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INTERNATIONAL COURT OF JUSTICE

YEAR 2010

General List No. 141 22 July 2010

ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

Jurisdiction of the Court to give the advisory opinion requested. Article 65, paragraph 1, of the Statute-Article 96, paragraph 1, of the Charter-Power of General Assembly to request advisory opinions -Articles 10 and 11 of the Charter-Contention that General Assembly acted outside its powers under the Charter-Article 12, paragraph 1, of the Charter-Authorization to request an advisory opinion not limited by Article 12. Requirement that the question on which the Court is requested to give its opinion is a “legal question”-Contention that the act of making a declaration of independence is governed by domestic constitutional law-The Court can respond to the question by reference to international law without the need to address domestic law-The fact that a question has political aspects does not deprive it of its character as a legal question-The Court is not concerned with the political motives behind a request or the political implications which its opinion may have. The Court has jurisdiction to give advisory opinion requested. Discretion of the Court to decide whether it should give an opinion.

Integrity of the Court’s judicial function-Only “compelling reasons” should lead the Court to decline to exercise its judicial function-The motives of individual States which sponsor a resolution requesting an advisory opinion are not relevant to the Court’s exercise of its

discretion-Requesting organ to assess purpose, usefulness and political consequences of opinion.

Delimitation of the respective powers of the Security Council and the General Assembly-Nature of the Security Council's involvement in relation to Kosovo-Article 12 of the Charte does not bar action by the General Assembly in respect of threats to international peace and security which are before the Security Council-General Assembly has taken action with regard to the situation in Kosovo. No compelling reasons for Court to use its discretion not to give an advisory opinion. Scope and meaning of the question. Text of the question in General Assembly resolution 63/3 -Power of the Court to clarify the question-No need to reformulate the question posed by the General Assembly-For the proper exercise of its judicial function, the Court must establish the identity of the authors of the declaration of independence-No intention by the General Assembly to restrict the Court's freedom to determine that issue-The Court's task is to determine whether or not the declaration was adopted in violation of international law.

Factual background. Framework for interim administration of Kosovo put in place by the Security Council-Security Council resolution 1244 (1999)-Establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK)-Role of Special Representative of the Secretary-General- "Four pillars" of the UNMIK régime-Constitutional Framework for Provisional Self-Government-Relations between the Provisional Institutions of Self-Government and the Special Representative of the Secretary-General. Relevant events in the final status process-Appointment by Secretary-General of Special Envoy for the future status process for Kosovo-Guiding Principles of the Contact Group Failure of consultative process-Comprehensive Proposal for the Kosovo Status Settlement by Special Envoy- Failure of negotiations on the future status of Kosovo under the auspices of the Troika-Elections held for the Assembly of Kosovo on 17 November 2007-Adoption of the declaration of independence on 17 February 2008. Whether the declaration of independence is in accordance with international law.No prohibition of declarations of independence according to State practice-Contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity-Scope of the principle of territorial integrity is confined to the sphere of relations between States-No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence-Issues relating to the extent of the right of self-determination and the existence of any right of "remedial secession" are beyond the scope of the question posed by the General Assembly. General international law contains no applicable prohibition of declarations of independence-Declaration of independence of 17 February 2008 did not violate general international law. Security Council resolution 1244 and the Constitutional Framework- Resolution 1244 (1999) imposes international legal obligations and is part of the applicable international law-Constitutional Framework possesses international legal character- Constitutional Framework is part of specific legal order created pursuant to resolution 1244 (1999)-Constitutional Framework regulates matters which are the subject of internal law-Supervisory powers of the Special Representative of the Secretary-General-Security Council resolution 1244 (1999) and the Constitutional Framework were in force and applicable as at 17 February 2008-Neither of them contains a clause providing for termination and neither has been repealed-The Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Security Council resolution 1244 (1999) and the

Constitutional Framework form part of theinternational law to be considered in replying to the question before the Court. I

nterpretation of Security Council resolutions-Resolution 1244 (1999) established an international civil and security presence in Kosovo-Temporary suspension of exercise of Serbia's authority flowing from its continuing sovereignty over the territory of Kosovo-Resolution 1244 (1999) created an interim régime-Object and purpose of resolution 1244 (1999). Identity of the authors of the declaration of independence-Whether the declaration of independence was an act of the Assembly of Kosovo-Authors of the declaration did not seek to act within the framework of interim self-administration of Kosovo-Authors undertook to fulfil the international obligations of Kosovo - No reference in original Albanian text to the declarationbeing the work of the Assembly of Kosovo - Silence of the Special Representative of theSecretary-General-Authors of the declaration of independence acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

Whether or not the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999)- Resolution 1244 (1999) addressed to United Nations Member States and organs of the United Nations - No specific obligations addressed to other actors - The resolution did not contain any provision dealing with the final status of Kosovo - Security Council did not reserve for itself the final determination of the situation in Kosovo - Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence - Declaration of independence did not violate Security Council resolution 1244 (1999).

Declaration of independence was not issued by the Provisional Institutions of Self-Government-Declaration of independence did not violate the Constitutional Framework. Adoption of the declaration of independence did not violate any applicable rule of international law.

ADVISORY OPINION

Present: President OWADA; *Vice-President* TOMKA; *Judges* KOROMA, AL-KHASAWNEH,

BUERGENTHAL, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA,

SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Registrar* COUVREUR.

On the accordance with international law of the unilateral declaration of independence in

respect of Kosovo,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in

resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General

Assembly) on 8 October 2008. By a letter dated 9 October 2008 and received in the Registry by

facsimile on 10 October 2008, the original of which was received in the Registry on

15 October 2008, the Secretary-General of the United Nations officially communicated to the Court

the decision taken by the General Assembly to submit the question for an advisory opinion.

Certified true copies of the English and French versions of the resolution were enclosed with the

letter. The resolution reads as follows:

"*The General Assembly*,

Mindful of the purposes and principles of the United Nations,

Bearing in mind its functions and powers under the Charter of the United

Nations,

Recalling that on 17 February 2008 the Provisional Institutions of

Self-Government of Kosovo declared independence from Serbia,

Aware that this act has been received with varied reactions by the Members of

the United Nations as to its compatibility with the existing international legal order,

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Decides, in accordance with Article 96 of the Charter of the United Nations to

request the International Court of Justice, pursuant to Article 65 of the Statute of the

Court, to render an advisory opinion on the following question:

'Is the unilateral declaration of independence by the Provisional

Institutions of Self-Government of Kosovo in accordance with

international law?'"

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the

Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the

Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the

Statute, the Court decided that the United Nations and its Member States were likely to be able to

furnish information on the question. By the same Order, the Court fixed, respectively,

17 April 2009 as the time-limit within which written statements might be submitted to it on the

question, and 17 July 2009 as the time-limit within which States and organizations having

presented written statements might submit written comments on the other written statements in

accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of

independence of 17 February 2008 is the subject of the question submitted to the Court for an

advisory opinion, the authors of the above declaration were considered likely to be able to furnish

information on the question. It therefore further decided to invite them to make written

contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its

Member States of the Court's decisions and transmitted to them a copy of the Order. By letter of

the same date, the Registrar informed the authors of the above-mentioned declaration of

independence of the Court's decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the

Secretary-General of the United Nations communicated to the Court a dossier of documents likely

to throw light upon the question. The dossier was subsequently placed on the Court's website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in

order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania,

Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan

Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of

Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina,

Azerbaijan, Maldives, Sierra Leone and Bolivia. The authors of the unilateral declaration of

independence filed a written contribution. On 21 April 2009, the Registrar communicated copies

of the written statements and written contribution to all States having submitted a written

statement, as well as to the authors of the unilateral declaration of independence.

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7. On 29 April 2009, the Court decided to accept the written statement filed by the

Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant

time-limit. On 15 May 2009, the Registrar communicated copies of this written statement to all

States having submitted a written statement, as well as to the authors of the unilateral declaration of

independence.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The United Nations and its Member States were invited to inform the Registry, by 15 September 2009, if they intended to take part in the oral proceedings. The letters further indicated that the authors of the unilateral declaration of independence could present an oral contribution.

By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court's decision to hold hearings, inviting them to indicate, within the same time-limit, whether they intended to take part in the oral proceedings.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in

order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands,

Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain.

The authors of the unilateral declaration of independence submitted a written contribution

regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the

Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written

statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to

all of its Member States that had not participated in the written proceedings, copies of all written

statements and written comments, as well as the written contributions of the authors of the

unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registry transmitted a detailed timetable of the

hearings to those who, within the time-limit fixed for that purpose by the Court, had expressed their

intention to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written

statements and written comments submitted to the Court, as well as the written contributions of the

authors of the unilateral declaration of independence, accessible to the public, with effect from the

opening of the oral proceedings.

14. In the course of hearings held from 1 to 11 December 2009, the Court heard oral

statements, in the following order, by:

- 7 -

For the Republic of Serbia: H.E. Mr. Dušan T. Bataković, PhD in History, University

of Paris-Sorbonne (Paris IV), Ambassador of the

Republic of Serbia to France, Vice-Director of the

Institute for Balkan Studies and Assistant Professor at

the University of Belgrade, Head of Delegation,

Mr. Vladimir Djerić, S.J.D. (Michigan), Attorney at Law,

Mikijelj, Janković & Bogdanović, Belgrade, Counsel

and Advocate,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of

International Law, University of Potsdam, Director of

the Potsdam Center of Human Rights, Member of the

Permanent Court of Arbitration, Counsel and Advocate,

Mr. Malcolm N. Shaw Q.C., Sir Robert Jennings Professor

of International Law, University of Leicester, United

Kingdom, Counsel and Advocate,

Mr. Marcelo G. Kohen, Professor of International Law,

Graduate Institute of International and Development

Studies, Geneva, Associate Member of the Institut de

droit international, Counsel and Advocate,

Mr. Saša Obradović, Inspector General in the Ministry of

Foreign Affairs, Deputy Head of Delegation;

For the authors of the unilateral Mr. Skender Hyseni, Head of Delegation,

declaration of independence: Sir Michael Wood, K.C.M.G., member of the English Bar,

Member of the International Law Commission, Counsel,

Mr. Daniel Müller, Researcher at the Centre de droit

international de Nanterre (CEDIN), University of

Paris Ouest, Nanterre-La Défense, Counsel,

Mr. Sean D. Murphy, Patricia Roberts Harris Research

Professor of Law, George Washington University,

Counsel;

For the Republic of Albania: H.E. Mr. Gazmend Barbullushi, Ambassador Extraordinary

and Plenipotentiary of the Republic of Albania to the

Kingdom of the Netherlands, Legal Adviser,

Mr. Jochen A. Frowein, M.C.L., Director emeritus of the

Max Planck Institute for International law, Professor

emeritus of the University of Heidelberg, Member of

the Institute of International Law, Legal Adviser,

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Mr. Terry D. Gill, Professor of Military Law at the

University of Amsterdam and Associate Professor of

Public International Law at Utrecht University, Legal

Adviser;

For the Federal Republic Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign

of Germany: Office (Berlin);

For the Kingdom of Saudi Arabia: H.E. Mr. Abdullah A. Alshaghrood, Ambassador of the

Kingdom of Saudi Arabia to the Kingdom of the

Netherlands, Head of Delegation;

For the Argentine Republic: H.E. Madam Susana Ruiz Cerutti, Ambassador, Legal

Adviser to the Ministry of Foreign Affairs, International

Trade and Worship, Head of Delegation;

For the Republic of Austria: H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal

Adviser, Federal Ministry of European and

International Affairs;

For the Republic of Azerbaijan: H.E. Mr. Agshin Mehdiyev, Ambassador and Permanent

Representative of Azerbaijan to the United Nations;

For the Republic of Belarus: H.E. Madam Elena Gritsenko, Ambassador of the Republic

of Belarus to the Kingdom of the Netherlands, Head of

Delegation;

For the Plurinational State of Bolivia: H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the

Plurinational State of Bolivia to the Kingdom of the

Netherlands;

For the Federative Republic H.E. Mr. José Artur Denot Medeiros, Ambassador of the

of Brazil: Federative Republic of Brazil to the Kingdom of the

Netherlands;

For the Republic of Bulgaria: Mr. Zlatko Dimitroff, S.J.D., Director of the International

Law Department, Ministry of Foreign Affairs, Head of

Delegation;

For the Republic of Burundi: Mr. Thomas Barankitse, Legal Attaché, Counsel,

Mr. Jean d'Aspremont, Associate Professor, University of

Amsterdam, Chargé de cours invité, Catholic University

of Louvain, Counsel;

For the People's Republic of China: H.E. Madam Xue Hanqin, Ambassador to the Association

of Southeast Asian Nations (ASEAN), Legal Counsel of

the Ministry of Foreign Affairs, Member of the

International Law Commission, Member of the Institut

de droit international, Head of Delegation;

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For the Republic of Cyprus: H.E. Mr. James Droushiotis, Ambassador of the Republic

of Cyprus to the Kingdom of the Netherlands,

Mr. Vaughan Lowe Q.C., member of the English Bar,

Chichele Professor of International Law, University of

Oxford, Counsel and Advocate,

Mr. Polyvios G. Polyviou, Counsel and Advocate;

For the Republic of Croatia: H.E. Madam Andreja Metelko-Zgombić, Ambassador,

Chief Legal Adviser in the Ministry of Foreign Affairs

and European Integration;

For the Kingdom of Denmark: H.E. Mr. Thomas Winkler, Ambassador, Under-Secretary

for Legal Affairs, Ministry of Foreign Affairs, Head of

Delegation;

For the Kingdom of Spain: Ms Concepción Escobar Hernández, Legal Adviser, Head

of the International Law Department, Ministry of

Foreign Affairs and Co-operation, Head of Delegation

and Advocate;

For the United States of America: Mr. Harold Hongju Koh, Legal Adviser, Department of

State, Head of Delegation and Advocate;

For the Russian Federation: H.E. Mr. Kirill Gevorgian, Ambassador, Head of the Legal

Department, Ministry of Foreign Affairs, Head of

Delegation;

For the Republic of Finland: Ms Päivi Kaukoranta, Director General, Legal Service,

Ministry of Foreign Affairs,

Mr. Martti Koskenniemi, Professor at the University of

Helsinki;

For the French Republic: Ms Edwige Belliard, Director of Legal Affairs, Ministry of

Foreign and European Affairs,

Mr. Mathias Forteau, Professor at the University of

Paris Ouest, Nanterre-La Défense;

For the Hashemite Kingdom H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of

of Jordan: the Hashemite Kingdom of Jordan to the United States

of America, Head of Delegation;

For the Kingdom of Norway: Mr. Rolf Einar Fife, Director General, Legal Affairs

Department, Ministry of Foreign Affairs, Head of

Delegation;

For the Kingdom of the Netherlands: Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign

Affairs;

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For Romania: Mr. Bogdan Aurescu, Secretary of State, Ministry of

Foreign Affairs,

Mr. Cosmin Dinescu, Director-General for Legal Affairs,

Ministry of Foreign Affairs;

For the United Kingdom of Great Mr. Daniel Bethlehem Q.C., Legal Adviser to the Foreign

Britain and Northern Ireland: and Commonwealth Office, Representative of the

United Kingdom of Great Britain and Northern Ireland,

Counsel and Advocate,

Mr. James Crawford, S.C., Whewell Professor of

International Law, University of Cambridge, Member

of the Institut de droit international, Counsel and

Advocate;

For the Bolivarian Republic Mr. Alejandro Fleming, Deputy Minister for Europe of the

of Venezuela: Ministry of the People's Power for Foreign Affairs;

For the Socialist Republic H.E. Madam Nguyen Thi Hoang Anh, Doctor of Law,

of Viet Nam: Director-General, Department of International Law

and Treaties, Ministry of Foreign Affairs.

15. Questions were put by Members of the Court to participants in the oral proceedings;

several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court

with effect from 28 May 2010.

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I. JURISDICTION AND DISCRETION

17. When seised of a request for an advisory opinion, the Court must first consider whether it

has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative,

there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction

in the case before it (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J.*

Reports 1996 (I), p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the*

Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 144, para. 13).

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A. Jurisdiction

18. The Court will thus first address the question whether it possesses jurisdiction to give the

advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court

to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides

that:

“The Court may give an advisory opinion on any legal question at the request of

whatever body may be authorized by or in accordance with the Charter of the United

Nations to make such a request.”

19. In its application of this provision, the Court has indicated that:

“It is . . . a precondition of the Court’s competence that the advisory opinion be

requested by an organ duly authorized to seek it under the Charter, that it be requested

on a legal question, and that, except in the case of the General Assembly or the

Security Council, that question should be one arising within the scope of the activities

of the requesting organ.” (*Application for Review of Judgement No. 273 of the United*

Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334,

para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an

organ of the United Nations or a specialized agency having competence to make it. The General

Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides

that:

“1. The General Assembly or the Security Council may request the International

Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at

any time be so authorized by the General Assembly, may also request advisory

opinions of the Court on legal questions arising within the scope of their activities.”

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to

request an advisory opinion on “any legal question”, the Court has sometimes in the past given

certain indications as to the relationship between the question which is the subject of a request for

an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties*

with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 70;

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),

pp. 232-233, paras. 11-12; *Legal Consequences of the Construction of a Wall in the Occupied*

Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

“The General Assembly may discuss any questions or any matters within the

scope of the present Charter or relating to the powers and functions of any organs

provided for in the present Charter, and, except as provided in Article 12, may make

recommendations to the Members of the United Nations or to the Security Council or

to both on any such questions or matters.”

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Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly

with competence to discuss “any questions relating to the maintenance of international peace and

security brought before it by any Member of the United Nations” and, subject again to the

limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation

the functions assigned to it in the present Charter, the General Assembly shall not

make any recommendation with regard to that dispute or situation unless the Security

Council so requests.”

24. In the present proceedings, it was suggested that, since the Security Council was seised

of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly's request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 148, para. 25). Accordingly, while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court's opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. Whether the delimitation of the respective powers of the

Security Council and the General Assembly of which Article 12 is one aspect should lead the

Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an

advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its

opinion is a “legal question” within the meaning of Article 96 of the Charter and Article 65 of the

Statute. In the present case, the question put to the Court by the General Assembly asks whether

the declaration of independence to which it refers is “in accordance with international law”. A

question which expressly asks the Court whether or not a particular action is compatible with

international law certainly appears to be a legal question; as the Court has remarked on a previous

occasion, questions “framed in terms of law and rais[ing] problems of international law . . . are by

their very nature susceptible of a reply based on law" (*Western Sahara, Advisory Opinion,*

I.C.J. Reports 1975, p. 18, para. 15) and therefore appear to be questions of a legal character for the

purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the

question posed by the General Assembly is not, in reality, a legal question. According to this

submission, international law does not regulate the act of making a declaration of independence,

which should be regarded as a political act; only domestic constitutional law governs the act of

making such a declaration, while the Court's jurisdiction to give an advisory opinion is confined to

questions of international law. In the present case, however, the Court has not been asked to give

an opinion on whether the declaration of independence is in accordance with any rule of domestic

law but only whether it is in accordance with international law. The Court can respond to that

question by reference to international law without the need to enquire into any system of domestic

law.

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27. Moreover, the Court has repeatedly stated that the fact that a question has political

aspects does not suffice to deprive it of its character as a legal question (*Application for Review of*

Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion,

I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to

respond to the legal elements of a question which invites it to discharge an essentially judicial task,

namely, in the present case, an assessment of an act by reference to international law. The Court

has also made clear that, in determining the jurisdictional issue of whether it is confronted with a

legal question, it is not concerned with the political nature of the motives which may have inspired

the request or the political implications which its opinion might have (*Conditions of Admission of a*

State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948,

I.C.J. Reports 1947-1948, p. 61, and *Legality of the Threat or Use of Nuclear Weapons, Advisory*

Opinion, I.C.J. Reports 1996 (I), p. 234, para. 13).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in

response to the request made by the General Assembly.

B. Discretion

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to

exercise it:

“The Court has recalled many times in the past that Article 65, paragraph 1, of

its Statute, which provides that 'The Court *may* give an advisory opinion . . .'

(emphasis added), should be interpreted to mean that the Court has a discretionary

power to decline to give an advisory opinion even if the conditions of jurisdiction are

met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44.)

The discretion whether or not to respond to a request for an advisory opinion exists so as to protect

the integrity of the Court's judicial function and its nature as the principal judicial organ of the

United Nations (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29;

Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal,

Advisory Opinion, I.C.J. Reports 1973, p. 175, para. 24; *Application for Review of Judgement*

No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982,

p. 334, para. 22; and *Legal Consequences of the Construction of a Wall in the Occupied*

Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 156-157, paras. 44-45).

30. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory

opinion “represents its participation in the activities of the Organization, and, in principle, should

not be refused” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First*

Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; *Difference Relating to Immunity from Legal*

Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion,

I.C.J. Reports 1999 (I), pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in*

the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44).

Accordingly, the consistent jurisprudence of the Court has determined that only “compelling

reasons” should lead the Court to refuse its opinion in response to a request falling within its

jurisdiction (*Judgments of the Administrative Tribunal of the ILO upon complaints made against*

the Unesco, I.C.J. Reports 1956, p. 86; *Legal Consequences of the Construction of a Wall in the*

Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44).

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31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in

the present case. It has therefore given careful consideration as to whether, in the light of its

previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from

the General Assembly.

32. One argument, advanced by a number of participants in the present proceedings,

concerns the motives behind the request. Those participants drew attention to a statement made by

the sole sponsor of the resolution by which the General Assembly requested the Court’s opinion to

the effect that

“the Court’s advisory opinion would provide politically neutral, yet judicially

authoritative, guidance to many countries still deliberating how to approach unilateral

declarations of independence in line with international law.

. . . . . .

Supporting this draft resolution would also serve to reaffirm a fundamental

principle: the right of any Member State of the United Nations to pose a simple, basic

question on a matter it considers vitally important to the Court. To vote against it

would be in effect a vote to deny the right of any country to seek now or in the

future judicial recourse through the United Nations system.” (A/63/PV.22, p. 1.)

According to those participants, this statement demonstrated that the opinion of the Court was

being sought not in order to assist the General Assembly but rather to serve the interests of one

State and that the Court should, therefore, decline to respond.

33. The advisory jurisdiction is not a form of judicial recourse for States but the means by

which the General Assembly and the Security Council, as well as other organs of the United

Nations and bodies specifically empowered to do so by the General Assembly in accordance with

Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in

their activities. The Court's opinion is given not to States but to the organ which has requested it

(*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory*

Opinion, I.C.J. Reports 1950, p. 71). Nevertheless, precisely for that reason, the motives of

individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion

are not relevant to the Court's exercise of its discretion whether or not to respond. As the Court put

it in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*,

"once the Assembly has asked, by adopting a resolution, for an advisory opinion on a

legal question, the Court, in determining whether there are any compelling reasons for

it to refuse to give such an opinion, will not have regard to the origins or to the

political history of the request, or to the distribution of votes in respect of the adopted

resolution" (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

34. It was also suggested by some of those participating in the proceedings that

resolution 63/3 gave no indication of the purpose for which the General Assembly needed the

Court's opinion and that there was nothing to indicate that the opinion would have any useful legal

effect. This argument cannot be accepted. The Court has consistently made clear that it is for the

organ which requests the opinion, and not for the Court, to determine whether it needs the opinion

for the proper performance of its functions. In its Advisory Opinion on *Legality of the Threat or*

Use of Nuclear Weapons, the Court rejected an argument that it should refuse to respond to the

General Assembly's request on the ground that the General Assembly had not explained to the

Court the purposes for which it sought an opinion, stating that

"it is not for the Court itself to purport to decide whether or not an advisory opinion is

needed by the Assembly for the performance of its functions. The General Assembly

has the right to decide for itself on the usefulness of an opinion in the light of its own

needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

Similarly, in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the*

Occupied Palestinian Territory, the Court commented that "[t]he Court cannot substitute its

assessment of the usefulness of the opinion requested for that of the organ that seeks such

opinion,

namely the General Assembly" (*I.C.J. Reports 2004 (I)*, p. 163, para. 62).

35. Nor does the Court consider that it should refuse to respond to the General Assembly's

request on the basis of suggestions, advanced by some of those participating in the proceedings,

that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its

own assessment for that of the requesting organ in respect of whether its opinion will be useful to

that organ, it cannot in particular where there is no basis on which to make such an

assessment substitute its own view as to whether an opinion would be likely to have an adverse

effect. As the Court stated in its Advisory Opinion on *Legality of the Threat or Use of Nuclear*

Weapons, in response to a submission that a reply from the Court might adversely affect

disarmament negotiations, faced with contrary positions on this issue "there are no evident criteria

by which it can prefer one assessment to another" (*Legality of the Threat or Use of Nuclear*

Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 237, para. 17; see also *Western Sahara,*

Advisory Opinion, I.C.J. Reports 1975, p. 37, para. 73; and *Legal Consequences of the*

Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,

I.C.J. Reports 2004 (I), pp. 159-160, paras. 51-54).

36. An important issue which the Court must consider is whether, in view of the respective

roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the

Court, as the principal judicial organ of the United Nations, should decline to answer the question

which has been put to it on the ground that the request for the Court's opinion has been made by

the General Assembly rather than the Security Council.

37. The situation in Kosovo had been the subject of action by the Security Council, in the

exercise of its responsibility for the maintenance of international peace and security, for more than

ten years prior to the present request for an advisory opinion. The Council first took action

specifically relating to the situation in Kosovo on 31 March 1998, when it adopted resolution

1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On

10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an

international military presence (subsequently known as “KFOR”) and an international civil

presence (the United Nations Interim Administration Mission in Kosovo, “UNMIK”) and laid

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down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security

Council decided to terminate the prohibitions on the sale or supply of arms established by

paragraph 8 of resolution 1160 (1998). The Security Council has received periodic reports from

the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the

Secretary-General records that the Security Council met to consider the situation in Kosovo on

29 occasions between 2000 and the end of 2008. Although the declaration of independence which

is the subject of the present request was discussed by the Security Council, the Council took no

action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m.

(S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850)).

38. The General Assembly has also adopted resolutions relating to the situation in Kosovo.

Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly

adopted five resolutions on the situation of human rights in Kosovo (resolutions 49/204, 50/190,

51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one

further resolution on the situation of human rights in Kosovo (resolution 54/183 of

17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241,

54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/326, 58/305, 59/286A, 59/286B, 60/275,

61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the

agenda of the General Assembly at the time of the declaration of independence and it was therefore

necessary in September 2008 to create a new agenda item for the consideration of the proposal to

request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the

Security Council and the General Assembly, if the Court's opinion were to be sought regarding

whether the declaration of independence was in accordance with international law, the request

should rather have been made by the Security Council and that this fact constitutes a compelling

reason for the Court not to respond to the request from the General Assembly. That conclusion is

said to follow both from the nature of the Security Council's involvement and the fact that, in order

to answer the question posed, the Court will necessarily have to interpret and apply Security

Council resolution 1244 (1999) in order to determine whether or not the declaration of

independence is in accordance with international law.

40. While the request put to the Court concerns one aspect of a situation which the Security

Council has characterized as a threat to international peace and security and which continues to

feature on the agenda of the Council in that capacity, that does not mean that the General Assembly

has no legitimate interest in the question. Articles 10 and 11 of the Charter, to which the Court has

already referred, confer upon the General Assembly a very broad power to discuss matters within

the scope of the activities of the United Nations, including questions relating to international peace

and security. That power is not limited by the responsibility for the maintenance of international

peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the

Court has made clear in its Advisory Opinion on *Legal Consequences of the Construction of a Wall*

in the Occupied Palestinian Territory, paragraph 26, “Article 24 refers to a primary, but not

necessarily exclusive, competence”. The fact that the situation in Kosovo is before the Security

Council and the Council has exercised its Chapter VII powers in respect of that situation does not

preclude the General Assembly from discussing any aspect of that situation, including the

declaration of independence. The limit which the Charter places upon the General Assembly to

protect the role of the Security Council is contained in Article 12 and restricts the power of the

General Assembly to make recommendations following a discussion, not its power to engage in

such a discussion.

41. Moreover, Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security and observed that it is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

42. The Court's examination of this subject in its Advisory Opinion on *Legal Consequences*

of the Construction of a Wall in the Occupied Palestinian Territory was made in connection with

an argument relating to whether or not the Court possessed the jurisdiction to give an advisory

opinion, rather than whether it should exercise its discretion not to give an opinion. In the present

case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction

conferred by Article 96, paragraph 1 (paragraphs 23 to 24 above). It considers, however, that the

analysis contained in the 2004 Advisory Opinion is also pertinent to the issue of discretion in the

present case. That analysis demonstrates that the fact that a matter falls within the primary

responsibility of the Security Council for situations which may affect the maintenance of

international peace and security and that the Council has been exercising its powers in that respect

does not preclude the General Assembly from discussing that situation or, within the limits set by

Article 12, making recommendations with regard thereto. In addition, as the Court pointed out in its 2004 Advisory Opinion, General Assembly resolution 377A (V) (“Uniting for Peace”) provides for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 150, para. 30). These considerations are of relevance to the question whether the delimitation of powers between the Security Council and the General Assembly constitutes a compelling reason for the Court to decline to respond to the General Assembly’s request for an opinion in the present case.

43. It is true, of course, that the facts of the present case are quite different from those of the

Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied*

Palestinian Territory. The situation in the occupied Palestinian territory had been under active

consideration by the General Assembly for several decades prior to its decision to request an

opinion from the Court and the General Assembly had discussed the precise subject on which the

Court's opinion was sought. In the present case, with regard to the situation in Kosovo, it was the

Security Council which had been actively seised of the matter. In that context, it discussed the

future status of Kosovo and the declaration of independence (see paragraph 37 above).

44. However, the purpose of the advisory jurisdiction is to enable organs of the United

Nations and other authorized bodies to obtain opinions from the Court which will assist them in the

future exercise of their functions. The Court cannot determine what steps the General Assembly

may wish to take after receiving the Court's opinion or what effect that opinion may have in

relation to those steps. As the preceding paragraphs demonstrate, the General Assembly is entitled

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to discuss the declaration of independence and, within the limits considered in paragraph 42, above,

to make recommendations in respect of that or other aspects of the situation in Kosovo without

trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the

declaration of independence has been discussed only in the Security Council and that the Council

has been the organ which has taken action with regard to the situation in Kosovo does not

constitute a compelling reason for the Court to refuse to respond to the request from the General

Assembly.

45. Moreover, while it is the scope for future discussion and action which is the determining

factor in answering this objection to the Court rendering an opinion, the Court also notes that

the

General Assembly has taken action with regard to the situation in Kosovo in the past. As stated in

paragraph 38 above, between 1995 and 1999, the General Assembly adopted six resolutions

addressing the human rights situation in Kosovo. The last of these, resolution 54/183, was adopted

on 17 December 1999, some six months after the Security Council had adopted

resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian

issues, it also addressed (in para. 7) the General Assembly's concern about a possible

"cantonization" of Kosovo. In addition, since 1999 the General Assembly has each year approved,

in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38

above). The Court observes therefore that the General Assembly has exercised functions of its own

in the situation in Kosovo.

46. Further, in the view of the Court, the fact that it will necessarily have to interpret and

apply the provisions of Security Council resolution 1244 (1999) in the course of answering the

question put by the General Assembly does not constitute a compelling reason not to respond to

that question. While the interpretation and application of a decision of one of the political organs

of the United Nations is, in the first place, the responsibility of the organ which took that decision,

the Court, as the principal judicial organ of the United Nations, has also frequently been required to

consider the interpretation and legal effects of such decisions. It has done so both in the exercise of

its advisory jurisdiction (see for example, *Certain Expenses of the United Nations, (Article 17,*

paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 175; and *Legal*

Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)

notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,

pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example,

Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the

Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United Kingdom), Provisional Measures,*

Order of 14 April 1992, I.C.J. Reports 1992, p. 15, paras. 39-41; *Questions of Interpretation and*

Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan

Arab Jamahiriya v. *United States of America), Provisional Measures, Order of 14 April 1992,*

I.C.J. Reports 1992, pp. 126-127, paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the

Court undertaking such a task. The question is, rather, whether it should decline to undertake that

task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory

Opinion on *Certain Expenses of the United Nations*, however, the Court responded to the question

posed by the General Assembly, even though this necessarily required it to interpret a number of

Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of

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1961) (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory*

Opinion, I.C.J. Reports 1962, pp. 175-177). The Court also notes that, in its Advisory Opinion on

Conditions of Admission of a State in the United Nations (Article 4 of the Charter)

(I.C.J. Reports 1947-1948, pp. 61-62), it responded to a request from the General Assembly even

though that request referred to statements made in a meeting of the Security Council and it had

been submitted that the Court should therefore exercise its discretion to decline to reply

(*Conditions of Admission of a State in the United Nations (Article 4 of the Charter)*, *Pleadings,*

Oral Arguments, Documents, p. 90). Where, as here, the General Assembly has a legitimate

interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the

Security Council is not sufficient to justify the Court in declining to give its opinion to the General

Assembly.

48. Accordingly, the Court considers that there are no compelling reasons for it to decline to

exercise its jurisdiction in respect of the present request.

II. SCOPE AND MEANING OF THE QUESTION

49. The Court will now turn to the scope and meaning of the question on which the General

Assembly has requested that it give its opinion. The General Assembly has formulated that

question in the following terms:

“Is the unilateral declaration of independence by the Provisional Institutions of

Self-Government of Kosovo in accordance with international law?"

50. The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the "legal questions really in issue" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

51. In the present case, the question posed by the General Assembly is clearly formulated.

The question is narrow and specific; it asks for the Court's opinion on whether or not the

declaration of independence is in accordance with international law. It does not ask about the legal

consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved

statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those

States which have recognized it as an independent State. The Court notes that, in past requests for

advisory opinions, the General Assembly and the Security Council, when they have wanted the

Court's opinion on the legal consequences of an action, have framed the question in such a way

that this aspect is expressly stated (see, for example, *Legal Consequences for States of the*

Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security

Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 and *Legal*

Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory

Opinion, I.C.J. Reports 2004 (I), p. 136). Accordingly, the Court does not consider that it is

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necessary to address such issues as whether or not the declaration has led to the creation of a State

or the status of the acts of recognition in order to answer the question put by the General Assembly.

The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, two aspects of the question which require comment. First, the

question refers to “the unilateral declaration of independence *by the Provisional Institutions of*

Self-Government of Kosovo” (General Assembly resolution 63/3 of 8 October 2008, single

operative paragraph; emphasis added). In addition, the third preambular paragraph of the General

Assembly resolution "*[r]ecall* that on 17 February 2008 the Provisional Institutions of

Self-Government of Kosovo declared independence from Serbia". Whether it was indeed the

Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of

independence was contested by a number of those participating in the present proceedings. The

identity of the authors of the declaration of independence, as is demonstrated below

(paragraphs 102 to 109), is a matter which is capable of affecting the answer to the question

whether that declaration was in accordance with international law. It would be incompatible with

the proper exercise of the judicial function for the Court to treat that matter as having been

determined by the General Assembly.

53. Nor does the Court consider that the General Assembly intended to restrict the Court's

freedom to determine this issue for itself. The Court notes that the agenda item under which what

became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration

and was entitled simply “Request for an advisory opinion of the International Court of Justice on

whether the declaration of independence *of Kosovo* is in accordance with international law”

(General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this

agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3,

when it requested the inclusion of a supplementary item on the agenda of the 63rd session of the

General Assembly (Letter of the Permanent Representative of Serbia to the United Nations

addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the

title of the draft resolution and, in turn, of resolution 63/3. The common element in the agenda

item and the title of the resolution itself is whether the declaration of independence is in accordance

with international law. Moreover, there was no discussion of the identity of the authors of the

declaration, or of the difference in wording between the title of the resolution and the question

which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

54. As the Court has stated in a different context:

“It is not to be assumed that the General Assembly would . . . seek to fetter or

hamper the Court in the discharge of its judicial functions; the Court must have full

liberty to consider all relevant data available to it in forming an opinion on a question

posed to it for an advisory opinion.” (*Certain Expenses of the United Nations*

(Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,

p. 157.)

This consideration is applicable in the present case. In assessing whether or not the declaration of

independence is in accordance with international law, the Court must be free to examine the entire

record and decide for itself whether that declaration was promulgated by the Provisional

Institutions of Self-Government or some other entity.

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55. While many of those participating in the present proceedings made reference to the

opinion of the Supreme Court of Canada in *Reference by the Governor-General concerning*

Certain Questions relating to the Secession of Quebec from Canada ([1998] 2 *S.C.R.* 217;

161 *D.L.R.* (4th) 385; 115 *Int. Law Reps*. 536), the Court observes that the question in the present

case is markedly different from that posed to the Supreme Court of Canada.

The relevant question in that case was

“Does international law give the National Assembly, legislature or government

of Quebec the right to effect the secession of Quebec from Canada unilaterally? In

this regard, is there a right to self-determination under international law that would

give the National Assembly, legislature or government of Quebec the right to effect

the secession of Quebec from Canada unilaterally?"

56. The question put to the Supreme Court of Canada inquired whether there was a right to

"effect secession", and whether there was a rule of international law which conferred a positive

entitlement on any of the organs named. By contrast, the General Assembly has asked whether the

declaration of independence was "in accordance with" international law. The answer to that

question turns on whether or not the applicable international law prohibited the declaration of

independence. If the Court concludes that it did, then it must answer the question put by saying

that the declaration of independence was not in accordance with international law. It follows that

the task which the Court is called upon to perform is to determine whether or not the declaration of

independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.

III. FACTUAL BACKGROUND

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe the relevant

characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo. The Court will then proceed with a brief description of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

A. Security Council resolution 1244 (1999) and the relevant

UNMIK regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, “determined to resolve the grave humanitarian situation” which it had identified (see the fourth

preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United

Nations Secretary-General to establish an international civil presence in Kosovo in order to provide

“an interim administration for Kosovo . . . which will provide transitional administration while

establishing and overseeing the development of provisional democratic self-governing institutions”

(para. 10).

Paragraph 3 demanded “in particular that the Federal Republic of Yugoslavia put an

immediate and verifiable end to violence and repression in Kosovo, and begin and complete

verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according

to a rapid timetable”. Pursuant to paragraph 5 of the resolution, the Security Council decided on

the deployment in Kosovo, under the auspices of the United Nations, of international civil and

security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such

presences. The powers and responsibilities of the security presence were further clarified in

paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation

Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and

comply with the requirements for demilitarization. Immediately preceding the adoption of Security

Council resolution 1244 (1999), various implementing steps had already been taken through a

series of measures, including, *inter alia*, those stipulated in the Military Technical Agreement of

9 June 1999, whose Article I.2 provided for the deployment of KFOR, permitting these to “operate

without hindrance within Kosovo and with the authority to take all necessary action to establish

and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission.”

The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces,

save for “an agreed number of Yugoslav and Serb military and police personnel” as foreseen in

paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international

civil presence in Kosovo as follows:

“*(a)* Promoting the establishment, pending a final settlement, of substantial autonomy

and self-government in Kosovo, taking full account of annex 2 and of the

Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for

democratic and autonomous self-government pending a political settlement,

including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities

while overseeing and supporting the consolidation of Kosovo's local provisional

institutions and other peace-building activities;

(e) Facilitating a political process designed to determine Kosovo's future status,

taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional

institutions to institutions established under a political settlement . . . "

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60. On 12 June 1999, the Secretary-General presented to the Security Council "a preliminary

operational concept for the overall organization of the civil presence, which will be known as the

United Nations Interim Administration Mission in Kosovo (UNMIK)", pursuant to paragraph 10 of

resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative

of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called “four pillars”) of the UNMIK régime (para. 5): *(a)* interim civil administration (with a lead role assigned to the United Nations); *(b)* humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); *(c)* institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and *(d)* reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated

UNMIK regulation 1999/1, which provided in its Section 1.1 that “[a]ll legislative and executive

authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK

and is exercised by the Special Representative of the Secretary-General”. Under Section 3 of

UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999

were to continue to apply, but only to the extent that these did not conflict with internationally

recognized human rights standards and non-discrimination or the fulfilment of the mandate given

to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25

promulgated by the Special Representative of the Secretary-General on 12 December 1999, with

retroactive effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of

12 December 1999 provides that “[t]he law applicable in Kosovo shall be: *(a)* The regulations

promulgated by the Special Representative of the Secretary-General and subsidiary instruments

issued thereunder; and *(b)* The law in force in Kosovo on 22 March 1989". Section 4, entitled

"Transitional Provision", reads as follows:

"All legal acts, including judicial decisions, and the legal effects of events

which occurred, during the period from 10 June 1999 up to the date of the present

regulation, pursuant to the laws in force during that period under section 3 of UNMIK

Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not

conflict with the standards referred to in section 1 of the present regulation or any

UNMIK regulation in force at the time of such acts."

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999)

were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional

Framework for Provisional Self-Government (hereinafter "Constitutional Framework"), which

defined the responsibilities relating to the administration of Kosovo between the Special

Representative of the Secretary-General and the Provisional Institutions of Self-Government of

Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General

under Chapter 12 of the Constitutional Framework,

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"[t]he exercise of the responsibilities of the Provisional Institutions of

Self-Government under this Constitutional Framework shall not affect or diminish the

authority of the SRSG to ensure full implementation of UNSCR 1244 (1999),

including overseeing the Provisional Institutions of Self-Government, its officials and

its agencies, and taking appropriate measures whenever their actions are inconsistent

with UNSCR 1244 (1999) or this Constitutional Framework".

Moreover, pursuant to Chapter 2 *(a)*, "[t]he Provisional Institutions of Self-Government and their

officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999)

and the terms set forth in this Constitutional Framework". Similarly, according to the ninth

preambular paragraph of the Constitutional Framework, "the exercise of the responsibilities of the

Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the

ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)". In his periodical

report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional

Framework contained

"broad authority for my Special Representative to intervene and correct any actions of

the provisional institutions of self-government that are inconsistent with Security

Council resolution 1244 (1999), including the power to veto Assembly legislation,

where necessary" (Report of the Secretary-General on the United Nations Interim

Administration Mission in Kosovo, S/2001/565, 7 June 2001).

63. Having described the framework put in place by the Security Council to ensure the

interim administration of the territory of Kosovo, the Court now turns to the relevant events in the

final status process which preceded the declaration of independence of 17 February 2008.

B. The relevant events in the final status process prior to

17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of

Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a

comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted

to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was

consensus within the Security Council that the final status process should be commenced:

“The Security Council agrees with Ambassador Eide’s overall assessment that,

notwithstanding the challenges still facing Kosovo and the wider region, the time has

come to move to the next phase of the political process. The Council therefore

supports the Secretary-General’s intention to start a political process to determine

Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999).”

(Statement by the President of the Security Council of 24 October 2005,

S/PRST/2005/51.)

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65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former

President of Finland, as his Special Envoy for the future status process for Kosovo. This

appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the

President of the Security Council addressed to the Secretary-General, S/2005/709). Mr. Ahtisaari's

Letter of Appointment included, as an annex to it, a document entitled "Terms of Reference" which

stated that the Special Envoy "is expected to revert to the Secretary-General at all stages of the

process". Furthermore, "[t]he pace and duration of the future status process will be determined by

the Special Envoy on the basis of consultations with the Secretary-General, taking into account the

cooperation of the parties and the situation on the ground" (Terms of Reference, dated

10 November 2005, as an Appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari

of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the

members of the Council attached to their approval of Mr. Ahtisaari's appointment the Guiding

Principles of the Contact Group (an informal grouping of States formed in 1994 to address the

situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the

United Kingdom and the United States). Members of the Security Council further indicated that

the Guiding Principles were meant for the Secretary-General's (and therefore also for the Special

Envoy's) "reference". These Principles stated, *inter alia*, that

"[t]he Contact Group . . . welcomes the intention of the Secretary-General to appoint a

Special Envoy to lead this process . . .

A negotiated solution should be an international priority. Once the process has

started, it cannot be blocked and must be brought to a conclusion. The Contact Group

calls on the parties to engage in good faith and constructively, to refrain from

unilateral steps and to reject any form of violence.

. . . . . .

The Security Council will remain actively seized of the matter. The final

decision on the status of Kosovo should be endorsed by the Security Council."

(Guiding principles of the Contact Group for a settlement of the status of Kosovo, as

annexed to the Letter dated 10 November 2005 from the President of the Security

Council addressed to the Secretary-General, S/2005/709.)

67. Between 20 February 2006 and 8 September 2006, several rounds of negotiations were

held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of

Kosovo's governmental and administrative functions, cultural heritage and religious sites,

economic issues, and community rights (Reports of the Secretary-General on the United Nations

Interim Administration Mission in Kosovo, S/2006/361, S/2006/707 and S/2006/906). According

to the reports of the Secretary-General, "the parties remain[ed] far apart on most issues" (Reports

of the Secretary-General on the United Nations Interim Administration Mission in Kosovo,

S/2006/707; S/2006/906).

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68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft

comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage

in a consultative process (recalled in the Report of the Secretary-General on the United Nations

Interim Administration Mission in Kosovo, S/2007/134, 9 March 2007). On 10 March 2007, a

final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by

the Secretary-General, “the parties were unable to make any additional progress” at those

negotiations (Report of the Secretary-General on the United Nations Interim Administration

Mission in Kosovo, S/2007/395, 29 June 2007, p. 1).

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that “after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo’s future status” (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 26 March 2007). After emphasizing that his “mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground” (*ibid.*, para. 3), the Special Envoy concluded:

“It is my firm view that the negotiations’ potential to produce any mutually

agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks,

whatever the format, will overcome this impasse.

. . . . . .

The time has come to resolve Kosovo’s status. Upon careful consideration of

Kosovo’s recent history, the realities of Kosovo today and taking into account the

negotiations with the parties, I have come to the conclusion that the only viable option

for Kosovo is independence, to be supervised for an initial period by the international

community.” (*Ibid.*, paras. 3 and 5.)

70. The Special Envoy’s conclusions were accompanied by his finalized Comprehensive

Proposal for the Kosovo Status Settlement (S/2007/168/Add. 1, 26 March 2007), which, in his

words, set forth “international supervisory structures, [and] provide[d] the foundations for a future

independent Kosovo” (S/2007/168, 26 March 2007, para. 5). The Comprehensive Proposal called

for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo

(S/2007/168/Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership

of that Commission (*ibid.*, Art. 10.2), set numerous requirements concerning principles and

provisions to be contained in that Constitution (*ibid.*, Art. 1.3 and Ann. I), and required that the

Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (*ibid.*,

Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition

period, after which “all legislative and executive authority vested in UNMIK shall be transferred *en*

bloc to the governing authorities of Kosovo, unless otherwise provided for in this Settlement”

(*ibid.*, Art. 15.1). It mandated the holding of general and municipal elections no later than nine

months from the entry into force of the Constitution (*ibid.*, Art. 11.1). The Court further notes that

the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an

International Civilian Representative (ICR), who would have the final authority in Kosovo

regarding interpretation of the Settlement (*ibid.*, Art. 12). The Comprehensive Proposal also

specified that the mandate of the ICR would be reviewed “no later than two years after the entry

into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR

and the frequency of intervention” (*ibid.*, Ann. IX, Art. 5.1) and that

“[t]he mandate of the ICR shall be terminated when the International Steering Group

[a body composed of France, Germany, Italy, the Russian Federation, the United

Kingdom, the United States, the European Union, the European Commission and

NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement”

(*ibid.*, Art. 5.2).

71. The Secretary-General “fully support[ed] both the recommendation made by [his]

Special Envoy in his report on Kosovo’s future status and the Comprehensive Proposal for the

Kosovo Status Settlement” (Letter dated 26 March 2007 from the Secretary-General addressed to

the President of the Security Council, S/2007/168). The Security Council, for its part, decided to

undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue,

S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo.

A draft resolution was circulated among the Council’s members (see draft resolution sponsored by

Belgium, France, Germany, Italy, the United Kingdom and the United States, S/2007/437 Prov.,

17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be

adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of

Kosovo were held under the auspices of a Troika comprising representatives of the European

Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted

its report to the Secretary-General, which came to the conclusion that, despite intensive

negotiations, “the parties were unable to reach an agreement on Kosovo’s status” and “[n]either

side was willing to yield on the basic question of sovereignty” (Report of the European

Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to

S/2007/723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal

assemblies and their respective mayors (Report of the Secretary-General on the United Nations

Interim Administration Mission in Kosovo S/2007/768). The Assembly of Kosovo held its

inaugural session on 4 and 9 January 2008 (Report of the Secretary-General on the United Nations

Interim Administration Mission in Kosovo, S/2008/211).

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C. The events of 17 February 2008 and thereafter

74. It is against this background that the declaration of independence was adopted on

17 February 2008. The Court observes that the original language of the declaration is Albanian.

For the purposes of the present Opinion, when quoting from the text of the declaration, the Court

has used the translations into English and French included in the dossier submitted on behalf of the

Secretary-General.

In its relevant passages, the declaration of independence states that its authors were

"*[c]onvened* in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo"

(first preambular paragraph); it "*[r]ecall[ed]* the years of internationally-sponsored negotiations

between Belgrade and Pristina over the question of [Kosovo's] future political status" and

"*[r]egrett[ed]* that no mutually-acceptable status outcome was possible" (tenth and eleventh

preambular paragraphs). It further declared that the authors were "*[d]etermin[ed]* to see

[Kosovo's] status resolved in order to give [its] people clarity about their future, move beyond the

conflicts of the past and realise the full democratic potential of [its] society" (thirteenth preambular

paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

"1. We, the democratically-elected leaders of our people, hereby declare

Kosovo to be an independent and sovereign state. This declaration reflects the will of

our people and it is in full accordance with the recommendations of UN Special Envoy

Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

2. We declare Kosovo to be a democratic, secular and multi-ethnic republic,

guided by the principles of non-discrimination and equal protection under the law.

We shall protect and promote the rights of all communities in Kosovo and create the

conditions necessary for their effective participation in political and decision-making

processes.

. . . . . .

5. We welcome the international community’s continued support of our

democratic development through international presences established in Kosovo on the

basis of UN Security Council resolution 1244 (1999). We invite and welcome an

international civilian presence to supervise our implementation of the Ahtisaari Plan,

and a European Union-led rule of law mission.

. . . . . .

9. We hereby undertake the international obligations of Kosovo, including those

concluded on our behalf by the United Nations Interim Administration Mission in

Kosovo (UNMIK), . . .

. . . . . .

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12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall

be legally bound to comply with the provisions contained in this Declaration,

including, especially, the obligations for it under the Ahtisaari Plan . . . We declare

publicly that all states are entitled to rely upon this declaration . . .”

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by

109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo

and by the President of Kosovo (who was not a member of the Assembly). The ten members of the

Assembly representing the Kosovo Serb community and one member representing the Kosovo

Gorani community decided not to attend this meeting. The declaration was written down on two

sheets of papyrus and read out, voted upon and then signed by all representatives present. It was

not transmitted to the Special Representative of the Secretary-General and was not published in the

Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the

Secretary-General that it had adopted a decision stating that that declaration represented a forceful

and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either

in Serbia or in the international legal order (S/PV.5839; Report of the Secretary-General on the

United Nations Interim Administration Mission in Kosovo, S/2008/211). Further to a request from

Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in

which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the

declaration of independence as an unlawful act which had been declared null and void by the

National Assembly of Serbia (S/PV.5839).

IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE

IS IN ACCORDANCE WITH INTERNATIONAL LAW

78. The Court now turns to the substance of the request submitted by the General Assembly.

The Court recalls that it has been asked by the General Assembly to assess the accordance of the

declaration of independence of 17 February 2008 with “international law” (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General international law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous

instances of declarations of independence, often strenuously opposed by the State from which

independence was being declared. Sometimes a declaration resulted in the creation of a new State,

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at others it did not. In no case, however, does the practice of States as a whole suggest that the act

of promulgating the declaration was regarded as contrary to international law. On the contrary,

State practice during this period points clearly to the conclusion that international law contained no

prohibition of declarations of independence. During the second half of the twentieth century, the

international law of self-determination developed in such a way as to create a right to independence

for the peoples of non-self-governing territories and peoples subject to alien subjugation,

domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South*

Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),

Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *East Timor (Portugal* v.

Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the*

Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J.

Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a

result of the exercise of this right. There were, however, also instances of declarations of

independence outside this context. The practice of States in these latter cases does not point to the

emergence in international law of a new rule prohibiting the making of a declaration of

independence in such cases.

80. Several participants in the proceedings before the Court have contended that a

prohibition of unilateral declarations of independence is implicit in the principle of territorial

integrity.

The Court recalls that the principle of territorial integrity is an important part of the

international legal order and is enshrined in the Charter of the United Nations, in particular in

Article 2, paragraph 4, which provides that:

“All Members shall refrain in their international relations from the threat or use

of force against the territorial integrity or political independence of any State, or in

any other manner inconsistent with the Purposes of the United Nations.”

In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of

International Law concerning Friendly Relations and Co-operation among States in Accordance

with the Charter of the United Nations”, which reflects customary international law (*Military and*

Paramilitary Activities in and against Nicaragua (Nicaragua v. *United States of America), Merits,*

Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated

"[t]he principle that States shall refrain in their international relations from the threat or use of force

against the territorial integrity or political independence of any State". This resolution then

enumerated various obligations incumbent upon States to refrain from violating the territorial

integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on

Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that

"[t]he participating States will respect the territorial integrity of each of the participating States"

(Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of

relations between States.

81. Several participants have invoked resolutions of the Security Council condemning

particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965)

and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983),

concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the

Republika Srpska.

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The Court notes, however, that in all of those instances the Security Council was making a

determination as regards the concrete situation existing at the time that those declarations of

independence were made; the illegality attached to the declarations of independence thus stemmed

not from the unilateral character of these declarations as such, but from the fact that they were, or

would have been, connected with the unlawful use of force or other egregious violations of norms

of general international law, in particular those of a peremptory character *(jus cogens)*. In the

context of Kosovo, the Security Council has never taken this position. The exceptional character of

the resolutions enumerated above appears to the Court to confirm that no general prohibition

against unilateral declarations of independence may be inferred from the practice of the Security

Council.

*

82. A number of participants in the present proceedings have claimed, although in almost

every instance only as a secondary argument, that the population of Kosovo has the right to create

an independent State either as a manifestation of a right to self-determination or pursuant to what

they described as a right of “remedial secession” in the face of the situation in Kosovo.

The Court has already noted (see paragraph 79 above) that one of the major developments of

international law during the second half of the twentieth century has been the evolution of the right

of self-determination. Whether, outside the context of non-self-governing territories and peoples

subject to alien subjugation, domination and exploitation, the international law of

self-determination confers upon part of the population of an existing State a right to separate from

that State is, however, a subject on which radically different views were expressed by those taking

part in the proceedings and expressing a position on the question. Similar differences existed

regarding whether international law provides for a right of “remedial secession” and, if so, in what

circumstances. There was also a sharp difference of views as to whether the circumstances which

some participants maintained would give rise to a right of “remedial secession” were actually

present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case.

The General Assembly has requested the Court’s opinion only on whether or not the declaration of

independence is in accordance with international law. Debates regarding the extent of the right

of

self-determination and the existence of any right of “remedial secession”, however, concern the

right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and

as almost all participants agreed, that issue is beyond the scope of the question posed by the

General Assembly. To answer that question, the Court need only determine whether the

declaration of independence violated either general international law or the *lex specialis* created by

Security Council resolution 1244 (1999).

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84. For the reasons already given, the Court considers that general international law contains

no applicable prohibition of declarations of independence. Accordingly, it concludes that the

declaration of independence of 17 February 2008 did not violate general international law. Having

arrived at that conclusion, the Court now turns to the legal relevance of Security Council

resolution 1244, adopted on 10 June 1999.

B. Security Council resolution 1244 (1999) and the UNMIK

Constitutional Framework created thereunder

85. Within the legal framework of the United Nations Charter, notably on the basis of

Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing

obligations under international law. The Court has had the occasion to interpret and apply such

Security Council resolutions on a number of occasions and has consistently treated them as part of

the framework of obligations under international law (*Legal Consequences for States of the*

Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security

Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16); *Questions of*

Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at

Lockerbie (Libyan Arab Jamahiriya v. *United Kingdom), Provisional Measures, Order of*

14 April 1992, *I.C.J. Reports 1992*, p. 15, paras. 39-41; *Questions of Interpretation and*

Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan

Arab Jamahiriya v. *United States of America), Provisional Measures, Order of 14 April 1992,*

I.C.J. Reports 1992, pp. 126-127, paras. 42-44). Resolution 1244 (1999) was expressly adopted by

the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore

clearly imposes international legal obligations. The Court notes that none of the participants has

questioned the fact that resolution 1244 (1999), which specifically deals with the situation in

Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on

the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998),

1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on

resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case,

recalled in the second preambular paragraph of the latter.

*

87. A certain number of participants have dealt with the question whether regulations

adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the

Constitutional Framework (see paragraph 62 above), also form part of the applicable international

law within the meaning of the General Assembly’s request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an

act of an internal law rather than an international law character. According to that argument, the

Constitutional Framework would not be part of the international law applicable in the present

instance and the question of the compatibility of the declaration of independence therewith would

thus fall outside the scope of the General Assembly's request.

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The Court observes that UNMIK regulations, including regulation 2001/9, which

promulgated the Constitutional Framework, are adopted by the Special Representative of the

Secretary-General on the basis of the authority derived from Security Council

resolution 1244 (1999), notably its paragraphs 6, 10, and 11, and thus ultimately from the United

Nations Charter. The Constitutional Framework derives its binding force from the binding

character of resolution 1244 (1999) and thus from international law. In that sense it therefore

possesses an international legal character.

89. At the same time, the Court observes that the Constitutional Framework functions as part

of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in

Kosovo and the purpose of which is to regulate, during the interim phase established by

resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than

international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework

was promulgated

“[f]or the purposes of developing meaningful self-government in Kosovo pending a

final settlement, and establishing provisional institutions of self-government in the

legislative, executive and judicial fields through the participation of the people of

Kosovo in free and fair elections”.

The Constitutional Framework therefore took effect as part of the body of law adopted for

the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

90. The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration Mission in Kosovo. As noted above (see paragraph 58), Security Council resolution 1244 (1999) envisages “an interim administration for Kosovo . . . which will provide transitional administration while establishing and

overseeing the development of provisional democratic self-governing institutions" (para. 10).

Resolution 1244 (1999) further states that "the main responsibilities of the international civil

presence will include . . . [o]rganizing and overseeing the development of provisional institutions

for democratic and autonomous self-government pending a political settlement, including the

holding of elections" (paragraph 11 *(c)*). Similarly, as described above (see paragraph 62), under

the Constitutional Framework, the Provisional Institutions of Self-Government were to function in

conjunction with and subject to the direction of the Special Representative of the Secretary-General

in the implementation of Security Council resolution 1244 (1999).

91. The Court notes that Security Council resolution 1244 (1999) and the Constitutional

Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security

Council resolution 1244 (1999) expressly provides that "the international civil and security

presences are established for an initial period of 12 months, to continue thereafter unless the

Security Council decides otherwise". No decision amending resolution 1244 (1999) was taken by

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the Security Council at its meeting held on 18 February 2008, when the declaration of

independence was discussed for the first time, or at any subsequent meeting. The Presidential

Statement of 26 November 2008 (S/PRST/2008/44) merely "welcom[ed] the cooperation between

the UN and other international actors, *within* the framework of Security Council

resolution 1244 (1999)" (emphasis added). In addition, pursuant to paragraph 21 of Security

Council resolution 1244 (1999), the Security Council decided "to remain actively seized of the

matter" and maintained the item "Security Council resolutions 1160 (1998), 1199 (1998),

1203 (1998), 1239 (1999) and 1244 (1999)" on its agenda (see, most recently, Report of the

Security Council, 1 August 2008-31 July 2009, General Assembly, Official Records, 64th session,

Supplement No. 2, pp. 39 ff. and 132 ff.). Furthermore, Chapter 14.3 of the Constitutional

Framework sets forth that “[t]he SRSG . . . may effect amendments to this Constitutional

Framework”. Minor amendments were effected by virtue of UNMIK regulations

UNMIK/REG/2002/9 of 3 May 2002, UNMIK/REG/2007/29 of 4 October 2007,

UNMIK/REG/2008/1 of 8 January 2008 and UNMIK/REG/2008/9 of 8 February 2008. Finally,

neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a

clause providing for its termination and neither has been repealed; they therefore constituted the

international law applicable to the situation prevailing in Kosovo on 17 February 2008.

92. In addition, the Special Representative of the Secretary-General continues to exercise his

functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to

the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see

the most recent quarterly Report of the Secretary-General on the United Nations Interim

Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports

S/2008/692 of 24 November 2008, S/2009/149 of 17 March 2009, S/2009/300 of 10 June 2009,

S/2009/497 of 30 September 2009 and S/2010/5 of 5 January 2010).

93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999)

and the Constitutional Framework form part of the international law which is to be considered in

replying to the question posed by the General Assembly in its request for the advisory opinion.

1. Interpretation of Security Council resolution 1244 (1999)

94. Before continuing further, the Court must recall several factors relevant in the

interpretation of resolutions of the Security Council. While the rules on treaty interpretation

embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide

guidance, differences between Security Council resolutions and treaties mean that the interpretation

of Security Council resolutions also require that other factors be taken into account. Security

Council resolutions are issued by a single, collective body and are drafted through a very different

process than that used for the conclusion of a treaty. Security Council resolutions are the product

of a voting process as provided for in Article 27 of the Charter, and the final text of such

resolutions represents the view of the Security Council as a body. Moreover, Security Council

resolutions can be binding on all Member States (*Legal Consequences for States of the Continued*

Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council

Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116), irrespective of

whether they played any part in their formulation. The interpretation of Security Council

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resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

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95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: “1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.” Those general principles sought to defuse the Kosovo crisis first by ensuring an end to

the violence and repression in Kosovo and by the establishment of an interim administration. A longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

"[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA" (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; *ibid.*, Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

96. Having earlier outlined the principal characteristics of Security Council

resolution 1244 (1999) (see paragraphs 58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. As described above (see paragraph 60), on 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary”, was vested in UNMIK and exercised by the Special Representative. Viewed together,

resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the

legal order in force at that time in the territory of Kosovo and setting up an international territorial

administration. For this reason, the establishment of civil and security presences in Kosovo

deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure

relating to civil, political and security aspects and aimed at addressing the crisis existing in that

territory in 1999.

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98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation

of an interim international territorial administration, was designed for humanitarian purposes: to

provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order

in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which,

in its second preambular paragraph, recalls Security Council resolution 1239, adopted on

14 May 1999, in which the Security Council had expressed “grave concern at the humanitarian

crisis in and around Kosovo”. The priorities which are identified in paragraph 11 of

resolution 1244 (1999) were elaborated further in the so-called “four pillars” relating to the

governance of Kosovo described in the Report of the Secretary-General of 12 June 1999

(paragraph 60 above). By placing an emphasis on these “four pillars”, namely, interim civil

administration, humanitarian affairs, institution building and reconstruction, and by assigning

responsibility for these core components to different international organizations and agencies,

resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The

interim administration in Kosovo was designed to suspend temporarily Serbia’s exercise of its

authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the

legal régime established under resolution 1244 (1999) was to establish, organize and oversee the

development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

99. Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.

100. The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.

2. The question whether the declaration of independence is in accordance with Security

Council resolution 1244 (1999) and the measures adopted thereunder

101. The Court will now turn to the question whether Security Council

resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on

issuing a declaration of independence, applicable to those who adopted the declaration of

independence of 17 February 2008. In order to answer this question, it is first necessary, as

explained in paragraph 52 above, for the Court to determine precisely who issued that declaration.

(a) ***The identity of the authors of the declaration of independence***

102. The Court needs to determine whether the declaration of independence of

17 February 2008 was an act of the “Assembly of Kosovo”, one of the Provisional Institutions of

Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those

who adopted the declaration were acting in a different capacity.

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103. The Court notes that different views have been expressed regarding this question. On

the one hand, it has been suggested in the proceedings before the Court that the meeting in which

the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional

Institution of Self-Government within the limits of the Constitutional Framework. Other

participants have observed that both the language of the document and the circumstances under

which it was adopted clearly indicate that the declaration of 17 February 2008 was not the work of

the Provisional Institutions of Self-Government and did not take effect within the legal framework

created for the government of Kosovo during the interim phase.

104. The Court notes that, when opening the meeting of 17 February 2008 at which the

declaration of independence was adopted, the President of the Assembly and the Prime Minister of

Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court

considers, however, that the declaration of independence must be seen in its larger context, taking

into account the events preceding its adoption, notably relating to the so-called “final status

process” (see paragraphs 64 to 73). Security Council resolution 1244 (1999) was mostly concerned

with setting up an interim framework of self-government for Kosovo (see paragraph 58 above).

Although, at the time of the adoption of the resolution, it was expected that the final status of

Kosovo would flow from, and be developed within, the framework set up by the resolution, the

specific contours, let alone the outcome, of the final status process were left open by Security

Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs *(d*),

(e) and *(f)*, deals with final status issues only in so far as it is made part of UNMIK's

responsibilities to "[f]acilitat[e] a political process designed to determine Kosovo's future status,

taking into account the Rambouillet accords" and "[i]n a final stage, [to oversee] the transfer of

authority from Kosovo's provisional institutions to institutions established under a political

settlement".

105. The declaration of independence reflects the awareness of its authors that the final

status negotiations had failed and that a critical moment for the future of Kosovo had been reached.

The Preamble of the declaration refers to the "years of internationally-sponsored negotiations

between Belgrade and Pristina over the question of our future political status" and expressly puts

the declaration in the context of the failure of the final status negotiations, inasmuch as it states that

"no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs).

Proceeding from there, the authors of the declaration of independence emphasize their

determination to “resolve” the status of Kosovo and to give the people of Kosovo “clarity about

their future” (thirteenth preambular paragraph). This language indicates that the authors of the

declaration did not seek to act within the standard framework of interim self-administration of

Kosovo, but aimed at establishing Kosovo “as an independent and sovereign state” (para. 1). The

declaration of independence, therefore, was not intended by those who adopted it to take effect

within the legal order created for the interim phase, nor was it capable of doing so. On the

contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the

capacity of an institution created by and empowered to act within that legal order but, rather, set

out to adopt a measure the significance and effects of which would lie outside that order.

106. This conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (declaration of independence, para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (*ibid.*, para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General:

"*(m)* concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);

(n) overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;

(o) external relations, including with states and international organisations . . .”

(Chap. 8.1 of the Constitutional Framework, “Powers and Responsibilities

Reserved to the SRSG”),

with the Special Representative of the Secretary-General only consulting and co-operating with the

Provisional Institutions of Self-Government in these matters.

107. Certain features of the text of the declaration and the circumstances of its adoption also

point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is

the sole authentic text) is any reference made to the declaration being the work of the Assembly of

Kosovo. The words “Assembly of Kosovo” appear at the head of the declaration only in the

English and French translations contained in the dossier submitted on behalf of the

Secretary-General. The language used in the declaration differs from that employed in acts of the

Assembly of Kosovo in that the first paragraph commences with the phrase “We, the

democratically-elected leaders of our people . . .”, whereas acts of the Assembly of Kosovo employ

the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed

by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was

signed by all those present when it was adopted, including the President of Kosovo, who (as noted

in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of

the persons adopting the declaration of independence as “the democratically-elected leaders of our

people” immediately precedes the actual declaration of independence within the text (“hereby

declare Kosovo to be an independent and sovereign state”; para. 1). It is also noticeable that the

declaration was not forwarded to the Special Representative of the Secretary-General for

publication in the Official Gazette.

108. The reaction of the Special Representative of the Secretary-General to the declaration of

independence is also of some significance. The Constitutional Framework gave the Special

Representative power to oversee and, in certain circumstances, annul the acts of the Provisional

Institutions of Self-Government. On previous occasions, in particular in the period between 2002

and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo,

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the Special Representative had qualified a number of acts as being incompatible with the

Constitutional Framework on the grounds that they were deemed to be “beyond the scope of [the

Assembly’s] competencies” (United Nations dossier No. 189, 7 February 2003) and therefore

outside the powers of the Assembly of Kosovo.

The silence of the Special Representative of the Secretary-General in the face of the

declaration of independence of 17 February 2008 suggests that he did not consider that the

declaration was an act of the Provisional Institutions of Self-Government designed to take effect

within the legal order for the supervision of which he was responsible. As the practice shows, he

would have been under a duty to take action with regard to acts of the Assembly of Kosovo which

he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim

Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated

that “the Assembly of Kosovo held a session during which it adopted a ‘declaration of

independence’, declaring Kosovo an independent and sovereign State” (United Nations

doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose

of which was to inform the Security Council about developments in Kosovo; it was not intended as

a legal analysis of the declaration or the capacity in which those who adopted it had acted.

109. The Court thus arrives at the conclusion that, taking all factors together, the authors of

the declaration of independence of 17 February 2008 did not act as one of the Provisional

Institutions of Self-Government within the Constitutional Framework, but rather as persons who

acted together in their capacity as representatives of the people of Kosovo outside the framework of

the interim administration.

(b) ***The question whether the authors of the declaration of independence acted in violation of***

Security Council resolution 1244 (1999) or the measures adopted thereunder

110. Having established the identity of the authors of the declaration of independence, the

Court turns to the question whether their act in promulgating the declaration was contrary to any

prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework

adopted thereunder.

111. The Court recalls that this question has been a matter of controversy in the present

proceedings. Some participants to the proceedings have contended that the declaration of

independence of 17 February 2008 was a unilateral attempt to bring to an end the international

presence established by Security Council resolution 1244 (1999), a result which it is said could

only be effectuated by a decision of the Security Council itself. It has also been argued that a

permanent settlement for Kosovo could only be achieved either by agreement of all parties

involved (notably including the consent of the Republic of Serbia) or by a specific Security Council

resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of

the Contact Group. According to this view, the unilateral action on the part of the authors of the

declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and

thus constitutes a violation of that resolution.

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112. Other participants have submitted to the Court that Security Council

resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo's independence. They

argued that the resolution only regulates the interim administration of Kosovo, but not its final or

permanent status. In particular, the argument was put forward that Security Council

resolution 1244 (1999) does not create obligations under international law prohibiting the issuance

of a declaration of independence or making it invalid, and does not make the authors of the

declaration of independence its addressees. According to this position, if the Security Council had

wanted to preclude a declaration of independence, it would have done so in clear and unequivocal

terms in the text of the resolution, as it did in resolution 787 (1992) concerning the Republika

Srpska. In addition, it was argued that the references, in the annexes of Security Council

resolution 1244 (1999), to the Rambouillet accords and thus indirectly to the “will of the people”

(see Chapter 8.3 of the Rambouillet accords) of Kosovo, support the view that Security Council

resolution 1244 (1999) not only did not oppose the declaration of independence, but indeed

contemplated it. Other participants contended that at least once the negotiating process had been

exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of

independence.

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113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of

17 February 2008 from declaring independence from the Republic of Serbia can only be answered

through a careful reading of this resolution (see paras. 94 *et seq.*).

114. First, the Court observes that Security Council resolution 1244 (1999) was essentially

designed to create an interim régime for Kosovo, with a view to channelling the long-term political

process to establish its final status. The resolution did not contain any provision dealing with the

final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows

that in situations where the Security Council has decided to establish restrictive conditions for the

permanent status of a territory, those conditions are specified in the relevant resolution. For

example, although the factual circumstances differed from the situation in Kosovo, only 19 days

after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of

29 June 1999, reaffirmed its position that a “Cyprus settlement must be based on a State of Cyprus

with a single sovereignty and international personality and a single citizenship, with its

independence and territorial integrity safeguarded" (para. 11). The Security Council thus set out

the specific conditions relating to the permanent status of Cyprus.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve

for itself the final determination of the situation in Kosovo and remained silent on the conditions

for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of

independence of 17 February 2008 because the two instruments operate on a different level: unlike

resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status

of Kosovo.

115. Secondly, turning to the question of the addressees of Security Council

resolution 1244 (1999), as described above (see paragraph 58), it sets out a general framework for

the “deployment in Kosovo, under United Nations auspices, of international civil and security

presences” (para. 5). It is mostly concerned with creating obligations and authorizations for United

Nations Member States as well as for organs of the United Nations such as the Secretary-General

and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council

resolution 1244 (1999)). The only point at which resolution 1244 (1999) expressly mentions other

actors relates to the Security Council’s demand, on the one hand, “that the KLA and other armed

Kosovo Albanian groups end immediately all offensive actions and comply with the requirements

for demilitarization” (para. 15) and, on the other hand, for the “full cooperation by all concerned,

including the international security presence, with the International Tribunal for the Former

Yugoslavia" (para. 14). There is no indication, in the text of Security Council

resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific

obligation to act or a prohibition from acting, addressed to such other actors.

116. The Court recalls in this regard that it has not been uncommon for the Security Council

to make demands on actors other than United Nations Member States and intergovernmental

organizations. More specifically, a number of Security Council resolutions adopted on the subject

of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed

eo nomine to the Kosovo Albanian leadership. For example, resolution 1160 (1998) "[c]all[ed]

upon the authorities in Belgrade *and the leadership of the Kosovar Albanian community* urgentl y to

enter without preconditions into a meaningful dialogue on political status issues"

(resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate

demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering

into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means

only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the

Former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998)

“[d]emand[ed] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo

Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and

cooperate fully with the OSCE Verification Mission in Kosovo” (resolution 1203 (1998), para. 4).

The same resolution also called upon the “Kosovo Albanian leadership to enter immediately into a

meaningful dialogue without preconditions and with international involvement, and to a clear

timetable, leading to an end of the crisis and to a negotiated political solution to the issue of

Kosovo"; demanded that "the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel"; "[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions"; and demanded that the Kosovo Albanian leadership "cooperate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe" (resolution 1203 (1998), paras. 5, 6, 10 and 11).

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to "all concerned" (para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may

serve as an important indicator in this regard. The approach taken by the Court with regard to the

binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here. In

this context, the Court recalls its previous statement that:

“The language of a resolution of the Security Council should be carefully

analysed before a conclusion can be made as to its binding effect. In view of the

nature of the powers under Article 25, the question whether they have been in fact

exercised is to be determined in each case, having regard to the terms of the resolution

to be interpreted, the discussions leading to it, the Charter provisions invoked and, in

general, all circumstances that might assist in determining the legal consequences of

the resolution of the Security Council.” (*Legal Consequences for States of the*

Continued Presence of South Africa in Namibia (South West Africa) notwithstanding

Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 53,

para. 114.)

118. Bearing this in mind, the Court cannot accept the argument that Security Council

resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of

independence, against declaring independence; nor can such a prohibition be derived from the

language of the resolution understood in its context and considering its object and purpose. The

language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The

object and purpose of the resolution, as has been explained in detail (see paragraphs 96 to 100), is

the establishment of an interim administration for Kosovo, without making any definitive

determination on final status issues. The text of the resolution explains that the

“main responsibilities of the international civil presence will include . . . [o]rganizing

and overseeing the development of provisional institutions for democratic and

autonomous self-government *pending a political settlement*" (para. 11 *(c)* of the

resolution; emphasis added).

The phrase "political settlement", often cited in the present proceedings, does not modify this

conclusion. First, that reference is made within the context of enumerating the responsibilities of

the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo

and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on

this matter illustrate, the term "political settlement" is subject to various interpretations. The Court

therefore concludes that this part of Security Council resolution 1244 (1999) cannot be construed to

include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008,

against declaring independence.

119. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar

the authors of the declaration of 17 February 2008 from issuing a declaration of independence from

the Republic of Serbia. Hence, the declaration of independence did not violate Security Council

resolution 1244 (1999).

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120. The Court therefore turns to the question whether the declaration of independence of

17 February 2008 has violated the Constitutional Framework established under the auspices of

UNMIK. Chapter 5 of the Constitutional Framework determines the powers of the Provisional

Institutions of Self-Government of Kosovo. It was argued by a number of States which

participated in the proceedings before the Court that the promulgation of a declaration of

independence is an act outside the powers of the Provisional Institutions of Self-Government as set

out in the Constitutional Framework.

121. The Court has already held, however (see paragraphs 102 to 109 above), that the

declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of

Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal

order in which those Provisional Institutions operated. It follows that the authors of the declaration

of independence were not bound by the framework of powers and responsibilities established to

govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court

finds that the declaration of independence did not violate the Constitutional Framework.

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V. GENERAL CONCLUSION

122. The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

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123. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

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IN FAVOUR: *President* Owada; *Judges* Al-Khasawneh, Buergenthal, Simma, Abraham,

Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Vice-President* Tomka; *Judges* Koroma, Keith, Bennouna, Skotnikov;

(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on

17 February 2008 did not violate international law.

IN FAVOUR: *President* Owada; *Judges* Al-Khasawneh, Buergenthal, Simma, Abraham,

Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Vice-President* Tomka; *Judges* Koroma, Bennouna, Skotnikov.

Done in English and in French, the English text being authoritative, at the Peace Palace,

The Hague, this twenty-second day of July, two thousand and ten, in two copies, one of which will

be placed in the archives of the Court and the other transmitted to the Secretary-General of the

United Nations.

(Signed) Hisashi OWADA,

President.

(Signed) Philippe COUVREUR,

Registrar.

Vice-President TOMKA appends a declaration to the Advisory Opinion of the Court;

Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court; Judge SIMMA

appends a declaration to the Advisory Opinion of the Court; Judges KEITH and SEPÚLVEDA-AMOR

append separate opinions to the Advisory Opinion of the Court; Judges BENNOUNA and

SKOTNIKOV append dissenting opinions to the Advisory Opinion of the Court;

Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Advisory Opinion of the

Court.

(Initialled) H. O.

(Initialled) Ph. C.

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