

MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS

**The Director for Legal Affairs
No. 758/DJ**

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Peace Palace
2517 KJ The Hague
Netherlands

Paris, 7 April 2009

Within the deadline set by the International Court of Justice by its order of 17 October 2008, I have the honour to send to you, enclosed, the written statement of the French Republic in the case concerning the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (request for an advisory opinion). As you requested in your letter of 20 October 2008, the original of this statement is accompanied by 30 copies. I am also enclosing an electronic version of the written statement on CD-ROM.

Yours etc.

(Signed) Edwige BELLIARD.

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

**ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION
OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS OF
SELF-GOVERNMENT OF KOSOVO**

WRITTEN STATEMENT BY THE FRENCH REPUBLIC

17 April 2009

[Translation by the Registry]

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INTRODUCTION

1. On 8 October 2008, the United Nations General Assembly adopted resolution 63/3, entitled “Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law”. By this resolution, the General Assembly addressed the following question to the Court:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with International Law?”

2. This request for an advisory opinion was transmitted to the Court on 9 October 2008 by the Secretary-General of the United Nations and was notified to all States with standing before the Court by letter dated 10 October. By an order of 17 October 2008, the Court decided that “the United Nations and its Member States are . . . likely to be able to furnish information on the question submitted to the Court for an advisory opinion” and fixed 17 April 2009 as the time-limit within which written statements could be put to the Court in conformity with Article 66 2) of its Statute. In response to this order, France considers it necessary to convey to the Court the observations which, in its view, are required in regard both to the request itself and to the question that the request refers to the Court.

3. Before considering legal issues related to the request to the Court for an opinion, France would like briefly to recall the sequence of events which led the United Nations General Assembly to adopt resolution 63/3 (1), and the more general context of that resolution (2).

1. The adoption of General Assembly resolution 63/3

4. Draft resolution A/63/L.2, submitted by Serbia on 23 September 2008, was adopted in plenary on 8 October by 77 votes to 6 and 74 abstentions without amendment and without referral to a Main Committee¹. The draft resolution had been included under item 71 on the agenda of the sixty-third session of the General Assembly, drawn up several weeks earlier at the initiative of Serbia², entitled “Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law”, and included under heading (F), “Promotion of justice and international law”.

5. France stated its conviction that, whether or not it led to the adoption of the resolution the Republic of Serbia was seeking and then, possibly, to an advisory opinion, this initiative taken in the General Assembly was not by nature capable of achieving Serbia’s objectives. France does not consider that the artificial distinction that Serbia is trying to draw between analysing Kosovo’s declaration of independence from the political point of view on the one hand, and in legal terms on the other, is a way of averting the possible “destabilizing consequences” that Serbia³ fears.

¹See the verbatim record of the 22nd Plenary Meeting, A/63/PV.22, 8 October 2008, p.11.

²See the letter from the Permanent Representative of Serbia to the United Nations dated 15 August 2008, A/63/195.

³See the explanatory memorandum attached to the request for the inclusion of item 71 on the agenda, *ibid.*: “We (Serbia) hold that the most principled, sensible way to overcome the potentially destabilizing consequences of Kosovo’s unilateral declaration of independence is to transfer the issue from the political to the juridical arena”.

6. France, as it explains in this statement, does not believe that presenting Kosovo's declaration of independence from an exclusively legal point of view – even though it acknowledges that this would be possible — can take proper account of so singular a question. In this connection, it is not possible to tell from Serbia's initiative how the General Assembly could take action on the basis of an opinion of the Court, assuming that the Court was in a position to give such an opinion, and whatever that opinion might be, given that it is a matter for each State to determine whether or not it recognizes the existence of Kosovo⁴. Nor, and for good reason, does resolution 63/3 indicate how the General Assembly could rely on an opinion of the Court for the purposes of confirming or altering the present situation of Kosovo.

7. In the opinion of France, it follows that, whether from a political or a legal point of view, the present request for an advisory opinion does not appear to offer ways and means of achieving the objectives that Serbia states it is pursuing, however legitimate and incontestable the principles that it cites may be: namely, the primacy of law in international relations and the preeminent role of the International Court of Justice, in its capacity as the principal judicial organ of the United Nations.

8. The common desire to see the Balkans experience stability and for reconciliation between the peoples of the region will be fully achieved only if they unite around a common future, not by keeping open the scars of the past. France, as it has repeated on numerous occasions, including the vote on resolution 63/3, is guided by the essential objective of offering this common future to the peoples of the western Balkans within the framework of the European Union. Thus France, while respecting and commending Serbia's commitment to act with the greatest possible restraint "through diplomacy and international law"⁵, entertains the greatest doubts as to any genuine effects that an opinion of the Court could have.

2. The historical context of the request for an advisory opinion

9. By an irrevocable decision, France recognized the State of Kosovo on the day after the declaration of independence, as did more than 55 Member States of the United Nations, including 22 Member States of the European Union⁶. By this act, France not only confirmed Kosovo's standing as a sovereign and independent State and the definitive conclusion of a political process begun in 1999, but also wished to open for the future with a now independent Kosovo, as it has with all the States of the region, a new page in its relations with the Balkans after the tragic events of the 1990s. France's intention was also to become more widely involved in the European Union's commitment to promote the stability of the region, and support the observance of human rights and the principles of the rule of law⁷.

10. The declaration of independence of Kosovo, officially approved on 17 February 2008 by the Assembly of Kosovo, brought to a conclusion an unprecedented situation which had its origin in the dissolution of the former Yugoslavia, the repression of the Albanian community in Kosovo and the conflict which followed in 1999 (*a*). Nor, moreover, can the declaration of independence be discussed without recalling the major efforts that have been, and continue to be, made by the

⁴See below, para. 1.16.

⁵See the verbatim record of the 22nd Plenary Meeting, A/63/PV.22, 8 October 2008, p. 1. See also the declaration of the President of Serbia, Mr Tadić, in the Security Council, S/PV.5839, 18 February 2008, p. 5.

⁶At the date of drafting of the present statement, 56 States have recognized Kosovo's independence.

⁷See *inter alia* the conclusions of the Council of the European Union dated 18 February 2008, reproduced in S/2008/105, Annex; see also below, paras. 28-29.

international community, including the European Union, to guarantee peace, stability and the promotion of the principles of the rule of law in Kosovo and the wider region (b).

(a) *The crisis in Kosovo (1989-1999)*

11. The wide autonomy that the Yugoslav constitution of 1974 had guaranteed to Kosovo (for example, by giving it dual status as a component both of Serbia and of the Socialist Federative Republic of Yugoslavia) had increasingly been called into question from 1981 onwards, and was withdrawn in 1989, resulting in the forcible and complete integration of Kosovo into Serbia. In the context of the break-up of the Yugoslav Federation in 1991-1992, and subsequently, within the Federal Republic of Yugoslavia (Serbia-and -Montenegro), (hereafter the FRY), the Kosovo Albanian community was subject to discriminatory measures, including the deprivation of access to public employment, in an economy which was at the time entirely State-controlled, the closure of schools and universities, the prohibition of the use of the Albanian language, and violence against individuals. The latter claimed thousands of victims even before a guerrilla movement had appeared, and contributed to massive outward migration. Within this community, these discriminatory measures created a widespread movement demanding independence for Kosovo, triggering a violent crisis which, following closely on events with tragic humanitarian implications in the former Yugoslavia, once more threatened security in the Balkans⁸.

12. The crisis in Kosovo reached its culmination at the end of the 1990s, after the first armed confrontations broke out. These events led the international community to multiply its efforts with the aim, initially, of fostering dialogue with a view to a political solution, and then, faced with a deteriorating situation, to put an end to an exceptionally grave crisis in Kosovo and to prevent it from having disastrous consequences.

13. In March 1998, as the conflict intensified, the Contact Group, bringing together the Foreign Ministers of Germany, the United States, the Russian Federation, Italy and the United Kingdom, the Organization for Security and Co-operation in Europe (OSCE) and the United Nations Security Council, among others, swiftly condemned “the excessive use of force by Serbian police forces against civilians and peaceful demonstrators in Kosovo”, as well as “all acts of terrorism by the Kosovo Liberation Army or any other group or individual, and all external support for terrorist activity in Kosovo”⁹. From that date until the deployment of the forces of the North Atlantic Treaty Organization (NATO), which began on 24 March 1999¹⁰, the humanitarian

⁸As the Interagency Needs Assessment Mission sent to the Federal Republic of Yugoslavia by the Secretary-General of the United Nations was to recall, “The . . . crisis in Kosovo has complex historical, political and socio-economic roots. Long-standing, systemic violation of civil, political and human rights led, in turn, to an escalating pattern of violence and retaliation. In particular, a pattern of serious human rights abuses against Kosovo Albanians had been documented by the Special Rapporteurs of the Commission on Human Rights, the Office of the High Commissioner for Human Rights and other independent observers since 1993.” (S/1999/662, 14 June 1999, Ann., p. 11, para. 12). See the judgment of the Trial Division of the International Criminal Tribunal for the former Yugoslavia (ICTY) of 26 February 2009, *Milutinović and Others*, Case IT-05-87-T, Vol. 1, paras. 213-230.

⁹Resolution 1160, dated 31 March 1998, third recital of the Preamble. See also the declaration on Kosovo adopted by the Contact Group on 9 March 2008 (S/1998/223), and Decision 218 adopted by the Permanent Council of the Organization for Security and Co-operation in Europe on 11 March 1998 (S/1998/246).

¹⁰For an overview of the crisis between March 1998 and March 1999, see the Report of the Interagency Needs Assessment Mission, *op. cit.*, footnote 8, pp. 12-14, paras.13-17. See also ICTY, judgment of 26 February 2009, *Milutinović and others*, *op. cit.*, footnote 8, particularly Vol. 1, para. 350.

situation continued to deteriorate, bringing with it a significant increase in the number of refugees and displaced persons¹¹, and above all reflecting a generalization of the violence in Kosovo¹².

14. On 17 March 1999, the United Nations Secretary-General indicated that “the humanitarian and human rights situation in Kosovo remain[ed] grave” and that the [...] background investigations [by the Office of the United Nations High Commissioner for Human Rights] of targeted violence further confirmed the observations expressed in [his] previous report that the nature of violent activity in Kosovo, which ha[d] now spread to urban areas, ha[d] increased the number of people who live[d] in fear of being directly affected by violence or arbitrary treatment”¹³. And the Secretary-General added, on the same date, that the proliferation of violence against civilians in Kosovo “contributed to the climate of fear and insecurity, causing deep distrust among communities and adding to humanitarian and social problems in Kosovo”¹⁴.

15. During the same period, the United Nations Security Council fulfilled its principal responsibility of maintaining international peace and security by adopting several resolutions under Chapter VII of the United Nations Charter, including the imposition of an arms embargo on the FRY¹⁵. In addition, the Security Council consistently supported the efforts of the Contact Group aimed at achieving a peaceful solution to the crisis and reaching agreement on a political solution between the FRY authorities and the Kosovo Albanian leadership. Thus, in a statement by its President of 29 January 1999, the Security Council welcomed a new initiative by the Contact Group seeking to achieve a political settlement between the parties¹⁶. This initiative culminated in an international Conference, held at Rambouillet and Paris in February and March 1999, but the FRY did not sign the agreements negotiated there¹⁷, the Belgrade authorities categorically

¹¹See the letter dated 20 February 1999 from the Chairman-in-Office of the OSCE to the Secretary-General, S/1999/214 (Ann.), p. 7: “UNHCR estimates that the overall level of displacement within Kosovo is still at 210,000”. The number estimated by OSCE, at 20 March 1999, was at least 230,000 people, see the report on the situation on Kosovo in pursuance of Security Council resolutions 1160 (1998) and 1203 (1998), addressed to the Secretary-General by the Chairman-in-Office of the OSCE, S/1999/315 (Ann.), 23 March 1999, p. 7. This report also draws attention to the continuing “departure of Serbs and other minorities from Kosovo” (*ibid.*, p. 6). The Interagency Needs Assessment Mission sent to the FRY from 16-27 May 1999 reported that “by 24 March 1999, UNHCR estimated that there were some . . . 260,000 displaced persons in Kosovo” (*op. cit.*, footnote 8, p. 12, para. 16).

¹²On 29 January 1999, in his report to the Security Council, the United Nations Secretary-General indicated that “the human rights situation in Kosovo has remained consistently grave for nearly 11 months . . . The most disturbing new element is the spread of violence in Kosovo and the transformation of the nature of that violence” S/1999/99, paras. 3 and 4).

¹³S/1999/293, 17 March 1999, para. 4.

¹⁴*Ibid.*, para. 5.

¹⁵See resolutions 1160 (1998), 1199 (1998) and 1203 (1998). Several declarations by the President of United Nations Security Council were also adopted, see S/PRST/1998/25 (24 August 1998), S/PRST/1999/2 (19 January 1999) and S/PRST/1999/5 (29 January 1999).

¹⁶S/PRST/1999/5, 29 January 1999. In addition, the Security Council: “reiterates its full support for international efforts, including those of the Contact Group and the Organization for Security and Co-operation in Europe Kosovo Verification Mission, to reduce tensions in Kosovo and facilitate a political settlement on the basis of substantial autonomy and equality for all citizens and ethnic communities in Kosovo and the recognition of the legitimate rights of the Kosovo Albanians and other communities in Kosovo”.

¹⁷“The Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo” are reproduced under the official United Nations reference S/1999/648.

rejecting, among other things, any deployment of foreign forces charged with implementing a peace agreement¹⁸.

16. Thus, in March 1999, the situation in Kosovo reached a point of no return, as fears of a new humanitarian disaster were realized¹⁹. The mission sent by the Secretary-General to the FRY in May 1999 summarized the impact of the crisis in Kosovo as follows: “The crisis in Kosovo has resulted in the mass forced displacement and deportation of hundreds of thousands of civilians, wholesale destruction of property and means of livelihood, wanton lawlessness and violence, thousands of documented killings, countless as-yet undocumented deaths, and immeasurable human suffering”, and stated that at the date of the report “more than 850,000 Kosovo Albanians (had) fled the Province for neighbouring countries and into the Republic of Montenegro . . .”²⁰. Moreover, the diplomatic measures taken as a whole had not succeeded in persuading the Belgrade authorities to respect their specific obligations under Security Council resolutions²¹. The NATO Member States then decided that it was necessary to use force against Belgrade, in order to put an end to the constantly escalating violence which gravely threatened the security of the civilian population of Kosovo as a whole and was directly contrary to the decisions of the Security Council²².

(b) *The contribution of the international community to the creation of “a multi-ethnic and democratic Kosovo which must reinforce regional stability”*²³

17. When that intervention ended, it was possible for the international community to lay down the first foundations for a final settlement of the Kosovo question with the adoption by the

¹⁸See the report on the situation in Kosovo, prepared under resolutions 1160 (1998) and 1203 (1998) of the Security Council, sent to the Secretary-General by the Chairman-in-Office of the OSCE, S/1999/315, 23 March 1999, Annex, pp. 6-7. See also ICTY, judgment of 26 February 2009, *Milutinović and others, op. cit.*, footnote 8, Vol. 1, paras. 353-401, para. 397 in particular.

¹⁹See, among others, the report on the situation in Kosovo referred to above, footnote 18, which noted that: “(the Yugoslav Army) has since late February carried out preparations that would enable it to destroy infrastructure and block roads into and out of Kosovo”, while the only independent mechanism for independent observation, the Kosovo Verification Mission, had been forced to withdraw as the security situation deteriorated (*ibid.*, pp. 6 and 11). The Kosovo Verification Mission had been established on 25 October 1998 by decision 263 of the Permanent Council of the OSCE. It was charged with monitoring the observance of the provisions of Security Council resolution 1198 (1998) dated 23 September 1998. See also the report prepared pursuant to Security Council resolution 1203 (1999), from the Secretary-General of NATO on 23 March 1999, S/1999/338, 25 March 1999, Annex, p. 2: “Following the withdrawal of the Kosovo Verification Mission of the Organization for Security and Co-operation in Europe (OSCE), the Federal Republic of Yugoslavia has increased its military activities and is using excessive and wholly disproportionate force, thereby creating a further humanitarian catastrophe”.

²⁰The Interagency Mission adds that: “all the arguments put forward by officials of the Federal Government of Yugoslavia Government, however plausible and legitimate, cannot explain its failure to exercise its obligation to protect its own citizens against generalized acts of violence prohibited by and punishable under international law, believed to have been largely committed by its own agents” *op.cit.*, footnote 8, pp. 5-6, para. 8. Serbia itself has recognized that “violence has been a reality for too long in our southern province. That which took place under a dictatorship in the 1990s was terrible and should never be minimized.” S/PV.5850, 11 March 2008, p. 3. See also the *Milutinović* judgement, *op. cit.*, footnote 8, Vol. 2, paras. 1150-1178, in particular.

²¹See S/PV.3988, 24 March 1999, p. 9 (France). See also the report on the situation in Kosovo, drawn up in accordance with Security Council resolutions 1160 (1998) and 1203 (1998), sent to the Secretary-General by the Chairman-in-Office of OSCE, S/1999/315, 23 March 1999, p. 5: “developments on the ground and continued fighting demonstrated a lack of political will for reconciliation”.

²²The Court, having received applications from the FRY challenging the lawfulness of the use of force by France and other NATO States, declared by judgments dated 15 December 2004 that it was without jurisdiction to entertain them. See in particular, *Legality of Use of Force (Serbia and Montenegro v. France), Preliminary Objections, I.C.J. Reports 2004*, p. 575. This question is not at issue — and nor could it be, given the judgments handed down in 2004 by the Court — in the present advisory proceedings.

²³See the Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005.

Security Council on 10 June 1999 of resolution 1244 (1999). Later in its observations, France will return in more detail to the particular response which this resolution made to the crisis in Kosovo²⁴.

18. At this stage, it is sufficient, *first*, to recall that the Security Council, in adopting this resolution, demanded that the FRY “put an immediate and verifiable end to violence and repression in Kosovo”, by the withdrawal from Kosovo of all its military, paramilitary and police forces, and that, in parallel, the Security Council authorized in the resolution the deployment by Member States and the competent international organizations of an international security presence²⁵. This international security force, called the Kosovo Force (KFOR), was set up with substantial participation by NATO, in order to carry out the responsibilities conferred by paragraph 9 of resolution 1244, and, more generally, in order to establish: “a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees”²⁶. It deployed in accordance with a military technical agreement reached with the FRY²⁷ and will continue with its mission until the Security Council decides otherwise²⁸.

19. *Secondly*, the Security Council decided to create an international civil presence in Kosovo by:

“authoriz[ing] the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo”²⁹.

20. One of the principal responsibilities conferred on the international civil presence, which the Secretary-General was rapidly to put in place under the title of the United Nations Interim Administration in Kosovo (UNMIK)³⁰, was that of “facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords”, and “in a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement”³¹.

21. Thus it is clear that resolution 1244 envisages three stages in relation to the administration and status of Kosovo: the first consists in the direct administration of the territory of Kosovo by the international civil presence, and the second in a provisional régime of

²⁴See below, paras. 2.18-2.39.

²⁵S/RES/1244 (1999), para. 19.

²⁶*Ibid.*, Ann. 2, point 4, referred to by para. 7 of the resolution.

²⁷This agreement is reproduced in S/1999/682, 15 June 1999, Annex.

²⁸S/RES/1244 (1999), para. 19.

²⁹*Ibid.*, para. 10. See also para. 11 (a).

³⁰See, among others, the report presented by the Secretary-General pursuant to para. 10 of Security Council resolution 1244 (1999), S/1999/672, 12 June 1999.

³¹S/RES/1244 (1999), para. 11 (e) and (f).

self-government by autonomous Kosovan institutions, under the supervision of the civil presence³². As regards the third stage, in contrast, namely that of the anticipated “final settlement”³³, the Security Council could do no more than envisage, support and seek to “facilitate a political process” with a view to ensuring the stability of the region, as provided for by resolution 1244.

22. Almost six years after the adoption of resolution 1244, it was possible for the Secretary-General to initiate the process that was intended to lead to Kosovo’s future status, on the basis of proposals from his Special Envoy³⁴, and with the support of the Security Council, with “the objective of a multi-ethnic and democratic Kosovo, which must reinforce regional stability”³⁵.

23. After “intensive negotiations with the leadership of Serbia³⁶ and Kosovo . . . (and) . . . more than one year of direct talks, bilateral negotiations and expert consultations”, the Secretary-General’s Special Envoy, Mr. Martti Ahtisaari, nevertheless had to conclude that “the negotiations’ potential to produce any mutually agreeable outcome . . . (was) exhausted”, and that “the only viable option for Kosovo (was) independence, to be supervised by the international community for an initial period”³⁷. Despite this, throughout 2007, the international community pursued its efforts to reach an agreement between the parties, without ruling out any solution³⁸.

24. Kosovo’s declaration of independence on 17 February 2008 brought the political process for determining the status of Kosovo to an irrevocable close, without calling into question -- quite the contrary -- the commitment of the international community to its stability and security.

25. The United Nations, the NATO, the Organization for Security and Co-operation in Europe and the European Union, among others, took action on a massive scale in order to support the objectives and meet the responsibilities set out by the Security Council in resolution 1244. Concerted action enabled UNMIK, to which the immediate task of reconstruction fell in 1999, to

³²These two stages correspond to the general principles stated in Annex 1 of the resolution, on which the Security Council decided that “a political solution to the Kosovo crisis” should be based (*ibid.*, para. 1), namely: the “establishment of an interim administration for Kosovo . . . to ensure conditions for a peaceful and normal life for all in Kosovo”, then “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” (*ibid.*, Ann. 1).

³³*Ibid.*, para. 11 (a).

³⁴See the report of Mr. Kai Eide, addressed by the Secretary-General to the Security Council, S/2005/635, 7 October 2005.

³⁵See the statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005.

³⁶The FRY took the official name of the State Union of Serbia and Montenegro after adopting a new constitution in 2003. After the declaration of independence of the Republic of Montenegro on 3 June 2006, Serbia declared that it would ensure the continuity of the State of Serbia and Montenegro, see I.C.J., Judgment of 18 November 2008, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, available at <http://www.icj-cij.org/docket/files/118/14891.pdf>, para. 23.

³⁷Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, p. 2, paras. 1, 3 and 5. Mr. Ahtisaari presented a Comprehensive Proposal for the Kosovo status settlement (S/2007/168/Add. 1, 26 March 2007), which “sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence” *op. cit.*, p. 2, para. 5.

³⁸See below, paras. 2.40-2.62.

establish a constitutional framework for provisional self-government³⁹, and thus pave the way for the emergence of democratically elected institutions in Kosovo⁴⁰. On 17 November 2007, the re-election of the members of the Kosovo's Assembly marked a point at which "Kosovo ha[d] now successfully held five sets of elections since UNMIK was established"⁴¹.

26. It was in this context that the declaration of independence was approved in Kosovo's Assembly by 109 of the 120 representatives elected in November 2007 in conditions which were perfectly democratic⁴², even though the ten deputies from the Serb community did not attend the session⁴³. The declaration of independence clearly and unambiguously expresses commitment to pursue the objectives that had been followed to this point by the international community and to allow the efforts that had been undertaken to be followed through. In the declaration of independence, the representatives of Kosovo stress their determination to respect human rights and the rights of the ethnic communities of Kosovo: in it, they declare that they are:

"Committed to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness,

Dedicated to protecting, promoting and honouring the diversity of our people,

Reaffirming our wish to become fully integrated into the Euro-Atlantic family of democracies,"

and, consequently, that

- “1. We, the democratically elected leaders of our people, hereby declare . . .
2. 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 necessary conditions for their effective participation in political and decision-making processes.
3. We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.
4. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect human rights and fundamental freedoms of all our citizens, particularly

³⁹See UNMIK Regulation of 15 May 2001, UNMIK/REG/2001/9 (reproduced in the dossier presented to the Court on behalf of the Secretary-General in accordance with Article 65 (2) of the Statute of the Court, Part II-F, item No. 156. See also the report of the Secretary-General on UNMIK, S/2001/565, 7 June 2001, p. 1, para. 2.

⁴⁰The Secretary-General reported that “the election of the Kosovo Assembly on 17 November 2001 was generally considered a great success” (S/2002/62, p. 1, para. 3), before going on to give details of the establishment of the provisional institutions of self-government. See also the oral report to the Security Council by the Secretary-General's Special Representative and Head of UNMIK, 27 November 2001, S/PV.4430.

⁴¹See the report of the Secretary General on UNMIK, S/2007/768, 3 January 2008, p. 1, para. 3. “The elections took place without incident following a generally fair and calm campaign period, and were confirmed by the Council of Europe to have been in compliance with international and European standards” (*ibid.*, p. 1, para. 3).

⁴²See the report of the Secretary-General on UNMIK, S/2008, Ann. 1, 12 June 2008, para. 3.

⁴³Although six of these deputies “ended their boycott of Assembly plenary sessions on 19 March” (report of the Secretary-General on UNMIK, S/2008/458, 15 July 2008, Ann. I, para. 1).

as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari plan and be adopted through a democratic and deliberative process.”⁴⁴

27. The Constitution, which was adopted on 9 April 2008 and came into force on 15 June 2008, incorporates and develops the principles stated in the declaration:

- in the very first paragraph of the preamble, the Kosovan people declare themselves “Determined to build a future of Kosovo as a free, democratic and peace-loving country that will be a homeland to all of its citizens”;
- Article 3 proclaims the equality of all before the law;
- Articles 21 to 62 specify in great detail the fundamental rights and liberties guaranteed to all human beings⁴⁵;
- Articles 57 to 62, on the rights of communities and their members, provide in principle that:
 - “1. Inhabitants belonging to the same national or ethnic, religious or linguistic group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in Chapter II of this Constitution.
 2. Every member of a Community shall have the right freely to choose to be treated or not to be treated as such and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice.
 3. Members of Communities shall have the right freely to express, foster and develop their identity and Community attributes.
 4. The exercise of these rights shall carry with it duties and responsibilities to act in accordance with the law of the Republic of Kosovo and shall not violate the rights of others.”⁴⁶

⁴⁴English version of the declaration of independence available at <http://www.assembly-kosova.org/?cid=2,128,1635>

⁴⁵See Article 22 in particular:

“[Direct Applicability of International Agreements and Instruments] Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

- (1) Universal Declaration of Human Rights;
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (3) International Covenant on Civil and Political Rights and its Protocols;
- (4) Council of Europe Framework Convention for the Protection of National Minorities;
- (5) Convention on the Elimination of All Forms of Racial Discrimination;
- (6) Convention on the Elimination of All Forms of Discrimination Against Women;
- (7) Convention on the Rights of the Child;
- (8) Convention on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.” (English translation of the Constitution of Kosovo available at <http://www.ustavkosova.info/?cid=2,250> (site of Kosovo Constitutional Commission).

⁴⁶*Ibid.* Art. 57 [General Principles].

— and the effective application of these principles is guaranteed by a modern judicial system, by a constitutional court with extensive powers and by “independent institutions” (Ombudsman, Auditor General etc.). At the date of the present written statement, the objectives and requirements specified in the Constitution have begun to be crystallized through the adoption of laws and regulations that offer, within a democratic environment, substantial guarantees for the stability, security and prosperity of Kosovo⁴⁷.

28. Since the declaration of independence, action has continued to be taken by the international community⁴⁸ — despite divergences between States over the recognition of the State of Kosovo — and has been reorganized, taking account of a “profoundly new reality”⁴⁹ on the ground. On 26 November 2008, the Security Council: “welcome[d] the cooperation between the United Nations and other international actors, within the framework of Security Council resolution 1244 (1999), and also welcome[d] the continuing efforts of the European Union to advance the European perspective of the whole of the western Balkans, thereby making a decisive contribution to regional stability and prosperity”⁵⁰.

29. France, in common with the Member States of the European Union as a whole, wishes to continue its participation in these efforts, for example by strengthening co-operation with the European Union in the area of the rule of law through the EULEX Mission that the latter is now deploying in Kosovo⁵¹. In keeping with the joint action taken by the Council of the European Union on 4 February 2008 to institute this Mission⁵², and as the United Nations Secretary General subsequently recalled: “EULEX will fully respect Security Council resolution 1244 (1999) and operate under the overall authority and within the status-neutral framework of the United Nations).”⁵³

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30. France is persuaded that the higher interest of stability and prosperity for the whole of the western Balkans, around which the international community has succeeded in uniting, cannot be usefully furthered by posing artificial questions as to whether the declaration of independence of Kosovo is in accordance with international law. On the contrary, that higher interest could well be

⁴⁷See the list of laws adopted by the Kosovo Assembly at: http://www.assembly-kosova.org/common/docs/ligjet/matrix_en.pdf

⁴⁸On 12 June 2008, the Secretary-General stated that: “During those nine years, the international civil presence, known as the United Nations Interim Administration Mission in Kosovo (UNMIK), helped Kosovo make significant strides in establishing and consolidating democratic and accountable Provisional Institutions of Self-Government and in creating the foundations for a functioning economy. While there has been substantial progress in the implementation of standards, there remains scope for improvement in certain areas, in particular in the field of the return of refugees and internally displaced persons. The full reconciliation and integration of Kosovo communities will be a long-term process and remains an uphill challenge”, report of the Secretary-General on UNMIK, S/2008/354, 12 June 2008, p. 1, para. 2.

⁴⁹Report of the Secretary-General on UNMIK, S/2008/458, 15 July 2008, p. 1, para. 3.

⁵⁰Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008.

⁵¹See the conclusions of the Council of the European Union, General Affairs and External Relations, of 4 February 2008, reproduced in S/2008/105, 18 February 2008, Annex.

⁵²See Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *Official Journal of the European Union*, L.42, pp. 92-98.

⁵³Report of the Secretary-General on UNMIK, S/2008/692, 24 November 2008, p. 12, para. 50.

compromised by the intervention, in one way or another, of the Court and the General Assembly in the question of the status of Kosovo. The main intention of France, with full confidence in the wisdom of the Court and a deep commitment to the contribution that it makes to the activities of the United Nations, is to draw its attention to the incompatibility of the request for an advisory opinion with its judicial function (I) before indicating the considerations that the Court should take into account in giving an advisory opinion, should it nevertheless decide to do so (II).

I. A REQUEST FOR AN ADVISORY OPINION THAT FALLS OUTSIDE THE COURT'S JUDICIAL FUNCTION

1.1. “The power of the Court to give an advisory opinion is derived from Article 65 of the Statute”⁵⁴. In contrast with the provisions on the exercise of the Court’s function in relation to litigation, the wording of Articles 96 of the Charter and 65 of the Statute is *permissive*: “[t]he power granted is of a discretionary character”⁵⁵. It follows that the Court is not obliged to respond to a request made to it:

“The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that ‘[t]he 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 (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 234-235, para. 14)⁵⁶.

1.2. Of course, “only ‘compelling reasons should lead the Court to refuse its opinion’⁵⁷. However, the fact that the Court has only rarely exercised its discretion to decline to give an advisory opinion does not “release the Court from the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of ‘compelling reasons’ . . .”⁵⁸.

1.3. The Court must establish that no such compelling reasons exist, even if it is competent to give an opinion on the question that has been posed. As a judicial organ, and,

“in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court said in its Opinion of 30 March 1950, the permissive character of Article 65 ‘gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request’ (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72.”⁵⁹)

1.4. In this case, there are serious grounds for doubting the Court’s competence to rule on the request set out in General Assembly resolution 63/3, as the question posed is clearly not of a “legal

⁵⁴*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155.

⁵⁵*Ibid.* See also Karin Oellers-Frahm, “Article 96 United Nations Charter” in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary*, Oxford University Press, 2006, pp. 187-188.

⁵⁶*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 156-157, para. 44.

⁵⁷*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 235, para. 14 and the case law cited therein.

⁵⁸*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, cited in footnote 56, p. 157, para. 45.

⁵⁹I.C.J. Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations*, cited in footnote 54, p. 155.

nature”. As will be demonstrated below in greater detail⁶⁰, international law merely takes note of the existence of an independent State, but is concerned neither with the conditions in which that State was formed — at any rate provided it was not established as a result of the illegitimate use of armed force — nor *a fortiori* the circumstances in which it was “proclaimed”.

1.5. That being the case, the question put to the Court is, at most, seemingly a legal question; in reality, it cannot be answered within a genuinely legal framework and, consequently, the Court is not competent to answer it. The Court would be competent only if the declaration of independence were accompanied by the threat or use of force in breach of the United Nations Charter. From that perspective, and that perspective alone, could the question put to the Court have been deemed to be of a legal nature. A summary or *prima facie* analysis of the circumstances in which Kosovo declared its independence should, however, lead the Court to dismiss the question, as being manifestly devoid of object and, since it cannot give a *legal* ruling or decision “on the merits”⁶¹ in regard to other aspects of the question, to declare that it lacks jurisdiction.

1.6. Moreover, since, in this case, “compelling reasons” render the exercise of advisory jurisdiction particularly inappropriate, it is probably unhelpful for the Court to rule, by way of preliminary, on the question of its competence or the admissibility of the request for an opinion, or to make a formal distinction between the two. In fact, not only would it appear that, whatever the Court’s answer, it cannot as such have any legal effect on the question of Kosovo’s status (§1), but, in addition, the General Assembly could not act upon it, because, in the light of the provisions defining its authority, it does not intend, and would, in any case, not be in a legal position, to draw the slightest consequence from that answer (§2). For those two compelling reasons at least, the Court should, in any event, decline to answer the question that has been put to it.

**§1. Any opinion of the Court, whatever its nature, would
be without legal effect on Kosovo’s status**

1.7. In its 1963 judgment concerning *Northern Cameroon*, the International Court of Justice pointed out that:

“both the Permanent Court of International Justice and this Court have emphasized the fact that the Court’s authority to give advisory opinions must be exercised as a judicial function. Both Courts have had occasion to make pronouncements concerning requests for advisory opinions, which are equally applicable to the proper role of the Court in disposing of contested cases; in both situations, the Court is exercising a judicial function. That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case”⁶².

⁶⁰See II, §1, below.

⁶¹As Judge Higgins pointed out in the context of the examination of preliminary objections, “[s]election of grounds of claim that may proceed to the merits is a proper exercise of the *compétence de la compétence*” (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 803, separate opinion, p. 857, para. 36). To paraphrase that opinion, for the purposes of this case, “[t]he Court should thus see if, on the facts as alleged by [Serbia], the actions [of Kosovo, i.e. the declaration of independence] [forming the subject of the request] might violate [international law]” (*ibid.*, para. 33). In the absence of any material provision on the matter, the Court should conclude that there is no cause of action in relation to this request.

⁶²*Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 30.

1.8. The fact is that when it is exercising its advisory functions, the Court is still a judicial organ and must respect the inherent limitations on its judicial function:

“In exercising its discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in its case concerning the *Status of Eastern Carelia* on 23 July 1923: ‘The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court’ (*P.C.I.J., Series B, No. 5, p. 29*)”⁶³.

1.9. In other words, the Court may answer the question put to it only in the absence of circumstances likely to “render the giving of an advisory opinion incompatible with the Court’s judicial character”⁶⁴. In this case, considerations of a compelling nature must lead the Court to decline to give the advisory opinion that has been requested, quite apart from fact that the question posed is not a legal question.

1.10. In the *Northern Cameroons* case, the Court pointed out that:

“[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore . . . The Court itself, and not the parties, must be the guardian of the Court’s judicial integrity.”⁶⁵

In that same judgment, the Court explained that “it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved”⁶⁶ and, to “safeguard the judicial function”, it declined to hand down a judgment that, whatever the circumstances, could not be effective and would be without object⁶⁷.

1.11. Similarly, in the *Nuclear Tests* cases, the Court pointed out that it:

“possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the ‘inherent limitations on the exercise of the judicial function’ of the Court, and to ‘maintain its judicial character’ (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States,

⁶³I.C.J. Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations*, cited in footnote 54, p. 155.

⁶⁴*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33; see also Advisory Opinion of 9 July 2004, cited in footnote 56, p. 157, para. 47.

⁶⁵Judgment of 2 December 1963, *Northern Cameroon*, cited in footnote 62, p. 29; see also p. 30: “Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved”, and the Judgments of 20 December 1974, *Nuclear Tests (Australia v. France)*, *I.C.J. Reports 1974*, p. 259, para. 23, and (*New Zealand v. France*), *I.C.J. Reports 1974*, p. 463, para. 23.

⁶⁶*Ibid.*, p. 37.

⁶⁷*Ibid.*, p. 38.

and is conferred upon it in order that its basic judicial functions may be safeguarded".⁶⁸

With this in mind, the Court found that, as a result of events subsequent to the application, the object of the claims of Australia and New Zealand had disappeared and, consequently, there was now nothing on which to give judgment⁶⁹.

1.12. No doubt the Court adopted those views in contested cases, and the purpose of an opinion is different from that of a judgment. However, the Court itself has emphasized that the problem of protecting its judicial integrity arises, in the same terms, in both instances, where there is a need to avoid handing down a decision that cannot be effective⁷⁰, and, *mutatis mutandis*, the same considerations must give rise to the same solutions. Moreover, in the *Western Sahara* case, the Court held that it could not answer questions referred to in as part of a request for an advisory opinion unless they had "a practical and contemporary effect"⁷¹.

1.13. In this case, the question put to the Court is devoid of practical effect: whatever the answer, it can have no practical result.

1.14. Whether — or not — the Kosovo's declaration of independence is compatible with international law can have no effect on that entity's existence as a State, as that is a simple matter of fact, as will be demonstrated in greater detail in the second part of this statement. Consequently if, as France believes, it possesses the attributes of a State, then Kosovo constitutes a State; if it does not possess those attributes, it is not a State, regardless of whether or not the declaration of 17 February 2008 was lawful. In any event, it plainly does not follow from the question put to the Court that it would be for the Court itself to rule on the question of fact as to whether Kosovo is now a State, or was a State on the date of the declaration of independence.

1.15. The situation would be different only if the declaration and consequent independence had been imposed as a result of external armed intervention — which is not the case — since "[e]very State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity . . . of any State"⁷².

1.16. As regards the possible impact of the answer to the question, the same applies to the recognition of Kosovo by the other States. It cannot be disputed that the recognition of a State "is a discretionary act that other States may perform when they choose and in a manner of their own

⁶⁸I.C.J., Judgments of 20 December 1974, cited in footnote 65, *Nuclear Tests (Australia v. France)*, pp. 259-260, para. 23, and (*New Zealand v. France*), *I.C.J. Reports 1974*, p. 463, para. 23.

⁶⁹*Ibid.*, p. 272, para. 62, and p. 478, para. 65.

⁷⁰See para. 1.10 above.

⁷¹*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73.

⁷²Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV) of 24 October 1970, First Principle.

choosing”⁷³, and is limited only by the prohibition on recognizing a situation that has arisen as a result of a violation of the ban on the use of force in international relations⁷⁴.

Consequently, either:

- the declaration of independence is adjudged to be compatible with international law, which does not compel those States which have not recognized Kosovo to do so;
- or, most improbably, the Court considers that the declaration is not compatible with international law, which does not compel States to refrain from recognizing Kosovo (nor does it compel States that have recognized it to withdraw that recognition — assuming that were possible), since the situation is not one in which a declaration of independence has resulted from the illegal use of force, the only circumstance in which there would be an obligation to refrain from according recognition⁷⁵.

Thus, during the debate that preceded the adoption of resolution 63/3, a number of States correctly stated that voting in favour of the resolution in no way prejudged the attitude they would take to recognizing Kosovo (regardless of the Court’s opinion, of which, moreover, they made no mention)⁷⁶.

1.18. In both cases, the Court’s opinion would amount to a kind of theoretical and academic legal consultation, which would have no real legal effect. The answer to the question posed would not, nor could it, be “legally effective”, either now or in the future. However, it could have regrettable political consequences, particularly in terms of aggravating the situation by prompting a hardening of positions on both sides.

1.19. In the *Nuclear Tests* cases, the Court held that “[w]hile judicial settlement may provide a path to harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony”⁷⁷. The same applies to the Court’s advisory role: its opinions must provide “to the requesting organs the elements necessary for them in their action”⁷⁸, but the Court can — and must — decline to give an opinion, if it is apparent, as in this case, that it will have no effect, other than to jeopardize the equilibrium that has been established on the ground.

⁷³Arbitration Commission of the Peace Conference on the former Yugoslavia, Opinion No. 10, 4 July 1992, para. 4, (International Law Reports, Vol. 92, 1993, p. 162).

⁷⁴See Declaration 2625 (XXV), cited in footnote 72, First Principle: “No territorial acquisition resulting from the threat or use of force shall be recognized as legal”. France notes that the International Law Commission has acknowledged the existence of a customary-law obligation to refrain from recognizing a situation that has been brought about by the illegal use of force, see the commentary under Art. 41 (2) of the I.L.C. Articles on the Responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83 of 12 December 2001, paras. (6) and (7), in *ILC Report, Fifty-Third Session (2001), Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10)*, p. 309.

⁷⁵See paras. 25-27 above and paras. 2.63-2.69 below in regard to the circumstances in which the declaration of independence was made. See also the letter dated 1 October 2008 addressed to the President of the General Assembly by the United Kingdom’s Permanent Representative, A/62/461, Annex, para. 8.

⁷⁶See, for example, the declaration of Panama and Norway (A/63/PV.22, 8 October 2008, p. 7 and p. 15). Montenegro recognized Kosovo’s independence the day after it voted in favour of Serbia’s draft resolution.

⁷⁷I.C.J., Judgments of 20 December 1974, cited in footnote 65, *Nuclear Tests (Australia v. France)*, p. 271, para. 58, and (*New Zealand v. France*), p. 477, para. 61.

⁷⁸I.C.J. Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cited in footnote 56, p. 162, para. 60.

1.20. In exercising its discretion, the Court must ensure not only that any opinion it gives will not worsen the divisions between the Member States, but that it will not complicate the process of easing tensions or the European prospects of the western Balkans. However, as many delegations stressed when General Assembly resolution 63/3 was being debated, far from helping to ease tensions, the request for an opinion addressed to the Court in this instance may “create uncertainty as to the status of Kosovo and instabilities in the region”⁷⁹.

1.21. Pointless in itself and perhaps further reinforcing divisions between the States, the question put to the Court is all the more doubtful because there is another reason why it fails to meet the objectives that any request for an advisory opinion must pursue.

§2. An opinion from the Court would impinge on a political matter in relation to which the General Assembly neither intends nor is in a position to make a recommendation

1.22. Other “compelling reasons”, if not, indeed, problems of jurisdiction, which it will be for the Court, if necessary, to address of its own motion, must lead the latter to decline the request for an opinion drawn up by the General Assembly. That must be the conclusion, first of all, in the light of the — in many ways unprecedented — circumstances in which the General Assembly adopted resolution 63/3 requesting an opinion the Court, which indicate that the request was made exclusively at the instigation of and for the purposes of States (1). Furthermore, an opinion from the Court would, of necessity, be devoid of any real significance, given the way in which Article 12 of the Charter organizes the functions of the General Assembly and the Security Council (2).

1. The request fails to meet the objectives which any request for an opinion must seek to further

1.23. As commentators on the Statute of the Court have rightly pointed out, the procedure established under Article 96 of the Charter and Article 65 *et seq* of the Statute is based on a system of “functional co-operation” between the Court and the other organs of the United Nations⁸⁰. Only in its capacity as an organ of the United Nations is the Court in fact called upon, under that procedure, to give an opinion to the organ of the United Nations which has requested it.

1.24. Since 1945, the Court has consistently and decisively drawn attention to the special legal nature of advisory proceedings, which are designed solely to provide a channel for functional co-operation between institutions attached to the United Nations Organization. As early as 1950, in its Opinion of 30 March concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (first phase)*, it held that “[t]he Court’s opinion is given not to the States, but to the organ that is entitled to request it”⁸¹. Indeed, a year later, in its Opinion of 28 May 1951 on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court, more particularly, made it clear that “[t]he object of this request for an Opinion is to guide

⁷⁹A/63/PV.22, declaration by France, p. 13. See also the declarations by Albania (p. 5), Turkey (*ibid.*), Canada (p. 12), Germany (p. 13), Australia (p. 14), Denmark (p. 15) and Switzerland (*ibid.*).

⁸⁰See Jean-Pierre Cot, “Article 68”, in *The Statute of the International Court of Justice, A Commentary, op. cit.*, footnote 555, p. 1460: “Art. 96 UN Charter insists on the functional co-operation between the Court and the other organs of the United Nations.”

⁸¹*I.C.J. Reports 1950*, p. 71.

the United Nations *in respect of its own action*⁸². Again, according to the Court, “[t]he purpose of the advisory function is not to settle — at least directly — disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”⁸³. The Court concluded from this that its advisory role consists exclusively in “lending its assistance in the solution of a problem confronting the [requesting organ]”⁸⁴.

1.25. The Court has never departed from this definition of advisory proceedings as proceedings which exclusively involve *one organ seeking the advice of another*⁸⁵, and this has certain important legal consequences, such as the circumstance that “the consent of States is not a condition precedent to the competence of the Court” if the latter is seized of a request for an opinion⁸⁶. Whether or not there are other limits on the authority of the General Assembly and Security Council to ask the Court for an advisory opinion, it is, at least, perfectly clear that, *by their very nature*, advisory proceedings require the existence of a link between the Court and the requesting organ, and this is a two-way link: only an organ of the United Nations (including the specialized agencies) may request an opinion from the Court; and, thereafter, the opinion may be given to that organ only, and not to any other person or entity⁸⁷.

1.26. For a number of different of reasons, it is far from certain that this request for an advisory opinion emanates from one organ to another:

- (i) First, the request for an advisory opinion is based exclusively on the request made by a State, Serbia, to the General Assembly on 22 August 2008, just a few weeks before the matter was referred to the Court, without the Assembly having discussed the question or being previously or currently engaged in any activity in its regard⁸⁸;
- (ii) neither the request itself nor the explanatory memorandum attached to it provide any indication of what exactly would be expected of the General Assembly once the opinion has been given. The focus is entirely on the Member States, as the memorandum stresses that “[m]any *Member States* would benefit from the legal guidance an advisory opinion of the Court of Justice would confer. It would enable them to make a more thorough judgment on the issue”;

⁸²*I.C.J. Reports 1951*, p. 19 (emphasis added). As early as 1950, the Court had stated that advisory opinions are addressed to the United Nations to enlighten it “as to the course of action it should take” (Opinion of 30 March 1950, cited in footnote 81, *I.C.J. Reports 1950*, p. 71). See also, to the same effect, the Advisory Opinion of 21 June 1971 *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 24, para. 32; or *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 27, para. 41.

⁸³*Legality of the Threat or the Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, cited in footnote 57, p. 236, para. 15.

⁸⁴*Western Sahara*, Advisory Opinion of 16 October 1975, cited in footnote 82, p. 21, para. 23.

⁸⁵See also *Legality of the Threat or the Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, cited in footnote 57, p. 235, para. 14.

⁸⁶*Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, *I.C.J. Reports 1989*, pp. 188-189, paras. 31-32. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, cited in footnote 56, pp. 157-158, para. 47.

⁸⁷See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, cited in footnote 56, p. 164, para. 64: “it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity”.

⁸⁸A/63/195, *Request for the Inclusion of a Supplementary Item in the Agenda of the Sixty-Third Session*.

- (iii) that same approach — of a process between States rather than between organs — is to be found in the draft resolution tabled by Serbia on 23 September 2008. Adopted as it stood by the General Assembly on 8 October 2008⁸⁹, it again makes no mention of the General Assembly’s attitude, past or future, merely stating that Kosovo’s declaration of independence “has been received with varied reactions by the Members of the United Nations”⁹⁰, outside the General Assembly;
- (iv) the Member States that supported the Serbian proposal when it was adopted by the General Assembly on 8 October 2008 unequivocally accepted that this was an inter-State initiative, at the risk of distorting the provisions governing advisory proceedings. On that occasion, the right to refer to the Court was in fact construed not as a prerogative of the General Assembly and necessary for its action, but as a direct right of the Member State which it exercised in order to clarify the judgment of other Member States:
- Serbia presented its request for an opinion as “its” request, which the General Assembly was simply to “convey” to the Court⁹¹;
 - the opinion requested was envisaged by Serbia as being designed to be *directly* and *exclusively* of use to the other States⁹²;
 - Serbia has also argued that
 - “[s]upporting 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 to deny *the right of any country to seek* — now or in the future — *judicial recourse* through the United Nations system”⁹³;
 - in the course of the discussions, a number of States adopted this same view that a request for an advisory opinion may be made on an inter-State basis, with the General Assembly being considered merely as the body transmitting the request, apparently unable to exercise a power of discretion of its own (each Member State having, according to those same States, “the right to seek advisory opinions for the International Court of Justice”)⁹⁴.

⁸⁹Resolution 63/3.

⁹⁰A/63/L.2, *Draft resolution submitted by Serbia* (emphasis added).

⁹¹A/63/PV.22, 8 October 2008, p. 1: “*We have chosen to seek an advisory opinion from the International Court of Justice (ICJ) on the legality of the unilateral declaration of independence. Today we are turning to the General Assembly to convey that request to the Court, in fulfilment of its powers and functions under the UN Charter*” (emphasis added).

⁹²*Ibid.*: “*We also believe that the Court’s advisory opinion would provide politically neutral, yet judicially authoritative guidance to many countries deliberating still how to approach unilateral declarations in line with international law*” (emphasis added).

⁹³*Ibid.*; emphasis added.

⁹⁴See, for example, *ibid.*, p. 7 (Slovakia): “*Slovakia, as a matter of principle, respects the right of every Member State to seek advisory opinions from the International Court of Justice*”; pp. 7-8 (Egypt): “*every Member State has the right to request an advisory opinion of the International Court of Justice and the General Assembly has the responsibility to grant that request in accordance with Article 96 of the Charter*”; p. 8 (Greece) “*As a matter of principle, Greece believes that every State has the prerogative to request an advisory opinion of the International Court of Justice on issues of importance and relevance to international law*”; p. 10 (Cuba): “*Cuba supports the legitimate right of any Member State to request an advisory opinion from the International Court of Justice*”; p. 11 (Algeria): “*Algeria believes it to be the prerogative of any State to request an advisory opinion of the Court, in conformity with Article 96 of the Charter*”; see also p. 9 (Cyprus) and p. 15 (El Salvador).

1.27. Even assuming that, in this case, the request for an advisory opinion satisfies the requirement that it be made “from one United Nations organ to another”, and this is something for the Court to ascertain, the fact remains that the Court will be able to give its opinion to the General Assembly only. However, the allocation of powers between the General Assembly and the Security Council, under Article 12 of the Charter, would leave an opinion of the Court devoid of any real significance.

2. Article 12 of the United Nations Charter would leave an opinion of the Court devoid of any real significance

1.28. Respecting the powers of the Security Council and the balance which the Charter seeks to achieve, it should be pointed out here that Article 12(1) of the Charter clearly states 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 recommendations with regard to that dispute or situation unless the Secretary-General so requests.”

1.29. In its opinion of 9 July 2004, the Court adopted a very liberal interpretation of Article 12 (1) of the Charter⁹⁵. However, that cannot have had the effect of rendering the prohibition it contains meaningless. Without doubt, that prohibition continues to apply at least in the special circumstances typical of this case. The circumstances surrounding the request for an opinion of October 2008 are in fact very different from those pertaining to the request for an advisory opinion in relation to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, even if there are some parallels between the two.

1.30. As regards the points the two cases have in common, it should be pointed out that in neither case did the Security Council ask the General Assembly to seize the Court or was a draft request for an advisory opinion submitted to the Security Council. In other words, the Security Council had no involvement in the advisory initiative, even though it was, and remains, actively seized of the situation in Kosovo, and Serbia is associated with the Security Council’s discussions on the situation.

1.31. Moving on to the differences, there are several elements worth pointing out. They enable a crucial distinction to be made between the current request and the request to the Court in 2004, and, consequently, allow the solution adopted on the occasion to be dismissed. A close analysis of the Court’s reasons clearly demonstrates that, if applied to the present case, the *ratio legis* for its 2004 opinion cannot be upheld here.

1.32. When the Court noted, in that opinion, the way in which the practice in relation to Article 12 of the Charter had developed, it did not, in fact, consider it necessary to take account of the extreme circumstance in which the Security Council was actively seized of a matter but the General Assembly entirely uninvolved with it. The Court simply took note, first of all, of the practice whereby the General Assembly acts if the Security Council is not fulfilling its functions “at this moment”, and, then, of the practice consisting in each organ considering the same situations “in parallel” but from different perspectives (“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

⁹⁵*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion cited in footnote 56, pp. 148 *et seq.*, paras. 24 *et seq.*

a broader view, considering also their humanitarian, social and economic aspects”⁹⁶. In its 2004 opinion, the Court was, therefore, referring only to situations in which, *prior to the moment when the question of the application of Article 12 arises*, the General Assembly has already been engaged in activity in regard to the situation at issue, in parallel to the Security Council, but from a different perspective. On the other hand, the Court has never contemplated the unusual circumstance in which the General Assembly refers to the Court a request for an opinion relating to a situation which the General Assembly has not previously dealt with and in relation to which the Security Council is, in fact, exercising its functions.

1.33. Viewed in the light of those comments, the request for an opinion referred to the Court by the General Assembly on 8 October 2008 differs in three ways, in particular, from the request made in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

1.34. First, this request for an advisory opinion cannot imply any kind of division of responsibilities between the Security Council, which would deal with peace-keeping aspects, and the General Assembly, which would take a broader view of the situation. The question posed covers the situation in Kosovo only as far as aspects directly linked to maintaining international peace and security are concerned. In its request for an opinion, Serbia in fact states that an opinion by the Court “would go a long way towards calming tensions created by Kosovo’s unilateral declaration of independence, avoiding further negative developments in the region and facilitating efforts at reconciliation among all the parties involved”⁹⁷. During the debate which preceded the vote on the request for an opinion, Serbia confirmed that a decision to seise the Court of the matter would “reduce tensions in the region and facilitate our efforts at reconciliation”⁹⁸. That, however, is exactly what the Security Council has been actively engaged in since 31 March 1998, the date on which it began to take action in regard to the situation in Kosovo, on the basis of Chapter VII of the Charter⁹⁹.

1.35. Secondly, not only has the issue of Kosovo remained officially included on the Security Council’s agenda since 1998, but the latter has remained actively seised of it up to the present, despite the extremely complex nature of the situation on the ground, which has constantly required the Security Council, the Secretary-General acting on its behalf and the Head of UNMIK to exercise great caution in regard to the decisions to be taken, within the framework of Chapter VII of the Charter, in order to secure regional stability and maintain peace in Kosovo and the wider region.

1.36. Since the declaration of independence of 17 February 2008, the situation in Kosovo has remained under close scrutiny.

- (i) The Secretary-General of the United Nations has continued regularly to report to the Security Council on developments in the situation on the ground and on the activities of UNMIK, a subsidiary organ of the Security Council¹⁰⁰. Analysis of those reports reveals the extent to which the Secretary-General, who is the Security Council’s representative in

⁹⁶*Ibid.*, p. 150, para. 27.

⁹⁷A/63/195, 22 August 2008, Annex, p. 3.

⁹⁸A/63/PV.22, p. 1.

⁹⁹Resolution 1160 (1998).

¹⁰⁰See Reports S/2008/211 of 28 March 2008; S/2008/354 of 12 June 2008; S/2008/458 of 15 July 2008; S/2008/692 of 24 November 2008 and S/2009/149 of 17 March 2009.

regard to Kosovo¹⁰¹, as well as his Special Representative, the Head of UNMIK, have continued to be very closely involved in the situation of Kosovo, at both political and operational level, and always with an eye to the very complex nature of their mission¹⁰².

- (ii) The Security Council has met just as regularly to discuss the situation in Kosovo in detail, particularly on the basis of the Secretary-General's reports¹⁰³.
- (iii) In addition, as happened on several occasions before February 2008, the Security Council met in closed session and invited to that meeting a very large number of delegations from States which are not Security Council members, so as to involve as many participants as possible in its discussions¹⁰⁴.
- (iv) Finally, on 26 November 2008, the Security Council adopted a declaration, by the its President on behalf of all of its members, approving the Secretary-General's proposal that the activities of the international civil presence in Kosovo be reconfigured in the light of the declaration of independence of 17 February 2008 and the consequent involvement of the European Union in monitoring the guarantees recognized therein¹⁰⁵. Therefore, as the principal organ of the United Nations, but, in addition, as a result of the different operational missions established in succession on the ground, under its general authority, the Security Council has never stopped being actively seized of the situation in Kosovo.
- (v) The declaration of independence did not interrupt that activity, as the forms of international presence established on the basis of Security Council resolution 1244 (1999) remained, as indeed was requested by the new State of Kosovo,¹⁰⁶ without any objection from Serbia.

1.37. In absolute contrast to the activity of the Security Council, it is striking to note that before the Serbian initiative of August 2008 seeking to have a question referred to the Court, and except for the mere two hours of debate the General Assembly devoted to that initiative on 8 October 2008¹⁰⁷, the General Assembly has been *totally* uninvolved and disinterested in the Kosovo question since 1999 (that is to say for nine years), with just one — inevitable but contingent — exception, bearing in mind, in particular, and quite properly, that it could not make recommendations concerning a situation in regard to which the Security Council was fulfilling its functions¹⁰⁸.

¹⁰¹See para. 10 of resolution 1244 (1999).

¹⁰²See, for example, S/PV.5917, 20 June 2008, p. 2 (Secretary-General):

“In almost 40 years of my diplomatic life, I have never encountered an issue as divisive, as delicate and as intractable as the Kosovo issue. Legally, politically and morally, it is a landscape of enormous complexity and sensitivity and requires the exercise of extraordinary objectivity and balance.”

¹⁰³See S/PV.5839, 18 February 2008; S/PV.5850, 11 March 2008; S/PV.5917, 20 June 2008; S/PV.5944, 25 July 2008; S/PV. 6025, 26 November 2008; S/PV.6097, 23 March 2009.

¹⁰⁴See S/PV.5871, 21 April 2008 (42 representatives were invited to join the 15 members of the Security Council).

¹⁰⁵S/PRST/2008/44.

¹⁰⁶See para. 5 of the declaration of independence, cited in footnote 44.

¹⁰⁷A/63/PV.22.

¹⁰⁸In that connection, France would point out that, incidentally, in its 1996 Opinion, the Court considered that it did not need to answer and reserved its decision on the question whether the General Assembly could put to the Court a question unrelated to its activities (Advisory Opinion of 8 July 1996, cited in footnote 57, *I.C.J. Reports 1996 (I)*, pp. 232-233, paras. 11-12). In this case, there is no doubt that the question posed is a question of that kind.

- (i) The General Assembly actually adopted its *most recent* resolution on Kosovo, regarding respect for human rights in that territory, on 17 December 1999¹⁰⁹. Adopted just a few months after the vote on resolution 1244 (1999) and the creation of UNMIK, General Assembly resolution 54/183 was a concrete indication that, in contrast to the Security Council and its subsidiary body, the General Assembly was definitively stepping aside from the decisions and missions of which its resolution actually makes extensive reference.
- (ii) Since then, the General Assembly has discussed Kosovo only as a very subsidiary matter, in the form of the annual vote, based on its budgetary powers, of a resolution on UNMIK funding¹¹⁰. In those various resolutions, and as required of it under the Charter, the General Assembly has always confined itself exclusively to the budgetary aspect of the Mission, and has not encroached on the substantive matters that fall exclusively within the sphere of responsibility of the Security Council and UNMIK.
- (iii) In regard to those substantive matters, in those same resolutions, the General Assembly initially recognized the “complexity of the activities envisaged in the Mission”¹¹¹, and then the “complexity of the Mission”¹¹², stating that it was mindful of the fact “that it is essential to provide the Mission with the necessary financial resources to enable it to fulfil its responsibilities under the relevant resolutions of the Security Council”¹¹³.
- (iv) Those resolutions on funding were finally adopted, without debate, by the General Assembly meeting in plenary, and, therefore, *a fortiori*, without any debate on substantive matters¹¹⁴.

1.38. That entirely justified situation in which the General Assembly has completely dissociated itself from the matter explains why, in response to the Serbian initiative of August 2008 — and this is a precedent in relation to advisory proceedings — it was necessary to *create, from nothing, a new agenda item* to enable the General Assembly to consider the request to put a question to the Court.

1.39. Moreover, the way in which this was done clearly demonstrates that the General Assembly had not been exercising its functions (other than in the strictly budgetary field) in relation to Kosovo for nine years. Since the General Assembly had not been seised of any substantive issue in relation to Kosovo since 1999, it was impossible to attach the request for an opinion to the agenda items to which Kosovo could genuinely have been linked (namely item A concerning the maintenance of international peace and security)¹¹⁵. To circumvent that difficulty, Serbia proposed that its request for an opinion be included under item F (“Promotion of justice and

¹⁰⁹Resolution 54/183 of 17 December 1999, “Situation of human rights in Kosovo”.

¹¹⁰See resolutions 53/241 of 28 July 1999; 54/245A of 23 December 1999 and 54/245B of 15 June 2000; 55/227A of 23 December 2000 and 55/227B of 14 June 2001; 56/295 of 27 June 2002; 57/326 of 18 June 2003; 58/305 of 18 June 2004; 59/286A of 13 April 2005 and 59/286B of 22 June 2005; 60/275 of 30 June 2006; 61/285 of 29 June 2007 and 62/262 of 20 June 2008.

¹¹¹Para. 3 in the preamble of resolution 53/241 of 28 July 1999.

¹¹²Resolutions 54/245 to 62/262, cited in footnote 110.

¹¹³Resolutions 53/241 to 62/262, cited in footnote 110 (emphasis added).

¹¹⁴See, for example, in relation to resolution 62/262, A/62/PV.109, 20 June 2008, p. 8.

¹¹⁵See A/63/251, *Agenda of the Sixty-Third Session of the General Assembly*, 19 September 2008.

international law”) of the Assembly’s agenda, and the General Assembly approved this, on the recommendation of the General Committee¹¹⁶.

1.40. It is sufficient to glance through the list of questions included in item F of the agenda to comprehend just how artificial the inclusion of Kosovo was. That item covers only consideration of reports of United Nations courts and organs and the review of abstract general legal questions such as “oceans and the law of the sea”, “nationality of natural persons in relation to the succession of States” and “the rule of law at national and international levels”. This is clearly blatantly out of keeping with the very specific objective Serbia attached to its request for an opinion¹¹⁷, as well as the — very real — political effects the opinion would inevitably have, if provided, on peace and security in the region.

1.41. There is one final respect in which resolution 63/3 (adopted, moreover, by the slimmest of majorities)¹¹⁸, by which the General Assembly seised the Court of this request for an opinion is noteworthy: it is excessively cryptic in regard to the context of the request. The practice of the General Assembly (and the Security Council) in advisory proceedings has always been to state, in the resolution making the request to the Court, if not the use to made of the opinion, at least the specific link between its activities and the question posed, but resolution 63/3 provides absolutely no indication of this. This again reflects the lack of real activity by the General Assembly in relation to the situation in Kosovo, and that, in turn, must lead to the prohibition set out in Article 12(1) of the Charter being declared fully applicable in this case.

1.42. Admittedly, in its most recent advisory opinion, the Court stated that for the purposes of Article 12 of the Charter, “[a] request for an advisory opinion is not in itself a ‘recommendation’ by the General Assembly ‘with regard to [a] dispute or situation’”¹¹⁹. It further pointed out that the Court “cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose”, since it “cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion”¹²⁰. However, the case in point is very different. Not only has the General Assembly failed to indicate of what use the opinion might be, but it is also apparent from the wording of the request that it is of interest solely to the Member States, to the exclusion of the Organization; that it was adopted, moreover, in the absence of any activity by the General Assembly in relation to Kosovo; and, finally, that the Assembly cannot, in any event, take act in this situation without undermining Article 12 of the Charter. France considers that, in the circumstances, the Court must to decline to answer the request for an opinion that has been made to it.

¹¹⁶See A/63/250, First Report of the General Committee, para. 61; A/63/PV.2, 19 September 2008, p. 4.

¹¹⁷See para. 1.34 above.

¹¹⁸Of the 192 Member States, 158 took part in the vote. Seventy-seven voted to refer the question to the Court; 7 voted against (however, Liberia’s vote was not counted, pursuant to Art. 19 of the Charter — see A/63/PV.22, p. 11); and there were 74 abstentions. The States that voted to refer the question to the Court therefore represented a minority of 77 States of the 192 States that make up the United Nations.

¹¹⁹*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Opinion cited in footnote 56, p. 148, para. 62.

¹²⁰*Ibid.*, p. 163, para. 62.

II. THE FACTORS THE COURT SHOULD TAKE INTO ACCOUNT SHOULD IT CONSIDER ITSELF OBLIGED TO ANSWER THE REQUEST FOR AN OPINION

2.1. Were the Court nonetheless to decide to answer the request for an opinion, it would need to take careful account of the fact that there is no provision that makes it possible to assess the conformity with international law of Kosovo's declaration of independence. That factor alone should lead the Court to reply that the declaration of independence was not contrary to international law (§1). However, France has no doubt that the Court would not reach such a conclusion without having fully informed itself about the unprecedented circumstances that led Kosovo to declare independence. It therefore seems necessary to complete this written statement by highlighting, not only the extent to which these circumstances make Kosovo a *sui generis* case, which can certainly not be extrapolated to other situations that have arisen in international law, but also that they confirm the only conclusion in law to which the question put to the Court should give rise, namely that, in the absence of a material rule of international law, the declaration of independence cannot be subject to a theoretical test of legality, and, therefore, cannot be adjudged incompatible with international law (§2).

§1. There are no grounds for claiming that the Kosovo's declaration of Kosovo's independence is not "in accord with international law"

2.2. As the French Republic has stated above, the question whether an entity constitutes a State relies is a matter of purely factual assessment and, consequently, in exercising its exclusively judicial functions, the Court cannot consider the merits of the question that has been posed¹²¹. If, nonetheless, the Court were to decide to broach the matter, it would have to find that there was nothing to stop Kosovo from declaring its independence since international law contains no rule that either prohibits or permits a State's accession to independence as a result of its secession from a pre-existing State (1), at least provided its independence is not the result of a violation of the ban on the use of armed force in international relations pursuant to the United Nations Charter (2).

1. International law does not in principle prohibit a declaration of independence of a new State

2.3. Were the Court to decide to give an advisory opinion, it would have, clearly, to confine itself to answering the question posed by the General Assembly. It should not, more particularly, decide whether, in general terms, the Kosovar people had the right to independence or analyse whether Kosovo fulfils the conditions that allow it to be deemed a State, but should simply ascertain whether the declaration of independence of 17 February 2008 is compatible with international law.

2.4. In making that assessment, it is necessary to start from the fundamental principle according to which international law neither encourages nor forbids secession: it takes note of it. As the Arbitration Commission of the Conference on Yugoslavia pointed out "the principles of international law define . . . the conditions in which an entity constitute[s] a State", but "the existence or disappearance of a State [is] a question of fact"¹²². International law records that "primary act" (in the same way as national law records an individual birth), but although this is a "juridical person" ("personne morale"), it does not create it; it records its existence and draws the consequences in the sense that, simply as a result of its existence and as soon as it comes into existence, the State has all of the rights and obligations that international law attaches to statehood.

¹²¹See para. 1.14 above.

¹²²Opinion No. 1, 29 November 1991, reproduced in *International Law Reports*, Vol. 92, 1993, p. 162.

The conditions or criteria for its existence may be the subject of legal definition, but their implementation remains a question of sheer fact of which the law takes note¹²³. “The formation of a new State is . . . a matter of fact, and not of law”¹²⁴. “International law does not encourage secession; however, it accepts successful secession. It takes note of the event, as in the case of Bangladesh or former Yugoslavia. The law accepts the State act”¹²⁵.

2.5. A declaration of independence is only one of the elements of fact leading to the establishment of a new State. Of itself, it is neither illegal nor is it legal. Save in exceptional cases, the predecessor State will obviously not encourage secession and, in the great majority of cases, it will seek to prevent it by peaceful means (as in this case) or by force: but it cannot be established as a principle that international bows to the view of the predecessor State, since, otherwise, all cases of secession would have to be regarded as condemned under international law, and that is not the case: the principle is that international law takes a neutral position in this respect—condemnation of the declaration of independence being the exception; however, as will be demonstrated below (2), the exceptional circumstances which lead to a declaration of independence being illegal are not present in this case. As Professor James Crawford has written, “[t]he position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally. As Lauterpacht pointed out ‘[i]nternational law does not condemn rebellion or secession aiming at the acquisition of independence’¹²⁶”¹²⁷.

2.6. However, there is no doubt, save in the specific case of a colonial territory¹²⁸, that secession calls into question the territorial ascendancy of the State at whose expense the secession takes place. But in international law, the principle of territorial integrity relates not to relations between a State and its own population, but to relations between the States, as is clear from the wording of Article 2 (2) of the United Nations Charter, a crucial provision establishing and governing that principle: “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 . . .”¹²⁹

As Professor James Crawford points out, “[t]his position was affirmed by the International Law Commission in its discussion of the principle of non-recognition of territorial acquisition by illegal force. Article 11 of the Draft Declaration on Rights and Duties of States, which embodied that principle, was amended by limiting it to acquisition ‘by another State’ so as to deal with¹³⁰ the

¹²³See Alain Pellet, “Le droit international à l’aube du XXIème siècle (La société internationale contemporaine — Permanences et tendances nouvelles)”, in *Cours euro-méditerranéens Bancaja de droit international*, Vol. I, 1997, Aranzadi, Pamplona, 1998, p. 55. See also, for example, Vladimir-Djuro Degan, “Création et disparition de l’Etat (à la lumière du démembrement de trios federations multiethniques en Europe)”, *Recueil des cours de l’Académie de droit international*, 1999, Vol. 279, p. 227.

¹²⁴Oppenheim’s International Law (1st ed.), Vol. 1, p. 264, § 209; 8th ed., Vol. 1, p. 544, § 209. See also 9th ed. by Sir Robert Jennings and Sir Arthur Watts, 1992, Vol. 1, p. 677, §241 (cited by James Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 2nd ed., 2006, p. 3).

¹²⁵Alain Pellet, *op. cit.*, footnote 123, p. 59.

¹²⁶*Recognition in international law*, Cambridge University Press, 1947, p. 8, and “Revolutionary Activities against Foreign States”, *American Journal of International Law*, 1928, p. 128.

¹²⁷James Crawford, *op. cit.*, footnote 124, p. 390.

¹²⁸See the fourth principle of Declaration 2625 (XXV), cited in footnote 72: “The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it”.

¹²⁹Emphasis added.

¹³⁰In reality, *to exclude* the case of secession: “The CHAIRMAN proposed the following text: ‘Every State has the duty to refrain from recognizing any territorial acquisition made by another State through force or the threat of force.’ The addition of the words ‘by another State’ *eliminated* the case of secession” (*I.L.C. Yearbook* 1949, Vol. I, 15th meeting — 4 May 1949, p. 113, para. 131; emphasis added).

case of secession”¹³¹. It follows that the principle of territorial integrity, as conceived by the United States Charter, excludes any *foreign* intervention designed to break up a State, including by providing armed support to a secessionist movement¹³²; but that certainly does not imply that international law condemns (or, indeed, encourages) secession per se.

2.7. The most highly qualified public law specialists also consider that this must be the conclusion, as illustrated by the report by the “five experts”, which was prepared at the request of the Quebec National Assembly. Stating the view that third States reserve a right of control by means of recognition, which will be refused a new State if there is doubt concerning its existence or if it owes its existence to the illegal use of armed force, particularly if accompanied by help from abroad¹³³, the five jurists conclude that the existing rules of international law do not make it possible to judge the legality of a secession: the right of peoples to self-determination does not create a right to accede to independence outside colonial situations, but nor does the principle of territorial integrity stand in the way of the accession to independence of non-colonial peoples¹³⁴.

2.8. In other words, while it is entirely clear that there is no right to secession in international law, it is equally apparent that international law does not prohibit secession, nor, consequently, a declaration of independence by part of a State’s population. Any contrary view would be tantamount to calling into question the legality of the accession to independence of very many States whose existence is now undisputed and which have all become members of the United Nations, be they the successor States to “Gran Colombia”, the “partition” of India and Pakistan, Eritrea, Senegal (which withdrew from the Mali Federation), Syria (which triggered the break-up of the United Arab Republic), Singapore or the Republics born of the dissolution of both the USSR and former Yugoslavia.

2.9. In the absence of a rule of international law prohibiting the secession of part of the territory and population of a pre-existing State — and, consequently, that territory’s declaration of independence — the Court:

- must decline to answer the question posed by resolution 63/3 of the United Nations General Assembly, which does not lend itself to an answer of a legal nature; and
- could, if, despite everything, it were to respond, only find that Kosovo’s unilateral declaration of independence is not contrary to international law.

2.10. The latter conclusion is required both because there is neither a ban nor an authorization under international law concerning a territory’s accession to independence, and because there are clearly no special circumstances indicating a violation, on the occasion of Kosovo’s declaration of independence, of certain — and, moreover, well-established — rules of international law.

¹³¹James Crawford, *op. cit.*, footnote 124, p. 390.

¹³²See para. 2.13 below.

¹³³Case of the “Turkish Republic of Northern Cyprus”. See, in particular, Security Council resolutions 541 (1983) and 550 (1984).

¹³⁴Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw and Christian Tomuschat, “The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty”, Commission d’étude des questions afférentes à l’accession du Québec à la souveraineté, *Exposés et études*, Vol. I, *Les attributs d’un Québec souverain*, 1992, p. 383, pp. 428-430.

2. No other rule of international law prohibited Kosovo's declaration of independence

2.11. Although international law does not, on principle and generally, prohibit secession, it nonetheless contains certain rules of a prohibitory nature, and the violation of those rules in connection with a declaration of independence could result in that declaration being illegal.

2.12. It is not worth drawing up a list of these prohibitory rules for the purposes of this written statement, since a *prima facie* review of the circumstances in which Kosovo declared its independence must preclude any possibility of any of those rules having been breached¹³⁵.

2.13. There is, of course, no question that a declaration of independence and the constitution of a new "State" in the territory of a pre-existing State may involve the threat or use of force incompatible with the United Nations Charter, or be accompanied by large-scale breaches of international law, requiring all parties without exception to refrain from recognizing the breaches committed and the resultant situation as legal¹³⁶. For instance, it was because the declarations of independence of the "Bantustans" by South Africa¹³⁷ or the "Turkish Republic of Northern Cyprus"¹³⁸ were contrary to such basic principles of international law as the prohibition of apartheid and the use of force that they justifiably received a hostile reception from the international community.

2.14. If Kosovo's declaration of independence could be considered to be the consequence of the violation of one of those fundamental principles or one aspect of a complex situation that constituted a violation of that nature, it would certainly be within the discretion of the Court to find the declaration to be contrary to international law. But the fact is that none of these prohibitory rules is relevant in this case. No-one can claim¹³⁹ that Kosovo's independence is the result of illegal foreign armed intervention, when the declaration of 17 February 2008 was made on the conclusion of a lengthy political process, conducted under the auspices of the Secretary-General of the United Nations and with the support of the Security Council, and during which all of the options for Kosovo's final status, including independence, were considered.

2.15. Consequently, in the opinion of France, there is no ground that would justify concluding that Kosovo's declaration of independence was not consistent with international law.

¹³⁵See para. 2.5 above and paras. 2.63-2.69 below.

¹³⁶In a different context, the Court took the view that "[g]iven the character and the importance of the rights and obligations involved", namely the right of the Palestinian People to self-determination, as well as certain obligations under international humanitarian law, "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, cited in footnote 56, p. 200, para. 159). In its Advisory Opinion of 21 June 1971 concerning Namibia, cited in footnote 82, the Court declared that, pursuant to the decisions taken by the Security Council, the Member States of the United Nations were "under an obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia" (*I.C.J. Reports 1971*, pp. 53 and 54, paras. 115 and 119).

¹³⁷See resolution 31/6A of 26 October 1976 in which the General Assembly "rejects the declaration of independence of the Transkei and declares it invalid"; see also, for example, Security Council resolution 417 (1977) of 31 October 1977.

¹³⁸See Security Council resolution 541 (1983) of 18 November 1983: "[t]he attempt to create a 'Turkish republic of Northern Cyprus' is invalid".

¹³⁹And Serbia has never claimed this, see S/PV.6025, 26 November 2008, pp. 4-5; S/PV.5917, 20 June 2008, p. 4; S/PV.5850, 11 March 2008, p. 2; S/PV.5839, 18 February 2008, pp. 4-5. Regarding the alleged violation of the principles of sovereignty and territorial integrity, see para. 2.6 above.

§2. The *sui generis* character of the political process that led to Kosovo's declaration of independence

2.16. Since the creation of a new State is a matter of fact, save only where an obligation not to afford recognition applies — which it clearly does not in this case — the considerations set out above are sufficient to settle the question referred to the Court by Serbia. From a legal perspective, it is not necessary to give an account of the distinctive features of the political process that led to Kosovo's declaration of independence, as this concerns not the law but the facts (the circumstances and political parameters that governed the way in which Kosovo's final status was determined, how they affected the creation of the new Kosovar State and the policy of the other States on recognition, none of them issues which are predetermined by international law).

2.17. Nonetheless, it is probably helpful for the Court to be duly informed of the profoundly *sui generis* character of this political process, in the — extremely unlikely — event that it should decide that it must respond to the request for an opinion.

2.18. The unprecedented nature of this political process is bound up with a number of inter-linked factors:

- first, throughout the process, that is to say from 1999 until the day on which independence was declared, that is over a period of no less than nine years, Kosovo enjoyed a status entirely separate and distinct from that of Serbia. The extreme severity of the repressive measures which Serbia directed against Kosovo in the 1990s resulted in a threat to international peace and security, and, in June 1999, that led the Security Council, to take the unusual decision to place the territory under an interim international administration (1);
- secondly, as early as 1999, the Security Council considered independence for Kosovo to be one possible option for the territory's final status, in the light, in particular, of the absolute need (reiterated on many occasions) to respect the will of the people of Kosovo (2);
- thirdly, independence, declared in February 2008, was not something that happened overnight, but in the wake of intensive negotiations over a period of several years, under the auspices and supervision and at the instigation of the Security Council, in order to achieve a mutually acceptable solution. It was only because those negotiations came to a complete halt and were a consummate failure that independence was finally declared, as the genuine expression of the will of the people of Kosovo (3);
- fourthly, independence was not declared without guarantees or control. Although independence was achieved in a peaceful manner, it was accompanied by a firm commitment from the State of Kosovo to comply with the most exemplary rules in relation to democracy, human rights, the rights of minorities and the rule of law, enabling stability to be maintained in the region (4);
- fifthly, and bearing the above factors in mind, the United Nations, like the European Union, entirely legitimately continued fully to support and to assist Kosovo's authorities, thereby demonstrating, among other things, that they never considered the declaration of independence a threat to international peace and security in the region (5).

2.19. Taken as a whole, those different factors very clearly preclude the case of Kosovo from establishing a precedent able to be cited in other situations. As France has had occasion to explain,

to the Security Council¹⁴⁰ and the General Assembly, in particular¹⁴¹, the political process under way in Kosovo since 1999 is clearly a *sui generis* case and, as such, not one able to be relied upon elsewhere in the world. In its conclusions on Kosovo of 18 February 2008, the Council of the European Union very correctly pointed out that

“[t]he European Union adheres to the principles of the United Nations Charter and the Helsinki Final Act, *inter alia*, the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under Security Council Resolution 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.”¹⁴²

1. Kosovo was placed under international administration for nearly nine years, resulting *de facto* in an irreversible situation

2.20. As France pointed out in the introduction to this written statement¹⁴³, the gravity of the crisis in Kosovo during 1998-1999 led the Security Council to take the decision, itself unprecedented as a response to an unprecedented situation, to place Kosovo under the direct administration of the United Nations, on the basis of Chapter VII of the Charter. The exceptional nature of the crisis demanded an exceptional response. That was why resolution 1244 (1999) placing Kosovo under international administration was adopted without a single vote against, despite the fact that its provisions imposed major constraints on the FRY¹⁴⁴.

2.21. In its preamble, resolution 1244 (1999) reaffirms “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”, but that reference has clearly to be construed in the light of the decisions taken by the Security Council in the operative paragraphs of the resolution.

2.22. The resolution had a twofold effect on the exercise of Serbia’s powers in the territory of Kosovo.

2.23. *As regards the provisional status of Kosovo*, by placing Kosovo under international administration in order to maintain international peace and security, the Security Council *de facto* made the territory independent in relation to the Serbian authorities, which ceased to be in a position to exercise any authority over it from then on, for a period of nearly nine years, to the date

¹⁴⁰See, for example, S/PV.5839, 18 February 2008, p. 21.

¹⁴¹See S/63/PV.22, 8 October 2008, p. 9.

¹⁴²S/2008/105, 18 February 2008, Annex. See, to the same effect, Finland’s declaration to the Security Council, on behalf of the European Union, on 13 December 2006, S/PV.5588, p. 23: “[w]e would like to make it clear that we see the question of Kosovo’s status as *sui generis*. The outcome of the status process will not set a precedent for other regions because its current status is exceptional, being based on Security Council resolution 1244 (1999).

¹⁴³See paras. 12-27 above.

¹⁴⁴The resolution was adopted by 14 votes in favour, China abstained: see S/PV.4011, 10 June 1999, p. 10.

of Kosovo's independence. During that lengthy period, Kosovo therefore had a status that was entirely separate and distinct from that of Serbia¹⁴⁵.

2.24. That was bound to produce consequences in relation to the effective exercise of State authority in the territory of Kosovo. In its First Opinion of 29 November 1991, the Arbitration Commission of the Peace Conference on the Former Yugoslavia stated that it was necessary to take into consideration "the form of internal political organization . . . in order to determine the Government's sway over the population and the territory"¹⁴⁶. In this case, as soon as an international administration had been set up in the territory of Kosovo and a new "internal political organization" followed, Serbia was unable to exercise any State authority whatsoever over the territory of Kosovo from 1999. State authority was gradually transferred to the Kosovar authorities, with the result that Serbia's sway over Kosovar territory and its population was irreversibly transferred to the Kosovar authorities.

2.25. *As regards Kosovo's final status*, resolution 1244 (1999) did not preclude the option of independence. By not precluding it, the Security Council accepted in advance that the possible creation of a new State, on conclusion of the political process that the Security Council itself was to facilitate was not to be construed as undermining the principle of Serbia's territorial integrity (see (2) below).

2.26. As soon as resolution 1244 (1999) was adopted, the Federal Republic of Yugoslavia was fully cognizant of its exceptional implications in relation to both Kosovo's provisional and its final status. Before the resolution was put to the vote, the Federal Republic of Yugoslavia made a declaration stating that

"in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia"¹⁴⁷.

2.27. That was in fact the correct interpretation of the decisions which the Security Council was preparing to take by adopting the resolution. The fact that the FRY itself underscored their — in every respect — exceptional implications for the provisional and final status of Kosovo demonstrates the lack of ambiguity in the decision taken by the Security Council solely in order to maintain international peace and security. It is one thing for the FRY to have disputed the appropriateness of these decisions — and, clearly, it is not for the Court to review them from that perspective — but quite another matter that they should have had the above-mentioned implications and that the representatives of the RFY undeniably realized this at the time of their adoption.

¹⁴⁵With all of the legal consequences that flow from that. For example, the European Court of Human Rights found in *Behrami v. France* and *Saramati v. France, Germany and Norway* that Serbia could no longer be considered to have been exercising its "jurisdiction" over the territory of Kosovo since 10 June 1999 and was therefore no longer accountable in terms of respect for the European Convention of Human Rights in relation to the territory (Judgment of 31 May 2007, Applications Nos. 71412/01 and 78166/01, paras. 66-72).

¹⁴⁶Opinion No. 1, 29 November 1991, reproduced in *International Law Reports*, Vol. 92, 1993, p. 162, para. 1 (c).

¹⁴⁷S/PV.4011, 10 June 1999, p. 6.

2. Pursuant to resolution 1244 (1999), independence was one possible option for the territory's final status

2.28. By referring, in its preamble, to Serbia's sovereignty and territorial integrity, the effect of resolution 1244 (1999) was not to prohibit Kosovo's accession to independence, far from it. The resolution was careful to draw a distinction between provisional and final status. Under the resolution, independence was precluded as far as Kosovo's provisional status was concerned, but not in relation to its final status.

2.29. At a time when the serious levels of violence of 1999 had yet to occur, the Contact Group and the Security Council both expressed their preference for a status for Kosovo that both respected Serbia's territorial integrity and offered Kosovo "a substantially greater degree of autonomy . . . and meaningful self-administration"¹⁴⁸. At the time, the Contact Group in fact took the view that it should support "neither independence nor the maintenance of the status quo" but meaningful self-administration¹⁴⁹. The 1999 conflict was radically to change the situation by making it impossible for the territory of Kosovo to be reintegrated into the Serbian fold without the agreement of the Kosovar people, because of the terrible repression that they had suffered and the irrevocable split that was bound to produce.

2.30. The solution adopted at the time involved setting in place a two-phase political process:

- first, the temporary institution of a substantial degree of autonomy and self-administration for Kosovo; this did not formally call into question the principle of Serbian sovereignty over the territory but, at the same time, it removed the territory temporarily and completely from effective Serbian authority by establishing an interim international administration;
- those measures were set in place until the question of Kosovo's status could be finally settled on the basis of a political process that could, in the long term and among other things, result in the territory's independence. While some conditions were certainly laid down, they no longer included respect for Serbia's territorial integrity.

2.31. That approach was fully implemented, first of all, in the draft Rambouillet Agreement of 18 March 1999, which described itself as an *interim* agreement for peace and autonomy in Kosovo. In its various provisions, the Rambouillet Agreement established, on a temporary basis, a substantial degree of autonomy for Kosovo within the framework of the FRY, as clearly indicated by the very title of Kosovo's ("interim") Constitution included in Chapter 1 of the Agreement. The Rambouillet Agreement changed the parameters to be taken into consideration in two ways; it no longer mentioned the principle of territorial integrity and referred simply to the "opinion" of the relevant authorities while, at the same time, introducing the criterion of respect for the "will of the people" of Kosovo. According to Article 1 (3) of Chapter 8 of the Agreement:

"Three years after the entry into force of this Agreement, an interim meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, and opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to

¹⁴⁸See resolutions 1160 (1998), para. 5; 1199 (1998) 12th and 13th recitals in the preamble; 1203 (1998), 8th recital in the preamble.

¹⁴⁹See the statements by the Contact Group reproduced in S/1998/223, 12 March 1998, para. 9; S/1998/272, 27 March 1998, para. 13, and S/1998/657, 16 July 1998, para. 7.

¹⁴⁹S/1999/648, 7 June 1999. The original version of the agreement, in English, is attached to the English version of document S/1999/648.

undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.”¹⁵⁰

2.32. On 10 June 1999, resolution 1244 (1999) adopted that two-phase approach. In regard to the immediate measures to be taken to resolve the crisis in Kosovo, the Security Council referred, in paragraph (1) of the resolution, to the general principles and the more detailed principles and elements set out in Annexes (1) and (2) of the resolution, which governed only Kosovo’s *provisional* status. Annexes (1) and (2) in fact envisaged the establishment of an “*interim* political framework agreement” only. Once again, this was to be based on the principles of a substantial degree of autonomy for Kosovo and the territorial integrity of the FRY, specifying that it was for an international civil presence, which was to become UNMIK, to provide an administration, again an “*interim*” administration, for Kosovo, in order to secure the establishment of a substantial degree of autonomy and “*provisional*” self-government¹⁵¹. However, neither of the annexes makes any mention of the territory’s final status.

2.33. The operative paragraphs of resolution 1244 (1999) meet the latter concern. Paragraph 11 of the resolution, which was designed to define the main responsibilities of the international civil presence, divided the issue of status between two subparagraphs. The international civil presence was to:

(a) [Promote] 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)¹⁵²;

.....

(e) [Facilitate] a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords (S/1999/648)”.

2.34. Those two subparagraphs prompt three comments:

- by the very fact of making a distinction between the two phases in Kosovo’s status (provisional and final status), resolution 1244 (1999) implied that the conditions framing one phase in its status could not necessarily be invoked in relation to the other;
- in fact, according to resolution 1244 (1999) itself, the determination of Kosovo’s future status was not to reflect the detailed principles and conditions set out in Annex 2 of the resolution, which is mentioned only in subparagraph (a) and not subparagraph (e). It was merely to “take account” of the Rambouillet accords. Now, the only conditions set by the Rambouillet Agreement of 18 March 1999 were that the “opinions of the relevant authorities” were to be sought and the “will of the people of Kosovo” respected¹⁵³. Far from barring the way to independence, resolution 1244 (1999), very clearly, therefore, accepted the possibility of independence, in negative terms, by not making the outcome of the political process dependent on respect for the principle of Serbia’s territorial integrity and consent, and, in positive terms, by requiring that the will of the “people” of Kosovo be respected;

¹⁵⁰S/1999/648, 7 June 1999. The original version of the agreement, in English, is attached to the English version of document S/1999/648.

¹⁵¹See para. 10 of resolution 1244 (1999).

¹⁵²Subparagraphs (c) and (d) are subdivisions of the task set out in subparagraph (a).

¹⁵³See para. 2.31 above.

— finally, under subparagraph (e), the role of the United Nations consisted in “facilitating a political process”, which presupposed that the Security Council and those acting on its behalf would, on the one hand, remain neutral in regard to which of the options on the table were championed, subject to compliance with the requirements laid down in the Rambouillet Agreement, and, on the other, ensure that the process was conducted without threat to international peace and security. A political process of that kind naturally presupposed that the path of negotiation would first be attempted; it should, however, be noted that, in the resolution, the Security Council was careful not to make the achievement of a consensual solution an absolute prerequisite. From that point of view, the deliberate reference to the more flexible expression of “political process” was better attuned to the very particular and eminently factual objective¹⁵⁴ of a process designed to establish a territory’s final status in relation to statehood.

2.35. The principles drawn up by the Contact Group as of 2005, when the final status process was to be launched¹⁵⁵, entirely confirm that independence was one of the options available under resolution 1244 (1999). In its Guiding Principles of 2 November 2005¹⁵⁶, and Principle No. 6 more specifically, the only options the Contact Group rules out are “partition of Kosovo” and the “union of Kosovo with any country or part of any country”, but it makes no mention of independence. Similarly, while there was reference to territorial integrity, this was solely in regard to “neighbours”, but not, and this is very significant, Serbia’s territorial integrity. Finally, the same guiding principle specified that “Kosovo [will] not return to the pre-March 1999 situation”.

2.36. The Contact Group confirmed its position and clarified it in a manner still more favourable to the independence option, on 31 January 2006:

“The Contact Group Guiding Principles of November 2005 make clear that there should be: no return of Kosovo to the pre-1999 situation, no partition of Kosovo, and no union of Kosovo with any or part of another country . . . Ministers look to Belgrade to bear in mind that the settlement needs, *inter alia*, to be acceptable to the people of Kosovo. The disastrous policies of the past lie at the heart of the current problems.”¹⁵⁷

2.37. The Contact Group reiterated the need for the final settlement to be “acceptable to the people of Kosovo” on 24 July, and then again on 20 September 2006¹⁵⁸, but again without requiring respect for Serbia’s territorial integrity.

2.38. As early as 15 May 2001, moreover, the preamble to the Constitutional Framework for Provisional Self-government in Kosovo, adopted in the form of UNMIK Regulation 2001/9, had

¹⁵⁴See para. 2.4 above.

¹⁵⁵See para. 2.40 *ff* below.

¹⁵⁶The English text of the Guiding Principles is available at the following internet address: [http://www.unosek.org/docref/Contact Group Ten Guiding principles for Ahtisaari.pdf](http://www.unosek.org/docref/Contact%20Group%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf). A French version may be accessed at: http://www.diplomaatie.gouv.fr/fr/pays-zones-geo_833/kosovo_650/colonne-droite_2743/texts-reference_2741/principes-directeurs-du-groupe-contact-vue-un-reglement-du-statut-du-kosovo-02.11.05_29390.html.

¹⁵⁷Declaration accessible at: <http://www.unosek.org/docref/fevrier/statement> by the contact group on the future of Kosovo-Eng.pdf.

¹⁵⁸Declarations accessible at the following internet addresses: [http://www.unosek.org/docref/Statement_of_the Contact Group after first Pristina-Belgrade High-level meeting held in Vienna.pdf](http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf) and [http://www.unosek.org/docref/2006-09-20_CG Ministerial Statement New York.pdf](http://www.unosek.org/docref/2006-09-20_CG_Ministerial_Statement_New_York.pdf).

stated that meaningful self-government was to be established only “pending a final settlement” and the process that was to result in Kosovo’s final status “in accordance with UNSCR 1244 (1999) take[s] full account of all relevant factors *including the will of the people*”¹⁵⁹. Similarly, legal writers have clearly interpreted resolution 1244 (1999) as leaving open the question of Kosovo’s final status, including the option of independence¹⁶⁰.

2.39. Therefore, resolution 1244 (1999) and the subsequent declaration of the Contact Group certainly did not prohibit the option of independence, since they made it a requirement that the will of the “people of Kosovo” should be respected, but nor did they require that Serbia’s territorial integrity or the consent of its authorities should be taken into account. From that perspective, Kosovo’s independence is not really a classic example of secession. Its unique features make it more akin to situations in which the right of peoples to self-determination is being applied, although it is not the same as this. At any rate, the fact remains that Kosovo’s declaration of independence must be viewed in the light of the requirement consistently laid down, as part of the political process set in place by the Security Council, to respect the will of the people of Kosovo, at the possible cost of Serbia’s territorial integrity.

3. On conclusion of the negotiation process, independence emerged as the only political option that was both viable and met the requirements laid down by the Security Council and the Contact Group

2.40. The fact that independence was an option on the table and, therefore, accepted by the Security Council on the basis of resolution 1244 (1999), which cited the Rambouillet accords, did not, of course, imply that it was the only possible outcome. It was, in the first instance, for the parties concerned to identify a mutually acceptable solution through negotiation. Nonetheless, there could be no question of allowing the failure of the negotiations to block the final status process.

2.41. From those different perspectives, the political process that resulted in Kosovo’s declaration of independence is again unique:

- between 2005 and 2007, lengthy negotiations were instigated, driven and steered by the Security Council, acting under Chapter VII of the Charter;
- those negotiations failed, and there was no hope of reconciling the differences between the parties, but nor was it possible to maintain the status quo;
- in the light of the special circumstances of Kosovo, independence then emerged as the only viable political option among the various options opened under the political process.

¹⁵⁹Regulation of 15 May 2001, cited in footnote 39, p. 4; emphasis added.

¹⁶⁰See, for example, Marcelo Kohen, “Le Kosovo: un test pour la communauté internationale”, in Vincent Chetail (ed.), *Conflits, sécurité et coopération — Liber amicorum Victor-Yves Ghébal*, Bruylant, 2007, p. 372: “La Résolution 1244 (1999) ne préjuge rien sur le ‘réglement définitif’, autrement dit, sur la solution à trouver une fois finie l’étape provisoire d’administration internationale fondée sur une ‘autonomie substantielle’”; Stefan Oeter, “The Dismemberment of Yugoslavia: An Update on Bosnia and Herzegovina, Kosovo and Montenegro”, *German Yearbook of International Law*, 2007, p. 506: “Should the territory be reintegrated into the Serbian State, or should Kosovo be granted independence as a sovereign State? Resolution 1244 left open this question deliberately. It stressed the persisting territorial sovereignty of Serbia over the territory, but had at the same time reserved a different status solution to future negotiations” (footnotes omitted).

2.42. Before revisiting these different elements, France wishes to make it clear that it is not in any way seeking here to attribute blame for the failure of the negotiations. That approach would be both pointless and counter-productive in regard to peace in the region and its future, its future in Europe, in particular. The fact is that the negotiations failed, after everything was done to try to make them succeed. That is a fact, and all that matters for the present purposes is an objective analysis of the consequences.

2.43. In 2005, the Security Council launched the political process designed to result in the determination of Kosovo's final status. In a statement by its President of 24 October, the Security Council expressed the view that "the time [had] come to move to the next phase of the political process". With that in mind, it approved the Secretary-General's appointment of a new Special Envoy "to lead the Future Status process", welcomed the fact that the Contact Group remained closely engaged "in the political process" and, finally, reaffirmed its "commitment to the objective of a multi-ethnic and democratic Kosovo, which must reinforce regional stability"¹⁶¹.

2.44. That decision of the Security Council was taken on the basis of the report submitted a few weeks earlier by the Secretary-General's Special Envoy, Mr. Kai Eide¹⁶². After analysing in detail the current situation in Kosovo, Mr. Eide had recommended that the political process designed to determine the territory's future status should be launched as soon as possible, because the status quo was no longer sustainable¹⁶³. The Secretary-General's Special Representative and Head of UNMIK took absolutely the same view, saying a few days later¹⁶⁴: "it must . . . be clear to all of us that continuing with the status quo is not a viable option", and reiterating this still more plainly in February of the following year:

"As the Security Council has acknowledged in the past, the status quo in Kosovo is not sustainable. It follows that the status process should not become a continuation of the status quo. The acceleration of the status process is the best contribution that can be made now to ensuring political stability in Kosovo and in the wider region."¹⁶⁵

2.45. As the negotiations were set to begin, it was, naturally, hoped that the parties would reach a mutually acceptable solution, and, consequently, it was necessary, to encourage them to reach that ideal solution. In its Guiding Principles of 2 November 2005, the Contact Group therefore pointed out that "[a] negotiated solution should be an international priority" (a "priority", not an "obligation"), and that the parties should, therefore "refrain from unilateral steps" *at that stage*¹⁶⁶. On 31 January 2006, the Contact Group again stressed the fact that "all efforts should be made to achieve a negotiated settlement in the course of 2006" and that "a negotiated settlement is the best way forward" (there again, the "best", not the "only")¹⁶⁷. At the same time, the Contact

¹⁶¹S/PRST/2005/51, 24 October 2005.

¹⁶²S/2005/635, 7 October 2005.

¹⁶³*Ibid.*, paras. 5-10 in particular.

¹⁶⁴S/PV.5289, 24 October 2005, p. 5. See also the earlier S/PV.5188, 27 May 2005, p. 7.

¹⁶⁵S/PV. 5373, 14 February 2006, p. 3: *idem* in S/PV.5588, 13 December 2006, p. 2 and p. 4. See also, among other examples, Finland's statement to the Security Council on behalf of the European Union of 13 September 2006 (S/PV.5522, p. 24): "Resolving the status issue is necessary in order to maintain stability in the Western Balkans region. The status quo is unsustainable and must be replaced by a solution that provides lasting peace and stability in the region and promotes Kosovo's European integration."

¹⁶⁶Principles cited in footnote 156.

¹⁶⁷Declaration cited in footnote 157.

Group drew attention to the fact that it was, in any event, important to respect the will of the people of Kosovo¹⁶⁸.

2.46. On 24 July 2006, the Contact Group again declared that

“all possible efforts should be made to achieve a negotiated settlement in the course of 2006 that is, *inter alia*, acceptable to the people of Kosovo and promotes a multi-ethnic society with a future for all of its citizens. As set out in the Guiding Principles, once negotiations are under way, they cannot be allowed to be blocked. The process must be brought to a close, not least to minimize the destabilizing political and economic effects of continuing uncertainty over Kosovo’s future status.”¹⁶⁹

2.47. However, as the intense negotiations continued, the initial hope gradually faded, so that it became necessary to accept the idea of a solution that was not necessarily consensual, as long as it was realistic, respected the will of the people of Kosovo and was capable of guaranteeing regional stability and the rights of the different communities. On 20 September 2006, meeting at ministerial level, the Contact Group therefore declared:

“Ministers reaffirmed their commitment that all possible efforts be made to achieve a negotiated settlement in the course of 2006 . . . Ministers express their deep appreciation to the UN Special Envoy for conducting eight months of intensive negotiations . . . Regarding Kosovo’s political status, Ministers recognize that distance remains between the positions of Belgrade and Pristina, as was made clear at the high-level meeting in Vienna on 24 July. Ministers support the Special Envoy’s efforts to work with the parties in co-operation with the Contact Group to arrive at a realistic outcome that enhances regional stability, is acceptable to the people of Kosovo and preserves Kosovo’s multi-ethnic character. Striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status from advancing. Ministers encouraged the Special Envoy to prepare a comprehensive proposal for a status settlement and on this basis to engage the parties in moving the negotiating process forward.”¹⁷⁰

2.48. After more than a year of negotiations, including 17 sessions of direct discussion and visits by 26 expert missions to Belgrade and Pristina¹⁷¹, it became clear that a mutually acceptable solution was not possible, while the status quo was becoming still less sustainable. The Secretary-General’s Special Envoy, Martti Ahtisaari, drew the inevitable conclusions when, on 26 March 2007, he submitted a Comprehensive Proposal for the Kosovo Status Settlement, the very purpose of which was to achieve an independent Kosovo¹⁷². As the Special Envoy explained in his Report on Kosovo’s Future Status, the recommendations were “fully supported” by the United Nations Secretary-General:

“after more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an

¹⁶⁸See paras. 2.36-2.39 above.

¹⁶⁹Declaration cited in footnote 158 above.

¹⁷⁰Declaration cited in footnote 158 above.

¹⁷¹See Stefan Oeter, *op. cit.*, footnote 160, p. 507. See also the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 26 March 2007, para. 1.

¹⁷²S/2007/168/Add.1, 26 March 2007.

agreement on Kosovo's future status . . . 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 . . . Nevertheless, resolution of this fundamental issue is urgently needed. Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole . . . 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."¹⁷³

2.49. The assessment of the Special Envoy, whose authority was enhanced by his neutrality and direct involvement in the negotiations¹⁷⁴, was not open to question. Anxious not to lose even the slightest opportunity of nonetheless reaching a consensual settlement, on 19 April 2007, the Security Council decided to send a fact-finding mission to Kosovo, in response to a formal proposal from Russia¹⁷⁵. In late April 2007, that fact-finding mission travelled to the region and consulted all of the parties involved in the situation in Kosovo. It emerged very clearly that Serbia and Kosovo continued to take opposing and irreconcilable positions, while the status quo was less sustainable than ever¹⁷⁶.

2.50. When the report was submitted to them, the members of the Security Council endorsed those two conclusions and confirmed the resulting deadlock: the two parties had "strongly opposed positions", but both considered that "the status quo [was] not sustainable"¹⁷⁷. Even among the few delegations which still expressed the hope, despite everything, that fresh negotiations might succeed, it was recognized, and not without contradiction, that "[t]he Kosovo issue is quite involved and convoluted" and that "[m]aintaining the status quo is not a solution"¹⁷⁸.

2.51. Although it had been apparent for several years that the status quo could not continue, and the resolutions tabled at the Security Council to secure the latter's approval for the Special Envoy's Proposal for the Kosovo Status Settlement had not been successful¹⁷⁹, the Contact Group

¹⁷³S/2007/168, 26 March 2007, paras. 1-5.

¹⁷⁴See, by analogy, the rules applicable to evidence, I.C.J., Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, available at the following internet address: <http://www.icj.cij.org/docket/files/91/13684.pdf>, paras. 213 and 227 ff.

¹⁷⁵Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007, para. 1.

¹⁷⁶*Ibid.*, in particular paras. 6, 12, 23, 24, 26 and 59.

¹⁷⁷S/PV.5673, 10 May 2007, p. 3 (Belgium, as head of the Security Council mission).

¹⁷⁸*Ibid.*, p. 9, China.

¹⁷⁹See the declaration of 20 July 2007 by Belgium, France, Germany, Italy, the United Kingdom and the United States, available at the following internet address: <http://www.unosek.org/docref/2007-07-20-Statement> issued by the co-sponsors of the draft resolution.doc.

nonetheless proposed a final attempt at negotiation in late July 2007, even though this was clearly not essential, in the light of past failures¹⁸⁰.

2.52. The Secretary-General announced this on 1 August, and stated that the negotiations would be conducted by a Troika made up of representatives of the European Union, Russia and the United States. On that occasion, the Secretary-General specified that “[t]he international community must find a solution that is timely, addresses the key concerns of all communities living in Kosovo and provides clarity for Kosovo’s status. The status quo is not sustainable.”¹⁸¹

2.53. On 10 December 2007, the Troika was, however, compelled to acknowledge that the latest negotiations had failed, even though they had been conducted intensively for more than four months¹⁸².

2.54. The Troika’s report of its work is very telling in many respects:

- (i) indicating that the negotiations were conducted “within the framework of the Security Council resolution 1244 (1999) and the guiding principles of the Contact Group”, and specifying that the parties had “discussed a wide range of options, such as full independence”¹⁸³, the Troika confirmed that resolution 1244 (1999) had acknowledged the possibility of independence for Kosovo and, consequently, had certainly not prohibited it;
- (ii) the Troika had also informed the parties that “the Ahtisaari Settlement was still on the table”¹⁸⁴;
- (iii) the negotiations were once again very intensive (“10 sessions, six of which consisted of face-to-face dialogue, including a final intensive three-day conference in Baden, Austria, as well as two trips to the region”); moreover, they were conducted at the highest possible level (presidential and ministerial)¹⁸⁵, and not at the traditional diplomatic level¹⁸⁶;
- (iv) despite that, and even though all of the possible options had been considered, including the minimum option of “agreement to disagree”¹⁸⁷, “[n]one of these models proved to be an adequate basis for compromise”, “[a]fter 120 days of intensive negotiations, the parties

¹⁸⁰The scale of the negotiations which had been held since 2005 far exceeded the criterion laid down by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case. In that case, the Court in fact held that: “the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the parties definitely declares himself unable, or refuses, to give way . . .” (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13). See also *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345-346.

¹⁸¹Statement by the Secretary-General of 1 August 2007, S/2007/723, 10 December 2007, Ann. I.

¹⁸²S/2007/723, 10 December 2007, attached.

¹⁸³*Ibid.*, para. 1.

¹⁸⁴*Ibid.*, para. 5.

¹⁸⁵*Ibid.*, para. 7.

¹⁸⁶See Sir Robert Jennings, Sir Arthur Watts (eds.), *Oppenheim’s International Law*, Vol. I, *Peace*, Parts 2 to 4, Longman, 9th edition, 1992, p. 1182.

¹⁸⁷Report cited in footnote 175, para. 10.

were unable to reach an agreement on Kosovo's status. Neither side was willing to yield on the basic question of sovereignty"¹⁸⁸;

- (v) as the Troika stressed, that deadlock was extremely problematical since "the resolution of Kosovo's status is crucial to the stability and security of the western Balkans and Europe as a whole"¹⁸⁹.

2.55. From that point on, it became glaringly obvious to all neutral observers who had had an involvement in the situation in Kosovo over several years that independence was now the only viable option.

2.56. There was in fact no alternative:

- (i) maintaining the status quo was impossible, not only because this would have been based on a sham (re-launching formal negotiations which had no hope of succeeding), but also because it would have meant failing to respect the will of the people of Kosovo and would, moreover, have resulted, as pointed out, on several occasions, by all of the players involved in the political process, in the destabilization of Kosovo and the wider region, and, consequently, would have posed a threat to international peace and security;
- (ii) furthermore, the international administration could not remain in place indefinitely, again because this would have compounded the uncertain status of Kosovo, producing negative effects, particularly at political and economic level¹⁹⁰, but also because, under resolution 1244 (1999), it had been envisaged solely as a provisional authority;
- (iii) Serbia clearly could not *force* the people of Kosovo to join its territory, as this would have been directly contrary to the consistently stipulated requirement that the will of the people of Kosovo had to be taken into account. In the light of past relations between Kosovo and Serbia, the use of force that this would have implied would have tipped the region into a fresh cycle of violence which had, at all costs, to be avoided¹⁹¹;
- (iv) as far as Kosovo joining Serbia on a consensual basis was concerned, this was all the more unlikely to secure the agreement of the people of Kosovo because Serbia had, in the past, proved disinclined to accept a substantial degree of autonomy for Kosovo (for whatever reasons). That reluctance was confirmed by the adoption in 2006, right in the midst of the negotiations, of a new Constitution refusing to accord Kosovo lasting and genuine autonomy. On 12 July 2007, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe noted this, in complete impartiality, as follows:

"6. The text of the Preamble [of the 2006 Constitution] considers the Province of Kosovo and Metohija as an integral part of the territory of Serbia enjoying the status of substantial autonomy . . .

7. With respect to substantial autonomy, an examination of the Constitution, and even more specifically of Part VII, makes it clear that this substantial autonomy of

¹⁸⁸*Ibid.*, paras. 10-11.

¹⁸⁹*Ibid.*, para. 14.

¹⁹⁰See the Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, paras. 8-9 and 10.

¹⁹¹*Ibid.*, paras. 6-7.

Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the legislature. In Part I on Constitutional Principles, Article 12 deals with provincial autonomy and local self-government. It does so in a rather ambiguous way: on the one hand, in the first paragraph it provides that State power is limited by the right of citizens to provincial authority and local self-government, yet on the other hand it states that the right of citizens to provincial autonomy and local self-government shall be subject to supervision of constitutionality and legality. Hence it is clear that ordinary law can restrict the autonomy of the Provinces.

8. This possibility of restricting the autonomy of the Provinces by law is confirmed by almost every article of Part 7 of the Constitution, and more specifically by:

- Article 182, para. 2: ‘The substantial autonomy of the Autonomous Province of Kosovo and Metohija shall be regulated *by the special law* which shall be adopted in accordance with the process envisaged for amending the Constitution.’
- Article 182, para. 4: ‘The territory of autonomous provinces and the terms under which borders between autonomous provinces may be altered shall be regulated *by the law . . .*’
- Article 183, para. 2: ‘Autonomous provinces shall, *in accordance with the law*, regulate matters of provincial interest in the following fields . . .’
- Article 183, para. 3: ‘Autonomous provinces shall see to it that human and minority rights are respected, *in accordance with the Law*.’
- Article 183, para. 5: ‘Autonomous provinces shall manage the provincial assets *in the manner stipulated by the Law*.’
- Article 183, para. 6: ‘Autonomous provinces shall, *in accordance with the Constitution and the Law*, have direct revenues.’
- Article 184, paras. 1 to 3: ‘An autonomous province shall have direct revenues for financing its competences. The kind and amount of direct revenues shall be *stipulated by the Law*. *The Law* shall specify the share of the autonomous provinces in the revenues of the Republic of Serbia.’

Hence, in contrast with what the preamble announces, the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government be realized or not.”¹⁹²

2.57. Independence, on the other hand,

- (i) was compatible with resolution 1244 (1999), which had made provision for that option;
- (ii) mirrored political reality (it was the only viable political option, and had already largely existed in practice for several years);

¹⁹²Opinion No. 405/2006, *Opinion on the Constitution of Serbia*, Strasbourg, 12 July 2007, CDL-AD(2007)004, paras. 6-8; emphasis in original.

- (iii) finally, as the conditions in which independence was declared on 17 February 2008 showed, it made it possible to guarantee the existence of a multi-ethnic Kosovo that respected human rights and the rights of minorities, in accordance with the requirements that had been placed at the core of the political process set under way under the auspices of the Security Council¹⁹³.

2.58. Of course, as Serbia was anxious to stress in the way in which it drafted its request for an advisory opinion, independence was, in the end, declared “unilaterally”. But one must be careful to avoid misinterpreting the significance to be attached to that term.

2.59. First of all, the declaration of independence is less significant than the reality of independence. A State *is* or *is not* independent¹⁹⁴, it is not “unilaterally” independent.

2.60. It is then necessary to bear in mind the special nature of the political process set in place, in 1999, to determine Kosovo’s final status. The rationale of the process clearly required that the parties concerned should start by negotiating. In parallel, however, it was stipulated, by way of fundamental requirement, that the will of the people of Kosovo had, in fact, to be taken into account. On the other hand, Serbia’s consent was not a condition that had definitely to be met in determining Kosovo’s final status¹⁹⁵. Viewed in conjunction with one another, as they should be, these different criteria therefore implied that the route of negotiation had to be exhausted before there could be independence *but also* that the failure of the negotiations could not result in the will of the Kosovar people being entirely left out of account. In other words, the “obligation” to negotiate did not preclude Kosovo from acceding to independence without Serbia’s consent, at least once the negotiations had failed¹⁹⁶.

2.61. From the latter perspective, it had become blatantly clear in late 2007 that the parties had pursued the negotiations “as far as possible”, as required by the Court’s case law¹⁹⁷. Indeed, “[s]o long as both sides remain adamant . . . there is no reason to think that the dispute can be settled by further negotiations between the Parties”¹⁹⁸; the prolonged deadlock in the negotiations

¹⁹³See para. 2.63 *ff* below.

¹⁹⁴See para. 2.4 above.

¹⁹⁵See paras. 2.34-2.39 above.

¹⁹⁶*Mutatis mutandis*, since we are dealing here with a political process that is not predetermined by international law, the situation is comparable to one in which a State is accorded a right unilaterally to refer to the International Court of Justice only if it has tried to resolve the dispute beforehand. In such circumstances, the existence of a requirement to negotiate certainly does not mean that it is impossible to act unilaterally, it merely defers the exercise of the unilateral right to refer the matter to the Court, by requiring that the route of negotiations be first exhausted (see, for example, *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)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 121-122, paras. 16-20).

¹⁹⁷See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, pp. 47-48, para. 87: “Defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation ‘was not merely to enter into negotiations but to pursue them as far as possible with a view to concluding agreements’, even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42, 1931, p. 116*)”.

¹⁹⁸*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346.

“compel[s] a conclusion that no reasonable probability exists that further negotiations would lead to a settlement”¹⁹⁹.

2.62. In accordance with those principles, the Contact Group informed the parties on several occasions that the lack of a negotiated solution should certainly not prevent the status determination process from moving forward. In their statement of 27 September 2007, the Contact Group ministers reaffirmed, for instance, the point they had already made in their statement of 20 September 2006, namely “[s]triving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing”²⁰⁰.

Unilaterally *blocking* the process of determining Kosovo’s status was the only thing prohibited. Thus, the Contact Group specifically recognized that it was possible, and even necessary, were the negotiations to fail, to advance towards determining Kosovo’s final status in such a way that the will of the people of Kosovo was respected, provided that regional stability and the rights of the difference communities were maintained²⁰¹ -- all requirements which the declaration of independence met in full.

4. Independence was achieved with respect for exemplary principles in relation to democracy, the rule of law, human rights and the rights of minorities, and without jeopardizing regional stability

2.63. The circumstances in which independence was declared, on 17 February 2008, after the complete failure of the most recent negotiations, made it possible to reconcile respect for the will of the people of Kosovo with the two requirements placed at the forefront throughout the political process, namely maintaining regional stability and protecting the rights of minorities within the framework of a multi-ethnic and democratic Kosovo.

2.64. First of all, there is no doubt that Kosovo’s declaration of independence genuinely expressed the will of the people of Kosovo, and met the highest standards of democracy. The declaration was in fact adopted practically unanimously by Kosovo’s Assembly, just after it had been elected in accordance with the highest international electoral standards²⁰². Consequently, there can be no doubt that, through the declaration, the people of Kosovo gave valid expression to their will to accede to independence, thereby meeting the key criterion placed at the forefront of the political process.

2.65. Secondly, the declaration of independence contains a firm commitment on the part of Kosovo to respect the recommendations contained in the proposal of the Secretary-General’s Special Envoy, Martti Ahtisaari. As a result, it incorporates (as would Kosovo’s Constitution a few months later)²⁰³ the very binding guarantees which it contains. As the declaration of independence rightly emphasizes, those guarantees are “in line with the highest European standards of human rights and good governance”²⁰⁴. Exemplary in many respects, these guarantees go far beyond the

¹⁹⁹*Ibid.*, p. 345.

²⁰⁰Report of the Contact Group ministers on Kosovo of 27 September 2007, S/2007/723, 10 December 2007, Ann. III, p. 9.

²⁰¹See, to that effect, the Contact Group declaration of 20 September 2006.

²⁰²See para. 26 above.

²⁰³See para. 28 above.

²⁰⁴Recital 12 in the preamble to the Declaration of independence, cited in footnote 44.

principles, compliance with which some States have, in the past, made a political condition for recognizing new States²⁰⁵; they, in comparison, are far more binding in scope and in terms of the detail of the requirements placed on Kosovo's authorities. In that regard also, Kosovo is a unique case.

2.66. Moreover, the commitment to respect the Ahtisaari proposal is all the more remarkable since the State of Kosovo

“affirm[s], 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. In all of these matters, we shall act consistently with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.”²⁰⁶

2.67. As a result, although, formally, a unilateral declaration, the declaration of independence does not mark a break with or departure from the earlier process: far from it, in referring to it, it adopts the approach based on *compromise and a balance between the interests of all sides* that was central to the “Ahtisaari Proposal”²⁰⁷. Moreover, many of the States that recognized Kosovo took note of those undertakings²⁰⁸.

2.68. Thirdly, bearing in mind specifically the undertakings which it contains, in particular continued international supervision, the declaration of independence did not trigger an increase in tensions. Serbia's constructive approach must be welcomed in that regard. It firmly undertook to refrain from the use of force against Kosovo and from imposing economic sanctions against it in the wake of the declaration of independence²⁰⁹. There is also no doubt that that the substantial contribution of those countries most actively involved in stabilizing the Balkans, as well as “[t]he common European prospects offered to Kosovo and to Serbia [which] are also a very specific characteristic of the situations”²¹⁰, significantly contributed to securing a peaceful political

²⁰⁵See, in particular, the *Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union*, adopted by the Member States of the European Union on 16 December 1991, A/46/804, 18 December 1991.

²⁰⁶Declaration of independence, cited in footnote 44, para. 12.

²⁰⁷When presenting his Comprehensive Proposal for the Kosovo Status Settlement in March 2007, Martti Ahtisaari said: “My Settlement proposal, upon which such independence will be based, builds upon the positions of the parties in the negotiating process and offers compromises on many issues to achieve a durable solution” (S/2007/168, 26 March 2007, para. 16).

²⁰⁸See also the declarations of recognition of the United States, France, Albania, the United Kingdom, Latvia, Denmark, Estonia, Switzerland, Ireland, Sweden, Iceland, Japan, Finland and Norway.

²⁰⁹As early as January 2008, the President of Serbia stated before the Security Council that “Serbia will not resort to violence or war” (S/PV.5821, p. 4). The day after Kosovo's declaration of independence, President Tadić reaffirmed that Serbia would not resort to the use of force (S/PV.5839, 18 February 2008, p. 5). On 8 October 2008, Serbia's Foreign Minister told the General Assembly that “[o]ur democracy responded with maximal restraint. We ruled out the use of force and the imposition of sanctions against the breakaway province” (A/63/PV.22, p. 1).

²¹⁰A/63/PV.22, 8 October 2008, p. 9 (France).

transition. All of that helped the situation on the ground remain relatively calm, at any rate given the special nature of the circumstances²¹¹.

2.69. In the light of those different factors, there is no doubt that the circumstances in which Kosovo declared its independence satisfied in every way all of the fundamental requirements which the Security Council has always placed at the heart of the political process designed to secure Kosovo's final status. As the Security Council has consistently stated, "[t]he establishment of a multi-ethnic, tolerant, democratic society in a stable Kosovo remains the fundamental objective of the international community in implementing Security Council resolution 1244 (1999)"²¹²; the Security Council "reaffirms its commitment to the objective of a multi-ethnic and democratic Kosovo which must reinforce regional stability"²¹³. Kosovo's independence, in the special circumstances in which it was attained, made it possible to satisfy those different requirements. Moreover, independence alone was capable of achieving this.

5. The United Nations has continued to support Kosovo's authorities

2.70. In the light of the foregoing, it is no surprise that the Security Council, like the Secretary-General and the Head of UNMIK, as well as the General Assembly or, indeed, the European Union, have not condemned Kosovo's declaration of independence in any way. That is entirely justified. The formation of a new State is actually a matter of fact, and the United Nations has no specific jurisdiction in regard to the recognition of States, which is a matter for the discretion of the States, provided there is no obligation not to accord recognition²¹⁴. Since the declaration of independence was consistent with the will of the people of Kosovo; was the only viable option after the negotiations had failed; did not breach any of the basic principles of the political process drawn up since 1999; and was made without posing a threat to international peace and security, the Security Council, the Secretary-General and the Head of UNMIK rightly took the view that their responsibility could only be to facilitate the political transition, by ensuring that it did not threaten international peace and security, while retaining their traditionally neutral stance in regard to Kosovo's final status.

2.71. That attitude is extremely significant, from a number of points of view.

2.72. First of all, it marks a departure from the situations in which the political organs of the United Nations felt compelled to condemn, explicitly and unequivocally, certain attempts at secession²¹⁵ because they violated a fundamental principle of international law or threatened

²¹¹See S/PV.5839, 18 February 2008, p. 3 (Secretary-General): "The situation has remained calm throughout Kosovo"; Report of the Secretary-General of 28 March 2008, S/2008/211, para. 11: "Despite a number of serious security incidents, the overall security situation in Kosovo during the reporting period remained calm though tense"; S/PV.5917, 20 June 2008, p. 10 (France): "an objective assessment shows that over the four months since independence the pessimistic scenarios predicted by some have not come to pass. On the contrary, what we see is a security situation that is generally calm and institutions that are working in a satisfactory manner within a democratic framework"; S/PV.6025, 26 November 2008, p. 3 (Special Representative of the Secretary-General and Head of UNMIK): "it has been encouraging that the overall atmosphere in Kosovo was generally calm throughout the summer, that there have been no major security incidents and that a series of minor problems have been managed and contained by low-level intervention".

²¹²Declaration by the President of the Security Council of 18 March 2004, S/PRST/2004/5.

²¹³Declaration by the President of the Security Council of 24 October 2005, S/PRST/2005/51.

²¹⁴See paras. 1.16 and 2.13 above.

²¹⁵See para. 2.13 above.

international peace and security²¹⁶, with the dramatic consequence that relations with the entity concerned were now prohibited²¹⁷. The absence of any condemnation by any of the organs of the United Nations of Kosovo's declaration of independence confirms *a contrario* that they clearly did not regard it as involving a violation of international law or as posing a threat to international peace and security.

2.73 The fact that the organs of the United Nations refrained from expressing condemnation is all the more significant in the light of the special authority that both the Security Council and the Head of UNMIK have to condemn any breach of the principles flowing from resolution 1244 (1999).

2.74. Had it deemed the declaration to be contrary to resolution 1244 (1999), the Security Council, as the arbiter of compliance with its own resolutions, would clearly have had the authority to condemn the terms of the declaration. In the past, the Security Council has not hesitated to exercise that authority. In 2002, at a time when the process intended to determine Kosovo's future status had, for instance, yet to be launched, the Security Council

“deplore[d] the adoption by the Assembly of Kosovo, in its session of 23 May 2002, of a ‘resolution on the protection of the territorial integrity of Kosovo’. It concu[rred] with the Special Representative of the Secretary-General that such resolutions and decisions by the Assembly on matters which do not fall within its field of competence are null and void.”²¹⁸

However, the Security Council refrained from declaring “null and void” or even just “deploring” the declaration of independence of 17 February 2008, and was right to exercise that restraint, because the declaration is in no way contrary to paragraph 11 (*e*) of resolution 1244 (1999), and actually fits into the framework of the political process defined therein and fully satisfies the central requirements of that process.

2.75. The Secretary-General's Special Representative also had the power to decide, on his own authority, that the declaration of independence was possibly contrary to resolution 1244 (1999). Under the second subparagraph of Chapter 8.1 of the Constitutional Framework for Provisional Self-Government, the Special Representative had, in fact, retained the power of “[d]issolving the assembly and calling for new elections in circumstances where the Provisional Institutions of Self-Government are deemed to act in a manner which is not in conformity with UNSCR 1244(1999), or in the exercise of the SRSG's responsibilities under that resolution”²¹⁹. The Special Representative did not exercise that responsibility, because he, rightly, considered that the declaration of independence was in no way contrary to resolution 1244 (1999) and did not pose a threat to international peace and security.

²¹⁶But not the violation of an alleged rule of international law prohibiting secession: see James Crawford, *The Creation of States in International Law*, *op. cit.*, footnote 124, pp. 389-390: the language of the resolutions of the Security Council condemning certain instances of secession “does not imply the existence of an international rule prohibiting secession . . . Any international concern associated with secession movements relates to the existence of foreign intervention (as in Katanga) or the existence of a threat to international peace and security (as in Rhodesia)”.

²¹⁷In its Opinion of 21 June 1971 concerning Namibia, cited in footnote 82, the Court detailed the various implications of the obligation not to accord recognition: see *I.C.J. Reports 1971*, pp. 54 *et seq.*, paras. 119 *ff.* See, more generally, James Crawford, *The Creation of States in International Law*, *op. cit.*, footnote 124, pp. 157-173.

²¹⁸S/PRST/2002/16, 24 May 2002.

²¹⁹See the UNMIK regulation of 15 May 2001, cited in footnote 39, p. 12.

2.76. In the exercise of their responsibilities, the Security Council, the Secretary-General and the Head of UNMIK did, however, ensure that the political transition consequent on the declaration of independence did not undermine progress achieved since 1999, both by continuing to support the strengthening of democracy and the rule of law in Kosovo and by reconfiguring the international civil presence to take account of the reality on the ground as a result of Kosovo's declaration of independence²²⁰.

2.77. In relation to that first point, it was consistent with the Ahtisaari Proposal, to which the declaration of independence refers, that the international presence called upon to remain provisionally in Kosovo should continue to support Kosovo in strengthening its democratic structures and the rule of law. On 15 July 2008, the Secretary-General clearly reaffirmed that Kosovo's independence had not brought an end to that support: "UNMIK will continue to support Kosovo in its effort to consolidate democratic governance institutions, advance economic growth and move towards a future in Europe as part of the western Balkans."²²¹

2.78. In relation to the second point, the Secretary-General first stated in his Report to the Security Council of 28 March 2008 that in order to meet the "challenge" of the repercussions of the declaration of independence, "UNMIK, guided by the imperative need to ensure peace and stability in Kosovo, has acted and will continue to act, in a realistic and practical manner in the light of the evolving circumstances"²²². A few weeks later, he was to consider it a "pressing need" to "preserve . . . international peace and security and stability in Kosovo", to reconfigure UNMIK²²³, "in accordance with resolution 1244 (1999)"²²⁴. According to the Secretary-General, that reconfiguration meant handing over to the European Union's "Rule of Law" Mission (EULEX)²²⁵, while remaining "status-neutral"²²⁶. In two letters addressed to the Serbian and Kosovar authorities respectively, the Secretary-General again pointed out that the United Nations maintained "strict status-neutrality" in relation to Kosovo²²⁷. This neutrality, which is expected of the United Nations, was reaffirmed by many States that spoke during the Security Council's discussions, including some States that voted to refer to the Court for an advisory opinion²²⁸ -- again demonstrating that the request for an advisory opinion is not a request channelled between United Nations organs²²⁹.

2.79. In any event, it was, clearly, necessary to reconfigure UNMIK. Its continued presence was not called into question, and this was something that Kosovo had committed to in its

²²⁰As regards the "substantially changed situation in Kosovo", brought about by the declaration of independence, the United Nations Secretary-General considered, on 20 June 2008, that "[t]hat needs to be acknowledged as a fact of life" (S/PV.5917, 20 June 2008, p. 3).

²²¹S/2008/458, 15 July 2008, para. 32.

²²²S/2008/211, 28 March 2008, para. 30.

²²³S/2008/354, 12 June 2008, paras. 10 *et seq.*

²²⁴S/2008/458, 15 July 2008, para. 30.

²²⁵Established by Council Joint Action 2008/124/CFSP, of 4 February 2008, on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *Official Journal of the European Union*, 16 February 2008, L. 42, pp. 92-98.

²²⁶S/2008/354, 12 June 2008, paras. 10 *et seq.*

²²⁷*Ibid.*, Anns. I and II.

²²⁸See also S/PV.6025, 26 November 2008, p. 6 (Serbia); p. 13 (South Africa); pp. 15-16 (Russia); p. 17 (Vietnam); p. 18 (China); p. 19 (Libya). See also S/PV.6097, 23 March 2009, p. 7 (Serbia); p. 15 (Russia); p. 21 (China); p. 22 (Vietnam).

²²⁹See para. 1.26 above. It is in fact impossible to reconcile the desire to see the United Nations remain neutral on the matter of Kosovo's status with asking the General Assembly to request the Court to help it exercise its functions in regard to Kosovo.

declaration of independence²³⁰, which could not have the effect of terminating resolution 1244 (1999). It was, however, necessary to appreciate the implications of Kosovo's independence for the operation of the international presence.

2.80. In his report of 24 November 2008, the Secretary-General noted that

“all parties have accepted the reconfiguration of the structure and profile of the international presence, as envisaged in paragraph 16 of my report²³¹, to one that corresponds to the evolving situation in Kosovo and enables the European Union to assume an enhanced operational role throughout Kosovo . . .”²³².

2.81. Two days later, the Security Council “welcomed the Secretary-General’s report” and “[took] into account the positions of Belgrade and Pristina” and “their intention to co-operate with the international community”²³³. It also welcomed the co-operation between the different international players and the European Union’s efforts “to advance the European perspective of the whole of the western Balkans, thereby making a decisive contribution to regional stability and prosperity”²³⁴. With that same end in view, by remaining neutral in regard to Kosovo’s status, each of the organizations involved lent its full support and assistance to the Kosovar authorities in their efforts to consolidate democratic structures and the rule of law. Yet again, it would be very difficult to explain that approach if the declaration of independence had to be regarded as a violation of international law.

2.82. Finally, it is clear that Kosovo’s declaration of independence cannot in any way be seen as “incompatible with international law”. Since international law is silent as to the legality of the emergence of a new State, save for exceptions that clearly do not apply in this case, it is impossible to apply to the declaration of independence a test of legality or illegality. Analysis of the many factors which make the process that resulted in Kosovo’s independence a *sui generis* case prompt the same conclusion.

CONCLUSION

For all of the above reasons, the French Government considers, principally, that the Court should decline to answer the request for an opinion. In the alternative, should the Court nonetheless decide to answer the question that has been put to it, France considers that the Court should conclude that the declaration of independence of 17 February 2008 is not contrary to any rule of international public law.

On behalf of the Minister of Foreign and European Affairs,

(Signed) Edwige BELLiard.

²³⁰See para. 5 of the declaration of independence, cited in footnote 44.

²³¹Para. 16 of his Report of 12 June 2008, S/2008/354, in which the Secretary-General planned the handover from UNMIK to the European Union’s operational mission.

²³²S/2008/692, 24 November 2008, para. 28.

²³³S/PRST/2008/44, 26 November 2008.

²³⁴*Ibid.*

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