

[Translation]

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Paris, 6 July 2009

Within the deadline set by the International Court of Justice by its Order of 17 October 2008, I have the honour to enclose herewith the Written Comments 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 Advisory Opinion). As 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 Comments 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 COMMENTS OF THE FRENCH REPUBLIC

July 2009

[Translation by the Registry]

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1. By an Order dated 17 October 2008, and in accordance with Article 66, paragraph 4, of its Statute, the International Court of Justice authorized those States and organizations which had presented written statements to submit written comments on the other written statements by 17 July 2009¹. The present comments have been submitted pursuant to that Order.

2. Having acquainted itself with all of the written statements submitted to the Court, France stands by its observations regarding the jurisdiction of the Court and the propriety of exercising it in the present case (I). Further, it remains as certain as ever that, even if the Court were to decide to respond to the request for an opinion, it could only conclude that the declaration of independence of Kosovo is not contrary to international law (II).

I. The conditions governing the exercise of the advisory function have not been fulfilled

4. A number of considerations all point, in France's view, to the conclusion that the Court should refuse the request addressed to it.

1. The advisory procedure has been used in a way out of keeping with its object and purpose

5. The request for an opinion submitted to the Court is, by the General Assembly's own admission, solely aimed, at the instigation of certain States, at shedding light on the action of other States, or even at having the Court settle what appears to be an entirely inter-State dispute. In this respect, the purpose underlying the request for an opinion does not correspond to that to be achieved in advisory proceedings.

6. The only element of reasoning contained in resolution 63/3 refers solely to the existence of a dispute between States². In the *Western Sahara* case, in order to determine whether it was entitled to exercise its advisory jurisdiction, the Court satisfied itself that "[t]he object of the General Assembly [in referring the matter to the Court] has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy" between States; and the Court only laid aside that objection because the controversy in question "arose during the proceedings of the General Assembly and in relation to matters with which it was dealing"³. That is clearly not the case in the present instance⁴. The Court has, moreover, emphasized the necessarily accessory nature which the question put must possess in relation to the relevant activities of the Assembly⁵. Here again, this condition has not been satisfied in the present case, as the Assembly was obliged to add a new item to its agenda for the sole purpose of putting an inter-State dispute before the Court, which is a precedent in the realm of advisory proceedings⁶. One State at least openly acknowledged in its written statement the use of the advisory procedure for contentious ends, while groundlessly accusing those States which have recognized Kosovo of

¹Order of 17 October 2008, para. 3.

²"Aware that this act [the declaration of independence] has been received with varied reactions by Members of the United Nations as to its compatibility with the existing international legal order".

³*I.C.J. Reports 1975*, p. 26, para. 39 and p. 25, para. 34.

⁴See Written Statement of France, paras. 1.23-1.26 and paras. 1.37-1.41, and that of the United States of America, pp. 41-45.

⁵Aforementioned Advisory Opinion of 1975, pp. 26-27, para. 39; see also Advisory Opinion of 21 June 1971 in the *Namibia* case, *I.C.J. Reports 1971*, p. 24, para. 32.

⁶See Written Statement of France, paras. 1.38-1.40.

being guilty of an act characterized as “intervention”⁷. This allegation, like the use of the advisory function solely for the purposes of obtaining inter-State legal advice⁸, does not fall within the jurisdiction the Court derives under Article 96 of the Charter. It is for the Court to draw the conclusions from this by not acceding to the request for an opinion.

2. The Court should refuse to take a position in a controversy in which the competent organs of the United Nations have chosen to remain neutral

7. It is clear that the question put to the Court by the General Assembly both is entirely extraneous to any Assembly activity with respect to the situation in Kosovo and arises against a backdrop of uninterrupted activity by the Security Council. This unprecedented situation not only gives rise to a problem in terms of jurisdiction in view of the prohibition established in Article 12 of the United Nations Charter⁹ but also makes it inappropriate for the Court to exercise its advisory jurisdiction¹⁰.

8. Any opinion issued is likely to break with the neutral stance unanimously taken to date by all of the United Nations organs¹¹. As the Secretary-General recently recalled, the United Nations has adopted and “will continue to adopt a position of strict neutrality on the question of Kosovo’s status”, in accordance with “the status-neutral framework of Security Council resolution 1244 (1999)”¹². The Special Representative of the Secretary-General has also emphasized the crucial need, when dealing with a highly sensitive political situation¹³, to respect that neutrality to ensure that peace is maintained in Kosovo¹⁴. In that regard, nothing could be further from the truth than to claim that an advisory opinion would help “the United Nations and Member States in their subsequent actions”¹⁵. Quite the opposite, the declaration of independence was not at all understood to be a significant challenge to the authority of the United Nations¹⁶; neither the Security Council nor the Secretary-General, let alone the General Assembly, expressed the wish in the course of their activities to obtain “legal guidance”, in so far as they are empowered to do so, regarding the action to be taken with respect to the situation in Kosovo, to use the terms Serbia now

⁷Written Statement of Argentina, para. 112. See also Written Statement of Venezuela, p. 2, last paragraph.

⁸Kosovo quite rightly observed in its Written Contribution that the Court should not accede to the request for an opinion “considering, in particular, that the request was not made to assist the General Assembly in its work but as ‘legal advice’ for Member States” (para. 7.21). See to the same effect and in greater detail Written Statement of the United States of America, pp. 41-45.

⁹See Written Statement of France, paras. 1.28 *et seq.*

¹⁰See Written Statement of Ireland, para. 12. See also the various points made by Albania in its Written Statement, paras. 54-70.

¹¹That neutrality can, in particular, be explained by the fact that the UN has not been empowered to recommend the collective recognition of new States: see Written Statement of the United Kingdom, para. 5.59, which quotes in this respect the *travaux préparatoires* of the Charter and the Memorandum of the Secretary-General of 1950.

¹²See the Report of the Secretary-General on UNMIK, S/2009/300, 10 June 2009, paras. 6 and 40. See also paras. 36, 39 and 41. The current neutrality of the UN, like that of Resolution 1244 (1999), regarding the final status of Kosovo was also reiterated at the Security Council meeting of 17 June 2009: see S/PV.6144, p. 2 (Special Representative of the Secretary-General and Head of UNMIK), p. 11 (Vietnam), p. 14 (Russia), p. 16 (China), p. 20 (Mexico), p. 21 (Uganda).

¹³The Kosovo question constitutes a “highly sensitive political issue” according to the Special Representative of the Secretary-General, Mr. Eide (quoted in the Written Statement of Serbia, para. 395).

¹⁴See S/PV.6144 (17 June 2009), p. 3: “Our status of neutrality allows us to use our efforts to nurture the reconciliation of Kosovo’s communities and foster regional cooperation, for the benefit of all of Kosovo’s people and for the stability and development of the region as a whole”.

¹⁵Written Statement of Serbia, p. 44 (“The Advisory Opinion Will Help the United Nations and Member States in Their Subsequent Actions”).

¹⁶Written Statement of Serbia, para. 87. See also Written Statement of France, paras. 29 and 2.70-2.81.

employs to describe the objective to be achieved by the proceedings before the Court¹⁷; an answer by the Court to the question put to it would break with the neutral stance adopted by the United Nations with respect to the final status of Kosovo, with all the resulting risks for the conduct of missions by the authorities at work in Kosovo within the framework of Security Council resolution 1244 (1999).

3. The question put to the Court does not lend itself to a legal response from the perspective of international law

9. The question put to the Court — and the Court is bound to confine itself to the question as phrased, without the possibility of broadening its terms¹⁸ — is devoid of any legal substance or scope. As international law does not, apart from exceptions which no-one would claim applied in the present case, prohibit secessions as such, or *a fortiori* declarations of independence (see Section II below), the question which constitutes the subject-matter of the request for an advisory opinion is inherently bereft of any legal object or significance and thus does not, despite the misleading appearance of its wording, constitute a genuine legal question concerning genuine issues of international law¹⁹.

4. The opinion requested is destined to have no practical impact on Kosovo's current position

10. Whatever the meaning attributed to it, the question put before the Court is in itself devoid of any practical import. Indeed it is acknowledged, and rightly so, by all of the States which have taken part in the proceedings, beginning with Serbia itself, that the question of the existence of the State of Kosovo has not been put before the Court²⁰. The legality of the numerous decisions to recognize that State, in particular by a large number of European States among those most directly concerned with regional stability, is similarly not in question²¹. While certain States, not without contradiction, discuss Kosovo's independence and status as a State at length, in order to challenge it²², it is perfectly clear that that is not the object of the request submitted to the Court. General Assembly resolution 63/3, as its sponsor emphasized when it was adopted, "is amply clear" and "entirely non-controversial"²³: it concerns, as is recalled in its preamble, the "act" by which, on

¹⁷Written Statement of Serbia, paras. 91-94.

¹⁸The Court "is, in principle, bound by the terms of the questions formulated in the request" and can only, when the need really arises, interpret their terms in order to determine the meaning (see *Advisory Opinion of 20 July 1982, Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982*, pp. 349-350, paras. 47-48).

¹⁹See Written Statement of France, paras. 1.4-1.5.

²⁰Written Statement of Serbia, paras. 23 and 964.

²¹*Ibid.*, para. 22.

²²*Ibid.* paras. 964-985 ("Effectiveness Alone Is Not a Ground for Statehood"); see also the Written Statement of Cyprus, pp. 41-49, paras. 159-192 ("The unilateral declaration has not created a State"). Several Written Statements by States which have refused to recognize the independence of Kosovo focus essentially on the question of the legality of secession; see for example the Written Statements of Iran ("no derogation is permitted from [the principle of territorial integrity]. [...] States practice since 1945 shows very clearly the opposition of states to recognition or accepting unilateral secession outside the colonial context", p. 10, Conclusions), of China ("Secession is not recognized by international law and has always been opposed by the international community of States", p. 6) or of Russia ("outside the colonial context, international law allows for secession of a part of a State against the latter's will only as a matter of self-determination of peoples", Conclusions, p. 39, para. 4). See also the Written Statement of Argentina, in which it asserts the importance of the Court dismissing "the position of the 'irreversibility' of the situation emerging from the unilateral declaration of independence [...]"; para. 36.

²³A/63/PV.22 (8 October 2008), p. 2, (Serbia).

17 February 2008, “the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia”²⁴.

11. In the same way that the question does not concern independence itself or the numerous recognitions of that status that have been made²⁵, the Court’s answer to the only question put to it cannot have any effect on that independence or those recognitions. Even if the Court, should it accede to the request for an opinion, were to decide that the declaration of independence of Kosovo was unlawful, that would not in any way affect the recognition of the State of Kosovo by numerous States or its full and complete participation in several international organizations. Conversely, were the Court to conclude that the declaration of 17 February 2008 was not contrary to international law, nothing suggests that Serbia, or other States opposed to it, would recognize Kosovo’s independence, as indeed they are in no way legally bound to do²⁶. The Court’s opinion, whatever it may be, is in this respect devoid of any effect or useful purpose.

12. It is moreover completely pointless to imagine that use of the advisory procedure might make it possible to alter in any way the current political status of Kosovo. Such an opinion could not achieve what several years of negotiations have failed to obtain, whereas it could well endanger the only political solution which has proven viable following those negotiations and one which has not been criticized by any of the competent organs of the United Nations²⁷. Such an attitude is, furthermore, highly significant, especially when compared with that prevailing before the process aimed at determining Kosovo’s final status began in 2005. Prior to that, the Security Council and the persons acting in its name showed no hesitation in condemning any attempt at independence. The fact in itself that such condemnations were no longer reiterated after 2005 necessarily confirms not only that the independence option had not been ruled out for the final status of the territory, but that it had become an entirely viable solution. If not, such a sudden change in the position of the organs concerned would be inexplicable²⁸.

13. As France indicated in its Written Statement, it would be both a pointless and a counter-productive exercise at this point to try to establish any responsibility for the failure of the political negotiations held on the final status of Kosovo. The fact is — as has been objectively observed on a number of occasions — that those negotiations resulted in a deadlock considered by all concerned to have become completely impossible by the end of 2007 to break by consensus. It was also patently clear that maintaining the status quo was no longer tenable and would have endangered regional stability. In those conditions, as the negotiation option had been completely exhausted, the sole viable political alternative could only be independence, in the light, in particular, of recent relations between Serbia and Kosovo and the need to respect the will of the Kosovar people²⁹.

²⁴A/RES/63/3, third paragraph of the preamble.

²⁵To date, Kosovo has been recognized by 60 States. Further, 96 States voted in favour of the application by Kosovo to join the IMF and 95 in favour of its application to join the IBRD (see S/PV.6144, p. 10 (Kosovo)).

²⁶See the declaration of Mr. Jeremić before the Security Council, 17 June 2009: “Serbia will never, under any circumstances, implicitly or explicitly recognize the unilateral declaration of independence by the ethnic Albanian authorities of our southern province. On this issue, we will not yield, come what may. We will continue to defend our integrity in a non-confrontational manner, using all peaceful means at our disposal” (S/PV.6144, p. 6).

²⁷See Written Statement of France, paras. 2.70-2.81.

²⁸See in this respect the Written Statements of Austria, para. 41, the United States of America, pp. 24 and 85-86, Germany, p. 42, and Spain, paras. 43, iv) and v), 44 and 67-71 (to the contrary), and the Written Contribution of Kosovo, paras. 9.24-9.27.

²⁹See Written Statement of France, paras. 2.40-2.62.

14. Certain States, in their Written Statements, raised two objections in this respect.

15. First, the unilateral nature of the declaration of independence is alleged to have been contrary to the process established by the Security Council, which is said to have necessitated a negotiated settlement between the two parties concerned and a decision by the Security Council validating it³⁰. France has never denied that a consensual settlement would have been the better solution. The Contact Group itself, when talks on the final status of Kosovo opened, indicated that this option was a “priority” and the “best way forward” to settle the dispute³¹. But that did not amount to making a negotiated settlement the only possible outcome. An alternative solution had to be envisaged for the case where negotiations failed, which is what happened; and this cannot be disregarded without ignoring the facts.

16. Since resolution 1244 (1999) did not require that a consensual solution be arrived at at all costs³², as it merely stipulated that the process would be conducted “under the auspices” of the Security Council and UNMIK³³, and since it merely referred, by way of the Rambouillet Accords, to respect for the will of the people of Kosovo, it is clear that secession, tolerated by general international law, which neither encourages it nor forbids it, constituted a means of moving forward in the process in the event of a complete failure of negotiations. Aware of the deadlock which might arise in the negotiations, the Contact Group had moreover, as of September 2006, asserted that “neither party c[ould] unilaterally block the status process from advancing”, thus confirming unambiguously that the negotiated settlement scenario (in which each party would have a right of veto) was not the only conceivable option³⁴. The attitude adopted by the United Nations, and in particular the Security Council and the persons acting under its authority, following the declaration of independence bears this out once again beyond all possible dispute³⁵.

17. The second objection by those same States is made at a different level. According to them, as the Serbia of 2008 was no longer the Serbia of 1999, it would have been entirely conceivable simply to grant substantial autonomy to the Kosovar people³⁶. That is once again a political determination upon which it is clearly not for the Court to rule, especially as the negotiations did not indeed succeed in securing acceptance of the idea. France will confine itself to stating on this matter that the reasons for concern were far from all having been dispelled at the time when the people of Kosovo chose independence³⁷.

18. Whatever the political changes seen in Serbia since the fall of the Milosević régime, the trauma and scars of the past were (and still are) far from healed. The brutal repression — and international crimes accompanying it — to which the Kosovar population was subjected in

³⁰See Written Statements of: Cyprus, para. 98; Russia, paras. 59-64; Serbia, paras. 751-775; Spain, paras. 76-82; and Argentina, paras. 101-106.

³¹Written Statement of France, para. 2.45.

³²*Ibid.*, para. 2.34, last point.

³³See Written Statement of Serbia, para. 814.

³⁴See Written Statement of France, para. 2.62.

³⁵As recently emphasized by the Secretary-General’s Special Representative and Head of UNMIK, the neutral stance taken by the United Nations on the question of the status of Kosovo originates in particular in resolution 1244 (1999) itself. Thus “EULEX continues to operate throughout Kosovo under the overall authority of the United Nations and within the status-neutral framework of *resolution 1244 (1999)*” (Security Council meeting of 17 June 2009, S/PV.6144, p. 4 [emphasis added]); see also para. 8 above.

³⁶See Written Statements of Russia, paras. 46 *et seq.* and paras. 98-101, and of Serbia, para. 646.

³⁷See Written Statement of France, paras. 2.56-2.57.

1998-1999³⁸ could but prevent it from contemplating a future within the Serbian State, so deep did the psychological wounds go (and still do) and so well entrenched in minds was (and still is) the memory of the atrocities committed. There are crimes which cannot fade from the individual and collective memory³⁹.

19. The behaviour of the Serbian authorities which have replaced the Milosević régime has not, moreover, been reassuring as to their intention to make a clean break with the past⁴⁰. This is attested to in particular by the discriminatory policy maintained after 2000 and, more specifically, by not including the Kosovar people in the referendum on the adoption of the 2006 Constitution⁴¹.

20. Maintaining the status quo, in addition to creating major risks for the economy and hampering the development of Kosovo⁴², would also have aggravated an already unstable situation. Independence, on the other hand, was the only outcome capable of preserving regional stability. The international bodies directly engaged in Kosovo have repeatedly emphasized this in complete objectivity and impartiality. While administrating Kosovo free from Serbian interference made it possible to lay “the basis for a peaceful and normal life for all of the people of Kosovo”⁴³, “if its future status remain[ed] undefined there [wa]s a real risk that the progress achieved by the United Nations and the Provisional Institutions in Kosovo c[ould] begin to unravel”⁴⁴. Any “further prolongation of the future-status process put[] at risk the achievements of the United Nations in Kosovo since June of 1999”⁴⁵ and “there [wa]s a real risk of progress beginning to unravel and of instability in Kosovo and the region”⁴⁶. The Contact Group said the same thing in July 2006, when it recalled that “[t]he process must be brought to a close, not least to minimise the destabilizing political and economic effects of continuing uncertainty over Kosovo’s future status”⁴⁷.

21. Certainly, a consensual settlement would have been the ideal solution to resolve a situation which for too long had posed a threat to international peace and security. But given what had proven to be the absolute impossibility of arriving at a consensual settlement and given the risk which maintaining the status quo posed for peace and stability in the region, independence — which had not been condemned by the competent organs of the United Nations from either the legal or peace-keeping perspectives — emerged as the only political outcome in which the will of

³⁸*Ibid.*, paras. 11 *et seq.*

³⁹See Written Statement of Germany, p. 20: while it is true that “[t]he Serbia of today is not the Serbia of 1998/1999”, “there can be no doubt that the events of 1998/1999 have left an indelible mark on the collective memory of the Kosovo Albanians”.

⁴⁰The Court itself found in 2007 that Serbia had still not fulfilled its obligation to pursue the perpetrators of the acts of genocide committed in Bosnia and Herzegovina (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment of 26 February 2007, paras. 448-450).

⁴¹See Written Statements of Switzerland, para. 86, and of the United States of America, pp. 27-28, and the Written Contribution of Kosovo, end of para. 8.40, as well as Serbia’s unconvincing argument, para. 202 of its Written Statement.

⁴²Written Statement of the United Kingdom, para. 6.33.

⁴³Report of the Secretary-General on UNMIK, S/2007/395, 29 June 2007, para. 30: “In eight years of interim administration by the United Nations, Kosovo has made significant strides in the establishment and consolidation of democratic and accountable Provisional Institutions of Self-Government and in creating the foundations for a functioning economy. The Provisional Institutions have laid the basis for a peaceful and normal life for all of the people of Kosovo.”

⁴⁴*Ibid.*, para. 33.

⁴⁵Report of the Secretary-General on UNMIK, S/2007/582, 28 September 2007, para. 28.

⁴⁶*Ibid.*, para. 29.

⁴⁷Statement of the Contact Group of 24 July 2006. See the Written Statement of France, para. 2.46 and footnote 158.

the Kosovar people could be respected and peace maintained in the region. In that respect too, an opinion of the Court will be devoid of any practical value.

22. As international law does not govern declarations of independence and (therefore) leaves States an entirely discretionary power regarding State recognition (unless an obligation of non-recognition exists, and no political organ of the United Nations has laid down any such in the present case), ultimately the following conclusions must be drawn:

- first, it is impossible for the Court to play its judicial role, which would require it, in Serbia’s words, “to assess the compatibility of the unilateral declaration of independence with relevant principles and rules of international law”⁴⁸, when, precisely, there are no such principles and rules⁴⁹;
- second, any legal opinion, in whatever terms (if, *quod non*, it could be given), would serve no useful purpose since a finding of illegality would not prevent States from recognizing Kosovo any more than a finding of legality would oblige them to do so⁵⁰.

23. Examining whether or not the declaration of independence of Kosovo is in conformity with international law is thus a question devoid of any object. Yet, as the Court observed in its Opinion on the *Western Sahara*, its advisory function “is to give an opinion based on law, *once* it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose”⁵¹.

II. The declaration of independence was not contrary to international law in any respect

24. France has no doubt that if the Court were, in spite of everything, to exercise its advisory function in the present case, its answer could only be confined to stating that the declaration of independence was not contrary to international law. None of the States supporting the opposite conclusion (just ten of the 192 Member States of the United Nations entitled to submit a written statement) has succeeded in showing that there is any rule proscribing the act of declaring independence or any precedent in which the mere act of declaring independence or proclaiming the existence of a State has, in itself, been ruled to be contrary to international law. Neither analysis of the wording of resolution 1244 (1999) nor of general international law has provided them any support for their submissions.

25. There is hardly any need to return to that resolution to recall that, far from prohibiting independence and requiring that a consensual solution be reached at any cost, it merely asked the international civil presence to facilitate “a political process designed to determine Kosovo’s future

⁴⁸Written Statement of Serbia, para. 61.

⁴⁹Serbia explains that the exercise by the Court of its advisory jurisdiction on a question of law entails “the identification of the relevant principles and rules of international law, their interpretation and, finally, their application to the UDI” (*idem.*). Since international law is neutral on the question of the legality of secessions as such, it is clear that the Court cannot engage in that judicial exercise in the present case. If there were to exist a legal answer to the question put before the Court, it could only, at best, take up a single sentence: “Given the formulation of the question, there is a simple answer to the question posed, namely, that international law does not address the legality of declarations of independence *per se* and, accordingly, the Declaration of Independence by Kosovo is not incompatible with international law” (Written Statement of the United Kingdom, para. 0.24).

⁵⁰See Written Statement of the Czech Republic, p. 5; and that of France, paras. 1.7-1.18.

⁵¹*Western Sahara*, p. 37, para. 73 (emphasis added).

status”, wording characterized by a neutrality and flexibility which faithfully reflect the purely factual nature of the process of State formation in international society.

26. The only condition laid down by resolution 1244 (1999) was that of respect for the will of the Kosovar people⁵². In contrast, neither the consent of Serbia nor the adoption of a Security Council decision on the final status of Kosovo was required by the Council⁵³. This, moreover, explains why Serbia sought to modify the draft resolution which became resolution 1244 (1999) to write into it the principle that independence should be categorically ruled out⁵⁴ and why, having failed to achieve this, it interpreted resolution 1244, with a view to challenging it, as paving the way to the possible independence of Kosovo⁵⁵. It also explains why the various authorities overseeing the negotiations (particularly Mr. Ahtisaari and the Troika) were able to make independence one of the options for negotiation without the Security Council, the Secretary-General, his Special Representative to Kosovo or the Contact Group *ever* indicating that that option was prohibited by resolution 1244. The lack of any condemnation of the declaration of independence by the Security Council points to the same conclusion⁵⁶.

27. The arguments mustered to the contrary offer no basis for now reading into the resolution something which it did not say in 1999. Thus, the fact that, as things stood prior to resolution 1244 (1999), independence was not included among the options considered desirable by the Security Council and the international community⁵⁷ provides no support for the argument that independence was excluded in the situation which followed the serious crisis of 1999 and the adoption of that resolution. Similarly, resolution 1244 (1999) cannot be given a forced reading which goes so far as to confuse the principles which the Security Council intended to apply to the *interim* status of Kosovo with the solutions that its *final* status might bring: here again it is not possible to rely on the former in order to assess the latter, as these States do once more⁵⁸.

28. In not prohibiting the independence option, resolution 1244 (1999) in reality merely aligned itself with general international law, which does not prohibit secessions as such nor, consequently, the act of declaring independence. In this respect, Serbia itself acknowledges the principle of the neutrality of international law concerning secessions, as it frames the debate in

⁵²See Written Statement of France, paras. 2.28-2.39.

⁵³As moreover Spain acknowledges in its Written Statement: “[. . .] Resolution 1244 (1999) does not expressly mention the need for agreement” (p. 50, footnote 154). This silence is entirely intentional in the Rambouillet Accords and resolution 1244 (1999), which refers to them, as is demonstrated *a contrario* by an analysis of earlier drafts which expressly required the consent of Serbia (see the Written Statement of the United States of America, p. 17 and pp. 65-68, and the Written Contribution of Kosovo, paras. 9.13-9.14).

⁵⁴See Written Statement of Switzerland, paras. 49-50.

⁵⁵See Written Statement of France, para. 2.26, and the Written Contribution of Kosovo, para. 4.22.

⁵⁶See Written Statement of France, paras. 2.70 *et seq.* See also the Report of the Secretary-General of 17 March 2009, S/2009/149, para. 34. The European Union did not condemn the declaration of independence either (see for example the information provided in the Written Contribution of Kosovo, paras. 2.44-2.45).

⁵⁷See, for example, the Written Statements of Romania, paras. 26 *et seq.* and para. 41, of Slovakia, para. 22, of Russia, para. 44, of Serbia, paras. 728 *et seq.*, and of Spain, para. 51. The fact that a consensual solution, or one taking account of the territorial integrity of the Federal Republic of Yugoslavia of that time, was called for by numerous States, including France, as was noted by Serbia (para. 661), even when resolution 1244 was adopted and afterwards, plainly does not mean that that resolution barred Kosovo’s accession to independence.

⁵⁸See Written Statement of Serbia, for example paras. 697 *et seq.*, or that of Spain, paras. 35 *et seq.*

terms of a *gradual reduction* of that neutrality in contemporary international law⁵⁹. However, at present international law limits the obligation of non-recognition to situations not involving secession as such, and, moreover, there has never yet been any thought of including secession with them⁶⁰.

29. Several written statements, in contrast, very rightly point to the precedents, among others, of Slovenia, Croatia and Macedonia, which declared themselves independent at a time when the Yugoslav predecessor State still existed and did so, moreover, contrary, to the will of Serbia, *without* that ever having been perceived as a violation of international law or even as a matter governed by it⁶¹. Serbia itself acknowledges, not without inconsistency, that the consequences of the principle of territorial integrity are to be drawn in relation to the principle of the non-use of force and non-intervention, rather than the prohibition of secession as such⁶².

30. Finally, while in some situations the Security Council, for the purpose of maintaining international peace and security, has indeed enforced respect for territorial integrity on non-State entities and thereby prevented a secession, that cannot be sufficient in itself, as certain States argue⁶³, to demonstrate the existence of an “*erga omnes*”, “absolute” international rule safeguarding territorial sovereignty and applying “not only to neighbouring and other States, but also to those groups within the State in question that seek non-consensual secession”⁶⁴. The very fact that the Security Council did not lay down such a prohibition in resolution 1244 (1999) shows precisely that, on the contrary, it did not seek to extend the scope of the principle of territorial integrity beyond its ordinary meaning, that of a rule applying solely between States by virtue of all the major conventions and declarations —the Charter of the United Nations first and foremost — that have adopted that principle⁶⁵.

31. For want of any legal rule whatsoever prohibiting Kosovo’s declaration of independence *per se* — a situation which renders pointless the discussion of the circumstances which might justify a possible right to secede — and for all of the compelling reasons recalled above, the Court can only conclude in the present case that it is impossible to answer the request for an opinion which has been put to it. If, nonetheless, it were to consider that it could exercise its judicial

⁵⁹Written Statement of Serbia, para. 1019: “international law plays an *increasing* role in prohibiting the creation of a State [. . .]” (emphasis added); see to the same effect the Written Statement of Argentina, which claims to describe international law as it is applied “these days” or “today”, without indicating when international law changed in its orientation or which factor in particular prompted such a change (para. 129).

⁶⁰In its commentary on Article 41 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, the International Law Commission only addresses the cases where the territorial integrity of one State has been violated by the use of force by another State or where the right of peoples to self-determination has been violated (A/56/10, para. 77, Commentary on Article 41, paras. 6-10).

⁶¹See the treatment of those precedents by the United States of America in its Written Statement (pp. 52-55). See also the Written Contribution of Kosovo, paras. 8.28-8.29 and 8.35-8.36; the Written Statement of Austria, para. 24. On the neutrality of international law concerning secession, see also the Written Statement of Germany, pp. 27 *et seq.* and the Written Contribution of Kosovo, paras. 8.07 *et seq.* See also the precedent in the *Genocide (Bosnia and Herzegovina v. FRY)* case cited by Kosovo in para. 8.43 of its Written Contribution, in which the Court found that “the circumstances of [Bosnia and Herzegovina’s] accession to independence [we]re of little consequence” (*I.C.J. Reports 1996*, p. 611, para. 19).

⁶²Written Statement of Serbia, paras. 492-497.

⁶³See Written Statements of Romania, paras. 80, 97-98 and 108, of Serbia, paras. 440-476 and 501, and Iran, paras. 3.1-3.6.

⁶⁴Written Statement of Serbia, para. 476.

⁶⁵See Written Statement of France, para. 2.6. These instruments are discussed at length in the Written Statement of Serbia, paras. 477 *et seq.*

function, it would behove the Court to find a manifest lack of anything contrary to international law in the declaration of independence of Kosovo.

On behalf of the Minister for Foreign and European Affairs,

(Signed) Edwige BELLIARD,
Director for Legal Affairs.
