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Press Release

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Accordance with international law of the unilateral declaration of independence in respect of Kosovo

Advisory Opinion

The Court finds that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law

THE HAGUE, 22 July 2010. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, has today given its Advisory Opinion on the question of the Accordance with international law of the unilateral declaration of independence in respect of Kosovo (request for advisory opinion).

In this Opinion, the Court unanimously finds that it has jurisdiction to give the advisory opinion requested by the General Assembly of the United Nations and, by nine votes to five, decides to comply with that request.

The Court then responds to the request as follows:

“(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.”

Reasoning of the Court

At the end of its reasoning, which is summarized below, the Court concludes “that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework [adopted on behalf of UNMIK by the Special Representative of the Secretary-General]”, and that “[c]onsequently the adoption of that declaration did not violate any applicable rule of international law”.

The Advisory Opinion is divided into five parts: (I) jurisdiction and discretion; (II) scope and meaning of the question; (III) factual background; (IV) the question whether the declaration of independence is in accordance with international law; and (V) general conclusion.

I. JURISDICTION AND DISCRETION

The Court recalls that, when seised of a request for an advisory opinion, it must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it.

It thus first addresses the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. Referring in particular to Articles 10, 11, paragraph 2, and 12 of the Charter of the United Nations, the Court observes that the General Assembly “may discuss any questions or any matters within the scope of the . . . Charter or relating to the powers and functions of any organs provided for in the . . . Charter”, and that “the Charter has specifically provided the General Assembly with competence to discuss ‘any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations’ and . . . to make recommendations”. The Court further observes that the request for an advisory opinion does not contravene the provisions of Article 12, paragraph 1, of the Charter which prohibit the General Assembly from making any recommendation with regard to a dispute or situation in respect of which the Security Council is exercising the functions assigned to it by the Charter. The Court then notes that the question put by the General Assembly “certainly appears to be a legal question” within the meaning of Article 96 of the Charter and Article 65 of its Statute, and concludes from the foregoing that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly. It points out, in so doing, that the fact “that a question has political aspects does not suffice to deprive it of its character as a legal question” and also makes clear that “in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have”.

The Court then observes that the fact that it has jurisdiction “does not mean, however, that it is obliged to exercise it”, pointing out that the discretion accorded to it under Article 65 of the Statute whether or not to respond to a request for an advisory opinion exists “so as to protect the integrity of [its] judicial function and its nature as the principal judicial organ of the United Nations”.

After recalling that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused”, the Court notes that it “must satisfy itself as to the propriety of the exercise of its judicial function in the present case” and that it has therefore “given careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly”. First, the Court considers that the motives which lie behind the request for an advisory opinion “are not relevant to the . . . exercise of its discretion whether or not to respond”. Second, it notes that it cannot accept the argument put forward by some of those participating in the proceedings that resolution 63/3 (in which the General Assembly made its request to the Court for an advisory opinion) gave no indication “of the purpose for which the General Assembly needed the Court’s opinion and that there was nothing to indicate that the opinion would have any useful legal effect”. The Court recalls that it “has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions”. Third, it also cannot accept the suggestion of some of those participating in the proceedings that it should refuse to respond on the grounds that its opinion might lead to adverse political consequences.

The Court then considers an issue which it deems “important”, that is, whether it “should decline to answer the question which has been put to it on the ground that the request for the Court’s opinion has been made by the General Assembly rather than the Security Council”. It notes that “[w]hile the request . . . concerns one aspect of a situation which the Security Council

has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question". It recalls that "the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly". Further, it adds that "the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question". It observes in this respect that, while the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, "has also frequently been required to consider the interpretation and legal effects of such decisions", and that it has already done so both in the exercise of its advisory jurisdiction and in the exercise of its contentious jurisdiction. The Court therefore finds that there is "nothing incompatible with the integrity of [its] judicial function" in answering the question put by the General Assembly.

It points out that the question is, rather, whether it should decline to respond to the request from the General Assembly unless it is asked to do so by the Security Council, the latter being, as the Court recalls, both the organ which adopted resolution 1244 and the organ which is responsible for interpreting and applying that resolution. The Court observes that "[w]here, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly".

The Court accordingly concludes that "there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the . . . request" which is before it.

II. SCOPE AND MEANING OF THE QUESTION

The Court notes that the General Assembly has asked it whether the declaration of independence of Kosovo adopted on 17 February 2008 was "in accordance with" international law: the answer to that question therefore turns on whether or not the applicable international law prohibited that declaration of independence. The Court adds that, if it concludes that international law did prohibit the said declaration, then it should answer the question put by saying that the declaration of independence was not in accordance with international law. The Court observes that the task which it is called upon to perform is therefore to determine whether or not the declaration in question was adopted in violation of international law. It points out that it "is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it".

III. FACTUAL BACKGROUND

The Court continues its reasoning by indicating that the declaration of independence of Kosovo adopted on 17 February 2008 "must be considered within the factual context which led to its adoption". It briefly describes the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo (UNMIK). It then gives a succinct account of the developments relating to the so-called "final status process" in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

In this fourth part, the Court examines the substance of the request submitted by the General Assembly. It recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with “international law”.

The Court first turns its attention to certain questions concerning the **lawfulness of declarations of independence under general international law**, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. In particular, it notes that during the second half of the twentieth century, “the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation” and that a “great many new States have come into existence as a result of the exercise of this right”. The Court observes that there were, however, also instances of declarations of independence outside this context and that “[t]he practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”.

The Court states that several participants in the proceedings have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. It “recalls that [this] principle . . . is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4”, under the terms of which “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”.

The Court adds that in General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”, which reflects customary international law (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. The Court points out that, in the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV). Hence the Court considers that “the scope of the principle of territorial integrity is confined to the sphere of relations between States”.

After recalling that several participants have invoked resolutions of the Security Council condemning particular declarations of independence (see, inter alia, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska), the Court “notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)”. “In the context of Kosovo”, the Court continues, “the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.”

Turning to the arguments put forward by a number of participants concerning the extent of the right of self-determination and the existence of any right of “remedial secession”, the Court considers that the debates on these points “concern the right to separate from a State”. The Court recalls that “as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly”. It notes that, to answer the question posed, it need only “determine whether the declaration of independence violated either general international law or the lex specialis created by Security Council resolution 1244 (1999)”.

The Court concludes that “general international law contains no applicable prohibition of declarations of independence” and accordingly that the declaration of independence of 17 February 2008 did not violate general international law.

The Court then examines the **legal relevance of Security Council resolution 1244**, adopted on 10 June 1999, in order to determine whether the resolution creates special rules, and therefore ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

The Court first notes that resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court observes that “none of the participants has questioned the fact that [this] resolution . . . , which specifically deals with the situation in Kosovo, is part of the law relevant in the . . . situation [under consideration]”.

The Court then addresses the UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework for Provisional Self-Government and which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. It notes that these regulations are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999) and thus ultimately from the United Nations Charter. It goes on to state that “[t]he Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law” and that “[i]n that sense it therefore possesses an international legal character”.

The Court further adds that at the same time, “the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law”; the “Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase”. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law, the Court continues, observing “[i]n particular, [that] the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General”.

The Court notes that “neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008”. It concludes from the foregoing that “Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly”.

After considering the **interpretation of resolution 1244 (1999)** itself, the Court concludes that “the object and purpose of [the] resolution . . . was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis”.

The Court then turns to the question whether resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary for the Court to determine precisely who issued that declaration.

In the part of its Advisory Opinion devoted to the **identity of the authors of the declaration of independence**, the Court seeks to establish whether the declaration of independence of 17 February 2008 was an act of the “Assembly of Kosovo”, one of the Provisional Institutions of Self-Government, established under the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity. On this point, the Court arrives at the conclusion that “the authors of the declaration of independence . . . did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”.

The Court then turns to the question, debated in the proceedings, whether **the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999)**. After outlining the arguments submitted by the participants in the proceedings on this point, the Court undertakes a careful reading of resolution 1244 (1999) in order to determine whether that text prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia.

It first points out that the resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement. In this regard, the Court notes that contemporaneous practice of the Security Council shows that “in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution”. The Court notes that “under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo”. It finds that resolution 1244 (1999) “thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo”.

Turning to the **question of the addressees of Security Council resolution 1244 (1999)**, the Court recalls that, when interpreting Security Council resolutions, it must establish, “on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations”. It recalls that “it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations”, more specifically, in this case, on the Kosovo Albanian leadership, but points out that such reference to that leadership or other actors, notwithstanding the somewhat general reference to “all concerned” (para. 14), is missing from the text of Security Council resolution 1244 (1999). The Court therefore considers that it cannot accept the argument that resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence. It adds that “nor can such a prohibition be derived

from the language of the resolution understood in its context and considering its object and purpose”, and that “[t]he language of . . . resolution 1244 (1999) is at best ambiguous” on the question of whether the resolution creates such a prohibition. The Court notes that the object and purpose of the resolution “is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues”.

While the text of paragraph 11 (c) of resolution 1244 (1999) explains that the “main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement” (emphasis added), the Court nevertheless states that the phrase “political settlement”, often cited in the proceedings, “does not modify [its] conclusion” that resolution 1244 (1999) does not contain a prohibition, binding on the authors of the declaration of independence, against declaring independence. The Court explains that this reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors; the Court adds that, as the diverging views presented to it on this matter illustrate, the term “political settlement” is subject to various interpretations. The Court therefore concludes that this part of resolution 1244 (1999) “cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence”. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia, and that “[h]ence, the declaration of independence did not violate Security Council resolution 1244 (1999)”.

Finally, on the **question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework** established under the auspices of UNMIK, as argued by a number of States which participated in the proceedings, the Court recalls that it has already held, earlier in its Advisory Opinion, “that [this] declaration of independence . . . was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated”. Accordingly, the Court states that “the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government”, and finds that “the declaration of independence did not violate the Constitutional Framework”.

V. GENERAL CONCLUSION

To bring its reasoning to a close, the Court summarizes its conclusions as follows:

“The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.”

Composition of the Court

The Court was composed as follows:

President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Registrar Couvreur.

Vice-President Tomka appends a declaration to the Advisory Opinion of the Court; Judge Koroma appends a dissenting opinion to the Advisory Opinion of the Court; Judge Simma appends a declaration to the Advisory Opinion of the Court; Judges Keith and Sepúlveda-Amor append separate opinions to the Advisory Opinion of the Court; Judges Bennouna and Skotnikov append dissenting opinions to the Advisory Opinion of the Court; Judges Cançado Trindade and Yusuf append separate opinions to the Advisory Opinion of the Court.

A summary of the Advisory Opinion is contained in the document “Summary No. 2010/2”, to which summaries of the opinions and declarations appended to the Advisory Opinion are attached. This press release, the summary and the full text of the Advisory Opinion (including the opinions and declarations of the judges) can also be found on the Court’s website (www.icj-cij.org) under the heading “Cases” (click on “Advisory Proceedings”). Photographs and audiovisual files will be made available to the media in the early evening of 22 July 2010 by the Court’s Information Department (consult the “Press Room” section).

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