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

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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

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[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.

[59]I.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 detail[60], 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].

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[60]See II, §1, below.

[61]As 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 competence*" (*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 object[67].

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,

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[63] I.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.

[65] Judgment 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 judgment[69].

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 effective[70], 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

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[68] I.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.

[70] See para. 1.10 above.

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

[72] Declaration 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.

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 posed[121]. 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.

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[121]See para. 1.14 above.

[122]Opinion 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 note[123]. "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 territory[128], 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 with[130] the

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[123]See Alain Pellet, "Le droit international à l'aube du XXIème siècle (La société international 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.

[124]Oppenheim'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).

[125]Alain 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.

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

[128]See 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".

[129]Emphasis added.

[130]In 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 movement[132]; 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 its owes its existence to the illegal use of armed force, particularly if accompanied by help from abroad[133], the five jurists conclude that the existing rules of international law do not made 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 peoples[134].

2.8. In other words, while 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 been 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.

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

[132]See para. 2.13 below.

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

[134]Thomas 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 afferents à l'accession du Québec à la souveraினté, *Exposés et etudes*, Vol. I, *Les attributs d'un Québec souverain*, 1992, p. 383, pp. 428-430.