DISSENTING OPINION OF JUDGE BENNOUNA

[Translation]

Propriety of the Court giving an advisory opinion — Respect for the integrity of the Court's judicial function — Frivolous requests for advisory opinions — Substitution of the Court for the Security Council in exercising its political responsibilities — Scope and meaning of the question put to the Court — Accordance with international law of the declaration of independence adopted in the context of a territory under United Nations administration — Identity of the authors of the unilateral declaration of independence — Consequences of the stalemate in the Security Council — Interpretation of "silence" in international law — Lex specialis *and general international law — Constitutional Framework established by UNMIK.*

1. Before turning to the reasons which have prevented me from concurring with the Opinion of the Court, I should first like to consider the propriety of the Court embarking on an exercise that is so hazardous for it, as the principal judicial organ of the United Nations, by responding to the request for an advisory opinion submitted to it by the General Assembly in resolution 63/3 of 8 October 2008.

2. That resolution was adopted in circumstances that are without precedent in the history of the United Nations. It is the first time that the General Assembly has sought an advisory opinion on a question which was not, as such, on its agenda and which it had until then dealt with essentially in terms of authorizing the expenditure of the United Nations Mission in Kosovo (UNMIK). It is recognized that, in substance, the whole of this question had fallen under the exclusive jurisdiction of the Security Council for at least ten years or so, in particular since the latter decided to place the territory of Kosovo under international administration (resolution 1244 of 10 June 1999) — with the exception, however, of General Assembly resolution 54/183 on the Situation of Human Rights in Kosovo, of 17 December 1999 (Advisory Opinion, para. 38).

3. I believe that if it had declined to respond to this request, the Court could have put a stop to any "frivolous" requests which political organs might be tempted to submit to it in future, and indeed thereby protected the integrity of its judicial function. What is at issue above all in this case is protecting the Court itself against any attempts to exploit it in a political debate, rather than protecting the balance between the principal political organs of the United Nations (the General Assembly and Security Council), a matter which the Court discusses at some length (*ibid.*, paras. 37-48), or indeed the question of the self-determination and independence of Kosovo, which has rightly been disregarded as lying

beyond the scope of the request for an opinion (Advisory Opinion, para. 83).

1. The Propriety of the Court Giving an Advisory Opinion

4. It should be recalled that, when the Court receives a request for an advisory opinion, pursuant to Article 65 of its Statute, it is not obliged to comply with the request if it considers that giving a reply to the question posed would be "incompatible with the Court's judicial character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33).

5. It is true that the Court has recalled on several occasions in its jurisprudence that it has discretion to consider the propriety of giving an advisory opinion (since the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*), but it has hitherto never exercised that authority, to the extent that scholarly opinion has begun to cast doubt on whether it actually exists. The Court is reaching the point of making the propriety of giving its opinion dependent on the requesting organ itself, thereby depriving itself of its own discretionary power (Robert Kolb, "De la prétendue discrétion de la Cour internationale de Justice de refuser de donner un avis consultatif", *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, 2001, pp. 609-627). The Court has shown itself to be very reluctant to decline to participate in United Nations action when asked to do so by one of the organs of the United Nations. It has thus strictly circumscribed its discretion, stipulating as a condition for exercising it the existence of "compelling reasons" for not giving an opinion, yet without making clear what it means by that.

6. However, the question of the compatibility of a request for an opinion with the functions of the Court and its judicial character still stands, even if no case of incompatibility has yet been recorded.

7. In the Kosovo case, the Court has been confronted with a situation that has never occurred before, since it has ultimately been asked to set itself up as a political decision-maker, in the place of the Security Council. In other words, an attempt has been made, through this request for an advisory opinion, to have it take on the functions of a political organ of the United Nations, the Security Council, which the latter has not been able to carry out.

8. The Court has been asked to give its opinion on whether the unilateral declaration of independence (UDI) of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law; however, the reply to this question cannot be restricted to an analysis of the declaration as a formal act — it is necessary for the Court to consider its content and scope, as well as the circumstances in which it was adopted. In this respect, the Court may not

confine itself to general reflections according to which it cannot substitute its own assessment for that of the requesting organ or is unable to form a view as to whether its opinion would be likely to have an adverse effect (Advisory Opinion, para. 35).

9. As will be seen below, the declaration was adopted by the Provisional Institutions of Self-Government of Kosovo established by resolution 1244 of the Security Council. It follows the mission which the Secretary-General of the United Nations, Mr. Kofi Annan, gave to his Special Envoy, Mr. Martti Ahtisaari, in November 2005, which was to lead the political process aimed at determining the future status of Kosovo, in the context of resolution 1244, by means of a negotiated settlement.

10. Mr. Martti Ahtisaari was thus called upon to act as a mediator between Serbia and the representatives of the institutions of Kosovo (the Assembly) so that they reach an agreement on the future status of the territory; such an agreement would then have to be endorsed by the Security Council.

11. In his final report of 26 March 2007 on Kosovo's future status, transmitted to the Security Council by Secretary-General Ban Ki-moon and with his support, Mr. Ahtisaari took the view that "[i]ndependence is the only option for a politically stable and economically viable Kosovo", and proposed that such independence should be supervised and supported for an initial period by international civilian and military presences. Mr. Ahtisaari concluded by urging the Security Council to endorse his proposal (Report transmitted to the President of the Security Council by letter from the Secretary-General, 26 March 2007, S/2007/168).

12. In the end, it was the Assembly of Kosovo that did so, thereby substituting itself for the Security Council. Serbia then asked the Court, through the General Assembly of the United Nations, to pronounce on the declaration of independence of 17 February 2008, whereby that substitution occurred, in order to establish whether it is in accordance with international law. It is therefore clear that, by giving the advisory opinion which has been requested of it, the Court is assessing, albeit indirectly, the validity of the conclusions of the Ahtisaari Report, a role which belongs solely to the Security Council, a political organ on which the United Nations Charter confers primary responsibility for the maintenance of international peace and security. That organ, by adopting resolution 1244 on the basis of Chapter VII of the Charter, established an interim administration in Kosovo and has initiated, after some ten years, a process for bringing it to an end, at the same time determining the final status of the territory.

13. How, in these circumstances, can the Court pronounce on the accordance with international law of Kosovo's declaration of independence, when such an assessment is a matter for the Security Council alone and that organ has not sought its opinion on the question?

14. That is why the Court, in this case, should have exercised its dis-

cretionary power and declined to give its opinion on a question which is incompatible with its status as a judicial organ. Beyond the question of the accordance with international law of the declaration of independence, what is at issue here is the exercise of the powers of a political organ of the United Nations, the Security Council. As for the Ahtisaari Report, as long as the Security Council makes no finding in this respect, it commits only its author.

15. It is essential for the Court to ensure, in performing its advisory function, that it is not exploited in favour of one specifically political strategy or another, and, in this case in particular, not enlisted either in the campaign to gather as many recognitions as possible of Kosovo's independence by other States, or in the one to keep these to a minimum; whereas the Security Council, which is primarily responsible for pronouncing on the option of independence, has not done so.

16. I am aware of the fact that the Court has a duty to contribute to United Nations action in legal terms, but here, the decision on the future status of Kosovo is not a matter for the General Assembly, which has submitted the request for an opinion to the Court, but for the Security Council. In this case, the Court cannot pronounce on the legality of the declaration of independence without interfering in the political process of maintaining peace established by the Security Council some ten years ago, which that organ has been unable to bring to a conclusion.

17. A response from the Court would have been conceivable if the substantive debate on Kosovo had moved from the Security Council to the General Assembly, for example through the convening of an emergency special session of the General Assembly under the terms of resolution 377 A (V), entitled "Uniting for peace", as was the case with the request for an advisory opinion by the General Assembly concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 145-146, paras. 18-19). In that case, however, the General Assembly had been continuously involved in the debate on the issue of the Middle East and the Palestinian question since the partition plan of 1947, and these were included year after year on its agenda. In contrast, the Kosovo case has been solely the responsibility of the Security Council since the armed intervention by NATO forces in Serbia in 1999.

18. Consequently, while Serbia initiated the inclusion on the General Assembly's agenda of a request for an advisory opinion of the Court, that was not in order to allow the Court to pronounce on certain legal aspects of the debate which the General Assembly had started on the Kosovo case, but because it saw in this the only opportunity still available to it to challenge the unilateral declaration of independence of 17 February 2008. What is involved here is not the "motives of individual States which sponsor . . . a resolution requesting an advisory opinion", which "are not relevant to the Court's exercise of its discretion" (Advisory Opinion, para. 33), but rather an assessment of the situation in

Kosovo and of the handling of it, by the United Nations, at the point when the General Assembly adopted the request for an opinion on 8 October 2008.

19. Moreover, there was no real debate on the question of the status of Kosovo when the General Assembly adopted resolution 63/3 requesting an advisory opinion of the Court (General Assembly, Sixty-third session, A/63/PV.22, 8 October 2008).

20. It may be questioned, therefore, whether the request for an advisory opinion adopted by the General Assembly (by 77 votes to six, with 74 abstentions) is compatible with the Court's functions as a judicial organ, as defined by the Charter of the United Nations and by the Statute of the Court.

21. Furthermore, whatever the Court's response to the question put by the General Assembly, it will not in any way assist that political organ, which cannot, in the light of the opinion, either modify Security Council resolution 1244 or interpret it accordingly, since that task falls to the organ which adopted it. It is not enough to say that only the Assembly can appreciate the reasons which have led it to request an advisory opinion (Advisory Opinion, para. 34), since that would mean the Court abandoning outright the exercise of its discretion as to the propriety of giving such an opinion. All the protagonists in the Kosovo case have stated in advance, in particular before the Court, that the opinion, whatever it may be, will have no impact on their position in relation to the declaration of independence. Therefore, the advisory opinion can only be used as an argument in the political debate taking place between the supporters of recognizing Kosovo's independence and those who are against it.

22. By becoming enlisted in this way, the Court has everything to lose in this political contest, without contributing in any real way either to reducing the tensions caused by the unilateral declaration of independence or to clarifying the functions and responsibility of the United Nations in respect of a territory placed under its administration.

23. In addition, since the declaration of independence of 17 February 2008, the fait accompli of the creation of Kosovo as an independent entity has been reflected on the ground, with the increasing *de facto* marginalization of the United Nations presence and its administration. Such a situation makes the propriety of responding to the question posed by the General Assembly yet more dubious and problematic, while the United Nations has given the impression of adapting to the new state of affairs (though how could it do otherwise?).

24. The Court itself has to make sure the integrity of its judicial function is respected, in contentious as well as in advisory matters, as it made very clear in its Judgment of 2 December 1963 in the case concerning *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections*:

> "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. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved. This Court, like the Permanent Court of International Justice, has always been guided by the principle which the latter stated in the 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 their activity as a Court.' (*P.C.I.J., Series B, No. 5*, p. 29.)" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 30.)

25. While the Court cannot substitute itself for the Security Council in exercising its responsibilities, nor can it stand legal guarantor for a policy of fait accompli based simply on who can gain the upper hand. Its duty is to preserve its role, which is to state the law, clearly and independently. That is how it will safeguard its credibility in performing its functions, for the benefit of the international community.

26. Those are the reasons which led me to vote against the Court's decision to give an advisory opinion in this case. Having said that, the Court's response to the request of the General Assembly did not strike me as convincing, and I shall now explain why.

2. The Scope and Meaning of the Question Posed

27. This second aspect of the opinion is of course linked with the first. Whereas the Court declines to consider either the motivation of the General Assembly or the aims it was pursuing by means of its request for an opinion, it has nonetheless deemed itself authorized to modify the wording of the request, to the point of completely altering its meaning and scope.

28. The Court relies on the fact that neither the agenda item under which resolution 63/3 was debated, nor the title of the resolution specified the identity of the authors of the unilateral declaration of independence, and that the question of their identity was not raised during the debate on the draft resolution. The Court then concludes that it is "free to . . . decide for itself whether that declaration was promulgated by the Provi-

sional Institutions of Self-Government or some other entity" (Advisory Opinion, para. 54).

29. However, the General Assembly's question could not be more clear, and there is nothing in the debate which preceded the adoption of resolution 63/3 of 8 October 2008 to suggest that the General Assembly's only concern was the accordance with international law of the declaration of independence, regardless of who the authors were. Does the fact that the participants in the debate on the draft resolution (A/63/PV.22) did not raise the question of the identity of the authors of the declaration imply that it is not a relevant consideration for the requesting organ, or is it rather precisely because the question is such an obvious one for all the United Nations Member States that they consequently did not consider it necessary to discuss or contest it? As for the difference noted by the Court between the title of the agenda item, the title of the resolution, and the question submitted to the Court, it is hard to see any significance in this since what matters for the Court is the content of the question put by the General Assembly.

30. This question therefore does not need to be interpreted in any way. And the Court acknowledges this: "the question posed by the General Assembly is clearly formulated. The question is narrow and specific." (Advisory Opinion, para. 51.) The General Assembly did not request the Court to give its opinion on just any declaration of independence, but on the one adopted on 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo, which were established with specific competences by the United Nations. On 2 October 2008, however, before the adoption of resolution 63/3, the representative of the United Kingdom addressed a note of issues to the President of the General Assembly in which he indicated that:

> "It would be useful to know whether Serbia is seeking to focus on a narrower question about the competence of the Provisional Institutions of Self-Government of Kosovo, and, if so, precisely how that question relates to Kosovo's status at the present time." (A/63/461 of 2 October 2008.)

31. The answer to that question has been given by Serbia and by the General Assembly. It is indeed a matter of assessing an act adopted by the Provisional Institutions of Self-Government of Kosovo, and not just any act emanating from a hundred or so persons who supposedly declared themselves to be representing the people.

32. At that point in time, the only institution recognized by the United Nations as representing the people of Kosovo was the elected Assembly of the Provisional Institutions of Self-Government. Even supposing that the Court comes to the conclusion that the declaration of independence was not adopted by the Assembly of the Provisional Institutions of Self-Government of Kosovo, acting as such, contrary to the assertion of the General Assembly of the United Nations, should it not then exercise its

discretionary power and decline to respond to a question that would no longer have any content or scope? Ultimately, the General Assembly does not expect the Court to provide its legal opinion on a question which it has not put to it, i.e., a declaration issued by a hundred or so persons, unconnected with the United Nations.

33. The Court has in the past extended the question posed in order to reply to it as fully as possible (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 88-89, para. 35). It took the same approach in the Advisory Opinion on *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (*I.C.J. Reports 1962*, pp. 156-157), in which it set out to "examine Article 17 in itself and in its relation to the rest of the Charter"; likewise, the Court was obliged to clarify the question posed when this appeared to be "infelicitously expressed and vague" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46). In these instances, however, the Court remained within the bounds of its judicial functions in taking account of all the applicable law or interpreting a confused or imprecise text.

34. Never, though, has the Court amended the question posed in a manner contrary to its object and purpose, which in this case are to determine whether the declaration of independence of 17 February 2008 did or did not fall within the competence of the Provisional Institutions of Self-Government of Kosovo, as indicated by the United Kingdom representative in his above-mentioned note of 2 October 2008 to the President of the General Assembly.

35. If the Court were able to employ discretion to such an extent, by replying in the end to a question which it has itself adjusted beforehand in order to make it fit a certain mould, then it would seriously prejudice the sense of judicial security that ought to prevail among the States and organs of the United Nations applying to the Court.

3. Accordance with International Law of the Unilateral Declaration of Independence

36. The General Assembly made a point of characterizing the declaration of independence as unilateral to make it clear that it issued from only one of the parties (the Assembly of the Provisional Institutions of Self-Government of Kosovo) involved in the political process, based on Security Council resolution 1244 of 10 June 1999, for the determination of Kosovo's final status.

37. The Court was requested by the General Assembly to give its opinion on the accordance of the declaration with international law. In rendering its opinion, the Court should first of all have ascertained the international law applicable in this area.

38. But, while the Court does describe the legal régime established by the Security Council through resolution 1244 and regulations adopted by the Secretary-General's Special Representative and UNMIK (Advisory Opinion, paras. 58-63), it fails first to identify the applicable rules of general international law and to explain how it will go about determining whether the unilateral declaration is in accordance with these two sets of standards. Ordinarily, the Court should first look into the applicable *lex specialis* (that is to say the law of the United Nations) before considering whether the declaration is in accordance with general international law. As observed by the Chairman of the International Law Commission's Study Group on the Fragmentation of International Law: "[P]reference was often given to a special standard because it not only best reflects the requirements of the context, but because it best reflected the intent of those who were to be bound by it." (Report of the International Law Commission, 2004, A/59/10, p. 286.)

39. The Court has chosen instead to examine "the lawfulness of declarations of independence under general international law" (Advisory Opinion, para. 78). The General Assembly did not however ask the Court to opine in the abstract on declarations of independence generally but rather on a specific declaration adopted in a particular context — that of a territory which the Council has placed under United Nations administration — and this at a time when Security Council resolution 1244 was in force, and it still is. It would moreover make no sense to assess the accordance with international law of a declaration of independence without regard to who the author(s) are or to the background against which it was adopted. Likewise, the Court's conclusion in this respect is itself meaningless:

> "the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law." (*Ibid.*, para. 84.)

40. This is at best a sophism, in other words reasoning that is logical in appearance alone, because it proceeds from the proposition that what is valid for the whole is valid for the part. Since the principles of general international law, i.e., territorial integrity and self-determination, call here for analysis in the context of a territory under United Nations administration, the Court could not announce its conclusion before examining the law governing the territory as it relates to the declaration of independence.

41. It is only in a second stage that the Court reaches the conclusion that: "Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion" (*ibid.*, para. 93).

42. While resolution 1244 was indeed concerned with setting up an interim framework of self-government for Kosovo, as the Court notes, I do not see anything to justify the assertion the Court then makes: "at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution" (Advisory Opinion, para. 104).

43. It was simply a matter of UNMIK facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords. That political process is what the Special Envoy, Mr. Ahtisaari, was asked by the Security Council to lead through negotiations between Serbia and the elected representatives of Kosovo (the Assembly); as the two parties were unable to reach agreement, Mr. Ahtisaari proposed a settlement plan to the Council, but the Council never approved it.

44. The facts that the authors of the Declaration, members of the Assembly of the Provisional Institutions of Self-Government of Kosovo, cited the breakdown of negotiations and that they did not intend to act within the framework of the interim régime of self-government (*ibid.*, para. 105) do not by themselves change the legal nature of an act adopted by the Assembly of the Provisional Institutions of Self-Government of Kosovo. In law, it is not merely because an institution has adopted an act exceeding its powers *(ultra vires)* that the legal bond between the institution and the act is broken. In such a case, the institution must be considered to be in breach of the legal framework that justifies and legitimizes it.

45. Similarly, it is not because the Assembly trespassed on the powers of the Special Representative (*ibid.*, para. 106) by involving itself in matters of Kosovo's external relations that it must be considered as acting in a different capacity or as an entity no longer related to the Provisional Institutions of Self-Government of Kosovo. Here as well, the Assembly simply committed an act which is illegal under international law.

46. The Court's reasoning, aimed at dispelling any inkling of the declaration's illegality under the law of the United Nations, consisted of severing it from the institution (the Assembly) that was created within this framework:

> "the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government . . . but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (*ibid.*, para. 109).

To reach this conclusion, the Court relies upon the language used and the procedure employed (*ibid.*, para. 107). Thus it was enough for the authors of the declaration to change the appearance of the text, and to hold themselves out as "the democratically-elected leaders of [the] people" in order for them to cease to be bound by the Constitutional Framework

for Kosovo, which states that "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". If such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law.

47. With a view to shedding light on this aspect of the question, during the oral proceedings I asked participants generally, and the authors of the declaration of independence specifically (CR 2009/33, p. 24), whether the question of adopting such a declaration had been raised in any form during the campaign for election to the Assembly of the Provisional Institutions in November 2007. A response in the negative was received both from the authors of the declaration of independence and from Serbia (replies by the authors of the declaration of independence and by the Republic of Serbia, dated 22 December 2009). If the members of the Assembly, who had been elected on 17 November 2007, had wished to express the "will of [their] people" in a declaration made on 17 February 2008, they should at least have told their electors so.

48. It is very significant that when he reported to the Security Council at the meeting held on 18 February 2008 (S/PV.5839), the day after the adoption of the declaration of independence of Kosovo dated 17 February 2008, the Secretary-General of the United Nations did so as follows: "Yesterday, my Special Representative for Kosovo informed me that the Assembly of Kosovo's Provisional Institutions of Self-Government held a session during which it adopted a declaration of independence, which declares Kosovo an independent and sovereign State."

49. On the other hand, in his report of 28 March 2008 to the Security Council on the United Nations Interim Administration Mission in Kosovo (S/2008/211) the Secretary-General added, after noting that the electoral process in Kosovo had concluded on 19 December 2007 and that the members of the Assembly of Kosovo had taken their oath on 4 January 2008: "On 17 February, the Assembly of Kosovo held a session during which it adopted a 'declaration of independence', declaring Kosovo an independent and sovereign State." I would infer that the Secretary-General as well as his special representative were also relying on the address by the Prime Minister of Kosovo on 17 February 2008, when he spoke before the extraordinary meeting of the Assembly of Kosovo:

> "Today, the President of Kosovo and myself, as the Prime Minister of Kosovo, have officially requested from the President of the Assembly, Mr. Krasniqi; to call for a special session with two agenda items,
>
> This invitation for a special session is extended in accordance with the Kosovo Constitutional Framework, whereby we present two items on the agenda:
>
> 1. Declaration of independence for Kosovo, and

2. Presentation of Kosovo State symbols." (Written Contribution of the Authors of the Unilateral Declaration of Independence, 17 April 2009, Ann. 2.)

50. Thus, there was no doubt in the minds of the Secretary-General and his Special Representative in Kosovo that the declaration was in fact the work of the recently elected Assembly of the Provisional Institutions of Self-Government of Kosovo.

51. Of course, the serious problem the declaration raised in respect of the United Nations Mission and the mandate it had been given by the Security Council did not escape the Secretary-General:

> "I immediately drew this development to the attention of the Security Council, so that it could consider the matter. In doing so, I reaffirmed that, pending guidance from the Security Council, the United Nations would continue to operate on the understanding that resolution 1244 (1999) remains in force and constitutes the legal framework for the mandate of UNMIK, and that UNMIK would continue to implement its mandate in the light of the evolving circumstances." (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211 of 28 March 2008.)

52. It must also be kept in mind that when, in its resolution on 7 November 2002, the Assembly of Kosovo had previously asserted the right to determine Kosovo's future status, the Special Representative of the United Nations Secretary-General stated on the same day:

> "Kosovo is under the authority of UN Security Council resolution 1244 (1999). Neither Belgrade nor Pristina can prejudge the future status of Kosovo. Its future status is open and will be decided by the UN Security Council. Any unilateral statement in whatever form which is not endorsed by the Security Council has no legal effect on the future status of Kosovo."

53. Accordingly, no unilateral declaration affecting Kosovo's future status, whatever the form of the declaration or the intentions of its authors, has any legal validity until it has been endorsed by the Security Council. Contrary to what the Court implies, it is not enough for the authors simply to step beyond the bounds of the law to cease being subject to it.

54. The Court believes the inaction of the Security Council, the Secretary-General and his Special Representative, in response to the declaration of independence, to be confirmation that the declaration was not the work of the Assembly of Kosovo, and it contrasts this inertia with the actions taken between 2002 and 2005, when

> "the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the ground that

> they were deemed to be 'beyond the scope of [the Assembly's] competencies' (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo" (Advisory Opinion, para. 108).

55. However, the Security Council was prevented, by a lack of agreement among its permanent members, from taking a decision on the Kosovo question after receiving the Ahtisaari Report in March 2007. And, as is often the case within the United Nations, this deadlock in the Council had a reverberating effect on the Secretary-General, charged with implementing its decisions, and his Special Representative.

56. A stalemate in the Security Council does not release either the parties to a dispute from their obligations or by consequence the members of the Assembly of Kosovo from their duty to respect the Constitutional Framework and resolution 1244. Were that the case, the credibility of the collective security system established by the United Nations Charter would be undermined. This would, in fact, leave the parties to a dispute to face off against each other, with each being free to implement its own position unilaterally. And in theory the other party, Serbia, could have relied on the deadlock to claim that it was justified in exercising full and effective sovereignty over Kosovo in defence of the integrity of its territory.

57. In my view, stalemate within the Security Council at a particular point cannot justify unilateral acts performed, or faits accomplis created, by either party, or be deemed tacit approval of them. A failure by the Council to take a decision on account of the veto power of one of its permanent members is contemplated in the Charter. Its legal effect ends there; inaction is itself a political act.

58. On the other hand, although unable to reach a decision on the Ahtisaari Report, referred to it in March 2007, the Council nevertheless encouraged attempts at mediation between the parties, in particular when it decided to send a mission, made up of members of the Council and led by Johan C. Verbeke, representative of Belgium, to Belgrade and Pristina, in April 2007 (S/2007/220 of 20 April 2007), and when it supported the attempts by the troika (made up of the European Union, United States and Russia) created by the Contact Group to reconcile the two parties (from July to December 2007).

59. This being the case, I cannot endorse the Court's interpretation of the "silence" of the Special Representative of the Secretary-General, which supposedly confirms that the declaration of independence was not the work of the Assembly of the Provisional Institutions of Self-Government of Kosovo.

60. We know just how delicate it can be to interpret an actor's "silence" in international law. In all events, silence must be interpreted by reference to the entirety of the direct context and its background. Here, the deadlock in the United Nations bodies during the process to determine Kosovo's future status does not justify the conclusion that a unilateral

declaration of independence hitherto not in accordance with international law is suddenly deserving of an imprimatur of compliance. In fact, the reason why the Special Representative of the Secretary-General took no action was not that he considered the declaration to be in accordance with international law, but simply that the political body to which he was answerable was unable to reach a decision on advancing in the process under way to determine the future status of Kosovo.

61. The Court then reflects on resolution 1244 and arrives at the conclusion that the resolution does not contain a prohibition binding on the authors of the declaration of independence (Advisory Opinion, para. 118). And for good reason, since the Provisional Institutions had yet to be created and the authors in question could not yet be identified. In reality, the issue at this juncture is not establishing whether resolution 1244 was aimed at prohibiting action by the authors of the declaration of independence, but simply recalling the mandatory force of this text, which is binding on the institutions to be created "to provide an interim administration . . . under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia" (paragraph 10 of resolution 1244 (1999) of the Security Council).

62. UNMIK thus adopted the Constitutional Framework and set up the interim administration on the basis of the mandate it had received from the Security Council in resolution 1244. A violation of the Constitutional Framework therefore entails a simultaneous violation of the Security Council resolution, which is binding on all States and non-State actors in Kosovo as a result of the territory having been placed under United Nations administration. This being the case, it is difficult to see how the Court could find 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" (Advisory Opinion, para. 119). In my view, it does establish such a bar, on at least two counts: because the declaration is not within the Constitutional Framework established pursuant to the mandate given to UNMIK in the resolution; and because the declaration is unilateral, whereas Kosovo's final status must be approved by the Security Council.

63. Finally, even if it is assumed that the declaration of 17 February 2008 was issued by a hundred or so individuals having proclaimed themselves representatives of the people of Kosovo, how is it possible for them to have been able to violate the legal order established by UNMIK under the Constitutional Framework, which all inhabitants of Kosovo are supposed to respect?

64. The Court responds merely by asserting that, when adopting the declaration of independence, the authors were not bound by the Constitutional Framework and that the declaration was not an act intended to take effect within the legal order put in place by the United Nations (*ibid.*, para. 121). But then what legal order governed the authors and the

declaration itself? It was not, in any case, the legal order of Serbia nor that of a new sovereign State. And not being part of the interim institutions does not exempt the authors from the legal order established by UNMIK regulation 1999/1, providing that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General". This simply means that all those living in Kosovo are subject to such authority and must comply with the régime of self-government established by the United Nations. Hence, in my opinion, it does not matter whether or not the authors of the declaration of independence are considered to be members of the Assembly of Kosovo; under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council resolution 1244 by running counter to the legal régime for the administration of Kosovo established by the United Nations.

65. That said, the Court has minimized the purport and scope of its Opinion, since it has limited it to the declaration as such, severed from its legal effects. It may therefore be asked: how can this Opinion, wherein it is concluded that a declaration adopted by some one hundred individuals, self-proclaimed representatives of the people, does not violate international law, guide the requesting organ, the General Assembly, in respect of its own action?

66. This remains a complete mystery, even if the Opinion will be exploited for political ends.

67. Expressing my personal view, I would be tempted to say that the result is that the Court's assistance to the General Assembly has emerged trivialized, and this is yet another reason why the Court should have exercised its discretion by refraining from acceding to the request for an opinion.

68. Finally, the Court in this case has not identified the rules, general or special, of international law governing the declaration of independence of 17 February 2008; according to the Opinion, general international law is inoperative in this area and United Nations law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order. Accordingly, there is apparently nothing in the law to prevent the United Nations from pursuing its efforts at mediation in respect of Kosovo in co-operation with the regional organizations concerned.

69. Such declarations are no more than foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present.

(Signed) Mohamed BENNOUNA.