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CR 2009/26

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Wednesday 2 December 2009, at 10 a.m., at the Peace Palace,

President Owada, presiding,

***on the* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le mercredi 2 décembre 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***sur la* Conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Shi
		Koroma
		Al-Khasawneh
		Buergenthal
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Shi
Koroma
Al-Khasawneh
Buergenthal
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges

M. Couvreur, greffier

The Republic of Albania is represented by:

H.E. Mr. Gazmend Barbullushi, Ambassador Extraordinary and Plenipotentiary of Albania to the Kingdom of the Netherlands;

Professor Jochen Frowein,

Professor Terry D. Gill,

as Legal Advisers;

Mr. Gentian Zyberi,

as Co-Adviser;

Ms Ledia Hysi, Director of Legal Affairs and International Law at the Ministry of Foreign Affairs;

Mr. Sami Shiba, Director for Kosovo, Macedonia and Montenegro at the Ministry of Foreign Affairs;

Mr. Genc Pecani, Minister Plenipotentiary at the Embassy of Albania in the Kingdom of the Netherlands.

The Federal Republic of Germany is represented by:

Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office, Berlin;

H.E. Mr. Thomas Läufer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands;

Mr. Guido Hildner, Head of Division, Federal Foreign Office, Berlin;

Mr. Felix Neumann, Counsellor, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands.

The Kingdom of Saudi Arabia is represented by:

H.E. Mr. Abdullah A. Alshaghrood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands,

as Head of Delegation;

Mr. Mohammad I. Alaqeel, Counsellor,

Mr. Fahad M. Alruwaily, Counsellor,

as Members of Delegation.

For the complete list of delegations of all participants, please refer to CR 2009/24.

La République d'Albanie est représentée par :

S. Exc. M.Gazmend Barbullushi, ambassadeur extraordinaire et plénipotentiaire de l'ambassade d'Albanie auprès du Royaume des Pays-Bas ;

M. Jochen Frowein,

M. Terry D. Gill,

comme conseils ;

M. Gentian Zyberi,

comme co-conseil ;

Mme Ledia Hysi, directrice des affaires juridiques et du droit international au ministère des affaires étrangères de l'Albanie ;

M. Sami Shiba, directeur pour le Kosovo, la Macédoine et le Monténégro au ministère des affaires étrangères de l'Albanie ;

M. Genc Pecani, ministre plénipotentiaire, ambassade d'Albanie au Royaume des Pays-Bas (personne à contacter).

La République fédérale d'Allemagne est représentée par :

Mme Susanne Wasum-Rainer, conseiller juridique, ministère fédéral des affaires étrangères à Berlin ;

M. Thomas Läufer, ambassadeur de la République fédérale d'Allemagne auprès du Royaume des Pays-Bas ;

M. Guido Hildner, chef de division au ministère fédéral des affaires étrangères à Berlin ;

M. Felix Neumann, conseiller à l'ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas.

Le Royaume d'Arabie saoudite est représenté par :

S. Exc. M. Abdullah A. Alshaghrood, ambassadeur,

comme chef de délégation ;

M. Mohammad I. Alaqeel, conseiller,

M. Fahad M. Alruwaily, conseiller,

comme membres de la délégation.

Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2009/24.

The Argentine Republic is represented by:

H.E. Ms Susana Ruiz Cerutti, Ambassador, Head of the Legal Adviser Office, Ministry of Foreign Affairs,

as Head of Delegation;

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands;

Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands.

La République argentine est représentée par :

S. Exc. Mme Susana Ruiz Cerutti, ambassadeur, chef du bureau du conseiller juridique du ministère des relations extérieures,

comme chef de délégation ;

S. Exc. M. Santos Goñi Marenco, ambassadeur de la République argentine auprès du Royaume des Pays-Bas ;

M. Fernando Marani, deuxième secrétaire à l'ambassade de la République argentine au Royaume des Pays-Bas.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets this morning to hear the following participants on the question submitted to the Court, namely, Albania, Germany, Saudi Arabia and Argentina. And each of the delegations, as I said yesterday, is assigned 45 minutes at their disposal for their presentation. In that context, I would like to make two procedural points.

One is that, in order to have an expeditious conduct of affairs in these proceedings, I shall introduce the first speaker of each delegation. Because some delegations have several speakers within those 45 minutes, and it is not going to be easy for me to call each of the speakers, I will call only the first speaker of the delegation, and each delegation can continue without my intervention.

The second point that I would like to make is that, since we have four speakers today, each assigned 45 minutes, it seems appropriate to have a short coffee break of 15 minutes after we have heard two participating delegations, and then we shall proceed on to the next two delegations.

With that, I shall now give the floor to His Excellency Mr. Gazmend Barbullushi.

Mr. BARBULLUSHI:

I. BACKGROUND TO THE CASE

1. Mr. President, distinguished Members of the Court, it is a great honour and privilege to appear before you on behalf of the Republic of Albania which for obvious reasons has a great interest in the present proceedings.

2. Twenty years ago, in 1989, Kosovo was illegally stripped of its autonomy and its right to self-determination under the 1974 Yugoslav Constitution. Ten years of State-sanctioned discrimination followed where widespread and systematic violations of human rights occurred. Ten years ago, in 1999, the population of Kosovo was subjected to the largest ethnic cleansing campaign since the Second World War. Thousands were killed and disappeared, and tens of thousands of homes were damaged or destroyed. As the International Criminal Tribunal for the former Yugoslavia found, and as other sources also confirm, Serbian forces and paramilitaries implemented a systematic campaign to ethnically cleanse Kosovo, which included the forcible displacement of civilians, the looting of homes and businesses, wanton destruction of property,

summary executions, rape, torture and inhuman and cruel treatment. Over 1.5 million Kosovar Albanians were forcibly expelled from their homes. During those dark days Albania hosted about 700,000 Kosovars. All of these facts are a matter of public record and have been brought to your attention by a large number of States during these proceedings.

3. Mr. President, honourable Members of the Court, the situation I just referred to stands in stark contrast with the situation today. Kosovo is an independent and multi-ethnic State, committed to democracy and the rule of law, with full protection for the rights of all its inhabitants. Kosovo's commitment to protection of human rights and the rights of minorities is an example for other States in the world. With its mature stance and behaviour, Kosovo contributes to peace and stability in the Balkans. That is a widely acknowledged fact.

4. The Republic of Albania and many other countries have recognized the Republic of Kosovo, considering that Kosovo's Declaration of Independence is in full accordance with international law. Albania has supported and will continue rendering its full support to the people of Kosovo in their efforts towards peace, progress and prosperity for all its citizens.

5. Mr. President, with your permission, Professor Frowein, leader of our legal team, will now address in more detail a number of legal issues concerning this case. Thank you.

Mr. FROWEIN:

1. Mr. President, judges of the International Court of Justice, it is a great honour and privilege to appear again before you, this time for the Republic of Albania which, as already stated by the Ambassador, is very much concerned with the present proceedings. They are of great importance for the people of Kosovo, the majority of which — over 90 per cent — are of Albanian origin as to language and culture in general.

2. With your permission, Mr. President, I shall first very briefly come back to the issue of the conditions for an advisory opinion. I shall then discuss the conformity with international law of the Declaration of Independence.

3. My first point will be a few remarks concerning the general approach. The second part will discuss under which circumstances declarations of independence may be in violation of international law. The third part will deal with the relationship between a declaration of

independence and the rule of territorial integrity. The fourth part will discuss the interpretation of resolution 1244. The fifth part on self-determination will be presented by my colleague, Professor Gill. I shall then come to a conclusion. I am afraid, Mr. President, there will be repetitions, but I hope to shed some new light on some of the problems.

II. JURISDICTION AND PROPRIETY

4. Albania has submitted some remarks concerning jurisdiction to which I refer. However, I would like to come back to two issues which could be of importance for the Court when deciding whether or not to comply with the request for an advisory opinion.

1. Possible action of the General Assembly

5. As it is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs of the United Nations the elements of law necessary for them in their action.

6. The Court has held that the General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs. But the Court has frequently indicated why the opinion might be useful. It did so for the last time in paragraph 62 of the famous *Wall* Opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 163. para. 62). The Court indicated that the General Assembly or the Security Council may draw specific conclusions from the findings.

7. The present question is formulated in a way which limits it to the conformity with international law of the Declaration of Independence on 17 February 2008. It is only this narrow and limited question on which the advisory opinion is requested. Since the Declaration, 63 States have recognized Kosovo as an independent State, the last one being New Zealand. The General Assembly cannot undo these recognitions. Nobody has argued that the recognitions are invalid under international law, and this question is definitely not before the Court, as France and Japan have rightly underlined.

8. Therefore, it would seem that in this particular case the Court must ask the question whether an advisory opinion could be useful for any function to be performed by the General

Assembly. Could the General Assembly draw any conclusions from the findings? Assume that Kosovo, one day, will apply for membership in the United Nations, as many of us hope.

9. The General Assembly will then have to decide upon the recommendation of the Security Council. It would be required that Kosovo is a peace-loving State which accepts the obligations contained in the Charter, as confirmed in your earlier Opinion on admission of States to the United Nations (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4). For that decision of the General Assembly, not tomorrow, not a few months from now, but certainly at some time, problems with the Declaration of Independence of 17 February 2008 could play, I submit, no role whatsoever. This, I think, should be taken into account when the Court exercises its discretion whether or not to give an advisory opinion. My second remark in that context concerns the *ultra vires* problem.

2. The argument that the Declaration was *ultra vires*

10. It is argued that the Declaration was an *ultra vires* act and therefore a violation of international law. To go into that issue, the International Court of Justice would act like a municipal court and scrutinize the specific powers granted by the rules adopted on the basis of resolution 1244 to the provisional organs set up in Kosovo. Some States even qualify these rules as municipal law, for instance the United States and the United Kingdom. It seems very doubtful whether it should be the task of the International Court of Justice to control the conformity of the Declaration with these rules. Even if one does not go as far as the United States and the United Kingdom, as well as Professor Murphy for Kosovo yesterday (CR 2009/25), the Court should consider whether this is really a matter for its jurisdiction.

11. However, even assuming that the Court should find that the Declaration as such was in that sense *ultra vires*, what could be the effect of such a finding for action of the General Assembly? It is clear that the Declaration would remain the exercise of the *pouvoir constituant* of the Kosovo people. Even if the provisional organs had no mandate for such a declaration this would not change, in my submission, the situation at all. You can in fact compare it to the famous action by the *tiers état* in Paris in 1789. This was within a State, but it is exactly the same with an act of secession forming a new State. The *pouvoir constituant* is not bound by rules existing under

the previous constitutional system. This is, I submit, an additional reason why it seems doubtful whether the Court should entertain the advisory opinion. And let me add this, which we should I think not forget, a considerable majority of States Members of the United Nations did not express the wish to have an advisory opinion by your Court.

III. CONFORMITY OF THE DECLARATION WITH INTERNATIONAL LAW

1. General approach

12. I now come to the conformity with international law of the Declaration. Many of the statements have shown that international law does not regulate as such a declaration of independence. The practice of States — at least, I submit, since the declaration of independence by the United States and the discussion which followed, and which is very well known, and until the most recent period with the declarations of independence in the context of the disintegration of former Yugoslavia, the secession of many States from the former Soviet Union and other examples — shows that international law has nothing to say concerning a declaration of independence as such.

13. Secession is not regulated by international law. The only question is, therefore, whether in a specific case a violation of international law can be shown. In that respect I respectfully, but very firmly, disagree with Professors Shaw, Zimmermann, and Kohen. There is no rule of international law prohibiting secession. And there is ample proof for the correctness of this statement in the study on secession edited by Professor Kohen. We have, in our written pleadings, quoted several of the contributions in that rather well organized book.

14. There are in particular two situations where a declaration of independence is a violation of international law. This is, first, the situation of illegal intervention and, secondly, the violation of specific mandatory rules of international law, *ius cogens*.

2. A declaration of independence brought about by illegal intervention of any State is a violation of international law

15. Where intervention by a third State, be it by the use of force or by other means, is decisive for the declaration of independence this is of course a severe violation of international law. Therefore, the Security Council and sometimes also the General Assembly have called upon States

not to recognize the newly formed entity. A particular telling example is, of course, Northern Cyprus. No State, except the one having intervened, recognized the declaration of independence of Northern Cyprus.

16. Nothing of that sort happened in the present case. The Security Council did not take any action, nor did the General Assembly recommend non-recognition. Nobody has argued that intervention by any State was at the origin of the Declaration of Independence of the Republic of Kosovo. Therefore, I submit, the situation cannot be compared to these cases where such an intervention was at the origin of a declaration of independence.

3. Declaration of independence in violation of *ius cogens*

17. Second, when the racist minority régime in Rhodesia declared its independence, the Security Council adopted a resolution calling upon States not to recognize that régime. It was qualified as an "illegal racist minority regime". Similarly concerning the independence of the former South African homelands, the Security Council and the General Assembly called upon States not to recognize these entities.

18. The General Assembly condemned these acts "as designed to consolidate the inhuman policies of apartheid". It rejected the declaration of independence as invalid and called upon all Governments to deny "any form of recognition to the so-called independent Transkei" and the other bantustans. Nothing of that sort is present here. It is quite telling that only these cases could be quoted by Serbia for the proposition that secession as such is in violation of international law.

IV. DECLARATION OF INDEPENDENCE AND TERRITORIAL INTEGRITY

19. I come to problem of territorial integrity. Territorial integrity is of course one of the foundations of international law. Article 2, paragraph 4, of the Charter, prohibits the threat or use of force against the territorial integrity of any State. It is argued that territorial integrity is also a rule which guarantees the territory of a State against internal constitutional developments, in particular against declarations of independence by secessionist movements. However, this, I submit, is a complete misunderstanding of the rule.

20. The creation of a new State by secession has nothing to do with the disregard of territorial integrity of the State. This is shown by the practice of States which has never used the

argument that a declaration of independence by a secessionist group is a violation of the principle of territorial integrity.

21. Where a declaration of independence is brought about by the intervention of a third State, one may very well call that intervention a violation also of the principle of territorial integrity. However, this is not so where internal developments within a State lead to a secession of a part of that State. I submit that it is clearly wrong to argue that secession as such is a violation of international law of the rule of territorial integrity.

22. It is, by the way, quite telling how Serbia, in its July Comments, deals with this issue. It kindly quotes a statement made by myself about the resolutions reaffirming the sovereignty and territorial integrity of Iraq. It deletes, however, the one sentence which explains the formula as being contained in Article 2, paragraph 4, prohibiting the use of force against the territorial integrity of any State.

23. By deleting that sentence the impression is created that the notion of territorial integrity applies also to secessionist movements. However, this is clearly not the case and I have not said so. I refer to footnote 489 of Serbia's July Comments.

24. Nobody doubts that a declaration of independence may be a violation of constitutional law and Serbia takes that view concerning Kosovo's Declaration. But Serbia is unable to show that such a violation has any relevance for international law. Serbia quotes in this context Security Council resolution 169 (1961) concerning the situation in the Congo, but that again concerned foreign intervention.

25. The resolution reaffirms that "all foreign military, paramilitary and advisory personnel not under the United Nations Command, and all mercenaries" must be withdrawn. And in its operative part the resolution states under paragraph 1:

> "*Strongly deprecates* the secessionist activities illegally carried out by the provincial administration of Katanga with the aid of external resources and manned by foreign mercenaries."

This shows that this was clearly a case of outside intervention.

26. The same is of course true for resolution 787 (1992) concerning Bosnia and Herzegovina. In paragraph 5, the Security Council, in that resolution, demands "that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the

country of irregular units and personnel, cease immediately". I think it is somewhat ironic that this resolution should be quoted by Serbia for its arguments.

27. Let me also clarify one point: Where the Security Council determines a threat to the peace it can, of course, intervene on the basis of Chapter VII. This was the legal basis for the resolution just quoted in the Bosnia and Herzegovina case. But no such decision was made after the Declaration of Independence by Kosovo, brought about by peaceful means after a lengthy period of negotiations had ended without an agreed solution being reached.

28. Although the rule of "territorial integrity" protects against outside intervention, it does not apply to internal constitutional developments. Secession as such is not regulated by international law as State practice proves and as so many authors have underlined. We have shown that with many citations.

29. All the resolutions quoted by Serbia concerning the violent disintegration of Yugoslavia are proof for the competence of the Security Council under Chapter VII to act against a threat to the peace or breach of the peace. They do not prove that secession as such is in violation of international law or of the rule of territorial integrity.

30. This explanation is also relevant for the issue of non-State actors being bound by international law. Serbia is of course correct in underlining that the Security Council has in many resolutions now addressed non-State actors on the basis of Chapter VII. But this does not at all prove that a secessionist movement is bound by the principle of territorial integrity without such a Chapter VII resolution. The Security Council did not adopt such a resolution when Kosovo declared its independence in a peaceful way.

31. And let me add this: On page 111, paragraph 254, Serbia states that the United Kingdom is correct in underlining a possibility for a dissolution or reconfiguration of the State. But Serbia limits that to "the consensual rearrangements which may always take place" adding that the comment of the United Kingdom "is not correct beyond this point", to use Serbia's words. This has been repeated yesterday. With this limitation, Serbia tries to turn the clock of international law back to the period when consent of the former sovereign was seen as the only way for a new State to come into existence. This rule was abrogated by about 1820 as we have shown, i.e., almost 200 years ago.

32. One last point in this connection, Mr. President: It is true that the penultimate paragraph in the famous Friendly Relations resolution 2625 uses the notion of territorial integrity when explaining the principle of self-determination. This is to be seen in the context of the whole explanation. It is directed against the action of other States as the last paragraph shows and it clarifies under which circumstances so-called "remedial secession" may operate. Professor Gill will deal with that. The use of the notion here — of the notion of "territorial integrity" — does not broaden the application of this rule to processes of secession in general. A resolution of the General Assembly could not have that effect anyway, as we know.

V. THE IMPORTANCE OF RESOLUTION 1244

33. I now come to the importance of resolution 1244. Serbia argues in detail that the Declaration of Independence violates resolution 1244. This resolution is, of course, of a very special nature. It was adopted to set in motion a process by which the future status of Kosovo should be clarified. The notions used in the resolution as to the final outcome are, clearly on purpose, not limited in any way. And Professor Murphy had more time to outline that than I have. The resolution speaks of "final settlement", "political settlement", "future status". This shows that the resolution does not in any way prejudge the final outcome of a process started with the adoption of this resolution. And there can be no doubt that all members of the Security Council were fully aware of that situation.

34. This is also made clear by the formal reference to the Rambouillet Accords to be found in Annex 2, paragraph 8. According to this paragraph, agreement is reached as to a political process towards the establishment of an interim political framework agreement. This should provide for substantial self-government. According to the last sentence, negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.

35. But this reference to Rambouillet creates a very important balance in resolution 1244. The Rambouillet Accords — as we heard yesterday and we all know — envisaged as one possible solution the full independence of Kosovo as a sovereign State on the basis of the will of the people, as expressly mentioned there. By referring to these Accords, resolution 1244 confirms this

possibility. On the other hand, the resolution refers to the sovereignty and territorial integrity of the FRY. By that reference it is made clear that at the time when resolution 1244 was adopted, no final decision was taken. It is also made clear that the process would not in any way affect the sovereignty and territorial integrity of Yugoslavia.

36. One may assume that the system set up by the resolution prevented action changing the situation before the negotiations envisaged in the resolution, including the Annexes, had come to an end. After these negotiations had come to an end and it had been confirmed by all those concerned that no consensus could be reached, resolution 1244 did not any longer provide for an interim solution.

37. Of course, when the resolution was adopted everybody hoped that a consensus could be reached. However, after it became clear that no consensus could be arrived at, the system was no longer workable as an interim system. Resolution 1244 is, I submit, no basis for an eternal deadlock between the parties. This would be the consequence of the position taken by Serbia yesterday. This means that the Declaration of Independence cannot be seen as a violation of the resolution, even if one would accept that the resolution created an interim phase during which a declaration of independence would have been a violation of the resolution.

38. This shows that resolution 1244 does not exclude the Declaration of Independence in the specific circumstances of the case. If Serbia now tries to imply that the political process was not conducted in an open and unbiased manner one can only be astonished, I submit, taking into account the reputation President Ahtisaari has throughout the world. I am happy to say that I could co-operate with him in 2000 in establishing an important international report.

39. It is indeed quite telling that the Serbian Comments quote a remark by President Ahtisaari and interpret it as showing that Ahtisaari's view from the very beginning was that independence was the only option. However, the language used by President Ahtisaari does not in any way convey this meaning. I repeat what Serbia quotes in paragraph 106 as the words of President Ahtisaari. According to this quotation he said: "L'une des conditions formulées au départ était de ne surtout pas revenir à la situation d'avant 1999." This does not in any way show that independence was the only possible solution President Ahtisaari had in mind. Before 1999, as we all know, Kosovo had no longer any autonomy and at that time the human rights of the people

of Kosovo were severely violated. It was clear from resolution 1244 that at least a high degree of autonomy was envisaged. To interpret this statement by President Ahtisaari as being biased, taking only the possibility of full independence, is a complete reversal of the meaning of the sentence expressed in the statement.

40. With your permission, Mr. President, I would now ask my colleague Professor Gill to explain our position on the issue of self-determination before I then come to a conclusion.

Mr. GILL:

1. Mr. President, distinguished Members of the Court, it is an honour to appear before this Court on behalf of the Republic of Albania. My presentation will address the relevance and implications of the right of self-determination to the question of the legality of the Declaration of Independence by Kosovo.

VI. SELF-DETERMINATION AND THE RIGHT TO REMEDIAL SECESSION

2. My presentation is divided into two parts. Firstly, I will address the question whether the right of self-determination should be seen as precluding the Declaration of Independence of the people of Kosovo, thereby preventing the establishment of an independent State, guaranteeing equal rights for all its inhabitants. Secondly, I will present arguments relating to the right of remedial secession in cases of systematic discrimination and exclusion of a people from full participation in the government and administration within an independent State, and relate these observations to the question before the Court.

3. Before I proceed, I should like to point out that Albania's position is that the legality of the Declaration of Independence in no way depends upon the necessity of an entitlement to independence for Kosovo based on the right of self-determination. Consequently, the arguments relating to the right of remedial secession are purely additional to those relating to the absence of any illegality of secession under international law.

1. Self-determination under international law

May it please the Court:

4. The right to self-determination is both a rule of conventional and customary international law which is widely recognized and acknowledged as having an *erga omnes* and *jus cogens* character. It is generally considered to have two distinct but closely related dimensions, usually related to respectively as the external and internal dimensions of self-determination. The former provides for the right of a people under colonial rule or under foreign occupation to independence or to otherwise freely determine a political status through association or integration with another State. In General Assembly resolution 2625 (XXV) of 24 October 1970 — known as the Friendly Relations Declaration — it additionally further is declared to be potentially relevant in situations where a people is denied meaningful participation in the government and administration of a State as a result of systematic discrimination and denial of equal rights of part of the population, with the consequence that the government of the State therefore is not representative of the entire population.

5. The internal dimension of self-determination is generally considered to consist primarily of the right of a people to full and meaningful participation and representation in the government and administration of an existing State on the basis of equal treatment and non-discrimination.

6. The holders of the right of self-determination are of course peoples. While the question of what constitutes a people can differ according to the context in which it is used, there can be no doubt that the population of Kosovo constitutes a people, as has been recognized in the Rambouillet Accords, in the Constitutional Framework for Kosovo adopted by UNMIK, by the Ministers of the Contact Group and by the Special Representative of the Secretary-General on behalf of the United Nations, and this is all referred to, Your Honours, in paragraphs 61-65 of the Albanian Written Statement of July 2009. And I might point out that this is in contrast to what our respected colleagues from Serbia said to the Court yesterday in regard to the question of the Kosovars being a people. While the Court is not called upon to pronounce whether the population of Kosovo constitutes a people for the purpose of self-determination, there can be no doubt that they do so qualify and this could be relevant if the Court should decided to exercise its jurisdiction.

7. I will now turn to the question as to whether the right of self-determination provides for a prohibition of secession and an examination of which conditions could possibly give rise to a right of unilateral secession in the sense of an entitlement within the specific context of the right of self-determination. The starting point is to note that there is neither a general right, nor a prohibition of secession under the right of self-determination. If secession by a people from an existing State were precluded, then this would be stated in no uncertain terms in the text of the Friendly Relations Declaration which sets out to clarify and restate the fundamental principles underlying the Charter. This is done with regard to the territorial integrity of a State vis-à-vis any other State where, in the last sentence of the paragraph relating to self-determination, it is clearly stated that: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country." Professor Frowein has already addressed this issue and, in doing so, has submitted that the principle of territorial integrity is primarily externally oriented and this is no different when viewed from the perspective of self-determination.

8. The normal mode of exercising self-determination within an existing independent State is through the exercise of civil and political rights in accordance with the procedures in force in that State on the basis of equal rights and non-discrimination. In any State which functions along these lines, there is no doubt that self-determination does not give rise to a general right of secession. However, in situations where the conditions are grossly and systematically violated and a people is denied full participation in the political life and administration of the country, there is no prohibition against secession under the law pertaining to self-determination or any other rule of international law. This is indicated by the text of another passage in resolution 2625 which reads as follows:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

9. Mr. President, Members of the Court, this is by no means a passport to secession, but neither can it be viewed as an unconditional right to maintain territorial integrity at the price of the

practice of discrimination and exclusion from participation in the political life and denial of representation of part of the population. This is how it is widely viewed in academic opinion and in the advisory opinion handed down by the Canadian Supreme Court in *re Secession of Quebec* of 1998. In that decision, which is unique in that it squarely addresses the issue of when a possible lack of prohibition of secession could arise in the context of the exercise of self-determination, the Court reasoned that since Canada met the requirements of a democratic State, guaranteeing full participation of the entire population in the political life and administration of Canada, there was no entitlement to unilateral secession on the part of the Quebec population.

10. Now, since the Canadian Supreme Court decision is generally considered to be correct in its interpretation of the law, it logically follows that in situations where a State has a system of law providing for participation of the entire population in the political life and administration on the basis of equal rights and non-discrimination, there is no entitlement to secession contained within the right of self-determination. On the other hand, where a State practises policies based on exclusion of a part of the population, it cannot rely on the law pertaining to self-determination to preserve its territorial integrity. The important point is that the right of self-determination does not provide for an unconditional guarantee of territorial integrity of States in relation to part of its own population. In fact, it does not preclude secession under circumstances of systematic discrimination and denial of equal treatment under the law.

2. Circumstances surrounding Kosovo's Declaration of Independence and remedial secession

11. I shall now examine the question whether such exceptional circumstances existed in relation to Kosovo.

12. The question whether the Declaration of Independence in any way violates the right of self-determination is of signal importance to these proceedings. The question can only be answered by applying the law to the specific factual and historical circumstances surrounding the declaration. These facts are set out in detail in the Written Statement of Albania and other States and are incontestable and a matter of public record. They document a series of events extending over a period of some ten years, which constituted a policy of systematic discrimination and exclusion of the Kosovar Albanians from the public life of the province; consisting of cancellation

of all representative bodies of government, exclusion of the Kosovar Albanian population from all levels of governmental administration, and suppression of the Albanian language and culture, resulting in mass opposition and the spread of the armed conflict in the Former Yugoslavia to Kosovo, ending finally in international intervention and the placing of the territory under international administration.

13. This was the situation under which Security Council resolution 1244 was adopted, and over a period of a decade, all attempts to reach a negotiated solution under the auspices of the international community have failed to achieve an agreement which would be acceptable and durable. It has been argued by some that Serbia's policies of the past should not stand in the way of it reasserting sovereignty over Kosovo. In essence, this argument says that even if the policies and events of the period from 1989 through 1999 were a violation of equal rights and self-determination, that all this should be set aside and that the present Serbian Government is ready to reinstate the autonomous status of the province within Serbia and that therefore there is no right for Kosovo to determine its future as an independent State. Mr. President, distinguished Members of the Court, this is an absurd and totally misconstrued reading of the right of self-determination.

14. To begin with, this option is simply not acceptable to the people of Kosovo. They have made abundantly clear that they have no faith in such assurances and no desire whatsoever to remain within Serbia. This in itself makes such a solution completely untenable and doomed to fail, even supposing the good faith of the present Serbian Administration. There can be no doubt that the only way for Serbia to reassert sovereignty over Kosovo would be through forced incorporation of Kosovo with the acquiescence of the international community. To state that this would not be a just or workable solution in the light of the recent past and the meaning of self-determination is to state the obvious.

15. The law of self-determination does not provide that when the rights of equal treatment and full participation in the political life and administration within a State have been systematically and violently denied for a decade, that the State responsible for such violations can lay claim to a right to reassert sovereignty over a territory and people, which as a result of such denial of equal treatment, has chosen to seek its future as an independent State. The same law does provide for a

right of remedial secession in such situations and it is submitted if there ever were a case of remedial secession as a last resort, that this is such a case.

16. Mr. President, Members of the Court, the law is an instrument to promote and provide for a just and acceptable, as well as a workable and durable solution to a problem such as this. On all these counts, there should be no question of what is both just and workable in this situation. Consequently, should the Court choose to exercise its jurisdiction to pronounce on this issue, it should not do so in a way that would stand in the way of such a choice; a choice brought about by a unique set of circumstances and historical events which have resulted in a new situation, whereby a people has determined its future and one third of the international community has recognized this as irreversible.

17. Mr. President, distinguished Members of the Court, that concludes my statement. I would like to thank the Court for its attention and, with your permission, give Professor Frowein the floor to make some concluding statements on behalf of the Republic of Albania.

The PRESIDENT: I would like to warn the delegation of Albania that the time allocated to you — the 45 minutes — has been exhausted. The Court has to keep impartiality to all the delegations. I give you a few minutes to present your conclusion, but please do it as expeditiously as possible. Thank you.

Mr. FROWEIN: I apologize, Mr. President, and I will make a very brief statement.

VII. CONCLUSIONS

1. Let me sum up our arguments and come to my conclusion.

2. The fundamental rule protecting territorial integrity has nothing to do with the issue.

3. Resolution 1244 did not guarantee in any way the final outcome. It was kept open, on purpose, whether finally Kosovo would become an independent State.

4. I conclude our intervention. No case before the International Court of Justice and of course no request for an advisory opinion has had such far-reaching possible importance for a new member of the international community, recognized today by almost one third of this community,

among them three permanent members of the Security Council, all but one of the neighbouring States, and the great majority of States of the region, organized in the European Union.

5. A non-binding statement by the International Court of Justice that the Declaration of Independence of the young nation of Kosovo has been a violation of international law would certainly not have the effect of turning the clock back. As President Ahtisaari has recently underlined, there is no doubt that Kosovo will remain an independent State. It will finally be recognized by most if not all States in the world. However, such a finding would be very unfortunate for the future development.

6. The attitude of the Kosovar people towards international law and the feeling of a young nation which has suffered brutal suppression and has lost many of its citizens in the armed conflict would certainly be affected in a very negative manner.

7. It is understandable that Serbia has difficulties to come to terms with the loss of a territory which has been of great importance for the country because of its history. It is not the first case in the development of international law that a State had great problems with the recognition of a newly independent State established on its former territory.

8. However, what seems very difficult to accept is that Serbia tries to hide the real background of the development when it is states that accepting the legality would amount to awarding actors who are unwilling to further bona fide continue with a negotiation process. Here, Serbia seems to overlook completely what the background of the development was.

9. Rather, a finding of illegality would amount to awarding actors who have brutally suppressed the people which has finally opted for independence.

10. Albania asks the Court, Mr. President, to state that the Declaration of Independence was in conformity with international law, if it decides to render the opinion.

11. Thank you very much, Mr. President, distinguished Members of the Court, for your kind attention, and I apologize again for overstepping your time by a very few minutes. Thank you.

The PRESIDENT: Thank you, Professor Frowein, for your presentation. Now, we move to the next participant: that is Germany. I call upon Dr. Susanne Wasum-Rainer to make her presentation.

Ms WASUM-RAINER:

1. Mr. President, distinguished Members of the Court, it is indeed a great honour for me to appear before this Court in these oral proceedings with regard to the request for an advisory opinion submitted to you by the General Assembly. With your permission I will present to you the comments of the Federal Republic of Germany to the questions of law raised by this request. I appear before this Court to ask you respectfully to confirm that the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo — as it was formulated by the General Assembly — indeed was in accordance with international law.

2. Mr. President, let me begin my argument by underlining the good relations between both Germany and Serbia — and between Germany and the Republic of Kosovo. My Government is convinced that the independence of Kosovo has fostered stability and security in the Balkans. Germany sees the future of both States, of Serbia and of the Republic of Kosovo, as partners in the European Union.

3. Germany has already stated its position in detailed written submissions. We have carefully considered all of the other Written Statements submitted to you, as well as the arguments put forward by Serbia and by Kosovo yesterday. In the light of this, I will limit my oral presentation to a few particularly relevant points.

4. I would like to present our line of argument as follows. I will start by looking at the question submitted to the Court by the General Assembly which is specific and narrow in scope (I). In order to answer the question I will, in the second part of my presentation, search for rules of international law which might be violated by the Declaration in question (II). The result of our careful examination is that there are no such rules and, therefore, that the Declaration is in accordance with international law. After having clarified that international law does not contain any rule *prohibiting* the Declaration I will, in the third part of my intervention, examine the question whether international law does contain a rule explicitly *justifying* the Declaration. In this regard I will address the fact that there is now a State of Kosovo — a fact which, in the light of the principle of effectiveness in international law, cannot be ignored (III). I will continue by elaborating, in the fourth section, that the existence of this State is based on the exercise of the right

to self-determination by the people of Kosovo (IV). My conclusion will confirm that the Declaration of Independence in question is in accordance with international law (V).

I. General Assembly resolution 63/3 of 8 October 2008

5. Mr. President, distinguished Members of the Court, Germany is of the opinion that the question before us was diligently chosen by the General Assembly. It relates only to Kosovo's Declaration of Independence. This was accepted by the Written Statements submitted, including that by Serbia as the main sponsor of General Assembly resolution 63 of 8 October 2008, as well as by Serbia's oral pleading yesterday (CR 2009/24).

6. Therefore, it is the Declaration of Independence which is to be legally evaluated — and nothing else. Acts of States or international organizations with regard to this Declaration, the status of Kosovo under international law, or the issue of its recognition by third States are not the subject-matter of our proceedings.

7. However, contrary to what the language of the question put to the Court suggests, Kosovo's Declaration of Independence was not an act of the Provisional Institutions of Self-Government. Both the explicit wording of the Declaration itself and the circumstances of its adoption made it clear that those voting for and signing the Declaration of Independence were acting as the democratically elected leaders of the people of Kosovo and not merely as members of an assembly created under the international administration of Kosovo. They were expressing as *pouvoir constituant* the will of the people of Kosovo to live in a State of their own.

8. As the Declaration emanated from the people's will, it was unilateral by its very nature. However, the unique circumstances leading up to and encompassing Kosovo's Declaration of Independence, including the involvement of the Secretary-General of the United Nations and his Special Envoy Ahtisaari, supported by the Security Council, reveal the multilateral context of the issuance of Kosovo's Declaration. Thus, the overall context of the events makes Kosovo an extraordinary and special case.

II. Possible norms prohibiting the Declaration of Independence

9. Germany shares the opinion that a declaration of independence leading to secession, and indeed secession itself, are merely factual events. The question of that declaration's legality may

well be governed by domestic, notably constitutional, law. International law, however, is silent on this point.

10. The thorough search for rules of international law which might prohibit such a declaration in the present case leads us to the principle of territorial integrity and to Security Council resolution 1244 (1999). With your permission, Mr. President, I will first discuss those.

11. The principle of territorial integrity of any *State* is well established in international law. In the United Nations Charter this principle is interwoven with the fundamental principle of the prohibition of the threat or use of force among States. The addressees of this rule are the States. The States have to respect the territorial integrity of each other.

12. International law does not create any obligations for *individuals* in this regard. Whether there is a corresponding norm for individuals is a matter of domestic law. This is not a subject of international law. This is also the case for peoples who have the right to self-determination. The international legal norm of respecting the territorial integrity of States does not apply to them.

13. Allow me to refer in this regard to General Assembly resolution 2625 (XXV), the "Friendly Relations Declaration". It contains a chapter on "the principle of equal rights and self-determination of peoples" with a paragraph which seems to be particularly pertinent in our context. While stressing the importance of self-determination, it states that nothing in the Declaration shall be construed as authorizing the dismembering of the territorial integrity of States.

14. What does this mean in our case? Does this reply to the question of the legality of the Declaration of Independence of Kosovo? The answer is: No. The subject of the "Friendly Relations Declaration" is relations among *States*. When the Friendly Relations Declaration underlines the importance of the right to self-determination it reminds *States* of their duty to respect this right. And when the Declaration clarifies that this shall not be understood as allowing to the impairment of the territorial integrity of States, it also addresses *States* — and *not* individuals, groups of individuals, an entity within a State or peoples.

15. The fact that there are Security Council resolutions which address specific conflict situations and require that in these specific situations also non-State actors respect the territorial integrity of a specific State does not contravene this finding. Contrary to what Serbia had stated

yesterday, the inclusion of such an obligation in a Security Council resolution can also be seen — and this is our position — as establishing an obligation which otherwise would not exist.

16. In the context of a declaration of independence it is, of course, possible that States violate their obligation to respect each other's territorial integrity, for instance, by illicit acts of intervention. Yet this was not the situation with regard to Kosovo and this question is not the one before the Court today.

17. Let me now come to Security Council resolution 1244 (1999). Does this resolution prohibit a declaration of independence of Kosovo? The answer is, once again, No. Resolution 1244 establishes an interim situation with the purpose of enabling a political process which will bring about a final solution.

18. Resolution 1244 does not anticipate a specific result of this political process, nor does it contain a requirement that the final status be *agreed*. My Government had certainly hoped for such an agreement between Serbia and Kosovo and had actively supported corresponding efforts. Allow me to refer, in this context, to the contribution of Ambassador Ischinger as member of the "Troika" made up by the European Union, the United States and Russia. Yet, however desirable an agreement might have been, resolution 1244 does not require it.

19. The United Nations launched a political process in order to decide on the future of Kosovo. The situation was altered fundamentally when the process, having explored and exhausted every conceivable avenue for reaching a negotiated settlement, failed unequivocally and irretrievably. The international community was faced with the dilemma of how to deal with an impasse that would, if allowed to persist, destabilize both Kosovo and the entire region. The focus then turned to a settlement proposal which built upon the positions the parties had put forward during the negotiation process and identified compromises on all issues related to the status of Kosovo. While it was not a negotiated solution, it was a solution which built upon the preceding negotiation processes in order to establish a sustainable solution conducive to stability in Kosovo and in the region.

20. Resolution 1244 contained the requirement that the final status process must take into account the March 1999 Rambouillet Accords. But it did not exclude a declaration of independence. The fact that neither the Special Representative of the Secretary-General, nor the

Secretary-General, nor the Security Council, acted to set aside the Declaration of Independence of February 2008 strongly supports the proposition that the issuance of the Declaration of Independence did not violate resolution 1244.

21. Mr. President, distinguished Members of the Court, let me pause here to summarize: The Declaration of Independence of the people of Kosovo does not violate international law and, in particular, it is not prohibited by the principle of territorial integrity or by Security Council resolution 1244 (1999).

22. Referring to the famous decision of the Permanent Court of International Justice in the *Lotus* case *("Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10)*, it is possible to give the following answer to the question posed by the General Assembly: Since the Declaration of Independence is not forbidden by international law, it is in accordance with international law.

III. PRINCIPLE OF EFFECTIVENESS: EXISTENCE OF THE STATE OF KOSOVO

23. Mr. President, distinguished Members of the Court, having answered the General Assembly's question, I could end my presentation here. Allow me, nevertheless, to continue my argument and to draw your attention to one further important aspect.

24. We have found that international law does not contain rules *prohibiting* the Declaration of Independence in question. Let us now go one step further and examine whether international law positively *justifies* the Declaration.

25. In this regard, I am referring to the fact that now, as I stand before you, an independent State of Kosovo exists. The Declaration of Independence was a crucial step in the formation of this State. If international law accepts the existence of the State of Kosovo, we have to conclude that international law also accepts its constituent Declaration of Independence.

26. Let me first address the existence of the State of Kosovo. All three elements which are required by the traditional doctrine of statehood are present: State population, State territory and government. The continuous presence of the international community in Kosovo is not inconsistent with the authority of the Government of Kosovo which acts independently and autonomously. There has been considerable progress in stabilizing the State institutions.

27. Recent examples include the independent municipal elections which took place on 15 November and the establishment of the Constitutional Court in June. Accordingly, so far 63 States have recognized this State — including the successor States of the former Yugoslavia with one exception — and it has been admitted — with the support of more than 100 States — into both the International Monetary Fund and the World Bank Group.

28. Even though the question before the Court addresses neither the status of Kosovo itself nor its recognition by other States, it is related to a factual situation which exists and therefore cannot be ignored. The legal principle I am referring to here is the principle of effectiveness.

29. Of course, not every factual situation is in accordance with the law just because it is factual. When it comes to the question of statehood, however, international practice clearly refers to the principle of effectiveness.

30. This also applies to the constituent act of statehood, the declaration of independence. In past cases where violations of international law have been stated relating to a declaration of independence, it was not the declaration itself but a separate act linked to the declaration which was considered to violate a rule of international law. This is not the situation in the present case and, consequently, no such question has been brought before this Court.

IV. RIGHT TO SELF-DETERMINATION

31. Besides the principle of effectiveness, there is a norm in international law which seems to positively justify the formation of the State of Kosovo: the right to self-determination.

32. While self-determination should, for the sake of the stability of the international system, normally be enjoyed and exercised within the existing framework of a State, secession may, by way of exception, be considered legitimate if it is possible to establish that this is the only remedy to a prolonged, rigorous and oppressive refusal of internal self-determination.

33. This was precisely the situation the people of Kosovo faced. The developments preceding the Declaration of Independence reveal a clear case of prolonged and severe repression and denial of internal self-determination that left the people of Kosovo no other meaningful choice.

34. In the debate about the right to self-determination, concerns have been voiced that a broad exegesis of its content might trigger risks for stability, peace and security. In order to

prevent the concept getting out of hand, attempts have been made to narrow and limit the scope of the right to self-determination.

35. Yet, the perspective of those arguments is the *ex ante* viewpoint: namely, the situation *prior to* the exercise of a possible right to self-determination. Our case is different. Ours has an *ex post* perspective.

36. The State of Kosovo exists, the people of Kosovo have exercised their right to self-determination. Denying them this right would have triggered serious risks for stability and security both in Kosovo and in the region. On the other hand, it has also been observed that acknowledging and recognizing this right has been, visibly and beyond all doubt, conducive to stability and security in Kosovo and in the region.

37. To date, as I have said already, nearly all countries in the region have recognized Kosovo. Thus, the largest part of the region has expressed its trust in the legitimacy and sustainability of the new State of Kosovo in their neighbourhood — a confidence that was rooted in the now widely accepted evidence that this statehood has benefited and strengthened regional stability.

38. Mr. President, distinguished Members of the Court, Kosovo is not a precedent. The case is specific and unique.

39. The main elements of the case are, first: a period of massive and systematic repression in Kosovo culminating in a policy of massacre and displacement directed against the majority population — we have laid out the details in our written submission. The second element was a long-lasting presence of the international community under the umbrella of the United Nations over a period in which Serbia, against the backdrop of its persistent repression and denial of the democratic right to internal self-determination, retained neither power nor influence in and over Pristina. The third element was a unique, and UN-led, negotiation process that explored all imaginable settlement options in order to seek a negotiated settlement and failed. At this juncture, given the specific history, an independent State of Kosovo the only possible remedy remaining.

40. In the light of the very special conditions of the Kosovo case, concerns that this case might be used as an unwanted precedent are not justified.

41. Let me sum up. The formation of the State of Kosovo was justified under international law. It is based on the right to self-determination exercised by the people of Kosovo. It has established a fact which has to be considered in the light of the principle of effectiveness in international law. The Declaration of Independence in question was a constituent step in this process. Therefore, international law also justifies this Declaration — even though *stricto sensu* international law does not specifically address the issuance of such a declaration.

V. CONCLUSION

42. Mr. President, distinguished Members of the Court, this brings me to the conclusion that Kosovo's Declaration of Independence is in accordance with international law. In particular, it does not contravene the principle of territorial integrity of States or Security Council resolution 1244 (1999). It was a step taken by the people of Kosovo, a case with a very specific history, to exercise their right to self-determination. It does not challenge the principle of territorial integrity which retains its full relevance, not at least in the case of the territorial integrity of the State of Kosovo itself.

43. Mr. President, this year we are celebrating the twentieth anniversary of the fall of the Berlin Wall. This event enabled the people of my country to reunite by exercising their right to self-determination. And this event was also the starting-point of a success story integrating Eastern and Western Europe — a development few observers would have thought possible 20 years ago. My Government is convinced there is room for both States, Kosovo and Serbia, in our common house of Europe.

Thank you, Mr. President.

The PRESIDENT: I thank Dr. Susanne Wasum-Rainer for her presentation. As I announced earlier, we shall have a short recess of 15 minutes. We will meet again at 11.30 a.m.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated. Now the Court resumes its session. I call upon His Excellency Mr. Abdullah Alshaghrood to make his presentation on behalf of Saudi Arabia.

Mr. ALSHAGHROOD: Mr. President, distinguished Members of the Court, I have the honour, as a representative of my country, the Kingdom of Saudi Arabia, to participate before you in this oral proceeding to render an advisory opinion on the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. The Kingdom of Saudi Arabia was informed about the public hearings through a Note sent by the distinguished Court to the Royal Embassy of Saudi Arabia in The Hague on 20 October 2008. In this Note the Court referred to the request received from the General Assembly of the United Nations to render an advisory opinion on the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in accordance with the decision of the General Assembly No. 63/3 dated 8 October 2008. The Embassy received also in the same Note the Order of the Court No. 141 dated 17 October 2008 concerning the organization of the hearings and their schedules. The Government of the Kingdom of Saudi Arabia had informed the Court about its intention to participate in these hearings through a Note sent by the Embassy in The Hague to the Court on 14 September 2009. As a response the Embassy received a Note from the Court on 29 September 2009, in which it mentioned that according to the schedule adopted by the Court, the Saudi delegation will have the opportunity to participate in the oral proceedings before the Court on Wednesday 2 December 2009.

Mr. President, Members of the Court, my country has declared its recognition of the independence of the Republic of Kosovo according to the statement of an official source at the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia on 24 Rabia II 1430 Hijri, corresponding to 20 April 2009. The main motive of the Kingdom of Saudi Arabia to take this sovereign decision was to contribute to strengthening the security, stability and prosperity of Kosovo and its neighbour States in the Balkan region. Especially, the region has suffered from a long period of wars, fighting and instability. This resulted in the deterioration of its economic and political situations and reflected badly on the humanitarian circumstances of its people. It is significant here to mention the assessment of the United Nations Secretary-General made in September 2007 that if a resolution was not reached, there was “real risk of progress beginning to unravel and instability in Kosovo and the region”.

In our view, the Declaration of Independence issued by Kosovo on 17 February 2008 was the final step in a process for resolving Kosovo's status, which came constant with both Security Council resolution 1244 of 1999 and general international law. Although my government has not submitted a written statement to the Court, we agree with the conclusions in the written statements submitted by Kosovo and by others that there was no violation of international law and that resolution 1244 did not forbid Kosovo from declaring its independence. It is important here to mention the resolution adopted by the Council of Foreign Ministers of the Organization of Islamic Conference in its Thirty-Sixth Session in May 2008, in which the Council took note of Security Council resolution 1244 and of Kosovo's Declaration of Independence. In the same resolution the Council recognized the progress made towards democracy, peace and stability in Kosovo and the whole region.

In this regard, the decision of the Kingdom of Saudi Arabia regarding the recognition of the independence and self-determination of Kosovo has come to meet the aspirations of the overwhelming majority of the population of Kosovo who have indicated clearly that independence is their choice, in the exercise of their right to self-determination, and to consolidate the Kingdom's desire to bring stability in the country and to incarnate the desire of the Saudi Government in co-operating with the rest of the international community that strives to bring stability in the region and to support its States in order to get their legitimate rights of political stability and economic and social development. My Government urges the Court, in its consideration of the specific legal question before it, not to lose sight of the broader context, including political, human and economic sides. We are confident that the Court will take into consideration the substantial progress that has been made in Kosovo and the stability that exists today both there and in the whole region.

Finally, I would like to thank you, Mr. President, distinguished Members of the Court, for giving me this opportunity to clarify the viewpoints of the Kingdom of Saudi Arabia regarding the Unilateral Declaration of Independence by the Republic of Kosovo.

Thank you.

The PRESIDENT: Thank you very much, His Excellency Mr. Abdullah Alshaghrood, for your presentation on behalf of Saudi Arabia. I now call upon Her Excellency, Ms Susana Ruiz Cerutti, who will be making the presentation on behalf of Argentina.

Mme RUIZ CERUTTI :

1. Monsieur le président, Messieurs les juges, c'est un honneur de participer à la phase orale de cette procédure consultative afin d'exposer les points de vue de la République argentine. Mon pays attache une importance fondamentale au respect du droit international en général et des résolutions des Nations Unies en particulier. L'avis que la Cour rendra à cette occasion aura un impact certain non seulement sur la question du Kosovo, mais aussi au-delà. Il y va en effet de la place que les acteurs internationaux accordent au droit international dans la conduite de leurs relations, ainsi que de la capacité de l'Organisation à respecter ses engagements et à faire valoir ses résolutions. L'Argentine a pleine confiance dans le rôle que l'organe judiciaire principal des Nations Unies est appelé à jouer dans cette procédure consultative, en tant que garant de l'autorité du droit international.

2. Depuis le début des crises yougoslaves, l'Argentine a participé à toutes les opérations de maintien de la paix et d'administration décidées par les Nations Unies en ex-Yougoslavie, y compris au Kosovo, à travers la MINUK et la KFOR. Participer à cette procédure devant votre Cour pour défendre le respect du droit international est aussi une manière de rendre hommage aux ressortissants argentins qui ont perdu leur vie en accomplissant les missions à eux confiées par l'Organisation dans cette région du monde. L'Argentine a également été membre du Conseil de sécurité au moment de l'adoption de la résolution 1244, qui revêt une fonction clé dans la réponse à donner à la question posée par l'Assemblée générale. C'est aussi en tant que l'un de ceux qui ont voté en faveur de cette résolution que mon gouvernement souhaite contribuer à l'éclaircissement de sa vraie portée dans cette procédure.

3. Cet exposé abordera sept points en particulier :

A. la compétence de la Cour et l'opportunité de son exercice ;

B. la portée de la résolution 1244 du Conseil de sécurité et son infraction par la déclaration unilatérale d'indépendance ;

C. la violation de l'intégrité territoriale de la Serbie ;

D. l'impossibilité d'invoquer le principe d'autodétermination pour justifier la déclaration unilatérale ;

E. l'obligation de poursuivre le règlement des différends par des moyens pacifiques et l'impossibilité d'imposer une solution unilatérale ;

F. le caractère *sui generis* du Kosovo, qui constitue une raison de plus pour déclarer illicite la déclaration unilatérale ; et finalement,

G. les autres arguments avancés pour justifier la sécession, qui ne sont pas recevables.

A. Il y a des raisons décisives pour que la Cour exerce sa compétence consultative

4. Certains participants à cette procédure vous demandent explicitement de ne pas rendre l'avis consultatif, arguant essentiellement que la question n'est pas réglée par le droit, ou que même si la déclaration devait s'avérer illicite, la situation existante demeurerait inchangée[3]. En réalité, ces participants cherchent à ce que vous répondiez à la question comme ils le souhaitent, sans rendre l'avis demandé par l'Assemblée générale. D'autres participants ont avancé exactement les mêmes idées pour prétendre que la déclaration unilatérale d'indépendance n'est pas contraire au droit international. Comme nous le verrons dans un instant, l'argument de la neutralité juridique face à la déclaration unilatérale et l'argument du fait accompli ne sont ni l'un ni l'autre recevables.

5. Pour le reste, Monsieur le président, Messieurs les juges, il est évident que nous ne sommes ni dans la situation de la Carélie orientale[4], ni dans la situation de l'avis sur les armes nucléaires demandé par l'Organisation mondiale de la santé[5]. Il n'est donc point nécessaire de s'appesantir sur la question. Les trois conditions pour rendre l'avis consultatif sont clairement remplies : la Charte donne à l'Assemblée générale le pouvoir de demander un avis, la question posée est juridique et elle tombe sous le coup de la compétence de l'Assemblée générale.

6. Aucune raison décisive n'empêche la Cour d'exercer sa compétence. Au contraire, il est absolument indispensable qu'une voix autorisée comme la vôtre offre l'orientation juridique dont

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[3] Albanie, exposé écrit, p. 27, 30-37, par. 47, 54-70 ; France, exposé écrit, p. 16, 9, par. 1.6, 1.13.

[4] *Statut de la Carélie orientale, avis consultatif, 1923, C.P.J.I. série B n° 5*.

[5] *Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 66.

tous les organes politiques ont tant besoin. Compte tenu de la responsabilité particulière des Nations Unies à l'égard du Kosovo et de votre jurisprudence relevant l'exercice restreint du pouvoir discrétionnaire en matière consultative[6], il n'est même pas imaginable que l'organe judiciaire principal des Nations Unies décide de ne pas répondre à la question posée par l'Assemblée générale.

7. L'Argentine soutient qu'il peut être répondu à la question en confrontant la déclaration unilatérale d'indépendance à la résolution 1244 du Conseil de sécurité ainsi qu'aux principes fondamentaux du droit international. De l'avis de mon pays, la déclaration unilatérale n'est pas en conformité avec la résolution 1244 ; elle viole l'obligation du respect de l'intégrité territoriale de la Serbie, l'obligation de règlement pacifique des différends ainsi que le principe de non-intervention — pour avoir été faite en coordination avec des Etats étrangers. Par ailleurs, la résolution ne trouve aucun fondement juridique dans le principe d'autodétermination.

B. La déclaration unilatérale d'indépendance est contraire à la résolution 1244 (1999) du Conseil de sécurité

8. La déclaration unilatérale d'indépendance du 17 février 2008 n'est pas en conformité avec la résolution 1244, et ce pour de nombreuses et graves raisons :

— *Primo*, parce que ses auteurs, à savoir les institutions provisoires d'administration autonome du Kosovo, elles-mêmes créées par l'ONU et qui puisent leur source principale dans la résolution 1244, ne sont pas compétents pour procéder à une telle déclaration[7].

— *Secundo*, parce que la déclaration, qui vise à établir un nouvel Etat souverain sur un territoire qui est soumis à un régime établi par une résolution adoptée en vertu du chapitre VII de la Charte, remet en question la base même de ce régime. Permettre qu'un organe d'administration locale créé par les Nations Unies puisse faire en toute impunité ce qu'aucun Etat Membre ne serait autorisé à faire représenterait un développement grave. La déclaration

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[6] *Certaines dépenses des Nations Unies (article 17, paragraphe 2, de la Charte), avis consultatif, C.I.J. Recueil 1962*, p. 155 ; *Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies, avis consultatif, C.I.J. Recueil 1987*, p. 31, par. 25 ; *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 21, par. 23 ; *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 235, par. 14 ; *Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme, avis consultatif, C.I.J. Recueil 1999 (I)*, p. 78-79, par. 29 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, p. 157, par. 45.

[7] Argentine, exposé écrit, p. 26-27, par. 61-64.

unilatérale sape ainsi les bases mêmes de la compétence de l'organe qui a adopté la résolution, et par là même l'ensemble du système de sécurité collective.

— *Tertio*, parce que la déclaration prétend modifier unilatéralement la distribution de compétences entre l'administration internationale et l'Etat souverain telle qu'établie par la résolution, violant à la fois les compétences d'administration des Nations Unies et les compétences souveraines de la Serbie.

— *Quarto*, et c'est là un corollaire de ce qui précède, la déclaration est en contradiction flagrante avec le respect de l'intégrité territoriale de la Serbie, élément fondamental du régime établi par la résolution 1244.

— *Quinto*, parce que la déclaration implique que la partie qui l'a adoptée a décidé unilatéralement de mettre fin au processus politique visant à déterminer le statut futur du Kosovo. Or, seul le Conseil de sécurité peut prendre une telle décision.

— *Sexto*, parce que la déclaration vise à imposer à la Serbie et à l'ensemble de la communauté internationale une solution donnée, qui ne peut pourtant que résulter de négociations menées de bonne foi. Si même le Conseil de sécurité ne peut imposer une solution, ce n'est certes pas les institutions provisoires d'administration locale créées par les Nations Unies elles-mêmes qui pourront le faire.

a) *Les auteurs de la déclaration sont les institutions provisoires d'administration autonome, lesquelles ont reçu le soutien d'Etats étranger*s

9. Conscients du caractère ouvertement contraire de la déclaration unilatérale au droit de la Charte, ses auteurs et les Etats qui les soutiennent ont prétendu que cette déclaration n'avait pas été adoptée par les institutions provisoires. C'est nier l'évidence même. Mais cette prétention peut aisément être réfutée ; c'est l'Assemblée générale qui a elle-même déterminé, dans la question posée à la Cour, qui en sont les auteurs : ce sont les institutions provisoires d'administration autonome. Lors des débats et après le vote de la demande d'avis consultatif, aucun Etat — je dis bien : aucun Etat — n'avait même soulevé la question. Pourquoi les Etats qui avancent aujourd'hui cet argument n'ont-ils pas indiqué à l'Assemblée générale que la question était erronée et qu'il n'aurait pas fallu mentionner comme auteurs les institutions provisoires d'autonomie ? La réponse est simple : parce qu'ils savaient tous que c'étaient bien ces organes-là qui avaient adopté la

déclaration. Personne à l'époque ne songeait à cet argument inventé de toutes pièces au cours de la présente procédure.

10. La réalité est reflétée dans le débat à l'Assemblée générale sur la demande d'avis consultatif, où l'on retrouve par exemple l'affirmation suivante : «en coordination avec un grand nombre des pays qui prenaient le plus activement part à la stabilisation des Balkans, l'Assemblée du Kosovo a déclaré l'indépendance du Kosovo le 17 février 2008»[8]. En clair, l'un des participants à cette procédure a même pris le soin de préciser laquelle des institutions provisoires avait déclaré l'indépendance : l'Assemblée ; et il a indiqué en outre que cela avait été fait «en coordination» avec un certain nombre d'Etats étrangers. Cet aveu on ne peut plus clair révèle que la déclaration est le résultat de l'action cordonnée des institutions provisoires avec un certain nombre d'Etats qui les ont soutenues et qui leur ont donné leur aval avant même la déclaration d'indépendance. Or, s'il y a un point sur lequel il existe une unanimité de critères en la matière, c'est bien celui qui reconnaît que l'encouragement aux mouvements sécessionnistes avant que la sécession ne réussisse constitue une ingérence dans les affaires internes de l'Etat concerné[9].

Ces Etats ne se sont pas limités à exprimer leur point de vue et à expliquer que la meilleure solution était, à leurs yeux, l'indépendance. Non. Ils ont accompli des actions concrètes — ils se sont coordonnés avec les auteurs de la sécession pour procéder à la déclaration unilatérale d'indépendance. Absolument rien dans la résolution 1244 ne permet à des Etats de venir soutenir et de promouvoir activement la sécession de concert avec un mouvement ou une province séparatiste.

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[8] Sir John Sawers (Royaume-Uni), 8 octobre 2008, Nations Unies, doc. A/63/PV.22, p. 3. (Version anglaise : «in coordination with many of the countries most closely involved in stabilizing the Balkans, Kosovo's Assembly declared Kosovo independent on 17 February 2008»).

[9] Sir Michael Wood, «The Principle of Non-Intervention in Contemporary International Law: Non-Interference in a State's Internal Affairs Used to be a Rule of International Law: Is it Still?», *Summary of the Chatham House International Law discussion group meeting of 28 February 2007*, disponible sur : http://www.chathamhouse.org.uk/research/international_law/papers, p. 7 ; Crawford, James, *The Creation of States in International Law*, 2e éd., Oxford, Oxford University Press, 2006, p. 388-389 ; Crawford, James, *State Practice and International Law in Relation to Unilateral Secession*, Report for the Attorney General of Canada, 19 février 1997, reproduit dans Bayefsky, Anne (éd.), *Self-determination in International Law: Quebec and Lessons Learned*, La Haye, Kluwer Law International, 2000, 31-61, p. 36.

11. Pour le reste, il a été prouvé dans la phase écrite que le constat de l'Assemblée générale est aussi en pleine conformité avec les faits : ce sont les institutions provisoires d'autonomie qui ont déclaré l'indépendance[10] ; et elles l'ont fait en toute illicéité.

b) ***Le Conseil de sécurité ne pouvait pas limiter et n'a pas limité le respect de l'intégrité territoriale de la Serbie. Au contraire, il l'a renforcé***

12. Monsieur le président, Messieurs les juges, les Etats qui soutiennent la sécession invoquent d'autres arguments qui sont en contradiction flagrante avec la résolution 1244. Pour échapper au constat simple de la non-conformité de la déclaration à la résolution 1244, ils prétendent ainsi que celle-ci protégerait seulement l'intégrité territoriale de la Serbie durant la période intérimaire[11]. Messieurs les juges, l'Argentine a participé à l'adoption de la résolution 1244, en faveur de laquelle elle a voté. Aucun Etat n'a prétendu à ce moment que l'intégrité territoriale de ce qui était alors la République fédérale de Yougoslavie était en sursis, ou que sa garantie se limitait à l'étape intérimaire. Comment l'inclusion explicite de cette garantie, qui visait à donner des assurances quant à l'intégrité territoriale de la Yougoslavie alors que celle-ci consentait à soumettre une partie de son territoire à une administration internationale, pourrait-elle être interprétée dans le sens exactement inverse ? L'Argentine n'aurait tout simplement jamais voté pour la résolution 1244 si celle-ci avait contenu une clause telle que celle qu'invoquent aujourd'hui certains participants. Enfin, Monsieur le président, ce ne serait tout simplement même pas de la compétence du Conseil de sécurité de restreindre le principe du respect de l'intégrité territoriale des Etats.

c) ***La résolution 1244 a privilégié l'autonomie et ne parle nulle part de sécession***

13. J'en viens maintenant à l'argument selon lequel la résolution 1244 ne préjugerait en rien du résultat final du processus politique visant à déterminer le statut futur du Kosovo. Cette prétendue «neutralité» de la résolution 1244 est avancée comme argument pour justifier la sécession[12]. La résolution 1244 montre toutefois la voie contraire lorsqu'elle affirme de manière

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[10] Argentine, observations écrites, p. 15-16, par. 26-27.

[11] Etats-Unis d'Amérique, observations écrites, p. 31 ; auteurs, contribution écrite I, par. 9.05 ; *contra :* Argentine, observations écrites, p. 20, par. 38.

[12] Royaume-Uni, exposé écrit, par. 6.6 ; Suisse, exposé écrit, p. 14, par. 56.

générale — et pas seulement pour la période intérimaire — «l'attachement de tous les Etats Membres à la souveraineté et à l'intégrité territoriale de la République fédérale de Yougoslavie»[13]. La résolution privilégie plutôt une autonomie substantielle dans le cadre de l'Etat, et elle prépare cette autonomie en mettant sur pied les institutions provisoires d'administration autonome. Pas un mot de la résolution 1244 ne permet de supposer que le Conseil de sécurité a autorisé d'une manière ou d'une autre les Albanais du Kosovo, ou les institutions provisoires autonomes envisagées, à proclamer unilatéralement leur indépendance. Au contraire, la résolution parle de «règlement définitif» et de «règlement politique». Or, par définition, une décision unilatérale de l'une des parties ne peut constituer un «règlement» ; c'est bien plutôt une aggravation du différend. Ainsi, tant qu'un règlement sur le statut «futur» n'est pas atteint, le statut «présent» demeure. C'est là la lecture normale de la résolution. Toute autre lecture serait lourde de conséquences pour la stabilité des relations internationales.

14. Mais au fond, Monsieur le président, ce débat n'a même pas lieu d'être. Car à supposer que la résolution 1244 reste neutre quant au statut futur du Kosovo, cela signifierait simplement que tout règlement, y compris un éventuel accord sur l'indépendance, serait *possible*. Mais certainement pas une tentative d'*imposer unilatéralement* l'indépendance.

15. Le Conseil de sécurité n'a jamais imposé à la Serbie, sans son consentement, la perte à terme de son territoire. Il ne pourrait d'ailleurs pas le faire. Jamais les pères fondateurs des Nations Unies n'avaient même envisagé la possibilité que les Etats Membres donneraient au Conseil de sécurité le pouvoir d'amputer ou de permettre l'amputation du territoire d'un Etat Membre.

16. En outre, Monsieur le président, il faut relever un élément essentiel qui distingue le régime établi par la résolution 1244. Normalement, les résolutions mettant sur pied des opérations de maintien de la paix ou d'administration territoriale établissent des mandats à durée déterminée

[13] Version anglaise : «the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia».

qui requièrent une résolution ultérieure pour être reconduites[14]. Par contre, la résolution 1244 a établi un régime à durée indéterminée, qui exige une nouvelle résolution du Conseil de sécurité pour mettre fin à ce régime. Cela montre clairement que le Conseil a voulu préserver ce régime tant qu'une majorité nécessaire pour le modifier ne puisse être obtenue. Comment les institutions provisoires pourraient-elles alors le faire de leur propre chef ?

17. Le constat est donc dépourvu d'ambiguïté : la déclaration unilatérale d'indépendance est en flagrante contradiction avec la résolution 1244. Mais ce n'est pas tout : cette déclaration heurte également et de manière autonome des principes fondamentaux du droit international.

C. La déclaration unilatérale d'indépendance est contraire à l'intégrité territoriale de la Serbie

18. Le premier de ces principes est celui de l'intégrité territoriale. L'Argentine se félicite du large consensus existant dans cette procédure concernant l'importance en droit international du principe du respect de l'intégrité territoriale des Etats[15]. Comme il a été expliqué dans la phase écrite, il s'agit d'un principe fondamental du droit international[16]. Cependant, certains participants ont seulement reconnu cette importance du bout des lèvres. Cette timide reconnaissance de principe se heurte alors aussitôt à une autre affirmation, selon laquelle le respect de l'intégrité territoriale serait une règle applicable uniquement dans les relations d'Etat à Etat[17]. Pour ces mêmes participants, les acteurs infra-étatiques ne seraient donc pas tenus de respecter l'intégrité territoriale des Etats[18]. Mais tant l'Argentine que d'autres participants ont déjà démontré que l'évolution du droit international a fait du respect de l'intégrité territoriale un principe applicable à

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[14] Par exemple, le mandat de l'Opération des Nations Unies à Chypre, a été prolongé jusqu'au 15 décembre 2009 par la résolution 1873, 29 mai 2009, par. 6 ; le mandat de la Mission des Nations Unies pour la stabilisation en Haïti a été prolongé jusqu'au 15 octobre 2010 par la résolution 1892 (2009), par. 1 ; le mandat de la Force des Nations Unies chargée d'observer le dégagement a été renouvelé jusqu'au 31 décembre 2009 par la résolution 1875, 23 juin 2009, par. 3 ; le mandat de la Force intérimaire des Nations Unies au Liban a été prolongé jusqu'au 31 août 2010 par la résolution 1884, 27 août 2009, par. 1 ; le mandat de la Mission intégrée des Nations Unies au Timor-Leste a été prolongé jusqu'au 26 février 2010 par la résolution 1867, 26 février 2009. La Mission d'appui au Timor Oriental a été créée par la résolution 1410, 17 mai 2002, par. 1, d'une durée initiale de 1 mois, et a été prolongée successivement par les résolutions 1480, 19 mai 2003, et 1573, 16 novembre 2004.

[15] Argentine, exposé écrit, p. 28-30, par. 69-75 ; Azerbaïdjan, exposé écrit, par. 19 ; Bolivie, exposé écrit, p. 1 ; Chine, exposé écrit, p. 2-3 ; Chypre, exposé écrit, par. 81-82 ; Egypte, exposé écrit, par. 26-29 ; Espagne, exposé écrit, par. 25 et 27 ; Iran, exposé écrit, par. 2.1 ; Serbie, exposé écrit, p. 28-30 ; Slovaquie, exposé écrit, par. 3 ; Roumanie, exposé écrit, par. 97 ; Royaume-Uni, exposé écrit, par. 5.8-5.11 ; Russie, exposé écrit, par. 76-78.

[16] Argentine, exposé écrit, p. 28, par. 69.

[17] Etats-Unis d'Amérique, exposé écrit, p. 69 ; Royaume-Uni, exposé écrit, p. 86, par. 5.10.

[18] Royaume-Uni, exposé écrit, p. 86, par. 5.9 ; auteurs, exposé oral du 1 décembre 2009, CR 2009/25 (Müller).

tous les acteurs internationaux[19]. S'agissant de la situation en Bosnie-Herzégovine, en Géorgie, en Azerbaïdjan, aux Comores ou encore au Kosovo, parmi d'autres, la communauté internationale s'est adressée à toutes les parties — y compris donc les mouvements sécessionnistes — rappelant l'obligation de respecter l'intégrité territoriale des Etats concernés[20]. La pratique des Nations Unies à l'égard du Kosovo le confirme, et ce avant même l'adoption de la résolution 1244.

19. En fait, ce débat serait même académique dans les circonstances de la présente affaire : les institutions provisoires d'autonomie — une création onusienne — doivent respecter le cadre juridique défini par l'instrument international dans lequel elles trouvent leur source, et cet instrument confirme le respect de l'intégrité territoriale de l'Etat souverain. Il en va de même de tous les participants au processus politique déclenché en vertu de la résolution 1244, fussent-ils des «représentants démocratiquement élus», des partis politiques ou autres. Prétendre le contraire, c'est ignorer les désormais nombreuses résolutions du Conseil de sécurité régissant des conflits internes qui menacent la paix et la sécurité internationales. C'est les condamner à n'être obligatoire que pour les parties étatiques, alors qu'elles deviendraient facultatives pour les acteurs non étatiques.

20. Monsieur le président, Messieurs les juges, au cœur même du principe de respect de l'intégrité territoriale se trouve l'idée de fournir une garantie contre tout démembrement. Or, en voulant mettre fin à la souveraineté serbe sur la province du Kosovo, les institutions provisoires d'administration autonome ont gravement porté atteinte à l'intégrité territoriale de la Serbie.

D. Le droit d'autodétermination ne constitue pas un fondement à la déclaration unilatérale d'indépendance

21. Durant la phase écrite, de nombreux participants se sont référés au principe d'autodétermination, soit pour relever sa non-pertinence, et cela même parmi des Etats ayant reconnu la prétendue «République du Kosovo»[21], soit pour l'invoquer afin de justifier la prétendue

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[19] Argentine, observations écrites, p. 20-21, par. 39-40.

[20] Pour la Géorgie, cf. les résolutions 876 (1993), 896 (1994) et 906 (1994) du Conseil de sécurité. Pour l'Azerbaïdjan, les résolutions 882 (1993), 853 (1993), 874 (1993) et 884 (1993) du même organe. Pour les Comores, cf. l'accord d'Addis-Abeba du 13 décembre 1997 dans : 4 *Documents d'actualité internationale*, Paris, La documentation française, 1998, p. 143. Pour le Kosovo : les résolutions 1160 (1998), 1199 (1998) et 1203 (1998).

[21] Albanie, observations écrites, p. 34, par. 61 ; Etats-Unis d'Amérique, observations écrites, p. 21 ; Norvège, observations écrites, p. 3, par. 8 ; Royaume-Uni, exposé écrit, par. 5.33, 6.65.

conformité vis-à-vis du droit international de la déclaration unilatérale d'indépendance[22]. L'Argentine a expliqué pourquoi à son avis ce principe ne constitue pas un fondement juridique de la déclaration[23].

22. Monsieur le président, Messieurs les juges, votre Cour a eu l'occasion de rappeler à plusieurs reprises l'importance de ce principe fondamental dans les relations internationales ainsi que les compétences des Nations Unies — et en particulier de l'Assemblée générale — en la matière, reconnaissant que seuls les «peuples» dans le sens juridique international du terme et reconnus comme tels, sont titulaires de l'autodétermination. Dans votre avis consultatif sur le *Sahara occidental*, votre Cour a relevé que

> «La validité du principe d'autodétermination, défini comme répondant à la nécessité de respecter la volonté librement exprimée des peuples, n'est pas diminuée par le fait que dans certains cas l'Assemblée générale n'a pas cru devoir exiger la consultation des habitants de tel ou tel territoire. Ces exceptions s'expliquent soit *par la considération qu'une certaine population ne constituait pas un «peuple» pouvant prétendre à disposer de lui-même*, soit par la conviction qu'une consultation eût été sans nécessité aucune, en raison de circonstances spéciales.» (*Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 33, par. 59 ; les italiques sont de nous.)[24]

23. Dans la présente espèce, ni le Conseil de sécurité ni l'Assemblée générale n'ont reconnu l'existence d'un «peuple kosovar» ayant droit à disposer de lui-même. Ni explicitement, ni implicitement. Ceci n'a rien d'étonnant. La conférence de Paix pour l'ex-Yougoslavie avait traité les Albanais du Kosovo comme une minorité, non comme un peuple titulaire de l'autodétermination. Selon la Constitution yougoslave de 1974, seules les républiques avaient droit à l'autodétermination. Par ailleurs, le processus de dissolution de l'ancienne Yougoslavie a été considéré par la commission Badinter comme mené à terme le 29 novembre 1991[25]. Comme nous l'avons déjà expliqué à la phase écrite[26], même Rambouillet, avec sa référence à la «volonté du peuple», n'autorise pas à prétendre une reconnaissance quelconque du droit d'autodétermination.

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[22] Albanie, exposé écrit, p. 39, par. 74 ; auteurs, contribution écrite II, p. 80-86, par. 4.42-4.53 ; Pays-Bas, observations écrites, p. 5 ; Slovénie, exposé écrit, p. 2/3 ; Suisse, exposé écrit, p. 21, par. 77.

[23] Argentine, exposé écrit, p. 37, par. 95, et observations écrites, p. 26-27, par. 59-61.

[24] (Version anglaise : «The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a «people» entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances»).

[25] Opinion nº 8 du 4 juillet 1992, reproduit dans *RGDIP*, 1993, t. XCVII, p. 590.

[26] Argentine, exposé écrit, p. 39, par. 98-99.

Ceci n'est pas non plus autorisé par la seule mention dans la résolution 1244 que l'on devra tenir compte de Rambouillet[27]. En effet, tenir compte d'un texte non contraignant ne signifie nullement que ce texte soit devenu obligatoire.

24. Certainement, la population albanaise du Kosovo jouit d'importants droits reconnus sur le plan international en tant que minorité et ses intérêts doivent être pris en compte. Cela ne la transforme pas pour autant en décideur du destin du territoire sur lequel elle se trouve. Comme l'a relevé un auteur : «[s]elf-determination for peoples or groups within a State is to be achieved by participation in the constitutional system and on the basis of respect for its territorial integrity»[28].

25. Certains participants ont également recouru à la doctrine controversée de la «sécession corrective», sans avoir pourtant prouvé son existence en droit international. J'ajouterai seulement ici à tout ce qui a déjà été dit et écrit que cette doctrine ne repose pas même sur les prétendues finalités dont elle est censée tenir compte. Comme l'a affirmé un autre auteur :

> «[l]a création d'un nouvel Etat revêt par la force des choses une certaine permanence. La durée est inscrite dans la vocation des Etats. En revanche, une situation de violation des droits des minorités peut obéir à l'attitude d'un gouvernement, lequel est par définition temporaire. Dès lors, on ne voit pas pourquoi on fait recours à une situation de rupture, destinée à durer longtemps, pour répondre à une situation qui ne pourrait qu'être transitoire. La réponse à donner à une violation des droits des minorités n'est pas de les ériger en peuples, mais de rétablir leurs droits et de les garantir sur le plan international.»[29]

26. Monsieur le président, Messieurs les juges, certains participants vous ont demandé de ne pas vous prononcer sur l'autodétermination[30]. Mais dans le cadre de cette procédure, vous êtes censés éclairer l'organe requérant quant à l'ensemble des règles qui ont été invoquées et qui pourraient s'avérer pertinentes, soit pour attester la conformité du fait, acte ou situation sous

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[27] Résolution 1244 (1999), par. 11 *e)*.

[28] Crawford, James, *The Creation of States in International Law*, 2e éd., Oxford, Oxford University Press, 2006, p. 417 (traduction : «L'autodétermination pour des peuples ou des groupes à l'intérieur d'un Etat s'accomplit par la participation au système constitutionnel et sur la base du respect de son intégrité territoriale.»).

[29] Kohen, Marcelo, «Création d'Etats en droit international contemporain», *Cours euro-méditerranéens Bancaja de droit international*, vol. VI, 2002, p. 596. (Traduction : «once a new State is created it has by force of circumstance a certain permanence. This duration derives from the vocation of States. In contrast, a violation of minority rights is a reflection of the attitude of a government, which is by definition temporary. Consequently, there is no need to resort to rupture, designed to be of long duration, in order to respond to a situation that is only temporary. A violation of minority rights should not be addressed by creating peoples, but by re-establishing their rights and by guaranteeing these at the international level.»).

[30] Albanie, observations écrites, p. 34, par. 61 ; auteurs, contribution écrite I, p. 157, par. 8.38 ; Etats-Unis d'Amérique, observations écrites, p. 21 ; Norvège, observations écrites, p. 3, par. 8 ; Royaume-Uni, exposé écrit, par. 5.33, 6.65.

examen avec le droit international, soit pour l'exclure comme justification juridique. C'est ce que vous avez fait par exemple dans deux de vos derniers avis consultatifs[31]. La manière stricte par laquelle la communauté internationale détermine l'existence d'un peuple titulaire du droit à disposer de lui-même, le fait que ce principe s'exerce par l'ensemble de la population à l'intérieur du territoire d'un Etat souverain et le constat évident que les Nations Unies n'ont pas reconnu l'existence d'un «peuple kosovar» ayant droit à l'autodétermination permettent d'écarter cet argument comme justification de la déclaration unilatérale d'indépendance.

E. L'obligation de régler les différends par des moyens pacifiques impose aux parties de s'abstenir de prendre des mesures unilatérales et de poursuivre les négociations

27. Monsieur le président, Messieurs les Membres de la Cour, l'Argentine souhaite attirer l'attention de la Cour sur un point de droit qui lui semble être particulièrement pertinent. Il s'agit de l'obligation de régler les différends par des moyens pacifiques. A partir du moment où la question du statut futur du Kosovo a été placée sur le plan international, que le Conseil de sécurité a décidé d'un processus politique visant à déterminer ce statut, que les principales parties à la négociation de ce statut ont été clairement définies et que des négociations sous la direction d'un médiateur nommé par le Secrétaire général ont eu lieu, il ne fait pas de doutes que le règlement pacifique des différends, en tant que principe fondamental du droit international contemporain, est applicable aux parties. Ce n'est d'ailleurs pas la première fois que le Conseil de sécurité met en place un processus de négociation visant à régler des différends internes ayant une composante internationale, consécutivement à leur qualification comme des menaces à la paix et à la sécurité internationales[32]. On peut aussi mentionner des exemples de conflits internes réglés par des organes arbitraux internationaux appliquant des règles du droit international[33].

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[31] *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004,* p. 136 ; *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J Recueil 1996 (I),* p. 226.

[32] Résolution 367 du Conseil de sécurité, 12 mars 1975 ; résolution 874 du Conseil de sécurité, 14 octobre 1993 ; résolution 1345 du Conseil de sécurité, 21 mars 2001 ; résolution 1393 du Conseil de sécutité, 31 janvier 2002.

[33] Arbitrage *Dubaï/Charchah*, 91 ILR (1993), p. 543 ; *Fédération de Bosnie-Herzégovine/République Srpska* (arbitrage pour la région de Brcko), sentence finale du 5 mars 1999, 38 ILM 534 ; Arbitrage *Terre-Neuve et Labrador/Nouvelle-Ecosse*, 128 ILR (2002), p. 425 ; *Gouvernement du Soudan/le Mouvement/Armée populaire de libération du Soudan* (arbitrage Abyei), Sentence finale du 22 juillet 2009, disponible sur : http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf.

28. Dans le cas qui nous occupe, le Secrétaire général a nommé un envoyé spécial devant remplir une fonction de médiateur. On peut regretter certains partis pris d'avance ainsi que l'absence de solutions imaginatives, telles qu'on en trouve dans différentes parties du monde et qui auraient permis aux deux parties d'obtenir l'essentiel de leur revendication : souveraineté territoriale du côté de la Serbie et le maximum imaginable de compétences d'auto-administration pour la province. On sait la suite, moins de deux ans après le début des négociations, le médiateur a fait une proposition d'indépendance qui a été acceptée par une partie et rejetée par l'autre.

29. Messieurs les juges, un médiateur n'est ni un arbitre ni un juge. Le plan de l'envoyé spécial n'est jamais qu'une simple proposition aux parties, sans effet obligatoire. Il est impossible de la considérer comme fondement de la déclaration unilatérale d'indépendance, comme le font certains[34]. Ce ne serait d'ailleurs pas la première fois qu'un médiateur onusien voit sa proposition rejetée[35].

30. Vouloir tirer parti de l'échec d'un médiateur pour transformer sa proposition en une sorte de sentence arbitrale et vouloir l'imposer unilatéralement à l'autre partie constitue un non-respect grave des obligations découlant du principe du règlement pacifique des différends. Passer sous silence une telle entorse à ce principe fondamental constituerait un précédent fâcheux aux conséquences dommageables pour l'application de l'obligation du règlement pacifique des différends. L'article 7 de la déclaration de Manille énonce la démarche à suivre par les parties en cas d'impasse : «elles doivent continuer de rechercher une solution pacifique et se consulter sans délai pour trouver des moyens mutuellement acceptables de régler pacifiquement leur différend»[36]. Une mesure unilatérale comme la déclaration du 17 février 2008 est l'antithèse même d'une telle démarche.

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[34] France, exposé écrit, par. 2.65-2.67.

[35] Voir : rapport du Secrétaire général sur sa mission de bons offices à Chypre, 1er avril 2003, Nations Unies, doc. S/2003/398 ; commentaires de M. Alvaro de Soto, Secrétaire général adjoint et conseiller spécial du Secrétaire général pour Chypre, Conseil de sécurité, 4738e séance, 10 avril, Nations Unies, doc. S/PV.4738, p. 2-4.

[36] A/RES/37/10.

F. Le caractère *sui generis* du cas de Kosovo constitue une raison de plus pour déclarer illicite la déclaration unilatérale d'indépendance

31. Une autre manière de chercher à échapper au constat évident de l'illicéité de la déclaration unilatérale est l'affirmation selon laquelle le cas du Kosovo est *sui generis* et qu'il ne constitue donc pas un précédent[37]. Mais quels sont les éléments qui font du Kosovo un cas *sui generis* ? Certainement pas les considérations politiques avancées, mais bien plutôt ce qui découle des résolutions pertinentes des Nations Unies. Les traits caractéristiques de la situation du Kosovo sont la souveraineté serbe, une administration internationale, l'autonomie locale dans le cadre de cette administration et des négociations sous l'égide internationale en vue de déterminer le statut futur du territoire. Rien de tout cela n'autorise une déclaration unilatérale d'indépendance. Au contraire, en plaçant la situation du Kosovo sur le plan international, le mouvement séparatiste interne — et à plus forte raison des institutions provisoires qui ont été créées par les Nations Unies elles-mêmes — se sont mises en devoir de respecter les règles du jeu internationales.

G. Les autres arguments avancés pour justifier la sécession ne sont pas juridiquement recevables

32. Permettez-moi, Monsieur le président, de me référer brièvement à d'autres arguments avancés pour justifier la sécession mais qui ne sont pas recevables. En premier lieu, on doit constater que les événements postérieurs à la déclaration du 17 février 2008 ne peuvent en rien déterminer la qualification juridique de cette dernière ou curer son illicéité intrinsèque. La Serbie n'a pas accepté l'indépendance de sa province et les reconnaissances minoritaires ne changent pas non plus la situation, qui demeure juridiquement celle établie par la résolution 1244 aussi longtemps que le Conseil n'en décide pas autrement.

33. L'argument selon lequel on ne pourrait pas constater l'illicéité de la déclaration unilatérale d'indépendance du Kosovo dans la mesure où cela reviendrait également à condamner l'émergence «controversée» de certains Etats[38] se heurte à la pratique existante depuis l'adoption

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[37] Albanie, exposé écrit, par. 72 et 95 ; Allemagne, exposé écrit, p. 26-27, observations écrites, p.6 ; Azerbaïdjan, exposé écrit, par. 17 ; Danemark, exposé écrit, p. 6 ; Estonie, exposé écrit, par. 2.1 et 2.2 ; Finlande, exposé écrit, par. 10 ; France, exposé écrit, par. 2.1, 2.16-2.82 ; Irlande, exposé écrit, par. 33 ; Japon, exposé écrit, par. 3 ; Lettonie, exposé écrit, par. 8 ; Luxembourg, exposé écrit, par. 5-8 ; Maldives, exposé écrit, p. 1 ; Pologne, exposé écrit, par. 3.2 et 5.1-5.25 ; République tchèque, exposé écrit, p. 6 ; Royaume-Uni, exposé écrit, par. 0.17-0.23, observations écrites, par. 11-14 ; Slovénie, exposé écrit, p. 2/3, observations écrites, par. 6. *Contra :* Argentine, exposé écrit, par. 60, observations écrites, par. 33-35 ; Chypre, exposé écrit, par. 77, observations écrites, par. 28-29 ; Serbie, observations écrites, par. 124-170 ;

[38] Royaume-Uni, exposé écrit, p. 9, par. 0.15.

de la Charte des Nations Unies. Cette pratique montre clairement que depuis 1945, tous les nouveaux Etats ont été créés en vertu des résolutions pertinentes de l'Organisation, du fait de la dissolution de l'Etat prédécesseur ou lors de rares cas de séparation, toujours avec le consentement de l'Etat parent — un consentement donné soit d'avance, soit postérieurement. Le cas du Kosovo ne tombe sous le coup d'aucune de ces situations.

34. J'en viens maintenant à la tentative d'imposer le fait accompli. On invoque l'idée qu'une décennie sans que la Serbie ait pu exercer son administration sur le territoire, avec en sus la présence internationale, aurait créé une réalité irréversible. Monsieur le président, cette tentative à peine voilée de vouloir imposer le fait accompli se heurte à de nombreux exemples dans lesquels certaines situations territoriales ont duré bien davantage, sans qu'il ait pour autant été impossible de les modifier plus tard : songez aux plus de sept décennies de contrôle de la Namibie par l'Afrique du Sud, au siècle écoulé pour la restitution de Hong Kong à la Chine, au quart de siècle pour le Timor oriental et j'en passe. Les arguments du fait accompli et des prétendues «réalités irréversibles» — qui ne le sont d'ailleurs pas — procèdent d'une politique de force qui ne constitue en aucune manière un fondement juridique, et qui mériterait d'être condamnée pour le mépris du droit international qu'elle représente.

Conclusion : il est temps de revenir au respect de la légalité internationale au Kosovo

35. Monsieur le président, Messieurs les juges, aucune situation non conforme au droit international ne peut apporter ni la stabilité ni la paix, ni la démocratie, ni le respect des droits humains, ni aux Balkans ni ailleurs. Par définition, aucune mesure unilatérale n'est susceptible de régler les différends. Bien au contraire : le mépris du droit international et les tentatives d'imposer des mesures unilatérales affaiblissent les bases même du système international.

36. L'Argentine estime opportun que votre Cour examine les conséquences juridiques les plus fondamentales qui découleront de votre réponse. Certes, à la différence d'autres questions posées par voie consultative, la présente demande d'avis ne demande pas à la Cour d'établir «les conséquences juridiques» d'une situation donnée. Toutefois, ce ne serait pas un obstacle pour que la Cour, dans son pouvoir d'appréciation de la question, trace des orientations générales sur la signification juridique de sa réponse.

37. De l'avis de l'Argentine, la réponse de la Cour permettra au Secrétaire général et à son représentant sur le terrain de remplir exactement leurs fonctions prévues par la résolution 1244 ; elle exigera aussi des institutions provisoires d'autonomie qu'elles exercent leurs fonctions dans le cadre juridique qui est le leur, cessant ainsi de s'autoproclamer organes d'un Etat indépendant qui n'existe pas. Votre réponse permettra également aux Etats Membres d'adapter leurs politiques de reconnaissance aux exigences du droit international ; elle permettra un nouveau départ aux négociations sur le statut futur, sans pressions d'aucune sorte, si ce n'est la pression du respect scrupuleux par toutes les parties du droit international ; elle aura une influence certaine et bénéfique sur d'autres conflits semblables, aidant ainsi à écarter les politiques de double standard ; elle apaisera également la situation interne des Etats voisins composés eux aussi de minorités nationales — qui d'ailleurs recevraient un très mauvais message si l'on devait considérer que les indépendances sont des pures questions de fait. Aucun avenir ne sera solide s'il s'édifie sur le mépris de normes fondamentales et sur la violation flagrante d'une résolution du Conseil de sécurité adoptée en vertu du chapitre VII de la Charte.

38. Monsieur le président, Messieurs les juges, l'Argentine n'adopte pas une position juridique dans une situation et l'exact opposé dans une autre situation pourtant semblable ; elle est guidée par sa détermination à respecter le droit international dans toutes les circonstances. L'Argentine condamne les atteintes à l'intégrité territoriale où qu'elles se produisent ; elle rejette les invocations de l'autodétermination sans fondement juridique où qu'elles soient faites ; elle soutient fermement l'application du principe d'autodétermination partout où il y a un peuple qui en est titulaire et qui est privé de son exercice. C'est animée de cette forte conviction que l'Argentine a participé à cette procédure et a tenu à y apporter sa contribution.

39. Monsieur le président, Messieurs les juges, je vous remercie de votre attention.

The PRESIDENT: Thank you very much, Your Excellency Ms Susana Ruiz Cerutti.

Now that concludes the oral statement and comments of Argentina and brings to a close today's hearings. The Court will meet again tomorrow at 10 a.m. when it will hear Austria, Azerbaijan and Belarus. The Court is adjourned.

The Court rose at 12.25 p.m.

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