Embassy of the
Argentine Republic

Nro. OI 25/2009

The Hague, April 17, 2009

Dear Mr. Registrar:

I have the honour to refer to your note No 133310 of October 20, 2008, regarding the request for an advisory opinion submitted to the International Court of Justice by the General Assembly of the United Nations on the question of the "*Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*".

In this regard and on behalf of the Government of the Argentine Republic I hereby submit a written statement on the above mentioned question. Following your recommendation, please find attached to this letter thirty (30) bound paper copies of the statement and one (1) CD-ROM containing its electronic version.

I avail myself of the opportunity to renew to you the assurances of my highest consideration.

Santos Goñi Marenco
Ambassador

Mr. Philippe COUVREUR
Registrar of the International Court of Justice
The Hague

INTERNATIONAL COURT OF JUSTICE

ACCORDANCE WITH INTERNATIONAL LAW OF
THE UNILATERAL DECLARATION OF INDEPENDENCE BY
THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT
OF KOSOVO

REQUEST FOR AN ADVISORY OPINION

WRITTEN STATEMENT OF THE ARGENTINE REPUBLIC

17 April 2009

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Introduction

1. The present written statement is filed pursuant to the Court's Order of 17 October 2008 upon the request for an advisory opinion made by the General Assembly of the United Nations in its resolution 63/3 of 8 October 2008.

2. The terms of the request made by the General Assembly are as follows:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

3. The question put before the Court regards a wide range of issues of particular importance not only for the maintenance of peace and security in the region concerned but also with regard to fundamental principles of international law and to the respect thereof, which are of general concern.

4. Having in mind both the particular and the general relevance of the General Assembly's request, the Argentine Republic (hereinafter Argentina) voted in favour of Resolution 63/3. The representative of Argentina explained this vote in the following terms:

> "The pillar of the United Nations system is international peace and security. The principal organ of the Organization with powers in this area is the Security Council. The whole of the collective security system is based on the fact that Members of the United Nations are duty bound to abide by the relevant resolutions of the Organization.
>
> In the case of Kosovo, Security Council resolution 1244 (1999), for which Argentina voted in the affirmative, establishes clearly the legal and political parameters for the solution to the situation of the Kosovar minority in Serbia, ensuring the sovereignty and territorial integrity of Serbia, as well as the settlement of the disputes through a negotiated agreement that is mutually accepted by all parties. Argentina believes

that that resolution is clear. Nevertheless, we join with the majority in agreeing to the request for an advisory opinion on this matter."[1]

5. Argentina, as a member of the Security Council at that time, voted in favour of Resolution 1244 (1999). Stressing the importance and the historic transcendence of this Resolution, the Argentine representative stated:

> "The resolution just adopted by the Security Council is of singular importance for various reasons. First, it marks the end of a humanitarian tragedy in which the main victims were thousands of innocent civilians whose fundamental human rights were being systematically and persistently violated.
>
> Secondly, it lays the foundation for a definitive political solution to the Kosovo crisis that will respect the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. The rights of minorities and of all the inhabitants of Kosovo, without exception, to live in a climate of peace and tolerance must also be unequivocally recognized.
>
> Thirdly, this resolution confirms the central and irreplaceable role of the United Nations, and in particular that of the Security Council and the Secretary-General at times when there is a need to join efforts in order to maintain international peace and security.
>
> Lastly, it represents an interpretation of the Charter that reflects the current recognition of human rights throughout the international community."[2]

6. Following the unilateral declaration of independence of 17 February 2008, Dr. Jorge Taiana, Argentina's Minister of Foreign Affairs, International Trade and Worship, made a declaration that was summarized as follows:

> "Minister Taiana reaffirmed that the Argentine Republic does not recognise the said unilateral declaration, and that [Argentina] endorses the full force of United Nations Security Council Resolution 1244 (1999).
>
> In this context, the Foreign Affairs Minister recalled the importance of respect of the principles of sovereignty and territorial integrity as a

[1] Mr. Argüello (Argentina), United Nations General Assembly, Sixty-third session, 22nd plenary meeting, 8 October 2008, UN Doc. A/63/PV.22, p. 12.
[2] Mr. Petrella (Argentina), United Nations Security Council, Fifty-fourth Year, 4011th Meeting, 10 June 1999, UN Doc. S/PV.4011, pp. 18-19.

basis towards finding a political solution in the region, in accordance with what is provided in the said resolution, signaling that a sustainable solution for the status of Kosovo must be the result of a negotiated agreement that is mutually acceptable to the Parties concerned"[3].

7. The legal status of Kosovo at the time that the unilateral declaration of independence was made is beyond discussion. Kosovo is and was at that time Serbian sovereign territory, under international administration and enjoying substantial autonomy, in conformity with Security Council Resolution 1244 (1999). It is also uncontroversial that the Provisional Institutions of Self-Government, created as part of that international administration, did not possess the legal capacity to declare the independence of Kosovo. Even States having encouraged the independence of the territory and that have subsequently recognised the so-called "Republic of Kosovo", cannot deny these uncontroversial facts.

8. SC Resolution 1244 (1999) also envisaged a political process designed to determine the future status of Kosovo. Negotiations were conducted with that aim in mind. It is well known that some voices at the international level favoured independence for Kosovo and have acted accordingly. The Special Envoy Martti Ahtisaari made a proposal to that end, which did not result in an agreement between the negotiating parties, and has not been endorsed by the Security Council.

9. It is against this background that the question submitted by the General Assembly should be addressed. At the outset, Argentina stresses the importance that all concerned actors – the United Nations, all member States, the local autonomous institutions of Kosovo, and the different communities constituting the population of Kosovo – act in plain conformity with what is prescribed by international law. Only an outcome based on the respect for international law will provide a lasting solution for Kosovo, bringing stability to the region and allowing all parts of the population in Kosovo to enjoy their human rights in the framework of a multiethnic society. What is at stake is not only the future of Kosovo and the stability of

[3] Translation. Press Release No. 105/08, 14 April 2008, available at: www.mrecic.gob.ar.

the Balkans, but also, and more generally, respect for the rule of law at the international level.

10. Argentina's commitment to the maintenance of peace and security in the region, and its involvement in United Nations action towards this goal, is well established. In particular, it must be recalled that Argentina has participated in UN peacekeeping and other UN authorized operations in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter SFRY) since 1992. Argentina has contributed forces in Croatia and Bosnia and Herzegovina to the United Nations Protection Force (UNPROFOR), the United Nations Confidence Restoration Operation (UNCRO), the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES), the United Nations Civilian Police Support Group (UNPSG), the United Nations Mission of Observers in Prevlaka (UNMOP), the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and the Multinational Stabilization Force (SFOR); in Macedonia, to the United Nations Preventive Deployment Force (UNPREDEP). In the Federal Republic of Yugoslavia (later on Serbia and Montenegro and presently Serbia), Argentine military and civilian personnel participated in the Kosovo Force (KFOR) and the United Nations Interim Administration Mission in Kosovo (UNMIK) since July 1999. In particular, Argentine personnel contributed to the creation of the new local police and the establishment of a system of criminal justice. An Argentine diplomat acted as Mayor of Mitrovica during 2002. Argentina participated in KFOR from 1999 to 2003. Participation in UNMIK lasted until December 2008. Seven members of the Argentine troops participating in these operations lost their lives accomplishing the tasks decided by the Security Council.

11. Argentina vigorously promotes global respect of fundamental human rights and compliance with the obligation to settle disputes through peaceful means. In Argentina's view, respect for United Nations resolutions is also of paramount importance if the international community wishes the Organization to remain at the core of the international system.

12. Consequently, Argentina is convinced that the advisory opinion that the Court will render with regard to the situation in Kosovo will be of practical importance. As the Court has previously stated: "The jurisdiction of the

Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law".[4] The United Nations and the whole international community are in acute need of the Court's guidance in this respect.

13. This written statement is divided into three main sections. The first section will address the competence of the General Assembly to request an advisory opinion and the reasons for the Court to exercise its jurisdiction in this regard. The second section addresses the principles and rules relevant to the question raised by General Assembly Resolution 63/3. The third section is devoted to the answer to be given to that question. Finally, a conclusion states the submissions of Argentina.

[4] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 188, para. 31.

Section I

Jurisdiction of the Court and the Propriety of Its Exercise

14. In this section, it will be shown that the General Assembly has competence to request the present advisory opinion, since it clearly raises a legal question falling within the scope of its powers and functions. Likewise, this section addresses the absence of compelling reasons that would lead the Court to use its discretionary power not to exercise its advisory jurisdiction.

A. The Court has jurisdiction to give the advisory opinion requested

15. The competence of the General Assembly to request an advisory opinion of the International Court of Justice is derived from Article 96 (1) of the Charter of the United Nations, which reads as follows:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

16. Both the reference to the General Assembly as one of the two named principal organs of the United Nations and the phrase "any legal question" exemplify the broad competence of the Assembly to request advisory opinions. Consequently, it is submitted that, by requesting the present advisory opinion, the General Assembly rightly exercised this competence **(1)** and that the question raised is a legal one **(2)**.

(1) The General Assembly has competence to request the advisory opinion

17. The Court has noted that Article 10 of the Charter "has conferred upon the General Assembly a competence relating to 'any questions or any matters' within the scope of the Charter."[5]

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[5] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 233, para. 11; *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 145, para. 17.

18. The request for an advisory opinion by the General Assembly concerns a declaration of independence by provisional institutions of self-government created by the UN in a territory which is under the administration of the UN. This declaration raises questions concerning respect for the Charter, in particular its purposes and principles, and for decisions of the United Nations organs, as well as compliance with fundamental principles of international law. In conformity with Chapter IV of the Charter, the General Assembly has the competence to deal with these issues.

19. It should be noted that the General Assembly has specifically dealt with the situation in Kosovo for over a decade.[6] Equally, during the discussion of Resolution 63/3, no State has challenged the competence of the General Assembly to request the present advisory opinion.

20. It could be argued that since it was the Security Council which was the United Nations organ that adopted the core resolution setting out the international regime for Kosovo (Resolution 1244 (1999)), the question could not be addressed by the General Assembly. This is not the case for many reasons.

21. *First*, according to Article 10 of the Charter, "[t]he General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter". *Second*, Article 12 of the Charter limits the authority of the General Assembly to making recommendations with regard to a dispute or situation in respect of which the Security Council is exercising the functions assigned to it by the Charter. When interpreting this provision, the Court noted that "there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter

[6] See General Assembly resolutions 54/62 ('Maintenance of international security – stability and development of South-Eastern Europe', 10 January 2000]; 55/27 ('Maintenance of international security – good-neighbourliness, stability and developmement in South-Eastern Europe', 20 December 2000]; 56/18 ('Maintenance of international security – good-neighbourliness, stability and development in South-Eastern Europe', 9 January 2002); 57/52 ('Maintenance of international security – good-neighbourliness, stability and development in South-Eastern Europe', 30 December 2002); 59/59 ('Maintenance of international security – good-neighbourliness, stability and development in South-Eastern Europe', 16 December 2004); and 61/53 ('Maintenance of international security – good-neighbourliness, stability and development in South-Eastern Europe', 19 December 2006).

concerning the maintenance of international peace and security".[7] *Third*, in any case, the limitation of Article 12 does not apply to a request for an advisory opinion, since this request is not a "recommendation".[8]

22. Furthermore, the General Assembly has also dealt with conflicts emerging from other attempts at creating States in contradiction with fundamental principles of international law in the past, such as the Bantustans and the so-called "Turkish Republic of Northern Cyprus.[9]

23. Clearly, the General Assembly has a direct interest in ensuring respect for international law in general, and all the more so if the matter is of direct concern to the Organisation, as is the case of the challenge posed by the unilateral declaration of independence. Consequently, Argentina considers that the competence of the General Assembly to request this advisory opinion is well established.

(2) By definition, the question raised is a legal one

24. The second requirement for granting advisory jurisdiction to the Court through the General Assembly is that the question raised is a legal one. According to the Court, questions "framed in terms of law and rais[ing] problems of international law…are by their very nature susceptible of a reply based on law…[and] appear…to be questions of a legal character".[10]

25. The question in the present case submitted to the Court for advice is clearly a legal one, relating as it does to the *accordance with international law* of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. To some extent, it can be said that nothing falls more squarely into the category of a "legal question" than the determination of the accordance of an act, fact or situation with the applicable law. To use the words of the Court itself, the request for the present advisory opinion requires "an assessment of whether [the unilateral declaration of

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[7] *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 149, para. 27.
[8] *Ibid.*, p. 148, para. 25.
[9] General Assembly Resolutions 31/6 ('Policies of *apartheid* of the Government of South Africa') of 26 October 1976, and 37/253 ('Question of Cyprus') of 13 May 1983.
[10] See *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 18, para. 15 and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 233, para. 11.

independence] is or is not in breach of certain rules and principles of international law."[11] As such, "it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law."[12]

B. There Are No Compelling Reasons Preventing the Court to Exercise Its Jurisdiction

26. Having established the jurisdiction of the Court to render the present advisory opinion, it is argued in this section that there are no compelling reasons for the Court to use its discretionary power to decline to give an advisory opinion.[13] Taking into account the implications of the question on the activities of the United Nations, the Court's answer to the request for an advisory opinion will represent its participation in the activities of the Organization as its principal judicial organ.[14] Thus, there are compelling reasons to render the advisory opinion requested. These are: the fact that the matter has been of UN concern for a long time and that the UN bears a special responsibility thereto **(1)**; the concrete consequences that the advisory opinion will have on future action taken not only by the UN and other international organisations, but also by UN member States **(2)**; lastly, the issue of whether the consent of the interested State is required for the exercise of the advisory jurisdiction is not relevant here, since the interested State, the Republic of Serbia, has at any rate given its consent **(3)**.

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[11] *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 154, para. 39.
[12] *Ibid.*, p. 153 , para. 37.
[13] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, *Application for Review of judgment no. 333 of the UN Administrative Tribunal, Advisory Opinion, ICJ Reports 1987*, p. 31; *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 21, para. 23; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 235, para. 14.p. 155; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999*, pp. 78-79, para. 29; *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 157, para. 45.
[14] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Certain Expenses of the United Nations (Article 17, para. 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, advisory opinion, I.C.J. Reports 2004*, p. 156, para. 44.

(1) The matter has been of UN concern for a long time and the UN bears a special responsibility thereto

27. The United Nations plays a core role in the situation in Kosovo. This involvement began with the participation of the Organization in, and the co-presidency of, the Conference of Peace for Yugoslavia, originally held by the then European Communities at the time of the collapse of the former SFRY in 1991. The International Conference was conceived as a permanent body "until a final solution to the problem of former Yugoslavia [was] found".[15] This process ended with the transformation of the former Republics composing the SFRY into new States. At not time was the transformation of entities within the Republics into States at issue, such as existing autonomous regions like Kosovo and Vojvodina in Serbia, or new entities created within Bosnia and Herzegovina or Croatia. Consequently, the participation of the Kosovo Albanians was limited to one of the six Working Groups on ethnic and national communities and minorities.[16]

28. A second stage in the UN involvement in Kosovo occurred in 1998, when the Security Council declared that the situation in Kosovo constituted a threat to international peace and security, and adopted measures under Chapter VII of the Charter.[17]

29. As is well known, after the aggravation of the civil strife and the violations of human rights committed in Kosovo, NATO undertook an armed operation on 24 March 1999, which in the words of the Court, "raise[d] very serious issues of international law".[18] As a result of the end of this armed intervention, a third step in the UN involvement in Kosovo was the adoption of Security Council Resolution 1244 (1999) of 10 June 1999, which established an international civil presence and authorised a security

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[15] See: *The International Conference on the Former Yugoslavia. Official Papers* (ed. By B. Ramcharan, The Hague: Kluwer, 1997), p. 3.

[16] Weller, Marc, *The Crisis in Kosovo 1989-1999* (Cambridge: International Documents & Analysis, 1999), pp. 89-90.

[17] Resolution 1160 (1998) of 31 March 1998.

[18] *Legality of the Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 132, para. 17.

presence, "for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise".[19] Both presences continue until today, since the Security Council has not decided otherwise. The unilateral declaration of independence seriously challenges this regime.

30. Bearing in mind the UN administration of the territory, what happens in Kosovo is not only of UN concern; it is a matter concerning the direct responsibility and the role of the UN. This involves the responsibility of the Secretary-General with regard to the administration of the territory, the role and responsibility of the Security Council as the organ that has the exclusive capacity to decide upon both presences in Kosovo, and the role of the General Assembly as the organ that may discuss the functioning of the other organs and addressing issues related to the principles and purposes of the Organisation. In relation to the Court, it can be advanced that there would be no more specific case in which the exercise of its advisory jurisdiction "should not be refused",[20] since "[b]y lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its functions as the principal judicial organ of the United Nations."[21] As such, it is for the Court to provide legal guidance to the other UN organs in this particular matter of direct UN concern.

(2) The Court's advisory opinion will have concrete consequences for the future action of the UN and other international organisations, as well as UN member States

31. When explaining the purpose of the exercise of its advisory jurisdiction, the Court has stated:

> "The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose."[22]

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[19] SC Res. 1244 (1999), para. 19.
[20] *Ibid.*
[21] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 21, para. 23.
[22] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73.

32. This is the case with the present request of advisory opinion. The question put by the General Assembly is not one of pure academic interest. The ascertainment of the legality or otherwise of the unilateral declaration of independence plays a pivotal role in the determination of the concrete action to be followed by the organs of the United Nations, as well as member States and other relevant actors. What is at stake is the credibility of the binding decisions of the Security Council as the UN organ charged with the principal responsibility for the maintenance of international peace and security; the respect of the sovereignty and territorial integrity of a UN member State; and the capacity of the Organisation to conduct negotiations between the parties concerned in a manner by which these negotiations have real value and cannot be unilaterally brought to an end by one of the parties that attempts to impose its own views on the other party.

33. Although continuing to exercise his duties under SC Resolution 1244 (1199), the Secretary-General has announced a policy of "neutrality" with regard to the unilateral declaration of independence, due to the fact that the Security Council is unable to provide him with guidance concerning his role and responsibilities.[23] This position creates serious legal and practical problems and in the long-term undermines the functioning and the credibility of the Organisation and its organs. The advisory opinion will undoubtedly contribute to overcoming these difficulties.

34. Of particular importance is the impact of the advisory opinion in helping the activity of the Special Representative of the Secretary-General in Kosovo (SRSG). According to the Constitutional Framework for Provisional Self-Government in Kosovo, adopted under the authority vested to him in accordance with Security Council resolution 1244 (1999):

> "The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-

[23] See United Nations Security Council, 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo', 24 November 2008, UN Doc. S/2008/692, p. 8, para. 26, p. 10, para. 46, p. 11, paras. 49 and 50.

> Government, its officials and its agencies, and *taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework.*"[24]

35. It has been argued that the unilateral declaration of independence has created an "irreversible fact" and consequently that the request for an advisory opinion would be deprived on any concrete effect.[25] This is merely wishful thinking of those voices in favour of independence for Kosovo, and their attempt to impose this purported independence on the rest of the international community. Leaving aside the actual inaccuracy of this claim, and the fact that the majority of the international community does not share this perception, it is a position that raises serious concern as to the manner in which these voices attempt to sideline international law. The fact remains that the international administration (UNMIK/EULEX) and the security presence (KFOR) continue to be deployed in Kosovo in accordance with Resolution 1244 (1999), and are vested with the paramount administrative and security power on this territory. Even a *de facto* exercise of sovereign authority by the provisional institutions of self-government (the self-proclaimed "Government of the Republic of Kosovo") is far from being demonstrated.

36. Obviously, the Court could not uphold the position of the "irreversibility" of the situation emerging from the unilateral declaration of independence without depriving international law of any relevance. As will be detailed later,[26] in contemporary international law, the creation of States is not a pure matter of fact, but also a matter of law. And this is all the more the case when the United Nations itself is administering the territory concerned and has not decided, as was the case in other territories under its administration, that the ultimate goal of this administration is the independence of Kosovo.

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[24] Special Representative of the Secretary-General, Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001, Chapter 12 (emphasis added). Available at: http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf.

[25] United Nations General Assembly, Sixty-third session, 22nd plenary meeting, 8 October 2008, UN Doc. A/63/PV.22, in particular comments by Sir John Sawers (United Kingdom), p. 2; and comments by Ms. DiCarlo (United States of America), p. 5.

[26] Infra, para. 129.

(3) The directly interested State has given its consent

37. The Court has consistently held that "the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court but the propriety of its exercise".[27] In the present case, there is no need to examine whether such consent is required as a matter of propriety, since the only directly interested State, Serbia, has given its consent. Indeed, it was Serbia that proposed that the General Assembly request an advisory opinion of the Court.[28]

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38. For the abovementioned reasons, Argentina considers that the Court has jurisdiction to render an advisory opinion. Further, there are not compelling reasons for the Court not to give its answer. On the contrary, the request by the General Assembly raises fundamental issues that require the guidance of the Court in its advisory opinion.

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[27] *Western Sahara, advisory opinion, I.C.J. Reports 1975*, p. 20, paragraph 21; *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 158, para. 47.

[28] United Nations General Assembly, Sixty-third session, Agenda item 71, Draft resolution submitted by Serbia entitled 'Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law', 23 September 2008, UN Doc. A/63/L.2.

Section II:

Principles and Rules Relevant to the Question Raised by General Assembly Resolution 63/3

39. The question submitted by the General Assembly concerns the accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. In order to respond to it, "the Court must identify the existing principles and rules, interpret them and apply them [...], thus offering a reply to the question posed based on law"[29].

40. The organs that unilaterally declared independence are a direct creation of the United Nations. The first question to be ascertained is whether these organs had the capacity to take such a decision in conformity with the relevant UN rules. Secondly, this declaration must be examined in the framework of SC Resolution 1244 (1999), which established the international legal regime for Kosovo on the basis of Chapter VII of the UN Charter and envisaged a political process leading to the determination of the future status of the territory. Thirdly, the unilateral declaration must be read against the background of the fundamental principles of international law that can be at issue. In this regard, it will be advanced that the principle of respect for the territorial integrity of States is of paramount importance, as recognised by SC Resolution 1244 (1999). The principle of respect of fundamental human rights and the rights of minorities is equally relevant, but does not lead to the existence of a right to declare the independence of the territory. It must also be stressed that another fundamental principle of contemporary international law, the right of peoples to self-determination, is

[29] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 234, para. 13.

not applicable in the present situation, in other words the inhabitants of Kosovo do not constitute a "people" entitled to self-determination. Finally, the obligation to settle disputes through peaceful means is also relevant in this case. Fourthly, in order to complete the legal analysis, other arguments that could serve as justification for the unilateral declaration of independence will also be examined. At any rate, before dealing with the application of the relevant rules to the object of the request for an advisory opinion, the determination of the critical date appears as the starting point. As the Court may wish to address the arguments advanced by the authors of the unilateral declaration of independence to consider any justifications submitted thereto, this written statement will equally consider them.

A. The critical date: 17 February 2008

41. Although the present proceedings do not concern a territorial dispute, the notion of critical date is applicable to the present advisory opinion, as it has been applied by the Court in the context of other matters[30].

42. The accordance of an act with law, , must be determined at the moment that the act was accomplished. Subsequent acts cannot modify this original qualification. The question put to the Court exclusively concerns the legality of the unilateral declaration of independence made by the Provisional Institutions of Self-government. It is for the United Nations and its Member

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[30] *Nottebohm Case (Liechtenstein v. Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, pp. 122-123; *Case concerning the right of passage over Indian territory (Portugal v. India), Preliminary Objections, I.C.J. Reports 1957*, p. 125, pp. 142-144; *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p.69, p. 95, para. 66; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, pp. 25-26, paras. 43-44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 115, pp. 130-131, paras. 42-43; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, p. 318, para. 99; *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Canada) (Yugoslavia v. Spain) (Serbia and Montenegro v. Portugal) (Serbia and Montenegro v. United Kingdom), Request for the Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 826, Separate opinion of Judge Higgins, p. 867, para. 4; *Request for Interpretation of the Judgment of 11 June 1998 in the* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections *(Nigeria v. Cameroon), Judgment*, I.C.J. Reports 1999, p. 31, Dissenting Opinion of Vice-President Weeramantry, pp. 46-47.

States to determine their future action in the light of the Court's ascertainment.

(1) The unilateral declaration of independence must be analysed at the time it was issued

43. The rule according to which an act must be examined in the light of the law in force at the time that the act occurred is well established in international law[31]. The question raised by the General Assembly's request only concerns the accordance with international law of a specific act that occurred on a precise date, i.e. 17 February 2008. Consequently, the Court's analysis must examine whether the unilateral declaration, at the time that it was adopted, was or was not in conformity with international law.

44. Acts that have occurred after the critical date are not significant in order to determine the accordance of international law of the unilateral declaration of independence. The Court stated, in the context of a territorial dispute but nevertheless applicable to the present question, that:

> "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallised unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them"[32].

45. As a result, what must be taken into consideration in order to make a legal ascertainment of the situation under scrutiny is the unilateral declaration of independence adopted by the Provisional Institutions of Self-Government of

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[31] As Judge Max Huber noted in the *Island of Palmas Case (or Miangas) (United States of America v. The Netherlands), Award,* II UNRIAA 829, p. 845: "[...] a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." Rosalyn Higgins has noted that "Few arbitral *dicta* have been more widely cited, or have come to assume a more important place in international law, than [this] *dictum* of Judge Huber in the *Islands of Palmas* case": Rosalyn Higgins, 'Some Observations on the Inter-Temporal Rule in International Law', in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krysztof Skubiszewski* (The Hague: Kluwer Law International, 1997), reprinted in Rosalyn Higgins, *Themes and Theories. Selected Essays, Speeches, and Writings in International Law*, Vol. 2, (Oxford: Oxford University Press, 2009), p. 867,

[32] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 135. See also *Territorial Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007*, para. 117; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008*, para. 32.

Kosovo on 17 February 2008, the reaction thereto by the State concerned (Serbia) the same day, and relevant principles and rules of international law applicable at that time.

46. To paraphrase what the Court affirmed in a previous advisory opinion, "this does not mean that any information regarding [the] legal status [of the unilateral declaration of independence] at other times is wholly without relevance for the purposes of this Opinion. It does, however, mean that such information has present relevance only in so far as it may throw light on the questions as to what [was] the legal status [of the unilateral declaration of independence] at that period"[33].

(2) Events that occurred subsequent to the unilateral declaration of independence have not modified the situation

47. For the sake of completeness, it is noted that no subsequent events or decisions, or changes in the law –which in at any rate did not occur-, have modified the situation regarding the legal status of the territory in relation to which the unilateral declaration of independence purported to apply.

48. To date, 56 of the 192 Member States of the United Nations have recognised the entity claiming to be a State in the declaration of independence. As is well established in general international law, recognition does not have a constitutive effect[34]. It is useful to recall here what the Canadian Supreme Court stated in *Re Secession of Quebec*: "international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a 'legal' right to secede in the first place"[35]. *A fortiori*, recognition cannot change the legal qualification of the unilateral act at issue when a large majority of States does not recognise the entity purportedly created by the unilateral declaration of 17 February 2008. This is also true with regard to international organisations: not one of them, either at the universal or the

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[33] *Western Sahara, Advisory* Opinion, I.C.J. Reports 1975, p. 12, p. 38, para. 78.

[34] Cf. Article 3 of the Convention on Rights and Duties of States, adopted by the 7th International American Conference at Montevideo on 26 December 1933 (League of Nations, Treaty Series, 1936, vol CLXV, p. 20.

[35] *Reference re Secession of Quebec* case, [1998] 2 S.C.R. 217, (1998) 115 ILR 536, p. 589, para. 142.

49. More importantly, the international civil and security presences have continued to be deployed in Kosovo. After drawing the unilateral declaration of independence to the attention of the Security Council, the UN Secretary-General "reaffirmed that, pending guidance from the Security Council, the United Nations would continue to operate on the understanding that resolution 1244 (1999) remains in force and constitutes the legal framework for the mandate of UNMIK"[36]. As already mentioned, the Security Council did not take any new decision related to the implementation of Resolution 1244 (1999) and consequently the regime set up by this resolution remains in force. Consequently, the Secretary-General has continued to submit his periodical reports on the United Nations Interim Administration Mission of Kosovo (UNMIK) to the Security Council[37].

50. Further, the security presence remains present in Kosovo on the exclusive basis of SC Resolution 1244 (1999). In a statement by NATO on 18 February 2008, it was stated that "Following Kosovo's declaration of independence yesterday, NATO reaffirms that KFOR shall remain in Kosovo on the basis of UNSCR 1244, as agreed by Foreign Ministers in December 2007, unless the UN Security Council decides otherwise"[38].

51. Strikingly, even after that unilateral declaration, organs of the Provisional Institutions of Self-Government, even if they contend that they are organs of a State, have continued to participate in events at the international level only as part of the delegation of the UNMIK. When they tried to participate on their own, they were not accepted and their attempt was qualified by the Secretary-General as "irregular"[39].

52. The European Union mission in Kosovo (EULEX), which in the eyes of those having proclaimed or encouraged the independence of Kosovo would

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[36] UN Doc. S/2008/211 (28 March 2008), para. 4.

[37] Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 17 March 2009 (UN Doc. S/2009/149), 24 November 2008 (UN Doc. S/2008/692), 15 July 2008 (UN Doc. S/2008/458), 12 June 2008 (UN Doc. S/2008/354), and 28 March 2008 (UN Doc. S/2008/211).

[38] Available at: http://www.nato.int/docu/pr/2008/p08-025e.html.

[39] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 17 March 2009 (UN Doc. S/2009/149), para. 28.

act on the basis of the purported "new reality" created by the unilateral declaration, nevertheless operates "under the overall authority of the United Nations, under a United Nations umbrella headed by [Secretary-General's] Special Representative, and in accordance with resolution 1244 (1999)"[40]. This arrangement was agreed upon by the State that has sovereignty over the territory, and was backed by the Security Council[41].

53. The considerations above not only demonstrate that subsequent facts have not brought about any change in the legal situation existing on 17 February 2008, but also that from a factual point of view the situation remains substantially as it was before that date.

B. The unilateral declaration of independence

54. The key paragraph of the unilateral declaration of independence of 17 February 2008 reads as follows:

> "We, the democratically-elected members of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of the UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement".[42]

55. Three propositions are advanced in the above passage: 1) the democratic-elected character of those having adopted the decision, 2) the will of the "people" and 3) the accordance of the declaration with the Ahtisaari Plan. As preliminary considerations, a number of comments can be made in respect of these propositions.

56. Firstly, the fact that an organ is democratically elected does not automatically imply that a decision taken by such an organ is in accordance with international law. An organ must have the competence to adopt the act in question. This is a universally accepted principle applicable to all kind of

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[40] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/692 (24 November 2008), para. 23; see, also, para. 50.
[41] See Statement by the President of the Security Council, UN Doc. S/PRST/2008/44 (26 November 2008).
[42] Text reproduced in (2008) 47 ILM 467.

institutions.[43] The question whether the Provisional Institutions of self-Government had the competence to proclaim the independence of Kosovo is addressed below[44].

57. Secondly, to invoke the will of the "people" suggests a reference to the principle of self-determination. But as will also be addressed below[45], only "peoples" in the sense of international law are entitled to the right of self-determination. Put it in other terms, not just any human group is vested with this right.

58. Thirdly, the Ahtisaari Comprehensive Proposal for the Kosovo Status Settlement is just a recommendation made by the Special Envoy of the UN Secretary-General. In his first public appearance in Pristina after having been appointed, the Special Envoy himself stated:

> "In the final analysis it is not me, I have also made it perfectly clear, it is not me, neither us, who will decide the timing, the Secretary General has an important role, and finally it is up to the Security Council to decide how the future status will look like"[46].

59. Consequently, the Ahtisaari Proposal is devoid of any binding character. It cannot therefore constitute a legal ground for the unilateral declaration of independence.

60. The unilateral declaration also contends "that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation".[47] Three remarks can be made. *First*, at no time during the International Conference on Yugoslavia, set out at the beginning of the process of the collapse of the SFRY, was even the mere possibility of an independent Kosovo envisaged. *Second*, the Arbitration Commission of the Conference on Yugoslavia (also known as *Badinter Commission*) found that the process of dissolution of the SFRY had come to an end with the adoption of the constitution of the Federal Republic of Yugoslavia, and that this State was composed of Serbia – including its two autonomous regions: Kosovo

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[43] See, for example, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, p. 74, para. 18.
[44] See *infra*, paras. 61-64.
[45] See *infra*, paras. 88-91.
[46] United Nations Office of the Special Envoy of the Secretary-General for the Future Status of Kosovo (UNOSEK), Press Briefings, 23 November 2005, available at: www.unosek.org.
[47] *Ibid.*

and Vojvodina – and Montenegro[48]. *Third*, the mere invocation of the purported independence of Kosovo as being a "special case" and "not a precedent", no matter whether this is the case or not, cannot *per se* provide a legal justification. It has not been advanced which particular rules of international law would provide for a special outcome if Kosovo would be a "special case". As to the nature of the case as a "precedent", certainly if the declaration is in conformity with international law, it would constitute a "precedent". If, on the contrary, it is not in accordance with international law, it cannot constitute either a "precedent" or a "special case" according to the principle *ex iniuria ius non oritur*.

C. The powers of the Provisional Institutions of Self-Government of Kosovo do not include the declaration of independence of the territory

61. In operative paragraph 10 of Resolution 1244 (1999), the Security Council decided that the international civil presence would perform the civilian administrative functions and would "establish[...] and oversee[...] the development of provisional democratic self-governing institutions".

62. The Special Representative of the Secretary-General was vested with the highest authority of the international administration. The Provisional Institutions of Self-Government were created by UNMIK Regulation N° 2001/9 of 15 May 2001, issued by the Special Representative[49]. They were conceived as a local governing institution under the supervision of the United Nations. Consequently, the external affairs related to the administration of the territory remained in the hands of the Special Representative[50]. Nothing in the long and detailed list of powers on responsibilities granted to the PISG, neither explicitly nor implicitly, allow to these institutions to make decisions on the sovereignty of Kosovo.

63. On the contrary, the Constitutional Framework clearly establishes that "[t]he Provisional Institutions of Self-Government and their officials shall: (a) Exercise their authorities consistent with the provisions of UNSCR 1244

[48] Opinion No. 8 of the Arbitration Commission on former Yugoslavia of 4 July 1992, 31 ILM 1521, 1523 (1992).
[49] Available at: http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf.
[50] Chapter 8 of the Constitutional Framework.

(1999) and the terms set forth in this Constitutional Framework" and that "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244(1999)"[51].

64. Clearly, the two sources of the powers and responsibilities of the PISG, UNSCR 1244 (1999) and UNMIK Regulation 2001/9, do not authorise these institutions to declare the independence of Kosovo.

D. The framework established by SC Resolution 1244 (1999)

65. UNSCR 1244 (1999) is the specific instrument governing the international legal regime of Kosovo and as such constitutes a fundamental legal instrument with respect to which the accordance or not of the unilateral declaration of independence with international law must be determined.

66. The main characteristics of the legal regime established by that Resolution are:

- Respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (now Serbia)[52];
- International administration of the territory, through a civil and a security presences[53];
- Substantial autonomy for Kosovo[54];
- A political process leading to determine the future status of the territory[55];
- Safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo and to ensure conditions for a peaceful and normal life for all inhabitants of the province[56]..
- No time limits for this regime, which will last until the Security Council will not decide otherwise[57].

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[51] Chapter 2 and Preamble of the Constitutional Framework.
[52] See preambular para. 10, principle 6 of Annex 1, and para. 8 of Annex 2 to Resolution 1244 (1999).
[53] *Ibid.*, operative paras. 5-11, 14-16, and 19.
[54] *Ibid.*, preambular para. 11, operative paras. 10 and 11(a), and para. 5 of Annex 2.
[55] *Ibid.*, operative para. 11(e).
[56] *Ibid.*, preambular paras. 4 and 7, operative paras. 9(c), 10, 11(k), 13, principle 5 of Annex 1, paras. 4, 5 and 7 of Annex 2.
[57] *Ibid.*, operative para. 19.

67. This is the legal framework against which the unilateral declaration of 17 February 2008 must be examined. The Security Council did not decide to put an end, either totally or in part, to the regime established in accordance with its resolution of 10 June 1999. As demonstrated above, the existing factual situation on the ground continues to correspond to this established regime.

68. Most of the points constituting the legal regime set out by Resolution 1244 (1999) are also fundamental principles and rules of general international law and consequently the basis of their application rests not only on Resolution 1244 (1999), but also on general international law.

E. The principle of respect for the territorial integrity of States

69. Respect for the territorial integrity of States is a well established principle of international law, without which the very existence of international law, as a corpus of rules governing primarily the relationship among sovereign entities, could not be envisaged. In its first judgment, the Court stressed that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations".[58] Some years later the Court reaffirmed "the duty of every State to respect the territorial sovereignty of others"[59].

70. The aim of the principle of territorial integrity is to protect a quintessential element of a State – its territory – whereby any modification of a State's territorial sovereignty must take place in accordance with international law, mainly through the consent of the interested State. As a corollary of the sovereign equality of States, the principle of the respect of territorial integrity is a fundamental principle of international law. The 1970 Declaration on Principles of International Law Concerning Friendly Relations lists as one of the elements of the equal sovereignty of States the principle that "[t]he territorial integrity and political independence of the State are inviolable"[60].

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[58] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35.

[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 26 June 1986, I.C.J. Reports 1986*, p. 111, para. 213, and p. 128, paras. 251-252.

[60] General Assembly Resolution 2625 (XXV) of 24 October 1970, (d)

71. The United Nations Millennium Declaration, as well as the 2005 World Summit Outcome, equally support "all efforts to uphold the sovereign equality of all States, [and] respect for their territorial integrity and political independence"[61].

72. Respect for the territorial integrity of States can be founded in an impressive number of international instruments, sometimes coupled with the "inviolability of boundaries", and at other times coupled reaffirmations of the sovereignty, political independence and security of States[62]. The respect of the territorial *status quo* was also mentioned as an equivalent of territorial integrity[63].

73. At the regional level, like in other parts of the world, respect for the territorial integrity has been a matter of particular concern in Latin America. At all levels, in the Inter-American system[64] as well as in sub-regional levels[65], and in a wide range of different issues and no matter the State concerned, the need to respect the territorial integrity of States has been underscored. This is not just a regional concern, or the expression of a particular rule that is not applicable to the rest of the world. It is a legitimate common aspiration to see this fundamental principle universally respected, as one of the main foundations of the entire international legal system and as a concrete manifestation of the sovereign equality of States.

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[61] General Assembly Resolutions 55/2 of 8 September 2000 and 60/1 of 24 October 2005.

[62] Notably: Article 10 of the Covenant of the League of Nations; Article 2, para. 4, of the Charter of the United Nations and the Helsinki Final Act adopted on 1 August 1975 by the Conference on Security and Cooperation in Europe, among others.

[63] See for instance the opinion N° 3 of the Arbitration Commission of the International Conference for the former Yugoslavia (32 *I.L.M.* 1993, p. 1500).

[64] It can be mentioned among other instruments: Articles 1, 13,28 and 29 of the Charter of the Organisation of American States, AG/RES. 2250(XXXVI-O/06), "Obligation of Member States to Respect the Rules and Principles of International Law Contained in the OAS Charter in Order to Preserve and Strengthen Peace in the Hemisphere"; A/RES/41/128, 4 December 1986, Declaration on the Right to Development; AS CP/RES. 935 (1648/08), Support for the Process of Dialogue, Peace, and for Democratic Institutions in Bolivia; OAS Declaration on Security in the Americas, 2003, doc. OEA/SER.K/XXXVIII, CES/dec.1/03 rev. 1; Resolution CP/RES. 859 (1397/04) "Support to the Peace Process in Colombia"; Declaration of Managua, OEA/SER.K/XLI.1, EPICOR/doc.05/04 rev. 6, 9 July 2004; Resolution CP/RES. 930 (1632/08), Resolution of the Twenty-Fifth Meeting of Consultation of Ministers of Foreign Affairs, RC.25/RES. 1/08, 17 March 2008; Legal Opinion of the Inter-American Juridical Committee on the Resolution CP/RES.586 (909/92) of the Permanent Council of the Organization of the American States about the decision issued by the Supreme Court of the United States of America in the Case US vs. Alvarez Machain, Rio de Janeiro, 15 August 1992.

[65] Group of Rio: "Declaration of the Heads of State and Government of the Rio Group on the recent events between Ecuador and Colombia", adopted in Santo Domingo, Dominican Republic, 7 March 2008 (OEA/Ser.G CP/INF.5653/08); UNASUR: Constituent Treaty of the Union of South American Nations, 23 May 2008, Preamble (available at: http://www.integracionsur.com/sudamerica/TratadoUnasurBrasil08.pdf).

74. It emerges from State practice that three main elements constitute the core of the notion of territorial integrity: *first*, the notion of *plenitude*. This amounts to the capacity to display all State functions over the whole territory of the State. Restrictions upon that display can only be the result of the consent of the State concerned itself or a binding resolution adopted by the Security Council under Chapter VII of the Charter. The international administration of Kosovo is an example of both means. *Second*, the notion of *inviolability*. According to this notion there exists an international obligation not to display State jurisdiction over the territory of another State without its consent. The Permanent Court underscored the consequence of this for the other States as follows: "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State"[66]. *Third*, the guarantee against any dismemberment of the territory. That explains, for instance, that the support of secessionist movements is considered a violation of the territorial integrity of the State concerned[67].

75. In contemporary international law, respect for the principle of territorial integrity is an obligation that applies not only to States and international organisations, but also to other international actors, particularly those involved in internal conflicts threatening international peace and security. Evidence of this is the particular case under the consideration of the Court, in which the Security Council referred to the respect of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (now Serbia). Resolution 1203 (1998) addressed directly to the Kosovo Albanian part. After reaffirming the territorial integrity of the Federal Republic of Yugoslavia, it demanded that "the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)".

76. Resolution 1244 (1999) reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and

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[66] *"Lotus", Judgment of 7 September 1927, P.C.I.J., Series A, No. 10*, p. 18.

[67] See, among others, Resolutions 145 (1960) of 22 July 1960, 169 (1961) of 24 November 1961, 404 (1977) of 8 February 1977 and 496 (1981) of 15 December 1981.

annex 2". For its part, Annex 2 enumerates the principles to be followed for the resolution of the Kosovo crisis, among which it is found: "A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK"[68].

77. The Security Council has also adopted the same stance in other cases. Thus, in its Resolution 787 (1992), the Security Council

> "Strongly reaffirms its call on *all parties and others concerned* to respect strictly the territorial integrity of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted".[69]

78. Equally, the declaration of the President on behalf of the Security Council of 2 December 1994 points out that

> "The Security Council has received with deep concern a report from the Secretariat concerning a statement of 26 November 1994 attributed to the Supreme Soviet of Abkhazia, Republic of Georgia. It believes that any unilateral act purporting to establish a sovereign Abkhaz entity would *violate the commitments assumed by the Abkhaz side to seek a comprehensive political settlement of the Georgian-Abkhaz conflict. The Security Council reaffirms its commitment to the sovereignty and territorial integrity of the Republic of Georgia*"[70].

79. Security Council resolution 981 (1995), while referring to the situation of the Krajina in Croatia, affirmed "its commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia" and called upon "the Government of the Republic of Croatia and the local Serb authorities to refrain from the threat or use of force and to reaffirm their commitment to a peaceful resolution of their differences".[71]

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[68] Principle 8.

[69] Emphasis added.

[70] S/PRST/1994/78 (emphasis added). See also Resolution 971 (1995), which urged "the parties to refrain from any unilateral actions which could complicate or hinder the political process aimed at an early and comprehensive settlement of the conflict" and called upon "the parties to intensify efforts (...) to achieve an early and comprehensive political settlement of the conflict, including on the political status of Abkhazia, *fully respecting the sovereignty and territorial integrity of the Republic of Georgia*" (emphasis added).

[71] See also Security Council Resolutions 990 (1995), 994 (1995) and 1009 (1995).

80. More recently, the Security Council reaffirmed the territorial integrity of Somalia, the Democratic Republic of the Congo, Sudan and Georgia in the context of internal and secessionist conflicts[72].

81. Double standards in international law are unacceptable, even if they are concealed under the veil of a purported "special" case which would not constitute a "precedent". They can find no legal justification. Rather, double standards undermine the necessary respect for, the perception, and the effectiveness of international law. During the crisis in the Balkans, Argentina adopted a strict and coherent policy of respect for the territorial integrity of States in all the situations in which the principle was at stake, i.e. in relation to Croatia, Bosnia and Herzegovina, and now Serbia. The same consistent approach has also been taken by Argentina with respect to other conflicts in other parts of the world.[73] It is respectfully submitted that the advisory opinion should stress the need to apply and respect the territorial integrity of all States, irrespective of the particular State concerned in a given case.

82. Moreover, such a reaffirmation from the Court is especially required in the present case where the Security Council, while establishing the international administration on part of the territory of one member State, also expressly guaranteed respect of the territorial integrity of this same State. This guarantee was in accordance with all previous Security Council resolutions adopted prior to Resolution 1244 (1999),[74] and following which the Security Council has not modified its policy.

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[72] See Security Council Resolutions 1772 (2007) of 20 August 2007, 1784 (2007) of 31 October 2007, 1756 (2007) of 15 May 2007 and 1808 (2008) of 15 April 2008.

[73] For example, with regard to the conflict in Georgia of August 2008, "[t]he Argentine Government declares its satisfaction for the cessation of hostilities in Georgia, reached as a result of steps taken by the President of the European Union, and calls upon the concerned Parties to find a negotiated and mutually acceptable solution to the currently existing conflict that respects the principles universally accepted by International Law, such as the territorial integrity of States and full respect of the human rights of the persons affected" (Press Release No. 275/08, 14 August 2008), available at: http://www.mrecic.gob.ar.

[74] Prior to the adoption of Resolution 1244 (1999), the Resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998, and 1239 (1999) of 14 May 1999 were adopted.

F. The obligation to respect individual human rights and the rights of minorities

83. The population of Kosovo has suffered and continues to suffer from serious violations of fundamental human rights. Argentina has condemned the grave violations of human rights, whoever their authors and victims may be, and has insisted on the requirement of an effective restoration of the enjoyment of these rights, particularly the right of all refugees and displaced persons to return to their homes safely, a just solution regarding the situation of the disappeared people, and the respect of the rights of all the ethnic groups that make up Kosovo's population. Before the Security Council it was affirmed that

> "Argentina believes that there cannot be a prosperous and peaceful future for Kosovo without full respect for the diversity of the people who live there. A sustainable resolution of the question of Kosovo must be achieved with full application of the principle of territorial integrity. In this context, we attach the greatest importance to respect for human rights, including the rights of refugees and displaced persons, as well as for international humanitarian law and minority rights."[75]

84. Little progress has been made with regard to the return of refugees or displaced persons. As noted in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24 November 2008, "The number of minority returns has declined sharply in comparison with previous years and remains disappointing"[76]. The most recent Secretary-General's Report also observed that "The returns statistics for 2008 show a dramatic decline in the number of voluntary minority returns to Kosovo compared to earlier years"[77]. The reconstruction of an effective multiethnic society still rests an aim to be achieved[78]. To say the least, a

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[75] Intervention of Mr. Mayoral (Argentina), United Nations Security Council, Sixty-first year, 5373rd meeting, 14 February 2006, UN Doc. S/PV.5373, p. 13.
[76], UN Doc. S/2008/692, p.4, para. 11,
[77] Report of 17 March 2009, UN Doc. S/2009/149, p. 6, para. 21.
[78] Numerous inter-ethnic security incidents continue to take place: Report of the Secretary-General on the United Nations Administration Mission in Kosovo, 17 March 2009, UN Doc. S/2009/149, p. 3, paras. 9-11; Report of the Secretary-General on the United Nations Administration Mission in Kosovo,

unilateral declaration of independence is certainly not the best way to make progress with respect to both these two concerns.

85. The fact that Kosovo Albanians were victims of serious violations of human rights and of the humanitarian tragedy that occurred in 1999 does not imply the emergence of a right to obtain independence. This right, which is one of the possible outcomes of the exercise of the right to self-determination by those peoples entitled thereto, is not granted on the basis of the major or minor violence inflicted upon particular groups of individuals. The so-called theory of "remedial secession" is nothing more than an argument made in doctrine, and which has not received any legal consecration. According to the Canadian Supreme Court, "it remains unclear whether this [...] proposition actually reflects an established international law standard".[79] Conventional or customary rules dealing with minority rights, both at the individual and the collective level, do not recognize minorities as holders of the right to self-determination and make no distinction whether they were victim of major human rights violations or not.[80]

86. In the concrete case of Kosovo, during the worst period of the conflict in which serious breaches of fundamental human rights and the rules of international humanitarian law were applicable, all Security Council resolutions adopted in 1998-1999 concerning the situation in Kosovo stressed the need to respect the territorial integrity of the FRY, which is tantamount to denying any kind of "remedial secession"[81].

G. The principle of self-determination is not applicable

87. Argentina has always promoted and defended the right of peoples to self-determination. Today, this right is a well established fundamental principle of international law and possesses an *erga omnes* character, as the Court has

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24 November 2008, UN Doc. S/2008/692, p. 2, para. 6; Report of the Secretary-General on the United Nations Administration Mission in Kosovo, 28 March 2008, UN Doc. S/2008/211, pp. 3-4, paras. 11-12.

[79] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, (1998) 115 ILR 536, paras. 134-135.

[80] See Article 27 of the ICCPR; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135; Framework Convention for the Protection of National Minorities (opened for signature 1 February 1995, entered into force 1 February 1998), CETS No. 157.

[81] See Security Council resolutions 1199 (1998), 1203 (1998) and 1244 (1999)

had occasion to affirm[82]. However, the right to self-determination is framed by international law and this includes the determination of both the holders of the right as well as its scope and consequences.

88. With regard to the holder of this right, not every human group is entitled to self-determination. As the Court stated in the context of decolonisation:

> "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"[83].

89. A basic premise for the application of the principle of self-determination is the qualification of the holder of that right as a "people". This is a legal qualification in the context of international law and not a mere sociological or ethnic qualification.

90. The UN organs have played a key role in applying self-determination and have adopted an impressive number of resolutions with regard to both general and particular situations. This has notably been the case of the General Assembly, the Trusteeship Council and the Decolonisation Committee. In all the cases in which the relevant organs have recognised the existence of a "people" in the legal sense and consequently their right to self-determination, they have expressly indicated so. Regional organisations have equally played a role in the recognition of human groups as "peoples" entitled to self-determination.[84]

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[82] "In the Court's view, Portugal's assertion that the right of peoples to self-determination as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable [...], it is one of the essential principles of contemporary international law". *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 172, para. 88, and p. 199, para. 156.

[83] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 33, para. 59.

[84] This has been the case with regard to the peoples of the former Portuguese colonies, South-Africa, Namibia and Palestine.

91. Even in the case of decolonisation, which is the situation in which the principle led to the creation of a major number of newly independent States[85], self-determination has not been applied in all circumstances. The UN developed a methodology for identifying the Non-Self-Governing territories and also concerning the specific ways to put an end to the colonial situation[86]. This includes the decision about the applicability or not of the principle of self-determination. There have been cases in which the General Assembly and its Decolonisation Committee have not considered applicable the right of self-determination to the inhabitants of some Non-Self-Governing Territories[87]. In the case of the right to self-determination with regard to territories under foreign occupation, such recognition has occurred with regard to the Palestinian people. As the Court stated in its 2004 advisory opinion, "[a]s regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue"[88].

92. Nothing of this sort has occurred with respect to Kosovo. By way of comparison, the case of Timor Leste is illustrative, since the Security Council dealt with it contemporaneously to Kosovo in 1979. Whereas the right of the East Timorese people and its possible choice of independence were recognized, this was not the case for the inhabitants of Kosovo[89].

93. A distinction between peoples entitled to self-determination and minorities or indigenous populations is of particular importance. The Inter-American Commission on Human Rights in the *Miskitos Case*, while acknowledging the principle of self-determination of peoples, nevertheless stated that "[t]his does not mean, however, that it recognizes the right to self-determination of

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[85] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52.

[86] See eg. General Assembly resolutions 9 (I), 66 (I), 1541 (XVI), and 1654 (XVI).

[87] Cf. the cases of Ifni (GA Resolution 2428 (XXIII) of 18 December 1968), Gibraltar (GA Resolution 2353 (XXII) of 19 December 1967) and the Malvinas Islands (GA Resolutions 2065 (XX) of 16 December 1965 and 3160 (XXVIII) of 14 December 1973 among others. See also the amendment draft to the text that became Resolution 40/21 of 27 November 1985, rejected by the General Assembly (Doc. A/40/L.20 of 22 November 1985).

[88] *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 182-183, para. 118.

[89] Resolution 1246 (1999) of 11 June 1999.

any ethnic group as such."[90] To hold otherwise would lead to a complete blur between the distinction clearly made in international law between peoples and minorities.

94. At any rate, recognition of the right to self-determination does not automatically imply the right to independence. The distinction between internal and external self-determination is relevant here. For instance, the United Nations Declaration on the Rights of Indigenous Peoples, adopted on 7 September 2007, recognised the right of indigenous peoples to self-determination[91]. However, Article 4 provides that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions". Furthermore, this Declaration establishes that:

> "[n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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"[92].

95. In the case of Kosovo, neither within the UN nor within a regional context, is there a recognition of the applicability of the right of self-determination to a so-called "Kosovar people". Further, the International Conference on Yugoslavia did not accept the request by the representatives of the Kosovo Albanians to be considered as entitled to independence and they were not even authorised to participate in its plenary sessions.[93] Notably, the Arbitration Commission of the Conference on Yugoslavia did not accept that the Serbian populations of Croatia and Bosnia and Herzegovina were entitled

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[90] The *Miskito* Case, Case 7964 (Nicaragua), Inter-American Commission on Human Rights, Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L./V.II.62, doc. 10 rev. 3, 29 November 1983, Part Two(B) § 9.

[91] General Assembly Resolution 61/295, Annex, Article 3.

[92] *Ibid.*, Article 46.

[93] See the exchange of letters between Dr. Rugova, leader of the Kosovo Albanians, and Lord Carrington, Chair of the Peace Conference on Yugoslavia of 22 December 1991 and 17 August 1992, reprinted in Marc Weller, *Crisis in Kosovo 1989-1999* (Center of International Studies University of Cambridge, 1999), pp. 81 and 86.

to external self-determination[94], in a situation resembling that of the Kosovo Albanians.

96. Indeed, relevant instruments dealing with the principle of self-determination have clearly established its relationship with the principle of territorial integrity. General Assembly Resolution 1514 (XV) containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, after stating the right of peoples to self-determination in paragraph 2, incorporated another paragraph by which it declares that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"[95]. The seventh paragraph of the principle of equal rights and self-determination of peoples of the Declaration contained in Resolution 2625 (XXV), known as the "safeguard clause", provides:

> "Nothing in the foregoing paragraphs shall be construed as authorising 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".[96]

97. This paragraph has been interpreted *a contrario* as accepting secession if the State does not possess a government representing the whole people.[97] It has never been interpreted in such a way by any competent body. The *travaux preparatoires*[98] as well as the subsequent practice does not allow such

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[94] Opinion No 2 of the Arbitration Commission on former Yugoslavia.
[95] General Assembly Resolution 1514 (XV) of 14 December 1960, para. 6
[96] General Assembly Resolution 2625 (XXV).
[97] For an account of this doctrinal position, see Ch. Tomuschat, 'Secession and Self-Determination' in Marcelo G. Kohen (ed.) *Secession. International Law Perspectives* (Cambridge: Cambridge University Press, 2006), 48; J. Dugard and D. Raič, 'The Role of Recognition in the Law and Practice of Secession' in Marcelo G. Kohen (ed.), in ibid., 28; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: C.U.P., 1995), p. 118.
[98] See Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 19, UN Doc. A/7619, p. 67, para. 187; Statement by Mr. Arangio-Ruiz on behalf of Italy, UNGA, 1970 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States: Summary Records of the One Hundred and Tenth to One Hundred and Fourteenth Meeting held at Palais des Nations, Geneva, from 31 March to 1 May 1970, UN Doc. A/AC.125/SR.110-114, p. 22, and p. 110, para. 221.

interpretation.[99] At any rate, the policy of the Albanian population itself of not participating in the Yugoslav (later Serbian) State organs since the beginning of the 1990s[100] precludes the invocation of this doctrinal interpretation.

98. The Rambouillet Agreement proposed in February 1999 contained a clause related to the future status which read as follows: "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures".[101]

99. There is a reference to the "will of the people", but this by no means amounts to a recognition of a "people" in the legal sense. No explicit reference to the right to self-determination is made. An implicit reference cannot be constructed either: "the will of the people" merely appears as one of the bases to be taken into consideration. Conversely, if the principle of self-determination would be applicable, the "will" of the people would be paramount and not as just one element among others to be taken into account for the determination of a future status. Moreover, the reference to the Helsinki Final Act, which strongly stressed respect of the territorial integrity and the inviolability of boundaries, is another element which supports the consideration that the proposal made at Rambouillet did not recognise the

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[99] See for example, Helsinki Final Act, Declaration on Principles Guiding Relations between Participating States, Principle IV, see, also, Principles I and VIII; for other international instruments confirming the principle of territorial integrity of States see Chapter 6, Sections B & C; Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation XXI, Right to self-determination, adopted on 23 August 1996. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?Opendocument; and Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 13 March 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994). Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument.

[100] This lack of participation followed an earlier declaration of independence by the Kosovo Assembly: Resolution on Independence, September 7, 1991 in Marc Weller, *Crisis in Kosovo 1989-1999* (Center of International Studies University of Cambridge, 1999), p.72.

[101] Annexed to the Letter dated 4 June 1999 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, 7 June 1999, UN Doc. S/1999/648, p. 85, para. 3,

applicability of the right of peoples to self-determination to the inhabitants of Kosovo.

100. Consequently, the principle of self-determination cannot be considered as a legal ground for establishing the accordance of the unilateral declaration of independence of 17 February 2008 with international law.

H. The obligation to reach a settlement through negotiation

101. The Security Council, when it established an international administration for Kosovo, also determined the procedure according to which the future status of the territory would be determined and it consequently envisaged the end of that international presence. Hence, UNSCR 1244 (1999) stated that one of the tasks of the international civil presence would be that of "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords",[102] and later, as "a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".[103]

102. Clearly, as actually occurred later, "political process" and "political settlement" referred to negotiations between the parties concerned, that is, the central government of Serbia and the representatives of the Kosovo Albanians and later the local government of the province of Kosovo under international administration. Annex 2 of UNSCR 1244 (1999) provides that "[n]egotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions". A "political settlement" also means an agreement as a result of these *negotiations*. For its part, "future status" implies that there is an existing "present status"; pending a "political settlement", the *present status* remains. This is even more evident in the present case, for two reasons: *first*, the negotiations involve the government of a State and a government of one of the State's internal units; and *second*, the negotiations do not have as goal the settlement of a dispute of the legal status of an existing situation, but the *modification* of an existing situation.

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[102] Paragraph 11, (e).
[103] Paragraph 11, (f).

103. Although the negotiations are not between two subjects of international law, the negotiations nevertheless have an international character since they form part of an international regime established by a binding Security Council resolution adopted under Chapter VII of the Charter. This is not the only case where such a situation has arisen. Other domestic conflicts after having being qualified as threats to the international peace and security have become subject to a Security Council requirement for negotiations to be conducted between the parties to these conflicts.[104]

104. The negotiations concerning the province of Kosovo were marked by the role played by the Special Envoy of the Secretary-General, Mr. Martti Ahtisaari, who acted as a mediator. His Comprehensive Proposal, endorsed by the Secretary-General,[105] has not and cannot have a binding effect. For this reason, it is not necessary to analyse here whether this proposal meets the requirements established by UNSCR 1244 (1999) or even whether the process was carried out in an impartial manner, because it is merely a proposal for the consideration of the parties and as such, it cannot be imposed on them as though it were compulsory.

105. The Court has already described in length the main features of negotiations as a peaceful means to solve international disputes:

> "Defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was 'not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements', even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42, 1931*, at p. 116). In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given

[104] This occurred in the cases of Somalia, the Democratic Republic of the Congo, Sudan and Georgia mentioned above, para. 80.

[105] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, 26 March 2007, UN Doc. S/2007/168.

> the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 *(a)*, but fresh negotiations are to take place on the basis of the present Judgment"[106].

106. With the necessary adjustments to the particular case, this analysis applies in the case of Kosovo. Negotiations must be conducted in good faith. If they have failed to reach an outcome then fresh negotiations must be conducted with the aim of reaching an agreement on the basis of what is provided in Resolution 1244 (1999) and that respects international law.

I. The corollary obligation not to adopt unilateral measures that attempt to impose a *fait accompli*

107. By definition, negotiations imply that one side cannot unilaterally impose its position on the other. If negotiations or mediation fails, the parties should continue to seek a settlement either through further negotiations or by other peaceful means of settling disputes. As the Manila Declaration on the Peaceful Settlement of International Disputes states:

> "In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully"[107].

108. In the present case, the exclusion of an imposed unilateral solution has been explicitly mentioned at the beginning of the negotiations. The Contact Group adopted guiding principles governing these negotiations, stating that "[a]ny solution that is *unilateral* or results from the use of force would be unacceptable"[108].

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[106] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, p. 47-48, para.87. See also: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, I.C.J. Reports 2002*, p. 424, para. 244.

[107] GA Resolution 37/10 of 15 November 1982. See also the Declaration of Principles of International Law annexed to Resolution 2625 (XXV).

[108] Annex to Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, 10 November 2005, UN Doc. S/2005/709, p. 3, para.6 (emphasis added).

109. Previously, at the time of the creation of the Provisional Institutions of Self-Government, the UNMIK-FRY Common Document signed on 5 November 2001 clearly reaffirmed "that the position on Kosovo's future status remains as stated in UNSCR 1244, and that *this cannot be changed by any action taken by the Provisional Institutions of Self-government*"[109]. The Security Council welcomed the signing of this document and emphasised "the *responsibility of the provisional institutions of self-government and all concerned to respect fully the final status provisions of resolution 1244 (1999)*. It underlines its continued commitment to the full implementation of resolution 1244 (1999), which remains the basis for building Kosovo's future."[110]

110. The Guiding principles of the Contact Group for a settlement of the status of Kosovo also affirmed that "[t]he Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council"[111].

111. If negotiations are to be fruitful, each party must abstain from adopting unilateral measures that aggravate the dispute or the conflicting situation and prevent the dispute or situation from being settled. This is an important corollary of the obligation to settle disputes through peaceful means, one of the fundamental principles of international law[112], applicable in the particular case under the examination by the Court.

112. This analysis is equally relevant for those States that supported the solution proposed by Mr. Ahtisaari and, that subsequently have encouraged the unilateral declaration of independence, and have supported it in a campaign in favour of recognition. The failure of these States to obtain the agreement of the concerned party for the desired aim should not lead to an attempt to impose this aim as a mere *fait accompli*. In the present context, such a policy can be qualified as intervention and, as the Court perceptively stated fifty years ago, this is "the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the

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[109] Emphasis added. UNMIK-FRY, Common Document (5 November 2001), para. 5 (available at : http://www.mfa.gov.yu/Policy/Priorities/KIM/unmik_e.html).
[110] Emphasis added. Presidential Statement of 9 November 2001, UN Doc. S/PRST/2001/34.
[111] UN Doc. S/2005/709, 10 November 2005 (Annex).
[112] See the Friendly Relations Declaration adopted by GA Resolution 2625 (XXV) of 24 October 1975.

present defects in international organization, find a place in international law"[113].

113. It was suggested during the General Assembly discussions of the request for this advisory opinion, that it was Serbia that unilaterally rendered the successful negotiations impossible, because of the adoption of a new Constitution that "unilaterally reasserted control over Kosovo" and consequently tied the hands of the Serbian negotiators[114]. This is not accurate. The new Constitution reaffirmed Serbian sovereignty over Kosovo and explicitly referred to its enjoyment of substantial autonomy[115], which is in conformity with Resolution 1244 (1999). Moreover, the Constitution leaves open the possibility of amendment[116]. This argument is therefore devoid of any relevance.

114. On the contrary, it is the unilateral declaration of independence itself that attempts at modifying the existing status and putting an end to the negotiations between the parties.

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[113] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35.
[114] Sir John Sawers (United Kingdom), United Nations General Assembly, Sixty-third sessin, 22nd plenary meeting, 8 October 2008, UN Doc. A/63/PV.22, p. 3.
[115] Preamble and Article 182. Available at:
http://www.parlament.sr.gov.yu/content/eng/akta/ustav/ustav_ceo.asp
[116] Article 203. Available at: ibid.

Section III:
The Answer to the Question Raised by the General Assembly

115. Having determined the rules and principles of international law relevant to the question posed by the General Assembly, this section will ascertain whether the unilateral declaration of independence of 17 February 2008 is in accordance with those rules and principles.

A. The Provisional Institutions of Self-Government have no competence to proclaim the independence of Kosovo

116. It has been determined that the Provisional Institutions of Self-Government have no competence to proclaim the independence of Kosovo.[117] Consequently, being organs created by the Special Envoy of the Secretary-General in the framework of the responsibilities vested to the latter by UNSC Resolution 1244 (1999), their unilateral declaration of independence is an *ultra vires* act in violation of that Resolution and the Constitutional Framework set out by UNMIK Regulation 2001/9.

B. The unilateral declaration of independence infringes SC Resolution 1244 (1999)

117. As discussed above, the specific international legal provision governing the situation in Kosovo is UNSCR Resolution 1244 (1999).[118] The Provisional Institutions of Self-Government, which were created by virtue of this resolution, are naturally required to respect its provisions.

118. The unilateral declaration of independence of 17 February 2008 infringes UNSC Resolution 1244 (1999) in a number of ways:

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[117] *Supra*, paras. 61-64.
[118] *Supra*, para. 65.

- It is an act of defiance against the continued applicability of the Resolution itself, and as such attempts to undermine the competences of the Security Council under Chapter VII of the Charter of the United Nations;
- It contravenes the authority of the international administration established by the Resolution;
- It attempts to put an end to such presence established on the basis of the Resolution, something which can only be decided by the Security Council itself;
- It disregards the political process that must lead to the determination of the future status of the territory, i.e. negotiations between the parties concerned;
- It attempts to impose a given political settlement, even though this can only be the outcome of negotiations;
- It does not respect the sovereignty and territorial integrity of Serbia, explicitly preserved in the Resolution.

119. This open defiance to a binding SC resolution in force is attested by the last report on Kosovo prepared by the Secretary-General: "The Kosovo authorities, who have been under significant pressure from opposition parties, have repeatedly stated during the past months that resolution 1244 (1999) is no longer relevant and that the institutions of Kosovo have no legal obligation to abide by it"[119].

120. If member States are obliged to comply with Security Council resolutions, this is also the case for organs created on the very basis of resolutions. The serious undermining of the collective security system set up by the Charter by the Provisional Institutions of Self-Government of Kosovo cannot be tolerated. The very credibility of this system is at stake.

[119] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 17 March 2009, UN Doc. S/2009/149, para. 4.

C. The unilateral declaration of independence violates the territorial integrity of Serbia

121. As has been stated above, respect for the territorial integrity of States is not only an obligation for States but it is also a requirement opposable to parties to internal armed conflicts threatening international peace and security.[120] It has already been noted that respect for the sovereignty and territorial integrity of Serbia is expressly provided in Resolution 1244 (1999).

122. Because the very purpose of the unilateral declaration of independence of 17 February 2008 is the creation of a new sovereign State from the territory under the sovereignty of an existing State, the declaration infringes the obligation to respect the territorial integrity of Serbia.

D. The unilateral declaration of independence constitutes a breach of the obligation to settle disputes through peaceful means

123. Furthermore, the unilateral declaration of independence of 17 February 2008 violates the obligation of the Provisional Institutions of Self-government of Kosovo to negotiate the future status of the territory with the sovereign State. This obligation stems not only from UNSC Resolution 1244 (1999), but from general international law as well.

124. As stated above[121], non-State actors, most particularly in the case of internal conflicts which are of international concern, are also the addressees of injunctions of the Security Council acting under Chapter VII of the UN Charter. When the Security Council imposes on all sides of the dispute the obligation to solve the crisis through negotiations or other peaceful means, this requirement implies that the general rules related to the peaceful settlement of international disputes are applicable. In concrete terms, this means that failure of a round of negotiations does not liberate the parties from the obligation to pursue the settlement of their dispute through available peaceful means, including further negotiations.

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[120] See supra, paras. 69-82.
[121] Supra, para. 75.

125. As such, the unilateral declaration, by attempting to unilaterally put an end to the negotiation process, constitutes a breach of the obligation to settle the disputes through peaceful means.

E. There are no legal grounds for the unilateral declaration of independence

126. Having established that the unilateral declaration of independence of 17 February 2008 is an *ultra vires* act of the Provisional Institutions of Self-government of Kosovo that infringes Resolution 1244, the territorial integrity of Serbia and the obligation to settle disputes through peaceful means, it will be analysed here whether there are grounds to legally justify that declaration.

127. The unilateral declaration of independence of 17 February 2008 cannot be grounded either on the existence of a right to secession in domestic law or on the consent of the parent State given afterwards. With regard to the former situation, some constitutions provide for such a right. Indeed, this was the case of the Constitution of the SFRY of 1974, but only limited to the constituent Republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia) and not to the provinces (Kosovo and Vojvodina)[122]. Later Constitutions, such as those of the Federal Republic of Yugoslavia, Serbia and Montenegro, and Serbia, did not grant that right to the autonomous regions either[123]. As it is well known, Serbia has not consented the secession of Kosovo. On the contrary, it has declared the unilateral declaration to be null and void[124].

128. The situation of Kosovo is also in clear contrast with other situations, such as those of Bangladesh, Eritrea and the Baltic States, in which the parent States accepted the separation of part of their territories and inhabitants. In the case of Eritrea moreover, the territory of this former Italian colony had been

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[122] The preamble to the Basic Principle of the Constitution of the Socialist Federal Republic of Yugoslavia, 1974, provides "The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession".

[123] See Articles 2, 3 and 6 of the Constitution of the Federal Republic of Yugoslavia of 1992; Preamble and Article 5 of the Constitutional Charter of the Union of Serbia and Montenegro of 2003; and Article 8 of the Constitution of the Republic of Serbia of 2006, currently in force and available on the website of the National Assembly of the Republic of Serbia at <http://www.parlament.sr.gov.yu/content/eng/akta/ustav/ustav_ceo.asp>.

[124] Letter from Mr. Boris Tadic, President of the Republic of Serbia, to the Secretary-General of 17 February 2008, U.N. Doc. A/62/703-S/2008/111.

incorporated to Ethiopia by a binding UN General Assembly resolution on condition of the enjoyment of autonomy of the territory in the framework of a federation[125]. In the case of the Baltic States, their illegal annexation in 1940 is relevant to their subsequent separation from the parent State. These situations are clearly different from that of Kosovo.

129. It could be argued that the creation of States is a matter of fact and not of law. Certainly, a State cannot exist if the material elements traditionally mentioned are absent[126]. These days, however, the creation of States must be the result of a process in which respect for international law is assured. This explains why entities claiming to be States, and that show effective and exclusive control over the territory and its inhabitants, but which were created in violation of international law, have not been considered to be States. Examples include "Katanga", "Southern Rhodesia", the "Turkish Republic of Northern Cyprus" and "Somaliland", among others. The creation of States being also a matter of law today means that international law does not remain neutral *vis-à-vis* secession. For this reason, the unilateral declaration of independence cannot produce its purported effect. *A fortiori*, as has been previously mentioned[127], there is no such effective and exclusive control by the Provisional Institutions of Self-government in the case of Kosovo.

130. To sum up, there are no legal grounds justifying the unilateral declaration of independence.

131. Before concluding, Argentina wishes to insist on the need for a resumption of the negotiations between the parties concerned, with the aim of reaching a lasting settlement on the basis of international law and that permits all the inhabitants of the territory – including the displaced persons who are not in a position to exercise their right to return – the full enjoyment of their human rights in a multiethnic society. Imaginative solutions in the framework of international law are always possible and certainly they were not exhausted

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[125] "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown." (GA Resolution 390 (V) , Article 1)

[126] Cf. Article 1 of the Convention on Rights and Duties of States, adopted by the 7th International American Conference at Montevideo on 26 December 1933 (League of Nations, Treaty Series, 1936, vol CLXV, p. 20. See also: Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia, 31 ILM 1494 (1992).

[127] Supra, para. 35.

between 2005 and 2007, during the negotiations lead by Mr. Ahtisaari. It is also the responsibility of those States directly involved in the Kosovo process to insist upon the parties that the respect of international law is an essential part of the conduct of any actor in international relations.

Conclusions

132. On the basis of the arguments set out above, Argentina respectfully submits that:

(a) The Court has jurisdiction to answer the question raised by the General Assembly;

(b) There are not compelling reasons preventing the Court from exercising its advisory jurisdiction;

(c) The unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law, since:

(i) It is an act which did not fall within the competences of its authors, as stemming from Resolution 1244 (1999) and the Constitutional Framework adopted by UNMIK Regulation 2001/9;

(ii) It infringes the competences and responsibilities of the Security Council under Chapter VII of the Charter of the United Nations;

(iii) It infringes Resolution 1244 (1999) in a way described in paragraph 118 of this written statement;

(iv) It constitutes a violation of the territorial integrity of Serbia:

(v) It constitutes a breach to the obligation to settle disputes through peaceful means, in particular the obligation to reach a settlement for the future status of Kosovo through negotiations.