

SEPARATE OPINION OF JUDGE KEITH

1. The Court, in my view, should have exercised its discretion to refuse to answer the question which the General Assembly submitted to it on 8 October 2008 in resolution 63/3. In this opinion I give my reasons for that conclusion.

2. While the terms of the French text of Article 14 of the Covenant of the League of Nations may have been read as denying the Permanent Court of International Justice a discretion to refuse (the Court “*donnera aussi des avis consultatifs*” on matters submitted to it by the Council or Assembly) and the English text may have been read as an enabling rather than a discretionary provision (“The Court *may* also give an advisory opinion . . .”), the Court made it clear, very early in its life, that it had a discretion to refuse a request. In 1923, in the *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, the Court, having decided that it was “impossible” for it to give the opinion on the dispute before it, continued “that there are other cogent reasons which render it very inexpedient that [it] should attempt to deal with the present question” (p. 28). Those reasons related to the availability of evidence about a factual issue at the heart of the dispute. It was very doubtful, said the Court, that there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact: what did the parties agree to? While that particular reason for refusing to give an opinion does not arise in this case, what is significant, in addition to the Court’s recognition that it had a discretion to refuse a request, is its broader statement of principle: “The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court.” (P. 29.)

3. At that early stage the Court was taking care to underline that, in its advisory jurisdiction, it was not simply an adviser to the political organs of the League and, as such, obliged to respond at their beck and call. It was a court and had to maintain its judicial integrity in the exercise of that jurisdiction just as in its contentious jurisdiction. It continued to underline that essential character in its practice and rules relating to its advisory jurisdiction. Those rules were moved in 1936 to the Statute of the Permanent Court and were in turn included in the Statute of this Court. Notable among them is Article 68: “In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.” Article 65 (1), in the only addition to the Chapter on Advisory Opinions included in the Statute of this Court, expressly recognizes that the Court has a discretion whether to reply to a request: “The Court *may* give an advisory opinion on any legal question . . .”

4. That discretion exists for good reason. The Court, in exercising it, considers both its character as a principal organ of the United Nations and its character as a judicial body. In terms of the former, the Court early declared that its exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, *in principle*, should not be refused (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 71-72). That indication of a strong inclination to reply is also reflected in the Court’s later statement that “compelling reasons” would be required to justify a refusal (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86). While maintaining its integrity as a judicial body has so far been the reason for refusal which the Court has emphasized, it has not ever identified it as the *only* factor which might lead it to refuse. So too may other considerations, including the interest of the requesting organ and the relative interests of other United Nations organs, discussed later.

5. That discussion of the law highlights the link between the interest of the requesting organ and the strong inclination or the duty, as it is sometimes put, of the Court to reply. Accordingly, I consider in some detail the facts relating to this particular request and the relative interests of the General Assembly and Security Council. The exercise of the discretion, recognized by Article 65 (1) of the Statute, should not, in a case such as this, be unduly hampered by a label such as “compelling reasons”.

6. The issue which for me is decisive is whether the request in this case should have come from the Security Council rather than from the General Assembly and whether for that reason the Court should refuse to answer the question. That statement of the issue raises the question whether the Court may properly raise such a contention in terms of its participation as a principal organ of the United Nations within the wider United Nations system or for the purpose of protecting the integrity of its judicial function. To make my position clear, I add that I would have been able to see no possible reason for the Court refusing to answer the question in this case had it been put by the Security Council. My concern relates only to the propriety of the Court replying to the General Assembly in the circumstances of this case. I consider that the Court should address that issue of the appropriateness of an organ requesting an opinion if the request is essentially concerned with the actual exercise of special powers by another organ under the Charter, in relation to the matter which is the subject of the request. As will appear, this exact issue has not arisen in respect of any earlier request for an advisory opinion.

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7. While my focus is primarily on Security Council resolution 1244 adopted on 10 June 1999 and on the actions taken after that date by the Security Council and the General Assembly, some earlier actions are also relevant to an assessment of their relative roles since that date and in particular in late 2008 when the Assembly made its request to the Court. In the 1990s both bodies had substantial roles in respect of the developing crises and armed conflicts in the territory of the Socialist Federal Republic of Yugoslavia and the new States formed from it. The Security Council’s concern was primarily with the issues of international peace and security arising there and, in that context, with the introduction of sanctions, the establishment and functioning of peacekeeping forces, and the setting up of the International Criminal Tribunal for the Former Yugoslavia. Between 31 March 1998 and 14 May 1999 the Council also adopted four resolutions relating specifically to Kosovo. All were adopted under Chapter VII of the Charter and, as the “crisis” developed into a “humanitarian catastrophe”, made various calls and demands on the Federal Republic of Yugoslavia, the Kosovo Albanian leadership and others. (See also resolution 1367 (2001) ending the prohibition on the sale and supply of arms imposed in the first of those resolutions.)

8. The General Assembly’s involvement in that earlier period was principally with the situation of human rights, at first in the territory of the former Yugoslavia in general (e.g., General Assembly resolution 48/153 (1993), para. 17 of which is concerned with Kosovo), and, from 1995, in Kosovo specifically. The last resolution in that annual series (General Assembly resolution 54/183) was adopted on 17 December 1999. In it, the Assembly gives major place to resolution 1244 and the role of the newly established United Nations Mission in Kosovo (operative paragraphs 1, 2, 3 and 5). While between 2000 and 2006 the Assembly adopted resolutions relating to the “Maintenance of international security — good neighbourliness, stability and development in South-Eastern Europe”, its references to Kosovo were essentially limited to resolution 1244 and the processes under it (e.g., General Assembly resolution 61/53). Since 1999,

the only resolutions adopted by the Assembly relating particularly to Kosovo have been those, adopted under Article 17 (1) of the Charter, approving the budget of UNMIK for the following year, and, of course, the resolution requesting the opinion in this case, a request which, uniquely in the practice of the Assembly and the Council, did not arise from a more general agenda item.

9. Two features of those budget resolutions are significant. The first is that the sums approved year by year for the Mission until 2008 were between US\$200 and US\$400 million, with between 5,000 and 10,000 personnel; but for the years since they have been substantially reduced to about US\$50 million, with 500 personnel. That reduction reflects the major role exercised since December 2008 by EULEX, with a budget of over US\$300 million and over 2000 staff, with a target of 3000. The second feature of the resolutions is that the Assembly's consideration of them does not involve it or its Fifth Committee in any substantive consideration of the situation in Kosovo, including political developments there; rather, the Secretary-General and the ACABQ submit relevant reports and proposals to the Fifth Committee and the resulting resolutions focus on the financing of the Mission, including the obligations of States to pay their assessed contributions and those which are outstanding. To the extent that the resolutions go beyond the funding of the Mission, they are concerned with the financing of peacekeeping operations elsewhere in the world and with the safety and security of the members of the Mission (e.g., paras. 4-7 and 24 of General Assembly resolution 63/295). The limited role of the Assembly in respect of this budget matter is not unusual. For one thing, some parts of the budget adopted by the General Assembly are included to meet existing financial obligations of the United Nations, which cannot be denied, as the Court made clear in its Opinion relating to the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, pp. 47 ff.).

10. The introduction of EULEX along with the related scaling down of the role of UNMIK and the reduction of its budget were the subject of discussions in the Security Council in November 2008 and in the Fifth Committee and the General Assembly in June 2009. The first resulted in a Presidential Statement which welcomed the intentions of Belgrade and Pristina to co-operate with the international community (see para. 13 below). When on 3 June 2009 the much reduced UNMIK budget for the following year was being considered in the Fifth Committee the Serbian representative expressed concern and stated that the reduction contravened resolution 1244 as it went beyond what had been welcomed by the Security Council and was unacceptably based on the unilateral declaration of independence, "thereby contradicting the status-neutral position of UNMIK" (A/C.5/63/SR 51, para. 16). The Serbian proposal for the creation of three professional posts in the Office of the Special Representative for co-ordination and co-operation between UNMIK and EULEX was included in the budget, with the Serbian representative in the plenary expressing his country's satisfaction at that development "as part of the status-neutral framework of the Council's resolution 1244 (1999)" (A/63/PV.93, p. 6).

11. Against that background of a very limited General Assembly involvement with the situation in Kosovo since 1999, I turn to the sharply contrasting role of the Security Council and UNMIK established under resolution 1244. The Council, in that resolution, "acting for [the purposes set out in the preamble] under Chapter VII of the Charter of the United Nations", authorizes certain actions, makes a number of decisions and associated requests, and makes certain demands. The Council authorizes both an international security presence and an international civil presence. In respect of the first, it authorizes Member States and relevant international organizations to establish the international security presence in Kosovo with all necessary means to fulfil its responsibilities which are set out in some detail in a non-exhaustive list which includes in paragraph 9:

- “(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;
- (d) Ensuring public safety and order until the international civil presence can take responsibility for this task;
- (f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence”.

In the second, the Council authorizes the Secretary-General,

“with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo”.

Among the main responsibilities of the international civil presence, stated in paragraph 11, are:

- “(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo . . . ;
- (b) Performing basic civilian administrative functions where and as long as required;
- (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities;
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- (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
- (j) Protecting and promoting human rights;
- (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo”.

Those two international presences (one civil, one security) were established for an initial period of 12 months and were to continue thereafter unless the Security Council should decide otherwise. The Council requested the Secretary-General, in consultation with it, to appoint a Special Representative to control the implementation of the international civil presence and to ensure that both international presences operated towards the same goals and in a mutually supportive manner.

12. While the Council “[r]eaffirm[ed] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”, the effect of the resolution, as long as it remained in effect, was to displace the administrative and related functions

of the Federal Republic of Yugoslavia which it would otherwise have exercised through its institutions as the sovereign over the territory of Kosovo. The plenary character of the authority of UNMIK and of the Special Representative over the territory of Kosovo was manifested at the outset in the first UNMIK regulation adopted by the Special Representative. Under it “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative”.

13. Resolution 1244 requested the Secretary-General to report to the Council at regular intervals on the implementation of the resolution including reports from the leaderships of both presences. Those reports, submitted on average every three months, are the subject of debate in which the members of the Council and other participants address developments as they see them. Because of the political divisions within the Council (which explain its lack of comment on the Assembly request in this case) it has only once been able, since it adopted the resolution, to formulate an agreed position relating to the situation in Kosovo. It did that in the Presidential Statement of 26 November 2008 (S/PRST/2008/44) in which it welcomed the intentions of Belgrade and Pristina to co-operate with the international community and continued as follows:

“The Security Council welcomes the cooperation between the UN and other international actors, within the framework of Security Council Resolution 1244 (1999), and also welcomes the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans, thereby making a decisive contribution to regional stability and prosperity.”

It follows, as indeed is generally accepted including by the authorities in Kosovo, that the resolution continues to be in effect along with the presences established under it.

14. What is to be concluded from the above account, in terms of the relative and absolute interests of the General Assembly and the Security Council in the matter submitted to the Court by the Assembly? Resolution 1244 adopted by the Security Council, the Council’s role under it and the role of its subsidiary organ, UNMIK, are the very subject of the inquiry into the conformity of the declaration of independence with the *lex specialis* in this case — the resolution and the actions taken under it. The resolution, adopted under Chapter VII of the Charter and having binding force, established an interim international territorial administration with full internal powers which superseded for the time being the authority of the Federal Republic of Yugoslavia which remained sovereign. By contrast, the Assembly’s only dispositive role since June 1999 and the introduction of that régime has been to approve the budget of the Mission.

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15. I return to the case law of the Court and in particular to the critical reason for its recognition that, as a principal organ of the United Nations, it should in principle respond to requests for opinions. The Court regularly couples that recognition with an indication of the interest which the requesting organ has in seeking an opinion from the Court: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 65, 70, 71, 72; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 15, 19-20; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 151, 155, 156; *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. 16, para. 32; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, paras. 20 and 72; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, paras. 11, 12; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 16-17 and pp. 162-163, para. 60. Further, in the case of every one of the other requests made by the General Assembly or the Security Council, their interest has been manifest and did not need to be expressly stated in the request or discussed by participants in the proceedings or by the Court. In the *Wall Opinion*, referring to several of the cases mentioned above, the Court stated this proposition:

“As is clear from the Court’s jurisprudence, advisory opinions have the purpose of furnishing to the requesting organ the elements of law *necessary for them in their action.*” (Para. 60; emphasis added.)

While the Court has made it clear that it will not evaluate the motives of the requesting organ (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; and the *Wall Opinion*, para. 62), it does in practice determine, if the issue arises, whether the requesting organ has or claims to have a sufficient interest in the subject-matter of the request.

16. In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to co-operate does not exist and what is sometimes referred to as its duty to answer disappears.

17. In this case the Court, in my opinion, has no basis on which to reach the conclusion that the General Assembly, which has not itself made such a claim, has the necessary interest. Also very significant for me is the almost exclusive role of the Security Council on this matter. Given the centrality of that role for the substantive question asked (as appears from Part IV B of the Court’s Opinion) and the apparent lack of an Assembly interest, I conclude that the Court should exercise its discretion and refuse to answer the question put to it by the General Assembly.

18. I add that I do not see the *Admissions, Certain Expenses, Namibia* and *Wall Opinions*, on which the Court relies in this context, as affecting this conclusion. In all of those cases, both the General Assembly and the Security Council had a real interest. In the one case in which a Security Council resolution was expressly at the centre of the request, *Namibia*, it was the Council that made the request. In the *Admissions* case in which the General Assembly in its request had referred to the exchange of views which had taken place in meetings of the Security Council the Court determined that the abstract form in which the question was stated precluded the interpretation that it should say whether the views referred to were well founded or not (*I.C.J. Reports 1947-1948*, p. 61). While, in the *Certain Expenses* case, the Court, in replying to a request from the General Assembly, did consider a sequence of Security Council resolutions, one building on the other, it did not face issues of interpretation of those resolutions of the kind involved in this case (*I.C.J. Reports 1962*, pp. 175-177). Further, none of those cases involved anything comparable to the régime of international territorial administration introduced by Security Council resolution 1244.

19. As is indicated by my vote, I agree with the substantive ruling made by the Court, essentially for the reasons it gives.

(Signed) Kenneth KEITH.
