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Agenda item 71

**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****Letter dated 1 October 2008 from the Permanent Representative
of the United Kingdom of Great Britain and Northern Ireland to
the United Nations addressed to the President of the
General Assembly**

The United Kingdom has the honour to refer to agenda item 71, “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”, and to the draft resolution submitted by Serbia (A/63/L.2). In order to assist in the consideration of this item, the United Kingdom hereby submits a note of issues (see annex), raising a number of questions on which members of the General Assembly may wish to reflect. As the paper makes clear, the United Kingdom is a strong supporter of the International Court of Justice and our note is submitted in that context.

For its part, the United Kingdom has no doubt about the legality of the declaration of independence of Kosovo and, in a spirit of transparency and openness, the United Kingdom has shared its legal views on this issue both in meetings of the Security Council and with the wider membership of the United Nations.

Kosovo’s declaration of independence cannot be seen in isolation from the context of the violent and non-consensual break-up of Yugoslavia, including the humanitarian crisis of 1999. The engagement of the international community both in the international administration of Kosovo and the extensive efforts to arrive at a negotiated settlement must likewise be given due account. Any request should therefore enable the Court to reach its findings against the full context that culminated in Kosovo’s declaration of independence.

Similarly the General Assembly will need to consider carefully the precise formulation of the question submitted to the Court in order to ensure that the Court’s answer will be of the greatest value.



Should the General Assembly decide to request an advisory opinion, we would expect that, as a matter of basic fairness, Kosovo will be permitted to participate in the proceedings and present arguments to the Court. In our view it would be entirely appropriate and would assist the Court if the General Assembly made this clear in the text of the resolution.

I should be grateful if you would circulate the present letter and its annex as a document of the General Assembly.

(Signed) John **Sawers**

Annex to the letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly

“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”

Note of issues

1. By a letter dated 15 August 2008 (A/63/195), the Permanent Representative of Serbia to the United Nations transmitted a letter from Vuk Jeremic, Minister for Foreign Affairs of the Republic of Serbia, to the Secretary-General requesting “the inclusion in the agenda of the sixty-third session of the General Assembly, under heading F, ‘Promotion of justice and international law’, of a supplementary item 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’, with subsequent consideration of the item directly at a plenary meeting of the General Assembly”. An explanatory memorandum was attached.
2. The General Assembly agreed by consensus on 19 September 2008 to include the item on the agenda for consideration at a plenary meeting. The United Kingdom joined the consensus, reflecting the United Kingdom’s practice of supporting the inclusion of agenda items that merit debate. Serbia has now circulated a draft resolution under this agenda item (A/63/L.2).
3. The United Kingdom is a strong supporter of the International Court of Justice. It has a long-standing Optional Clause Declaration under article 36(2) of the Court’s Statute giving the Court compulsory jurisdiction in a wide range of matters. It has taken an active part in all the recent advisory proceedings of the Court. It has also been a party in a number of contentious proceedings before the Court in recent years. The role of the Court as the principal judicial organ of the United Nations is important, both within the United Nations system and more widely. The advisory jurisdiction of the Court is an important mechanism for affording guidance to the General Assembly, Security Council and other bodies on questions of law relevant to the performance of their functions. Advisory opinions have contributed much to the work of the Organization and to the development of international law.
4. The view is sometimes expressed that there is intrinsic merit in requesting an advisory opinion from the Court on contentious issues of law. Notwithstanding its strong support for the Court, the United Kingdom does not subscribe to this view if the consequence of this approach would be to request an advisory opinion without a clear sense of purpose and the practical utility of an opinion for the requesting body.
5. The United Kingdom nevertheless recognizes that the proposed request for an advisory opinion engages important questions of international law. We also recognize the sensitivity of the issues for Serbia’s internal political debate. Notwithstanding the United Kingdom’s well-known position on the underlying issues of substance, including its recognition of Kosovo, it looks forward to engaging constructively in the General Assembly debate on this item in due course and, to this end, identifies below some of the questions that it believes would merit closer consideration.

6. If an advisory opinion is to be requested, it will be important to ensure that the resolution sets the context of the question posed in order to assist the Court in its consideration of the issues. Previous requests for advisory opinions from the General Assembly have set the question to be addressed in its wider legal and political context. The resolution requesting an advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (General Assembly resolution 10/14 of 8 December 2003) illustrates this. In the matter under discussion, any consideration of the issues by the Court would necessarily have to take place in the context of the events associated with the wider dissolution of the former Socialist Federal Republic of Yugoslavia in the period from 1991. It would facilitate the task of the Court, therefore, for further contextualization to be added by expanding the preambular paragraphs of the draft resolution.

7. The United Kingdom would also welcome consideration of the formulation of the question in the draft resolution. The agenda item proposed by Serbia requests an advisory opinion on the question of whether “the unilateral declaration of independence of Kosovo is in accordance with international law”. In contrast, the question formulated in the draft resolution is cast in terms of whether “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law”. It would be useful to know whether Serbia is seeking to focus on a narrower question about the competence of the Provisional Institutions of Self-Government of Kosovo, and, if so, precisely how that question relates to Kosovo’s status at the present time.

8. Beyond this, Serbia’s explanatory memorandum states that the object of the request for an advisory opinion is to enable States to make a more thorough judgement of the issue. Separate from any question of whether this object is appropriate to the advisory role of the Court, it would be useful to consider whether the question as formulated is best suited to this objective. Many States emerged to independence in what at the time were controversial circumstances. An advisory opinion addressing the emergence to independence of Kosovo could not therefore by itself be determinative of Kosovo’s present or future status or the effect or recognition of that independence by other States.

9. The ability of all those who have an interest in a matter at issue before a court to be represented and to present arguments is a cardinal principle of fairness in legal proceedings. The proposed advisory opinion would put in issue the legality of the declaration of independence of Kosovo. Without prejudice to the answer to this question, if an advisory opinion is requested, it would be appropriate for the resolution referring the matter to the Court to signal that the General Assembly considers that fairness dictates that Kosovo should be permitted to be represented in the proceedings and to present arguments in its own name.

10. In raising these issues for consideration, the United Kingdom emphasizes both its commitment to the International Court of Justice and to a constructive discussion of the issues. The United Kingdom has recognized Kosovo’s independence and considers that the pragmatic reality of the circumstances warrant wider recognition of this status. If a question is referred to the Court for an advisory opinion, the United Kingdom would engage constructively in the proceedings, as it has done in previous advisory opinions. The United Kingdom is not, however, currently persuaded of the utility of the proposal or that some of the issues of detail that it considers to be important have been fully addressed. This note is circulated with the object of raising relevant issues in a transparent fashion for wider consideration.