

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

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I. PROLEGOMENA

1. My vote is in favour of the adoption of the present Advisory Opinion of the International Court of Justice (ICJ) on *Accordance with International Law of Kosovo's Declaration of Independence*, for having concurred with the conclusions the Court has reached, set forth in the *dispositif*. As I have arrived at the same conclusions on the basis of a reasoning distinct from that of the Court, I feel obliged to lay on the records the foundations of my own personal position on the matter at issue. To that end, I begin by addressing the preliminary questions of jurisdiction and judicial propriety, with attention turned to the preponderant humanitarian aspects of the question put to the Court, and to its duty to exercise its advisory function, without attributing to so-called judicial "discretion" a dimension which it does not have. Next, I draw attention to the need to proceed to a most careful examination of the factual background and context of the question put to the Court by the U.N. General Assembly.

2. My following line of reflections is directed to the advent of international organizations and the recurring and growing attention dispensed to the needs and aspirations of the "people" or the "population" (in the mandates system under the League of Nations, in the trusteeship system under the United Nations, and in contemporary U.N. experiments of international territorial administration). My next set of considerations (in parts V and VI of the present Separate Opinion) propounds an essentially humanist outlook of the treatment of peoples under the law of nations, from a historical as well as a deontological perspectives. I then proceed to an examination (in part VII) - eluded by the Court in the present Advisory Opinion — of the grave concern expressed by the United Nations *as a whole* with the humanitarian tragedy in Kosovo.

3. After recalling the principle *ex injuria jus non oritur*, I move on to an examination (in part IX) of the important aspect of the conditions of living of the population in Kosovo (as from 1989), on the basis of the submissions adduced by participants in the present advisory proceedings before the Court, in their written and oral phases. I also recall the judicial recognition, and further evidence, of the atrocities perpetrated in Kosovo (in the decade 1989-1999), and ascribe a central position to the sufferings of the people, pursuant to the people-centered outlook in contemporary international law. I then turn to the consideration of territorial integrity in the framework of the humane ends of the State, to the overcoming of the inter-State paradigm in contemporary international law, to the overriding importance of the fundamental principles of humanity, and of equality and non-discrimination, and to a comprehensive conception of the incidence of *jus cogens*. The way will then be paved for the presentation of my final considerations.

II. CONSIDERATIONS ON PRELIMINARY QUESTIONS OF JURISDICTION AND JUDICIAL PROPRIETY

1. The Court's Jurisdiction, with Attention on the Preponderant *Humanitarian Aspects*

4. First of all, the Court's jurisdiction to deliver the present Advisory Opinion is, in my view, established beyond any doubt, on the basis of Article 65(1) of its Statute, whereby the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". Such conditions have been acknowledged in the case-law of the Court¹. It is for the ICJ, as master of its

¹Cf., e.g., ICJ, Advisory Opinion on the Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal, 1982, para. 21.

own jurisdiction, to satisfy itself that the request for an Advisory Opinion comes from an organ endowed with competence to make it; in the case of the General Assembly, it is so authorized by Article 96(1) of the U.N. Charter, to request an Advisory Opinion of the ICJ on “any legal question”. In its case-law, the Court has at times given indications as to the relationship between the object of the requests at issue and the activities of the General Assembly².

5. Article 10 of the U.N. Charter confers upon the General Assembly competence to deal with “any questions or any matters” within the scope of the Charter, and Article 11(2) specifically endows it with competence discuss “questions relating to the maintenance of international peace and security brought before it”. The question put to the Court by General Assembly resolution 63/3, adopted on 08 October 2008, pertains to the scope of activities of the General Assembly, which, like the Security Council, has been dealing with the situation in Kosovo for over a decade (cf. *infra*)³. The main point that may be raised here pertains to Article 12(1) of the U.N. Charter, which states that “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

6. In any case, a request for an Advisory Opinion is not in itself a “recommendation” by the General Assembly with regard to a “dispute or situation”. Under Article 24 of the Charter, the Security Council has “primary responsibility for the maintenance of international peace and security”⁴. Yet, Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the U.N. Charter, to “recommend measures for the peaceful adjustment” of various situations. The ICJ itself has lately pointed out⁵, as to the interpretation of Article 12 of the U.N. Charter, that in recent years there has been an “increasing tendency” for the General Assembly and the Security Council to deal “in parallel” with the same matter concerning the maintenance of international peace and security: while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, *considering also their humanitarian, social and economic aspects*.

7. The General Assembly has developed the practice of making recommendations on issues which the Security Council has also been dealing with; U.N. member States have not objected to such practice⁶, nor has the Security Council opposed it. This has been the “accepted practice” of the General Assembly, as it has lately evolved, being consistent with Article 12(1) of the U.N. Charter. By adopting, on 08 October 2008, resolution 63/3, seeking an Advisory Opinion from the ICJ relating to the declaration of independence by the authorities of Kosovo, the General

²ICJ, Advisory Opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1950) p. 70; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, paras. 11-12; ICJ, Advisory Opinion, on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, paras. 16 and 25.

³In respect of the situation in Kosovo, in addition to the main course of action taken up by the Security Council, the role of the General Assembly includes taking decisions - with the advice of its Vth Committee - on the budget of UNMIK. And the responsibilities of the Secretary-General include the support of the mandate of UNMIK.

⁴It can thus, in that regard, impose on States an “explicit obligation of compliance” if, for example, it issues “an order or command” under Chapter VII, and it can, to that end, “require enforcement by coercive action”; cf. ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 163.

⁵Cf. ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, 2004, paras. 27-28.

⁶Cf. United Nations Juridical Yearbook (1964), pp. 228 and 237.

Assembly has not acted *ultra vires* in respect of Article 12(1) of the U.N. Charter: it was fully entitled to do so, in the faithful exercise of its functions⁷ under the U.N. Charter.

8. The remaining aspect concerning the Court's jurisdiction is whether the General Assembly's request relates to a "*legal question*" within the meaning of the U.N. Charter and the ICJ Statute. On this particular point, the ICJ has already indicated that questions "framed in terms of law" and raising "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"⁸. It is immaterial if the legal question put to the Court, for the exercise of its advisory function, discloses also political aspects. It could hardly be doubted that the question submitted by the General Assembly to the ICJ for an Advisory Opinion is a legal one, relating as it is to the accordance with *international law* of the declaration of independence by the authorities of Kosovo. In its *jurisprudence constante*, the ICJ has clarified that a legal question may also reveal political aspects, "as, in the nature of things, is the case with so many questions which arise in international life"; this "does not suffice to deprive it of its character as a 'legal question' and to deprive the Court of a competence expressly conferred on it by its Statute"⁹.

9. The ICJ has made it clear that it cannot attribute a political character to a request for an Advisory Opinion which invites it to undertake an "essentially judicial task"¹⁰ concerning the scope of obligations imposed by international law¹¹, namely, an assessment of "the legality of the possible conduct of States" in respect of obligations imposed upon them by international law¹². Since the earlier years of the ICJ, it has been clarified that the old distinction between so-called "legal" and "political" questions does not stand, as there are no questions which, by their "intrinsic nature", may be termed as essentially "legal" or "political"; such qualifications pertain rather to the means of resolution of the questions at issue¹³, whether "legal" (judicial), or otherwise. It is thus somewhat surprising to see this point being persistently raised before the ICJ along the years without consistency.

10. In the light of the aforementioned, it can be concluded that the present request by the General Assembly, by means of its resolution 63/3 of 08.10.2008, for an Advisory Opinion by the

⁷On this particular point, the ICJ has already indicated that questions "framed in terms of law" and raising "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"; ICJ, Advisory Opinion on Western Sahara, 1975, para. 15; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 11.

⁸ICJ, Advisory Opinion on Western Sahara, 1975, para. 15; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 11.

⁹ICJ, Advisory Opinion on Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal, 1973, para. 14; ICJ, Advisory Opinion on Threat or Use of Nuclear Weapons, 1996, para. 13.

¹⁰ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155.

¹¹Cf. ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, para. 41.

¹²Cf. ICJ, Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, 1948, pp. 61-62; ICJ, Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, 1950, pp. 6-7; ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155. And cf. also ICJ, Advisory Opinion on Threat or Use of Nuclear Weapons, 1996, para. 13; ICJ, Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980, para. 33.

¹³Cf. M. Vaucher, *Le problème de la justiciabilité et de la non-justiciabilité en droit international des différends dits "politiques" ou "non-juridiques" et les notions de compétence exclusive et de compétence nationale*, Paris, Pédone, 1951, pp. 3-243.

ICJ, fulfils the requirements of Article 96(1) of the U.N. Charter and of Article 65 of the Statute of the Court, in respect of both the competence of the requesting organ (the General Assembly) and of the substance of the request, and discloses the nature of a legal question. This suffices to determine the issue of the Court's jurisdiction. Furthermore, there is no element raised in the course of the present advisory proceedings that could lead the Court to conclude otherwise.

11. Accordingly, I concur with the Court's view that it has jurisdiction to deliver the requested Advisory Opinion. This latter should be attentive to the broader view of the consideration of issues pursued by the General Assembly (cf. *supra*), focusing on the *preponderant humanitarian aspects* surrounding the conformity or otherwise with international law of the declaration of independence at issue. This requires a careful consideration by the Court of the *factual complex* of the request lodged with it (cf. *infra*), so as to avoid an aseptic reasoning in the Advisory Opinion.

12. This is an aspect in respect of which my reasoning differs from that of the Court. The consideration of the *factual complex* is of considerable importance, as declarations of independence are not proclaimed in a social *vacuum*, and require addressing at least its immediate *causes*. This is a point of far greater importance than the usual arguments concerning so-called judicial "discretion", dealt at length by the Court in the present Advisory Opinion. This argument has been repeatedly raised before this Court, in its practice as to the exercise of its advisory jurisdiction. This point deserved no more than a brief review of the Court's *jurisprudence constante* on it, so as to concentrate attention on other points that are of far greater relevance, such as the factual background of the question but to the Court by the General Assembly.

2. Alleged Judicial "Discretion" and the Court's Duty to Exercise its Advisory Function

13. The second line of considerations at this preliminary stage, pertaining to judicial "discretion" (rather than propriety), has been brought to the fore by certain arguments adduced by some participants, in the course of the present proceedings. Such arguments tried to persuade the Court that it should nevertheless decline, in the exercise of its discretionary power, to render the Advisory Opinion requested by the General Assembly, either because the request concerns "matters essentially within the domestic jurisdiction of a State" (under Article 2(7) of the U.N. Charter); or because the procedure was allegedly being used primarily to further the interests of individual States rather than that of the requesting organ; or because the Court's Advisory Opinion would lack any useful purpose; or because the Court's Opinion would arguably have adverse effects on peace and security in the region; or because that there is no consent of Kosovo to the jurisdiction of the Court; or else because it would be allegedly politically inappropriate for the Court to deliver the Advisory Opinion. I find all these arguments wholly unconvincing.

14. To start with, the ICJ itself observed, in an Advisory Opinion delivered six decades ago, that Article 65 of its Statute gives it "the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request"¹⁴; it further warned that "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the

¹⁴ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950, p. 72.

activities of the Organization, and, in principle, should not be refused”¹⁵. In accordance with its own *jurisprudence constante*, only “compelling reasons” could lead the ICJ to such refusal¹⁶.

15. As to the argument of domestic jurisdiction (*supra*), already in the case of the *Nationality Decrees in Tunis and Morocco* (1923), the former Permanent Court of International Justice (PCIJ) pondered that “[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations” (pp. 23-24). Ever since, in their constant practice, in the line of this *obiter dictum* of the PCIJ, both the U.N. main organs and U.N. member States have themselves acknowledged the gradual erosion of the plea of domestic jurisdiction under the U.N. Charter.

16. This has also been reckoned in international legal writing on this particular point. Thus, it was pondered, 35 years ago, that the fact that a State raising an objection on the ground of domestic jurisdiction could not impede the inclusion of the matter into the agenda of the international organ seized of it and its discussion at international level, afforded evidence for the view that the reserved domain of States was already undergoing a continuing process of reduction. Domestic jurisdiction in this context becomes a *residuum* of discretionary authority left by international law within the reserved domain of States¹⁷. Two decades later, it was reasserted that Article 2(7) of the U.N. Charter was inapplicable in so far as the principle of self-determination was concerned, linked to the consideration of human rights issues, thus removed from the domain of domestic jurisdiction¹⁸.

17. In fact, the ICJ itself has stated that “[t]he purpose of the Court’s advisory opinion is not to settle – at least directly - disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”¹⁹. The U.N. practice with regard to Kosovo’s humanitarian crisis illustrates the widespread agreement that the powers of the main U.N. organs (in particular the Security Council and the General Assembly) to initiate and undertake measures in order to secure the maintenance of international peace and security, are rather broad, - and cannot be restrained by pleas of domestic jurisdiction of individual States. This being so, the ICJ, as “the principal judicial organ of the United Nations” (Article 92 of the U.N. Charter), cannot accept the plea of domestic jurisdiction as a reason to decline to exercise its advisory function, and this applies to the present request for an Advisory Opinion on *Accordance with International Law of Kosovo’s Declaration of Independence*.

18. Another argument has been raised, by some participants in the present advisory proceedings, whereby the advisory procedure is allegedly being used primarily to further the

¹⁵*Ibid.*, p. 71.

¹⁶ICJ, Advisory Opinion on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, 1956, p. 86; ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155; Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971, p. 27; ICJ, Advisory Opinion on the Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal, 1973, p. 183; ICJ, Advisory Opinion on Western Sahara, 1975, p. 21; ICJ, Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989, p. 191; ICJ, Advisory Opinion on Threat or Use of Nuclear Weapons, 1996, p. 235.

¹⁷A.A. Cançado Trindade, “The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations”, 25 *International and Comparative Law Quarterly* (1976) pp. 713-765.

¹⁸A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge, University Press, 1995, pp. 174 et seq.

¹⁹ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 15; ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, 1950, p. 71.

interests of individual States rather than the concerns of the General Assembly as the requesting U.N. organ. A handful of participants further argued that, given the close voting in the adoption of resolution 63/3 of the General Assembly, the ICJ would have to be extremely careful in delivering the Advisory Opinion, if at all; in their view, extreme restraint was required from the ICJ. In my perception, these arguments beg the question.

19. All these considerations were to have been born in mind in the course of the discussion of the draft resolution of the General Assembly²⁰, when all U.N. member States had an opportunity to express their views in support or against the adoption of such draft resolution. The proposal for inclusion of the item in the agenda of the General Assembly was originally advanced by Serbia, and all U.N. member States had a chance to make their views known in the consideration of this agenda item. The circumstances of the approval of the draft resolution in a rather close or divided voting are, in my view, immaterial.

20. Resolution 63/3 was adopted on behalf of the U.N. General Assembly, and not of only those States which voted in favour of it. This ensues from the international legal personality of the United Nations, which is endowed with a *volonté* of its own, surely distinct from the sum of *volontés* of its member States, or of some of them (those which vote in favour of a resolution of one of its main organs). In the *cas d'espèce*, U.N. member States considered the matter in the General Assembly, and *this latter*, as one the main organs of the United Nations, decided to make of the issue of Kosovo's declaration of independence one of "United Nations concern".

21. The ICJ should thus proceed with care, - as it of course did, - but without feeling inhibited to deliver the present Advisory Opinion. It is not for the Court to dwell upon the circumstances of the political debate prior to the adoption of General Assembly resolution 63/3(2008). The ICJ itself has warned that "the opinion of the Court is given not to States, but to the organ which is entitled to request it"²¹. The international community expects that the Court acts at the height of the responsibilities incumbent upon it, without succumbing to apprehensions or fears, in face of apparent sensitivities of some States. It is incumbent upon the Court to say what the Law is (*juris dictio*)²².

22. In any case, it is for the Court itself to assess the consequences of its decision to deliver an Advisory Opinion, bearing in mind that it cannot at all abstain itself from the exercise of its advisory function of *saying what the Law is (juris dictio)*. After all, the ICJ itself pointed out, six decades ago, that, to provide a proper answer to a request for an Advisory Opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused"²³.

²⁰U.N. doc. A/63/L.2.

²¹ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950, p. 71.

²²The ICJ has, on various occasions, pointed out that it "may give an advisory opinion on any legal question, abstract or otherwise". ICJ, Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, 1948, p. 61; ICJ, Advisory Opinion on Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, 1954, p. 51; ICJ, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971, para. 40; ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 14; ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, 2004, para. 40.

²³ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania - First Phase, 1950, p. 71.

23. Accordingly, the argument of a couple of participants in the present advisory proceedings to the effect that the Court's Advisory Opinion would lack a useful purpose, appears to me wholly unfounded. The same applies to the alleged lack of "practical effect" of the Court's Opinion: this allegation simply begs the question. The Court's *jurisprudence constante* on the point at issue could be recalled in this connection²⁴. In the *cas d'espèce*, it is the task of the Court to provide an Opinion on the question of the accordance with international law of Kosovo's declaration of independence; and it is for the General Assembly to draw its own conclusions, from the Court's Opinion, and to apply them to its further treatment of the situation in Kosovo. In proceeding in this way, the ICJ is contributing to the *rule of law* at international level, which, ever since the 2005 U.N. World Summit has been attracting increasing interest and attention, and since 2006 has become an important agenda item ("*The Rule of Law at the National and International Levels*") of the U.N. General Assembly²⁵.

24. The next argument, with an apparent bearing on judicial "discretion" or propriety, whereby the Court's Opinion would arguably have "adverse effects on peace and security" in the region, likewise begs the question. There is nothing new under the sun, and the Court itself has already answered arguments of the kind in previous Advisory Opinions. For instance, in its Advisory Opinion on the *Threat or Use of Nuclear Weapons* (1996), the ICJ stated:

"It has (...) been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any Opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the Opinion is a matter of appreciation" (para. 17)²⁶.

25. It is not the Court's business to speculate on eventual effects of its Advisory Opinions; in my view, it is rather for the Court to contribute, in the faithful exercise of its advisory function, to the *prevalence of the rule of law* in the conduction of international relations. This may well assist in reducing the tension and the political controversy in the region at issue. In the more distant past, there was a trend of opinion that favoured wide discretion on the part of the Hague Court to deliver an Advisory Opinion or not; it was followed by another trend of opinion which accepted that discretion, but only exceptionally and in face of "compelling reasons" (*raisons*

²⁴Thus, in its Advisory Opinion on the Western Sahara (1975), the ICJ pondered that nothing in the U.N. Charter, or in its Statute, limited the competence of the General Assembly to request an Advisory Opinion, or that of its own to give an Opinion, on legal questions relating to existing rights or obligations (para. 18). The Opinion would provide the General Assembly with "elements of a legal character relevant to its further treatment" of the subject-matter at issue (para. 32). Earlier on, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), the ICJ observed that the object of that request for an Opinion was "to guide the United Nations in respect of its own action" (p. 19). And half a decade ago, the ICJ stressed, as it clearly ensued from its *jurisprudence constante*, that "Advisory Opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action"; ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, para. 59.

²⁵Cf. U.N. General Assembly resolution 61/39, of 18.12.2006; U.N. General Assembly resolution 62/70, of 06.12.2007; U.N. General Assembly resolution 63/128, of 11.12.2008; U.N. General Assembly resolution 64/116, of 16.12.2009.

²⁶Cf. also ICJ, Advisory Opinion on the Western Sahara, 1975, para. 73.

décisives). A more enlightened trend of opinion discards discretion, accepting only inadmissibility to protect judicial integrity²⁷.

26. The Court seems to have indulged into an unnecessary confusion in paragraph 29 of the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, in regrettably admitting to self-limit its advisory function, and in ascribing to so-called "discretion" a dimension that it does not have. It has confused discretion with judicial propriety, and it has failed to stress the proactive posture that it has rightly adopted in the United Nations era, in the exercise of its advisory function, as the principal judicial organ of the United Nations (Article 92 of the U.N. Charter), and as the ultimate guardian of the prevalence of the rule of law in the conduction of international relations²⁸. By the same token, it is somewhat disquieting to find, in the unfortunate language of paragraph 29, that the ghost of *Eastern Carelia* seems, like phoenix, to have arisen from the ashes...

27. The Court's advisory function is not a simple faculty, that it may utilize at its free discretion: it is a *function*, of the utmost importance ultimately for the international community as a whole, of the principal judicial organ of the United Nations. Discretion is for a political organ, like the General Assembly or the Security Council, to exercise, also when deciding to request an Advisory Opinion to the ICJ. This latter, when seized of a matter, - either a request for an Advisory Opinion, or a contentious case, - has a duty to perform faithfully its judicial functions, either in advisory matters or in respect of contentious cases. It is not for the Court to indulge in an appreciation of the opportunity of an Advisory Opinion, and it is surprising to me that the Court should dispense so much attention to this issue in the present Advisory Opinion (paragraphs 29-48), to the point of singling out technicalities (in paragraphs 36 and 39, as to the respective roles and faculties of the Security Council and the General Assembly) and of eluding a careful consideration of the factual background (cf. *infra*) of the *grave humanitarian crisis in Kosovo*, brought to its attention by several participants in the course of the written and oral phases of the present advisory proceedings.

28. After all, ours is the age of the reassuring multiplication of international tribunals, bearing witness of the acknowledgement of the primacy of Law over force. Ours is the age of the "jurisdictionalisation" of international law and relations, bearing witness of the improvements in the modalities of peaceful settlement of disputes. Ours is the age of the *expansion of international jurisdiction*, bearing witness of the advances of the idea of an objective justice. Ours is the age of an ever-increasing attention to the advances of the *rule of law* at both national and international levels, a cause which the United Nations as a whole is now committed with, particularly from 2006 onwards (cf. *supra*). To invoke and to insist on "discretion", - rather discretionally, - seems to me to overlook, if not to try to obstruct, the course of evolution of the judicial function in contemporary international law. The awareness of the contemporary and reassuring phenomenon of jurisdictionalisation has fortunately prevailed at the end over undue politicization, underlining certain arguments examined by the Court, which should have been promptly discarded by it.

²⁷Cf. R. Kolb, "De la prétendue discrétion de la Court Internationale de Justice de refuser de donner un avis consultatif", in *The International Legal System in Quest of Equity and Universality – Liber Amicorum G. Abi-Saab* (eds. L. Boisson de Chazournes and V. Gowlland-Debbas), The Hague, Nijhoff, 2001, pp. 614-618, and cf. pp. 619-627.

²⁸In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), the ICJ recalled that "[t]he present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. (...) On only one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (*Status of Eastern Carelia*, Advisory Opinion, 1923)" (para. 44).

29. Turning to another related aspect, it seems furthermore clear to me that the ICJ is fully entitled, if it so deems fit, to reformulate the question put to it by the request for an Advisory Opinion, so as to give it more clarity. Thus, the alleged lack of clarity or certainty in the drafting of a question cannot be invoked so as to deprive the Court of its jurisdiction. Quite on the contrary, any uncertainty may require clarification or rephrasing by the Court itself. In fact, along the decades, both the PCIJ and the ICJ have repeatedly observed that the wording of a request for an Advisory Opinion did not accurately state the question on which the Court's Opinion was being sought²⁹, or else did not correspond to the "true legal question" under consideration³⁰. In one particular instance, the ICJ noted that the question put to it was, "on the face of it, at once infelicitously expressed and vague"³¹.

30. Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put³²; and it has accordingly deemed it fit to "identify the existing principles and rules", to interpret them and to apply them, thus offering a reply to "the question posed based on law"³³. This disposes of the wholly unconvincing – if not inappropriate – argument that it would allegedly be "politically inappropriate" for the ICJ to deliver the present Advisory Opinion. Such an argument should simply not be raised before "the principal *judicial* organ of the United Nations" (Article 92 of the U.N. Charter), which cannot attribute a political character to a request which is supposed to invite it to undertake an essentially judicial task³⁴. The ICJ itself has pondered, in this respect, that

"In institutions in which political considerations are prominent, it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate"³⁵.

31. Yet, another argument of the kind has been raised in the course of the present advisory proceedings, namely, the lack of consent of Kosovo to the jurisdiction of the Court, allegedly affecting this latter as a matter of judicial propriety: the allegation was that the ICJ should refrain from exercising its jurisdiction in the *cas d'espèce*, because the General Assembly request concerns arguably a bilateral dispute between Kosovo and Serbia in respect of which Kosovo has not consented to the exercise of that jurisdiction. This argument also appears, in my view, unpersuasive and groundless.

32. As widely known, consent is a precondition for the exercise of the Court's *contentious*, not advisory, function. And it could not be otherwise, as Advisory Opinions are intended for the

²⁹Cf., e.g., PCIJ, Advisory Opinion on the Interpretation of the Greco-Turkish Agreement of 01.12.1926, 1928, pp. 14-16.

³⁰ICJ, Advisory Opinion on the Interpretation of the Agreement of 25.03.1951 between the WHO and Egypt, 1980, paras. 34-36.

³¹ICJ, Advisory Opinion on the Application for Review of Judgment n. 273 of the U.N. Administrative Tribunal, 1982, para. 46.

³²Cf., in addition to the aforementioned three Advisory Opinions, also the ICJ's Advisory Opinion on the Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956, p. 25; and the ICJ's Advisory Opinion on Certain Expenses of the United Nations, 1962, pp. 157-162.

³³ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 13; ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, para. 38.

³⁴ICJ, Advisory Opinion on Certain Expenses of the United Nations, 1962, p. 155.

³⁵ICJ, Advisory Opinion on the Interpretation of the Agreement of 25.03.1951 between the WHO and Egypt, 1980, p. 87, para. 33.

orientation or guidance of the United Nations and its organs. The ICJ itself has clarified this aspect, six decades ago, in its celebrated Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase, 1950)*; in its own words,

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court (...), in principle, should not be refused” (p. 71)³⁶.

In the present instance, the object of the request for an Advisory Opinion of the ICJ is to enlighten the General Assembly as to the accordance, or otherwise, with international law, of the declaration of independence of Kosovo by its authorities.

33. It should, furthermore, be kept in mind that, whilst the prior consent of States has always been a hurdle to the exercise of the ICJ’s function in settling contentious cases, the opposite occurs in the exercise of its advisory function: it is not at all conditioned by the prior consent of States. Here, the ICJ has a means not only to clarify the questions submitted to it for Advisory Opinions, but also to contribute thereby to the progressive development of International Law. Three remarkable examples to this effect lie in its ground-breaking Advisory Opinions on *Reparation for Injuries Suffered in the Service of the United Nations*, of 1949; on *Reservations to the Convention against Genocide*, of 1951; and on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, of 1971.

34. In sum and conclusion on the preliminary question under consideration, none of the arguments raised in the course of the present advisory proceedings, to try to persuade the ICJ to inhibit itself and to refrain from performing its advisory function in relation to the declaration of independence of Kosovo by its authorities, resists a closer examination. The Court’s jurisdiction is fully established in the present matter (cf. *supra*), and there is no “compelling reason” for the Court not to exercise it. There is not much else to be clarified in this respect. My conclusion on this point is that it is not at all for the Court to act “discretionally”; the Court has to perform its advisory function, and ought to deliver, as it has just done, the requested Advisory Opinion, thus fulfilling faithfully its duties as the principal judicial organ of the United Nations. In turn, the Court should have, in my understanding, devoted much more attention than it has done, in the present Advisory Opinion, to the factual context - in particular the factual background - of the matter at issue.

³⁶The ICJ followed this same reasoning, half a decade ago, in its previous Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004). The Court, after examining “the opposition of certain interested States to the request by the General Assembly” for an Advisory Opinion on the subject-matter at issue, “in the context of issues of judicial propriety”, pondered that

“The object of the request before the Court is to obtain from the Court an Opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The Opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute” (par. 50).

III. THE FACTUAL BACKGROUND AND CONTEXT OF THE QUESTION PUT TO THE COURT

35. In the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, the Court pursued a minimalist approach to the factual background of the question put to it by the General Assembly, concentrating its attention on Kosovo's declaration of independence of 17.02.2008, and making abstraction of its *causes*, lying in the tragic succession of facts of the prolonged and *grave humanitarian crisis of Kosovo*, which culminated in the adoption of Security Council resolution 1244(1999). As a Member of the Court, I feel obliged to examine that factual background in the present Separate Opinion, given the fact that the Court appears not to have found it necessary to do, namely, to consider carefully Kosovo's *grave humanitarian crisis*. This issue, to which I attach great relevance, was, after all, brought repeatedly to the attention of the Court, in the course of the present advisory proceedings, by several participants, in both the written and oral phases. Perhaps the Court, like human kind, "cannot bear very much reality"³⁷.

36. In addressing, accordingly, the factual background and the context of the issue submitted by the General Assembly's request to the Court for the present Advisory Opinion, may I draw attention to the fact that, on previous occasions, somewhat distinctly, the ICJ deemed it fit to dwell carefully on the *whole range of facts* which led to the issues brought to its cognizance for the purpose of the requested Advisory Opinions. Thus, in its *célèbre* Advisory Opinion of 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the ICJ stated that

"It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

Under the Charter of the United Nations, the former Mandatory has pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter" (paras. 130-131).

37. Likewise, in its Advisory Opinion of 1975 on the *Western Sahara*, the ICJ examined the matter submitted to its cognizance "in the context of such a territory and such a social and political organization of the population" (para. 89), which led it to a detailed factual examination (paras. 90-107). And, once again, in its Advisory Opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, before determining the principles and rules of international law which of relevance to assess the legality of the measures taken by

³⁷To paraphrase Thomas Becket's soliloquy in *Canterbury*, his premonition in face of the imminence of his sacrifice; cf. T.S. Eliot, "Murder in the Cathedral" (of 1935), in *The Complete Poems and Plays 1909-1950*, N.Y./London, Harcourt Brace & Co., 1980 [reprint], pp. 208-209.

Israel, the Court described extensively the works that Israel constructed or was planning to construct, basing itself on the report of the Secretary General. The Advisory Opinion gave ample detail of the effect of those works for the Palestinians (paras. 79-85). And the ICJ added that, for “developments subsequent to the publication” of the report of the Secretary General, it would refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (para. 79).

38. On another occasion, in its Judgment of 19.12.2005 in the case concerning *Armed Activities in the Territory of the Congo* (D.R. Congo *versus* Uganda), the ICJ, after a careful analysis of the factual background of the case and the evidence produced before it, considered that

“it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories” (para. 211).

In the same 2005 Judgment in the case opposing the D.R. Congo to Uganda, the Court added that “the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict” (para. 221).

39. On yet another occasion, in its Order of 10.07.2002 in the case concerning *Armed Activities in the Territory of the Congo* (New Application: 2002, D.R. Congo *versus* Rwanda), the ICJ, taking account of the factual context, declared itself “deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east Democratic Republic of the Congo resulting from the continued fighting there” (para. 54). Likewise, in its Order on Provisional Measures of 02.06.1999 in the cases concerning the *Legality of Use of Force*, the ICJ noted that it was

“deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia”³⁸.

On all the aforementioned occasions, as one could well expect, the ICJ did not hesitate to dwell upon the *factual background* of the cases and matters brought into its cognizance, before pronouncing on them.

40. It looks thus rather odd to me that, in the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, the ICJ, after having dedicated - as already pointed out - so much attention to the usual points raised before it, in its practice, on so-called judicial “discretion”, - as if apparently attempting to justify the delivery of the present Advisory Opinion, - has given only a brief and cursory attention to the *factual background* of the question put to it by the General Assembly for the purpose of the present Advisory Opinion. Yet, it is precisely the *humanitarian catastrophe* in Kosovo that led to the adoption of Security Council

³⁸ICJ, case concerning *Legality of Use of Force* (Yugoslavia *versus* Belgium), Request for the Indication of Interim Measures, ICJ Reports (1999) p. 131, para. 16, and corresponding obiter dicta in the other *Legality of Use of Force* cases (1999).

resolution 1244(1999), and the subsequent events, that culminated in the declaration of independence of 17 February 2008 by Kosovo's authorities.

41. I thus consider Kosovo's *humanitarian catastrophe* as deserving of careful attention on the part of the Court, for the purpose of the present Advisory Opinion. The Court should, in my view, have given explicit attention to the factual background and general context of the request of its Opinion. After all, the *grave humanitarian crisis* in Kosovo remained, along the decade 1989-1999, not only a continuing threat to international peace and security, - till the adoption of Security Council resolution 1244(1999) bringing about the U.N.'s international administration of territory, - but also a human tragedy marked by the massive infliction of death, serious injuries of all sorts, and dreadful suffering of the population. The Court should not, in my view, have limited itself, as it did in the present Advisory Opinion, to select only the few reported and instantaneous facts of the circumstances surrounding the declaration of independence by Kosovo's authorities on 17.02.2008 and shortly afterwards, making abstraction of the factual background which led to the adoption of Security Council resolution 1244(1999) and, one decade later, of that declaration of independence.

42. In effect, that factual background was to a great extent eluded by the ICJ. In the present Advisory Opinion, it appeared satisfied to concentrate on the events of 2008-2009³⁹, and, as to the *grave humanitarian crisis* which preceded and accounted for them, it has only briefly and elliptically referred to that crisis in Kosovo, and to the "end to violence and repression"⁴⁰ in Kosovo, without any further concrete references to the facts which constituted that prolonged humanitarian crisis. The Court did so, notwithstanding the fact that such factual background was brought to its attention, in detail, by several participants (cf. *infra*), in the course of the present advisory proceedings, during both the written and oral phases.

43. Moreover, in my view, neither Security Council resolution 1244(1999), nor Kosovo's declaration of independence of 17.02.2008, can be properly considered making abstraction of their factual background and context. As to their factual background, it may be recalled that, prior to the irruption and aggravation of the crisis of Kosovo (in the late eighties and early nineties), the constitutional structure of the Socialist Federal Republic of Yugoslavia (SFRY) encompassed six Republics (the Socialist Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) and two Autonomous Provinces (Kosovo, and Vojvodina, within the Socialist Republic of Serbia). Under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia, the Socialist Autonomous Province of Kosovo had a "very high degree of autonomy"; in fact, the "broad powers" granted by the 1974 Constitution of the SFRY resulted in a "*de facto* equality" between the aforementioned Republics and Autonomous Provinces⁴¹.

44. In 1989, as a result of changes introduced into the Constitution of the Republic of Serbia, Kosovo's status of Autonomous Province was revoked, what led to much tension and Kosovo's prompt reaction⁴², seeking independence. The humanitarian crisis broke up, and the period following 1990 was marked by systematic discriminatory measures, and successive and serious violations of human rights, perpetrated in the earlier years by Serbian authorities against a large segment of the Kosovo Albanian population. In the late nineties the crisis aggravated, with the

³⁹Sections III-IV of the present Advisory Opinion.

⁴⁰Cf. paragraph 58 of the present Advisory Opinion.

⁴¹Cf., inter alia, R. Muharremi, "Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited", 33 Review of Central and East European Law (2008) pp. 406-407.

⁴²In declaring itself, by its Assembly, in July 1990, an independent Republic within Yugoslavia.

heinous practice of ethnic cleansing⁴³ and grave violations of human rights and of international humanitarian law.

45. In the course of the present advisory proceedings (written and oral phases) before this Court, several participants were concerned at characterizing the situation of Kosovo as *sui generis*, or otherwise. Underlying this concern is the underlying preoccupation with the creation of a precedent, whatever its outcome might be. One can hardly escape from the acknowledgement that each case is a case, engulfed as it is in its own history. Some cases may partake the same historical features (such as the decolonization cases of the late sixties, seventies and early eighties), thus conforming a pattern, in the historical development of the *Law of the United Nations*. Others may appear rather unique, also in the framework of the *Law of the United Nations*.

46. Thus, the history of each case is to be kept carefully in mind. And each case has a dynamics of its own. Accordingly, Kosovo's declaration of independence of 2008 cannot, in my view, be examined *in abstracto*, or in isolation, but rather in relation to its *factual background* and its historical context, which explain it. In the same line, the 2008 declaration of independence should be considered as a whole. The humanitarian crisis of Kosovo along the decade of 1989-1999 appeared related to the historical process of the dissolution of former Yugoslavia. Its *social facts* resisted successive attempts of peaceful settlement, did not abide by time-limits⁴⁴, nor were restrained by deadlines. The history of each case is not limited to the successive attempts of its peaceful settlement: it also comprises its *causes* and *epiphenomena*, which have likewise to be taken carefully into account.

47. Secondly, the grave humanitarian crisis, as it developed in Kosovo along the nineties, was marked by a prolonged pattern of successive crimes against civilians, by grave violations of International Humanitarian Law and of International Human Rights Law, and by the emergence of one of the most horrible crimes of our times, that of *ethnic cleansing*. This latter entered the vocabulary of contemporary International Law through the prompt reaction of the former U.N. Commission on Human Rights, which, as from August 1992, began to utilize the expression in relation specifically to the tragic conflicts that began to plague the former Yugoslavia. From late 1992 onwards, the expression "ethnic cleansing" was to appear systematically in other U.N. documents, including resolutions of the General Assembly and the Security Council.

48. I well remember the prompt repercussions that the news of those crimes had, a couple of hundreds of kilometres away, in Vienna, in the course of the II World Conference on Human Rights in Vienna, where I was working (in June 1993), in its Drafting Committee. The decision that the World Conference had taken not to single out any situation, was promptly abandoned, and reversed, given the horrible news that were arriving from the former Yugoslavia: it became the general feeling that, a U.N. World Conference on Human Rights that would make abstraction of that general situation, would simply lose its *raison d'être*. This explains the adoption of, - besides the 1993 Vienna Declaration and Programme of Action, and the Final Report of the Conference, - of two resolutions, on Bosnia and Herzegovina and on Angola, respectively, both then plagued by armed conflicts.

⁴³Cf. M. Grmek, M. Gjidara and N. Simac (eds.), *Le nettoyage ethnique (Documents historiques sur une idéologie serbe)*, Paris, Fayard/Éd. Seuil, 2002, pp. 43-353.

⁴⁴Unlike what the Badinter Commission would have liked to make one believe (having attempted in vain to do so). Cf., on this particular point, P. Radan, *The Break-up of Yugoslavia and International Law*, London/N.Y., Routledge, 2002, pp. 247-253.

49. Thirdly, another element characteristic of the humanitarian crisis of Kosovo was the decision taken by the U.N. Security Council 1244 (1999), adopted on 10 June 1999, to place Kosovo under a U.N. transitional international administration - while recognizing Serbia's territorial integrity, - pending a final determination of its future status. Ever since, Kosovo was withdrawn from Serbia's "domestic jurisdiction", having become a matter of legitimate international concern. The *Law of the United Nations* was the one that became applicable to its status, for the purposes of its international administration. The unique character of the situation of Kosovo was pointed out also by the Special Envoy (Mr. M. Ahtisaari, appointed on 14.11.2005) of the U.N. Secretary General, in its *Report on Kosovo's Future Status*: - "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts" (para. 15)⁴⁵.

50. Looking back to the *causes* and *epiphenomena* of Kosovo's humanitarian crisis (which the present Advisory Opinion of the Court just briefly refers to, while avoiding any examination whatsoever of the relevant facts which led to it), the deprivation of Kosovo's autonomy (previously secured by the Constitution of 1974) in 1989, paved the way for the cycle of systematic discrimination, utmost violence and atrocities which victimized large segments of the population of Kosovo, along one decade (1989-1999), leading to the adoption of a series of resolutions by the main political organs of the United Nations, and culminating in the adoption of Security Council resolution 1244(1999).

51. For the examination of a humanitarian crisis such as that of Kosovo, endeavours of its friendly settlement are surely relevant⁴⁶, but, in order to move from Security Council resolution 1244(1999) to address Kosovo's declaration of independence of 17.02.2008, one needs to keep in mind the *causes* of the preceding conflict, which lie in the planned, long-standing and brutal repression of large segments of the population of Kosovo (*infra*). Friendly settlement efforts, in my view, cannot thus be approached in a "technical", isolated way, detached from the *causes* of the conflict. It is thus important, as already pointed out, to have clearly in mind the whole context and *factual background* of the question put to the ICJ by the General Assembly for the present Advisory Opinion (cf. *infra*).

52. Before proceeding to an examination of that series of resolutions *altogether* (which the ICJ has likewise avoided doing, concentrating specifically on Security Council resolution 1244(1999)), I deem it necessary to insert the matter into the larger framework of the *Law of the United Nations*. To that end, I shall start by recalling pertinent antecedents linked to the advent of international organizations, - which cannot pass unnoticed here, - in their growing attention to the needs and aspirations of the "people" or the "population".

⁴⁵Likewise, the Council of the European Union reiterated, on 18.02.2008, its view that the situation of Kosovo constituted a *sui generis* case. Along those years, the general picture in the whole region changed remarkably.

⁴⁶Efforts and initiatives taken, at distinct stages of the crisis of Kosovo, to arrive at a peace settlement, are of course to be taken into account by the ICJ, together with the causes of the conflict. One may recall, in this connection, as to the endeavours of peace settlement, among others, the negotiations engaged into by the Contact Group (1998-1999), the Accords resulting from the Rambouillet Conference (1999), Security Council resolution 1244 (1999) itself, the Constitutional Framework for Provisional Self-Government of Kosovo (promulgated by the Special Representative of the U.N. Secretary General in May 2001 and with implementation completed by the end of 2003), the Troika talks (2007) the Report on Kosovo's Future of the Special Envoy of U.N. Secretary General (2007). For recent accounts of the successive endeavours of peaceful settlement, cf., e.g., H.H. Perritt Jr., *The Road to Independence for Kosovo - A Chronicle of the Ahtisaari Plan*, Cambridge, University Press, 2010, pp. 1-278; J. Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans*, London/N.Y., I.B. Tauris, 2009, pp. 1-126.

IV. THE ADVENT OF INTERNATIONAL ORGANIZATIONS AND THE GROWING ATTENTION TO THE NEEDS AND ASPIRATIONS OF THE “PEOPLE” OR THE “POPULATION”

53. The advent of international organizations not only heralded the growing expansion of international legal personality (no longer a monopoly of States), but also shifted attention to the importance of fulfilling the needs and aspirations of people. In this sense, international organizations have contributed to a return to the *droit des gens*, in the framework of the new times, and to a revival of its humanist vision, faithful to the teachings of the “founding fathers” of the law of nations (cf. *infra*). That vision marked its presence in past experiments of the mandates system, under the League of Nations, and of the trusteeship system, under the United Nations, as it does today in the U.N. initiatives of international administration of territory.

1. League of Nations: The Mandates System

54. The mandates system emerged of human conscience, as a reaction to abuses of the past, and in order to put an end to them: the annexation of colonies, the policy of acquisition of territory (as an emanation and assertion of State sovereignty) practiced by the great powers of the epoch, the acquisition and exploitation of natural resources. All such abusive practices used to occur in flagrant and gross disregard to the already adverse conditions of living, and defencelessness, of the native peoples. The reaction to such abuses found expression in Article 22 of the Covenant of the League of Nations, which shifted attention to the peoples to be assisted and protected.

55. Article 22(1) and (2) of the Covenant left it clear that, under the emerging mandates system, the mandatory powers were entrusted with the “well-being and development”, and the “tutelage”, of the peoples placed thereunder. State sovereignty was alien to the mandates system: it had no incidence on, or application in, its realm. State sovereignty was clearly dissociated from the mandatory duties and responsibilities towards the mandated peoples, as a “sacred trust of civilization”, to promote the well-being and development of those peoples.

56. A new relationship was thus created in international law, replacing, in the framework of the mandates system, the old and traditional conception of State sovereignty by the governance of peoples, pursuing their own interests, and training them towards autonomy and self-government. In the thoughtful words of Norman Bentwich in 1930 (then Attorney-General of Palestine, one of the mandated territories),

“The mandatory is a protector with a conscience and - what is more - with a keeper of his conscience, required to carry on the government according to definite principles, to check the strong and protect the weak, to make no profit and to secure no privilege”⁴⁷.

57. In securing the well-being and development of the peoples concerned, mandatory powers were required to assure their freedom of conscience and the free exercise of all religions and forms of worship. The dual nature of mandatory powers became evident, ensuing from Article 22 of the Covenant itself: first, and foremost, they had duties *vis-à-vis* the peoples under guardianship (a personal relationship); and, secondly, they had duties towards the international society (of the epoch) at large, to the League of Nations as supervisor of the mandates system⁴⁸, and, ultimately, to humankind as a whole.

⁴⁷N. Bentwich, *The Mandates System*, London, Longmans, 1930, p. 5.

⁴⁸Cf. *ibid.*, pp. 7-9 and 16-20.

58. Yet, like all juridical instruments, mechanisms and institutions, the mandates system was a product of its time. We all live *within* time. It made clear that it was necessary, from then onwards, furthermore, to avoid stigmas of the past, - source of much debate in those days and thereafter, - such as the use of certain terms (like “tutelage”, or even “guardianship” itself), and the attempted classification of degrees of civilization (as in the list of mandates A, B and C). In the following experiment of international organizations, already in the League of Nations era, - that of the trusteeship system, - attention became focused on self-determination of peoples.

2. United Nations: The Trusteeship System

59. In the U.N. international trusteeship system, under chapters XII and XIII of the Charters, attention remained focused on the *peoples* concerned. There was, in addition, chapter XI, on non-self-governing territories: thereunder, Article 73 reiterated the notion of “sacred trust”, in the protection of the peoples concerned “against abuses”, and in the progressive development of their “self-government” pursuant to their “aspirations”. As to the trusteeship system itself (chapter XII), Article 76 listed its basic objectives, namely:

“(a) to further international peace and security;

(b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the independence of the peoples of the world; and

(d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice (...).”

60. It ensues from those objectives, from the letter and spirit of their formulation in Article 76 of the U.N. Charter, that the U.N. trusteeship system was devised and put into practice, in line with natural law thinking, in order to secure the welfare of the inhabitants of trust territories, and to move towards their self-government or independence⁴⁹. In fostering the social development of the inhabitants of trust territories, the trusteeship system stimulated the consciousness of their rights; furthermore, it kept in mind the common interests - of present and future generations - of the populations of those territories⁵⁰. Furthermore, it aimed at enabling such populations to achieving the capacity to become independent, in fulfilment of their own aspirations, so as to secure the equality of treatment to everyone⁵¹.

⁴⁹Cf., to this effect, e.g., C.E. Toussaint, *The Trusteeship System of the United Nations*, London, Stevens, 1956, pp. 5, 21, 29, 248, 251 and 253.

⁵⁰Cf., to this effect, C.V. Lakshmi-Narayan, *Analysis of the Principles and System of International Trusteeship in the Charter* (thesis), Genève, Université de Genève/IUHEI, 1951, pp. 131, 133, 139-140, 145 and 153.

⁵¹Cf., to this effect, Jean Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 14-15, and cf. pp. 12-13.

61. This outlook has projected itself into the contemporary U.N. experiments of international administration of territory. The humanist legacy of past experiments of international organizations to present-day U.N. initiatives of international administration of territory (cf. *infra*) cannot pass unnoticed here. Former experiments of the League of Nations (the mandates system) and of the United Nations (the trusteeship system, in addition to the regime of non-self-governing territories), were devised, and put into operation, as human conscience awakened as to the need to do so, in order to put an end to abuses against human beings, and to prevent the recurrence of abuses of the past.

3. International Administration of Territory

62. Territorial administration exercised by international organizations (rather than foreign States) has also historical antecedents: for example, in the League of Nations era, the Free City of Danzig (1920-1939), and the Saar (German Saar Basin, 1920-1935), followed, in the United Nations era, by the U.N. Council for Namibia (established in 1967), and the U.N.-performed administrative functions in Cambodia (1991-1992). Three decades after the creation of the U.N. Council for Namibia, contemporary experiments of U.N. international administration of territory began to pursue likewise a people-centered outlook, in a rather proactive way, to put an end to abuses and to correct mistakes that affected the population⁵².

63. The cases of Kosovo and East Timor serve as pertinent illustrations: the roles of UNMIK and UNTAET have been unique, turned as they have been to the aftermath of *intra-State*, rather than inter-State conflicts⁵³. As from the nineties, as well-known, U.N. peace operations began to engage themselves in post-conflict reconstruction⁵⁴ and peaceful State-building, as from a people-centered perspective, attentive to the creation and preservation of public participation. This applies even more forcefully in cases (like that of Kosovo) where the population was subjected to successive brutalities, for a prolonged period of time, on the part of the former “sovereign” authorities.

64. Prolonged oppression stresses the pressing need of safeguarding the rights of the inhabitants, and this again brings to the fore the notion of *trusteeship*, this time related to the contemporary experiments of international administration of territory⁵⁵. In the U.N. World Summit of September 2005, the former U.N. Trusteeship Council came indeed to the end of its days, replaced as it was by the U.N. Peacebuilding Commission, but the basic idea of *trusteeship* seems to have survived in the new context⁵⁶. It is thus not surprising to find that, out of a context of utmost violence such as that of Kosovo in the decade of 1989-1999, Security Council

⁵²R. Wilde, “From Danzig to East Timor and Beyond: The Role of International Territorial Administration”, 95 *American Journal of International Law* (2001) pp. 586, 592-593, 599-600 and 605.

⁵³M. Bothe and T. Marauhn, “U.N. Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration”, in *Kosovo and the International Community - A Legal Assessment* (ed. C. Tomuschat), The Hague, Kluwer, 2002, pp. 223, 233, 236 and 239, and cf. p. 242.

⁵⁴Cf. B. Boutros-Ghali, *An Agenda for Peace* (With the New Supplement), 2nd ed., N.Y., U.N. 1995, pp. 61-64.

⁵⁵T.B. Knudsen, “From UNMIK to Self-Determination? The Puzzle of Kosovo’s Future Status”, in *Kosovo between War and Peace - Nationalism, Peacebuilding and International Trusteeship* (eds. T.B. Knudsen and C.B. Laustsen), London, Routledge, 2006, pp. 158-159 and 163-165, and cf. p. 156; and cf. T.B. Knudsen and C.B. Laustsen, “The Politics of International Trusteeship”, in *ibid.*, pp. 10 and 16.

⁵⁶Cf., to this effect, R. Wilde, *International Territorial Administration - How Trusteeship and the Civilizing Mission Never Went Away*, Oxford, University Press, 2008, pp. 321-323, 325, 344-346, 349, 379-380, 382, 384, 386, 399, 415-416, 444 and 459; and cf. also G. Serra, “The International Civil Administration in Kosovo: A Commentary on Some Major Legal Issues”, 18 *Italian Yearbook of International Law* (2008) p. 63.

resolution 1244(1999) emerged, followed by the goals of self-government and U.N.-supervised independence pursued by the victimized population.

4. The Recurring Concern with the “People” or the “Population”

65. It is not surprising that, in the times of the experiments of territories under mandate or in that of trust territories, considerable attention was dispensed to “*territory*”. Yet, the considerable development of international law in our times, assists us, in current-day rethinking of those juridical institutions, to identify an element, in my view, of greater transcendence in those juridical institutions: that of the care with the *conditions of living of the “people” or the “population”*. People and territory, - regarded as two of the constitutive elements of statehood (added to the normative system), - go together; yet, when placed on balance, to paraphrase a Judge of the Hague Court of the past, “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”⁵⁷.

66. This leads us to consider a key aspect which was insufficiently singled out in the past, despite its great relevance, and which remains, in my view, of considerable importance in the present, namely, the aforementioned *conditions of living of the population*. People and territory go together, but the *emphasis* is shifted from the status of territory to the needs and aspirations of people. It is this element which, in my perception, provides the common denominator, in an inter-temporal dimension, of the experiments of mandates, trust territories and contemporary international administration of territories. Those juridical institutions, - each one a product of its time, - were conceived and established, ultimately, to address, and respond to, the needs (including of protection) and aspirations of *peoples*, of human beings.

V. BASIC CONSIDERATIONS OF HUMANITY IN THE TREATMENT OF PEOPLES UNDER THE LAW OF NATIONS

67. Along the last decades, attempts have thus been made to characterize the role of international organizations in the aforementioned experiments turned to the treatment of the “people” or the “population” (the mandates and trusteeship systems, and the international administration of territory). If a common denominator of such characterization in relation to distinct experiments can be detected, it lies in the basic considerations of humanity which permeates them all. Such considerations go well beyond the classical focus on private law analogies.

1. Private Law Analogies

68. In assessing the growing experience of international organizations with experiments of the kind of the mandates system (in the League of Nations era), and the trusteeship system (in the United Nations era), followed by that of the contemporary international administration of territories, there has been an effort, on the part of expert writing, to situate them in the conceptual universe of Law and identify therein their origins. To this end, there was a tendency, especially in studies by authors of common law formation, to resort to private law analogies, in particular with regard to the mandates and trusteeship systems.

⁵⁷ICJ, Advisory Opinion on the Western Sahara, ICJ Reports (1975), Separate Opinion of Judge Dillard, p. 122.

69. In addressing them, most legal scholars appeared satisfied to identify such private law analogies, without feeling the need to go deeper into the *international* legal doctrine of a more distant past⁵⁸. Thus, “mandate” was identified as deriving from the *mandatum*, a consensual contract in Roman law; the beneficiary was a third party. “Trust” and “tutelage” had roots in the *tutela* of Roman law, a sort of guardianship of infants; this disclosed much uniformity in legal systems, as disclosed by the English *trust*, to some extent a descendant of the *fideicommissa* of Roman law (in “fiduciary” relations). In any case, a new relationship was thereby created, in the mandates and trusteeship systems, on the basis of confidence (the “sacred trust”, *infra*) and, ultimately, human conscience.

70. What ultimately began to matter was the well-being and human development of the *population*, of the inhabitants of mandated and trust territories. In the infancy of those experiments under international organizations, it was clearly pointed out by Quincy Wright, for example, that mandates - under the League of Nations’ mandates system - were thus intended to evade the notion of absolute territorial sovereignty, which became “unsuited” to the international society of the time, and were further intended to give “legal protection” to newly-arisen needs, namely, those of “the mandated peoples”, by application of those private law analogies (*supra*); the mandatory, tutor or trustee had “duties rather than rights”⁵⁹.

2. The Central Position of Peoples in the Origins of the Law of Nations (*Droit des Gens*)

71. Yet, however clarifying an analysis of the kind may be (no one would deny it), it would remain incomplete if not accompanied by an examination of the teachings of the so-called “founding fathers” of the law of nations (*le droit des gens*). This latter is remarkable by its essentially humanist outlook, - which is the one I have always espoused. Human conscience soon awakened, and reacted at the news of atrocities perpetrated at international level, in the epoch of formation of the *jus gentium* (already detached from its origins in Roman law), the *droit des gens* (*derecho de gentes*). The attention was turned to the victims, the people victimized by the violence and cruelty of power-holders of the time. Peoples assumed a central position in the early days of the emergence of the *droit des gens*.

72. Thus, as early as in the mid-XVIth century, in his memorable account of the cruel destruction of the *Indias* (1552), Bartolomé de Las Casas, invoking the *recta ratio* and natural law, boldly denounced the massacres and the destruction of the villages, of the inhabitants of the *Indias*, perpetrated with impunity by the colonizers⁶⁰. Despite the fact that the victims were totally innocent⁶¹, not even women and children and elderly persons were spared by the cruelty and violence of those who wanted to dominate them, at the end killing them all; in some regions the whole population was exterminated⁶². The violence was characterized by its inhumanity and

⁵⁸For a notable exception, going back to the thinking of the Spanish theologians of the of the XVIth century (F. de Vitoria and B. de Las Casas), cf. R.N. Chowdhuri, *International Mandates and Trusteeship Systems - A Comparative Study*, The Hague, Nijhoff, 1955, pp. 13, 16-18 and 20-22.

⁵⁹Quincy Wright, *Mandates under the League of Nations*, Chicago, University of Chicago Press, 1930, pp. 389-390, and cf. pp. 375-378, 382-386 and 387.

⁶⁰Fray Bartolomé de Las Casas, *Brevísima Relación de la Destrucción de las Indias* (1552), Barcelona, Ediciones 29, 2004 [reprint], pp. 7, 9, 17, 41, 50 and 72.

⁶¹*Ibid.*, pp. 7-14.

⁶²*Ibid.*, pp. 23, 27 and 45. According to his account, some of the victims were burned alive, and those who survived were enslaved; *ibid.*, pp. 31, 45, 73, 87 and 89.

extreme cruelty; notwithstanding, injustice prevailed⁶³. But the reaction of the *droit des gens* emerged therefrom.

3. The *Civitas Maxima Gentium* in the Vision of the 'Founding Fathers' of the Law of Nations

73. The ideal of the *civitas maxima gentium* was soon to be cultivated and propounded in the writings of the so-called "founding fathers" of international law, namely, the *célèbres Relecciones Teológicas* (1538-1539), above all the *De Indis - Relectio Prior*, of Francisco de Vitoria; the treatise *De Legibus ac Deo Legislatore* (1612), of Francisco Suárez; the *De Jure Belli ac Pacis* (1625), of Hugo Grotius; the *De Jure Belli* (1598), of Alberico Gentili; the *De Jure Naturae et Gentium* (1672), of Samuel Pufendorf; and the *Jus Gentium Methodo Scientifica Pertractatum* (1749), of Christian Wolff. At the time of the elaboration and dissemination of the classic works of F. Vitoria and F. Suárez (*supra*), the *jus gentium* had already freed itself from private law origins (of Roman law) to apply itself universally to all human beings⁶⁴.

74. As recently recalled, in the conception of the "founding fathers" of the *jus gentium* inspired by the principle of humanity *lato sensu* (which seems somewhat forgotten in our days), the legal order binds everyone (the ones ruled as well as the rulers); the *droit des gens* regulates an international community constituted by human beings socially organized in States and co-extensive with humankind (F. Vitoria); thus conceived, it is solely Law which regulates the relations among members of the universal *societas gentium* (A. Gentili). This latter (*totus orbis*) prevails over the individual will of each State (F. Vitoria). There is thus a *necessary* law of nations, and the *droit des gens* reveals the unity and universality of humankind (F. Suárez). The *raison d'État* has limits, and the State is not an end in itself, but a means to secure the social order pursuant to the right reason, so as to perfect the *societas gentium* which comprises the whole of humankind (H. Grotius). The legislator is subject to the natural law of human reason (S. Pufendorf), and individuals, in their association in the State, ought to promote together the common good (C. Wolff)⁶⁵.

VI. THE CONTEMPORANEITY OF THE 'DROIT DES GENS': THE HUMANIST VISION OF THE INTERNATIONAL LEGAL ORDER

75. Since the times of those writings, the world of course has entirely changed, but human aspirations have remained the same. The advent, along the XXth century, of international organizations (as we came to know them nowadays), has much contributed, in a highly positive way, to put an end to abuses against human beings, and gross violations of human rights and international humanitarian law. The United Nations, in our times, has sought the prevalence of the dictates of the universal juridical conscience, particularly when aiming to secure dignified conditions of living to all peoples, in particular those subjected to oppression.

76. International organizations have contributed to foster an essentially humanist outlook of the earlier experiments of mandates and trusteeship under their supervision, - an outlook which is line with the natural law thinking of the *totus orbis*, or the *civitas maxima gentium*. In that thinking, be it the old *polis*, be it the State, or any other forms of socio-political organization, they were all conceived, and came to exist, for the human person, and not *vice-versa*. International organizations, created by States, have acquired a life of their own, and been faithful to the

⁶³*Ibid.*, pp. 89-90. Bartolomé de Las Casas asserted that those mass killings and that devastation did harm to the Spanish crown itself, to the Kings of Castilla themselves, and were in breach of all rights; *ibid.*, pp. 41-42.

⁶⁴A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 318-319.

⁶⁵Cf. *ibid.*, pp. 9-14, and cf. pp. 172, 393 and 408.

observance of the principle of humanity *lato sensu*, bringing this latter well beyond the old and strict inter-State dimension. The early experiments of the mandates and trusteeship systems provide clear historical evidence to that effect.

77. Yet, international legal doctrine, obsessed, along the XXth century, with the ideas of State sovereignty and territorial integrity (which are not here in question) to the exclusion of others, was oblivious of the most precious constitutive element of statehood: human beings, the “population” or the “people”. The study of statehood *per se*, centered on the State itself without further attention to the people, was carried to extremes by the legal profession. In successive decades, attention was focused, in institutions of learning (mainly Faculties of Law in numerous countries), on the so-called “general theory of the State” (*théorie générale de l’État / teoría general del Estado / teoria geral do Estado / Allgemeine Staatslehre / teoria generale dello Stato*), repeating mechanically and *ad nauseam* certain concepts advanced by authors of times past who had distinct concerns in mind. This uncritical attitude led many to believe that the State was the permanent and final repository of human aspirations and human freedom.

1. The Early Judicial Recognition of Rights of Human Beings and of Peoples

78. The consequences of that indifference to the human factor⁶⁶ were devastating. As abuses and atrocities became recurrent, the need began to be felt to turn attention to the conditions of living of the population or the people, to the fulfillment of their needs and aspirations. International juridical conscience took a long time to awake to that. Yet, already in the inter-war period the minorities and mandates systems under the League of Nations were attentive to that. The old Permanent Court of International Justice (PCIJ) gave its own contribution to the rescue of the “population” or the “people”. Some of its relevant *obiter dicta* cannot pass unnoticed here, as, eight decades later, they seem to remain endowed with contemporaneity.

79. Thus, in its Advisory Opinion on the *Greco-Bulgarian Communities* (1930), the PCIJ took the occasion to state that a community is

“(…) a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other” (p. 21).

80. Half a decade later, the PCIJ, in its Advisory Opinion on *Minority Schools in Albania* (1935), warned that “the idea underlying the treaties for the protection of minorities” was to secure “living peaceably” alongside with the population. To that end, “two things were regarded as particularly necessary”, namely:

“The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements for the preservation of their racial peculiarities, their traditions and their national characteristics.

⁶⁶To paraphrase the title of Graham Greene’s insightful novel.

These two requirements are indeed closely interlocked, for their would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority” (p. 17).

81. The minorities treaty at issue, - the PCIJ added, - aimed at “preventing differences of race, language or religion from becoming a ground of inferiority in law or an obstacle in fact to the exercise of the rights in question” (p. 18). The PCIJ further recalled that, twelve years earlier, in its other Advisory Opinion on *German Settlers in Poland* (1923), it had stated that

“There must be equality in fact as well as ostensible legal equality in the sense of discrimination in the words of the law” (*cit. in* p. 19).

82. The “principle of identical treatment in law and in fact” was reiterated by the PCIJ in the aforementioned Advisory Opinion on *Minority Schools in Albania* (1935), in the following terms:

“Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact (...). The equality between members of the majority and of the minority must be an effective, genuine equality (...)” (p. 19)⁶⁷.

83. It is thus significant that, even well before the 1948 Universal Declaration of Human Rights, the fundamental principle of equality and non-discrimination had found judicial recognition. The Universal Declaration placed the principle in a wider dimension, by taking the individual *qua* individual, *qua* human being, irrespective of being a member of a minority, or an inhabitant of a territory under the mandates system (or, later on, under the trusteeship system). Yet, the formulation of the principle in relation to those pioneering experiments under the League of Nations (the minorities and mandates systems, this latter followed by the trusteeship system under the United Nations), contributed to giving universal expression to equality and non-discrimination. Yet, the principle of equality and non-discrimination was already engraved in human conscience.

84. The Universal Declaration of Human Rights proclaimed it in emphatic terms. Its preamble began by stating that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (para. 1). It then recalled that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind” (para. 2). And it further warned, still in its preamble, that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law” (para. 3). The Universal Declaration then proclaimed, in its Article 1, that

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

⁶⁷The PCIJ added that “the idea embodied in the expression ‘equal right’ is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other Albanian nationals” (p. 20).

85. Already in the early years of the United Nations era, the International Court of Justice (ICJ), in its Advisory Opinion on the *International Status of South-West Africa* (1950), saw it fit to ponder that Article 80(1) of the U.N. Charter purported

“to safeguard, not only the rights of States, but also the rights of the peoples of mandated territories until trusteeship agreements are concluded. The purpose must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ” (pp. 136-137).

Thus, as acknowledged by the ICJ, “the necessity for supervision continues to exist despite the disappearance of the supervisory organ under the mandates system” (p. 136). The “international function of administration” (of mandated territories) aimed at “promoting the well-being and development of the inhabitants”⁶⁸.

86. The ICJ saw it fit to recall that the mandates system had been created

“in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law” (p. 132).

Furthermore, in the view of the ICJ, the rights of States *and peoples* did not lapse automatically on the dissolution of the League of Nations; on the contrary, they were safeguarded “under all circumstances and in all respects, until each territory should be placed under the trusteeship system” (p. 134).

87. The ICJ stressed “the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants”, and this assumed “particular obligations” in relation to abuses of the past⁶⁹. The ICJ sought to secure the continuity of those obligations. Thus, in the same Advisory Opinion on the *International Status of South-West Africa* (1950), it recalled that the Assembly of the League of Nations, in its Resolution of 18.04.1946, reckoned that chapters XI, XII and XIII of the Charter of the United Nations embodied principles corresponding to those declared in Article 22 of the Covenant, in a clear indication that “the supervisory functions exercised by the League would be taken over by the United Nations”. The competence of the U.N. General Assembly to exercise such supervision derived from Article 10 of the Charter, which authorized it “to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the members of the United Nations” (p. 137). The U.N. General Assembly, early in its life, began to exercise that competence, and the ICJ found, in that Advisory Opinion of 1950, that the General Assembly was “legally qualified” to do so (p. 137).

⁶⁸This being the “sacred trust of civilization” referred to in Article 22 of the Covenant of the League of Nations (p. 133).

⁶⁹Such as “slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship”; such obligations represented “the very essence of the sacred trust of civilization” (p. 133).

2. The Humanist Legacy of Past Experiments to U.N. International Administration of Territory

88. Each juridical institution is the product of its time. Social facts tend to come before the norms, and these latter emerge from legal principles, in order to regulate new forms of inter-individual and social relations. Juridical institutions constitute responses to social needs of their times, including protection. The institutions of mandates (under the League of Nations), of trusteeship (under the United Nations until 2005) and of international administration of territory (by the United Nations, of the kind of the ones evolved in the nineties), are no exception to that.

89. Although the experiences of the mandates and the trusteeship systems belong to the past, are now part of history, this does not mean that lessons cannot be extracted therefrom, for the consideration of new juridical institutions, operating nowadays also in response to social needs, including protection. This amounts to rethinking the juridical institutions of the past, to identify their legacy, of relevance for new social needs. In my own perception, in at least one particular aspect the experiments of the mandates and the trusteeship systems were ahead of their times: that of the access of the inhabitants concerned (of mandated and trust territories) to justice at international level.

90. As attention gradually began to turn into the “population” or the “people” (with the awakening to the human conscience as to their needs of protection), pioneering experiments were devised and placed in operation: in the era of the League of Nations, the minorities and mandates systems, placed under its supervision, and, later on, in the era of the United Nations, the trusteeship system. There can hardly be any doubt that the experiments of mandates (in addition to the minorities system), and of trust territories, aimed at the fulfillment of the needs, and at the empowerment, of the inhabitants of the territories at issue, so as to put an end to abuses of the past. The inhabitants of mandate and trust territories were, furthermore, endowed with the right of international individual petition⁷⁰ (to the Permanent Mandates Commission, to the Minorities Committees, and to the Trusteeship Council, respectively), - heralding the advent of the access of individuals to international instances in order to vindicate their own rights, emanated directly from the *droit des gens*, from the law of nations itself.

91. If we go through the bulk of expert writing on the mandates and the trusteeship systems, especially those who were familiar with the operation of those systems, we detect: (a) analogies of private law wherefrom inspiration was drawn for the establishment of those juridical institutions; (b) devising of mechanisms of supervision (of territories and mandates and in the trusteeship system), also at international level (recourse to the former Permanent Mandates Commission and the former Trusteeship Council); (c) interactions between the domestic and international legal orders; (d) classification of units (mandates and trust territories); (e) *modus operandi* of the respective systems.

92. A rethinking of those experiments of mandates and trust territories does not need to go over such aspects, overworked in the past; it is here rather intended to focus on the lessons left for

⁷⁰Just like the members of minorities, in the minorities system under the League of Nations. The procedures varied from one system to the other; on the right of international individual petition in those pioneering experiments, cf., e.g., C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-138; A.A. Cançado Trindade, “Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century”, 24 *Netherlands International Law Review* (1977) pp. 373-392; A.A. Cançado Trindade, “Exhaustion of Local Remedies in the Experiment of the United Nations Trusteeship System”, 61 *Revue de Droit international de sciences diplomatiques et politiques - Genève* (1983) pp. 49-66.

the present and the future. This implies consideration of their *causes*, of what originated those institutions, as well as of their *purposes*, of which goals they purported to attain. Much of the energy - not all of it - spent in devising them was conditioned, perhaps ineluctably, by prevailing notions of their times. Yet, they left a precious lesson for succeeding generations, that cannot be overlooked nowadays.

93. The juridical institutions of mandates, trusteeship and international administration of territories emerged, in succession, from the juridical conscience, to extend protection to those “peoples” or “populations” who stood - and stand - in need of it, in modern and contemporary history. The respective “territorial” arrangements were the *means* devised in order to achieve that *end*, of protection of “populations” or “peoples”. It was not mandates for mandates’ sake, it was not trusteeship for trusteeship’s sake, and it is not international administration of territory for administration’s sake.

94. If we turn to the *causes*, as we ought to, we identify their common purpose: to safeguard the “peoples” or “populations” concerned (irrespective of race, ethnic origin, religious affiliation, or any other trait) from exploitation, abuses and cruelty, and to enable them to be masters of their own destiny in a temporal dimension. In such domain of protection, Law is ineluctably *finaliste*. Those experiments were inspired by the fundamental *principle of humanity* (cf. paras. 196-211, *infra*), and purported to safeguard the dignity of the human person. This, *Article 22* of the Covenant of the League of Nations, on the mandates system, enunciated “the principle that the well-being and development” of the “peoples” at issue, under “tutelage”, formed “a sacred trust of civilization”⁷¹. The mandates system, - it added, - was to ensure “freedom of conscience and religion”, and to establish the prohibition of abuses of the past⁷².

95. On its part, *Article 73* of the United Nations Charter, concerning non-self-governing territories, determined that

“Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- (c) to further international peace and security;

⁷¹It added - in a categorization that did not pass without criticism - that “the character of the mandate” (i.e., mandates A, B or C) “must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances”.

⁷²Such as, e.g., “the slave trade, the arms traffic and the liquor traffic”.

- (d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
- (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply”.

96. The lessons accumulated, by those who witnessed or survived the successive massacres and atrocities of the last hundred years, and those who study and think seriously about them today, cannot but lead to this humanist acknowledgement: in the roots of those juridical institutions (mandates, trusteeship, international administration of territories) we detect the belated consciousness of the *duty of care for the human kind*. This is, after all, in my own perception, their most invaluable common denominator.

VII. THE CONCERN OF THE UNITED NATIONS ORGANIZATION AS A WHOLE WITH THE HUMANITARIAN TRAGEDY IN KOSOVO

97. In the light of the previous considerations, we may now turn to the expressions of the United Nations Organization *as a whole* with the humanitarian tragedy in Kosovo which victimized its population for one decade (1989-1999). Not only the Security Council, but also the General Assembly, ECOSOC and the Secretary General expressed, on successive occasions, their grave concern with that humanitarian crisis. It had become, in fact, a matter of legitimate concern of the international community as a whole, in the framework of the United Nations Charter, as we shall see now.

1. The Security Council’s Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

98. By the turn of the century, in the period extending from March 1998 to September 2001, the Security Council expressed its concern with the grave humanitarian crisis in Kosovo. In its *Resolution 1160* (of 31.03.1998), the Security Council condemned both “the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo” and “all acts of terrorism by the Kosovo Liberation Army”⁷³. A few months later, in *Resolution 1199* (of 23.09.1998), the Security Council expressed its grave concern at the “rapid deterioration” of the “humanitarian situation in Kosovo”⁷⁴, with the “increasing violation of human rights and of international humanitarian law”⁷⁵. In particular, *Resolution 1199* expressed its grave concern at

“the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes”⁷⁶.

⁷³Preamble, para. 3.

⁷⁴Preamble, paras. 10 and 14.

⁷⁵Preamble, para. 11.

⁷⁶Preamble, para. 6.

99. In the same *Resolution 1199*, the Security Council expressed its deep concern with the “flow of refugees” and the “increasing numbers of displaced persons”, up to “50,000 of whom (...) without shelter and other basic necessities”⁷⁷. It then warned against the “impending humanitarian catastrophe”⁷⁸ in Kosovo, and asserted

“the right of all refugees and displaced persons to return to their homes in safety, and (...) the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so”⁷⁹.

The Security Council then demanded, still in *Resolution 1199*, the unimpeded and safe return of refugees and displaced persons to their homes, and “humanitarian assistance to them”⁸⁰, so as “to improve the humanitarian situation and to avert the impending humanitarian catastrophe”⁸¹; it also acknowledged the need “to bring to justice those members of the security forces who have been involved in the mistreatment of civilians”⁸², through full cooperation with the Prosecutor of the International Tribunal for the Former Yugoslavia “in the investigation of possible violations” within its jurisdiction⁸³. *Resolution 1199* further asserted the support for a peaceful resolution of the Kosovo crisis, including “an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration”⁸⁴.

100. One month later, the Security Council adopted *Resolution 1203* (of 24.10.1998), whereby it reiterated this last objective in the same terms⁸⁵, as well as its deep “alarm” and concern with the continuation of the “grave humanitarian situation throughout Kosovo” and the pressing need to prevent “the impending humanitarian catastrophe”⁸⁶, which constituted “a continuing threat to peace and security in the region”⁸⁷. *Resolution 1203* further reiterated its demand to the authorities of the Federal Republic of Yugoslavia to secure the safe return to their homes of all refugees and displaced persons, in the exercise of their own right of freedom of movement⁸⁸, - so as “to avert the impending humanitarian catastrophe”⁸⁹. *Resolution 1203* called at last for “prompt and complete investigation” of “all atrocities committed against civilians”, in “full cooperation with the International Tribunal for the Former Yugoslavia”⁹⁰.

101. Seven months later, the Security Council adopted *Resolution 1239* (of 14.05.1999), reiterating its “grave concern” at the humanitarian catastrophe in and around Kosovo”, given the “enormous influx of Kosovo refugees” and the “increasing numbers of displaced persons within

⁷⁷Preamble, para. 7.

⁷⁸Preamble, para. 10, and operative part, para. 1.

⁷⁹Preamble, para. 8.

⁸⁰Operative part, paras. 5(c) and (e), and 12.

⁸¹Operative part, para. 2.

⁸²Operative part, para. 14.

⁸³Operative part, para. 13.

⁸⁴Preamble, para. 12.

⁸⁵Preamble, para. 8.

⁸⁶Preamble, para. 11.

⁸⁷Preamble, para. 15.

⁸⁸Operative part, paras. 12 and 9, and cf. para. 13.

⁸⁹Operative part, para. 11.

⁹⁰Operative part, para. 14.

Kosovo”⁹¹, calling for the effective coordination of “international humanitarian relief”⁹². After reaffirming “the right of all refugees and displaced persons to return to their homes in safety and in dignity”⁹³, *Resolution 1239* warned with emphasis that “the humanitarian situation will continue to deteriorate” in the absence of a proper “political solution” to the crisis⁹⁴.

102. The next step taken by the Security Council, shortly afterwards, was the adoption of its significant *Resolution 1244* (of 10.06.1999), commented *supra/infra*. Subsequently, the Security Council adopted *Resolution 1367* (2001), wherein it took note, in relation to Kosovo, of the situation concerning security in the borders, and stressed the “continuing authority” of the U.N. Secretary-General’s Special Representative “to restrict and strictly control the flow of arms into, within and out of Kosovo, pursuant to resolution 1244(1999)”⁹⁵.

2. The General Assembly’s Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

103. Earlier than the Security Council, as from 1994, the General Assembly began to express its concern with the grave humanitarian crisis in Kosovo. In its *Resolution 49/204* (of 23.12.1994), — the first of a series on the “Situation of Human Rights in Kosovo”, - the General Assembly acknowledged the “continuing deterioration” of the human rights situation in Kosovo, with “various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo”, including:

- “(a) police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice;
- (b) discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against Albanian pupils and teachers, the closing of Albanian-language secondary schools and university, as well as the closing of all Albanian cultural and scientific institutions;
- (c) the harassment and persecution political parties and associations of ethnic Albanians and their leaders and activities, maltreating and imprisoning them;
- (d) the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language;
- (e) the dismissal from clinics and hospitals of doctors and members of other categories of the medial profession of Albanian origin;
- (f) the elimination in practice of the Albanian language, particularly in public administration and services;

⁹¹Preamble, paras. 3-4.

⁹²Preamble, para. 5, and operative part, paras. 1-2.

⁹³Operative part, para. 4.

⁹⁴Operative part, para. 5.

⁹⁵Preamble, para. 4.

- (g) the serious and massive occurrence of discriminatory and repressive practices aimed at Albanians in Kosovo, as a whole, resulting in widespread involuntary migration”⁹⁶.

104. The General Assembly then strongly condemned, in the same *Resolution 49/204*, these “measures and practices of discrimination” and “large-scale repression” of the “defenceless ethnic Albanian population”, and the discrimination against ethnic Albanians “in the administrative and judiciary branches of government, education, health care and employment, aimed at forcing ethnic Albanians to leave”⁹⁷. It then demanded from the authorities of the Former Republic of Yugoslavia (Serbia and Montenegro) to bring to an “immediate end” all those human rights violations (including torture and other cruel, inhuman or degrading treatment; arbitrary searches and detention; denial of a fair trial; among others)⁹⁸. It further encouraged the U.N. Secretary-General to pursue his “humanitarian efforts” in the region, *in liaison* with, *inter alia*, the UNHCR and UNICEF, “with a view to taking urgent practical steps to tackle the critical needs of the people in Kosovo, especially of the most vulnerable groups affected by the conflict, and to assist in the voluntary return of displaced persons to their homes”⁹⁹.

105. One year later, the General Assembly adopted *Resolution 50/190* (of 22.12.1995), acknowledging the same acts of discrimination and violence¹⁰⁰, and reiterated – in a longer text - its concerns with the human rights violations in Kosovo¹⁰¹. It “urgently” demanded that the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro):

- “(a) take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo, including, in particular, the discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989;
- (b) release all political prisoners and cease the persecution of political leaders and members of local human rights organizations;
- (c) allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and respect the will of its inhabitants as the best means of preventing the escalation of the conflict there;
- (d) abrogate the official settlement policy as far as it is conducive to the heightening of ethnic tensions in Kosovo;
- (e) reopen the cultural and scientific institutions of the ethnic Albanians;
- (f) pursue dialogue with the representatives of ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia”¹⁰².

⁹⁶Preamble, para. 4.

⁹⁷Operative part, paras. 1-2.

⁹⁸Operative part, para. 3.

⁹⁹Operative part, para. 5.

¹⁰⁰Preamble, para. 5.

¹⁰¹Preamble, paras. 6 and 8, and operative part, paras. 1-2.

¹⁰²Operative part, para. 3.

And, once again, the General Assembly encouraged the U.N. Secretary-General to pursue his “humanitarian efforts” in the region, together with, *inter alia*, the UNHCR and UNICEF, “to tackle the critical needs of the people in Kosovo, especially of the most vulnerable groups affected by the conflict”, as well as “to assist in the voluntary return of displaced persons to their homes”¹⁰³.

106. The “continuing grave human rights situation in Kosovo” was again object of concern by the General Assembly, in its *Resolution 51/111* (of 12.12.1996)¹⁰⁴, whereby the Assembly condemned “all violations of human rights in Kosovo, in particular repression of the ethnic Albanian population and discrimination against them, as well as all acts of violence in Kosovo”¹⁰⁵. It reiterated the aforementioned demands to the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro)¹⁰⁶, and it again (para. 6-7) encouraged the U.N. Secretary-General to pursue his humanitarian endeavours with the appropriate humanitarian entities (such as UNHCR and UNICEF)

“to tackle the critical needs of the people of Kosovo, especially of the most vulnerable groups affected by the conflict, and to assist in the voluntary return of displaced persons to their homes in conditions of safety and dignity”¹⁰⁷.

Moreover, *Resolution 51/111* called for compliance with the “principles of non-discrimination, equal protection before the law and the reduction and avoidance of statelessness”¹⁰⁸.

107. One year afterwards, the General Assembly, in *Resolution 52/139* (of 12.12.1997), noted with concern “the use of force by Serbian police against peaceful Albanian student protesters of Kosovo on 1 October 1997”¹⁰⁹, and further expressed “deep concern” about “all violations of human rights and fundamental freedoms in Kosovo, in particular the repression of the ethnic Albanian population and discrimination against it, as well as acts of violence in Kosovo”¹¹⁰. Accordingly, the General Assembly called upon the authorities of the Federal Republic of Yugoslavia:

“(a) to take all necessary measures to bring an immediate end to all human rights violations against ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989;

(b) to release all political prisoners and to cease the persecution of political leaders and members of local human rights organizations;

(c) to allow the return in safety and dignity of Albanian refugees from Kosovo to their homes;

¹⁰³Operative part, para. 5.

¹⁰⁴Preamble, para. 2.

¹⁰⁵Operative part, para. 1.

¹⁰⁶Operative part, para. 2.

¹⁰⁷Operative part, para. 6.

¹⁰⁸Operative part, para. 7.

¹⁰⁹Preamble, para. 4.

¹¹⁰Operative part, para. 1.

(d) to allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and to respect the will of its inhabitants as the best means of preventing the escalation of the conflict there;

(e) to allow the reopening of the educational, cultural and scientific institutions of the ethnic Albanians”¹¹¹.

Resolution 52/139 at last reiterated the same encouragement words to the U.N. Secretary-General¹¹² as previously done in earlier resolutions of the General Assembly on the situation of human rights in Kosovo (cf. *supra*).

108. In the following year, the General Assembly adopted an extensive resolution on the situation of human rights in Kosovo: by means of *Resolution 53/164* (of 09.12.1998), the General Assembly focused on “the regional dimensions of the crisis in Kosovo”, and its “persistent and grave violations and abuse of human rights and humanitarian law in Kosovo”¹¹³. The General Assembly expressed its “grave” concern with

“the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens (...) by the police and military”¹¹⁴.

The General Assembly expressed further its concern with “reports of violence committed by armed ethnic Albanian groups against non-combatants and the illegal detention of individuals, primarily ethnic Serbs, by those groups”¹¹⁵.

109. In its call for respect for human rights and international humanitarian law¹¹⁶, *Resolution 53/164* condemned “the acts of violence, including kidnappings, by armed ethnic Albanian groups, in particular against non-combatants”¹¹⁷. Furthermore, it “strongly” condemned

“the overwhelming number of human rights violations committed by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), the police and military authorities in Kosovo, including summary executions, indiscriminate and widespread attacks on civilians, indiscriminate and widespread destruction of property, mass forced displacement of civilians, the taking of civilian hostages, torture and other cruel, inhuman or degrading treatment (...)”¹¹⁸.

110. Next, the General Assembly, by means of *Resolution 53/241* (of 28.07.1999), turned its attention to the financing of the United Nations Interim Administration Mission in Kosovo (UNMIK). The following resolution of the General Assembly on the matter, — *Resolution 54/183* (of 17.12.1999), — again shifted attention to the situation of human rights in Kosovo. It began by recalling “the background of years of repression, intolerance and violence in Kosovo”, and the

¹¹¹Operative part, para. 2.

¹¹²Operative part, para. 7.

¹¹³Preamble, paras. 3-4.

¹¹⁴Preamble, para. 5.

¹¹⁵Preamble, para. 6.

¹¹⁶Operative part, para. 6, and cf. also operative part, paras. 14(e), 17, and 18 (a) and (b).

¹¹⁷Operative part, para. 9.

¹¹⁸Operative part, para. 8.

persisting challenge to build therein “a multi-ethnic society on the basis of substantial autonomy”, as well as the “continuing problems”, the “human rights and humanitarian situation”, and the “regional dimensions of the crisis in Kosovo”¹¹⁹.

111. It then expressed its concern with, and condemned, the persistent and “grave violations of human rights” and of international humanitarian law in Kosovo, affecting ethnic Albanians¹²⁰. There had been many reported cases, - *Resolution 54/183* added, - of

“torture, indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanians in Kosovo by the Yugoslav police and military, [as well as] frequent instances of harassment, periodic kidnapping and murder of ethnic Serb, Roma and other minorities of Kosovo by ethnic Albanian extremists”¹²¹.

112. As a consequence, - *Resolution 54/183* went on, - “the entire population of Kosovo has been affected by the conflict”¹²². It then warned that all national minorities must benefit from “their full and equal rights”¹²³, and further stressed “the urgent need to implement effective measures to stop trafficking in women and children”¹²⁴. In its operative part, *Resolution 54/183* called for a solution to the Kosovo crisis on the basis of “general principles”¹²⁵, putting an end to actions leading *de facto* or *de jure* to “ethnic cantonization”¹²⁶. Moreover, it called upon all actors “to refrain from all acts of violence”¹²⁷, and

“to facilitate the free and unhindered return to their homes, in safety and with dignity, of all displaced persons and refugees, of whichever ethnic background”¹²⁸.

113. In addition, *Resolution 54/183* requested humanitarian entities, and the UNHCR and the Office of the U.N. High-Commissioner for Human Rights to continue to take practical steps

“to meet the critical needs of the people in Kosovo and to assist in the voluntary return of displaced persons to their homes in conditions of safety and dignity”¹²⁹.

It further urged all parties involved in the Kosovo crisis to support the efforts of UNICEF

“to ensure that all children in Kosovo return to school as soon as possible and to contribute to the rebuilding and repair of schools destroyed or damaged during the conflict in Kosovo”¹³⁰.

¹¹⁹Preamble, paras. 3-4.

¹²⁰Preamble, paras. 5-6.

¹²¹Preamble, paras. 7-8.

¹²²Preamble, para. 9.

¹²³Preamble, para. 9.

¹²⁴Preamble, para. 12.

¹²⁵Operative part, paras. 1-2.

¹²⁶Operative par, para. 7.

¹²⁷Operative par, para. 6.

¹²⁸Operative part, para. 11.

¹²⁹Operative part, para. 14.

114. The General Assembly continued to occupy itself of the humanitarian crisis of Kosovo. In the years preceding its request (by means of *Resolution 63/3*, of 08.10.2008) for an Advisory Opinion of this Court, it adopted a series of fourteen resolutions on the financing of UNMIK¹³¹. And months after its request for an Advisory Opinion of the ICJ, the General Assembly adopted a new Resolution¹³², again on the financing of UNMIK. The U.N. General Assembly has, thus, just like the Security Council, been constantly attentive to the evolving situation of Kosovo in recent years.

3. The Economic and Social Council's Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

115. Not only the Security Council and the General Assembly, but also the Economic and Social Council (ECOSOC), likewise occupied itself with the situation of human rights in Kosovo, in its more troubling moments. By means of its *Resolution 1998/272* (of 30.07.1998), ECOSOC approved the requests of the old U.N. Commission on Human Rights that the special *rapporteur* on the situation of human rights in Former Yugoslavia carry out missions in the Federal Republic of Yugoslavia, including in Kosovo¹³³. One year later, in its *Resolution 1999/232* (of 27.07.1999) ECOSOC again approved a request of the former U.N. Commission on Human Rights that the aforementioned special *rapporteur* conduct missions *inter alia* in Kosovo¹³⁴; furthermore, ECOSOC endorsed the decision of the Commission on Human Rights to request the special *rapporteur* "to make interim reports as appropriate about his work in support of the Kosovo initiative of the United Nations High Commissioner for Human Rights"¹³⁵.

116. The former U.N. Commission on Human Rights, which used to report to ECOSOC and the Secretary-General, issued two resolutions in 1994 expressing its grave concern with the humanitarian tragedy in Kosovo. In its *Resolution 1994/72* (of 09.03.1994), the Commission, "gravely" concerned at the deteriorating human rights situation in Kosovo¹³⁶, strongly condemned in particular

"the measures and practices of discrimination against and the violation of the human rights of the ethnic Albanians of Kosovo, as well as the large scale repression committed by the Serbian authorities"¹³⁷.

The Commission demanded that these authorities "respect the human rights" of ethnic Albanians in Kosovo, and further declared that "the best means to prevent the possible escalation of the conflict"

¹³⁰Operative part, para. 21.

¹³¹Namely, Resolution 54/245A of 23.12.1999; Resolution 54/245B of 15.06.2000; Resolution 55/227A of 23.12.2000; Resolution, 55/227B of 14.06.2001; Resolution 56/295 of 27.06.2002; Resolution 57/326 of 18.06.2003; Resolution 58/305 of 18.06.2004; Resolution 59/286A of 13.04.2005; Resolution 59/286B of 22.06.2005; Resolution 60/275 of 30.06.2006; Resolution 61/285 of 29.05.2007; and Resolution 62/262 of 20.06.2008; Resolution 63/295 of 30.06.2009; and Resolution 64/827 (general distribution of 18.06.2010, and cf. doc. A/C.5/64/L.47, of 28.05.2010).

¹³²Resolution 63/295, of 30.06.2009.

¹³³Item (c) (iii), para. 21.

¹³⁴Item (b) (iii).

¹³⁵Item (c) (i).

¹³⁶Operative part, para. 25.

¹³⁷Operative part, para. 26.

was “to safeguard human rights, restore the autonomy of Kosovo and to establish democratic institutions in Kosovo”¹³⁸.

117. Shortly afterwards, the Commission, recalling an ECOSOC document¹³⁹, *Resolution 1994/76* (also of 09.03.1994) again condemned strongly the “discriminatory measures and practices as well as the violations of human rights, committed by Serbian authorities against ethnic Albanians in Kosovo”¹⁴⁰, and urgently demanded that those authorities

- “(a) Cease all human rights violations, discriminatory measures and practices against ethnic Albanians in Kosovo, in particular arbitrary detention and violation of the right to a fair trial and the practice of torture and other cruel, inhuman and degrading treatment;
- (b) Release all political prisoners and cease all persecution of political leaders and members of local human rights organizations;
- (c) Establish democratic institutions in Kosovo and respect the will of its inhabitants as the best means of preventing the escalation of the conflict there (...)”¹⁴¹.

118. The Commission, again recalling an ECOSOC document¹⁴², in its *Resolution 1995/89* (of 08.03.1995) saw it fit to reiterate its deep concern with the ongoing human rights situation in Kosovo, and to repeat its “strong condemnation of “discriminatory measures and practices”¹⁴³ and its urgent demands (*supra*) to the Serbian authorities to put an end to them and to human rights violations, and to “respect the will of the inhabitants of Kosovo”¹⁴⁴. Next, in its *Resolution 1996/71* (of 23.04.1996), the Commission once again strongly urged the Serbian authorities “to revoke all discriminatory legislation and to apply all other legislation without discrimination, release all political detainees”, and “allow the free return of ethnic Albanian refugees to Kosovo”¹⁴⁵. Furthermore, it urgently demanded Serbian authorities to

“take immediate action to put an end to the repression of and prevent violence against non-Serb populations in Kosovo, including acts of harassment, beatings, torture, warrantless searches, arbitrary detention, unfair trials, arbitrary unjustified evictions and dismissals (...)”¹⁴⁶.

¹³⁸Operative part, para. 27.

¹³⁹Doc. E/CN.4/1994/110, referring to the report of the Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia (describing the “continuing deterioration” of that situation in Kosovo).

¹⁴⁰Operative part, para. 1.

¹⁴¹Operative part, para. 2.

¹⁴²U.N. doc. E/CN.4/1995/57, referring to the report of the special rapporteur on the situation of human rights in the former Yugoslavia (describing the brutalities and discriminatory measures perpetrated in Kosovo).

¹⁴³Such as mass dismissals of civil servants, discrimination against ethnic Albanians in primary and secondary schools and University, dismissal of doctors and other members of the medical profession from clinics and hospitals, - generating forced migration.

¹⁴⁴Operative part, paras. 29-31.

¹⁴⁵Operative part, para. 25.

¹⁴⁶Operative part, para. 26.

4. The Secretary General's Reiterated Expressions of Grave Concern with the Humanitarian Tragedy in Kosovo

119. Like other main organs of the United Nations (General Assembly, Security Council, ECOSOC - *supra*), the Secretary General of the United Nations also expressed on distinct occasions his grave concern with the humanitarian tragedy in Kosovo. Thus, in his *Report* of 12.07.1999 on UNMIK¹⁴⁷, he warned that

“The humanitarian consequences of the conflict on the people of Kosovo have been profound. Out of a population estimated in 1998 to number 1.7 million, almost half (800,000) have sought refuge in neighbouring Albania, the former Yugoslav Republic of Macedonia and Montenegro during the past year. While estimates vary, up to 500,000 persons may have been internally displaced. Many internally displaced persons (IDPs) are in worse health than the refugees, having spent weeks in hiding without food or shelter. Many refugees and IDPs bear the scars of psychological trauma as well as physical abuse.

As of 8 July 1999, more than 650,000 refugees had returned to Kosovo through a combination of spontaneous and Office of the United Nations High Commissioner for Refugees (UNHCR)-assisted movement. This leaves an estimated 150,000 persons in neighbouring regions and countries, 90,000 evacuees in third countries and an unknown number of asylum-seekers. Those who have not returned home will continue to require a high level of assistance in their country of asylum and upon eventual return. Within Kosovo, a still unknown number of individuals remain outside their homes. (...)” (paras. 8-9).

120. In the same *Report*, the U.N. Secretary General deemed it fit to add, *inter alia*, that

“The adoption of Security Council resolution 1244 (1999) and the deployment of KFOR and UNMIK has marked the end of a tragic chapter in the history of the people of Kosovo. The task before the international community is to help the people of Kosovo to rebuild their lives and heal the wounds of conflict. Reconciliation will be a long and slow process. Patience and persistence will be needed to carry it through” (para. 117).

121. In his following *Report* of 16.09.1999¹⁴⁸ on UNMIK, the Secretary General pointed out that “[t]he level and nature of violence in Kosovo, especially against vulnerable minorities, remains a major concern. Measures taken to address this problem are having a positive effect, but continued vigilance is necessary” (para. 4). The *Report* addressed some of the most pressing measures to be taken:

“Housing surveys have been conducted in more than 90 per cent of the war-affected villages. An estimated 50 thousand houses are beyond repair and another 50 thousand have sustained damage of up to 50 per cent, but are repairable. One of the most urgent tasks to be completed before winter is the temporary rehabilitation of the 50 thousand repairable houses” (para. 11).

122. To that end, UNMIK counted on the assistance of the UNHCR's emergency rehabilitation program (para. 11). Another priority are, - the Secretary General's *Report* added, -

¹⁴⁷UN doc. S/1999/779, of 12.07.1999, pp. 1-25.

¹⁴⁸UN doc. S/1999/987, of 16.09.1999, pp. 1-12.

was “targeted assistance for women and children”; to that end, UNMIK counted on the assistance of UNHCR, UNICEF, and international local non-governmental organizations, which were “implementing a series of projects under a ‘Kosovo Women’s Initiative’” (para. 13). Parallel to those two *Reports*, early in the same year of 1999, the Secretary General also saw it fit to issue a statement, on 16.01.1999 (the day following the massacre of Raçak), expressing his grave concern as follows:

“I am shocked to learn today of the alleged massacre of some 40 individuals, apparently civilians, in Kosovo. (...) I am gravely concerned at this latest development and call for a full investigation by the competent authorities. I appeal once again to all sides in Kosovo to refrain from any action that would further escalate the tragic situation”¹⁴⁹.

123. From 1999 onwards, the U.N. Secretary-General issued periodical and numerous *Reports* on the evolving work of UNMIK. Early in this decade (2002-2004), his *Reports* pursued the supervision of the agreed policy of “standards before status”¹⁵⁰. In the following period (2006-2008), before the declaration of independence, the Secretary General drew the attention of all concerned to the importance of putting an end to violence for the future of Kosovo. Thus, in his *Report* of 05.06.2006¹⁵¹, he pondered that

“(...) Implementation of the standards is a measure of the commitment of the political leaders and Provisional Institutions of Kosovo to realizing a society where all people can live in dignity and without fear. (...) Real progress in this regard remains an essential factor in determining progress in the political process to determine Kosovo’s future status. (...)

Reconciliation remains essential for the future of a multi-ethnic Kosovo as well as stability in the region. Although all communities have a role in improving the conditions under which all can live and work together in harmony, the principal responsibility rests with the majority. (...)

(...) Violence will affect the future status process, and must not be tolerated by any part of the society in Kosovo. (...)”¹⁵².

124. In his following *Reports* on UNMIK, attention was increasingly turned to the setting up of provisional institutions for democratic and autonomous self-government, i.e., of public institution-building, so as to foster the consolidation of the rule of law in a democratic society¹⁵³. In one of those *Reports* (that of 09.03.2007), the Secretary General stated:

“After almost eight years of United Nations interim administration, Kosovo and its people need clarity on their future. (...) Moving towards a timely conclusion of the

¹⁴⁹Cit. in M. Weller, *The Crisis in Kosovo, 1989-1999*, Cambridge, Docs. & Analysis Publ., 1999, p. 320. Two days later (18.01.1999) the U.N. High Commissioner for Refugees (Ms. S. Ogata) also expressed the grave concern of the UNHCR and condemned the atrocities; cf. cit. in *ibid.*, p. 321.

¹⁵⁰Cf. SG, Report of 09.10.2002 (UN doc. S/2002/1126), para. 2; SG, Report of 29.01.2003 (UN doc. S/2003/113), paras. 12 and 61; SG, Report of 16.01.2004 (UN doc. S/2004/71), para. 2.

¹⁵¹UN doc. S/2006/361, of 05.06.2006, pp. 1-9.

¹⁵²*Ibid.*, paras. 24 and 26-27, p. 8.

¹⁵³Cf. Report of 01.09.2006 (UN doc. S/2006/707); Report of 20.11.2006 (UN doc. S/2006/906); Report of 09.03.2007 (UN doc. S/2007/134); Report of 29.06.2007 (UN doc. S/2007/395); Report of 28.09.2007 (UN doc. S/2007/582); Report of 03.01.2008 (UN doc. S/2007/768).

Kosovo future status political process and a sustainable solution to the future status of Kosovo should be a priority for the international community as a whole.

Such a solution must entail a Kosovo that is stable and in which all communities can coexist in peace. The use of violence by extremist groups in Kosovo to achieve political objectives cannot be tolerated and should be strongly condemned”¹⁵⁴.

125. In the following *Report* (of 29.06.2007), the Secretary General took note of the report presented to him by his Special Envoy, containing “his recommendation of independence for Kosovo supervised initially by the international community, and his settlement proposal”¹⁵⁵. In another *Report* (that of 20.11.2006), the Secretary General had already called upon “the leaders and people of Kosovo” to remain engaged in the political settlement, and added that “[i]t remains important for the Kosovo authorities to take the progress achieved still further, and not to lose sight of all the standards that are important to developing more stable and effective institutions and to improving the delivery of services to all people in Kosovo”¹⁵⁶.

126. There is, at last, a series of *Reports* of the Secretary General, covering developments pertaining to UNMIK since Kosovo’s declaration of independence of 17 February 2008¹⁵⁷. Shortly after the adoption of the declaration of independence by the Assembly of Kosovo on 17.02.2008, the U.N. Secretary General, in his *Report* of 28.03.2008, took note of the declaration (para. 3) and added that UNMIK continued “to operate on the understanding that resolution 1244 (1999) remains in force” (para. 29), but at the same time conceded that

“Kosovo’s declaration of independence has had a profound impact on the situation in Kosovo. The declaration of independence and subsequent events in Kosovo have posed significant challenges to the ability of UNMIK to exercise its administrative authority in Kosovo” (para. 30).

127. In his subsequent *Report* on UNMIK (of 12.06.2008), the Secretary General took note of the Constitution adopted by the Assembly of Kosovo 09.04.2008, to enter into force on 15.06.2008 (para. 7). This posed, in his view, “significant challenges” and “operational implications” for UNMIK to exercise its “administrative authority” (paras. 10, 14 and 17). In the following *Report* (of 15.07.2008), he added that “the authorities in Pristina have taken a number of steps to assert their authority in Kosovo” (para. 4), and UNMIK has been “confronted with a substantially changed situation in Kosovo” (para. 29).

128. The next *Report* (of 24.11.2008) of the Secretary General acknowledged the difficulty to reconcile Security Council resolution 1244 (1999) and the Kosovo Constitution (para. 21). At last, in a following *Report* (of 10.06.2009), the Secretary General added that, although, to the Kosovo authorities, Security Council resolution 1244 (1999) no longer appeared relevant (para. 2), the United Nations would “continue to adopt a position of strict neutrality on the question of Kosovo’s status” (para. 40).

¹⁵⁴UN doc. S/2007/134, of 09.03.2007, paras. 24-25, p. 7.

¹⁵⁵UN doc. S/2007/395, of 29.06.2007, para. 2, p. 1, and docs. referred to therein.

¹⁵⁶UN doc. S/2006/906, of 20.11.2006, para. 24, p. 7.

¹⁵⁷Cf. SG, Report of 28.03.2008 (UN doc. S/2008/211); SG, Report of 12.06.2008 (UN doc. S/2008/354); SG, Report of 15.07.2008 (UN doc. S/2008/458); SG, Report of 24.11.2008 (UN doc. S/2008/692); SG, Report of 17.03.2009 (UN doc. S/2009/149); SG, Report of 10.06.2009 (UN doc. S/2009/300); SG, Report of 30.09.2009 (UN doc. S/2009/497); and SG, Report of 05.01.2010 (UN doc. S/2010/5).

129. Thus, it clearly ensues from these and the previous *Reports* that, to start with, the main concern of the U.N. Secretary General and UNMIK was with the safety and the conditions of living of the population. It then turned to public institution-building. International administration of territory does not appear as an end in itself, - not international administration of territory for territorial administration's sake, - but rather as a means to an end, namely, to secure the well-being of the "people" or the "population", and the inhabitants' living under the rule of law in a democratic society. As for the more recent *Reports*, issued by the time of Kosovo's declaration of independence, and shortly afterwards, it is difficult to escape the impression that, by then, Kosovo was already being envisaged as a State *in statu nascendi*.

5. General Assessment

130. From the review above, it is clear that the United Nations Organization *as a whole* was and has been concerned with the humanitarian tragedy in Kosovo. Each of its main organs (General Assembly, Security Council, ECOSOC and General Secretariat) expressed on distinct occasions its grave concern with it, and each of them was and has been engaged in the solution of the crisis, within their respective spheres of competence. Such domains of competence are not competing, but rather complementary, so as to fulfill the purposes of the United Nations Charter, in the light of the principles proclaimed therein (Articles 1-2). The crisis concerned the international community as a whole, and the United Nations Organization *as a whole* thus rightly faced it.

131. The International Court of Justice, the principal judicial organ of the United Nations (Article 92 of the U.N. Charter), has now been called upon to pronounce on one specific aspect, namely, that of the conformity, or otherwise, with international law, of the declaration of independence of Kosovo. In the exercise of its advisory function, and bearing in mind its high responsibility as the World Court, it has rightly refused to indulge into a false and fabricated problem of delimitation of competences between the main organs of the United Nations. It has kept in mind the principles and purposes of the U.N. Charter, together with general international law. It has acted as it should.

VIII. EX INJURIA JUS NON ORITUR

132. According to a well-established general principle of international law, a wrongful act cannot become a source of advantages, benefits or else rights for the wrongdoer¹⁵⁸: *ex injuria jus non oritur*. In the period extending from the revocation of Kosovo's autonomy in 1989 until the adoption of the U.N. Security Council's resolution 1244(1999), successive grave breaches of international law were committed by all concerned. These grave breaches, from all sides, seriously victimized a large segment of the population of Kosovo. They comprised grave violations of human rights and of international humanitarian law from virtually all those who intervened in Kosovo's crisis.

133. In the course of the advisory proceedings before the Court, a couple of participants invoked the principle *ex injuria jus non oritur*, each one referring to one of the successive wrongful acts, in the course of the decade 1989-1999, and up to Kosovo's declaration of independence of 17 February 2008. None of them referred to the successive *injuriae* as a whole, - including three unwarranted NATO bombings of Kosovo in 1999, outside the framework of the U.N. Charter, and

¹⁵⁸P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", 74 Recueil des Cours de l'Académie de Droit International de La Haye (1949) pp. 226-227, 230-231 and 256; H. Lauterpacht, *Recognition in International Law*, Cambridge, University Press, 1947, pp. 420-421.

also generating “casualties” among hundreds of innocent civilians. There occurred, in fact, *injuriae* committed everywhere in the region as a whole, coming from a variety of sources (State and non-State alike).

134. The principle *ex injuria jus non oritur* applies to all those grave breaches, to the atrocities perpetrated against the population, as well as to the unwarranted use of force in the bombings of Kosovo (likewise causing numerous innocent victims in the civilian population), outside the framework of the U.N. Charter. U.N. Security Council resolution 1244(1999) cannot thus be read as endorsing wrongful acts of any origin or kind, nor as taking advantage of them. Quite on the contrary: Security Council resolution 1244(1999) reinserted the handling of Kosovo’s humanitarian crisis within the framework of the U.N. Charter, in one of the great challenges to *the U.N. as a whole (not only its Security Council)* in our days. It can hardly be doubted that the Security Council, proceeding on the basis of chapter VII of the United Nations Charter, by means of its resolution 1244(1999), acted in a decisive way for the restoration and preservation of peace in Kosovo and the whole region.

135. In establishing UNMIK by that resolution, the Security Council has been careful not to anticipate or prejudge the outcome of the interim administration of Kosovo. Its balanced position is transparent in the terms of its resolution 1244(1999) as a whole: nowhere it professed an obsession – proper of traditional international law of the past – with territory to the detriment of the people, of the local population. It likewise took people into account. It had the principle *ex injuria jus non oritur* in mind.

136. This general principle, well-established as it is, has at times been counterbalanced by the maxim *ex factis jus oritur*¹⁵⁹. This does not mean that Law can emerge out of grave violations of international humanitarian law, but rather as a response or reaction to these latter. In the conceptual universe of international law, as of Law in general, one is in the domain of *Sollen*, not of *Sein*, or at least in that of the tension between *Sollen* and *Sein*. In is inconceivable that States’ rights can arise, or be preserved, by means of a consistent pattern of grave violations of human rights and of international humanitarian law.

137. Thus, the maxim *ex factis jus oritur* does not amount to a *carte blanche*, as Law plays its role also in the emergence of rights out of the tension between *Sollen* and *Sein*. In the present stage of evolution of the law of nations (*le droit des gens*), it is unsustainable that a people should be forced to live under oppression, or that control of territory could be used as a means for conducting State-planned and perpetrated oppression. That would amount to a gross and flagrant reversal of the ends of the State, as a promoter of the common good.

IX. CONDITIONS OF LIVING OF THE POPULATION IN KOSOVO (SINCE 1989): THE SUBMISSIONS ADDUCED IN THE PRESENT ADVISORY PROCEEDINGS BEFORE THE COURT

138. In respect of the present request by the General Assembly for an Advisory Opinion of the ICJ, it seems to me wholly warranted, and indeed necessary, to turn attention to the conditions of living – or rather, of surviving, - of the population in Kosovo, ever since this latter was deprived of its autonomy in 1989 and until the U.N. international administration of the territory was established in 1999 by means of the adoption of the aforementioned resolution 1244(1999) of the Security Council. This crucial aspect was in fact object of attention, and was submitted to the

¹⁵⁹H. Lauterpacht, “Règles générales du droit de la paix”, 62 Recueil des Cours de l’Académie de Droit International de La Haye (1937) pp. 287-288; P. Guggenheim, “La validité et la nullité...”, op. cit. supra n. (105), p. 231.

cognizance of the Court, in the course of the present advisory proceedings, in both their written and oral phases.

1. Submissions during the Written Phase of Proceedings

139. In the course of the written phase, some of the participants in the proceedings sought to provide - apart from a descriptive account of the facts - an evaluation of the events which took place in that decade (1989-1999), irrespective of their conclusions on the central question at issue. Thus, in its Written Statement, Germany, for example, adduced that the Yugoslav Government had created “a climate of absolute lawlessness in the region” and that

“the responsible authorities not only failed to protect the life and physical integrity of their citizens of Albanian ethnicity, but that these citizens had become objects of constant prosecution, subjected to the most complete arbitrariness. . . . It was clearly conveyed to all ethnic Albanians that their presence was undesirable in Kosovo and that they would do better to leave the region for good” (pp. 16-17).

Germany then concluded that “[the] facts (...) speak for themselves”, fully confirming that “at the beginning of 1999 there indeed existed, as observed and documented by knowledgeable and impartial third-party institutions, a humanitarian emergency, caused by serious crimes deliberately and purposefully committed by the security and military forces of the FRY, and that the criminal strategy gained unprecedented momentum when the KVM Observer Mission was withdrawn” (p. 19).

140. Likewise, in its Written Comment, the United Kingdom stressed that those events of great violence (between 1989 and 1999) were “horrific, well-documented and proven abuses of human rights, abuses that have been described and condemned by the U.N. General Assembly, the Security Council, by various U.N. treaty organs (such as the Committee on the Elimination of Racial Discrimination [CERD], and the Committee against Torture [CAT]), the former U.N. Commission on Human Rights, U.N. special *rapporteurs* (from 1992 to 1997), and by the International Committee of the Red Cross” (para. 14). The United Kingdom also referred to these sources in its Written Statement (paras. 2.25-2.40).

141. The Netherlands, on its part, recalling, in its Written Statement, the findings by the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) *Milutinovic et al.* case (2009 – cf. *infra*), pointed out that there had been “campaigns of terror and violence” which resulted in “the denial of fundamental human rights in Kosovo”, amounting to a pattern of breaches which

“was serious because it was systematic, the joint criminal enterprise, in particular, evidencing that the breach was carried out in an organized and deliberate way. The breach was also serious in that it was gross: the number of expelled Kosovo Albanians and the nature and extent of the violence directed against them constituted evidence of the flagrant nature of the breach, amounting to a direct and outright assault on the values protected” (para. 3.12).

142. Norway, in turn, in its Written Statement, informed the ICJ that, in its letter of recognition of Kosovo (by the Royal Decree of 28.03.2008), it referred to the comprehensive assessment of evidence carried out by the ICTFY in the *Milutinovic et al.* case (2009). And, in its Written Comment, Norway further recalled that the Rambouillet Accords (of 1999) provided that Kosovo’s final status should be determined on the basis of the “will of the people”.

143. In its Written Statement, in the same line of concern, Albania referred to the report published by the International Commission of Experts to indicate that “through a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo”; the purpose of such a campaign would have been to “displace a number of [Kosovo Albanians] sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission” (para. 29).

144. Albania referred to systematic repression, daily human rights violations and discriminatory State policies (between 1990 and 1995 - para. 11); it further invoked the reports of the U.N. *Special Rapporteur* on Human Rights in the Former Yugoslavia, and of Human Rights Watch (1997-1998, - paras. 18 and 20). Moreover, it also invoked the former U.N. Commission on Human Rights’ resolution 1998/79, calling upon the Serbian authorities to put an end to torture and ill-treatment of persons under detention (para. 18). Albania at last added that “the intention to reduce the Albanian population in Kosovo to about 600,000 by killing members of the group or forcefully expelling them”, was “known to foreign officials, and reportedly have been publicly uttered by Serbian officials” (para. 29). This concern was retaken by a handful of participants in the course of the oral phase of the present proceedings (cf. *infra*).

145. But still in the written phase of the proceedings, in its Written Statement Austria referred to various documentary sources, including the 2009 findings of the ICTFY in the *Milutinovic et al.* case, confirming the massive violations of human rights of international humanitarian law in Kosovo, as from the revocation of its autonomy in 1989 onwards, until the perpetration of crimes against humanity in 1999 (paras. 5-9). In its Written Statement, Estonia likewise observed that the long-lasting refusal of internal self-determination suffered by the Kosovar people was accompanied by grave violations of human rights and ethnic cleansing, as disclosed in various documentary U.N. sources (paras. 6-9).

146. Poland, likewise, drew attention, in its Written Statement, to the systematic and large-scale violations of human rights and international humanitarian law in Kosovo along the nineties, marked by the spreading of ethnic cleansing, forced displacement of people, arbitrary detentions and extra-legal executions, forced disappearances of persons, and other outbreaks of violence directed against Kosovo’s civilian population (as established by the ICTFY, Trial Chamber, in its 2009 Judgement in the *Milutinovic et al.* case), rendering the situation of Kosovo unique and *sui generis*. To Poland, all this humanitarian tragedy should be taken into account in considering Kosovo’s declaration of independence of 17 February 2008 (paras. 4.5.1 and 5.2.2.1).

147. Further references to the grave and systematic violations of human rights in Kosovo were made by Switzerland, in its Written Statement, which also referred to General Assembly resolutions and the ICTFY findings in the *Milutinovic et al.* case (*supra* - paras. 81-85). The United States, likewise, recalling a variety of U.N. documentary sources (General Assembly and Security Council, the former U.N. Commission on Human Rights, the U.N. High Commissioner for Human Rights, the ICTFY), observed in its Written Statement that the whole factual background of the massive violence and repression along the nineties was relevant for considering Kosovo’s declaration of independence of 17.02.2008 (II-III, paras. 8-19).

148. Slovenia also, in its Written Statement, mentioned the systematic repression of Kosovo Albanians, as one of the factors that led to its recognition of Kosovo on 05.03.2008 (para. 5). Luxembourg, in its Written Statement, also took into account the factual background of the acute humanitarian crisis in Kosovo in the nineties, especially the late nineties, which called for a response of the international community (para. 6 n. 1). And Finland, also recalling the findings of

the ICTFY in the *Milutinovic et al.* case (*supra*), pondered in its Written Statement that the factual background of the situation in Kosovo during the period 1989-2007 was to be taken into account for the consideration of its declaration of independence of 17.02.2008. In Finland's view, that factual situation was inserted into the violent break-up of Yugoslavia, within which the deliberate policy of repression and persecution of Kosovo Albanians along the decade 1989-1999 (seeking to render them defenceless) took place, culminating, in the spring of 1999, in massive displacement of people in and from Kosovo (paras. 10-11).

2. Submissions during the Oral Phase of Proceedings

149. The factual background of the grave humanitarian crisis in Kosovo was also brought to the ICJ's attention in the oral phase of the present advisory proceedings. The matter was retaken by participants, – irrespective of their conclusions on Kosovo's declaration of independence of 17.02.2008, - in the public sittings of the ICJ of the first half of December 2009. Thus, in its oral arguments, (present-day) Serbia, much to its credit, regretted the tragedies and pain provoked by the conflicts of 1998-1999; it conceded that there was ethnic cleansing in the city of Pristina, and all this - the generalized violence of State and non-State actors - led to the establishment in 1999 of the international administration of territory, and to the purported criminal sanction of individuals responsible for the grave breaches of human rights and International Humanitarian Law¹⁶⁰.

150. On their part, Kosovo's authorities, after recalling persecutions in the twenties, the fifties and the sixties, added that the forcible removal, by intimidation, of Kosovo's autonomy in 1989 by S. Milosevic led to the "humanitarian catastrophe" of 1998-1999, when there were large scale discrimination, grave human rights violations, war crimes, crimes against humanity, ethnic cleansing, massive refugee flows, loss of life and great suffering, - all rendering impossible for the people of Kosovo to contemplate a future within Serbia¹⁶¹. Albania, likewise, referred to the illegal deprivation of Kosovo's autonomy which led to those systematic and widespread violations of human rights, also including, in addition to ethnic cleansing, summary executions, torture and rape, forced disappearance of persons, forceful displacement of persons, in the hands of Serbian forces and paramilitaries¹⁶². Albania stated that over 1,5 million Kosovar Albanians were forcibly expelled from their homes, and argued that the denial of internal self-determination of Kosovo points to its independence¹⁶³.

151. Denmark also singled out the tragic events of the nineties; it contended that those gross human rights violations, led to the adoption of resolution 1244 (1999) of the Security Council, so as to address the real and daily needs of the "people" of Kosovo¹⁶⁴. Brazil identified, in the adoption of Security Council resolution 1244(1999), a "clear rejection", by the U.N. "collective security system", of "the use of the veil of sovereignty by any State to perpetrate heinous crimes against its own population"¹⁶⁵. In the view of Spain, the grave situation of violations of human rights, of International Humanitarian Law, and of the rights of minorities in Kosovo, was "settled" in 1999, with the adoption of Security Council resolution 1244 (1999)¹⁶⁶. Russia, in its turn, stated that resolution 1244 (1999) of the Security Council was the result of the tragedy which fell upon

¹⁶⁰ICJ, doc. CR 2009/24, of 01.12.2009, pp. 33-34.

¹⁶¹ICJ, doc. CR 2009/25, of 02.12.2009, pp. 15-19.

¹⁶²ICJ, doc. CR 2009/26, of 02.12.2009, pp. 8-9.

¹⁶³*Ibid.*, pp. 9 and 31.

¹⁶⁴ICJ, doc. CR 2009/29, of 07.12.2009, pp. 66 and 74-75.

¹⁶⁵ICJ, doc. CR 2009/28, of 04.12.2009, p. 17.

¹⁶⁶ICJ, doc. CR 2009/30, of 08.12.2009, p. 18.

Kosovo, of the conflict which victimized its “community”, and of the acts of terrorism of the Kosovo Liberation Army (KLA)¹⁶⁷.

152. The United States, on its part, argued that Kosovo, having suffered a tragedy, marked by oppression and massive and systematic abuses of human rights, became detached from Serbia¹⁶⁸. In turn, Croatia stressed that the illegal removal of the autonomy of Kosovo was followed by the systematic repression and grave violations of the human rights of its population, which, in turn, were followed by the U.N. international administration of Kosovo and the development, thereunder, of its self-administration¹⁶⁹; in Croatia’s view, Kosovo has now elements of statehood, and all this development should be taken into account by the ICJ¹⁷⁰.

153. Jordan recalled the well-documented history in Kosovo of discrimination, police brutality, arbitrary imprisonment, torture, ethnic cleansing, war crimes and crimes against humanity, victimizing the “people” of Kosovo, as from the denial of its autonomy in 1989; it further recalled that Kosovo’s declaration of independence of 17.02.2008 provided for its international supervision and human rights guarantees¹⁷¹; Jordan further contended that, in these circumstances, the “people” of Kosovo are entitled to independence, emerged within the context of the disintegration of the SFRY in 1991¹⁷². The Netherlands, likewise, warned that there was an atmosphere of terror in Kosovo, with the killings, sexual assaults and forcible displacements; those grave breaches by Serbia, - it added, - generated the lawful exercise by the “people” of Kosovo of external self-determination, and the recognition of such right by the ICJ would in its view contribute to peace and stability in the region¹⁷³.

154. In the view of Finland, the atrocities perpetrated in Kosovo render it necessary to create the conditions wherein Kosovo’s “communities” can live in peace and justice; hence, with the impossibility of returning to the *statu quo ante*, the emergence of the State of Kosovo, with its declaration of independence of 17.02.2008¹⁷⁴. The United Kingdom, on its part, after recalling the “human rights catastrophe” which followed the revocation of Kosovo’s autonomy in 1989, argued that secession is not regulated by international law, territorial integrity applies only to international relations, Article 1 of the two U.N. Covenants on Human Rights is not limited to decolonization cases only, and the stability which prevails in the region today flows, in its view, from Kosovo’s independence¹⁷⁵.

155. All the aforementioned participants, as just seen, saw it fit to lay particular emphasis on the conditions of living – actually, of surviving, - of the population of Kosovo in the period concerned, namely, as from the revocation by Serbia of Kosovo’s autonomy (constitutionally ensured since 1974) in 1989, that led to the great suffering imposed upon the population throughout a whole decade, until 1999. I feel obliged to leave on the records this aspect of the substantial advisory proceedings before this Court (written and oral phases), as, for reasons which escape my

¹⁶⁷ICJ, doc. CR 2009/30, of 08.12.2009, p. 45.

¹⁶⁸ICJ, doc. CR 2009/30, of 08.12.2009, pp. 31 and 33.

¹⁶⁹ICJ, doc. CR 2009/29, of 07.12.2009, p. 57.

¹⁷⁰*Ibid.*, p. 61.

¹⁷¹ICJ, doc. CR 2009/31, of 09.12.2009, pp. 28-31.

¹⁷²*Ibid.*, pp. 30-32, 36-37, 39 and 41.

¹⁷³ICJ, doc. CR 2009/32, of 10.12.2009, pp. 8, 11, 13 and 16.

¹⁷⁴ICJ, doc. CR 2009/30, of 08.12.2009, pp. 52-53, 61 and 64.

¹⁷⁵ICJ, doc. CR 2009/32, of 10.12.2009, pp. 42, 50 and 54.

comprehension, they are not even referred to in the present Advisory Opinion of the Court. Significantly, that suffering of the population of Kosovo has now found judicial recognition, to which I shall turn next.

X. JUDICIAL RECOGNITION OF THE ATROCITIES IN KOSOVO

156. As already indicated, the recent decision of the ICTFY (Trial Chamber) in the *Milutinovic et al.* case (2009), was in fact referred to, in the course of the written and oral phases of the present proceedings before the ICJ, by several participants (cf. *supra*). A careful reading of the judgment of the ICTFY (Trial Chamber) of 26 February 2009 discloses facts, determined by it, which appear to me of relevance to the ICJ for the purposes of the requested Advisory Opinion. The Trial Chamber of the ICTFY was very attentive to the atrocities perpetrated in Kosovo along the nineties. In my view, the ICJ, in the same line of thinking, cannot make abstraction of them.

157. In its judgment of 26 February 2009 in the *Milutinovic et al.* case, the Trial Chamber of the ICTFY found that there had been in Kosovo, in the period concerned, a “joint criminal enterprise”, with the intent to commit crimes or to cover them up (paras. 95-96). The targeted groups - the victims - were civilians (para. 145). By means of the suppression of Kosovo’s autonomy and of that “joint criminal enterprise”, Kosovo was placed firmly under the control of Serbian authorities, and the Kosovo Albanian population became object of repressive and discriminatory practices, which led to the emergence of the KLA (paras. 211-213 and 222). In 1990, Kosovo had already become a “police State”, with detentions and restrictions on the freedom of information; in 1991 professors and officials of the University of Pristina were removed and replaced by non-Albanians (paras. 224-225). By then, a system of discrimination against Kosovo Albanian workers was already imposed, and maintained throughout the nineties (paras. 226-228).

158. State-sanctioned discrimination took place even in the workplace, in labour relations; it was reported in the United Nations in 1992 the “dismissal of thousands of Kosovo Albanian workers, and the effect of the ‘Law on Labour Relations under Special Circumstances’”, as well as “the measures taken by the Serbian authorities in Kosovo” (paras. 229-230). As from 1989, “laws, policies and practices were instituted that discriminated against the Albanians, feeding into local resentment and feelings of persecution” (para. 237). Those fears increased in 1996, with the emergence of the KLA, and its actions thereafter (para. 237).

159. Furthermore, impunity prevailed, as the local judicial system was not effective “in investigating, prosecuting, and punishing those responsible for committing serious crimes against the civilian population” (para. 569). As a result of all this, and particularly of the “excessive and indiscriminate force used by the forces of the FRY and Serbia in 1998”, massive forced displacement took place: the United Nations (its High Commissioner for Human Rights) estimated that 285,500 people had been internally displaced towards the end of 1998 (paras. 913 and 918-919). In its resolution 1199 (1998), of 23.09.1998, the Security Council expressed its “grave concern” about “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army” (para. 916). The Trial Chamber of the ICTFY established the occurrence of an armed conflict on the territory of Kosovo in 1998-1999 (para. 1217).

160. Last but not least, the Trial Chamber of the ICTFFY saw it fit to refer also to the efforts undertaken to reach a peaceful settlement of the humanitarian crisis of Kosovo. It recalled, in this connection, that, at the Conference of Rambouillet (1999), Kosovo Albanians - unlike S. Milosevic for Serbia - signed the agreement only after the inclusion of chapter 8, foreseeing the taking into

account, for the determination of the status of Kosovo, first and foremost, “the will of the people in Kosovo” (para. 401).

XI. FURTHER EVIDENCE OF THE ATROCITIES IN KOSOVO: THE CENTRALITY OF THE SUFFERINGS OF THE PEOPLE

161. The substantial evidence obtained by the ICTFY in its judgment of 26 February 2009 in the *Milutinovic et al.* case (2009), is by no means the only one. A detailed account of the systematic and gross violations of the rights of workers in Kosovo (as from 1990), in flagrant breach of the fundamental principle of equality and non-discrimination, and in further “violation of the principles of the rule of law”, is provided in the detailed Written Comments (of 17.07.2009) of Slovenia, lodged with this Court. Other sources could be referred to¹⁷⁶.

162. The argument that, since the utmost violence of 1998-1999 one decade has passed and the “conflict is over”, somehow “buried” into oblivion, and that there is peace today in Kosovo and the aforementioned repression belongs to the past, is in my view superficial, if not unsustainable. It leads precisely to approach the matter from a “technical” point of view, making abstraction of the human sufferings of the recent past. The effects of oppression are still present, and account for Kosovo’s declaration of independence on 17 February 2008. One cannot erase the massive violations of human rights and of International Humanitarian Law of the recent past, by invoking the passing of time. In this respect, in its Written Comment submitted to this Court, France has aptly pondered that

“[w]hatever the political changes seen in Serbia since the fall of the Milosevic régime, the trauma and scars of the past were (and still are) far from healed. The brutal

¹⁷⁶For example, Amnesty International opened its Report on Kosovo of 24.07.2006 with the warning that “respect for the human rights of all, without discrimination, should lie at the heart of the talks process. This should be a central and unifying consideration in all decisions and agreements made about the future of Kosovo” (para. 1). Almost one year later, in its subsequent Report on Kosovo of May 2007, Amnesty International, dwelling upon the ongoing forced displacement of persons, further warned that “[i]n addition to ongoing ethnically motivated attacks, impunity for past inter-ethnic violence - including war crimes, and in particular impunity for ‘disappearances’ and abductions, and continued impunity for perpetrators of the ethnic violence of March 2004, - continues to provide a massive barrier to minority return” (par. 3.2). - On its part, the 1999 Report of the OSCE Kosovo Verification Mission, provided an account of its findings in the period ranging from October 1998 to June 1999. In its foreword, Justice Louise Arbour warned that “the violence in Kosovo was horrific, and again proved devastating for the many ordinary people who became its victims” (p. 1). The atrocities comprised arbitrary arrest and detention, denial of fair trial, torture, rape and other forms of sexual violence (sometimes applied as a weapon of war), killings, targeting of children, forced expulsion on a massive scale, destruction of property and looting, - all “highly organized and systematic”. Acts of utmost violence perpetrated in, e.g., Rogovo, Rakovina, Kacanik, Raçak, Pristina. According to the OSCE Report, by June 1999 over 90 per cent of the Kosovo Albanian population (over 1.45 million people) had been displaced by the conflict. In its summary (p. 2), the same Report stressed that “[o]n the part of the Yugoslav and Serbian forces, their intent to apply mass killing as an instrument of terror, coercion or punishment against Kosovo Albanians was already in evidence in 1998, and was shockingly demonstrated by incidents in January 1999 (including the Raçak mass killing and beyond)”. - In its turn, the Report of Human Rights Watch Humanitarian Law Violations in Kosovo, covering the period February-September 1998, gave a detailed account of grave breaches of International Humanitarian Law which took place (forced disappearances, killings, destruction of villages, arbitrary arrests, looting of homes by the police, burning of crops, taking of hostages and extrajudicial executions), victimizing mainly civilians, including “indiscriminate attacks on women and children”¹⁷⁶. Special police forces acted in a planned, quick and well-organized manner, and “autopsies were not performed on any of the victims”¹⁷⁶. There was a sustained pattern of serious crimes (duly reported) committed by the Serbian special police, in distinct localities of Kosovo¹⁷⁶. Summing up, the Report attributed the majority of those acts of brutality to the government forces of the Serbian special police (MUP) and the Yugoslav Army (VJ), under the command of Yugoslav President Slobodan Milosevic; it attributed violence also, on a “lesser scale”, to the Kosovo Albanian insurgency, the Kosovo Liberation Army (KLA), and added: - “The primary responsibility for gross government abuses lies with Slobodan Milosevic, who rode to power in the late eighties by inciting Serbian nationalist chauvinism around the Kosovo issue”; Human Rights Watch, Humanitarian Law Violations in Kosovo, London/N.Y., HRW, 1998, pp. 3-22 and pp. 26-65.

repression - and international crimes accompanying it - to which the Kosovar population was subjected in 1998-1999 could but prevent it from contemplating a future within the Serbian State, so deep the psychological wounds go (and still do) and so well entrenched in minds was (and still is) the memory of the atrocities committed. There are crimes which cannot fade from the individual and collective memory” (para. 18).

163. To attempt to make abstraction of the suffering of the people or population of Kosovo in the years of repression is an illusory exercise. The scars of the bloodshed will take a long time to heal, they will take generations to heal. The experience, in this connection, of the recent adjudication by international human rights tribunals such as the Inter-American and the European Courts of Human Rights, of *cases of massacres* lodged with them, contains invaluable lessons, worthy of attention and deserving of being rescued in this respect. One of such lessons lies in the enhanced *centrality* of the position of those victimized by human cruelty, and of their suffering.

164. To recall but one example of the recent cycle of *cases of massacres* brought before, and adjudicated by, international human rights tribunals (a noticeable advance of the old ideal of the realization of international justice), - in the case of the *Moiwana Community versus Suriname*, the massacre of the members of that Community (by State-organized, trained and armed perpetrators) had taken place in late 1986, but only two decades later, their case, lodged with the Inter-American Court of Human Rights, was adjudicated by this latter (Judgment on the merits, of 15.06.2005). In my Separate Opinion in the *Moiwana Community* case, I deemed it fit to ponder:

“The circumstances of the present case of the *Moiwana Community versus Suriname* invite one to a brief reflection, going beyond its confines. Well before, as well as after, the attainment of statehood by Suriname, the existence of the Maroon peoples (like the Saramakas in the *Aloboetoe* case and the N’djukas in the present *Moiwana Community* case, before this Court) has been marked by suffering, in their constant struggle against distinct forms of domination.

The projection of human suffering in time (its temporal dimension) is properly acknowledged, e.g., in the final document of the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Dunbar, 2001), its adopted Declaration and Programme of Action. In this respect, it began by stating that

‘We are conscious of the fact that the history of humanity is replete with major atrocities as a result of gross violations of human rights and believe that lessons can be learned through remembering history to avert future tragedies’ (para. 57).

It then stressed the ‘importance and necessity of teaching about the facts and truth of the history of humankind’, with a view to ‘achieving a comprehensive and objective cognizance of the tragedies of the past’ (par. 98). In this line of thinking, the Durban final document acknowledged and profoundly regretted the ‘massive human suffering’ and the ‘tragic plight’ of millions of human beings caused by the atrocities of the past; it then called upon States concerned ‘to honour the memory of the victims of past tragedies’, and affirmed that, wherever and whenever these occurred, ‘they must be condemned and their recurrence prevented’ (par. 99).

The Durban Conference final document attributed particular importance to remembering the crimes and abuses of the past, in emphatic terms:

‘We emphasize that remembering the crimes or wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the truth about history, are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity’ (para. 106). (...)

In the present case of the *Moiwana Community*, the *handicap* of, or harm suffered by, the survivors of the massacre and close relatives of the direct victims, of the massacre perpetrated on 29 November 1986 in the N’djuka Maroon village of Moiwana, is a spiritual one. Under their culture, they remain still tormented by the circumstances of the violent deaths of their beloved ones, and the fact that the deceased did not have a proper burial. This privation, generating spiritual suffering, has lasted for almost twenty years, from the moment of the perpetration of the 1986 massacre engaging the responsibility of the State until now. The N’djukas have not forgotten their dead. (...) Nor could they. (...)

For the first time in almost two decades, since the massacre at Moiwana village in 1986, the survivors found redress, with the present Judgment of the Inter-American Court. In the meantime, the N’djukas did not, and could not, forget their innocent and defenceless beloved relatives, murdered in cold blood. And they will never forget them, but their suffering - theirs together with their dead - has now been at least judicially recognized. Their long-standing longing for justice may now be fulfilled, so that they can rest in peace with their beloved deceased.

(...) The usual blindness of power-holders as to human values has not succeeded - and will never succeed - in avoiding human thinking to dwell upon the conception of human mortality, to reflect on the enigmas of existence and death. (...)

Human thinking on mortality has, in fact, accompanied humankind in all ages and cultures. In the old Paleolithic times, there was a cult to the memory, and in ancient Egypt the living and their dead remained close together¹⁷⁷. In ancient Greece, a new sensitivity towards *post mortem* destiny arose¹⁷⁸. It need only be recalled, as two examples among many, namely, Plato’s contribution, in securing the continuity of human experience through the immortality and transmigration of the soul, as well as Budha’s contribution of detaching human suffering from in his view what originates it, the desires¹⁷⁹. The myth of the ‘eternal return’ (or repetition), so widespread in ancient societies (as in Greece), conferring upon time a cyclic structure, purported to annul (or even abolish) the irreversibility of the passing of time, to contain or withhold its virulence, and to foster regeneration¹⁸⁰.

In modern times, however, human beings became ineluctably integrated into history and to the idea of ‘progress’, implying the ‘definitive abandonment of the paradise of the archetypes and of the repetition’¹⁸¹, proper of ancient cultures and religions. In the Western world, there came to prevail, in the XXth century, an attitude of clearly avoiding to refer to death; there came to prevail a ‘great silence’

¹⁷⁷J.L. de León Azcárate, *La Muerte y Su Imaginario en la Historia de las Religiones*, Bilbao, Universidad de Deusto, 2000, pp. 24-25, 37, 50-51 and 75.

¹⁷⁸*Ibid.*, pp. 123 and 130.

¹⁷⁹J.P. Carse, *Muerte y Existencia - Una Historia Conceptual de la Mortalidad Humana*, Mexico, Fondo de Cultura Económica, 1987, pp. 85 and 167.

¹⁸⁰M. Eliade, *El Mito del Eterno Retorno*, Madrid/Buenos Aires, Alianza Ed./Emecé Ed., 2004, pp. 90-91.

¹⁸¹*Ibid.*, p. 156.

about death¹⁸². Contemporary Western societies came to 'prohibit' the consideration of death at the same time that they fostered hedonism and material well-being¹⁸³.

While ancient cultures were very respectful of the elderly, 'modern' societies try rather to put them aside¹⁸⁴. Ancient cultures ascribe great importance to the relationships between the living and the dead, and to death itself as part of life. Modern societies try in vain to minimize or ignore death, rather pathetically. Nowadays there is stimulus simply to forget (...)"¹⁸⁵.

165. In the present Advisory Opinion, the ICJ should not have eluded, as it did, the consideration of the facts - the atrocities undergone by the people in Kosovo in the decade 1989-1999 - which led to the adoption by the U.N. Security Council of its resolution 1244(1999). This factual background was taken note of in several preceding resolutions of the Security Council itself, as well as of the General Assembly and ECOSOC, and in reports of the U.N. Secretary General. One cannot avoid the sunlight with a blindfold. That factual background has been duly captured by human conscience, by the United Nations as a whole, - whether the ICJ evades it or not. It is of great importance to keep the *grave humanitarian tragedy* of Kosovo in mind, so as to avoid the repetition in the future of the crimes against humanity therein committed in the course of a decade.

166. At this stage of my Separate Opinion in the present Advisory Opinion of the ICJ, may I summarize the factual background and context of the present request for an Advisory Opinion of the ICJ. As pointed out by several participants in their Written Statements and Comments, as well as in the course of their oral arguments in the public hearings before this Court, the forcible removal, in 1989, by the Serbian authorities, of Kosovo's autonomy, led to the humanitarian catastrophe, which reached the point of highest tension in 1998-1999. During this catastrophe, grave and successive violations of human rights and of international humanitarian law occurred, including mass killings, war crimes, crimes against humanity, ethnic cleansing, massive refugee flows, massive forcible displacement of large segments of the population. Over 1,5 million Kosovar Albanians were forcibly expelled from their homes.

167. There were systematic and widespread violations of human rights, including torture and rape, forced disappearance of persons, abductions, indiscriminate attacks on women, targeting of children, taking of hostages, arbitrary arrests, summary and extrajudicial executions, in the hands of Serbian forces and paramilitaries. There also occurred destruction of property, looting of homes by the police, burning of crops, - all highly organized and systematic.

168. State-sanctioned discrimination took place in the workplace, in labour relations, in public health, and in education. The basic needs of the population were no longer met with, as a result of State-sanctioned discrimination. The judicial system failed to work, and total impunity prevailed. Systematic and gross violations of the rights of workers in Kosovo occurred (as from 1990) in flagrant violation of the fundamental principle of equality and non-discrimination, and in further breach of the rule of law. As violence breeds violence, as from the mid-nineties KLA violence was added to the context of social disruption in Kosovo. The State-planned widespread

¹⁸²Ph. Ariès, *Mourir en Occident depuis la Edad Media hasta Nuestros Días*, Buenos Aires, A. Hidalgo Ed., 2000 (reed.), pp. 196-199, and cf. pp. 213 and 238.

¹⁸³*Ibid.*, p. 251.

¹⁸⁴Cf. [Various authors,] *Dialogue among Civilizations - The Round Table on the Eve of the United Nations Millennium Summit*, Paris, UNESCO, 2001, p. 84 (intervention by E. Morin).

¹⁸⁵IACtHR, case of the *Moiwana Community versus Suriname*, Judgment (merits) of 15.06.2005, Series C, n. 124, Separate Opinion of Judge A.A. Cançado Trindade, paras. 24-27, 29-30, 33 and 35-38.

oppression created an atmosphere of terror, and led to the adoption of resolution 1244 (1999) of the Security Council, so as to address the pressing daily needs of the “people” or “population” of Kosovo.

XII. THE PEOPLE-CENTERED OUTLOOK IN CONTEMPORARY INTERNATIONAL LAW

1. “People” or “Population” and Statehood Revisited

169. In the past, expert writing on statehood seemed obsessed with one of the constitutive elements of statehood, namely, territory. The obsessions of the past with territory became reflected, in the legal profession, in the proliferation of writings on the matter, in particular on the acquisition of territory. Those past obsessions led to the perpetration of the abuses of colonialism, and other forms of dominance or oppression. All this happened at a time when international law was approached from the strict and reductionist outlook of inter-State relations, overlooking - or appearing even oblivious of - the needs and legitimate aspirations of the subjugated peoples.

170. The preconditions for statehood in International Law remain those of an objective international law, irrespective of the “will” of individual States. As to the classic prerequisites of statehood, gradually greater emphasis has shifted from the element of territory to that of the normative system¹⁸⁶. In more recent times, it has turned to that of the population, - pursuant to what I would term as the people-centered outlook in contemporary international law, - reflecting the current process of its *humanization*, as I have been sustaining for many years. In fact, the law of nations has never lost sight of this constitutive element - the most precious one - of statehood: the “population” or the “people”, irrespective of the difficulties of international legal thinking¹⁸⁷ to arrive at a universally-accepted definition of what a “people” means.

171. Even some exercises of the past, - which have proven to be long-lasting and still valuable, - disclosed concern with the conditions of living of the “people” or the “population”, in an endeavour which at their time was perhaps not grasped with sufficient clarity. Thus, the *célèbre* 1933 Montevideo Convention on the Rights and Duties of States was adopted at the VII International Conference of American States, as the most significant achievement of a Latin American initiative prompted by a regional resentment against interventionist and certain commercial) policies. The *Proceedings (Actas)* of the Montevideo Conference reveal that the *travaux préparatoires* of the aforementioned 1933 Convention were marked by reliance on principles of international law, so as to protect “small or weak nations”¹⁸⁸.

172. Those principles emanated from the “juridical conscience” of the continent¹⁸⁹. In the course of that Conference’s debates on the Draft Convention, there were in fact reiterated

¹⁸⁶Cf., e.g., K. Marek, *Identity and Continuity of States in Public International Law*, 2nd. ed., Geneva, Droz, 1968, pp. 1-619.

¹⁸⁷The endeavours of conceptualization of “people”, in connection with the exercise of self-determination in international law, have given rise to much discussion in recent decades, which have, however, remained inconclusive to date. Cf., on this particular point, e.g., J. Summers, *Peoples and International Law*, Leiden, Nijhoff, 2007, pp. XXXIII, 26, 73, 164, 174-175, 244-245, 269-270, 306, 314 and 404.

¹⁸⁸[Actas de la] VII Conferencia Internacional Americana (1933) - II Comisión: interventions of Haiti (pp. 12-13), Nicaragua (pp. 15 and 60-61), Ecuador (p. 34), Argentina (pp. 38 and 40-41), El Salvador (p. 52) and Cuba (p. 60) [original document deposited in the Columbus Memorial Library - OAS, Washington D.C.; copy of the document on file with me].

¹⁸⁹*Ibid.*, interventions of Colombia (pp. 43-45 and 57-59), Brazil (p. 55), Nicaragua (pp. 62-63 and 72) and Uruguay (pp. 65-67).

expressions of concern with the conditions of living of the *peoples (pueblos)* of the continent¹⁹⁰. It comes, thus, as no surprise, that the 1933 Montevideo Convention, adopted on 26.12.1933 (having entered into force on 26.12.1934), in dwelling upon the prerequisites of statehood, already at that time referred *first* to the population, and then to the other elements. In the wording of its Article I,

“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States”.

2. The Principle of Self-Determination of Peoples under Prolonged Adversity or Systematic Oppression

173. In our age of the advent of international organizations, the former experiments of the mandates system (in the League of Nations era), and of the trusteeship system (under the United Nations), to which the contemporary (and distinct) U.N. experiments of international administration of territory (such as Kosovo and East Timor) can be added, display one common denominator: the concern with the conditions of living, the well-being and the human development of the peoples at issue, so as to free them from the abuses of the past, and to empower them to become masters of their own destiny (cf. *supra*).

174. The historical process of emancipation of peoples in the recent past (mid-XXth century onwards) came to be identified as emanating from the principle of self-determination, more precisely external self-determination. It confronted and overcame the oppression of peoples as widely-known at that time. It became widespread in the historical process of decolonization. Later on, with the recurrence of oppression as manifested in other forms, and within independent States, the emancipation of peoples came to be inspired by the principle of self-determination, more precisely internal self-determination, so as to oppose tyranny.

175. Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it. The principle of self-determination has survived decolonization, in order to face nowadays new and violent manifestations of systematic oppression of peoples. International administration of territory has thus emerged in U.N. practice (in distinct contexts under the U.N. Charter, as, e.g., in East Timor and in Kosovo). It is immaterial whether, in the framework of these new experiments, self-determination is given the qualification of “remedial”, or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.

176. No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the “people” or “population” victimized. What has happened in Kosovo is that the victimized “people” or “population” has sought independence, in reaction against systematic and long-lasting terror and oppression, perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination (cf. *infra*). The basic lesson is clear: no State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not *vice-versa*.

¹⁹⁰*Ibid.*, interventions of Mexico (pp. 20-21), Ecuador (p. 34), Chile (p. 48) and Nicaragua (pp. 62-63).

XIII. PRINCIPLES OF INTERNATIONAL LAW, THE LAW OF THE UNITED NATIONS AND THE HUMANE ENDS OF THE STATE

1. Territorial Integrity in the Framework of Those Humane Ends

177. Along the last four decades, growing attention has been turned to the treatment dispensed by States to the populations concerned. This has become a matter of concern in contemporary international law. The debate on *human* security has echoed in the U.N. General Assembly along the last decade, reminding States that theirs is the duty *to protect and to empower* their inhabitants. They cannot engage in criminal activities against their population. Human conscience has again awakened to respond to the pressing need to secure that abuses of the past and the present are no longer committed in the future, to the detriment of the population. Two illustrations may be recalled in this connection.

178. The celebrated resolution 2625(XXV) of 1970 of the U.N. General Assembly, containing the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations¹⁹¹, states in paragraph 5(7) that:

- “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples 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*” [emphasis added].

179. The Court could, and should, have given close attention to this particular paragraph of the U.N. Declaration of Principles, when it recalled another passage of the 1970 Declaration in paragraph 80 of the present Advisory Opinion on *Accordance with International Law of Kosovo’s Declaration of Independence*. After all, this paragraph of the U.N. Declaration of Principles has a direct bearing on the question put to the Court by the General Assembly, and should at least have been considered together with the paragraph that the Court saw it fit to refer to. The relevance of compliance with the principle of equal rights and self-determination of peoples, in relation to the States’ territorial integrity, as set forth in paragraph 5(7) of the 1970 Declaration, has not passed unnoticed along the years in expert writing on this particular subject¹⁹².

180. Thus, in the line of the previous considerations, the government of a State which incurs into grave and systematic violations of human rights ceases to represent the people or population victimized. This understanding has been reiterated, in even stronger terms, at the outcome of the

¹⁹¹Hereinafter referred to as the “1970 U.N. Declaration of Principles”.

¹⁹²Cf., e.g., Milan Sahovic, “Codification des principes du Droit international des relations amicales et de la coopération entre les États”, 137 Recueil des Cours de l’Académie de Droit International de La Haye (1972) pp. 295 and 298; O. Sukovic, “Principle of Equal Rights and Self-Determination of Peoples”, in *Principles of International Law concerning Friendly Relations and Cooperation* (ed. M. Sahovic), Belgrade, Institute of International Politics and Economics/Oceana, 1972, pp. 338-341, 346-347 and 369-373; G. Arangio-Ruiz, *The U.N. Declaration on Friendly Relations and the System of the Sources of International Law*, Alphen aan den Rijn, Sijthoff/Noordhoff, 1979, pp. 135-136 and 140-141; P. Thornberry, “The Principle of Self-Determination”, in *The United Nations and the Principles of International Law - Essays in Memory of M. Akehurst* (eds. V. Lowe and C. Warbrick), London/N.Y., Routledge, 1994, pp. 176 and 192-195.

II World Conference on Human Rights held in Vienna, by the 1993 Vienna Declaration and Programme of Action (paragraph 2), which restates:

- “(...) The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind*” [emphasis added].

181. The final document of a memorable United Nations World Conference, - the II World Conference on Human Rights of 1993, - went further than the 1970 Declaration of Principles, in proscribing discrimination “*of any kind*”. The massive violations of human rights and international humanitarian law to which the Kosovar Albanians were subjected in the nineties met the basic criterion set forth in the 1970 U.N. Declaration of Principles, and enlarged in scope in the 1993 final document of the U.N.’s II World Conference on Human Rights. The entitlement to self-determination of the victimized population emerged, as the claim to territorial integrity could no longer be relied upon by the willing victimizers.

2. The Overcoming of the Inter-State Paradigm in International Law

182. Principles of international law, as formulated in the U.N. Charter (Article 2) and restated in the 1970 U.N. Declaration of Principles, besides retaining their full validity in our days, have had significant projections in time, accompanying *pari passu*, and guiding, the evolution of international law itself. This applies to the seven restated principles¹⁹³ in the 1970 Declaration of Principles (to which the ICJ has been attentive in its case-law)¹⁹⁴, including *the principle of equality of rights and self-determination of peoples*, pointing towards the overcoming of the traditional inter-State dimension of International Law.

183. In the restatement of the principle of equality of rights and self-determination of peoples by the 1970 U.N. Declaration of Principles of International Law, it was explained that even a non-self-governing territory (under chapter XI of the U.N. Charter) has a separate and distinct status from the territory of the State which administers it, so that the people living therein can exert

¹⁹³Namely: 1) the principle of the prohibition of the threat or use of force in international relations; 2) the principle of peaceful settlement of disputes; 3) the principle of non-intervention in the internal affairs of States; 4) the States’ duty of international cooperation in accordance with the U.N. Charter; 5) the principle of equality of rights and self-determination of peoples; 6) the principle of sovereign equality of States; and 7) the principle of good faith in the fulfillment of obligations in accordance with the U.N. Charter.

¹⁹⁴As, for example, and as well-known, in its Advisory Opinion on Western Sahara of 1975, and in its Judgments in the Nicaragua versus United States case of 1986, and in the East Timor case of 1995.

their right of self-determination in accordance with the principles and purposes of the U.N. Charter¹⁹⁵.

184. Recent developments in contemporary international law were to disclose the dimensions both *external* and *internal* of the right of self-determination of peoples: the former meant the right of every people to be free from any form of foreign domination, and the latter referred to the right of every people to choose their destiny in accordance with their own will, if necessary – in case of systematic oppression and subjugation - against their own government. This distinction¹⁹⁶ challenges the purely inter-State paradigm of classic international law. In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples¹⁹⁷ under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation.

185. The emergence and evolution of the International Law of Human Rights came to concentrate further attention in the treatment dispensed by the State to all human beings under its jurisdiction, in the *conditions of living* of the population, in sum, in the function of the State as promoter of the common good. If the legacy of the II World Conference on Human Rights (1993) convened by the United Nations is to be summed up, it surely lies in the recognition of *the legitimacy of the concern of the international community as a whole with the conditions of living of the population everywhere and at any time*¹⁹⁸, with special attention to those in situation of greater vulnerability and standing thus in greater need of protection. Further than that, this is the common denominator of the recent U.N. cycle of World Conferences along the nineties, which sought to conform the U.N. agenda for the dawn of the XXIst century. Ironically, while the international community was engaged in this exercise, at the same time discriminatory practices and grave violations of human rights and international humanitarian law kept on being perpetrated in Kosovo, and the news of those practices and violations promptly echoed in the United Nations.

186. Both the Security Council and the General Assembly, as well as other organs of the United Nations, promptly responded to the aggravation of the *humanitarian crisis* in Kosovo, by means of a series of resolutions they adopted (cf. *supra*). Security Council resolution 1244(1999) itself, adopted on 10 June 1999, established UNMIK, drawing attention to the “grave humanitarian situation in Kosovo”¹⁹⁹, amounting to a “humanitarian tragedy”²⁰⁰. It condemned all acts of

¹⁹⁵The international legal status of that territory (under chapter XI of the U.N. Charter) generates likewise obligations of respect for the right of self-determination of the people living in it, as well as for the safeguard of the human rights of its inhabitants; cf., in this respect, e.g., I. Brownlie, “The Rights of Peoples in Modern International Law”, in *The Rights of Peoples* (ed. J. Crawford), Oxford, Clarendon Press, 1988, pp. 1-16; [Various authors,] *Les résolutions dans la formation du droit international du développement* (Colloque de 1970), Genève, IUHEI, 1971, pp. 63-67.

¹⁹⁶Endorsed in expert writing; cf., e.g., A. Cassese, *Self-Determination of Peoples - A Legal Reappraisal*, Cambridge, University Press, 1995, pp. 1-365; P. Thornberry, “The Principle of Self-Determination”, in *The United Nations and the Principles of International Law...*, op. cit. *supra* n. (192), pp. 175-203; Ch. Tomuschat, “Self-Determination in a Post-Colonial World”, in *Modern Law of Self-Determination* (ed. Ch. Tomuschat), Dordrecht, Nijhoff, 1993, pp. 1-20; A. Rosas, “Internal Self-Determination”, in *ibid.*, pp. 225-251; J. Salmon, “Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?”, in *ibid.*, pp. 253-282.

¹⁹⁷Cf., on the matter, e.g., United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. doc. HRI/GEN/1/Rev.3, of 15.08.1997, p. 13, paras. 1-2 and 6.

¹⁹⁸A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2nd. ed., vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 241-242; *ibid.*, 1st. ed., vol. II, 1999, pp. 263-276; *ibid.*, 1st. ed., vol. III, 2003, pp. 509-510.

¹⁹⁹Preamble, para. 4.

²⁰⁰Preamble, para. 6.

violence against, and repression of, the population in Kosovo²⁰¹. It called for, and insisted on, the voluntary and safe return of all refugees and (internally) displaced persons to their homes²⁰².

187. Its major concern was with the *population* in Kosovo; it thus decided to facilitate a “political process designed to determine Kosovo’s future status”²⁰³. To that end, and “pending a final settlement”, it further decided to promote “substantial autonomy and self-government in Kosovo”²⁰⁴. Accordingly, two years after the adoption of Security Council resolution 1244(1999), the Head of UNMIK, Special Representative of the U.N. Secretary-General (Mr. H. Haekkerup), promulgated, on 15 May 2001, the newly-created “*Constitutional Framework for Provisional Self-Government in Kosovo*”²⁰⁵. The adoption of this document resulted from a concerted dialogue involving UNMIK itself, Kosovo’s authorities and members of its distinct communities; significantly, the Constitutional Framework was not “conceptually linked” to any State, and rather addressed an “internationalized territory”²⁰⁶.

188. It went beyond the strict inter-State paradigm in international law. The aforementioned Constitutional Framework favoured the emergence of a “multi-ethnic civil society”, guided by the principles of protection to the national communities and of supervision by the Special Representative of the U.N. Secretary-General. In this understanding, it delegated to local institutions in Kosovo parts of the responsibility that UNMIK itself had undertaken since mid-1999, thus taking a relevant step towards the attainment of self-government in Kosovo²⁰⁷. In Kosovo’s evolving domestic legal order in its new era, a key role was reserved to the fundamental principles of equality and non-discrimination, and of humanity (in the framework of the *Law of the United Nations*), to which I shall now turn.

3. The Fundamental Principle of Equality and Non-Discrimination

189. I have already referred to the fact that the “principle of identical treatment in law and in fact” found judicial recognition, by the PCIJ, before the 1948 Universal Declaration of Human Rights (cf. paras. 70-71, *supra*). And even before that, it was deeply-engraved in human conscience. More recently, the ICJ, in its *célèbre* Advisory Opinion on *Namibia* of 1971, pointed out that “the injured entity” was a “people”, which had to “look to the international community for assistance (para. 127). In their Separate Opinions, Judge Ammoun stressed the relevance of “the principles of equality, liberty and peace” embodied in the U.N. Charter and the 1948 Universal Declaration (pp. 72 and 76-77), and Judge Padilla Nervo stressed the U.N. Charter’s call (Articles 1(3) and 76(c)) for the promotion of respect for human rights “for all, without distinction as to race (...)” (pp. 111 and 126).

190. The fundamental principle of equality and non-discrimination is indeed of the utmost importance in the framework of the *Law of the United Nations*. When the United Nations engaged itself in the protection of the inhabitants of trust territories (chapter XII of the U.N. Charter), or else

²⁰¹Preamble, para. 5; operative part, para. 3; Annex 1; and Annex 2, para. 1.

²⁰²Preamble, para. 7; operative part, para. 9(c), 11(k) and 13; Annex 1; Annex 2(4) and (7).

²⁰³Operative part, para. 11(e).

²⁰⁴Operative part, para. 11(a).

²⁰⁵U.N. doc. UNMIK Regulation 2001/9.

²⁰⁶Carsten Stahn, “Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government”, 14 *Leiden Journal of International Law* (2001) pp. 542 and 544.

²⁰⁷*Ibid.*, pp. 531-532, 557-558 and 561.

of non-self-governing territories (chapter XI), its humanitarian initiatives intended to bring about changes in the international legal order itself, as part of the historical process of its *humanization*. In its outlook, sovereignty “resided with the people, was at their service; such “people-centred vision of sovereignty” was remindful of the preamble of the United Nations Charter, evoking “We, the peoples of the United Nations”; this outlook is further illustrated by some rather novel conceptions, such as States’ automatic succession into human rights treaties, or extra-territorial application of human rights²⁰⁸.

191. International law, freed from the strictness and reductionism of the inter-State paradigm of the past, is nowadays conceived with due account of the fundamental principle of equality and non-discrimination. The U.N. Human Rights Committee itself, supervisory organ under the U.N. Covenant on Civil and Political Rights, has pronounced on States’ automatic succession into human rights treaties (*general comment* n. 26, of 1997, on “continuity of obligations”, para. 4) and on extra-territorial application of human rights (*general comment* n. 31, of 2004, on “the nature of the general legal obligation imposed on States Parties”, para. 10)²⁰⁹.

192. There is nowadays a considerable number of international instruments informed by, and conformed on the basis of, the fundamental principle of equality and non-discrimination. It is the case, *inter alia*, of 1965 U.N. Convention on the Elimination of All Forms of Racial Discrimination, of the 1973 U.N. Convention on the Suppression and Punishment of the Crime of *Apartheid*, of the 1979 U.N. Convention on the Elimination of All Forms of Discrimination against Women, of the 1985 Convention against *Apartheid* in Sports, of the 1990 U.N. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, of the 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1958 I.L.O. Convention (n. 111) Concerning Discrimination in Respect of Employment and Occupation, the 1960 UNESCO Convention against Discrimination in Education, to name a few.

193. It goes beyond the scope of the present Separate Opinion to proceed to an examination of these instruments. At this stage, I limit myself to add that, parallel to this impressive law-making work on the basis of the fundamental principle of equality and non-discrimination, this latter has generated in recent decades much doctrinal writing (on pertinent provisions of human rights treaties in force)²¹⁰ and an equally impressive jurisprudential construction on the principle at

²⁰⁸As timely recalled by Carsten Stahn, *The Law and Practice of International Territorial Administration – Versailles to Iraq and Beyond*, Cambridge, University Press, 2008, pp. 112 and 755-756; and cf. pp. 753 and 759, for the U.N. proactive State-building practice developed as from the nineties.

²⁰⁹Cf. text in: U.N., *International Human Rights Instruments – Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, vol. I, doc. HRI/GEN/1/Rev.9 (vol. I), of 27.05.2008, pp. 223 and 245. - As to State succession, may it be recalled that, a resolution of the Institut de Droit International (of 26.08.2001), though covering State succession in matters of property and debts rather than treaties, nevertheless acknowledged the need “to clarify and improve the situation of individuals” (Article 5(2)), and affirmed, in the preamble, that “all situations leading to a succession of States should take place in full conformity with public international law, and in particular with humanitarian law and human rights”. Cf. 69 *Annuaire de l’Institut de Droit International - Session de Vancouver (2000-2001)* pp. 715 and 717. And, in relation to State succession as well as extra-territorial application of human rights, cf. further, *inter alia*, comments in: F. Pocar, “Patto Internazionale sui Diritti Civili e Politici ed Estradizione”, in *Diritti dell’Uomo, Estradizione ed Espulsione (Atti del Convegno di Ferrara di 1999 per Salutare G. Battaglini, ed. F. Salerno)*, Padova/Milano, Cedam, 2003, pp. 89-90.

²¹⁰Cf., *inter alia*, e.g., J. Symonides (ed.), *The Struggle against Discrimination*, Paris, UNESCO, 1996, pp. 3-43; T. Opsahl, *Law and Equality - Selected Articles on Human Rights*, Oslo, Ad Notam Gyldendal, 1996, pp. 165-206; M. Bossuyt, *L’interdiction de la discrimination dans le Droit international des droits de l’homme*, Bruxelles, Bruylant, 1976, pp. 1-240; N. Lerner, *Group Rights and Discrimination in International Law*, 2nd ed., The Hague, Nijhoff, 2003, pp. 1-187.

issue. As a result of all that, contemporary international law does not lose sight at all of the fundamental principle of equality and non-discrimination, keeps it in mind all the time and in distinct circumstances, with all the implications of this new posture.

194. Attention has thereby been rightly shifted from unaccountable “sovereign” prerogatives of the past onto people-centered rights and accountability of territorial authorities. And it was about time that human conscience awakened to the imperative of doing so, so as to avoid the repetition of the atrocities of the recent past. The fundamental principle of equality and non-discrimination provides the foundation of an impressive series of human rights treaties (*supra*) which integrate the *corpus juris gentium* of contemporary international law. It is, however, by no means only a contemporary phenomenon, as the secular *principle of equality of treatment* in the relations among individuals as well as among peoples is deeply-rooted in the *droit des gens (jus gentium)*²¹¹.

195. Last but not least, on this particular point, I have had the occasion to dwell upon the incidence of the fundamental principle of equality and non-discrimination in a recent decision of this Court. In my Dissenting Opinion in the Court’s Order of 06.07.2010 in the case concerning *Jurisdictional Immunities of the State* (original claim and counter-claim, Germany *versus* Italy), I have deemed it fit to observe that

“(…) As proclaimed, in the aftermath of the II World War, by the 1948 Universal Declaration of Human Rights, ‘[a]ll human beings are born free and equal in dignity and rights’ (Article 1). This prohibition derives from the fundamental principle of equality and non-discrimination. This fundamental principle, according to the Advisory Opinion n. 18 of the Inter-American Court of Human Rights (IACtHR) on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), belongs to the domain of *jus cogens*.

In that transcendental Advisory Opinion of 2003, the IACtHR, in line with the humanist teachings of the ‘founding fathers’ of the *droit des gens (jus gentium)*, pointed out that, under that fundamental principle, the element of equality can hardly be separated from non-discrimination, and equality is to be guaranteed without discrimination of any kind. This is closely linked to the essential dignity of the human person, ensuing from the unity of the human kind. The basic principle of equality before the law and non-discrimination permeates the whole operation of the State power, having nowadays entered the domain of *jus cogens*²¹². In a Concurring Opinion, it was stressed that the fundamental principle of equality and non-discrimination permeates the whole *corpus juris* of the International Law of Human Rights, has an impact in Public International Law, and projects itself onto general or customary international law itself, and integrates nowadays the expanding material content of *jus cogens*²¹³“ (paras. 134-135).

²¹¹Cf. Association Internationale Vitoria-Suárez, Vitoria et Suárez: Contribution des théologiens au Droit international moderne, Paris, Pédone, 1939, pp. 38-39.

²¹²IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the Juridical Condition and Rights of Undocumented Migrants, Series A, n. 18, paras. 83, 97-99 and 100-101.

²¹³*Ibid.*, Concurring Opinion of Judge A.A. Cançado Trindade, paras. 59-64 and 65-73. - In recent years, the IACtHR, together with the ad hoc International Criminal Tribunal for the Former Yugoslavia, have been the contemporary international tribunals which have most contributed, in their case-law, to the conceptual evolution of *jus cogens* (well beyond the law of treaties), and to the gradual expansion of its material content; cf. A.A. Cançado Trindade, “Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law”, in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – OAS (2008) pp. 3-29.

4. The Fundamental Principle of Humanity in the Framework of the Law of the United Nations

196. In the present Separate Opinion, I have already pointed out that the experiments of international organizations of mandates, minorities protection, trust territories, and, nowadays, international administration of territory, have not only turned closer attention to the “people” or the “population”, to the fulfillment of the needs, and the empowerment, of the inhabitants, but have also fostered - each one in its own way – their access to justice at international level (para. 90, *supra*). Such access to justice is understood *lato sensu*, i.e., as encompassing the *realization of justice*. Those experiments of international organizations (rendered possible by the contemporary expansion of the international legal personality, no longer a monopoly of States) have contributed to the vindication by individuals of their own rights, emanated directly from the *droit des gens*, from the law of nations itself.

197. In my perception, this is one of the basic features of the new *jus gentium* of our times. After all, every human being is an end in himself or herself, and, individually or collectively, is entitled to enjoy freedom of belief and “freedom from fear and want”, as proclaimed in the preamble of the Universal Declaration of Human Rights (para. 2). Every human person has the right to respect for his or her dignity, as part of the human kind. The recognition of this fundamental *principle of humanity* is one of the great and irreversible achievements of the *jus gentium* of our times. At the end of this first decade of the XXIst century, the time has come to derive the consequences of the manifest non-compliance with this fundamental principle of humanity.

198. Rights inherent to the human person are endowed with universality (the unity of the human kind) and timelessness, in the sense that, rather than being “conceded” by the public power, they truly precede the formation of the society and of the State. Those rights are independent of any forms of socio-political organization, including the State created by society. The rights inherent to the human person precede, and are superior to, the State. All human beings are to enjoy the rights inherent to them, for belonging to humankind. As a corollary of this, the safeguarding of such rights is not exhausted – it cannot be exhausted – in the action of States. By the same token, States are not to avail themselves of their entitlement to territorial integrity to violate systematically the personal integrity of human beings subject to their respective jurisdictions.

199. States, created by human beings gathered in their social *milieu*, are bound to protect, and not at all to oppress, all those who are under their respective jurisdictions. This corresponds to the minimum ethical, universally reckoned by the international community of our times. States are bound to safeguard the integrity of the human person from systematic violence, from discriminatory and arbitrary treatment. The conception of fundamental and inalienable human rights is deeply-engraved in the universal juridical conscience; in spite of variations in their enunciation or formulation, their conception marks presence in all cultures, and in the history of human thinking of all peoples²¹⁴.

200. This was captured in one of the rare moments, - if not glimpses, - of lucidity in the XXth century (marked by successive atrocities victimizing millions of human beings), namely, that of the proclamation, by the U.N. General Assembly, of the Universal Declaration of Human Rights, on 10 December 1948. In the present Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the ICJ did not even mention, -

²¹⁴Cf., e.g., [Various Authors,] *Universality of Human Rights in a Pluralistic World* (Proceedings of the 1989 Strasbourg Colloquy), Strasbourg/Kehl, N.P. Engel Verlag, 1990, pp. 45, 57, 103, 138, 143 and 155.

not even once, - the Universal Declaration of Human Rights; as one of the Members of the Court, I feel, however, obliged to dwell upon it, given the considerable importance that I attribute to the Universal Declaration, in interaction with the United Nations Charter, for the consideration of a subject-matter like the one raised before the Court for the present Advisory Opinion.

201. I feel not only obliged, but likewise entirely free to do so, since, unlike the Advisory Opinion of the Court, in the present Separate Opinion I made a point of filling a void, by not eluding the *cause* of the grave humanitarian crisis in Kosovo, underlying not only the adoption of Security Council resolution 1244(1999), but also the following declaration of independence of Kosovo, one decade later, of 17.02.2008. In fact, it should be kept in mind that the acknowledgement of the principle of respect for human dignity was introduced by the 1948 Universal Declaration, and is at the core of its basic outlook. It firmly asserts: - “All human beings are born free and equal in dignity and rights” (Article 1). And it recalls that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind” (preamble, para. 2). The Universal Declaration warns that

“it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law” (preamble, para. 3);
and it further acknowledges that

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (preamble, para. 1).

202. Since the adoption of the Universal Declaration in 1948, one could hardly anticipate that a historical process of generalization of the international protection of human rights was being launched, on a truly universal scale. Throughout more than six decades, of remarkable historical projection, the Declaration has gradually acquired an authority which its draftsmen could not have foreseen. This happened mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a “common standard of achievement” (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations²¹⁵.

203. The Universal Declaration is widely recognized as having inspired, and paved the way for, the adoption of more than 70 human rights treaties²¹⁶, and as having served as a model for the

²¹⁵Already throughout the travaux préparatoires of the Universal Declaration (particularly in the thirteen months between May 1947 and June 1948), the holistic view of all rights to be proclaimed promptly prevailed. Such outlook was espoused in the official preparatory work of the Declaration, i.e., the debates and drafting in the former U.N. Commission on Human Rights (rapporteur, René Cassin) and subsequently in the Third Committee of the General Assembly. In addition, in 1947, in a contribution to the work then in course in the U.N. Commission on Human Rights, UNESCO undertook an examination of the main theoretical problems raised by the elaboration of the Universal Declaration; it circulated, to some of the most influential thinkers of the time around the world, a questionnaire on the relations between rights of individuals and groups in societies of different kinds and in distinct historical circumstances, as well as the relations between individual freedoms and social or collective responsibilities. For the answers provided, cf. *Los Derechos del Hombre - Estudios y Comentarios en torno a la Nueva Declaración Universal Reunidos por la UNESCO*, Mexico/Buenos Aires, Fondo de Cultura Económica, 1949, pp. 97-98 (Teilhard de Chardin), 181-185 (Aldous Huxley), 14-22 and 69-74 (Jacques Maritain), 24-27 (E.H. Carr), 129-136 (Quincy Wright), 160-164 (Levi Carneiro), 90-96 (J. Haesaert), 75-87 (H. Laski), 143-159 (B. Tchechko), 169-172 (Chung-Shu Lo), 23 (M.K. Gandhi), 177-180 (S.V. Puntambekar), and 173-176 (H. Kabir). The two U.N. World Conferences on Human Rights (Teheran, 1968; and Vienna, 1993) have given concrete expression to the interdependence of all human rights and to their universality, enriched by cultural diversity.

²¹⁶Applied today on a permanent basis at global (U.N.) and regional levels, and all containing references to it in their preambles.

enactment of numerous human rights norms in national constitutions and legislations, and helped to ground decisions of national and international courts. The Declaration has been incorporated into the domain of customary international law, much contributing to render human rights the common language of humankind.

204. The Universal Declaration, moreover, is today widely recognized as an authoritative interpretation of human rights provisions of the Charter of the United Nations itself, heralding the transformation of the social and international order to secure the enjoyment of the proclaimed rights. In the preamble of the United Nations Charter, “the peoples of the United Nations” express their determination “to save succeeding generations from the scourge of war” (para. 1), and “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person” (para. 2). This last assertion is repeated in the 1948 Universal Declaration (para. 5). The U.N. Charter, furthermore, repeatedly calls for universal respect for all, without distinction as to race, sex, language, or religion (Articles 1(3), 13(1)(b), 55(c), and 76(c)).

205. Grave breaches of fundamental human rights (such as mass killings, the practice of torture, forced disappearance of persons, ethnic cleansing, systematic discrimination) are in breach of the *corpus juris gentium*, as set forth in the U.N. Charter and the Universal Declaration (which stand above the resolutions of the U.N.’s political organs), and are condemned by the universal juridical conscience. Any State which systematically perpetrates those grave breaches acts criminally, and loses its legitimacy, ceases to be a State for the victimized population, as it thereby incurs into a gross and flagrant reversal of the humane ends of the State.

206. Under contemporary *jus gentium*, no State can revoke the constitutionally-guaranteed autonomy of a “people” or a “population” to start then discriminating, torturing and killing innocent persons, or expelling them from their homes and practicing ethnic cleansing, - without bearing the consequences of its criminal actions or omissions. No State can, after perpetrating such heinous crimes, then invoke or pretend to avail itself of territorial integrity; the fact is that any State that acts this way ceases to behave like a State *vis-à-vis* the victimized population.

207. An international organization of universal vocation and scope of action like the United Nations, created on behalf of the peoples of the world (*supra*), is fully entitled to place under its protection a population that was being systematically discriminated against, and victimized by grave breaches of human rights and international humanitarian law, by war crimes and crimes against humanity. It is fully entitled, in my understanding, to assist that population to become master of its own destiny, and is thereby acting in pursuance of its Charter and the dictates of the universal juridical conscience.

208. In a historical context such as the one under review, the claim to territorial integrity, applicable in *inter-State relations*, is not absolute as some try to make one believe. If one turns to *intra-State* relations, territorial integrity and human integrity go together, with State authority being exercised harmoniously with the condition of the population, aiming to fulfill their needs and aspirations. Territorial integrity, in its *intra-State* dimension, is an entitlement of States which act truly like States, and not like machines of destruction of human beings, of their lives and of their

spirit²¹⁷. By the same token, self-determination is an entitlement of “peoples” or “populations” subjugated in distinct contexts (not only that of decolonization), systematically subjected to discrimination and humiliation, to tyranny and oppression. Such condition of inhumane subjugation goes against the Universal Declaration and the United Nations Charter altogether. It is in breach of the *Law of the United Nations*.

209. Last but not least, the fundamental principle of humanity has been asserted also in the case-law of contemporary international tribunals. In the case of the *Massacre of Plan de Sánchez* (Judgment of 29.04.2004), concerning Guatemala, for example, at a certain stage of the proceedings before the IACtHR, the respondent State accepted its international responsibility for violations of rights guaranteed under the American Convention on Human Rights, and, in particular, for “not guaranteeing the right of the relatives of the (...) victims and members of the community to express their religious, spiritual and cultural beliefs” (para. 36). In my Separate Opinion in that case, I pondered that the primacy of the principle of humanity is identified with the very end or ultimate goal of the Law, of the whole legal order, both domestic and international, in recognizing the inalienability of all rights inherent to the human person (para. 17).

210. That principle marks presence - I added - not only in the International Law of Human Rights, but also in International Humanitarian Law, being applied in all circumstances. Whether it is regarded as underlying the prohibition of inhuman treatment (established by Article 3 common to the four Geneva Conventions on International Humanitarian Law of 1949), or else as by reference to humankind as a whole, or still to qualify a given quality of human behaviour (*humaneness*), the principle of humanity is always and ineluctably present (paras. 18-20). The *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY - Trial Chamber) likewise devoted attention to that principle in its Judgments in, e.g., the cases of *Mucic et alii* (of 20.02.2001) and of *Celebici* (of 16.11.1998). It may further be recalled that the *Martens clause*, which permeates the *corpus juris* of International Humanitarian Law from the times of the I Hague Peace Conference (1899) to our days, invokes and sustains the continued applicability of the principles of the law of nations, the “principles of humanity” and the “dictates of the public conscience”²¹⁸.

²¹⁷Already the ancient Greeks were aware of the devastating effects of the indiscriminate use of force and of war over both winners and losers, revealing the great evil of the substitution of the ends by the means: since the times of the *Illiad* of Homer until today, - as so perspicaciously pondered by Simone Weil, one of the great thinkers of the XXth century, - all “belligerents” are transformed in means, in things, in the senseless struggle for power, incapable even to “subject their actions to their thoughts”. The terms “oppressors and oppressed” almost lose meaning, in face of the impotence of everyone in front of the machine of war, converted into a machine of destruction of the spirit and of fabrication of the “inconscience”; S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131. As in the *Illiad* of Homer, there are no winners and losers, all are taken by force, possessed by war, degraded by brutalities and massacres; S. Weil, “*L'Iliade ou le Poème de la Guerre (1940-1941)*” in *Oeuvres*, Paris, Quarto Gallimard, 1999, pp. 527-552. Homer's perennial message, - as to “the butchery of men” and the “wretched lives” of all those involved in endless fighting (cf. Homer, *The Iliad*, N.Y./London, Penguin Books, 1991 [reed.], pp. 222 and 543-544, verses 275-281 and 83-89), - is as valid and poignant in his times in ancient Greece as in our days. Along the centuries, the “butchery of men” has continued occurring endlessly (cf., e.g., Bartolomé de Las Casas, *Tratados*, vol. I, Mexico, Fondo de Cultura Económica, 1997 [reprint], pp. 14-199, and cf. pp. 219, 319 and 419), and lessons do not yet seem to have been sufficiently learned, - in particular the pressing need and duty to secure the primacy of Law over brute force. Thus, already in ancient Rome, M.T. Cicero pondered, in his *De Legibus* (On the Laws, book II, circa 51-43 b.C.), that there was “nothing more destructive for States, nothing more contrary to right and law, nothing less civil and humane, than the use of violence in public affairs” (M.T. Cicero, *On the Commonwealth and On the Laws* (ed. J.E.G. Zetzel), Cambridge, University Press, 2003 [reed.], book III, *ibid.*, p. 172). And in his *De Republica* (circa late 50s-46 b.C.), Cicero added that nothing was “more damaging to a State” and “so contrary to justice and law” than recourse “to force through a measure of violence”, where a country had “a settled and established constitution”; M.T. Cicero, *The Republic - The Laws*, Oxford, University Press, 1998, p. 166 (book III, par. 42). All those warnings sound, centuries later, in our days, quite contemporary...

²¹⁸Cf. ICJ, case concerning Jurisdictional Immunities of the State (Order of 06.07.2010, original claim and counter-claim, Germany versus Italy), Dissenting Opinion of Judge Cañado Trindade, paras. 126 and 136-139.

211. The same principle of humanity, - I concluded in the aforementioned Separate Opinion in the case of the *Massacre of Plan de Sánchez*, - also has incidence in the domain of International Refugee Law, as disclosed by the facts of the *cas d'espèce*, involving massacres and the State-policy of *tierra arrasada*, i.e., the destruction and burning of homes, which generated a massive forced displacement of persons (para. 23). Cruelties of the kind occur in different latitudes, in Europe as in the Americas, and in the other regions of the world, - human nature being what it is. The point I wish to make here is that the principle of humanity operates, in my view, in a way to foster the convergences among the three trends of the international protection of the rights inherent to the human person (International Law of Human Rights, International Humanitarian Law and International Refugee Law).

XIV. TOWARDS A COMPREHENSIVE CONCEPTION OF THE INCIDENCE OF *JUS COGENS*

212. May I now refer back to my brief reflections on the principle *ex injuria jus non oritur* (cf. *supra*, paras. 132-137), in order to address another point touched upon by the present Advisory Opinion of the ICJ on *Accordance with International Law of Kosovo's Declaration of Independence*. As I pointed out therein, in the years preceding the adoption of Security Council resolution 1244(1999) - in the decade 1989-1999 - the United Nations *as a whole* was deeply concerned with all sorts of *injuriae* perpetrated against the population of Kosovo; there were successive grave breaches of human rights and of international humanitarian law, committed by all concerned and coming from all sides, seriously victimizing that population, and aggravating Kosovo's *humanitarian crisis*.

213. Yet, the invocation of the principle *ex injuria jus non oritur* by a couple of participants during the advisory proceedings before the Court referred only, in an atomized way, to one or another of the successive grave breaches committed in that period, and none of them referred to the successive *injuriae* as a whole (cf. *supra*). In paragraph 81 of the present Advisory Opinion, the ICJ has expressed concern with, and has drawn attention to, unlawful use of force, or other egregious violations of international law, in particular of peremptory norms of international law. I fully endorse the Court's concern with violations of *jus cogens*, and I go further than the Court in this respect.

214. The Court's *obiter dictum* appears (in para. 81) at the end of its reasoning addressing specifically one aspect, namely, that of the territorial integrity of States, a basic principle applicable at *inter-State* level. The Court, given the classic features of its own Statute and of its Rules (*interna corporis*), is used to reasoning in the straightjacket of the *inter-State* dimension. Yet, the incidence of *jus cogens* transcends that dimension. Egregious violations of international law, in particular of peremptory norms of general international law, have most regrettably taken place both at *inter-State* level (e.g., unlawful use of force, such as the 1999 bombings of Kosovo outside the framework of the U.N. Charter, generating many victims), and at *intra-State* level (e.g., the grave violations of human rights and of international humanitarian law perpetrated in Kosovo along the decade of 1989-1999, victimizing its population).

215. As to these latter, in contemporary international law it is clear that the prohibitions of torture, of ethnic cleansing, of summary or extra-legal executions, of forced disappearance of persons, are *absolute* prohibitions, in any circumstances whatsoever: they are prohibitions of *jus cogens*. Breaches (at *intra-State* level) of those prohibitions, such as those which occurred in Kosovo during its grave humanitarian crisis, are violations of peremptory norms of general international law (i.e., of *jus cogens*), promptly engaging the responsibility of their perpetrators (States and individuals), with all the juridical consequences ensuing therefrom (which have not yet been sufficiently elaborated by international case-law and legal doctrine to date).

216. By bearing in mind only the inter-State dimension, the Court's aforementioned *obiter dictum* has pursued also an unsatisfactory atomized outlook. The truth is that *jus cogens* has an incidence at both *inter-State* and *intra-State* levels, in the relations between States *inter se*, as well as in the relations between States and all human beings under their respective jurisdictions. We may here behold a *horizontal* (inter-State) and a *vertical* (intra-State) dimensions. This is the comprehensive conception of the incidence of *jus cogens* that, in my understanding, the Court should from now on espouse.

217. In this latter (vertical) dimension, in our times, the State's territorial integrity goes hand in hand with the State's respect of, and guarantee of respect for, the human integrity of all those human beings under its jurisdiction. A State's territory cannot be used by its authorities for the pursuance of criminal policies, in breach of *jus cogens* prohibitions (such as the ones aforementioned). A State's territorial borders cannot be used by its authorities, responsible for grave breaches of human rights or of international humanitarian law, as a shelter or shield to escape from the reach of the law and to enjoy impunity, after having committed atrocities which shocked the conscience of humankind. After all, *hominum causa omne jus constitutum est* (all law is created, ultimately, for the benefit of human beings); this maxim, originated in Roman law, is nowadays common to both the national and the international legal orders (the *jus gentium* of our times).

XV. FINAL CONSIDERATIONS: KOSOVO'S INDEPENDENCE WITH U.N. SUPERVISION

218. In view of the Court's reasoning almost entirely on the basis of Security Council resolution 1244(1999), I feel obliged to make a couple of further points in the present Separate Opinion. First, no one would deny the central position here of Security Council resolution 1244(1999), but the fact is that resolution 1244(1999) is the outcome of a political compromise²¹⁹, and, above it and above all resolutions of the Security Council (and of other political organs of the U.N.), lies the *United Nations Charter*. It is the U.N. Charter that is ultimately to guide any reasoning. Secondly, the Court's argument that it "sees no need to pronounce" on other Security Council resolutions adopted "on the question of Kosovo" (as stated in paragraph 86) prior to resolution 1244(1999) (and anyway "recalled" in the preamble of this latter) is, in my view, not well-founded: it simply begs the question.

219. It simply enables the Court to proceed to a "technical" and aseptic examination of Kosovo's declaration of independence of 17.02.2008, making abstraction of the complex and tragic factual background of the *grave humanitarian crisis of Kosovo*, which culminated in the adoption by Security Council of its resolution 1244(1999). While not "pronouncing" on other resolutions of the Security Council (and certainly not of the General Assembly, the importance of which it clearly appears unduly to minimize in paragraph 38), the Court appears at pains when it reckons the need at least to take into account other Security Council resolutions (without "pronouncing" on them), prior to resolution 1244(1999), just to illustrate one aspect of the crisis (in paragraph 116), in an incomplete way²²⁰.

²¹⁹After its adoption, the debate persisted between, on the one hand, those States which laid emphasis on the reference the "territorial integrity" of the F.R. Yugoslavia, found in a preambular paragraph (and Annex 2, para. 8) of resolution 1244(1999), and those States which stressed that that preambular paragraph of the resolution at issue did not create binding obligations and applied only to Kosovo's interim phase, and not to its final status, which was not determined by resolution 1244(1999); cf. A. Tancredi, "Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia", 18 *Italian Yearbook of International Law* (2008) pp. 55-56. In effect, operative paragraph 11(a) of that resolution expressly referred to the promotion of "the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo".

²²⁰Further brief references to those other resolutions of the Security Council are found in paragraphs 91 and 98.

220. The result is that the Court has found it sufficient just to refer briefly and *in passim* to the Kosovo crisis²²¹, without explaining anywhere in the Advisory Opinion what caused that crisis, and what it consisted of; this is exactly what has been addressed in detail by the Security Council resolutions prior to resolution 1244(1999), and by General Assembly resolutions, and by manifestations of other organs of the United Nations. As I do not accompany nor endorse the Court's reasoning, I have felt obliged, as a Member of the Court, to lay down in the present Separate Opinion my own reasoning, which includes a consideration of the reiterated *expressions of grave concern with the humanitarian tragedy in Kosovo* on the part of the Security Council, of the General Assembly, of ECOSOC, of the Secretary General (cf. *supra*), in sum, of the *United Nations as a whole*.

221. To me, the whole factual background should have been treated by the Court with the same zeal and attention to details which prompted it to consider the factual circumstances that surrounded the act of adoption by the Assembly of Kosovo of the declaration of independence. I have concluded, like the Court, that the ICJ has jurisdiction to deliver the Advisory Opinion requested by the General Assembly, that it ought to comply with the General Assembly's request for the Advisory Opinion, and that Kosovo's declaration of independence of 17 February 2008 did not violate international law; but I have so concluded on the basis of my own reasoning, developed in the present Separate Opinion, which is clearly distinct from the Court's reasoning.

222. Another aspect which cannot pass unnoticed here pertains to the recent practice of the Security Council, as reflected in some of its resolutions, of addressing not only States but also non-State entities, and thus going beyond the strict inter-State dimension. The Court briefly refers to it (paragraph 115-117), as well as to the growing need of securing a proper interpretation of resolutions of the Security Council (paragraph 94). Yet, the Court touches on these two points without further elaboration. Without intending to go deeper into this matter, I shall, however, refer here to one additional point, not touched upon by the Court, which in this connection cannot be overlooked.

223. The Security Council's increasing engagement, from the early nineties onwards, in operations not only of peacekeeping, but also of conflict prevention, peacemaking and peacebuilding, has enlarged its horizon as to the exercise of its functions. This is a well-known contemporary phenomenon within the *Law of the United Nations*²²². In this context, the fact that the Security Council has lately started making demands on, besides States, also non-State entities (including groups of individuals), is not so surprising, after all. What, however, needs to be added - as the Court seems to have missed this point - is that the Security Council also has its "*constitutional framework*": the United Nations Charter. However broad its powers might be, or might have become nowadays, they remain limited by the United Nations Charter itself.

224. The Security Council is not the legislator of the world, but rather one of the main political organs of the United Nations, and the central organ entrusted with the maintenance of international peace and security under the U.N. Charter. For the consideration of the question put to the Court by the General Assembly for the present Advisory Opinion, the *Grundnorm* is not Security Council resolution 1244(1999), but rather the United Nations Charter. And the Charter has placed limits on the action of all its organs, including the Security Council. In the case of Kosovo, the Security Council has acted within those limits, and, by means of its

²²¹E.g., paragraphs 95, 97, 98 and 116.

²²²Cf., inter alia, e.g., K. Manusama, *The United Nations Security Council in the Post-Cold War Era - Applying the Principle of Legality*, Leiden, Nijhoff, 2006, pp. 1-320; B.G. Ramcharan, *The Security Council and the Protection of Human Rights*, The Hague, Nijhoff, 2002, pp. 1-213.

resolution 1244(1999), has placed the grave humanitarian crisis of Kosovo within the framework of the Law of the United Nations. This latter, in turn, has been particularly attentive to the conditions of living of the population, in Kosovo as in distinct parts of the world, so as to preserve international peace and security.

225. There is still a remaining line of considerations that I deem proper to add hereto. At the close of the oral proceedings before this Court relating to the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*, in the public sitting of 11 December 2009, I put to the participants the following question:

“- United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11(a), to ‘substantial autonomy and self-government in Kosovo’, taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this *renvoi* to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people’s eligibility into statehood, in the framework of the legal regime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configurations of a ‘people’, and of its eligibility into statehood, under general international law?”

226. Fifteen participants cared to provide their answers to my question: Kosovo²²³, Serbia²²⁴, Albania²²⁵, Argentina²²⁶, Austria²²⁷, Burundi²²⁸, Cyprus²²⁹, Finland²³⁰, France²³¹, The Netherlands²³², Romania²³³, Spain²³⁴, United Kingdom²³⁵, United States²³⁶, and Venezuela²³⁷. After a careful reading of those 15 answers, I am led to extract and select a couple of points, made therein, to which I attach particular importance.

²²³ICJ doc. 2009/115.

²²⁴ICJ doc. 2009/111.

²²⁵ICJ doc. 2009/106.

²²⁶ICJ doc. 2009/110.

²²⁷ICJ doc. 2009/116.

²²⁸ICJ doc. 2009/117.

²²⁹ICJ doc. 2009/109.

²³⁰ICJ doc. 2009/107.

²³¹ICJ doc. 2009/118.

²³²ICJ doc. 2009/108.

²³³ICJ doc. 2009/112.

²³⁴ICJ doc. 2009/114.

²³⁵ICJ doc. 2009/119.

²³⁶ICJ doc. 2009/113.

²³⁷ICJ doc. 2009/120.

227. The *renvoi* of Security Council resolution 1244 (1999) to the Rambouillet Accords was meant to create the conditions for substantial autonomy and an extensive form of self-governance in Kosovo²³⁸, in view of the “unique circumstances of Kosovo”²³⁹ (cf. *supra*). In the course of the following decade (1999-2009), the population of Kosovo was able, thanks to resolution 1244 (1999) of the Security Council, to develop its capacity for substantial self-governance, as its declaration of independence by the Kosovar Assembly on 17 February 2008 shows. Declarations of the kind are neither authorized nor prohibited by international law, but their consequences and implications bring international law into the picture.

228. Furthermore, it would not be necessary to indulge into semantics of what constitutes a “people” either. This is a point which has admittedly been defying international legal doctrine to date. In the context of the present subject-matter, it has been pointed out, for example, that terms such as “Kosovo population”, “people of Kosovo”, “all people in Kosovo”, “all inhabitants in Kosovo”, appear indistinctly in Security Council resolution 1244 (1999) itself²⁴⁰. There is in fact no terminological precision as to what constitutes a “people” in international law²⁴¹, despite the large experience on the matter. What is clear to me is that, for its configuration, there is conjugation of factors, of an objective as well as subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people²⁴²; these are all *factual*, not *legal*, elements, which usually overlap each other²⁴³.

229. It may be recalled that the UNMIK Constitutional Framework for Kosovo (2001) itself (cf. *supra*), clarifying the U.N. approach to matter at issue, pointed out that Kosovo is “an entity” which, “with its people, has unique historical, legal, cultural and linguistic attributes” (para. 1.1)²⁴⁴. To these elements I would add yet another one, - and a significant one, - namely, that of *common suffering*: common suffering creates a strong sense of identity. Many centuries ago, Aeschylus (525-circa 456 b.C.) had an intuition to that, in his penetrating *Oresteian Trilogy*: he made clear, - in the third choral Ode in *Agamemnon*, and in the culmination of the final procession in *The Eumenides*, - that human beings learn by suffering, and they ultimately learn not simply how to avoid suffering, but how to do right and to achieve justice. Nowadays, in 2010, so many centuries later, I wonder whether Aeschylus was being, perhaps, a bit too confident, but, in any case, I

²³⁸Answers by Kosovo (para. 19), Serbia (para. 3.12), United States (pp. 1 and 4), United Kingdom (para. 11), Argentina (para. 4).

²³⁹Answer by the United Kingdom (para. 12). - The Rambouillet Conference brought Europe - besides the U.N. itself - into the framework of the Kosovo crisis, in yet another demonstration that the crisis had become a matter of “international concern”; E. Decaux, “La Conférence de Rambouillet – Négotiation de la dernière chance ou contrainte illicite?”, in *Kosovo and the International Community – A Legal Assessment* (ed. C. Tomuschat), The Hague, Kluwer, 2002, pp. 45-64.

²⁴⁰In preamble para. 5, operative para. 10, and Annex 2 para. 5; in Annex 2 para. 4, operative para. 10; in Annex 1 principle 4; and in Annex 2 para. 5, respectively; Answer by Spain (para. 20).

²⁴¹It has been argued, for example, that, for a human collectivity or a group to constitute a “people” for eligibility to statehood, it would need: *a*) sharing of common background of ethnicity, language, religion, history and cultural heritage; *b*) territorial integrity of the area claimed; *c*) the subjective element of the group’s self-conscious perception as a distinct “people”, able to form a viable political entity; for the view that the Kosovars meet these requirements and constitute a “people”, and, moreover, their right to internal self-determination was not respected by Milosevic-led Serbia, cf., e.g., M. Sterio, “The Kosovar Declaration of Independence: ‘Botching the Balkans’ or Respecting International Law?”, 37 *Georgia Journal of International and Comparative Law* (2008-2009) pp. 277 and 287.

²⁴²Answers by The Netherlands (para. 16), and Albania (paras. 20-21).

²⁴³Answer by Finland (p. 3).

²⁴⁴Cit. in Answer by Austria (p. 2).

greatly sympathize with his brave message, which I regard as a most valuable and a timeless or perennial one.

230. It is true that U.N. Security Council resolution 1244 (1999) did not determine Kosovo's end-status, nor did it prevent or impede the declaration of independence of 17 February 2008 by Kosovo's Assembly to take place. The U.N. Security Council has not passed any judgment whatsoever on the chain of events that has taken place so far. There remains the U.N. presence in Kosovo, under the umbrella of Security Council resolution 1244 (1999). It has operated in favour of Kosovo's "substantial autonomy" and self-government, and, in the view of some, also of its independence²⁴⁵.

231. This is not, after all, so surprising, if one keeps in mind the special attention of the contemporary U.N. experiments of international administration of territory to the conditions of living of the population (in the line of the similar concern of the prior experiments of the mandates system under the League of Nations, and of the U.N.'s trusteeship systems – cf. *supra*), disclosing a *humanizing* perspective. The permanence of U.N. presence in Kosovo, also from now on, appears necessary, for the sake of human security, and the preservation of international peace and security in the region.

232. In the other contemporary example of U.N. international administration of territory, that of *East Timor*, even a few years after the completion of the task of UNTAET and the proclamation of independence of East Timor, the U.N. has been keeping a residual presence in the new State of East Timor until now (mid-2010)²⁴⁶. Would anyone dare to suggest it should be removed? Hardly so. With all the more reason, in the case of Kosovo, given its factual background, the U.N. presence therein seems to remain quite necessary. Kosovo, as a State *in statu nascendi*, badly needs "supervised independence", as recommended in the *Report on Kosovo's future* (2007) presented by the Special Envoy of the U.N. Secretary General (Mr. M. Ahtisaari).

233. That *Report*, accompanied by the Special Envoy's *Comprehensive Proposal for the Kosovo Status Settlement*, presented in mid-March 2007²⁴⁷, contains proposals of detailed measures aiming at: (a) ensuring the promotion and protection of the rights of communities and their members; (b) the effective decentralization of government and public administration (so as to encourage public participation); (c) the preservation and protection of cultural and religious heritage. The ultimate goal is the formation and consolidation of a multi-ethnic democratic society. To that end, Kosovo will have no "official" religion, will promote the voluntary and safe return of refugees and internally displaced persons, will secure *direct applicability* in domestic law of provisions of human rights treaties and international instruments, will secure representation of non-majority communities in its Assembly, will have Albanian and Serbian as official languages, will secure the formation and establishment of an independent Judiciary based upon the rule of law.

234. Furthermore, Kosovo will secure the prevalence of the fundamental principle of equality and non-discrimination, the exercise of the right of participation in public life, and of the

²⁴⁵Cf. to this effect, e.g., G. Serra, "The International Civil Administration in Kosovo (...)", op. cit. *supra* n. (56), pp. 77-78, 81-82 and 87.

²⁴⁶By means of its resolution 1704(2006), of 25.08.2006, the Security Council established the new U.N. Integrated Mission in East Timor (UNMIT), whose mandate has ever since been renewed (Security Council resolutions 1802(2008) of 25.02.2008, and 1867(2009) of 26.02.2009); recently, by its resolution 1912 (2010) of 26.02.2010, the Security Council has again renewed UNMIT's mandate for one year.

²⁴⁷Cf. U.N. docs. S/2007/168 and S/2007/168/Add.1.

right of equal access to justice by everyone. In the framework of all these proposed measures, the safeguard of the rights of the members of the Serb community (as a minority) assumes special importance²⁴⁸, as well as the promotion of the preservation of the cultural and religious heritage²⁴⁹ of all communities as an integral part of the heritage of Kosovo.

235. In its declaration of independence of 17 February 2008, Kosovo's Assembly expressly accepts the recommendations of the U.N. Special Envoy's *Comprehensive Proposal for the Kosovo Status Settlement*²⁵⁰, and adds that

“We declare Kosovo to be a democratic, secular and multi-ethnic Republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo (...)”²⁵¹.

In the declaration of independence, Kosovo's Assembly, furthermore, accepts the continued presence of the U.N. in Kosovo, on the basis of Security Council resolution 1244(1999)²⁵², and expresses its commitment to “act consistent with principles of international law and resolutions of the Security Council”, including resolution 1244(1999)²⁵³.

236. The Special Representative of the U.N. Secretary-General continues, in effect, to exercise its functions in Kosovo to date, as the Court recalls in paragraph 92 of the present Advisory Opinion on *Accordance with International Law of Kosovo's Declaration of Independence*; but, contrary to what may be inferred from the Court's brief reference (without any analysis) to the *Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, issued after the declaration of independence by Kosovo's Assembly (period 2008-2010)²⁵⁴, the situation in Kosovo today is not the same as at the time of its declaration of independence. An examination of the aforementioned *Reports* indicates that Kosovo's situation has undergone changes in the period 2008-2010.

237. Thus, the *Report of the Secretary-General* of 24.11.2008, for example, commented that Kosovo's declaration of independence and its new Constitution posed difficulties and challenges to UNMIK's ability to exercise its administrative authority, but it has never stated that the evolving circumstances represented a violation of resolution 1244(1999) of the Security Council; it has never attempted to “annul” that declaration of independence (para. 21). The Secretary-General admitted making adjustments in UNMIK in the light of the evolving circumstances, rather than opposing these latter, and he added that this would be done by means of a “reconfiguration process” of the international presence in Kosovo (paras. 22-25). He insisted on such UNMIK “reconfiguration” in his *Reports* of 17.03.2009 (paras. 12-14 and 16-17), and of 10.06.2009 (paras. 18-20).

²⁴⁸As the riots of 2004 indicate.

²⁴⁹With the continuous and undisturbed existence and operation of the Serbian Orthodox Church in Kosovo.

²⁵⁰Preamble, para. 12; operative part, paras. 1, 3, 4, 5 and 12.

²⁵¹Operative part, para. 2.

²⁵²Operative part, para. 5.

²⁵³Operative part, para. 12.

²⁵⁴Ever since Kosovo's declaration of independence, six Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo have been issued, and reproduced in the following documents: U.N. doc. S/2008/692, of 24.11.2008, pp. 1-23; U.N. doc. S/2009/149, of 17.03.2009, pp. 1-18; U.N. doc. S/2009/300, of 10.06.2009, pp. 1-17; U.N. doc. S/2009/497, of 30.09.2009, 1-19; U.N. doc. S/2010/169, of 06.04.2010, pp. 1-19; and U.N. doc. S/2010/5, of 05.01.2010, pp. 1-18, respectively.

238. In his following *Report*, of 30.09.2009, the Secretary General informed that the “gradual adjustment” and “reconfiguration” of UNMIK had been “successfully concluded” (para. 2), and its role was now that of promotion of security and stability in Kosovo and in the Balkans (para. 3), defusing tensions and facilitating practical cooperation with all communities in Kosovo “as well as between the authorities in Pristina and Belgrade” (paras. 3 and 46-47). The same outlook has been pursued in the two most recent *Reports of the Secretary General* (of 2010), which indicate, as areas of priority, those of elections and decentralization, security, rule of law, returns, cultural and religious heritage, community issues, human rights, and Kosovo’s representation and engagement in international and regional forums (*Reports* of 05.01.2010, paras. 15-46, and of 06.04.2010, paras. 16-38). In sum, there has been an apparent acceptance by UNMIK of the new situation, after Kosovo’s declaration of independence, in view of its successive endeavours to adjust itself to the circumstances on the ground, so as to benefit the population concerned.

239. In conclusion, States exist for human beings and not *vice-versa*. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State. This distortion led States to regard themselves as final repositories of human freedom, and to treat individuals as means rather than as ends in themselves, with all the disastrous consequences which ensued therefrom. The expansion of international legal personality entailed the expansion of international accountability.

240. States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population. Thrown into lawlessness, their victims sought refuge and survival elsewhere, in the *jus gentium*, in the law of nations, and, in our times, in the *Law of the United Nations*. I dare to nourish the hope that the conclusion of the present Advisory Opinion of the International Court of Justice may conform the closing chapter of yet another long episode of the timeless saga of the human kind in search of emancipation from tyranny and systematic oppression.

(Signed) Antônio Augusto CANÇADO TRINDADE.
