Kosovo in the International Court of Justice

Kosova në Gjykatën Ndërkombëtare të Drejtësisë

Ministry of Foreign Affairs of the Republic of Kosovo
Ministria e Punëve të Jashtme e Republikës së Kosovës,
2010
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Hisashi Owada, President of the Court

H.E. Mr. Skender Hyseni, Head of the Kosovo Delegation to the Court

Sir Michael Wood, Principal Legal Advisor

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KOSOVO IN THE INTERNATIONAL COURT OF JUSTICE

H.E. Skender Hyseni

In accordance with Resolution 63/3 of 8 October 2008, the United Nations General Assembly tasked the International Court of Justice, the principal judicial organ of the United Nations, to render an Advisory Opinion on whether the Declaration of Independence of Kosovo was in compliance with the International Law. The Resolution was adopted with 77 votes in favor, 6 against and 74 abstentions.

Based on Article 65(2) of the Statute of the International Court of Justice, the UN Secretary General, on 30 January 2009, handed over to the Court a dossier with documents which could shed light on the raised question. The Court has set a clear time- frame within which the interested states could submit written statements and comments. The Court eventually has decided and established the sequence of oral hearings.

Thirty seven states submitted their written statements at the first stage until 17 April 2009. During the second stage, the one of comments to the written statements, fifteen states submitted written comments. From 1-11 December 2009, the Court organized hearings in which twenty nine (29) states participated. The Republic of Kosovo participated in all stages of the Court proceedings.

Following the UNGA request to the International Court of Justice for an Advisory Opinion, the institutions of the Republic of Kosovo swiftly undertook the necessary action to build the strongest case and defense possible, and to represent Kosovo before the Court. On 15 October 2008, the President and the Prime Minister authorized the Minister of Foreign Affairs of the Republic of Kosovo to represent the Republic of Kosovo before the International Court of Justice. On 16 October 2008 decided to task the Ministry of Foreign Affairs of the Republic of Kosovo with the coordination of all activities related to the ICJ. The Government also decided to appoint Sir Michael Wood, a legal expert, to lead the legal team.

It was for the first time in the history of the International Court of Justice that all five Permanent Members of the Security Council (United States, United Kingdom, France, Russian Federation and China), have participated in an Advisory Proceedings. The Proceedings were also characterized by the participation of a large number of the UN Member States.

The Court's Opinion was delivered on 22 July 2010. The Opinion was announced by the President of the Court Hisashi Owada at a public sitting at the Peace Palace in The Hague.

With an overwhelming majority, the Court concluded that the Declaration of Independence of Kosovo did not violate International Law.

The Court reconfirmed the trust we have consistently placed in the international justice, as well as the profound trust in the natural right of the people of Kosovo to freedom, a right to be free of repression and terror and a right to decide independently on its destiny. The content of the Opinion has also

reconfirmed our expressed trust in the substance and force of our argument related to the question raised in the Court. At all stages of the proceedings we were engaged in a hard work aimed at building up and presenting our case comprehensively and in the most convincing manner possible. Having said that, I wish to emphasize the indispensible support and credit that goes to all countries that have supported Kosovo throughout these proceedings. After all, it was a victory for the cause of Kosovo, a victory of the people of Kosovo and its allies.

This edition, which is published for the needs of the Ministry of Foreign Affairs of Kosovo, namely for the purpose of promotion of the ICJ Opinion, is designed to offer a comprehensive and systematic collection of all oral and written statements of the Republic of Kosovo, as well as of all concluding oral statements by the states that have participated in support of Kosovo.

(Minister of Foreign Affairs of the Republic of Kosovo)

Kosova në Gjykatën Ndërkombëtare të Drejtësisë

Sh.T. Skender Hyseni

Me rezolutën 63/3 të miratuar më 8 tetor 2008, Asambleja e Përgjithshme i ka kërkuar Gjykatës Ndërkombëtare të Drejtësisë, organit kryesor gjyqësor të Kombeve të Bashkuara, dhënien e një mendimi këshillëdhënës në pyetjen nëse Deklarata e Pavarësisë së Kosovës është në pajtim me të drejtën ndërkombëtare. Rezoluta është miratuar me 77 vota për, 6 kundër dhe 74 abstenime.

Mbështetur në nenin 65(2) të Statutit të Gjykatës Ndërkombëtare të Drejtësisë, më 30 janar 2009, Sekretari i Përgjithshëm i OKB-së i ka dorëzuar Gjykatës një dosje me dokumente që mund të hidhnin dritë në pyetjen e kërkuar. Gjykata ka përcaktuar afatet kohore brenda të cilave shtetet e interesuara do të mund të paraqisnin deklaratat, përkatësisht komentet me shkrim, si dhe më vonë ka vendosur dhe përcaktuar dinamikën e mbajtjes së seancave dëgjimore. Gjykata e ka ftuar edhe Kosovën që të paraqesë kontributet me shkrim dhe të marrë pjesë në seancat dëgjimore.

Në fazën e parë me shkrim, deri më 17 prill 2009, 37 shtete kanë dorëzuar deklarata me shkrim. Në fazën e dytë, atë të komenteve ndaj deklaratave me shkrim, komente me shkrim kanë paraqitur 15 shtete. Në periudhën midis 1 dhe 11 dhjetorit 2009, Gjykata ka organizuar seanca dëgjimore, me të cilin rast argumentet e tyre i kanë paraqitur 29 shtete. Republika e Kosovës ka marrë pjesë në të gjitha fazat e procesit në Gjykatë.

Menjëherë pas kërkesës së Asamblesë së Përgjithshme për mendim këshillëdhënës nga Gjykata Ndërkombëtare e Drejtësisë, institucionet e Republikës së Kosovës kanë ndërmarrë veprimet e duhura për të ndërtuar një mbrojtje sa më të fortë dhe për të përfaqësuar Kosovën në Gjykatë. Më 15 tetor 2008, Presidenti dhe Kryeministri kanë autorizuar Ministrin e Punëve të Jashtme të Republikës së Kosovës ta përfaqësojë Republikën e Kosovës në Gjykatën Ndërkombëtare të Drejtësisë. Me datë 16 tetor 2008, Qeveria e Republikës së Kosovës ka vendosur që aktivitetet e koordinimit në relacion me Gjykatën Ndërkombëtare të Drejtësisë të udhëhiqen nga Ministria e Punëve të Jashtme dhe gjithashtu ka marrë vendim për emërimin e ekspertit ligjor, Sir Michael Wood si udhëheqës të ekipit ligjor.

Ka qenë hera e parë në historinë e Gjykatës që të pesë anëtarët e përhershëm të Këshillit të Sigurimit (Shtetet e Bashkuara të Amerikës, Mbretëria e Bashkuar, Franca, Federata Ruse dhe Kina), kanë marrë pjesë në një proces këshillëdhënës. Procesi është karakterizuar nga një pjesëmarrje numerikisht shumë e madhe e shteteve anëtare të OKB-së.

Mendimi i Gjykatës është shpallur me datën 22 korrik 2010. Mendimi është lexuar nga Presidenti i Gjykatës, Hisashi Owada, në një seancë publike në Pallatin e Paqes në Hagë.

Gjykata konstatoi, me shumicë dërmuese, se Deklarata e Pavarësisë së Kosovës nuk ka shkelur të drejtën ndërkombëtare. Mendimi i Gjykatës ishte eksplicit dhe i qartë, duke vendosur në favor të Kosovës në të gjitha pikat.

Gjykata e rikonfirmoi besimin që kemi artikuluar në mënyrë konsistente në drejtësinë ndërkombëtare, sikundër dhe besimin e thellë në të drejtën e natyrshme të popullit të Kosovës për të qenë i lirë nga shtypja dhe terrori dhe për të përcaktuar në mënyrë të pavarur fatin e vetë. Përmbajtja e Mendimit ka rikonfirmuar edhe besimin e shprehur në forcën dhe substancën e argumentit tonë për pyetjen që i ishte parashtruar Gjykatës. I gjithë procesi është përcjellë nga një punë e palodhshme që kemi bërë për të ndërtuar argumentet tona dhe paraqitur rastin tonë në tërësinë e përmbajtjes së tij më të mirë dhe më të plotë të mundshme. Në këtë rrafsh, duhet theksuar përkrahjen e pazëvendësueshme dhe meritat e duhura të shteteve që e kanë mbështetur Kosovën në këtë proces. Përfundimisht, ishte një fitore për kauzën e Kosovës, fitore kjo e popullit të Kosovës dhe aleatëve të saj.

Ky publikim, i cili botohet për nevoja të Ministrisë së Punëve të Jashtme të Kosovës, përkatësisht për nevoja të afirmimit të Mendimit të GJND-së, ka për qëllim të ofrojë një përmbledhje të plotë dhe sistematike të të gjitha deklaratave me shkrim dhe me gojë të Republikës së Kosovës, por edhe të deklaratave përfundimtare gojore të shteteve që janë paraqitur në mbështetje të Kosovës. Duke pasur parasysh qëllimin e këtij botimi, të gjitha deklaratat dhe dokumentet e tjera në këtë botim janë në gjuhën angleze.

(Ministër i Punëve të Jashtme të Republikës së Kosovës)

Correspondence with the Court and Other Documents

Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria –Vlada – Government

Ministria e Punëve të Jashtme / Ministarstvo Inostranih Poslova
Ministry of Foreign Affairs

15 October 2008

Sir,

I have the honour to refer to the request for an advisory opinion contained in General Assembly resolution 63/3, and to request that the Court invite the Republic of Kosovo to participate in the proceedings on a footing of equality with others, including the Republic of Serbia.

Resolution 63/3 was proposed by Serbia, and was adopted by 77 votes in favour, 6 against, with 74 abstentions. In it, the General Assembly requested the Court to render an advisory opinion on the following question:

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

The question submitted to the Court is one in which Kosovo self-evidently has a profound and direct interest.

The importance of Kosovo being able to present its views to the Court, without prejudice to the Court's eventual response to the question contained in the request for an advisory opinion, was stressed by a considerable

number of the representatives who spoke in the General Assembly debate on 8 October 2008, at which resolution 63/3 was adopted, and was not opposed by any speaker (Press Release, General Assembly/10764; the verbatim record will appear in A/PV.63/22). Moreover, following its Declaration of Independence, the Republic of Kosovo has now been recognized by 51 States from around the world.

It is respectfully submitted that, if the Court is to consider the request submitted by the General Assembly, and at the same time remain true to its judicial character, it is important that Kosovo be invited to participate on a footing of complete equality with others, including Serbia, in the interests of the proper administration of justice. As the Court said in *Eastern Carelia*, '[t]he Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.' (*P.C.I.J. Ser. B*, p. 29).

The Court has considerable discretion in the organization of advisory proceedings. The practice of the Court (as well as that of the Permanent Court) indicates that the Court has approached the question of participation flexibly (Rosenne, *The Law and Practice of the International Court, 1920-2005*, pp. 1671-4). This was demonstrated, for example, in the most recent advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*I.C.J. Reports 2004*, p. 136 at 141-2, paras. 4 and 5; and *CR 2004/1*, p. 19), in which the Court recognized the particular position and interests of Palestine in relation to the question put to the Court.

As the Court has frequently recognized, equality of the parties and *audi alteram partem* are fundamental principles in all judicial proceedings (see, for example, Rosenne, *loc.cit*, pp. 1048-52). This includes advisory opinion proceedings (see Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, pp. 157-64).

The Court has recognised the need to uphold the principle of the equality of the parties in advisory proceedings where two or more parties are directly affected by the proceedings, in order to ensure the fairness of the proceedings. For example, in the *Administrative Tribunal of the ILO (UNESCO)* advisory opinion, the Court said that '[t]he judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and arguments to the Court' (*I.C.J. Reports 1956*, p.76 at 86).

In addition to the legal arguments that Kosovo will wish to make to the Court, Kosovo will be able to furnish the Court with relevant information essential to any consideration of the request. In particular, the Declaration of Independence of 17 February 2008 has to be seen against the background of the history of Kosovo, including events since 1989 and those leading directly to the Declaration of Independence

If and to the extent that it may be considered relevant in the present proceedings, I would request that this letter be regarded as constituting, exclusively for the purposes of these proceedings, the declaration referred to in Article 41 of the Rules of Court.

I hereby inform you that my Government has nominated me as the Representative of the Republic of Kosovo for the purposes of the present proceedings.

For the reasons set out above, and on behalf of the Government of the Republic of Kosovo, I respectfully request the Court to invite the Republic of Kosovo, as a party that is directly interested and able to furnish relevant information, to participate in the proceedings, on a footing of equality with others, including the Republic of Serbia, both at the written stage and at any oral hearing.

Accept, Sir, the assurances of my highest consideration.

Skender Hyseni
Minister of Foreign Affairs
Republic of Kosovo

H. E. Mr Philippe Couvreur
Registrar
International Court of Justice
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133313

20 October 2008

Excellency,

I have the honour to refer to resolution 63/3 whereby the United Nations General Assembly requests the Court to give an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. The text of the operative paragraph of this resolution, as received from the Secretary-General, reads as follows:

> "The General Assembly,
>
> . . . . . .
>
> Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:
>
> > 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'."

A copy of the request for advisory opinion in the bilingual printed version prepared by the Registry will be forwarded to you as soon as possible.

I further have the honour to acknowledge receipt of Your Excellency's letter dated 15 October 2008 and received in the Registry on the same day by facsimile, raising various issues with regard to the request for an advisory opinion.

The Court has decided, in accordance with Article 66, paragraph 2, of its Statute, that the United Nations and its Member States are likely to be able to furnish information on the question. It has fixed 17 April 2009 as the time-limit within which written statements on the question may be presented to the Court, and 17 July 2009 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements. The subsequent procedure has been reserved for further decision. Please find herewith a copy of the Order made by the Court on 17 October 2008 to that effect.

/.

/.

His Excellency
Mr. Skender Hyseni
Str. "Nënë Tereza"
10000 Prishtina
Kosovo

Moreover, I have the honour to inform you that the Court has decided further, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, to invite the authors of the above declaration to make written contributions to the Court within the above-mentioned time-limits.

May I draw your attention to the fact that any written contribution by the authors of the declaration of 17 February 2008 must be signed by a duly empowered person. While the Rules of Court do not lay down any specific requirement concerning the number of copies to be filed, it would be desirable for 30 copies of such contribution to be submitted, with a view to the immediate transmittal of the contribution to Members of the Court and to the Registry's various departments. It is also requested that an electronic copy of the contribution be provided on CD-ROM at the time of the filing. It should be recalled that such contribution must be prepared in French or in English — the "official languages" of the Court, under Article 39, paragraph 1, of its Statute — and that the filing of the contribution in both languages would be highly appreciated in the present proceedings. Finally, pursuant to Article 106 of the Rules of Court, written statements, comments and contributions are not accessible to the public at this stage of the proceedings and must therefore be regarded as confidential documents.

Accept, Excellency, the assurances of my highest consideration.

Philippe Couvreur
Registrar

17 OCTOBER 2008

ORDER

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

(REQUEST FOR ADVISORY OPINION)

CONFORMITÉ AU DROIT INTERNATIONAL DE LA DÉCLARATION UNILATÉRALE D'INDÉPENDANCE DES INSTITUTIONS PROVISOIRES D'ADMINISTRATION AUTONOME DU KOSOVO

(REQUÊTE POUR AVIS CONSULTATIF)

17 OCTOBRE 2008

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

YEAR 2008

2008
17 October
General List
No. 141

17 October 2008

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

(REQUEST FOR ADVISORY OPINION)

ORDER

Present: *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, PARRA-ARANGUREN, BUERGENTHAL, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 48, 65 and 66 of the Statute of the Court and to Articles 104 and 105 of the Rules of Court,

Makes the following Order:

Whereas on 8 October 2008 the United Nations General Assembly adopted, at the 22nd meeting of its Sixty-third Session, resolution 63/3 (A/63/L.2), by which it decided, pursuant to Article 65 of the Statute of the Court, to request the International Court of Justice to render an advisory opinion on the following question:

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

Whereas certified true copies of the English and French texts of that resolution were transmitted to the Court under cover of a letter from the Secretary-General of the United Nations dated 9 October 2008 and received by facsimile on 10 October 2008;

Whereas the Secretary-General indicated in his letter that, pursuant to Article 65, paragraph 2, of the Statute, all documents likely to throw light upon the question would be transmitted to the Court as soon as possible;

Whereas, by letters dated 10 October 2008, the Registrar gave notice of the request for an advisory opinion to all States entitled to appear before the Court, pursuant to Article 66, paragraph 1, of the Statute,

1. *Decides* that the United Nations and its Member States are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion;

2. *Fixes* 17 April 2009 as the time-limit within which written statements on the question may be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute;

3. *Fixes* 17 July 2009 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute;

4. *Decides* further that, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question; and *decides* therefore to invite them to make written contributions to the Court within the above time-limits; and

Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of October, two thousand and eight.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria –Vlada – Government

Ministria e Punëve të Jashtme – Ministarstvo Inostranih Poslova – Ministry of Foreign Affairs

2 December 2008

Sir,

I have the honour to refer to your letter of 20 October 2008 concerning the request for an advisory opinion on the question of *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, in which you drew attention to the Court's Order of 17 October 2008.

I should like to raise one further matter at this stage, the question of possible judges *ad hoc*. According to article 102, paragraph 3, of the Rules of Court, it would seem that a State may only appoint a judge *ad hoc* in advisory proceedings if the opinion is requested "upon a legal question actually pending between two or more States".

If the Republic of Serbia were to seek to appoint a judge *ad hoc*, this would suggest that there may be a legal question actually pending between the Republic of Serbia and the Republic of Kosovo to which the advisory opinion relates.

I would respectfully request to be informed of any such request by Serbia, prior to any decision by the Court, so that the Republic of Kosovo has the possibility to provide the Court with its own views on the matter in accordance with article 35 of the Rules of Court. The Republic of Kosovo formally reserves its rights on a basis of equality, including whether in such circumstances it would then itself wish to appoint a judge *ad hoc*.

Accept, Sir, the assurances of my highest consideration.

Skender Hyseni
Minister of Foreign Affairs
Republic of Kosovo

H.E. Mr. Philippe Couvreur
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133697

3 December 2008

Excellency,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, I have the honour to acknowledge receipt of Your Excellency's letter dated 2 December 2008 and received in the Registry by facsimile on the same day.

Members of the Court have been informed of the content of your letter.

Accept, Excellency, the assurances of my highest consideration.

Philippe Couvreur
Registrar

His Excellency
Mr. Skender Hyseni
Str. "Nënë Tereza"
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Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria –Vlada – Government

Ministria e Punëve të Jashtme – Ministarstvo Inostranih Poslova – Ministry of Foreign Affairs

17 April 2009

Sir,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, I have the honour to submit herewith, in accordance with Article 66 of the Statute of the Court and the Court's Order of 17 October 2008, the Written Contribution of the Republic of Kosovo.

The Government of the Republic of Kosovo transmits thirty copies of its Written Contribution and annexes, as well as an electronic copy.

I also transmit, for deposit in the Registry, a full-scale photographic reproduction of the Declaration of Independence of Kosovo as signed on 17 February 2008.

Accept, Sir, the assurances of my highest consideration.

Skender Hyseni
Minister of Foreign Affairs
Representative of the Republic of Kosovo before
the International Court of Justice

H.E. Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
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134123

17 April 2009

Excellency,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, I have the honour to acknowledge receipt of Your Excellency's letter dated 17 April 2009 and handed in to the Registry today, transmitting to the Court the Written Contribution of the authors of the above declaration.

Accept, Excellency, the assurances of my highest consideration.

Philippe Couvreur
Registrar

His Excellency
Mr. Skender Hyseni
Government Building
Pristina
Kosovo

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135081

29 September 2009

Excellency,

With reference to the request for advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, I have the honour to inform you that, in the oral proceedings to open on Tuesday 1 December 2009, oral statements and comments, as well as an oral contribution, will be presented in turn by: Serbia; the authors of the unilateral declaration of independence; Albania; Germany; Saudi Arabia; Argentina; Austria; Azerbaijan; Bahrain; Belarus; Bolivia; Brazil; Bulgaria; Burundi; China; Cyprus; Croatia; Denmark; Spain; the United States of America; the Russian Federation; Finland; France; Jordan; Norway; the Netherlands; the Lao People's Democratic Republic; Romania; the United Kingdom of Great Britain and Northern Ireland; Venezuela; Vietnam.

Please find enclosed the detailed schedule for the oral proceedings as decided by the Court.

Moreover, in view of the fact that the request for advisory opinion relates to the accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo, the Court expects participants to direct the oral statements and comments, and the oral contribution, to the questions of law raised by this request.

The speaking time allocated to each delegation is a maximum. Participants scheduled to be heard at a given sitting are kindly requested to be present from the opening of that sitting, even if they will not be the first to speak. This is intended to enable them to be heard without delay in the event that participants preceding them do not use all of their speaking time.

./.

His Excellency
Mr. Skender Hyseni
Government Building
Pristina
Kosovo

Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria – Vlada – Government

Ministria e Punëve të Jashtme / Ministarstvo Inostranih Poslova / Ministry of Foreign Affairs

Prishtina, 5 October 2009

Sir,

I have the honour to refer to your letter of 29 September 2009 concerning the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.*

The composition of the delegation of the Republic of Kosovo at the hearing scheduled to open on Tuesday 1 December 2009 will be as follows:

H.E. Mr. Skender Hyseni, Minister of Foreign Affairs, Representative of the Republic of Kosovo,

Sir Michael Wood, KCMG, member of the English bar and a member of the International Law Commission,

Professor Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms. Vjosa Osmani, Advisor to the President of the Republic of Kosovo,

Mr. Qerim Qerimi, Advisor to the Minister of Foreign Affairs of the Republic of Kosovo,

Ms. Albana Beqiri, Media Advisor and Spoksewoman to the Minister of Foreign Affairs of the Republic of Kosovo,

Mr Qudsi Rasheed, member of the English bar.

H.E. Mr. Skender Hyseni, Sir Michael Wood, Professor Sean D. Murphy and Mr. Daniel Müller will address the Court.

Three of the speakers will address the Court in English. H.E. Mr. Skender Hyseni will address the Court in English and in French. Mr. Daniel Müller will address the Court in French. Approximately 30 per cent of the pleadings will be in French.

The address for the delivery of the transcript will be the Golden Tulip Bel Air Hotel (for the attention of Sir Michael Wood). Please also send the transcripts to the following email address: mwood@20essexst.com

Accept, Sir, the assurances of my highest consideration.

Skender Hyseni
Minister of Foreign Affairs of the Republic of Kosovo
Representative of the Republic of Kosovo before
the International Court of Justice

H.E. Mr. Philippe Couvreur
Registrar
International Court of justice
Peace Palace
2517 KJ The Hague
Netherlands

Nr. 586/09

COUR INTERNATIONALE DE JUSTICE

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135103

5 October 2009

Sir,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, I have the honour to acknowledge receipt of Your Excellency's letter dated 5 October 2009 and received in the Registry on the same day by facsimile. By your letter, you kindly informed the Court, inter alia, of the composition of the delegation of the authors of the unilateral declaration of independence at the oral proceedings due to open on 1 December 2009.

Accept, Sir, the assurances of my highest consideration.

Philippe Couvreur
Registrar

His Excellency
Mr. Skender Hyseni
Government Building
Pristina
Kosovo

In order that the members of your delegation may enjoy the privileges, immunities and facilities to which they are entitled under the agreement in force between the Court and the Netherlands, I should be obliged if you would inform me as soon as possible of the composition of the delegation, and which of its members will be speaking.

Further, to enable the Registry to provide Members of the Court and participants with the best possible assistance in connection with the oral proceedings, I should be grateful if you could inform me whether your delegation intends to use English or French and, if it wishes to use both languages, roughly what proportion of the pleadings each of the official languages of the Court will account for. This information will facilitate the work of translation and interpretation.

The transcripts of the oral statements and comments, and the oral contribution, made during the oral proceedings will appear on the Court's website as the hearings proceed.

With regard to the texts of the oral statements, comments and the oral contribution, we would appreciate receiving ten typewritten copies (printed on one side only), together with the corresponding electronic version, one hour prior to the beginning of the hearing. In addition, the different sections of each pleading should be indicated by the use of brief subheadings printed in bold type. This last requirement is necessary to automate the conversion of documents for the Court's website. It is further requested that the paragraphs of each presentation be numbered.

The electronic version of the oral statements, comments or contribution should be compatible with the Microsoft Word format.

I should also like to take this opportunity to draw your attention to the fact that it would be helpful if each participant: (i) would ask its representatives not to read out their pleadings too quickly; and (ii) would ask those of its representatives quoting a text which exists in the Court's other official language to include a copy in that language with the text of their pleadings.

Furthermore, I have the honour to draw your attention to Article 71 of the Rules of Court, which the Court, under paragraph 2 of Article 102 of those Rules, applies in advisory matters as well as in contentious cases. Article 71 lays down, inter alia, that:

> "1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used . . .
>
> 4. Copies of the transcript shall be circulated to the judges sitting in the case, and to the parties. The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing thereof . . ."

Consequently, the verbatim record prepared, as the case may be, in English and/or French will be made available to the representatives of the participants in the oral proceedings.

During the hearings scheduled to open on Tuesday 1 December 2009, the full transcript will be transmitted to participants as soon as possible after the close of each hearing. I should be grateful to you for indicating an address in The Hague at which transcripts should be transmitted to you, as well as the number of copies you wish to receive. You may also indicate an e-mail address at which you may wish to receive the transcripts in electronic form.

./.

In order to facilitate any supervision which the Court may feel it proper to exercise, any correction which the representatives of the participants in the proceedings may wish to make to the transcript of their oral statements or comments, or their oral contribution, should be handwritten on a copy of the verbatim record and given to my secretary as soon as possible after the verbatim record in question is circulated and, at the latest, by 6 p.m. the next day. It should be pointed out that any corrections to the full transcript are noted on a copy thereof which is available for consultation by other representatives in the Library of the Court.

May I also take this opportunity to draw your attention to the fact that, pursuant to Article 106 of the Rules of Court, the Court may decide that the written statements, written comments and written contributions shall be made accessible to the public on or after the opening of the oral proceedings.

Accept, Excellency, the assurances of my highest consideration.

Philippe Couvreur
Registrar

COUR INTERNATIONALE DE JUSTICE INTERNATIONAL COURT OF JUSTICE

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo

Schedule for the oral proceedings

Tuesday 1 December 2009	10 a.m.-1 p.m.	— Serbia (3 hours)
	3 p.m.-6 p.m.	— Authors of the unilateral declaration of independence (3 hours)
Wednesday 2 December 2009	10 a.m.-1 p.m.	— Albania (45 mins.) — Germany (45 mins.) — Saudi Arabia (45 mins.) — Argentina (45 mins.)
Thursday 3 December 2009	10 a.m.-1 p.m.	— Austria (45 mins.) — Azerbaijan (45 mins.) — Bahrain (45 mins.) — Belarus (45 mins.)
Friday 4 December 2009	10 a.m.-1 p.m.	— Bolivia (45 mins.) — Brazil (45 mins.) — Bulgaria (45 mins.) — Burundi (45 mins.)
Monday 7 December 2009	10 a.m.-1 p.m.	— China (45 mins.) — Cyprus (45 mins.) — Croatia (45 mins.) — Denmark (45 mins.)
Tuesday 8 December 2009	10 a.m.-1 p.m.	— Spain (45 mins.) — United States of America (45 mins.) — Russian Federation (45 mins.) — Finland (45 mins.)
Wednesday 9 December 2009	10 a.m.-12.15 p.m.	— France (45 mins.) — Jordan (45 mins.) — Norway (45 mins.)
Thursday 10 December 2009	10 a.m.-1 p.m.	— Netherlands (45 mins.) — Lao People's Democratic Republic (45 mins.) — Romania (45 mins.) — United Kingdom of Great Britain and Northern Ireland (45 mins.)
Friday 11 December 2009	10 a.m.-11.30 a.m.	— Venezuela (45 mins.) — Vietnam (45 mins.)

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136911 14 July 2010

Excellency,

With reference to the request for an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, I have the honour to enclose herewith four admission badges for the delivery of that Opinion at public sitting, which will take place on Thursday 22 July 2010, from 3 p.m., at the Peace Palace. /.

The four **green** admission badges enclosed with this letter give the holders access to the Great Hall of Justice, where seats will be reserved at the front for the participants in the proceedings, though not allocated by name. The badges are only valid on the day of the reading of the above-mentioned Advisory Opinion and **cannot be replaced if lost**.

Vehicles carrying the members of your delegation will be able to enter the Palace grounds through the "protocol" gates (on the right-hand side) to reach the main entrance of the Peace Palace. As parking is not permitted within the Palace grounds, they will be required to leave once they have set down their passengers and to return in order to collect them. If the vehicles in question do not have diplomatic licence plates, the members of your delegation are requested to send their registration numbers to the Information Department by e-mail, by 21 July at the latest (address: information@icj-cij.org).

In order to avoid long queues, the members of your delegation are requested to present themselves at the Peace Palace between 1.45 p.m. and 2.15 p.m. and to show their passport/laissez-passer and badge to the security guards at both the "protocol" gates and the entrance of the Palace. **Individuals not in possession of these two documents will not be admitted to the sitting**.

A strict security check will be carried out in the Entrance Hall of the Palace. No armed protection will be allowed.

./.

His Excellency
Mr. Skender Hyseni
Government Building
Pristina
Kosovo

Opinion of the Court

Mendimi i Gjykatës

INTERNATIONAL COURT OF JUSTICE

YEAR 2010

22 July
2010
General List
No. 141

22 July 2010

ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

Jurisdiction of the Court to give the advisory opinion requested.

Article 65, paragraph 1, of the Statute - Article 96, paragraph 1, of the Charter - Power of General Assembly to request advisory opinions - Articles 10 and 11 of the Charter - Contention that General Assembly acted outside its powers under the Charter - Article 12, paragraph 1, of the Charter - Authorization to request an advisory opinion not limited by Article 12.

Hisashi Owada, President of the Court

Requirement that the question on which the Court is requested to give its opinion is a "legal question" - Contention that the act of making a declaration of independence is governed by domestic constitutional law - The Court can respond to the question by reference to international law without the need to address domestic law - The fact that a question has political aspects does not deprive it of its character as a legal question - The Court is not concerned with the political motives behind a request or the political implications which its opinion may have.

The Court has jurisdiction to give advisory opinion requested.

* *

Discretion of the Court to decide whether it should give an opinion.

Integrity of the Court's judicial function - Only "compelling reasons" should lead the Court to decline to exercise its judicial function - The motives of individual States which sponsor a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion - Requesting organ to assess purpose, usefulness and political consequences of opinion.
Delimitation of the respective powers of the Security Council and the General Assembly - Nature of the Security Council's involvement in relation to Kosovo - Article 12 of the Charter does not bar action by the General Assembly in respect of threats to international peace and security which are before the Security Council - General Assembly has taken action with regard to the situation in Kosovo.
No compelling reasons for Court to use its discretion not to give an advisory opinion.

* *

Scope and meaning of the question.

Text of the question in General Assembly resolution 63/3 - Power of the Court to clarify the question - No need to reformulate the question posed by the General Assembly - For the proper exercise of its judicial function, the Court must establish the identity of the authors of the declaration of independence - No intention by the General Assembly to restrict the Court's freedom to determine that issue - The Court's task is to determine whether or not the declaration was adopted in violation of international law.

* *

Factual background.

Framework for interim administration of Kosovo put in place by the Security Council - Security Council resolution 1244 (1999) - Establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK) - Role of Special Representative of the Secretary-General - "Four pillars" of the UNMIK régime - Constitutional Framework for Provisional Self-Government - Relations between the Provisional Institutions of Self-Government and the Special Representative of the Secretary-General.
Relevant events in the final status process - Appointment by Secretary-General of Special Envoy for the future status process for Kosovo - Guiding Principles of the Contact Group - Failure of consultative process - Comprehensive Proposal for the Kosovo Status Settlement by Special Envoy - Failure of negotiations on the future status of Kosovo under the auspices of the Troika - Elections held for the Assembly of Kosovo on 17 November 2007 - Adoption of the declaration of independence on 17 February 2008.

* *

Whether the declaration of independence is in accordance with international law.

No prohibition of declarations of independence according to State practice - Contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity - Scope of the principle of territorial integrity is confined to the sphere of relations between States - No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence - Issues relating to the extent of the right of self-determination and the existence of any right of "remedial secession" are beyond the scope of the question posed by the General Assembly.

General international law contains no applicable prohibition of declarations of independence - Declaration of independence of 17 February 2008 did not violate general international law.

Security Council resolution 1244 and the Constitutional Framework - Resolution 1244 (1999) imposes international legal obligations and is part of the applicable international law - Constitutional Framework possesses international legal character - Constitutional Framework is part of specific legal order created pursuant to resolution 1244 (1999) - Constitutional Framework regulates matters which are the subject of internal law - Supervisory powers of the Special Representative of the Secretary-General - Security Council resolution 1244 (1999) and the Constitutional Framework were in force and applicable as at 17 February 2008 - Neither of them contains a clause providing for termination and neither has been repealed - The Special Representative of the Secretary-General continues to exercise his functions in Kosovo.

Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law to be considered in replying to the question before the Court.

Interpretation of Security Council resolutions - Resolution 1244 (1999) established an international civil and security presence in Kosovo - Temporary suspension of exercise of Serbia's authority flowing from its continuing sovereignty over the territory of Kosovo - Resolution 1244 (1999) created an interim régime - Object and purpose of resolution 1244 (1999).

Identity of the authors of the declaration of independence - Whether the declaration of independence was an act of the Assembly of Kosovo - Authors of the declaration did not seek to act within the framework of interim self-administration of Kosovo - Authors undertook to fulfil the international obligations of Kosovo - No reference in original Albanian text to the declaration being the work of the Assembly of Kosovo - Silence of the Special Representative of the Secretary-General - Authors of the declaration of independence acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

Whether or not the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) - Resolution 1244 (1999) addressed to United Nations Member States and organs of the United Nations - No specific obligations addressed to other actors - The resolution did not contain any provision dealing with the final status of Kosovo - Security Council did not reserve for itself the final determination of the situation in Kosovo - Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence - Declaration of independence did not violate Security Council resolution 1244 (1999).

Declaration of independence was not issued by the Provisional Institutions of Self-Government - Declaration of independence did not violate the Constitutional Framework.

Adoption of the declaration of independence did not violate any applicable rule of international law.

ADVISORY OPINION

Present: *President OWADA; Vice-President TOMKA; Judges KOROMA, AL-KHASAWNEH, BUERGENTHAL, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; Registrar COUVREUR.*

On the accordance with international law of the unilateral declaration of independence in respect of Kosovo,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. By a letter dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008, the original of which was received in the Registry on 15 October 2008, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of the resolution were enclosed with the letter. The resolution reads as follows:

"The General Assembly,

Mindful of the purposes and principles of the United Nations,

Bearing in mind its functions and powers under the Charter of the United Nations,

Recalling that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,

Aware that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order, Decides, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

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

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the Statute, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question. By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration were considered likely to be able to furnish information on the question. It therefore further decided to invite them to make written contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the above-mentioned declaration of independence of the Court's decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court's website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone and Bolivia. The authors of the unilateral declaration of independence filed a written contribution. On 21 April 2009, the Registrar communicated copies of the written statements and written contribution to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar communicated copies of this written statement to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The United Nations and its Member States were invited to inform the Registry, by 15 September 2009, if they intended to take part in the oral proceedings. The letters further indicated that the authors of the unilateral declaration of independence could present an oral contribution. By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court's decision to hold hearings, inviting them to indicate, within the same time-limit, whether they intended to take part in the oral proceedings.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain.The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to all of its Member States that had not participated in the written proceedings, copies of all written statements and written comments, as well as the written contributions of the authors of the unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registry transmitted a detailed timetable of the hearings to those who, within the time-limit fixed for that purpose by the Court, had expressed their intention to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to the Court, as well as the written contributions of the authors of the unilateral declaration of independence, accessible to the public, with effect from the opening of the oral proceedings.

14. In the course of hearings held from 1 to 11 December 2009, the Court heard oral statements, in the following order, by:

For the Republic of Serbia:

H.E. Mr.Dušan T. Bataković, PhD in History, University of Paris-Sorbonne (Paris IV), Ambassador of the Republic of Serbia to France, Vice-Director of the Institute for Balkan Studies and Assistant Professor at the University of Belgrade, Head of Delegation,

Mr. Vladimir Djerić, S.J.D. (Michigan), Attor ney at Law, Mikijelj, Janković & Bogdanović, Belgrade, Counsel and Advo cate,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration, Counsel and Ad vocate,

Mr. Malcolm N. Shaw Q.C., Sir Robert Jennings Professor of International Law, University of Leicester, UnitedKingdom, Coun sel and Advocate,

	Mr.	Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international, Counsel and Advocate,
	Mr.	Saša Obradović, Inspector General in the Ministry of Foreign Affairs, Deputy Head of Delegation;
For the authors of the unilateral declaration of independence:	Mr.	Skender Hyseni, Head of Delegation,
		Sir Michael Wood, K.C.M.G., member of the English Bar,Member of the International Law Commission, Counsel,
	Mr.	Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense, Counsel,
	Mr.	Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University, Counsel;
For the Republic of Albania:	H.E.	Mr. Gazmend Barbullushi, Ambassador Extraordinary and Plenipotentiary of the Republic of Albania to the Kingdom of the Netherlands, Legal Adviser,
	Mr.	Jochen A. Frowein, M.C.L., Director emeritus of the Max Planck Institute for International law, Professor emeritus of the University of Heidelberg, Member of the Institute of International Law, Legal Adviser,
	Mr.	Terry D. Gill, Professor of Military Law at theUniversity of Amsterdam and Associate Professor of Public International Law at Utrecht University, Legal Adviser;
For the Federal Republic of Germany:	Ms.	Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office (Berlin);
For the Kingdom of Saudi Arabia:	H.E.	Mr. Abdullah A. Alshaghrood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands, Head of Delegation;
For the Argentine Republic:	H.E.	Madam Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Head of Delegation;
For the Republic of Austria:	H.E.	Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of European and International Affairs;

For the Republic of Azerbaijan: H.E. Mr. Agshin Mehdiyev, Ambassador and Per manent Representative of Azerbaijan to the United Nations;
H.E. Madam Elena Gritsenko, Ambassador of the Republic of Belarus to the Kingdom of the Netherlands, Head of Delegation;

For the Plurinational State of Bolivia: H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands;

For the Federative Republic of Brazil: H.E. Mr. José Artur Denot Medeiros, Am bassador of the Federative Republic of Brazil to the Kingdom of the Netherlands;

For the Republic of Bulgaria: Mr. Zlatko Dimitroff, S.J.D., Director of the International Law Department, Ministry of Foreign Affairs, Head of Delegation;

For the Republic of Burundi: Mr. Thomas Barankitse, Legal Attaché, Counsel, Mr. Jean d'Aspremont, As sociate Professor, University of Am sterdam, Chargé de cours invité, Catholic University of Louvain, Counsel;

For the People's Republic of China: H.E. Madam Xue Hanqin, Ambassador to the Association of Southeast Asian Nations (ASEAN), Legal Counsel of the Ministry of Foreign Affairs, Member of the Internation al Law Commission, Member of the Institut de droit international, Head of Delegation;

For the Republic of Cyprus: H.E. Mr. James Droushiotis, Ambassador of the Republic of Cy prus to the Kingdom of the Nether lands, Mr. Vaughan Lowe Q.C., member of the English Bar, Chichele Professor of International Law, University of Oxford, Counsel and Advocate, Mr. Polyvios G. Poly viou, Counsel and Advocate;

For the Republic of Croatia: H.E. Madam Andreja Metelko-Zgombić, Ambassador, Chief Legal Adviser in the Ministry of Foreign Affairs and European Integration;

For the Kingdom of Denmark:	H.E.	Mr. Thomas Winkler, Ambassador, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs, Head of Delegation;
For the Kingdom of Spain:	Ms.	Concepción Escobar Hernández, Legal Adviser, Head of the International Law Department, Ministry of Foreign Affairs and Co-operation, Head of Delegation and Advocate;
For the United States of America:	Mr.	Harold Hongju Koh, Legal Adviser, Department of State, Head of Delegation and Advocate;
For the Russian Federation:	H.E.	Mr. Kirill Gevorgian, Ambassador, Head of the Legal Department, Ministry of Foreign Affairs, Head of Delegation;
For the Republic of Finland:	Ms.	Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs, Mr. Martti Koskenniemi, Professor at the University of Helsinki;
For the French Republic:	Ms.	Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs, Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense;
For the Hashemite Kingdom of Jordan:	H.R.H.	Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, Head of Delegation;
For the Kingdom of Norway:	Mr.	Rolf Einar Fife, Director General, Legal Affairs Department, Ministry of Foreign Affairs, Head of Delegation;
For the Kingdom of the Netherlands:	Ms.	Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs;
For Romania:	Mr.	Bogdan Aurescu, Secretary of State, Ministry of Foreign Affairs,
	Mr.	Cosmin Dinescu, Director-General for Legal Affairs, Ministry of Foreign Affairs;

For the United Kingdom of Great Britain and Northern Ireland:	Mr.	Daniel Bethlehem Q.C., Legal Adviser to the Foreign and Commonwealth Office, Representative of the United Kingdom of Great Britain and Northern Ireland, Counsel and Advocate,
	Mr.	James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Counsel and Advocate;
For the Bolivarian Republic of Venezuela:	*Mr.*	*Alejandro Fleming, Deputy* Minister for Europe of the Ministry of the People's Power for Foreign Affairs;
For the Socialist Republic of Viet Nam:	H.E.	Madam Nguyen Thi Hoang Anh, Doctor of Law, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs.

15. Questions were put by Members of the Court to participants in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court with effect from 28 May 2010.

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I. JURISDICTION AND DISCRETION

17. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 232, para. 10; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13).

A. Jurisdiction

18. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that:

"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."

19. In its application of this provision, the Court has indicated that:

"It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." *(Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ of the United Nations or a specialized agency having competence to make it. The General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that:

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

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on "any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 70; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 232-233, paras. 11-12; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly with competence to discuss "any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations" and, subject again to the limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter provides that:

"While 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."

24. In the present proceedings, it was suggested that, since the Security Council was seised of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly's request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (*Legal Consequences of theConstruction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 148*, para. 25). Accordingly, while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the

Court's opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. Whether the delimitation of the respective powers of the Security Council and the General Assembly - of which Article 12 is one aspect - should lead the Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court by the General Assembly asks whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question; as the Court has remarked on a previous occasion, questions "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18,* para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the question posed by the General Assembly is not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration, while the Court's jurisdiction to give an advisory opinion is confined to questions of international law. In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

27. Moreover, the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172,* para. 14). Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (*Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61, and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p.* 234, para. 13).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

B. Discretion

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

"The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion . . .' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156*, para. 44.)

The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 29; Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 175, para. 24; Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 334, para. 22; and Legal Consequences of the Construction of a Wall in the OccupiedPalestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 156-157*, paras. 44-45).

30. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only "compelling reasons" should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco, I.C.J. Reports 1956, p. 86; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p*. 156, para. 44).

31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present case. It has therefore given careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly.

32. One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. Those participants drew attention to a statement made by the sole sponsor of the resolution by which the General Assembly requested the Court's opinion to the effect that "the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law.

. . . . . .

Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek - now or in the future - judicial recourse through the United Nations system." (A/63/PV.22, p. 1.)

According to those participants, this statement demonstrated that the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.

33. The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 71). Nevertheless, precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution

requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond. As the Court put it in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons,*

"once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the
political history of the request, or to the distribution of votes in respect of the adopted
resolution" (*I.C.J. Reports* 1996 (I), p. 237, para. 16).

34. It was also suggested by some of those participating in the proceedings that resolution 63/3 gave no indication of the purpose for which the General Assembly needed the Court's opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court rejected an argument that it should refuse to respond to the General Assembly's request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that

"it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (I.C.J. Reports 1996 (I), p. 237, para. 16.) Similarly, in the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court commented that "[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly" (*I.C.J. Reports* 2004 (I), p. 163, para. 62).

35. Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot - in particular where there is no basis on which to make such an assessment - substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue "there are no evident criteria by which it can prefer one assessment to another" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 37, para. 73; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 159-160,* paras. 51-54).

36. An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court's opinion has been made by the General Assembly rather than the Security Council.

37. The situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion. The Council first took action specifically relating to the situation in Kosovo on 31 March 1998, when it adopted resolution 1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On 10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an international military presence (subsequently known

as "KFOR") and an international civil presence (the United Nations Interim Administration Mission in Kosovo, "UNMIK") and laid down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 8 of resolution 1160 (1998). The Security Council has received periodic reports from the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the Secretary-General records that the Security Council met to consider the situation in Kosovo on 29 occasions between 2000 and the end of 2008. Although the declaration of independence which is the subject of the present request was discussed by the Security Council, the Council took no action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850)).

38. The General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human rights in Kosovo (resolutions 49/204, 50/190, 51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo (resolution 54/183 of 17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241, 54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/326, 58/305, 59/286A, 59/286B, 60/275, 61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the agenda of the General Assembly at the time of the declaration of independence and it was therefore necessary in September 2008 to create a new agenda item for the consideration of the proposal to request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the Security Council and the General Assembly, if the Court's opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly. That conclusion is said to follow both from the nature of the Security Council's involvement and the fact that, in order to answer the question posed, the Court will necessarily have to interpret and apply Security Council resolution 1244 (1999) in order to determine whether or not the declaration of independence is in accordance with international law.

40. While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter, to which the Court has already referred, confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 26, "Article 24 refers to a primary, but not necessarily exclusive, competence". The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.

41. Moreover, Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court noted that there has been an

increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security and observed that it is often the case that, 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.

42. The Court's examination of this subject in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was made in connection with an argument relating to whether or not the Court possessed the jurisdiction to give an advisory opinion, rather than whether it should exercise its discretion not to give an opinion. In the present case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction conferred by Article 96, paragraph 1 (paragraphs 23 to 24 above). It considers, however, that the analysis contained in the 2004 Advisory Opinion is also pertinent to the issue of discretion in the present case. That analysis demonstrates that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from discussing that situation or, within the limits set by Article 12, making recommendations with regard thereto. In addition, as the Court pointed out in its 2004 Advisory Opinion, General Assembly resolution 377A (V) ("Uniting for Peace") provides for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 150*, para. 30). These considerations are of relevance to the question whether the delimitation of powers between the Security Council and the General Assembly constitutes a compelling reason for the Court to decline to respond to the General Assembly's request for an opinion in the present case.

43. It is true, of course, that the facts of the present case are quite different from those of the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* The situation in the occupied Palestinian territory had been under active consideration by the General Assembly for several decades prior to its decision to request an opinion from the Court and the General Assembly had discussed the precise subject on which the Court's opinion was sought. In the present case, with regard to the situation in Kosovo, it was the Security Council which had been actively seised of the matter. In that context, it discussed the future status of Kosovo and the declaration of independence (see paragraph 37 above).

44. However, the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps. As the preceding paragraphs demonstrate, the General Assembly is entitled to discuss the declaration of independence and, within the limits considered in paragraph 42, above, to make recommendations in respect of that or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

45. Moreover, while it is the scope for future discussion and action which is the determining factor in answering this objection to the Court rendering an opinion, the Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. As stated in paragraph 38 above, between 1995 and 1999, the General Assembly adopted six resolutions addressing the human

rights situation in Kosovo. The last of these, resolution 54/183, was adopted on 17 December 1999, some six months after the Security Council had adopted resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian issues, it also addressed (in para. 7) the General Assembly's concern about a possible "cantonization" of Kosovo. In addition, since 1999 the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38 above). The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

46. Further, in the view of the Court, the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. It has done so both in the exercise of its advisory jurisdiction (*see for example, Certain Expenses of the United Nations, (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 175; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (*see for example, Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15, paras. 39-41; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127,* paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on *Certain Expenses of the United Nations*, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of 1961) (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* pp. 175-177). The Court also notes that, in its Advisory Opinion on Conditions of Admission of a State in the United Nations (Article 4 of the Charter) (I.C.J. Reports 1947-1948, pp. 61-62), it responded to a request from the General Assembly even though that request referred to statements made in a meeting of the Security Council and it had been submitted that the Court should therefore exercise its discretion to decline to reply (*Conditions of Admission of a State in the United Nations (Article 4 of the Charter), Pleadings, Oral Arguments, Documents*, p. 90). Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.

48. Accordingly, the Court considers that there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request.

II. SCOPE AND MEANING OF THE QUESTION

49. The Court will now turn to the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The General Assembly has formulated that question in the following terms:

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

50. The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the "legal questions really in issue" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89,* para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (A*pplication for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 348,* para. 46).

51. In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court notes that, in past requests for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court's opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated (see, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 136).* Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, two aspects of the question which require comment. First, the question refers to "the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo*" (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution *"[r]ecall[s]* that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia". Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below (paragraphs 102 to 109), is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

53. Nor does the Court consider that the General Assembly intended to restrict the Court's freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply "Request for an advisory opinion of the International Court of Justice on whether the declaration of independence of Kosovo is in accordance with international law" (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the 63rd session of the General Assembly (Letter of the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the title of the draft resolution and, in turn, of resolution 63/3. The common element in the agenda item and the title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

54. As the Court has stated in a different context:

"It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question
posed to it for an advisory opinion." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p.* 157.)

This consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada ([1998] 2 S.C.R. 217; 161 D.L.R. (4th) 385; 115 Int. Law Reps. 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada. The relevant question in that case was "Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?"

56. The question put to the Supreme Court of Canada inquired whether there was a right to "effect secession", and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was "in accordance with" international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act - such as a unilateral declaration of independence - not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.

III. FACTUAL BACKGROUND

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo. The Court will then proceed with a brief description of the developments relating to the so-called "final status process" in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

A. Security Council resolution 1244 (1999) and the relevant UNMIK regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, "determined to resolve the grave humanitarian situation" which it had identified (see the fourth preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide "an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10).

Paragraph 3 demanded "in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable". Pursuant to paragraph 5 of the resolution, the Security Council decided on the deployment in Kosovo, under the auspices of the United Nations, of international civil and security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such presences. The powers and responsibilities of the security presence were further clarified in paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including, inter alia, those stipulated in the Military Technical Agreement of 9 June 1999, whose Article I.2 provided for the deployment of KFOR, permitting these to "operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission." The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces, save for "an agreed number of Yugoslav and Serb military and police personnel" as foreseen in paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows: "(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement,including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement . . . "

60. On 12 June 1999, the Secretary-General presented to the Security Council "a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)", pursuant to paragraph 10 of resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called "four pillars") of the UNMIK régime (para. 5): (a) interim civil administration (with a lead role assigned to the United Nations); (b) humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); (c) institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and (d) reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General". Under Section 3 of UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue to apply, but only to the extent that these did not conflict with internationally recognized human rights standards and non-discrimination or the fulfilment of the mandate given to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25 promulgated by the Special Representative of the Secretary-General on 12 December 1999, with retroactive effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of 12 December 1999 provides that "[t]he law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989". Section 4, entitled "Transitional Provision", reads as follows:

"All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts."

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework"), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

"[t]he exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework".

Moreover, pursuant to Chapter 2 (a), "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". Similarly, according to the ninth preambular paragraph of the Constitutional Framework, "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)". In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained

"broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary" (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2001/565, 7 June 2001).

63. Having described the framework put in place by the Security Council to ensure the interim administration of the territory of Kosovo, the Court now turns to the relevant events in the final status process which preceded the declaration of independence of 17 February 2008. B.

The relevant events in the final status process prior to 17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was consensus within the Security Council that the final status process should be commenced:

"The Security Council agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999)." (Statement by the President of the Security Council of 24 October 2005, S/PRST/2005/51.)

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709). Mr. Ahtisaari's Letter of Appointment included, as an annex to it, a document entitled "Terms of Reference" which stated that the Special Envoy "is expected to revert to the Secretary-General at all stages of the process". Furthermore, "[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground" (Terms of Reference, dated 10 November 2005, as an Appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the members of the Council attached to their approval of Mr. Ahtisaari's appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans

and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). Members of the Security Council further indicated that the Guiding Principles were meant for the Secretary-General's (and therefore also for the Special Envoy's) "reference". These Principles stated, inter alia, that

"[t]he Contact Group . . . welcomes the intention of the Secretary-General to appoint a Special Envoy to lead this process . . .

A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence.

. . . . . .

The Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council." (Guiding principles of the Contact Group for a settlement of the status of Kosovo, as annexed to the Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709.)

67. Between 20 February 2006 and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of Kosovo's governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/361, S/2006/707 and S/2006/906). According to the reports of the Secretary-General, "the parties remain[ed] far apart on most issues" (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906).

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process (recalled in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/134, 9 March 2007). On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, "the parties were unable to make any additional progress" at those negotiations (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/395, 29 June 2007, p. 1).

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that "after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo's future status" (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007). After emphasizing that his

"mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground" (ibid., para. 3), the Special Envoy concluded:

"It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

. . . . . .

The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community." (Ibid., paras. 3 and 5.)

70. The Special Envoy's conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add. 1, 26 March 2007), which, in his words, set forth "international supervisory structures, [and] provide[d] the foundations for a future independent Kosovo" (S/2007/168, 26 March 2007, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (S/2007/168/Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (ibid., Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (ibid., Art. 1.3 and Ann. I), and required that the Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (ibid., Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition period, after which "all legislative and executive authority vested in UNMIK shall be transferred en bloc to the governing authorities of Kosovo, unless otherwise provided for in this Settlement" (ibid., Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force of the Constitution (ibid., Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (ibid., Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed "no later than two years after the entry into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention" (ibid., Ann. IX, Art. 5.1) and that

"[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement" (ibid., Art. 5.2).

71. The Secretary-General "fully support[ed] both the recommendation made by [his] Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement" (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168). The Security Council, for its part, decided to undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council's members (see draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States, S/2007/437 Prov., 17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, "the parties were unable to reach an agreement on Kosovo's status" and "[n]either side was willing to yield on the basic question of sovereignty" (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to S/2007/723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2007/768). The Assembly of Kosovo held its inaugural session on 4 and 9 January 2008 (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211).

C. The events of 17 February 2008 and thereafter

74. It is against this background that the declaration of independence was adopted on 17 February 2008. The Court observes that the original language of the declaration is Albanian. For the purposes of the present Opinion, when quoting from the text of the declaration, the Court has used the translations into English and French included in the dossier submitted on behalf of the Secretary-General.

In its relevant passages, the declaration of independence states that its authors were "[c]onvened in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo" (first preambular paragraph); it "[r]ecall[ed] the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of [Kosovo's] future political status" and "[r]egrett[ed] that no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). It further declared that the authors were "[d]etermin[ed] to see [Kosovo's] status resolved in order to give [its] people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of [its] society" (thirteenth preambular paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

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

2. 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 and create the conditions necessary for their effective participation in political and decision-making processes.

. . . . . .

5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

. . . . . .

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK), . . .

. . . . . .

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan . . . We declare publicly that all states are entitled to rely upon this declaration . . ."

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special

Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (S/PV.5839; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211). Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia (S/PV.5839).

IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with "international law" (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General international law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity.

The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." In General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", which reflects customary international law (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

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82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of "remedial secession" in the face of the situation in Kosovo. The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that

question, the Court need only determine whether the declaration of independence violated either general international law or the lex specialis created by Security Council resolution 1244 (1999).

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84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

B. Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder

85. Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15, paras. 39-41; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127, paras. 42-44). Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

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87. A certain number of participants have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework (see paragraph 62 above), also form part of the applicable international law within the meaning of the General Assembly's request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an international law character. According to that argument, the Constitutional Framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly's request.

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10,

and 11, and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

89. At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

"[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections".

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

90. The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration Mission in Kosovo. As noted above (see paragraph 58), Security Council resolution 1244 (1999) envisages "an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10). Resolution 1244 (1999) further states that "the main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections" (paragraph 11 (c)). Similarly, as described above (see paragraph 62), under the Constitutional Framework, the Provisional Institutions of Self-Government were to function in conjunction with and subject to the direction of the Special Representative of the Secretary-General in the implementation of Security Council resolution 1244 (1999).

91. The Court notes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that "the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise". No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meeting. The Presidential Statement of 26 November 2008 (S/PRST/2008/44) merely "welcom[ed] the cooperation between the UN and other international actors, within the framework of Security Council resolution 1244 (1999)" (emphasis added). In addition, pursuant to paragraph 21 of Security Council resolution 1244 (1999), the Security Council decided "to remain actively seized of the matter" and maintained the item "Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999)" on its agenda (see, most recently, Report of the Security Council, 1 August 2008-31 July 2009, General Assembly, Official Records, 64th session, Supplement No. 2, pp. 39 ff. and 132 ff.). Furthermore, Chapter 14.3 of the Constitutional Framework sets forth that "[t]he SRSG . . . may effect amendments to this Constitutional Framework". Minor amendments were effected by virtue of UNMIK regulations UNMIK/REG/2002/9 of 3 May 2002, UNMIK/REG/2007/29 of 4 October 2007, UNMIK/REG/2008/1 of 8 January 2008 and UNMIK/REG/2008/9 of 8 February 2008. Finally, neither Security

Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008.

92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to he Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see the most recent quarterly Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports S/2008/692 of 24 November 2008, S/2009/149 of 17 March 2009, S/2009/300 of 10 June 2009, S/2009/497 of 30 September 2009 and S/2010/5 of 5 January 2010).

93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion. 1. Interpretation of Security Council resolution 1244 (1999)

94. Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

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95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: "1. Decide[d] that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2." Those general principles sought to defuse the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

"[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA" (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; ibid., Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia. 96. Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999) (see paragraphs

58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. First, resolution 1244 (1999) establishes an international civil and security presence inKosovo with full civil and political authority and sole responsibility for the governance of Kosovo. As described above (see paragraph 60), on 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary", was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes: to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed "grave concern at the humanitarian crisis in and around Kosovo". The priorities which are identified in paragraph 11 of resolution 1244 (1999) were elaborated further in the so-called "four pillars" relating to the governance of Kosovo described in the Report of the Secretary-General of 12 June 1999 (paragraph 60 above). By placing an emphasis on these "four pillars", namely, interim civil administration, humanitarian affairs, institution building and reconstruction, and by assigning responsibility for these core components to different international organizations and agencies, resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the legal régime established under resolution 1244 (1999) was to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

99. Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.

100. The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.

2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder

101. The Court will now turn to the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary, as explained in paragraph 52 above, for the Court to determine precisely who issued that declaration.

a) The identity of the authors of the declaration of independence

102. The Court needs to determine whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity.

103. The Court notes that different views have been expressed regarding this question. On the one hand, it has been suggested in the proceedings before the Court that the meeting in which the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional Institution of Self-Government within the limits of the Constitutional Framework. Other participants have observed that both the language of the document and the circumstances under which it was adopted clearly indicate that the declaration of 17 February 2008 was not the work of the Provisional Institutions of Self-Government and did not take effect within the legal framework created for the government of Kosovo during the interim phase.

104. The Court notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called "final status process" (see paragraphs 64 to 73). Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo (see paragraph 58 above). Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs (d), (e) and (f), deals with final status issues only in so far as it is made part of UNMIK's responsibilities to "[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" and "[i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

105. The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The Preamble of the declaration refers to the "years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status" and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that "no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to "resolve" the status of Kosovo and to give the people of Kosovo "clarity about their future" (thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo "as an independent and sovereign state" (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

106. This conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (declaration of independence, para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (ibid., para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive

prerogative of the Special Representative of the Secretary-General:

"(m) concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);

(n) overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;

(o) external relations, including with states and international organisations . . ." (Chap. 8.1 of the Constitutional Framework, "Powers and Responsibilities Reserved to the SRSG"),

with the Special Representative of the Secretary-General only consulting and co-operating with the Provisional Institutions of Self-Government in these matters.

107. Certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words "Assembly of Kosovo" appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase "We, the democratically-elected leaders of our people . . .", whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as "the democratically-elected leaders of our people" immediately precedes the actual declaration of independence within the text ("hereby declare Kosovo to be an independent and sovereign state"; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

108. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special epresentative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. On previous occasions, in particular in the period between 2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo, the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be "beyond the scope of [the Assembly's] competencies" (United Nations dossier No. 189, 7 February 2003) and thereforeoutside the powers of the Assembly of Kosovo.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be ultra vires.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that "the Assembly of Kosovo held a session during which it adopted a 'declaration of independence', declaring Kosovo an independent and sovereign State" (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

109. The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder

110. Having established the identity of the authors of the declaration of independence, the Court turns to the question whether their act in promulgating the declaration was contrary to any prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework adopted thereunder.

111. The Court recalls that this question has been a matter of controversy in the present proceedings. Some participants to the proceedings have contended that the declaration of independence of 17 February 2008 was a unilateral attempt to bring to an end the international presence established by Security Council resolution 1244 (1999), a result which it is said could only be effectuated by a decision of the Security Council itself. It has also been argued that a permanent settlement for Kosovo could only be achieved either by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of the Contact Group. According to this view, the unilateral action on the part of the authors of the declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and thus constitutes a violation of that resolution.

112. Other participants have submitted to the Court that Security Council resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo's independence. They argued that the resolution only regulates the interim administration of Kosovo, but not its final or permanent status. In particular, the argument was put forward that Security Council resolution 1244 (1999) does not create obligations under international law prohibiting the issuance of a declaration of independence or making it invalid, and does not make the authors of the declaration of independence its addressees. According to this position, if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992) concerning the Republika Srpska. In addition, it was argued that the references, in the annexes of Security Council resolution 1244 (1999), to the Rambouillet accords and thus indirectly to the "will of the people" (see Chapter 8.3 of the Rambouillet accords) of Kosovo, support the view that Security Council resolution 1244 (1999) not only did not oppose the declaration of independence, but indeed contemplated it. Other participants contended that at least once the negotiating process had been exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of independence.

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113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia can only be answered through a careful reading of this resolution (see paras. 94 et seq.).

114. First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent

status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded" (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

115. Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above (see paragraph 58), it sets out a general framework for the "deployment in Kosovo, under United Nations auspices, of international civil and security presences" (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). The only point at which resolution 1244 (1999) expressly mentions other actors relates to the Security Council's demand, on the one hand, "that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization" (para. 15) and, on the other hand, for the "full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia" (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

116. The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed eo nomine to the Kosovo Albanian leadership. For example, resolution 1160 (1998) "[c]all[ed] upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues" (resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) "[d]emand[ed] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo" (resolution 1203 (1998), para. 4). The same resolution also called upon the "Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo"; demanded that "the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel"; "[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions"; and demanded that the Kosovo Albanian leadership "cooperate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe" (resolution 1203 (1998), paras. 5, 6, 10 and 11).

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to "all concerned" (para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, mutatis mutandis, also relevant here. In this context, the Court recalls its previous statement that:

"The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 53, para. 114.)

118. Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail (see paragraphs 96 to 100), is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the "main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement" (para. 11 (c) of the resolution; emphasis added).

The phrase "political settlement", often cited in the present proceedings, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term "political settlement" is subject to various interpretations. The Court therefore concludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

119. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999).

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120. The Court therefore turns to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK. Chapter 5 of the Constitutional Framework determines the powers of the Provisional Institutions of Self-Government of Kosovo. It was argued by a number of States which participated in the proceedings before the Court that the promulgation of a declaration of independence is an act outside the powers of the Provisional Institutions of Self-Government as set out in the Constitutional Framework.

121. The Court has already held, however (see paragraphs 102 to 109 above), that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

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V. GENERAL CONCLUSION

122. The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

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123. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Owada; Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Vice-President Tomka; Judges Koroma, Keith, Bennouna, Skotnikov;

(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

IN FAVOUR: President Owada; Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Vice-President Tomka; Judges Koroma, Bennouna, Skotnikov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of July, two thousand and ten, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President TOMKA appends a declaration to the Advisory Opinion of the Court; Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court; Judge SIMMA appends a declaration to the Advisory Opinion of the Court; Judges KEITH and SEPÚLVEDA-AMOR append separate opinions to the Advisory Opinion of the Court; Judges BENNOUNA and SKOTNIKOV append dissenting opinions to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Advisory Opinion of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

Statement by the Foreign Minister of the Republic of Kosovo, H.E. Mr. Skender Hyseni, on the ICJ Opinion of 22 July 2010

Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria – Vlada – Government

Ministria e Punëve të Jashtme / Ministarstvo Inostranih Poslova / Ministry of Foreign Affairs

Statement by the Foreign Minister of the Republic of Kosovo, H.E. Mr. Skender Hyseni, on the ICJ Opinion of 22 July 2010

We welcome the Opinion given today by the International Court of Justice. The Court found, by a large majority, that the Declaration of Independence of Kosovo did not violate international law. The Opinion is explicit and clear and leaves no room for doubt. The International Court has found in Kosovo's favor on all points.

We now look forward to further recognitions of Kosovo. We call upon States that have delayed recognizing the Republic of Kosovo pending the Opinion to move forward towards recognition.

Nothing in the Opinion given by the Court casts any doubt on the statehood of the Republic of Kosovo, which is an established fact.

It is clear that Kosovo's independence has not set any precedent. Kosovo is and has always been a special case.

Kosovo's independence is in the interests of the whole of the Western Balkans.

The future of both Kosovo and Serbia lies within the European Union and NATO. For that there must be good neighbourly relations. That is what we seek. It is now for Serbia to live up to its responsibilities. I wish to reaffirm Kosovo's willingness to discuss with Serbia practical matters of mutual interest. Any discussions with Serbia must be on an equal footing and on a State-to-State basis.

The Hague
22 July 2010

Written Statement of
17 April 2009

Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria -Vlada - Government

Ministria e Punëve të Jashtme - Ministarstvo Inostranih Poslova - Ministry of Foreign Affairs

17 April 2009

Sir,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, I have the honour to submit herewith, in accordance with Article 66 of the Statute of the Court and the Court's Order of 17 October 2008, the Written Contribution of the Republic of Kosovo.

The Government of the Republic of Kosovo transmits thirty copies of its Written Contribution and annexes, as well as an electronic copy.

I also transmit, for deposit in the Registry, a full-scale photographic reproduction of the Declaration of Independence of Kosovo as signed on 17 February 2008.

Accept, Sir, the assurances of my highest consideration.

Skender Hyseni
Minister of Foreign Affairs
Representative of the Republic of Kosovo before
the International Court of Justice

H.E. Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
The Netherlands

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

WRITTEN CONTRIBUTION OF THE REPUBLIC OF KOSOVO

17 APRIL 2009

ABBREVIATIONS

Ahtisaari Plan	Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1) (also referred to as "Ahtisaari Settlement" or "CSP")
Ahtisaari Report	Report of the Special Envoy of the Secretary-General on Kosovo's Future Status (S/2007/168)
Contact Group	France, Germany, Italy, Russian Federation, United Kingdom, United States of America
Dossier	Dossier submitted on behalf of the Secretary-General pursuant to Article 65, paragraph 2, of the Statute of the International Court of Justice
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EUSR	European Union Special Representative
FRY	Federal Republic of Yugoslavia
G-7 (Group of Seven)	Canada, France, Germany, Italy, Japan, United Kingdom, United States of America
G-8 (Group of Eight)	Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom, United States of America
ICO	International Civilian Office
ICR	International Civilian Representative
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISG	International Steering Group
JIAS	Joint Interim Administrative Structure
KFOR	Kosovo Force (international military presence in Kosovo)
KLA	Kosovo Liberation Army (see also UÇK)
KP	Kosovo Police
KPC	Kosovo Protection Corps
KPS	Kosovo Police Service

KSC ..... Kosovo Security Council

KSF ..... Kosovo Security Force

KVM ..... Kosovo Verification Mission

MUP ..... Ministarstvo Unutrašnjih Poslova (Ministry of Internal Affairs of Serbia)

OSCE ..... Organization for Security and Co-operation in Europe

PISG ..... Provisional Institutions of Self-Government of Kosovo

Quint ..... France, Germany, Italy, United Kingdom, United States of America

SFRY ..... Socialist Federal Republic of Yugoslavia

SRSG ..... Special Representative of the Secretary-General

Troika ..... European Union/United States of America/Russian Federation Troika on Kosovo

UÇK ..... Ushtria Çlirimtare e Kosovës (Albanian for KLA)

UNMIK ..... United Nations Interim Administration Mission in Kosovo

UNOSEK ..... United Nations Office of the Special Envoy for the Future Status Process for Kosovo

VJ ..... Vojska Jugoslavije (Yugoslav Army)

NOTE ON LANGUAGES, PLACE-NAMES AND OTHER USAGES

Article 5 of the 2008 Constitution of the Republic of Kosovo provides that the official languages of the Republic are Albanian and Serbian; and that the Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law.

In this Written Contribution, names are usually given using both the Albanian and Serbian names. Occasionally, the most common use in English is employed. For example, the English term "Kosovo" is used rather than the Albanian forms "Kosovë"/"Kosova"; and "Pristina" is used rather than the Albanian "Prishtinë"/"Prishtina" or the Serbian "Priština".

The word "Kosovo" is used to refer to the sovereign and independent State of Kosovo (whose formal name is "Republic of Kosovo"), or, before 17 February 2008, to Kosovo as under Security Council resolution 1244 (1999), the Autonomous Province within the SFRY/FRY/Republic of Serbia, or before that to the territory now within the borders of Kosovo.

Officials from the Republic of Serbia refer to Kosovo as "Kosovo and Metohija" or, in abbreviated form, "Kosmet". These terms are not used in Kosovo.

As the Court is well aware, the name of the State now known as the Republic of Serbia has changed over the years, as has its claim to be or not to be the continuing State of the Socialist Federal Republic of Serbia (SFRY). From 2000, when it applied for, and was granted, admission to the United Nations, it was known as "Federal Republic of Yugoslavia". This State changed its name to the (State Union of) Serbia and Montenegro in 2003. When the Republic of Montenegro seceded in May 2006, the remainder of the State became known as the "Republic of Serbia"[*].

[*] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment*, paras. 23-34.

The ethnic groups in Kosovo are referred to as "Kosovo Albanians", "Kosovo Serbs", "Turks", "Bosnians", "Roma", "Ashkali", and "Egyptians".

The adjective for "Kosovo" is "Kosovo", but sometimes "Kosovar" is used.

"Albanian" generally refers to the language or to the citizens of the Republic of Albania. "Kosovo Albanians" is used for the Albanian speaking citizens of Kosovo.

It is a convenient usage to distinguish between the terms "Serbian" (meaning of Serbia) and "Serb" (referring to ethnicity). The name of the language, however, is Serbian.

The aim of the above usage is convenience and clarity. It is not intended to have political significance.

PART I

INTRODUCTION

CHAPTER I

INTRODUCTION

1.01. The Republic of Kosovo submits this Written Contribution in accordance with paragraph 4 of the Order made by the International Court of Justice on 17 October 2008.

1.02. By resolution 63/3 of 8 October 2008, the General Assembly of the United Nations requested the Court to render an advisory opinion on the following question:

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

1.03. The Declaration of Independence was adopted by the representatives of the people of Kosovo on 17 February 2008. A reproduction of the Declaration, as signed, is at **Annex 1**, together with a type-written text in Albanian, with English and French translations. A verbatim transcript of the meeting at which the Declaration of Independence was signed is at **Annex 2**. As will be seen, the Declaration was signed by the President of the Republic, Dr. Fatmir Sejdiu, and by 109 representatives, including the Prime Minister, Mr. Hashim Thaçi, and the President of the Assembly, Mr. Jakup Krasniqi.

1.04. In its Order of 17 October 2008, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question submitted to the Court for an advisory opinion, and fixed 17 April and 17 July 2009 as the time-limits within which written statements and comments might be submitted to the Court. Paragraph 4 of the Order reads as follows:

> "The International Court of Justice,
>
> .....
>
> 4. *Decides* further that, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question; and *decides* therefore to invite them to make written contributions to the Court within the above time-limits."

1.05. The Republic of Kosovo is grateful to the Court for this invitation, which enables it to participate in the proceedings on an equal footing. Doing so is in the interests of fairness and the proper administration of justice, a point made by a number of States during the meeting of the General Assembly at which resolution 63/3 was adopted[1].

I. Adoption of General Assembly Resolution 63/3

1.06. In a letter dated 15 August 2008, the Minister for Foreign Affairs of the Republic of Serbia requested the inclusion in the agenda of the General Assembly of a supplementary item entitled "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law"[2]. The General Committee considered this request on 17 September 2008. After a short debate, during which the usefulness of the request for an advisory opinion was questioned, and the need for a full airing of the legal and political considerations was stressed[3], the Committee decided, without a vote, to recommend to the General Assembly the inclusion of the item on its agenda. On 19 September 2008, acting on this recommendation, the General Assembly decided, without a vote[4], to include the item in its agenda, referring it direct to plenary[5]. In due course, the Republic of Serbia (as sole sponsor) submitted a draft resolution, which was circulated on 23 September 2008[6].

1.07. On 8 October 2008, the General Assembly held a brief debate on the item, and proceeded immediately to vote on the draft resolution submitted by Serbia[7]. There were no

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[1] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 3 (United Kingdom); p. 5 (United States of America); p. 7 (Panama); p. 12 (Canada, Peru, Germany); p. 13 (Finland, Australia); p. 14 (Denmark, Norway) [Dossier No. 6].

[2] A/63/195 [Dossier No. 1].

[3] United Nations, *Official Records of the General Assembly, Sixty-third Session*, General Committee, 1st Meeting, 17 September 2008, Summary Records (A/BUR/63/SR.1), para. 101 (France), paras. 103-104 (United Kingdom), paras. 105-106 (United States of America).

[4] *Ibid.*, 2nd plenary meeting, 19 September 2008 (A/63/PV.2), p. 4 [Dossier No. 3]. As it had done in the General Committee, the United States of America expressed "serious reservations about the appropriateness of the General Assembly considering this item", and dissociated itself from the consensus (*ibid.*).

[5] *Ibid.*, pp. 4-6.

[6] A/63/L.2 [Dossier No. 4].

[7] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22) [Dossier No. 6].

co-sponsors. Resolution 63/3 was adopted by a vote of 77 in favour, six against, 74 abstentions and 35 Members not participating in the vote. The request for an advisory opinion was supported by barely 40 % of the total membership of the United Nations. Those voting against or abstaining on the resolution expressed strong doubts about its propriety or usefulness and criticized the formulation of the question. They noted, among other things, that the question was being asked out of context, that the Declaration of Independence had to be considered as part of a much broader background[8], that it raised "highly political" matters that are unsuitable for judicial review[9], that it represented a "manipulative attempt to stall the process of recognition"[10], and that it would not promote peace and stability in the region[11]. Moreover, no implication can be drawn that States which voted for the resolution opposed the Declaration of Independence. Indeed, several of those voting for resolution 63/3 had or have recognized Kosovo as a sovereign and independent State[12].

1.08. As was pointed out during the General Assembly debate, and notwithstanding the wishes of many States, resolution 63/3 requesting the advisory opinion was adopted without serious consideration being given to its usefulness for the Assembly's work, to the terms of the resolution, or to the formulation of the question. Many States pointed out that the question was not well worded, and that the resolution failed to place the request in context[13].

II. Summary of Kosovo's Written Contribution

1.09. This Written Contribution is divided into five parts comprising ten chapters.

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[8] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 3 (United Kingdom), p. 4 (Albania) [Dossier No. 6].

[9] *Ibid.*, p. 11 (Canada).

[10] *Ibid.*, p. 4 (Albania); see also p. 2 (United Kingdom).

[11] *Ibid.*, p. 4 (Turkey), p. 12 (Germany), p. 13 (Australia).

[12] Costa Rica, Iceland, Liechtenstein, Montenegro, Norway and Panama. Panama expressly said that its support for the resolution did "not affect or predetermine the political decision that Panama may or may not take to recognize the independence of Kosovo" (*ibid.*, p. 7). Panama recognized Kosovo on 17 January 2009.

[13] See paras. 7.04-7.10 and paras. 7.27-7.34 below.

1.10. **Part I** contains, besides this introductory chapter, in **Chapter II**, a description of the Republic of Kosovo today and of developments since the Declaration of Independence.

1.11. **Part II** concentrates on the recent history of Kosovo and the final status negotiations, which provide the immediate context for the Declaration of Independence. **Chapter III** covers briefly the history of Kosovo up to 1999, in so far as this may be useful to the Court's consideration of the question put to it. In particular, it describes Kosovo's position under the 1974 SFRY Constitution, the unlawful removal of Kosovo's autonomy, and the massive human rights abuses, crimes against humanity and war crimes perpetrated by the FRY and Serbian authorities against the people of Kosovo. This led to Security Council resolution 1244 (1999), the exclusion of the FRY and Serbian authorities from Kosovo, and almost a decade of United Nations administration during which there was a transfer of extensive powers to self-governing institutions in Kosovo, as explained in **Chapter IV**. **Chapter V** describes the final status process that took place between May 2005 and December 2007, ending with President Ahtisaari's recommendation in favour of independence, which was supported by the United Nations Secretary-General.

1.12. **Part III** consists of **Chapter VI**, which describes the Declaration of Independence of 17 February 2008, the circumstances surrounding its signing, its authors, and its contents.

1.13. **Part IV** addresses the legal aspects of the question contained in General Assembly resolution 63/3. **Chapter VII** opens the legal analysis by addressing in detail the question that has been asked to the Court. It shows that the question is narrow in scope, but contains – brief as it is – prejudicial and argumentative assumptions. It also points out that General Assembly resolution 63/3 did not indicate whether or how an answer to the question would assist the General Assembly in its work.

1.14. **Chapter VIII** explains why the Declaration cannot be regarded as not "in accordance with international law". It shows that international law contains no prohibition concerning the issuance of declarations of independence; rather, long-standing State practice, as well as practice that occurred in the context of the break-up of the former

Yugoslavia itself, confirms that the issuance of a declaration of independence is a factual event not regulated by international law.

1.15. **Chapter IX** concludes the legal argument by explaining why the Declaration cannot be seen as contravening Security Council resolution 1244 (1999). It shows that, rather than prohibiting the issuance of the Declaration of Independence, resolution 1244 (1999) established a framework that fully contemplated the possibility of a declaration of independence occurring. This is further supported by the fact that the Special Representative of the Secretary-General (SRSG), having had the power to declare the Declaration null and void in the event it was not in accordance with Security Council resolution 1244 (1999), did not do so.

1.16. The Written Contribution of the Republic of Kosovo concludes with **Part V**. **Chapter X** contains a summary of key contextual elements and of the legal arguments. By way of conclusion, Kosovo requests the Court, in the event that it deems it appropriate to respond to the request in General Assembly resolution 63/3, to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

CHAPTER II

KOSOVO TODAY

2.01. Developments in Kosovo since 17 February 2008, the date of the Declaration of Independence, are not directly relevant to the question before the Court, which concerns the legality under international law of the Declaration itself. Nevertheless, it may assist the Court to give, at the outset, an overview of developments in the Republic of Kosovo as of the date of this Written Contribution, 14 months on from the Declaration of Independence. Much has been achieved in terms of state-building over this period. The Security Council's objective of "a multi-ethnic and democratic Kosovo, which must reinforce regional stability"[14], is well on the way to being achieved.

2.02. After a brief overview (**Section I**), the present chapter describes the territory of Kosovo (**Section II**), its people (**Section III**), Constitution (**Section IV**), international relations (**Section V**), internal developments (**Section VI**) and the current international presence in Kosovo (**Section VII**). Finally, Serbia's continuing uncooperative attitude will briefly be mentioned (**Section VIII**).

I. Overview

2.03. The Republic of Kosovo is one of seven sovereign and independent States[15] to emerge from the break-up of the Socialist Federal Republic of Yugoslavia (SFRY)[16]. Like the other six new States, Kosovo had been one of eight constituent parts of

[14] Statement by the President of the Security Council, 24 October 2005, S/PRST/2005/51, p. 2 [Dossier No. 195].

[15] Bosnia and Herzegovina, Republic of Croatia, Republic of Kosovo, Republic of Macedonia (referred to for all purposes within the United Nations under the designation "the former Yugoslav Republic of Macedonia"), Republic of Montenegro, Republic of Serbia, and Republic of Slovenia.

[16] The Court has had occasion to refer to the dissolution/break-up and disappearance of the SFRY on a number of occasions (see, most recently, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment*, para. 75 (citing *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 310-311, para. 78)).

the SFRY[17]. The Kosovo settlement was "the last major issue related to Yugoslavia's collapse"[18].

2.04. The Republic of Kosovo is today a "democratic and secular, multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law"[19]. There have been many positive developments since the Declaration of Independence on 17 February 2008. While it is neither practical nor necessary to give a comprehensive account[20], the Republic of Kosovo has taken its place as a sovereign and independent State and a responsible member of the international community. Further, the Republic of Kosovo is fully implementing its commitments under the Ahtisaari Plan, in particular its commitments to human rights and fundamental freedoms and the rights of the Communities and their members, as well as to good relations with its neighbours.

2.05. Important developments since the Declaration of Independence include the adoption on 9 April 2008 of the Constitution of the Republic of Kosovo, its entry into force on 15 June 2008, and its implementation; the adoption and implementation by the Republic of Kosovo of the many laws envisaged in the Ahtisaari Plan; the recognition of Kosovo by 56 States; and the continuing support of the international community, including the International Steering Group (ISG) and the International Civilian Representative/ Office (ICR/ICO), as well as the successful deployment throughout Kosovo of the European Union's Rule of Law mission (EULEX).

2.06. In exercise of its sovereignty, and upon the invitation of the Republic of Kosovo, the implementation of Kosovo's commitments to the international community under the Ahtisaari Plan is supervised by the ISG and the ICR/ICO, who also assist with

[17] The constitutional history of Kosovo within the former Yugoslavia, including its position as an Autonomous Province on an equal footing with the six Republics, as well as the dissolution of the former SFRY, is considered in Chapter III below.

[18] Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 10 December 2007, Annex, para. 3 [Dossier No. 209]. Special Envoy Ahtisaari in his report referred to "this last episode in the dissolution of the former Yugoslavia" (Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, Annex, para. 16 [Dossier No. 203]).

[19] Declaration of Independence, paragraph 2 (Annex 1).

[20] An extensive account of developments in 2008 is given in the *Annual Government Report 2008*, presented by the Prime Minister to the Assembly on 29 January 2009 (available on the Kosovo Government website <http://ks-gov.net/pm>).

implementation in many ways, as do other international partners, including international and non-governmental organizations.

2.07. The Foreign Minister of the Republic of Kosovo, addressing the Security Council on 26 November 2008, referred to the progress made since the Declaration of Independence, saying "we have laid the foundations for a democratic and multi-ethnic State at peace with all its neighbours and firmly established on its path towards integration into Euro-Atlantic structures"[21]. In the debate of Security Council meeting on 23 March 2009, the Foreign Minister described recent achievements, including the adoption of further laws and the launching of the Kosovo Security Force[22].

2.08. Assessing the position on the first anniversary of the Declaration of Independence, at a special meeting of the Assembly of the Republic of Kosovo held on 17 February 2009, the President of the Republic, Dr. Fatmir Sejdiu, said:

> "One year after the declaration of an independent and sovereign state, Kosovo has made cautious steps forward, but vital for building democratic institutions and full confirmation that our state strongly helps peace and stability in the region."[23]

And Prime Minister Hashim Thaçi said:

> "The year which passed was a year of achievements and pride, a historic year of success for Kosovo.
>
> Within one year, we constructed and made functional all of the state institutions of the Republic of Kosovo.
>
> Working together, we have created a new feeling of optimism; a new feeling of faith; of strength and unity; that there is no challenge which the citizens of Kosovo cannot deal with and overcome."[23]

2.09. In its report to the International Steering Group of 27 February 2009, reviewing the first year of independence, the International Civilian Office noted that

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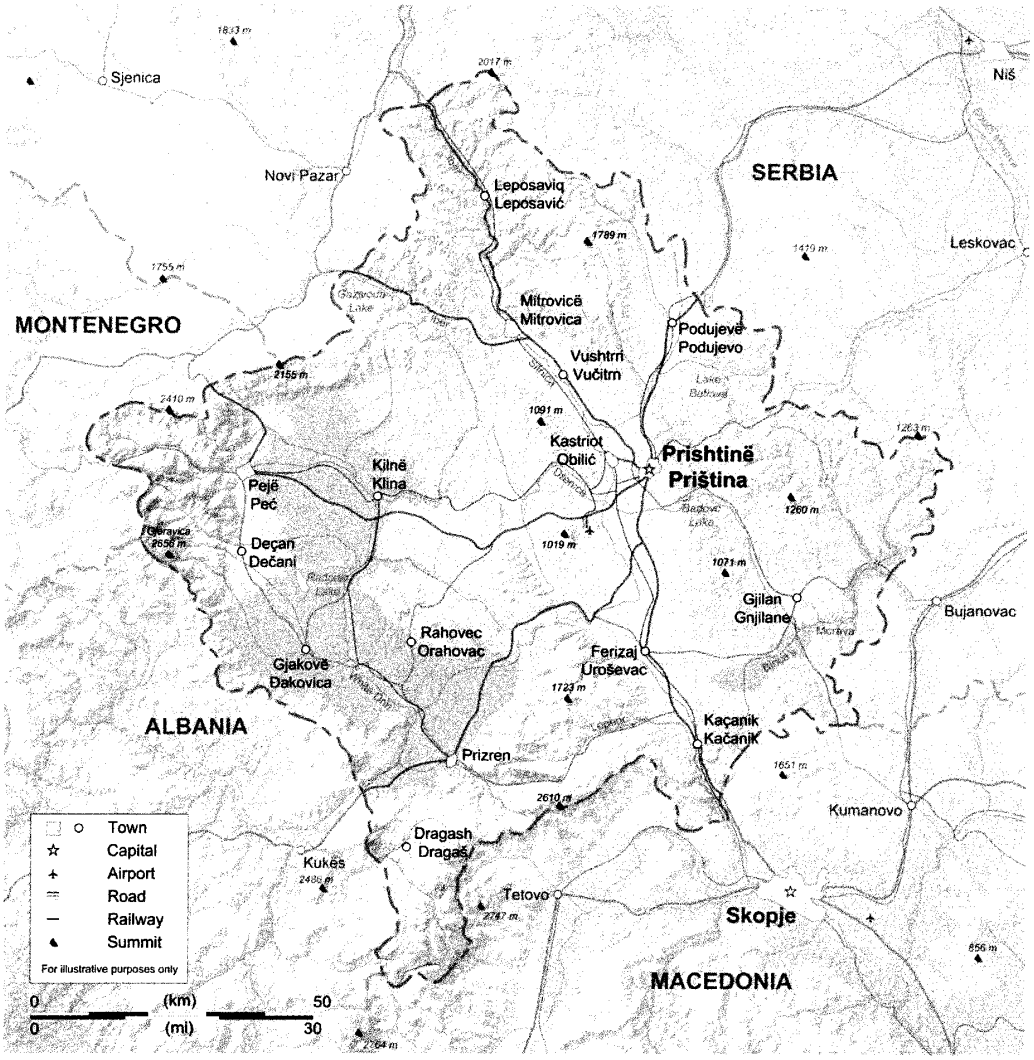
[21] Security Council, provisional verbatim record, sixty-third year, 6025th meeting, 26 November 2008, S/PV.6025, p. 7 [Dossier No. 124].

[22] Security Council, provisional verbatim record, sixty-fourth year, 6097th meeting, 23 March 2009, S/PV.6097, pp. 7-9.

[23] Assembly of the Republic of Kosovo, meeting of 17 February 2009, Transcript (available on the website of the Assembly of the Republic of Kosovo <http://www.kuvendikosoves.org/>).

Map 1

THE REPUBLIC OF KOSOVO



> "The past year witnessed much progress in Kosovo, progress in building institutions, anchoring Rule of Law, in the creating and consolidating of the elements of statehood, and in taking its place in the community of nations as a multi-ethnic democracy. Through all its actions the state of Kosovo has proven its independence and shown that independence is irreversible. Kosovo has also made strides, in partnership with the International Civilian Office (ICO), in fulfilling the promises made to its citizens and to the world when, in its Declaration of Independence, it committed itself to full implementation of the Comprehensive Proposal for the Kosovo Status Settlement (CSP)".

And looking forward, the ICO said that

> "Through continued effort and vigilance, we believe that 2009 will be a year of progress for Kosovo – progress in meeting its commitments to itself and to its international partners to implement the CSP, and progress toward the destiny foreseen in its Constitution, 'as a free democratic, and peace-loving country that will be a homeland for all of its citizens'."[24]

II. The Territory of Kosovo

2.10. Kosovo has a total area of 10,887 square kilometres. It has well-established borders with each of its four neighbours: Macedonia (to the south); Albania (to the south and west); Montenegro (to the north-west); and Serbia (to the north and east). Along some of its borders, Kosovo is divided from its neighbours by high mountain ranges with elevations of 2,000 to 2,500 metres. The central part of Kosovo is an extensive plain with an elevation of 400-700 metres.

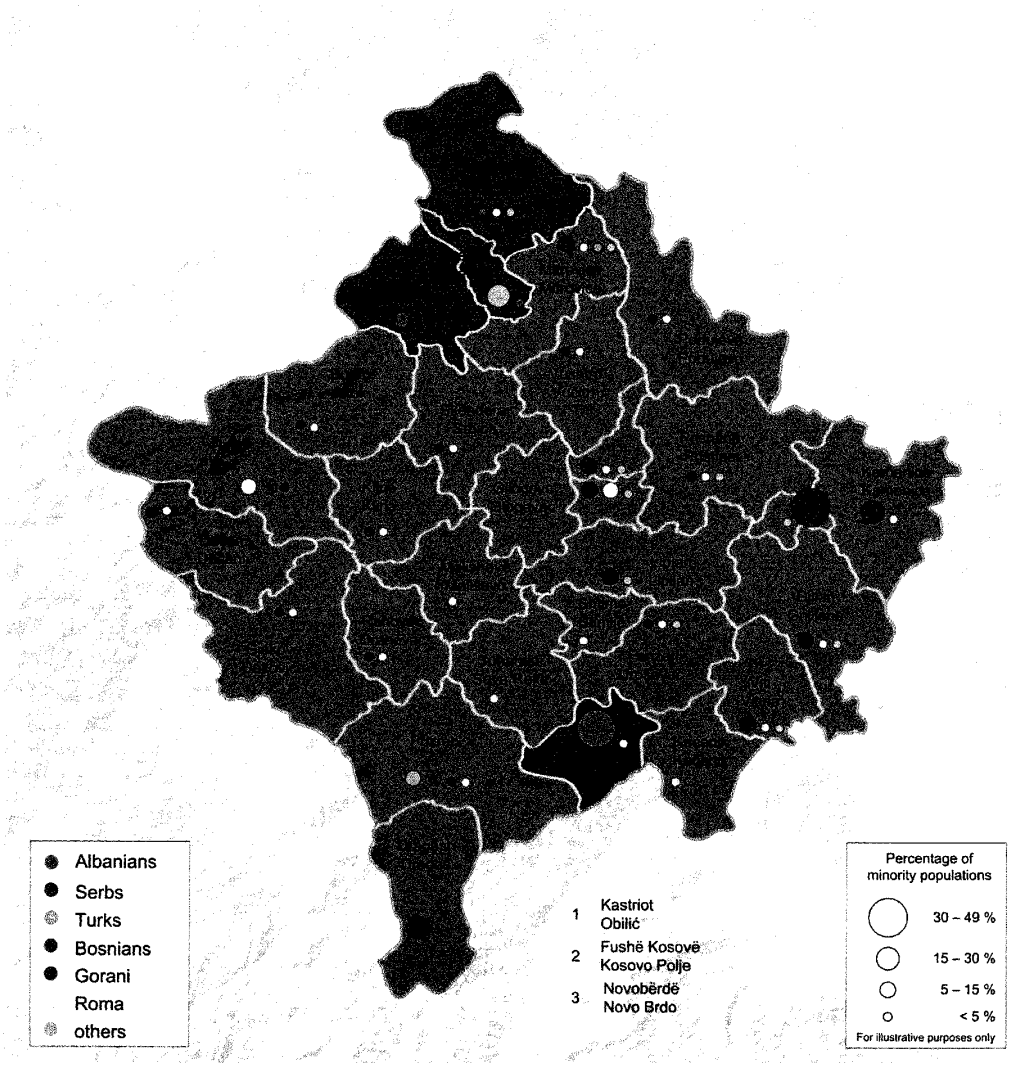
2.11. The capital of the Republic is Pristina (Prishtina/Priština), with an estimated population of 500,000. Other main towns include Prizren in the south-west, with over 200,000 inhabitants, Ferizaj/Uroševac in the south with approximately 160,000, Mitrovica in the north with approximately 130,000, Gjilan/Gnjilane in the south-east with over 130,000, Gjakovë/Đjakovica in the southwest with 90,000, and Pejë/Peć in the west with 80,000.

2.12. Map 1 (p. 12) gives a general overview of the Republic of Kosovo.

[24] Report of the International Civilian Office, Vienna, 27 February 2009 (Annex 3) (hereafter "ICO Report"), opening and closing paragraphs.

Map 2

ETHNIC COMPOSITION OF KOSOVO



2.13. Kosovo has no direct access to the sea, but negotiations are foreseen with Albania concerning the use of the harbour of Shëngjin located on the northern part of the Albanian coast.

2.14. The Ahtisaari Plan provided that

> "[t]he territory of Kosovo shall be defined by the frontiers of the Socialist Autonomous Province of Kosovo within the Socialist Federal Republic of Yugoslavia as these frontiers stood on 31 December 1988, except as amended by the border demarcation agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia on 23 February 2001"[25],

and went on to say that Kosovo shall engage with Macedonia to establish a technical commission "to physically demarcate the border and address other issues arising from the implementation of the 2001 agreement"[26]. A Joint Kosovo-Macedonian Commission for Demarcation and Marking the State Border was established in April 2008, and in June 2008 a tripartite Protocol was signed with Albania concerning the placing of a border marker at the Kosovo/Macedonia/Albania tri-point. In October/November 2008, the Joint Commission signed protocols concerning main and auxiliary border columns along the Kosovo-Macedonia border.

III. The People of Kosovo

2.15. According to the assessment of the Statistical Office of Kosovo (December 2008), the number of habitual residents is 2.1 million. 92 % of the inhabitants are Kosovo Albanians; 8 % are from other communities, including Serbs, Turks, Bosnians, Gorani, Roma, Ashkali and Egyptians. Map 2 (p. 14) shows the ethnic composition of Kosovo.

2.16. Kosovo Serb inhabitants are scattered throughout the territory of Kosovo. About one third live in the area of Kosovo north of the Ibar River (which flows through the

[25] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, Annex VIII, Article 3.2 [Dossier No. 204]; see also Statement by the President of the Security Council, S/PRST/2001/7, 12 March 2001 [Dossier No. 177].

[26] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, Annex VIII, Article 3.3 [Dossier No. 204].

town of Mitrovica). There are other Kosovo Serb-majority areas south of the River Ibar. About two thirds of Kosovo Serbs live south of the Ibar, including a sizeable number near the southern border with Macedonia.

IV. Constitution of the Republic of Kosovo

2.17. The first 120 days after the Declaration of Independence, from 17 February to 14 June 2008, were a transition period, as foreseen in the Ahtisaari Plan. On 15 June 2008, the Constitution of the Republic of Kosovo entered into force.

2.18. In the Declaration of Independence, the democratically-elected representatives of the people of Kosovo undertook to

> "adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process."[27]

2.19. The Ahtisaari Plan contained much of relevance to the drafting of the Constitution, including general principles and provisions on human rights, protection of the rights of communities, decentralization, the justice system, and a continued international civilian and military presence.

2.20. A draft of the Constitution was published in February 2008. There followed an intense period of informing members of the public and consultation, by Internet and at meetings throughout Kosovo. Following the consultations, the Commission reviewed and revised the draft, adopting it on 1 April 2008. On 2 April, the International Civilian Representative (ICR), Ambassador Peter Feith, reviewed the revised draft, and certified it as in accordance with the terms of the Ahtisaari Settlement. The Constitution was then adopted by the Assembly on 9 April 2008, and entered into force on 15 June 2008[28].

[27] Declaration of Independence of Kosovo, 17 February 2008, paragraph 4 (Annex 1).

[28] The text of the Constitution is available on the Assembly's website, in Albanian, Serbian and English (<http://www.assembly-kosova.org/common/docs/Kushtetuta_sh.pdf> (Albanian), <http://www.assembly-kosova.org/common/docs/Ustav1 Republike Kosovo Srpski .pdf> (Serbian), and <http://www.assembly-

2.21. The Constitution makes provision for the institutions of the Republic: a unicameral Assembly with 120 members[29], a Head of State (President of the Republic)[30], a Government consisting of a Prime Minister, one or more deputy prime ministers, and ministers[31], and judicial institutions (Constitutional Court, Supreme Court, district courts, municipal courts)[32].

2.22. Kosovo is a multi-party democracy. General elections have taken place in 2001, 2004 and 2007 and were found by the OSCE and the Council of Europe to be free and fair.

2.23. The Constitution makes provision for the highest standards of human rights. In addition to an extensive catalogue of rights and freedoms[33], the Constitution provides for the direct applicability of eight international human rights instruments: Universal Declaration of Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; International Covenant on Civil and Political Rights and its Protocols; Council of Europe Framework Convention for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination; Convention for the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[34].

2.24. The Constitution contains special provisions for the benefit of Communities which are not in the majority. An important matter in this regard is decentralization, that is local self-government at the level of municipalities[35].

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kosova.org/common/docs/Constitution1 of the Republic of Kosovo.pdf> (English)). The preamble and table of contents, together with an informal summary of its principal provisions, are at Annex 4.

[29] Constitution of the Republic of Kosovo, Chapter IV (Articles 63-82).

[30] *Ibid.*, Chapter V (Articles 83-91).

[31] *Ibid.*, Chapter VI (Articles 92-101).

[32] *Ibid.*, Chapters VII and VIII (Articles 102-118).

[33] *Ibid.*, Articles 23-54.

[34] *Ibid.*, Articles 22.

[35] *Ibid.*, Chapter III (Articles 57-62).

2.25. The official languages of the Republic are Albanian and Serbian. Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law[36].

2.26. Kosovo has adopted its state symbols (flag, seal and anthem), all of which reflect its multi-ethnic character[37]. For example, the Flag of the Republic bears the geographical shape of Kosovo in gold on a dark blue field, surmounted by six white, five-pointed stars[38].

V. International Relations

2.27. The Republic of Kosovo seeks good relations with all of its neighbours, including Serbia. As provided in its Constitution, it has no territorial claims against, and shall seek no union with, any State or part of any State[39]. During the final status negotiations, the Kosovo side proposed a Treaty of Friendship and Cooperation[40], but this was not accepted by the Serbian side.

2.28. Under the Constitution, the President of the Republic leads the foreign policy of Kosovo[41], assisted by the Minister for Foreign Affairs[42]. Since the Declaration of Independence, the President and Foreign Minister have represented Kosovo in numerous international meetings, bilateral and multilateral, including meetings of the United Nations General Assembly and Security Council. The Foreign Minister participated in the EU-Western Balkans Forum meeting at Hluboká nad Vltavou (Czech Republic) on 28 March 2009. Other Ministers have also been active internationally. The Assembly of

[36] Constitution of the Republic of Kosovo, Article 5.

[37] *Ibid.*, Article 6.

[38] *Ibid.*, Article 6; Law No. 03/L-038 on the Use of State Symbols of the Republic of Kosovo, 20 February 2008, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 35-40.

[39] Constitution of the Republic of Kosovo, Article 1 (3).

[40] Annex 6.

[41] Constitution of the Republic of Kosovo, Article 84 (10).

[42] The Foreign Ministry is organised in accordance with the Law on the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo (Law No. 03/L-044, 13 March 2008, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 50-53).

the Republic of Kosovo is also involved in international relations, both in its day-to-day activities[43] and through contacts with the parliaments of other States[44].

Recognition

2.29. As of the date of completion of this Written Contribution, Kosovo had been recognized as a sovereign and independent State by 56 States, from all geographical regions:

Africa

Burkina Faso
Liberia
Senegal
Sierra Leone

Asia

Afghanistan
Japan
Malaysia
Maldives
Marshall Islands
Micronesia
Nauru
Palau
Republic of Korea
Samoa
United Arab Emirates

Eastern Europe

Albania
Bulgaria
Croatia
Czech Republic
Estonia
Hungary
Latvia
Lithuania
Macedonia
Montenegro
Poland
Slovenia

Latin America and Caribbean

Belize
Colombia
Costa Rica

[43] In addition to legislating in the field of foreign affairs and its role in relation to treaties, the Assembly may adopt resolutions on foreign policy matters, such as the Resolution for Millennium Declaration adopted on 17 October 2008 (available on the website of the Assembly of the Republic of Kosovo <http://www.kuvendikosoves.org/>).

[44] For example, on 6 January 2009, the President of the Assembly, Mr. Jakup Krasniqi, signed a Memorandum of Understanding with the Speaker of the Turkish Assembly, on co-operation between the two Assemblies.

Latin America and Caribbean (continued)

Panama

Peru

Western Europe and Others

Australia

Austria

Belgium

Canada

Denmark

Finland

France

Germany

Iceland

Ireland

Italy

Liechtenstein

Luxembourg

Malta

Monaco

Netherlands

Norway

Portugal

San Marino

Sweden

Switzerland

Turkey

United Kingdom

United States of America

2.30. It will be seen that the recognizing States come from all parts of the world. They include all of Kosovo's neighbours other than Serbia. Four of the other six States to emerge from the disintegration of the SFRY (Croatia, Macedonia, Montenegro, and Slovenia) have recognized Kosovo. The recognizing States include a majority of the members of the Security Council in both 2008 (8 members) and 2009 (as of April, 9 members), as well as all of the Group of Seven (G-7) States, 22 of the 27 Members of the European Union[45], 24 of the 28 NATO Member States, 33 of the 47 Council of Europe Member States, 35 of the 56 OSCE Member States. The recognizing States represent two thirds of world Gross Domestic Product.

2.31. In addition, there have been practical moves by certain States which have not yet formally recognized Kosovo. For example, among the five EU Member States that

[45] In paragraph 3 of its resolution of 5 February 2009 on Kosovo and the role of the EU, the European Parliament "[e]ncourages those EU Member States which have not already done so to recognise the independence of Kosovo" (available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0052&language=EN&ring=B6-2009-0063>).

have not yet recognized Kosovo, Greece and Slovakia nevertheless accept passports issued by the Republic of Kosovo, as do other States, such as Saudi Arabia.

2.32. The fact that some States have not yet recognized the Republic of Kosovo in no way indicates that they have adopted a position opposed to recognition. In most cases, especially with States that are distant from the region, recognition is likely to be simply a matter of time. It is noteworthy that most States in Europe have recognized. The number of States that have taken a positive decision not to recognize at the present time seems to be rather limited. In addition, some States appear not to have a practice of according recognition[46].

Diplomatic Relations and the Establishment of Embassies

2.33. Since independence, Kosovo has enacted various laws in the field of international relations:

- Law on the Status, Immunities, and Privileges of Diplomatic and Consular Missions and Personnel in Kosovo and of the International Military Presence and its Personnel[47],
- Law on the Foreign Service of the Republic of Kosovo[48],
- Law on Consular Services of Diplomatic and Consular Missions of the Republic of Kosovo[49].

2.34. The Law on Status, Privileges and Immunities gives effect to the express commitment in the Declaration of Independence to continue to be bound by the Vienna Conventions on diplomatic and consular relations[50]. In addition to diplomatic missions in

[46] This is the case with New Zealand. The Foreign Ministry is in contact with the Ministry of Foreign Affairs and Trade of New Zealand, through standard diplomatic channels, over the modalities of establishing diplomatic and consular relations.

[47] Law No. 03/L-033, 20 February 2008, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 46-49.

[48] Law No. 03/L-122, 16 December 2008, *ibid.*, No. 46, 15 January 2009, pp. 31-39.

[49] Law No. 03/L-125, 16 December 2008, *ibid.*, pp. 45-48.

[50] Declaration of Independence of Kosovo, paragraph 9 (Annex 1).

Kosovo, the law applies to the ICR and EUSR, EULEX, the United Nations and its specialized agencies, the OSCE, and "any other international intergovernmental organization as the Minister for Foreign Affairs may deem appropriate"[51]. Some States still maintain liaison offices, which are accorded by law the same privileges and immunities as diplomatic missions.

2.35. As of the date of this Written Contribution, 17 States have Embassies in Pristina (Albania, Austria, Croatia, Czech Republic, Bulgaria, Finland, France, Germany, Hungary, Italy, Netherlands, Norway, Slovenia, Switzerland, Turkey, United Kingdom, and the United States of America). Seven States have accredited non-resident Ambassadors (Canada, Belgium, Denmark, Estonia, Ireland, Japan, and Sweden). The Republic of Kosovo has diplomatic missions in Ankara, Berlin, Bern, Brussels, London, Paris, Rome, Tirana, Vienna, and Washington, D.C. Another eight diplomatic missions have been recently decreed by the President of the Republic of Kosovo (Budapest, Ljubljana, Prague, Sofia, Stockholm, Tokyo, The Hague, and Zagreb). In addition, high officials of the Republic of Kosovo have engaged in extensive bilateral diplomacy with many other States.

Treaties and International Law

2.36. The Constitution of the Republic of Kosovo provides that the Republic of Kosovo shall respect international law[52], and that the Republic concludes international agreements and becomes a member of international organizations[53]. International agreements relating to certain subjects are ratified by a two-thirds vote of all the deputies of the Assembly. These include territory, peace, alliances, political and military issues, as well as fundamental rights and freedoms and the participation of Kosovo in international organizations. Other international agreements are ratified upon signature of the President of the Republic[54]. International agreements become part of the internal legal system upon

[51] Law No. 03/L-033 on the Status, Immunities, and Privileges of Diplomatic and Consular Missions and Personnel in Kosovo and of the International Military Presence and its Personnel, Article 3.2, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 46-49.

[52] Constitution of the Republic of Kosovo, Article 16 (3).

[53] *Ibid.*, Article 17 (1).

[54] *Ibid.*, Article 18.

publication in the *Official Gazette*. They are directly applied except where application requires the promulgation of a law[55]. International agreements and legally-binding norms of international law have superiority over the laws of the Republic[56].

2.37. In the Declaration of Independence, the democratically-elected representatives of the people of Kosovo gave the following commitment:

> "We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability."[57]

2.38. Article 145 (1) of the Constitution provides:

> "International agreements and other acts relating to international cooperation that are in effect on the day this Constitution enters into force will continue to be respected until such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution."

2.39. Kosovo is in the process of establishing with its treaty partners the status of treaties to which Kosovo was bound as a former constituent part of the SFRY. On 7 October 2008, the Ministry of Foreign Affairs addressed a Note Verbal to all Embassies, Liaison and Diplomatic Offices accredited in the Republic of Kosovo asking for a list and the texts of the treaties concerned. Replies have been received from a number of States, and are being studied by the Ministry. Even before 7 October 2008, there had already been contacts with certain States about treaty succession.

2.40. Kosovo is also beginning to enter into new bilateral treaties. Thus, for example, on 13 January 2009, Kosovo and Turkey signed an Agreement on the Mutual Abolition of Visas. Another important treaty under negotiation concerns the State border

[55] Constitution of the Republic of Kosovo, Article 19 (1).

[56] *Ibid.*, Article 19 (2).

[57] Declaration of Independence, paragraph 9 (Annex 1).

between the Republic of Kosovo and the Republic of Macedonia[58]. Three bilateral agreements are currently under negotiation with Albania (on travel of citizens; on readmission; and on cooperation between the two foreign ministries). Negotiations of bilateral agreements in different areas are also under way with other European countries.

International Monetary Fund, World Bank

2.41. The procedure is in train for the Republic of Kosovo to join the International Monetary Fund and the International Bank for Reconstruction and Development, as well as the other organizations in the World Bank Group – International Finance Corporation (IFC), International Development Agency (IDA), and Multilateral Investment Guarantee Agency (MIGA). IMF staff visits to Kosovo have taken place regularly. A draft Law on Membership of the Republic of Kosovo in the International Monetary Fund and the World Bank Group Organizations has been finalized, approved by the Government, and sent for final approval to the Assembly.

2.42. In early March 2009, the IMF sent a formal "quota letter" to Kosovo. The Government sent a positive reply on 17 March 2009. Kosovo's membership applications will be submitted to the executive bodies of the organizations, and with their approval to the respective boards of governors.

European Union

2.43. The Foreign Minister of the Republic of Kosovo, Mr. Skender Hyseni, stated in the United Nations Security Council on 23 March 2009:

> "We are committed also to pursuing the goal of full membership in the European Union (EU) as soon as feasible and are implementing the reforms required. ... The future of all nations of the Western Balkans lies in European integration, and Kosovo intends to pursue that goal very vigorously."[59]

[58] See para. 2.14 above.

[59] Security Council, provisional verbatim record, sixty-fourth year, 6097th meeting, 23 March 2009, S/PV.6097, p. 9.

2.44. In a Communication on Enlargement Strategy of 5 November 2008, the European Commission concluded:

> "Kosovo has a clear European perspective, in line with the rest of the Western Balkans. In the autumn of 2009, the Commission will present a feasibility study evaluating means to further Kosovo's political and socio-economic development, and examining how best Kosovo can progress as part of the region towards integration with the EU in the context of the Stabilization and Association Process."[60]

2.45. Among other things, the Commission's Communication noted that "[t]he constitution adopted by Kosovo is in line with European standards and a considerable amount of key legislation has been adopted"[61].

2.46. The EU Presidency Press Statement issued at the end of the EU-Western Balkans Forum meeting at Hluboká nad Vltavou (Czech Republic) on 28 March 2009 included the following paragraph on Kosovo:

> "The participants discussed ways of assisting the economic and political development of Kosovo through a clear European perspective, in line with the European perspective of the region. In this respect, they welcome the Commission's intention to present, in the autumn of 2009, a study. Kosovo's full involvement in regional initiatives needs to be ensured in a constructive manner."[62]

2.47. The Agency for European Integration within the Office of the Prime Minister has formulated proposals to reform reporting, implementation and coordination mechanisms in relation to integration within the EU.

VI. Internal Developments

2.48. Important steps have been taken since 17 February 2008, and especially since 15 June 2008, to establish the institutions foreseen in the Constitution[63]. These include in particular security sector reform and the development of institutions connected with the

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[60] Communication from the Commission to the Council and the European Parliament, Enlargement Strategy and Main Challenges 2008-2009, 5 November 2008, COM(2008)674 final, p. 14.

[61] *Ibid.*, p. 5.

[62] Para. 7 (available at the EU Presidency website <http://www.eu2009.cz/>).

[63] ICO Report, section II (Annex 3).

rule of law. Kosovo has begun to issue its own passports, which are recognised in many countries.

Adoption of laws

2.49. The ICO has certified that the draft laws in the "Ahtisaari package" are in accordance with the Ahtisaari Plan. Among the 41 such laws that came into force on 15 June 2008 were Laws on Diplomatic Privileges and Immunities[64]; on Kosovo Police[65]; on Citizenship[66]; on the Rights of Communities and their Members[67]; on Travel Documents[68]; on the Ministry of Foreign Affairs[69]; on General Elections[70]; and on the Central Bank[71]. Further "Ahtisaari package" laws were adopted in December 2008.

2.50. A table of laws adopted and published in the *Gazette* since Independence is at **Annex 5**.

Economic developments

2.51. The laws concerning the economy foreseen in the Ahtisaari Plan have been enacted, including legislation on publicly owned enterprises[72], the Privatization Agency of Kosovo[73], the Kosovo Property Agency, and the various independent economic regulators of Kosovo. These laws and their ongoing implementation assure a comprehensive

[64] Law No. 03/L-033 on the Status, Immunities and Privileges of Diplomatic and Consular Missions and Personnel in Republic of Kosova and of the International Military Presence and its Personnel, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 46-49.

[65] Law No. 03/L-035 on Police, *ibid.*, No. 28, 4 June 2008, pp. 29-46.

[66] Law No. 03/L-034 on Citizenship of Kosova, *ibid.*, No. 26, 2 June 2008, pp. 28-34.

[67] Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and their Members in Kosovo, *ibid.*, No. 28, 4 June 2008, pp. 65-73.

[68] Law No. 03/L-037 on Travel Documents, *ibid.*, No. 27, 3 June 2008, pp. 69-75.

[69] Law No. 03/L-044 on Ministry for Foreign Affairs and Diplomatic Service of Republic of Kosovo, *ibid.*, No. 26, 2 June 2008, pp. 50-53.

[70] Law No. 03/L-073 on General Elections in the Republic of Kosovo, *ibid.*, No. 31, 15 June 2008, pp. 1-38.

[71] Law No. 03/L-074 on the Central Bank of the Republic of Kosovo, *ibid.*, No. 32, 15 June 2008, pp. 15-27.

[72] Law No. 03/L-087, *ibid.*, No. 31, 15 June 2008, pp. 39-57.

[73] Law No. 03/L-067, *ibid.*, No. 30, 15 June 2008, pp. 30-43.

framework for rapid and sustainable economic growth. On 19 December 2008, the Assembly adopted the budget for 2009 amounting to Euro 1.43 billion[74].

2.52. In a recent article, the Minister of Economy and Finance wrote:

> "For a decade now, Kosovo has been at peace, working with the support of the international community to build a modern, investment-friendly framework for sustainable economic development.
>
> Over these years, as a consequence of newfound freedom and extraordinary efforts, a great deal has been achieved. A modern legal framework has been constructed, consistent with EU directives and international best practices. Liberal market policies have been implemented, including low tariffs, duties, and taxes. Progressive government institutions have been built. A sound banking sector has developed under the regulation and supervision of the Central Bank of Kosovo. Contemporary public sector financial management systems have been implemented, which many consider amongst 'the best in the Balkans.'"[75]

2.53. In his introduction to the 2008 End of Mission Report on UNMIK's Pillar IV (European Union Pillar), the Deputy SRSG EU Pillar, Mr. Paul Acda, summarised the economic progress in the following terms:

> "Today Kosovo has the legal framework that a modern market economy needs: laws favourable to business creation, an investor friendly tax system, and rules and regulations that protect the entrepreneur as well as the consumer. Banking and insurance supervision has been established. The private sector has received a boost from a successful privatisation process. Market regulators are in place and public utilities are on the sometimes painful path of modernisation. Kosovo can be proud of one of the most modern and efficient Customs services in South East Europe. And a number of agreements have integrated Kosovo's economy into the region's, thus paving the way for a common European future."[76]

Constitutional Court

2.54. The Law on the Constitutional Court[77] was adopted by the Assembly in December 2008, and promulgated by the President at the end of that month. It entered into

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[74] Law No. 03/L-105 on Budget of the Republic of Kosovo for the Year 2009.

[75] *The Economist*, 14 February 2009.

[76] UNMIK, *European Union Pillar, The 10 Key Achievements, End of Mission Report, 1999-2008*, p. 3 (published September 2008, available on the UNMIK website <http://www.unmikonline.org/>).

[77] Law No. 03/L-121, *Official Gazette of the Republic of Kosova*, No. 46, 15 January 2009, pp. 20-30.

force on 19 January 2009. 41 candidates responded to the invitation to apply to become a judge on the Court. The Special Committee to Review Candidates for Appointment to the Constitutional Court has conducted interviews, and is expected to select a short-list of candidates for submission to the Assembly for its approval in April or May 2009. In the meantime, the Interim Secretariat of the Court has begun registering cases.

Security sector

2.55. A series of important measures have been taken in the security sector. The Kosovo Police Service is highly regarded as one of the best in the region. The Kosovo Security Council had its first meeting in February 2009. Also in February 2009, the Assembly confirmed the first Director of the Kosovo Intelligence Agency, who is charged with developing an agency that is multi-ethnic and apolitical. As foreseen in the Ahtisaari Plan, and with guidance and support from KFOR, the Kosovo Security Force (KSF) became operational in January 2009. The Kosovo Protection Corps (KPC) has been disbanded.

Decentralization

2.56. An important matter for the protection of the rights of minority communities and their members is the decentralization programme. The Assembly has adopted the Law on Local Self-Government[78] and the Law on Municipal Administrative Borders[79] in accordance with the Ahtisaari Plan. The second of these provides for the establishment of five new municipalities, as well as extension of the Municipality of Novobërdë/Novo Brdo. According to this Law, out of 38 municipalities, ten will have a Serb majority, meaning that over 95 % of the members of the Serb community will be able to govern themselves, including competences in education, health, police, urban and economic planning, etc. The Law on Local Self-Government provides that in those municipalities where at least 10 % of the population comes from a minority community there will be an additional vice-president position for minorities. Education is guaranteed in the language of the

[78] Law No. 03/L-040, 20 February 2008, *Official Gazette of the Republic of Kosova*, No. 28, 4 June 2008, pp. 47-64.

[79] Law No. 03/L-041, 20 February 2008, *ibid.*, No. 26, 2 June 2008, pp. 1-17.

community. There are already excellent cases of cohabitation in several municipalities, for example in the municipalities of Kamenicë/Kamenica, Novobërdë/Novo Brdo and Gjilan/Gnjilane.

2.57. Also vital is the protection of religious and cultural heritage. The Assembly has passed the Law on the Establishment of Special Protective Zones[80], which sets up a mechanism to protect Kosovo's religious and cultural patrimony, including the sites of the Serbian Orthodox Church. In February 2009, the Kosovo Police assumed responsibility for a 24-hour protection of these sites[81].

VII. Presence of the International Community

2.58. As was foreseen in the Declaration of Independence[82], in accordance with the provisions of the Constitution of the Republic of Kosovo[83], and at its invitation, an international civilian presence and an international military presence are in Kosovo for the time being to supervise and support implementation of various aspects of Ahtisaari Plan.

2.59. In addition to the international bodies in Kosovo, many States (including some that have not yet recognised Kosovo) are generously and actively assisting Kosovo on a bilateral and multilateral basis. For example, international donors pledged a total of 1.2 billion Euros at the Kosovo Donors Conference in Brussels on 11 July 2008.

2.60. As provided in the Ahtisaari Report, the powers of the international presences are focused in critical areas such as community rights, decentralization, the protection of

[80] Law No. 03/L-039 on Special Protective Zones, *Official Gazette of the Republic of Kosova*, No. 28, 4 June 2008, pp. 74-76.

[81] ICO Report, section II.3 (Annex 3).

[82] Annex 1. Paragraph 5 of the Declaration read: "We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability."

[83] Constitution of the Republic of Kosovo, Chapter XIV, especially Articles 146, 147 and 153.

the Orthodox Churches in Kosovo and the rule of law, but at the same time "Kosovo's authorities are ultimately responsible and accountable for the implementation of the Settlement proposal"[84].

2.61. Central elements of the international civilian presence are the International Civilian Representative (ICR), supported by the International Steering Group (ISG), and the European Union's Rule of Law mission, EULEX. Other international bodies, including the OSCE, continue to play a role. KFOR remains as the international military presence. Details of the activities of these various bodies may be found in their publications, including their websites. The following is only a brief introduction.

2.62. The **International Steering Group (ISG)**, foreseen in the Ahtisaari Plan, has been established comprising key international stakeholders[85]. The principal tasks of the ISG are to appoint the International Civilian Representative (ICR), to support and give guidance to the ICR, to determine in due course that Kosovo has implemented the terms of the Ahtisaari Plan, to provide direction on the ultimate phase-out of the ICR, and to conduct one or more reviews of the mandate of the ICR, on the basis of the state of implementation of the Ahtisaari Plan[86].

2.63. The ISG meets regularly to discuss matters relevant to implementation of the Plan. It has issued a series of statements[87].

2.64. As noted above, Kosovo is responsible for managing its own affairs. For an initial period, an **International Civilian Representative (ICR),** supported by an **International Civilian Office (ICO)**, supervises the implementation of the Ahtisaari Plan

[84] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, paras. 13-14 [Dossier No. 203].

[85] The ISG currently comprises 25 States: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Slovenia, Switzerland, Sweden, Turkey, United Kingdom, United States of America.

[86] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, Article 12 [Dossier No. 204].

[87] Available on the website of the ICO (<http://www.ico-kos.org/?id=3>).

and supports the relevant efforts of the Kosovo authorities[88]. The ICR's role is set out in the Ahtisaari Plan *inter alia* at Article 12 (General Principles) and Annex IX. It is summarized in the Ahtisaari Report as follows:

> "The International Civilian Representative, who shall be double-hatted as the European Union Special Representative and who shall be appointed by an International Steering Group, shall be the ultimate supervisory authority over implementation of the Settlement. The International Civilian Representative shall have no direct role in the administration of Kosovo, but shall have strong corrective powers to ensure successful implementation of the Settlement. Among his/her powers is the ability to annul decisions or laws adopted by Kosovo authorities and sanction and remove public officials whose actions he/she determines to be inconsistent with the Settlement. The mandate of the International Civilian Representative shall continue until the International Steering Group determines that Kosovo has implemented the terms of the Settlement."[89]

2.65. **EULEX-Kosovo (EULEX)** is the European Security and Defence Policy (ESDP) mission envisaged in the Ahtisaari Plan[90]. The basis for the presence of EULEX in Kosovo is the mandate foreseen in the Declaration of Independence, the Ahtisaari Plan, the Constitution, the invitation from the institutions of the Republic of Kosovo, and the EU Joint Action of 4 February 2008[91].

2.66. EULEX was set up by a Joint Action of the Council of the European Union. Its Mission Statement is set out in Article 2, paragraph 1, of the Joint Action, as follows:

> "EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices."[92]

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[88] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, Annex IX, Article 1 [Dossier No. 204].

[89] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, Annex, p. 8 [Dossier No. 203]. For the ICO Report, see Annex 3.

[90] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, Articles 12.4 and 13; Annex IX, Article 2.3; and Annex X [Dossier No. 204].

[91] See point 3 of Kosovo's four points (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, Annex I [Dossier No. 90]).

[92] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, *Official Journal of the European Union*, L 42/92, 16.02.2008.

2.67. EULEX thus has an operational role in the field of police and the courts, with judges and prosecutors, but in other areas its function is to monitor, mentor and advise. In relation to the courts, basic provisions are the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo[93] and the Law on Special Prosecution Office of the Republic of Kosovo[94] (both adopted by the Assembly of Kosovo as part of the "Ahtisaari package"). EULEX deployed throughout Kosovo with effect from 9 December 2008. A report by EULEX is annexed to the Secretary-General's latest report on UNMIK.

2.68. The Ahtisaari Plan envisaged that an international military presence would be established by NATO. **KFOR**, originally established pursuant to Security Council resolution 1244 (1999), remained in Kosovo after independence in accordance with the Declaration of Independence and the Constitution of the Republic of Kosovo[95], upon the invitation of Kosovo and with its agreement. It carries out functions consistent with the Ahtisaari Plan[96].

2.69. In the light of the changed circumstances following the Declaration of Independence, **UNMIK** has been reconfigured by the Secretary-General (with the support of the Security Council) and now has a much reduced role. Its chief remaining functions (rule of law) came to an end in December 2008. It is foreseen that the number of persons working for UNMIK will be reduced to around 500 by July 2009.

2.70. Following the Declaration of Independence, the Secretary-General informed the Security Council "that UNMIK would continue to implement its mandate in the light of the evolving circumstances"[97]. A debate took place in the Security Council on 18 February 2008, the day after the Declaration of Independence, at the request of Serbia and the Russian Federation. The Council took no action at that stage or indeed at any time

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[93] Law No. 03/L-053, *Official Gazette of the Republic of Kosova*, No. 27, 3 June 2008, p. 59.

[94] Law No. 03/L-052, *ibid.*, p. 47.

[95] Constitution of the Republic of Kosovo, Article 153.

[96] On 17 February 2008, the President of the Republic wrote to NATO on behalf of the institutions to invite NATO to maintain KFOR in Kosovo.

[97] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/354, 12 June 2008, para. 2 [Dossier No. 88].

before 26 November 2008[98]. In his report on UNMIK for the period 16 December 2007 to 1 March 2008, the Secretary-General said that UNMIK "has acted, and will continue to act, in a realistic and practical manner and in the light of the changed circumstances"[99].

2.71. In his special report of 12 June 2008, the Secretary-General said that, on the basis of extensive consultations and pending guidance from the Security Council, he intended "to adjust operational aspects of the civilian presence in Kosovo"[100]. The Secretary-General's report on UNMIK of 24 November 2008[101] described the current political situation in Kosovo, including the actions of the Kosovo institutions under the Constitution of the Republic of Kosovo[102]. The Secretary-General further described progress with reconfiguration of UNMIK, the relationship between UNMIK and EULEX[103], and how "UNMIK has begun to adapt its structure and profile in response to the profoundly changed reality in Kosovo following Kosovo's declaration of independence and the adoption of a Constitution"[104]. He noted that "reconfiguration is both timely and necessary, and is being accelerated in order to adapt it fully to the prevailing circumstances on the ground. It is taking place in a transparent manner with respect to all stakeholders and is consistent with the United Nations position of strict neutrality on the question of Kosovo's status."[105] The report described "a dialogue with the Government of Serbia" conducted by the SRSG, but further recorded that the institutions of Kosovo "have clearly expressed that they do not accept the results of the arrangements set out in the present report". The Secretary-General was nevertheless "encouraged by Pristina's indication that

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[98] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839 [Dossier No. 119]. Further debates were held in the Security Council, without action being taken, on 30 March 2008 (S/PV.5850 [Dossier No. 120]); 21 April 2008 (closed meeting, S/PV.5871); 20 June 2008 (S/PV.5917 [Dossier No. 122]); and 25 July 2008 (S/PV.5944 [Dossier No. 123]).

[99] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211, 28 March 2008, para. 30 [Dossier No. 86]; see also paras. 31-33. See also the Secretary-General's report on UNMIK for the period 1 March to 25 June 2008 (S/2008/458, 15 July 2008 [Dossier No. 89]).

[100] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/354, 12 June 2008 [Dossier No. 88].

[101] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008 [Dossier No. 90].

[102] *Ibid.*, para. 2.

[103] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, paras. 21-25 [Dossier No. 90].

[104] *Ibid.*, para. 48.

[105] *Ibid.*, para. 49.

it is willing to cooperate with EULEX, and, inter alia, with the European Union and NATO"[106].

2.72. On 26 November 2008, the Security Council held a debate on the Secretary-General's report on UNMIK[107]. At the end of the debate, the Council, in a Presidential statement[108], welcomed the report and

> "taking into account the positions of Belgrade and Pristina on the report which were reflected in their respective statements, welcomes their intentions to cooperate with the international community".

The statement continued:

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

2.73. The Security Council raised no objection to the developments on the ground in Kosovo described in the Secretary-General's reports, and in particular the role of the institutions of Kosovo and of the international community, as well as the Secretary-General's proposals for the "umbrella" role of UNMIK. In so doing, the Security Council took into account the position of the Republic of Kosovo. That position was reflected in the statement of its Foreign Minister, Mr. Skender Hyseni, in the Security Council debate on 26 November 2008, in the following terms:

> "We are ... committed to the early deployment of EULEX throughout Kosovo, in accordance with the mandate that derives from the Kosovo Declaration of Independence, the Ahtisaari package, the Constitution of the Republic of Kosovo, the laws of the Republic of Kosovo, the European Union joint action plan of 4 February 2008, and the invitations of 17 February and 8 August 2008 for EULEX deployment.

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[106] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, para. 52 [Dossier No. 90].

[107] Security Council, provisional verbatim record, sixty-third year, 6025th meeting, 26 November 2008, S/PV.6025 [Dossier No. 124].

[108] Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008 [Dossier No. 91].

> In a declaration of 18 November, the institutions of the Republic of Kosovo made very clear their rejection in its entirety of the six-point proposal contained in the Secretary-General's report (S/2008/354). Our position and response to the report remains the same. We cannot permit any action that infringes upon the sovereignty and territorial integrity of the Republic of Kosovo. We will cooperate with EULEX on its deployment throughout Kosovo on the basis of the mandate deriving from the aforementioned documents, fully respecting the sovereignty, territorial integrity and unitary character of the Republic of Kosovo."[109]

2.74. The Security Council held a further debate on 23 March 2009, on the Secretary-General's latest report on UNMIK[110]. That report indicated that UNMIK had accelerated the process of reconfiguration[111], and annexed the first report of EULEX[112].

VIII. Serbia's Attitude towards Kosovo

2.75. Serbia does not accept the independence of Kosovo. Indeed, Serbian officials, including President Boris Tadić, the current Foreign Minister, Mr. Vuk Jeremić and "Minister for Kosmet", Mr. Goran Bogdanivić, repeatedly say that Serbia will "never" recognize the independence of "Kosmet". The 2006 Constitution of the Republic of Serbia, promulgated in an act of extraordinary bad faith in the middle of the final status process, institutionalizes Serbian obstructionism, by referring to the "constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations"[113].

2.76. In adopting this negative line on Kosovo, the Serbian leadership is out of line with its public opinion. There is widespread acknowledgment in Serbia that the future lies in Europe, not in fighting old and lost battles over Kosovo. But that is not acknowledged by high officials of that country.

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[109] Security Council, provisional verbatim record, sixty-third year, 6025th meeting, 26 November 2008, S/PV.6025, pp. 8-9 [Dossier No. 124]; see also Security Council, provisional verbatim record, sixty-fourth year, 6097th meeting, 23 March 2009, S/PV.6097, p. 8

[110] Report of the Secretary-General on the United Nations Interim Mission in Kosovo, S/2009/149, 17 March 2009.

[111] *Ibid.*, para. 35.

[112] *Ibid.*, annex 1.

[113] Constitution of the Republic of Serbia (2006), preamble; see paras. 5.16-5.17 below.

2.77. Serbia constantly seeks to obstruct the development of Kosovo's international relations. Serbia does whatever it can to discourage States from recognizing Kosovo, and to block Kosovo's admission to international and regional organizations. Serbia's initiative in pursuing the present advisory proceedings seems to be motivated, at least in part, by the hope that States will delay recognizing Kosovo or admitting it to international institutions while the proceedings are pending. The President of Serbia, Mr. Boris Tadić, said in the Security Council debate on 23 March 2009:

> "I believe that all United Nations Member States should respect the fact that the International Court of Justice will decide the issue, and that no one should in any way prejudge its deliberations. Therefore, we expect no encouragement for further recognitions. I call on all United Nations Member States that have not recognized the unilateral declaration of independence to stay the course while the Court conducts its work."[114]

2.78. Serbia refuses to cooperate with efforts to integrate Kosovo Serbs into Kosovo structures. It actively discourages Kosovo Serbs from participating at all levels. It has ordered Kosovo Serbs to withdraw from the Kosovo Police. Such actions are potentially highly detrimental to the interests of the Serb community and its members in Kosovo. (Some Kosovo Serbs nevertheless do continue to participate in the institutions of the Republic of Kosovo, including as Government Ministers.) Serbia engages in deliberately provocative actions in the north of Kosovo. A particularly flagrant example was the meeting of Serbian parliamentarians with the members of the so-called "Assembly of the Association of Serb Municipalities" held at Zveçan/Zvečan on 17 February 2009[115].

2.79. As the Foreign Minister of the Republic of Kosovo said in the Security Council debate on 23 March 2009,

> "the Republic of Serbia ... has continued to encourage and support the illegal and criminal structures in the north of Kosovo. Serbia is working actively to prevent Serb citizens of Kosovo from cooperating with institutions that are seeking to protect their rights and to help them solve their problems and improve their lives. The Serbian

[114] Security Council, provisional verbatim record, sixty-fourth year, 6097th meeting, 23 March 2009, S/PV.6097, p. 6

[115] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 17 March 2009, S/2009/149, para. 3.

> Government supports illegal parallel structures that exploit our Serb citizens but never deliver appropriate assistance or any solutions to their problems."[116]

2.80. Serbia continues to interfere in the north of Kosovo and elsewhere in areas inhabited by members of the Kosovo Serb Community, in an effort to obstruct the implementation of the Constitution and the Ahtisaari Plan in those areas (including provisions which are for the benefit of the Serb community). This has a detrimental effect on the well-being of the inhabitants. For their part, the institutions of Kosovo are doing what they can, with the support of the international community, to ensure that the Constitution and the laws of Kosovo, including those flowing from the Ahtisaari Plan, are respected and applied throughout Kosovo.

2.81. The Republic of Kosovo looks forward to good neighbourly relations with the Republic of Serbia. Its Foreign Minister, Mr. Hyseni, assured the Security Council on 23 March 2009:

> "My Government stands ready to engage in talks with Serbia, as two independent and sovereign States, on a wide range of issues of mutual interest. Dialogue would help to ease tensions and normalize relations between our two countries."[117]

[116] Security Council, provisional verbatim record, sixty-fourth year, 6097th meeting, 23 March 2009, S/PV.6097, p. 8.

[117] *Ibid.*, p. 9.

PART II

HISTORY AND CONTEXT

CHAPTER III

FROM AUTONOMY TO ETHNIC CLEANSING

3.01. This Chapter describes the main historical developments in Kosovo leading up to the deployment of UNMIK in June 1999. Chapter IV addresses governance in Kosovo from June 1999 onward, while Chapter V focuses on the final status process launched by the United Nations in 2005. These three chapters set the historical context relevant to the Court's consideration of the specific question before it. The period following 1974, when Kosovo enjoyed a high degree of autonomy within the Socialist Federal Republic of Yugoslavia (SFRY), and the period between 1988 and 1999, when Kosovo Albanians suffered severe human rights violations, crimes against humanity and war crimes at the hands of the FRY and Serbian authorities, are the most relevant to the eventual Declaration of Independence of 17 February 2008, the subject of these proceedings[118].

3.02. The present Chapter deals briefly with Kosovo before its occupation by Serbia in 1912, and then its existence within the Kingdom of Serbs, Croats and Slovenes, the Yugoslav state formed in 1918 (**Section I**). Next, it describes Kosovo's dual constitutional position under the 1974 SFRY Constitution, whereby Kosovo as a Federal unit was on essentially the same footing within the Federation as the six Republics, with a balance of political power within the Federation that in principle should have protected Kosovo from Serbian domination (**Section II**). However, in 1989, Serbia under President Slobodan Milošević illegally and brutally terminated Kosovo's dual constitutional position by stripping it of the rights it had at the Federal level, and dismantling the extensive autonomy Kosovo enjoyed within Serbia (**Section III**). At the same time, discriminatory measures were taken which severely restricted the rights of the Kosovo Albanians to education, work and political representation (**Section IV**). This spurred several of the other SFRY Republics to move to independence, sparking armed conflicts that raged in the former Yugoslavia throughout the first half of the 1990s. After the conclusion and implementation of the Dayton Accords (1995), FRY and Serbian attention turned back to

[118] For greater detail on this and subsequent periods of Kosovo's history, see N. Malcolm, *Kosovo. A Short History* (1998). For an account of more recent events, see M. Weller, *Contested Statehood, Kosovo's Struggle for Independence* (2009).

Kosovo, leading to the tragic events of 1998-1999. Diplomatic efforts by the United Nations, OSCE and NATO sought to forestall FRY and Serbian human rights violations against the people of Kosovo, but did not succeed (**Section V**). Throughout the 1990s, there were large-scale human rights abuses against the Kosovo Albanian majority, culminating in the crimes against humanity, ethnic cleansing, war crimes and destruction of 1998-1999, which saw over 1.45 million Kosovo Albanians (over 90 % of the population) fleeing or forced from their homes, many driven across the borders into neighbouring countries (**Section VI**).

I. Kosovo before 1974

3.03. For over four and a half centuries before 1912, Kosovo, like much of the Balkan peninsula, was part of the Ottoman Empire, governed not by Serbian authorities but by the Porte. In the second half of the nineteenth century Kosovo was at the heart of the Albanian national movement (*Rilindja Kombëtare*, or "national renaissance").

3.04. Serbia's independence from the Ottoman Empire was confirmed at the Congress of Berlin in 1878. Kosovo was not part of Serbia at that time, and remained within the Ottoman Empire. Serbia did, however, include an Albanian-inhabited area around Niš, which still today remains within Serbia. In that area, in the nineteenth century, in scenes reminiscent of more recent events, Serbian troops proceeded to burn villages and expel more than 100,000 ethnic Albanians, many of whom fled to Kosovo.

3.05. Kosovo was first occupied by Serbia in the First Balkan War (October 1912), some thirty-five years after Serbia's independence in 1878. In the course of this first occupation, Serbia began to implement a programme of colonization; and Serbian paramilitaries and elements of the Serbian army committed large-scale atrocities and massacres, burning villages and forcing conversions to Orthodoxy in an effort to change the ethnic composition of the territory[119]. An international commission of enquiry set up by the Carnegie Foundation reported that

[119] N. Malcolm, *op. cit.* (fn. 118), pp. 253-256, who quotes an eye-witness, the journalist Lev Bronshtein (later known as Leon Trotsky): "The Serbs in Old Serbia, in their national endeavour to correct data in the ethnographical statistics that are not quite favourable to them, are engaged quite simply in systematic

> "Houses and whole villages reduced to ashes, unarmed and innocent populations massacred ... such were the means which were employed and are still being employed by the Serb-Montenegrin soldiery, with a view to the entire transformation of the ethnic character of regions inhabited exclusively by Albanians."[120]

3.06. The territory of Kosovo was fought over and changed hands a number of times during the Second Balkan War (1913) and World War I (1914-1918). It was absorbed into the Kingdom of Serbs, Croats and Slovenes (later known as the Kingdom of Yugoslavia) in December 1918; but, prior to that the territory of Kosovo had never been lawfully incorporated into the Kingdom of Serbia, having merely been occupied territory. It should therefore be noted that when Kosovo first entered a modern Yugoslav State, it did not do so as an integral part of any Serbian State. Serbia itself ceased to exist as a political entity, though the policies of successive governments of the new Kingdom were dominated by Serb interests.

3.07. Under a Treaty for the Protection of Minorities, the new Kingdom undertook to provide primary education in the local language in all areas where a considerable proportion of the population had a language other than Serbo-Croat, and to allow other educational and language rights. The Kingdom ignored these undertakings in respect of Kosovo. The Albanian language was suppressed. In the period 1918-1941, Belgrade continued Serbia's policy of colonization in Kosovo, with the forced emigration of Kosovo Albanians to Turkey and other countries[121]. In response to the colonization programme and to other oppressive measures, there was widespread popular resistance by Kosovo Albanians, especially in the years 1918 to 1927, when police and military actions are estimated to have caused the deaths of more than 12,000 people and the imprisonment of more than 22,000.

3.08. During World War II, Kosovo was again occupied by warring parties, with the north under direct German control, the eastern districts allotted to Bulgaria, and the rest of Kosovo attached to Italian-occupied Albania. Resistance movements of Communist

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extermination of the Muslim population." (*ibid.*, p. 253). ("Old Serbia" was a term used by some Serbs to refer to Kosovo.)

[120] Carnegie Endowment for International Peace, *Report of the International Commission of Enquiry into the Causes and Conduct of the Balkan Wars* (1914), p. 151, quoted in N. Malcolm, *op. cit.* (fn. 118), p. 254.

[121] N. Malcolm, *op. cit.* (fn. 118), pp. 267-269 (languages and schools), pp. 278-282 (colonization), pp. 283-286 (forced emigration).

"Partisans" became active in both Yugoslavia and Albania. At the Bujan Conference (December 1943 – January 1944) local representatives of the Communist movement from Kosovo agreed on their policy for the future of the region, issuing a formal "Declaration" which said that the Albanians of Kosovo should have "the possibility of deciding on their own destiny, with the right to self-determination". This Declaration displeased the Partisan leader, Joseph Broz "Tito", whose policy was to keep the territory within a Yugoslav State, regardless of the wishes of the majority of its inhabitants; nevertheless, recognising that any promise of self-determination would gain much support, he later wrote, in March 1944, that "the question of which federal unit [Kosovo is] joined to will depend on the people themselves, through their representatives, when the issue is decided by a definitive ruling after the war"[122].

3.09. In July 1945, as World War II came to a close, a so-called "Regional People's Council of Kosovo" (an unelected body representing the members of the Communist Party in Kosovo) met in Prizren under conditions of military administration, imposed on Kosovo in February of that year. Though its name suggests otherwise, this Council represented only the 2,250 members of the Communist Party in Kosovo, with only 33 of its 142 members being Albanian[122]. At this meeting, it was agreed that Kosovo should become a constituent unit within a "federal Serbia" (that is, a Serbia which was to be part of a Yugoslav Federation). On the basis of this decision, the Presidency of the "People's Assembly of Serbia" passed a law on 3 September 1945 establishing the "Autonomous Region of Kosovo-Metohija" and declaring that it was a constituent part of Serbia.

3.10. There are three points to note about the events of 1943-1945. First, even as recently as 1943, it was by no means clear that Kosovo would be part of Yugoslavia, for its history was one of connections with various empires and States. Second, while the future of Kosovo within Yugoslavia was said by Tito, who would become the SFRY's leader, to depend on the will of the people, the question of that future was never actually put to the people of Kosovo, but instead to an unelected and unrepresentative body, the "Regional People's Council of Kosovo", speaking for a tiny fraction of the population. As such, any idea that the annexation of Kosovo by Serbia was based on the will of the people is a myth. Yet this history demonstrates the importance of the *idea* that Kosovo's destiny should be

[122] N. Malcolm, *op. cit.* (fn. 118), p. 315.

decided by its own people, even if in fact they were not allowed to do so. Nevertheless, any claim that the people of Kosovo had in fact freely chosen to join Serbia was spurious at the time and remains so today. Third, the decision of the "Regional People's Council" stated that Kosovo was to be part of a *federal* Serbia – that is, a Serbia which was a part of the Yugoslav Federation – in which Serbian power would be balanced by the powers of the other Republics and the Federation. Thus the acceptance by the "People's Council" of Kosovo as a part of Serbia was predicated and conditioned upon Serbia itself being within the Yugoslav Federation.

3.11. In August 1945, an organization known as the "Anti-Fascist Council for the National Liberation of Yugoslavia" met to discuss Yugoslavia's future. This organisation was formed as the collective of the various National Liberation Councils in Yugoslavia, and ultimately became the constitutive body of the Federal People's Republic of Yugoslavia formed the following year. For present purposes, it is important to note that Kosovo was directly represented at this meeting – and was not represented by Serbia. Thus, at this key stage in the formation of the new Yugoslav Federation, Kosovo acted not as a part of Serbia, but as a political unit in its own right.

3.12. Under the 1946 Constitution of the Federal People's Republic of Yugoslavia[123], Yugoslavia was "a community of peoples equal in rights who, on the basis of the right of self-determination, including the right of separation, have expressed their will to live together in a federative state"[124]. It was a federation, composed of six republics. One of these, Serbia, included the autonomous provinces[125]. The position was not much changed under the 1953 Constitution of the Federal People's Republic of Yugoslavia, which provided that "[t]he self-governance of the autonomous province Vojvodina and of the autonomous region of Kosovo is guaranteed"[126].

[123] Constitution of the Federal People's Republic of Yugoslavia (1946). An English translation of the 1946 Constitution is at <http://www.worldstatesmen.org/Yugoslavia_1946.txt>.

[124] *Ibid.*, Article 1.1.

[125] *Ibid.*, Article 2.

[126] Constitution of the Federal People's Republic of Yugoslavia (1953), Article 113.

3.13. The 1950s and 1960s saw continued Serb persecution of Kosovo Albanians combined with a policy of coercing the removal of Kosovo Albanians to Turkey, whilst encouraging Serbs to settle in Kosovo. According to the London *Times*:

> "The almost daily disclosures of brutal acts of repression, murder and torture by members of Rankovic's police against the Albanian minority there ... to intimidate that minority, are astonishingly frank."[127]

3.14. The 1963 Constitution of the Socialist Federal Republic of Yugoslavia[128] provided that the SFRY was "a federal state of voluntarily united and equal peoples"[129]. Articles 111 and 112 concerned the autonomous provinces, Article 112 providing that their rights would be determined by the relevant republic's constitution. The competences of the autonomous provinces were set out in the 1963 Constitution of the Republic of Serbia (Article 129), which further provided that "Republican law overrules provincial regulation" (Article 131).

3.15. The year 1966 saw a policy change at the federal level, beginning with the removal from power of Ranković. Following Tito's visit to Kosovo in 1967, under constitutional amendments adopted in 1968, legislative and judicial authority was transferred to Kosovo, which was given direct representation in the Federal Parliament. Kosovo passed its own Constitutional Law in 1969. Far from being merely a part of Serbia, Kosovo was also a "fully fledged constituent element of the federation"[130], a "legal entity at the federal level"[131], with Amendment VII of the Constitution stating that Kosovo was both part of Serbia and part of the Federation. This fact that Kosovo was a federal unit was of crucial constitutional importance, as a protection to Kosovo as against Serbian encroachment on its very extensive autonomy.

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[127] *The Times*, 22 September 1966, cited in M. Vickers, *Between Serb and Albanian. A History of Kosovo* (1999), p. 164. Aleksandar Ranković was the Serbian Vice-President of the SFRY.

[128] Constitution of the Socialist Federal Republic of Yugoslavia (1963), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 14/1963.

[129] *Ibid.*, Article 1.

[130] M. Vickers, *op. cit.* (fn. 127), p. 170.

[131] N. Malcolm, *op. cit.* (fn. 118), p. 324.

II. Kosovo under the 1974 SFRY Constitution

A. Overview of Constitutional Developments

3.16. In considering the particular constitutional position of Kosovo within the SFRY under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia[132], five points should be borne in mind:

(a) From 1944 onwards, Kosovo's participation in federal Yugoslavia (like that of the other federal units) was, in theory at least, based on the will of its people. In 1945, Kosovo's decision to become part of Serbia – although taken by an unrepresentative body – purported to be based on the will of the people, with all subsequent Constitutions describing the SFRY as a voluntarily formed federation.

(b) Since 1944, and particularly under the 1974 SFRY Constitution, Kosovo had a substantial degree of autonomy. This was not just autonomy within Serbia but, crucially, autonomy within the SFRY, in all areas, including social, economic and national policy. The various Constitutions refer consistently to Kosovo being a part of Serbia within the framework of the federal state of Yugoslavia, not as a part of Serbia outside that framework.

(c) Under the 1974 SFRY Constitution, Kosovo's constitutional position was virtually the same as the six republics - Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. (It was sometimes suggested that the only difference was that the republics had a constitutional right of secession, which Kosovo did not. Even here, in reality there was no significant difference between Kosovo and the six republics[133].)

(d) Kosovo had special rights and protections vis-à-vis Serbia under the 1974 SFRY Constitution. For example, it was for the Federation, including the Federal Constitutional Court, to resolve disputes between Serbia and Kosovo, just as that Court did between republics. These special rights and protections were illegally

[132] Constitution of the Socialist Federal Republic of Yugoslavia (1974), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 9/1974.

[133] See paras. 3.18-3.20 below.

removed in 1989-1990, and could not be re-established once the SFRY had disintegrated. Once that happened, there was no longer any framework within which to ensure Kosovo's rights as against Serbia.

(e) The position of Kosovo under the 1974 SFRY Constitution was cancelled in 1989-1990 by the forcible and illegal actions of Serbia and the Serbia-dominated SFRY.

B. The 1974 SFRY Constitution

3.17. As an autonomous province, Kosovo's autonomy prior to the 1974 SFRY Constitution depended upon the Serbian Constitution, and came under the authority of Serbia (within the constitutional structure of the federal State of Yugoslavia). Under the 1974 Constitution of the SFRY, however, this changed radically. The statement of Fundamental Principles referred to

> "the principles of agreement among the Republics and Autonomous Provinces, solidarity and reciprocity, equal participation by the Republics and Autonomous Provinces in federal agencies, in line with the present constitution, and according to the principle of responsibility of the Republics and Autonomous Provinces for their own development and for the development of the socialist community as a whole".

3.18. The 1974 Constitution provided that the SFRY was "a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Socialist Republic of Serbia"[134]. Like the Republics, Kosovo issued its own Constitution[135], and had its own Constitutional Court. The territory of an Autonomous

[134] Constitution of the Socialist Federal Republic of Yugoslavia (1974), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 9/1974, Article 1. For a brief but authoritative description of the constitutional position of Kosovo, see the article by Stjepan Mesić, "Kosovo – problem koji ne trpi odgadjanje" [Kosovo – a problem which cannot be postponed], *Večernji List*, 16 February 2008 (see also the website of the Presidency of Croatia <http://www.predsjednik.hr/default.asp?ru=143&gl=200802200000002&sid=&jezik=1>). Mesić, the President of Croatia, had been a member of the Presidency of the former Yugoslavia. He emphasises that "the Provinces were constitutive elements of the federation", and that "the Republics and Provinces voluntarily united themselves with Yugoslavia, from which there follows the clear conclusion that they cannot be kept within those state frameworks against their will. In the case of the Provinces, that applies in the same way both to the framework of the federation and to the framework of a federal unit [*sc.* Serbia]."

[135] See para. 3.22 below.

Province, like the territories of the Republics, could not be altered without its consent[136]. Article 281 provided that "[t]he Federation shall through its agencies ... regulate matters concerning the settlement of conflict of law between Republics and/or Autonomous Provinces". The Constitutional Court of Yugoslavia decided disputes between the Federation and the Republics and/or the Autonomous Provinces, between the Republics, and between the Republics and the Autonomous Provinces[137]. The Autonomous Provinces were represented in both chambers of the SFRY Assembly, alongside representatives of the Republics[138]. The Federal Presidency was composed of one member from each of the Republics and Autonomous Provinces[139]. Most amendments to the SFRY Constitution required the agreement of the Assemblies of the Autonomous Provinces[140].

3.19. In other words, the 1974 SFRY Constitution confirmed the dual status of Kosovo – part of Serbia but at the same time also a constituent unit of the SFRY. Under it, Kosovo had a status equivalent to that of the six republics, with direct representation in the main federal bodies. Kosovo had equal status with the republics in economic and social policy. It was also separately represented in the Federal Court and the Constitutional Court. The 1974 Constitution prohibited Serbia from intervening in provincial affairs against the will of the Kosovo Assembly. Kosovo had its own National Bank, Supreme Court, and independent administration under the supervision of the Kosovo Executive Council and Presidency, and the right to adopt its own Constitution[141]. As it was

[136] Constitution of the Socialist Federal Republic of Yugoslavia (1974), *op. cit.* (fn. 134), Article 5.

[137] *Ibid.*, Article 375.

[138] *Ibid.*, Articles 291 and 292.

[139] *Ibid.*, Article 321.

[140] *Ibid.*, Article 398.

[141] It has been suggested that, under the 1974 Constitution, the Republics had the right to secede whereas the autonomous provinces did not. (This, indeed, is sometimes said to have been the only constitutional difference between republics and autonomous provinces.) The suggestion seems to be based on one of the preambular "Basic Principles", which stated that "[t]he nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their freely expressed will." Earlier Constitutions (1946, 1953, and 1963) had referred to "peoples" rather than "nations" having the right to self-determination, including the right to secede. Nevertheless, neither "nations" nor "peoples" had any operational right to secede under any of these constitutions. There was no provision in the various Constitutions, including in that of 1974, for the actual exercise of the "right" mentioned in the preamble (compare the Constitution of Serbia and Montenegro (2003), which set out the procedure for secession). In any case, the 1974 SFRY Constitution described Yugoslavia as a federation of "free and equal nations and nationalities" ("equal" here translates "ravnopravnih", which means "having equal rights"), and declared that "the working people, the nations and the nationalities implement their sovereign rights in the Socialist Republics and in the Autonomous Provinces" (Fundamental Principles, Article 1). Thus, whatever these ill-defined "sovereign" rights might have been, they were

represented in both Chambers of the SFRY Assembly, Kosovo also participated, alongside the other Republics, in the formation and ratification of international agreements. International agreements which affected individual federal units (Republics and Autonomous Provinces) required the explicit consent of the units concerned. Article 301 of Kosovo's own 1974 Constitution stated: "The Assembly of Kosovo ratifies agreements which the Province concludes with organs and organizations of other states and international organs and organizations."

3.20. In its judgment of 26 February 2009 in the *Milutinović et al.* case[142], a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), summarised the position of Kosovo under the 1974 Constitution in the following terms:

> "213. Under the Constitution of the Socialist Federal Republic of Yugoslavia ('SFRY'), promulgated in February 1974, the SFRY comprised six republics and two autonomous provinces. Both of these provinces – Kosovo and Vojvodina – formed part of the Socialist Republic of Serbia. This Constitution gave the provinces a significant degree of autonomy, which included the power to draft their own constitutions, to have their own constitutional courts, to have a representative in the SFRY Presidency in Belgrade, and the right to initiate proceedings before the Constitutional Courts of Yugoslavia and Serbia. In addition, they were represented, along with the republics, in the SFRY Chamber of Republics and Provinces and the Federal Chamber, which was a legislative body with the power to amend the SFRY Constitution."[143]

3.21. The 1974 Constitution of the Socialist Republic of Serbia[144] was adopted at the same time as the 1974 SFRY Constitution. The preamble to the Constitution of Serbia noted that the Autonomous Provinces "had united, on the basis of the freely expressed will of the population, nations and nationalities of the provinces and Serbia, in the Socialist Republic of Serbia within the SFRY". The Constitution laid down the respective competences of the Republic and the Autonomous Provinces and provided that any

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also attributed on an equal basis to the "nationalities" and to the Autonomous Provinces. Moreover, Article 5 of the 1974 Constitution provided that "[t]he frontiers of the Socialist Federal Republic of Yugoslavia may not be altered without the consent of all Republics and Autonomous Provinces".

[142] *Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), *Judgement*, 26 February 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug). The Chamber was composed of Judge Iain Bonomy, presiding, Judge Ali Nawaz Chowhan and Judge Tsvetana Kamenova.

[143] *Ibid.*, vol. 1, paras. 213-216 (footnotes omitted here and in subsequent citations from the Judgment).

[144] Constitution of the Socialist Federal Republic of Yugoslavia (1974), *op. cit.* (fn. 134).

amendment related to questions of interest to the Republic as a whole, the consent of the Assemblies of the Autonomous Provinces was required[145].

3.22. The 1974 Constitution of the Autonomous Socialist Province of Kosovo was adopted at the same time as the 1974 SFRY Constitution. It provided that Kosovo,

> "proceeding from the freely expressed will of the population, the nations and nationalities of Kosovo and the freely expressed will of the people of Serbia, has associated itself with the Socialist Republic of Serbia within the framework of the SFRY"[146].

III. Illegal Removal of Autonomy (1989)

3.23. Following Tito's death in 1980, the anti-Albanian policy pursued by Serbia gradually led to general inter-ethnic conflict within the Federation as a whole, with Croatia and Slovenia in particular voicing concerns at Serbia's hegemony and domination. After Slobodan Milošević's provocative speech in Kosovo on 24 April 1987, Serbia edged closer to confrontation not only with Kosovo, but also with the other Yugoslav republics. From 1987 onwards, following Milošević's rise to power in Serbia and seizure of power in the provinces, Serbian domination of the Federal Presidency allowed Serbia to pursue its nationalistic and confrontational policies.

3.24. In 1989 Serbia, under Milošević, set out to destroy the autonomy of Kosovo as part of the campaign to secure Serbia's domination over the Federation. At the same time as removing the autonomy of Kosovo, Milošević sought political change in the Republics, especially in Montenegro, to ensure his and Serbia's control of the Federation. These developments led to the break-up of the Federation.

3.25. Early in 1989, the Serbian Assembly began passing amendments to the Serbian Constitution attempting to restrict Kosovo's powers, which were guaranteed by the 1974 SFRY Constitution. However, while such amendments could be proposed by Serbia,

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[145] Constitution of the Socialist Federal Republic of Yugoslavia (1974), *op. cit.* (fn. 134), Article 427. See *Milutinović et al.*, *op. cit.* (fn. 142), vol. 1, paras. 215-216.

[146] Constitution of the Socialist Autonomous Province of Kosovo (1974), Article 1, *Official Gazette of the Autonomous Socialist Province of Kosovo*, No. 4/1974.

they required acceptance by the Kosovo Assembly before they could be considered as having been adopted.

3.26. To obtain that acceptance, Serbia coerced widespread resignations of the Kosovo leadership. Through pressure and intimidation, on 23 March 1989 Serbia forced the Kosovo Assembly to accept changes to its Constitution, removing its autonomy. Representatives hand-picked by Serbia accepted the changes to the Serbian Constitution, and further approved changes to the Kosovo Constitution, initiating the disintegration of the SFRY, and a sustained period of Serbian oppression and brutality in Kosovo.

3.27. The ICTY Trial Chamber's judgement in *Milutinović et al.* describes the extraordinary circumstances leading to the "approval" of the constitutional amendments by the Assembly of Kosovo on 23 March 1989, sometimes referred to as the "Assembly of the Tanks":

> "217. This state of affairs [i.e., the position of Kosovo under the 1974 Constitution] resulted in dissatisfaction amongst some constitutional experts in Serbia. They wrote a confidential document in 1977, commissioned by the Presidency of Serbia, which criticised the 1974 constitutional arrangement of the republic for giving an excessive degree of power to the autonomous provinces.
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> 218. Later, in the early 1980s, following the death of SFRY President Josip Broz 'Tito', demonstrations took place as the Kosovo Albanians sought full recognition for Kosovo as a republic within the SFRY. Some of these demonstrations turned violent, and the police and the Yugoslav Army were deployed. On the other hand, there were increasing calls by the Serbs for reduction of the autonomy of Kosovo. By March 1989 these calls led to approval from the SFRY Assembly for amendment of the Serbian Constitution in terms of 'conclusions' that identified a need to 'normalise' the 'deteriorated situation' in Kosovo, and to *inter alia* 'take measures immediately for establishing the criminal and other responsibility of those who have inspired or organised counter-revolutionary activities in Kosovo,' and to stem the emigration of Serbs and Montenegrins from Kosovo. These conclusions referred to 'special measures' that had already been put in place in Kosovo, which were also described by Human Rights Watch researcher Frederick Abrahams, who stated that the federal authorities had assumed responsibility for security within the province. The SFRY Assembly further concluded that the process for amending the Serbian Constitution 'should be finalised as soon as possible.'
>
> 219. Prior to their adoption by the Serbian Assembly, the proposed amendments to the Serbian Constitution required approval from the Kosovo Assembly itself, which met on 23 March 1989. Both Veton Surroi, a Kosovo Albanian journalist, and Frederick Abrahams testified that this session of the Kosovo Assembly was held while the Assembly building in Priština/Prishtina was surrounded by police and military

vehicles, although Abrahams was not present at the time. Surroi also stated that he had seen a photograph indicating that one person who participated in the vote was not in fact a member of the Assembly. He further stated that he had heard that pressure to support the measures was put on members of the Assembly prior to the vote, although he had not spoken to any member of the Assembly who claimed to have voted in favour of the amendments due to such pressure. The Chamber also received evidence – by way of a witness statement and the transcript of his testimony in the Milošević trial of the deceased leader of the Democratic League of Kosovo (*Lidhja Demokratike e Kosovës*, 'LDK'), Ibrahim Rugova – that pressure was exerted to influence the voting, and that the ten members of the Assembly who voted against the amendments were later subjected to reprisals.

220. After receiving approval from the SFRY Assembly and positive votes in the provincial assemblies, on 28 March 1989 the Serbian Assembly adopted the proposed constitutional amendments. Ratko Marković asserted throughout his evidence that the amendments did not affect the autonomous status of the two provinces, as provided by the SFRY Constitution, but rather simply effected a 'redistribution of competencies'. Similarly Lukić, while accepting that these amendments changed the position of the province of Kosovo within the republic by conferring power on the republican organs to legislate and exert judicial control over laws in the province, and by removing several powers from the provinces, also asserted that Kosovo's autonomy was not reduced by the changes. However, Lukić conceded that, following the constitutional amendments of 1990, Kosovo no longer had full judicial autonomy because it did not have legislative authority, but only an executive organ and it no longer had its own Supreme Court or Constitutional Court.

221. The Chamber is in no doubt that the Kosovo Albanians perceived the amendments as removing the substantial autonomy previously enjoyed by Kosovo and Vojvodina, and that, in fact, that was their effect. For example, the regulation of education and the taxation system was placed within the jurisdiction of the Government of Serbia, and responsibility for the public security services was placed under republican control. All were previously within the exclusive competence of the provincial authorities. Two amendments were of particular significance: the removal of the need for the consent of the provincial assemblies to further constitutional amendments affecting the whole republic; and the greater power of the Serbian Presidency to use MUP forces in Kosovo to 'protect the constitutional order'."[147]

3.28. Thus, through a process of violence and intimidation, Serbia unconstitutionally and illegally removed Kosovo's autonomy, both within Serbia and within the SFRY.

[147] *Milutinović et al.*, *op. cit.* (fn. 142), vol. 1, paras. 217-221. See also the ICTY Trial Chamber's judgment of 30 November 2005 in *Prosecutor v. Limaj et al.*, paras. 40-42. The Kosovo Constitutional Court subsequently considered the events of 23 March 1989, and, on 27 June 1990, decided "to initiate a procedure for verification of the constitutionality of the decision" by the Assembly. The initiative for the Constitutional Court proceedings referred among many irregularities to the fact that "unprecedented pressure was exercised on the Assembly of the SAP of Kosovo to declare itself in favour of Amendments", as well as to the fact that the votes were not recorded properly (so it could not be known whether the two-thirds majority required by the Constitution had been achieved, that non-members of the Assembly took part in the voting, and that the Assembly's Decision was not published in the *Official Gazette* and so could not enter into force). Before the Court reached a substantive decision, in a further act of illegality, Serbia dissolved it.

IV. Persecution and Repression through the 1990s

3.29. Serbia's tactics against Kosovo were noted by the other Republics, who feared that they too would fall prey to Serbian efforts at political dominance. Consequently, in 1991 the Republics began issuing declarations of independence, sparking further aggressive acts by Serbia that would plunge the former Yugoslavia into a series of armed conflicts. The significance of these declarations of independence to the question now before the Court is considered in Chapter VIII below[148].

3.30. The removal of Kosovo's autonomy in March 1989 provoked widespread public demonstrations and protests in Kosovo; martial law was declared, and at least 20 demonstrators were killed. The main demand of the demonstrators was the full restoration of Kosovo's status under the 1974 Constitution. This demand was also expressed by the Albanian members of the Assembly of Kosovo, who met on 2 July 1990 in front of the Assembly building (the doors having been locked by the Serbian authorities), and passed a resolution declaring Kosovo "an equal and independent entity within the framework of the Yugoslav Federation". But when, with the declarations of independence by Slovenia and Croatia, it became clear that the Federation was disintegrating, this demand for the restoration of the 1974 status became unrealistic, and, crucially, the continuation of Kosovo within Serbia became unsustainable.

3.31. As explained above[149], under the 1974 SFRY Constitution, Kosovo had a dual constitutional status. It was part of Serbia and at the same time it was a federal unit within the SFRY. Kosovo was never, and was never intended to be, a part of an independent Serbia existing outside the framework of the SFRY. This is clear in the 1974 SFRY Constitution itself, in that it was the Federation that was to act as the arbiter of any disputes between Serbia and Kosovo. It was the Federation that was to act as the protection for Kosovo from Serbia. Thus, following the disintegration of the SFRY, Kosovo could not simply be incorporated within Serbia. The actions of Serbia aimed at doing just that were illegal and contrary to the 1974 SFRY Constitution, contrary to the founding principles of the SFRY, and contrary to the will of the people of Kosovo.

[148] See paras. 8.22-8.37 below.

[149] See paras. 3.17-3.22 above.

3.32. After Serbia dissolved the Kosovo Assembly and Government in July 1990, a majority of the Assembly representatives met in the town of Kaçanik/Kačanik, and issued a resolution demanding status as an equal member in the Federation. When war broke out in the former Yugoslavia, and the other Republics began declaring independence, the Kaçanik resolution was revised on 22 September 1991, and a subsequent resolution on the Independence and Sovereignty of Kosovo was put to popular vote between 26 and 30 September 1991. The referendum demonstrated overwhelming support of the people of Kosovo for independence, which was declared on 19 October 1991.

3.33. The ICTY Trial Chamber described these events in its judgement of 26 February 2009 in *Milutinović et al.*, as well as the situation in Kosovo in the 1990s:

> "223. During 1990 the crisis in Kosovo intensified. On 26 June the Serbian Assembly declared that 'special circumstances' existed in Kosovo due to 'activities directed at overthrowing the constitutional order and the territorial integrity'. On 2 July the members of the Kosovo Assembly were prevented from entering the Assembly building and dramatically issued a 'constitutional statement' declaring Kosovo an independent republic. The Serbian Assembly formally suspended the Kosovo Assembly on 5 July. The unsanctioned Assembly proceeded to draft a new 'Kosovo Constitution', which was subsequently endorsed in a local referendum. In September 1990 a new Serbian Constitution further restricted the limited autonomy exercised by Kosovo. The Kosovo Constitutional Court was later effectively abolished by decree of the Serbian Assembly.
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> 224. Frederick Abrahams characterised Kosovo at this time as like a 'police state'. In a 1992 report the United Nations Special Rapporteur on human rights in the former Yugoslavia expressed concern about discrimination against the Albanian population, allegations of torture and mistreatment in detention, and restrictions on the freedom of information. According to Veton Surroi and Ibrahim Rugova, Albanian radio and television was restricted and newspapers were closed. The Special Rapporteur also described how, from the early 1990s, Kosovo Albanians employed in public enterprises and institutions, including banks, hospitals, the post office, and schools, were sacked in large numbers.
>
> 225. The Chamber has heard from several witnesses that Kosovo Albanian teachers refused to implement a new school curriculum introduced in 1990 or 1991, leading to the dismissal of many. … Kosovo Albanian pupils, who wished to be schooled in the Albanian language, were unable to attend classes. As a result, the LDK and other Kosovo Albanian political parties developed an unofficial education system using private dwellings to hold classes for Kosovo Albanian children. In June 1991 the Serbian Assembly issued a decision which removed a number of officials and professors at the University of Priština/Prishtina, and replaced them with non-Albanians. The University's assembly and several faculty councils were dissolved and replaced by provisional organs staffed predominantly by Serbs. … Kosovo Albanian

students were unable to attend classes at the University at that time, and so a parallel university education system was organised by the Kosovo Albanians, holding classes in private homes.

.....

227. The Serbian authorities continued to encourage immigration or return to Kosovo by Serbs and Montenegrins, while Kosovo Albanians began to leave the province in large numbers. In November 1992 the Serbian Assembly issued a Declaration on the Rights of National Minorities ... The tone of the entire Declaration seems designed to inspire fear amongst the Serb population of Kosovo of their Kosovo Albanian neighbours, who were portrayed as an ideologically homogeneous and dangerous group.

228. The Chamber has heard evidence of a system of discrimination against Kosovo Albanian workers through the 1990s. Some witnesses testified about mass dismissals of Kosovo Albanians from positions in industry and the public sector and their replacement by Serbs. Others stated that Kosovo Albanian workers were presented with a document to sign to indicate their loyalty to the state authorities, and that those who did not sign were dismissed ...

229. Several official documents support these accounts of organised, state-sanctioned discrimination in the workplace. In July 1991, several Decisions from the Serbian Assembly were adopted pertaining to the removal of predominantly Kosovo Albanian officials in various business enterprises across Kosovo and their replacement by non-Albanians."[150]

3.34. It is misleading to suggest, as does the United Nations Dossier[151], that "the starting point for the UN's engagement in Kosovo" was March 1998. The discrimination and human rights violations perpetrated against Kosovo Albanians attracted widespread international condemnation, including from United Nations organs, from the early 1990s. The General Assembly, the Security Council, the Commission on Human Rights and its Sub-Commission, and the Committee under the Convention for the Elimination of All Forms of Racial Discrimination, all took up the human rights abuses perpetrated in Kosovo by Serbia. These bodies documented the openly discriminatory legislation applied by Serbia in Kosovo, including in relation to property; programmes for resettlement and demographic manipulation; the removal of Kosovo Albanians from public office and from commercial enterprises; interference with the judiciary; the removal of press freedoms; arbitrary arrests; torture and mistreatment; impunity for perpetrators; and the disproportionate use of force, resulting in numerous violations of the right to life,

[150] *Milutinović et al., op. cit.* (fn. 142), vol. 1, paras. 223-229.

[151] Dossier, Introductory Note, para. 4.

destruction of property and the displacement of large numbers of people, many of whom were women and children[152].

3.35. As the ICTY Trial Chamber noted, the United Nations Special Rapporteur for human rights in the former Yugoslavia had described many of these abuses in his report of 17 November 1992[153]. The General Assembly adopted annual resolutions on the "Situation of human rights in Kosovo" between 1993 and 1999[154].

3.36. The FRY Prime Minister from 1992-1993, Milan Panić, himself wrote to the Security Council in August 1992 stating that his Government was "conducting its own investigation into human rights violations of its citizens, particularly in Kosovo" and promised careful and urgent examination of all laws, regulations and administrative practices to ensure that human rights violations in Kosovo would cease[155]. But nothing came of these promises.

3.37. In its resolution 855 (1993) of 9 August 1993, the Security Council expressed its deep concern "at the refusal of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to allow the CSCE missions of long duration to continue their activities", bore in mind that these missions had "greatly contributed to promoting stability and counteracting the risk of violence in Kosovo", and attached "great importance to ... the continued ability of the international community to monitor the situation in Kosovo"[156]. The Council then called upon "the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to reconsider their refusal to allow the continuation of the activities of the CSCE missions in Kosovo ..."[157].

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[152] M. Weller, *op. cit.* (fn. 118), pp. 59-64 (with further references).

[153] *Milutinović et al.*, *op. cit.* (fn. 142), vol. 1, para. 230.

[154] General Assembly resolutions 48/153, 20 December 1993; 49/204, 23 December 1994; 50/190, 22 December 1995; 51/111, 12 December 1996; 52/139, 12 December 1997; 53/164, 9 December 1998; and 54/183, 17 December 1999. In 1992, the situation of human rights in Kosovo was dealt with in the Assembly's resolution 47/147 on the "Situation of human rights in the territory of the former Yugoslavia" (18 December 1992, para. 14).

[155] Letter dated 17 August 1992 of the Prime Minister of the FRY to the President of the Security Council, S/24454-A/46/960, Annex.

[156] Security Council resolution 855 (1993), 6 August 1993, third, fourth and sixth preambular paragraphs.

[157] *Ibid.*, para. 2.

V. Diplomatic Efforts to Resolve the Crisis

3.38. Efforts by the international community to resolve the crisis in Kosovo began early in the 1990s[158]. In 1992, the Helsinki Summit of the Conference on Security and Co-operation in Europe (CSCE) urged the Belgrade authorities "to refrain from further repression". In August 1992, the CSCE established a mission in Kosovo to monitor the situation. In its report of December 1992, the mission expressed deep concern over the increasing violence in Kosovo. In June 1993, the FRY refused to agree to a renewed mandate for the mission. As noted in the previous section, the Security Council in its resolution 855 (1993) of 9 August 1993 called on the authorities of the FRY to reconsider, but to no avail.

3.39. At Dayton the international community dealt with the situation in Bosnia and Herzegovina, but not with the deteriorating situation in Kosovo. After the conclusion of the Dayton Accords in 1995, Serbia turned its attention back to Kosovo, continuing a policy of oppression that deliberately and deeply aggravated relations between Kosovo Serbs and Kosovo Albanians.

3.40. From the time when Serbia abolished Kosovo's autonomy in 1989, the existence of "parallel" institutions organized by the Kosovo Albanians clearly demonstrated their rejection of the FRY and its illegal occupation. Throughout the 1990s, the Kosovo Albanian population continued in their attempts to resist Serbian occupation and persecution, leading eventually to the armed struggle by the Kosovo Liberation Army (KLA/UÇK), which "developed in organisation and capacity from early 1998"[159]. The KLA's "evolution and growth in this period was linked to increasing perceptions within the Kosovo Albanian community that it needed to protect itself from increasing attacks by forces of the FRY and Serbia"[160].

3.41. Thus, despite the clear imbalance of power between the FRY and the Kosovo Albanians, the Kosovo Albanians resisted the occupation and persecution. The "parallel"

[158] *Milutinović et al., op. cit.* (fn. 142), vol. 1, paras. 231-236.

[159] *Ibid.*, para. 822.

[160] *Ibid.*, para. 794.

institutions established by the Kosovo Albanians, the armed struggle of 1998-1999, and intervention by NATO, were a clear reaction to the massive human rights violations and crimes against humanity committed by the FRY/Serbia.

3.42. As the crisis in Kosovo worsened in 1998, diplomatic efforts to resolve it intensified. The diplomatic efforts are dealt with at length in the ICTY Trial Chamber's judgement of 26 February 2009, in *Milutinović et al.*[161], and are not repeated in detail here.

3.43. The principal international body involved in the negotiations was the Contact Group (France, Germany, Italy, Russian Federation, United Kingdom, United States of America). US Ambassadors Christopher Hill and Richard Holbrooke spearheaded unsuccessful efforts at mediation. A Kosovo Diplomatic Observer Mission (KDOM) established from among diplomats stationed in Belgrade, with powers to observe and monitor what was happening on the ground in Kosovo, was endorsed by Security Council resolution 1199 (1998) of 27 September 1998[162].

3.44. Efforts to ensure FRY and Serbian compliance with Security Council resolutions 1160 (1998) and 1199 (1998) led to the Holbrooke-Milošević agreement of October 1998, which provided for some FRY and Serbian forces (including MUP special police) to be withdrawn from Kosovo, and for the OSCE to send a Kosovo Verification Mission (KVM) to Kosovo[163]. The principal purpose of the KVM was to verify compliance by all parties with Security Council resolution 1199 (1998).

3.45. These diplomatic efforts eventually led to the Rambouillet Conference in February/March 1999, co-chaired by the British and French Foreign Ministers. Two and a half weeks of negotiations culminated in the "Rambouillet accords", entitled "Interim Agreement for Peace and Self-Government in Kosovo", which were endorsed by Contact Group Foreign Ministers on 23 February 1999. When the second round of talks took place at Paris, the FRY/Serbian delegation submitted very substantial proposals to amend the

[161] *Milutinović et al.*, *op. cit.* (fn. 142), vol. 1, paras. 312-412.

[162] Dossier No. 17.

[163] Dossier No. 19. For further details, see M. Weller, *op. cit.* (fn. 118), pp. 95-106.

accords[164]. In response, the EU, Russian, and US negotiators emphasised in a letter to the FRY/Serbian delegation that "the unanimous view of the Contact Group" was that only technical adjustments to the agreement endorsed at Rambouillet could be agreed[165]. The Interim Agreement was signed by the Kosovo party on 18 March 1999, at the resumed Conference in Paris, but not by the FRY or Serbia[166].

3.46. The Rambouillet Interim Agreement only dealt with the arrangements for a three-year interim period, with the exception of a single provision, Chapter 8, Article I, paragraph 3, which touched on the question of the final settlement following the interim period. This provision read:

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."

VI. Crimes Against Humanity, War Crimes and Human Rights Violations Committed Against Kosovo Albanians in 1998-1999

3.47. It has been estimated that, by 9 June 1999, over 90 % of the Kosovo Albanian population – over 1.45 million people – were forcibly displaced[167]. In the period 1998-1999, numerous United Nations and other international agencies expressed dismay at the atrocities being committed by Serbia in Kosovo and demanded that they cease immediately. It should be noted that the mass expulsions of Albanian civilians from their homes in Kosovo, involving the threat of force and the actual use of force (including artillery bombardment and arson), began long before the start of the NATO military action in March 1999. Figures compiled by the UNHCR showed that by August 1998, there were

[164] H. Krieger, *The Kosovo Conflict and International Law* (2001), p. 149.

[165] M. Weller, *The Crisis in Kosovo* (1999), p .470.

[166] The Interim Agreement was transmitted to the United Nations Secretary-General and is reproduced in S/1999/648, Annex [Dossier No. 30]. For an account of Rambouillet/Paris Conference, see M. Weller, *op. cit.* (fn. 118), pp. 107-154.

[167] *Kosovo/Kosova. As Seen, As Told,* Executive Summary (available on the OSCE website <http://www.osce.org/publications/odihr/1999/11/17755_506_en.pdf>). As the KVM report explained "Suffering in Kosovo in the period monitored by the OSCE-KVM [i.e., from October/December 1998-June 1999] was overwhelmingly Kosovo Albanian, at the hands of Yugoslav and Serbian state military and security apparatus" (Executive Summary).

260,000 internally displaced people inside Kosovo and 200,000 refugees outside Kosovo; again, the UNHCR noted that between 150,000 and 200,000 new refugees were driven from their homes in Kosovo between the beginning of January 1999 and mid-March 1999. The Court itself had occasion to express its concern in the *Legality of Use of Force* cases:

> "Whereas the Court is 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"[168].

3.48. The ICTY Trial Chamber, in its judgement in *Milutinović et al.*[169], found five of the six accused guilty. It found that there was a common purpose to modify the ethnic balance in Kosovo in order to ensure continued control by the FRY and Serbian authorities over the province. The five convicted were high-level officials: Nikola Šainović was a FRY Deputy Prime Minister; Dragoljub Ojdanić, Chief of the General Staff of the Yugoslav Army (VJ); Nebojša Pavković, Commander of the VJ 3rd Army; Vladimir Lazarević, Commander of the VJ Pristina Corps; and Sreten Lukić, Head of the Serbian Ministry of the Interior Staff for Kosovo (MUP Staff).

3.49. Referring to the flight of hundreds of thousands of Kosovo Albanians between March and June 1999, the Trial Chamber found that

> "there was a broad campaign of violence directed against the Kosovo Albanian civilian population during the course of the NATO air-strikes, conducted by forces under the control of the FRY and Serbian authorities. ... In all of the 13 municipalities the Chamber has found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians from their homes, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. As these people left their homes and moved either within Kosovo or towards and across its borders, many of

[168] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 131, para. 16; *Legality of Use of Force (Yugoslavia* v. *Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 265, para. 15; *Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 369-370, para. 15; *Legality of Use of Force (Yugoslavia* v. *Germany), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 428, para. 15; *Legality of Use of Force (Yugoslavia* v. *Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 488, para. 15; *Legality of Use of Force (Yugoslavia* v. *Netherlands), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 549, para. 16; *Legality of Use of Force (Yugoslavia* v. *Portugal), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 663, para. 15; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 768, para. 15; *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 833, para. 15; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 922, para. 15.

[169] *Milutinović et al., op. cit.* (fn. 142).

> them continued to be threatened, robbed, mistreated, and otherwise abused. In many places men were separated from women and children, their vehicles were stolen or destroyed, their houses were deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents."[170]

3.50. The Trial Chamber made detailed findings about each of the various crime sites mentioned in the Indictment, including Peja/Peć, Deçan/Dečani, Gjakova/Đjakovica, Prizren, Suhareka/Suva Reka, Rahovec/Orahovac, Ferizaj/Uroševac, Kaçanik/Kačanik and Pristina[171]. For example, on 26 March 1999 MUP personnel in Suhareka/Suva Reka targeted members of the Berisha family, killing 45 men, women and children. The bodies of most of these people were found in a mass grave near Belgrade. In the following days many of the remaining Kosovo Albanian residents of Suhareka/Suva Reka left their homes as the police set fire to houses, stole money and valuables and ordered them to go to Albania[172]. In Pristina, many people were directly evicted from their homes, while others fled out of fear of the violence around them caused by the FRY and Serbian forces. The expulsion from Pristina was carried out in an organized manner, with hundreds of Kosovo Albanians channelled to the train station and onto overcrowded trains that took them to the Macedonian border[173].

3.51. In concluding a section on "the overall pattern of events", the Trial Chamber said:

> "The manner in which the VJ and MUP dealt with the KLA was often heavy-handed and involved indiscriminate violence and damage to civilian persons and property, further exacerbating rather than ameliorating the situation in Kosovo. The consistent eye-witness accounts of the systematic terrorisation of Kosovo Albanian civilians by the forces of the FRY and Serbia, their removal from their homes, and the looting and deliberate destruction of their property, satisfies the Chamber that there was a campaign of violence directed against the Kosovo Albanian civilian population, during which there were incidents of killing, sexual assault, and the intentional destruction of mosques. It was the deliberate actions of these forces during this campaign that caused the departure of at least 700,000 Kosovo Albanians from Kosovo in the short period of time between the end of March and beginning of June 1999. Efforts by the MUP to conceal the killing of Kosovo Albanians, by transporting the bodies to other

[170] *Milutinović et al.*, *op. cit.* (fn. 142), vol. 2, para. 1156.

[171] *Ibid.*, vol. 2, *passim*.

[172] *Ibid.*, vol. 2, paras. 534-555.

[173] *Ibid.*, vol. 2, paras. 885-890.

areas of Serbia, as discussed in greater detail below, also suggest that such incidents were criminal in nature."[174]

3.52. And the Trial Chamber concluded:

"The crimes that have been proved by the Prosecution and for which the Accused are responsible include hundreds of murders, several sexual assaults, and the forcible transfer and deportation of hundreds of thousands of people."[175]

3.53. The findings of the ICTY Trial Chamber in its judgement of 26 February 2009 are based upon a great deal of carefully examined witness evidence[176]. In addition, there are numerous findings of United Nations principal and subsidiary organs, and the many authoritative reports by international governmental and non-governmental bodies, which have been taken into account by the Chamber, that attest to the crimes against humanity, war crimes and massive violations of human rights committed by FRY and Serbian forces in Kosovo between 1998 and June 1999 (when those forces were expelled following NATO's intervention). Some of them are recalled briefly here.

3.54. The Security Council adopted a series of resolutions and Presidential statements addressing the atrocities in 1998-1999[177]. In resolution 1160 (1998) of 31 March 1998[178], the Council condemned "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo". In a Presidential statement of 24 August 1998[179], the Council expressed its grave concern at the recent intense fighting in Kosovo, particularly the numbers of displaced persons. And in its resolution 1199 (1998) the Council expressed itself to be

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[174] *Milutinović et al.*, *op. cit.* (fn. 142), vol. 2, para. 1178.

[175] *Ibid.*, vol. 3, para. 1172.

[176] In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court stated that "it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal" (*Merits*, *Judgment*, para. 22).

[177] Security Council resolution 1160 (1998), 23 March 1998 [Dossier No. 9]; Statement of the President of the Security Council, S/PRST/1998/25, 24 August 1998 [Dossier No. 14]; Security Council resolutions 1199 (1998), 23 September 1998 [Dossier No. 17]; 1203 (1998), 24 October 1998 [Dossier No. 20]; Statements of the President of the Security Council, S/PRST/1999/2, 19 January 1999 [Dossier No. 24]; S/PRST/1999/5, 29 January 1999 [Dossier No. 25]; Security Council resolution 1239 (1999), 14 May 1999 [Dossier No. 28].

[178] Dossier No. 9.

[179] S/PRST/1998/25, 24 August 1998 [Dossier No. 14].

> "*Gravely concerned* 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,
>
> *Deeply concerned* by the flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries as a result of the use of force in Kosovo, as well as by the increasing numbers of displaced persons within Kosovo, and other parts of the Federal Republic of Yugoslavia, up to 50,000 of whom the United Nations High Commissioner for Refugees has estimated are without shelter and other basic necessities,
>
> .....
>
> *Deeply concerned* at the rapid deterioration in the humanitarian situation throughout Kosovo, *alarmed* at the impending humanitarian catastrophe as described in the report of the Secretary-General, and *emphasising* the need to prevent this from happening,
>
> *Deeply concerned also* by reports of increasing violations of human rights and of international humanitarian law, and *emphasising* the need to ensure the rights of all inhabitants of Kosovo are respected"[180].

3.55. In its resolution 54/183 of 17 December 1999, the General Assembly condemned

> "the grave violations of human rights in Kosovo that affected ethnic Albanians ..., as demonstrated in the many reports 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"[181].

3.56. The Special Rapporteur of the Commission on Human Rights, Mr. Jiri Dienstbier, documented the atrocities in Kosovo in a series of letters and reports[182].

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[180] Dossier No. 17. The Secretary-General had described the dire situation in Kosovo in a series of reports presented to the Security Council (see for example Report of the Secretary-General prepared pursuant to resolution 1160 (1998) of the Security Council, S/1998/712, 5 August 1998 [Dossier No. 13]; Report of the Secretary-General prepared pursuant to resolution 1160 (1998) of the Security Council, S/1998/834, 4 September 1998, paras. 6-17, and Add.1, 21 September 1998 [Dossier Nos. 15 and 16]).

[181] Sixth preambular paragraph.

[182] Report on the situation of human rights in Bosnia and Herzegovina prepared by the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, A/53/322, Annex, and A/53/322, Add.1, Annex; Report of Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, E/CN.4/1999/42, 20 January 1999, paras. 79-119, esp. paras. 83-96.

3.57. The Commission on Human Rights, in its resolution 1999/2 of 13 April 1999[183], strongly condemned

> "the policy of ethnic cleansing against the Kosovars being perpetrated by the Belgrade and Serbian authorities"

and condemned

> "the massive military operations launched by the Serbian authorities against unarmed civilians in Kosovo, resulting in large-scale killings, systematic and planned massacres, destruction of homes and property, and forced mass exoduses to neighbouring countries, as well as internal displacement"[184].

3.58. In May 1999, the United Nations High Commissioner for Human Rights reported that

> "[a]ccounts received by the High Commissioner and OHCHR staff ... provide substantial evidence of gross human rights violations, ... including summary executions, forcible displacement, rape, physical abuse, and the destruction of property and identity documents"[185].

As regards forcible expulsions, she wrote:

> "13. Forced displacement and expulsions of ethnic Albanians have increased dramatically in scale, swiftness and brutality.
>
> 14. A large number of corroborating reports from the field indicate that Serbian military and police forces and paramilitary units have conducted a well planned and implemented programme of forcible expulsion of ethnic Albanians from Kosovo. More than 750,000 Kosovars are refugees or displaced persons in neighbouring countries and territories, while according to various sources there are hundreds of thousands of internally displaced persons (IDPs) inside Kosovo. This displacement seems to have affected virtually all areas of Kosovo as well as villages in southern Serbia, including places never targeted by NATO air strikes or in which the so-called Kosovo Liberation Army (KLA) has never been present.
>
> 15. This last fact strengthens indications that refugees are not fleeing NATO air strikes, as is often alleged by the Yugoslav authorities. The deliberateness of the programme to expel ethnic Albanians from Kosovo is further supported by statements made by the Serbian authorities and paramilitaries at the time of eviction, such as

[183] E/CN.4/RES/1999/2.

[184] See also Commission on Human Rights resolution 2000/26, E/CN.4/RES/2000/26, 18 April 2000.

[185] Report by the High Commissioner for Human Rights on the situation of human rights in Kosovo, Federal Republic of Yugoslavia, E/CN.4/2000/7, 31 May 1999, para. 12.

telling people to go to Albania or to have a last look at their land because they will never see it again.

.....

18. Villages were emptied in house-to-house operations. Accounts indicate that, in many cases, populations were grouped together or driven to certain assembly points where transport had been pre-arranged, or from which they were escorted out of the area ..."[186]

3.59. The OSCE's Kosovo Verification Mission (OSCE-KVM), although withdrawn from Kosovo on 19 March 1999, was nevertheless able to prepare an impressive report, based on many interviews, including with those forced to flee Kosovo. The report

"reveals a pattern of human rights and humanitarian law violations on a staggering scale, often committed with extreme and appalling violence. The organized and systematic nature of the violations is compellingly described ... It is evident that human rights violations unfolded in Kosovo according to a well-rehearsed strategy".

The findings summarised in report include:

"Summary and arbitrary killing of civilian non-combatants occurred at the hands of both parties to the conflict in the period up to 20 March [1999]. On 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 Racak mass killing) and beyond. Arbitrary killing of civilians was both a tactic in the campaign to expel Kosovo Albanians, and an objective in itself.

Arbitrary arrest and detention, and the violation of the right to a fair trial, became increasingly the tools of the law enforcement agencies in the suppression of Kosovo Albanian civil rights and – accompanied by torture and ill-treatment – were applied as a means to intimidate the entire Kosovo Albanian society.

Rape and other forms of sexual violence were applied sometimes as a weapon of war.

Forced expulsion carried out by Yugoslav and Serbian forces took place on a massive scale, with evident strategic planning and in clear violation of the laws and customs of war. It was often accompanied by deliberate destruction of property, and looting. Opportunities for extortion of money were often a prime motivator for Yugoslav and Serbian perpetrators of human rights violations."[187]

[186] Report by the High Commissioner for Human Rights on the situation of human rights in Kosovo, Federal Republic of Yugoslavia, E/CN.4/2000/7, 31 May 1999.

[187] *Kosovo/Kosova: As Seen, As Told, op. cit.* (fn. 167), Executive Summary.

3.60. The United Nations Secretary-General, addressing the High-level meeting on the Balkans in Geneva on 14 May 1999, said:

> "Before there was a humanitarian catastrophe in Kosovo, there was a human rights catastrophe. Before there was a human rights catastrophe, there was a political catastrophe: the deliberate, systematic and violent disenfranchisement of the Kosovar Albanian people."[188]

[188] Cited by Malaysia in the Security Council on 10 June 1999 (provisional verbatim record, fifty-fourth year, 4011th meeting, S/PV.4011, p. 16 [Dossier No. 33]).

CHAPTER IV

RESOLUTION 1244 (1999) AND THE INTERIM PERIOD

4.01. This Chapter deals with the adoption of Security Council resolution 1244 (1999) (**Section I**), the interim period, which began in June 1999 and involved extensive transfer of powers and responsibilities to Kosovo political institutions (**Section II**), and the transition to independence in 2008 (**Section III**). The final status process (May 2005-December 2007) is covered in Chapter V.

4.02. Resolution 1244 (1999)[189] provided for an interim period, during which the United Nations would establish an international civil presence in Kosovo (UNMIK) headed by a Special Representative of the Secretary-General (SRSG). The purpose of that presence was to provide for an interim administration for Kosovo "under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia", with gradual transfer of powers and responsibilities to Kosovo institutions of self-government. Following the period of interim administration, governance would be assumed by the institutions under the final status settlement, for which independence was one clear option.

4.03. For the initial period following June 1999, the efforts of the international community, including the United Nations, the OSCE and the European Union, concentrated first on the return to Kosovo of the refugees and displaced persons and the rebuilding of their lives, and then on developing provisional institutions of self-government. It was only at a later stage, from 2004 onwards, that attention turned to the political process for Kosovo's final status. As at Rambouillet, all options for final status were open, though it was generally acknowledged that the will of the Kosovo people was a fundamental premise of the status negotiations. These options ranged from the continuation of substantial autonomy (already provided for during the interim period without any FRY or Serbian presence in Kosovo) to the emergence of a sovereign and independent State. Nothing was ruled in, nothing ruled out, though it was provided that the

[189] Dossier No. 34.

process would be political in nature and that it would be overseen by the Secretary-General and his representatives. Nothing in Security Council resolution 1244 (1999), or in its implementation, was intended to prejudge the eventual final status, though it did indicate that it must take into account the Rambouillet accords.

I. Resolution 1244 (1999)

4.04. Efforts to guarantee that the FRY's repression in Kosovo would end, and not return, began while the NATO intervention was ongoing, and were a condition for termination of the armed conflict between NATO and Serbia. On 6 May 1999, at a meeting at the Petersberg Centre near Bonn, the Group of Eight (G-8) Foreign Ministers adopted general principles on the political solution to the Kosovo crisis (which became annex 1 to resolution 1244). One of these principles called for

> "[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA."[190]

Neither this nor any other principle in the Petersberg principles addressed the final status process, nor did any other principle address the territorial integrity of the FRY.

4.05. In resolution 1239 (1999), adopted during the conflict on 14 May 1999[191], the Security Council expressed "grave concern at the humanitarian crisis in and around Kosovo", and urged all concerned to work towards the aim of a political solution consistent with the principles adopted by the G-8.

4.06. On 3 June 1999, the FRY Government and the Serbian Assembly agreed to the principles (peace plan) presented on 2 June by the President of Finland, Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the

[190] Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, S/1999/516, Annex [Dossier No. 29].

[191] Dossier No. 28.

Russian Federation[192] (which became annex 2 to resolution 1244 (1999)). Principle 8 was virtually identical to the G-8 principle cited above and was likewise only concerned with an "interim political framework agreement"[193]. It read:

> "A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions."

Neither this nor any other principle in the peace plan addressed the final status process, nor did any other principle address the territorial integrity of the FRY.

4.07. Thus the references to sovereignty and territorial integrity in what became annex 1 (G-8 general principles) and annex 2 (Chernomydin/Ahtisaari peace plan) to resolution 1244 (1999) were solely in the context of an interim political settlement.

4.08. On 9 June 1999, a Military Technical Agreement (MTA) was signed at Kumanovo (Macedonia) between the international security presence (Kosovo Force – KFOR) and the FRY and Serbian Governments. In accordance with the MTA and resolution 1244(1999), the withdrawal of FRY and Serbian forces from Kosovo began on 10 June 1999 and was completed by 20June 1999[194].

4.09. On 10 June 1999, the Security Council adopted resolution 1244 (1999) by 14 votes in favour, none against, and one abstention (China). As was also the case with the G-8 principles and the Ahtisaari/Chernomyrdin peace plan, both of which were annexed, the resolution addressed in detail the immediate issues and the governance of Kosovo in an interim period. But, as is clear from its text, and from the debate that took place in the Security Council when it was adopted[195], the resolution provided only limited guidance on

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[192] S/1999/649, Annex [Dossier No. 31].

[193] It will be recalled that the Rambouillet accords principally addressed the notion of an interim agreement, as indicated by its title [Dossier No. 30].

[194] Dossier No. 32. See *Milutinović et al.*, *op. cit.* (fn. 142), vol. 1, paras. 1215-1217.

[195] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011 and S/PV.4011 (Resumption 1) [Dossier No. 33].

the process for determining the final status of Kosovo. The resolution itself did not seek to fix the timing or form of the process leading to future status, still less the substance of an eventual solution. These matters were left largely open. Importantly, however, the resolution characterized the process as "political" in nature, indicated that the process must take into account the Rambouillet accords, decided that the international civil presence would oversee the process of transferring authority to the final status institutions, and requested that the Secretary-General appoint his Special Representative (SRSG) so as "to control the implementation of the international civil presence".

4.10. In the preamble to resolution 1244 (1999), the Security Council recalled its previous resolutions on Kosovo[196], resolutions 1160 (1998), 1199 (1998), 1203 (1999) and 1239 (1999), and welcomed "the general principles on a political solution of the Kosovo crisis adopted on 6 May 1999" and the FRY's acceptance of and agreement with "the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999"[197].

4.11. The Council reaffirmed, in the preamble, "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2 [to the resolution]"[198], while at the same time reaffirming the call in its previous resolutions for "substantial autonomy and meaningful self-government for Kosovo"[199]. As is explained in more detail in Chapter IX below[200], the preambular reference to the FRY's territorial integrity is conditioned by reference to an annex concerned solely with the interim period, a change from such references in prior resolutions. As such, the preamble to resolution 1244 (1999) was entirely without prejudice to the arrangements and terms of the eventual final status of Kosovo. All possible solutions for final status were open; none was excluded *a priori*, particularly not independence, which was known to be the demand of the overwhelming majority of the people of Kosovo.

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[196] Security Council resolution 1244 (1999), 10 June 1999, second preambular paragraph [Dossier No. 34].

[197] *Ibid.*, ninth preambular paragraph.

[198] *Ibid.*, tenth preambular paragraph.

[199] *Ibid.*, eleventh preambular paragraph.

[200] See paras. 9.29-9.36 below.

4.12. The operative part of the resolution begins with a Council decision that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 [i.e., the G-8 Petersberg principles of 6 May 1999] and as further elaborated in the principles and other required elements in annex 2 [i.e., those presented in Belgrade on 2 June 1999 and agreed to by the FRY]". Again, the Council here is indicating that the initial concern in resolving the crisis was to establish an interim period, built on the principles set forth in the annexes, which would allow for the end of violence and repression in Kosovo, the removal of all FRY and Serbian military and paramilitary forces, and the deployment of international presences that would allow for the establishment of peace, the return of refugees, and a move toward substantial self-government for Kosovo. Neither the preamble nor the overall thrust of the resolution (as signaled in its paragraph 1) establish FRY (or Serbian) territorial integrity as a condition for Kosovo's final status. The principles in annexes 1 and 2 did not touch on the content of the final status.

4.13. In the further operative paragraphs of resolution 1244 (1999), the Security Council provided both for KFOR and for UNMIK, headed by the SRSG[201]. The detailed responsibilities of each were set out in paragraphs 9 and 11 respectively.

4.14. Specifically, the Security Council authorized Member States and relevant international organizations to establish the international security presence in Kosovo[202], and decided that its responsibilities were to include:

> "(a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces …;
>
> (b) Demilitarization of the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups …;

[201] Security Council resolution 1244 (1999), 10 June 1999, paragraphs 5-11 [Dossier No. 34].

[202] *Ibid.*, paragraph 7. The composition of KFOR has varied over time. It currently includes troops from 25 States: Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and United States of America. KFOR has submitted monthly report on its activities, a representative selection of which is included in the Dossier submitted by the United Nations Secretariat (Dossier, p. 12, and Nos. 133-146).

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;

.....

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations."[203]

4.15. The United Nations Secretary-General was to appoint, in consultation with the Security Council, the SRSG "to control the implementation of the international civilian presence"[204]. The Security Council authorized the Secretary-General to establish, "with the assistance of relevant international organizations", the international civil presence

"in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions"[205].

4.16. The Security Council decided in paragraph 11 of resolution 1244 (1999) that the main responsibilities of the international security presence would include:

"(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords ...;

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions ...;

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords;

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement"[206].

[203] Security Council resolution 1244 (1999), 10 June 1999, paragraph 9 [Dossier No. 34].

[204] *Ibid.*, paragraph 6.

[205] *Ibid.*, paragraph 10.

[206] *Ibid.*, paragraph 11.

4.17. Paragraph 11 (e) refers to a "political process" to determine final status, taking into account the Rambouillet accords[207]. It will be recalled that the only provision in those accords that concerned final status envisaged a final settlement "on the basis of the will of the people", and made no reference to approval by either the FRY or Serbia[208]. As noted in paragraph 3.46 above, Chapter 8, Article I, paragraph 3, of the Rambouillet accords provided that the final settlement would be "on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act …".

4.18. Moreover, as discussed in Chapter IX, this provision of the Rambouillet accords consciously dropped any reference to "mutual consent" of the FRY and Kosovo, which had existed in the analogous provision of the peace proposals drafted by Ambassador Christopher Hill in the period immediately preceding Rambouillet[209].

4.19. Otherwise, resolution 1244 (1999) is silent on the form that the political process would take, including whether it would conclude with a decision of the United Nations, and if so which United Nations body, and on the content of final status. However, paragraph 11 (e) clearly states that the political process is one of the "main responsibilities" of UNMIK, headed and controlled by the SRSG. After adoption of the resolution, the Secretary-General would regularly report to the Security Council on developments as they unfolded in Kosovo, and on the appointment both of the SRSG and of special envoys relating to the final status negotiations.

4.20. Paragraph 11 of resolution 1244 (1999) concluded by identifying further responsibilities of the international civil presence: support for reconstruction; maintenance of civil law and order; protection and promotion of human rights; and assurance of the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo[210]. Given the placement of these responsibilities after the sub-paragraphs (e) and (f) relating to final status, it is clear that the role of UNMIK was envisaged as potentially straddling the

[207] S/1999/648, Annex [Dossier No. 30].

[208] See paras. 3.45-3.46 above.

[209] See paras. 9.13-9.14 below.

[210] Security Council resolution 1244 (1999), paragraph 11 (g), (h), (i), (j) and (k) [Dossier No. 34].

interim and post-interim periods, depending on whether there existed continuing needs that the international civil presence could address.

4.21. The Security Council went on to demand "that all States in the region cooperate fully in the implementation of all aspects of this resolution"[211]. It decided that the international civil and security presences would continue "until the Security Council decides otherwise"[212]. As described in Chapter II, those presences continue today in Kosovo, with Kosovo's agreement. Further, the Council requested the Secretary-General to report at regular intervals[213], as he continues to do.

4.22. Some important points emerged in the course of the Security Council meeting at which resolution 1244 (1999) was adopted[214]:

(a) The FRY representative (Mr. Jovanović), opening the debate and speaking before the draft resolution was put to the vote, objected strongly to many of the terms of the draft (which was nevertheless adopted unchanged). He said that the draft "should contain ... a firm and unequivocal reaffirmation of full respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia"[215] (thus acknowledging that it did not). He said that it should contain a provision for "a political solution to the situation in Kosovo and Metohija that would be based on broad autonomy"[216] (again acknowledging that the draft language, which was then adopted by the Council, did not). He continued: "The solution for Kosovo and Metohija must fall within the legal frameworks of the Republic of Serbia and the Federal Republic of Yugoslavia, which implies that all State and public services in the province, including the organs of law and order, should function according to the Constitutions and laws of the Federal Republic of Yugoslavia and the Republic of

[211] Security Council resolution 1244 (1999), paragraph 18 [Dossier No. 34].

[212] *Ibid.*, paragraph 19.

[213] *Ibid.*, paragraph 20. The Secretary-General's reports are included in Part II.C of the Dossier.

[214] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011 and S/PV.4011 (Resumption 1) [Dossier No. 33].

[215] *Ibid.*, p. 5. As the United Kingdom representative said, "[t]he interpretation and conditions which the delegation of the Federal Republic of Yugoslavia has attempted to propose have been rejected" (*ibid.*, p. 18).

[216] *Ibid.*, p. 5.

Serbia"[217]. Perhaps most importantly for the matter now before the Court, the FRY representative stated that "operative paragraph 11 ... opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia"[218]. He thus acknowledged that resolution 1244 (1999), as adopted, permitted the very outcome that Serbia now claims the resolution prohibits.

(b) Some States attached importance to the resolution's reaffirmation of Member States' commitment to the sovereignty and territorial integrity of the FRY (especially China[219]). Others, however, spoke of the shift from absolute State sovereignty to recognition of the importance of human rights[220].

(c) Most speakers focused on the immediate steps envisaged by resolution 1244 (1999). Just as the resolution itself contained rather little about the final status negotiations, so few speakers dwelt on what was then a rather distant aspect of resolving the Kosovo crisis. No one (except perhaps the FRY representative) suggested that Kosovo would have to remain within the FRY in any future settlement (as opposed to during the interim period). Indeed, it is clear that to rule out that option would have been unacceptable to many Council members. The representative of Malaysia, echoing the resolution's reference to the Rambouillet accords, referred to

> "the need to ensure one very fundamental element in the peace settlement: the fulfilment of the legitimate aspirations and expectations of the Kosovar Albanian people, the majority inhabitants of Kosovo"[221].

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[217] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011 and S/PV.4011 (Resumption 1), p. 5 [Dossier No. 33].

[218] *Ibid.*, p. 6.

[219] *Ibid.*, p. 9.

[220] *Ibid.*, pp. 12-13 (Netherlands), pp. 13-14 (Canada).

[221] *Ibid.*, p. 16.

II. The Promotion of Kosovo Self-Governance

4.23. A comprehensive account of the establishment of UNMIK, its activities, and events in Kosovo from June 1999 to February 2008 is set out in the quarterly reports of the Secretary-General under paragraph 20 of Security Council resolution 1244 (1999)[222]. Its functions included the promotion of democracy, rule of law, human rights, multi-ethnic relations, and institution building. Its mandate enabled it to develop institutions of local self-government to which functions would be gradually transferred. While UNMIK is still present in Kosovo, its principal functions have now either been fulfilled or been assumed by others, notably by the institutions of the Republic of Kosovo and EULEX-Kosovo[223].

UNMIK pillars

4.24. UNMIK initially consisted of four "Pillars": Pillar I (Humanitarian Affairs), with UNHCR in charge; Pillar II (Civil Administration), run by the United Nations; Pillar III (Democratization and Institution-Building), under the OSCE; and Pillar IV (Reconstruction), under the EU. UNHCR left the structure in June 2000, and in May 2001 a "new Pillar I" (Law Enforcement and Justice) was established, under the United Nations. The SRSG was the head of UNMIK, and there were four Deputy SRSGs, one in charge of each Pillar.

4.25. Successive SRSGs[224] ensured the transfer of powers and responsibilities to self-government institutions. There was a gradual transition from direct international

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[222] Dossier, Part II.C. The reports "provide a detailed description of the full breadth of UNMIK's activities, the structure of the Mission, its powers and competences, concept of operation and the relationship between UNMIK and the international organizations that played a lead role in UNMIK's four Pillars, namely the United Nations, the European Union and the Organization for Security and Cooperation in Europe. These reports provide regular updates on, and assessments of, the security, political, economic, and humanitarian situation, as well as on capacity and institution-building, in particular, the establishment of a Constitutional Framework for Provisional Self-Government for Kosovo, the establishment and functioning of Provisional Institutions of Self-Government of Kosovo (PISG) and other administrative structures established pursuant to the Constitutional Framework, transfer of competences to the PISG, municipal and Kosovo-wide elections, dialogue between Pristina and Belgrade and technical assessments on the implementation of the 'Standards for Kosovo'." [Introductory Note, Dossier, p. 6]

[223] See paras. 2.69-2.74 above.

[224] Sérgio Vieira de Mello of Brazil (Acting SRSG, 13 June-15 July 1999); Bernard Kouchner of France (15 July 1999-15 January 2001); Hans Haekkerup of Denmark (15 January-31 December 2001); Michael Steiner of Germany (14 February 2002-8 July 2003); Harri Holkeri of Finland (25 August 2003-

administration by UNMIK to governance by democratic institutions representing the people of Kosovo, namely the President, the Government (consisting of a Prime Minister and other Ministers) and the Assembly of Kosovo.

UNMIK authority and applicable law

4.26. UNMIK had unprecedented authority in terms of the international administration of territory[225]. As foreshadowed in the Secretary-General's report to the Security Council on its establishment[226], UNMIK Regulation No. 1999/1, adopted on 25 July 1999, provided that

> "All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General."[227]

Section 3 of UNMIK Regulation No. 1999/1 made provision for the domestic law applicable in Kosovo in the following terms:

> "The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2 [internationally recognized human rights standards and non-discrimination], the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK."

4.27. However, the application of laws enacted after the unlawful removal of Kosovo's autonomy in 1989 was unacceptable to the people of Kosovo. The SRSG therefore, on 12 December 1999, adopted UNMIK Regulation No. 1999/24[228], which replaced the reference to the law applicable prior to 24 March 1999 with a reference to the law in force in Kosovo on 22 March 1989, that is, the law in force immediately preceding

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11 June 2006); Søren Jessen-Petersen of Denmark (16 August 2004-30 June 2004); Joachim Rücker of Germany (1 September 2006-20 June 2008); Lamberto Zannier of Italy (since June 2008).

[225] Though it was rapidly followed by UNTAET in East Timor.

[226] Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), S/1999/779, 12 July 1999, para. 35 [Dossier No. 37].

[227] Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, Section 1.1 [Dossier No. 138].

[228] Dossier No. 146. By section 3, Regulation No. 1999/24 was deemed to have entered into force as of 10 June 1999.

the unlawful and forceful abolition of Kosovo's autonomy on 23 March 1989 [229]. Section 1.1 of Regulation No. 1999/24 read:

> "The law applicable in Kosovo shall be:
>
> (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
>
> (b) The law in force in Kosovo on 22 March 1989.
>
> In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence."[230]

4.28. UNMIK Regulation No. 1999/1 was further amended, also with effect from 10 June 1999, by UNMIK Regulation No. 2000/54, which included a consolidated text of the regulation[231].

Early and far-reaching UNMIK legislation

4.29. The SRSG enacted a number of important regulations in the first few months of the interim administration, which formed part of the domestic law of Kosovo and which reinforced Kosovo's position as a territory no longer under the rule of the FRY or Serbia. These included regulations "for the purpose of establishing customs and other related services at the inland customs houses and international borders of Kosovo"[232]; on the currency permitted to be used in Kosovo[233]; and on the establishment of a court of final appeal and the office of the public prosecutor "for the purpose of enhancing the

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[229] See paras. 3.23-3.28 above.

[230] UNMIK Regulation No. 1999/24 of 12 December 1999 on the Applicable Law in Kosovo [Dossier No. 146]. On the same date, section 3 of Regulation No. 1999/1was repealed by Regulation No. 1999/25 [Dossier No. 139].

[231] Dossier No. 140. Another regulation on applicable law was Regulation No. 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property [Dossier No. 141].

[232] UNMIK Regulation No. 1999/3 of 31 August 1999 on the Establishment of the Customs and Other Related Services in Kosovo, *Official Gazette of the United Nations Interim Mission in Kosovo* (available on the UNMIK website <http://www.unmikonline.org>). The citation is from the preamble to the Regulation.

[233] UNMIK Regulation No. 1999/4 of 2 September 1999 on the Currency to be used in Kosovo, *Official Gazette of the United Nations Interim Mission in Kosovo* (available on the UNMIK website <http://www.unmikonline.org>).

administration of justice in Kosovo pending a more thorough review"[234]. The FRY/Serbia made repeated protests about these and other "unlawful" regulations, saying that in adopting them the SRSG had "violated the mandate established under Security Council resolution 1244 (1999) and the related documents, in particular the principle of the territorial integrity and sovereignty of the FR of Yugoslavia ..."[235]. Neither the SRSG/ Secretary-General nor the Security Council took any action following these protests[236].

External relations

4.30. UNMIK's powers also included the conduct of external relations on behalf of Kosovo and to the exclusion of the FRY/Serbia. To this end, UNMIK concluded a number of international agreements on behalf of Kosovo[237]. The position was described in a March 2004 Note Verbale of the United Nations Office of Legal Affairs in the following terms:

> "While not expressly vested with treaty-making power, the power to conclude bilateral agreements with third States and Organizations on behalf of Kosovo has in practice been assumed by UNMIK with regard to matters falling within the scope of its responsibilities under Security Council resolution 1244, and to the extent necessary for the administration of the territory. A number of agreements have thus been concluded over the years on a variety of practical matters relating to economic development assistance and cooperation, road transport and police cooperation with the Republic of Albania, Italy, the United States, Switzerland, Iceland, and the former Yugoslav Republic of Macedonia, among others. Bilateral Agreements have also been concluded between UNMIK and international organizations, and notably ICAO and INTERPOL."[238]

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[234] UNMIK Regulation No. 1999/5 of 4 September 1999 on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor, *Official Gazette of the United Nations Interim Mission in Kosovo* (available on the UNMIK website <http://www.unmikonline.org>). The citation is from the preamble to the regulation.

[235] Memorandum of the Government of the FRY on the UN Security Council resolution 1244 (1999) of 5 November 1999, Part 2, (available on <http://www.arhiva.serbia.sr.gov.yu/news/1999-11/05/15429.html>).

[236] Such measures were in areas which, according to the FRY itself, went to the heart of sovereignty. The FRY again protested, describing the SRSG's decision as "the so-called transformation of the terrorist KLA into an allegedly civilian organization" and asserting that "a core of some future Albanian army in Kosovo has thus been created" (*ibid.*, Part 3, point 3 (available on <http://www.arhiva.serbia.sr.gov.yu/ news/1999-11/05/15431.html>).

[237] Dossier, Section II.G, includes a selection of such international agreements, bilateral and multilateral.

[238] Note Verbale from the United Nations Office of Legal Affairs, 12 March 2004 [Dossier No. 168].

Institution building

4.31. There were early efforts to involve the people of Kosovo in governance. Joint civilian commissions (JCCs) were formed in areas such as health, universities, education and culture, municipalities and governance, post and telecommunications, and power[239]. A Kosovo Transitional Council (KTC) was established in July 1999[240]. This initially included 12 representatives of political parties and communities, and could make recommendations to UNMIK[241]. At about the same time, a Judicial Advisory Council, with 20 national and international legal experts, was established to review and comment on draft legislation and to propose new legislation. A local Advisory Judicial Commission advised the SRSG on the appointment of judges and was consulted on the removal of judges and prosecutors.

4.32. UNMIK then moved quickly to establish a Joint Interim Administrative Structure (JIAS)[242], pursuant to an Agreement on a Kosovo-UNMIK Joint Interim Administrative Structure (JIAS), signed on 15 December 1999 by three Kosovo political leaders[243]. This provided for the transformation and progressive integration of existing "Kosovo structures"[244], to the extent possible, into the JIAS. There was a high-level eight-member Interim Administrative Council, composed of the four Deputy SRSG's and four members from Kosovo, including one Serb, to "make recommendations to the SRSG for amendments to the applicable law and for new regulations", and to "propose policy guidelines for Administrative Departments"[245]. In addition, there were 20 Administrative Departments, responsible for civil administration, jointly led by a Kosovo and UNMIK Co-

[239] Report of the Secretary-General pursuant to paragraph 10 of Security Council resolution 1244 (1999), S/1999/779, 12 July 1999, para. 19 [Dossier No. 37].

[240] *Ibid.*, para. 20.

[241] Its enlargement and integration into the JIAS was foreseen in UNMIK Regulation No. 2000/1 on the Kosovo Joint Interim Administrative Structure, 14 January 2000, section 2 [Dossier No. 148].

[242] UNMIK Regulation No. 2000/1 on the Kosovo Joint Interim Administrative Structure, 14 January 2000, section 2 [Dossier No. 148].

[243] Report of the Secretary-General on the United Nations Interim Mission in Kosovo, S/1999/1250, 23 December 1999, paras. 5-6 [Dossier No. 40].

[244] UNMIK Regulation No. 2000/1, 14 January 2000, Section 1 (c) of which refers to "[c]urrent Kosovo structures, be they executive, legislative or judicial (such as the 'Provisional Government of Kosovo', 'Presidency of the Republic of Kosovo')" [Dossier No. 148].

[245] *Ibid.*, Sections 3-6.

Head of Department[246]. Provision was also made for Municipal Administrative Boards, headed by an UNMIK official but including Kosovo members.

The Constitutional Framework

4.33. The next stage was to develop a basic document providing for "meaningful self-government in Kosovo pending a final settlement"[247]. The Constitutional Framework for Provisional Self-Government in Kosovo (hereafter "Constitutional Framework") was promulgated by the SRSG on 15 May 2001[248]. Just like any other UNMIK regulation, it formed part of the domestic law applicable in Kosovo. It was not a constitution for Kosovo, and had no greater formal status than any other UNMIK regulation. It could, for example, be amended at any time by the SRSG[249]. The Constitutional Framework was nevertheless seen as important, because it created a framework within which the people of Kosovo could govern themselves during the interim period. It was described by the SRSG as follows:

> "It is a truly historic document. It will guide the people of Kosovo toward the establishment of democratic structures, and its successful implementation will greatly assist the process of determining Kosovo's final status."[250]

4.34. The Constitutional Framework included the following preambular paragraph, setting out the SRSG's basic understanding of the position then pertaining in Kosovo:

> "Acknowledging Kosovo's historical, legal and constitutional development; and taking into account the legitimate aspirations of the people of Kosovo to live in freedom, in peace, and in friendly relations with other people in the region"[251].

Also in the preamble, the SRSG referred to the final status process, stressing the importance of the will of the people. He said that responsibilities would be transferred to

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[246] UNMIK Regulation No. 2000/1, 14 January 2000, Section 7 [Dossier No. 148].

[247] UNMIK Regulation No. 2001/9, 15 May 2001, preamble [Dossier No. 156].

[248] *Ibid.* The Constitutional Framework was attached to Regulation No. 2001/9. It was later amended by UNMIK Regulation No. 2002/9, 3 May 2002, [Dossier No. 157].

[249] Constitutional Framework, Chapter 14.3.

[250] UNMIK, *Constitutional Framework for Provisional Self-Government in Kosovo*, Introduction (available on the UNMIK website <http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf>).

[251] Constitutional Framework, third preambular paragraph [Dossier No. 156].

the PISG "which shall work ... with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244 (1999), take full account of all relevant factors including the will of the people"[252].

Transfer of powers and responsibilities to the PISG

4.35. As part of the domestic law of Kosovo, the Constitutional Framework made provision for "Provisional Institutions of Self-Government" (PISG). These were the Assembly, the President of Kosovo, the Government, the Courts, and other bodies and institutions set forth in the Framework[253]. The PISG were to have extensive and open-ended responsibilities, set out in Chapters 5.1 (broad fields of domestic and foreign policy[254]), 5.2 (local administration), 5.3 (judicial affairs), 5.4 (mass media), 5.5 (emergency preparedness), 5.6 (external relations), 5.7 (aligning legislation and practices with European and international standards) and 5.8 (such other responsibilities as are specified in the Constitutional Framework of in other legal instruments).

4.36. The Constitutional Framework contained detailed provisions on the institutions of self-government, including on the procedure for the adoption of laws, which required two or three readings. If approved by the Assembly, the laws were submitted to the President of Kosovo for signature, who in turn submitted them to the SRSG for promulgation. The Assembly could also adopt resolutions, which were non-binding declarations[255].

4.37. By the time of the Declaration of Independence by the democratically-elected leaders of Kosovo, Kosovo had "successfully held five sets of elections since UNMIK was

[252] Constitutional Framework, sixth preambular paragraph [Dossier No. 156].

[253] *Ibid.*, Chapter 1.5.

[254] Including, by way of example, economic and financial policy, fiscal and budgetary issues, customs, education, health, environmental protection, labour and social welfare, transport, telecommunications, agriculture, good governance and human rights.

[255] Constitutional Framework, Chapter 9 [Dossier No. 156].

established"[256]. Pursuant to the Constitutional Framework, free and fair elections were successfully held on several occasions for the Assembly of Kosovo and at the local level. The first general election was held on 17 November 2001, and following somewhat protracted coalition discussions a Government was formed by February 2002. A further general election was held in 2004. A third was held on 17 November 2007[257].

4.38. The Constitutional Framework provided that

> "The SRSG shall take the necessary measures to facilitate the transfer of powers and responsibilities to the Provisional Institutions of Self-Government."[258]

4.39. Pursuant to this provision, from 2002 onwards, powers and responsibilities were gradually transferred to the PISG and new ministries and bodies were formed, as is fully described the reports of the SRSG under resolution 1244 (1999)[259].

4.40. Following the adoption the Constitutional Framework, "UNMIK made internal adjustments for the handover of significant powers to the provisional institutions of self-government"[260]. Chapter 5 of the Constitutional Framework set out those unreserved powers and responsibilities which would gradually be transferred to the PISG, with Chapter 8 listing those powers and responsibilities that were reserved to the SRSG. The transfer of additional competencies from UNMIK to the PISG was a gradual one, continuing and accelerating during the years subsequent to the establishment of the PISG in order to create, build and consolidate self-governing institutions, in preparation for the determination of the final status of Kosovo.

4.41. UNMIK completed the transfer of responsibilities under Chapter 5 of the Constitutional Framework to the Provisional Institutions at the end of 2003[261]. Discussions

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[256] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/768, 3 January 2008, para. 3 [Dossier No. 84].

[257] See para. 4.55 below.

[258] Constitutional Framework, Chapter 14 (2) [Dossier No. 156].

[259] Dossier, Section II.C.

[260] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2002/62, 15 January 2002, para. 2 [Dossier No. 53].

[261] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2004/71, 26 January 2004, para. 5 [Dossier No. 66].

ensued in order to determine whether additional competencies could be handed over to the PISG. By 2004, UNMIK sought to "involve the Provisional Institutions in an advisory and consultative capacity within the specific areas reserved for [the] Special Representative in chapter 8 of the Constitutional Framework"[262], and in addition "identified a number of responsibilities that [did] not impinge on sovereignty and [could] be transferred to the Provisional Institutions"[263]. During this period, UNMIK continued to examine the "ways in which the functional engagement in reserved areas of the Provisional Institutions [could] be further developed"[264].

4.42. In the early years, the PISG had relatively few competencies and it was felt that Kosovo still had "some way to go in establishing representative and functioning institutions"[265]. But four years into UNMIK's mandate, Kosovo had made "significant progress"[266], with the Secretary-General reporting in 2003 that of the non-reserved responsibilities in Chapter 5 of the Constitutional Framework, 19 had been transferred, 17 had been identified for transfer in a gradual and controlled manner, and it was anticipated that the remaining eight would be transferred by the end of 2003[267]. By his report of 29 June 2007, the Secretary-General was able to state that

> "[i]n eight years of interim administration by the United Nations, Kosovo has made significant strides in the establishment and consolidation of democratic and accountable Provisional Institutions of Self-Government and in creating the foundations for a functioning economy. The Provisional Institutions have laid the basis for a peaceful and normal life for all the people of Kosovo."[268]

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[262] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2004/71, 26 January 2004, para. 5 [Dossier No. 66].

[263] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2004/907, 17 November 2004, para. 11 [Dossier No. 70].

[264] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2005/335, 23 May 2005, para. 12 [Dossier No. 73].

[265] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2003/421, 14 April 2003, para. 4 [Dossier No. 62].

[266] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2003/675, 26 June 2003, para. 60 [Dossier No. 63].

[267] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2003/996, 15 October 2003, para. 3 [Dossier No. 64].

[268] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/395, 29 June 2007, para. 30 [Dossier No. 80].

4.43. Over the course of its mission, UNMIK thus created, developed and nurtured the Kosovo institutions through a process of gradual and increasing transfer of competencies in order to prepare it for the final status. This process is shown by having regard to the developments within the institutions themselves.

4.44. Throughout 2002 the Assembly, with the assistance of UNMIK, "formed the rudimentary structures needed for a functioning parliament" with the formation of 18 committees[269], such that by 2006 the Secretary-General described the Assembly as showing "political maturity"[270]. UNMIK was central in forming the nine original ministries[271] in 2002, with the promulgation in December 2005 of an UNMIK regulation establishing the new Ministries of Justice and Internal Affairs, marking "a key step forward"[272]. According to the Secretary-General's report to the Security Council of 25 January 2006, "[i]n this first stage, the ministries are given legal, technical, financial and administrative responsibilities in relation to police and justice. Transfer of more important responsibilities, such as operational control over the Kosovo Police Service and the Kosovo Correctional Service, will only take place after, and conditional upon, a positive assessment by my Special Representative of the performance by the new ministries in the first three months of their existence."[272] The Ministry of Internal Affairs "continued to make generally satisfactory progress towards full establishment"[273], creating the Department of Borders, Boundaries, Asylum and Migration by 2007[274].

[269] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2003/113, 29 January 2003, para. 11 [Dossier No. 60].

[270] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2005/88, 14 February 2005, para. 3 [Dossier No. 72].

[271] The nine original ministries were: Agriculture, Foresting and Rural Development; Culture, Youth and Sports; Education, Science and Technology; Labour and Social Welfare; Health, Environment and Spatial Planning (which was subsequently split into two separate Ministries, for Health and for Environment and Spatial Planning); Transport and Communications; Public Services; Trade and Industry; Finance and Economy.

[272] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/45, 25 January 2006, para. 13 [Dossier No. 75].

[273] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707, 1 September 2006, para. 17 [Dossier No. 77].

[274] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/395, 29 June 2007, para. 17 [Dossier No. 80].

4.45. UNMIK "moved ahead with the transfer of further competencies to the Provisional Institutions, particularly in the field of rule of law and security"[275]. In relation to policing activities, whilst retaining overall authority, UNMIK's role "shifted increasingly to mentoring and monitoring the Kosovo Police Service as it assume[d] additional operational functions"[276].

4.46. Summarising the position in 2007, the Secretary General stated:

> "UNMIK has largely achieved what is achievable under resolution 1244 (1999). At this stage, further progress depends on a timely resolution of the future status of Kosovo. A further prolongation of the future-status process puts at risk the achievements of the United Nations in Kosovo since June of 1999"[277].

Authority of the SRSG

4.47. Chapter IX of this Written Contribution addresses in some detail the authority of the SRSG under the Constitutional Framework[278]. His general authority was acknowledged in Chapter 12 of the Constitutional Framework, which provided as follows:

> "The existence of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244(1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework."

4.48. As discussed in Chapter IX[279], on several occasions the SRSG made use of his power under Chapter 12 to strike down acts of the PISG, and in particular of the Assembly. For example on 23 May 2002 the SRSG made a Determination in the following terms:

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[275] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/45, 25 January 2006, para. 13 [Dossier No. 75].

[276] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707, 1 September 2006, para. 16 [Dossier No. 77].

[277] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/582, 28 September 2007, para. 28 [Dossier No. 82].

[278] See paras. 9.21-9.22 below.

[279] See paras. 9.24-9.26 below.

> "By the powers vested in me by Security Council Resolution 1244 (1999) and the Constitutional Framework I hereby declare null and void the 'resolution on the protection of the territorial integrity of Kosovo' adopted by the Assembly of Kosovo today."[280]

4.49. On a more routine level, it was not uncommon for the SRSG to exercise his power to make changes in legislation adopted by the Assembly before promulgating it in the *Official Gazette of UNMIK*.

Standards for Kosovo

4.50. In his April 2002 report to the Security Council, the Secretary-General said that he had asked the SRSG "to develop benchmarks against which progress can be measured in the critical areas of the rule of law, functioning democratic institutions, the economy, freedom of movement, the return of internally displaced persons and refugees and contributions to regional stability"[281]. For a time, the policy of the international community was encapsulated in the term "Standards before Status"[282]. In December2003 UNMIK published a document entitled "Standards for Kosovo"[283], and in March 2004 a further more elaborate document was published[284]. Pressures from within Kosovo, however, were such that it soon became apparent that the policy of "Standards before Status" was unsustainable in the longer term, leading the Secretary-General to request a review from Ambassador Kai Eide of Norway[285].

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[280] Dossier No. 179. For reactions from the Republic of Macedonia, a State that has now recognized the Republic of Kosovo, see Dossier Nos. 180 and 181. For further examples of action by the SRSG, see paras. 9.24-9.26.

[281] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2002/436, 22 April 2002, para. 54 [Dossier No. 54].

[282] On 24 April 2002, the SRSG expressed the view in the Security Council that "[t]hese benchmarks should be achieved before launching a discussion on status" (Security Council, provisional verbatim record, fifty-seventh year, 4518th meeting, 24 April 2002, S/PV.4518, p. 4 [Dossier No. 103]). The Security Council endorsed this approach (Statement by the President of the Security Council, S/PRST/2002/11, 24 April 2002 [Dossier No. 55]). See also Statement by the President of the Security Council, S/PRST/2003/1, 6 February 2003 [Dossier No. 61].

[283] UNMIK Press Release, *Standards for Kosovo*, 10 December 2003 [Dossier No. 59].

[284] Kosovo Standards Implementation Plan, 31 March 2004 (available on the UNMIK website <http://www.unmikonline.org/standards/docs/ksip_eng.pdf>)

[285] The Eide review, which in effect initiated the final status process, is described in Chapter V (paras. 5.06 and 5.07 below).

4.51. In his mid-2005 report, Ambassador Eide, who had been requested by the Secretary-General to conduct a general review of the Kosovo operation[286], summarised progress in the following terms:

> "After the end of the conflict in 1999, there was a total institutional vacuum in Kosovo. Today [i.e., 2005], a comprehensive set of institutions has been established which includes executive, legislative and judicial bodies at the central as well as at the local levels. Much progress has also been achieved in the development of a sustainable legal framework. The legislative work of the Assembly, the Government and UNMIK has been ambitious, covering essential areas of public life and the economy. Systems providing public services have been put in place across most of Kosovo. A civil service is taking shape. Over the recent period, a significant transfer of competences has occurred."[287]

III. The Transition to Independence

4.52. In 2005, after the political process to determine Kosovo's final status had commenced, UNMIK started to plan for its future transition of authority to the Kosovo institutions that would exist under a final status and to successor international authorities. The presentation of the Status Settlement Proposal by the United Nations Special Envoy Martti Ahtisaari served as an important milestone in the transition planning process. Indeed, the Ahtisaari Plan soon became a guiding tool for substantive transition planning.

4.53. Beginning in September 2006, preparations for transition became a priority for UNMIK. A mission-wide Transition Planning and Implementation (TPI) team was established. The TPI included all UNMIK departments and was chaired by the Strategy Coordinator. The work was carried out in coordination with Kosovo's Unity Team and with Kosovo's international partners. A comprehensive system of working groups was set up covering all aspects of transition planning: elections, drafting of the constitution, security, rule of law, legislation, property and economy, governance and civil administration.

4.54. The working groups prepared detailed transition action plans for each field, proposing amendments to existing legislation and drafting new laws. The groups also

[286] See paras. 5.06 and 5.07 below.

[287] "A comprehensive review of the situation in Kosovo", S/2005/635, 7 October 2005, p. 2 (Summary) [Dossier No. 193]; see also *ibid.*, p. 9, paras. 17-18.

discussed a range of very practical matters, such as future issuance of identification cards and travel documents, and the transfer of archives, UNMIK premises and assets.

4.55. Elections were held in Kosovo on 17 November 2007 for the Assembly of Kosovo, the 30 municipal assemblies, and the position of mayor of each of the 30 municipalities[288]. The elections "took place without incident following a generally fair and calm campaign period, and were confirmed by the Council of Europe to have been in compliance with international and European standards"[289]. However, the participation of Kosovo Serbs was "disappointingly very low". The authorities in Belgrade had called for a boycott; there were reports of intimidation of candidates and voters, and several political entities representing established political parties in Serbia withdrew, reportedly under pressure. The SRSG's assessment was that "these incidents played a major part in ensuring a low Kosovo Serb voter turnout"[290].

4.56. Following the elections, the Assembly of Kosovo met on 9 January 2008, re-elected Dr. Fatmir Sejdiu as President of Kosovo, and voted into office a new coalition government, led by Prime Minister Hashim Thaçi (PDK).

4.57. It was clear during the election campaign that a date for a declaration of independence would be set quickly after 10 December 2008, the deadline for the Troika's report. As the Secretary-General noted in his report to the Security Council covering the period in question, "[p]ublic pressure on the new Government and Assembly to act swiftly to declare independence following the period of engagement is high"[291]. Neither the Security Council nor the Secretary-General (or the SRSG) took any steps to prohibit such action.

[288] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/768, 3 January 2008, paras. 3-8 [Dossier No. 84].

[289] *Ibid.*, para. 3.

[290] *Ibid.*, para. 5.

[291] *Ibid.*, para. 8.

4.58. On 17 February 2008, the representatives of the people of Kosovo adopted the Declaration of Independence[292]. The next day, the United Nations Secretary-General summarized the United Nations' achievements in Kosovo in the following terms:

> "The United Nations has been instrumental in moving Kosovo away from the humanitarian and emergency phase to peace consolidation and the establishment of functional local self-government and administration. Since 1999, the United Nations has overseen the creation and consolidation of Provisional Institutions of Self-Government at the central and municipal levels, with minority representation. The United Nations has created a functional justice system and a multi-ethnic police force, and has successfully organized and overseen five elections. Kosovo now has a vibrant and diversified political party scene. Freedom of movement has improved, and inter-ethnic crimes have been reduced. Kosovo has made considerable progress through the years on the implementation of standards, and the standards implementation process is now fully integrated into the European approximation process."[293]

[292] See Chapter VI below.

[293] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839, p. 3 [Dossier No. 119].

CHAPTER V

FINAL STATUS PROCESS

5.01. This Chapter describes the political process that took place between May 2005 and December 2007, led by the United Nations Secretary-General, with – in the words of the Security Council – "the objective of a multi-ethnic and democratic Kosovo, which must reinforce regional stability"[294]. **Section I** deals with the Eide review and report (May-August 2005). **Section II** describes the Ahtisaari talks (November 2005-March 2007). **Section III** deals with the Security Council mission to Kosovo (April 2006). **Section IV** covers the efforts of the Troika (August-December 2007).

5.02. It is important to recall that, by contrast with the 1999 Rambouillet Conference or the negotiations leading to Security Council resolution 1244 (1999), the United Nations-led process of 2005-2007 was not concerned with an interim period, but with the final status of Kosovo. Some matters discussed in the final status process, such as the protection of communities, were for good reason also considered in connection with the interim period. But the distinction between the interim arrangements and the final status was clear throughout. It was clear during the Hill negotiations of 1998, at Rambouillet in 1999, during the negotiation of Security Council resolution 1244 (1999), and when the time came, in 2005, to move on to settle the final status of Kosovo.

5.03. The United Nations Secretary-General, with the support of the Security Council led the final status process. There was strong support, and indeed active participation, from the Contact Group (France, Germany, Italy, Russian Federation, United Kingdom and United States of America). Despite intense and prolonged efforts, the positions of Belgrade and Pristina proved to be irreconcilable[295]. The Secretary-General's Special Envoy, President Ahtisaari, recommended independence as the only viable option, and this recommendation was endorsed by the Secretary-General.

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[294] Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005 [Dossier No. 195].

[295] Ahtisaari put it bluntly, "Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept nothing short of independence" (Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, Annex, para. 2 [Dossier No. 203]).

5.04. By December 2007, there was widespread acceptance that all efforts to achieve an agreed settlement between Belgrade and Pristina had been exhausted. At the same time, it did not prove possible to secure a decision of the Security Council on the way forward. It was, nevertheless, clear that independence, as recommended by the Special Envoy and endorsed by the Secretary-General, was the only outcome acceptable to the overwhelming majority of the people of Kosovo; and that to prolong the process would not bring results but would merely serve to destabilise Kosovo and the entire Balkans region. Attention therefore turned to the need to entrench protections for all of the people of Kosovo, especially the Serb community, within the context of independence. This was accomplished in the first half of 2008, on the basis of the Ahtisaari Plan and in close coordination with interested members of the international community, through the Declaration of Independence of 17 February 2008 and in the Constitution of the Republic of Kosovo, which was adopted on 9 April 2008 and came into force on 15 June 2008.

5.05. Some important themes run through the final status process:

(a) There was agreement among all major participants that the *status quo* in Kosovo was unsustainable[296].

(b) There could be no return to the pre-March 1999 situation in Kosovo[297].

(c) Once the process had started, it could not be blocked and would have to be brought to a conclusion[298]. In other words, the process could not continue indefinitely and might lead to a settlement in the absence of the consent of one of the parties.

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[296] See, among many such statements, the second Eide Report ("A comprehensive review of the situation in Kosovo", S/2005/635, 7 October 2005, Annex, para. 63 [Dossier No. 193]); the Report of the Security Council Mission ("the current status quo was not sustainable", S/2007/256, 4 May 2007, para. 59 [Dossier No. 207]); the Contact Group Ministers on 27 September 2007, who "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable" (Statement on Kosovo by the Contact Group Ministers, New York, 27 September 2007, S/2007/723, 10 December 2007, Annex III [Dossier No. 209]). Ahtisaari said in his report, "Kosovo's current state of limbo cannot continue" (Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, Annex, para. 4 [Dossier No. 203]).

[297] Contact Group Statement, London, 31 January 2006 (available on <http://www.unosek.org/docref/fevrier/STATEMENT BY THE CONTACT GROUP ON THE FUTURE OF KOSOVO - Eng.pdf>).

[298] "A comprehensive review of the situation in Kosovo", S/2005/635, 7 October 2005, Annex, para. 70 [Dossier No. 193]; Guiding principles of the Contact Group for a settlement of the status of Kosovo, S/2005/709, 10 November 2005, Annex [Dossier No. 197]; Contact Group Statement, Vienna, 24 July 2006 (available on <http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_

(d) The Contact Group's guiding principles of November 2005[299] set the framework for the final status process, which was based on Security Council resolution 1244 (1999)[300].

(e) Any settlement needed to be acceptable to the people of Kosovo[301], ensure implementation of standards with regard to Kosovo's multi-ethnic character, and promote the future stability of the region[302].

I. Eide Reviews and Reports (2004-2005)

5.06. Following the March 2004 riots, the Secretary-General requested Ambassador Kai Eide of Norway to conduct a general review of the Kosovo operation. Until that time, the policy had been "Standards before Status"[303], but this now came under question. Eide presented an initial report in August 2004, in which he suggested that "[r]aising the future status question soon seems – on balance – to be the better option"[304]. In mid-2005 Eide was requested by the Secretary-General to conduct a further comprehensive review of the situation in Kosovo, in order to determine whether the conditions were in place to enter into "a political process designed to determine the future status of Kosovo, in accordance with Security Council resolution 1244 (1999) and relevant Presidential Statements"[305]. In his second report, transmitted to the Security Council on 7 October 2005, Ambassador Eide said that "an overall assessment leads to the conclusion that the time has come to

Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf>); Statement on Kosovo by the Contact Group Ministers, New York, 27 September 2007, S/2007/723, 10 December 2007, Annex III [Dossier No. 209].

[299] Guiding principles of the Contact Group for a settlement of the status of Kosovo, S/2005/709, 10 November 2005, Annex [Dossier No. 197].

[300] Statement on Kosovo by the Contact Group Ministers, New York, 27 September 2007, S/2007/723, 10 December 2007, Annex III [Dossier No. 209].

[301] Or, as it was put at Rambouillet, in Security Council resolution 1244 (1999), and in the preamble to the Constitutional Framework of 2001, the final settlement would have to be on the basis of/take full account of "the will of the people".

[302] Statement on Kosovo by the Contact Group Ministers, New York, 27 September 2007, S/2007/723, 10 December 2007, Annex III [Dossier No. 209].

[303] See paras. 4.50 above.

[304] Report on the situation in Kosovo, S/2004/932, 30 November 2004, Enclosure [Dossier No. 71].

[305] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/635, 7 October 2005 [Dossier No. 193].

commence [the final status] process"[306]. As he put it, "Kosovo will either move forward or slide backwards – having moved from stagnation to expectation, stagnation cannot again be allowed to take hold there"[307].

5.07. In a Presidential statement of 24 October 2005, the Security Council agreed with Ambassador Eide's assessment, welcomed the Secretary-General's readiness to appoint a Special Envoy to lead the process, and reaffirmed "its commitment to the objective of a multi-ethnic and democratic Kosovo, which must reinforce regional stability"[308].

II. Final Status Process Led by Martti Ahtisaari (November 2005-March 2007)[309]

5.08. On 14 November 2005, Martti Ahtisaari, former President of Finland, was appointed by the Secretary-General as his Special Envoy to lead the final status process for Kosovo. He was assisted by a deputy, Albert Rohan of Austria, and a Secretariat (UNOSEK). Other international actors were involved, including from the OSCE High Commissioner for National Minorities and the Venice Commission of the Council of Europe.

5.09. The Secretary-General's letter of 14 November 2005 appointing President Ahtisaari as his Special Envoy stated that Ahtisaari would "lead the political process to determine the future status of Kosovo in the context of resolution 1244 (1999) and the relevant Presidential Statements of the Security Council"[310]. The Terms of Reference attached to the letter emphasised that the Special Envoy "will lead this process on behalf of the Secretary-General". They went on to say that the Special Envoy would work closely with the parties and also with Security Council members and other key players. They further said that "[t]he pace and duration of the future status process will be determined by

[306] "A comprehensive review of the situation in Kosovo", S/2005/635, 7 October 2005, Annex, para. 62 [Dossier No. 193].

[307] *Ibid.*, para. 63.

[308] Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005 [Dossier No. 195].

[309] M. Weller, *op. cit.* (fn. 118), Chapter 12.

[310] Letter from Secretary-General Kofi Annan to Mr. Martti Ahtisaari, 14 November 2005 [Dossier No. 198].

the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of parties and the situation on the ground". The Special Envoy was to have "maximum leeway in order to undertake his task" and was "expected to revert to the Secretary-General at all stages of the process".

5.10. It is clear from the Terms of Reference that the Special Envoy was acting directly for the Secretary-General, and that he had very broad discretion as to the modalities and timing of the final status process. There is no indication in the letter, or in the Terms of Reference, that the settlement of the final status for Kosovo would only occur if it had the consent of Serbia or if there were a further decision of the Security Council.

5.11. In anticipation of the commencement of the political process led by Martti Ahtisaari, the Contact Group agreed upon "Guiding Principles", which were transmitted by the President of the Security Council to the Secretary-General on 10 November 2005 "for your reference"[311]. Among other things, the Contact Group's Guiding Principles repeated that "[o]nce the process [to determine the final status of Kosovo] has started, it cannot be blocked and must be brought to a conclusion". The Principles also stated that the settlement should "ensure that Kosovo can develop in a sustainable way both economically and politically and that it can cooperate effectively with international organizations and international financial institutions".

5.12. In a further statement, dated 31 January 2006, the six-member Contact Group recalled

> "that the character of the Kosovo problem, shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999, and the extended period of international administration under UNSCR 1224, must be fully taken into account in settling Kosovo's status"[312].

The Contact Group once again made clear that there should be "no return to the pre-1999 situation". They concluded that "[t]he disastrous policies of the past lie at the heart of the

[311] Guiding principles of the Contact Group for a settlement of the status of Kosovo, S/2005/709, 10 November 2005, Annex [Dossier No. 197].

[312] Contact Group Statement, London, 31 January 2006, para. 2 (available on <http://www.unosek.org/docref/fevrier/STATEMENT BY THE CONTACT GROUP ON THE FUTURE OF KOSOVO - Eng.pdf>).

current problems". While emphasising "that a negotiated settlement is the best way forward", the Contact Group did not exclude other routes.

5.13. There were fifteen rounds of negotiations in the course of 2006, held in Vienna. Belgrade's position throughout was that independence was unacceptable. Belgrade even made the wholly untenable claim that international law precluded a settlement involving independence[313]. Belgrade said that it was prepared to offer autonomy, but nothing more. Kosovo's position was also clear. Pristina insisted that the settlement should result in the independence of Kosovo. Within the framework of independence, there could be far-reaching protections for minority communities (including within the system of governance of Kosovo), religious and historic monuments, and human rights. A high-level meeting involving both sides was held in Vienna on 24 July 2006, but positions remained far apart. The ensuing Contact Group statement stressed that "Belgrade needs to demonstrate much greater flexibility in the talks than it has done so far", and reiterated that

> "once negotiations are underway, they can not be allowed to be blocked. The process must be brought to a close, not least to minimise the destabilising political and economic effects of continuing uncertainty over Kosovo's future status."[314]

5.14. In their Statement of 20 September 2006, Contact Group Ministers said:

> "Striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing. Ministers encouraged the Special Envoy to prepare a comprehensive proposal for a status settlement and on this basis to engage the parties in moving the negotiating process forward."[315]

In the same statement, Contact Group Ministers renewed "their call to Belgrade to cease its obstruction of Kosovo Serb participation in Kosovo's institutions"[316].

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[313] See Serbia's opening "platform", 5 January 2006 (cited in M. Weller, *op. cit.* (fn. 118), p. 200); a line repeated in the Assembly of Serbia's resolution of 14 February 2007 (see note 323 below).

[314] High-level meeting on the future status of Kosovo, Contact Group Statement, Vienna, 24 July 2006, (available at <http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf>).

[315] Contact Group Ministerial Statement, New York, 20 September 2006, para. 4 (available on <http://www.unosek.org/docref/2006-09-20_-_CG _Ministerial_Statement_New _York.pdf>).

[316] *Ibid.*, para. 5.

5.15. Belgrade's approach continued to be unconstructive. Belgrade arranged the suspension of cooperation between municipal authorities in northern Kosovo and UNMIK[317].

5.16. On 30 September 2006, in an act of extraordinary bad faith in the middle of the final status talks, Serbia adopted a new Constitution. The revealing preamble focused almost exclusively on Kosovo. It consisted of just two paragraphs:

> "Considering the state tradition of the Serbian people and equality of all citizens and ethnic communities in Serbia,
>
> Considering also that the province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations".[318]

5.17. This Constitution (replacing the Milošević one of 1990) was drafted and adopted in haste, without any involvement of the institutions or people of Kosovo. The Venice Commission reported that "the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not"[319]. It has been suggested that "[t]he main purpose of the new constitution was to demonstrate Serbian hostility to and create further legal barriers against, Kosovo independence"[320].

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[317] This led to the Contact Group Statement on the Situation in Northern Kosovo, 4 August 2006 (available on <http://www.unosek.org/docref/2006-08-04_-_CG _Statement_on_the_situation_in_Northern_Kosovo-english.pdf>).

[318] Constitution of the Republic of Serbia, preamble. The Presidential oath commences with the words: "I do solemnly swear that I will devote all my efforts to preserve the sovereignty and integrity of the territory of Serbia, including Kosovo and Metohija as its constituent part..." (Constitution, Article 114). The Constitution was narrowly approved by a referendum held on 28-29 October 2006, in which Kosovo Albanians were ineligible to participate.

[319] European Commission for Democracy through Law (Venice Commission), *Opinion No. 405/2006 on the Constitution of Serbia*, 19 March 2007, para. 8 (available at the Venice Commission's website <http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf>). Article 182, para. 2, of the Constitution provides: "The substantial autonomy of ... the Autonomous Province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution."

[320] International Crisis Group, Europe Briefing No. 44, 8 November 2006, *Serbia's New Constitution: Democracy Going Backwards*, p. 1. The referendum campaign "emphasised that defending Kosovo was

5.18. Kosovo's approach, by contrast, was forward-looking and positive. Among other things, Kosovo proposed in the course of the negotiations a Treaty of Friendship and Cooperation between Kosovo and Serbia[321], which recognized "that unique historical circumstances and common interests will require an extremely close and friendly relationship between Kosovo and Serbia for many years to come", included commitments to Euro-Atlantic integration, and provided for far-reaching cooperation, including through working groups and a Kosovo-Serbia Permanent Cooperation Council to meet regularly at the highest level.

5.19. Special Envoy Ahtisaari presented his draft comprehensive proposal to Belgrade and Pristina on 2 February 2007. On that day, the Contact Group issued a statement encouraging both parties "to engage fully and constructively with the Special Envoy in this phase of the process"[322]. The National Assembly of the Republic of Serbia rejected Ahtisaari's Proposal on 15 February 2007, in terms reminiscent of the 2005 "platform":

> "The National Assembly of the Republic of Serbia concludes that the Proposal of UN Secretary-General's Special Envoy Martti Ahtisaari breaches the fundamental principles of international law since it does not take into consideration the sovereignty and territorial integrity of the Republic of Serbia in relation to Kosovo-Metohija."[323]

5.20. Further direct negotiations took place, in the course of which Kosovo essentially accepted the draft Proposal, while Serbia presented a whole new version of the document, among other things referring to Kosovo throughout as "the Autonomous Province of Kosovo and Metohija", which was to be governed in accordance with the Constitution of the Republic of Serbia and within its sovereignty[324], and hence in a manner that left Kosovo exposed to future changes in Serbian national law. Serbia even claimed

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the main point of the constitution" (*ibid.*, p. 4), as did Party leaders when urging the Assembly to adopt the constitution on 30 September (*ibid.*).

[321] Annex 6.

[322] Joint Contact Group Statement, 2 February 2007 (available on <http://www.unosek.org/docref/Joint Contact Group Statement 2nd february 2007.doc>).

[323] Republic of Serbia, Assembly Resolution following UN Special Envoy Martti Ahtisaari's "Comprehensive proposal for the Kosovo status settlement" and continuation of negotiations on the future status of Kosovo-Metohija, 14 February 2007 (available at <http://www.mfa.gov.yu/Policy/Priorities/KIM/resolution_kim_e.html>.

[324] M. Weller, *op. cit.* (fn. 118), pp. 210-211.

that the negotiations had not yet taken place, and should now commence[325]. At the final meeting on 10 March 2007, both President Tadić and Prime Minister Kostunica rejected the Special Envoy's Proposal[326].

5.21. The Secretary-General presented President Ahtisaari's Report on Kosovo's Future Status, together with his Comprehensive Proposal for the Kosovo Status Settlement, to the Security Council on 26 March 2007[327]. The Special Envoy's recommendation was as follows:

> "Kosovo's status should be independence, supervised by the international community."[328]

5.22. In his report, President Ahtisaari said, "[i]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse"[329]. He was also of the view that

> "Kosovo's current state of limbo cannot continue. ... Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole."[330]

5.23. Ahtisaari explained that reintegration into Serbia was not a viable option[331], and that continued international administration was not sustainable[332]. He concluded that independence with international supervision was the only viable option[333]:

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[325] M. Weller, *op. cit.* (fn. 118), p. 211.

[326] Statement by the President of the Republic of Serbia, 10 March 2007; Statement by the Prime Minister of the Republic of Serbia, 10 March 2007 (cited in *ibid.*, p. 211).

[327] S/2007/168 and Add.1 [Dossier Nos. 203 and 204]. Addendum 2 consists of a note about the availability of certain maps.

[328] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, heading [Dossier No. 203].

[329] *Ibid.*, para. 3.

[330] *Ibid.*, para. 4. Ahtisaari introduced his report at a closed meeting of the Security Council on 3 April 2007 (S/PV.5654).

[331] *Ibid.*, paras. 6-7.

[332] *Ibid.*, paras. 8-9.

[333] *Ibid.*, paras. 10-14.

"5. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence.

.....

10. Independence is the only option for a politically stable and economically viable Kosovo. Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With continued political ambiguity, the peace and stability of Kosovo and the region remains at risk. Independence is the best safeguard against this risk. It is also the best chance for a sustainable long-term partnership between Kosovo and Serbia."

5.24. Ahtisaari continued:

"Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary."[334]

5.25. In his covering letter transmitting the Ahtisaari Settlement to the President of the Security Council, Secretary-General Ban Ki-moon said:

"Having taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status[335] and the Comprehensive Proposal for the Kosovo Status Settlement."

5.26. Thus by May 2007, the position was that "Pristina accepted the Ahtisaari Settlement in its entirety; Belgrade rejected it"[336].

[334] S/PV.5654, para. 15.

[335] I.e., "Kosovo's status should be independence, supervised by the international community".

[336] Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 10 December 2007, Annex, para. 5 [Dossier No. 209].

5.27. The main provisions of the President Ahtisaari's Settlement[337] are summarized in the annex to his Report[338]. This describes the aim of the Settlement as:

> "to define the provisions necessary for a future Kosovo that is viable, sustainable and stable. It includes detailed measures to ensure the promotion and protection of the rights of communities and their members, the effective decentralization of government, and the preservation and protection of cultural and religious heritage in Kosovo. In addition, the Settlement prescribes constitutional, economic and security provisions, all of which are aimed at contributing to the development of a multi-ethnic, democratic and prosperous Kosovo."[339]

5.28. The Settlement, which is very detailed (some 60 pages, plus a map section) consists of 15 Articles, which in turn refer to 12 Annexes and to the maps. The Settlement covers a wide range of subjects, indicated by the headings of the 15 Articles: General Principles; Human Rights and Fundamental Freedoms; Rights of Communities and Their Members; Rights of Refugees and Internally Displaced Persons; Missing Persons; Local Self-Government and Decentralization; Religious and Cultural Heritage; Economic and Property Issues; Security Sector; Constitutional Commission; Elections; International Civilian Representative; International Support in the Area of Rule of Law; International Military Presence; and Transitional Arrangements and Final Provisions.

III. Security Council Mission to Kosovo (April 2007)

5.29. Following the submission of Ahtisaari's proposal, at the Russian Federation's suggestion, a Security Council mission visited Kosovo between 25 and 28 April 2007[340]. After a full round of briefings in Brussels, Belgrade and Pristina, and a series of visits, the mission concluded that:

> "The positions of the sides on the Kosovo settlement proposal remain far apart. The Belgrade authorities and the Kosovo Serb interlocutors who expressed themselves on this issue ... rejected a solution that would entail any form of independence. ... There was recognition, however, that the current status quo was not sustainable. Kosovo

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[337] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007 [Dossier No. 204].

[338] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/20007/168, 26 March 2007, pp. 6-9 [Dossier No. 203].

[339] *Ibid.*, p. 6.

[340] For the composition and terms of reference of the mission, see Letter dated 19 April 2007 from the President of the Security Council to the Secretary-General, S/2007/220, Annex [Dossier No. 206].

> Albanian representatives and representatives of non-Serb communities, on the other hand, expressed clear and unambiguous support for the Kosovo settlement proposal and recommendation on Kosovo's future status. Expectations among the majority Kosovo Albanian population for an early resolution of Kosovo's future status were very high."[341]

5.30. The Security Council considered the mission's report on 10 May 2007[342]. The head of the mission, Ambassador Verbeke of Belgium, described the assessment in the report[343]. France noted that "the positions of the parties are irreconcilable. That was clear during the entire mission. Unfortunately, that inescapable fact will not change with time."[344] The United Kingdom likewise noted that "there is no prospect of an agreement between Belgrade and Pristina, as the mission demonstrated"[345]. The United States representative said

> "there is no potential for the passage of time to change the polarization in the foreseeable future. Therefore, delay, I believe, has no potential to help the situation. I think, on the other hand, that delay has great potential to destabilize Kosovo and the Balkans."[346]

5.31. In July 2007, six co-sponsors, Belgium, France, Germany, Italy, United Kingdom, and the United States of America circulated a draft Security Council resolution[347]. Among other things, echoing the Contact Group statement of 31 January 2006, the resolution would have recognized

> "the specific circumstances that make Kosovo a case that is sui generis resulting from the disintegration of the former Yugoslavia, including the historical context of Yugoslavia's violent break-up, as well as the massive violence and repression that took place in Kosovo in the period up to and including 1999, the extended period of international administration under resolution 1244, and the UN-led process to determine status, and that this case shall not be taken as a precedent".

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[341] Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007, para. 59 [Dossier No. 207].

[342] Security Council, provisional verbatim record, sixty-second year, 5673rd meeting, 10 May 2007, S/PV.5673 [Dossier No. 114]. The head of the Mission had already briefed the Security Council on 2 May 2007 (*ibid.*, S/PV.5672 [Dossier No. 113]).

[343] *Ibid.*, S/PV.5673, pp. 2-3 [Dossier No. 114].

[344] *Ibid.*, p. 6.

[345] *Ibid.*, p. 12.

[346] *Ibid.*, p. 13.

[347] The draft resolution was provisionally assigned the number S/2007/437, with a date of 17 July 2001. That number was reassigned to a different document after the resolution was withdrawn.

Further, the resolution would have acknowledged that the status quo in Kosovo was not sustainable. While the resolution received broad support among Council members, it was not possible to secure its adoption in the face of Russian opposition, so it was not put to a vote[348].

IV. European Union/United States/Russian Federation Troika on Kosovo (August-December 2007)[349]

5.32. A final attempt to reach agreement on a settlement was made between August and December 2007. The Contact Group proposed the establishment of a "Troika" of representatives of the European Union (Wolfgang Ischinger), the United States of America (Frank Wisner), and the Russian Federation (Alexander Botsan-Harchenko). The Secretary-General welcomed this initiative on 1 August 2007, restating his belief that the status quo was unsustainable and requesting a report on these efforts by 10 December 2007[350].

5.33. Between August and December 2007, the Troika undertook an intense schedule of meetings with the parties, who were represented at the highest possible level. They were fully supported by Contact Group Ministers, who reiterated that "striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing"[351]. But the Troika could not achieve an agreed settlement. In their report, presented to the Security Council on 4 December 2007, they concluded that

> "the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo."[352]

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[348] Statement issued on 20 July 2007, Belgium, France, Germany, Italy, UK and USA.

[349] M. Weller, *op. cit.* (fn. 118), Chapter 13.

[350] Available on <http://www.un.org/apps/sg/sgstats.asp?nid=2692>.

[351] Statement on Kosovo by Contact Group Ministers, 27 September 2007, S/2007/723, 10 December 2007, Annex III [Dossier No. 209].

[352] Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 10 December 2007, para. 2.

5.34. It was thus widely accepted, by December 2007, that all efforts to achieve an agreed settlement had been exhausted, that the status quo was not sustainable, and that independence was inevitable[353]. Only thus could the Council's objective be met – "a multi-ethnic and democratic Kosovo, which must reinforce regional stability"[354].

[353] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839, pp. 9-10 (Italy) [Dossier No. 119].

[354] Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005, p. 2 [Dossier No. 195].

PART III

THE DECLARATION OF INDEPENDENCE

CHAPTER VI

THE DECLARATION OF INDEPENDENCE

6.01. On 17 February 2008, the representatives of the people of Kosovo declared Kosovo to be an independent and sovereign State. Contrary to the misleading language in the question put to the Court, the Declaration of Independence was not an act of the Provisional Institutions of Self-Government of Kosovo (PISG). According to the Constitutional Framework, the PISG were the Assembly, the President of Kosovo, the Government, the Courts, and other bodies and institutions set forth in the Constitutional Framework[355]. These institutions, however, did not issue the Declaration of Independence. As the circumstances surrounding the approval of the Declaration indicate (**Section I**), the Declaration was an act of the democratically-elected representatives of the people of Kosovo meeting as a constituent body to establish a new State (**Section II**).

6.02. The content of the Declaration was not limited to affirming to the public the independence of the Republic of Kosovo. It included obligations and commitments publicly assumed by the people of Kosovo in the name of their newly independent State before the entire international community (**Section III**).

I. The Circumstances Surrounding the Signing of the Declaration

6.03. The Declaration of Independence of Kosovo of 17 February 2008 was described by the sole sponsor of General Assembly resolution 63/3, the Republic of Serbia, as having been made by "the Provisional Institutions of Self-Government of Kosovo". This is incorrect, as is demonstrated by the text and the circumstances of its approval.

6.04. Once all efforts to achieve an agreed settlement had been exhausted[356], the option of independence in accordance with the Ahtisaari Plan was the only viable outcome. The likelihood of a declaration of independence was no secret. Indeed, on

[355] Constitutional Framework, Chapter 1.5 [Dossier No. 156]; see also *ibid.*, Chapter 9.

[356] See para. 5.34 above.

12 February 2008, five days before the Declaration of Independence was issued, the Permanent Representative of Serbia to the United Nations requested, upon instructions of his Government,

> "an urgent meeting of the Security Council to consider an extremely grave situation in the Serbian province of Kosovo and Metohija, where we are witnessing the final preparatory activities for a unilateral declaration of independence by the Provisional Institutions of Self-Government"[357].

In Kosovo, the people were gathering in the streets of Pristina, and in front of the Government and Assembly buildings, calling for independence on 15, 16 and 17 February.

6.05. Early on Sunday, 17 February 2008, President Dr. Fatmir Sejdiu and Prime Minister Hashim Thaçi requested the convening of an extraordinary meeting of the Assembly in order to consider urgently the matter of declaring independence.

6.06. As demonstrated by the particular and exceptional circumstances of this meeting, the Assembly was not convened and did not meet as one of the PISG undertaking its responsibilities under the Constitutional Framework. Indeed, the Assembly, as one of the PISG, could be convened under its Rules, but those rules were not followed on 17 February 2008. The request to the President of the Assembly, Mr. Jakup Krasniqi, was made jointly by the President of Kosovo and the Prime Minister despite the fact that the power to convene an extraordinary session was assigned, under Rule 23 (6) of the Rules of Procedure of the Assembly, to the Presidency of the Assembly only upon its own initiative or upon a request of the Prime Minister or at least 40 members of the Assembly[358].

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[357] Letter dated 12 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/92 [Dossier No. 116]. See also letter dated 4 January 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/7, Annex, in particular para. 4 [Dossier No. 85].

[358] Article 23 (6) of the Rules of Procedure of the Assembly provides:

"The Presidency shall, upon its own initiative or in response to a request by the Prime Minister or by one or more parliamentary groups representing not less than one-third, respectively 40 (forty) Members of the Assembly, convene the Assembly for an extraordinary session in order to deal with an urgent matter. The request shall state the matter or matters to be considered, and the reasons why they are considered urgent and important in such a way as to justify recalling the Assembly. In such cases, only the items of business that form the basis of the request shall be considered." (available on the website of the Assembly of the

6.07. The extraordinary session took place from 3 p.m. in the presence of the President of Kosovo, the Prime Minister, 109 out of the 120 members of the Assembly (including those from all the communities, except the Serb community whose members chose not to attend), and guests, including those representing the international community.

6.08. The President of the Assembly, the President of Kosovo and the Prime Minister each addressed the meeting. All of the speakers underlined that the 17 February 2008 meeting was more than a "usual" meeting of the Assembly. President of Kosovo, Dr. Fatmir Sejdiu, underlined that it was a "historical session of the Kosovo Assembly"[359] and that that "day separate[d] the history of Kosovo in two: the times before and after independence"[360]. Prime Minister Thaçi described it as an "historical day"[361] which "br[ought] the end of a long process"[362], "the day of a new beginning"[362]. President of the Assembly Krasniqi said that these were "historical moments for the future of the people of Kosovo"[363].

6.09. The Declaration of Independence was read out to the assembled representatives by the Prime Minister, voted upon and then signed by the President of Kosovo, the Prime Minister and all the representatives present[364].

6.10. The procedure for the presentation of the text, the voting, and the signing ceremony confirm the special nature of the 17 February 2008 meeting and the Declaration of Independence. It does not constitute an act of the PISG or of one of the PISG, given that, contrary to the usual decision-making process established in the Assembly under the Constitutional Framework[365],

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Republic of Kosovo <http://www.assembly-kosova.org/common/docs/Z-Rregullore e punes-anglisht-20 maj 2005-me ndryshime.pdf>).

[359] Assembly of Kosovo, Special Plenary Session on the Declaration of Independence, 17 February 2008, Transcript, p. 9 (Annex 2).

[360] *Ibid.*, p. 8.

[361] *Ibid.*, p. 5.

[362] *Ibid.*, p. 6.

[363] *Ibid.*, p. 3.

[364] *Ibid.*, p. 14.

[365] Constitutional Framework, Chapters 9.1.34-9.1.45 [Dossier No. 156].

- the Declaration of Independence was not submitted to a first and second reading, nor was it considered by the relevant main or functional committees as was the case when the Assembly acted as one of the PISG under the Constitutional Framework[366]. It was directly voted upon.

- the Declaration of Independence was voted on by raising hands and subsequently signed in a solemn procedure by the President of Kosovo, the Prime Minister and the President of the Assembly, the members of the Presidency, the heads of the different parliamentary groups, and all other members of the Assembly present, called one by one by name to sign the Declaration[367]. Under the Constitutional Framework, only the President of the Assembly signed the texts approved by the Assembly[368].

- the Declaration of Independence was signed immediately after the voting and not after waiting for the expiration of the usual 48 hours time-frame within which a motion against an approved text could be lodged[369]. No such motion was lodged.

- the Declaration of Independence was not transmitted to the SRSG as was the case with all acts adopted by the Assembly acting as one of the PISG[368].

- the Declaration of Independence was not published in the *Official Gazette of the Provisional Institutions of Self-Government of Kosovo*, as were acts of the Assembly acting as one of the PISG.

6.11. All these elements demonstrate that the issuance of the Declaration of Independence of 17 February 2008 was not an act of the PISG, and was wholly different in nature from the normal business and procedure of the Assembly acting as one of the PISG. The Declaration of Independence was a particular act voted upon and signed by the participants gathered together in a very special meeting.

6.12. The understanding that this event was special was shared by the people of Kosovo. Once the holding of the extraordinary session was publicly announced by Prime

[366] Constitutional Framework, Chapters 9.1.34-9.1.36 [Dossier No. 156].

[367] Assembly of Kosovo, Special Plenary Session on the Declaration of Independence, 17 February 2008, Transcript, pp. 15-21 (Annex 2). See also the photographic reproduction at Annex 1.

[368] Constitutional Framework, Chapter 9.1.44 [Dossier No. 156].

[369] *Ibid.*, Chapters 9.1.39 ff.

Minister Thaçi, the people of Kosovo came together in the streets of Pristina and all over the country to celebrate their Independence Day. The next day, the United Nations Secretary-General commented on the celebrations in the following words:

> "In much of Kosovo, there have been peaceful celebrations by tens of thousands welcoming the declaration."[370]

II. The Declaration of Independence was made by the Democratically-Elected Leaders of the People of Kosovo

6.13. The exceptional nature of the Declaration of Independence is not only shown by the special circumstances of its adoption. The text and form of the Declaration also indicate that it was not "the Provisional Institutions of Self-Government" that made the Declaration, as suggested by the question contained in General Assembly resolution 63/3, but the democratically-elected representatives of the people of Kosovo.

6.14. The English and French translations of the Declaration of Independence included by the United Nations Secretariat in its Dossier[371] do not reflect the actual wording of the Declaration of Independence as read out (in Albanian), voted upon, and signed on 17 February 2008. In particular, the words "The Assembly of Kosovo … Approves …" ("*L'Assemblée du Kosovo ... Approuve ...*") do not appear in the original text. The Republic of Kosovo draws the attention of the Court to the photographic reproduction of the original Declaration of Independence reproduced as **Annex 1** and its translation into English and French. This is the Declaration actually read out, voted upon, and signed during the extraordinary session of the Assembly on 17 February 2008[372].

6.15. As stated in its paragraph 1, the Declaration of Independence was an act of the "democratically-elected leaders of our people" ("*les représentants de notre peuple,*

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[370] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839, p. 2 [Dossier No. 119].

[371] Dossier No. 192.

[372] Assembly of Kosovo, Special Plenary Session on the Declaration of Independence, 17 February 2008, Transcript, pp. 11-14 (Annex 2). For a time, an incorrectly edited version of the Declaration appeared on the Assembly's website, which now contains the correct version. The BBC had reproduced a correct English translation from the Albanian version, as read out, on its website as from 17 February 2008 (see <http://news.bbc.co.uk/2/hi/europe/7249677.stm>).

démocratiquement élus"), i.e., the people of Kosovo, in the name of the people. The preamble further made clear that these representatives acted in order to answer "the call of the people to build a society that honors human dignity and affirms the pride and purposes of its citizens". Paragraph 1 of the Declaration stated in the same sense that "[t]his declaration reflects the will of our people". This understanding was also confirmed by the representatives who addressed the meeting on 17 February 2008. The President of Kosovo affirmed in his speech that "[t]he declaration of independence is the will of the people"[373]. The people were indeed present in the streets and in front of the Assembly building days before the extraordinary meeting, calling for independence[374].

6.16. Moreover, the entire Declaration was formulated in the first person plural showing that the Declaration was not made by the Assembly acting as one of the PISG, but by the representatives of the people of Kosovo. The first person plural was used consistently throughout the text, in the preamble as well as in the operative part of Declaration. Thus, the participles used in the preamble were in the plural[375], not in the third person singular as would have been the case if the subject had been the Assembly and not the "democratically-elected leaders of our people"[376]. Similarly, the consistent use of the possessive adjective "*tonë*" or "*tanë*"[377] and of the first person plural tense for the verbs in the main part of the Declaration[378] shows that this act was drafted as a declaration of the representatives of the people, referred to in paragraph 1 of the Declaration as

[373] Assembly of Kosovo, Special Plenary Session on the Declaration of Independence, 17 February 2008, Transcript, p. 8 (Annex 2).

[374] See para. 6.04 above.

[375] Contrary to the English language, the Albanian language distinguishes between the singular and plural of participles.

[376] In the Declaration the following plural forms were used in the Albanian language: "*të mbledhur*" (first preambular paragraph) (convened), "*të zotuar*" (third preambular paragraph) (committed), "*të përkushtuar*" (fourth preambular paragraph) (dedicated) and "*të vendosur*" (thirteenth preambular paragraph) (determined). In addition, the Albanian original text uses the plural of the past participle "*krenarë*" (ninth preambular paragraph) (proud), a difference which is apparent in the French translation rendering the original by "*fiers*" instead of "*fière*" as it would have been grammatically correct if the subject had been the Assembly.

[377] The possessive adjectives "*tonë*" and "*tanë*" are rendered in English by "our" and in French by "*notre*" ou "*nos*": "*popullit tonë*" (fourth and thirteenth preambular paragraphs, and paragraph 1 of the Declaration) ("our people"/"*notre preuble*"), "*dëshirën tonë*" (fifth preambular paragraph and paragraph 11 of the Declaration) ("our wish/desire"/"*notre souhait*"), "*qytetarëve tanë*" (ninth preambular paragraph and paragraph 4 of the Declaration) ("our citizens"/"*nos citoyens*"), "*udhëheqësve tanë*" (eleventh preambular paragraph) ("our leaders"/"*nos représentants*"), "*zotimin tonë*" (Paragraph 4 of the Declaration) ("our commitment"/"*notre engagement*"), etc.

[378] The original Albanian text consistently used the personal pronoun "*ne*" ("we" or "*nous*").

"*ne, udhëheqësit e popullit tonë, të zgjedhur në mënyrë demokratike*" ("we, the democratically-elected leaders of our people"/"*nous, les représentants de notre peuple, démocratiquement élus*").

6.17. The text of the Declaration thus confirms that the Declaration was made by the representatives of the people of Kosovo, gathered together in a special and extraordinary meeting, and not by the PISG.

6.18. The special form of the Declaration also demonstrates that it was not an act of the PISG. As the photographic reproduction of the original Declaration shows clearly, it is hand-written on two large sheets of papyrus[379]. The Declaration bears more than 100 signatures, i.e., the signatures of the political leaders and all members of the Assembly present[380]. It is unlike anything that might have been issued by the PISG.

6.19. All these elements confirm that the representatives of the people who gathered together in the extraordinary meeting did not perceive themselves as acting that day as "the Provisional Institutions of Self-Government" under the Constitutional Framework. Instead, they met in order to express the will of the people they were elected to represent and by whom they were empowered to articulate such will. Even if in some respects they physically were not distinguishable from the "normal" PISG Assembly, they acted this day in a different way, in a different political and legal framework, as a constituent body giving voice to the will of the people to be independent.

6.20. Contrary to what may be thought from the terms of the question put to the Court, the Declaration of Independence was made in the name of the people of Kosovo, by their representatives meeting in an extraordinary session, as a constituent body in Pristina.

[379] Annex 1 (pp. 207 and 209).

[380] See para. 6.10 above.

III. The Content of the Declaration

6.21. The primary purpose of the Declaration of Independence was to express the will of the people of Kosovo to attain independence and to declare an independent and sovereign State. This was clearly expressed in paragraph 1 of the Declaration, which unequivocally states:

> "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state."

6.22. However, the content of the Declaration of Independence was not limited to this proclamation. It also recalled the special historical circumstances that led to the Declaration. Furthermore, the people of Kosovo committed, through this Declaration, to core principles concerning the political and legal organization of the new Republic of Kosovo. Finally, by this Declaration, the people of Kosovo assumed full responsibility within the international community of States and undertook to fulfil their duties as one of its members.

A. The Historical Elements of the Declaration

6.23. The Declaration underlined the specific circumstances which made independence inevitable. The preamble recalled that

> "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation"[381].

And the Declaration continued:

> "*Recalling* the years of strife and violence in Kosovo, that disturbed the conscience of all civilized people,
>
> .....
>
> *Honoring* all the men and women who made great sacrifices to build a better future for Kosovo"[382],

[381] Sixth preambular paragraph, Annex 1.

[382] Seventh and fourteenth preambular paragraphs.

and

> "*Recalling* the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status,
>
> *Regretting* that no mutually-acceptable status outcome was possible, in spite of the good-faith engagement of our leaders"[383].

6.24. In order to move forward and to overcome this tragic and painful past, the representatives of the people of Kosovo decided to declare independence "*[d]etermined* to see our status resolved in order to give our people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of our society"[384]. This solution is clearly seen by the people and in the terms of the Declaration as a step forward, and not as a mere punishment of the former rulers of Kosovo who had brought so much pain. Indeed, the representatives of the people committed themselves to "to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness"[385].

B. Commitment to Core Principles Concerning the Political and Legal Organization of the Future State of Kosovo

6.25. One of the principal elements of the Declaration was the commitment of the people to core principles for the political and legal organization of the new State of Kosovo. As recalled in the preamble, the Declaration was issued in order to respond to "the call of the people to build a society that honors human dignity and affirms the pride and purpose of its citizens"[386], a people "*[d]edicated* to protecting, promoting and honoring [its] diversity"[387].

6.26. Consequently, paragraphs 2, 3 and 4 of the Declaration contained detailed and substantial commitments of the people of Kosovo concerning its future political and legal organization:

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[383] Tenth and eleventh preambular paragraphs.

[384] Thirteenth preambular paragraph.

[385] Third preambular paragraph.

[386] Second preambular paragraph.

[387] Fourth preambular paragraph.

- According to paragraph 2, the newly created State was to take the form of a "democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law". It should respect and promote the rights of all communities.

- Under paragraph 3, the people of Kosovo accepted fully, with regard to its internal political and legal organization, the Ahtisaari Plan which should be fully implemented.

- Finally, under paragraph 4, as under the Ahtisaari Plan, a constitution was to be adopted "as soon as possible" and "through a democratic and deliberative process". This constitution was to lay down the commitment of the people of Kosovo to the respect for human rights as defined in the European Convention on Human Rights, as well as all relevant principles of the Ahtisaari Plan.

C. Commitments under International Law as an Equal Member of the International Community

6.27. The last set of provisions of the Declaration concerned the position of the people of Kosovo and of the newly independent State with regard to the international community.

6.28. The international community greatly assisted the people of Kosovo in recent years. The representatives were aware of this fact and thankful for this assistance:

> "*Grateful* that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration"[388].

6.29. It is not surprising that through the Declaration and in accordance with the Ahtisaari Plan, the people of Kosovo invited the international community to continue to exercise its various mandates in order to supervise the creation of the new State and the implementation of its objectives. They accepted this continuing international presence in the name of the newly sovereign State, the Republic of Kosovo, exercising its sovereignty by accepting commitments:

[388] Eighth preambular paragraph.

> "We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability."[389]

6.30. It was the declared objective, under paragraphs 6 and 7 of the Declaration, for Kosovo to integrate into the European family of democracies, through membership in the European Union and through Euro-Atlantic integration, as well as to participate in and to collaborate constructively with the United Nations.

6.31. The representatives of the people also called for the Republic of Kosovo to become a member of the international community as a fully sovereign State by assuming international obligations and responsibilities. Under paragraphs 8 to 11, the people of Kosovo committed to key international obligations, such as

- to abide by the principles of the United Nations Charter, the Helsinki Final Act and other acts and instruments of the OSCE[390];
- to abide by international obligations concerning relations among States[390];
- to respect its international boundaries (as enshrined in the Ahtisaari Plan), and the territorial integrity of all its neighbors[390];
- to respect and honour the international obligations concluded on behalf of Kosovo by UNMIK and those resulting from the principles of State succession[391];
- to cooperate fully with the ICTY[391];

[389] Paragraph 5 of the Declaration.

[390] Paragraph 8 of the Declaration.

[391] Paragraph 9 of the Declaration.

- to participate actively as part of the international community through membership in international organizations in order to contribute to the pursuit of international peace and stability[392];

- to commit to peace and stability in southeast Europe[393] and, in particular, in its relations with the Republic of Serbia[394], on the basis of reconciliation and good-neighbourliness.

6.32. All these commitments constitute key obligations under international law and demonstrate the firm will of the people of Kosovo to honour them as an independent and sovereign State. Indeed, "with independence comes the duty of responsible membership in the international community"[395]. This is underlined in paragraph 12 of the Declaration, which provides:

> "We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship."

6.33. As a result, the people of Kosovo, through their representatives, expressed their intention to create a sovereign and independent State bound by specific commitments, concerning the internal structure of the State as well as its international obligations. One cannot express more clearly the intent to assume such international obligations vis-à-vis the international community, and, by so doing, to join this community as an equal member. As the President of Assembly, Jakup Krasniqi, proclaimed after the Declaration of Independence was voted upon and signed:

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[392] Paragraph 9 of the Declaration.

[393] Paragraph 10 of the Declaration.

[394] Paragraph 11 of the Declaration.

[395] Paragraph 8 of the Declaration.

"And from this point on, the political position of Kosovo has changed. Kosovo is:

A REPUBLIC, AN INDEPENDENT, DEMOCRATIC AND SOVEREIGN STATE."[396]

[396] Assembly of Kosovo, Special Plenary Session on the Declaration of Independence, 17 February 2008, Transcript, p. 14 (Annex 2).

PART IV

THE LAW

CHAPTER VII

THE QUESTION IN THE REQUEST FOR AN ADVISORY OPINION

7.01. In resolution 63/3 of 8 October 2008, the General Assembly requested the Court to respond to the following question:

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

7.02. The resolution containing the request and the question was adopted virtually without debate in the General Assembly[397], though there were contrary views expressed in the General Committee and in the plenary[398]. Serbia "declined to seek a consensual way forward"[399] and refused to countenance any amendments. The Foreign Minister of Serbia, Mr. Jeremić, asserted that "[t]he question posed is amply clear and refrains from taking political positions on the Kosovo issue". The draft resolution, he claimed, "is entirely non-controversial" and represented "the lowest common denominator of the positions of the Member States". He even seemed to suggest that the drafting hardly mattered since "[w]e are confident that the Court will know what to do"[400]. In these circumstances, it is unsurprising that the drafting of the question is defective in a number of respects (**Section I**).

7.03. Despite being drafted in a prejudicial and argumentative manner, it is clear that the question addressed to the Court was designed to be and is a narrow one (**Section II**). The function of the Court, as a court of law and as the principal judicial organ of the United Nations, is to respond to the question posed (**Section III**) taking into account the context of the issuance of the Declaration (**Section IV**).

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[397] See paras. 1.06-1.08 above.

[398] United Nations, *Official Records of the General Assembly, Sixty-third Session*, General Committee, 1st meeting, 17 September 2008, Summary Records (A/BUR/63/SR.1), para. 101 (France), paras. 103-104 (United Kingdom), paras. 105-106 (United States of America); *ibid.*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 3 (United Kingdom) [Dossier No. 6]. See also *ibid.*, pp. 3-4 (Albania).

[399] *Ibid.*, p. 3 (United Kingdom).

[400] *Ibid.*, pp. 1-2.

I. The Prejudicial and Argumentative Formulation of the Question

7.04. The question as presented by the sole sponsor of resolution 63/3, i.e., the Republic of Serbia[401], presents a prejudicial and argumentative approach to the legal issue at the centre of these advisory proceedings. It contains several elements apparently intended to advance Serbia's own viewpoint, such as:

- the characterization of the Declaration of Independence as "unilateral";
- the suggestion that the Declaration was made by "the Provisional Institutions of Self-Government of Kosovo"; and
- the unnecessary, and unjustified, implication that there are rules of international law governing the issuance of declarations of independence.

7.05. On the first point, the qualification of the declaration of independence as "unilateral" is superfluous and may have been intended to be prejudicial. Given the openly asserted position of the Republic of Serbia on the status of Kosovo, the adjective "unilateral" appears to have been intended to be merely a synonym for "illegal"[402]. As the Representative of Albania said in the General Assembly:

> "On another technical matter, the wording 'unilaterally declared independence': the word 'unilateral' is not a factual representation, but a biased interpretation. The legal act of declaration of independence may have different qualifiers. As the General Assembly is discussing an issue to be referred to the ICJ, biased rhetoric that deviates from a factual representation of the circumstances on the ground is not a good reflection on the competence of the General Assembly."[403]

7.06. Furthermore, the adjective "unilateral" is particularly misleading in the present circumstances. The Declaration of Independence was made by the democratically-elected leaders of the people of Kosovo after extensive consultations and an extended process

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[401] A/63/L.2 [Dossier No. 4]

[402] Republic of Serbia, Assembly Resolution following UN Special Envoy Martti Ahtisaari's "Comprehensive proposal for the Kosovo status settlement" and continuation of negotiations on the future status of Kosovo-Metohija, 14 February 2007 (available at <http://www.mfa.gov.yu/Policy/Priorities/KIM/resolution_kim_e.html>.

[403] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 4 (Albania) [Dossier No. 6].

involving States, international institutions and multilateral initiatives, which reached the conclusion that independence was the only viable option to resolve the status problem and to secure peace and stability in the region[404].

7.07. Second, in so far as the question refers to the "declaration of independence *by the Provisional Institutions of Self-Government of Kosovo*"[405], it is argumentative in its characterization of those who issued the Declaration of Independence of Kosovo. The Declaration of Independence was not an act of the Provisional Institutions of Self-Government of Kosovo, i.e., the Assembly, the President of Kosovo, the Government, courts, and other bodies and institutions set forth in the Constitutional Framework[406], but, as the text, the form and the circumstances of its adoption make clear, was an act of the representatives of the people of Kosovo[407].

7.08. Despite the wording of the question, it is clear that only the Declaration of Independence of 17 February 2008 is at issue in the proceedings now before the Court. First, only this declaration of independence exists as a matter of fact. Second, in the letter of the Permanent Representative of Serbia to the United Nations Secretary-General dated 15 August 2008[408], the sponsor of the resolution actually requested inclusion on the agenda of the sixty-third session of the General Assembly of an item entitled "Request for an advisory opinion of the International Court of Justice on whether the unilateral *declaration of independence of Kosovo* is in accordance with international law"[409]. The item was included under this title in the General Assembly's agenda (item 71) and discussed under this denomination[410]. The argumentative description of those who issued the Declaration was only introduced later in the draft resolution presented by Serbia[411],

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[404] See paras. 4.52-4.58 and 5.01-5.34 above. See also paras. 9.15-9.19 below.

[405] Emphasis added.

[406] Constitutional Framework, Chapter 1.5 and Chapter 9 [Dossier No. 156]. See also para. 6.01 above.

[407] See paras. 6.03-6.20 above.

[408] A/63/195 [Dossier No. 1].

[409] Emphasis added.

[410] See United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22) [Dossier No. 6].

[411] See fn. 401 above.

apparently in order to advance Serbia's own arguments about the illegality of the Declaration.

7.09. Concerning the third point, the question as formulated by the sponsor seems to imply, wrongly, that there are rules of international law governing declarations of independence. To ask whether such a declaration is "in accordance" with international law appears to assume that international law regulates such declarations. This is not the case as will be explained in Chapter VIII below. It is for the Court to "identify the existing principles and rules"[412]. If there are none, then the question of conformity becomes moot.

7.10. These three points show that the question as drafted is far from being "entirely non-controversial" as was suggested by the Serbian Representative in the General Assembly[413]. Contrary to Serbia's assertions, the question does not "refrain[] from taking political positions on the Kosovo issue"[413]. It is respectfully submitted that these prejudicial and argumentative elements should not affect the Court's approach to these proceedings.

II. The Meaning of the Question

7.11. It is well established that the Court has the power, when facing lack of clarity in the drafting of a question, to interpret the request or to provide the necessary modifications[414] in order to "guide the United Nations in respect of its own action"[415] in a useful manner. However, the question formulated in General Assembly resolution 63/3 does not need to be reinterpreted, broadened or reformulated, as the Court has sometimes done[416]. It is not, "on the face of it, at once infelicitously expressed and vague", as was the

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

[413] United Nations, *Official Records of the General Assembly*, *Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 2 (Serbia) [Dossier No. 6].

[414] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, pp. 153-154, para. 38.

[415] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*, *I.C.J. Reports 1951*, p. 19; *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, p. 27, para. 41.

[416] *Jaworzina*, *Advisory Opinion*, 1923, *P.C.I.J.*, *Series B*, *No. 8*, p. 19; *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, *Advisory Opinion*, 1928, *P.C.I.J.*, *Series B*,

case of the question in the advisory proceedings concerning the *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*[417].

7.12. The question set forth in General Assembly resolution 63/3 is a narrow one. The General Assembly requested the Court to advise on whether the Declaration of Independence voted upon and signed on 17 February 2008 was "in accordance with international law", whether it is "*conforme au droit international*". It is clear that the Court is called to respond to the limited question whether the Declaration of Independence of 17 February 2008 contravened any applicable rule of international law[418]. This is the ordinary meaning to be given to the terms of the question forth in General Assembly resolution 63/3.

7.13. In 1995, facing a comparable question of conformity with international law, i.e., the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law, the Court explained that it

> "must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law"[419].

7.14. Concerning the present request, the Court's task is identical. It has been asked to rule on the compatibility of the Declaration of Independence of Kosovo with international law. Accordingly, it is for the Court to "identify the existing principles and rules" of international law and, in case such rules exist, to "interpret them and to apply them" to the Declaration of Independence, being mindful of context[420].

No. 16, pp. 15-16; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, para. 34-36; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46.

[417] *I.C.J. Reports 1982*, p. 348, para. 46. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 154, para. 38.

[418] See paras. 8.03-8.06 below.

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

[420] See paras. 7.27-7.34 below.

7.15. As such, and subject to the three points noted in Section I above[421], there is no need to interpret the question.

III. The Power of the Court to Respond to this Question

7.16. As a court of justice and as the principal judicial organ of the United Nations, the Court, when exercising its advisory function, shall "guide the United Nations in respect of its own action"[422]. This "represents [the Court's] participation in the activities of the Organization"[423].

7.17. Resolution 63/3 did not specify in what respect the question put to the Court would be useful to guide the General Assembly's actions[424]. It merely asserts in its preamble that the Declaration of Independence of 17 February 2008 "has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order". Nor was the intention of the sponsor of resolution 63/3, the Republic of Serbia, expressed clearly.

7.18. In this regard, it is noteworthy that the sole sponsor of the resolution had previously tried to have the Declaration of Independence of Kosovo declared invalid by the political organs of the United Nations, in particular by the Security Council[425]. Only once

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[421] See para. 7.04.

[422] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, para. 41.

[423] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference relating to Immunity from Legal Process if a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 78, para. 29.

[424] See also the statements of the United Kingdom (Letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly, A/63/461, Annex, para. 4 [Dossier No. 5]; United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 11 [Dossier No. 6]) and Germany (*ibid.*, p. 12). See also Australia (*ibid.*, p. 13) and Denmark (*ibid.*, p. 14).

[425] See, e.g., Letter dated 12 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/92 [Dossier No. 116] and Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/103 [Dossier No. 117]. See also Serbia's intervention in the Security Council meetings (5839th meeting, 18 February 2008, S/PV.5839, pp. 4-6 [Dossier No. 119], 5850th meeting, 11 March 2008, S/PV.5850, pp. 2-5 [Dossier No. 120], 5917th meeting, 20 June 2008,

these attempts failed, did the Republic of Serbia decide to adopt an alternative route, "to transfer the issue from the political to the juridical arena"[426].

7.19. The Republic of Serbia has chosen the way of advisory proceedings in order to influence the actions of Member States rather than the activities of the General Assembly. According to its Permanent Representative:

> "The Republic of Serbia believes that an advisory opinion of the principal judicial organ of the United Nations — the International Court of Justice — would be particularly appropriate in the specific case of determining whether Kosovo's unilateral declaration of independence is in accordance with international law.
>
> .....
>
> Many Member States would benefit from the legal guidance an advisory opinion of the International Court of Justice would confer. It would enable them to make a more thorough judgment on the issue."[427]

7.20. The Court is certainly not a – or the – legal adviser of United Nations Member States. It is, according to Article 92 of the United Nations Charter, the principal *judicial* organ *of the Organization*, not of its Members. Describing its special function under the advisory jurisdiction, the Court pointed out in 1950:

> "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, itself an 'organ of the United Nations', represents its participation in the activities of the Organization ..."[428].

7.21. Even if the General Assembly has, under Article 96, paragraph 1, of the Charter, the power to request an opinion on "any" legal question, the Court needs to consider whether, in the circumstances of the present request, it should exercise its discretionary power to accede to the request, considering, in particular, that the request was

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S/PV.5917, pp. 4-6 [Dossier No. 122], 5944th meeting, 25 July 2008, S/PV.5944, pp. 5-7 [Dossier No. 123]).

[426] Explanatory Memorandum, A/63/195, Annex [Dossier No. 1].

[427] Letter dated 15 August 2008 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, A/63/195, Annex [Dossier No. 1].

[428] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 188, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 158, para. 47.

not made to assist the General Assembly in its work but as "legal advice" for Member States.

7.22. In the event the Court deems it appropriate to accede to the request of the General Assembly, it needs to bear in mind the specific and limited terms of the question. It is solely directed at the conformity of the Declaration of Independence with international law and cannot be used to broaden the issue before the Court, such as to submit, through the General Assembly, a dispute of the Republic of Serbia with the Republic of Kosovo or with each and every State that has recognized the Republic of Kosovo since 17 February 2008, that is, at the time this submission was completed, 56 States[429].

7.23. Moreover, the General Assembly did not consider it appropriate to ask the Court to resolve a pending dispute, to rule on any *consequences* of the conformity or the absence of conformity of the Declaration with international law, still less to consider the question, which has been put to the Court in other advisory proceedings[430], of the consequences for Member States of the lack of conformity of certain actions with international law.

7.24. The Court is equally not asked to advise on the legal status of the Republic of Kosovo as it exists at the time of the request, or at the time of the delivery of the advisory opinion. The General Assembly did not ask the Court whether the Republic of Kosovo was a State and if so when it became a State, or whether any of the subsequent recognitions (made on various dates from 18 February 2008 to the present) were contrary to international law. These are all different questions, which are not before the Court.

7.25. While the Court has the power to reformulate the question it is called to answer in advisory proceedings, it can only respond to the actual question put. The Court is not empowered, either under the United Nations Charter or under its own Statute, to pronounce itself, *proprio motu*, on any legal question it considers "interesting" or "relevant" for the

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[429] See para. 2.29.

[430] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

conduct of international relations, nor to issue political advice such as calling for negotiations of one kind or another. The Court is not a general advisory body, and "being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court"[431].

7.26. It follows that if, despite doubts relating to the propriety of the exercise of its advisory function in the present case[432], the Court accedes to the request of the General Assembly, it can only answer the question in its ordinary meaning as formulated by the General Assembly, the requesting body, in resolution 63/3.

IV. The Necessity to Take into Account the Context of the Declaration of Independence

7.27. In the General Assembly debate on the draft resolution proposed by the Republic of Serbia, several delegations expressed concerns related to the succinct formulation of the request and the lack of reference to the factual circumstances that led to the Declaration of Independence of 17 February 2008. The representative of Albania suggested in this regard:

> "The intentional reduction of the complex issue of Kosovo into a simple aspect, namely, the legal one, is an attempt to establish a situation outside of its context, cutting it away from its root causes. In other words, it attempts to establish a false connection between cause and effect."[433]

7.28. Canada also submitted that

> "the referral put before us in resolution 63/3 and the frame of reference it purports to set for the International Court of Justice are unlikely to result in an advisory opinion that could usefully contribute to fostering stability in the region. At a minimum, the resolution would have benefited from the inclusion of additional context to reflect the unique circumstances of the case."[434]

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[431] *Status of Eastern Carelia, Advisory Opinion*, 1923, *P.C.I.J. Series B*, No. 5, p. 29. See also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155.

[432] See para. 7.21 above.

[433] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 3 (Albania) [Dossier No. 6].

[434] *Ibid.*, p. 11 (Canada).

7.29. The sponsor of resolution 63/3, the Republic of Serbia, however, did not consider it necessary to include any further explanations or guidance in the text of the request. Its Foreign Minister claimed during the debate that

> "[t]he question posed is amply clear and refrains from taking political positions on the Kosovo issue".

And the Foreign Minister continued:

> "We believe that the draft resolution in its present form is entirely non-controversial. It represents the lowest common denominator of the positions of the Member States on this question, and hence there is no need for any changes or additions. Let us adopt it and allow the Court to act freely and impartially within the framework of its competencies. We are confident that the Court will know what to do, and that it will take into account the opinions of all interested Member States and international organizations. We hold that the most prudent way to proceed today is to adopt our draft resolution without opposition, in the same way that it was decided at the General Committee to include this item in the agenda."[435]

7.30. However, the question formulated by the General Assembly is not an abstract one. The General Assembly asks the Court to evaluate the conformity with international law of the Declaration of Independence of Kosovo made on 17 February 2008, and not, abstractly, of any declaration of independence voiced by whatever entity. The present proceedings consequently do not involve an exercise of legal doctrine or a theoretical examination of legal rules and principles. If any relevant rules concerning declarations of independence exist, they will have to be applied to the particular factual and political situation of Kosovo, which led to the Declaration of Independence of 17 February 2008.

7.31. In its 1962 Advisory Opinion on *Certain Expenses of the United Nations*, the Court itself considered that the absence of certain elements in the request of the General Assembly, despite the wording of Article 65, paragraph 2, of the Statute, did not necessarily mean that the Court could not or must not take into account the context. On the contrary,

> "[i]t is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full

[435] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 2 (Serbia) [Dossier No. 6].

liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion."[436]

7.32. In its 2005 judgment in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, the Court pointed out that even if its task "must be to respond, on the basis of international law" to the legal dispute, in contentious proceedings, or to the question put by the General Assembly, in these advisory proceedings, "[a]s it interprets and applies the law, it will be mindful of context"[437].

7.33. Consequently, the Court will need to address the question, as the representative of the United Kingdom emphasized in the General Assembly,

"against the background of the full context of the dissolution of Yugoslavia in so far as it affects Kosovo, starting with Belgrade's unilateral decision in 1989 to remove Kosovo's autonomy through to events of the present day"[438].

7.34. The representative of the United States of America stressed that

"the Court will, understandably, have to look at the referred question with extreme care, taking into account the particular context in which the events leading to Kosovo's declaration occurred. Kosovo must be viewed within the context of the violent dissolution of the former Yugoslavia in the 1990s. The policies of that period led the Security Council to adopt resolution 1244 (1999), which authorized the United Nations to administer Kosovo and called for a political process to determine Kosovo's status. After intensive negotiations, the United Nations Special Envoy recommended to the Secretary-General that Kosovo become an independent State."[439]

7.35. In summary, the question contained in General Assembly resolution 63/3 is in some important respects prejudicial and argumentative in its drafting, and was intended by the sole sponsor to present a one-sided view of the underlying legal issues. This should be disregarded by the Court. Nevertheless, the question is clear, and limited in scope:

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[436] *I.C.J. Reports 1962*, p. 156.

[437] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 190, para. 26.

[438] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 3 [Dossier No. 6]. See also Letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly, A/63/461, Annex, para. 6 [Dossier No. 5].

[439] United Nations, *Official Records of the General Assembly, Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 5 [Dossier No. 6].

whether the Declaration of Independence of 17 February 2008 contravened any applicable rule of international law. The Court has the power to respond to this question as it has been formulated, if it considers it proper to do so. In so doing, it should assess the conformity of the Declaration of Independence mindful of the context that led to the issuance of the Declaration.

CHAPTER VIII

THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE ANY APPLICABLE RULE OF GENERAL INTERNATIONAL LAW

8.01. Chapter VII demonstrated that the question asked by the General Assembly is directed at the action of a particular entity on a particular day – the Declaration of Independence voted upon and signed by the representatives of Kosovo on 17 February 2008. The question put to the Court asks whether the Declaration was "in accordance with international law", meaning whether the act of declaring independence is in violation of any applicable rule of international law.

8.02. As a threshold matter, the Court should conclude that for Kosovo's Declaration to be not "in accordance with international law", there would have to be a rule of international law *prohibiting* the issuance of a declaration of independence (**Section I**). Yet international law contains no such prohibition; rather, long-standing State practice, as well as practice in the context of the break-up of the former Yugoslavia itself, confirms that the issuance of a declaration of independence is viewed by States as a factual event not regulated by international law (**Section II**). That factual event, in combination with other events and factors may or may not over time result in the emergence of a new State. Given that international law contains no prohibition on the issuance of a declaration of independence, the Court need not reach the issue of whether the Declaration of Independence by the representatives of the people of Kosovo reflects an exercise of the internationally-protected right of self-determination, for there is no need to determine whether international law has *authorized* the people to seek independence (**Section III**).

I. For Kosovo's Declaration of Independence to be not "in Accordance with International Law", there must Exist a Rule of International Law *Prohibiting* its Issuance

8.03. The presumption is that conduct is permissible unless it is prohibited by a rule of international law. In answering the question now before the Court, it is thus necessary to identify a prohibition in international law against the issuance of a declaration of

independence; in the absence of such a prohibition, it cannot be said the Declaration of Independence of 17 February 2008 is not "in accordance with international law".

8.04. From the *Lotus* case[440] to the present, the Court's jurisprudence indicates that when assessing the international legality of a contested action, the starting point is a presumption of permissibility, overcome only if it can be shown that the action is prohibited by treaty or customary international law. The Court reaffirmed this basic principle in the context of obligations imposed by the United Nations Charter, when it stated in the *Certain Expenses* advisory opinion that the purposes of the United Nations "are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action."[441] In the *Nicaragua* case, the Court reaffirmed this principle in the context of whether international law regulated a State's possession of armaments. There, the Court stated:

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception"[442].

8.05. Similarly, in the *Nuclear Weapons* advisory opinion, even though the General Assembly asked the Court whether the threat or use of nuclear weapons was "permitted" under international law, the Court conducted an analysis that principally looked for a prohibition, not an authorization, to possess or use nuclear weapons. Among other things, the Court noted that "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition"[443]. The Court's conclusion that the threat or use of nuclear weapons would generally be contrary to international law did not turn on the lack of an authorization in international law; rather, it turned on "strict requirements" concerning the

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[440] *S.S. "Lotus" (France/Turkey)*, 1927, *P.C.I.J., Series A, No. 10*, p. 18.

[441] *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 168.

[442] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Merits, Judgment, I.C.J. Reports 1986*, p. 135, para. 269.

[443] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 247, para. 52.

conduct of warfare emanating from conventional and customary rules of international humanitarian law. Such reasoning is in accord with the general attitude of States. For example, in the *Nuclear Weapons* advisory opinion proceedings, the Russian Federation observed that "in virtue of the principle of sovereignty, we treat as generally admitted the presumption that the State may accomplish any acts which are not prohibited under international law. Basically, international law is a system of limitations, rather than permissions."[444]

8.06. While such precedents speak principally to the residual freedom of States to act in the absence of a prohibition under international law, the same applies *a fortiori* to those that are not States, since the system of international law is primarily directed at the regulation of State activity. Indeed, it would be quite extraordinary to assert that a permissive rule of international law must be found before acts by individuals, corporations, non-governmental organizations, international organizations, or other non-State entities can be regarded as internationally lawful. International law simply does not seek to regulate most of the countless acts or omissions of non-State entities that occur on a daily basis, either directly or by judging the scope of their authority under national law. The Court itself acknowledged this in the *Barcelona Traction* case when addressing the conduct of the shareholders of a company, finding that "[i]nternational law may not, in some fields, provide specific rules in particular cases"[445]. Consequently, for the Court to find that the Declaration of Independence of 17 February 2008 was "not in accordance with international law", it would be necessary for the Court to identify a prohibition in international law, applicable to and binding on the authors of the Declaration, that the issuance of the Declaration contravened.

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[444] *Written Comments of the Russian Federation* (19 June 1995), *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, p. 5. The views of scholars are also in accordance with this principle. For instance, Kelsen stated that "[i]f there is no norm of conventional or customary international law imposing upon the state ... the obligation to behave in a certain way, the subject is under international law legally free to behave as it so pleases; and by a decision to this effect existing international law is applied." (H. Kelsen, *Principles of International Law* (2nd ed., 1966), pp. 438-439).

[445] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 38, para. 52.

II. There Is No Rule of International Law Prohibiting the Issuance of a Declaration of Independence

8.07. General international law does not prohibit the issuance of a declaration of independence, regardless of the circumstances under which that declaration occurs[446]. Numerous declarations of independence have been issued over hundreds of years, even in circumstances where a group is seeking to separate from the State to which it belongs without its consent, without those declarations being qualified as violations of international law. Indeed, State practice in the context of the Balkans during the 1990s confirms that international law generally does not prohibit the issuance of a declaration of independence, even in the face of a disapproving central government. There have been very rare and specific cases in which a declaration of independence was part of a broader effort to systematically deny fundamental rights, leading to condemnation by the Security Council or the General Assembly, but such circumstances are not present with respect to the 17 February 2008 Declaration of Independence now before this Court. Consequently, the Declaration did not contravene any applicable rule of international law and was in that sense "in accordance" with international law, since international law generally is not concerned with the legality of such a declaration.

A. The Issuance of a Declaration of Independence Is a Factual Event Not Regulated by General International Law

8.08. International law on the creation of States regards an entity as meeting the requirements of statehood when certain factual conditions have been met, but does not contain any rule prohibiting persons or entities from seeking independence, nor from issuing a declaration of independence. Rather, international law identifies factual predicates by which an entity can become a State; it does not impose obligations until statehood is achieved. The factual conditions relating to the persons or entities prior

[446] An entity may become independent from a predecessor State in many ways: by operation of national law allowing separation, sometimes referred to as "devolution"; by dissolution or dismemberment of a predecessor State, resulting in the establishment of two or more new States; or by departure of the entity from the parent State without the latter's consent, sometimes referred to as "secession".

to State formation, including a declaration of independence, are, in essence, pre-international law[447].

8.09. The factual criteria for statehood are a defined territory, a permanent population, an effective government, and a capacity to enter into international relations[448]. An important component is the desire to be regarded as a State, often expressed through a declaration of independence or other act signifying a move toward statehood, one that may occur before, as, or after the "Montevideo" criteria are satisfied. The reactions of other States through the process of "recognition" are an important part of this process of State formation; other factors (a commitment to democracy, human rights, and the rule of law) have in recent times been regarded as significant for many States when considering whether, as a matter of political appreciation, to recognize a new State or not.

8.10. It is clear from the circumstances of Kosovo today that the Republic of Kosovo satisfies the factual criteria required for statehood[449]. But the Court is not called upon in these advisory proceedings to confirm Kosovo's statehood, nor to advise more generally on the nature and scope of the factual conditions considered important when assessing a claim to statehood. As explained in Chapter VII, the question before the Court is directed exclusively at the issuance of the Declaration of Independence of 17 February 2008. Likewise, the Court is not asked to pass upon the legality of the Declaration of Independence under applicable national law. Rather, the question put to the Court is focused on the international legality of a non-State entity declaring independence, which may be answered by noting that a declaration of independence is one of many factual events along a factual continuum that can lead to State formation – an event which is not, by itself, regarded as lawful or unlawful under international law. Just as the extra-constitutional formation of a new government is generally neither prohibited nor

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[447] See, e.g., Conference of Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991, para. 1 (a) [Dossier No. 233] ("the existence or disappearance of the State is a question of fact."); G. Abi-Saab, "Conclusion", in M. Kohen (ed.), *Secession. International Law Perspectives* (2006), p. 471 ("the creation of the State from the standpoint of international law is always a legal fact and not a legal act, even when this fact is based on a legal act such as a treaty").

[448] Inter-American Convention on the Rights and Duties of States, 26 December 1933, Article 1, League of Nations, *Treaty Series (LNTS)*, vol. 165, p. 19 ("Montevideo Convention").

[449] See Chapter II above.

authorized by international law[450], so too a declaration of independence is not prohibited by, and therefore does not contravene, general international law.

B. Longstanding State Practice Confirms that the Issuance of a Declaration of Independence Is Not Regulated by General International Law

8.11. State practice confirms that there is no rule of international law prohibiting the issuance of a declaration of independence. Historically, numerous bodies have declared independence as a means of signaling their intention to create a new State. Some declarations of independence have succeeded over time, while others have failed. Yet the issuance of such declarations generally have not been regarded as either violating or not violating international law; they are instead treated as a factual development that, in conjunction with other circumstances, may or may not result in the emergence of a new State.

8.12. Thus, when the Second Continental Congress of the thirteen American colonies declared independence from Britain in July 1776, that act was not regarded by States, including Britain, as a violation of the law of nations[451]. Rather, it was the fact of the declaration in conjunction with other facts, such as the colonial victories at Saratoga and Yorktown, that over time led to the conditions by which a State was formed and recognized as such by other States, thus conferring upon the United States rights and obligations under the law of nations. Other States, such as France in 1778, ultimately began recognizing the new State, as Britain did some seven years after the event upon conclusion of the Revolutionary War with the 1783 Treaty of Paris[452]. Had the facts developed differently after the issuance of the declaration, the American move toward

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[450] See, e.g., *Tinoco Claims Arbitration (Great Britain v. Costa Rica)*, United Nations, *Reports of International Arbitral Awards (RIAA)*, vol. I, p. 381 (1923) (sole arbitrator William Howard Taft) ("To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.")

[451] In lieu of an official response, the British Government secretly commissioned a lawyer and pamphleteer, John Lind, to publish a response entitled *Answer to the Declaration of the American Congress* (1776), which makes no argument that the declaration violated international law.

[452] D. Armitage, "The Declaration of Independence and International Law", *William and Mary Quarterly*, vol. 59, January 2002, p. 60.

statehood might have been no different than other failed independence movements of the late eighteenth century.

8.13. Throughout the nineteenth century, other declarations of independence were also not seen as regulated by international law. For example, in September 1810, Hidalgo y Costilla declared independence for Mexico from Spanish rule. Though the declaration sparked a decade of war, the reaction by Spain and other States evinces no evidence that the declaration as such was regarded as violating international law. Instead, as was the case with the United States, other States began recognizing the new State of Mexico, including Spain by the 1821 Treaty of Córdoba[453]. Likewise, when the Brazilian regent-prince Pedro declared Brazil's independence from Portugal in September 1822, and thereafter established a constitutional monarchy, that declaration was also not regarded by other States as violating international law. Other States proceeded to recognize the new State of Brazil, including Portugal itself by treaty in 1825[454]. New Zealand's independence from Britain occurred over an extended period, but for present purposes the point is that the 1835 declaration of the independence, signed by the United Tribes of New Zealand, was not regarded as an unlawful act under international law by either Britain or other States[455]. Likewise, the 1847 Liberian declaration of independence, proclaiming that the Republic of Liberia was "a free, sovereign, and independent state", was not regarded as unlawful, marking the emergence of one of the earliest States in Africa[456].

8.14. The same reactions to declarations of independence, in terms of their relationship to international law, may be seen in State practice throughout the twentieth century. For example, the 1918 declaration of independence of the Czechoslovak Nation[457] was not seen by States as a violation of international law. Similarly, in April 1959, the Republic of the Mali Federation was formed by a union

[453] See A.H. Chávez, *Mexico: A Brief History* (2006), pp. 104-16; B. Kirkwood, *The History of Mexico* (2000), pp. 80-88.

[454] See R.J. Barman, *Brazil: The Forging of a Nation, 1798-1852* (1988), pp. 96-129; R. Cavaliero, *The Independence of Brazil* (1993), pp. 145-155.

[455] K. Sinclair, *A History of New Zealand* (4th ed., 2000), pp. 53-58.

[456] Ch.H. Huberich, *The Political and Legislative History of Liberia*, vol. I (1947), pp. 828-832; N. Azikiwe, *Liberia in World Politics* (1934), p. 67 ("Great Britain was the first great power to recognize ... [o]ther nations followed suit.")

[457] G.J. Kovtun, *The Czechoslovak Declaration of Independence: A History of the Document* (1985), pp. 46-48.

between Senegal and French Sudan, which then achieved independence as a State from France in June 1960. In August of that year, authorities in Senegal declared their independence, thus seceding from the Federation and creating the Republic of Senegal[458]. Other States did not regard Senegal's declaration of independence as a violation of international law; instead, Senegal was ultimately admitted to the United Nations in 1960. Similarly, in March 1971, Sheikh Mujibur Rahman, a Bengali politician and leader of the Awami League (the largest East Pakistani political party), signed a declaration stating that: "Today Bangladesh is a sovereign and independent country". Although Pakistan viewed the declaration as unlawful under Pakistani law, States generally did not view this declaration as a violation of international law. The armed conflict that ensued, however, was of considerable concern to other States; the General Assembly adopted a resolution calling for an "immediate cease-fire and withdrawal of ... armed forces", but issued no statement that the declaration of independence was not in accordance with international law[459]. Ultimately, the People's Republic of Bangladesh was recognized by many other States and admitted to the United Nations in September 1974.

8.15. More recently, in July 1992, the Slovak National Council declared Slovakia a sovereign State, beginning with the words: "We, the democratically elected Slovak National Council, hereby solemnly declare that the 1,000-year efforts of the Slovak nation are herewith successfully accomplished. In this historic moment, we declare the natural right of the Slovak nation to its own self-determination ..."[460] That declaration was issued before the conclusion of negotiations with officials of the Czech and Slovak Federal Republic concerning the dissolution of the Federation. Indeed, only in November of 1992 did the Federal Parliament vote to dissolve the country, which occurred on 31 December 1992. During the period between the issuance of the Slovak National Council's declaration of independence and the conclusion of the "velvet divorce", no State regarded the Council's declaration as being unlawful under international law[461].

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[458] R. Higgins, "Legal Problems Arising From the Dissolution of the Mali Federation", in *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (2009), vol. 2, p. 747. One month later, Mali declared its own independence as the Republic of Mali.

[459] General Assembly resolution 2793 (1971); see also J. Crawford, *The Creation of States in International Law* (2006), pp. 140-143.

[460] CCPR/C/81/Add.9 (1996), para. 12.

[461] See S.K. Kirschbaum, *A History of Slovakia: The Struggle for Survival* (2005), pp. 269-270.

8.16. In short, in many instances, declarations of independence have been issued, even without the consent of existing governmental authorities, and such an act was not regarded by other States or the United Nations political organs as having violated international law. Rather, in such circumstances, over time and based on a sometimes lengthy continuum of facts, the entity was often established as an independent State if the relevant factual conditions were fulfilled.

8.17. Some of the examples mentioned above occurred in the context of "secession," in which a State is formed by breaking away from a parent State without the latter's consent. Though the circumstances under which other States will accept such a claim to statehood may be contentious, it remains the case that the attempt at secession, including any issuance of a declaration of independence, is simply not regulated by international law. As Professor Hersh Lauterpacht observed: "International law does not condemn rebellion or secession aiming at the acquisition of independence"[462]. More recently, Professor James Crawford noted that "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally"[463]. According to Professor Georges Abi-Saab, "if international law does not recognise a right of secession outside the context of self-determination ..., this does not mean that it prohibits secession. Secession thus remains basically a phenomenon not regulated by international law."[464] The Supreme Court of Canada stated in its *Succession of Quebec* decision, "[i]nternational law contains neither a right of unilateral secession nor the explicit denial of such a right"[465].

8.18. In very rare circumstances the Security Council or the General Assembly may condemn a broad effort aimed at State creation when it involves a systematic denial of fundamental rights or other egregious behavior, such as creating a State based upon

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[462] H. Lauterpacht, *Recognition in International Law* (1947), p. 8.

[463] J. Crawford, *op. cit.* (fn. 459), p. 390.

[464] G. Abi-Saab, *op. cit.* (fn. 447), p. 474; see also T. Franck, "Opinion Directed at Question 2 of the Reference", in *Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, Projet de Rapport (1992)*, reprinted in, *Self-Determination in International Law: Quebec and Lessons Learned* (2000), p. 78, para. 2.9 ("while there may ordinarily be no *right* to secede, international law has long recognized a *privilege* of secession and has not in any way *prohibited* secession ..."), and p. 79, para. 2.11 ("It cannot seriously be argued today that international law *prohibits* secession.")

[465] Secession of Quebec, [1998] 2 *S.C.R.* 217 (Can.), para. 112, reprinted in *I.L.M.*, vol. 37, 1998, p. 1340. Though a national tribunal, the Supreme Court was also construing international law.

apartheid or racial discrimination[466]. In the course of doing so, the political organs may denounce a declaration of independence as one part of that broad effort[467]. In those exceptional circumstances, the political organs may determine that the declaration is regarded by the United Nations as having no legal effect and may call upon other States not to recognize the emergence of a new State. The circumstances surrounding these rare incidents, however, bear no relationship to the circumstances of the 17 February 2008 Declaration of Independence, which provoked no condemnation from either the General Assembly or the Security Council. As discussed in detail in Chapters IV, V, and IX, Kosovo's Declaration occurred in the context of a lengthy period of United Nations administration of Kosovo and the UN-led final settlement process, which contemplated as one possibility the emergence of an independent State of Kosovo.

8.19. Given the lack of State practice supporting any prohibition in international law on the issuance of a declaration of independence, it is no surprise that relevant global and regional treaties contain no such prohibition. For example, there is no explicit or implied prohibition on the issuance of a declaration of independence in the United Nations Charter. While Article 2 (4) of the Charter prohibits Member States from using force against the territorial integrity of other Member States, that prohibition by both its ordinary meaning and its context is not addressing the issuance of a declaration of independence by a non-State entity. Likewise, the constituent instruments of the European Union, the African Union, the Organization of American States, and the League of Arab States contain no provisions prohibiting declarations of independence. Indeed, treaties generally do not seek to regulate non-State entities in such fashion; rather, they set out the rights and obligations of States that are parties to the treaty.

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[466] See, e.g., General Assembly resolution 2024 (1965), Security Council resolution 216 (1965) and Security Council resolution 217 (1965) (condemning efforts of a "racist minority" in southern Rhodesia); General Assembly resolution 31/6 (A) (1976); and Security Council resolution 402 (1976) (condemning efforts to create ten ethnically and linguistically divided homelands (bantustans) for black South Africans, as a means of implementing a policy of apartheid).

[467] Even in these circumstances, the political organs do not find that the declaration of independence itself violated or was not in accordance with international law, nor are they required to do so. As Rosalyn Higgins has observed, the political organs react to a variety of circumstances that may threaten peace, but that do not necessarily entail a violation of the United Nations Charter, customary international law, or even general international law (R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963), p. 204; see also J.E. Alvarez, *International Organizations as Law-makers* (2005), p. 187 ("The Charter leaves its enforcement arm with considerable discretion to act whenever the 'international peace' is threatened, regardless of whether the threatening act violates international law …")).

8.20. Similarly, non-binding instruments, such as the Helsinki Final Act, do not identify a commitment, legal or political, to permanent, unchanging territorial boundaries. Rather, the principles expressed in the Helsinki Final Act on "inviolability of frontiers" and "territorial integrity of States" are expressed in terms of States not "assaulting" each other's frontiers and not using, or threatening to use, force against each other's territory[468]. The principles are silent on the issue of whether and under what circumstances an entity within a member of the CSCE (now OSCE) might seek and acquire independence. Indeed, to the extent that the Helsinki Final Act speaks to the issue of Kosovo's Declaration of Independence, the salient language is found in Principle VIII, which reads in part:

> "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.
>
> The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle."

Thus, the principles expressed within the Helsinki Final Act recognize a variety of competing concepts – ones that seek to protect territory from external uses of force, but that also seek to promote human rights and the rule of law. As such, it is not possible to ascribe to the Helsinki Final Act a single fixed notion disfavoring the legality of a declaration of independence.

8.21. In sum, while rare circumstances can arise involving condemnation of heinous behaviour one part of which is an issuance of a declaration of independence, as a general matter States view declarations of independence as simply one fact in a series of factual circumstances, the totality of which over time may or may not result in the creation of a new State under international law. No individual fact in this continuum is generally regarded as being either authorized or prohibited by international law. Hence, a declaration of independence, such as that issued by the representatives of Kosovo on 17 February 2008, cannot be regarded as contravening international law.

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[468] Helsinki Final Act, Declaration on Principles Guiding Relations between Participating States, principles III and IV [Dossier No. 217].

C. State Practice Relating to the Break-up of the Former Yugoslavia Confirms that the Issuance of a Declaration of Independence Is Not Regulated by General International Law

8.22. As discussed in Chapter V, the Declaration of Independence by the democratically-elected representatives of Kosovo and the emergence of Kosovo as a State was the final step in the process of break-up of the Socialist Federal Republic of Yugoslavia (SFRY). The Contact Group recognized in 2006 that Kosovo represents "the last major issue related to the breakup of Yugoslavia"[469]. Further, it found that the "character of the Kosovo problem" was shaped in part "by the disintegration of Yugoslavia", and hence "must be fully taken into account in settling Kosovo's status"[470]. That break-up resulted in the issuance of a series of declarations, none of which were regarded by other States or by this Court as inconsistent with international law, notwithstanding the claim by Serbia (or, depending on the relevant date, by the Belgrade-based SFRY or the FRY) that such entities remained a part of the SFRY.

8.23. Chapter III recounted how Slobodan Milošević, who had served as the Chairman of the Central Committee of the League of Communists of Serbia since 1986, in 1989 became President of Serbia. Milošević adhered to centralism and one party rule through the Yugoslav Communist Party, and he effectively ended the autonomy of the Kosovo and Vojvodina provinces. That action, in turn, served as the catalyst for the disintegration of the SFRY, since the other Republics regarded themselves as now clearly threatened by Serbian efforts to dominate the SFRY. When Belgrade began repressing Kosovo Albanian's political and cultural rights, dismissing them from public positions, closing down their Albanian-speaking schools, and changing street signs into the Serbian Cyrillic alphabet – all as a part of abolishing Kosovo's autonomous status and removing the rights of the people forming the majority – the other parts of the SFRY glimpsed their own future under Serbian dominance. Moreover, seizing control of Kosovo's political institutions in 1989 was an important element in Serbia securing dominance over half the SFRY Federal Presidency's eight votes (Serbia, Kosovo, Montenegro, and Vojvodina).

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[469] Contact Group Ministerial Statement, New York, 20 September 2006, para. 2 (available on <http://www.unosek.org/docref/2006-09-20_-_CG _Ministerial_Statement_New _York.pdf>).

[470] Contact Group Statement, London, 31 January 2006, para. 2 (available on <http://www.unosek.org/docref/fevrier/STATEMENT BY THE CONTACT GROUP ON THE FUTURE OF KOSOVO - Eng.pdf>). See also para. 2.03 above.

8.24. As a direct consequence of these actions against Kosovo, Slovenia proposed amendments to the SFRY Constitution so as to secure greater autonomy from Belgrade, including an amendment that would expressly grant Slovenia the right to secede from the SFRY. When such proposals foundered, both Slovenia and Croatia moved instead toward independence.

8.25. On 25 June 1991, the Slovenian Assembly, meeting in Ljubljana, adopted "The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia", which in Article I stated: "The Constitution of the SFRY is no longer in force in the Republic of Slovenia."[471] Further, the Assembly issued a declaration of independence, which began as follows:

> "On the basis of the right of the Slovene nation to self-determination, of the principles of international law and the Constitution of the former SFRY and of the Republic of Slovenia, and on the basis of the absolute majority vote in the plebiscite held on December 23, 1990, the people of the Republic of Slovenia have decided to establish an independent state, the Republic of Slovenia, which will no longer be part of the Socialist Federal Republic of Yugoslavia.
>
> On the basis of an unanimous proposal of all parliamentary parties and groups of delegates and in compliance with the plebiscitary outcome, the Assembly of the Republic of Slovenia has adopted the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia at the sessions of all its chambers held on June 25, 1991."[472]

The next day, 26 June 1991, President Milan Kučan declared Slovenia to be an independent State at a ceremony held in Trg Revolucije square, Ljubljana. The Serbian-dominated SFRY government then moved units of the Yugoslav People's Army (JNA) against Slovenia, resulting in a ten-day war between the JNA and Slovenian military and paramilitary forces.

8.26. In similar fashion, on 25 June 1991, the newly-reorganized Parliament in Croatia adopted a "Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia", which established that by "this act, the Republic of Croatia initiates proceedings for disassociation from the other republics and from the SFRY. The Republic

[471] S. Trifunovska (ed.), *Yugoslavia Through Documents: From its Creation to its Dissolution* (1994), p. 291.

[472] *Ibid.*, p. 286.

of Croatia is initiating proceedings for international recognition."[473] At the same session of all the three chambers, the Parliament also passed the declaration of independence, entitled "Declaration on the Establishment of the Sovereign and Independent Republic of Croatia"[474]. In response, the Belgrade-based SFRY government moved its forces against Croatia, with full-scale fighting continuing until November 1991, when the United Nations Protection Force (UNPROFOR) deployed to Croatia.

8.27. The Serbian-dominated SFRY declared that the two declarations of independence violated both the law of the SFRY and its "territorial integrity"[475], a pattern that would repeat itself with respect to declarations issued by the other parts of the former Yugoslavia, including ultimately Kosovo. Specifically, the SFRY Presidency stated

> "that the Republics of Slovenia and Croatia declared independence and sovereignty by unilateral unconstitutional acts that cannot produce immediate constitutional-legal consequences. These acts constitute a flagrant violation of the territorial integrity of the SFR of Yugoslavia and its State borders and as such are liable to all the consequences envisaged in the constitutional-legal system of the protection of the territorial integrity. ...
>
> By their secessionist acts Slovenia and Croatia pose a direct threat to the territorial integrity of Yugoslavia, which is the only subject recognized in international law, the constituent parts of which are these Republics.
> The Presidency of the SFR of Yugoslavia therefore warns that the SFR of Yugoslavia will consider every attempt to recognize these acts of Slovenia and Croatia as flagrant interference into its internal affairs, as an act directed against its international subjectivity and territorial integrity. In such a case it will resort to all available means recognized in international law."[476]

Thus, from Belgrade's perspective, these declarations were "secessionist" acts that threatened the SFRY as a territorial unit "recognized under international law." Yet other States did not react to the declarations of independence by condemning them as violations of the SFRY's territorial integrity or as violations of international law generally. This confirms the practice of States in not regarding such declarations *per se* as violating international law.

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[473] S. Trifunovska, *op. cit.* (fn. 471), p. 300.

[474] *Ibid.*, p. 301.

[475] *Ibid.*, p. 353.

[476] *Ibid.*, pp. 353-354; see also *ibid.*, p. 305 (SFRY Presidency statement that the two declarations of independence directly threaten SFRY's "territorial integrity" and "its sovereignty according to international law").

8.28. Further confirmation that international law does not generally speak to the legality of such declarations may be seen in the circumstances surrounding the conclusion of the 7 July 1991 Joint Declaration at Brioni (Brioni Agreement)[477], a result of negotiations sponsored by the European Union and involving representatives from Slovenia, Croatia, and the SFRY. The Brioni Agreement was successful in ending armed conflict between the SFRY forces and Slovenia. Though it also sought to secure the withdrawal of SFRY forces from Croatia, the Agreement failed in that respect. However, in exchange for the SFRY's promises to remove its forces from both Slovenia and Croatia, the Brioni Agreement adopted a three-month suspension of the Slovenian and Croatian declarations of independence. Nothing in the Agreement characterizes these declarations as unlawful under international law. When the three-month period of negotiations envisaged by the Brioni Agreement came to an end, Slovenia and Croatia announced the reassertion of their independence. Again, instead of asserting the illegality under international law of such declarations, States viewed the resumed declarations as factual events that needed to be assessed in conjunction with other events and factors in order to determine whether in fact two new States existed.

8.29. A similar reaction occurred with respect to Macedonia's declaration of independence on 18 September 1991[478] and Bosnia and Herzegovina's declaration of "sovereignty" of October 1991 (followed by its declaration of independence of March 1992). Here, too, issuance of these declarations was opposed by the SFRY and Serbia. Indeed, before this Court, the FRY argued in 1995 that Bosnia and Herzegovina was not qualified to become a party to the Genocide Convention because it had not obtained its independence in conformity with an "imperative rule of international law" – the "principle of equal rights and self-determination of peoples"[479]. Rather, the FRY stated to the Court that it "believes that the acts whereby the Applicant State was constituted as an indepent (*sic*) state are in contravention of the rules of international law"[480]. Yet other

[477] S. Trifunovska, *op. cit.* (fn. 471), p. 311.

[478] *Ibid.*, p. 345.

[479] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections of the Federal Republic of Yugoslavia*, June 1995, p. 4.

[480] *Ibid.*, p. 111.

States did not regard the declarations as violating international law, instead seeing them as factual events to be assessed in conjunction with other events and factors.

8.30. The reaction of European States to these declarations by Bosnia and Herzegovina, Croatia, Macedonia, and Slovenia is instructive. Rather than regarding the declarations of independence as *per se* unlawful under international law (or even the issuance of such a declaration as an event that must be determined as either lawful or unlawful), European States instead initiated a political process for assessing whether new States should be recognized. On 16 December 1991, the European Council adopted Guidelines to be applied in considering the emergence of new States in Eastern Europe and in the Soviet Union[481] and issued a Declaration on Yugoslavia[482]. Neither instrument indicated any belief that the existing declarations of independence by the Republics were unlawful; instead, they demonstrate a belief that the declarations were simply factual events that must now be considered as a political matter by European States. Under the political process established by the Declaration, "all Yugoslav Republics" were invited to file "applications" by 23 December 1991, to indicate whether they wished to be regarded as independent States, and to state whether they accepted the commitments contained in the EC Guidelines. Notably, the EC Guidelines made reference to the provisions of the United Nations Charter, the Helsinki Final Act, and the Charter of Paris, but those references did not indicate a rigid adherence to pre-existing international boundaries, let alone a prohibition on declarations of independence. Rather, the reference to those instruments expressed a range of European concerns, including promoting the rule of law, democracy, human rights, and stability of borders. Indeed, such principles ultimately were not the basis for denying statehood to new entities, but the touchstone for those entities in expressing their commitment to international legal principles as part of their passage into statehood.

8.31. This process unfolded under the direction of the European Community Conference on Yugoslavia (ECCY) (which in August 1992 became the International Conference on the Former Yugoslavia (ICFY)), under the chairmanship of Lord

[481] European Community, Declaration of the European Council on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991 [Dossier No. 232].

[482] European Community, Declaration on Yugoslavia, 16 December 1991, reprinted in M. Weller, *op. cit.* (fn. 165), p. 81; *E.J.I.L.*, vol. 4, 1993, p. 73.

Carrington. Over the course of time, European (and non-European) States came to a political judgment that Bosnia and Herzegovina, Croatia, Macedonia, and Slovenia were entities that had emerged as new States. The paths of these new States in consolidating their statehood and securing admission to the United Nations were not identical, but the overall proposition – that their declarations of independence were viewed as factual events and not as actions regulated by international law – was true for each of them. For example, the first recognitions of Slovenia and Croatia came from Germany, Iceland, Ukraine, and the Vatican in late 1991, followed in mid-January 2002 by the recognition of some thirty other countries in Europe. In April 1992, the United States recognized the two new States, and ultimately they were admitted to the United Nations in May 1992.

8.32. In short, during the period between the issuance of Slovenia's and Croatia's declarations of independence in June 1991 and their admission to the United Nations almost a year later, there was no suggestion in the practice of States that those declarations and their issuance constituted a violation of international law, nor that they were even acts that international law sought to regulate. Rather, taking into account the fact of the declarations, in conjunction with other facts, States over time viewed Slovenia and Croatia as having emerged as independent States. A similar overall result occurred with respect to Bosnia-Herzegovina and Macedonia.

8.33. The representatives in the Kosovo Assembly issued a declaration in September 1991 proclaiming Kosovo "as a sovereign and independent state, with the right to participate as a constituent republic in Yugoslavia, on a basis of freedom and equality"[483]. The 16 December European Council Declaration on Yugoslavia, however, indicated a political decision on the part of European States only to invite "Yugoslav Republics" to apply for recognition as independent States, given the focus at that time on the armed conflict that had occurred in Croatia and Slovenia, and that would soon break out in Bosnia and Herzegovina. Consequently, when the Kosovo Assembly in December 1991 requested that Lord Carrington include Kosovo in the European political process for recognition[484], he did not act upon that request. As noted, the European

[483] Resolution of the Assembly of the Republic of Kosova on Independence, 22 September 1991, in M. Weller, *op. cit.* (fn. 165), p. 72. That factual event was also not regulated by international law.

[484] Letter from Dr. Rugova to Lord Carrington, Peace Conference on Yugoslavia, 22 December 1999, in M. Weller, *op. cit.* (fn. 165), p. 81.

Council Declaration had limited the political process to applications by existing republics, of which Kosovo was not one. Of course, the vast array of commitments that have now been made by Kosovo in its Declaration of Independence of 17 February 2008[485] and the Constitution of the Republic of Kosovo in fulfillment of the Ahtisaari Plan[486] fully meet the standards set in the European Council Guidelines, as evidenced by the recognition that Kosovo has received from most European Union Member States.

8.34. To assist in the political process of determining whether new States had emerged, European States in 1991 established a commission composed of the presidents of some of their Constitutional Courts, under the chairmanship of Robert Badinter (commonly referred to as the "Badinter Commission"). Over the course of many months, the ICFY asked the Badinter Commission a series of specific questions, resulting in several opinions from the Commission providing legal guidance on the formation of States in the former Yugoslavia. For the reason indicated above[487], none of the questions asked by the ICFY to the Commission related to Kosovo and consequently the Commission issued no opinions on Kosovo's status. Nevertheless, two key elements of the Badinter Commission opinions may be of assistance to the Court when answering the question currently before it.

8.35. First, in Badinter Commission Opinion 1, issued in November 1991, the Commission's advice on the nature of the changes in sovereignty that were occurring in the SFRY did not view the declarations of independence as acts capable of being internationally wrongful. The Commission noted that it was informed of the positions of Bosnia and Herzegovina, Croatia, Macedonia, Slovenia, Serbia, and the SFRY, and that the Commission's advice "should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state ..."[488]. The Commission noted that "the Republics have expressed their desire for independence", and expressly listed the declarations of independence as part of the acts conveying that desire:

[485] See paras. 6.25-6.33 above.

[486] See paras. 2.17-2.57 above.

[487] See para. 8.33 above.

[488] Conference of Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991, preamble and para. 1 (a) [Dossier No. 233].

"– in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

– in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

– in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav States;

– in Bosnia and Herzegovina, by a sovereignty resolution adopted by Parliament on 14 October 1991 ..."[489]

Although the Belgrade-based SFRY had maintained that such declarations of independence violated international law, the Badinter Commission made no such finding, nor even saw the declarations as acts that might be found wrongful under international law. Instead, the Commission took the approach that "in this respect, the existence or disappearance of the State *is a question of fact*", one that other States would acknowledge through the process of recognition[490]. The Commission essentially reiterated this point in Opinion 3, when it stated that "Croatia and Bosnia-Herzegovina, *inter alia*, have sought international recognition as independent States" and that this fact was part of "a fluid and changing situation"[491]. Ultimately, in making its recommendations as to whether these entities should be recognized by States, the Commission issued a series of opinions which in no respect characterized the declarations of independence as acts that *per se* might be internationally wrongful[492].

8.36. Second, the Commission's unwillingness to view the declarations of independence as capable of being internationally wrongful cannot be explained on the basis that the SFRY had dissolved, since at the time of Opinions 1 to 3, the Commission did not regard the SFRY as having dissolved (nor did the SFRY authorities in Belgrade). Rather, the Commission regarded the SFRY *as still existing*, since it "has until now

[489] Conference of Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991, para. 2 (a) [Dossier No. 233].

[490] *Ibid.*, para. 1 (a) (emphasis added).

[491] Conference of Yugoslavia, Arbitration Commission, Opinion No. 3, 11 January 1992, para. 1, *I.L.M.*, vol. 31, 1992, p. 1499; *E.J.I.L.*, vol. 3, 1992, p. 185.

[492] Those opinions – Opinion No. 4 (Bosnia and Herzegovina), Opinion No. 5 (Croatia), Opinion No. 6 (Macedonia), and Opinion No. 7 (Slovenia) – were published on 11 January 1992, and appear at *I.L.M.*, vol. 31, 1992, p. 1501; *E.J.I.L.*, vol. 4, 1993, p. 74.

retained its international personality"[493]. Though the SFRY was "in the process of dissolution", it was still possible for "those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice"[494]. Hence, even though the SFRY was not yet dissolved, there was still no consideration that the declarations of independence might be unlawful under the "principles of public international law" being applied by the Commission. Instead there was an implicit acceptance by the Commission that there existed an ongoing continuum of facts that had to develop in order, eventually, to resolve issues of statehood.

8.37. The practice of States in assessing the declarations of independence in the early 1990s by the Republics of the former Yugoslavia confirms the overall proposition that general international law does not prohibit the issuance of a declaration of independence. Kosovo's Declaration of Independence represents the final stage in this series of declarations of independence by the constituent units of the SFRY. As discussed in Chapter III, Kosovo's status under the 1974 Constitution of the SFRY was one in which Kosovo as a Federal unit had the same fundamental governance rights as the several republics—such as the ability to veto constitutional amendments, the right for its territory not to be altered without its consent, the right to be represented in the SFRY Assembly, and the right to have a member on and preside over the Federal Presidency on a rotating basis. The extraordinary events from 1988 onward led those Republics to declare independence, just as those events in conjunction with the catastrophe of 1998-1999 and its aftermath ultimately led Kosovo to declare independence as well. In none of these instances was the declaration of independence an act the legality of which was regulated by international law. International law provided a framework for considering whether certain factual conditions were present for the creation of a State, and provided certain important principles relating to democracy, rule of law, and human rights that guided other States in recognizing the new entities, but international law was not seen as specifically addressing the legality of the declarations of independence. Such practice confirms that, in the matter now before this Court, Kosovo's Declaration of Independence did not contravene international law.

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[493] Conference of Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991, para. 2 (a) [Dossier No. 233].

[494] *Ibid.*, para. 3.

III. The Court Need Not Reach the Issue of the Right of Self-Determination in this Proceeding

8.38. The Court is not obliged to reach the issue of whether the Declaration of Independence by the representatives of the people of Kosovo reflected an exercise of the internationally-protected right of self-determination, for there is no need to determine whether international law authorized Kosovo to seek independence.

8.39. The right of self-determination has been articulated in various United Nations resolutions and human rights treaties[495]. In its jurisprudence, this Court has acknowledged the existence of a right of self-determination[496], including in situations unrelated to decolonization[497]. Other international bodies have also acknowledged the existence of such a right in appropriate circumstances[498]. None of these sources views a declaration of independence as *per se* a violation of international law.

8.40. While the exact contours of any right of self-determination have not been articulated by this Court, the authorities noted above may be read as identifying two key components that permit the exercise of the right: the existence of a "people"; and the demonstrated inability of that people to be protected within a particular State, given prior abuses and oppression by that State's government. The people of Kosovo are distinct, being a group of which 90 percent are Kosovo Albanians, who speak the Albanian

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[495] See, e.g., General Assembly resolution 2625 (1970), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (principle of equal rights and self-determination of all peoples) [Dossier No. 226]; International Covenant on Civil and Political Rights, 1966, Article 1 (1) [Dossier No. 211]; International Covenant on Economic, Social and Cultural Rights, 1966, Article 1 (1) [Dossier No. 212].

[496] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-35; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

[497] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 182-183, para. 118; see also *Separate Opinion of Judge Higgins, ibid.*, p. 214, para. 29 (referring to the "substantial body of doctrine and practice on 'self-determination beyond colonialism'.")

[498] See, e.g., Report of the International Committee of Jurists upon the Legal Aspects of the Aaland Islands Question, League of Nations, *O.J. Spec. Supp. 3*, p. 5 (1920); African Commission on Human and Peoples' Rights, *Communication 75/92, Katangese Peoples' Congress* v. *Zaire*, para. 26 (1995); Secession of Quebec, [1998] 2 *S.C.R.* 217 (Can.), paras. 122, 126, 133, 134 and 138 (finding a right of "external self-determination" in situations "where a definable group is denied meaningful access to government to pursue their political, economic, social, and cultural development.")

language, and who mostly share a Muslim religious identity. The Security Council itself has referred to the "people of Kosovo"[499]. Further, the prior infliction of massive human rights abuses and crimes against humanity by the Serbian authorities upon the people of Kosovo, are well-known and well-documented, as demonstrated by the February 2009 ICTY Judgment in *Milutinović et al.*[500], and have been condemned by the General Assembly[501], the Security Council[502], and many other international bodies[503]. The continued denial by Serbia of representative government to Kosovo was recently demonstrated by the failure of Serbia to invite Kosovo-Albanian representatives to the drafting of the 2006 Constitution of Serbia, nor to give them a chance to express themselves upon it (only Kosovo Serbs were allowed to participate in the referendum). In these circumstances there can be no doubt that the people of Kosovo were entitled to the right of self-determination.

8.41. Yet, as indicated above, to answer the General Assembly's question, it is sufficient for the Court to confirm that international law does not prohibit the issuance of a declaration of independence, and instead leaves the emergence of statehood to certain factual developments. Consequently, the General Assembly's question may be answered by finding that Kosovo's Declaration did not contravene international law, without passing upon whether the people of Kosovo were authorized by international law to exercise a right of self-determination by seeking independence.

IV. Kosovo's Ability to Exercise Inter-State Relations Is Now Part of a *Political* Process of Recognition and Membership in International Organizations, a Process to Which the Court Has Previously Deferred

8.42. The Declaration of Independence of 17 February 2008 is a fact that, standing alone, is neither lawful nor unlawful under international law. As noted in Chapter VII above, the Declaration and only the Declaration is the subject of the question addressed to the Court. The political process of recognitions and other developments since the

[499] Security Council resolution 1244 (1999), para. 10 [Dossier No. 34].

[500] See paras. 3.29-3.37 and paras. 3.47-3.60 above.

[501] See, e.g., General Assembly resolutions 49/204, 23 December 1994, and 50/190, 22 December 1995.

[502] See, e.g., Security Council resolutions 1160 (1998) [Dossier No. 9] and 1199 (1998) [Dossier No. 17].

[503] See paras. 3.34, 3.55-3.60 above.

Declaration, outlined in Chapter II above, are not before the Court in these proceedings. States individually and through international organizations are now in the process of deciding what further legal effect to give to Kosovo's claim to statehood. This Court has previously extended considerable deference to such processes, seeing them as political ones that are left by international law to the individual judgment of States and international organizations, not one that calls for judicial intervention. Thus, in the Court's Advisory Opinion on *Admission of States*, the Court spoke of the Charter entrusting to the political organs the ability to make judgments on matters of admission, subject to the conditions laid down in the Charter[504].

8.43. Indeed, even in the context of declarations of independence in the Balkans, the Court has previously stated that the political decision of admitting a State to membership in the United Nations in essence *cures* any possible prior defects in the declaration. In Section II (C) above[505], it was noted that in 1995 the FRY argued before this Court that Bosnia and Herzegovina had not obtained its independence in conformity with an "imperative rule of international law" – the "principle of equal rights and self-determination of peoples" – all for the purpose of establishing that Bosnia and Herzegovina was not qualified to become a party to the Genocide Convention[506]. The Court considered the FRY's position, but then found that since Bosnia and Herzegovina had been admitted to the United Nations, "the circumstances of its accession to independence are of little consequence"[507]. This finding is consistent with the views of the Supreme Court of Canada, which stated that a unilateral secession, even if it were regarded as illegal, could be successful if recognized by the international community[508].

8.44. In sum, rather than viewing a declaration of independence as a single moment of either legality or illegality, the Court has allowed subsequent political processes to

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[504] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1948*, p. 57.

[505] See para. 8.29.

[506] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections of the Federal Republic of Yugoslavia*, June 1995, pp. 4, 81-82, 89 and 103-116.

[507] *I.C.J. Reports 1996*, p. 611, para. 19.

[508] Secession of Quebec, [1998] 2 *S.C.R.* 217 (Can.), para. 141, reprinted in *I.L.M.*, vol. 37, 1998, p. 1340.

unfold, in which States and international organizations investigate, assess, and react to factual claims of statehood, and thereby through those processes determine the long-term legal effects of such a declaration. The Court should follow the same approach here.

CHAPTER IX

THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE SECURITY COUNCIL RESOLUTION 1244 (1999)

9.01. In various public statements, the Government of Serbia has asserted that the Declaration of Independence of 17 February 2008 by the democratically elected representatives of Kosovo contravened Security Council resolution 1244 (1999) of 10 June 1999. Yet there is no language within either the preamble or the operative paragraphs of resolution 1244 that prohibits the issuance of such a declaration; rather, the resolution envisages the unfolding of a political process in which *either* Kosovo's independence *or* autonomy within Serbia might result.

9.02. That resolution 1244 (1999) did not prohibit the issuance of a declaration of independence is understandable given that the Security Council, in exercising its Chapter VII powers, normally issues resolutions that impose obligations upon *States*[509]. On some occasions, the Security Council has turned its attention to the conduct of persons or non-state entities, but it always does so in express and clear terms, and even then, as a legal matter, the resolution imposes obligations not directly upon the person or entity, but upon States to take steps against or impose sanctions upon those concerned[510].

9.03. The Court need look no further than the Security Council's practice with respect to the Balkans in the 1990s to see that resolution 1244 (1999) did not address itself to, let alone prohibit, the issuance of a declaration of independence. In 1992, the Security Council issued a decision in the context of Bosnia and Herzegovina in which it directly and expressly addressed the possibility of the issuance of a declaration of independence that would promote an independent state of Republika Srpska. Specifically, Security Council resolution 787 (1992) provided that the Security Council "strongly reaffirms its call on all

[509] See United Nations Charter, Article 25 ("The *Members of the United Nations* agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.") (emphasis added). By way of contrast, European Community law provides for a "decision" (defined in Article 249 EC) as a means by which Community institutions directly bind the particular addressee, which can include an individual.

[510] See, e.g., Security Council resolutions 1373 (2001), 28 September 2001, and 1540 (2004), 28 April 2004.

parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and affirms that *any entities unilaterally declared* or arrangements imposed *in contravention thereof will not be accepted*"[511]. Even in this context, the Security Council did not assume the power of rendering such a declaration unlawful but, rather, simply indicated that the Security Council would not accept such an act.

9.04. The Security Council adopted no such language just seven years later, in resolution 1244 (1999), even though resolution 787 (1992) was well known to the members of the Council, especially in the context of state formation in the Balkans. Resolution 1244 makes no reference of any kind to the possibility of a "unilateral declaration" by an "entity" within the Federal Republic of Yugoslavia (FRY), even though the hope for independence by the leaders and people of Kosovo would have been well known to Council members. Had the Council intended to declare unacceptable a Kosovo declaration of independence, or the issuance of such a declaration without FRY, Serbian, or Security Council consent, the Council was fully capable of saying as much. Yet it did not.

9.05. Drawing upon the factual background set forth in Chapters IV and V, this Chapter explains that, rather than prohibit the issuance of a declaration of independence, resolution 1244 (1999) established a framework that included the possibility of a declaration of independence occurring. The resolution accorded very broad powers to the United Nations Secretary-General and his Special Representative (SRSG) to establish an United Nations interim administration in Kosovo, so as to foster extensive Kosovo self-governance without FRY or Serbian military, police or other interference. Moreover, the resolution accorded to the Secretary-General and his representatives broad power to pursue political negotiations toward a final settlement (and to determine the pace and duration of those negotiations), without in any fashion predetermining the outcome of that settlement or requiring that the settlement be approved by the FRY, by Serbia, or by the Security Council itself (**Section I**). Those negotiations then culminated with a determination by the SRSG, endorsed by the Secretary-General, that the "potential to produce any mutually agreeable outcome on Kosovo's status is exhausted" and that "the only viable

[511] Security Council resolution 787 (1992), 16 November 1992, para. 3 (emphasis added).

option for Kosovo is independence" (**Section II**). Thereafter, the democratically elected representatives of the people of Kosovo declared independence, a step that was not declared null and void by the SRSG, though he had previously taken steps to avert moves by Kosovo toward independence (**Section III**). Though Serbia at times points to resolution 1244's preambular reference to "sovereignty and territorial integrity" as a basis for finding a violation of international law, that non-binding clause on its face and in context cannot be construed as prohibiting the issuance of a declaration of independence (**Section IV**). All told, given the terms of resolution 1244, the process that unfolded based on those terms, and the reaction of the SRSG after the issuance of Kosovo's Declaration of Independence, there is no basis for concluding that the February 2008 Declaration contravened resolution 1244.

I. Security Council Resolution 1244 Did Not Dictate the Terms of the Final Political Settlement, Nor Accord the FRY or Serbia a Veto

9.06. Resolution 1244 established an interim administration in Kosovo to promote a transition to a final status, and launched a political process for resolving the Kosovo crisis, one likely outcome of which was Kosovo's independence. As such, the resolution was crafted to create conditions of interim stability in which Kosovo institutions could emerge, and could lead to a final political outcome, but not to dictate as a legal matter what that outcome should be. Four key elements of the resolution clarify its purpose.

9.07. First, the resolution identified the FRY and especially Serbia as a threat to the people of Kosovo. The preamble of resolution 1244 recalls earlier Security Council resolutions in which the Council had condemned "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo", expressed grave concern at "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 Security Council, the displacement of over 230,000 persons from their homes", and expressed deep concern at the closure by FRY authorities of independent media outlets[512]. Resolution 1244 itself then noted in its preamble the "grave humanitarian

[512] See Security Council resolution 1160 (1998), preamble [Dossier No. 9]; resolution 1199 (1998), preamble [Dossier No. 17]; and resolution 1203 (1998), preamble [Dossier No. 20]. For further discussion of these resolutions, see para. 3.54 above.

situation" in Kosovo and condemned "all acts of violence against the Kosovo population". In the operative part of the resolution, the Council demanded "that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo ..."[513].

9.08. Second, the resolution incorporated general principles to guide an *interim* administration of Kosovo. Paragraph 1 of the resolution provides that a "political solution shall be based on the general principles" set forth in annex 1 (statement of the G-8 Foreign Ministers adopted at the Petersberg Centre on 6 May 1999) and annex 2 (the list of principles agreed by the Serbian Parliament and Belgrade Government on 3 June 1999, known as the "Kosovo Peace Accords"). Those principles envisaged an "interim administration for Kosovo" designed to permit a return to "peaceful and normal life for all inhabitants in Kosovo", but did not indicate the terms of a final political resolution[514]. Under this period of interim administration, Kosovo would enjoy substantial self-government within the FRY, but without prejudice to whether a final political solution would continue that status or result in Kosovo as an independent State. Consistent with the reference to those principles, the Security Council in paragraph 10 of the resolution authorized the Secretary-General to establish an international civil presence to provide an "interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy" within the FRY, a presence that commenced in June 1999, as discussed in detail in Chapter IV above.

9.09. Third, the resolution denied to the FRY and Serbia governmental authority in Kosovo during the interim period. In paragraph 3 of the resolution, the Council demanded the "complete verifiable phased withdrawal from Kosovo of all military, police and

[513] Security Council resolution 1244 (1999), preamble and para. 3 [Dossier No. 34].

[514] See, e.g., A. Zimmerman and C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo", *Nordic Journal of International Law*, vol. 70, 2001, pp. 452-453 ("it is a common feature of the G-8 statement, the Kosovo Peace Accords and the Rambouillet Accords that they only refer to the conclusion of 'an interim agreement' between the FRY and the international community leaving room for a variety of solutions concerning Kosovo's final status."); W. Benedek, "Implications of the Independence of Kosovo for International Law", in *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), p. 394 (in resolution 1244, "the final status was not pre-determined in any way. In particular, Resolution 1244 did not say that Kosovo had to remain under Serb sovereignty.")

paramilitary forces according to a rapid timetable"[515]. As such, from June 1999 until the Declaration of Independence of 17 February 2008, Serbian governmental authority was completely absent from Kosovo pending a political solution. Such an approach strongly implies the possibility of an ultimate political solution in which Kosovo would obtain independence, for resolution 1244 envisaged wide-ranging Kosovo legislative, executive and judicial institutions being established, nourished, and protected by the United Nations without any FRY or Serbian involvement.

9.10. Fourth, the resolution called for a "political process" to determine Kosovo's final status, without specifying the modalities of that process or prejudicing its outcome. Nor did it grant to the FRY or Serbia a veto over the terms of any settlement. Specifically, the resolution states that the tasks of the international civil presence established under the direction of the Secretary-General included "[f]acilitating a political process designed to determine Kosovo's future status" and "[i]n a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement"[516]. There was no legal requirement in either the resolution itself or its annexes that at the end of the process, Kosovo authorities must refrain from issuing a declaration of independence. Further, there was no legal requirement that Kosovo remain a part of the FRY or of Serbia. Lastly, there was no legal requirement that the final political settlement must be approved through any particular process, such as after obtaining the consent of Serbia or further decision by the Security Council. While a further Security Council decision was doubtless viewed as politically desirable, resolution 1244 (1999) did not require any such decision. Indeed, the process and substance identified in the resolution for guiding this process were consciously open-ended and identified as "political" in nature[517].

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[515] While the resolution contemplated the possibility of a return of "Yugoslav and Serbian personnel" for activities such as clearing minefields (Security Council resolution 1244 (1999), annex 2, para. 6 [Dossier No. 34]), full resumption of control in Kosovo by Yugoslav or Serbian military, police, or paramilitary forces is nowhere mentioned or implicated in any part of the resolution.

[516] Security Council resolution 1244 (1999), paras. 11 (e) and (f) [Dossier No. 34].

[517] See, e.g., Zimmerman and Stahn, *op. cit.* (fn. 514), p. 451 ("Perhaps the most difficult problem that remains to be solved is the question of the final status of Kosovo. Any discussion of this problem must necessarily begin with an analysis of Security Council Resolution 1244. This Resolution, however, is remarkable vague on this important issue.")

9.11. By contrast, in the same time frame that resolution 1244 (1999) was adopted, the Security Council adopted resolutions relating to Georgia that were quite explicit about the need for a mutual agreement of the two parties to the conflict and about the essential outcome expected in that agreement. In Security Council resolutions 1225 (1999) and 1255 (1999), which were adopted, respectively, five months before and one month after resolution 1244, the Council underlined in the operative part of the resolutions the "necessity for the parties to achieve an early and comprehensive political settlement, which includes a settlement on the political status of Abkhazia within the State of Georgia ..."[518]. In resolution 1244, the same members of the Council did not specify that Kosovo and the FRY must be parties to a final status settlement, nor indicate that the settlement should be based upon a status of Kosovo within the State of the FRY.

9.12. Resolution 1244, however, contained an important component that did speak to the process by which the final status would be determined – the resolution calls for "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[519]. As discussed at paragraph 3.46 above, those accords state that "[t]hree years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, *on the basis of the will of the people*, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act"[520]. At a minimum, this reference to the Rambouillet accords shows that resolution 1244 (1999) did not envisage that Kosovo would necessarily remain a part of the FRY or Serbia in the final settlement. Yet more importantly for the task of this Court, the reference to the Rambouillet accords demonstrates that the final political settlement was to be driven by the "will of the people". Indeed, even after the adoption of the resolution, the members of Contact Group, including the Russian Federation, continued to regard as a key principle that any settlement "be acceptable to the people of Kosovo"[521]. Given that the 17 February 2008 Declaration of Independence, which was voted upon and signed by

[518] Security Council resolution 1225 (1999), 28 January 1999, para. 3; Security Council resolution 1255 (1999), 30 July 1999, para. 5.

[519] Security Council resolution 1244 (1999), para. 11 (e) [Dossier No. 34].

[520] Rambouillet accords, Chapter 8, Article I, para. 3 (emphasis added), S/1999/648 [Dossier No. 30].

[521] Contact Group Statement, London, 31 January 2006 (available on <http://www.unosek.org/docref/fevrier/STATEMENT BY THE CONTACT GROUP ON THE FUTURE OF KOSOVO - Eng.pdf>).

the democratically-elected representatives of Kosovo, was an expression of "the will of the people", the Declaration was entirely consistent with the terms of resolution 1244, not a contravention thereof.

9.13. Further, the reference to the Rambouillet accords is significant because of what those accords do not say. The negotiating process that preceded the Rambouillet Conference was conducted under the leadership of US Ambassador Christopher Hill. The terms of Hill's proposals provide insight into the meaning of the Rambouillet accords. At the outset of the Hill negotiations, direct negotiations with Milošević resulted in Belgrade agreeing on 2 September 1998 to pursuit of

> "an agreement on the basis of which it would be possible to establish [an] adequate level of self-governance, which presumes equality of all citizens and national communities living in Kosovo and Metohija. Being committed to mutual understanding and tolerance, the participants of the dialogue, i.e., the state delegation as well as representatives of all national communities living in Kosovo and Metohija, should express their readiness to make [an] assessment after a certain period, e.g., three to five years, of the implementation of the achieved agreement and to achieve improvement, about which mutual agreement would be reached."[522]

9.14. This statement began the process of viewing the solution to the Kosovo crisis as two-step in nature: an interim agreement with considerable detail about self-governance in Kosovo and protections for minorities, to be followed at a later time by a second stage at which a final resolution of Kosovo's status could be achieved. Ambassador Hill's first draft Agreement for a Settlement of the Crisis in Kosovo on 1 October 1998[523], second draft on 1 November 1998[524], and third draft on 2 December 1998[525] all followed this basic structure; their principal focus was on the details of the interim period. A particularly salient feature of each of these drafts was a final clause stating: "In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, *which will require mutual agreement for adoption*"[526]. As such, it was anticipated in these drafts that

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[522] Reprinted in W. Petritsch, K. Kaser and R. Pichler, *Kosovo, Kosova* (1999), p. 229.

[523] First [Hill] Draft Agreement for a Settlement of the Crisis in Kosovo, 1 October 1998, in M. Weller, *op. cit.* (fn. 165), p. 356.

[524] Revised Hill Proposal, 1 November 1998, *ibid.*, p. 362.

[525] Third Hill Draft Proposal for a Settlement of the Crisis in Kosovo, 2 December 1998, *ibid.*, p. 376.

[526] Emphasis added.

the shift to a final resolution of the crisis would require "mutual" agreement of the FRY, Serbia, and Kosovo. By the final Hill proposal on 27 January 1999[527], this language appears in brackets, and in the comparable language of the Rambouillet accords – "[t]hree years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, ..." – the language of "mutual consent", by which the FRY, Serbia and indeed Kosovo would be able to veto a final resolution of Kosovo's status, has been completely dropped. Hence, the reference in resolution 1244 to the Rambouillet accords was important not just for what those accords say, but for what they did not say.

II. Resolution 1244 Launched a Political Process that Concluded When Negotiations were Exhausted, the Status Quo Was No Longer Sustainable, and the only Viable Option for Kosovo Was Independence

9.15. Instead of indicating a particular legal outcome, resolution 1244 (1999) placed extensive authority in the Secretary-General to oversee a process designed to determine Kosovo's final status, a process that ultimately determined that the only viable option for Kosovo was independence. As recounted in greater detail in Chapter V, in May 2005 the Secretary-General first appointed Ambassador Kai Eide as his Special Envoy for the Comprehensive Review of the Situation in Kosovo. Eide conducted a review and reported in October 2005 that the situation in Kosovo was no longer sustainable[528], a conclusion with which the Security Council agreed, stating:

> "The Security Council agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999). The Council reaffirms the framework of the resolution, and welcomes the Secretary-General's readiness to appoint a Special Envoy to lead the Future Status process."[529]

[527] Final Hill Proposal, 27 January 1999, in M. Weller, *op. cit.* (fn. 165), p. 383.

[528] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/635, 7 October 2005, Annex [Dossier No. 193].

[529] Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005 [Dossier No. 195].

9.16. The Secretary-General then proposed the appointment of President Martti Ahtisaari as his Special Envoy for negotiation of a final status for Kosovo, stating that the "future status process will be carried out in the context of resolution 1244 (1999) and the relevant presidential statements of the Security Council"[530]. The President of the Security Council welcomed this proposal[531], and in doing so provided to the Secretary-General "for your reference" certain "guiding principles" for the final status talks that had been developed by the Contact Group, including the Russian Federation. Those principles called for the "launch" of a "process to determine the future status of Kosovo in accordance with Security Council resolution 1244", a process that the Special Envoy would "lead", and that "[o]nce the process has started, it cannot be blocked and must be brought to a conclusion"[532]. The Secretary-General then appointed President Ahtisaari, conveying to him Terms of Reference stating that the Special Envoy would lead the process for determining Kosovo's final status, and in the course of doing so "will consult closely with inter alia Security Council members, Contact Group Members, relevant regional organizations, relevant regional actors, and other key players"[533]. Further, the Terms of Reference indicated that the "pace and duration" of the process "will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground"[533]. Most importantly, the Terms of Reference stated that the process "should culminate in a political settlement that determines the future status of Kosovo"[533]. Nowhere in the Secretary-General's recommendation and appointment of the Special Envoy, or in his Terms of Reference, is it stated that the final status could only be determined with the approval of Serbia and Montenegro (now Serbia) or by a further decision of the Security Council[534].

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[530] Letter dated 31 October from the Secretary-General addressed to the President of the Security Council, S/2005/708, 10 November 2005 [Dossier No. 196].

[531] Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709, 10 November 2005 [Dossier No. 197].

[532] *Ibid.*, Annex. While those Contract Group principles welcomed an endorsement of a final decision on status by the Security Council, it did not envisage the final decision itself being taken by the Security Council.

[533] Letter of Appointment, Annex [Dossier No. 198].

[534] The Contact Group's Guiding Principles, transmitted to the Secretary-General by the President of the Security Council solely for his "reference", also did not require a Security Council decision on final status, although these guidelines did note the Contract Group's view that, as a political matter, the final status decision reached outside the Council "should" be "endorsed" by the Council. The Council itself, however, was silent on this issue, both in resolution 1244 (1999) and at the time of launching the Ahtisaari process.

9.17. President Ahtisaari conducted extensive negotiations with all relevant parties, culminating in 2007 when he determined: "It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse"[535]. Further:

> "Upon careful consideration of Kosovo's recent history, the reality of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community."[536]

To that end, he advanced a Comprehensive Proposal for the Kosovo Status Settlement for achieving Kosovo's independence (the Ahtisaari Plan)[537]. After reviewing the report and recommendation, the Secretary-General stated that "[h]aving taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement". Efforts thereafter to secure Serbian cooperation failed, notwithstanding extensive efforts by the Security Council and through the European Union/United States/Russian Federation Troika.

9.18. Only then, in the face of the Secretary-General's acknowledgment that the status quo could not be sustained[538] and that independence was the only viable option, did Kosovo almost a year later (and after further efforts by the Troika) declare independence on 17 February 2008. As explained in Chapter VI, the authors of the declaration of independence were not the Provisional Institutions of Self-Government (PISG) but, rather, the democratically-elected representatives of Kosovo, expressing the will of the people of Kosovo. As such, the authors of the Declaration were not even an entity subject to the

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[535] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].

[536] *Ibid.*, para. 5.

[537] Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007 [Dossier No. 204].

[538] In addition to endorsing the President Ahtisaari's conclusion that the status quo was no longer sustainable, the Secretary-General reported in September 2007 to the Council that "there is real risk of progress beginning to unravel and of instability in Kosovo and the region" (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/582 (2007), 28 September 2007, para. 29 [Dossier No. 82]).

direction and control of UNMIK, and were not operating under the Constitutional Framework enacted by UNMIK as part of the applicable law in Kosovo. Yet even if the entity declaring independence were to be seen as one of the PISG, *quod non*, its conduct was fully in accordance with the political process initiated under Security Council resolution 1244 (1999).

9.19. In sum, when adopting resolution 1244 (1999), the Security Council called upon the Secretary-General, directly and through his representatives, to facilitate a political process for Kosovo's final status. The outcome of that political process was a recommendation by the United Nations Special Envoy appointed by the Secretary-General that independence was the only viable option. That recommendation provided for a detailed settlement, one that accommodated the concerns expressed by Serbia during the negotiations (e.g., Serbian demands for decentralization and for the protection of cultural heritage). Given the acceptance by the Secretary-General that the status quo was unsustainable, that further negotiations would be fruitless and that independence was the only viable option, it is not the case that the Declaration of Independence voted upon and signed by the democratically elected representatives of Kosovo contravened resolution 1244. Rather, the Declaration was an obvious and necessary next step in the process of achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very authorities (the Secretary-General and his Special Envoy) charged by the Security Council with leading the final status process.

III. Kosovo's Declaration of Independence Was Not Declared Null and Void, or Without Legal Effect, by the Secretary-General's Special Representative, the Authorized Person Responsible for Monitoring Implementation of Resolution 1244

9.20. Resolution 1244 (1999) called upon the Secretary-General to appoint, in consultation with the Security Council, "a Special Representative to control the implementation of the international civil presence ..."[539]. As recounted in Chapter V, the SRSG was responsible for overseeing the United Nations Mission in Kosovo (UNMIK). Further, resolution 1244 stated that the main responsibilities of the international civil presence included "in a final stage, overseeing the transfer of authority from Kosovo's

[539] Security Council resolution 1244 (1999), para. 6 [Dossier No. 34].

provisional institutions to institutions established under a political settlement"[540]. In pursuance of this mandate, the SRSG has promulgated a wide range of regulations as applicable law in Kosovo, allowing for UNMIK's administration of Kosovo, including its powers and competencies, and the means by which authority would be transferred to Kosovo legislative, executive, and judicial institutions[541].

9.21. On 15 May 2001, the SRSG promulgated a regulation establishing the Constitutional Framework for Provisional Self-Government "for the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections"[542]. Based on this regulation, the PISG were established[543]. As is made clear in the preamble to the Constitutional Framework, the PISG would be given responsibilities "within the limits defined by UNSCR 1244 (1999)" and "shall work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244 (1999), take full account of all relevant factors including the will of the people"[544]. Moreover, the SRSG would supervise this transfer of authority to ensure consistency with resolution 1244; the preamble to the Constitutional Framework stated "that the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)"[545].

9.22. In its operative provisions, the Constitutional Framework stated that the SRSG had the exclusive power to dissolve the Kosovo Assembly "in circumstances where the Provisional Institutions of Self-Government are deemed to act in a manner which is not in

[540] Security Council resolution 1244 (1999), para. 11 (f) [Dossier No. 34].

[541] For a compendium of UNMIK regulations, see Dossier Nos. 138-167. For a discussion of selected regulations, see paras. 4.23-4.46 above.

[542] UNMIK Regulation No. 2001/9, 15 May 2001, preamble [Dossier No. 156].

[543] Constitutional Framework, para. 1.5 [Dossier No. 156].

[544] *Ibid.*, preamble; see also *ibid.*, Chapter 2 (a).

[545] *Ibid.*, preamble.

conformity with UNSCR 1244 (1999), or in the exercise of the SRSG's responsibilities under that Resolution"[546]. Further, the Constitutional Framework reiterated that the SRSG was empowered to oversee "the Provisional Institutions of Self-Government, its officials and its agencies" and to take "appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework"[547]. In his report to the Security Council after promulgation of the Constitutional Framework, the Secretary-General stated that it contained "broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary"[548]. Several members of the Council then expressed support for the Constitutional Framework and the role of the SRSG[549].

9.23. As such, it would be expected that in implementing resolution 1244, the SRSG would declare null and void acts by the PISG, including the Kosovo Assembly, that were regarded as inconsistent with resolution 1244, in particular during the interim period but also with respect to transition to a final status. Any mission deployed under the direction of the Secretary-General is expected faithfully to execute the tasks assigned to it, in close consultation with United Nations officials in New York if important issues of interpretation arise. As such, the SRSG would have been expected to annul the Declaration of Independence of 17 February 2008 if it had been regarded as breaching resolution 1244.

9.24. On several occasions, the SRSG did declare as having no legal effect acts by the PISG that he regarded as inconsistent with resolution 1244[550]. Moreover, prior to the

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[546] *Ibid.*, para. 8.1.

[547] Constitutional Framework, Chapter 12 [Dossier No. 156].

[548] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2001/565, 7 June 2001 [Dossier No. 49].

[549] For example, speaking on behalf of the European Union, Sweden endorsed the Constitutional Framework as "a landmark step in the implementation of resolution 1244 ..." (Security Council, provisional verbatim record, fifty-sixth year, 4335th meeting, 22 June 2001, S/PV.4335, p. 21 [Dossier No. 99]). Similarly, a Security Council mission to Kosovo commended the SRSG's action, noting that the Constitutional Framework was "an important step in the implementation of resolution 1244" (Report of the Security Council Mission on the implementation of Security Council resolution 1244 (1999), S/2001/600, 19 June 2001, para. 30 [Dossier No. 50]).

[550] See B. Knoll, "Kosovo's Endgame and its Wider Implications in Public International Law", *Finnish Yearbook of International Law*, vol. 20, 2009 (forthcoming) ("In practice, it has not been uncommon for [the SRSG] to intervene in the legislative process of the PISG and refuse to promulgate laws that, upon advice from UN Headquarters in New York, were deemed to be in violation of the Constitutional

launching of the Ahtisaari process, the SRSG took such action with respect to resolutions by the Kosovo Assembly that he regarded as inconsistent with resolution 1244 because they called for or implied Kosovo's independence. Thus, on 22 May 2002, the SRSG expressed concerns to the Assembly relating to a proposed resolution objecting a FRY/Macedonia border agreement that purported to protect "the territorial integrity of Kosovo"[551]. When on 23 May, the Assembly nevertheless adopted the resolution, the SRSG immediately declared the resolution null and void because in his view it exceeded the powers of the Assembly under resolution 1244.

9.25. Similarly, in November 2002, the SRSG again became aware that the Kosovo Assembly had drafted a resolution rejecting language contained in a draft Serbia and Montenegro Constitution, which indicated that Kosovo was a part of Serbia[552]. When, on 7 November, the Kosovo Assembly nevertheless adopted the resolution[553], the SRSG declared that this unilateral statement "has no legal effect"[554]. Clearly, at this point in the interim period, the SRSG viewed acts oriented toward Kosovo independence as premature under and therefore inconsistent with resolution 1244, and that a further step by the Security Council, such as launching what would become the Ahtisaari final status process, must first occur.

9.26. In February 2003, a draft "Declaration on Kosovo Independence" was prepared within the Kosovo Assembly[555], but intervention by the SRSG precluded further action[556].

Framework and thus Resolution 1244. Powers of intervention were also exercised through executive decisions to set aside inter-ministerial agreements with other states as well as decisions of municipalities and decisions of the local executive taken within the scope of their competence. ... Furthermore, the SRSG has also nullified 'statements' and 'resolutions' of the Kosovo Assembly – political pronunciations which would not have had any direct legal consequences within Kosovo's legal order – which he considered to have been passed *ultra vires*.")

[551] Letter dated 22 May 2002 from the Special Representative of the Secretary-General to the President of the Assembly of Kosovo [Dossier No. 184].

[552] Letter dated 6 November 2002 from the Special Representative of the Secretary-General to the President of the Assembly of Kosovo [Dossier No. 185].

[553] Resolution of the Assembly of Kosovo, 7 November 2002 [Dossier No. 186].

[554] Pronouncement by the Special Representative of the Secretary-General, 7 November 2002 [Dossier No. 187].

[555] Declaration on Kosova – A Sovereign and Independent State, draft declaration by the Assembly of Kosova, 3 February 2003 [Dossier No. 188].

[556] Letter dated 7 February 2003 from the Principal Deputy Special Representative of the Secretary-General to the President of the Assembly of Kosovo [Dossier No. 189]. Leaders of the Assembly decided to keep the matter under review (Common Declaration, Kosovo Assembly, 13 February 2003 [Dossier No. 190]).

Likewise, in November 2005, the Kosovo Assembly contemplated a declaration of independence, but again the SRSG intervened and succeeded in having the matter held back, indicating to the Assembly that the resolution would have been contrary to resolution 1244[557]. At the same time, the SRSG found acceptable a modified version of the resolution – entitled "Resolution on Reconfirmation of the Political Will of Kosova People for Kosova an Independent and Sovereign State"[558] – because it took the form of guidelines for the Kosovo negotiating team that would participate in the Ahtisaari final status talks[559]. This shows already the beginnings of a shift in the SRSG's understanding of what types of action by the Kosovo Assembly were viewed as consistent with the political process contemplated by resolution 1244.

9.27. By contrast with these earlier incidents, after completion of the Ahtisaari process in 2007, which found that Kosovo's independence was the only feasible option, and that maintaining the *status quo* was impossible, the SRSG issued no statement of any kind setting aside or declaring null and void, or of no legal effect, the Declaration of Independence of 17 February 2008. The SRSG was certainly aware that the Declaration had been voted upon and signed by the democratically elected representatives of Kosovo since he immediately informed and sought guidance from Secretary-General[560]. Serbia immediately asked the Secretary-General to take steps to have the declaration set aside since it allegedly contravened resolution 1244. Specifically, Serbia requested:

> "the Secretary-General, Mr. Ban Ki-Moon, to issue, in pursuance of the previous decisions of the Security Council, including resolution 1244 (1999), a clear and unequivocal instruction to his Special Representative for Kosovo, Joachim Rücker, to use his powers within the shortest possible period of time and declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void. We also request that Special Representative Rücker dissolve the Kosovo Assembly, because it declared independence contrary to Security Council resolution 1244 (1999).

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[557] See UNMIK Press Briefing, 16 November 2005, pp. 4-5.

[558] Kosovo Assembly, Resolution "On Reconfirmation of Political Will of Kosova People for Kosova an Independent and Sovereign State", 17 November 2005 [Dossier No. 200].

[559] Special Representative of the Secretary-General's Statement on the resolution passed by the Assembly of Kosovo, UNMIK Press Release UNMIK/PR/1445, 17 November 2005 [Dossier No. 199].

[560] See Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839, p. 2 [Dossier No. 119].

> The Special Representative has binding powers, and they have been used before. I request that he use them again."[561]

Yet, despite this request from Serbia, at no time did the Secretary-General take any steps to instruct the SRSG to set aside or declare null and void, or of no legal effect, the February 2008 Declaration of Independence. Instead, the Secretary-General noted in the Security Council that "recent developments are likely to have significant operational implications for UNMIK," and urged all parties to cooperate to ensure peace and stability in the region[562]. Nor did the Security Council, either by resolution or through a statement of its President, take any steps to instruct the Secretary-General or his representative to set aside the Declaration.

9.28. In sum, the issuance of the Declaration of Independence was fully consistent with the political process that was contemplated by resolution 1244 (1999), launched in 2005 with the appointment of President Ahtisaari, and concluded in 2007 with President Ahtisaari's determination that further negotiations were fruitless and the only viable option was independence for Kosovo. Further, given that the declaration was not even an act of the PISG but, rather, a constituent act of the people of Kosovo expressed through their democratically elected representatives, the Declaration was not even capable of violating resolution 1244. Finally, the fact that the SRSG did not take any action to declare the Declaration as null and void, or otherwise inconsistent with resolution 1244 – especially in light of prior occasions where acts of the Kosovo Assembly had been set aside by the SRSG and in light of the SRSG's duty to faithfully execute his mandate under resolution 1244 – demonstrates that the Declaration did not contravene resolution 1244[563].

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[561] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839, p. 5 [Dossier No. 119].

[562] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, 18 February 2008, S/PV.5839, p. 3 [Dossier No. 119].

[563] See, e.g., W. Benedek, *op. cit.* (fn. 514), p. 403 ("The Special Representative of the Secretary-General did not use his powers to declare the Declaration of Independence null and void, which can only be interpreted as acquiescence in or tacit consent given to the declaration. Again, legally relevant practice has to be taken into account in a current interpretation of international instruments."); B. Knoll, *op. cit.* (fn. 550) ("Since the only authority that could have declared, within Kosovo's normative order, the Declaration null and void remained silent on the issue—despite the formal request of Serbia to the UN Secretary-General—, its omission of annulment can be interpreted as tacit consent to or, at a minimum, acquiescence of, the course of action taken by Kosovo's legislature. It may therefore be presumed that the Declaration was passed in line with Resolution 1244.")

Rather, the implication and effect of the SRSG's not acting leads to the opposite conclusion: the Declaration of Independence was not in contravention of resolution 1244.

IV. Resolution 1244's Preambular Reference to "Sovereignty and Territorial Integrity" Cannot Be Construed as an Obligation Not to Declare Independence

9.29. In its arguments against Kosovo's declaration of independence, Serbia has at times noted the tenth preambular paragraph of resolution 1244, which "reaffirmed" the commitment of all United Nations "Member States" to the "sovereignty and territorial integrity" of the "Federal Republic of Yugoslavia", "as set out in the Helsinki Final Act and Annex 2". According to Serbia, this reaffirmation of an existing commitment of Member States to sovereignty and territorial integrity, in some manner imposed a legal obligation upon the Kosovo authorities to refrain from issuing a declaration of independence. For various reasons, Serbia is wrong.

9.30. First, aside from the fact that it is a preambular reference to a pre-existing commitment of Member States (without any reference to other persons or entities), the most distinguishing feature of this clause is the qualification "as set out in the Helsinki Final Act and annex 2". Whatever meaning might otherwise be ascribed to a clause of this type in any other Security Council resolution, this particular clause is unique in its incorporation by reference to annex 2 to the resolution (the so-called Ahtisaari-Chernomyrdin principles). The issue of territorial integrity is addressed in annex 2 of the resolution *solely* in the context of a principle that should apply during the period of the "interim political framework", existing prior to the point of a final status[564]. Annex 2 focuses on the conditions that must exist during the interim period and contains no provisions setting the terms for a final status, including within the one principle in annex 2 (no. 8) that mentions territorial integrity. As such, and unlike resolutions that preceded resolution 1244 and that addressed territorial integrity, the preambular reference in resolution 1244 marked a clear shift in the position of the Security Council, one that now

[564] Security Council resolution 1244 (1999), Annex 2, Principle 8 [Dossier No. 34]. The one reference in resolution 1244, Annex 1 (in the sixth principle) to "territorial integrity" is also focused exclusively on the interim period. By contrast, in resolutions relating to Georgia adopted within the same time frame as resolution 1244 (1999), the Security Council adopted language that clearly associated with a "comprehensive" political settlement "full respect for the sovereignty and territorial integrity of Georgia within its internationally recognized borders" (Security Council resolution 1225 (1999), para. 3; Security Council resolution 1255 (1999), para. 5).

contemplated the possibility that a final status for Kosovo would not entail maintenance of FRY territorial borders. As such, it cannot be said that the preambular reference precludes or prohibits the issuance of a declaration of independence. Similarly, the reference's referral to the Helsinki Final Act[565] does not establish a prohibition on the issuance of a declaration of independence. That non-binding instrument does not identify a commitment, legal or political, to permanent, unchanging territorial boundaries[566].

9.31. Second, viewing this reference as a blanket protection of FRY (or Serbian) "sovereignty and territorial integrity" is especially unwarranted, given that resolution 1244 (1999) represented an unprecedented intrusion into the FRY's sovereignty and territorial integrity. In resolution 1244, the Security Council decided to shape actively the system of political governance within the FRY, denying all FRY government authority over the people of Kosovo and creating the conditions for establishing new government authorities there. All the references in resolution 1244 to the need for Kosovo self-governance and the extensive framework built toward that end, envisaged either very significant constitutional change in the FRY or Kosovo independence. To assist in creating these conditions, resolution 1244 allowed for the deployment of both military forces (KFOR) and civilian personnel (UNMIK) into Kosovo, thus establishing a highly intrusive regime of international administration. This included the power not just to administer Kosovo internally, but to represent Kosovo externally, such as by UNMIK's conclusion during the interim period of international agreements with Kosovo's neighbouring States in the field of economic cooperation, as well as agreements with third parties on repatriation of Kosovars[567]. Immediately after the adoption of resolution 1244, many States and international organizations opened liaison offices in Pristina. In doing so, they did not seek FRY consent. Further, UNMIK Regulation No. 2000/42 granted those offices a status functionally identical to that of embassies under the Vienna Convention on Diplomatic Relations. Taken as a whole, resolution 1244 cannot be seen as directed at protecting the sovereignty and territorial integrity of the FRY.

[565] Dossier No. 217.

[566] See para. 8.11 above.

[567] Constitutional Framework, Chapter 8, para. 8.1, confirmed this external role by providing that the SRSG remains exclusively responsible for "[c]oncluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999)" [Dossier No. 156].

9.32. Third, any reference to sovereignty and territorial integrity of the Federal Republic of Yugoslavia in 1999 is simply not speaking to the issue of the Declaration of Independence by Kosovo from Serbia in 2008, for the preambular language is addressing a State that underwent significant changes over the course of a decade. As the Court is well aware, the name of "Federal Republic of Yugoslavia" was changed in 2003 to "Serbia and Montenegro". When Serbia and Montenegro broke apart in 2006, the name of the predecessor State was changed to "Republic of Serbia". More importantly, the territory in 1999 of the State named the "Federal Republic of Yugoslavia" was no longer the same territory of any State as of 2008 and, above all, its Federal nature, which had been so important, had disappeared with the 2006 secession of Montenegro from Serbia. While Montenegro may have agreed, for purposes of international rights and obligations, that Serbia would be the continuation of Serbia and Montenegro, that alone is not sufficient for imputing any commitment in 1999 of Member States (or of the Security Council) to very different circumstances of February 2008. Even if the preambular language of resolution 1244 were construed (incorrectly) as a binding commitment to maintain in 1999 a single State consisting of Serbia, Montenegro, and Kosovo, that is not the same as a commitment in 2008 to maintain a single State consisting solely of Serbia and Kosovo. Indeed, an expression of support for a territorial unit that would comprise Serbia, Montenegro, and Kosovo as single State, with the political authorities of each able to participate in, and balance each other over, the governance of the FRY, is quite different from supporting a territorial unit in which Montenegro and the federal structure are absent.

9.33. The preambular language itself supports the proposition above, given its reference to annex 2 to the resolution. That annex calls for the establishment during the interim period of conditions "under which the people of Kosovo can enjoy *substantial autonomy within the Federal Republic of Yugoslavia*"[568]. The resolution did not call for substantial autonomy for Kosovo *within Serbia*, thereby confirming that the resolution was focused upon the status of the FRY as a whole and Kosovo's position as a federal unit within the FRY. Given that the FRY radically changed in nature, it cannot be assumed that commitments existing in 1999 stayed the same. Further, these changed circumstances arose not just with respect to the FRY, but also from activities pursued by the United

[568] Security Council resolution 1244 (1999), annex 2, para. 5 (emphasis added) [Dossier No. 34]. The same language appears in paragraph 10 of the resolution, also solely in the context of the interim period.

Nations itself in Kosovo, which saw in the period after resolution 1244 a rapid movement toward Kosovo self-government, without any Serbian involvement[569]. There is simply no basis for assuming that any position taken in 1999 with respect to the FRY remained the same in 2008 with respect to Serbia, given the fundamentally changed circumstances that arose from the FRY's fragmentation and the extensive UN-sponsored creation of institutions of self-governance in Kosovo.

9.34. Finally, the context in which references of this sort arose in the Balkans during the 1990s should be kept in mind, for they do not support the categorical position now being pressed upon this Court by Serbia. For example, the 1992 Brioni Agreement contained a similar reference to "territorial integrity" and to the Helsinki Final Act as guiding the negotiations over the future status of Slovenia and Croatia. Yet the reference there was not viewed as a basis for finding the declarations of Slovenia and Croatia contrary to international law; indeed, those Republics ultimately emerged as States notwithstanding the SFRY's resistance. Specifically, in the context of negotiations on whether those declarations should or should not remain suspended, the Brioni Agreement stated that

> "negotiations should begin urgently, no later than August 1st 1991, on all aspects of the future of Yugoslavia without preconditions and on the basis of the principles of the Helsinki Final Act and the Paris Charter for a new Europe (in particular respect for Human Rights, including the rights of peoples self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including these relating to territorial integrity of States"[570].

Notably, these references to the Helsinki Final Act, the Paris Charter, and "territorial integrity" occur at a time when Slovenia and Croatia have already declared independence; yet there is no indication in the Brioni Agreement, or in any of the discussions between States at Brioni, that these international instruments or principles forbade such declarations of independence, let alone any requirement that such declarations be terminated. Rather,

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[569] See, e.g., W. Benedek, *op. cit.* (fn. 514), p. 403 ("the UN-led process of determination of the future status of Kosovo has resulted in a clear recommendation: 'supervised independence.' Therefore, to go back to the original text of Resolution 1244 to prove that Kosovo could only realize its right to self-determination in the form of internal self-determination as part of Serbia, neglects the entire status process, conducted under the aegis of the United Nations and the Contact Group. This is not to say that UNMIK deliberately prepared Kosovo for separation from Serbia, but rather that fulfilling its mandate, including legal and institutional reforms as well as provided for a democratic process, eventually had this effect.")

[570] Brioni Agreement, 7 July 1991, in S. Trifunovska, *op. cit.* (fn. 471), p. 312.

the Brioni Agreement calls for negotiations to move forward *based on those principles while allowing the two declarations of independence to remain in force*, albeit suspended for a period of time.

9.35. As such, even at this early stage in the break-up of the SFRY, references to principles existing in the Helsinki Final Act or relating to "territorial integrity" are not regarded by any of the relevant actors as necessarily precluding a declaration of independence. Instead, such principles were regarded as providing guideposts for negotiations that might lead to independence or to a reconfigured SFRY, ones that emphasized not just the importance of the stability of existing borders, but also the importance of respecting human rights and other factors.

9.36. In sum, the tenth preambular paragraph of resolution 1244 – like all the other provisions of the resolution – simply does not support the proposition that the Security Council had prohibited a declaration of independence. Rather, by resolution 1244 the Security Council established an interim administration of Kosovo for the duration of which territorial borders would be retained, but also created the means for a political process that would result in a final status for Kosovo that contemplated the possibility of a new and independent State of Kosovo. That final status process was entrusted by the Security Council to the Secretary-General and his Special Envoy, who ultimately concluded in 2007 that the status quo in Kosovo was no longer sustainable and that the only viable option was for Kosovo to be an independent State. The democratically elected representatives of the Kosovo people thereafter declared independence, an act that was fully consistent with the process that unfolded based on resolution 1244 and the further decisions reached by the Security Council, the Secretary-General and his special representatives. That declaration was not declared null or void, or without legal effect, by the authority charged by the Security Council and the Secretary-General with monitoring the implementation of resolution 1244 in Kosovo, the SRSG. The SRSG had intervened prior to the completion of the Ahtisaari process to set aside acts of the Assembly that he considered inconsistent with resolution 1244. In the aftermath of the Declaration of Independence of 17 February 2008, however, he did not do so. For all these reasons, the Declaration of Independence of 17 February 2008 cannot be regarded as having contravened resolution 1244.

PART V

SUMMARY AND CONCLUSION

CHAPTER X

SUMMARY

10.01. This concluding Chapter begins by drawing together key elements that emerge from earlier chapters that help to illuminate the context in which the representatives of the people of Kosovo signed the Declaration of Independence on 17 February 2008 (**Section I**). These elements include the following: the final status of Kosovo was the last major issue related to the non-consensual dissolution of the Socialist Federal Republic of Yugoslavia (SFRY); Kosovo's position within the former Yugoslavia was for all practical purposes the same as that of the republics of the SFRY, until it was unlawfully changed in 1989; by the end of 2007, the final status negotiations had reached the end of the road and prolongation would have been highly destabilising, in Kosovo and in the region; the aspiration of the people of Kosovo to independence was strong and of long-standing, and was reinforced by the events of 1998-1999; today, Kosovo has been recognized as a sovereign and independent State by a large section of the international community; the commitments in the Declaration of Independence are being implemented and honoured; and the future of Kosovo and other States in the region lies in Europe.

10.02. The Chapter then draws together the conclusions of the legal arguments set out in Chapters VII, VIII and IX (**Section II**).

I. Key elements

Final Status for Kosovo was the Last Part of the Dissolution of the SFRY

10.03. Kosovo's Declaration of Independence needs to be seen in the context of the non-consensual dissolution of the SFRY, which began in the early 1990s. The final status of Kosovo was rightly described by the Troika as "the last major issue related to Yugoslavia's collapse"[571]. Serbia's destruction of Kosovo's autonomy in 1989, as part of a

[571] Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 December 2007, Annex, para. 3 [Dossier No. 209]. The Contact Group had earlier spoken of "the last major issue related to the break-up of Yugoslavia" (Contact Group Statement, New York, 20 September 2006 (available on <http://www.unosek.org/docref/2006-09-20_-_CG _Ministerial_Statement_

concerted effort to dominate the SFRY, was an important element in the chain of events leading to Yugoslavia's collapse. The break-up of the Federation, which had consisted of eight federal units, fundamentally undermined the basis for Kosovo's autonomy within Serbia. Before the break-up, Kosovo had had a dual nature: it was a constituent unit of the Federation (in all but name on an equal footing with the six republics), and it was an autonomous province within Serbia. With the disintegration of the SFRY, the constitutional safeguards could not be re-established. The unacceptability of any solution other than independence was confirmed by the brutal way in which Serbia destroyed Kosovo's autonomy in 1989, by the events of the 1990s, and by the terms of the 2006 Constitution of the Republic of Serbia.

Kosovo's constitutional position under the SFRY Constitution of 1974, until it was removed illegally, was in all but name identical to that of the six republics

10.04. As explained in Chapter III, under the 1974 Constitution of the SFRY, Kosovo's status as an autonomous province accorded to it the same rights as the six republics. As a constituent unit of the SFRY, like the republics, Kosovo was entitled to appoint a member to the Federal Presidency, who, based on a rotation system, was able to assume the office of Federal President. Kosovo was directly represented in the Federal Assembly, and protected by a right of recourse to the Federal Constitutional Court when disputes arose with the other Republics, including Serbia. There was no legal reason (though in the early 1990s some may have considered there were reasons of policy) to treat Kosovo any differently from other constituent units of the Federation.

The people of Kosovo have long made clear their overwhelming desire for independence

10.05. The desire of the people of Kosovo for an independent State of their own goes back for many years[572]. This desire was clear to all the participants in the 1999 Rambouillet Conference, which is why the "will of the people" clause appears in the

New _York.pdf>). And President Ahtisaari, in his report, referred to "this last episode in the dissolution of the former Yugoslavia" (Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, Annex, para. 16 [Dossier No. 203]).

[572] As was acknowledged by the President of Serbia in the Security Council on 23 March 2009 (S/PV.6097, p. 25).

Rambouillet accords as the key element in resolving Kosovo's final status. It was clear immediately after the 1999 conflict when resolution 1244 (1999) expressly referred to the Rambouillet accords, was clear throughout the period of UNMIK administration, and was fully discussed and considered throughout the final status negotiations. Key participants in those negotiations, such as the Contact Group, repeatedly said that the final status must be acceptable to the people of Kosovo.

The crimes against humanity and human right abuses suffered by the people of Kosovo in 1998/1999 reinforced their demands for independence, and their unwillingness to return to Serbia

10.06. By 1999, as a result of widespread and large-scale crimes against humanity and war crimes, over half of the Kosovo Albanians had been driven from their homes or fled the onslaught from Serbia. They had suffered human rights abuses in 1912, in the 1920s and 1930s, between 1945 and 1966, and even worse throughout the 1980s and 1990s, culminating in the 1998-1999 ethnic cleansing, and the massive refugee and IDP crisis. All this suffering was the result of a deliberate policy of the authorities of Serbia, as was confirmed by the Trial Chamber in its 26 February 2009 judgment in *Milutinović et al.*

Final status negotiations had reached an impasse by the end of 2007; prolongation would have been highly destabilising for Kosovo and the region

10.07. The Minister for Foreign Affairs of the Republic of Serbia, Mr. Vuk Jeremić, has repeatedly and publicly suggested that the outcome of the present advisory proceedings should be a resumption of final status negotiations between Kosovo and Serbia[573]. Yet it is wholly unrealistic to suggest that final status negotiations should be resumed. By December 2007, at the latest, these negotiations had reached a dead-end, and it was

[573] By way of example, the following is taken from an interview given by Mr. Jeremić to *The Economist* of 16 January 2009: "We believe that, after the court states its opinion in a manner that we expect, it will be clear that the path which institutions in Priština chose on February 17th cannot bring a sustainable solution. With the verdict from the International Court of Justice, which stipulates that the unilateral proclamation of independence was in disproportion to the international law, we expect that Kosovo will not be recognized by any other country and that it will be relatively simple to prevent that the so-called state of Kosovo joining any international institutions. Kosovo will find itself in a semi-defined state, "not here or there", and by that it will be forced to return to the negotiation table with Belgrade, in order to find a compromise, which both Belgrade and Priština will accept and which will be confirmed at the UN Security Council."

clear that their continuation would serve no purpose. This was the considered position of those most closely involved in the negotiations, including Special Envoy Ahtisaari[574], the Troika[575], and the United Nations Secretary-General[576]. It was also the considered view of many in the international community that to prolong the uncertainty caused by the protracted negotiations would be destabilising within Kosovo, given the expectations of the people of Kosovo, and within the region[577]. There can be no obligation to negotiate in such circumstances[578]. More than one year later, there can be no question of resuming final status negotiations. This would be pointless and destabilizing, and doomed to failure. The Declaration of Independence of 17 February 2008, the adoption, entry into force and implementation of the Constitution of the Republic of Kosovo, and above all the will of the people of Kosovo make clear that Kosovo's independence is irreversible.

10.08. In any event, in these proceedings for an advisory opinion, it would not be appropriate for the Court to call upon the two States to resume final status negotiations. In fact, were the issue before the Court to be seen as essentially a bilateral dispute over which the Court does not have contentious jurisdiction, then the Court should decline to address the matter through these advisory proceedings.

10.09. The Republic of Kosovo hereby reaffirms its wish for good neighbourly relations with the Republic of Serbia. It repeats that it would welcome talks with the Republic of Serbia on practical issues of mutual concern, such as those foreseen in the Ahtisaari Plan. Such talks would be normal between neighbouring sovereign and independent States but must be held on an equal basis, between two sovereign States. On the other hand, the Republic of Kosovo is not willing to enter into negotiations that could bring into question its status as a sovereign and independent State. Given the past history, status issues cannot be papered over by formulae such as "sovereignty umbrella" or "status neutrality".

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[574] See para. 5.22 above.

[575] See para. 5.33 above.

[576] See para. 5.34 above.

[577] See paras. 5.11-5.14 above.

[578] It will, for example, be recalled that the Badinter Arbitration Commission did not suggest, despite Serbia's insistence, that Slovenia, Croatia, Bosnia and Herzegovina, or Macedonia should negotiate their independence with Serbia.

Kosovo has been recognized as a sovereign and independent State by many States, including almost all States in the region

10.10. Since 17 February 2008, the day on which the representatives of the people of Kosovo voted upon and signed the Declaration of Independence, many States have recognized Kosovo as a sovereign and independent State. Indeed, most European States have recognized the Republic of Kosovo, including all of its immediate neighbours, with the exception of Serbia. Within Europe, it is widely agreed that Kosovo's status as an sovereign and independent State is an important factor for peace and security in the region.

10.11. Since the Declaration of Independence, many steps have been taken by Kosovo to implement the commitments made to the international community regarding protections for communities, rule of law, respect for international agreements, and cooperation with international institutions. Importantly, these steps include the adoption and entry into force of the Constitution of the Republic of Kosovo, with its strong protections of human rights and the rights of communities and their members.

10.12. Kosovo has received much help from the international community, including from many States that have not yet taken the step of recognising it. They thus make important contributions to Kosovo's future, and clearly do not feel inhibited by the current proceedings in this Court.

The situation of Kosovo entailed special characteristics that are unlikely to be replicated in other cases

10.13. The emergence into statehood of the Republic of Kosovo occurred under circumstances that are most unlikely to be replicated elsewhere. Kosovo is best seen not as an example of secession, but as the final step in the process of a disintegrating Federation (the former SFRY). Other former units of that Federation have become independent States, and their independence is universally accepted. Within that Federation, Kosovo had a dual status: it was a constituent unit of the Federation and a province within Serbia. Kosovo's status within the Federation gave Kosovo important protections against unilateral actions by Serbia. Those protections, however, could not survive the dissolution of

the SFRY, as was amply demonstrated throughout the 1990s, culminating in Serbia's devastating crimes against the Kosovo Albanian population in 1998 and 1999, 90 percent of whom were forced from or fled their homes. The crimes against humanity and massive human rights violations of the 1998-1999 resulted ultimately in the intervention of the international community. Under Security Council resolution 1244 (1999), Serbia was excluded from any role in the governance of Kosovo, replaced instead by UNMIK and institutions established and nurtured by UNMIK beginning in 1999. The political process on final status was led by the United Nations Secretary-General and his Special Envoy. The process was based upon the will of the people. So it is understandable why any return of Kosovo to Serbia would be wholly unacceptable.

The common future for the States of the Western Balkans lies in Europe

10.14. In its Presidential statement of 26 November 2008, the Security Council welcomed "the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans, thereby making a decisive contribution to regional peace and stability"[579].

10.15. The common future for Kosovo and Serbia lies in eventual membership in the European Union. As described in Chapter II, the European Commission is preparing a study to examine and evaluate how Kosovo can progress towards integration in the European Union. In the meantime, the development of good-neighbourly relations, as is normal between neighbouring States[580], should proceed hand-in-hand with progress towards full integration within European institutions, including the EU and the Council of Europe. This is a positive prospect, one looking toward the future, not rooted in the past.

[579] Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008 [Dossier No. 91].

[580] Kosovo's proposal for a Treaty of Friendship and Cooperation between Kosovo and Serbia was described in Chapter V, para. 5.18, above.

II. Summary of Kosovo's Legal Arguments

The question posed to the Court is narrow in scope, but does not indicate how an answer would assist the General Assembly in its work, and consequently may not be proper

10.16. The question that has been put to the Court is narrow in scope, with a focus on the issuance of a particular statement – a declaration of independence – by particular persons on a particular day. Nevertheless, despite its brevity and specificity, there are certain problems with the question.

10.17. First, the process by which the question was formulated, considered, and then adopted provides no indication as to how the Court's opinion will assist the General Assembly in its work. Rather, the purpose of the question appears to be part of a strategy by Serbia to influence States in their political decision whether to recognize the Republic of Kosovo. Yet in the course of exercising its advisory jurisdiction, the Court is not charged with providing general legal advice on any question of international law to whoever might solicit it; the Court is charged with providing advice to the political organs of the United Nations and the specialized agencies on matters within their competence. To the extent that answering this question is intended as a vehicle for giving legal advice to Serbia, or to resolve a dispute between Serbia and Kosovo, or even to provide legal advice to States considering whether to recognize Kosovo, that function is not properly to be exercised in advisory proceedings.

The question asked to the Court is argumentative and prejudicial: it needs to be approached in an objective manner

10.18. Second, because the question was sponsored by a single State that declined to entertain any modifications, the question – brief as it is – contains prejudicial and argumentative assumptions. The question is argumentative by characterizing the Declaration of Independence as "unilateral", a term that at best is superfluous and at worst intended as a synonym for "illegal". In fact, the Declaration was the end product of an extensive multilateral process involving the Security Council, the Secretary-General, their representatives, a massive deployment of multinational personnel to Kosovo for almost a

decade from the United Nations, NATO, and other organizations, and painstaking efforts by numerous States, groups of States and international organizations, including the European Union, the Contact Group, and the Troika.

10.19. Further, the question incorrectly suggests that the Declaration was adopted by the "Provisional Institutions of Self-Government of Kosovo", when it was an act voted upon and signed by the democratically elected representatives of the people of Kosovo, acting in a manner wholly different from the PISG.

10.20. Finally, the question appears unjustifiably to assume that there are rules of international law governing the issuance of declarations of independence, when in fact general international law does not regulate such declarations.

There is no rule of international law prohibiting the issuance of a declaration of independence

10.21. International law contains no prohibition on the issuance of declarations of independence. Rather, the issuance of a declaration of independence is understood as a *factual* event that, in combination with other events and factors over time, may or may not result in the emergence of a new State. Only at that point do those who formed the new State become exposed to rights and obligations cognizable under international law. Numerous declarations of independence have been issued for over two hundred years, often in circumstances where a group is seeking to separate from a State without its consent, without those declarations being regarded as violations of international law.

10.22. State practice in the context of the Balkans during the 1990s confirms that international law does not prohibit the issuance of a declaration of independence, even in the face of a disapproving central government. Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia all declared independence in the face of opposition by the SFRY, and yet other States (and this Court, with respect to Bosnia and Herzegovina) did not view those declarations as contrary to international law. Rather, over time and in conjunction with other factors, those States were ultimately recognized and admitted to membership in international organizations.

10.23. Consequently, the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law and in that sense was "in accordance" with international law. Given that international law contains no prohibition on the issuance of a declaration of independence, the Court need not reach the issue of whether the declaration of independence by the people of Kosovo reflected an exercise of the internationally-protected right of self-determination (though it clearly did), for there is no need to determine whether international law has authorized Kosovo to seek independence.

The Declaration did not contravene Security Council resolution 1244 (1999), which envisaged a political process that included the possibility of Kosovo's independence if it was the "will of the people"

10.24. The Declaration of Independence of 17 February 2008 also cannot be seen as having contravened Security Council resolution 1244 (1999). Rather than prohibit the issuance of a declaration of independence, resolution 1244 established a framework that fully contemplated the possibility of Kosovo's emergence as an independent State. The resolution accorded very broad powers to the United Nations Secretary-General and his Special Representative (SRSG) to establish a United Nations interim administration in Kosovo, so as to foster Kosovo self-governance without FRY or Serbian interference. Moreover, the resolution accorded to the Secretary-General and his representatives broad power to pursue political negotiations toward a final settlement (and to determine the pace and duration of those negotiations), without in any fashion predetermining the outcome of that settlement or requiring that the settlement be approved by the FRY, by Serbia, or by the Security Council itself.

10.25. On the issue of Kosovo's final status, the resolution called for "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords". Those accords stated that the final settlement for Kosovo should be achieved "on the basis of the will of the people", a reference that clearly did not require that Kosovo remains a part of the FRY or Serbia. Yet more importantly for the work of this Court, the reference to Rambouillet demonstrates that the final political settlement was to be driven, in the first instance, by the "will of the people". While a further Security Council decision was no doubt viewed as politically desirable, resolution 1244 did not

require any such decision. Indeed, the process and substance identified in the resolution for guiding this process were consciously open-ended and identified as "political" in nature.

The political process envisaged by resolution 1244 (1999) ended in 2007 when the authorized representatives of the United Nations determined that independence was the only viable option

10.26. In 2005, the Secretary-General, after consulting the Security Council, launched the political process for the determination of Kosovo's final status. The outcome of that process was a determination by the United Nations Special Envoy appointed by the Secretary-General, President Ahtisaari, that the "potential to produce any mutually agreeable outcome on Kosovo's status is exhausted"[581] and that "the only viable option for Kosovo is independence"[582]. Thereafter, the democratically elected representatives of Kosovo declared independence on behalf of the people of Kosovo. Given the acceptance by the Secretary-General that further negotiations would be fruitless and that independence was the only viable option, it cannot be said that a declaration of independence by the democratically elected representatives of Kosovo contravened resolution 1244 (1999). Rather, the declaration was an obvious and necessary next step in the process of achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very persons (the Secretary-General and his Special Envoy) charged by the Security Council with leading the final status process.

The Declaration was not declared unlawful by the SRSG, the United Nations official authorized to monitor implementation of resolution 1244 (1999)

10.27. Under the mandate assigned to the SRSG by resolution 1244 (1999), as well as the terms of the Constitutional Framework promulgated by the SRSG, it would be expected that the SRSG would declare null and void any acts of the Kosovo Assembly that were regarded as inconsistent with resolution 1244 (1999). Any United Nations mission

[581] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].

[582] *Ibid.*, para. 5.

deployed under the direction of the Secretary-General is expected faithfully to execute the tasks assigned to it, in close consultation with United Nations officials in New York if important issues of interpreting that mandate arise. As such, the SRSG would have been expected to annul a declaration of independence if it was regarded as being contrary to resolution 1244 (1999), just as he had taken steps at earlier stages against actions of that nature prior to the completion of the Ahtisaari process. The fact that the SRSG did not do so demonstrates that the Declaration did not contravene resolution 1244 (1999).

Resolution 1244's preambular reference to "sovereignty and territorial integrity" cannot be construed as an obligation not to declare independence

10.28. Though Serbia at times points to resolution 1244's preambular reference to "sovereignty and territorial integrity" as a basis for finding a violation of international law, that non-binding clause on its face and in context cannot be construed as prohibiting the issuance of a declaration of independence by the democratically elected representatives of Kosovo. While there are several reasons why this is the case, the most distinguishing feature of that clause is the qualification "as set out in the Helsinki Final Act and annex 2". Whatever meaning might otherwise be ascribed to a clause of this type in any other Security Council resolution, this particular clause is unique in its incorporation by reference of Annex 2, which addresses "territorial integrity" solely in the context of a principle that should apply during the period of the "interim political framework", not with respect to Kosovo's final status. Similarly, the reference in annex 2 and in paragraph 10 of the resolution itself to Kosovo being "within the Federal Republic of Yugoslavia" was expressly in the context of the interim period.

10.29. In short, given the terms of resolution 1244 (1999), the process that unfolded based on those terms, and the reaction of the SRSG after the issuance of Kosovo's declaration of independence, there is no basis for concluding that the February 2008 declaration contravened resolution 1244 (1999) or any other any applicable rule of international law.

CONCLUSION

For the reasons set out in this Written Contribution, the Republic of Kosovo respectfully requests the Court, in the event that it deems it appropriate to respond to the request for an advisory opinion contained in General Assembly resolution 63/3, to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

Skender Hyseni

Minister of Foreign Affairs of the Republic of Kosovo
Representative of the Republic of Kosovo before the
International Court of Justice

Pristina, 17 April 2009

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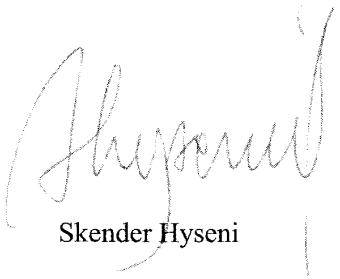
ANNEXES

CERTIFICATION

I hereby certify that the documents annexed to this Written Contribution are true copies of and conform to the original documents and that the English and French translations provided by the Republic of Kosovo are accurate.



Skender Hyseni

Minister of Foreign Affairs of the Republic of Kosovo
Representative of the Republic of Kosovo before the
International Court of Justice

Pristina, 17 April 2009

Annex 1

DECLARATION OF INDEPENDENCE OF KOSOVO

Photographic Reproduction, Albanian Original,
English and French Translations

Deklarata e Pavarësisë së Kosovës

Të mbledhur në mbledhje të jashtëzakonshme më 17 shkurt 2008, në kryeqytetin e Kosovës, në Prishtinë

Duke iu përgjigjur thirrjes së popullit për të ndërtuar një shoqëri që respekton dinjitetin njerëzor dhe afirmon kranarinë dhe sigurinë e qytetarëve të saj;
Të zotuar për t'u përballur me trashëgiminë e dhembshme të së kaluarës së afërt dhe në frymë të pajtimit dhe faljes;
Të përkushtuar ndaj mbrojtjes, promovimit dhe respektimit të drejtësisë të popullit tonë;
Duke riafirmuar dëshirën tonë për të integruar plotësisht në familjen euroatlantike të demokracive;
Duke vërtetuar se Kosova është një rast i veçantë që dal nga shpërbërja jokonsensuale e Jugosllavisë dhe nuk është precedan për çfarëdo situate tjetër;
Duke njohur vitet e konfliktit dhe shkeljet në Kosovë që shpesh kanë qenë të ngjashme me format e tjera të spastrimit etnik në Evropë;
Duke gjetur mirëmbajtës që bota ndërkryer më 1999 duke lejuar në kë të mënyrë qeverisjen e Beogradit mbi Kosovën, dhe duke vendosur Kosovën nën administrimin e përkohshëm të Kombeve të Bashkuara;
Duke gjetur krenarë që Kosova që atëherë ka zhvilluar institucione funksionale, shumëetnike të demokracisë që shpreh in liri shtet vullnetin e qytetarëve tanë;
Duke njohur vitet e negociatave të sponsorizuara ndërkombëtarisht ndërmjet Beogradit dhe Prishtinës mbi çështjen e statusit tonë të ardhshëm politik;
Duke shprehur kegardhje që nuk u arrit asnjë rezultat i pranueshëm për të dyja palët përkundër angazhimit të mirëfilltë të udhëheqjeve tanë;
Duke konfirmuar se rekomandimet e të Dërguarit Special të Kombeve të Bashkuara, Martti Ahtisaari, i ofrojnë Kosovës një kornizë gjithëpërfshirëse për zgjidhjen e saj të ardhshëm dhe janë n
një me standardet më të larta evropiane për të drejtat e njerëzit dhe qeverisjen e mirë;
Duke gjetur se vendosur që të shohim statusin tonë të zgjidhur në mënyrë që të jetë popullit tonë sjellë më ardhmen e nuk duhet të shkaktojë asnjë konflikteve të së kaluarës dhe të realizohet pozitivitet
plotë demokratik i shoqërisë sonë.
Duke ndenjur të gjithë burrat dhe gratë që bëmë sakrifica të mëdha për të ndërtuar një të ardhme më të mirë për Kosovën.

1. Në udhëheqësitë e popullit tonë të zgjedhur në mënyrë demokratike, nëpërmjet kësaj deklarate shpallim Kosovën Shtet të Pavarur dhe Sovran. Kjo shpallje pasqyron vullnetin e popullit tonë dhe është në pajtim
shumë të plotë me rekomandimet e të Dërguarit Special të Kombeve të Bashkuara, Martti Ahtisaari. Propozimin e tij Gjithëpërfshirës për Zgjidhjen e Statusit të Kosovës.
2. Ne e shpallim Kosovën Republikë demokratike laike dhe shumëetnike të udhëhequr nga parimet e mosdiskriminimit dhe mbrojtjes të barabarta sipas ligjit. Ne do të mbrojmë dhe promovojmë të
drejtat e të gjitha komuniteteve në Kosovë dhe do të krijojmë kushtet e nevojshme për pjesëmarrjen e tyre efektive në proceset politike dhe vendimmarrëse.
3. Në pranojmë plotësisht obligimet për Kosovën që përmban Plani i Ahtisaarit. dhe marrëveshja sanksion që ai propozon për të udhëhequr Kosovën në vitet në vijim. Ne do të zbatojmë
plotësisht ato obligime, edhe miratimin prioritar të legjislacionit të përshtatë në Aneksin XII të tij, veçanërisht atë që mbron dhe promovon të drejtat e komuniteteve dhe pjesëmarrje të tyre.
4. Ne do të miratojmë sa më shpejt që të jetë e mundshme një kushtetutë e cila përfshin dispozitat e Planit të Ahtisaarit dhe do të miratohet në
posaçërisht ashtu siç definohen në Konventën Evropiane për të Drejtat e Njeriut. Kushtetuta do të përfshijë të gjitha parimet relevante të Planit të Ahtisaarit dhe do të miratohet në
përmjet një procesi demokratik dhe të hapur.
5. Ne mirëpresim mbështetjen e vazhdueshme të bashkësisë ndërkombëtare për zbatimin të tonë demokratik nëpërmjet të cilit misioni ndërkombëtare të udhëhequr në Kosovë në bazë të Rezolutës 1244 të Këshillit të Sigurimit të Kombeve të Bashkuara (1999). Ne gjithë dhe mirëpresim një praninë ndërkombëtare civile për të mbikëqyrur zbatimin e Planit të Ahtisaarit dhe misionin për sundimin e ligjit të udhëhequr nga Bashkimi Evropian. Ne, po ashtu, fryjmë dhe mirëpresim NATO-n që të mbajë praninë ushtarake dhe të
bazuar përjashtësitë që janë dhënë sipas Rezolutës 1244 të Këshillit të Sigurimit të Kombeve të Bashkuara (1999) dhe Planit të Ahtisaarit. Ne do të bëjmë të gjitha institucionet e Kosovës do të jenë
gjendje të marrin këto përgjegjësi. Ne do të bashkëpunojmë plotësisht me këto misione në Kosovë për të siguruar zbatimin e tyre të suksesshëm.
6. Për arsye të kulturës, historisë dhe historisë ne e quajmë veten si e anëtarësia jonë është në familjen evropiane. Ne do të bëjmë të gjitha hapat e nevojshme për të siguruar anëtarësimin të plotë në Bashkimin Evropian sapo të jetë e mundshme dhe për të përmbushur kriteret e kërkuara për integrimin evropian dhe euroatlantik.
7. Ne e shpreh mirëbesimin e Organizatës së Kombeve të Bashkuara për punën që ka bërë për të na ndihmuar në këtë të dhënë dhe vendosmëri pas luftës, dhe në veçanti misionin e saj aktual në Kosovë. Ne kemi të
të punojmë në mënyrë konstruktive me Organizatën e Kombeve të Bashkuara dërsa ajo e vazhdon misionin e saj në Kosovë.

Kryetari i Kosovës
Fatmir Sejdiu

Kryetari i Kuvendit të Kosovës
Jakup Krasniqi

Kryeministri i Kosovës
Hashim Thaçi

Deputetët e Kuvendit të Kosovës

Deklarata e Pavarësisë së Kosovës

Të mbledhur në mbledhje të jashtëzakonshme më 17 shkurt 2008, në kryeqytetin e Kosovës, në Prishtinë,

Duke iu përgjigjur thirrjes së popullit për të ndërtuar një shoqëri që respekton dinjitetin njerëzor dhe afirmon krenarinë dhe synimet e qytetarëve të saj,

Të zotuar për t'u përballur më trashëgiminë e dhembshme të së kaluarës së afërt në frymë të pajtimit dhe faljes,

Të përkushtuar ndaj mbrojtjes, promovimit dhe respektimit të diversitetit të popullit tonë,

Duke riafirmuar dëshirën tonë për t'u integruar plotësisht në familjen euroatlantike të demokracive,

Duke vërejtur se Kosova është një rast special që del nga shpërbërja jokonsensuale e Jugosllavisë dhe nuk është presedan për cilëndo situatë tjetër,

Duke rikujtuar vitet e konfliktit dhe dhunës në Kosovë që shqetësuan ndërgjegjen e të gjithë popujve të civilizuar,

Mirënjohës që bota intervenoi më 1999 duke hequr në këtë mënyrë qeverisjen e Beogradit mbi Kosovën, dhe vendosur Kosovën nën administrimin e përkohshëm të Kombeve të Bashkuara,

Krenarë që Kosova që atëherë ka zhvilluar institucione funksionale, multietnike të demokracisë që shprehin lirisht vullnetin e qytetarëve tanë,

Duke rikujtuar vitet e negociatave të sponsorizuara ndërkombëtarisht ndërmjet Beogradit dhe Prishtinës mbi çështjen e statusit tonë të ardhshëm politik,

Duke shprehur keqardhje që nuk u arrit asnjë rezultat i pranueshëm për të dyja palët përkundër angazhimit të mirëfilltë të udhëheqësve tanë,

Duke konfirmuar se rekomandimet e të Dërguarit Special të Kombeve të Bashkuara, Martti Ahtisaari, i ofrojnë Kosovës një kornizë gjithëpërfshirëse për zhvillimin e saj të ardhshëm, dhe janë në vijë me standardet më të larta europiane për të drejtat të njeriut dhe qeverisjen e mirë,

Të vendosur që ta shohim statusin tonë të zgjidhur në mënyrë që t'i jipet popullit tonë qartësi mbi të ardhmen e vet, të shkohet përtej konflikteve të së kaluarës dhe të realizohet potenciali i plotë demokratik i shoqërisë sonë,

Duke nderuar të gjithë burrat dhe gratë që bënë sakrifica të mëdha për të ndërtuar një të ardhme më të mirë për Kosovën,

1. Ne, udhëheqësit e popullit tonë, të zgjedhur në mënyrë demokratike, nëpërmjet kësaj Deklarate shpallim Kosovën shtet të pavarur dhe sovran. Kjo shpallje pasqyron vullnetin e popullit tonë dhe është në pajtueshmëri të plotë me rekomandimet e të Dërguarit Special të Kombeve të Bashkuara, Martti Ahtisaari, dhe Propozimin e tij Gjithëpërfshirës për Zgjidhjen e Statusit të Kosovës.

2. Ne shpallim Kosovën një republikë demokratike, laike dhe multietnike, të udhëhequr nga parimet e jodiskriminimit dhe mbrojtes së barabartë sipas ligjit. Ne do të mbrojmë dhe promovojmë të drejtat e të gjitha komuniteteve në Kosovë dhe krijojmë kushtet e nevojshme për pjesëmarrjen e tyre efektive në proceset politike dhe vendimmarrëse.

3. Ne pranojmë plotësisht obligimet për Kosovën të përmbajtura në Planin e Ahtisarit, dhe mirëpresim kornizën që ai propozon për të udhëhequr Kosovën në vitet në vijim. Ne do të zbatojmë plotësisht ato obligime, përfshirë miratimin prioritar të legjislacionit të përfshirë në Aneksin XII të tij, veçanërisht atë që mbron dhe promovon të drejtat e komuniteteve dhe pjesëtarëve të tyre.

4. Ne do të miratojmë sa më shpejt që të jetë e mundshme një kushtetutë që mishëron zotimin tonë për të respektuar të drejtat e njeriut dhe liritë themelore të të gjithë qytetarëve tanë, posaçërisht ashtu siç definohen me Konventën Europiane për të Drejtat e Njeriut. Kushtetuta do të inkorporojë të gjitha parimet relevante të Planit të Ahtisaarit dhe do të miratohet nëpërmjet një procesi demokratik dhe të kujdesshëm.

5. Ne mirëpresim mbështetjen e vazhdueshme të bashkësisë ndërkombëtare për zhvillimin tonë demokratik nëpërmjet të pranive ndërkombëtare të themeluara në Kosovë në bazë të Rezolutës 1244 të Këshillit të Sigurimit të Kombeve të Bashkuara (1999). Ne ftojmë dhe mirëpresim një prani ndërkombëtare civile për të mbikëqyrur zbatimin e Planit të Ahtisaarit dhe një mision të sundimit të ligjit të udhëhequr nga Bashkimi Europian. Ne, po ashtu, ftojmë dhe mirëpresim NATO-n që të mbajë rolin udhëheqës në praninë ndërkombëtare ushtarake dhe të zbatojë përgjegjësitë që i janë dhënë sipas Rezolutës 1244 të Këshillit të Sigurimit të Kombeve të Bashkuara (1999) dhe Planit të Ahtisaarit, deri në atë kohë kur institucionet e Kosovës do të jenë në gjendje të marrin këto përgjegjësi. Ne do të bashkëpunojmë plotësisht më këto prani në Kosovë për të siguruar paqen, prosperitetin dhe stabilitetin në të ardhmen në Kosovë.

6. Për arsye të kulturës, gjeografisë dhe historisë, ne besojmë se e ardhmja jonë është në familjen europiane. Për këtë arsye, ne shpallim synimin tonë për të marrë të gjitha hapat e nevojshëm për të siguruar anëtarësim të plotë në Bashkimin Europian sapo që të jetë e mundshme dhe për të zbatuar reformat e kërkuara për integrim europian dhe euroatlantik.

7. Ne i shprehim mirënjohje Organizatës së Kombeve të Bashkuara për punën që ka bërë për të na ndihmuar në rimëkëmbjen dhe rindërtimin pas lufte dhe ndërtimin e institucioneve të demokracisë. Ne jemi të përkushtuar të punojmë në mënyrë konstruktive me Organizatën e Kombeve të Bashkuara gjersa ajo vazhdon punën e saj në periudhën në vijim.

8. Me pavarësinë vie detyra e anëtarësisë së përgjegjshme në bashkësinë ndërkombëtare. Ne e pranojmë plotësisht këtë detyrë dhe do t'i përmbahemi parimeve të Kartës së Kombeve të Bashkuara, Aktin Final të Helsinkit, akteve tjera të Organizatës për Siguri dhe Bashkëpunim në Europë, obligimeve ligjore ndërkombëtare dhe parimeve të

marrëdhënieve të mira ndërkombëtare që shënojnë marrëdhëniet ndërmjet shteteve. Kosova do të ketë kufijtë e saj ndërkombëtarë ashtu siç janë paraparë në Aneksin VIII të Planit të Ahtisaarit, dhe do të respektojë plotësisht sovranitetin dhe integritetin territorial të të gjithë fqinjve tanë. Kosova, po ashtu, do të përmbahet nga kërcënimi apo përdorimi i forcës në cilëndo mënyrë që është jokonsistente me qëllimet e Kombeve të Bashkuara.

9. Ne, nëpërmjet kësaj Deklarate, marrim obligimet ndërkombëtare të Kosovës, përfshirë ato të arritura në emrin tonë nga Misioni i Administratës së Përkohshme të Kombeve të Bashkuara në Kosovë (UNMIK), si dhe obligimet e traktateve dhe obligimet tjera të ish-Republikës Socialiste Federative të Jugosllavisë ndaj të cilave obligohemi si ish-pjesë konstituive, përfshirë konventat e Vjenës për marrëdhëniet diplomatike dhe konsullore. Ne do të bashkëpunojmë plotësisht me Tribunalin Penal Ndërkombëtar për ish-Jugosllavinë. Ne synojmë të kërkojmë anëtarësim në organizatat ndërkombëtare, në të cilat Kosova do të synojë të kontribuojë për qëllime të paqes dhe stabilitetit ndërkombëtar.

10. Kosova shpall zotimin e saj ndaj paqes dhe stabilitetit në rajonin tonë të Europës Juglindore. Pavarësia jonë e sjell në fund procesin e shpërbërjes së dhunshme të Jugosllavisë. Gjersa ky proces ka qenë i dhembshëm, ne do të punojmë pa pushim për t'i kontribuar një pajtimi që do të lejonte Europën Juglindore të shkojë përtej konflikteve të së kaluarës dhe të farkojë lidhje të reja rajonale të bashkëpunimit. Për këtë arsye, do të punojmë së bashku me fqinjtë tanë për të avansuar të ardhmen tonë të përbashkët europiane.

11. Ne shprehim, në veçanti, dëshirën tonë për të vendosur marrëdhënie të mira me të gjithë fqinjtë tanë, përfshirë Republikën e Serbisë, me të cilën kemi marrëdhënie historike, tregtare dhe shoqërore, të cilat synojmë t'i zhvillojmë më tej në të ardhmen e afërt. Ne do të vazhdojmë përpjekjet tona për t'i kontribuar marrëdhënieve të fqinjësisë dhe bashkëpunimit me Republikën e Serbisë duke promovuar pajtimin ndërmjet popujve tanë.

12. Ne, nëpërmjet kësaj, afirmojmë në mënyrë të qartë, specifike dhe të parevokueshme se Kosova do të jetë ligjërisht e obliguar të plotësojë dispozitatat e përmbajtura në këtë Deklaratë, përshirë këtu veçanërisht obligimet e saj nga Plani i Ahtisaarit. Në të gjitha këto çështje, ne do të veprojmë në pajtueshmëri në parimet e së drejtës ndërkombëtare dhe rezolutat e Këshillit të Sigurimit të Kombeve të Bashkuara, përfshirë Rezolutën 1244 (1999). Ne shpallim publikisht se të gjitha shtetet kanë të drejtën të mbështeten në këtë Deklaratë, dhe i bëjmë apel të na ofrojnë përkrahjen dhe mbështetjen e tyre.

Kosovo Declaration of Independence

Convened in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo,

Answering the call of the people to build a society that honours human dignity and affirms the pride and purpose of its citizens,

Committed to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness,

Dedicated to protecting, promoting and honouring the diversity of our people,

Reaffirming our wish to become fully integrated into the Euro-Atlantic family of democracies,

Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,

Recalling the years of strife and violence in Kosovo, that disturbed the conscience of all civilised people,

Grateful that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration,

Proud that Kosovo has since developed functional, multi-ethnic institutions of democracy that express freely the will of our citizens,

Recalling the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status,

Regretting that no mutually-acceptable status outcome was possible, in spite of the good-faith engagement of our leaders,

Confirming that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance,

Determined to see our status resolved in order to give our people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of our society,

Honouring all the men and women who made great sacrifices to build a better future for Kosovo,

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

2. 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 and create the conditions necessary for their effective participation in political and decision-making processes.

3. We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

4. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability.

6. For reasons of culture, geography and history, we believe our future lies with the European family. We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

7. We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy. We are committed to working constructively with the United Nations as it continues its work in the period ahead.

8. With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also

refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

10. Kosovo declares its commitment to peace and stability in our region of southeast Europe. Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation. We shall therefore work together with our neighbours to advance a common European future.

11. We express, in particular, our desire to establish good relations with all our neighbours, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future. We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people.

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

Déclaration d'indépendance du Kosovo

Réunis en session extraordinaire le 17 février 2008, à Pristina, capitale du Kosovo,

Répondant aux vœux du peuple de bâtir une société qui respecte la dignité de l'homme et garantit la fierté et la volonté de ses citoyens,

Résolus à affronter l'héritage douloureux du passé récent dans un esprit de réconciliation et de pardon,

Résolus à protéger, à favoriser et à respecter la diversité de notre peuple,

Réaffirmant notre souhait de nous intégrer pleinement dans la famille euro-atlantique des démocraties,

Observant que le Kosovo est un cas spécifique résultant de l'éclatement non consensuel de la Yougoslavie et ne constitue aucunement un précédent pour une quelconque autre situation,

Rappelant les années de conflit et de violence au Kosovo, qui ont troublé la conscience de tous les peuples civilisés,

Exprimant notre gratitude envers la communauté internationale qui est intervenue en 1999, mettant ainsi fin à la gouvernance de Belgrade sur le Kosovo et plaçant le Kosovo sous l'administration intérimaire des Nations Unies,

Fiers que, depuis lors, le Kosovo ait développé des institutions démocratiques à la fois multiethniques et opérationnelles qui expriment librement la volonté de nos citoyens,

Rappelant les années de négociations sous l'égide de la communauté internationale entre Belgrade et Pristina sur la question de notre futur statut politique,

Déplorant qu'aucun accord n'ait pu être trouvé concernant un statut acceptable pour les deux parties, en dépit de l'engagement de bonne foi de nos représentants,

Confirmant que les recommandations de l'Envoyé spécial des Nations unies, Martti Ahtisaari, offrent au Kosovo un cadre complet pour son développement futur et sont conformes aux normes européennes les plus élevées en matière de droits de l'homme et de bonne gouvernance,

Résolus à trouver un règlement à notre statut afin de donner à notre peuple une vision claire de son avenir, de dépasser les conflits du passé et de réaliser pleinement le potentiel démocratique de notre société,

Rendant hommage à tous les hommes et femmes qui ont fait de grands sacrifices pour bâtir un avenir meilleur pour le Kosovo,

1. Nous, les représentants de notre peuple, démocratiquement élus, déclarons par la présente que le Kosovo est un État indépendant et souverain. Cette déclaration reflète la volonté du peuple et est en pleine conformité avec les recommandations de l'Envoyé spécial des Nations unies, Martti Ahtisaari, et avec sa Proposition globale de Règlement portant statut du Kosovo.

2. Nous déclarons que le Kosovo est une république démocratique, laïque et multiethnique, guidée par les principes de non-discrimination et de protection égale devant la loi. Nous protégerons et promouvrons les droits de toutes les communautés du Kosovo et créerons les conditions nécessaires à leur participation effective aux processus politique et de prise de décisions.

3. Nous acceptons intégralement les obligations du Kosovo découlant du plan Ahtisaari et approuvons le cadre qu'il propose pour guider le Kosovo dans les années à venir. Nous mettrons pleinement en œuvre ces obligations y compris l'adoption prioritaire des lois figurant dans son annexe XII, notamment celles qui protègent et promeuvent les droits des communautés et de leurs membres.

4. Nous adopterons dès que possible une constitution qui proclame notre engagement à respecter les droits de l'homme et les libertés fondamentales de tous nos citoyens, tels qu'ils sont définis notamment par la Convention européenne des droits de l'homme. La Constitution intégrera tous les principes pertinents du plan Ahtisaari et sera adoptée dans le cadre d'un processus démocratique réfléchi.

5. Nous saluons le soutien continu à notre développement démocratique manifesté par la communauté internationale par le biais des présences internationales établies au Kosovo sur la base de la résolution 1244 (1999) du Conseil de sécurité de l'Organisation des Nations unies. Nous invitons et accueillons une présence internationale civile chargée de superviser la mise en œuvre du plan Ahtisaari et une mission pour l'État de droit menée par l'Union européenne. Nous invitons et accueillons également l'OTAN à garder un rôle dirigeant dans la présence militaire internationale et à assumer les responsabilités qui lui ont été confiées par la résolution 1244 (1999) du Conseil de sécurité de l'Organisation des Nations Unies et le plan Ahtisaari jusqu'à ce que les institutions du Kosovo soient capables d'assumer ces responsabilités. Nous coopérerons pleinement avec ces présences au Kosovo pour assurer la paix, la prospérité et la stabilité à venir au Kosovo.

6. Pour des raisons culturelles, géographiques et historiques, nous sommes convaincus que notre avenir ne se conçoit que dans la famille européenne. Par conséquent, nous proclamons notre intention de prendre toutes les mesures nécessaires pour assurer notre adhésion à l'Union européenne dès que possible et mettre en application les réformes requises pour l'intégration européenne et euro-atlantique.

7. Nous exprimons notre profonde gratitude envers l'Organisation des Nations Unies qui nous a aidés à rétablir et à reconstruire le pays après la guerre et à bâtir des institutions fondées sur la démocratie. Nous sommes résolus à coopérer utilement avec l'Organisation des Nations Unies pour assurer la poursuite de sa mission dans les années à venir.

8. L'indépendance implique les devoirs inhérents à notre appartenance responsable à la communauté internationale. Nous acceptons pleinement ces devoirs et nous respecterons les principes de la Charte des Nations Unies, l'Acte final d'Helsinki, les autres actes de l'Organisation pour la sécurité et la coopération en Europe (OSCE), les obligations

juridiques internationales et les principes de courtoisie internationale inhérents aux relations entre États. Le Kosovo aura comme frontières internationales celles que fixe l'annexe VIII du plan Ahtisaari et respectera pleinement la souveraineté et l'intégrité territoriale de tous nos voisins. Le Kosovo s'abstiendra de tout usage ou menace de la force incompatible avec les buts des Nations Unies.

9. Nous assumons par la présente les obligations internationales du Kosovo, y compris celles conclues pour notre compte par la Mission d'administration intérimaire des Nations unies au Kosovo (MINUK) et les traités et autres obligations de l'ex-République socialiste fédérale de Yougoslavie auxquels nous sommes liés en tant qu'ancienne partie constituante, y compris les Conventions de Vienne sur les relations diplomatiques et consulaires. Nous coopérerons pleinement avec le Tribunal pénal international pour l'ex-Yougoslavie. Nous entendons adhérer aux organisations internationales, au sein desquelles le Kosovo s'efforcera de contribuer à la poursuite de la paix et de la stabilité dans le monde.

10. Le Kosovo déclare être attaché à la paix et à la stabilité dans notre région de l'Europe du Sud-est. Notre indépendance met un terme au processus de dissolution violente de la Yougoslavie. Bien que ce processus ait été douloureux, le Kosovo s'efforcera inlassablement de contribuer à une réconciliation qui permettrait à l'Europe du Sud-est de dépasser les conflits du passé et de bâtir de nouvelles relations de coopération régionale. Nous œuvrerons avec nos voisins pour avancer vers un avenir européen commun.

11. Nous exprimons, en particulier, notre souhait d'établir de bonnes relations avec tous nos voisins, y compris la République de Serbie, avec laquelle nous avons des liens historiques, commerciaux et sociaux que nous chercherons à développer davantage dans un proche avenir. Nous poursuivrons nos efforts visant à établir des relations d'amitié et de coopération avec la République de Serbie, tout en favorisant la réconciliation entre nos peuples.

12. Nous affirmons clairement, explicitement et de manière irrévocable, par la présente, que le Kosovo sera tenu juridiquement de respecter les dispositions contenues dans cette déclaration, y compris en particulier les obligations qui lui incombent aux termes du plan Ahtisaari. Dans tous ces domaines, nous agirons en accord avec les principes du droit international et avec les résolutions du Conseil de sécurité de l'Organisation des Nations Unies, y compris la résolution 1244 (1999). Nous déclarons publiquement que tous les États sont en droit de se prévaloir de cette déclaration et nous les invitons à nous offrir leur soutien et leur amitié.

Annex 2

EXTRAORDINARY SESSION OF THE ASSEMBLY OF KOSOVO,

HELD ON 17 FEBRUARY 2008

(TRANSCRIPT)

English Translation*

* The Albanian Original is available on the website of the Assembly of the Republic of Kosovo (<http://www.assembly-kosova.org/common/docs/proc/trans_s_2008_02_17_al.pdf>).

Legislature III

TRANSCRIPT

OF THE SPECIAL PLENARY SESSION OF THE ASSEMBLY OF KOSOVO

ON THE DECLARATION OF INDEPENDENCE

HELD ON 17 FEBRUARY 2008

FEBRUARY 2008

Session opened at 15.00.

Session is chaired by Mr. Jakup Krasniqi, President of the Kosovo Assembly

Co-chairs were Mr. Xhavit Haliti and Mr. Sabri Hamiti, members of the Assembly Chairmanship

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Today, Kosovo is opening a new page in history, and is changing the political map of Europe

Leaving behind bitter memories of hatred and tragic strife we went through, we are now entering the age of independence, peace and prosperity of our country.

There can be real peace and freedom only between equals. An independent Kosovo will be the homeland of equal and happy citizens, building upon foundations of the best values of its tradition as well as principles of modern democracy.

It is a special privilege for the present generation in Kosovo to experience this great historical turn, an honor for them, but also a great responsibility for the democratic and European development of the home country and the generations that will succeed us.

Our solemn oath for Kosovo, a democratic country, is a contract with its citizens and a partnership with the international community; it is the promise for lifelong dedication towards the most prosperous underlying values of today's society.

Kosovo has never in its life had as many friends as today. However, tomorrow there will be even more. A democratic culture and society, rule of law, peacemaking commitment, friendly neighborhood and the spirit of dialogue, respect and good faith – will be the basis for expanding friendships and cooperation and partnership.

I will take this solemn opportunity to express feelings of the people of Kosovo who humbly bow before the ones who were sacrificed on the altar of freedom for Kosovo.

With special respect, I thank all our friends, who with great commitment helped Kosovo in its historical and decisive moments.

The Albanian people and the citizens of Kosovo will be grateful forever.

On this special day, I feel honored to welcome the representative of the great family Jashari – Mr Rifat Jashari.

(applause)

The Jashari family represents all sacrifices for freedom of the Albanian people, it is the institution of morals for Kosovo now and forever.

Honorable Mr. President of Kosovo
Honorable Mr. Prime Minister of Kosovo
Honorable Members of the Assembly of Kosovo
Honorable representatives of the international presence in Kosovo
Honorable friends and guests
Honorable citizens of Kosovo and compatriots, wherever you are
Ladies and Gentlemen,

It is with great pleasure that on behalf of the Assembly of Kosovo and on my personal behalf, I welcome and thank you all, and those who are following us anywhere in the world, on these historical moments for the future of the people of Kosovo!

(applause)

Honorable Assembly Members,

Welcome to the special solemn plenary session on this day, February 17th, 2008, at 15.00 hours

It is an honor for me to present to you today's agenda

The first item on our agenda is:

DECLARATION OF INDEPENDENCE

(applause)

The second item on our agenda is:

APPROVAL OF STATE SYMBOLS

104 Assembly members are present,

I ask the assembly members, to cast their vote on the approval of this proposed agenda.

Thank you!

Any votes "against"? None.

I declare that the Assembly has approved the agenda by unanimous vote

109 assembly members are now present

I would like to invite the Prime Minister of Kosovo, Mr. Hashim Thaçi, to provide justification for the request for the special and solemn Assembly session.

THE PRIME MINISTER OF KOSOVO, HASHIM THAÇI:

Honorable Mr. Chairman,
President of Kosovo,
Honorable ministers,
Honorable Assembly Members,
Leaders of Political Parties,
Honorable guests – internationals, locals
Honorable Jashari Family,
Honorable representatives, guests from religious communities,
Honorable contributors to the agenda for the present special Assembly session,

Today, the President of Kosovo and myself, as the Prime Minister of Kosovo, have officially requested from the President of the Assembly, Mr Krasniqi; to call for a special session with two agenda items,

This invitation for a special session is extended in accordance with the Kosovo Constitutional Framework, whereby we present two items on the agenda:

1. DECLARATION OF INDEPENDENCE FOR KOSOVO, and
2. PRESENTATION OF KOSOVO STATE SYMBOLS

Mr. Chairman, thank you for calling this urgent session and for prompt approval by the Chairmanship of the Assembly, as well as for the approval of this agenda. Let us continue.

Honorable Assembly President,
Honorable Assembly Members
Honorable President,
Honorable guests, citizens of Kosovo,

We have waited too long for this day. Many people gave so much to make this a reality, this big day – the Day of Kosovo Independence.

Today, we honor those who have honored us with their sacrifice for freedom and state. We forever remember and respect their names and their deeds. We keep their memory forever in our hearts.

We are deeply grateful to our friends and allies in the country and beyond, who have assisted us to jointly reach this point.

I welcome all of those who are with us today, and I express my deepest gratitude, my highest respect to those who are following us on these moments, on behalf of my institutions and my people.

This day has come! From now on, Kosovo is proud, independent, sovereign and free!

My family, as well as your family and all families throughout Kosovo, never hesitated and never lost faith in us, we never lost faith in God, in justice and in power.

Let me mention the brother who left his family to go to war, the farmer who left his land a waste, the women and men who opened their doors to teach our children, and the students, who as always, raised and said – enough!

To all of those who came back to build a better life for their children, we never lost faith on a dream that one day, we will be among free and independent countries of the democratic world.

All of us together, brought Kosovo to this moment and we all need to be proud, very proud.

As my parents and my grandparents, who taught me about sacrifice and what it means to be free, I ask you to talk to your children, to your nephews and nieces and to explain to them the meaning of today's day. It was a long, difficult road, a road of sacrifice, but also a road of victory.

Carry on this story to the next generations, the story about the joy and pride we feel today, and never forget to remind them to remember great sacrifice of the generations before us.

Kosovo will face many challenges in the coming years

However, no challenge will make us surrender our way forward, with one joint spirit as one united people, with a clear, pro-western political vision.

Our challenges, including economy, education and health, infrastructure and European integration, are important challenges, but they cannot resist the positive spirit of our citizens and our fate.

Kosovo, both people and territory are united today in a historical moment, to improve the lives of each citizen within our borders, regardless of ethnic origin.

Our hopes have never been higher. Our faith has never been bigger. The people of Kosovo have never been more united. Our dreams know no limit. Kosovo has never had more international support.

The challenges before us are great, but nothing can stop us from moving forward – towards new historical moments, which a new history will give us and we are jointly making the new history.

Today, the whole world is with us, and we are becoming an equal part of the democratic world. We are becoming an equal part of a world we deserve.

Until now, we did a great deal to guarantee our commitment towards communities

On this historical day, honorable assembly members, I wish to reaffirm our political will to create the necessary conditions for respecting and protecting the communities and for further improving relationships between them in a new Kosovo.

Our constitution and our laws will reflect this, together with an inter-institutional strategy at all levels of our new country.

Our commitments will be embodied in three main elements:

The first, a strong and irreversible guarantee by law of equal rights of all communities in Kosovo

The second, establishment of permanent mechanisms to guarantee that the communities play a complete and active role in developing the future of our country, and

The third, is our responsibility to take effective and immediate measures to ensure that our commitments result with positive change, for all those living in Kosovo, especially members of minority communities

Our Constitution states that Kosovo is a state of all its citizens. There is no place for fear, discrimination or unequal treatment for anyone. We are building Kosovo with equal rights for everyone, with equal opportunities for everyone.

Each discriminatory practice will be eradicated from our state institutions. Each discriminatory practice will be eradicated from our society. In Kosovo, there will only be tolerance, understanding, living together, solidarity and progress.

We all agree that diversity brings positive benefits for all

Honorable Assembly Members,

[in Serbian language] Honorable co-citizens,

Today's day brings the end of a long process

This is the end of the last threats and blunders that Belgrade will ever rule Kosovo again,

Kosovars themselves, of all ethnic, religious and language origins will together carry their responsibility for their country.

We make Kosovo independent, aiming that all citizens enjoy the freedom and other benefits of our country.

Let this day be the day of a new beginning!

Let this day mark a beginning of a better future for all citizens of the state of Kosovo

[continues in Albanian language]

Honorable President of the Assembly
Honorable President
Honorable Assembly members
Honorable guests
Honorable citizens of Kosovo, wherever you are, in the Diaspora,

Kosovo is bringing a historical decision. Kosovo is declaring its independence in accordance with the comprehensive proposal of President Ahtisaari.

The independence of Kosovo marks the end of the dissolution of former Yugoslavia. Implementation of the Ahtisaari provisions, which are incorporated in the Kosovo Constitution, are a national priority to us

all, to the institutions and to the people of Kosovo. The Assembly of Kosovo will soon adopt all the main laws resulting from the Ahtisaari document, in the coming days.

Honorable Assembly Members,

Kosovo highly appreciates the role played by the United Nations Organization in reconstructing Kosovo and in building our democratic institutions. We expect to work with the United Nations Organization to promote our joint efforts for peace, security and democratic development.

In addition, we welcome the new international mission, led by the European Union, which will assist us in our democratic development and supervise the implementation of Ahtisaari plan, which is already a Kosovo plan.

On this occasion, I would like to assure all of you, through the voice of Kosovo institutions, and I would like to send this message and to assure our neighbors that Kosovo will do the best possible to establish and maintain good relationships with all neighboring countries. We aspire to have good mutual relationships at a mutual interest with Serbia as well, having faith that this is in our common interest and that of investment of our friends for peace and stability in the region.

From today on, Kosovo will be a democratic and multi-ethnic country of all of its citizens, in its fast journey towards Euro-Atlantic integrations. Thank you!

Thank you Mr. Chairman!

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Thank you, Mr. Prime Minister! I give the floor to the President of Kosovo, Mr. Fatmir Sejdiu

PRESIDENT OF KOSOVO, FATMIR SEJDIU:

Honorable President of the Assembly of Kosovo,
Honorable Chairmanship
Honorable Mr. Prime Minister, Hashim Thaçi,
Honorable Assembly Members and Ministers
Honorable family of President Rugova
Honorable Jashari family,
(applause)
Honorable representatives of Kosovo institutions
Representatives of Diplomatic missions
Representatives of science, culture, cults
Honorable citizens of Kosovo

[in Serbian language]

Honorable ministers,

Honorable citizens of Kosovo,

[continues in Albanian language]

Ladies and Gentlemen,

Today's day separates the history of Kosovo in two: the times before and after independence

The independence of Kosovo was created by generations, with their works of life, with hard work and the sacrifice they have made.

We are declaring our independence before the world, and with the blessing of the world, among friends who stood by us through decades, especially one decade ago, when the atrocities had spread in this part of the Balkans. The same friends stood by us during recovery after the war, during reconstruction after destruction caused by war and occupation. They stand by us today; they will stand by us tomorrow.

Today, we remember the sacrifices which led to this extraordinary day. We remember the mothers and fathers, who went through hardship that cannot be described so that their sons and daughters can live in freedom. Today, we remember President Ibrahim Rugova, the great leader and establisher of our country, who brought Kosovo out of chaos into a democratic order. Today, we remember Adem Jashari and the Kosovo Liberation Army who brought forward the will of the people to live in freedom. We also remember our neighbors of all ethnic, ideological and religious backgrounds who helped us during the years of repression and war. We remember all of this, not as a token of revenge for our violent past, but to build a future full of trust, which will offer an environment for reconciliation and forgiveness.

These great events of our history, our sacrifices and the hopes and achievements, have brought us here to declare our independence. The declaration of independence is the will of the people. It is a moral and logical consequence of our history and it is in full accordance with recommendations of the Special Envoy – President Martti Ahtisaari.

The independence for Kosovo is the end of a long process of dissolution of Yugoslavia. After two years of engagement in negotiations over status with Belgrade, and despite serious and constructive engagement of the Kosovo Unity Team, achieving an acceptable solution for both parties was not possible. Therefore, we had to act to offer our people a clear perspective with the aim of advancing our political, social and economic development.

Our vision for Kosovo is very clear. We wish to build Kosovo on fundamental democratic principles. This means that Kosovo will be a democratic, multi-ethnic state, well integrated in the region, with good relationships with its neighboring countries, a state that moves fast towards full membership in the Euro-Atlantic community. The people of Kosovo are determined and desire a European future for their country.

The comprehensive proposal on a status settlement for Kosovo in March of last year has been supported by the Assembly of Kosovo. This package gives the Serbs, as well as other minorities: Turks, Bosniaks, Roma, Ashkali and Egyptians, a strong guarantee on the protection of their political and cultural rights, which in many points even exceed the most advanced international standards on rights of the minorities.

The Constitution of the Republic of Kosovo guarantees multi-faceted and meaningful participation of minorities in the decision making process.

Honorable participants of this historical session of the Kosovo Assembly,

A national priority for the Kosovo Republic in the coming weeks and months is the full implementation of the Ahtisaari plan. Very soon, we aim to adopt the laws and the new Constitution of Kosovo, which also embodies Ahtisaari principles. All this will be followed with actual actions in the field in terms of implementation of provisions contained in the Ahtisaari plan.

With today's act, Kosovo also assumes responsibilities as a state. At the same time, Kosovo reaffirms its dedication for close cooperation with the international community to build a country in accordance with the most advanced norms and principles of democracy. For this reason, Kosovo welcomes the deployment of an international civilian presence, which will support further democratic development of our country, as well as supervise the implementation of the Ahtisaari plan. Specifically, we value the willingness of the European Community to assume a greater role in Kosovo. In addition, we welcome the continuous military presence of the NATO troops. We are committed to cooperating closely with the civilian and military representatives in Kosovo.

We are aware that members of minority communities in Kosovo see independence with a degree of fear and skepticism. We will do all that is possible to ensure that the rights, the culture and their property are strictly honored in the independent Kosovo.

[in Serbian language]

Honorable citizens of Kosovo,

Honorable representatives,

I would once again like to take this solemn opportunity to again invite all citizens of Kosovo, above all the citizens of the Serb community in Kosovo, to give their contribution in a common building of a European Kosovo, where each citizen will feel like home. Kosovo is equally your home and your homeland. Your rights and the rights of members of other communities in an independent Kosovo will be a continuous obligation of our state institutions. Serb cultural and religious heritage will be entirely protected. Your ethnic and language identity will be entirely honored, and we will achieve this by working together in our daily lives and in the institutions of Kosovo.

[continues in Albanian language]

Honorable Assembly Members

We want to strongly point out that Kosovo wishes to have good neighboring relations with Serbia as well, on a basis of mutual respect. We hope that our aim to normalize relations with Belgrade as soon as possible will be supported by Serbia.

We are grateful for the role and the work done by the Organization of United Nations in reconstructing post-war Kosovo. The United Nations Organization shall continue to have a role in Kosovo, for as long as

UN Resolution 1244 will be in force. We will continue to cooperate with the UN in order to make progress in our common goals of peace, security and democratic development for Kosovo, until full membership of Kosovo in this prestigious organization.

Our integration will flow naturally, as with its values, Kosovo has always culturally belonged to this family, but now, under new circumstances, Kosovo needs political integration to create new opportunities, such that human and natural resources are put at the service of overall social and economic development of our country.

Ladies and Gentlemen

The Republic of Kosovo today asks for the world's embrace. As we await recognition by many countries of the world, with a special piety we remember many worldly personalities who stood by the people of Kosovo through decades, especially in its most difficult hours

Our people will be eternally grateful to the United States of America, the countries of the European Union, NATO and other countries of the democratic world for the extraordinary support to our dear country – Kosovo.

God bless Kosovo and its people!

God bless the Republic of Kosovo!

God bless all friends of Kosovo!

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Thank you, Mr. President!

I invite the Prime Minister of Kosovo, Mr. Hashim Thaçi, to present the Draft Declaration of Independence

(applause)

I invite the participants to stand up!

PRIME MINISTER OF KOSOVO, HASHIM THAÇI:

Honorable President of the Assembly
Honorable President,
Honorable Members of the Assembly
Honorable guests,
Honorable Jashari family
Honorable Rugova family

Thank you, United States of America, European Union and NATO! Respect!

Now allow me to, by feeling the heartbeats of our ancestors, with the highest honor and privilege, read the Declaration of Independence of Kosovo

(applause)

DECLARATION

OF INDEPENDENCE OF KOSOVO

Convened in a solemn extraordinary plenary session, on February 17, 2008, in the capital of Kosovo,

Answering the call of the people to build a society that honors human dignity and affirms pride and purpose of its citizens;

Committed to confront the painful legacy of the recent past and in the spirit of forgiveness and reconciliation;

Dedicated to protection, promotion and honoring the diversity of our people;

Reaffirming our wish to be fully integrated in the Euro-Atlantic family of democracies;

Observing that Kosovo is a special case arising from the non-consensual dissolution of Yugoslavia and is no precedent to any other situation;

Recalling the years of strife and violence in Kosovo, that disturbed the conscience of all civilized people;

Grateful to the whole world that intervened in 1999, thereby removing Belgrade's governance over Kosovo and placing Kosovo under interim administration of the United Nations;

Proud that Kosovo has since developed functional multi-ethnic institutions of democracy, which freely express the will of our citizens;

Recalling the years of negotiations sponsored by internationals between Belgrade and Prishtina over the question of our future political status;

Regretting that no mutually acceptable outcome was possible, in spite of the good-faith engagement of Kosovar leadership and the important international role;

Confirming that recommendations of the Special Envoy of the United Nations, President Martti Ahtisaari, provide a comprehensive framework for its future development, are in line with the highest European standards on human rights and good governance;

Determined to see our status resolved in such a way as to provide to our people clarity about their future and to move beyond conflicts of the past, and to achieve full democratic potential of our society;

Honoring all the men and women who made great sacrifice to build a better future for Kosovo

1. We, the democratically elected leaders of our people, through this

DECLARATION

HEREBY DECLARE KOSOVO AN INDEPENDENT AND DEMOCRATIC STATE

(applause)

This declaration reflects the will of our people and is in full accordance with recommendations of the Special Envoy of the United Nations, Martti Ahtisaari, and his comprehensive proposal for the Kosovo Status Settlement.

We declare Kosovo to be a democratic, secular and multiethnic 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 and create the conditions necessary for their effective participation in political and decision-making processes.

We fully accept the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead.

We shall implement those obligations in full, including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights.

The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244 in 1999.

We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

We also invite and welcome the NATO to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 from year 1999 and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities.

We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability

For reasons of culture, geography and history, we believe our future lies with the European family.

We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy.

We are committed to working constructively with the United Nations as it continues its work in the period ahead.

With independence comes the duty of responsible membership in the international community. We fully accept this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states.

Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors.

Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations.

We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia.

We intend to seek membership in international organizations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

Kosovo declares its commitment to peace and stability in our region of southeast Europe.

Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation.

We shall therefore work together with our neighbors to advance a common European future.

We express, in particular, our desire to establish good relations with all our neighbors, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future.

We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people.

We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the

Ahtisaari Plan.

In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999).

We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

Thank you! Thank you very much!

(frenetic applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Thank you, Mr. Prime Minister!
Honorable Assembly Members,
I inform you that the vote will be cast electronically, thus I propose we proceed.
I declare that 109 assembly members are present.
Are there any members who do not have their cards with you?
If any of you have no cards, you may vote by raising your hand.
I ask you, shall we vote electronically, or by raising our hand.

(from the hall: Let us vote by raising hand)

Who is "in favor"? Thank you!
This was the explanation on the voting method.

Who is in favor of the Declaration presented by the Prime Minister of Kosovo?
Thank you!
Any votes "against"? None.

(applause)

I state that with all votes "in favor" of the present members, Members of the Assembly of Kosovo, today, on February 17, 2008, have expressed their will and the will of the citizens of Kosovo, for Kosovo an independent, sovereign and democratic state.

(applause)

And from this point on, the political position of Kosovo has changed. Kosovo is:

A REPUBLIC, AN INDEPENDENT, DEMOCRATIC AND SOVEREIGN STATE

(applause)

Congratulations to you and all of those who are watching us!

(applause)

CHAIRMAN, XHAVIT HALITI:
Honorable Assembly Members, please take your seats so we can proceed.
We proceed with solemn signature of the Declaration.
I invite the President of Kosovo, Mr. Fatmir Sejdiu, to sign the Declaration of Independence!

I invite the Assembly President and the Prime Minister of Kosovo, to sign the Declaration of Independence together!

(the invitees sign the declaration)

(applause)

CHAIRMAN, IBRAHIM GASHI:
I invite members of the Chairmanship, Mr. Xhavit Haliti and Mr. Sabri Hamiti to sign the Declaration of Independence.
(signature follows)

I invite the member of Chairmanship, Mr. Eqrem Kryeziu, to sign the Declaration.
(signature follows)

CHAIRMAN, XHAVIT HALITI:

I invite the member of Chairmanship, Mr. Ibrahim Gashi, to sign the Declaration.
(signature follows)

I invite the member of Chairmanship, Mr. Nexhat Daci, to sign the Declaration
(signature follows)

I invite the member of Chairmanship, Naim Maloku.
(signature follows)

I invite the member of Chairmanship, Xhezair Murati.
(signature follows)

I invite the member of Chairmanship, Slobodan Petrovic. Absent.

I invite the Head of the Kosovo Democratic Party Parliamentary Group, Rame Buja
(signature follows)

I invite the Head of New Kosova Alliance Parliamentary Group, Ibrahim Makolli
(signature follows)

I invite the Head of Dardania Democratic League Parliamentary Group, Lulzim Zeneli
(signature follows)

I invite the Head of Kosovo Future Alliance Parliamentary Group, Ardian Gjini
(signature follows)

I invite the Head of "7+" Parliamentary Group, Zylfi Merxha
(signature follows)

I invite the Head of SLS Parliamentary Group, Bojan Stojanovic. Not present!

I invite the member of Kosovo Assembly, Adem Grabovci.
(signature follows)
I invite the member of Kosovo Assembly, Adem Hajdaraj.
(signature follows)
I invite the member of Kosovo Assembly, Adem Salihaj.
(signature follows)
I invite the member of Kosovo Assembly, Agim Veliu.
(signature follows)
I invite the member of Kosovo Assembly, Ahmet Isufi.
(signature follows)
I invite the member of Kosovo Assembly, Ali Lajçi.
(signature follows)
I invite the member of Kosovo Assembly, Alush Gashi.
(signature follows)
I invite the member of Kosovo Assembly, Anita Morina-Saraçi.
(signature follows)
I invite the member of Kosovo Assembly, Armend Zemaj.
(signature follows)
I invite the member of Kosovo Assembly, Arsim Bajrami.
(signature follows)
I invite the member of Kosovo Assembly, Arsim Rexhepi.
(signature follows)
I invite the member of Kosovo Assembly, Bahri Hyseni.
(signature follows)
I invite the member of Kosovo Assembly, Bajram Kosumi.
(signature follows)
I invite the member of Kosovo Assembly, Behxhet Pacolli.
(signature follows)
I invite the member of Kosovo Assembly, Berat Luzha.
(signature follows)
I invite the member of Kosovo Assembly, Berim Ramosaj.
(signature follows)
I invite the member of Kosovo Assembly, Besa Gaxherri.
(signature follows)
I invite the member of Kosovo Assembly, Branislav Grbić. Not present!
I invite the member of Kosovo Assembly, Bujar Bukoshi.
(signature follows)
I invite the member of Kosovo Assembly, Donika Kadaj.
(signature follows)
I invite the member of Kosovo Assembly, Dragiša Mirić. Not present!
I invite the member of Kosovo Assembly, Drita Kadriu.
(signature follows)
I invite the member of Kosovo Assembly, Drita Maliqi.
(signature follows)
I invite the member of Kosovo Assembly, Driton Tali.

(signature follows)
I invite the member of Kosovo Assembly, Edita Tahiri.
(signature follows)
I invite the member of Kosovo Assembly, Elheme Hetemi.
(signature follows)
I invite the member of Kosovo Assembly, Emrush Xhemajli.
(signature follows)
I invite the member of Kosovo Assembly, Enis Kervan.
(signature follows)
I invite the member of Kosovo Assembly, Enver Hoxhaj.
(signature follows)
I invite the member of Kosovo Assembly, Esat Brajshori.
(signature follows)
I invite the member of Kosovo Assembly, Etem Arifi.
(signature follows)
I invite the member of Kosovo Assembly, Ethem Çeku.
(signature follows)
I invite the member of Kosovo Assembly, Fatmir Limaj.
(signature follows)
I invite the member of Kosovo Assembly, Fatmir Rexhepi.
(signature follows)
I invite the member of Kosovo Assembly, Fatmire Berisha.
(signature follows)
I invite the member of Kosovo Assembly, Fehmi Mujota.
(signature follows)
I invite the member of Kosovo Assembly, Flora Brovina.
(signature follows)
I invite the member of Kosovo Assembly, Gani Buçinca.
(signature follows)
I invite the member of Kosovo Assembly, Gani Geci.
(signature follows)
I invite the member of Kosovo Assembly, Gani Koci.
(signature follows)
I invite the member of Kosovo Assembly, Gjylnaze Syla.
(signature follows)
I invite the member of Kosovo Assembly, Hafize Hajdini.
(signature follows)

CHAIRMAN, IBRAHIM GASHI:

I invite the member of Kosovo Assembly, Hajdin Abazi.
(signature follows)
I invite the member of Kosovo Assembly, Hajredin Hyseni.
(signature follows)
I invite the member of Kosovo Assembly, Hajredin Kuçi.
(signature follows)
I invite the member of Kosovo Assembly, Haki Shatri.
(signature follows)
I invite the member of Kosovo Assembly, Heset Cakolli.
(signature follows)

I invite the member of Kosovo Assembly, Hydajet Hyseni.
(signature follows)
I invite the member of Kosovo Assembly, Ibrahim Selmanaj.
(signature follows)
I invite the member of Kosovo Assembly, Ismet Beqiri.
(signature follows)

I invite the member of Kosovo Assembly, Kaçusha Jashari.
(signature follows)

I invite the member of Kosovo Assembly, Kolë Berisha.
(signature follows)

CHAIRMAN, XHAVIT HALITI:

I invite the member of Kosovo Assembly, Kosara Nikolić. Absent!

I invite the member of Kosovo Assembly, Ljubiša Zivić. Absent!

I invite the member of Kosovo Assembly, Luljeta Shehu.
(signature follows)

I invite the member of Kosovo Assembly, Lutfi Haziri.
(signature follows)

I invite the member of Kosovo Assembly, Mahir Yagcilar.
(signature follows)

I invite the member of Kosovo Assembly, Mark Krasniqi.
(signature follows)

I invite the member of Kosovo Assembly, Melihate Tërmkolli.
(signature follows)

I invite the member of Kosovo Assembly, Memli Krasniqi.
(signature follows)

I invite the member of Kosovo Assembly, Mihajlo Ščepanović. Absent!

I invite the member of Kosovo Assembly, Mimoza Ahmetaj.
(signature follows)

I invite the member of Kosovo Assembly, Mursel Halili. Absent!

I invite the member of Kosovo Assembly, Mufera Shinik.
(signature follows)

I invite the member of Kosovo Assembly, Myrvete Pantina.
(signature follows)

I invite the member of Kosovo Assembly, Myzejene Selmani.
(signature follows)

I invite the member of Kosovo Assembly, Naim Rrustemi.
(signature follows)

I invite the member of Kosovo Assembly, Nait Hasani.
(signature follows)

I invite the member of Kosovo Assembly, Naser Osmani.
(signature follows)

I invite the member of Kosovo Assembly, Naser Rugova.
(signature follows)

I invite the member of Kosovo Assembly, Nekibe Kelmendi.
(signature follows)

I invite the member of Kosovo Assembly, Nerxhivane Dauti.
(signature follows)

I invite the member of Kosovo Assembly, Numan Balić.
(signature follows)

I invite the member of Kosovo Assembly, Nurishahe Hulaj.
(signature follows)

I invite the member of Kosovo Assembly, Njomza Emini.
(signature follows)

I invite the member of Kosovo Assembly, Qamile Morina.
(signature follows)

I invite the member of Kosovo Assembly, Radmila Vujović. Absent!

I invite the member of Kosovo Assembly, Ramadan Avdiu.
(signature follows)

I invite the member of Kosovo Assembly, Ramadan Gashi.
(signature follows)

I invite the member of Kosovo Assembly, Ramë Manaj.
(signature follows)

I invite the member of Kosovo Assembly, Rasim Selmanaj.
(signature follows)

I invite the member of Kosovo Assembly, Rita Hajzeraj.
(signature follows)

I invite the member of Kosovo Assembly, Riza Smaka.

(signature follows)

I invite the member of Kosovo Assembly, Rrustem Mustafa.
(signature follows)

I invite the member of Kosovo Assembly, Sabit Rrahmani.
(signature follows)

I invite the member of Kosovo Assembly, Sadik Idriz.
(signature follows)

I invite the member of Kosovo Assembly, Safete Hadërgjonaj.
(signature follows)

I invite the member of Kosovo Assembly, Sala Berisha-Shala.
(signature follows)

I invite the member of Kosovo Assembly, Sanije Aliaj.
(signature follows)

I invite the member of Kosovo Assembly, Selvije Halimi.
(signature follows)

I invite the member of Kosovo Assembly, Skender Hyseni.
(signature follows)

I invite the member of Kosovo Assembly, Slaviša Petković. Absent!

I invite the member of Kosovo Assembly, Suzan Novobërdaliu.
(signature follows)

I invite the member of Kosovo Assembly, Synavere Rysha.
(signature follows)

I invite the member of Kosovo Assembly, Shkumbin Demalijaj.
(signature follows)

I invite the member of Kosovo Assembly, Shpresa Murati.
(signature follows)

I invite the member of Kosovo Assembly, Teuta Hadri.
(signature follows)

I invite the member of Kosovo Assembly, Vezira Emrush.
(signature follows)

I invite the member of Kosovo Assembly, Vladimir Todorović. Absent!

I invite the member of Kosovo Assembly, Vlora Çitaku.

(signature follows)

I invite the member of Kosovo Assembly, Xhevdet Neziraj.
(signature follows)

I invite the member of Kosovo Assembly, Zafir Berisha.
(signature follows)

I invite the member of Kosovo Assembly, Zef Morina.
(signature follows)

I invite the member of Kosovo Assembly, Zylfije Hundozi.
(signature follows)

Honorable Ladies and Gentlemen,

I declare that we have fulfilled our obligation by each of us signing the Declaration of Independence.

I invite the Chairman of the Parliament to resume chairmanship of the Assembly.

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Honorable Assembly members,

Let us continue with the second item on the agenda:

ADOPTION OF KOSOVO STATE SYMBOLS – THE FLAG AND SEAL

You, honorable assembly members, have before you the symbols – Flag and Seal

To shorten the procedure, let us immediately proceed with voting

As we agreed to vote by hand, I invite you to vote.

Who is "in favor"? Thank you!

(applause)

(At this point the flag is brought and placed in the hall)

(applause)

Honorable assembly members,

This is the flag of the youngest state in Europe and the world, of the state of Kosovo!

May we all enjoy it! Congratulations!

(applause)

Honorable assembly members

By congratulating you again on the Republic of Kosovo, independent and sovereign, and on the approval of the flag of Kosovo, I hereby declare the session adjourned.

(applause)

Prepared by:

The Transcript Unit within the Assembly of Republic of Kosovo

Annex 3

REPORT OF THE INTERNATIONAL CIVILIAN OFFICE (ICO), VIENNA, 27 FEBURARY 2009

Source: http://www.ico-kos.org/d/ISG report finalENG.pdf

Report of the International Civilian Office

27 February 2009

Vienna, Austria

Report of the International Civilian Office

27 February 2009

I. Introduction

II. Meeting its Commitments – Kosovo's Progress in CSP Implementation

III. The Republic of Kosovo's Growing Network of International Relations

IV. The Year Ahead

Report of the International Civilian Office

27 February 2009

I. INTRODUCTION

February 2009 marks several significant milestones for the Republic of Kosovo and its international partners. Just days ago, Kosovo completed its first year as an independent, sovereign state, and 27 February, marks the completion of the first year of the mandate of the International Civilian Representative (ICR). The past year witnessed much progress in Kosovo, progress in building institutions, anchoring Rule of Law, in the creating and consolidating of the elements of statehood, and in taking its place in the community of nations as a multi-ethnic democracy. Through all its actions the state of Kosovo has proven its independence and shown that independence is irreversible. Kosovo has also made strides, in partnership with the International Civilian Office (ICO), in fulfilling the promises made to its citizens and to the world when, in its Declaration of Independence, it committed itself to full implementation of the Comprehensive Proposal for the Kosovo Status Settlement (CSP).

The ICO has successfully assumed the role assigned to it by the CSP and enshrined in Kosovo's Constitution. We have forged strong ties with a range of Kosovo's leaders, both in the capital and in the municipalities. To supervise and support CSP implementation, we work closely with them as they prepare decisions. A spirit of cooperation prevails. Our approach is to hold frank and confidential talks early on, rather than to pass judgment after they act.

Several moments stand out in the ICR's exercise of his responsibilities: his certification in April 2008 of the Constitution as in accordance with the terms of the CSP; his certification, over a period of months, of some 50 Ahtisaari-related laws as consistent with the CSP; his endorsement of the President's decision in January 2009 to allow Assembly mandates to continue and not to terminate them to force new elections this year; and his speech in the Assembly in February 2009 reflecting on the first anniversary of Kosovo's independence. These moments illustrate the range of ICR activities, including political and ceremonial aspects.

The member states of the International Steering Group (ISG) have invested and continue to invest significant resources, both financial and human capital, in Kosovo's future, directly and through the ICO and other international organizations. Moreover, the ISG and ICO share an ambitious vision for a rapid and thorough implementation of the CSP. Such a vision conforms to the CSP itself, which requires a review of the ICR's powers and mandate within two years of the CSP's entry into force, with a view toward "reducing the scope of the powers of the ICR and the frequency of intervention." Cognizant of this ambitious time horizon and grateful for the

resources that ISG states have committed, the ICO offers this report to apprise ISG member states both of the progress that has been achieved and the challenges that lie ahead.

II. MEETING ITS COMMITMENTS – KOSOVO'S PROGRESS IN CSP IMPLEMENTATION

When on 17 February 2008 the democratically-elected leaders of the people of Kosovo took the step of declaring Kosovo an independent and sovereign state, they committed themselves without reservation to the implementation of the CSP, embedding these commitments into the Declaration of Independence itself. By doing so, they reflected the will of the people of Kosovo.

> "We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members."
>
> Declaration of Independence of the Republic of Kosovo

Just weeks after independence, on 1 April, the Constitutional Commission of Kosovo adopted a draft constitution, which incorporated, *inter alia*, Kosovo's obligations to comply with the CSP as well as the authority of the ICR as the final interpreter of the CSP into the domestic legal sphere. One day after its approval by the Commission, the ICR certified that the draft text was in accordance with the terms of the CSP and on 9 April 2008 it was adopted by the Assembly of Kosovo. The Constitution of Kosovo entered into force 15 June 2008 together with 41 laws promulgated by the President of the Republic the same day.

In the first ten months of its existence as the supreme legislative body, the Assembly of Kosovo passed over 50 laws directly related to the implementation of the provisions of the CSP. Included among these legislative provisions were acts to decentralize governing authority to Kosovo's municipalities; to build Kosovo's governing capacity; and to safeguard the rights and freedoms of Kosovo's communities, including through the protection of religious and cultural heritage.

1. Decentralization

Among the earliest CSP implementing laws were those concerning the vitally important process of decentralization. Laws on Local Self-Government, Boundaries of Municipalities, Local Government Finance, Local Education and Local Health not only establish the framework for the new municipalities to be formed under the CSP, but just as importantly codify the central principle of decentralization itself – that the interests of democracy and efficacy are best served by moving governing capacity closer to citizens. Consistent with these laws, EUR 3.9 million has been set aside for the expenses of the new municipalities to be formed according to the CSP; the Ministry of Local Self-Government has led a nationwide publicity campaign on the benefits of decentralization; and the ICO is working closely with the Government of Kosovo's Inter-Ministerial Working Group on Decentralization to determine the modalities for the formation of

the Municipal Preparation Teams that will be tasked with building the governing infrastructure of the new municipalities. The first transfer of competencies took place in January 2009. The ICO has worked closely with both the Government and the Assembly in order to ensure the timely adoption of relevant legislation and its implementation.

Establishing a Mitrovica North municipality, as foreseen by the CSP, still remains a challenge for the overall perception of the decentralization process.

2. Institution Building

- Security Sector Reform

Another set of CSP-implementing legislation passed early on by the Assembly concerned laws designed to establish the institutions needed to exercise the full measure of sovereignty. The Law on the Kosovo Security Council, the Law on the Ministry for the Kosovo Security Force, the Law on Service in the Kosovo Security Force, the Law on the Civil Aviation Authority, and the Law on the Establishment of the Kosovo Intelligence Agency are just a few that have been passed in the framework of a coherent reform of the security sector, according to the principles and provisions of the CSP.

Minister Fehmi Mujota was named Kosovo's first Minister for the Kosovo Security Force (KSF); he has played an important role – consistent with his position and the principle of civilian control of security bodies – in the selection of the KSF commander and KSF officers. Though not without difficulties, this process permitted the deactivation of the Kosovo Protection Corps on 20 January 2009, and the beginning of KSF training.

In September 2008, the Government of Kosovo named Driton Gjonbaljaj as the Director General of Kosovo's Civil Aviation Authority. The KCAA has taken the lead in assuring the safety of civil aviation in Kosovo and represented Kosovo in regional civil aviation fora.

On 6 February 2009, the Assembly of Kosovo confirmed Bashkim Smakaj as the first Director of the Kosovo Intelligence Agency, and he has been charged with the development of an agency that is multi-ethnic and apolitical. The Kosovo Security Council held its first meeting 11 February 2009 and efforts are underway to build a KSC Secretariat that will permit this body to take its proper role in coordinating Kosovo's national security and safety policy, while not duplicating the functions of government ministries.

In accordance with provisions of the CSP, the Republic of Kosovo has undertaken to demarcate its border with the former Yugoslav Republic of Macedonia. Both countries named representatives to a Joint Technical Commission (JTC), which has held numerous sessions. Together, the JTC has agreed on the location of the placement of all of the primary border stones. A small section of the border, near the villages of Debellde/Debelde and Tanusevci,

remains to be demarcated. The ICO has been closely involved in the process of border demarcation, both in the JTC and along the border.

- Rule of Law

One major element for the future development of a functioning Rule of Law sector was to deploy the largest ESDP mission to date, EULEX, throughout the country in late 2008. Its police, judges, prosecutors and customs officials will provide indispensable support to Kosovo's efforts to strengthen the rule of law. Efforts to establish a Constitutional Court also made important progress in the course of the last twelve months. A Law on the Constitutional Court was adopted in late 2008, and an interim mechanism for registering prospective cases for this court has been established. The process of the selection of judges, both international and national, is now underway. International judges will be appointed in coordination with the President of the European Court of Human Rights.

The Constitution of Kosovo has established the Kosovo Judicial Council (KJC), an independent body responsible, inter alia, for all decisions on the proposal of candidates for judicial office. Kosovo has, since then, adopted implementing legislation in order to regulate further the composition and organization of the KJC.

Efforts are also underway regarding the comprehensive Kosovo-wide review and reappointment process of all judges and prosecutors foreseen by Annex IV of the CSP and the Constitution. The President of the Republic of Kosovo has appointed all members on the Independent Judicial and Prosecutorial Commission in January (IJPC). The IJPC has recently launched the reappointment process for all judges and prosecutors.

- Economy

A comprehensive set of CSP-implementing legislation passed by the Assembly concerned laws designed to establish the institutions needed to define the legal framework for the economy as defined and prescribed by CSP. This included legislation on publicly-owned enterprises; on the Privatization Agency of Kosovo (PAK); the Kosovo Property Agency (KPA); and on the various independent economic regulators of Kosovo. Following the adoption of the laws, the PAK successfully started to work last summer and KPA accelerated the settlement of claims. Furthermore the ICR made key appointments in the area of economics as foreseen by the CSP, including the Auditor-General of Kosovo, a member of the board of the Kosovo Pensions Savings Trust (KPST) and members of the Board of PAK.

3. Community Rights and Religious and Cultural Heritage

The protection of community rights and of religious and cultural heritage are at the very heart of the CSP and central to the Kosovo Constitution's inclusion of rights for this multi-ethnic, secular, democratic state. Among the first of such laws passed by the Kosovo Assembly was the

Law on the Protection and Promotion of Rights of Communities and their Members and the Law on the Establishment of Special Protective Zones. The first piece of legislation provides the legal framework for community rights in the constitution, including in the realms of education, identity and the use of Kosovo's official languages. The rights of communities and their members, and their inclusion in Kosovo's public life are also the work of the Communities Consultative Council (CCC). The CCC was established in accordance with the Kosovo Constitution and was formed by a decree of the President of Kosovo. It held its first session in December 2008.

The Law on the Establishment of Special Protective Zones sets up a mechanism to protect Kosovo's rich religious and cultural patrimony, including but not limited to the sites of the Serbian Orthodox Church (SOC). These protections aim to prohibit land use that would detract from the character or appearance of the sites or disturb the monastic life of the clergy. While Special Protective Zones are designed to protect some SOC sites from development, the Kosovo authorities have taken practical steps to support the physical protection of SOC sites and the economic sustainability of the Church. The Government of Kosovo, through its Ministry of Culture Youth and Sport, contracted a private security firm to provide round-the-clock protection to SOC sites considered to be in the greatest danger. In February 2009, this contract was suspended and the Kosovo Police assumed its responsibility with a 24-hour-a-day protection of these sites.

The Kosovo Police's implementation of their Operational Order for protection of SOC holy sites will permit international partners, like KFOR, to proceed with plans to withdraw from such tasks, without placing these churches and monasteries in additional danger. The implementation of the Operational Order is done in close collaboration with the ICO. As for the economic sustainability of the SOC, the Kosovo Customs Code, passed in late 2008, included CSP-related provisions exempting the SOC from the payment of certain customs duties. Similar exemptions will have to be adopted to implement other CSP provisions on SOC self-sustainability.

It has been a challenge for the Government of Kosovo to address the needs of the Kosovo Serb community appropriately due to lack of dialogue between the majority community and the Kosovo Serb community. The ICR, primarily in his capacity as EUSR, is facilitating a Round Table between key government ministers and Kosovo Serb representatives. Its goal is to discuss an effective implementation of the CSP with regard to the needs of the Kosovo Serb community.

For a complete picture of the progress made to date on CSP implementation, please refer to the most recent version of ICO's CSP Implementation Matrix.

III. THE REPUBLIC OF KOSOVO'S GROWING NETWORK OF INTERNATIONAL RELATIONS

17 February 2008 witnessed the declaration of Kosovo's independence, and hence its entry into the family of independent, sovereign states; the year that followed has seen Kosovo's leadership, together with its international partners, consolidate its statehood through the establishment of a growing network of international relations.

Since its Declaration of Independence, 55 states have formally recognized Kosovo's statehood, including 22 of the 27 member states of the European Union, and states from every continent. It has also been recognized by three of the four states with which it shares common borders. Kosovo has issued its citizens with identity documents, including passports. These passports have been recognized as valid for travel by other states.

In March 2008, the Assembly of Kosovo passed a Law on the Ministry of Foreign Affairs and Diplomatic Service of Kosovo. Skender Hyseni was named Kosovo's first Foreign Minister and was charged with building both his ministry and Kosovo's diplomatic representations abroad. Laudable efforts are underway on both fronts. The initial legislation was followed by a Law on the Foreign Service of the Republic of Kosovo and a Law on the Consular Service in Diplomatic and Consular Missions of the Republic of Kosovo. These laws provided the legal basis for the establishment of Kosovo's first diplomatic and consular presences abroad. Kosovo's first foreign missions, to be headed by ten Chargés d'affaires, were announced in August 2008. The ICO has supported the build-up of the Ministry of Foreign Affairs by establishing the External Relations Working Group, which includes officials from the Ministry and ISG representatives.

The Government of Kosovo has received numerous diplomatic delegations including several Heads of State and Government, and numerous ministers including ministers of foreign affairs. The Kosovo Prime Minister, Foreign Minister and other Ministers have also been invited abroad to further cooperation.

In July 2008, the Republic of Kosovo submitted official applications for membership in the International Monetary Fund and the World Bank. These applications have the full support of the ICO, and the ICR has lobbied for their acceptance. The IMF membership committee has been formed and is about to start its work.

IV. THE YEAR AHEAD

Kosovo and the ICO now enter their second year. ICO's partnership with the Kosovo Government and institutions remains strong. It would be irresponsible, however, to assume that the progress achieved to date ensures a successful conclusion. Much work lies ahead, particularly in monitoring the implementation of CSP laws.

Our strategic priorities for the coming months are to:

- help ensure a successful completion of the reform of the security sector;
- keep our focus on decentralization;
- help strengthen the rule of law, in close cooperation with EULEX;
- attend to good governance and economic reform.

Of all sectors, that involving public security and safety has seen the most institutional progress over recent months. All security institutions set forth in Annex VIII of the CSP and Chapter XI of the Constitution are now moving ahead. But some are untried in practice and incomplete in personnel. Resource needs will continue. The ICO and the international community will have to offer steady support to ensure that the fledgling institutions, given their central role in society, will develop.

As in 2008, ICO will continue its work with the Government of Kosovo to advance the process of decentralization, both the creation of the five-plus-one municipalities foreseen in the CSP and the transfer of competencies to all of Kosovo's local governments. A successful decentralization process, which will allow all communities to determine their own affairs on the local and municipal level, will be a key element for a sustainable reconciliation in Kosovo.

Further efforts to enhance good governance and the Rule of Law are needed. The ICO will continue to work closely with the EULEX mission, in order to foster the rule of law in Kosovo. The challenges range from enabling the operations of Customs throughout the territory; efficient, fair and competent courts; as well as a competent multiethnic police throughout the entire territory of Kosovo.

Finally, the accelerated reform of the economy must include several elements, all of which touch on CSP responsibilities. The ICO will continue to encourage fiscal responsibility from the Government of Kosovo, mainly by enhancing the sustainability and the quality of the budget, through CSP-mandated budget consultations. ICO will also encourage its Kosovo partners to keep their pledge to complete quickly, through the Privatization Agency of Kosovo, the privatization of socially-owned enterprises and the assessment of creditor and ownership claims over them. Kosovo also needs to start privatizing large publicly owned enterprises in a

transparent manner, as well as to improve standards of the governance of all publicly-owned enterprises, with a view toward their eventual privatization. The ICO will work together closely with the Kosovo authorities to push for a transparent and objective process of selecting and appointing members of boards and other key positions, as foreseen in the CSP. The ICR will also support the reform of the energy sector in order to help establishing a viable economic development.

Through continued effort and vigilance, we believe that 2009 will be a year of progress for Kosovo -- progress in meeting its commitments to itself and to its international partners to implement the CSP, and progress toward the destiny foreseen in its Constitution, "as a free democratic, and peace-loving country that will be a homeland to all of its citizens."

Annex 4

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Preamble, Table of Contents (English translations), and
Summary of Principal Provisions (unofficial)*

* The full Albanian and Serbian text of the Constitution of the Republic of Kosovo and an English Translation are available on the website of the Assembly of the Republic of Kosovo (http://www.assembly-kosova.org/common/docs/Kushtetuta_sh.pdf (in Albanian), http://www.assembly-kosova.org/common/docs/Ustav1 Republike Kosovo Srpski .pdf (in Serbian) and http://www.assembly-kosova.org/common/docs/Constitution1 of the Republic of Kosovo.pdf (in English)).

CONSTITUTION OF THE REPUBLIC OF KOSOVO

We, the people of Kosovo,

Determined to build a future of Kosovo as a free, democratic and peace-loving country that will be a homeland to all of its citizens;

Committed to the creation of a state of free citizens that will guarantee the rights of every citizen, civil freedoms and equality of all citizens before the law;

Committed to the state of Kosovo as a state of economic wellbeing and social prosperity;

Convinced that the state of Kosovo will contribute to the stability of the region and entire Europe by creating relations of good neighborliness and cooperation with all neighboring countries;

Convinced that the state of Kosovo will be a dignified member of the family of peace-loving states in the world;

With the intention of having the state of Kosovo fully participating in the processes of Euro-Atlantic integration;

In a solemn manner, we approve the Constitution of the Republic of Kosovo.

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Principal Provisions of the Constitution (Summary)

This informal summary describes the principal provisions of the Constitution of the Republic of Kosovo that may be of particular interest in the present proceedings.

CHAPTER I: BASIC PROVISIONS

The Republic of Kosovo is an independent, sovereign, democratic, unique and indivisible State (art. 1(1)). It shall have no territorial claims against, and shall seek no union with, any State or part of any State (art. 1(3)). The Republic of Kosovo is a secular State (art. 8).

The Constitution is the highest legal act of the Republic of Kosovo (art. 16 (1)). The Republic of Kosovo shall respect international law (art. 16 (3)). The Republic of Kosovo concludes international agreements and becomes a member of international organizations (art. 17 (1)). International agreements relating to certain subjects are ratified by two thirds vote of all Deputies of the Assembly (art. 18 (1)). Other international agreements are ratified upon signature of the President of the Republic (art. 18 (2)). International agreements become part of the internal legal system upon publication in the *Official Gazette*. They are directly applied except where application requires the promulgation of a law (art. 19 (1)). International agreements and norms of international law have superiority over the laws of the Republic (art. 19 (2)).

CHAPTER II: FUNDAMENTAL RIGHTS AND FREEDOMS

Various provisions of the Constitution emphasise the commitment to human rights. In addition to the catalogue of rights and freedoms in Chapter II (articles 23 to 52), these include articles 1 (2) (respect for human rights and freedoms), 3 (Equality Before the Law), 5 (Languages), 7 (Values), 9 (Cultural and Religious Heritage), and 144 (3) (constitutional amendments may not diminish rights and freedoms).

The opening provisions of Chapter II include General Principles (art. 21), and provision for the direct applicability of eight international human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the International Covenant on Civil and Political Rights and its Protocols (art. 22).

The catalogue of fundamental rights and freedoms goes beyond those contained in the European Convention and the International Covenant. It includes, for example, Right of Access to Public Documents (art. 41), Freedom of Art and Science (art. 48), Right to Work and Exercise Profession (art. 49), Health and Social Protection (art. 51) and Responsibility for the Environment (art. 52).

Human rights and fundamental freedoms shall be interpreted consistent with the decisions of the European Court of Human Rights (art. 53).

Provision is made for the judicial protection of rights (art. 54) and for limitations on rights only in accordance with law and to the extent necessary for the fulfilment of the purpose of the limitation in an open and democratic society (art. 55). Many of the rights are non-derogable even during a State of Emergency (art. 56).

CHAPTER III: RIGHTS OF COMMUNITIES AND THEIR MEMBERS

Chapter III contains specific provisions relating to the rights of the various Communities in the Republic (art. 57 (1)), based on the principle of non-discrimination (art. 57 (2)). It is the duty of the State to ensure appropriate conditions enabling members of Communities to preserve, protect and promote their identities (art. 58 (1)).

Provision is made for the establishment of a Consultative Council for Communities containing representatives of all Communities to reflect their various interests (art. 60). In addition, Communities are to be represented in Local Government (art. 62).

CHAPTER IV: ASSEMBLY OF THE REPUBLIC OF KOSOVO

The Assembly consists of 120 Deputies elected by secret ballot on the basis of open lists (art. 64 (1)), with ten seats guaranteed for candidates representing the Kosovo Serb Community (art. 64 (2) (1)), and another ten reserved for other Communities (art. 64 (2) (2)).

The Assembly can make constitutional amendments only with a two-thirds majority vote of all its Deputies, including a two-thirds majority of all Deputies who hold reserved seats as representatives of Communities (art. 65 (2)).

The Assembly elects, and may dismiss, the President of the Republic (art. 65 (7)) and the Government (art. 65 (8)), and proposes judges for the Constitutional Court (art. 65 (11)).

The Assembly is elected for a mandate of four years (art. 66(1)), which may only be extended in a State of Emergency (art. 66(4)).

Legislation is adopted by a majority vote of Deputies present and voting (art. 80 (1)), unless it is of vital interest, which includes legislation concerning municipalities, implementing the rights of Communities and their members, the use of language, local elections, protection of cultural heritage, religious freedom, education or use of symbols. Such legislation requires both the majority of Deputies present and voting, and the majority of Deputies present and voting holding seats reserved or guaranteed for representatives of Communities that are not in the majority (art. 81 (1)).

CHAPTER V: PRESIDENT OF THE REPUBLIC OF KOSOVO

The President is the head of state and represents the unity of the people of the Republic of Kosovo (art. 83).

His competencies include: guaranteeing the constitutional functioning of the institutions set out in the Constitution (art. 84 (2)); leading foreign policy (art. 84 (10)); being the Commander-in-Chief of the Kosovo Security Force (art. 84 (12)); appointing judges to the Constitutional Court upon the proposal of the Assembly (art. 84 (19)); and declaring a State of Emergency (art. 84 (22)).

The President is elected by the Assembly in a secret ballot (art. 86 (1)), by a two-thirds majority of Deputies (art. 86 (4)). The term of office is five years (art. 87 (2)), and re-electable only once (art. 87 (3)).

CHAPTER VI: GOVERNMENT OF THE REPUBLIC OF KOSOVO

The Government consists of the Prime Minister, Deputy Prime Minister(s) and Ministers (art. 92 (1)).

The competencies of the Government include: proposing and implementing internal and foreign policy (art. 93 (1)) and proposing laws to the Assembly (art. 93 (3)).

The President of the Republic proposes to the Assembly a candidate for Prime Minister, who then presents the composition of the Government to the Assembly for approval (art. 95 (1) and (2)).

At least one Minister and two Deputy Ministers must be from the Kosovo Serb Community, and at least one Minister and two Deputy Ministers must be from other Kosovo non-majority Communities (art. 96).

The Government is accountable to the Assembly regarding its work (art. 97 (1)).

The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality (art. 101 (1)).

CHAPTER VII: JUSTICE SYSTEM

Judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts (art. 102 (2)).

The Supreme Court of Kosovo is the highest judicial authority (art. 103 (2)). At least 15 % of judges, but no fewer than three, shall be from non-majority Communities (art. 103 (3)).

The President of the Republic shall appoint, reappoint and dismiss judges upon the proposal of the Kosovo Judicial Council (art. 104 (1)).

The composition of the judiciary shall reflect the ethnic diversity of Kosovo and the internationally recognized principles of gender equality (art. 104 (2)), and the composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court (art. 103 (3)).

The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality (art. 108 (2)). It is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office (art. 108 (3)), and the general administration of the judiciary (art. 108 (5)). It is to be composed of 13 members: five elected by members of the judiciary, four elected by the Deputies of the Assembly, two elected by Deputies of the Assembly holding guaranteed seats for the Kosovo Serb community, and two elected by Deputies of the Assembly holding guaranteed seats for other Communities (art. 108 (6)).

Chapter VIII: Constitutional Court

The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution (art. 112 (1)).

Judges are appointed by the President of the Republic upon the proposal of the Assembly and serve for a non-renewable mandate of nine years (art. 114 (2)).

Seven of the nine judges are proposed with a two-thirds majority of the Deputies present and voting in the Assembly. The remaining two are proposed with a majority vote of the Assembly, but only upon the consent of the majority of the Deputies holding seats guaranteed for the representatives of the Communities not in the majority in Kosovo (art. 114 (3)).

Chapter IX: Economic Relations

The Republic is to ensure a market economy, freedom of economic activity and safeguards for public and private property (art. 119 (1)).

Equal rights are ensured for all domestic and foreign investors and enterprises (art. 119 (2)), with foreign investors entitled to freely transfer profit and invested capital outside the country (art. 119 (6)).

Public expenditure and the collection of public revenue shall be based on the principles of accountability, effectiveness, efficiency and transparency (art. 120 (1)).

Chapter X: Local Government and Territorial Organization

The right to local self-government is guaranteed (art. 123 (1)), with local self-government exercised by representative bodies (art 123 (2)). The Republic shall observe

and implement the European Charter on Local Self-Government to the same extent as that required of a signatory State (art. 123 (3)).

CHAPTER XI: SECURITY SECTOR

Security institutions in the Republic are to protect public safety and the rights of all people in the Republic. Security institutions are to reflect the ethnic diversity of the population of the Republic (art. 125 (2)).

The Kosovo Security Force is the national security force and may send members abroad in full conformity with its international responsibilities (art. 126 (1)).

The Police of the Republic are responsible for the preservation of public order and safety throughout the territory of the Republic (art. 128 (1)), and shall reflect the ethnic diversity of the Republic (art. 128 (2)). The Police of the Republic are responsible for border control in direct cooperation with local and international authorities (art. 128 (5)).

The President of the Republic may declare a State of Emergency when: there is a need for emergency defence measures; there is internal danger to the constitutional order or to public security; or there is a natural disaster affecting all or part of the territory of the Republic (art. 131 (1)). During the State of Emergency, the Constitution is not suspended (art. 131 (1)). Detailed provisions are included concerning a State of Emergency

CHAPTER XII: INDEPENDENT INSTITUTIONS

An independent Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities (art. 132 (1)).

Provisions is made for the Auditor-General (art. 136), the Central Election Committee (art. 139), the Central Bank of Kosovo (art. 140), the Independent Media Commission (art. 141), and other independent agencies (art. 142).

CHAPTER XIII: FINAL PROVISIONS

All authorities in the Republic of Kosovo shall abide by all of Kosovo's obligations under the Ahtisaari Settlement, and take all necessary actions for their implementation (art.143 (1)). The provisions of the Settlement take precedence over all other legal provisions in Kosovo (art. 143 (2)). The Constitution, laws and other legal acts shall be interpreted in compliance with the Settlement; if there are inconsistencies the provisions of the Settlement prevail (art. 143 (3)).

Amendments to the Constitution require the approval of two thirds of all Deputies, including two thirds of all Deputies holding reserved or guaranteed seats for representatives of non-majority Communities (art. 144 (2)). Before adoption, the

Constitutional Court has to assess that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II (art.144 (3)).

Article 145 provides for the continuity of international agreements and applicable legislation.

CHAPTER XIV: TRANSITIONAL PROVISIONS

The Constitution provides that the International Civilian Representative and other international organizations and actors mandated under the Ahtisaari Settlement have the mandate and powers set forth under the Settlement; and all authorities in Kosovo shall cooperate fully with them, and shall give effect to their decisions or acts (art. 146).

The International Civilian Representative is the final authority in Kosovo regarding interpretation of the civilian aspects of the Settlement (art. 147).

The international military presence (KFOR) has the mandate and powers set forth under the relevant international instruments including Security Council resolution 1244 (1999) and the Ahtisaari Settlement. The Head of the international military presence is the final authority in theatre regarding the interpretation of those aspects of the Settlement that refer to the international military presence (art. 153).

All legal residents of the Republic as the date of the adoption of the Constitution have the right to citizenship (art. 155 (1)). The Republic recognizes the right of all citizens of the former Federal Republic of Yugoslavia habitually residing in Kosovo on 1 January 1998 and their direct descendents to Republic of Kosovo citizenship regardless of their current residence and of any other citizenship they may hold (art. 155 (2)).

The Republic of Kosovo shall promote and facilitate the safe and dignified return of refugees and internally displaced persons and assist them in recovering their property and possession (art. 156).

Annex 5

TABLE OF LAWS ADOPTED BY THE ASSEMBLY OF THE REPUBLIC OF KOSOVO

Laws Adopted by the Assembly of the Republic of Kosovo

No.	Name	Date of approval	Publication
03/L-033	Law on the Status, Immunities, and Privileges of Diplomatic and Consular Missions and Personnel in Kosovo and of the International Military Presence and its Personnel	20.02.2008	*Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, p. 46
03/L-034	Law on Citizenship of Kosova	20.02.2008	*Ibid.*, No. 26, 2 June 2008, p. 28
03/L-035	Law on Police	20.02.2008	*Ibid.*, No. 28, 4 June 2008, p. 29
03/L-036	Law on Kosova Police Inspektorate	20.02.2008	*Ibid.*, No. 26, 2 June 2008, p. 18
03/L-037	Law on Travel Documents	20.02.2008	*Ibid.*, No. 27, 3 June 2008, p. 69
03/L-038	Law on the Use of Kosovo State Symbols	20.02.2008	*Ibid.*, No. 26, 2 June 2008, p. 35
03/L-039	Law on Special Protective Zones	20.02.2008	*Ibid.*, No. 28, 4 June 2008, p. 74
03/L-040	Law on Local Self Government	20.02.2008	*Ibid.*, No. 28, 4 June 2008, p. 47
03/L-041	Law on Administrative Municipal Boundaries	20.02.2008	*Ibid.*, No. 26, 2 June 2008, p. 1
03/L-044	Law on Ministry for Foreign Affairs and Diplomatic Service of Republic of Kosovo	13.03.2008	*Ibid.*, No. 26, 2 June 2008, p. 50
03/L-045	Law on Ministry for the Kosovo Security Force	13.03.2008	*Ibid.*, No. 26, 2 June 2008, p. 54
03/L-046	Law on the Kosovo Security Force	13.03.2008	*Ibid.*, No. 27, 3 June 2008, p. 76
03/L-047	Law on The Protection and Promotion of the Rights of Communities and their Members in Republic of Kosovo	13.03.2008	*Ibid.*, No. 28, 4 June 2008, p. 65
03/L-048	Law on Public Financial Management and Accountability	13.03.2008	*Ibid.*, No. 27, 3 June 2008, p. 1
03/L-049	Law on Local Government Finance	13.03.2008	*Ibid.*, No. 27, 3 June 2008, p. 34
03/L-050	Law on Establishment of the Kosovo Security Council	13.03.2008	*Ibid.*, No. 26, 2 June 2008, p. 41
03/L-051	Law on Civil Aviation	13.03.2008	*Ibid.*, No. 28, 4 June 2008, p. 1
03/L-052	Law on Special Prosecution Office of the Republic of Kosovo	13.03.2008	*Ibid.*, No. 27, 3 June 2008, p. 47
03/L-053	Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo	13.03.2008	*Ibid.*, No. 27, 3 June 2008, p. 59
03/L-005	Law on Civil Use of Explosives	16.05.2008	*Ibid.*, No. 33, 15 Jul. 2008, p. 56
03/L-063	Law on the Kosovo Intelligence Agency	21.05.2008	*Ibid.*, No. 30, 15 June 2008, p. 17

No.	Name	Date of approval	Publication
03/L-065	Law on Integrated Management and Control of the State Border	21.05.2008	*Ibid.*, No. 30, 15 June 2008, p. 44
03/L-066	Law on Asylum	21.05.2008	*Ibid.*, No. 30, 15 June 2008, p. 1
03/L-067	Law on the Privatization Agency of Kosovo	21.05.2008	*Ibid.*, No. 30, 15 June 2008, p. 30
03/L-068	Law on Education in the Municipalities of the Republic of Kosovo	21.05.2008	*Ibid.*, No. 30, 15 June 2008, p. 51
03/L-064	Law on Official Holidays in Republic of Kosovo	23.05.2008	*Ibid.*, No. 30, 15 June 2008, p. 56
03/L-008	Law on Executive Procedure	02.06. 2008	*Ibid.*, No. 33, 15 July 2008, p. 1
03/L-072	Law on Local Elections in the Republic of Kosovo	05.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 35
03/L-073	Law on General Elections in the Republic of Kosovo	05.06.2008	*Ibid.*, No. 31, 15 June 2008, p. 1
03/L-074	Law on the Central Bank of the Republic of Kosovo	05.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 15
03/L-075	Law on the Establishment of the Office of the Auditor General of Kosovo and the Audit Office of Kosovo	05.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 42
03/L-076	Law on Railways in the Republic of Kosovo	05.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 1
03/L-079	Law on amending UNMIK Regulation 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 47
03/L-080	Law on Amending Kosovo Assembly Law No. 2004/9 on the Energy Regulator	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 55
03/L-081	Law on Amending UNMIK Regulation No. 2005/2 on the Establishment of the Independent Commission for Mines and Minerals	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 59
03/L-082	Law on Service in the Kosovo Security Force	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 28
03/L-083	Law on Dissolution of the Kosovo Protection Corps	13.06.2008	*Ibid.*, No. 31, 15 June 2008, p. 58
03/L-084	Law on Amending UNMIK Regulation 2005/20 Amending UNMIK Regulation 2001/35 on Kosovo Pensions Trust	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 50
03/L-085	Law on Amending UNMIK Regulation No. 2003/16 on the Promulgation of a Law adopted by the Assembly of Kosovo on Telecommunications	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 53

No.	Name	Date of approval	Publication
03/L-086	Law on Amending UNMIK Regulation 2004/49 on the Activities of Water, Wastewater and Waste Services Providers	13.06.2008	*Ibid.*, No. 31, 15 June 2008, p. 61
03/L-087	Law on Publicity Owned Enterprises	13.06.2008	*Ibid.*, No. 31, 15 June 2008, p. 39
03/L-088	Law on Amendment of UNMIK Regulation No. 2008/13 on the approval of the Kosovo Consolidated Budget and Authorizing Expenditures for the period 1 January to 31 December 2008	13.06.2008	*Ibid.*, No. 32, 15 June 2008, p. 57
03/L-089	Law on Amendments to the Law on Administrative Municipal Boundaries, Law on the Privatization Agency of Kosovo, Law on Education in the Municipalities of the Republic of Kosovo, Law on Official Holidays in Republic of Kosovo, Law on the Kosovo Intelligence Agency, Law on Asylum and Law on Integrated Management And Control of the State Border	13.06.2008	*Ibid.*, No. 31, 15 June 2008, p. 63
03/L-001	Law on Benefits to Former High Officials	19.06.2008	*Ibid.*, No. 33, 15 July 2008, p. 67
03/L-006	Law on Contentious Procedure	30.06.2008	*Ibid.*, No. 38, 20 Sep.. 2008, p. 1
03/L-054	Law on Stamps of the Republic of Kosovo Institutions	30.07.2008	*Ibid.*, No. 38, 20 Sep. 2008, p. 77
03/L-093	Law on Amendment to Law No. 03/L-088 on the Approval of the Kosovo Consolidated Budget and Authorizing Expenditures for the period from 1 January to 31 December 2008	30.07.2008	
03/L-057	Law on Mediation	18.09.2008	*Ibid.*, No. 41, 1 Nov. 2008, p. 6
03/L-099	Law on Identity Card	03.10.2008	*Ibid.*, No. 41, 1 Nov. 2008, p. 1
03/L-004	Law on the Amending and Supplementing and of the Law No. 2003/9 on Farmer's Cooperatives	03.10.2008	*Ibid.*, No. 41, 1 Nov. 2008, p. 12
03/L-100	Law on the pensions for Kosovo Protection Corps members	10.10.2008	*Ibid.*, No. 41, 1 Nov. 2008, p. 13
03/L-010	Law on Notary	17.10.2008	*Ibid.*, No. 42, 25 Nov. 2008, p. 5
03/L-031	Law on Amending and Supplementing Law No. 02/L-5 on Supporting the Small and Medium Enterprises	17.10.2008	*Ibid.*, No. 42, 25 Nov. 2008, p. 1
03/L-002	Law on Supplementing and Amending of the Criminal Code of Kosovo	06.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 4
03/L-003	Law on Supplementing and Amending of the Kosovo Code of Criminal Procedure	06.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 1
03/L-018	Law on Final and State Matura Exam	06.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 5

No.	Name	Date of approval	Publication
03/L-056	Law on National State Song and Dance Ensemble "Shota" and other Ensembles	06.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 40
03/L-110	Law on Termination of Pregnancy	06.11.2008	*Ibid.*, No. 48, 6 Feb. 2009, p. 1
03/L-060	Law on National Qualifications	07.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 33
03/L-077	Law on Amendments and Supplementing of the Law No. 2003/7 on Archives and Archive Materials	07.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 46
03/L-042	Law on Protection Products	07.11.2008	*Ibid.*, No. 44, 22 Dec. 2008, p. 13
03/L-106	Law Amending the Law on Spatial Planning No. 2003/14	10.11.2008	*Ibid.*, No. 42, 25 Nov. 2008, p. 35
03/L-107	Law Amending the Law on the Ministry of the Kosovo Security Force No. 03/L-045	10.11.2008	*Ibid.*, No. 42, 25 Nov. 2008, p. 34
03/L-108	Law Amending the Law on the Kosovo Security Force No. 03/L-046	10.11.2008	*Ibid.*, No. 42, 25 Nov. 2008, p. 33
03/L-109	Customs and Excise Draft Code of Kosovo	10.11.2008	*Ibid.*, No. 43, 11 Nov. 2008, p. 1
03/L-007	Law on Out Contentious Procedure	20.11.2008	*Ibid.*, No. 45, 12 Jan. 2009, p. 21
03/L-029	Law on Agriculture Inspection	20.11.2008	*Ibid.*, No. 45, 12 Jan. 2009, p. 1
03/L-116	Law on Central Heating	20.11.2008	*Ibid.*, No. 45, 12 Jan. 2009, p. 7
03/L-117	Law on the Bar	20.11.2008	*Ibid.*, No. 49, 25 Mar. 2009, p. 37
03/L-069	Law on Accreditation	20.11.2008	*Ibid.*, No. 45, 12 Jan. 2009, p. 17
03/L-118	Law on Public Gatherings	04.12.2008	
03/L-071	Law on Amendments and Supplements to the Law No. 2004/48 on Tax Administration and Procedures	04.12.2008	*Ibid.*, No. 47, 25 Jan. 2009, p. 18
03/L-101	Law on Pardon	12.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 57
03/L-120	Law for Amending and Supplementing the Law No. 2003/11 on Roads	12.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 51
03/L-121	Law on the Constitutional Court of the Republic of Kosovo	16.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 20
03/L-122	Law on Foreign Service of the Republic of Kosovo	16.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 31
03/L-123	Law on the Temporary Composition of the Republic of Kosovo Judicial Council	16.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 40
03/L-124	Law on Amending the Law on Health	16.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 49
03/L-125	Law on Consular Services of Diplomatic and Consular Missions of the Republic of Kosovo	16.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 45

No.	Name	Date of approval	Publication
03/L-126	Law on Foreigners	16.12.2008	*Ibid.*, No. 46, 15 Jan. 2009, p. 1
03/L-019	Law on Vocational Ability, Rehabilitation and Employment of People with Disabilities	18.12.2008	*Ibid.*, No. 47, 25 Jan. 2009, p. 9
03/L-027	Law on Accommodation Tax in Hotel-Tourist Facilities	18.12.2008	*Ibid.*, No. 47, 25 Jan. 2009, p. 7
03/L-112	Law on Excise Tax Rate in Kosova	18.12.2008	
03/L-113	Law on Corporate Income Tax	18.12.2008	
03/L-114	Law on Value Added Tax	18.12.2008	
03/L-115	Law on Personal Income Tax	18.12.2008	
03/L-105	Law on Republic of Kosovo Budget for 2009	19.12.2008	
03/L-094	Law on the President of the Republic of Kosovo	19.12.2008	*Ibid.*, No. 47, 25 Jan. 2009, p. 1
03/L-015	Law on Environmental Strategic Assessment	12.02.2009	*Ibid.*, No. 49, 25 Mar. 2009, p. 9
03/L-016	Law on Food	12.02.2009	*Ibid.*, No. 49, 25 Mar. 2009, p. 19
03/L-092	Law for Replenishment and Amendment of Law No. 02/L-20 Technical Demands for Products and Valuation of Conformation	12.02.2009	*Ibid.*, No. 49, 25 Mar. 2009, p. 35
03/L-134	Law on Freedom of Association in Non-Governmental Organizations	12.02.2009	*Ibid.*, No. 49, 25 Mar. 2009, p. 1
03/L-024	Law on Environmental Impact Assessment	26.02.2009	
03/L-025	Law on Environmental Protection	26.02.2009	
03/L-091	Law on Use Management and Maintenance of Building Joint Ownership	12.03.2009	
03/L-131	Law on Amendment and Supplementation of Law No. 2004/17 on Consumer Protection	12.03.2009	
03/L-043	Law on Integrated Prevention Pollution Control	26.03.2009	
03/L-139	Law on Expropriation of Immovable Property	26.03.2009	

Annex 6

DRAFT TREATY OF FRIENDSHIP AND COOPERATION

(proposed by Kosovo during the Final Status talks)

DRAFT TREATY OF FRIENDSHIP AND COOPERATION BETWEEN KOSOVO AND SERBIA

The Contracting Parties of Kosovo and Serbia:

Acknowledging the deep ties between the peoples of Kosovo and Serbia, including long-standing historic, cultural, ethnic and economic bonds;

Regretting the periods of conflict and war that have divided us, especially the tragic events related to the violent collapse of Yugoslavia in the 1990s;

Declaring a sincere desire to confront the legacy of the recent past in a spirit of reconciliation and forgiveness, even as we bring to justice those who have committed crimes in warfare;

Believing that both Kosovo and Serbia share the common destiny of closer integration into the Euro-Atlantic community of democracies, which will lead to a more secure, democratic and prosperous future for all;

Hoping that the process of Euro-Atlantic integration will bring all the peoples of southeast Europe closer together and will continue to eliminate the barriers that have divided our nations;

Recognizing that unique historical circumstances and common interests will require an extremely close and friendly relationship between Kosovo and Serbia for many years to come;

Convinced that regular, institutionalised mechanisms of cooperation and dialogue on issues of mutual concern can help reduce tensions, enhance regional stability and advance the common interests of both Kosovo and Serbia;

Solemnly agree to enter into a Treaty of Friendship and Cooperation as follows:

CHAPTER I
PURPOSE AND PRINCIPLES

ARTICLE 1

The purpose of this Treaty is to promote peace, friendship and cooperation between Kosovo and Serbia in order to promote stability, democracy and prosperity for all.

ARTICLE 2

In their relations with one another, the Parties shall be guided by the following principles:

a) Mutual respect for each other's sovereignty and territorial integrity;

b) Renunciation of the use or threat of use of force in solving disputes;

c) Respect for human rights and fundamental freedom of all citizens without discrimination of any kind, including, in particular the full protection of the national or

ethnic, linguistic, cultural, and religious identity of all minority communities and their members;

d) The free movement of people, goods and capital;

e) Cooperation and dialogue on issues of mutual concern.

CHAPTER II
COMMITMENT TO EURO-ATLANTIC INTEGRATION

ARTICLE 3

The Parties confirm their desire to integrate their societies and economies fully into the Euro-Atlantic community of democracies, in particular to take all measures necessary to achieve membership in the European Union and NATO at the earliest possible date.

ARTICLE 4

The Parties shall collaborate and assist each other wherever possible in the achievement of the high standards and other requirements for integration into the EU and NATO. The Parties shall take no actions that would undermine the achievement of these requirements.

CHAPTER III
SECURITY AND THE PEACEFUL SETTLEMENT OF DISPUTES

ARTICLE 5

In line with the principles of the UN Charter, the Parties affirm their commitment to the peaceful settlement of all disputes between them, and shall not use or threaten to use force in their relations in any manner inconsistent with the Purposes of the United Nations.

ARTICLE 6

The Parties shall undertake measures to enhance security cooperation, including the development of new confidence- and security-building measures across their common border. The Parties shall request the assistance of NATO and the Organization for Security and Cooperation in Europe (OSCE) to develop and implement such measures as soon as feasible. The Parties shall strive for maximum transparency in the placement and operations of their security personnel, especially along their common border.

CHAPTER IV
COOPERATION ON PRIORITY ISSUES OF MUTUAL CONCERN

ARTICLE 7

The Parties shall undertake to intensify and deepen cooperation on all issues of mutual concern. The Parties shall initially focus their efforts on the following priority areas:

a) Economic issues, including energy, trade and harmonization with EU standards and development of a joint economic growth and development strategy in line with regional economic initiatives;

b) Anti-crime efforts, particularly in the areas of terrorism, narcotics, trafficking in persons, weapons smuggling, organized crime and ethnic crime;

c) Protection and preservation of religious and other cultural heritage;

d) The health and welfare of our minority communities, including the implementation of special measures to protect and promote their rights, security and livelihood;

e) The fate of all persons missing from the war of the 1990s;

f) Public health;

g) Transportation;

h) Facilitation of cross-border movement of people and goods;

i) The return of refugees and displaced persons of all ethnicities;

j) Environmental issues.

ARTICLE 8

The Parties shall form issue-specific working groups, composed of both political and technical specialists, to develop and advance common priorities in all of these priority issues of mutual concern. Where appropriate, these working groups shall include representatives of civil society groups and relevant international organizations.

CHAPTER V
KOSOVO-SERBIA PERMANENT COOPERATION COUNCIL

ARTICLE 9

Within six months of this Treaty entering into force the Parties shall establish a Kosovo-Serbia Permanent Cooperation Council. This Council shall consist of ten members, five of whom shall be appointed by Serbia and five of whom shall be appointed by Kosovo. This Council shall operate by consensus and have responsibilities to:

a) Oversee and facilitate cooperation in all areas of mutual concern;

b) Meet regularly to exchange information and consult on all matters that may affect the interests of either Party;

c) Support, as required, the regular meeting of the working groups referred to in Article 8, including assistance in setting the meeting agenda and providing logistics aid as required;

d) Assess the results of cooperation initiatives and recommend new areas for enhanced cooperation between Kosovo and Serbia;

e) Request and facilitate third-party mediation on particularly sensitive issues of mutual concern, such as missing persons or the return of refugees and displaced persons.

ARTICLE 10

The Council shall convene a High-Level Meeting of the Parties at least every six months, which shall include the Presidents, Prime Ministers and Foreign Ministers of Kosovo and Serbia. Either Party may propose any matter for consideration or action at the High-Level Meeting.

ARTICLE 11

The Council shall explore the possibility of establishing a secretariat to facilitate cooperation and dialogue between Kosovo and Serbia.

ARTICLE 12

The Council shall facilitate dialogue among members of the Parliament of Serbia and the Kosovo Assembly, including the creation of inter-parliamentary working groups to enhance legislative cooperation.

CHAPTER VI
REQUEST OF WITNESSING STATES

ARTICLE 13

In the event of any dispute between the Parties, the Parties request that France, Germany, Italy, the Russian Federation, the United Kingdom and the United States provide neutral mediation and make other efforts to assist in the peaceful settlement of the dispute.

CHAPTER VII
FINAL PROVISIONS

ARTICLE 14

This Treaty shall be signed by leaders of Kosovo and Serbia and ratified in accordance with the constitutional procedures of each state. It shall enter into force upon ratification by both Parties and be deposited with the United Nations.

ARTICLE 15

This Treaty shall be translated into Albanian, Serbian and English. The English version shall be authoritative.

WRITTEN STATEMENT
OF 17 JULY 2009

Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria –Vlada – Government

Ministria e Punëve të Jashtme – Ministarstvo Inostranih Poslova
Ministry of Foreign Affairs

Pristina, 17 July 2009

Sir,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, I have the honour to submit herewith, in accordance with Article 66 of the Statute of the Court and the Court's Order of 17 October 2008, a Further Written Contribution.

The Government of the Republic of Kosovo transmits thirty copies of the Contribution and its annexes, as well as an electronic copy.

Accept, Sir, the assurances of my highest consideration.

Skender Hyseni
Minister of Foreign Affairs of the Republic of Kosovo
Representative of the Republic of Kosovo before
the International Court of Justice

Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
Netherlands

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

FURTHER WRITTEN CONTRIBUTION OF THE REPUBLIC OF KOSOVO

17 JULY 2009

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

FURTHER WRITTEN CONTRIBUTION OF THE REPUBLIC OF KOSOVO

17 JULY 2009

ABBREVIATIONS

Ahtisaari Plan ..... Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1) (also referred to as "Ahtisaari Settlement"

or "CSP")

Contact Group ..... France, Germany, Italy, Russian Federation, United Kingdom, United States of America

Dossier ..... Dossier submitted on behalf of the Secretary-General pursuant to Article 65, paragraph 2, of the Statute of the International Court of Justice

EU ..... European Union

EULEX ..... European Union Rule of Law Mission in Kosovo

EUSR ..... European Union Special Representative

FRY ..... Federal Republic of Yugoslavia

G-8 (Group of Eight) ..... Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom, United States of America

ICO ..... International Civilian Office

ICR ..... International Civilian Representative

ICTY ..... International Criminal Tribunal for the Former Yugoslavia

ISG ..... International Steering Group

KFOR ..... Kosovo Force (international military presence in Kosovo)

KLA ..... Kosovo Liberation Army

PISG ..... Provisional Institutions of Self-Government of Kosovo

SFRY ..... Socialist Federal Republic of Yugoslavia

SRSG ..... Special Representative of the Secretary-General

Troika ..... European Union/United States of America/Russian Federation Troika on Kosovo

UNMIK ..... United Nations Interim Administration Mission in Kosovo

PART I

INTRODUCTION

CHAPTER I

INTRODUCTION

I. Introductory Remarks

1.01. The Republic of Kosovo submits this Further Written Contribution in accordance with paragraph 4 of the Order of the Court dated 17 October 2008.

1.02. The purpose of the present Contribution is to comment on the Written Statements of other States, which were transmitted under cover of the Registrar's letters dated 21 April and 15 May 2009. The present Contribution does not repeat matters covered in the first Written Contribution of the Republic of Kosovo (hereafter "first Written Contribution"). Kosovo maintains and relies upon what was said in its first Written Contribution, which remains the basic statement of its position and which is complemented as necessary by the present Contribution.

1.03. The present Contribution does not seek to address each point made in the Written Statements. In particular, it does not address each of the questionable factual and legal assertions, and citations and references often made out of context, that appear in the Statements of those seeking to demonstrate that the Declaration of Independence was not in accordance with international law. Rather, it is limited to the main lines of argument made in those Statements. The absence of comment does not indicate agreement.

1.04. Nor does this Further Written Contribution address in detail the Written Statements which argue that the Court should find that the Declaration of Independence did not contravene any applicable rule of international law. Kosovo is in broad agreement with the lines of argument in those Written Statements.

II. Summary of Kosovo's Further Written Contribution

1.05. This Further Written Contribution is organised as follows. Section III of the present Chapter addresses the question put by the General Assembly to the Court, in lightof the approach adopted in some of the Written Statements. Chapter II then updates developments both within and external to the Republic of Kosovo since early April 2009 (when Kosovo's first Written Contribution was finalized).

1.06. Part II (which consists of a single chapter, Chapter III) comments on what Serbia in particular says about the history and context relevant to the question before the Court, especially as regards the period 1974 to 1999.

1.07. Part III then deals with the central legal arguments advanced in the Written Statements which assert that the Declaration of Independence of 17 February 2008 was not in accordance with international law. It does so in two chapters, demonstrating respectively why the Declaration of Independence (i) did not contravene general international law (Chapter IV); and (ii) did not contravene Security Council resolution 1244 (1999) (Chapter V).

1.08. Finally, Part IV (comprising Chapter VI) draws together certain key elements and summarises Kosovo's legal arguments.

III. The Request for an Advisory Opinion, the Question Put to the Court, and the Authors of the Declaration of Independence

1.09. The majority of the Written Statements address the propriety of the request for an advisory opinion contained in General Assembly resolution 63/3. Kosovo wishes to comment again, very briefly, on this issue (A).

1.10. As regards the question contained in General Assembly resolution 63/3, almost all the Written Statements, including that of Serbia[1], underline that it is strictly limited and should be answered by the Court as it stands. Kosovo fully subscribes to this conclusion, but deems it nevertheless necessary to comment on the more expansive approach adopted by some States (B).

1.11. Kosovo will once again[2] explain that the authors of the Declaration of Independence were not the Provisional Institutions of Self-Government (PISG), as seems to be suggested by the question put to the Court and as has been asserted by some States, but were the democratically elected representatives of the people of Kosovo (C).

A. THE PROPRIETY OF THE REQUEST FOR AN ADVISORY OPINION

1.12. The States that have submitted Written Statements accept that the Court has the discretion whether to respond to the question. The Court's jurisprudence establishes that

"Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion …' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused' (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; see also, for example, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29.) Given its responsibilities as the 'principal judicial organ of the United Nations' (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only 'compelling reasons' should lead the Court to refuse its opinion (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; see also, for example, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29.)"[3]

1 Serbia, paras. 19-23. (In this Contribution, references to Written Statements are given in this form.)
2 See Kosovo, para. 6.01 and paras. 6.03-6.20.
3 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory

Consequently, as the Court pointed out, by the same token it must

"satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of 'compelling reasons' …".[4]

1.13. Kosovo notes the opinion of several States.[5] that there may indeed be such "compelling reasons" that would justify the Court declining to exercise its discretionarypower under Article 65, paragraph 1, of the Statute. The present request does not appear to have been designed to enable the Court to participate in the activities of the Organization, but rather to render a legal opinion for the benefit of the sole sponsor of General Assembly resolution 63/3, the Republic of Serbia (in its words, the "interested State"[6]) and other States. The representative of Serbia explained during the short debate on the draft resolution in the Assembly:

"We have chosen to seek an advisory opinion from the International Court of Justice (ICJ) on the legality of the unilateral declaration of independence. Today we are turning to the General Assembly to convey that request to the Court, in fulfilment of its powers and functions under the United Nations Charter."[7]

And he stressed that:

"We also believe that the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law."[8]

1.14. The role of the Court in its advisory jurisdiction, however, is not to furnish "judicially authoritative guidance" to a State or even to States generally, but rather "to guide the United Nations in respect of its own action"[9]. It is not appropriate for a State to request an advisory opinion of the Court, and to ask the Assembly to "transmit" the request in order to meet the jurisdictional conditions set by the Statute, nor appropriate for the Court, under its Statute, to act as legal counsel for a State or States[10]. As the Court has pointed out, its "Opinion is given not to the States, but to the organ which is entitled torequest it"[11]. The present request and the circumstances of its adoption within the General Assembly disregarded the inter-organ nature of the advisory function of the Court.

1.15. Serbia cannot now "readjust" the picture in its Written Statement[12] by arguing that the "case raises issues of direct and acute concern to the United Nations and the international system as a whole"[13] and that, somehow incidentally, United Nations organs, including the Special Representative of

Opinion, I.C.J. Reports 2004, p. 156, para. 44.

4 Ibid., p. 157, para. 45.

5 For example, Czech Republic, p. 5; France, paras. 1.6-1.26; Ireland, para. 12; United States of America, pp. 43-45.

6 Serbia, para. 80.

7 United Nations, Official Records of the General Assembly, Sixty-third Session, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 1 (emphasis added) [Dossier No. 6].

8 bid. See also A/63/195 [Dossier No. 1] ("Many Member States would benefit from the legal guidance an advisory opinion of the International Court of Justice would confer. It would enable them to make a more thorough judgement on the issue.")

9 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 19 (emphasis added). See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 24, para. 32 ("The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions."); Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 27, para. 41.

10 See Kosovo, para. 7.20-7.21.

11 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p. 71.

12 See e.g. Serbia, para. 8.

13 See Serbia, paras. 75 and 79.

the Secretary-General (SRSG), might find some benefit in the opinion[14], in addition to the implications it would have for States[15]. There has been no statement from the SRSG, from the Secretary-General, from the Security Council, or from the General Assembly indicating that an opinion from the Court on this matter is necessary or even helpful for the work of the United Nations, including the SRSG's role and the functioning of UNMIK. Rather, every available source of information confirms that the opinion has been sought in order to guide States, as was made plain in Serbia's explanatory memorandum[16], the debate[17], and General Assembly resolution 63/3[18]. That the opinion of the Court might have some unspecified effects for the United Nations as an institution, or, as some States seem to wish, create a precedent on alleged "fundamental rules and principles of international law which apply throughout the international legal order"[19], is irrelevant.

1.16. The Court, "being a Court of Justice"[20], is not called upon to pronounce on issues of international law in the abstract, even in its advisory role. Its function under Article 65 of the Statute is to give legal guidance to the organ that requests the Court'sopinion for its own actions. In this regard, several United Nations Member States[21] have expressed strong doubts about whether the General Assembly can ultimately benefit for its own work from an opinion of the Court on this matter. In their view, the General Assembly was only a vehicle for the Republic of Serbia to achieve its own goal for its own purposes: a judicial pronouncement on the legality of the Declaration of Independence of Kosovo.

1.17. For all these reasons, several United Nations Member States have suggested that there are "compelling reasons" for the Court not to entertain the request for an advisory opinion contained in General Assembly resolution 63/3. The opinion requested from the Court would not represent the Court's "participation in the activities of the Organization", and the Court could, for this "compelling reason", decline to answer the question.

B. THE MEANING AND SCOPE OF THE QUESTION CONTAINED IN GENERAL ASSEMBLY RESOLUTION 63/3

1.18. Most States that have addressed the matter, including Serbia[22], the sole sponsor of General Assembly resolution 63/3, have recognized the strictly limited scope of the question contained in that resolution, i.e. the legality of the Declaration of Independence that was issued on 17 February 2008[23]. Serbia did so during the debate in the General Assembly. It stated that, as formulated, the question "represents the lowest common denominator of the positions of the Member States on this question, and hence there is no need for any changes or additions"[24].

1.19. Consequently, the Court, assuming that it considers it to be appropriate to respond to the question, should limit itself to the single issue contained in the question: Was the Declaration of Independence of 17 February 2008 in accordance with international law? The question is narrow. It need not be broadened, interpreted or reformulated. TheCourt need only identify the relevant legal rules, if any,

14 Serbia, paras. 92-94. See also Cyprus, para. 9-12.
15 Serbia, paras. 95-96.
16 A/ 63/195 [Dossier No. 1].
17 See para. 1.13 above.
18 Dossier No. 7 ("Aware that this act has been received with varied reactions by the Membcrs of the United Nations as to its compatibility with the existing international legal order".)
19 Cyprus, para. 16. See also Serbia, para. 97.
20 Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 29.
21 See note 5 above.
22 Serbia, para. 19.
23 See also, in principle, Spain, para. 6 (iii).
24 United Nations, Official Records of the General Assembly, Sixty-third Session, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 2 [Dossier No. 6].

and apply them to the Declaration of Independence. Other questions, such as Kosovo's statehood today, or the legality of the many recognitions of the Republic of Kosovo as a sovereign and independent State, are not before the Court[25], contrary to assertions of one or two States[26].

1.20. The question can also not be broadened by arguing that the rules that allegedly apply in the Kosovo situation are fundamental rules applying throughout the international legal order[27] or are potentially applicable to other situations[28]. The question only concerns, and the Court is only called to consider, the legality of the Declaration of Independence of Kosovo of 17 February 2008, in its particular context. The Court is not requested to pronounce in general or in the abstract on the legality of declarations of independence.

1.21. As previously submitted by Kosovo[29] and as underlined by others[30], the prejudicial and argumentative elements contained in the formulation of the question, i.e. the characterisation of the Declaration as "unilateral", the mischaracterization of those who issued the Declaration, and the assumption that there are indeed rules of international law governing the issuance of declarations of independence, should not affect the Court's approach in the present proceedings.

C. THE PERSONS WHO ISSUED THE DECLARATION OF INDEPENDENCE

1.22. It is necessary to comment again[31], very briefly, on the issue of the authorship of the Declaration of Independence that was read out, voted upon and signed on 17 February 2008.

1.23. As was shown by Kosovo in its first Written Contribution, and contrary to what may be thought from the terms of the question put to the Court, the Declaration ofIndependence of 17 February 2008 was issued in the name of the people of Kosovo, by their democratically elected representatives meeting in an extraordinary session, as a constituent body in Pristina[32]. Issuance of the Declaration was not an act of the "Provisional Institutions of Self-Government of Kosovo" (PISG), or of the Assembly of Kosovo acting as one of the PISG. As was explained in Kosovo's first Written Contribution, the special circumstances of the adoption of the Declaration, its form and its text confirm that it was not an act of the PISG[33]. As the Minister of Foreign Affairs of the Republic of Kosovo, Mr. Hyseni, put it in the Security Council: "the independence of the Republic of Kosovo was declared by elected representatives of the people of Kosovo, including by all elected representatives of non-Albanian communities except the members of the Serb community"[34].

25 Poland, para. 2.1; United Kingdom, para. 1.16. See also Spain, para. 6 (iii).
26 Cyprus, para. 10 ; Russian Federation, para. 52. See also Argentina, para. 112, and Venezuela, para. 5.
27 Cyprus, para.18; Serbia, paras. 75 and 79; Argentina, para. 3. See also Egypt, para. 23.
28 Russian Federation, paras. 13-14.
29 Kosovo, paras. 7.04-7.10.
30 Luxembourg, paras. 13-14.
31 See Kosovo, para. 6.01 and paras. 6.03-6.20.
32 A number of States have rightly identified those who issued the Declaration as the democratically elected representatives of the people of Kosovo expressing the will of the people. See, e.g., Austria, para. 8; Germany, pp. 6-7; Luxembourg, par. 13; Switzerland, para. 79; United Kingdom, para. 1.12; United States of America, pp. 32-33.
33 The text of the Declaration of Independence included by the United Nations Secretariat in its Dossier (Dossier N° 192), and the text included by the Republic of Serbia in its Written Statement (Serbia, Annex 2), do not reflect the actual wording of the Declaration of Independence as read out (in Albanian), voted upon, written down in solemn form, and signed on 17 February 2008. A scanned copy of the original of the Declaration, as well as a translation into English and French, can be found in Kosovo's first Written Contribution, Annex 1.
34 Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 23.

1.24. Serbia refers in its Written Statement to those who issued the Declaration as "members of the Assembly of Kosovo"[35]. In fact, on 17 February 2008, the Declaration was read out by the Prime Minister, voted upon and signed by the democratically elected representatives of the people, including members of the Assembly, the President of Kosovo and the Prime Minister. However, "members of the Assembly" are not "the Assembly", and these members and the other representatives of the people of Kosovo did not purport to act on that day as the PISG.

CHAPTER II

KOSOVO TODAY

2.01. The aim of this chapter is two-fold: to respond, as necessary, to assertions about the situation in Kosovo today made in some Written Statements; and to update the developments described in Chapter II of Kosovo's first Written Contribution.

2.02. The chapter is divided into five sections: international relations (Section I); constitutional and other internal developments (Section II); presence of the international community (Section III); criteria for statehood (Section IV); and Serbia's attitude towards Kosovo (Section V).

2.03. As stated in Kosovo's first Written Contribution, developments in Kosovo since 17 February 2008 are not directly relevant to the question before the Court[36]. That question concerns solely the Declaration of Independence issued on 17 February 2008, and its "accordance with international law"[37]. It does not concern other matters, such the status of the Republic of Kosovo today as a sovereign and independent State or its recognition by other States. Nevertheless, it may be helpful to mention some important developments since the finalization of Kosovo's first Written Contribution in early April 2009.

2.04. Major developments since early April 2009 include the celebration on 15 June 2009 of the first anniversary of the entry into force of the Constitution of the Republic of Kosovo; additional recognitions of the Republic of Kosovo as a sovereign and independent State; its admission to the International Monetary Fund and the World Bank, both specialized agencies of the United Nations, and to other organizations of the World Bank Group; the appointment of the nine judges of the Constitutional Court, and that Court's entry into full functioning; the election by the Assembly of the Ombudsman provided for in the Constitution; and increasing efforts at internal reconciliation, with"more and more Serb representatives willing to come forward and engage with the central institutions"[38].

2.05. Addressing the Assembly of Kosovo on 15 June 2009, former Finnish President and United Nations Special Envoy Martti Ahtisaari said:

"Kosovo's independence is irreversible and this is evident from the recognitions that continue to arrive from around the world. Acceptance of this reality by all would go a long way toward ensuring stability not only for Kosovo, but for the entire Western Balkans region and indeed for Europe as well."[39]

35 Serbia, para. 17.
36 Kosovo, para. 2.01.
37 Ibid., paras. 7.11-7.15, and paras. 1.18-1.21 above.
38 ICO, "Consolidating Kosovo's European Future: Tracing Next Steps", Presentation at the London School of Economics, 13 May 2009, p. 7 (available on the ICO website: http://www.icokos. org/d/LSE_final.pdf).
39 President Ahtisaari's address, Annex 1.

I. International Relations

Recognitions

2.06. Since early April 2009, four more States have recognized the Republic of Kosovo as a sovereign and independent State: Bahrain, Comoros, Gambia and Saudi Arabia. In addition, many other States deal with the Republic of Kosovo as a sovereign and independent State, without a formal act of recognition[40]. A large number of States that had not yet recognized the Republic of Kosovo voted for Kosovo's membership in the International Monetary Fund or the organizations of the World Bank Group[41].

2.07. Thus, as of the date when this further Written Contribution was completed, 60 States had formally recognized the Republic of Kosovo as a sovereign and independent State, while many others treated it as a State in practice. It is particularly noteworthy that the great majority of States in Kosovo's broader region, that is Europe, have recognized Kosovo. Of the 47 member States of the Council of Europe, 33 had recognized by early July 2009 including all of Kosovo's immediate neighbours (except Serbia). Such recognition happened notwithstanding heavy-handed campaigns, led by thePresident and Foreign Minister of the Republic of Serbia, to coerce States into not recognizing the Republic of Kosovo, and to put obstacles in the way of Kosovo's participation in international organizations and international cooperation. Such efforts illustrate Serbia's backward-looking and negative policies towards Kosovo[42].

Relationship with International Organizations

2.08. The Republic of Kosovo became a member of the International Monetary Fund on 29 June 2009, and a member of the International Bank for Reconstruction and Development and other organizations of the World Bank system on the same day. It is thus a member of two of the specialized agencies of the United Nations[43].

2.09. On 8 May 2009, the Executive Board of the International Monetary Fund (IMF) certified a vote by the IMF's Board of Governors to offer IMF membership to the Republic of Kosovo. 138 member countries of the IMF, out of 185, participated in the vote. 96 countries voted for the Republic of Kosovo's membership in the IMF; only 10 voted against. Kosovo became a member of the IMF when its authorized representative signed the IMF's Articles of Agreement on 29 June 2009[44].

2.10. By letter dated 22 April 2009, the Boards of Governors of the International Bank for Reconstruction and Development (IBRD, also known as the World Bank), the International Development Agency (IDA) and the International Finance Corporation (IFC) were asked to vote on draft Resolutions entitled "Membership of the Republic of Kosovo". The period within which votes could be received expired on 3 June 2009. By that date, the required number of votes had been cast, and the Resolutions inviting the Republic of Kosovo to join the three organisations were adopted. 96 countries voted for the Republic of Kosovo's membership in the World Bank, with only 7 voting against. In the case of the IDA the corresponding figures were 89 and 5; and in the case of the IFC they were 95 and 6.

40 As the Court is aware, the practice of some States is not to issue formal statements of recognition but, rather, simply to begin treating a new country as a State in their international relations, such as through the conclusion of bilateral treaties, or the exchange of diplomatic or consular representatives. On such implied recognition, see Kosovo, para. 2.32.

41 Paras. 2.08-2.11 below.

42 See paras. 2.56-2.58 below.

43 See also Kosovo, paras. 2.41-2.42.

44 Only "countries" (i.e., States) may become members of the IMF. See Articles of Agreement of the International Monetary Fund, 22 July 1944, United Nations, Treaties Series (UNTS), vol. 2, p. 39, Article II (2) ("Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors.")

2.11. By letter dated 22 April 2009, the Council of Governors of the Multilateral Investment Guarantee Agency (MIGA) was asked to vote on a draft Resolution entitled "Membership of the Republic of Kosovo". The period within which votes could be received expired on 3 June 2009. By that date, the required number of votes had been cast, and the Resolution inviting the Republic of Kosovo to join the organisation was thus adopted. 91 countries voted for the Republic of Kosovo's membership in MIGA, with 7 voting against.

2.12. A law to enable Kosovo to implement United Nations sanctions imposed by the Security Council is in preparation. This is an example of Kosovo's commitment to the World Organization even prior to its admission as a Member State.

European Union

2.13. The 16th plenary meeting of the Kosovo Stabilisation and Association Process Tracking Mechanism (STM) was held on 12 June 2009 in Pristina. The meeting focused on the progress delivered in the implementation of Kosovo's European agenda as well as the priorities for the immediate future. The European Commission has welcomed a number of recent laws which Kosovo had adopted, and presented an update on the preparations of the Feasibility Study that will be published in October.

2.14. During May and June 2009, as part of the continuous dialogue between the European Commission and Kosovo, regular technical discussions were held covering six main sectors. These meetings assess Kosovo's progress in implementing the European Partnership recommendations and advancing towards EU standards, including legislation and institutional arrangements.

Diplomatic Relations and the Establishment of Embassies[45]

2.15. The Law on the Ministry for Foreign Affairs and Diplomatic Service of Republic of Kosovo specifies criteria for the diplomatic representatives of Kosovo[46], andprocedures for their selection and appointment, which include a role for the Assembly in scrutinizing appointments[47]. The selection of Kosovo's first Ambassadors has been conducted by open competition. In addition, a Law on the State Protocol of the Republic of Kosovo was adopted by the Assembly in April[48].

2.16. High officials of the Republic of Kosovo have continued to have numerous bilateral and international meetings with their opposite numbers from other countries, with both inward and outward official visits[49]. By way of example, towards the end of June 2009 the President of the Republic of Kosovo attended a meeting at Vlora, Albania, with the Presidents of Albania, Macedonia and Montenegro.
Treaties and International Law[50]

2.17. The general position as regards treaties was set out in Kosovo's first Written Contribution[51]. In addition, Kosovo has concluded a number of bilateral treaties51, including:

– Agreement between the Government of the Republic of Kosovo and the Kingdom of Denmark on "Development Cooperation", entered into force on 3 April 2008;

45 See also Kosovo, paras. 2.33-2.35.
46 Law No. 03/L-044, 15 March 2008, art. 6, Official Gazette of the Republic of Kosova, No. 26, 2 June 2008, pp. 50-53.
47 Law No. 03/L-044, 15 March 2008, art. 7, Official Gazette of the Republic of Kosova, No. 26, 2 June 2008, pp. 50-53.
48 Law No. 03/L-132, 14 April 2009.
49 Kosovo, para. 2.28.
50 See also ibid., paras. 2.36-2.40.
51 Published or to be published on the website of the Official Gazette of the Assembly of the Republic of Kosovo (http://www.gazetazyrtare.com/).

– Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey on "Mutual Abolition of Visas", concluded on 13 January 2009, entered into force on 6 June 2009;

– Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Slovenia on "Development Cooperation", concluded on 21 April 2009;– Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey on "Economic Cooperation", concluded 28 May 2009;

– Loan Assumption Agreement between the Republic of Kosovo and the International Bank for Reconstruction and Development, signed on 29 June 2009;

– Investment Incentive Agreement between the Government of the Republic of Kosovo and the Government of the United States of America, signed on 30 June 2009.

2.18. Other bilateral treaties are at an advanced stage of negotiation (including with Albania and Turkey).

2.19. Kosovo has recently signed its first two Memoranda of Understanding, with Montenegro and Italy respectively, to facilitate the exchange of operational and judicial information on matters relating to organized crime.

II. Constitutional and Internal Developments

2.20. On 15 June 2009, the first anniversary of the entry into force of the Constitution of the Republic of Kosovo, Ambassador Pieter Feith, the International Civilian Representative (ICR), while acknowledging that there was a "long journey ahead", said that

"there is progress of which to be proud. This is evident in the development of central institutions, the rule of law and devolution of governing authority to municipalities. The Kosovo government and its international partners have also pressed ahead on community rights and representation and preservation of religious and cultural heritage."[52]

2.21. By early July, all the principal institutions provided for in the Constitution of the Republic of Kosovo (and foreseen in the Ahtisaari Plan) had been established and were operational. Contrary to the impression given in Serbia's Written Statement, Kosovo Serbs are increasingly taking part in institution-building.

2.22. During the period of international supervision following independence, the Constitutional Court of the Republic of Kosovo is composed of six judges appointed by the President of the Republic upon the proposal of the Assembly of Kosovo, and three international judges appointed by the International Civilian Representative (ICR) after consultation with the President of the European Court of Human Rights[53]. These appointments have all been made[54], and on 26 June 2009, the nine judges were sworn in by the President of the Republic. Mr. Enver Hasani was elected as President of the Constitutional Court, which is now fully operational.

2.23. On 4 June 2009, in accordance with article 134 of the Constitution, the **Ombudsperson** was elected by the Assembly of Kosovo for a non-renewable five-year term[55].

52 Koha Ditore interview, 15 June 2009.
53 Constitution, art. 152.
54 Of the six judges appointed by the President of the Republic, four are Kosovo Albanians, one a Kosovo Serb, and one from the Turkish community; the three judges appointed by the ICR are from Bulgaria, Portugal and the United States of America.
55 For the functions of the Ombudsman, see Constitution, art. 132.

2.24. A number of new laws have been adopted by the Assembly of Kosovo[56]. These include the *Law on the Membership of the Republic of Kosovo in the International Monetary Fund and World Bank Group of Organizations.*

2.25. In June 2009, the Government of Kosovo announced that a census would be held in the spring of 2011, in parallel with those in other European States.

2.26. On 16 June 2009, the President of the Republic fixed 15 November 2009 as the date for **local elections** throughout Kosovo. These elections will be the first held in Kosovo since independence, and will involve elections in 38 municipalities, including 10 with a Serb majority and one with a Turk majority. Five of the Serb-majority municipalities are new, formed as part of the decentralization process foreseen in the Ahtisaari Plan.

2.27. Efforts continue to ensure the return of **refugees and internally displaced persons**, and progress is being made – though for a number of reasons, not least economic, the numbers involved, while once again on the increase, continue to be disappointingly low[57]. Such efforts are necessarily long-term[58].

2.28. Progress has also been made with the reconstruction of cultural and religious heritage sites, with tenders for significant projects being issued in May 2009[59].

2.29. As regards the **Kosovo Security Force**, the Foreign Minister of Kosovo informed the Security Council on 17 June 2009 that "[t]he build-up of our security force is progressing. As I said in my March statement to the Council, the NATO-trained Kosovo Security Force is a democratic and civilian-controlled security force. This multi-ethnic and apolitical force will be focused primarily on emergency response and generally on activities to promote development and regional peace, security and stability."[60]

III. Presence of the International Community

2.30. Contrary to the presentation by certain States, notably Cyprus and Serbia, the international presence in Kosovo in no way undermines the sovereignty of the State. On the contrary, the principal role of the presence, which is in Kosovo at the invitation of the State, is to monitor and to assist in developing the institutions in accordance with the Ahtisaari Plan and the Constitution of the Republic of Kosovo.

2.31. Important elements of the international presence, in particular UNMIK and KFOR, have already been reconfigured and downsized very significantly. Others, in particular the ICR/ICO and EULEX, are due to have their mandates reviewed in 2010.These reductions reflect the development of the institutions of Kosovo, and the importance attached to local ownership.

2.32. **The International Steering Group of 25 States**[61] continues to support Kosovo's development. Its Eighth Meeting was held in Pristina on 15 June 2009, the anniversary of the entry into force of

56 Law No. 03/L-132 of 16 April 2009 On the State Protocol of the Republic of Kosovo; Law No. 03/L-129 of 30 April 2009 On Economic Zones; Law No. 03/L-119 of 27 May 2009 On Biocide products; Law No. 03/L-152 of 29 May 2009 On Membership of the Republic of Kosovo in the International Monetary Fund and World Bank Group Organizations.

57 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, paras. 30-33.

58 Remarks by the ICR at the Institute for Historical Justice and Reconciliation, The Hague, 26 May 2009, pp. 4-5 (available on the ICO website: http://www.ico-kos.org/d/090526 Remarks IHJR(1).pdf).

59 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, paras. 34-36.

60 Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 9.

61 Kosovo, paras. 2.62-2.63.

the Constitution of the Republic of Kosovo. In its statement issued on that occasion[62] the ISG noted that "in the past year the people of Kosovo have made significant progress in building a democratic, multi-ethnic State based on the principles of democracy and human rights in accordance with its European perspective".

2.33. The **ICR**[63] recently said

"[t]he Ahtisaari Plan vests in me executive authority to supervise Kosovo's development as an independent state, and this fact is also acknowledged in the Constitution of Kosovo. However, I have to date not felt the need to exercise these powers – mainly out of respect for the principle of local ownership and responsibility …"[64].

2.34. The ICR/ICO monitors progress in the broad fields covered by the Ahtisaari Plan. Considerable progress has been made in the various fields covered by European Standards (internal market; public procurement; transport; telecoms; social affairs; agriculture and rural development; energy; environment; justice, freedom and security; and integrated border management).

2.35. As provided for in the Ahtisaari Plan, when the ICR's powers are reviewed in 2010, the ISG will decide whether there is a continuing need for their retention.

2.36. **EULEX's** mandate is a technical one, aimed at assisting local institutions in the rule of law field. It does not have political functions. The mandate is set out in the JointAction of the Council of the European Union of 4 February 2009[65], and it reports to Brussels. Like other European Security and Defence Policy (ESDP) missions, the principle of local ownership is at the heart of the mission. As the Head of Mission, Yves de Kermabon, has put it, locals are "in the driver's seat".

2.37. EULEX's Mission Statement is as follows:

"The ESDP mission will assist the Kosovo authorities, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability. It will further develop and strengthen an independent and multi-ethnic justice system and a multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices. The mission, in full co-operation with the European Commission Assistance Programmes, will implement its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities."

2.38. EULEX is described as follows on its website:

"The European Union Rule of Law Mission in Kosovo (EULEX) is the largest civilian mission ever launched under the European Security and Defence Policy (ESDP). *The central aim is to assist and support* the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas. *The mission is not in Kosovo to govern or rule*. It is a technical mission which will monitor, mentor and advise whilst retaining a number of limited executive powers."[66]

2.39. As the Foreign Minister of Kosovo explained during the Security Council meeting on 23 March 2009,

62 Annex 2.
63 Kosovo, para. 2.64.
64 "Consolidating Kosovo's European Future: Tracing Next Steps", Presentation at the London School of Economics, 13 May 2009, p. 4 (available on the ICO website: http://www.ico-kos.org/d/LSE_final.pdf).
65 Kosovo, para. 2.66.
66 http://www.eulex-kosovo.eu/?id=2 (emphasis added).

"[d]eployment of EULEX throughout Kosovo is in accordance with the mandate that derives from the Kosovo independence declaration, the Ahtisaari package, the constitution of the Republic of Kosovo, the laws of the Republic of Kosovo, the European Union joint action plan of 4 February 2008 and the invitations of the President of 17 February and 8 August"[67].2.40. A second report on EULEX's activities, covering the period February to May 2009, is annexed to the United Nations Secretary-General's latest report[68]. As this report states, "[t]hrough monitoring, mentoring and advising the rule of law institutions in Kosovo, EULEX built up a picture of the competence of those authorities, and identified areas for further targeting of reform efforts".

2.41. EULEX judges and prosecutors act within the Kosovo judicial system, in accordance with the Constitution and laws of the Republic of Kosovo. In particular, they act on the basis of two *Laws adopted by the Kosovo Assembly as part of the Ahtisaari package, the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo*, and the Law on Special Prosecution Office of the Republic of Kosovo[69]. Article 1 of the first of these Laws provides as follows:

"This law regulates the integration and jurisdiction of the Eulex judges and prosecutors in the judicial system of the Republic of Kosovo."

2.42. Two recent reports of the Secretary-General describe the current situation as regards **UNMIK**: his report to the Fifth (Budgetary) Committee of April 2009[70]; and his report to the Security Council on UNMIK of June 2009[71].

2.43. As anticipated[72], the April 2009 report proposed to the General Assembly that the personnel of UNMIK be reduced, in 2009-2010, by almost 90% as compared with the approved numbers for 2008-2009 (507 persons instead of 4,911)[73]. In the case of law enforcement matters, UNMIK has now handed over to EULEX virtually all remainingactive case files[74]. As of 19 March 2009 the Kosovo authorities assumed responsibility for transnational mutual legal assistance with those States that have recognised Kosovo[75].

2.44. The mandate of UNMIK is described as now being "to help the Security Council achieve an overall objective, namely, to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance regional stability and prosperity in the western Balkans"[76].

2.45. The main remaining functions of UNMIK are described in the April 2009 report as being "monitoring and reporting on political, security and community developments that affect inter-ethnic relations and stability in Kosovo and the sub-region; facilitating, where necessary and possible, arrangements for Kosovo's engagement in international agreements; and facilitating dialogue between Pristina and Belgrade on issues of practical concern"[77]. The Secretary-General also made clear that UNMIK "will

67 Security Council, provisional verbatim record, sixty-fourth year, 6079th meeting, S/PV.6079, p. 8.

68 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, annex I.

69 Kosovo, para. 2.67.

70 Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009.

71 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009.

72 Kosovo, paras. 2.69-2.74.

73 Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009. On the basis of this report, the General Assembly has adopted a greatly reduced budget for UNMIK for 2009/2010 (resolution 63/295, 30 June 2009).

74 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, para. 21.

75 Ibid., para. 22.

76 Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009, para. 2; see also Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, paras. 18-20.

77 Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009, para. 34 (last sentence).

not undertake activities in the areas of the international administration of Kosovo or the rule of law, areas in which the Mission has already ceased operations in the wake of Kosovo's declaration of independence in February 2008 and the deployment of EULEX in December 2008"[78]. There is no mention in the report of any remaining functions of the SRSG/UNMIK with regard to "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[79].

2.46. The latest report of the Secretary-General is incorrect, when it says, without attribution, that "Kosovo authorities … made a series of public statements ... asserting that Security Council resolution 1244 (1999) is no longer relevant and that they had no legalobligation to abide by it"[80]. This statement, which in context appears to relate to the period covered by the latest report (10 March-31 May 2009), simply repeats what was said in the previous report[81].

2.47. In the Security Council debate on 17 June 2009, the Foreign Minister of Kosovo clearly and unequivocally stated

"As I said in my remarks in this forum in March, for practical and pragmatic reasons we have requested the conclusion of the mission and mandate of UNMIK. In light of the continued positive developments in Kosovo and the widespread deployment of EULEX, I reiterate that request today. I also reiterate the commitment expressed in our Declaration of Independence and in our Constitution of respect for and adherence to international law, including binding resolutions of this body. That commitment has never wavered."[82]

2.48. Until the Security Council terminates its mandate, UNMIK remains in Kosovo in accordance with Security Council resolution 1244 (1999), which is the United Nations basis for its presence, as Kosovo accepted in its Declaration of Independence. It will be recalled that in paragraph 12 of the Declaration of Independence, the representatives of the people of Kosovo stated that they would "act consistent with the principles of international law and resolutions of the Security Council, including resolution 1244 (1999)"[83]. This remains the position.

IV. Criteria for Statehood

2.49. It is suggested in one or two of the Written Statements[84] that the Republic of Kosovo does not meet the "Montevideo" criteria for statehood. In particular, in its WrittenStatement, the Republic of Cyprus argues at length that Kosovo was not, in April 2009, a State because it did not meet at least one of the criteria[85]. Specifically, Cyprus suggests that the role of the international community in Kosovo is such

78 Ibid., para. 12. The last remaining UNMIK rule of law function is liaison with INTERPOL. This too is expected to cease, when, as anticipated, EULEX concludes a Memorandum of Understanding with the International Criminal Police Organisation (INTERPOL) at its General Assembly in October 2009.

79 Security Council resolution 1244 (1999), para. 10 (e) [Dossier No. 34].

80 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, para. 4.

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

82 Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 8 (corrected).

83 Kosovo, Annex 1, p. 217.

84 Cyprus, paras. 159-192. The Russian Federation raises the question whether Kosovo "met the necessary criteria for statehood", without giving an answer. Its point seems to be that "throughout that period [June 1999 to February 2008], and well into the year 2008, Kosovo remained largely dependent on the functioning of the international presences" (it cites only figures for security forces), and it concludes that "[b]y and large, the situation remains the same today" (Russian Federation, paras. 52-53). This is simply not the case.

85 Cyprus, paras. 159-192. Cyprus further argues that Kosovo does not meet a requirement of "legality", which it suggests is missing inter alia when "the entity has been established in a manner that violates the legal obligations, or the legal limitations upon the powers, of those who purported to establish the State"85. This argument will not be addressed here; it adds nothing

as to preclude Kosovo from meeting the requirement of independence in the exercise of its international relations. While this issue is not before the Court[86], Kosovo wishes to place on record that it does in fact clearly meet the criteria for statehood.

2.50. Article 1 of the Montevideo Convention provides:

"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 other states."

2.51. The reality is that Kosovo has a defined territory[87], has a permanent population[88], has a fully functioning and effective government[89], and is engaging actively on its own behalf in international relations with States worldwide (as well as within international organizations)[90].

2.52. Despite some equivocal language about the criteria of population and territory[91], Cyprus seems only to question Kosovo's fulfilment of the criteria for statehood on the ground that it lacks an effective government and the capacity to enter into relations with other States[92]. Cyprus asserts, rather vaguely, that "the Kosovo authorities appear to be some way from being able to function independently as an effective government"[93], andthat "much of the responsibility for governance still falls on the 'international presences'"[94]. It seems to base these assertions largely on the tasks of EULEX, as set out in paragraph 3 of the EU Council Joint Action[95], and on what it claims is the continuing role of UNMIK in respect of Kosovo's international relations[96].

2.53. Regarding the presence of EULEX in Kosovo, as Cyprus itself notes, the mandate of EULEX is to "monitor, mentor and advise", and to "contribute to" certain other narrowly-defined tasks[97]. As explained in Kosovo's first Written Contribution[98] and above[99], EULEX's role is a technical one, strictly focused on assisting Kosovo institutions in certain discrete rule of law activities. It operates in accordance with the law applicable in Kosovo and supports the principle of local ownership.

2.54. Cyprus asserts that "it is UNMIK which conducts much, if not all, of Kosovo's international relations"[100]. This is not correct and Cyprus provides no factual foundation for the assertion. As noted above[101], and as the Secretary-General has made clear, the role of UNMIK in this field is strictly limited; it is confined to "*facilitating, where necessary and possible*, arrangements for *Kosovo's* engagement in international agreements"[102]. As agreed between the SRSG and the Government of Kosovo, UNMIK

to Cyprus's assertion that the authors of the Declaration of Independence acted ultra vires their powers under Security Council resolution 1244 (1999) (as to which see paras. 5.61-5.66 below).

86 See Kosovo, paras. 7.11-7.15, and paras. 1.18-1.21 above.

87 Kosovo, paras. 2.10-2.14.

88 Ibid., paras. 2.15-2.16.

89 Ibid., paras. 2.48-2.56.

90 Kosovo, paras. 2.27-2.47 and paras. 2.06-2.19 above.

91 Cyprus, para. 172. Past population changes, hardly unique to Kosovo, are irrelevant. What matters for statehood is current population.

92 Cyprus, paras. 3 (k), 172-183, and 193 (g).

93 Ibid., para. 173.

94 Cyprus, para. 175

95 Ibid., para. 174.

96 Ibid., para. 178.

97 Paras. 2.36-2.41 above.

98 Kosovo, paras. 2.65-2.67.

99 Paras. 2.36-2.41 above.

100 Cyprus, para. 178.

101 Paras. 2.42-2.48 above.

102 Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010,

stands ready to facilitate Kosovo's participation in regional and more widely in international initiatives upon the Government's request. Such facilitation may, occasionally, be of assistance in dealing on practical matters with certain States that have not yet recognized Kosovo. Inother respects, as already described[103], Kosovo conducts its international relations directly and independently.

2.55. As explained in Kosovo's first Written Contribution[104], the international community's presence and role in Kosovo is similar to that in certain other States that are fully accepted as having acquired statehood. Indeed, if one compares the position of Kosovo with other States that have been admitted to the United Nations, such as Bosnia and Herzegovina or Timor Leste, or States that in the past had significant international presences as they entered upon statehood (including former colonies and trusteeships), it is clear that the international community's present role in Kosovo can in no way be viewed as an exceptional circumstance, let alone a diminution of Kosovo's position as a sovereign and independent State. Rather, the international presence in Kosovo has been welcomed and accepted by Kosovo, and as such is an affirmation of Kosovo's independence and sovereignty.

V. Serbia's Attitude towards Kosovo

2.56. The hostile and backward-looking attitude of the Republic of Serbia's high officials towards Kosovo continues[105] as does their interference in Kosovo's internal affairs. This is to the grave detriment of Kosovo Serbs, especially those living in northern Kosovo, who have been largely prevented by direct and indirect Serbian pressure from benefiting from integration into the structures of the Republic of Kosovo. As the Foreign Minister of Kosovo informed the Security Council on 17 June 2009:

"Our Government has continued to seek ways to improve the conditions in the minority community areas, especially in the Serb-majority areas. Unfortunately the Republic of Serbia has continued to prevent the Serb citizens of Kosovo from cooperating with the institutions of Kosovo. Belgrade has also continued to impedeour cooperation with neighbors and the international community by blocking our participation in regional and wider international bodies."[106]

2.57. Serbian officials, in particular its Foreign Minister, Mr. Jeremić, assert that Serbia will "never" recognize Kosovo[107], apparently regardless of the outcome of the present proceedings before this Court and regardless of the attitude of the people of Kosovo (including the Kosovo Serbs) towards independence[108]. They engage in provocations, such as the recent announcement that "local elections" will be held in Peja and Pristina municipalities on August 2009. In adopting such positions, Serbia's leaders are seeking to bind the people of Serbia, and all the peoples of the Balkans, to an indefinite future of discord and instability. The ICR recently said,

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Report of the Secretary-General, A/63/803, 2 April 2009, para. 34 (emphasis added).

103 Kosovo, paras. 2.27-2.47.

104 Ibid., paras. 2.58-2.74.

105 See, as one example among many, the intemperate speech of the Foreign Minister of Serbia in the Security Council on 17 June 2009: "we are gathered [he said] to discuss the dangerous consequences of the 17 February 2008 unilateral declaration of independence by the ethnic Albanian authorities of Serbia's southern province of Kosovo and Metohija" (Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 5).

106 Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 9.

107 See, among many such statements, Mr. Jeremić's statement to the Security Council on 17 June 2009: "Serbia will never, under any circumstances, implicitly or explicitly recognize the unilateral declaration of independence by the ethnic Albanian authorities of our southern province" (ibid., p. 5).

108 As the Secretary-General says in his latest report, "increasing numbers of [Kosovo Serbs] continue to apply for Kosovo identity cards, driver's licenses and other Kosovo documentation, and sign contracts with the Kosovo Energy Corporation (KEK) in order to facilitate their daily lives (S/2009/300, para. 7). He further said that "[a] growing number of Kosovo Serb police officers appear to have started returning to work …; there also seems to be considerable interest amongst members of the Kosovo Serb community to apply for posts which might become vacant after 30 June" (ibid., para. 25). In fact, the overwhelming majority of Kosovo Serb police officers in the North did return to work with the Kosovo Police by the 30 June 2009.

"Kosovo's stability continues to be negatively influenced from the outside. While actively courting Brussels in its European aspirations, Serbia exercises a certain influence over the Serb community living in Kosovo, particularly in the North. Progress towards a multi-ethnic society in part rests on Belgrade's willingness to let communities decide their future for themselves."[109]

2.58. Serbia's negative attitude contrasts starkly with the positive vision of the people and leaders of Kosovo:

"The desire of Kosovo's people and of their leaders for progress and for Euro-Atlantic integration is palpable, and the spirit of local ownership for Kosovo's affairs grows."[110]

109 "Consolidating Kosovo's European Future: Tracing Next Steps", Presentation at the London School of Economics, 13 May 2009, pp. 6-7 (available on the ICO website: http://www.ico-kos.org/d/ LSE_final.pdf).
110 Remarks by the ICR at the Institute for Historical Justice and Reconciliation, The Hague, 26 May 2009, p. 6 (available on the ICO website: http://www.ico-kos.org/d/090526 Remarks IHJR(1).pdf).

PART II

HISTORY AND CONTEXT

CHAPTER III

HISTORY AND CONTEXT

3.01. This chapter responds to some specific points made by Serbia in its Written Statement[111] concerning the historical background and context against which the Declaration of Independence of Kosovo is to be seen. Serbia's presentation of history is selective and inaccurate on many points, large and small. The present chapter only covers some of these inaccuracies, focusing on the constitutional position of Kosovo as a federal unit in the period 1974 to 1989, and the forcible removal of that status in 1989, as well as Serbia's distorted view of the atrocities and acts of oppression committed against Kosovo Albanians in the period 1989-1999[112].

3.02. The general historical background is important for an understanding of the special circumstances of Kosovo. Further, certain aspects of the history could be relevant in the event that the Court were to find it necessary to consider whether the people of Kosovo had a right to self-determination under international law[113]. However, the detailed history is not directly relevant to the question before the Court, which is limited to whether the Declaration of Independence of 17 February 2008 contravened any rule of international law[114].

3.03. This chapter is divided into five sections. The first responds to some assertions by Serbia concerning the period up to 1945 (Section I). Then Serbia's arguments that Kosovo was not a federal unit of the SFRY are dealt with (Section II), as are Serbia's assertions about the removal of that status in 1989 (Section III). Response is made next to Serbia's account of the period of persecution in the 1980s and 1990s, culminating in theatrocities of 1998-1999 (Section IV). A final section deals with the position of Kosovo Serbs during the period June 1999 to February 2008 (Section V).

I. The Period before 1945

3.04. *Serbia has suggested that Serbs historically were the predominant inhabitants of Kosovo since the fourteenth and fifteenth centuries*[115]. This is incorrect.

3.05. Serbia gives a misleading and inaccurate account of the demographic history of Kosovo[116]. The claim that the first evidence of a "noticeable Albanian population" appeared "around the seventeenth century" is false: there are many references to an Albanian population in this territory in medieval records. A highly inaccurate and speculative estimate by an Austrian soldier in 1871 is quoted by Serbia

111 Of those States that have submitted Written Statements to the Court arguing against the legality of the Declaration of Independence of 17 February 2008, it is principally Serbia which has made detailed arguments on historical matters. See also Cyprus, paras. 28-40.

112 Kosovo's account of the relevant history is contained in Chapters III, IV, and V of its first Written Contribution. For a detailed account of the history of Kosovo, see N. Malcolm, Kosovo: A Short History (1998).

113 See paras. 4.31-4.52 below.

114 See paras. 1.18-1.21 above.

115 Serbia, para. 112.

116 Ibid., paras. 112-118.

because it claimed that there was a majority of Serbs in Kosovo; but no mention is made of the much more detailed Austrian study published in 1899 which carefully analysed the Ottoman census statistics and found that the ratio of Muslims (who were mostly Albanian) to non-Muslims (who were mostly Serb) in Kosovo was 72:28[117].

3.06. Over the course of history, the territory that now forms the Republic of Kosovo has at times been part of other units, most notably the Ottoman Empire. Over time, Kosovo has been occupied, annexed and exchanged between various powers, including by Serbia. In short, Serbia has no special historical claim to the territory that now forms the Republic of Kosovo.

3.07. In any case, these questions of historical demography are of limited relevance to the question of Kosovo's Declaration of Independence on 17 February 2008. At most, two facts (neither of which has been seriously contested by Serbia) might be considered to be of some relevance: that a majority of the population at the time of the Serbian conquest of Kosovo in 1912 consisted of Albanians, who had no wish to come under Serbian rule;and that Kosovo was subsequently treated by the government in Belgrade as a colonial territory, with what was officially described as a "colonisation" programme.

3.08. *Serbia refers to Kosovo's "integration into Serbia" in 1913 and adds that: "the constitutional provisions and laws of Serbia were gradually introduced to the territory and the guarantees of local self-government were not applied until after World War I, i.e. 1919*"[118]. This misrepresents both the factual situation and the legal position. In fact, Kosovo was forcibly occupied by Serbia in 1912/1913 prior to the creation of the Kingdom of Serbs, Croats and Slovenes in 1918[119].

3.09. The suggestion that the inhabitants of Kosovo gradually came to enjoy the normal protection of the law in the period between the Serbian conquest in 1912 and the Serbian loss of control of the territory during World War I (in 1915) is false. The territory was governed primarily on the basis of Serbian royal "decree-laws"[120]. Throughout this period, the Albanian population of Kosovo suffered gross abuses of human rights at the hands of the Serbian authorities. A detailed report by the Austrian Consul in January 1914 recorded that not one of the Serbians' promises of equal treatment for the Albanians had been kept[121].

3.10. The territory of Kosovo was not legally "integrated" into Serbia in 1913[122]. Kosovo was administered as an occupied territory. It only began to be integrated into a constitutional and legal system some time after the formation of the Kingdom of Serbs, Croats and Slovenes (later called the Kingdom of Yugoslavia) in 1918. Whatever "guarantees of local self-government" were eventually "applied", they were Yugoslav and not Serbian ones[123].

3.11. Thus, contrary to the impression given by Serbia[124], Kosovo was not part of Serbia at the time of the formation of the Yugoslav State. Legally, it was a component of a Yugoslav entity before it became a component of a Serbian one.

117 On all the demographic issues here, see N. Malcolm, Kosovo: A Short History (1998), passim.
118 Serbia, para. 138.
119 Kosovo, paras. 3.05-3.06.
120 N. Malcolm, Kosovo: A Short History (1998), p. 257.
121 Ibid., p. 258.
122 Under Article 4 of the 1903 Serbian Constitution, the consent of a "Grand National Assembly" (a constitutional assembly, specially convened) was required for this; yet no such Assembly was convened. See N. Malcolm, Kosovo: A Short History (1998), pp. 264-266.
123 In fact, power in the local administration was then held almost exclusively by Slavs, not by members of the local Albanian majority population.
124 Serbia, para. 138.

3.12. *Serbia refers to a 1943 declaration in support of certain legal propositions about the status of Kosovo*[125]. That declaration, however, was not a constitutional document, but merely a statement of policy by the Communist leadership at a particular moment in late November 1943. One month later, a conference of Kosovo representatives (Bujan, 31 December 1943 – 2 January 1944) issued another declaration, which stated:

"the only way freedom can be achieved is if all peoples, including the Albanians, have the possibility of deciding on their own destiny, with the right to selfdetermination up to and including secession"[126].

3.13. *Serbia's account of the establishment of the present-day territorial unit of Kosovo by the Presidency of the National Assembly of Serbia in 1945*[127] omits the essential information that Serbia was given the power to determine these matters on the basis of a decision (an ostensibly voluntary and democratic decision[128]) by the "Regional People's Council of Kosovo" to join a "federal Serbia". That decision was, officially, the constitutional basis of Kosovo's participation in the Serbian Republic.

II. Kosovo was a Federal Unit of the SFRY

3.14. The constitutional position of Kosovo within the SFRY may be relevant to the legal arguments in at least two respects: (1) whether the declarations of independence by the republics of the SFRY (Slovenia, Croatia, Bosnia and Herzegovina, Macedonia) in the 1990s are to be regarded as similar in nature to Kosovo's Declaration of Independence of 17 February 2008 (so that the failure to regard the former as violations of international law would be relevant to whether Kosovo's Declaration of Independence was inconformity with international law)[129]; and (2) whether the people of Kosovo were entitled to the right of self-determination[130].

3.15. *Serbia repeatedly asserts that Kosovo was not a federal unit of Yugoslavia*. Kosovo addressed this issue in its first Written Contribution[131]. The following specific points are made in reply to Serbia's distorted picture of Kosovo's position within the Federation.

.16. *Serbia states that upon the formation of a federal Yugoslavia in 1945, Kosovo was not regarded as a constituent component of the federation*[132]. This is not correct. In fact, at the meeting of the Anti-Fascist Council of National Liberation of Yugoslavia (AVNOJ) held in August 1945 – the constituent body of the federal Yugoslavia – Kosovo was represented by its own delegates independently of Serbia[133].

3.17. *Serbia asserts that Kosovo was not a federal unit under the 1974 SFRY Constitution – the constitution* in force before the dissolution of the SFRY. This too is incorrect. Kosovo had numerous powers, duties and rights, independent of Serbia, and directly guaranteed by the 1974 SFRY Constitution. In fact, Serbia itself admits that Kosovo was "ruled almost exclusively by [its] own institutions" and that if the Kosovo Constitution was contrary to the Serbian Constitution, "there was no legal mechanism in place that would ensure the latter's primacy"[134].

125 Ibid., paras. 144-146.
126 N. Malcolm, Kosovo: A Short History (1998), p. 308.
127 Serbia, para. 147.
128 See however Kosovo, paras. 3.09-3.10.
129 See Kosovo, paras. 8.22-8.37.
130 See ibid., paras. 8.38-8.41, and paras. 4.31-4.52 below.
131 Kosovo, paras. 3.17-3.22.
132 Serbia, para. 146.
133 Kosovo, para. 3.11.
134 Serbia, para. 190.

3.18. As set out in Kosovo's first Written Contribution[135], with supporting extracts from the ICTY judgment in the *Milutinović* case, the position of Kosovo under the 1974 SFRY Constitution was equivalent to that of the republics. Kosovo as a unit wasrepresented directly (not by Serbia) in the federal legislature, executive, and judiciary.Under powers granted to it by the Federal Constitution, it issued its own Constitution directly, not receiving it from the Republic of Serbia, and had its own Constitutional Court. Kosovo had its own legislature, executive, and judiciary, with competences equivalent in almost every way to those of the republics. It had the right, which it exercised, to negotiate and enter into agreements with foreign States. As such, Kosovo is properly regarded ashaving been a federal unit of the SFRY.

3.19. To deny that it was a federal unit is to go against the simple and universally accepted meaning of that term, as it would be applied in any federal system. A federal system is one in which the constitution distinguishes two levels of government: at the higher level, authority is exercised by a federal government over the entire State; at the lower level, authority is exercised by the governments of unit territories; and those unit territories are themselves represented at the higher, federal level. Kosovo was indeed such a unit territory, both exercising governmental power over its own territory and being represented directly at the federal level.

3.20. Serbia indicated in its Written Statement that Kosovo was defined as part of Serbia under the 1974 SFRY Constitution. Yet a proper understanding of the words used indicates that rather than Kosovo being a mere geographical area within Serbian territory, the Constitution was actually defining the structural and constitutional relationship between Kosovo and Serbia[136]. In any case, as set out in detail in Kosovo's first Written Contribution[137], Kosovo had a dual status under the SFRY Constitution – it was both a federal unit of the SFRY and a part of Serbia.

3.21. However, to say that it was both of these things does not and should not imply anything like a parity of importance between them, for two fundamental reasons. First, Kosovo was only part of Serbia on the condition that Serbia remained a part of the federal(SFRY) framework. Kosovo's relationship with Serbia was defined by, and existed by virtue of, the federal Constitution. Second, in the 1974 Constitution the status of Kosovo as a component of Serbia was an almost notional matter, being stated there only in a few articles of a general and theoretical nature; whereas the status of Kosovo as a unit of the federal system was established by the many substantive articles which set out its rights, powers and duties, both in its own territory and at the federal level.

3.22. Serbia suggests that what the Yugoslav constitutions called "nationalities" ("*narodnosti*") can be reasonably translated as "national minorities"[138]. Serbia's translation is seriously misleading, as the term "nationalities" ("*narodnosti*") was in fact used in a very different way in Yugoslav legal discourse – a way that had no relation to whether the population in question was a minority or a majority in any particular territory. The particular Yugoslav theory (which was directly modeled on Soviet theory and terminology) was that a population within Yugoslavia was called a "nationality", not a "nation", if there was a larger body of people with that ethnic or linguistic character in another State. Thus the Kosovo Albanians were called a "nationality" because of the existence of the Albanian population in Albania itself, regardless of their numerical position in Kosovo, and regardless of the relative sizes, within the Yugoslav

135 Kosovo, paras. 3.17-3.22.

136 The phrase "u njenom sastavu" is translated by Serbia as "[which are] its parts". Yet in paragraph 159 of Serbia's Written Statement, the phrase "u sastavu republike" is translated as "within a republic". This illustrates the difficulty of translating the abstract noun "sastav", which means "composition", "structure", or "makeup". Better translations would be: "[which are] in its composition" or "… in its structure", and "in the composition of a republic" or "in the structure of a republic". The implication of these phrases is that the relation of Serbia to the autonomous provinces was a structural relationship; insofar as those provinces were "parts" of Serbia they were so by virtue of their constitutional relationship to it, and not as mere geographical areas of Serbian territory.

137 Kosovo, paras. 3.17-3.21.

138 Serbia, para. 157.

State, of the Albanian population and the populations of the so-called "nations". In fact, within the SFRY, the Kosovo Albanians were the third most populous national group, comparable in numbers to the Bosnian Muslims and the Slovenes, and larger than the Macedonians and the Montenegrins.

3.23. In short, the term "nationality" ("narodnost") cannot properly be translated as "national minority". The status of a "nationality" was assigned to the Kosovo Albanians on extraneous grounds, without the application of any reasonable or consistent criteria as to what might constitute a "minority" in any numerical sense. Insofar as this status was intended to be associated with a lower level of constitutional or political rights, its assignment to the Kosovo Albanians was discriminatory.

3.24. Serbia argues that "[d]espite their participation in the federal bodies and their role in the Yugoslav federation, the autonomous provinces were not federal units"[139]. Thisstatement vividly illustrates the untenability of Serbia's position, since it must be obvious that, as a unit that enjoyed direct participation in the federal bodies and played a role equivalent to that of the other units in the Yugoslav federation, Kosovo was a federal unit. The only reason given by Serbia to sustain its assertion that Kosovo was not a federal unit is the fact that there were some differences of terminology between the two general articles that defined the republics and the autonomous provinces[140]. Emphasis is placed on the fact that a republic was defined as "based on the sovereignty of the people". The phrase translated here as "the sovereignty of the people" is "*suverenosti naroda*"; in fact, "*narod*" here means not "people" but "nation", in the special sense in which Yugoslav theory distinguished a "nation" from a "nationality". However, while this definition grounds a republic on the "sovereignty" of a "nation", the definition of an autonomous province also attributes "sovereign rights" ("*suverena prava*") to both "nations" and "nationalities", and
says that they realize or implement those sovereign rights in the autonomous province.

3.25. Such tensions or contradictions in these general statements show that these very general statements had a character and purpose that were, to a significant extent, rhetorical. A full understanding of Kosovo's constitutional position under the 1974 Constitution requires a study of all the specific rights and competences attributed therein to Kosovo, rather than from the study of these general phrases.

3.26. Serbia relies on an SFRY Constitutional Court decision of 19 February 1991 to argue that Kosovo was not a federal unit. As explained in Kosovo's first Written Contribution, this is factually and legally incorrect. When considering that decision by the Constitutional Court, it is necessary to understand that, by 1991, the Court was (and understood itself to be) a political organ of the State. In December 1990, the Socialist Party of Serbia had won a sweeping victory in the elections, under its leader Slobodan Milošević. For more than two years he had campaigned on the issue of Kosovo, stirring up a ferment of hostility in Serbian political and intellectual circles towards the rights enjoyedby Kosovo under the 1974 Constitution. Thus, when the SFRY Constitutional Court was asked to consider the proclamation made by former members of the Kosovo Assembly in September 1990 which declared that Kosovo was a "Republic", it is not surprising that the judges adopted an essentially political approach, believing that their role was to support the objectives of State policy. It should also be noted that even more blatant political pressures were exerted on the members of the SFRY Presidency during 1990-1991. As such, Serbia's references to statements of the SFRY Presidency should likewise be regarded with due caution[141].

139 Serbia, para. 178.

140 Articles 3 and 4 of the 1974 Constitution, first presented as Amendment XX, paras. 3 and 4 in 1971 (see Serbia, para. 167).

141 A clear account of the Serbian control over the SFRY, in particular the Presidency, and the extreme pressure placed on its non-Serb members is found in L. Silber and A. Little, The Death of Yugoslavia
(1995).

3.27. Serbia asserts, on the basis of the SFRY Constitutional Court decision, that under the SFRY Constitution the right of self-determination belonged exclusively to the nations of Yugoslavia and not to the nationalities[142]. This issue was addressed briefly in Kosovo's first Written Contribution, where it was noted that the SFRY Constitution does not expressly accord a right of secession to either the republics or the provinces[143]. If there was no right of secession under the SFRY Constitution, then none of the republics (such as Slovenia, Croatia, Macedonia, or Bosnia-Herzegovina) had a right under national law to declare independence prior to the dissolution of the SFRY, and yet the international community did not regard such declarations as internationally wrongful. Similarly, even if Kosovo's declaration of independence was inconsistent with FRY or Serbia law, that does not make it internationally wrongful. Alternatively, if there was a right of secession in the SFRY Constitution, it was shared by the equally sovereign nations and nationalities of the SFRY, including Kosovo. It cannot therefore be said that Kosovo's exercise of that right through a declaration of independence is wrongful either nationally or internationally. Moreover, that existence of such a right in the SFRY Constitution is of relevance in considering whether the people of Kosovo have an internationally-protected right of selfdetermination. Nothing in the 1974 SFRY Constitution says otherwise.

3.28. In summary, Kosovo was a federal unit of the SFRY and as such, like the republics, was entitled to determine its own future upon the dissolution of the SFRY.

III. The Illegal Removal of Kosovo's Autonomy in 1989

3.29. The federal protections guaranteed to Kosovo as an autonomous province under the SFRY Constitution were illegally removed by Serbia in 1989[144]. This forcible removal of Kosovo's autonomy was effectively a denial by Serbia of Kosovo's right to participate in the SFRY institutions. *Serbia's remarkable assertion that the amendments removing Kosovo's federal rights and autonomy were "duly adopted with the consent of the assemblies of the autonomous provinces of Kosovo and Vojvodina*"[145] is yet another example of Serbia's inability, even today, to accept that gross illegalities were committed by the Milošević regime.

3.30. The 1989 amendments were forced through unconstitutionally, as described by the ICTY in its *Milutinović* judgment[146]. Far from being duly adopted with the consent of the Kosovo Assembly, the measures were forced through in a procedurally invalid way in circumstances of intense intimidation and with tanks being outside the Assembly building. The BBC editor Dr. Paulin Kola has summarized the objections as follows:

"first … there was a state of emergency in place and, therefore, the conditions were not conducive to the free exercise of the functions of members of the Assembly; secondly, many members had been threatened with serious consequences unless they voted in favour of the changes; thirdly, there was no quorum in the Assembly, let alone the two-thirds majority required to pass constitutional laws; fourthly, the votes were never counted; and, fifthly, Belgrade delegates and even secret service agents had also participated in the vote"[147].

The amendments "adopted" on that occasion, and the subsequent measures carried out on the basis of those amendments, can not be described as legally valid.

142 Serbia, para. 195.
143 Kosovo, para. 3.19, in particular fn. 141.
144 Kosovo, paras. 3.23-3.28.
145 Serbia, para. 189.
146 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 February 2009, paras. 217-221 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), cited in Kosovo, para. 3.27.
147 P. Kola, In Search of Greater Albania (2003), pp. 180-181.

3.31. *Serbia relies on an SFRY Constitutional Court decision of 18 January 1990 to argue that the main amendments were legitimate*. However, that decision is simply not relevant. The Constitutional Court did not examine the circumstances in which theamendments were forced through the Kosovo Assembly, merely assuming that they had been correctly adopted.

3.32. In fact, in 1990 the Constitutional Court of Kosovo took up the issue of the constitutionality of the 1989 amendments, finding that there were indeed procedural improprieties in respect of the vote in the Kosovo Assembly on 27 March 1989. Before the Kosovo Constitutional Court could reach a final judgment, Serbia dissolved the Court, in yet another act of anti-Kosovo repression.

3.33. In summary, in 1989, Kosovo, a federal unit of the SFRY with all the associated powers and rights, had these rights forcibly and illegally removed by Serbia in violation of the SFRY Constitution. It was these events that triggered the collapse and ultimate dissolution of the SFRY[148].

IV. The Period from the 1989 to 1999

3.34. Throughout its Written Statement, Serbia downplays the atrocities and acts of oppression that were committed against the people of Kosovo.

Systematic violations of constitutional rights

3.35. *Serbia points to the rights that the people of Kosovo purportedly had under the 1990 Serbian Constitution*[149]. In fact, the guarantees appearing on paper in that Constitution were in practice systematically violated during subsequent years:

– The "freedom to use his or her language and alphabet" was systematically violated.

As the United Nations Rapporteur Tadeusz Mazowiecki stated in his report of 17 November 1993:
"

In 1984 identity cards, birth and marriage certificates, and other documents were issued in three-languages, Albanian, Serbo-Croat and Turkish; in 1990, in Albanian and Serbo-Croat, and in 1993 only in Serbo-Croat. In the Prizren district court, proceedings take place exclusively in Serbo-Croat, even though 95% of the peoplebeing tried are Albanian. The alteration of street names in Kosovo is intended to give a Serbian character to places with majority-Albanian populations. In Prizren, since 1991, 90% of the place names have been changed."[150]

Kosovo Albanian medical workers were also dismissed for communicating with other

Kosovo Albanians in the Albanian language.

– The right "to preserve, foster and express their cultural, linguistic and other peculiarities" was also systematically violated. The most important Albanian cultural bodies in Kosovo, such as the Academy of Sciences and Arts and the Institute of Albanology in Pristina, were forcibly suppressed, and in Prizren the Museum of the League of Prizren, one of the most important cultural sites for Albanian history in the region, was closed down[151].

– The right "to have information media in their own language" was also systematically violated. In July 1990, the Kosovo Albanian staff of the State-run radio and television servicein Kosovo were

148 For an account of this, see L. Silber and A. Little, The Death of Yugoslavia (1995).
149 Serbia, para. 207.
150 Cited in J. Hubrecht, Kosovo: établir les faits (2001), pp. 27-28.
151 N. Malcolm, Kosovo: A Short History (1998), pp. 346 and 352.

dismissed (1,300 journalists and technicians lost their jobs) and their Albanian-language programmes were closed down. In August 1990, the only Albanian-language daily newspaper, Rilindja, was also suppressed[152].

3.36. Serbia lists in a footnote[153] "various measures" which were adopted between 1989 and 1990 to prevent the exodus of Serbs from Kosovo and for the return of those who had left. But no information is given about the contents of those measures, nor of their effects in practice. Similarly, only the title of the "Program for realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo" is given at paragraph 231. In fact, these measures were blatantly discriminatory, being designed to benefit Serbs in Kosovo and future Serb migrants to Kosovo, by diverting resources to them.

3.37. Thus, for example, the "Yugoslav Program" of January 1990 retrospectively annulled legally valid sales of real estate by Serbs to Albanians; decreed that the development funds for Kosovo should be concentrated on projects in Serb-majority areas;enjoined that all large-scale investment projects in Kosovo should include an obligation to construct apartments for Serb and Montenegrin workers; called for measures to encourage Kosovo Albanians to move to other parts of Yugoslavia; offered special credits to non- Albanians to settle in Kosovo; and announced that in urban centres in Kosovo, Serbs and Montenegrins would be given priority in the allocation of permits to build houses, and would also be given priority when buying or renting shops, or seeking work permits or bank credits[154].

3.38. The "Program for realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo" was similarly concerned mostly with discriminatory measures in favour of Serb inhabitants and settlers, announcing, for example, that new factories would be built in 30 Serb-majority villages. It also contained the provision that "[a]ll those who have taken part in protest demonstrations will be dismissed from all managerial posts in enterprises and institutions"[155].

3.39. Altogether, 32 laws and more than 470 special decrees of this discriminatory kind were issued in the period 1990-1992[156].

3.40. During the period of Serbian oppression in the 1990s, Kosovo Albanians sought to develop many of the institutions (e.g. schools) that they were denied under the law. The reference to Serbia "tolerating" various aspects of the situation should not be taken to imply that Serbian policy was motivated or characterized by a spirit of "tolerance". Rather, the Serbian authorities made a calculation about the level of "political friction" that would suit them. This "friction" included repressive actions against many thousands of Albanians. In 1999, the Council for the Defense of Human Rights and Freedoms calculated that between March 1989 and December 1997 more than 10,000 Albanians in Kosovo had been victims of physical violence by the authorities, including heavy beatings and torture[157].

`Education

3.41. *Serbia's assertion that the Serbian authorities "tolerated most of the parallel structures*"[158] must be heavily qualified. Amnesty International reported in 1998 that "[t]he Serbian authorities have systematically harassed those involved in the educational process, including members of the teachers' trade union, teachers, university lecturers, private citizens who have made their homes available for teaching and even pupils themselves. Schools have been broken into and raided, teachers arrested and/or beaten and lessons repeatedly interrupted."[159]

152 J. Hubrecht, Kosovo: établir les faits (2001), p. 27.
153 Serbia, para. 230.
154 A. Gashi, ed., The Denial of Human and National Rights of Albanians in Kosova (1992), pp. 130-134.
155 J. Hubrecht, Kosovo: établir les faits (2001), pp. 19-20.
156 H. Clark, Civil Resistance in Kosovo (2000), pp. 71-72.
157 J. Hubrecht, Kosovo: établir les faits (2001), p. 26.
158 Serbia, para. 265.
159 Amnesty International, Kosovo: The Evidence (1998), p. 66.

3.42. *Serbia's account of the issue of education begins with the "boycott" following the introduction of new curricula in August 1990*[160]. This approach gives a false impression of the situation, as it fails to mention the events of the previous year. In August 1990, the Serbian Assembly repealed the entire body of educational legislation previously passed by the Assembly of Kosovo, in order to impose a uniform curriculum on the whole of Serbia, with only token concessions to the Albanians, this action was a central part of the Serbian political programme relating to Kosovo (a programme which also involved the closure of the Ministry of Education in Kosovo and of the Pedagogical Institute in July 1990). Any "boycott" of this new program was simply a reaction to the wholesale evisceration of an educational system that had been in place for years to educate students in Kosovo. The suggestion that proposals submitted by the Kosovo Albanian teachers would have been accepted by Belgrade is simply not realistic.

3.43. *The statement that "Kosovo Albanian educators chose to resign from their posts and to establish a parallel educational system"*[161] *also fails to characterize correctly the nature of these developments.* Kosovo Albanian teachers would have preferred to remain in their posts and, where possible, physically in their schools, teaching what had previously been the officially approved curriculum. Yet, during the 1990-1991 school year, schools in many Kosovo towns were closed down, sometimes forcibly, by the authorities: in Podujevë/Podujevo, for example, police used tear gas to close down twohigh schools where 4,300 Albanian children were taught by 264 teachers[162]. Then, in the period between January and May 1991, the Serbian authorities ceased to pay the Kosovo Albanian teachers.

3.44. *The claim made by Serbia that "primary and much of secondary education of Kosovo Albanian pupils was substantially funded by the State authorities"*[163] *is very misleading*. In May 1991, the Serbian authorities announced a plan to abolish half of the secondary schools in Kosovo (specifically, in areas where the Albanians formed a large majority). Only 29% of Albanian children leaving primary school would be permitted to go to secondary school, but the plan also specified that the number of places reserved for Serb children would be greater than the total number of Serb children leaving primary school. It was also announced that for the next year, the University of Pristina would admit 1,500 Albanian students and 1,500 Serb students, even though the ratio between these ethnic groups in the population of school-leavers was roughly 9:1, and the previous enrolment of Albanian students had been more than 7,000 per year[164]. Generally, schools were kept "open and running" in cases where there were Serb children being taught in them. In many cases, secondary schools that served Albanian communities were closed down by the authorities. At the start of the 1991-1992 school year, the Serbian authorities barred all Kosovo Albanian children from State schools, both primary and secondary. In the second term of that year, because the Yugoslav Constitution made elementary schooling compulsory, roughly 90% of the primary schools were re-opened to Kosovo Albanians. However, ethnic segregation was strictly maintained, and the Kosovo Albanian classes did not benefit from any public expenditure on teaching, books, equipment, or evenheating. Where the Kosovo Albanian children used separate classrooms (as opposed to the same ones in different shifts), all equipment – including, in one recorded case, the windowglass – was removed from those classrooms[165].

Public health

3.45. *Serbia refers to a "stable" situation in the public health system, in which "the Kosovo Albanian community continued to use the State public health system throughout the period", claiming that there were no "en masse resignations of Kosovo Albanian health care providers*"[166]. In support of this statement, it gives a reference to pp. 25-26 of a report issued by the International Crisis Group in 1998.

160 Serbia, para. 267.
161 Serbia, para. 267.
162 Amnesty International, Kosovo: The Evidence (1998), p. 164.
163 Serbia, para. 268.
164 Amnesty International, Kosovo: The Evidence (1998), pp. 124-125 and p. 172; H. Clark, Civil Resistance in Kosovo (2000), p. 96.
165 H. Clark, Civil Resistance in Kosovo (2000), p. 97; N Malcolm, Kosovo: A Short History (1998), p. 349.
166 Serbia, para. 269.

Serbia's statement seriously misrepresents the contents of that report, which in fact states (at p. 25) that "[i]n July and August 1990, health care in Kosovo came under Serbian 'emergency management' which rapidly led to large-scale sackings. In total, 1,855 Kosovar medical workers were dismissed, of whom 403 were physicians." It continues: "The boycott of the Serbian health care system is almost as comprehensive as that of the educational system," and it notes that "[b]etween 1990 and 1993 Kosovars went to great lengths not to visit Serb doctors, and Kosovar doctors by and large refused to work within the Serbian system which required them to write prescriptions in Cyrillic". The only exception it notes is that Kosovo Albanians were willing to use the Serbian system for consultations with specialists[167].

3.46. The statement that there were no "*en masse* resignations of Kosovo Albanian health care providers" is to be explained by the fact that there were en masse dismissals of them instead. As another analysis of this issue puts it:

"From August 1990 onwards, more than half of the medical staff of Kosovo were dismissed– beginning at the Gynaecological Clinic in the Medical Faculty. As elsewhere, any sign of disloyalty could be a reason for dismissal, including treating demonstrators, offering humanitarian aid to strikers or dismissed workers, or writing in Albanian … In the Medical Faculty, police dragged senior doctors from their offices. Clinics were shut down – 38 in Prishtina alone and many more in towns and villages."[168]

Employment

3.47. *Serbia's reference to "publicly-owned companies where Kosovo Albanians continued to work throughout the whole period discussed in this section*"[169] is misleading. Those who continued to work were minorities of the former workforces, in some cases very small ones. To give the example of three major industrial sectors, where the industries were all publicly owned: 94% of all Albanian miners were dismissed; 90% of chemical workers; and nearly 60% of metal workers[170].

Departure of Serbs from Kosovo

3.48. *Serbia makes much of the departure of thousands of Serbs from Kosovo since the 1960s, stating that the movement was due to mistreatment by Kosovo Albanians*. In fact, this movement was largely for economic reasons. For example, Serbia refers to a departure of 50,000 Serbs from Kosovo in the 1970s. But in reality during this period there were large flows of people moving from all underdeveloped parts of Yugoslavia to developed or developing ones. Thanks to the expansion of Belgrade and the industrial development of Serbia, Serbia attracted a higher net immigration, from all parts of Yugoslavia, than any other area. In 1981, there were 112,000 people living in Serbia who had moved from Bosnia-Herzegovina, 111,000 from Croatia, and 50,000 from Macedonia[171]. Overall, the flow of Serbs from Kosovo was a normal part of this trend. An investigation into the entire issue of the Serb "exodus" from Kosovo by the Yugoslav Democratic Initiative in 1990 concluded: "demographic shifts [in Kosovo] were not the result of an unusually large emigration of Serbs but of a surprisingly small emigration of Albanians"[172].

3.49. There was indeed "continued Serbian and Montenegrin emigration … throughout the 1980s"[173], again primarily for economic reasons. Official reports on the reasons for emigration of the 14,921 Serbs who left Kosovo in the period 1983-7 foundthat in 95% of cases the emigrants cited economic or family reasons. In only eleven cases (0.1%) were pressures from Albanians given as the main cause of emigration[174].

167 International Crisis Group, Kosovo Spring (1998), p.25 (available at http://www.crisisgroup.org/library/ documents/ report_archive).
168 H. Clark, Civil Resistance in Kosovo (2000), p. 106.
169 Serbia, para. 266.
170 H. Clark, Civil Resistance in Kosovo (2000), p. 76.
171 N. Malcolm, Kosovo: A Short History (1998), p.330.
172 S. Popović, "A Pattern of Domination", Balkan War Report, 1993, pp. 6-7.
173 Serbia, para. 224.
174 N. Malcolm, Kosovo: A Short History (1998), p. 331.

3.50. When charging that Kosovo Albanians were responsible for atrocities against Serbs, it is noteworthy that Serbia relies entirely on very general statements[175]. No specific evidence of maltreatment, and no detailed analyses of bodies of evidence (of the sort carried out by the Yugoslav Democratic Initiative) have been put forward.

Serbian atrocities in 1998/1999

3.51. *Serbia's statement that the hostilities between March and September 1998 "led to more than 600 civilian deaths on both sides" contrives* to give an impression of symmetry. However, it is adapted from the text of the Secretary-General's report of 4 September 1998, which said: "An estimated 600 to 700 civilians have been killed in the fighting in Kosovo since March."[176] The great majority of these were Kosovo Albanians.

3.52. *Serbia states that the KLA actions in July 1998 "provoked a fierce reaction from Government forces*"[177]. The "fierce reaction" of Serbia in fact involved killings of Kosovo Albanian civilians, the destruction of Kosovo Albanian civilian homes on a large scale, mostly by arson, and the driving out of Kosovo Albanian civilians en masse from the areas where they lived[178].

3.53. *Again, the statement that the increase in refugees and internally displaced persons "affected both sides of the conflict", and that the total number was "280,000, of which 200,000 were internally displaced persons within Kosovo, and 80,000 were located in central Serbia or neighbouring countries*"[179], is potentially misleading. By emphasizing that "both sides" were affected, and singling out "central Serbia" (the destination preferred by Serb refugees and some Roma), it obscures the fact that the great majority of the IDPsand refugees were Albanians. These figures are cited from the Secretary-General's report of 3 October 1998, which itself merely summarized a report by the UNHCR[180]. The report by the UNHCR, of 8 September 1998, estimated that 20,000 refugees were in Serbia, 39,628 in Montenegro, 14,000 in Albania, 5,200 in Bosnia, 2,000 in Turkey and 1,000 in Macedonia. Since the majority of those who went to Montenegro were Albanians seeking refuge with the ethnic Albanian population there (including 17,000 who went to the ethnic Albanian town of Ulcinj), it is clear that the majority of the refugees who left Kosovo were Albanian[181].

3.54. *Serbia's description of the violence in Kosovo between Spring 1998 and March 1999 is seriously misleading*. Serbia cites the Secretary-General's report of 30 January 1999 about the growth of violence in Kosovo[182], but fails to mention the most serious example discussed at length in that report, the massacre at Reçak/Račak, where 45 Kosovo Albanian civilians were murdered. The report noted that "[m]any of the dead appeared to have been summarily executed, shot at close range in the head and neck", and that "investigative and forensic efforts in the wake of this massacre have been willfully obstructed by the lack of cooperation by the authorities of the Federal Republic of Yugoslavia"[183].

3.55. *Further, the phrase "unrestrained armed conflict broke out*"[184] gives the impression almost of a natural occurrence taking place after the removal of a "restraint". Yet the atrocities that unfolded were the result of a deliberate policy by armed forces, paramilitaries and police acting under and on be-

175 Serbia, paras. 221-226.
176 Dossier No 18.
177 Serbia, para. 319.
178 See Kosovo, paras. 3.47-3.60.
179 Serbia, para. 322.
180 M. Weller, The Crisis in Kosovo, 1989-1999 (1999), p. 215.
181 Ibid., p. 269. The report gives a detailed breakdown of destinations in Montenegro, from which broad deductions can reasonably be made about the ethnic character of the refugees.
182 Serbia, para. 345.
183 S/1999/99, 30 January 1999, paras. 11-12 [Dossier No. 26].
184 Serbia, para. 351.

half of the Serbian and FRY authorities. The statement that "[t]he beginning of the NATO bombing, and intensified clashes between Government forces and the KLA led to massive displacement of Kosovo's population, including more than 800,000 refugees …" is simply wrong. The refugees were not fleeing from the NATO bombing (which was targeted at military and other installations, not at homes), nor were "clashes" between Government forces and the KLAthe prime reason for the mass exodus from Kosovo. The Serbian authorities went to great lengths to force people from their homes in areas where there was no fighting (e.g. the capital Pristina, where Kosovo Albanian inhabitants were rounded up and expelled in large numbers), and to force them en masse to leave Kosovo. While doing this, they confiscated passports and identity cards, and removed number-plates from cars before they were allowed to cross the border. This was clearly designed to make it possible, thereafter, to refuse them re-entry to Kosovo, on the basis that they could not prove that they were Kosovo citizens. In other words, the Serbian authorities drove most of the Kosovo Albanian population from their homes, and drove nearly half of them (the officially recorded figure is 848,100) out of Kosovo, in a deliberate attempt to cause a permanent change in the nature of the population there.

Serbia's current attitude to the past atrocities

3.56. The attitude displayed by Serbia, in its Written Statement, towards the horrific events in Kosovo from 1989 to 1999, culminating in the crimes against humanity, war crimes and human rights violations committed on a massive scale by the Belgrade authorities and security forces[185], is revealing. It confirms what is also clear from the statements of the highest representatives of Serbia, that underlying attitudes among those in power in Belgrade towards Kosovo seem not to be unduly troubled by the treatment of the people of Kosovo during the Milošević era. Such an attitude vividly confirms why the people of Kosovo were not willing to entertain a final status under which Kosovo would remain a part of Serbia.

3.57. Throughout the Written Statement, descriptions are given which reproduce and appear to defend the Milošević regime's own version of events. Thus the constitutional amendments of 1989, coercively and illegally imposed, are described as 'duly adopted'; the facts about the political persecution of Kosovo Albanians are denied; human rights guarantees are cited with no acknowledgement of the fact that they were systematically violated; the situation in education, public health and employment is misrepresented, with an attempt both to minimise the number of dismissals and to suggest that the Kosovo Albanians were themselves responsible for the loss of their jobs; the departures of Serbsare misrepresented, in ways that echo the propaganda of the Milošević regime at the time; the armed conflict of 1998-1999, and the suffering it caused, are characterized with false suggestions of symmetry; the worst atrocities of the Milošević regime are passed over in silence; and an attempt is made to blame the mass expulsion in 1999 on the NATO bombing, as was done by the Milošević regime at the time.

3.58. There is in Serbia's Written Statement, no real comprehension of the past. On the contrary, the underlying theme is that, since the autumn of 2000, there has been a "new" Serbia; that this new Serbia has nothing to do with the past; and that Serbia's sovereignty over its province of 'Kosovo and Metohija' cannot be put in doubt as a result of past events. Yet from their approach it seems clear that, like their predecessors, the present authorities in Belgrade view Kosovo essentially as territory, not as people that have overwhelmingly rejected rule from Belgrade because of the constant denial of their right of self-determination and massive human rights violations.

185 Kosovo, paras. 3.23-3.60.

V. The Position of Kosovo Serbs from June 1999 to February 2008

3.59. *Serbia wrongly claims that "more than 200,000 Serbs and other non-Albanians fled Kosovo" after 10 June 1999*[186]. This appears to reflect the figure of 229,600 (for refugees from Kosovo in Serbia and Montenegro) put forward by the government of the FRY at the time, but no evidence is supplied to justify this figure. Taken as such, this figure would imply the flight of virtually the entire Serb population of Kosovo. Since it is well known that many thousands of Serbs remained in Kosovo after 1999 (and remain today), Serbia's claim is clearly wrong.

3.60. In a study published in January 2000, six months after the end of the war, the Unites States Committee for Refugees and Immigrants noted:

"The Yugoslav government says that 229,600 people have been displaced from Kosovo into Serbia-proper (199,600, as of November 26, 1999) and Montenegro (30,000, as of January 28, 2000). This number is, however, open to dispute. The Kosovo Serb National Council claims that there are still about 100,000 Serbs living in Kosovo. Added together, this would be a larger number than the estimated 200,000 Serbs living in Kosovo before the war, casting obvious doubt on theaccuracy of the count, or of the pre-war estimate. Further confusing the numbers picture is the estimate that up to 50,000 Roma have fled Kosovo as well, and, by some accounts, that up to 25,000 are still living in Kosovo."[187] Other estimates have placed the number of Serbs who remained in Kosovo a little higher, at approximately 110,000.

3.61. *Serbia, against this evidence, continues to assert that 200,000 Kosovo Serbs left Kosovo in 1999*[188]. The Foreign Minister of Kosovo explained to the Security Council on 17 June 2009:

"the kind of game that is being played with figures is not helpful. Two hundred thousand Kosovo Serbs, said Minister Jeremic, are still displaced. I have to repeat yet again that according to the last census – which was conducted by the Serbianimposed authority in Kosovo – the largest number of Serbs ever living in Kosovo was 195,000. Presently in Kosovo, 135,000 Serbs live. I do not know where that 200,000 figure is found."[189]

3.62. While Serbia invokes the authority of the UNHCR for its inflated figures, it must surely be aware that the UNHCR merely reproduced figures given to it by the Serbian authorities. The most detailed study of this issue is the analysis carried out by the European Stability Initiative, an international NGO, in 2004, which presented evidence indicating that roughly 130,000 Serbs were living in Kosovo (as compared with the 195,000 living there in the early 1990s), and commented:

"The claim that there are 200,000 IDPs from Kosovo in Serbia, representing almost the entire Kosovo Serb population, has become an orthodoxy, even repeated by international officials … The only official figure on displacement of Serbs from Kosovo comes from a registration exercise carried out by the Serbian government in early 2000. The results, published in April 2000, state that there were 187,129 IDPs from Kosovo, of whom 141,396 were Serbs … However, the limited hard information available from within Kosovo paints a very different picture. As we have already pointed out, if one compares the data on the number of Serbs who remain in Kosovo with Yugoslav statistical data from before 1999, the extent of displacement of Serbs from Kosovo is more likely to be in the vicinity of 65,000 …UNHCR's

186 Serbia, paras. 357 and 365.

187 US Committee for Refugees and Immigrants, Reversal of Fortune: Serbia's Refugee Crisis, 1 January 2000, Refugee Reports, Vol. 21, No. 1 (available at: http://www.unhcr.org/refworld/docid/ 3c58099b4.html).

188 See most recently the comments of the Foreign Minister of Serbia in the Security Council debate on 17 June 2009 (provisional verbatim record, sixty-fourth year, 6144th meeting, S/PV.6144, pp. 6 and 24).

189 Ibid, p. 23.

own documents repeat the results of the Serbian government registration exercise. UNHCR, which operates on the territory of Serbia by invitation of the government, has not carried out an independent investigation. In the fine print of some of its documents, however, it expresses serious doubts about the official figures."[190]

It also cited a UNHCR document of February 2004 which said: "The sum of the estimated number of minorities living in Kosovo, and the number of currently registered IDPs in Serbia and Montenegro, results in a figure that is significantly higher than the minority population that has ever lived in Kosovo."[191]

3.63. *The comparison made by Serbia*[192] *between the human and minority rights situation in Serbia and that in Kosovo since June 1999 is artificial*, as it takes no account of relevant features of the background to these two very different situations. Some Kosovo Serbs have undoubtedly experienced hostility from Kosovo Albanians. This is partly because of the long previous history of Kosovo Albanian suffering at the hands of the Serbian authorities; partly because of the brutal actions of Serbian forces and paramilitaries in 1998-1999, in which some Kosovo Serbs participated; and partly because of the policy pursued by successive Belgrade governments since 1999, which has involved manipulating the Serb minority in Kosovo in order to block, so far as possible, any integration of those Serbs into a functioning Kosovo State.

3.64. *Serbia asserts that the "situation drastically deteriorated for Kosovo Serbs", pointing to the violence that occurred in March 2004*[193]. However, by extracting only a few elements from various reports, and omitting essential details that explain how this situation arose, Serbia gives an inadequate and potentially misleading account of these events. On 16 March 2004 three Albanian children drowned in the river Ibar; a fourth, who survived, claimed that they had been chased into the river by a group of local Serbs. This claim (which later turned out to be false) was reported as fact in news broadcasts,leading to widespread anger in the Kosovo Albanian population. When Kosovo Albanians gathered to demonstrate at the end of the bridge in the nearby city of Mitrovica on 17 March 2004, Serbs gathered to oppose them on the other side of the bridge; shooting broke out, in which six Kosovo Albanians and two Kosovo Serbs were killed. After this, a series of demonstrations and violent actions against Kosovo Serbs took place in other parts of Kosovo. Of the 19 who died, 11 were Kosovo Albanians.

3.65. Serbia presents quotations from Nexhat Daci, the then Speaker of the Kosovo Assembly, and Hashim Thaçi, the present Prime Minister of Kosovo, describing them as having "publicly supported" the violence against the Serbs in March 2004. This is grossly misleading. On 18 March 2004 Nexhat Daci was a signatory (with President Ibrahim Rugova, Prime Minister Bajram Rexhepi, and others) to a joint public statement that said:

"There is no excuse for violence and it must stop immediately. Those who are engaging in violence are betraying all the people of Kosovo. The progress of the last few years is in jeopardy and with it prospects for a better future for everyone. We, the leaders of Kosovo, unite in denouncing those who practice violence."[194]

190 European Stability Initiative, "The Lausanne Principle: Multiethnicity, Territory, and the Future of Kosovo's Serbs", 7 June 2004, pp. 18-19 (available at http://www.esiweb.org/pdf/ esi_document_id_53.pdf)

191 UNHCR, Critical Appraisal of Response Mechanisms Operating in Kosovo for Minority Returns, Pristina, February 2004, p. 14.

192 Serbia, para. 220.

193 Ibid., para. 375.

194 Human Rights Watch, Failure to Protect: Anti-minority Violence in Kosovo, March 2004, (report issued 25 July 2004), fn. 171.

Similarly, it is highly misleading to present Hashim Thaçi's comments as an example of "Kosovo Albanian politicians [who] publicly supported the violence". On 20 March Mr. Thaçi issued a strong public statement, including the following: "those who set fire to Serb houses and to Orthodox churches are nothing more than criminals, who cannot be tolerated. Kosovo does not just belong to the Albanians"[195].

3.66. To summarize the position of Serbs and other non-Albanians in Kosovo since 1999[196]:

(a) Even though, since June 1999, crimes have been committed against members of the Serb community, these have for the most part been individual and isolated, with the exception of the violence in March 2004. Two important points should be noted. First, the number of inter-ethnic crimes in Kosovo has drastically dropped over the ten yearssince 1999. In particular, the crimes that happened during the past two years (even between different communities) were ordinary crimes that mostly related to personal problems between individuals, not crimes of an inter-ethnic nature. Second, the Government of Kosovo has consistently condemned enter-ethnic crime[197], and has put in place measures to ensure that all persons in Kosovo can live in freedom and without fear. These measures are supported by the strong protections set out in the Constitution of the
Republic of Kosovo, which came into force in June 2008.

(b) The acts of violence committed against Serbs during these years have been the acts of individuals; they have not been organized by the Kosovo authorities, and have not formed part of a State policy. This strongly contrasts with the maltreatment of the Kosovo Albanians in the previous decade, 1989-1999, when the State policy of Serbia and the FRY was discriminatory, and violence and other forms of maltreatment were systematically applied by the organs of the State.

(c) While the Government of Serbia complains that the Serbs in Kosovo are not enabled to lead normal lives, Serbia is systematically working to prevent their integration into the legal structures, political structures, public services, etc., of Kosovo, by instituting boycotts, creating and funding parallel structures, and putting pressure (including threats of the withdrawal of pension payments) on those who might otherwise be willing to integrate with the structures of the Kosovo. This policy not only has a negative effect on the integration of the Serbs; it also contributes to distrust or even hostility on the part of ordinary Kosovo Albanians, who are thereby led to regard their Serb neighbours as instruments of a hostile Serbian policy. Despite direct and indirect pressure from Serbia, more and more Kosovo Serbs continue to cooperate and participate with the Kosovo institutions.

195 Ibid., fn. 174.

196 Serbia, paras. 365-387.

197 As recently as 23 March 2009, the Foreign Minister of Kosovo said in the Security Council "I will start by once again condemning, on behalf of the Republic of Kosovo, the events of 17 March 2004. I invite the Council's attention to the statement made by the Government of the Republic of Kosovo on 17 March this year." (Security Council, provisional verbatim record, sixty-fourth year, 6079th meeting, S/PV.6079, p. 24).

PART III

THE LAW

CHAPTER IV

THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE ANY APPLICABLE RULE OF GENERAL INTERNATIONAL LAW

4.01. In its Written Statement, Serbia argues that recognizing the newly created situation on the ground would constitute a violation of general international law by recognizing States[198]. It asserts that "were the international community to accept as proposed the UDI by the provisional institutions of self-government of Kosovo a radical re-orientation of international law would in effect be proposed which would significantly undermine the principle of the stability of boundaries"[199] and that "the obligation upon all States is not simply to avoid trespassing across international borders, but to acknowledge and positively protect the territorial composition of other States"[200].

4.02. This, however, is not the issue in the present proceedings. As underlined in Chapter I above[201], and as Serbia itself has recognized[202], the only question before the Court is the conformity with international law of the Declaration of Independence of 17 February 2008. The Court is not called upon to pronounce on the legality or the consequences of recognitions of the Republic of Kosovo as a State. The Court is only called upon to pronounce on the question of whether the Declaration of Independence was contrary to any rule of international law.

4.03. The fundamental point is that international law does not address the legality of declarations of independence[203]. While such declarations may well violate the internal law of a State, as a matter of international law the issuance of a declaration of independence is merely an element in the factual process of the creation of a State. International law onlytakes account of the existence of States as subjects of the international legal order[204]. The creation of a State is a matter of fact, not of law[205]. As Professor Malcolm Shaw rightly underlined, "[t]he process of secession is probably best dealt with in international law within the framework of a process of claim, effective control and international recognition"[206].

198 See also Argentina, para. 112; Romania, para. 109; Venezuela, para. 5.
199 Serbia, para. 427.
200 Ibid., para. 424.
201 See paras. 1.18-1.21 above.
202 Serbia, para. 19.
203 Kosovo, para. 8.07-8.37; Austria, paras. 22 and 24; Germany, p. 27; United Kingdom, paras. 5.2-5.7.
204 A. Pellet, "Le droit international à l'aube du XXIème siècle", 1 Bancaja Euromediterranean Courses of International Law 55 (1997). See also P. Daillier and A. Pellet, Droit international public (Nguyen Quoc Dinh) (7th ed., 2002), p. 407.
205 G. Abi-Saab, "Conclusion", in M. G. Kohen, Secession: International Law Perspectives (2006), p. 470.
206 International Law (6th ed., 2008), p. 523.

4.04. The absence of rules of international law concerning declarations of independence has been stressed by most of the States that have submitted written statements. Nevertheless, other States have advocated that, for various reasons, general international law precludes Kosovo's declaration of independence. In particular, two reasons have been addressed in depth by several States, which require further response in this Chapter. First, the principle of sovereignty and territorial integrity does not preclude the issuance of a declaration of independence, as argued by some States[207], whether considered generally or in the context of the preambular reference in Resolution 1244 (**Section I**). Second, though the right of self-determination need not be addressed when answering the question now before the Court, that right certainly is available to the people of Kosovo given the circumstances that preceded the issuance of Kosovo's Declaration of Independence (**Section II**).

I. The Principle of "Sovereignty and Territorial Integrity" under General International Law did not Preclude the Issuance of the Declaration of Independence

4.05. The principle of sovereignty and territorial integrity is widely recognized in numerous international instruments, especially Article 2, paragraph 4, of the United Nations Charter, and in the jurisprudence of the Court[208]. Kosovo does not dispute theimportance of the principle; indeed, the principle was accepted as part of Kosovo's international obligations in the Declaration of Independence itself:

"With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[209]

A. THE PRINCIPLE OF SOVEREIGNTY AND TERRITORIAL INTEGRITY IS ADDRESSED EXCLUSIVELY TO STATES AND IS NOT CONCERNED WITH THE ISSUANCE OF DECLARATIONS OF INDEPENDENCE

4.06. The authors of the Declaration of Independence in no way violated the principle of sovereignty and territorial integrity, as recognized in contemporary international law. That principle is designed and shaped as a protection of the territory of a State against other States, in particular against outside interference by the threat or use of force. The principle simply does not apply to situations that occur only within States and does not, in particular, prevent the authors of a declaration of independence from issuing such a declaration. By definition, at the time when they issue the declaration such authors do not act on behalf of a State but of a people. Nor does the issuance of a declaration of independence per se involve a threat or use of force in international relations prohibited by Article 2, paragraph 4, of the Charter. Hence the principle of sovereignty and territorial integrity cannot operate to preclude declarations of independence being issued on behalf of peoples.

207 Argentina, paras. 121-122; Azerbaijan, para. 27; Brazil, p. 2; Cyprus, paras. 88-89; Romania, para. 109; Russian Federation, para. 76; Serbia, paras. 498-524; Spain, para. 55; Venezuela, para. 4.

208 Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment, I.CJ. Reports 1949, p. 35; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 111, para. 213. Se also ibid., p. 128, paras. 251 and 252

209 Kosovo, Annex 1.

4.07. Article 2, paragraph 4, of the United Nations Charter embodies this State-to- tate character of the principle of sovereignty and territorial integrity:

"*All Members shall refrain in their international relations* from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[210]

It is clear from its wording that the principle in Article 2, paragraph 4, of the Charter prohibits only the threat or use of force by a State in its international relations, i.e. towards the territory or political independence of another State. Article 2, paragraph 4, which reflects the customary international law principle of the prohibition of the use of force and the territorial integrity of States[211], consequently has no application to the actions of the authors of the Declaration of Independence on 17 February 2008.

4.08. The list of regional instruments identified by Serbia[212] adds nothing to the argument. Serbia points out in its Written Statement that this "summary of some of the regional treaties embedding the principle of territorial integrity is sufficient to demonstrate the extent to which this principle forms the bedrock of international relations across the international community, covering all major regions, cultures and civilizations"[213]. However, it does not establish that these instruments prohibit the issuance of declarations of independence. As is clear from their text, all of these instruments only concern State-to-State relations, and are confined to reaffirming the principle as set forth in the United Nations Charter and customary international law. For example, Principle IV of the Declaration on Principles Guiding Relations between Participating States contained in the 1975 Helsinki Final Act makes clear that

"*The participating State*s will respect the territorial integrity of each of the participating States."[214]

4.09. Some States attempt, in their Written Statements, to apply the principle of sovereignty and territorial integrity to the authors of the Declaration of Independence by arguing that the principle "*imposes an erga omnes* obligation with regard to itsobservance"[215]. However, this reliance on erga omnes does not establish that the principle binds non-States. As the Court explained in its *Barcelona Traction* judgment:

"In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations erga omnes."[216]

The Court was clearly only referring to obligations owed by States to States. Moreover, the qualification of an obligation as erga omnes does not broaden the circle of those bound by the obligation, but only those to whom the obligation is owed.

4.10. Even Serbia initially seems to accept that the principle of sovereignty and territorial integrity is limited to State-to-State relations[217]; but it tries by a long enumeration of international instruments,

210 Emphasis added.
211 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 99-101, paras. 188-190.
212 Serbia, paras. 477-491.
213 Ibid., para. 491.
214 Dossier No. 217 (emphasis added).
215 Romania, para. 80.
216 Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33.
217 Serbia, para. 431.

especially General Assembly and Security Council[218] resolutions, to demonstrate that it "is not so limited"217. However, this "demonstration" is unpersuasive, in part because most of these instruments are not themselves legally binding upon States (let alone upon non-States) and in part because, even if they reflect customary international law, by their terms they do not support Serbia's conclusions. For example, the paragraph of General Assembly resolution 1514 (XV) of 14 December 1960, cited by Serbia[219], is simply not relevant to the present question; it concerns the particular situation of decolonization and is speaking to the right of a people to the integrity of their national territory as against external influences. Moreover, while resolution 1514 (XV) may perhaps be read as broadening the beneficiaries of the principle of territorial integrity so as to include not just the State but the people of the State, it says nothing about a duty of such people – even of peoples subject to alien subjugation – to respect the principle.
4.11. All other examples listed by Serbia[220] are equally unpersuasive in establishing that the authors of the Declaration of Independence were bound by the principle of sovereignty and territorial integrity under international law.

– General Assembly resolution 2625 (XXV) of 24 October 1970 embodies, like Article 2,paragraph 4, of the Charter, only a State-to-State obligation to respect the territorial integrity of a State. The particular provision cited by Serbia reads: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country" (emphasis added).

– General Assembly resolution 41/128 of 4 December 1986 (Declaration on the Right to Development) contains a State-to-State obligation concerning sovereignty and territorial integrity. It provides, in its Article 5, that "States shall take resolute steps to eliminate (…) aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity …" (emphasis added).

– The Guiding Principles on Humanitarian Assistance annexed to General Assembly resolution 48/192 of 19 December 1991 do not address the issue of declarations of independence, but instead the very different question of "strengthening of the coordination of emergency humanitarian assistance of the United Nations system". The citation by Serbia concerns the need for consent of the affected country to the provision of humanitarian assistance from outside the State.

– General Assembly resolution 52/112 "on the use of mercenaries as a means of violating humanrights and impeding the exercise of the rights of peoples to selfdetermination" [221] recalls Article 2, paragraph 4, of the Charter, without purporting to modify or broaden it in any way.

– The Millennium Declaration and the World Summit Outcome simply reaffirm the principle enshrined under Article 2, paragraph 4, of the United Nations Charter, and do not purport to modify or broaden it in any way.– Article 46 (1) of the United Nations Declaration on the Rights of Indigenous Peoples of 7 September 2007 also does not help Serbia[222]. It states that

"Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independ-ent States".

218 See paras. 4.21-4.29 below.
219 Serbia, para. 431-432.
220 Serbia, para. 433-436. It should be noted that many of the General Assembly resolutions cited by Serbia were adopted over negative votes.
221 Adopted by 113 votes to 18, with 41 abstentions (General Assembly, Official Records, fifty-second session, 70th plenary meeting, 12 December 1997, A/52/PV.70, pp. 10-11).
222 General Assembly resolution 61/295, 13 September 2007. See Serbia, para. 437.

By its terms, this Declaration is simply stating that nothing within it implies a right under international law for peoples or persons to take action to dismember or impair the territorial integrity or political unity of a State. The Declaration – which of course itself is not legally binding, and which was adopted by vote in the General Assembly[223] – expresses no view on whether such a right already exists in international law and certainly does not articulate a prohibition on the conduct of peoples or persons. Indeed, it leaves international law in the same position as it was prior to the issuance of the Declaration. Consequently, the instruments relied upon by Serbia do not demonstrate that the principle of sovereignty and territorial integrity extends beyond inter-State relations. Indeed, for the most part they confirm that it does not.

4.12. The correlative principle of stability of international borders, like the basic principle of sovereignty and territorial integrity, only applies as against forcible modification by other States. It does not protect a State against dissolution, but constitutes a useful means, under international law, to limit the breakup of a State to its own territory, without modifications of borders of neighbouring States. As the Badinter Arbitration Commission underlined in its Opinion No. 3:

"All external frontiers must be respected in line with the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General As sembly Resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties."[224]

This does not imply that the external frontiers of the SFRY had to remain the external frontiers of the FRY. Rather the principle of stability of borders is directed at maintaining intact the border between, for example, Kosovo and Albania, as it existed before the
independence of Kosovo. Furthermore, whereas a State can complain to another State about the violation of its external frontiers, it cannot do so, under international law, against its own citizens. As long as no other State is injured, international law does not preclude the redistribution of the external borders between the preexisting State and the newly created State. Even if the principle of stability of international boarders were binding upon the authors of the Declaration of Independence, which is not the case, it is clear that this principle has not been infringed in any way. Kosovo respects faithfully the international frontiers with its neighbours as recognized in the Declaration of Independence itself[225].

4.13. In summary, the principle of sovereignty and territorial integrity as enshrined in general international law does not address a declaration of independence like that issued on 17 February 2008. Rather, the principle protects States against the coercive action and interference of other States. It does not preclude the issuance of a declaration of independence. This has been made clear by States in their Written Statements[226].

223 General Assembly, Official Records, sixty-first session, 107th plenary meeting, 13 September 2007, A/61/PV.107, p. 19.
224 European Journal of International Law, vol. 3, 1992, p. 185.
225 See para. 4.05 above.
226 Austria, para. 37; Estonia, p. 4; France, paras. 2.6-2.8; Ireland, para. 18; Switzerland, para. 55; United Kingdom, paras. 5.8-5.11; United States of America, p. 69.

B. THE PREAMBULAR REFERENCE IN RESOLUTION 1244 (1999) TO "SOVEREIGNTY AND TERRITORIAL INTEGRITY" DID NOT PROHIBIT THE DECLARATION OF INDEPENDENCE

4.14. The preambular reference in Security Council resolution 1244 (1999) to the principle of sovereignty and territorial integrity of Serbia did not change the State-to-State character of the principle, nor did it prevent the democratically electedrepresentatives of the people of Kosovo from issuing the Declaration of Independence on 17 February 2008[227].

1. The Text of the Clause

4.15. In order to sustain the proposition that resolution 1244 (1999) prohibited the Declaration of Independence of 17 February 2008, Serbia and some other States rely heavily upon a single clause in the preamble of the resolution[228], where the Security Council says it is:

"*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2 …"[229]

This preambular paragraph, obviously, is not part of the operative part of the resolution[230]. As such, it is rather extraordinary for Serbia and others to regard this clause, standing alone, as a critical factor for whether the people of Kosovo could pursue independence, especially in light of the events and negotiations that unfolded in the period preceding the adoption of resolution 1244 (1999)[231].

4.16. Leaving aside its presence in the preamble, the language of the clause says nothing about a declaration of independence, nor is it formulated in terms of a prohibition of any kind[232]. Indeed, by its terms the clause does not purport to establish a new legal obligation; it is "reaffirming" a pre-existing commitment of United Nations Member States[233]. That commitment relates not to the "sovereignty and territorial integrity" of the FRY as a general matter; rather, the commitment is "as set out in the Helsinki Final Actand annex 2" of the resolution. That annex relates solely to the interim period[234], and hence this clause is only reaffirming a commitment of Member States for the interim period prior to resolution of

227 For the discussion of the operative text of resolution 1244 (1999) as it relates to the question before the Court, see Chapter V below.

228 Serbia, paras. 776-780 and paras. 928-940; Cyprus, para. 92; Spain, pp. 24-25; Russian Federation, para. 42 and paras. 54-58.

229 Dossier No. 34.

230 France, para. 2.21; United Kingdom, para. 6.12(1) ("It was a considerandum, not a guarantee.")

231 See paras. 5.05-5.18 below.

232 See Kosovo, paras. 9.29-9.36.

233 See Czech Republic, p. 9 ("the preambular part of UNSCR 1244 does not create any new obligations under international law for the Member States or the" PISG); Denmark, pp. 10-11 ("the reference was concerned with the commitment of UN Member States, as opposed to the people of Kosovo …").

234 See Kosovo, para. 9.30; Austria, para. 23 ("If there were an obligation to respect the territorial integrity of the FRY it would, first, apply only for a limited period of time, namely the interim period, and second, apply only to member states of the UN."); France, paras. 2.28 and 2.32 ("Les mêmes annexes ne disaient absolument rien en revanche du statut définitif du territoire."); Germany, p. 38 ("all references to Yugoslavia's territorial integrity occur in the context of the interim framework, and not in that of any final settlement"); Poland Submission, para. 7.2 ("that reference concerns solely the provisional phase of the UN administration in Kosovo"); Ireland, para. 24 (the "annexes confirm only that, pending a final settlement, an 'interim political framework' shall afford substantial self-governance for Kosovo and taken into account the territorial integrity of the Federal Republic of Yugoslavia"); Norway, para. 16 ("the wording of inter alia Annex 2 of resolution 1244 concerns only the interim period of international administration and not the final status, which was left open.")

Kosovo's final status (as some States concede[235]). As for the Helsinki Final Act, the relevant principles in that instrument in part reveal a concern with the prevention of forcible action by one State against another[236], but also with the promotion of human rights and democracy in Europe. As such, this commitment is best understood as focused on the interim period (and therefore not of relevance to decisions on the final status of Kosovo) and as cognizant of the importance of balancing during that period values of territorial integrity and human rights.

4.17. Moreover, even if – contrary to its terms – this preambular clause were viewed as an open-ended commitment in 1999 to FRY "sovereignty and territorial integrity", that commitment must be understood as simply reflecting the view of Member States that coercive force by States to alter FRY territory was not acceptable, since that is the meaning ascribed to the principle of sovereignty and territorial integrity[237]. Had the Security Council intended to link the aspirations of the Kosovo people in some fashion to the concept of territorial integrity, one would expect language to that effect in the preamble, and yet none exists[238]. As such, the commitment expressed in the preamble of resolution 1244 (1999) has no application to a peaceable declaration of independence by the representatives of the people of Kosovo.4.18. Finally, even if, by some extraordinary alchemy, this preambular clause were interpreted as a broad political commitment in 1999 to unchanging FRY territorial boundaries, that commitment cannot be regarded as still viable in 2008. Any such commitment in 1999 to the territory and borders comprising the FRY at that time was a commitment that saw Kosovo as part of a tripartite federal relationship within the FRY, in which political power could be balanced among the Federal authorities[239]. When the Parliament of Montenegro declared independence on 3 June 2006 and Montenegro left the State Union, it altered more than the geographic territory of the federal State and its international borders; it removed the last vestiges of Federal structure, thereby radically altering the premises of any such commitment. Serbia itself acknowledged that this was an issue when, in 2002, it included in the Constitutional Charter of the State Union of Serbia and Montenegro a provision stating that "[s]hould Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as a successor"[240]. Serbia and Montenegro properly concluded that any preambular "commitment to unchanging FRY boundaries" could not possibly continue automatically after Montenegro broke away. Yet Serbia and Montenegro could not unilaterally decide that any such commitment would now "concern and apply" to a radically different State, for those two states had no ability to alter the commitment of UN Member States (or of the Security Council)[241]. In short, even if this clause is given the extraordinary interpretation of committing Member States to unchanging FRY territorial borders as of 1999, it simply cannot be assumed that the same commitment continued after 2006[242].

235 See, e.g., Romania, para. 46 ("the objective of UNSC Resolution 1244 is not to find a long-term solution to the Kosovo situation but to provide for [a] short-term and medium-term solution to the crisis following the principles contained in annexes 1 and 2 to the Resolution.").

236 See para. 4.08 above.

237 See paras. 4.06-4.13 above.

238 For example, in the context of the interim period envisaged by the Rambouillet Interim Agreement, Article 1(2) expressly stated that "national communities … shall not use their additional rights to endanger … the sovereignty and territorial integrity of the Federal Republic of Yugoslavia …" No such language was used in the preamble of resolution 1244 (1999).

239 Kosovo, paras. 9.32-9.33. Concern with this balancing may be seen even in the interim agreement developed at Rambouillet, where the proposed Interim Constitution envisaged certain powers being accorded to the FRY, certain powers being accorded to Serbia, and certain powers being accorded to Kosovo. Such carefully negotiated divisions of authority would have no place in a state in which FRY authority no longer exists. See Rambouillet Accords, Chapter 1, Article 1.

240 Constitutional Charter of the State Union of Serbia and Montenegro, Article 60.

241 That the Republic of Serbia continues the legal personality of the FRY does not change this conclusion. While Serbia may be viewed as having retained the international rights and obligations of the Serbia and Montenegro, which in turn retained the rights and obligations of the FRY, this does not mean that any commitment of other States expressed in 1999 with respect to the FRY automatically remained the same after the fragmentation of what had been the FRY.

242 United States, pp. 74-78.

2. Statements Made when the Clause was Adopted

4.19. Serbia and some other States attempt to look past the actual language of the preamble to find support for their position in the statements made at the Security Council meeting when the resolution was adopted[243]. Yet none of the statements made by members of the Security Council at the meeting indicated that the representatives of Kosovo were precluded from declaring independence. Further, none of the statements made at the meeting indicated that Kosovo could not ultimately emerge as an independent State. On the contrary, certain members strongly signaled that the aspirations of the people of Kosovo were central to a final status settlement. The representative of Malaysia noted:

"With regard to the responsibility of the international civil presence, my delegation underscoresthe paramount importance of the proposed interim administration for Kosovo, which should pave the way for an early settlement of the future status of Kosovo, taking fully into account the political framework proposed in the Rambouillet accords. The root cause of the crisis is clear. The Secretary-General himself stated, in his address to the High-Level Meeting on the cri-sis in the Balkans, held in Geneva on 14 May 1999:

'Before there was a humanitarian catastrophe in Kosovo, there was a human rights catastrophe. Before there was a human rights catastrophe, there was a political catastrophe: the deliberate, systematic and violent disenfranchisement of the Kosovar Albanian people.'

This clearly demonstrates the need to ensure one very fundamental element in the peace settlement: the fulfilment of the legitimate aspirations and expectations of the Kosovar Albanian people, the majority inhabitants of Kosovo. Any departure from this fundamental point will risk unravelling the entire exercise which is being painstakingly put together."[244]

4.20. Certainly some members of the Council highlighted in their statements concern for FRY sovereignty and territorial integrity. At the same time, other members acknowledged that the Council needed to balance concerns for sovereignty and territorial integrity with concern for human rights and threats to the peace. For example, the representative of Slovenia stated:

"Success in this specific case would give an example of the balance between the considerations of State sovereignty on the one hand and humanity and internationalorder on the other. It is true that international organizations must be careful in all their efforts and that they must respect international law, including the principle of the sovereignty of States. However, it is at least equally clear that State sovereignty is not absolute and that it cannot be used as a tool of denial of humanity resulting in threats to peace. While the situation in Kosovo last year and early this year escalated to a serious threat to peace, there is now a genuine opportunity to reverse the situation and to create the balance necessary for political stability and durable peace for the future."[245]

243 See, e.g., Serbia, paras. 691-66; Spain, pp. 26-27.

244 Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 16 [Dossier No. 33].

245 Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 11 [Dossier No. 33]; see also remarks by Netherlands, ibid., p. 12 ("The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens."); remarks by Canada, ibid., pp. 13-14 ("We wholeheartedly agree with the Ambassador of the Netherlands that the tensions in the United Nations Charter between state sovereignty on the one hand and the promotion of international peace and security on the other must be more readily reconciled when internal conflicts become internationalized, as in the case of Kosovo.")

Finally, Serbia itself did not regard the preambular language to resolution 1244 as precluding the independence of Kosovo. In fact, Serbia stated the exact opposite, by asking Security Council members before they voted to oppose the resolution (including its preamble) so as to "stand up in defence … of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia …"[246]. Serbia entirely understood that this particular preambular reference was no guarantee against the possibility of the issuance of a declaration of independence, no more than the general international law principle of sovereignty and territorial integrity.

3. Comparison with Clauses in other Resolutions

4.21. Serbia[247], along with Iran[248] and Argentina[249], point to other Security Council resolutions concerning internal conflicts that reaffirm the territorial integrity of the State concerned. Even if the Security Council could legally impose an obligation on non-States, which is far from established[250], these examples do not indicate that the principle of sovereignty and territorial integrity applies to the issuing of declarations of independence.All the references made by Serbia relate to internal armed conflicts: Bosnia and Herzegovina, Croatia, Democratic Republic of Congo, Georgia, Somalia, and Sudan. The situation of the peaceful accession to independence by the people of Kosovo can hardly be compared to those examples.

4.22. Furthermore, Serbia fails to note that in most of those cases, the sovereignty and territorial integrity of the State was endangered primarily by external assistance. To comment only on one case that Serbia brings up: the crisis in Bosnia and Herzegovina was not primarily internal in character, as Serbia is well aware. The calls made by the Security Council relating to the territorial integrity of the new State were essentially directed to the Federal Republic of Yugoslavia. As the Court recalled in 2007:

"It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herze govina in the years prior to the events at Srebrenica. That participation was repeat edly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993))."[251]

4.23. Moreover, if the clauses on "sovereignty and territorial integrity" in Security Council resolutions relating to Bosnia and Herzegovina are relevant to the permissibility of Kosovo's Declaration of Independence, it must be noted that the same clause has been included in resolutions on Bosnia and Herzegovina *even after Kosovo's* Declaration of Independence with the support of several States that have recognized Kosovo. For example, in resolution 1845 (2008), nine members of the Security Council that had recognized Kosovo – Belgium, Burkina Faso, Costa Rica, Croatia, France, Italy, Panama, United Kingdom, and United States – had no difficulty supporting language reaffirming the Security Council's commitment "to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders". In other words, those States clearly do not regard the commitment expressed in those resolutions as precluding a Declaration of Independence by the representatives of the people of Kosovo.

246 Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 6 [Dossier No. 33].
247 Serbia, paras. 440-475.
248 Iran, para. 3.2.
249 Argentina, paras. 77-80.
250 See paras. 5.67-5.74 below.
251 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment, para. 386.

4.24. Finally, if comparisons are to be made with Security Council resolutions unrelated to Kosovo, then the most relevant comparison is between the preamble of resolution 1244 (1999) and the preamble or operative part of Security Council resolutions that expressly address whether particular entities should remain a part of an existing State, especially those relating to the Balkans. In 1992, the Security Council adopted a resolution in the context of Bosnia and Herzegovina in which it directly and expressly addressed the possibility of the issuance of a declaration of independence that would promote an independen State of Republika Srpska. Security Council resolution 787 (1992) stated in the operative part:

"*Strongly reaffirms* its call on all parties and others concerned to respect strictly the territorial integrity of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted …"[252].

By contrast, in resolution 1244 (1999), the Council made no statement regarding a unilateral declaration by Kosovo Albanian authorities or entities.

4.25. Similarly, the Security Council included in the preamble of its resolution 1037 (1996) on Croatia a clause that directly and expressly addressed the status of certain territories in that country:

"*Reaffirming* once again its commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia and emphasizing in this regard that the territories of Eastern Slavonia, Baranja and Western Sirmium are integral parts of the Republic of Croatia …"[253].

By contrast, in resolution 1244 (1999), the Council made no statement indicating that Kosovo is an integral part of the FRY or of Serbia.

4.26. Moreover, the Security Council included in Security Council resolutions contemporaneous with resolution 1244 (1999) language that clearly indicated a position on secession. In the same month of June 1999, the Council adopted a resolution on Cyprus in which it stated in the operative part:

"*Reaffirms* its position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bicommunal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession"[254].

Yet in resolution 1244 (1999), no statements of any kind were present indicating that a political settlement on Kosovo must be based on a FRY with a single sovereignty and international personality or that the political settlement must exclude secession.

4.27. In two resolutions concerning the situation unfolding in Georgia in the first half of 1999, the Council called for "settlement on the political status of Abkhazia *within the State of Georgia*"[255]. Through its President, the Council had also previously issued statements relating to Georgia reflecting its view on a declaration of independence:

252 Security Council resolution 787 (1992), para. 3.

253 Security Council resolution 1037 (1996), preamble. In its Written Statement, Serbia quotes the first half of this provision on "territorial integrity" but redacts the second half on "integral part" (Serbia, para. 793).

254 Security Council resolution 1251 (1991), 29 June 1999, para. 11.

255 Security Council resolution 1225 (1999), 28 January 1999, para. 3; Security Council resolution 1255 (1999), 30 July 1999, para. 5 (emphasis added).

"The Security Council has received with deep concern a report from the Secretariat concerning a statement of 26 November 1994 attributed to the Supreme Soviet of Abkhazia, Republic of Georgia. It believes that *any unilateral act purported to establish a sovereign Abkhaz entity would violate the commitments assumed by the Abkhaz side* to seek a comprehensive political settlement of the Georgian-Abkhaz conflict."[256]

4.28. Such resolutions and statements, of course, were well known to the Council at the time of the adoption of resolution 1244 (1999) in June 1999, as was the aspiration of the people of Kosovo for independence. Yet in neither the preamble nor the operative part of resolution 1244 (1999) did the Security Council repeat, *mutatis mutandis*, such language so as to reject prospectively a declaration of independence by Kosovo's leaders or to declare that Kosovo was and must remain an integral part of the FRY. Nor did the Council's President issue any statement to that effect. As stressed by the United Kingdom, "when the Security Council intends to create an explicit guarantee or prohibition, or anobligation of non-recognition consequent on such a guarantee, it knows how to do so and it does so explicitly, not in a preamble"[257].

4.29. Moreover, even in the context of these other resolutions and statements, the Security Council did not proclaim a declaration of independence unlawful under international law; rather, it simply indicated that the Council would not accept such an act or that the act would violate political commitments undertaken by the relevant entity[258]. Had the Council intended to declare unacceptable a Kosovo declaration of independence, or the issuance of such a declaration without FRY, Serbian, or Security Council consent, the Council was fully capable of saying as much, rather than masking its position in a preamble through reliance on a general reference to "sovereignty and territorial integrity". Yet it did not, leading inescapably to a conclusion that the Council had no such intention.

4.30. In conclusion, the international law principle of sovereignty and territorial integrity speaks to the obligation of States to refrain from the use of coercion against other States. As such, the authors of the Declaration of Independence, who were not a State, and who did not use force when issuing their Declaration, cannot be regarded as having violated the principle of sovereignty and territorial integrity under international law. The reference to the "sovereignty and territorial integrity" contained in the preamble of Security Council resolution 1244 (1999) did not change the legal position and did not prevent the issuance of a declaration of independence.

II. The People of Kosovo were Entitled to Exercise their Right of Self-Determination by Declaring Independence through their Elected Representatives

4.31. Kosovo explained in its first Written Contribution[259] that, given the specific question put to the Court by the General Assembly, it is not necessary to show that the authors of the Declaration of Independence of 17 February 2008 were entitled, under some rule of international law, to issue the Declaration. In order to assess the conformity of the Declaration with international law, it is sufficient to find that there is no rule ofinternational law prohibiting or preventing the authors from adopting the Declaration. It is not necessary to demonstrate that there are rules of international law entitling the authors of the Declaration of Independence to issue the Declaration.

4.32. Many States, nevertheless, commented, sometimes at length, on the question of whether the people of Kosovo had a right of self-determination. Kosovo therefore considers it necessary to deal briefly with this issue, while still maintaining that this point need not be reached by the Court in order to respond to the question contained in General Assembly resolution 63/3.

256 S/PRST/1994/78 (emphasis added).
257 United Kingdom, para. 6.12 (4).
258 Kosovo, para. 8.18. See also paras. 5.67-5.70 below.
259 Ibid., paras. 8.38-8.41.

4.33. The present section, after discussing some general aspects concerning the right of self-determination under international law (A), demonstrates that the people of Kosovo constitute a self-determination unit and were entitled to declare independence through their democratically elected representatives given the massive human rights' violations perpetrated and the systematical denial of the right of self-determination by the FRY/ Serbia (B). As stated in Kosovo's first Written Contribution, there can be no doubt that in the circumstances, the people of Kosovo were entitled to the right of self-determination[260].

A. THE RIGHT OF SELF-DETERMINATION UNDER INTERNATIONAL LAW

4.34. The existence of the right of self-determination as such is not disputed by those States that have submitted written statements. Indeed, the right is firmly established in contemporary international law as expressed, inter alia, in the United Nations Charter, in relevant General Assembly resolutions, and in the Court's case law:

"The principle of self-determination of peoples has been recognized by the United Nations Char ter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, pp. 31-33, paras*. 54-59); it is one of the essential principles of contemporary international law."[261]

4.35. In addition, it is also expressly recognized by Article 1 of the 1966 Covenants that "*all* peoples have the right of self-determination"[262]. Consequently, this right does not apply exclusively in the context of decolonization[263]. While Serbia seems to be in broad agreement with this proposition[264], it nevertheless discusses extensively the right to selfdetermination of dependent or colonial peoples[265], as those terms are understood in the practice of the General Assembly. Since the right is not limited to situations of decolonization, it is entirely irrelevant that Kosovo did not constitute a mandate or trusteeship territory or was not listed as dependent territory by the United Nations General Assembly[266].

4.36. In the most authoritative expression of the right of self-determination, a people are entitled "[b]y virtue of that right [to] freely determine their political status and [to] freely pursue their economic, social and cultural development"[267]. The right to "freely determine their political status" is sufficiently broad to include a multitude of choices, including but not limited to independence, depending on the particular circumstances of each case[268]. In this regard, Kosovo is well aware of the fact that, within a

260 Kosovo, para. 8.40.

261 East Timor, Judgment, I.C.J. Reports 1995, p. 102, para. 29. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, pp. 182-183, para. 118.

262 International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 1 (1), United Nations, Treaty Series, vol. 999, p. 171 (emphasis added); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Article 1 (1), United Nations, Treaty Series, vol. 993, p. 3. See also World Conference on Human Rights, Vienna Declaration and Programme of Action,
25 June 1993 (A/CONF.157/23), Article I.2.

263 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Higgins, I.C.J. Reports 2004, p. 214, para. 29 (referring to the "substantial body of doctrine and practice on 'self-determination beyond colonialism'.")

264 Serbia, para. 534.

265 Ibid., paras. 535-539. Serbia also acknowledged the existence of a right of self determination in the case of foreign occupation, especially with regard to the case of Palestine (ibid., paras. 540-543). See also China, passim.

266 See Serbia, para. 571.

267 International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 1 (1), United Nations, Treaty Series, vol. 999, p. 171; International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Article 1 (1), United Nations, Treaty Series, vol. 993, p. 3.

268 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 33, para. 58. See also General Assembly resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations
and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970.

sovereign State,the exercise of the right to self-determination by a self-determination unit usually does not include the creation of a new State. Serbia and others have sought at length to demonstrate that, in such a case, the principle of sovereignty and territorial integrity necessarily has precedence over the will of the people and that, consequently, the choice of the people concerned is limited in the sense that they are precluded from opting for independence. This ignores the fact that the principle of sovereignty and territorial integrity speaks to coercion in inter-State relations, not to the conduct of persons within a State[269].

4.37. Moreover, even if one were to reconceptualize the principle of territorial integrity as calling for maintaining the integrity of boundaries or frontiers (which international law normally addresses by reference to the principle of uti possidetis), there is no basis in law or practice for concluding that such a principle always supersedes the exercise of a right of self-determination. Serbia and other States cite no authority to the effect that this new form of "territorial integrity" would operate in a manner that entirely neglects the people living in the territory and their expressed desires. Moreover, Serbia fails to recognize that under contemporary international law there is no hierarchy between any such revised principle of territorial integrity and the right of self-determination; neither excludes the other. As this Court noted in the *Frontier Dispute* case, when considering the relationship between the uti possidetis principle and the right of self-determination in situations of State formation and the policy choice adopted by African States, neither concept preempts the other:

"At first sight this principle *[of uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." [270]

4.38. Thus, even if the principle of territorial integrity were reconceptualized so as to be a principle that generally disfavors changes in international boundaries (which is it not),in any given situation, that principle would need to be weighed against the right of selfdetermination,
without there being any predetermined outcome as to which prevails.

4.39. Despite Serbia's efforts to demonstrate otherwise, this is also the clear meaning of the " safeguard clause" contained in General Assembly resolution 2625 (XXV), stating:

"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."

This formula, which is essentially repeated in later instruments[271], may not expressly authorize or encourage secession as a means of self-determination, but it certainly does not exclude it. Indeed, the clause recognizes that independence may be an appropriate choice in the case where a State does not conduct itself in compliance with the principle of equal rights and self-determination of peoples as described. In those particular circumstances, the State concerned not only forfeits the benefit of the safeguard clause of General Assembly resolution 2625 (XXV), but also the right to invoke its sovereignty against the will of a people deprived of its right of self-determination. As Professor Tomuschat put it:

269 See paras. 4.06-4.13 above.

270 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 567, para. 25.

271 See World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993 (A/CONF.157/23), Article I.2; United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295, 13 September 2007, Article 46 (1). See also para. 4.11 above.

"Within a context where the individual citizen is more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for secession as a measure of last resort after all other methods employed to bring about change have failed."[272]

4.40. If, as the Canadian Supreme Court stated in its well-known Quebec Opinion, the right of self-determination "generates, at best, a right to external self-determination [i.e. independence] in situations (…) where a definable group is denied meaningful access togovernment to pursue their political, economic, social and cultural development"[273], then, the people of Kosovo were entitled to issue a declaration of independence in accordance with this right. As shown in Section B below, given the decade of deliberate exclusion from governing institutions and violation of basic human rights, culminating, in 1998-1999, in massive crimes against humanity and war crimes[274], the people of Kosovo had the right to chose independence[275]. The people of Kosovo chose to exercise this right through their democratically elected representatives, by adopting the Declaration of Independence.

4.41. Serbia repeatedly[276] argues that recognizing such a right effectively "punishes" the State concerned and that the law of international responsibility does not allow such a sanction. Yet it cannot be in the interest of the international community to offer only compensation or repeated exhortations to an existing government that it should "do better" when there have been massive violations of human rights and denial to a people of any ability to participate in the determination of their destiny. International law offers meaningful protective measures for such a people, and not only corrective instruments once the evil is done. Modern international law is also the law of people – a droit des gens – protecting the people, human beings, especially in the case where the State fails to do so. In those circumstances, the malfeasant State has to bear the consequences of its actions, not as a punishment, but as a necessary concomitant to the protection of core human rights.

B. THE PEOPLE OF KOSOVO WERE ENTITLED TO EXERCISE THEIR RIGHT OF SELFDETERMINATION BY DECLARING INDEPENDENCE

4.42. The people of Kosovo are a people enjoying the right of self-determination, contrary to assertions denying them such a right. For its part, Serbia denies the right of self-determination to the "territory of Kosovo"[277]. However, the right of selfdetermination is not a right held by territory, but a right held by human beings living in agiven territory, an important factor that Serbia ignored throughout the 1990s and still ignores today. For decades, Serbia's policy towards Kosovo has been to regard it simply as land (its territory) without regard to the rights and interests of the inhabitants.

4.43. The Canadian Supreme Court stated:

"It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indica-

272 Ch. Tomuschat, "Secession and self-determination", in M. G. Kohen, Secession: International Law Perspectives (2006), at p. 41; see also M. Shaw, International Law (6th ed., 2008), p. 523 (stating that there is an "arguable exception to this rule that the right to external self-determination applies only to colonial situations … where the group is question is subject to 'extreme and unremitting persecution' coupled with the 'lack of any reasonable prospect for reasonable challenge'"). See also Finland, paras. 8–9.

273 Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), para. 138, reprinted in I.L.M., vol. 37, 1998, p. 1340

274 See paras. 3.29-3.58 above.

275 See paras. 4.42-4.52 below.

276 See e.g. Serbia, paras. 627-628. See also Slovakia, para. 28.

277 Serbia , para. 570.

tive that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right of self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose."[278]

4.44. The existence of a people of Kosovo has been largely recognized by the international community, despite the fact that Kosovo formed part of the FRY/Serbia. And rightly so: as Professor Crawford points out, "a further possible category of selfdetermination units" is constituted by

"*entities* part of a metropolitan State but that have been governed in such a way as to make them in effect non-self-governing territories – in other terms, territories subject to *carence de souve-raineté*. Possible examples are Bangladesh, Kosovo and perhaps Eritrea"[279].

4.45. The people of Kosovo are much more than just a minority within the FRY/Serbia, but a self-determination unit as a "non-self-governing territory" in the sense referred to by Professor Crawford[280]. Furthermore, the people of Kosovo are distinct and homogeneous, being a group of which 90 percent are Kosovo Albanians, who speak the Albanian language, and who mostly share a Muslim religious identity. The 2001 Constitutional Framework promulgated by the SRSG recognized that "Kosovo is an entity under interim international administration which, with its people, *has unique historical,legal, cultural and linguistic attributes*"[281]. Security Council resolution 1244 (1999)[282], like earlier Presidential statements[283], the Rambouillet Interim Agreement and other preresolution 1244 documents[284], refers to the "people of Kosovo" or the "will of the people". Indeed, Security Council resolution 1244 (1999) itself may be read as confirming the existence of the right of self-determination for the people of Kosovo: the international administration of the territory was designed not only to exclude the FRY/Serbia from governing in Kosovo during the interim period, but also, and foremost, to establish favorable conditions for the people of Kosovo to exercise their right of self-determination, without prejudging whether the final status settlement would take the form of internal or external self-determination. As Professor Tomuschat explained:

"It should be noted that resolution 1244 carefully avoids mentioning this word [i.e. self-deter mination]. Nowhere does it appear in the text. Implicitly, however, it permeates the entire texture of the resolution. Autonomy for a given human community cannot be invented by the Security Council without any backing in general international law. In conclusion, Security Council Resolution 1244 can be deemed to constitute the first formalized decision of the international community recognizing that a human community within a sovereign State may under specific circumstances enjoy a right of self-determination."[285]

278 Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), para. 124, reprinted in I.L.M., vol. 37, 1998, p. 1340.
279 J. Crawford, The Creation of States in International Law (2nd ed., Oxford, 2006), p. 126. See also Ireland, para. 29.
280 Prof. Crawford also explained that "[a]t the root, the question of defining 'people' concerns identifying the categories of territory to which the principle of self-determination applies as a matter of right" (ibid, p. 126).
281 UNMIK Regulation No. 2001/9, 15 May 2001, Article 1.1 [Dossier No. 156] (emphasis added). See also Albania, para. 84.
282 Dossier No. 34.
283 See e.g. Statement by the President of the Security Council, S/PRST/1998/25, 24 August 1998 [Dossier No. 14].
284 See paras. 5.05-5.18 below.
285 Ch. Tomuschat, "Secession and self-determination", in M. G. Kohen, Secession: International Law Perspectives (2006), p. 34.

4.46. If a right to secession exists in the case of a people being denied the exercise and enjoyment of the right to self-determination and subject of deliberate discrimination and human rights' violations, then the people of Kosovo were certainly entitled to exercise that right. Being entitled to a right to self-determination, the people of Kosovo, given the particular circumstances surrounding their recent history, could declare independence in 2008.

4.47. In its Written Statement, Serbia plays down the dramatic events of 1989-1990, and the systematic denial of self-determination, as well the large scale violations of basichuman rights to which the people of Kosovo were subjected, in the period 1989-1999[286]. It states:

"As far as Kosovo is concerned, its status as an autonomous province granted by the 1974 Contitution of the SFRY and the 1974 Constitution of Serbia, was modified in 1989. This was done through amendments to the Constitution of Serbia, in the constitutionally prescribed procedure and with the consent of Kosovo and another Serbian autonomous province, Vojvodina. Their status of autonomous provinces remained under both the federal and Serbian constitutions, but they enjoyed less autonomous powers, particularly in the legislative realm. At no time was the Albanian minority, either in Kosovo or elsewhere in Serbia, excluded or discriminated from the participation in the public affairs of the State."[287]

4.48. As discussed in Chapter III this bland account of the terrible actions by Serbia from 1989-1999 is entirely contradicted by the findings of international bodies[288]. Kosovo has already quoted extensively from the findings of the International Criminal Tribunal for the former Yugoslavia in the *Milutinović* et al. judgment of 26 February 2009[289], which clearly contradict Serbia's assessment of the facts[290]. Furthermore, numerous General Assembly resolutions took account of the flagrant and systematic denial of basic human rights and discrimination against the people of Kosovo[291]. There is no doubt that the people of Kosovo were, at least since the events of 1989-1990, entirely deprived of any form of self-determination and excluded from any participation in the political processes within the SFRY/FRY institutions. These events culminated in systematic and deliberate large-scale violations of human rights, crimes against humanity, ethnic cleansing, and a massive refugee and internally displaced persons crisis. All these events, which were identified by the Security Council as a threat to the peace and resulted ultimately in the intervention of the international community, entitled the people of Kosovo to determine independently their political status and to declare independence from the State responsible for the grave humanitarian situation.

4.49. The adoption of Security Council resolution 1244 (1999) and the implementation of the United Nations administration in Kosovo put an end to these traumatic events and the situation on the ground changed. Circumstances also changed within the FRY, with the fall from power of the Milošević régime and, later, the departure of Montenegro from the State Union. However, these circumstances did not change the entitlement of the people of Kosovo to self-determination, contrary to the argument put forward by Cyprus[292].

4.50. Indeed, the positive developments in Kosovo in the period between June 1999 and February 2008 (a period of less than 9 years, during which the Serbian authorities had no presence in Kosovo) cannot be invoked to deny the people of Kosovo the right to selfdetermination. As discussed in Chapter V below, resolution 1244 (1999) did not preclude independence, but established an interim administration

286 Kosovo, paras. 3.23-3.60, and paras. 3.29-3.58 above.
287 Serbia, para. 641.
288 See paras. 3.29-3.58 above, and Kosovo, paras. 3.23-3.37 and 3.47-3.60. See also Albania, paras. 86-92.
289 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 February 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug).
290 Kosovo, paras. 3.27 and 3.33.
291 Estonia, pp. 6-9; Ireland, para. 33 (iii); Switzerland, paras. 82-84.
292 Cyprus, para. 146.

in order to enable the people of Kosovo to re-establish a secure environment and to effectively implement its right of selfgovernance pending a final status settlement, of which independence was one possibility. Rather than having the effect of ending a right of external self-determination, the interim period was aimed at giving the people of Kosovo the possibility to effectively exercise their internationally recognized rights through the establishment of democratic institutions, which ultimately might lead to independence if that was the will of the people of Kosovo.

4.51. Contrary to assertions made by various States, the new situation created in Kosovo between 1999 and 2008 was not accompanied by a markedly improved situation in the FRY/Serbia, at least in terms of Belgrade's attitude toward Kosovo. Serbia misleadingly claims that significant progress has been made with regard to the recognition of human rights for Kosovo within the new Serbian Constitution of 2006[293]. The fact is that even after 1999, the FRY and Serbian authorities continued in their statements and positions to treat Kosovo merely as a piece of territory belonging to Serbia, ignoring entirely the aspirations and fears of the people actually living there. The 2006 Constitution, which in its preamble openly declares that "the Province of Kosovo and Metohija is an integral part of the territory of Serbia"[294], was not even submitted for theapproval of the people of Kosovo[295]. Notwithstanding its positive assessment of the 2006 Constitution with regard to human rights, the Venice Commission sharply criticized the absence of any constitutional guarantee for an autonomy status of Kosovo:

"With respect to substantial autonomy, an examination of the Constitution, and more specifically of Part VII, makes it clear that this substantial autonomy of Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the [Serbian] legislature. In Part I on Constitutional Principles, Article 12 deals with provincial autonomy and local selfgovernment. It does so in a rather ambiguous way: on the one hand, in the first paragraph it provides that state power is limited by the right of citizens to provincial autonomy and local self-government, yet on the other hand it states that the right of citizens to provincial autonomy and local self-government shall be subject to supervision of constitutionality and legality. Hence it is clear that ordinary law can restrict the autonomy of the Provinces.

This possibility of restricting the autonomy of the Provinces by law is confirmed by almost every article of Part 7 of the Constitution, and more specifically by:

- Article 182, par. 2: 'The substantial autonomy of the Autonomous Province of Kosovo and Methohija shall be regulated **by the special law** which shall be adopted in accordance with the process envisaged for amending the Constitution.'

- Article 183, par. 4: 'The territory of autonomous provinces and the terms under which borders between autonomous provinces may be altered shall be regulated **by the law …'**

- Article 183, par. 2: 'Autonomous provinces shall, **in accordance with the law**, regulate matters of provincial interest in the following fields …'

- Article 183, par. 3: 'Autonomous provinces shall see to it that human and minority rights are respected, **in accordance with the Law**.'

293 See e.g. the very selective quotes made by Romania of the opinion of the Venice Commission on the Serbian Constitution (Romania, para. 154).

294 Serbia, Annex 59.

295 International Crisis Group, Serbia's New Constitution, Democracy going backward, Policy Briefing No. 44, 8 November 2006, available on http://www.crisisgroup.org/home/index.cfm?id=4494.

- Article 183, par. 5: 'Autonomous provinces shall manage the provincial assets **in the manner stipulated by the Law.'**

- Article 183, par. 6: 'Autonomous provinces shall, **in accordance with the Constitution and the Law**, have direct revenues, …'

- Article 184, par. 1 to 3: 'An autonomous province shall have direct revenues for financing its competences. The kind and amount of direct revenues shall be s**tipulated by the Law. The Law** shall specify the share of autonomous provinces in the revenues of the Republic of Serbia.'

Hence, in contrast with what the preamble announces, the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on thewillingness of the National Assembly of the Republic of Serbia whether selfgovernment will be realised or not."[296]

4.52. Against this background, it is apparent that the effective exercise of the right to self-determination of the people of Kosovo was not secured within the Republic of Serbia under the 2006 Constitution. At the end of the long but ultimately fruitless process in order to find a negotiated solution to this problem[297], the people of Kosovo had no other choice then to declare independence, as a last recourse to effectively exercise their right. In these circumstances, the issuance of the Declaration of Independence can properly be seen as the exercise by the people of Kosovo of their right to self-determination. As the Foreign Ministe of the Republic of Kosovo put it in the Security Council debate on 17 June 2009:

"After having endured decades of unspeakable occupation, terror and slavery, the people of Kosovo deserve to be free and to join the community of the free and democratic nations of the world."[298]

4.53. In conclusion, however, Kosovo reiterates that in order to assess the conformity of the Declaration with international law, the Court need not address the issue of whether international law authorized or entitled Kosovo to exercise a right of self-determination. As discussed in depth in Kosovo's first Written Contribution[299], it is sufficient to find that there is no rule of international law prohibiting or preventing the authors from adopting the Declaration.

CHAPTER V

THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE SECURITY COUNCIL RESOLUTION 1244 (1999)

5.01. Several written statements address the issue of whether the Declaration of Independence contravened Security Council resolution 1244 (1999). In its first Written Contribution, Kosovo addressed in some depth the meaning of resolution 1244 (1999) and the reasons why the Declaration cannot be seen as contravening it[300]. In this chapter, Kosovo will not repeat the arguments in its first Written Contribution, but will provide greater depth to certain specific issues raised by the statements of others.

5.02. First, the negotiating texts that preceded resolution 1244 (1999) did not prohibit Kosovo's representatives from declaring independence. Rather, those negotiations reveal a movement toward resolving the Kosovo crisis through a framework that would consist of two stages: an interim period during which Kosovo would be accorded extensive autonomy within the FRY, to be followed by a final settlement that would not require Belgrade- Pristina mutual agreement (**Section I)**. Resolution 1244 (1999)

296 European Commission for Democracy through Law, Opinion on the Constitution of Serbia, Venice, 17- 18 March 2007, paras. 7-8, available on http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf.
297 See Kosovo, paras. 5.08-5.5.34.
298 Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 9.
299 Kosovo, paras. 8.03-8.06.
300 Kosovo, Chapter IX.

adopted this two-stage approach through a framework that is status neutral in nature, meaning that it established an interim period of autonomy to be followed by a final status settlement based principally on the will of the Kosovo people, whatever that may be. As such, the resolution did not predetermine Kosovo's final status, nor prohibit Kosovo's representatives from ultimately declaring independence (**Section II**).

5.03. In the immediate aftermath of resolution 1244 (1999)'s adoption, certain documents and statements were issued that Serbia and some other States regard as relevant to Kosovo's ability to declare independence. Yet such statements and documents were reflecting attitudes as to what was appropriate at that time, prior to the commencement and completion of the final status process. After the relevant United Nations officials found in 2007 that independence was the only viable option, and that maintaining the *status quo* would be destabilizing, a declaration of independence was envisaged as the appropriatemeans for reaching a final settlement based upon the will of the people, as contemplated by resolution 1244 (1999) **(Section III**).

5.04. For several reasons, the Declaration of Independence cannot be regarded as an ultra vires act of the PISG or as a contravention of the Constitutional Framework. This is especially so since the Declaration was never set aside or declared null by the Special Representative of the Secretary-General in Kosovo – the United Nations official who established the Constitutional Framework and the PISG, and who was charged with overseeing the PISG and correcting any measures they took that were inconsistent with the Constitutional Framework **(Section IV**). Finally, the fact that the Declaration did not contravene resolution 1244 (1999) is consistent with the Security Council's general practice of only imposing legal obligations upon States (**Section V**).

I. The Negotiating Texts that Preceded Resolution 1244 (1999) did not Prohibit Kosovo's Representatives from Declaring Independence

5.05. In its Written Statement, Serbia argues that the negotiations preceding resolution 1244 (1999) demonstrate that Kosovo had no unilateral right to secede. In this regard, Serbia makes reference to the negotiations that took place at Rambouillet[301], those within the G-8[302], the Ahtisaari-Chernomydrin negotiations[303], and the negotiations in the context of the Military Technical Agreement[304]. Some other States make similar arguments[305]. Serbia fails to note, however, that none of the texts emerging from these various negotiations prohibited Kosovo from declaring independence. In each of these instances, the relevant negotiators understood that the leaders of Kosovo sought independence and that any text that precluded such an outcome would not be acceptable.

5.06. As indicated in Kosovo's first Written Contribution[306], any analysis of these pre-resolution 1244 (1999) negotiations should begin with the drafts prepared by the U.S.Ambassador (to Macedonia) Christopher Hill, who in late 1998 was tasked by the Contact Group to engage in extensive "shuttle diplomacy" with leaders from both Belgrade and Kosovo. From October 1998 to January 1999, in what is sometimes referred to as the "Hill Process", Ambassador Hill sought to establish an agreement that would stabilize the crisis that had unfolded in Kosovo. The Hill Process was important in laying the groundwork for two key elements of the negotiations that would follow and that would culminate in resolution 1244 (1999). First, it became apparent to all involved that it would not be possible to resolve Kosovo's final status at the outset. Instead, the central focus of the negotiations (and ultimately of resolution 1244 itself) had to be on establishing an interim solution, one designed to create the immediate conditions for the

301 Serbia, paras. 781-784.
302 Ibid., paras. 667 and 686-687.
303 Ibid., paras. 684-685.
304 Ibid., paras. 668-674.
305 E.g., Argentina, para. 76.
306 Kosovo, paras. 9.13-9.14.

return to a peaceful and normal life for the inhabitants of Kosovo[307]. Second, while the negotiations (and ultimately resolution 1244) briefly addressed the process for Kosovo's final status, they avoided prejudging what that final status would be and avoided giving Serbia any veto over the resolution of that status.

5.07. Analysis of the four draft proposals of the Hill Process readily demonstrates these elements. All of the drafts principally focused on an immediate interim solution providing rights and protections to the people of Kosovo, while only at the end of the drafts is there a brief, but important, reference to the process for resolving the final status after the passage of three years. In the first Hill draft proposal of 1 October 1998, this took the form of a final clause stating:

"In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additionalsteps, *which will require mutual agreement for adoption.*"[308]The second Hill draft proposal of 1 November 1998 repeated this final provision[309]. The third Hill draft proposal of 2 December 1998 repeated this provision but replaced "sides" with "Parties"[310].

5.08. Yet because the language of "mutual agreement" would have given Serbia a veto over future developments, it was not acceptable to the Kosovo delegation. Consequently, in the fourth and final Hill draft proposal of 27 January 1999, this final provision was altered and placed in brackets, so as to read as follows:

"In three years, there shall be a comprehensive assessment of this Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps, *by a procedure to be determined taking into account the Parties' roles in and compliance with this Agreement."*[311]

5.09. Hence, in the last version of the Hill proposals, reference to the "mutual agreement" by "sides" or "Parties" is completely dropped. Instead, the proposed provision moved toward a final status approach that would involve a "comprehensive assessment" under "international auspices" by a "procedure" that would "take into account" the two sides' roles and compliance with the agreement. No aspect of this (or any other) provision precluded the possibility of Kosovo seeking independence.

5.10. Ultimately, neither Kosovo nor the FRY/Serbia accepted the final Hill proposal: Kosovo was not sufficiently satisfied that the proposal constituted an interim agreement, while Serbia insisted that language be added definitively establishing that Kosovo would remain a part of Yugoslavia.

5.11. After the Yugoslav offensive in Kosovo in ecember 1999, and the massacre of some forty-five Kosovo Albanians in the village of Reçak/Račak, new negotiations were initiated at Rambouillet[312]. Coming only days after the end of the Hill Process and mediated in part by Ambassador Hill himself, the Rambouillet negotiations built upon theHill Process. Like the proposals that emerged from the Hill Process, the Rambouillet Interim Agreement contains no language prohibiting Kosovo's representatives from declaring independence. Instead, like the Hill Process, the Rambouillet Interim Agreement envis-

307 See, e.g., I. Daalder and M. O'Hanlon, Winning Ugly: NATO's War to Save Kosovo (2000), pp. 39-40 ("The logical options for Kosovo's future were three: independence, partition or autonomy. … Hill was tasked by the Contact Group to meet with the Belgrade and Albanian leadership to gain agreement on what were termed 'principles to guide discussions and negotiations' presented by the United States to the Contact Group meeting in Bonn. The key concept of the principles focused on the means for implementing autonomy in Kosovo in the short term and left the issue of the area's political future to be decided years later. On September 2, 1998, Hill announced that Milosevic and Rugova had agreed to work toward an interim plan for Kosovo and to postpone a final decision on Kosovo's political status for three to five years.")

308 First Hill Draft Agreement for a Settlement of the Crisis in Kosovo, 1 October 1998, Article VIII(3), reprinted in M. Weller, The Crisis in Kosovo 1989-1999 (1999), p. 359 (emphasis added).

309 Revised Hill Proposal, 1 November 1998, Article XI (3), reprinted in ibid., p. 369.

310 Third Hill Draft Proposal for a Settlement of the Crisis in Kosovo, 2 December 1998, Article X (3), reprinted in ibid., p. 381.

311 Final Hill Proposal, 27 January 1999, Article X (3), reprinted in ibid., p. 388 (emphasis added).

312 Kosovo, paras. 3.42-3.46.

aged an interim period of substantial Kosovo autonomy followed by a final settlement; indeed, the formal title of the Agreement is "Interim Agreement for Peace and Self-Government in Kosovo".

5.12. Like the final Hill Proposal, the Rambouillet Interim Agreement abandoned the idea of Kosovo's final status being determined by "mutual agreement" between Kosovo and Serbia. The first draft of the Rambouillet Interim Agreement of 6 February 1999 drew upon the relevant final clause from the final Hill Proposal, stating:

"In three years, there shall be a comprehensive assessment of the Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps."[313]

During the course of the Rambouillet negotiations, however, it became apparent that some greater content had to be given to the means by which final status would be determined. In doing so, the negotiators did not return to the original "mutual agreement" language of the Hill Process, but instead emphasized the need to base the final status upon "the will of the people" of Kosovo, in conjunction with certain other factors. Specifically, Chapter 8, Article I, paragraph 3 of the final version of the Rambouillet Interim Agreement stated:

"Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."[314]

5.13. Kosovo accepted the Rambouillet Interim Agreement[315], whereas the FRY/Serbia did not. Instead, the FRY/Serbia sought to revise the Rambouillet InterimAgreement to delete "interim" from its title and text, and to delete the concept of a final status based on the "will of the people" in favor of one that required Serbia's consent. Specifically, FRY/Serbia proposed to change the final clause so as to read:

"After three years, the signatories shall comprehensively review this Agreement with a view to improving its implementation and shall consider the proposals of any signatory for additional measures, *whose adoption shall require the consent of all signatories."*[316]

The negotiators at Rambouillet, including Russian Ambassador Majorski, rejected the FRY/Serbian proposed revision, stating that it was "the unanimous view of the Contact Group that only technical adjustments can be considered which, of course, must be accepted as such and approved by the other delegation"[317]. The FRY/Serbia's failed efforts to alter the Rambouillet Interim Agreement from an "interim" to a permanent settlement, and to require that the final status be subject to "the consent of all signatories"

(i.e. including FRY/Serbia) again confirms that the Rambouillet Interim Agreement in its final form contemplated an interim period of substantial autonomy for Kosovo within the FRY to be followed by a final status process driven principally by the "will of the people" and with no requirement of FRY/Serbian consent.

5.14. Some States apparently now regard the Rambouillet Interim Agreement as calling for a

313 Interim Agreement for Peace and Self-Government in Kosovo, Initial Draft, 6 February 1999, Article III (3), reprinted in M. Weller, The Crisis in Kosovo 1989-1999 (1999), pp. 422-423.

314 Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999, Chapter 8, Article I(3), reproduced in S/1999/648 [Dossier No. 30].

315 Letter from Hashim Thaci, Chairman of the Presidency of the Kosova Delegation, 15 March 1999, reprinted in M. Weller, The Crisis in Kosovo 1989-1999 (1999), p. 480.

316 FRY Revised Draft Agreement, 15 March 1999, Chapter 8, Article 1 (4), reprinted in ibid., pp. 489-490 (emphasis added).

317 Letter from the three Negotiators to Head of Republic of Serbia Delegation, 16 March 1999, reprinted in ibid., p. 490.

permanent integration of Kosovo in Serbia[318] or as establishing unchangeable borders because of its reference to the Helsinki Final Act[319]. Yet the text of the Agreement cannot sustain such interpretations. The various references to "territorial integrity" of the FRY or "autonomy" of Kosovo within the FRY must be seen in the context of an interim period. Indeed, the very title of the Interim Agreement makes clear that it is principally addressing an interim solution, not Kosovo's final status. So too does its text. For example, the preambular clause in the proposed Constitution (Chapter 1 of the Agreement) emphasizes the interim nature of the provision as follows:

"Desiring through this interim Constitution to establish institutions of democratic selfgovernment in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which the authorities of governance set forth herein originate."[320]

The one provision in the Rambouillet Interim Agreement that did address Kosovo's final status – Chapter 8, Article I, paragraph 3 – says nothing about either "territorial integrity" or "autonomy" of Kosovo within the FRY; instead, it refers to a political solution driven principally by the "will of the people" of Kosovo[321].

5.15. Perhaps the most striking interpretation of the meaning of the Rambouillet Interim Agreement is the one now advanced by Serbia itself for purposes of these proceedings[322]. Serbia now maintains that the Rambouillet Interim Agreement accepted that Kosovo would remain a part of the FRY unless Serbia otherwise consented. But in the immediate aftermath of the Rambouillet meeting, the FRY/Serbia had a very different view, seeing the Agreement as essentially endorsing secession by Kosovo.

On 24 March 1999 – just one month after completion of the text of the Rambouillet Interim Agreement – Belgrade's representative declared to the Security Council its view as to its meaning. He complained that the "meetings in France were not negotiations about the autonomy of Kosovo and Metohija" but instead an "attempt to impose a solution clearly endorsing the separatists' objectives". Further, he maintained that the FRY "was and is ready to find a political solution. We give it absolute priority, but we cannot agree to the secession of Kosovo and Metohija, either immediately or after the interim period of threeyears"[323]. Similarly, on 26 March 1999, Belgrade reiterated this view of the Rambouillet Interim Agreement to the Security Council, stating:

"Now Yugoslavia is faced with another ultimatum, this time from NATO – from socalled democratic countries. It has been offered two alternatives: either voluntarily to give up a part of its territory or to have it taken away by force. This is the essence of the 'solution' for Kosovo and Metohija that was offered by way of an ultimatum at the 'negotiations' in France."[324]

318 Russian Federation, para. 55; Spain, p. 26; Romania, paras. 47-52.

319 Cyprus, para. 93.

320 Rambouillet Accords, Chapter 1, preamble. The reference in the overall preamble of the Interim Agreement to "the commitment of the international community to the sovereignty and territorial integrity" of the FRY" and to the Helsinki Final Act, even if regarded as speaking beyond the interim period, cannot be viewed as calling for a permanent integration of Kosovo in Serbia, let alone a prohibition on a declaration of independence. As discussed in Chapter IV, paras. 4.06-4.13, general references of this sort to "territorial integrity" must be seen as a commitment by States not to use coercion to alter territorial boundaries. Further, as also discussed in Chapter IV, paras. 4.14-4.29, with respect to the similar commitment by Member States in the preamble to resolution 1244 (1999), a preambular clause of this type simply cannot sustain the weight of the interpretation Serbia and some other States wish to place upon it.

321 As Romania concedes, Rambouillet "was meant to provide an interim solution for Kosovo. The Rambouillet Agreement itself provided in its final chapter … for the way forward in identifying the final solution for the status of Kosovo. It is to be noted that such a solution would have taken account of the 'will of the people' …" (Romania, para. 52).

322 Serbia, paras. 781-784.

323 See Security Council, provisional verbatim record, fifty-forth year, 3988th meeting, 24 March 1999, S/PV.3988, p. 14.

324 Security Council, provisional verbatim record, fifty-forth year, 3989th meeting, 26 March 1999, S/PV.3989, p. 11.

5.16. These assertions were exaggerated, in that the Rambouillet Interim Agreement did not expressly provide that Kosovo would be an independent State. Yet by Belgrade's own assertions, the Rambouillet Interim Agreement cannot be interpreted in the manner now advanced by Serbia and others. At the time they were drafted, the FRY/Serbia read the Agreement as not deciding that Kosovo would remain a part of Serbia, and read the references to "territorial integrity" and "the Helsinki Final Act" as not precluding the emergence of an independent State of Kosovo, because those references related only to the interim period. Rather, the provision calling for final status to be resolved after three years based on the "will of the people" was well-understood, even by the FRY/Serbia, as including the possibility, indeed the likelihood, of Kosovo's emergence as an independent State after the interim period.

5.17. After armed conflict broke out in which the North Atlantic Treaty Organisation (NATO) States sought to prevent Serbian crimes against humanity and other atrocities in Kosovo, the leaders of the G-8 meeting at the Petersberg Centre on 6 May 1999 issued a statement of principles[325]. This relatively short statement was focused on the immediate steps necessary for ending the armed conflict: withdrawal of FRY/Serbian forces from Kosovo and establishment of an interim administration of Kosovo by the international community. The sole reference to "territorial integrity" refers to the interim period only:

"A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity ofthe Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA."

By its terms, this principle is focused on the establishment of an interim political framework agreement and in that context notes, among other things, "principles of sovereignty and territorial integrity". Nothing in this principle or in the G-8 statement of principles as a whole, sought to alter the basic scheme developed in the Rambouillet Interim Agreement. Indeed, by expressly referencing the Agreement in the principle quoted above, the statement acknowledged and adopted the basic approach of Rambouillet that FRY/Serbia had rejected. As noted above, that approach contemplated that the interim period would be followed by a final status process based on the will of the people of Kosovo and not on consent by authorities in Belgrade. This statement of principles would become Annex 1 to Security Council resolution 1244 (1999).

5.18. Former Finnish President Martti Ahtisaari, on behalf of the G-8 and the European Union, and former Russian Prime Minister Viktor Chernomyrdin, on behalf of the Russian Federation, then engaged in negotiations with FRY President Slobodan Milošević regarding the steps necessary to end the armed conflict. This negotiation resulted in the "Ahtisaari-Chernomyrdin Plan", a series of principles that the Serbian Parliament ratified on 3 June 1999, and that were later incorporated as Annex 2 to resolution 1244 (1999). Like the G-8 statement of principles, the Ahtisaari-Chernomyrdin Plan is relatively brief, and is focused on the immediate steps necessary for withdrawal of FRY and Serbian forces from Kosovo and an interim administration of Kosovo. Recognizing the need for a detailed framework for governance of Kosovo during the interim period, the Ahtisaari-Chernomyrdin Plan called for:

"A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions."[326]

325 Security Council resolution 1244 (1999), annex 1 [Dossier No. 34].
326 S/1999/649, Annex, p. 2, para. 8 [Dossier No. 31].

Again, the sole reference to "territorial integrity" arises in the context of the interim period and, further, by expressly referencing the Rambouillet Interim Agreement, bothacknowledges and adopts the basic approach at Rambouillet that the FRY/Serbia had originally rejected, including the provision relating to the final status process.

II. Resolution 1244 (1999) Itself did not Prohibit Kosovo's Representatives from Declaring Independence

A. THE OPERATIVE PART OF RESOLUTION 1244 (1999) DID NOT PROHIBIT THE DECLARATION OF INDEPENDENCE NOR REQUIRE SERBIAN CONSENT TO IT

5.19. Serbia's Written Statement and those of certain other States contain repeated and sweeping assertions that resolution 1244 (1999) requires that the final status for Kosovo be one of autonomy within Serbia or that the final status only be resolved with the consent of Belgrade[327]. As such, they argue that the Declaration of Independence was unlawful because it denied a status of Kosovo autonomy within Serbia and because the Declaration was undertaken without Serbia's consent.

5.20. Yet resolution 1244 (1999) contains no language either expressly or implicitly requiring autonomy within Serbia or requiring FRY/Serbia's consent to Kosovo's final status[328]. Indeed, had resolution 1244 (1999) intended to alter the basic premises of the prior negotiations from the Hill Process, Rambouillet, the G-8 principles, or the Ahtisaari- Chernomyrdin Plan – in other words, to return to the FRY/Serbia's preference for an immediate resolution of Kosovo's status as an integral part of the FRY with no future change unless consented to by the FRY/Serbia – it would be expected that resolution 1244 (1999) would say as much. Instead, the approach taken in resolution 1244 (1999) is one of continuity with the Rambouillet approach; one in which an interim period of autonomy ofKosovo within Serbia would be followed by a final status process based upon the will of the people of Kosovo[329].

5.21. The framework of resolution 1244 (1999) is neutral as to the final status of Kosovo, though it provides important guidance on how that status ultimately is to be determined. Most of resolution 1244 (1999) focuses on the interim period, in which FRY/Serbian forces would be removed from Kosovo, an international civilian and military presence in Kosovo would be established, and indigenous Kosovo institutions would be promoted and developed so as to allow for extensive self-governance[330]. To that end, paragraph 1 decided that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required lements in annex 2". To give that political solution greater content, paragraphs 2 to 4 indicated various steps for the withdrawal of FRY/Serb forces, while paragraphs 5 to 10 elaborated upon the deployment of the international civil and military presence to Kosovo.

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327 See, e.g., Russian Federation, para. 57 ("the Resolution was based on the idea of Kosovo remaining an integral part of the FRY and Serbia"); Slovakia, para. 24.

328 See, e.g., Japan, p. 5 ("UNSC resolution 1244 contains no language indicating any conclusion on the future legal status of Kosovo. Nor is there any language under which it may be understood that Kosovo's independence is precluded."); France, para. 2.25 ("la résolution 1244 (1999) n'a pas exclu l'option de l'indépendance."); Luxembourg, para. 22 ("L'indépendance du Kosovo n'y est ni explicitement souhaitée, ni exclue. Selon les termes et l'esprit de la résolution 1244, cette indépendance reste donc entièrement possible."); Norway, para. 16 ("resolution 1244 does not take a position on the question of Kosovo's final status"); United Kingdom, para. 6.9 ("The resolution, while stressing the need for a final settlement, is silent on the content of this settlement, a silence that was acknowledged by representatives to the Security Council during the debates of the resolution and in subsequent UN documents.").

329 Any interpretation of a Security Council resolution must begin with its terms, though other factors may be taken into account when construing those terms. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 53, para. 114 ("In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, al1 circumstances that might assist in determining the legal consequences of the resolution of the Security Council.")

330 Kosovo, paras. 4.04-4.22 and paras. 9.06-9.14.

5.22. The several references in this part of resolution 1244 (1999) indicating that Kosovo would have "substantial autonomy within the FRY" (which are highlighted by Serbia and some other States[331]) are all in the context of the interim period. As was the case at Rambouillet, it was understood that during an interim period Kosovo would be accorded extensive autonomy within the FRY, but that understanding did not prejudge the final status once the interim period came to an end. Indeed, as Spain acknowledges, the special regime for the interim period "does not predetermine the future status of Kosovo, as the status of this territory is to be determined in an autonomous way in accordance with a process established for this purpose under resolution 1244 (1999)"[332].

5.23. Resolution 1244 (1999)'s neutrality on what the final status for Kosovo should be was widely understood at the time the resolution was adopted and thereafter, even in the aftermath of issuance of the Declaration of Independence. For example, the Secretary- General recently noted that EULEX operates "under the overall authority of the United Nations and within the status-neutral framework of resolution 1244 (1999)", and that "UNMIK has moved forward with its configuration within the status-neutral framework of resolution 1244 (1999)"[333]. Such an understanding of the approach taken by resolution 1244 (1999) would make no sense if the resolution had predetermined Kosovo's final status or prohibited a declaration of independence.

5.24. Although it did not predetermine Kosovo's final status, resolution 1244 (1999) did address the process for reaching final status. Paragraph 11 decided that the main responsibilities of the international civilian presence would include:

"(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

5.25. Before this Court, Serbia seeks to portray resolution 1244 (1999) paragraphs 11 (e) and 11 (f) as dictating an outcome that required Kosovo to remain within the FRY in the absence of FRY consent[334], and that a "political settlement" means a legal requirement of Kosovo-Serbia mutual agreement[335]. Yet the actual text of paragraphs 11 (e) and 11 (f) says nothing about the political process or the political settlement occurring only with the acceptance of the FRY/Serbia or through agreement by Belgrade and Pristina authorities. The lack of any such language is important when considered in context, for elsewhereresolution 1244 (1999) expressly refers to securing the FRY's "agreement" or "acceptance" on other matters[336]. 5.26. Rather, the actual text of paragraph 11 (e) makes clear that the international civilian presence would facilitate a process that takes account of the outcome reached at Rambouillet, an outcome that in its Chapter 8, Article I, paragraph 3, emphasized the importance of the will of the people of Kosovo and that rejected a requirement of consent from Serbia[337]. Thus, paragraph 11 (e)'s reference to Rambouillet – which also provides context for the interpretation of paragraph 11 (f) – demonstrates

331 See, e.g., Serbia, paras. 685, 705, and 729-741; China, para. I (a); Cyprus, para. 94; Slovakia, para. 26.

332 Spain, p. 39, para. 58 (iv).

333 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 10 June 2009, paras. 6 and 40.

334 See Serbia, paras. 751-756; see also Russian Federation, paras. 59-64.

335 See Serbia, paras. 757-758; see also Spain, para. 18; Cyprus, para. 98.

336 See resolution 1244 (1999), preamble ("welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of … annex 2 to this resolution … and the Federal Republic of Yugoslavia's agreement to that paper,"); resolution 1244 (1999), para. 4 (referring to "an agreed number of Yugoslav and Serb military and police personnel" returning to Kosovo in the interim period); resolution 1244 (1999), para. 5 ("Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences … and welcomes the agreement of the Federal Republic of Yugoslavia to such presences").

337 Luxembourg, para. 21; United States of America, pp. 64-68.

that Kosovo-FRY/Serbia mutual agreement was not a required component of either the political process or political settlement (although it certainly was not precluded). Indeed, the term "political settlement" in paragraph 11 (f) is reminiscent of the phrase "final settlement" used in the Rambouillet Interim Agreement.

5.27. Moreover, an interpretation that insists upon Kosovo-Serbia mutual agreement is inconsistent with the overall object and purpose of resolution 1244 (1999) – i.e. to create an enduring peace in Kosovo. At the time resolution 1244 (1999) was adopted, Council members knew that it would be extremely difficult to reach agreement between Belgrade and Pristina on a permanent status; the Hill and Rambouillet negotiations had demonstrated as much. While negotiations with both sides were certainly expected, interpreting resolution 1244 (1999) as requiring mutual consent before any final status could be reached means imputing to the Council a willingness to "permanently lock the parties in a frozen conflict"[338], to create a situation of persistent instability in the region, to impede over the long-term the foreign investment needed for Kosovo's growth, and to maintain in perpetuity a costly United Nations administration[339]. By contrast, reading the language as it is actually drafted – without a requirement of mutual consent – is consistent with the resolution's object and purpose since it avoids the possibility of an enduring deadlock.

5.28. Yet perhaps the most compelling confirmation that paragraph 11 did not envisage FRY/Serbian consent to Kosovo's final status comes from Belgrade itself, in theposition taken before the Security Council at the meeting during which resolution 1244 (1999) was adopted. There, Belgrade advanced an entirely different interpretation of the meaning of the resolution, one that squarely envisaged the possibility of Kosovo's emergence as an independent State without Belgrade's consent[340]. In its statement to the Security Council on 10 June 1999, Belgrade's representative stated as follows:

"In sub-item (a) and (b) of operative paragraph 9, the draft resolution requests in all practical terms that the Federal Republic of Yugoslavia renounce a part of its sovereign territory and grant amnesty to terrorists. Furthermore, in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia.

In adopting the present text of the draft resolution, … the Security Council would … be instrumental in a de facto dismemberment of a sovereign European State …

By opposing these provisions, the Security Council shall stand up in defence … of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia …"[341]

Thus, at the time of its adoption, Belgrade interpreted resolution 1244 (1999) (which included the preambular clause relating to FRY territorial integrity as well as paragraph 11) as "open[ing] up the possibility of secession of Kosovo and Metohija from Serbia". It is not surprising that the FRY took this position; resolution 1244 (1999) embraced a final process based upon the approach taken at Rambouillet, an approach that the FRY rejected at Rambouillet because it allowed ultimately for an independent Kosovo without Belgrade's consent. As such, it is entirely unpersuasive to argue now that paragraphs 11 (e) and 11 (f) must be construed as requiring a meeting of the minds between the FRY/Serbia and Kosovo[342]. While it is correct that members of the United Nations Security Council would have welcomed a mutual

338 Germany, p. 40.
339 United Kingdom, para. 6.31 (referring to UNMIK annual budgets in recent years, which exceed $200 million).
340 See Kosovo, para. 4.22 (a).
341 Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 6 [Dossier No. 33].
342 See Cyprus, para. 98.

agreement and encouraged both sides to reach one[343], resolution 1244 (1999) contains no legal requirement to that effect.In light of its text, context, object and purpose, and negotiating history, many States are candid in acknowledging that resolution 1244 (1999) did not prohibit secession[344].

5.29. Given all these factors, Serbia's argument that Kosovo must recommence negotiations[345] is seriously misplaced for two reasons. First, Kosovo did engage in extensive negotiations, which ended in failure. As discussed in Kosovo's first Written Contribution, Kosovo engaged in fifteen rounds of negotiations in the course of 2006 in Vienna, during which Serbia insisted that autonomy was the only possible status (and even argued – incomprehensively – that international law precluded any settlement involving independence)[346]. Pristina advanced a forward-looking position, maintaining that while independence was the only solution, it could occur along with appropriate treaties and agreements on friendship and cooperation between two neighboring states. Ultimately, the Secretary-General's Special Envoy for the negotiations, President Ahtisaari, concluded that

"[i]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse"[347].

5.30. Though some further attempts at negotiation were made, in light of the repeated failures to reach agreement (the Hill Process, Rambouillet, Ahtisaari talks), these further efforts (by the "Troika") only served to confirm the deadlock[348]. Today, there can be no question of further negotiations on final status. Kosovo is now widely accepted as a State within the international community, while Serbia on repeated occasions, even after initiation of this request for an advisory opinion, insists that it will never accept an independent Kosovo[349]. This Court has long recognized that when an obligation to negotiate exists, it does not require continuing to negotiate until success is achieved; rather,reasonable efforts at negotiation satisfy the obligation[350]. In the Mavrommatis case, the Permanent Court stated that

"[t]he question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this ill be the case if a deadlock is reached or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way and there can be no doubt that *the dispute cannot be settled by diplomatic negotiation.*[351]

5.31. Second, resolution 1244 (1999) does not include an obligation to strive for bilateral agreement, nor does it require maintenance of the status quo if a bilateral agreement cannot be reached. Rather, paragraph 11 of resolution 1244 (1999) calls for a process to be facilitated by UNMIK, one that included as a possible outcome independence for Kosovo, even without Serbian consent, so long as it reflected the

343 See Spain, pp. 50-51.

344 See Slovakia, para. 26 ("Resolution 1244 does not contain provisions that exclude the possibility of Kosovo's independence"); ibid., para. 27 (resolution 1244 "does not explicitly prohibit secession or prohibit states from recognizing secession," as was done in the case of Southern Rhodesia); Azerbaijan, para. 14 ("There are divergent interpretations of resolution 1244 (1999) and there is no unanimity within the Security Council and among Member States of the United Nations in general as to the issue under examination by the Court.")

345 Serbia, paras. 766-775.

346 Kosovo, paras. 5.08-5.22.

347 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168/Add.1, 26 March 2007, para. 3 [Dossier No. 203].

348 See France, para. 2.51.

349 See para. 2.57 above.

350 See Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 210, para. 107; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 424, para. 244.

351 1924, P.C.I.J., Series A, No. 2, p. 13 (emphasis in original)

will of the people[352]. As aptly put by the United Kingdom, the "consequence of Resolution 1244 (1999) was that the future of the territory of Kosovo ceased to be a matter for Serbia alone to decide upon. It became a matter to be resolved having regard to the interests and wishes of the inhabitants of Kosovo."[353]

5.32. In their submissions, some States maintain that resolutions preceding resolution 1244 (1999), which were recalled in its preamble, established that the Security Council intended a bilaterally negotiated outcome consisting solely of Kosovo autonomy within the FRY[354]. Thus, resolution 1160 (1998) called upon the FRY to pursue a "dialogue" with the "leadership of the Kosovar Albanian community" concerning the rights of Kosovar Albanians, and expressed its "support for an enhanced status for Kosovowhich would include a substantially greater degree of autonomy and meaningful selfadministration" [355]. Similarly, resolution 1199 (1998) called upon

"the authorities in the Federal Republic of Yugoslavia and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo …"[356]

Further, resolution 1199 (1998) repeated in its preamble "support for a peaceful resolution of the Kosovo problem which would include an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration"[357]. Similar language may be found in resolution 1203 (1998)[358].

5.33. Such language in favor of dialogue and negotiation cannot be viewed as supporting Serbia's interpretation of resolution 1244 (1999). Certainly none of these earlier provisions constituted a prohibition on a declaration of independence by the democratically elected representatives of the people of Kosovo, whether issued with FRY consent or otherwise. Moreover, sentiments in these earlier resolutions in favor of dialogue and negotiation in 1998 simply cannot be transplanted to resolution 1244 (1999), which was adopted in the radically changed circumstances of June 1999, almost nine months after resolution 1203 (1998). Given the dramatic events that unfolded in late 1998 and the first five months of 1999, involving widespread FRY/Serbian crimes against humanity and other atrocities against Kosovar Albanians, resulting in massive flows of refugee and internally displaced persons,[359] there is no reason to suppose that the Security Council viewed measures of reconciliation pursued in 1998 as still viable in mid-1999. Indeed, when voting for resolution 1244 (1999), the representative of France reviewed resolutions 1160 (1998), 1199 (1998), and 1203 (1998), and then noted that "[u]nfortunately, the Belgrade regime refused to comply with the obligations set out in those resolutions", thereby compelling a radical change in approach by the internationalcommunity[360]. Likewise, the representative of Gabon stated that "[n]either the peaceful measures that were advocated nor the condemnation repeatedly expressed by the international community [in the prior resolutions] succeeded in curbing the violence in Kosovo", and therefore the "resolution that we have just adopted … offers fresh prospects for a resolution of the Kosovo conflict and for peace in the Balkan region …"[361]. The United Kingdom, another active participant in the meeting and the negotiations leading up to it, now notes to this Court:

352 See Austria, para. 30 ("the final settlement envisaged in Resolution 1244 comprises also a settlement towards independence. If this were not so, independence would have also been excluded as a solution to a political settlement by negotiation.")
353 United Kingdom, paras. 0.25 (1) and 6.10.
354 See, e.g., Romania, pp. 11-15.
355 Resolution 1160 (1998), paras. 1 and 4 [Dossier No. 9].
356 Resolution 1199 (1998), para. 3 [Dossier No. 17].
357 Ibid., preamble.
358 Resolution 1203 (1998), preamble, paras. 3 and 5 [Dossier No. 20].
359 Kosovo, pp. 60-67.
360 Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 12 [Dossier No. 33].
361 Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 20 [Dossier No. 33].

"As far as the Yugoslav effective presence [in Kosovo] was concerned, Resolution 1244 (1999) aimed for, and achieved a clean slate. Previous international mandates had been piecemeal and ultimately unsuccessful attempts to address an escalating series of abuses by Yugoslav forces in Kosovo. By contrast, Resolution 1244 (1999) established basic public order in Kosovo and created international and local transitional institutions as a framework for a final settlement of Kosovo's internal and external affairs."[362]

5.34. Finally, and most importantly, the failure to repeat provisions from those earlier resolutions actually confirms that resolution 1244 (1999) did not preclude a Kosovo declaration of independence. If the Security Council in resolution 1244 (1999) had intended that the "political process" in paragraph 11 (e) consist solely of a "dialogue" between the FRY and Kosovo's leaders that would result in a "negotiated political solution", the Council certainly knew how to say as much, for it had done so in those earlier resolutions. Likewise, if the Council in resolution 1244 (1999) had intended that the "political settlement" in paragraph 11 (f) consist solely of "an enhanced status for Kosovo" within the FRY, that too the Council could have stated, using language from its prior resolutions. Yet in drafting resolution 1244 (1999), no such language was included anywhere in the text of the resolution.

5.35. By contrast, in the same timeframe that resolution 1244 (1999) was adopted, the Security Council adopted resolutions relating to Georgia that were quite explicit about the need for a mutual agreement of the two parties to the conflict and about the essential outcome expected in that agreement. In resolutions 1225 (1999) and 1255 (1999), whichwere adopted, respectively, five months before and one month after resolution 1244 (1999), the Council underlined in the operative part of the resolutions the "necessity for the parties to achieve an early and comprehensive political settlement, which includes a settlement on the political status of Abkhazia *within the State of Georgia* …"[363].

5.36. Rather than adopt such an approach, the Council in resolution 1244 (1999) discontinued the use of such language, replacing it instead with language calling for a political process that would take into account the Rambouillet accords – accords that did not call for a FRY-Kosovo agreement on final status and did not require that final status to consist of autonomy within the FRY. Given that the Rambouillet Interim Agreement was adopted after virtually all of the resolutions "recalled" in resolution 1244 (1999)[364], and given that it is the Rambouillet Interim Agreement that is identified in the operative text of resolution 1244 (1999) relating to Kosovo's final status, the resolutions that preceded resolution 1244 (1999) serve to confirm the interpretation of that resolution discussed above, not to rebut it.

5.37. Perhaps aware that resolution 1244 (1999) cannot be construed as prohibiting a declaration of independence by the democratically elected representatives of the people of Kosovo, some States shift ground by arguing that resolution 1244 (1999) did not authorize a declaration of independence[365]. To that end, Serbia and certain other States note that in some other resolutions the Security Council has acknowledged a right of independence, such as with respect to Namibia and East Timor[366].

5.38. Such resolutions are not relevant to the case now before this Court. First, in those other instances, the Council had already decided that a new State should be formed and the Council was simply acknowledging that fact. By contrast, in resolution 1244 (1999), the Council adopted a status-neutral framework in which there would be an interimperiod of autonomy, followed by a process that would resolve the final status. Consequently, the language of the resolution did not seek to prejudge, one way or the other, the outcome of the final status process, as was done in the Namibia and East Timor resolutions.

362 United Kingdom, para. 6.25 (footnotes omitted).
363 Security Council resolution 1225 (1999), 28 January 1999, para. 3; Security Council resolution 1255 (1999), 30 July 1999, para. 5 (emphasis added).
364 The only resolution recalled in resolution 1244 (1999) that post-dated the Rambouillet Accords was resolution 1239 (1999), which "did not concern the negotiated solution for the Kosovo problem" (Romania, para. 40).
365 Cyprus, pp. 23-26 (especially para. 97); Argentina, para. 64.
366 Serbia, paras. 785-792.

5.39. Second, in answering the question now before it, the Court need not determine that resolution 1244 (1999) authorized such action; the Court need only find that resolution 1244 contains no prohibition on a declaration of independence and hence that the declaration cannot be said to contravene the resolution[367].

B.THE PREAMBULAR REFERENCE IN RESOLUTION 1244 (1999) TO "SOVEREIGNTY AND TERRITORIAL INTEGRITY" DID NOT PROHIBIT THE DECLARATION OF INDEPENDENCE

5.40. With no support in the operative part of resolution 1244 (1999) for the proposition that it prohibited the Declaration of Independence of 17 February 2008, Serbia and some other States turn to and rely heavily upon the single clause in the preamble of the resolution, where the Security Council says it is:

"*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2 . . . ."

5.41. Yet this preambular paragraph says nothing about a declaration of independence, nor is it formulated in terms of a prohibition of any kind. Indeed, by its terms, the clause does not even purport to impose any new legal obligation; it is "reaffirming" a pre-existing commitment of United Nations Member States. This commitment must be understood as simply confirming the commitment of Member States to the principle of "territorial integrity" embodied in general international law, which prohibits States from using coercion against other States so as to alter territorial boundaries, but does not prohibit declarations of independence. 5.42. As discussed in greater detail in Chapter IV above[368], there are several other reasons why Serbia's argument is not sustainable. Even if Serbia's view of the meaning of this commitment was correct as of 1999 (which it is not), such a commitment cannot be regarded as still viable by 2008, given the extensive changes that had occurred over almost a decade. Further, a comparison of this clause with other clauses in the resolution, and a review of the statements made by members of the Security Council when the resolution was adopted, confirm that the clause was not intended to preclude Kosovo's Declaration of Independence. Finally, had the Security Council intended to link the aspirations of the Kosovo people to the concept of territorial integrity, one would expect language to that effect in paragraph 11 of resolution (1999), yet no such language exists.

C.REFERENCES IN RESOLUTION 1244 (1999) TO KOSOVO AS PART OF THE FRY ARE FACTUALSTATEMENTS ADDRESSING THE INTERIM PERIOD

5.43. Serbia and some other States expend considerable effort attempting to deduce from the language of resolution 1244 (1999) that it is based on a "principle that Kosovo continues to form part of Serbia"[369]. For example, Serbia notes that paragraph 4 of resolution 1244 (1999) envisaged a limited number of FRY military and police personnel returning to Kosovo (which it fact never happened). From this, Serbia concludes that "the Security Council, while significantly limiting the right of the FRY to exercise effective control over Kosovo, still perceived Kosovo as continuing to form an integral part of the FRY pending a final agreement …"[370]. Similarly, Serbia points out that the Security Council in resolution 1244 (1999) did not seek to alter the nationality of persons living in Kosovo[371].

367 Kosovo, pp. 137-39; Germany, p. 38 ("As to how the final settlement at the end of the political process should look like, resolution 1244 (1999) is entirely silent. It does not ask for complete independence, but neither does it exclude it.").
368 See paras. 4.14-4.29 above.
369 Serbia, para. 721.
370 Ibid., paras. 722-723.
371 Ibid., paras. 724-725.

5.44. Kosovo does not dispute that at the time of resolution 1244 (1999)'s adoption, Kosovo was regarded by the international community as a part of the FRY. Consequently, any provisions within resolution 1244 (1999) or statements by members of the Security Council during that period of time naturally viewed Kosovo as being part of the FRY. Yetthese were merely factual statements of what was considered to be the case at the time resolution 1244 (1999) was adopted. These statements cannot be read as having in any way prejudged Kosovo's final status following the interim period[372].

5.45. The same point applies with respect to Serbia's arguments concerning the Military Technical Agreement of 9 June 1999, concluded between KFOR, the FRY, and Serbia immediately prior to the adoption of resolution 1244 (1999)[373]. That Agreement certainly contains provisions indicating that Kosovo is within Serbia, but these are simply factual statements reflecting what was considered to be the case at the time and remained so until 17 February 2008. The Agreement did not purport to provide any guidance on the final status process and would have had no reason to do so; indeed, NATO had no authority in this matter. The same point applies with respect to Security Council resolutions predating resolution 1244 (1999)[374], and Security Council Presidential statements[375] or other United Nations documents from that time[376]. All of these simply recognized the existing factual situation prior to 17 February 2008.

D.THE RELATIONSHIP OF RESOLUTION 1244 (1999) TO GENERAL INTERNATIONAL LAW

5.46. Some States argue that resolution 1244 (1999) established a special legal regime as it relates to the final status of Kosovo. Thus, Spain asserts that resolution 1244 (1999) established "an ad hoc legal system applicable to the Kosovo situation which would eventually make it possible to exclude the application of the rules and principles of intentional law generally applicable"[377]. If resolution 1244 (1999) is regarded as establishing a special legal system applicable only to Kosovo then, for the reasons indicated above, that *ad hoc* legal system did not prohibit the Declaration of Independence of 17 February 2008. Rather, resolution 1244 (1999) set up a status-neutral framework foraddressing Kosovo's future, one that contained no prohibition on a declaration of independence and instead fully envisaged the possibility of a final status of independence, if that ultimately proved to be the will of the people of Kosovo. Hence, even if the Court were to take the view that resolution 1244 (1999) is the sole source of law applicable in these proceedings, the Declaration of Independence still did not contravene that source of law.

5.47. Other States, such as Russia, assert that resolution 1244 (1999) "should be considered as the special legal regime upon which the Court can base its consideration of the request", but that "[p]rinciples of international law serve as the background against which the Resolution is to be interpreted and applied"[378]. If this approach is correct, then general international law does not prohibit a declaration of independence, as explained in Kosovo's first Written Contribution[379] and in Chapter IV above. Had the Security Council intended to alter the "background" rules emanating from general international law so as to create a prohibition on Kosovo's Declaration of Independence, it would have expressly said so in resolution 1244 (1999). By not doing so, general international law remained "as the background" and, under that law, there existed no prohibition on the issuance of the Declaration.

372 See, e.g., Estonia, p. 12 ("Resolution 1244 (1999) did not determine the autonomy of Kosovo within the Federal Republic of Yugoslavia as a final outcome of the process. It only established an interim international administration which should, pending a political settlement, assure Kosovo's autonomy within the Federal Republic of Yugoslavia.")

373 Serbia, paras. 668-674 (referring to resolution 1239 (1999)); see also Spain, para. 45.

374 Serbia, para. 660; Spain, para. 37 (i).

375 Spain, para. 38, fn. 60.

376 Serbia, paras. 698-699.

377 Spain, p. 12, para. 14. Such a position would seem inconsistent with the view that a decision by the Court in favor of Kosovo's position would set an adverse precedent for situations worldwide.

378 Russian Federation, paras. 28 and 30.

379 Kosovo, Chapter VIII.

III. The Legal Effects of and Political Attitudes towards Resolution 1244 (1999) Changed after Commencement of the Final Status Process

5.48. Serbia and some other States assert that in the immediate aftermath of the adoption of resolution 1244 (1999), certain documents and statements were issued that characterized Kosovo as a part of the FRY and that in some instances opposed Kosovo's ability to declare independence at that time. Yet, such statements and documents typically do not address whether a declaration of independence might be issued by the people of Kosovo, and in any event were reflecting attitudes as to what was politically and legally appropriate prior to the commencement and completion of the final status process. 5.49. In assessing the period between the adoption of resolution 1244 (1999) in June 1999 and the issuance of the Declaration of Independence on 17 February 2008, it is useful to consider three distinct phases. In the first phase, from 1999 to 2005, the international community was focused on an interim period in Kosovo that would see the departure of FRY/Serbian forces from Kosovo, the return of refugees and displaced persons to their homes, and the transfer of extensive authority to Kosovo institutions of self-government.

5.50. In this period, the Contact Group, the Secretary-General's Special Representative, and others made various statements to the effect that Kosovo's leaders should not proceed with efforts to declare independence[380]. Further, Serbia points to a "FRY-UNMIK Common Document" of 5 November 2001, a political document which "[reaffirmed] that the position on Kosovo's future status remains as stated in UNSCR 1244, and that this cannot be changed by any action taken by the Provisional Institutions of Self-government"[381]. Serbia also observes that the 2001 FRY-Macedonia border agreement[382] sought to address the border between Kosovo and Macedonia, a step that demonstrates that Kosovo remained a part of Serbia. Finally, Serbia notes that the SRSG declared null and void a "Resolution on the protection of the territorial integrity of Kosovo" adopted by the Kosovo Assembly in 2002 in connection with the border agreement[383], again confirming that Kosovo was not an independent State.

5.51. Yet such political statements and other actions often do not actually say what Serbia now claims that they say. The "Common Document", for instance, simply says that the position on Kosovo's future status "remains as stated" in resolution 1244 (1999) (i.e. that such status will be facilitated by UNMIK taking into account Rambouillet) and that "the position" expressed in the resolution cannot be changed by the PISG. The "Common Document" did not say that Kosovo's final status had to be one of autonomy, nor did it say that the PISG or any other entity or people could not be a factor in determining Kosovo's final status. Rather, the clause at issue merely says that the PISG cannot change theapproach on final status that was set forth within the framework of resolution 1244 (1999), which in fact it did not.

5.52. Moreover, it is important to note that such political statements and actions arose in the context of the first period of interim administration, at a time when the final status process had not yet been launched. In this period, it is clear that the relevant decision-makers in the international community did not regard the political process envisaged by resolution 1244 (1999), paragraph 11 (e), as yet having commenced. As such, action to bring about a final status settlement was not yet envisaged.

5.53. This situation changed during the second phase, the period between 2005 and 2007[384]. In 2005, Ambassador Kai Eide reported that the situation in Kosovo was no longer sustainable, an assessment with which the Security Council agreed. The Council therefore supported "the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council

380 Serbia, para. 658.
381 Ibid., para. 759-762; see also Spain, para. 41.
382 Spain, para. 44.
383 Serbia, paras. 701-704; see also Cyprus, para. 112; Spain, p. 51; Kosovo, paras. 9.24-9.26.
384 See Kosovo, paras. 9.15-9.19.

resolution 1244 (1999)", and welcomed the appointment of a Special Envoy to that end[385]. Moreover, the Security Council welcomed and approved the appointment of President Martti Ahtisaari as the Special Envoy, whose Terms of Reference indicated that the "pace and duration" of this process "will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground"[386].

5.54. As is often referred to by Serbia and others[387], the Contact Group stated in its "Guiding Principles" of 10 November 2005, issued at the outset of this process, that "any solution that is unilateral would be unacceptable". Seen in context, this was a political assertion that both sides must engage in good faith negotiations on final status issues under the auspices of the United Nations; it was certainly not, by its terms, nor could it have been, an interpretation of the requirements of resolution 1244 (1999), nor a statement that negotiations must continue indefinitely. Similarly, the statement by the Contact Group, inthose same "Guiding Principles", that the "final decision on the status of Kosovo should be endorsed by the Security Council"[388], as well as the statement by President Ahtisaari that "it is up to the Security Council to decide how the future status will look like"[389], were also political assertions, issued at the outset of the final status process, positing that it was politically desirable for the Security Council to endorse the outcome of the process. Such assertions were no doubt also motivated by an understanding that, at some point, in order to terminate the presence of UNMIK in Kosovo, there would need to be a further Security Council resolution. These statements cannot be read as an interpretation of resolution 1244 (1999) that Security Council endorsement was legally necessary for the final status settlement to take effect prior to the termination of UNMIK.

5.55. President Ahtisaari engaged in fifteen months of intense negotiations with Serbia, Kosovo, and other stakeholders culminating in 2007[390]. He then determined that it was not viable to continue the status quo and that further "negotiations' potential to produce an mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse."[391] Further, he crafted a detailed political settlement, the Ahtisaari Plan, based on his conclusion that independence for Kosovo was the only viable option[392]. The Secretary-General supported the plan. Kosovo accepted the plan. Serbia did not. It is true that President Ahtisaari's conclusions included a "recommendation" to the Security Council for action[393], and that many states saw Security Council action[394] as politically desirable. Yet none of these statements expressed the belief that Kosovo's could not declare independence in the absence of a further Security Council resolution. Indeed, the draft resolution that was considered at the time contained no provision that would have declared Kosovo to be an independent State or that would have authorized a declaration of independence; instead, it was focused on UNMIK's changed role in the post-independence period.

5.56. As it happened, the Ahtisaari Plan was supported by many members of the Security Council, none of whom viewed it as inconsistent with resolution 1244 (1999) due to a lack of Serbian consent or because it would transgress FRY "territorial integrity"[395]. No longer were statements being made at this

385 See ibid., para. 9.15.
386 See ibid., para. 9.16.
387 Serbia, para. 764; Cyprus, para. 99; Spain, para. 79.
388 Serbia, para. 763.
389 Ibid., para. 817.
390 These negotiations included 17 direct discussion sessions and 26 missions of experts dispatched to Belgrade and Pristina. See France, para. 2.48.
391 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].
392 Kosovo, para. 9.17.
393 See Argentina, paras. 58-59.
394 Serbia, para. 821.
395 See Security Council, provisional verbatim record, sixty-second year, 5673rd meeting, 10 May 2007, S/PV.5673 [Dossier No. 114] (indicating that the Plan was supported by Belgium (p. 3), Peru (p. 5),

point in the process about the need for further negotiations or about a concern with "unilateral action", for events had now moved past that point. Unfortunately, efforts to secure Security Council endorsement of the Ahtisaari Plan were unsuccessful due to the likely veto of a permanent member. Further efforts to resolve the matter, in which Serbia itself informed a mission of the Security Council that the status quo was not sustainable[396], also failed.

5.57. In the third and final phase, it was apparent towards the end of 2007 at the latest that the political process launched by the Security Council and Secretary-General had run its course, that the person charged with determining the "pace and duration" of this process viewed his task as completed, and that the only viable option was for Kosovo to be independent[397]. Once that process had run its course, the SRSG – unlike in prior phases – chose not to proclaim the Declaration null and void, or without legal effect. Thus, the entity charged by resolution 1244 (1999) with "facilitating" the final status process and, in the final stage, with overseeing the transfer of authority to the final settlement institutions, took a very different path than was taken before the end of the final status negotiations. Serbia thereupon formally demanded that the Secretary-General take steps to have the Declaration set aside. The Secretary-General did not do so. Nor did the Security Council,either by resolution or through a statement of its President, take any steps to instruct the Secretary-General or his representative to set aside the Declaration[398].

5.58. This unwillingness of the SRSG, the Secretary-General, or any other United Nations entity to act strongly supports the proposition that the issuance of the Declaration did not violate resolution 1244 (1999)[399]. Resolution 1244 (1999) charges the SRSG (as the head of UNMIK) with "overseeing the development of provisional democratic selfgoverning institutions in Kosovo" and then, "[i]n a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement"[400]. In discharging these functions, Serbia itself has characterized UNMIK as having "supreme administrative authority" in Kosovo[401], a view echoed by several States[402]. Actions in exercise of that authority, as noted by the Russian Federation, "constitute a means of interpretation of the Resolution as well as a part of the legal regime established by it". Moreover, UNMIK stated in its Constitutional Framework that it would take "appropriate measures whenever [PISG] actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework"[403].

France (p. 6), Ghana (p. 8), Panama (p. 9), Italy (p. 11), United Kingdom (p. 12), and United States (p. 13)). For example, Ghana stated: "We recognize the need to resolve the issue of the future status of Kosovo as soon as practicable, and support in principle the adoption of a resolution following the submission by the Special Envoy of the comprehensive proposal on the Security Council mission. We hope that the Security Council will work assiduously towards the realization of that objective." (p. 8).

396 Ibid., p. 3 ("Despite the strongly opposed positions, both parties agree that the status quo is not sustainable.")

397 Kosovo, paras. 9.20-9.28; see also France, paras. 2.55-2.56; United Kingdom, para. 0.15 (the Declaration "flowed from the failure of the two sides, and of the international community, after long and sustained effort, to secure any other framework for peaceful relations between the people of Serbia and the people of Kosovo".); United States, p. 83 ("At the point in February 2008 that Kosovo declared independence … there was no longer an ongoing future status process. The Special Envoy had declared that that the process was over, and that there was no prospect of its successful resumption.")

398 Kosovo, para. 9.27.

399 See also Austria, para. 19 ("By abstaining from a negative reaction, the Security Council has accepted the competence of the [PISG] Assembly to act in this field. Moreover, since this conduct consisting of nonobjection is decisive for interpretation of Resolution 1244 as subsequent practice, the act of the issuing of the Declaration has to be recognized as in conformity with Resolution 1244."); ibid., para. 42 ("Since the Secretary-General as well as the Security Council were immediately aware of the events in Kosovo and, nevertheless, none of the organs of the UN took action in this regard, the impression is created that the UN has agreed to the Declaration."); Germany, p. 42 ("This only confirms the proposition that the prohibition of unilateral steps towards independence, contained in resolution 1244 (1999) for the interim framework, ended when the political process foreseen by that resolution had finally collapsed."); United States, pp. 84-89.

400 Security Council resolution 1244 (1999), paras. 11 (c) and (f) [Dossier No. 34].

401 Serbia, para. 895; ibid., para. 896 (referring to "the international legal regime established by Security Council resolution 1244 (1999) which provides that UNMIK, headed by the Special Representative, is the supreme authority in Kosovo …").

402 Argentina, para. 62 ("The Special Representative of the Secretary-General was vested with the highest authority of the international administration.")

403 Constitutional Framework, Chapter 12 [Dossier No. 156].

5.59. Yet the SRSG did not take any action before or after the Declaration of Independence of 17 February 2008 to set aside the Declaration or to declare it null and void. By not doing so, the "supreme administrative authority" in Kosovo acted in a manner that does not fit Serbia's conclusion that the Declaration violated resolution 1244(1999). Rather, the SRSG's position was entirely consistent with the view that the events contemplated in resolution 1244 (1999) had unfolded to the point where a transfer of authority from interim institutions to permanent institutions was appropriate.

5.60. The concluding element of the final status process, the Declaration of Independence of 17 February 2008, was the product of the will of the people of Kosovo, as well as the other Rambouillet factors recognized in resolution 1244 (1999) as important for the facilitation of a final settlement. It occurred only after the conclusions reached by the relevant United Nations representatives responsible for overseeing the final status discussions that the status quo was not sustainable and independence was the only viable option. While the Declaration may have been "unilateral"(as it is qualified in the question put to the Court and by Serbia in its Written Submission[404]) in the sense of not being the product of a Kosovo-Serbia agreement, the Declaration was certainly not "unilateral" in the sense of an action taken by Kosovo without any involvement of the international community in launching, negotiating, and concluding a final status settlement.

IV. The Declaration did not Violate Resolution 1244 (1999) as an Ultra Vires Act of the PISG or as a Contravention of the 2001 Constitutional Framework

5.61. Serbia and some other States also maintain that the Declaration is "contrary to the international legal regime for Kosovo" established by resolution 1244 (1999) because it constituted an ultra vires act by the PISG[405] and violated the Constitutional Framework promulgated by the SRSG[406]. The crux of this argument is that resolution 1244 (1999) and the regulations issued by UNMIK thereafter established authorities within Kosovo that were limited in their power; the Declaration unlawfully transgressed that limited power, and in doing so violated the "legal regime" set up by the Security Council for Kosovo. For several reasons, these arguments fail.

5.62. First, as explained in greater detail in Kosovo's first Written Contribution, the entities identified in the question submitted to the Court – the PISG – did not adopt the Declaration[407]. As a series of institutions that do not act as a collective even in their normal functioning, the PISG cannot be regarded as having issued the Declaration. Moreover, if one sets aside the PISG and focuses on just one of the PISG institutions – the Assembly – it is also readily apparent from the form and content of the Declaration, and the procedure for adopting it, that this Declaration differed from the legislative acts normally adopted by the PISG Assembly. This particular action was of a very special and extraordinary nature that simply cannot be judged as the act of a body created by the SRSG and charged with day-to-day governing responsibilities during the interim period.

5.63. Second, even if this action of the democratically elected leaders of Kosovo, meeting as a constituent body, were to be regarded as an action of the PISG (or of the PISG Assembly), the legality of that action cannot be judged as against standards set in either resolution 1244 (1999) or UNMIK regulations for governance during the interim period. As discussed in Section III above, by February 2008 the final status settlement process had concluded with a determination by the United Nations authorities charged with overseeing the process that the status quo in Kosovo was unsustainable, further negotiations with Serbia were pointless, and Kosovo's independence was the only viable option. At this point,

404 Serbia, paras. 913-940.

405 Ibid., paras. 867-94; Cyprus, pp. 27-29; Argentina, para. 116; Romania, para. 60; Russian Federation, para. 72; Slovakia, para. 25.

406 Serbia, paras. 895-912. Slovakia refers to this as an alleged diminishment of the authority of the SRSG (Slovakia, para. 25).

407 Kosovo, Chapter VI and paras. 1.22-1.24 above; see also Austria, para. 16.

having reached the end of the political process for determining Kosovo's future status, paragraph 11 (f) of resolution 1244 (1999) contemplated a stage in which a transfer of authority would occur from Kosovo's provisional institutions to institutions established under a political settlement. Seen in this light, issuance of the Declaration of Independence on 17 February 2008 was not an act of an interim institution transgressing its limited authority; rather, it was an act of a constituent body declaring in the name of the people its readiness to exercise governing authority on a permanent basis, as contemplated by resolution 1244 (1999).

5.64. In this regard, it must be noted that the issuance of the Declaration did not terminate or seek to terminate the role of UNMIK under resolution 1244 (1999)[408]. Thatresolution contemplated a role for UNMIK in both the interim and post-interim periods[409], which UNMIK has continued to fulfil. Serbia itself accepts that the Declaration did not set aside the mandate of UNMIK and that UNMIK continued to perform certain functions after the adoption of the Declaration[410]. Kosovo accepts that it is the Security Council's prerogative to terminate the international civilian presence in Kosovo[411] and that resolution 1244 (1999) remains the UN basis for UNMIK's presence in Kosovo[412], which over time is being reconfigured so as to reduce UNMIK's functions and personnel.

Acceptance of those points, however, does not alter the fact that a final status process under resolution 1244 (1999) has run its course and UNMIK's role in facilitating a final status settlement is completed. Indeed, as noted in Chapter II, according to the Secretary- General, UNMIK's functions no longer include "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[413].

5.65. Third, whether or not the PISG issued the Declaration, it fell to the SRSG to determine whether the Declaration was an ultra vires act or an act that violated the Constitutional Framework promulgated by the SRSG, if that was truly the case. Yet, as discussed in the prior section, the SRSG took no such action. In this regard, a point of United Nations law arises. The Security Council, after delegating authority to the Secretary-General and his Special Representative on the ground in situations involving civilian administration of territory, provides those officials with authority for implementing the civilian administration, which includes interpreting Security Council resolutions as the need arises in the theatre of operations[414]. Such an approach empowers the relevant United Nations representatives (or for that matter subsidiary organs or committees) with theauthority they need for day-to-day implementation of the Council's resolutions. Obviously if the United Nations representative acts in a manner that transgresses the United Nations Charter or a Security Council resolution, the Council or this Court might take steps to correct that transgression. But where the issue concerns a possible transgression in theatre of the rules adopted by the United Nations representative to regulate local matters (such as the Constitutional Framework), considerable deference should be accorded to that representative to interpret whether a transgression has occurred and, if so, to correct it[415]. In this instance, the SRSG's decision not to declare

408 See, e.g., Argentina, para. 118 (the Declaration "attempts to put an end to such presence established on the basis of the Resolution, something which can only be decided by the Security Council").

409 409 See Kosovo, para. 4.20; Austria, para. 33 ("The wording of the Resolution signals that the international civil presence is meant to exist beyond the end of the interim period, after a political settlement has been achieved.")

410 Serbia, paras. 827 and 834.

411 Hence, Serbia's arguments in this respect are misguided. See ibid., paras. 795-798.

412 Kosovo's Foreign Minister has recently (on 17 June 2009) reiterated to the Security Council Kosovo's adherence to international law, including binding Security Council resolutions, such as resolution 1244 (1999). "This commitment has never wavered." S/PV.6144 (2009), p. 8: see paras. 2.46-2.47 above. Hence, arguments by others on this point are also misplaced. Serbia, paras. 799-815; Spain, para. 84; Russian Federation, para. 26.

413 See para. 2.45 above.

414 The need for according such authority to local administrators has also been recognized in the context of other types of representatives. See, e.g., resolution 1869 (2009), para. 4 ("Reaffirms also the final authority of the High Representative in theatre regarding the interpretation of annex 10 on civilian implementation of the Peace Agreement").

415 As the Permanent Court said, "it is an established principle that the right of giving an authoritative interpretation of a legal rule (le droit d'interpréter authentiquement) belongs solely to the person or body who has power to modify or suppress it." (Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37).

null or set aside the Declaration as an *ultra vires* act of the PISG, or as a violation of the Constitutional Framework, was an authoritative (or at least highly persuasive) interpretation that merits deference[416].

5.66. Fourth, even if one hypothesizes that the Declaration constituted an ultra vires act by the PISG and that it violated UNMIK's Constitutional Framework, Serbia errs in regarding any such action as a violation of *international law.* Such action would only have been a violation of the domestic law applicable in Kosovo – that is local law established for the administration of Kosovo. Indeed, as Spain notes, UNMIK's "set of regulations makes clear that these competences are to be deployed exclusively within the internal sphere", "that the PISG lack competences in the international sphere", that "competences granted to the PISG are internal powers, with no international projection whatsoever" and that "such powers are exercised within Serbia"[417]. As such, any transgression of the powers of the PISG or of the Constitutional Framework would have been a violation of domestic, not international law, and thus fall outside the scope of the question asked of this Court. In this respect, the Declaration of Independence would have been ultra vires only in the same way that most declarations of independence are – as a contravention of the domestic law of the State concerned.

V. The Fact that the Declaration did not Contravene Resolution 1244 (1999) is Consistent with the Security Council's General Practice of Only Imposing Legal Obligations upon States

5.67. The fact that resolution 1244 (1999) did not prohibit the issuance of the Declaration of Independence of 17 February 2008 is consistent with the Security Council's general practice of imposing obligations upon States, not upon other entities or persons.

5.68. As the Court is well aware, the United Nations Charter is a multilateral treaty establishing an international organization and focusing upon rights and obligations of its Member States. The binding nature of Security Council decisions flows from Article 25 of the Charter, which states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with this Charter"[418].

5.69. When acting under Chapter VII, the Security Council "may call upon the Members of the United Nations" when pursuing non-forcible measures to address a threat to the peace[419], whereas forcible measures may include "operations by air, sea or land forces of Members of the United Nations"[420]. Article 48 provides that the "action required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine", while under Article 49 "Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided by the Security Council"[421]. In light of Article 2 (6), the United Nations powers have sometimes been regarded as extended to States that are not Members of the United Nations, though this is controversial[422].

416 Netherlands, p. 4 ("the exercise of delegated power in this case … has been generally accepted in practice.") Indeed, it should be noted that the Constitutional Framework itself is simply a regulation of UNMIK, which can be altered, amended, and interpreted at any time by the SRSG.

417 Spain, para. 17; see also Argentina, para. 62 ("The Provisional Institutions of Self-Government … were conceived as a local governing institution …").

418 United Nations Charter, art. 25.

419 Ibid., art. 41.

420 Ibid., art. 42.

421 Ibid., arts. 48-49. China asserts that resolution 1244 (1999) was adopted in accordance with this Article 49. See China, p. 2.

422 Article 2 (6) provides that the United Nations "shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".

5.70. Such provisions help explain why the dominant and natural focus of the Security Council when adopting resolutions is upon the rights and obligations of States. This is not to say that the Council has refrained from issuing resolutions that speak to the conduct of entities or persons other than States. The Council, for example, can recognize *existing* legal rules that bind insurgent groups or that bind individuals under the *jus in bello*, and can set up international institutions to prosecute individuals for violations of those rules. The Council can also issue political statements about its attitude toward the conduct of non-state entities, calling upon them to (or demanding[423] that they) pursue a certain course of action, or stating that the Council will not accept a different course of action. The Council can certainly impose upon States the obligation to sanction groups or individuals, such as freezing of asset or travel restrictions. Yet under international law[424], and specifically under Article 25 of United Nations Charter, it is States (not individuals or groups of individuals) that are obligated to accept and carry out the decisions of the Security Council. As such, the authors of the Declaration of Independence cannot be said to have violated any obligation that might have been imposed by resolution 1244 (1999)[425].

5.71. In these proceedings, however, this Court need not address the exact limits on the power of the Security Council in this regard. Instead, it is sufficient to find that when the Security Council seeks to address (and perhaps to bind) non-state entities, it does so expressly and clearly. Although some States assert that the decisions contained in resolution 1244 (1999) are "unambiguously addressed to the Kosovo Albanian leadership and hence are binding on them"[426], in fact there is no demand or even request within resolution 1244 (1999) directed at the "Kosovo Albanian leadership". Nor is there any prohibition on the Declaration of Independence or of other acts that might alter the political status of Kosovo.

5.72. In prior resolutions, the Council made certain political demands of the Kosovo Albanian leadership on certain issues. For example, in resolution 1160 (1998), the Council called "upon the Kosovar Albanian leadership to condemn all terrorist action, and emphasize[d] that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only"[427]. Similarly, in resolution 1199 (1998), the Council demanded "that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe", and further called upon "the authorities of the Federal Republic of Yugoslavia, the leaders of the Kosovo Albanian community and all others concerned to cooperate fully with the Prosecutor of the International Tribunal for the Former Yugoslavia in the investigation of possible violations within the jurisdiction of the Tribunal"[428]. Yet the Council made no such requests or demands upon the Kosovo Albanian leadership in resolution 1244 (1999) of any kind, let alone with respect to a declaration of independence.

5.73. Some States argue that resolution 1244 (1999) binds the PISG by virtue of Chapter 2 of the Constitutional Framework, which states that the PISG and their officials shall exercise their authorities consistent with resolution 1244 (1999)[429]. Yet such an argument is misguided; the SRSG had no power to transform a Security Council resolution that does not bind an entity into one that does[430]. At best, the

423 See Argentina, para. 75.

424 Compare Vienna Convention on the Law of Treaties, 23 May 1969, Arts. 34 and 35, United Nations, Treaties Series, vol. 1155, p. 331 (providing that a treaty "does not create either obligations or rights for a third State without its consent" and that an obligation from a treaty arises for a third State only if it "expressly accepts that obligation in writing").

425 Indeed, if Cyprus is correct that the Security Council could not itself grant Kosovo independence (Cyprus, paras. 100-103), then there is no principled basis for finding that the Council has the power to forbid any modification of territorial title that is not prohibited under general international law.

426 Russian Federation, para. 24.

427 Security Council resolution 1160 (1998), para. 2 [Dossier No. 9].

428 Security Council resolution 1199 (1998), para. 2 [Dossier No. 17].

429 Romania, para. 14.

430 See Russian Federation, para. 27 (the Constitutional Framework is "secondary and subordinate to the legal regime created by Resolution 1244").

SRSG incorporated into his Regulation (the Constitutional Framework) certain standards existing in resolution 1244 (1999), such that a transgression of those standards by the PISG would violate the Regulation. As was indicated in the prior section, however, there was no violation of the Regulation, since (1) the persons who adopted the Declaration were not the PISG, (2) the Declaration was adopted as part of the transition from interim to final status, and thus was not by an interim institution, and (3) the Declaration cannot be seen as violating the Constitutional Framework given the inaction of the SRSG in setting the Declaration aside. In any event a violation of the Constitutional Framework would not have been a violation of international law, only of the local law applicable in Kosovo.

5.74. In short, given the orientation of the United Nations Charter in setting forth the powers of the Security Council and the overall practice of the Council in taking measures that bind only States, the lack of any mention of non-State entities in resolution 1244 (1999) confirms that the Council did not seek in resolution 1244 (1999) to prohibit, by imposing an obligation under international law, the conduct of a non-State entity in issuing a declaration of independence.

PART IV

SUMMARY AND CONCLUSION

CHAPTER VI

SUMMARY

6.01. In this concluding Chapter, the Republic of Kosovo reiterates some of the key elements that were identified in earlier Chapters and in its first Written Contribution (Section I). The Chapter then summarises Kosovo's the legal arguments as set out its first Written Contribution and in the present Contribution (Section II). I. Key Elements

The situation of Kosovo entailed special characteristics that are unlikely to be replicated in other cases

6.02. The emergence into statehood of the Republic of Kosovo occurred under circumstances that are very unlikely to be replicated elsewhere. Kosovo is best seen not as an example of secession, but as the final step in the process of a disintegrating Federation (the former SFRY).

6.03. Kosovo's status within the Federation gave Kosovo important protections against unilateral actions by Serbia, which could not survive the dissolution of the SFRY, as was amply demonstrated throughout the 1990s, culminating in Serbia's devastating crimes against the Kosovo Albanian population in 1998 and 1999, 90 percent of whom were forced from or fled their homes. The crimes against humanity and massive human rights violations of the 1998-1999 were identified by the Security Council as a threat to the peace and resulted ultimately in the intervention of the international community.

6.04. Under Security Council resolution 1244 (1999), Serbia was excluded from any role in the governance of Kosovo, replaced instead by UNMIK and Kosovo institutions nurtured by UNMIK from 1999 onwards.

6.05. Further, resolution 1244 (1999) called for a political process on final status that would be predicated upon certain key factors, in particular the will of the people ofKosovo, and not on the consent of the FRY or of Serbia. The political process on final status was led by the United Nations Secretary-General and his Special Envoy, involved extensive negotiations over a lengthy period, and concluded after the relevant United Nations officials determined that further negotiations were pointless, that the status quo was unsustainable, and that independence was the only viable option.

6.06. Such characteristics are quite special in nature, such that the emergence of Kosovo as an independent State is not a precedent for the emergence of other States where similar factors do not exist.

Final Status for Kosovo was the Last Stage of the Break-up of the SFRY

6.07. Kosovo's Declaration of Independence was the last stage of the non-consensual dissolution of the SFRY. Serbia's destruction of Kosovo's autonomy in 1989, in a concerted effort to dominate the SFRY, was an important element in the chain of events leading to Yugoslavia's collapse. The break-up of the Federation, which had consisted of eight federal units, fundamentally undermined the basis for Kosovo's autonomy within Serbia. Before the break-up, Kosovo had had a dual nature: it was a constituent unit of the Federation (on an equal footing with the six republics), and it was an autonomous province within Serbia. With the disintegration of the SFRY, the constitutional safeguards could not be re-estab

lished. The unacceptability of any solution other than independence was confirmed by the brutal way in which Serbia destroyed Kosovo's autonomy in 1989, by the events of the 1990s, and by the terms of the 2006 Constitution of the Republic of Serbia. Other former units of that Federation also have become independent States, and their independence is universally accepted.

The people of Kosovo have long made clear their overwhelming desire for independence

6.08. The desire of the people of Kosovo to determine freely their political status goes back many years. This desire was clear to all the participants in the 1999 Rambouillet Conference and was recognized through the "will of the people" clause in the Rambouillet Interim Agreement as the key element in resolving Kosovo's final status. It was clear immediately after the 1999 conflict when resolution 1244 (1999) expressly referred to the Rambouillet accords, it was clear throughout the period of UNMIK administration, and itwas fully discussed and considered throughout the final status negotiations. Key participants in those negotiations, such as the Contact Group, repeatedly said that the final status must be acceptable to the people of Kosovo.

The crimes against humanity and human right abuses suffered by the people of Kosovo in 1998/1999 reinforced their demands for independence, and their unwillingness to return to Serbia

6.09. The people of Kosovo suffered human rights abuses in 1912, in the 1920s and 1930s, between 1945 and 1966, and throughout the 1980s and 1990s, culminating in the 1998-1999 ethnic cleansing, crimes against humanity, and the massive refugee and IDP crisis. This suffering was the result of a deliberate policy of the authorities of Serbia[431].

Final status negotiations had reached an impasse by the end of 2007; prolongation would have been highly destabilising for Kosovo and the region

6.10. By December 2007, at the latest, final status negotiations had reached a deadend, and it was clear that their continuation would serve no purpose, as has been recognized by those most closely involved in these negotiations, including Special Envoy Ahtisaari[432], the Troika[433], and the United Nations Secretary-General[434]. It was also the considered view of many in the international community that to prolong the uncertainty caused by the protracted negotiations would be destabilising within Kosovo, given the expectations of the people of Kosovo, and within the region[435]. There can be no obligation to continue to negotiate in such circumstances[436]. More than one year later, there can be no question of resuming final status negotiations, as repeatedly and publicly suggested by Serbian authorities and as appears to be a principal motive for Serbia having instigated the present proceedings. Doing so would be pointless, destabilizing, and doomed to failure. The Declaration of Independence of 17 February 2008, the adoption, entry into force andimplementation of the Constitution of the Republic of Kosovo, the establishment of fullyfunctioning sovereign governing institutions, the widespread recognition of Kosovo and its admission to international organizations, and above all the will of the people of Kosovo make clear that Kosovo's independence is irreversible.

6.11. In any event, these proceedings are for the provision of advice to the General Assembly. It would not be appropriate for the Court to treat this matter as a contentious proceeding by calling upon the two States to resume final status negotiations. In fact, were the issue before the Court to be seen as essentially a bilateral dispute over which the Court does not have contentious jurisdiction, then the Court should decline to address the matter through these advisory proceedings.

431 See the ICTY Trial Chamber in its 26 February 2009 judgment in Milutinović et al.
432 Kosovo, para. 5.22.
433 Ibid., para. 5.33.
434 Ibid., para. 5.34.
435 Ibid., paras. 5.11-5.14.
436 See paras. 5.28-5.30 above.

6.12. The Republic of Kosovo hereby reaffirms its wish for good neighbourly relations with the Republic of Serbia. It repeats that it would welcome talks with the Republic of Serbia on practical issues of mutual concern, such as those foreseen in the Ahtisaari Plan. Such talks would be normal between neighbouring sovereign and independent States but must be held on an equal basis, between two sovereign States. On the other hand, the Republic of Kosovo is not willing to enter into negotiations that could bring into question its status as a sovereign and independent State.

Kosovo has been recognized as a sovereign and independent State by many States, including almost all States in the region, and admitted to international organizations

6.13. Since 17 February 2008, the day on which the representatives of the people of Kosovo voted upon and signed the Declaration of Independence, many States have recognized Kosovo as a sovereign and independent State, while others have taken steps that imply recognition. Indeed, most European States have recognized the Republic of Kosovo, including all of its immediate neighbours, with the exception of Serbia. Within Europe, it is widely agreed that Kosovo's status as a sovereign and independent State is an important factor for peace and security in the region.

6.14. Since the Declaration of Independence, many steps have been taken by Kosovo to implement the commitments made to the international community regarding protectionsfor communities, rule of law, respect for international agreements, and cooperation with international institutions.

6.15. The Republic of Kosovo is participating as a sovereign and independent State in international relations through the establishment of diplomatic relations, the conclusion of treaties and its participation in international organizations. In particular at the end of June 2009, Kosovo became a member in the IMF and the World Bank institutions following an overwhelming vote in its favour. Kosovo has received much help from the international community, including from many States that have not yet taken the step of according formal recognition.

The common future for the States of the Western Balkans lies in Europe

6.16. In its Presidential statement of 26 November 2008, the Security Council welcomed "the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans, thereby making a decisive contribution to regional peace and stability"[437].

6.17. The common future for Kosovo and Serbia lies in eventual membership in the European Union. In the meantime, the development of good-neighbourly relations, as is normal between neighbouring States, should proceed hand-in-hand with progress towards full integration within European institutions, including the EU and the Council of Europe. This is a positive prospect, one looking toward the future, not rooted in the past.

II. Summary of Kosovo's Legal Arguments

The question posed to the Court may not be proper

6.18. The process by which the question was formulated, considered, and then adopted provides no indication as to how the Court's opinion will assist the GeneralAssembly in its work. Rather, the pur pose of the question appears to be part of a strategy by Serbia to influence States in their political decision

437 Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008 [Dossier No. 91].

about whether to recognize theRepublic of Kosovo. Yet in the course of exercising its advisory jurisdiction, the Court is not charged with providing general legal advice on any question of international law to whomever might solicit it; the Court is charged with providing advice to the political organs of the United Nations and the specialized agencies on matters within their competence.

The question put to the Court is narrow in scope

6.19. The question that has been put to the Court is narrow in scope, with a focus on the issuance of a particular statement – a declaration of independence – by particular persons on a particular day. This has been recognized by Serbia, the author of the question and sole sponsor of General Assembly resolution 63/3.

In so far as the question asked to the Court is argumentative and prejudicial, these elements should be disregarded

6.20. The question was drafted by a single State that declined to entertain any modifications contains prejudicial and argumentative assumptions. The question characterizes the Declaration of Independence as "unilateral", a term that at best is superfluous and at worst intended as a synonym for "illegal". Further, the question incorrectly suggests that the Declaration was adopted by the "Provisional Institutions of Self-Government of Kosovo", when it was an act voted upon and signed by the democratically elected representatives of the people of Kosovo, acting in a manner wholly different from the PISG Assembly let alone the several institutions that collectively comprise the PISG. Finally, the question appears unjustifiably to assume that there are rules of international law governing the issuance of declarations of independence, when in fact general international law does not regulate such declarations.

There are no rules of international law prohibiting the issuance of a declaration of independence

6.21. International law contains no prohibition on the issuance of declarations of independence. Rather, the issuance of a declaration of independence is understood as a factual event that, in combination with other events and factors, may or may not result inthe emergence of a new State. If a State emerges, only at that point does the new State become exposed to rights and obligations under international law. Consequently, the Declaration of Independence of 17 February 2008, as a factual event, did not contravene any applicable rule of international law and in that sense was "in accordance" with international law.

The principle of sovereignty and territorial integrity did not prevent the issuance of the Declaration of Independence

6.22. The principle of sovereignty and territorial integrity is not a rule prohibiting the issuance of a declaration of independence. Rather, the principle is applicable only in Stateto- State relations, as is amply clear in the relevant provisions of the United Nations Charter, the Court's jurisprudence and relevant international instruments. Moreover, the principle is aimed at prohibiting the use or the threat of force by a State against the territorial integrity or political independence of another, or, more specifically, against established international boundaries. It is not shaped to protect a State against internal developments, such as the issuance of a declaration of independence. Consequently, as a matter of international law, Serbia cannot invoke the principle of sovereignty and territorial integrity against the people of Kosovo and their democratically elected representatives.

Even if it were necessary to demonstrate that the people of Kosovo had a right to issue the Declaration of Independence, they had the right to do so.

6.23. The Court need not reach the issue of whether the Declaration of Independence of 17 February 2008 reflected an exercise of the right of self-determination, for there is no need to determine whether international law has authorized Kosovo to declare independence.

6.24. However, because of the constant denial of self-determination to the people of Kosovo by Serbian authorities since 1989 and continuing right up to the date of the Declaration of Independence (as demonstrated by the 2006 Constitution of the Republic of Serbia), in conjunction with widespread violations of elementary human rights and the perpetration of war crimes and crimes against humanity against the people of Kosovo, the people of Kosovo were clearly entitled, under the internationally recognized right of selfdetermination, to declare independence. No international law rule precluded such an event.

The Declaration did not contravene Security Council resolution 1244 (1999), which envisaged a political process that included the possibility of Kosovo's independence if it was the "will of the people"

6.25. The Declaration of Independence of 17 February 2008 did not contravene Security Council resolution 1244 (1999). Rather than prohibit the issuance of a declaration of independence, resolution 1244 (1999) established a status-neutral framework that included the possibility of Kosovo's emergence as an independent State. 6.26. In the negotiations which took place at Rambouillet prior to the adoption of resolution 1244 (1999), the FRY and Serbia sought to include language that would ensure a final status solely of Kosovo autonomy within Serbia, with no further changes in the absence of FRY/Serbian consent. Those efforts failed; instead, the final text of the Rambouillet negotiations contained a clause that focused on final status that reflected the "will of the people". Although the Rambouillet accords were not agreed to by the FRY/Serbia, they became the touchstone for Kosovo's final status in the political process identified in resolution 1244 (1999).

6.27. Nothing in the text of resolution 1244 (1999) precluded independence as the final status for Kosovo. The operative part of resolution 1244 (1999) made provision primarily for an interim period, during which Kosovo was placed under international administration. The resolution did not prejudge any final status outcome and favoured neither autonomy nor independence; indeed, it has been characterized by the Secretary- General as establishing a "status-neutral framework". Further, while all solutions were left open, the resolution clearly did not require a final status settlement predicated upon FRY or Serbian consent. Rather, UNMIK was charged with facilitating a political process that would take into account the Rambouillet accords, meaning a process largely driven by the "will of the people". 6.28. References within Security Council resolution 1244 (1999) or as contained in previous resolutions of the Security Council to FRY/Serbia's territorial integrity, or to the fact that Kosovo was part of Serbia have to be interpreted in light of this clear understanding. Further, references to "territorial integrity" in resolution 1244 (1999) must be understood as references to inter-State relations, as previously discussed and, in any event, only related to the "interim political framework" envisaged by resolution 1244 (1999). As such, these references did not prejudge the outcome of the final status political process.

6.29. While a further Security Council decision was no doubt viewed as politically desirable, resolution 1244 (1999) did not require any such decision. Indeed, the process and substance identified in the resolution for guiding this process were consciously openended and identified as "political" in nature.

The political process envisaged by resolution 1244 (1999) ended in 2007 when the authorized representatives of the United Nations determined that independence was the only viable option

6.30. In 2005, the Secretary-General, after consulting the Security Council, launched the political process for the determination of Kosovo's final status. The outcome of that process was a determination by President Ahtisaari, the United Nations Special Envoy appointed by the Secretary-General, that the "potential to produce any mutually agreeable outcome on Kosovo's status is exhausted"[438] and that "the only viable option for Kosovo is independence"[439]. Given the acceptance by the Secretary-General that further negotiations would be fruitless and that independence was the only viable option, it cannot be said that a declaration of independence by the democratically elected representatives of Kosovo contra-

438 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].

439 Ibid., para. 5.

vened resolution 1244 (1999). Rather, the declaration was an obvious and necessary step in the process of achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very persons (the Secretary-General and his Special Envoy) charged by the Security Council with leading the final status process.*The Declaration was not declared unlawful by the SRSG, the United Nations official authorized to monitor implementation of resolution 1244 (1999)*

6.31. Under the mandate assigned to the Special Representative of the Secretary- General (SRSG) by resolution 1244 (1999), as well as the terms of the Constitutional Framework promulgated by the SRSG in 2001, it would be expected that the SRSG would declare null and void any acts of the Kosovo Assembly that were regarded as inconsistent with resolution 1244 (1999). Any United Nations mission deployed under the direction of the Secretary-General is expected faithfully to execute the tasks assigned to it, in close consultation with United Nations officials in New York if important issues of interpreting that mandate arise. As such, the SRSG would have been expected to annul a declaration of independence if he regarded necessary to do so in order to implement resolution 1244 (1999), just as he had taken steps at earlier stages against actions of that nature prior to the completion of the Ahtisaari process. The fact that the SRSG did not do so indicates that the Declaration did not contravene resolution 1244 (1999).

The Declaration did not violate resolution 1244 (1999) as an ultra vires act of the PISG or as a contravention of the Constitutional Framework

6.32. Contrary to allegations to this effect, the Declaration of Independence of 17 February 2008 did not violate resolution 1244 (1999) as an ultra vires act of the PISG. It was not the PISG which issued this Declaration, but the democratically elected representatives of the people of Kosovo. As shown by the text and the form of the Declaration, as well as the specific circumstances under which it was read out, voted upon and signed, the representatives of the people of Kosovo did not purport to act, on that day, as either the PISG or one of its parts.

6.33. Even if the Court were of the opinion that the Declaration was an act of the PISG, it was not ultra vires. The Declaration was not an act of an interim institution transgressing its limited authority; rather, it was the act of a constituent body declaring in the name of the people its readiness to receive the transfer of governing authority on a permanent basis, as contemplated by resolution 1244 (1999). Furthermore, the SRSG, the competent authority to set aside unlawful acts of the PISG, did not annul the Declaration ofIndependence. His judgment constitutes an authoritative interpretation that no violation of the relevant UNMIK regulations occurred.

6.34. In any event, even if one of the PISG had acted not in accordance with the Constitutional Framework by overstepping its competence, that would not have constituted a violation of public international law. Any action beyond the powers of the PISG or of the Constitutional Framework would have been contravened domestic or local rules, not rules of public international law. The Constitutional Framework, as its name indicates and like the many other regulations issued by the SRSG, set up a legal framework on the internal sphere of Kosovo. Given their non-international nature, any transgression of these rules falls outside the scope of the question before the Court.

6.35. Regarding the Declaration as not in contravention of resolution 1244 (1999) is consistent with the general practice of the Security Council in only regulating the conduct of states. To the extent that the Council seeks to address the conduct of other entities, it does so clearly and expressly, not through vague or ambiguous language.

6.36. In short, given the terms of resolution 1244 (1999), the process that unfolded based on those terms, and the reaction of the SRSG after the issuance of Kosovo's Declaration of Independence, there is no basis for concluding that the February 2008 Declaration contravened resolution 1244 (1999) or any other any applicable rule of international law.

CONCLUSION

For the reasons set out in its first Written Contribution and in this Further Written Contribution, the Republic of Kosovo respectfully requests the Court, in the event that it deems it appropriate to respond to the request for an advisory opinion contained in General Assembly resolution 63/3, to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

Pristina, 17 July 2009

Skender Hyseni

Minister of Foreign Affairs of the Republic of Kosovo
Representative of the Republic of Kosovo before the
International Court of Justice

ANNEXES

CERTIFICATION

I hereby certify that the documents annexed to this Written Contribution are true copies of and conform to the original documents and that the translations provided by the Republic of Kosovo are accurate.

Pristina, 17 July 2009

Skender Hyseni

Minister of Foreign Affairs of the Republic of Kosovo
Representative of the Republic of Kosovo before the
International Court of Justice

Annex 1

PRESENTATION BY PRESIDENT MARTTI AHTISAARI TO THE ASSEMBLY OF THE REPUBLIC OF KOSOVO, 15 JUNE 2009

Presentation by President Martti Ahtisaari

Chairman of Crisis Management Initiative, former UN SG Special Envoy
for the future status process for Kosovo

Pristina, 15 June 2009

Mr. Speaker, Mr. President, Mr. Prime Minister, distinguished members of the Kosovo Assembly, friends, colleagues, ladies and gentlemen.

I am deeply honored to be here on this momentous occasion, the first anniversary of the Kosovo Constitution. Please accept my warmest congratulations. My deep involvement with Kosovo began many years ago and it is particularly gratifying to see the journey Kosovo has taken this past year. I am also happy to see so many friends here today who worked closely with me for Kosovo and its future.

On this day, I am reminded of the Preamble in the Kosovo Constitution which so eloquently captures the aspirations of this nation as it stands "determined to build a future for Kosovo as a free, democratic and peace-loving country that will be a homeland to all of its citizens."

Kosovo's independence is irreversible and this is evident from the recognitions that continue to arrive from around the world. Acceptance of this reality by all would go a long way toward ensuring stability not only for Kosovo, but for the entire Western Balkans region and indeed for Europe as well.

There is much that Kosovo can be proud of in this past year. Domestically, with the passing of legislation and adoption of a Constitution, addressing concerns of all communities as well as establishing state institutions, remarkable progress has been made. have been deeply impressed as well with efforts made on the international front to setting up of diplomatic representations in key capitals, the recent membership offer from the IMF, and I am sure, offers from the World Bank and other organizations to follow, as well as bilateral meetings that the Kosovo leadership has undertaken in several countries.

I am also particularly impressed by the setting up of the Constitutional Court, the ultimate interpreter and guardian of the Constitution. It represents the launch of the most important body in the institutional architecture of the Constitution.

To Kosovo's partners here, the European Union and the United States, as well a number of other international organizations and NGO's, I offer my deepest thanks as well as encouragement for your efforts and commitment to assisting and advising Kosovo's own efforts in important areas such as rule of law and reforms in key sectors of society. When you declared independence and built the Constitution you took it upon yourselves to implement the Comprehensive Settlement Plan (CSP), and welcomed Pieter Feith as the International Civilian Representative. I congratulate you for the progress made thus far in your pledge and warmly thank Pieter and his team.With Yves De Kermabon leading EULEX efforts in critical rule of law areas, I am fully confident that top expertise is in place to assist Kosovo as it builds and strengthens the structures and processes of law and justice.

Ladies and gentlemen, no tangible progress is ever devoid of challenges. Let us be frank. Kosovo also faces challenges despite the rapid and remarkable progress that it has made thus far. Institutional structures are in deep need of further reforms, economic and social development must be furthered strengthened, the imperatives of accountability and transparency in institution-building cannot be stressed strongly enough. There also remains the task of obtaining full international recognition in the global arena. These challenges are daunting in many ways and therefore I appeal to all ministers, officials and political parties to recognize what is still an issue of common cause—that of building Kosovo into a truly multi-ethnic, democratic state with its European perspective in clear focus.

State and institution-building endeavors necessarily require the participation of all citizens. The Republic of Kosovo will sow the seeds of failure and discord if it does not reach out in an authentic way to those who feel excluded, isolated and disenfranchised. Women's empowerment is also critical and their full participation an imperative in the development of a society. I am keen to see members of the Kosovo Serb as well other ethnic communities, to be full participants in Kosovo's future growth. My Comprehensive Plan is dedicated to ensuring the legitimate place of the Serb community in the new Kosovo. Indeed, the Constitution enshrines the rights of all communities buttressed by a strong rule of law structure.

Let me now turn to my Kosovo Serb friends. It is most important that you take advantage of new opportunities that will present themselves as this nation grows and you must become important stakeholders in the future that your children will inherit from you. There needs to be fuller appreciation of the outreach by the Kosovo leadership toward you and other communities, particularly returnees, and a willingness to trust that responding to these initiatives is in the best interest of all citizens of Kosovo. Building these links is necessary in all places at the local, municipal and state level. I cannot emphasize enough the enjoyment that life can bestow when there is a will to coexist in harmony by people who ultimately share a common destiny and future.

Serbia is a neighbor of Kosovo's and to that end interaction between the two can never cease to exist. The question is what kind of interaction this will be—constructive or destructive? I would wish to remind Belgrade to accept the reality that is now Kosovo and to extend its cooperation to this young nation that has miles to go yet, but whose journey has begun and the horizon beckons toward a brighter tomorrow. Belgrade and Pristina could together find common ground on their place in the world and determine that they could actually move away from adversarial rhetoric and toward coexistence, reconciliation and ultimate friendship.

To the European Union, I would say it is important to remain fully engaged in Kosovo and to find a common position which could help the region, as well as prepare Kosovo for its European perspective. To all the other international agencies and organizations working in Kosovo, I urge you to continue with the important task of preserving and building upon the peace in the Western Balkans. This is a transatlantic task requiring the continued collaboration between the European Union and the United States. Following years of strife, the people of Kosovo and the other countries in this region richly deserve tranquil lives.I have a special message today for the young people of Kosovo. Yours is the future for which we have collectively worked and now arrived at this day. It is up to you to ensure that you build upon our efforts and determine to take your nation from strength to strength. There is so much opportunity for you to engage with each other and through your daily lives as students, friends, colleagues and citizens—you can already set the agenda for your participation in a stable and cosmopolitan Kosovo. So, begin now to imagine a Kosovo that you would be proud to call home and which would be proud of you. Because soon you will be called on to build it.

I stand before you today with a vision in mind for Kosovo. I imagine a few years from now a democratic, modern, multi-cultural, tolerant and prosperous nation, at peace with its neighbors, part of an integrated Europe and widely respected in the world. At the same time, I am a realist and I know that the road will continue to be strewn with obstacles. It is bound to be a long journey and requires your collective wisdom and effort to bring this vision into reality. Working for peace as I have done all my life, I have remained mindful that in negotiating I am vested with the responsibility to influence the destinies of peoples.

This is a responsibility I have never taken lightly and have fought hard to ensure that dignity, opportunity and a chance at peaceful living have been accorded to those on whose behalf I have intervened. Today, I have the unique privilege of witnessing a nation that has indeed taken charge of its own journey into a future which will be of its own making. Kosovo will forever hold a special place in my heart and I am so happy to share this day with you. While other responsibilities may keep me from visiting as often as I might like, please be assured of my continued support and trust in your progress. You have rightly earned this day and with genuine efforts of all the men and women who comprise this very special place. I know that the dream of a new Kosovo is bound to be realized. I also know that the vision of Kosovo as a "homeland to all of its citizens" will be a reality. Again, congratulations on your charter document, now one year old. Be proud of its achievements, dedicated to its vision, and mindful of its obligations.

I thank you.

Annex 2
INTERNATIONAL STEERING GROUP FOR KOSOVO,
PRISTINA, 15 JUNE 2009

(available at http://www.ico-kos.org/d/090615 Eighth ISG meeting ENG.pdf)

Eighth meeting of the International Steering Group for Kosovo

15 June 2009, Pristina, Republic of Kosovo

1. The International Steering Group (ISG) congratulates the citizens of Kosovo on the first anniversary of the entry into force of their Constitution. In the past year the people of Kosovo have made significant progress in building a democratic, multi-ethnic State on the principles of democracy and human rights in accordance with its European perspective. It welcomes the additional recognitions of Kosovo by a number of States as well as its admission to the International Monetary Fund and the World Bank.

2. The Constitution builds on the Declaration of Independence of 17 February 2008 and on the Comprehensive Settlement Proposal (CSP). The ISG appreciates the commitment of the Republic of Kosovo, as enshrined in the Constitution, to implement all the provisions in the CSP. The CSP is the result of the untiring mediation efforts of President Ahtisaari and his team. The ISG feels honoured to have President Ahtisaari and Ambassadors Rohan and Wisner in its midst today. It thanks H.E. President Sejdiu and H.E. Prime Minister Thaci for addressing the ISG.

3. Integration of the Kosovo Serb community as part of a multi-ethnic society in Kosovo remains a key objective. This can be achieved through participation in the forthcoming municipal elections and through engagement in the Government's decentralization initiative which will bring important benefits to the Kosovo Serb community, as well as to the other non-majority communities. Reform of local selfgovernment is highly important to further strengthen municipal governance to the benefit of every citizen, and to promote the inclusion of all in the democratic structures of Kosovo. The ISG urges the Government and all those in positions of responsibility to continue to reach out purposefully to every community in Kosovo in order to address their needs and to find practical and pragmatic solutions to everyday problems.

4.The ISG underlines the importance of Kosovo's regional integration as a prerequisite for economic development.

5. The ISG commends Kosovo for laying the groundwork for a successful election process by taking steps to strengthen the Central Election Commission. It furthermore congratulates Kosovo on the progress achieved in establishing the Constitutional Court and warmly welcomes the recent election of Kosovo's Ombudsperson.

6. The ISG expresses its support to the Government for its efforts to promote the rule of law. In particular, it encourages further efforts aimed at continuing the fight against corruption and organized crime in close cooperation with the EU Rule of Law mission EULEX.

7. Freedom of expression and independent media acting within the law are indispensable elements in a democracy. Accordingly the ISG urges the Government of Kosovo, the Independent Media Commission as well as other relevant actors to do their utmost to promote and strengthen freedom of expression in Kosovo.

8.The ISG reiterates its full support to the efforts undertaken by the International Civilian Representative (ICR) Mr Pieter Feith and the International Civilian Office (ICO). The ISG welcomes the publication on the ICO website (www.ico-kos.org) of an updated ICO Mission Implementation Matrix, demonstrating the progress achieved to date. The ISG looks forward to the review of the ICR's powers to be held at its meeting in February 2010

ORAL STATEMENTS OF THE REPUBLIC OF KOSOVO

H.E. Skender Hyseni:

I. INTRODUCTION

1. Mr. President, Members of the Court, it is an honour to appear before you today. I should say at the outset how grateful we are to the Court for the invitation to participate both at the written stage and at this hearing. These proceedings are of great importance for the people of the Republic of Kosovo, who are following them with keen attention.

A. Kosovo today

2. The question before the Court concerns a particular Declaration of Independence that was issued on a particular day in February 2008. But allow me first to say a few words about the position of Kosovo today, so as to provide important context to these proceedings.

3. Just a few months after issuance of the Declaration of Independence, the Constitution of the Republic of Kosovo came into force in June 2008. This Constitution is consistent with the Settlement developed in 2007 by the Secretary-General's Special Representative, President Ahtisaari, for Kosovo's independence. Kosovo's Constitution is a modern constitution, which does reflect the highest international standards of human and minority rights. It protects the rights of all citizens of Kosovo and gives special rights to the various communities that live in Kosovo. The people of Kosovo are very proud of this foundational document.

Minister Hyseni addressing the Court on the 1st of December 2009

4. The institutions of the Republic, comprising all three branches of government, are well-established. As provided in the Constitution, an Assembly exists for debating and enacting legislation and has to date passed around 120 laws. Further, a wide range of ministries implement Kosovo's laws on matters such as foreign affairs, trade, commerce, environmental protection, labour relations, agriculture and other important matters. An extensive array of civil and criminal courts operate in Kosovo at both the trial and appellate levels to enforce these laws, and the Constitutional Court began functioning earlier this year.

5. These laws cover crucial areas foreseen in the Ahtisaari Settlement, such as decentralization of local government, protection of minority rights, and protection of cultural and religious heritage. Both the new Constitution and the adoption and enforcement of these laws have created the basic prerequisites to implement the Ahtisaari Settlement in its entirety.

6. Despite the contrary assertions of Serbia, and indeed despite Serbian pressure, Kosovo Serbs are increasingly taking part in institution building in Kosovo. Reconciliation among all of our communities has been a standing priority of the institutions of the Republic of Kosovo. A Community Consultative Council has been established within the Office of the President of Kosovo, and the Prime Minister has established a Special Office for outreach to the minority ethnic communities.

7. The Constitution of the Republic of Kosovo and a number of laws govern the conduct of elections in Kosovo. The Law on General Elections, as well as that on Municipal Elections, was passed in June 2008. The Kosovo Central Election Commission was thus fully charged with the organization and conduct of the 15 November 2009 elections for the assemblies and the mayors of 36 municipalities across Kosovo. I am pleased to announce to the Court that the participation of non-majority communities in the November elections was sizeable. Out of 74 entities certified to contest these elections, 40 represent various minority communities. Twenty-two were Kosovo Serb political entities. The participation of the Serb community members in these elections was satisfactory in spite of the calls from Belgrade for a boycott. In a resolution adopted last Thursday, on 26 November, the European Parliament welcomed "the unprecedented good participation of Kosovo Serbs" and it regarded "[t]his as an encouraging indication that the Kosovo Serb community is willing to take up its responsibilities in the Kosovo institutions". There is a new momentum in building up a multiethnic Kosovo.

8. Observer missions to the 15 November elections in their eventual statements described those elections as free, fair and democratic. The European Parliament Ad Hoc Delegation welcomed in its statement the "ongoing decentralization process and peaceful election day in Kosovo". The European Union presidency statement "welcomed the orderly conduct of municipal elections", as well as a broad participation of different ethnic groups. The orderly conduct of the November elections was also welcomed in individual statements by many Governments and observer missions from Europe and elsewhere. Very positive reactions on elections came from NATO Secretary-General, European Union Special Representative in Kosovo, Ambassadors from various States accredited to Pristina, and various national and international NGOs. And the Special Representative of the Secretary-General "considered the trend towards more active participation by the Kosovo Serb community as an encouraging step towards longer term reconciliation and integration with the local community".

9. The international community has played a vital role in securing peace and security, and in bringing hope to the people of Kosovo. The United Nations Mission in Kosovo (UNMIK) provided important support for the people of Kosovo, in preparing our institutions so that they would be ready for independence. Following independence, EULEX is now providing assistance in the Rule of Law sector. The people of Kosovo are grateful for all the contributions made, and being made, towards our development.

10. As for our relations with other States, 63 nations around the world have recognized Kosovo as a sovereign and independent State. The vast majority of States in Europe have recognized Kosovo, including all of our immediate neighbours, except Serbia. Other States have taken steps that indicate clear acceptance of Kosovo's sovereignty. A total of 109 States supported Kosovo's membership in the International Monetary Fund and the World Bank.

Minister Hyseni, Sir Michael, Mr. Muller and Professor Murphy

11. Kosovo has entered into diplomatic relations with many States. We now have 21 diplomatic missions and nine consular posts across the world. We have entered into a number of bilateral treaties, including with Albania, Austria, Denmark, Luxembourg, Slovenia, Turkey and the United States of America. On 17 October this year, we concluded a border agreement with the Republic of Macedonia, as foreseen in the Ahtisaari Settlement. We have recently concluded our first treaty succession agreement, with Belgium. Senior officials of Kosovo continue to have numerous bilateral and international meetings with their opposite numbers from other States, with both inward and outward visits.

12. Mr. President, Members of the Court, we are at peace today but, as you know, there was a time when the situation in Kosovo was different. This is well documented, including in the Yugoslav Tribunal's Milutinović judgment of February this year. We cannot and should not forget the crimes against humanity and other horrors that were inflicted upon the people of Kosovo; such things must never happen again.

13. Yet, Mr. President, we in Kosovo are firmly committed and determined to look towards the future. There is now, finally, peace and security in Kosovo, and in the region; we are determined to preserve that peace. There are now constitutional protections of human rights in Kosovo, and in the region; we are determined to preserve those protections. Now it is more certain than ever before that the common future for both Kosovo and Serbia lies in eventual membership for both States in the European Union, as contemplated in the European Commission's latest report in October. Indeed, the future for all seven States of the western Balkans lies in European integration.

14. We also look forward to the day when we will be able to take our place as a Member of the United Nations. The commitments expressed in our Declaration of Independence and in our Constitution demonstrate our willingness to assume the responsibility of such membership. Indeed, the Government has adopted a draft law to enable Kosovo to implement Security Council sanctions, which the Assembly is expected to adopt shortly.

B. The impossibility and futility of further status negotiations

15. Mr. President, Members of the Court, with all that has happened, it is inconceivable that we could accede to Serbia's call to turn the clock back - to pursue further negotiations on whether Serbia will or will not accept Kosovo as an independent State. That would be highly disruptive, and could even spark new conflict in the region. Kosovo's independence is irreversible and that will remain the case, not only for the sake of Kosovo, but also for the sake of sustainable regional peace and security, to which Kosovo's independence has so greatly contributed.

16. As the Court will recall, by 2005 there was widespread agreement within the international community that the status quo in Kosovo was unsustainable. Consequently, intensive negotiations took place throughout 2006 and 2007 on Kosovo's final status, including on issues such as decentralization, protection of cultural and religious heritage, and minority rights. The United Nations Special Envoy, Martti Ahtisaari, now a Nobel Peace Prize winner, prepared a detailed Settlement, including a package of measures to protect Kosovo's minorities and a recommendation of independence for Kosovo. In doing so, President Ahtisaari recognized that there was no way that Kosovo and Serbia could remain together in the same State after the horrific events of the 1990s. The Settlement was endorsed by the European Union and NATO. It was fully supported by the United Nations Secretary-General. It enjoyed widespread international support. But it was rejected by Serbia.

17. After a period of discussions in the Security Council and the despatch of a Security Council mission to the region, the Contact Group, consisting of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States, proposed that a "troika" of officials from the European Union, the Russian Federation, and the United States make one last effort to find common ground between Pristina and Belgrade. German Ambassador Wolfgang Ischinger stated at the outset of this effort that no stone should be left unturned in an effort to reach a mutually acceptable solution.

Kosovo Delegation to Public Hearings

18. Kosovo did engage in the troika-led talks, actively and in very good faith. Yet a mutually acceptable outcome was still not possible, first and foremost because of Serbia's intransigence in seeing Kosovo as simply a piece of territory that Serbia must possess, with no regard whatsoever to the hopes, aspirations, and fears of the people living on the land.

19. With no stone having been left unturned, the people of Kosovo had to move forward. Lack of clarity about status was holding back our economy, discouraging international investment and preventing us from accessing international financial institution lending. Lack of clarity about status was preventing the people of Kosovo from taking full ownership over their own democratic institutions. In short, lack of clarity was denying the people of Kosovo, and indeed the entire region, of a clear roadmap for the future. We were exhausted after two decades of isolation, war and political uncertainty.

20. Lacking any agreement between Kosovo and Serbia, independence was the solution endorsed by Special Envoy Ahtisaari. Independence was the solution endorsed by the United Nations Secretary-General. Independence was the solution advocated by many members of the international community, including States within Europe and the Balkans, for they understood that to prolong Kosovo's uncertain status would have been greatly destabilizing, threatening the peace in Kosovo, and in the region, that the international community had striven so hard to achieve. So independence was the course that was ultimately pursued by the people of Kosovo through their democratically-elected representatives on 17 February 2008.

21. Those who today call for renewed negotiations either are unaware of the situation and the great efforts made to achieve consensus or, worse, actively seek to create disorder in the region. Those who have recognized Kosovo in the region, in particular all of Kosovo's immediate neighbours except Serbia, have continually emphasized this point.

C. The Declaration of Independence

22. Mr. President, I now address more specifically the Declaration of Independence that was issued by the representatives of the people of Kosovo on 17 February 2008.

23. The Declaration is reproduced at Annex 1 to our first Written Contribution. After several preambular provisions, there are 12 operative paragraphs. Paragraph 1 states: "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state."

24. As expressed in our Declaration, as well as in our Constitution, Kosovo is committed to international law, including binding resolutions of the Security Council. That commitment has never wavered. Each time I have been to the Security Council this year, I have reiterated this commitment.

25. Another important aspect of the Declaration of Independence was the commitment, in paragraph 2, to the principles of democracy, secularism, multi-ethnicity, and non-discrimination. The fundamentals of human rights are essential to Kosovo. In paragraph 3, we accepted fully all of the obligations for Kosovo contained in the Ahtisaari Settlement, including the protection and promotion of the rights of all communities in Kosovo.

26. The final aspect of the Declaration of Independence that I wish to highlight is that it was issued in the name of the people of Kosovo, by their democratically-elected representatives meeting in an extraordinary session, as a constituent body in Pristina, as a number of States have rightly stressed in their written statements[1]. Issuance of the Declaration was not an act of the "Provisional Institutions of

1 Kosovo, Further Written Contribution, para. 1.23. See, e.g., Austria, para. 8; Germany, pp. 6-7; Luxembourg, para. 13;

Self-Government" (PISG), or of the Assembly of Kosovo acting as one of the PISG. As I have explained to the Security Council in June this year: "the independence of the Republic of Kosovo was declared by elected representatives of the people of Kosovo, including by all . . . representatives of non-Albanian communities except the members of the Serb community" [2].

27. The Declaration of Independence was the manifestation and realization of the will of the people of Kosovo. The will of the people of Kosovo to determine freely their political status goes back many years. This was clear to all participants in the 1999 Rambouillet Conference. It was recognized through the "will of the people" clause in the Rambouillet Interim Agreement as the key element in resolving Kosovo's final status. It was clear immediately after the 1999 conflict, when resolution 1244 expressly referred to the Rambouillet Accords. It was clear throughout the period of UNMIK administration, and it was fully discussed and considered throughout the final status negotiations.

D. Kosovo's future relations with Serbia and the region

28. Notwithstanding the difficulties of the past and suffering that the people of Kosovo have been through, we still wish for good neighbourly relations with Serbia. We would welcome talks with Serbia on practical issues of mutual concern. Indeed this was what was foreseen in the Ahtisaari Settlement, which we wholeheartedly accepted in our Declaration of Independence. Such talks would be normal between neighbouring sovereign and independent States.

29. But any such talks must be held on an equal basis, between two sovereign States. We could not enter into negotiations that would bring into question our status as a sovereign and independent State. There can be no going back. Any attempt to do so would be severely destabilizing and dangerous to peace and security in the region.

30. Regional stability and co-operation with all our neighbours remains one of Kosovo's key priorities. We hope that, in due course, the Republic of Serbia will join in the efforts of the other countries in the western Balkans to establish an environment of co-operation and understanding throughout the region.

E. Presentation of legal argument

31. Mr. President, Members of the Court, we continue to rely on what is said in our Written Contribution of April of this year and in our Further Written Contribution of July. A considerable number of United Nations Members have submitted written statements and comments, or will address the Court during this hearing, in support of the position that the Declaration of Independence did not contravene any applicable rule of international law. We appreciate their support.

32. Mr. President, our counsel will take you through the main elements of our case, leading to our request to the Court, if it deems it appropriate to answer the question, to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

33. Mr. President, I would now most kindly urge you to invite Sir Michael Wood to continue the presentation of Kosovo's case. I thank you very much for your attention.

The PRESIDENT: I thank His Excellency, Mr. Skender Hyseni, and now call upon Sir Michael Wood.

Switzerland, para. 79; United Kingdom, para. 1.12; United States of America, pp. 32-33.

2 Security Council, Provisional Verbatim Record, Sixty-Fourth Year, 6144th Meeting, 17 June 2009, S/PV.6144, p.

Sir Michael WOOD:

II. SUMMARY OF LEGAL ARGUMENT AND OF THE FACTUAL BACKGROUND

1. Mr. President, Members of the Court, it is an honour to appear before you in these proceedings.

2. I propose, first, to give a brief overview of our legal case. Then, I will take you through some of the main events between 1998 and 2007, that form the essential background to the issuance of the Declaration of Independence. My colleagues Mr. Daniel Müller and Professor Sean Murphy will then deal in more detail with the legal issues.

A. Summary of legal argument

3. Our legal arguments may be summarized in five propositions.

Sir Michael Wood

4. First, the Court will need to consider the propriety of answering the question put by the General Assembly. We note that a number of States have raised serious questions in this regard[3] .

5. Second, as many States have made clear in their written pleadings, the General Assembly's question to the Court is narrow and precise[4] . The question relates solely to the Declaration of Independence that was issued on 17 February 2008. It does not concern questions of statehood, it does not concern questions of recognition or membership in international organizations. On that, at least, there seems to be a measure of agreement today. We shall not, for this reason, react to what Professors Shaw and Kohen said this morning about Kosovo's statehood today. We have set out our position on this in our written pleadings, in particular in Chapter 2 of our Further Written Contribution. There is no doubt that Kosovo is today a sovereign and independent State. The description we heard this morning of the current position of the international actors in Kosovo has no basis in reality, as we have explained carefully in our Further Written Contribution.

3 See the Written Statements of the Czech Republic, pp. 3-5; France, pp. 15-33, paras. 1.1-1.42; Albania, pp. 30-37, paras. 54-70; the United States of America, pp. 41-45; and Ireland, pp. 2-4, paras. 8-12, as well as the Written Comments of France, pp. 1-10, paras. 4-23); Albania, pp. 24-26, paras. 39-43; and the United States of America, pp. 10-12.

4 See the Written Statements of the Czech Republic, p. 6; France, p. 36, para. 2.3; Austria, p. 3, para. 2; Egypt, pp. 3-4, para. 7; Germany, pp. 5-6; Poland, p. 4, para. 2.1; Luxembourg, pp. 5-6, paras. 9-12; the United Kingdom, p. 25, para. 1.16; the United States of America, pp. 45-46; Serbia, pp. 26-27, paras. 19-23; Spain, p. 7, para. 6 (iii); Estonia, p. 2; Japan, pp. 1 and 2; and of Denmark, p. 2. See also the Written Comments of Norway, p. 3, para. 7; Serbia, p. 28, para. 45; Germany, p. 3; the Netherlands, p. 2, para. 2.1; the United Kingdom, p. 5, para. 9; and of the
United States of America, p. 10.

6. Third, the third proposition is that general international law does not contain rules by which the legality of a declaration of independence, like that of 17 February 2008, may be assessed. In particular, the principle of sovereignty and territorial integrity could not have operated to prohibit the issuance of the Declaration.

7. Fourth, nothing in Security Council resolution 1244 of 1999 precluded the issuance of the Declaration of Independence in 2008.

8. Our fifth point is that some States, in their written pleadings, have focused on the principle of self-determination. We refer to it only as a subsidiary or alternative point. We do not consider that the Court need reach the issue. But, if it does, we are clear that in February 2008 the people of Kosovo were entitled to exercise the right of self-determination, and they did so by choosing independence. We share the views of the many States, such as Albania and Switzerland, which have reached this conclusion[5] .

B. Principal events

9. Mr. President, Members of the Court, I now turn to the main events leading to the issuance of the Declaration of Independence, that was done in the name of the people of Kosovo, now nearly two years ago, on 17 February 2008. I do so because it is important to understand the context in which that Declaration came about.

10. The Milutinović judgment of a trial chamber of the Yugoslav Tribunal, given on 26 February 2009, contains an authoritative and thorough account of many of the factual issues relevant to the present proceedings [6]. The Yugoslav Tribunal covered in depth such issues as the dual nature of Kosovo within the Socialist Federal Republic of Yugoslavia, the SFRY, and Serbia, prior to 1989[7] ; it covers the events of 1989, when Kosovo's status as a federal unit was illegally removed by the Federal Republic of Yugoslavia's President, Slobodan Milošević[8] ; and it covers in detail the events preceding the atrocities of 1998-1999[9] ; and those atrocities themselves[10] .

11. The Milutinović judgment constitutes, to use the words of this Court in its 2007 Judgment in the Bosnia v. Serbia Genocide case, "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature" (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 131, para. 213; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 35, para. 61). In that Judgment - the Genocide Judgment - this Court, after carefully examining the procedures of the Yugoslav Tribunal, concluded "that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal" (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 134, para. 223). According to the Court's Judgment, even Serbia "based itself on the jurisprudence of the Tribunal" (ibid., p. 131, para. 215) at both

5 See the Written Statements of Switzerland, pp. 15-26, paras. 57-96 ; Albania, pp. 40-44, paras. 75-85; Germany, pp. 32-37 ; Finland, pp. 3-5, paras. 7-12; Poland, pp. 24-29, paras. 6.1-6.16; Estonia, pp. 4-12; the Netherlands, pp. 3-7, paras. 3.1-3.11; Slovenia, p. 2; Latvia, p. 1, point 1; Ireland, pp. 8-12, paras. 27-34; and Denmark, pp. 12-13. See also the Written Comments of Albania, pp. 31-36, paras. 55-65; and of Switzerland, pp. 2-3, paras. 6-9.

6 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug). See citations in Written Contribution, paras. 3.20, 3.27, 3.33, 3.49, 3.51, 3.52.

7 Written Contribution, para.3.20.

8 Ibid., para. 3.27.

9 Ibid., para. 3.33

10 Ibid., paras. 3.49 and 3.51.

the trial and appellate levels. Of course, as Members of the Court will know, the Milutinović judgment is under appeal, and that appeal may include the evaluation made by the Trial Chamber of some of the facts, the evaluation that it made, but we nevertheless submit that the Court can attach weight to the Tribunal's finding of fact relevant to the present proceedings.

1. Events prior to 1998

12. Mr. President, turning to facts, I want first to recall briefly three important matters from the past, which still resonate today. I do so because Serbia's view of history, as expressed in its written pleadings, is distorted and lacks credence. The humanitarian catastrophe of 1998-1999, and the adoption of resolution 1244, did not come out of the blue.

13. The first point is this. In the period 1912 to 1918, Kosovo, which for centuries had been part of the Ottoman Empire, was forcibly occupied by the Kingdom of Serbia, and then incorporated into the new southern Slav State. It was immediately subjected to large-scale colonization. This was followed by a period of persecution — including what would now be called "ethnic cleansing" — lasting well into the 1920s[11] . There was a further period of brutal suppression in the 1950s and 1960s, within the Federal People's Republic of Yugoslavia, orchestrated by its Minister of the Interior, Aleksandar Ranković[12] .

14. The second point is this: Kosovo has long had a status distinct from Serbia. Since 1946 it was a federal unit forming a direct part of the Yugoslav Federation, like Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Slovenia. Serbia's depiction of the constitutional position of Kosovo as wholly controlled by Serbia is simply wrong. Following the Second World War, and especially under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo enjoyed the status of a federal unit within the federal Yugoslavia, a status that under the 1974 Constitution was, in substance, the same as that of the six republics: it operated, and represented itself, directly at the federal level [13]. Thus, Kosovo had a dual nature, as a unit of a federal State, like the six republics, and as an autonomous province within Serbia. Under the federal Constitution, it enjoyed specific constitutional protections vis-à-vis Serbia, protections which simply could not survive the dissolution of the federal Yugoslavia. Kosovo had never accepted to be simply an autonomous part of a sovereign State of Serbia. Members of the Court, this is all very well described in the Milutinović judgment of the Yugoslav Tribunal[14] . It is also, for example, well set out by Slovenia in its Written Comments[15] .

15. Contrary to what Professor Kohen announced this morning, Kosovo's autonomy was forcibly removed by the Milošević régime in 1989 by intimidation, and in contravention of the SFRY, Serbian and Kosovo Constitutions[16] . This is also well described in the Yugoslav Tribunal in Milutinović [17], and by Slovenia in its Written Comments [18]. Slovenia, for example, describes what actually happened in the SFRY constitutional court decision, as do we in our Further Written Contribution. As Slovenia concludes, "[t]he analysis of the legal history and other events shows that the Constitutional amendments of 1989 and the laws adopted on these bases regarding the action against the autonomy of Kosovo were a violation of the 1974 SFRY Constitution and of the rule of law principle"[19] .

11 Written Contribution, paras. 3.03-3.07; Further Written Contribution, paras. 3.08-3.11.

12 Ibid., para. 3.13.

13 Written Contribution, paras. 3.15-3.22; Further Written Contribution, paras. 3.17-3.3.28.

14 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), para. 213, cited in Written Contribution, para. 3.20. Slovenia, Written Comments, paras. 9-110.

15 Slovenia, Written Comments, paras. 9-110.

16 Written Contribution, paras. 3.23-3.28; Further Written Contribution, paras. 3.29-3.33.

17 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), paras. 217-221, cited in Written Contribution, para. 3.27.

18 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), paras. 217-221, cited in Written Contribution, para. 3.27.

19 Slovenia, Written Comments, paras. 111.

16. The third point dating from before 1999 that I want to recall briefly — and this is still vivid in the minds of many people living in Kosovo today — is the large-scale discrimination and the human rights violations of the late 1980s that lasted throughout the 1990s[20] . This tragic period for the people of Kosovo has also been well documented in the Milutinović judgment [21], as well as in numerous General Assembly and Security Council resolutions[22] and other United Nations documents referred to in our Written Contribution [23].

2. The humanitarian catastrophe of 1998-1999

17. Mr. President, I now come to the humanitarian catastrophe of 1998 and 1999. As Members of the Court will recall, at this time a humanitarian crisis in Kosovo unfolded on an unimaginable scale. The inability of the new constitutional structure in the Federal Republic of Yugoslavia (the FRY) to protect the human rights of the people of Kosovo had become clear in the 1990s. This culminated in crimes against humanity, ethnic cleansing, and other war crimes which led to massive refugee flows and an IDP crisis: approximately 90 per cent of the Kosovo Albanian population were driven from their homes, fleeing, many to the hills, many to neighbouring countries. The Yugoslav Tribunal in Milutinović found that the attacks on the Kosovo Albanians were the result of a deliberate policy of the authorities of the FRY and Serbia, one that vastly exceeded any possible misconduct by Kosovo Albanians . Contrary to Serbia's claims, there can be no comparison whatsoever between the massive, officially inspired human rights violations committed by the Yugoslav and Serbian authorities and the acts committed by some Kosovo Albanians[24] in the late 1990s. Nor can the actions of the FRY and Serbia be described as counter-insurgency actions. They amounted, rather, to a general attack on the Kosovo Albanian population.

18. The crisis of 1998-1999 is described in numerous United Nations documents referred to in our first Written Contribution: documents from the General Assembly, from the Security Council, from the Secretary-General, from the Commission on Human Rights and its Special Rapporteur, from the United Nations Commissioner for Human Rights, and others[25] . In May 1999 the Security Council expressed its "grave concern at the humanitarian crisis in and around Kosovo"[26] . This Court itself had occasion, in June 1999, to refer to "the human tragedy, the loss of life, and the enormous suffering in Kosovo" [27]. The General Assembly, in December 1999, condemned "the grave violations of human rights in Kosovo that affected ethnic Albanians"[28] .

20 Written Contribution, paras. 3.29-37; Further Written Contribution, paras. 3.34-3.50.

21 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), paras. 223-229, cited in Written Contribution, para. 3.33.

22 General Assembly resolutions 48/153, 20 Dec. 1993; 49/204, 23 Dec. 1994; 50/190, 22 Dec. 1995; 51/111, 12 Dec. 1996; 52/139, 12 Dec. 1997; 53/164, 9 Dec. 1998; and 54/183, 17 Dec. 1999. In 1992, the situation of human rights in Kosovo was dealt with in the Assembly's resolution 47/147 on the "Situation of human rights in the territory of the former Yugoslavia" (18 Dec. 1992, para. 14).

23 Paras. 3.34-3.37.

24 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), passim, for example paras. 1156, 1178, cited in Written Contribution, paras. 3.49-3.51.

25 Written Statement, paras. 3.47-3.60.

26 Security Council resolution 1239 (1999) of 14 May 1999.

27 Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 131, para. 16; Legality of Use of Force (Yugoslavia v. Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 265, para. 15; Legality of Use of Force (Yugoslavia v. France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, pp. 369-370, para. 15; Legality of Use of Force (Yugoslavia v. Germany), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 428, para. 15; Legality of Use of Force (Yugoslavia v. Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 488, para. 15; Legality of Use of Force (Yugoslavia v. Netherlands), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 549, para. 16; Legality of Use of Force (Yugoslavia v. Portugal), Provisional Measures,

28 General Assembly resolution 54/183 of 17 December 1999.

19. Mr. President, none of us who watched the images on television, day after day, will ever forget the columns of terrorized families carrying all their belongings, the very young, the very old, the trains packed with terrified evacuees, the crowded camps in neighbouring Macedonia and Albania, overflowing with people who feared that they would never see their homes again. How much more vivid must it still be, in the minds of those men, women and children, who lived through these horrors at first hand! They are reluctant to speak, but — if you press — virtually every Kosovar has a nightmare story to tell of those days, those weeks, those months. The pain is still there, it does not go away so fast, if at all. It is no wonder that the people of Kosovo cannot contemplate a future within Serbia.

20. Mr. President, the crisis in Kosovo had worsened so dramatically by 1998, that diplomatic efforts intensified in the course of that year. They included action by the Security Council, which adopted a series of resolutions[29] , largely ignored by Milošević, and action by the Contact Group of six States. Again, these diplomatic efforts are well described in the Milutinović judgment [30].

21. The negotiating process led by Ambassador Christopher Hill between mid-1998 and early 1999 made some tentative steps forward. Professor Murphy will describe this in some detail, because it is important to a proper understanding of resolution 1244. He will also cover the Rambouillet Conference, which ended with the Kosovo Albanians accepting an agreement proposed by the negotiators. That agreement was rejected by Serbia. Ultimately, as the Court is well aware, a number of States then acted to prevent further, large-scale, catastrophic human rights abuses in Kosovo.

3. Resolution 1244 and UNMIK (1999-2004)

22. I now turn to the period between June 1999, when Security Council resolution 1244 was adopted, and 2005, when final status talks were initiated. As I have said, Professor Murphy will deal in more detail with 1244 and the Hill and Rambouillet talks that preceded it. At this stage I want to stress just one thing. In considering all these efforts to bring about an enduring peace, it is essential to recall the clear distinction, understood by all those involved, between on the one hand, the establishment of conditions for a peaceful and stable situation on an interim basis and, on the other hand, the subsequent determination of the final status for Kosovo. Resolution 1244 dealt primarily with the interim period. It hardly touched on final status. It would not have been conducive to a return to peace and stability in Kosovo to have sought to resolve, back in June 1999, the final status question. Indeed, it was to be six years before it was felt that the time had come to commence talks on that issue.

23. In the months immediately following June 1999, efforts focused on the return to Kosovo and to their homes of the one and a half million refugees and displaced persons, and the rebuilding of their lives. Next came the establishment of the provisional institutions of self-government. It was only at a much Order of 2 June 1999, I.C.J. Reports 1999, p. 663, para. 15; Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 768, para. 15; Legality of Use of Force (Yugoslavia v. United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 833, para. 15; Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 922, para. 15. later stage, beginning in 2004, that attention turned to the political process for Kosovo's final status. As at Rambouillet, all options were open - though resolution 1244 had acknowledged that the will of the Kosovo people was a fundamental premise of the political process that the United Nations would facilitate.

29 Security Council resolutions 1160 (1998) of 31 Mar. 1998, and 1199 (1998) of 27 Sept. 1998.

30 Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), Vol. 1, paras. 312-412.

4. Final status talks (2005-2007)

24. So I come to the extensive efforts that were made to resolve Kosovo's final status. The Secretary-General, with the support of the Security Council, led that process. Final status talks were launched in 2005, by which time, as all agreed, the interim status was no longer sustainable. Comprehensive negotiations then took place that explored all possible aspects of an agreed solution. After two years of efforts, by the end of 2007 at the latest, all involved, including the Secretary-General and his Special Envoy, President Ahtisaari (all, that is, except Serbia) came to see Kosovo's independence as the only viable option. To prolong final status talks would have been seriously destabilizing for Kosovo and the Western Balkans more widely. Only in this context, did the democratically-elected representatives of the people of Kosovo declare independence.

25. A catalyst for the timing of the final status negotiations was a sudden upsurge of violence in Kosovo in March 2004. We reject the description of these events given this morning by the representatives of Serbia. We described what actually happened in our Further Written Contribution at paragraphs 364-366. There you will see the reality. For example, of the 19 persons who died, 11 were Kosovo Albanians. Nevertheless, these events of March 2004 came as a shock to the international community; they came as a shock to the Kosovo authorities and to the people of Kosovo. But given the unfounded allegations by Serbia, I want to make clear that the Kosovo authorities immediately condemned the violence and they have done all in their power to bring the perpetrators to justice.

26. Following the events of March 2004, the Secretary-General requested Ambassador Eide to conduct a general review of the Kosovo operation. His initial report of August 2004 suggested that "[r]aising the future status question soon seems- on balance - to be the better option"[31] . In Ambassador Eide's second report, transmitted to the Security Council in October 2005, he said that "an overall assessment leads to the conclusion that the time has come to commence [the final status] process" [32]. As he put it, "Kosovo will either move forward or slide backwards - having moved from stagnation to expectation, stagnation cannot again be allowed to take hold there"[33] .

27. In a Presidential statement of 24 October 2005, the Security Council agreed with this assessment, welcomed the Secretary-General's readiness to appoint a Special Envoy to lead the process, and reaffirmed "its commitment to the objective of a multi-ethnic and democratic Kosovo, which must reinforce regional stability"[34] .

28. In November 2005, President Ahtisaari was appointed by the Secretary-General as his Special Envoy to lead the final status process. I shall not rise to the disgraceful assertions of bias that were heard this morning against the most distinguished Nobel prize-winner and public servant. The Secretary-General's letter of appointment, which is Document No. 198 in the Dossier provided to the Court by the United Nations Secretariat, stated that the Special Envoy would "lead the political process to determine the future status of Kosovo in the context of resolution 1244 (1999) and the relevant Presidential Statements of the . . . Council"[35] . The Terms of Reference that were annexed to the Secretary-General's letter can also be found at Document No. 198. They emphasized that the Special Envoy "will lead this process on behalf of the Secretary-General". They further stated "[t]he pace and duration [and duration] of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground". The Special Envoy was to have "maximum leeway in order to undertake his task" and was "expected to revert to the Secretary-General at all stages of the process".

31 Report on the situation in Kosovo, S/2004/932, 30 Nov. 2004, Enclosure, Dossier No. 71.

32 "A comprehensive review of the situation in Kosovo", S/2005/635, 7 Oct. 2005, Ann., para. 62, Dossier No. 193.

33 Ibid., para. 63.

34 Statement by the President of the Security Council, S/PRST/2005/51, 24 Oct. 2005, Dossier No. 195.

35 Letter from Secretary-General Kofi Annan to Mr. Martti Ahtisaari, 14 Nov. 2005, Dossier No. 198.

29. Thus Mr. President, Members of the Court, President Ahtisaari was acting directly for the Secretary-General, and had very broad discretion as to the modalities and duration of the final status process. There is no indication in the letter of appointment, or in the Terms of Reference annexed to that letter, that the settlement of the final status for Kosovo could only occur if it had the consent of Serbia, or if there were a further decision of the Security Council. That omission seems to have been deliberate.

30. President Ahtisaari conducted fifteen rounds of negotiations in the course of 2006. Belgrade's position throughout was that independence was unacceptable. Belgrade even made the wholly untenable claim that international law precluded a settlement involving independence[36] . Kosovo's position was also clear. Pristina insisted that the settlement should result in the independence of Kosovo. But within the framework of independence, there could be far-reaching protections for minority communities (including within the system of governance of Kosovo), protections for religious and historic monuments, and of course protections for human rights.

31. Notwithstanding a high-level meeting on 24 July 2006, positions remained far apart. The ensuing Contact Group statement stressed that "Belgrade needs to demonstrate much greater flexibility in the talks than it has done so far", and the Contact Group reiterated that "once negotiations are underway, they cannot be allowed to be blocked. The process must be brought to a close, not least to minimise the destabilising political and economic effects of continuing uncertainty over Kosovo's future status" [37].

32. In their later statement of 20 September 2006, Contact Group Ministers said: "Striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing. Ministers encouraged the Special Envoy to prepare a comprehensive proposal for a status settlement and on this basis to engage the parties in moving the negotiating process forward." [38]

33. Then, on 30 September 2006, while the final status talks were ongoing, Serbia took a dramatic step that signalled a complete unwillingness to engage in meaningful negotiations. On that day, Serbia adopted a new Constitution. The new Constitution was narrowly approved a month later by a referendum in which Kosovo Albanians were ineligible to participate. The referendum campaign "emphasised that defending Kosovo was the main point of the constitution", as did Party leaders when urging the Assembly to adopt the Constitution[39] .

34. The preamble to the new Constitution of Serbia, which remains in force to this day, focuses almost exclusively on Kosovo. It consists of just two paragraphs, the second of which reads: "Considering [. . .] that the province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations" [40].

36 See Serbia's opening "platform", 5 Jan. 2006 (cited in M. Weller, Contested Statehood: Kosovo's Struggle for Independence (2009), p. 200): a line repeated in the Assembly of Serbia's resolution of 14 Feb. 2007 (Assembly Resolution following United Nations Special Envoy Martti Ahtisaari's "Comprehensive proposal for the Kosovo status settlement" and continuation of negotiations on the future status of Kosovo-Metohija, available at http://www.mfa.gov.yu/Policy/Priorities/KIM/resolution_kim_e.html).

37 High-level meeting on the future status of Kosovo, Contact Group Statement, Vienna, 24 July 2006, (available at http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf).

38 Contact Group Ministerial Statement, New York, 20 Sep. 2006, para. 4 (available on http://www.unosek.org/docref/2006-09-20_-_CG _Ministerial_Statement_New _York.pdf).

39 International Crisis Group, Europe Briefing No. 44, 8 Nov. 2006, Serbia's New Constitution: Democracy Going Backwards, p.4.

40 Constitution of the Republic of Serbia 2006, preamble.

35. There are many provisions in this Constitution of 2006 that make the same point. For example, the Presidential oath commences with the words: "I do solemnly swear that I will devote all my efforts to preserve the sovereignty and integrity of the territory of Serbia, including Kosovo and Metohija as its constituent part"[41] .

36. So, Mr. President, in the middle of the final status negotiations, the adoption of this Constitution signalled a complete entrenchment of Serbia's position regarding the status of Kosovo. It also revealed Serbia's true view as to what "autonomy" would mean for the people of Kosovo. The Constitution provides that "The substantial autonomy of . . . the Autonomous Province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution"[42] . After reviewing this language, the Venice Commission of the Council of Europe concluded that "the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not"[43] . In other words, under the 2006 Constitution, the Assembly of Serbia, could characterize Kosovo's so-called "autonomy" to mean whatever it wanted the concept to mean. Like Humpty Dumpty in Through the Looking Glass, when they use a word it means just what they choose it to mean -neither more nor less [44].

37. The adoption of this new Constitution, addressing Kosovo in such stark terms, not only demonstrates Serbia's entrenched negotiating position, and not only Serbia's precarious idea of "substantial autonomy", but also Serbia's utter disregard for the will of the people of Kosovo. It is yet another example of Serbia treating Kosovo as a mere piece of land. For this Constitution was drafted without any involvement of the institutions or people of Kosovo. The International Crisis Group concluded that "[t]he main purpose of the new constitution was to demonstrate Serbian hostility to and create further legal barriers against, Kosovo independence" [45].

38. Mr. President, Special Envoy Ahtisaari presented his draft comprehensive Settlement to Belgrade and Pristina on 2 February 2007. On that day, the Contact Group issued a statement encouraging both Parties "to engage fully and constructively with the Special Envoy in this phase of the process"[46] .

39. Further negotiations took place, in the course of which Kosovo essentially accepted the Settlement, while Serbia, in a move reminiscent of its actions at Rambouillet eight years before, presented a whole new version of the document, among other things referring to Kosovo throughout as "the Autonomous Province of Kosovo and Metohija", which was to be governed in accordance with the Constitution of the Republic of Serbia and within its sovereignty [47]- and hence in a manner that would leave Kosovo exposed to future changes in Serbian national law adopted against its wishes.

40. The Secretary-General presented President Ahtisaari's Report on Kosovo's Future Status, together with his proposed Settlement, to the Security Council on 26 March 2007[48] . The Special Envoy's recommendation was that: "Kosovo's status should be independence, supervised by the international community."[49]

41 Ibid., Art. 114.

42 Constitution of the Republic of Kosovo, Art. 182, para. 2.

43 European Commission for Democracy through Law (Venice Commission), Opinion No. 405/2006 on the Constitution of Serbia, 19 Mar. 2007, para. 8 (available at the Venice Commission's website <http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf>). Art. 182, para. 2, of the Constitution provides: "The substantial autonomy of . . . the Autonomous Province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution."

44 Lewis Carroll, Through the Looking Glass and What Alice Found There, Chap. VI.

45 International Crisis Group, Europe Briefing No. 44, 8 Nov. 2006, Serbia's New Constitution: Democracy Going Backwards, p. 1.

46 Joint Contact Group Statement, 2 Feb. 2007 (available on http://www.unosek.org/docref/Joint Contact Group Statement 2nd february 2007.doc).

47 M. Weller, Contested Sovereignty: Kosovo's Struggle for Independence, 2009, pp. 210-211.

48 S/2007/168 and Add.1 [Dossier Nos. 203 and 204]. Addendum 2 consists of a note about the availability of certain maps.

49 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, heading [Dos-

41. In his report, President Ahtisaari said, "[i]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse"[50] . Indeed, he put it rather bluntly, "Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept nothing short of independence"[51] . He was also of the view that "Kosovo's current state of limbo cannot continue. . . . Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole."[52]

42. Ahtisaari explained that reintegration into Serbia was not a viable option [53], and that continued international administration was not sustainable[54] . He concluded that independence with international supervision was the only viable option [55]. President Ahtisaari's recommendation was endorsed by the Secretary-General of the United Nations [56].

43. In his covering letter to the Security Council, the Secretary-General said: "Having taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status [that is independence] and the Comprehensive proposal for the Kosovo Status Settlement."

44. In its pleadings before this Court, and in many public statements about these Court proceedings, Serbia argues that, if Kosovo's Declaration of Independence is not found to contravene international law, there will be worldwide repercussions. This is simply not the case. As Ahtisaari himself underlined: "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosević's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary."[57]

45. Mr. President, Members of the Court, the next stage was that, at Russia's suggestion, a Security Council mission went to the region in April 2007 [58]. Like Ahtisaari, the mission concluded that the positions of the sides remained far apart[59] .

46. A final effort to reach a settlement acceptable to both States was undertaken by the Troika, consisting of very senior representatives of the European Union, the Russian Federation, and the United States of America [60]. In August 2007, the Secretary-General welcomed this initiative, restating his belief that the status quo was unsustainable and requesting a report by December 2007 [61].

47. Between August and December 2007, over a four-month period, the Troika undertook an intense schedule of meetings with the parties, who were represented at the highest level. They were fully supported by Contact Group Ministers, who repeated that "striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing" [62]. The Troika

sier No. 203].

50 Ibid., para. 3.

51 Ibid., para. 2.

52 Ibid., para. 4.

53 Ibid., paras. 6-7.

54 Ibid., paras. 8-9.

55 Ibid., paras. 10-14.

56 See para. 43 above.

57 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, para. 15 [Dossier No. 203].

58 For the composition and terms of reference of the mission, see letter dated 19 April 2007 from the President of the Security Council to the Secretary-General, S/2007/220, Ann., Dossier No. 206.

59 Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007, para. 59, Dossier No. 207.

60 M. Weller, Contested Sovereignty: Kosovo's Struggle for Independence (2009), Chap. 13.

61 Available on http://www.un.org/apps/sg/sgstats.asp?nid=2692.

62 Statement on Kosovo by Contact Group Ministers, 27 Sept. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209.

could not achieve a settlement acceptable to both sides. They reached the same conclusion as Ahtisaari and the Security Council mission to the region. In their report, presented to the Council in December, the Troika concluded that "the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.[63]"

48. Thus, Mr. President, Members of the Court, by December 2007, there was widespread acceptance, including by the United Nations Secretary-General and his Special Envoy, that all efforts to achieve a settlement acceptable to both sides had been exhausted. At the same time, it was not possible to secure a decision of the Security Council on the way forward. It was, nevertheless, clear that independence, as recommended by the Special Envoy and endorsed by the Secretary-General, was the only outcome acceptable to the overwhelming majority of the people of Kosovo. It was clear that to prolong the process would not bring results; rather, it would serve to destabilize Kosovo and the entire western Balkans.

49. Kosovo was fully prepared to entrench protections for all of the people of Kosovo, especially the Serb community, within the context of independence, consistent with the Ahtisaari Settlement, and in close co-ordination with the interested members of the international community. This occurred through the Declaration of Independence of 17 February 2008 and the Constitution of the Republic of Kosovo, which entered into force on 15 June 2008.

C. Conclusions from the final status negotiations

50. Mr. President, Members of the Court, in concluding let me set out five central propositions that emerge from these efforts to secure a negotiated final status.

51. First, there was agreement among all major participants that the status quo in Kosovo was unsustainable[64] .

52. Second, there could be no return to the pre-March 1999 situation in Kosovo[65] .

53. Third, once the final status process had started, it could not be blocked and would have to be brought to a conclusion [66]. In other words, the process could not continue indefinitely and might lead to a settlement without the consent of one of the parties.

54. Fourth, the Security Council and the Secretary-General entrusted President Ahtisaari with responsibility for the negotiations, including expressly, in his terms of reference, for determining their duration. He ultimately concluded that negotiations had been exhausted.

55. And fifth, under resolution 1244, the final status process was to take into account the Rambouillet Accords, which meant that any settlement had to be acceptable to the people of Kosovo [67].

63 Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 10 Dec. 2007, para. 2, Dossier No. 209.

64 See, among many such statements, the second Eide Report ("A comprehensive review of the situation in Kosovo", S/2005/635, 7 Oct. 2005, Ann., para. 63, Dossier No. 193); the Report of the Security Council Mission ("the current status quo was not sustainable", S/2007/256, 4 May 2007, para. 59, Dossier No. 207); the Contact Group Ministers on 27 Sep. 2007, who "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable" (Statement on Kosovo by the Contact Group Ministers, New York, 27 Sep. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209). Ahtisaari said in his report, "Kosovo's current state of limbo cannot continue" (Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, Ann., para. 4, Dossier No. 203).

65 Contact Group Statement, London, 31 Jan. 2006 (available on <http://www.unosek.org/docref/fevrier/statement by the contact group on the future of Kosovo - Eng.pdf>).

66 "A comprehensive review of the situation in Kosovo", S/2005/635, 7 Oct. 2005, Ann., para. 70, Dossier No. 193; Guiding principles of the Contact Group for a settlement of the status of Kosovo, S/2005/709, 10 Nov. 2005, Ann., Dossier No. 197; Contact Group Statement, Vienna, 24 July 2006 (available on <http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf>); Statement on Kosovo by the Contact Group Ministers, New York, 27 Sep. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209.

67 Or, as it was put at Rambouillet, in Security Council resolution 1244 (1999), and in the preamble to the Constitutional

Further, any settlement had to ensure implementation of standards with regard to Kosovo's multi-ethnic character, and promote the future stability of the region [68].

56. Mr. President, it is clear from these propositions that in no sense did Kosovo's Declaration of Independence occur as an unexpected or radical event, let alone one that violated international law. Rather, the issuance of the Declaration came as a natural consequence of the political process initiated by the Security Council in 2005, that had run its course by the end of 2007.

57. Mr. President, Members of the Court, that concludes my presentation. I thank you for your attention, and I request that you now call on Mr. Daniel Müller.

The PRESIDENT: Thank you, Sir Michael Wood. I now call upon Mr. Daniel Müller.

Mr. MÜLLER: Thank you, Mr. President.

III. THE REQUEST FOR ADVISORY OPINION, THE DECLARATION OF INDEPENDENCE AND ITS CONFORMITY WITH GENERAL INTERNATIONAL LAW

Mr. President, Members of the Court, it is an honour and privilege for me to appear before you this afternoon to present our comments on the request for advisory opinion submitted to you.

1. In this request, given material form in General Assembly resolution 63/3 of 8 October 2008, the General Assembly has put the following question to the Court:

"Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" [69]

Daniel Muller

2. Our answer to that question - and Sir Michael has already announced it - is very simple: no rule of general international law prohibits the declaration of independence of 17 February 2008 made on behalf of the people of Kosovo by their democratically elected representatives. The declaration is therefore "in accordance with international law". It is my task to present to you the legal arguments that have led us to this conclusion, which is shared by most of the States having participated in the written proceedings (III). Professor Murphy will explain in a little while why Security Council resolution 1244 (1999) [70] does not prohibit the declaration of independence either.

Framework of 2001, the final settlement would have to be on the basis of/take full account of "the will of the people".

68 Statement on Kosovo by the Contact Group Ministers, New York, 27 Sep. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209.

69 A/RES/63/3, 8 Oct. 2008 [Dossier, doc. No. 7].

70 S/RES/1244 (1999), 10 June 1999 [Dossier, doc. No. 34].

3. But, with your leave, Mr. President, I shall begin my presentation with a few thoughts on the request for advisory opinion and the meaning to be ascribed to the question put by the General Assembly (I), before saying a few words about the 17 February 2008 declaration of independence by the representatives of the Kosovo people (II). That declaration is, or should be, the focus of the request for advisory opinion, notwithstanding the wording - which some may find clumsy - of the question adopted by the General Assembly on the proposition of Serbia alone. I shall return in a moment to this point, on which the States having participated in the written proceedings would appear still to be at odds.

I. The request for advisory opinion and the General Assembly's question

4. Among the 192 Member States of the United Nations there is far from any consensus on the General Assembly's request for an opinion, adopted on a vote of 77 to six, with 74 abstentions[71] , and on the question it contains[72] . A number of States in their written statements and comments expressed their doubts and objections in respect of the judicial propriety of responding.

5. In the light of the Court's "duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of 'compelling reasons'" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 157, para. 45), you should, according to a number of Member States[73] whose position in this respect we have already cited in our further written contribution[74] , refuse to respond to the request for an advisory opinion, for the reason that a response- regardless of its content - would not amount to the Court's "participation in the activities of the Organization". In the view of Serbia, the sponsor of resolution 63/3, what this involves is the exercise of its right "to pose a simple, basic question on a matter it considers vitally important to the Court" [75]. And just this morning Mr. Dušan [Bataković] stressed that this was a vital question for his country, Serbia. All things considered, the Court has been asked to act as legal adviser to the Member States of the United Nations. But that is not your function, Members of the Court: "The Court's Opinion is given not to the States, but to the organ which is entitled to request it" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 24, para. 31; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 188, para. 31; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 158, para. 47). At no time has there been any question of giving the General Assembly an authoritative opinion from the legal perspective on the conformity of the declaration of independence. The Court and the advisory procedure open to organs of the United Nations must not be exploited in this way by a State looking for a "legal opinion" or seeking to have its problems resolved by the Court.

6. Should you nevertheless deem it appropriate, Members of the Court, to accede to the request for an opinion, the Court will have to confine itself to the submitted question as worded, without being able to broaden its scope. Pursuant to the jurisprudence, "in giving its opinion the Court is, in principle, bound by the terms of the questions formulated in the request" (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 184, para. 41; Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 349, para. 47).

71 A/63/PV.22, 8 Oct. 2008, p. 11 [Dossier, doc. No. 6].

72 A/63/PV.22, 8 Oct. 2008, p. 11 (Sir John Sawers). See also Written Statement of the United Kingdom, p. 21, para. 1.7; and Written Statement of the Maldives, p. 2.

73 See, in particular, the Written Statements of the Czech Republic, pp. 3-5; France, pp. 15-33, paras. 1.1-1.42; Albania, pp. 30-37, paras. 54-70; the United States of America, pp. 41-45; and Ireland, pp. 2-4, paras. 8-12; as well as the Written Comments of France, pp. 1-10, paras. 4-23; Albania, pp. 24 to 26, paras. 39 to 43; and the United States of America, pp. 10-12.

74 Further Written Contribution of Kosovo, pp. 5-8, paras. 1.12-1.17.

75 A/63/PV.22, 8 Oct. 2008, p. 1; emphasis added [Dossier, doc. No. 6].

7. We have explained in our written contributions[76] how a number of elements in the question put by Serbia through the General Assembly are slanted and tendentious: in it the declaration is characterized as "unilateral"; the authors are misidentified; and the question would appear to presuppose the existence of rules under international law governing declarations of independence. But, leaving these elements aside, the question is specific and limited and most States have so recognized in their written statements and comments[77] . According to Serbia itself, the question "is entirely non-controversial"[78] and "there is no need for any changes or additions" [79] to it. Mr. Djerić reiterated this position this morning. You are therefore being asked to answer the one very specific and limited question, and that one question alone, of the conformity of the declaration of independence of 17 February 2008 with international law. In other words, to paraphrase the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [80], the Court must determine the existing principles and rules and, if there are any - which there are not -, must apply them to the declaration of independence of 17 February 2008 so that the question is given a reply based on law.

8. The question is not about anything else and there is neither any way nor any need to give it a more "comprehensive"[81] meaning. It does not concern the - different - problem of the status of the Republic of Kosovo as a State today, and we shall not go over the baseless arguments put forward this morning. Nor is the question about the legality or appropriateness of the 63 recognitions or of the treaties entered into by the Republic of Kosovo[82] , among which those concerning its participation in international organizations or the demarcation of its borders[83] . Unlike in some requests for advisory opinion referred to the Court in the past [84], the Assembly has avoided asking you to opine on the consequences of the conformity or nonconformity with international law of the declaration of independence of Kosovo. It has asked you only whether the declaration was prohibited by international law at the time it was adopted, now nearly two years ago. I shall take the liberty of further pointing out that, given what the question is about, the verb tense used in it would appear to be incorrect [85].

9. Contrary to what counsel for Serbia repeatedly asserted this morning, a response, if any, given to the question asked does not affect other situations in which separatist movements have attempted, or are attempting, forcibly to split off parts of the territory of a pre-existing State [86]. The General Assembly's request, drafted by Serbia alone, obviously relates only to the declaration of independence of 17 February 2008 at the time and under the circumstances specific to it and these in no way correspond with the troubling picture Serbia seeks to convey.

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76 Written Contribution of Kosovo, pp. 126-128, paras. 7.04-7.10; Further Written Contribution of Kosovo, p. 9, para. 1.21.

77 See the Written Statements of the Czech Republic, p. 6; France, p. 36, para. 2.3; Austria, p. 3, para. 2; Egypt, pp. 3 and 4, para. 7; Germany, pp. 5 and 6; Poland, p. 4, para. 2.1; Luxembourg, pp. 5 and 6, paras. 9 to 12; the United Kingdom, p. 25, para. 1.16; the United States of America, pp. 45 and 46; Serbia, pp. 26 and 27, paras. 19-23; Spain, p. 7, para. 6 (iii); Estonia, p. 2; Japan, pp. 1-2; Denmark, p. 2; together with the Written Comments of Norway, p. 3, para. 7; Serbia, p. 28, para. 45; Germany, p. 3; the Netherlands, p. 2, para. 2.1; the United Kingdom, p. 5, para. 9; and the United States of America, p. 10.

78 A/63/PV.22, 8 Oct. 2008, p. 2 [Dossier, doc. No. 6].

79 A/63/PV.22, 8 Oct. 2008, p. 2 [Dossier, doc. No. 6].

80 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 234, para. 13.

81 See Serbia's assertion, Written Comments of Serbia, p. 28, para. 45.

82 See the list of international agreements concluded by the Republic of Kosovo on the website of the Official Gazette of the Republic of Kosovo (http://www.ks-gov.net/GazetaZyrtare/MN.aspx).

83 Agreement between the Republic of Kosovo and the Republic of Macedonia relating to the physical demarcation of the State boundary, 16 and 17 October 2009, published on the website of the Official Gazette of the Republic of Kosovo (http://www.ks-gov.net/gazetazyrtare/Documents/anglisht-222.pdf).

84 See, in particular: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136. See also: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), p. 62; and Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73.

85 Written Statement of Germany, p. 8.

86 Written Comments of Serbia, p. 12, para. 4.

10. Mr. President, Members of the Court, if you deem it appropriate to accede to the request for an advisory opinion, you should answer only this very specific question: was the declaration of independence in February 2008 in violation of the applicable rules of international law? Our response is as precise as it is concise: neither general international law nor Security Council resolution 1244, to which my colleague Professor Murphy will return in a short while, contains any rules against the declaration of independence of Kosovo. And that brings me to a few comments on the declaration of independence of 17 February 2008.

II. The declaration of independence of 17 February 2008

11. To begin, Mr. President, may I say, once and for all, that there is no "unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo". In this regard, Serbia's wording of the question is incorrect. Under Article 1.5 of the Constitutional Framework for Provisional Self-Government[87] , the Provisional Institutions of Self-Government were the Assembly, the President of Kosovo, the Government, the courts and "other bodies and institutions set forth in this Constitutional Framework", such as the Ombudsperson, the Office of the Public Prosecutor and the Special Chamber of the Supreme Court on Constitutional Framework Matters. It is clear beyond doubt from a quick review of this list: these institutions never produced any joint declaration, let alone a declaration of independence.

12. The only declaration of independence of 17 February 2008 is the one that was read out in Albanian, voted on and subsequently signed by the representatives of the people of Kosovo[88] . We have filed a full-scale reproduction of this declaration with the Registry and produced a photocopy of the original in our written contribution[89] , accompanied by translations into English and French. I shall take the liberty, Mr. President, of observing that the English and French translations appearing in the dossier submitted in the name of the Secretary-General[90] are not consistent with the Albanian original of the declaration as adopted.

13. Granted, from various points of view, the meeting of the representatives of the people at which the declaration was approved and signed might have been confused with the Assembly of Kosovo. But the declaration is not an act of that Assembly in the same way as are the laws passed by the Assembly in its role as a provisional institution of self-government. It is also incorrect to say that Mr. Sejdiu, the President of Kosovo, and Mr. Thaçi, the Prime Minister, endorsed the declaration by signing it in their capacities as provisional institutions or members of a provisional institution. The special circumstances surrounding the extraordinary session of the Assembly, described in detail in our written contribution[91] , show that this was a special act adopted in the name of the Kosovo people by their democratically elected representatives meeting in a constituent assembly in Pristina.

14. Mr. Djerić sought to convince you that all the evidence confirms that the Assembly, as a provisional institution, was the author of the declaration of independence. But he forgot one crucial consideration. Members of the Court, one need only inspect the text of the declaration as publicly read out that day. The author is not the Assembly, and the Assembly does not claim to be the author. It is specifically in this regard that the translations in the dossier submitted on behalf of the Secretary-General are inaccurate. The declaration does not begin with the words "The Assembly of Kosovo . . . Approves", but rather, in terms which could not be any clearer, with "We, the democratically elected leaders of our people, hereby declare . . ."[92] This clause alone is enough to refute Serbia's claim, as well as those of Argentina and Cyprus, which continue to insist, without ever referring to the actual text, that the declaration is an act

87 Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo. UNMIK/REG/2001/9, 15 May 2001 [Dossier, doc. No. 156].
88 Written Contribution of Kosovo, Anns., Ann. 2, pp. 11-14 (pp. 235-238).
89 Written Contribution of Kosovo, Anns., Ann. 1 (pp. 207 and 209).
90 Dossier, doc. No. 192.
91 Written Contribution of Kosovo, Anns., pp. 109-113, paras. 6.03-6.12.
92 Written Contribution of Kosovo, Anns., Ann. 1, para. 1 of the declaration of independence.

of the Assembly of Kosovo. Yet none of these States explains why the entire declaration is in the first person plural - "we declare"[93] , "we accept" [94], "we shall adopt"[95] , "we welcome"[96] , "we . . . invite and welcome"[97] , "we believe"[98] , "we express"[99] and "we affirm" [100] - instead of the third person singular, as it should be if the Assembly was the author of it. They do not explain why the declaration was written out by hand on papyrus and why it was signed by all the elected representatives of the people of Kosovo, not just by the President of the Assembly. Nor do they explain why the declaration was not published as an act of the provisional institutions in the official gazette of those institutions, as is the case for all acts adopted by the Assembly acting in that capacity. The text of the declaration explains why: this is not an act of the Assembly of Kosovo as a provisional institution, but a declaration by the democratically elected representatives of the people, as a number of States have moreover pointed out in their written statements and comments [101].

15. In their declaration the elected representatives affirm the will of the people and declare "Kosovo to be an independent and sovereign state" [102]. The preamble sets this move against the backdrop of Kosovo's particular history, which Sir Michael has already recounted to you in outline.

16. But the declaration of 17 February 2008 contained much more than just the proclamation of independence. As His Excellency Mr. Hyseni said at the start of our presentation, the people's representatives in fact assumed firm commitments in respect of a number of fundamental principles governing the political organization of the future State -a "democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law"[103] in accordance with the obligations under the Ahtisaari Plan [104]. They further accepted the duty of "responsible membership in the international community"[105] , with all the ensuing consequences. Thus, not only did the representatives of the people re-affirm the validity of resolution 1244 (1999), they also invited the international presences to continue to play their role in the future [106]. In addition, they publicly and irrevocably undertook the key international obligations deriving from the United Nations Charter and the Helsinki Final Act, and the obligations in regard to neighbourly relations between States, respect for borders and co-operation with the Criminal Tribunal for the former Yugoslavia. They also re-affirmed their commitment to peace and stability in the region and to good relations with their neighbours, including in particular the Republic of Serbia[107] . The representatives went on: "In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999).[108]" The newly created State immediately assumed the undertakings and assurances given in the declaration as its own international obligations when the President and Prime Minister wrote to foreign States seeking recognition from them. The Written Statement of Norway shows that that is indeed how the action has been understood[109].

93 Written Contribution of Kosovo, Anns., Ann. 1, paras 1 and 2 of the declaration of independence.
94 Written Contribution of Kosovo, Anns., Ann. 1, paras. 3 and 8 of the declaration of independence.
95 Written Contribution of Kosovo, Anns., Ann. 1, para. 4 of the declaration of independence.
96 Written Contribution of Kosovo, Anns., Ann. 1, para. 5 of the declaration of independence.
97 Written Contribution of Kosovo, Anns., Ann. 1, para. 5 of the declaration of independence.
98 Written Contribution of Kosovo, Anns., Ann. 1, para. 6 of the declaration of independence.
99 Written Contribution of Kosovo, Anns., Ann. 1, paras. 7 and 11 of the declaration of independence.
100 Written Contribution of Kosovo, Anns., Ann. 1, para. 12 of the declaration of independence.
101 See: Written Statement of Germany, p. 6; Written Statement of Luxembourg, p. 6, para. 13; Written Statement of the United Kingdom, p. 23, para. 1.12; Written Statement of Estonia, pp. 3 and 4; Written Statement of Finland, pp. 5 and 6, paras. 13-15; Written Comments of Germany, p. 7; Written Comments of Switzerland, p. 2, para. 3.
102 Ibid., para. 1.
103 Ibid., para. 2.
104 Ibid., para. 3.
105 Ibid., para. 8.
106 Ibid., para. 5.
107 Ibid., paras. 7-11.
108 Ibid., para. 12.
109 Written Statement of Norway, p. 7, para. 22, p. 10, paras. 32-34.

17. Mr. President, Members of the Court, it is difficult to see how such a declaration whereby the democratically elected representatives of a people undertake to comply strictly with the fundamental rules of international law could be not in accordance with those rules. But, Mr. President, before addressing this third point in my statement, might I suggest this as a good time for the customary coffee break?

III. Conformity of the declaration of independence with general international law

18. So, Mr. President, Members of the Court, why is the declaration of independence of 17 February 2008 in accordance with international law or, actually, why was it not in breach of its rules? Because international law contains no rule governing declarations of independence, either negative — prohibiting them — or positive — encouraging them (A). In particular, the principle of territorial integrity, on which those who support Serbia's position have relied in attempting to demonstrate that Kosovo's declaration of independence is not in accordance with international law, in no way prohibits it (B). Moreover, a finding that there is no rule prohibiting the declaration of independence is sufficient to answer the question raised by Serbia through the General Assembly [110]. It is not necessary, contrary to the arguments of the State that sponsored the request for an advisory opinion[111] , to show that the representatives of the Kosovo people had the right, recognized by international law, to adopt and proclaim a declaration of independence. International law is hardly concerned with this, because it does not encourage secession, though it does not prohibit it either. If, however, we had to prove the Kosovo people's right to form an independent State in order to answer the question — which in our opinion we do not have to do —, we consider that the principle of self-determination of peoples provides a legal basis for it (C).

A. International law does not regulate declarations of independence

19. But to return to my first argument, Mr. President, international law does not regulate declarations of independence[112] . This is merely one factual element in the process which culminates, or does not culminate, in the establishment of a State as a "primary fact"[113] . Although Professor Kohen may not like it, international law does not create the State, its subject par excellence, but notes its existence[114] , records it and draws all conclusions from it. For this reason, international law cannot fail to acknowledge the existence of the Republic of Kosovo as a sovereign and independent State with a territory, a population and a political authority exercising effective control there. However, Members of the Court, that is not the question that has been put to you. The Court is not called upon to rule on the status of the Republic of Kosovo as a State [115]. Although the declaration of independence doubtless aimed at that result, it was not the declaration that achieved it under international law . So it is wrong to maintain that the declaration has an effect under international law and consequently is subject to that law [116]because the representatives of the Kosovo people expressed their wish to create a sovereign State.

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110 Written Contribution of Kosovo, pp. 137-139, paras. 8.03 to 8.06. See also Written Statement of Albania, p. 27, para. 45; Written Statement of Austria, p. 14, para. 22; Written Statement of Germany, p. 8; and Written Statement of the United Kingdom, p. 24, para. 1.14.

111 Written Comments of Serbia, p. 92, para. 205.

112 Written Contribution of Kosovo, pp. 140-157, paras. 8.07 to 8.37; and Further Written Contribution of Kosovo, p. 59, para. 4.03. See also Written Statement of the Czech Republic, p. 7; Written Statement of France, pp. 35-39, paras. 2.2-2.9; Written Statement of Austria, pp. 14 and 15, para. 24; Written Statement of Germany, pp. 27-29; Written Statement of Luxembourg, p. 7, paras. 16 and 17; Written Statement of the United States of America, pp. 50-51; Written Statement of Estonia, p. 4; Written Statement of Finland, pp. 4 and 5, paras. 7 and 10; Written Statement of Japan, p. 2; Written Comments of Germany, pp. 6 and 7; and Written Comments of the United Kingdom, p. 16, para. 33.

113 G. Abi-Saab, "Cours général du droit international public", R.C.A.D.I., Vol. 207, 1987-VI, pp. 68 and 9; and "Conclusion" in M. G. Kohen (ed.), Secession: International Law Perspectives, Cambridge University Press 2006, p. 470; P. Daillier, M. Forteau and A. Pellet, Droit international public (Nguyen Quoc Dinh), 8th ed., LGDJ, Paris, 2009, p. 574, No. 339.

114 Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No. 1, 29 Nov. 1991, RGDIP, Vol. XCVI, 1992, p. 264 [Dossier, doc. No. 233]. See also Opinion No. 8, 4 July 1992, RGDIP, Vol. XCVII, 1993, pp. 588 and 589 [Dossier, doc. No. 235].

115 See para. 8 above.

116 T. Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness", in M. G. Kohen (ed.), Secession: International Law Perspectives, Cambridge University Press 2006, p. 145. See also Written Statement of Austria, p. 15, para. 25; Written Statement of Japan, pp. 2 and 3 or Written Comments of the United Kingdom, p. 18, para. 36.

20. Just as general international law does not regulate the creation or disappearance of a State, it in no way concerns itself with the statement of the will to create a State in a declaration of independence formulated by the representatives of the people. It defines it neither as lawful nor as unlawful, and remains indifferent to its fate at the hands of the municipal law of the State directly concerned[117] . A declaration of independence may well, and in most cases does, run counter to municipal law provisions. However, this in no way implies that the declaration is in accordance with or contrary to international law[118] .

21. Contrary to erroneous assertions based for the most part on a tendentious reading of General Assembly or Security Council resolutions, State practice confirms that international law is not interested in the issue of the validity of a declaration of independence [119]. However, Mr. President, there is no need to go far back into the past: the upheavals in Europe in the 1990s are quite sufficient to show that international law does not define declarations of independence as such as valid or invalid. In our Written Contribution we gave the example of the declaration of independence of Slovakia proclaimed by the Slovak National Council on 17 July 1992, a few months before the break-up of Czechoslovakia. No State regarded this declaration of independence as invalid in relation to, or not in conformity with, international law[120] .

22. More specifically, Members of the Court, several of the former Yugoslav republics proclaimed their independence even before the SFRY had ceased to exist: Slovenia and Croatia, after polling their populations, made declarations to this effect on 25 June 1991; the population of Macedonia expressed its wish for independence in a referendum in September 1991; and the parliament of Bosnia and Herzegovina adopted a resolution on sovereignty on 14 October the same year. Despite the firm stand taken by the authorities in Belgrade, which took the view that these declarations and secessions were contrary to constitutional rules and imperilled the territorial integrity and frontiers of the SFRY[121] , European States embarked upon a political process aimed at recognizing these new States. No one suggested that the declarations of independence violated international law. Moreover, it is noteworthy that, in the context of the Peace Conference on Yugoslavia, the Arbitration Commission made up of eminent jurists from several States ruled, in law, on the requests by the new States for recognition. Even so, the Commission did not raise or examine the issue of the alleged conformity or non-conformity of the declarations of independence with international law in any of its opinions regarding these requests[122] . Of course, with regard to Bosnia and Herzegovina the Commission expressed doubts as to the reality of the people's wish to form a sovereign State[123] , but it did not condemn the declaration already made and did not prevent the holding of a referendum to dispel these doubts[124] . In 1996 this Court, after establishing that the Republic of Bosnia and Herzegovina had become a Member State of the United Nations, said: "Hence the circumstances of its accession to independence are of little consequence" (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 611, para. 19).

117 Against: Written Comments of Serbia, p. 91, para. 201.

118 Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989, p. 51, para. 73 or Certain German Interests in Polish Upper Silesia, Merits, Judgment, 1925, P.C.I.J., Series A, No. 7, p. 19. See also Art. 3 of the Articles on Responsibility of States for Internationally Wrongful Acts, United Nations, General Assembly, resolution A/RES/56/83, 12 Dec. 2001, Annex and commentary in ILC Yearbook, Vol. II, Part Two, pp. 37-39. Cf. Written Statement of the United Kingdom, pp. 58-59, paras. 5.2-5.7; Written Statement of the United States of America, p. 51.

119 Written Comments of Serbia, pp. 92-93, para. 206.

120 Written Contribution of Kosovo, p. 144, para. 8.15.

121 Ibid., p. 150, para. 8.27 and p. 151, para. 8.29.

122 Arbitration Commission of the Peace Conference on Yugoslavia, Opinions Nos. 4, 5, 6 and 7, 11 Jan. 1991, RGDIP, Vol. XCVII, 1993, pp. 564-583.

123 Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No. 4, 11 Jan. 1991, RGDIP, Vol. XCVII, 1993, p. 567, para. 4.

124 Ibid.

23. However, several States claimed during the written phase that declarations of independence are actually subject as such to the requirement of compliance with international law, because in certain situations, such as where an attempt is made to create a State by the use or threat of force by a third State or a régime is established based on apartheid or racial discrimination, these declarations are not recognized by the international community and are even declared invalid by the Security Council. The declaration of independence of which you are seised obviously does not fall into any of these categories[125] . However, in no way does it follow from the examples given in the Written Statements and Comments that declarations of independence proclaimed, for example, with resort to armed force are intrinsically invalid; instead their condemnation by the Security Council and the international community stems from the principle that there should be no recognition of a situation created by a serious breach of an obligation arising under a peremptory norm of general international law and no aid or assistance rendered in maintaining such a situation[126] .

24. Creation of the State is always a simple fact from the international law viewpoint, even today, and the "half a century of evolution of international law" [127] Serbia tries to convince us of has changed nothing. State practice regarding the declarations of independence proclaimed early in the 1990s by the former Yugoslav republics clearly confirms the proposition that international law does not prohibit such declarations. The declaration of independence of 17 February 2008 is the last by federal entities of the SFRY and is part of the process of dissolution of the former Yugoslavia. The extraordinary events starting in 1988/1989 drove the republics to declare their independence, just as these events, exacerbated by the humanitarian catastrophe of 1998/1999 and its consequences, finally brought home to the people of Kosovo that there was no other option but to choose the same path. The conformity of these declarations with international law has never been called into question. Of course, international law has played a part in identifying the new States by application of well-known factual criteria. However, the law has confined itself to acknowledging the existence of these new States — neither more nor less.

B. The territorial integrity rule does not prohibit Kosovo's declaration of independence

25. So there is nothing in the international legal order that prohibits the declaration of independence of 17 February 2008. In particular, the principle guaranteeing the sovereignty and territorial integrity of States in no way opposes the adoption of the declaration of independence by the representatives of the Kosovo people[128] . Although it is indisputable that the establishment of the Republic of Kosovo as a sovereign State challenges Serbia's hold on territory, the declaration of independence is not a breach of the rule of territorial integrity as enshrined in international law today.

26. It emerges clearly from the wording of Article 2, paragraph 4, of the Charter and of all the other legal instruments that enshrine the principle of territorial integrity that "[a]ll Members [i.e., States] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"[129] . Thus this provision, which reflects the customary rule [130], compels States alone to respect the territorial integrity of other States. It cannot be applied to situations arising within a territory and cannot be applicable to declarations of independence, which, by definition, are formulated by non-State entities[131] .

125 Cf. Written Comments of Albania, p. 29, para. 51.

126 Art. 41, para. 2, of the Articles on Responsibility of States for Internationally Wrongful Acts, United Nations, General Assembly, resolution A/RES/56/83, 12 Dec. 2001, Annex and commentary (ILC Yearbook, Vol. II, Part Two, pp. 122-124). See also Written Contribution of Kosovo, pp. 145 and 146, para. 8.18.

127 Written Comments of Serbia, p. 95.

128 Further Written Contribution of Kosovo, pp. 60-75, paras. 4.05-4.30.

129 Our italics.

130 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 99-101, paras. 188-190.

131 See Further Written Contribution of Kosovo, pp. 61-63, paras. 4.06-4.09; Written Comments of Albania, p. 29, paras. 49-51; Written Comments of Switzerland, p. 2, para. 3; Written Comments of the United Kingdom, pp. 19-22, paras. 39-45.

27. The same reasoning is called for with regard to the closely related principle of stability of frontiers: as we have shown in our Further Written Contribution [132], this applies only to forcible changes to the frontiers of a State by another State and cannot be invoked by a State against its own population.

28. In this area, Mr. President, it seems that the droit des gens [jus gentium or law of nations] belies its name — if one ignores the Latin origin of the term — and applies only to States. Here it protects the sovereign entity only against its equals, State against State.

29. The resolutions of the General Assembly which, according to claims by Serbia (reiterated by Professor Shaw this morning) and a few other States, extend the scope of the principle of territorial integrity, and thereby prohibit declarations of independence, do nothing of the sort. Neither General Assembly resolution 1514 (XV) nor the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[133] , nor Security Council resolution 1244, to which Professor Murphy will be referring in a moment, nor any of the other texts relied on by Serbia[134] extend beyond the limited scope of Article 2, paragraph 4, of the Charter. What is more, they confirm it following the example of the saving clause in Article 46, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples, which Professor Shaw mentioned in passing, without quoting it, and which states:[135]

"Nothing in this Declaration may be interpreted as implying for any State, people, group or per son any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."

This provision simply does not recognize any right of non-State entities to independence, any more than it authorises or encourages them to declare their independence. However, contrary to the biased interpretation taken up by Serbia, in no way does it impose on non-State entities a duty to refrain from such actions. It does not prohibit them at all[136] .

30. Thus Article 46, paragraph 1, of this Declaration, as well as many other General Assembly resolutions[137] , provides confirmation that international law does not promote secession, but neither does it prohibit it. International law merely records a successful secession. In this case "[t]he law bows before the fact of statehood"[138] . Like secession, a declaration of independence is a "legally neutral act"[139] in international law, in the words of Professor Crawford. As a factual element in the creation of a new State, it is neither encouraged nor prohibited pursuant to the principle of the territorial integrity of the predecessor State. It is, quite simply, not affected by international law.

31. Thus Mr. President, Members of the Court, there is no rule of general international law which regulates, let alone prohibits, the declaration of independence by Kosovo. This is an entirely satisfactory answer to the question in General Assembly resolution 63/3. However, in order to dispel any doubt as to our position in relation to the principle of self-determination and the right to independence, allow me to say a few words on the subject.

132 Further Written Contribution of Kosovo, pp. 65-66, para. 4.12.

133 United Nations, General Assembly, resolution 2625 (XXV), 24 Oct. 1970, Ann.

134 Further Written Contribution of Kosovo, pp. 63-65, para. 4.10 and 4.11.

135 United Nations, General Assembly, resolution A/RES/61/295, 13 Sep. 2007, Ann. (our italics). See also Further Written Contribution by Kosovo, p. 65, para. 4.11.

136 See also Written Comments of Albania, p. 33, para. 58.

137 Further Written Contribution of Kosovo, pp. 63-65, para. 4.10 and 4.11.

138 A. Pellet, "Le droit international à l'aube du XXIème siècle (La société internationale contemporaine — Permanences et tendances nouvelles)", Cours euro-méditerranéens Bancaja de droit international, Vol. I, 1997, p. 59. See also Written Statement of Finland, p. 4, para. 6; Written Statement of Japan, p. 3.

139 J.R. Crawford, The Creation of States in International Law, 2nd ed., Clarendon Press, Oxford, 2006, p. 390.

C. In the circumstances of the present case, the Kosovo people were entitled under international law to form a State

32. Mr. President, my first comment on a right to independence still remains the same: there is no necessity for you to decide this issue. It is not included in the General Assembly's question. You have not been asked whether the declaration of independence by Kosovo is authorized by international law, but whether it was in accordance with that law [140]. I have already given our answer, and I do not think that there is anything to add.

33. But, and this is my second comment, this is in no way a diversionary ploy, contrary to the allegations that you had to endure this morning. We think that the people of Kosovo had the right to self-determination and could exercise it in 2008 by choosing independence in the special circumstances of the case[141] . Because two conditions are met: - firstly, the population of Kosovo is a people, a group capable of possessing a right of self-determination (internal at first, external if that becomes necessary). The preamble of the Constitutional Framework for Provisional Self-government promulgated in 2001 by the Special Representative of the Secretary-General repeatedly refers to the "people" of Kosovo and Article 1.1 states unambiguously: "Kosovo is an entity under international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.[142]" It has also been said that in granting the population of Kosovo a status of substantial autonomy, resolution 1244 (1999) not only recognizes the existence of a distinct group; it acknowledges that group's fully fledged right of self-determination without actually calling it so [143];

- secondly, the atrocities committed against the population of Kosovo, which Sir Michael spoke about just now, as well as the attitude which Serbia has shown ever since 1999 to the population living in the territory of Kosovo have left the people no other choice than to declare independence. In this case international law, the law des gens ["of peoples"], should recognize a right to secede, not in order to punish the State responsible but to save the human beings who suffer from its actions[144] .

34. These reflections bring my presentation to a close. Thank you, Mr. President and Members of the Court, for your kind attention. I now ask you, Mr. President, to give the floor to my colleague Professor Sean Murphy.

140 Written Contribution of Kosovo, pp. 157 and 158, paras. 8.38-8.41; Further Written Contribution of Kosovo, pp. 75 and 76, para. 4.31, p. 86, para. 4.53. See also Written Statement of Germany, p. 8; Written Comments of the United Kingdom, pp. 5 and 6, para. 10.

141 Further Written Contribution of Kosovo, pp. 76-86, paras. 4.32-4.52. See also Written Statements of Switzerland, pp. 15-26, paras. 57-96; Albania, pp. 40-44, paras. 75-85; Germany, pp. 32-37; Finland, pp. 3-5, paras. 7-12; Poland, pp. 24-29, paras. 6.1-6.16; Estonia, pp. 4-12; the Netherlands, pp. 3-7, paras. 3.1-3.11; Slovenia, p. 2; Lithuania, p. 1, 1; Ireland, pp. 8-12, paras. 27-34; and Denmark, pp. 12 and 13; and Written Comments of Albania, pp. 31-36, paras. 55-65; and Switzerland, pp. 2 and 3, paras. 6-9.

142 Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-government in Kosovo, UNMIK/REG/2001/9, 15 May 2001 [Dossier, doc. No. 156].

143 To this effect, see C. Tomuschat, "Secession and self-determination" in M.G. Kohen (ed.), Secession: International Law Perspectives, Cambridge University Press 2006, p. 34 and P. Weckel, "Plaidoyer pour le processus d'indépendence du Kosovo: réponse à Olivier Corten", RGDIP, Vol. 113, 2009, No. 2, p. 264.

144 See C. Tomuschat, "Secession and self-determination" in M.G. Kohen (ed.), Secession: International Law Perspectives, Cambridge University Press 2006, p. 41, M.N. Shaw, International Law, 6th ed., Cambridge University Press 2008, p. 523 and A. Pellet, "Le droit international à l'aube du XXIème siècle (La société internationale contemporaine — Permanences et tendances nouvelles)", Cours euro-méditerranéens Bancaja de droit international, Vol. I, 1997, p. 58.

The PRESIDENT: Thank you, Mr. Müller, for your presentation. I now call upon Mr. Murphy to take the floor.

Mr. MURPHY: Thank you, Mr. President.

IV. THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE RESOLUTION 1244 (1999)

1. It is a great honour and pleasure to appear once again before this Court.

2. Mr. Müller has just addressed why the Declaration of Independence by Kosovo cannot be regarded as a violation of general international law. I will now explain why the Declaration did not contravene United Nations Security Council resolution 1244. My presentation will address five key points.

3. First, resolution 1244 (1999) contained no prohibition, express or implied, on a declaration of independence, nor any requirement of Serbia's consent to such a declaration.

4. Second, the lack of any requirement of Serbian consent is confirmed by resolution 1244's assertion that the final status process must take into account the March 1999 Rambouillet Accords. Those Accords contained no requirement of Serbian consent to the determination of Kosovo's final status, and instead anchored the final status determination upon "the will of the people" of Kosovo.

5. Third, as anticipated in resolution 1244, the international civilian presence in Kosovo facilitated the final status process which commenced in 2005 and ended in 2007. A decision by the people of Kosovo to pursue independence did not contravene or inhibit "facilitation" of this final status process; rather, the decision was fully consistent with the process.

6. Fourth, United Nations officials authorized to set aside inconsistent measures by authorities in Kosovo did not set aside the Declaration of Independence. This reaction strongly supports the proposition that the issuance of the Declaration did not violate resolution 1244.

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7. And fifth, for various reasons, the Declaration of Independence cannot be regarded as a violation of international law either as an ultra vires act of the Provisional Institutions of Self-Government (PISG) or as a contravention of the Constitutional Framework for Provisional Self-Government, promulgated by the Secretary-General's Special Representative in Kosovo (SRSG) in 2001.

A. Resolution 1244 (1999) contained no prohibition, express or implied, on a declaration of independence, nor any requirement of Serbian consent to such a declaration

8. Turning to my first point: Serbia has repeatedly asserted that resolution 1244 prohibited Kosovo's Declaration of Independence. Yet Serbia is unable to point to any such language in resolution 1244.

9. There is no reference of any kind in the resolution to a declaration or statement by Kosovo's leaders, let alone a reference that prohibits such a declaration. The lack of any such provision may be contrasted with a different Security Council resolution relied upon by Serbia itself this morning, and that is Security Council resolution 787, which was adopted in 1992[145] . In paragraph 3 of that resolution, as counsel for Serbia noted, the Security Council turned its attention to the possibility of a declaration of independence by the leaders of Republika Srpska in Bosnia-Herzegovina. Worried that such a declaration might be issued, the Security Council expressly affirmed in resolution 787 that it would not accept "any entities unilaterally declared".

10. Yet, in resolution 1244, no such language appears, even though it was well known in 1999 that the people of Kosovo desired to establish an independent State. The lack of any such language we submit makes clear that resolution 1244 did not preclude the possible issuance of a declaration of independence by the representatives of the people of Kosovo.

11. Resolution 787 also helps demonstrate two further points. First, even in a resolution where the Security Council expressly addressed a possible declaration of independence, it did not forbid the issuance of the declaration itself, in the sense of asserting that the declaration in question would violate an obligation imposed by the Council. Rather, the Council simply stated that it would not accept any such declaration, such as when considering the admission of an entity to membership in the United Nations. This approach is consistent with the observation in our written pleadings that generally the Security Council does not seek to regulate entities other than States [146].

12. Second, although the Council in resolution 787 opposed Republika Srpska's declaration under those particular circumstances, the Council nowhere indicated that it regarded all such declarations as violating general international law. This approach is consistent with our contention that, as a general matter, international law does not seek to regulate the issuance of declarations of independence [147].

13. Not only does resolution 1244 lack any reference to a declaration of independence, it also lacks any provision calling for a final status settlement in which Kosovo remains a part of either the Federal Republic of Yugoslavia (FRY) or Serbia. In this regard, resolution 1244 may be contrasted with resolution 1251 (1999), which was adopted in the same month of 1999. In resolution 1251, the Council considered the situation of northern Cyprus and stated, in paragraph 11, that "a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession" [148].

14. Yet, in resolution 1244, adopted in the very same month, no statements of any kind are present indicating that a political settlement for Kosovo must be based on Serbia or the FRY with a "single sovereignty and international personality", or that the political settlement must "exclude secession". The language is simply not there.

145 Security Council resolution 787 (1992), 16 Nov. 1992, para. 3.
146 KFWC (Further Written Contribution), paras. 5.67-5.74.
147 KWC (Written Contribution), paras. 8.08-8.37.
148 Security Council resolution 1251 (1999), 29 June 1999, para. 11.

15. Consider two further Council resolutions from 1999 relating to the situation unfolding in Georgia. In resolution 1225 of January 1999 and resolution 1255 of July 1999- thus, these are resolutions that pre-date and immediately post-date resolution 1244 - the Council expressly called for a "settlement on the political status of Abkhazia within the State of Georgia" [149]. In other words, the Council expressly stated that the settlement should be one that involved Abkazia remaining within the sovereign State of Georgia.

16. Again, in resolution 1244, no such language appears. So, at the end of the day, it is no surprise that Mr. Hans Corell, who was the Legal Counsel to the United Nations when resolution 1244 was adopted, has opined, in his private capacity, that resolution 1244 per se "does not guarantee that Serbia would have maintained Kosovo within its border", and then it goes on "that the resolution does not foresee that Kosovo should remain within the borders of Serbia"[150] .

17. The lack of any prohibition in resolution 1244 regarding a declaration of independence, or any demand that Kosovo stay within Serbia, is readily confirmed by the fact that all the key leading participants have viewed resolution 1244 as establishing a "status-neutral" framework. Now counsel for Serbia this morning spoke of a "status-neutral" approach by the United Nations today, but the point is that everyone views resolution 1244 itself as a "status-neutral" framework. The Secretary-General repeatedly refers to resolution 1244 as "status-neutral[151]" , as does the SRSG [152]. Members of the Security Council refer to the resolution in this way [153]. Even Serbia has confirmed to the Security Council itself that resolution 1244 is "status-neutral"[154] . It is difficult to see how resolution 1244 can, on the one hand, be "status-neutral" and, on the other hand, have forbidden a particular final status in the form of Kosovo's independence.

18. Confronted with this difficulty, Serbia at times refrains from arguing that resolution 1244 directly prohibited the Declaration of Independence, and instead argues that resolution 1244 prohibits such a declaration in the absence of Serbia's consent. On this reading, it is not the Declaration per se that violated resolution 1244, but instead the issuance of such a declaration in the absence of Belgrade's consent.

19. This reading of resolution 1244 is equally problematic, for the language of resolution 1244 nowhere calls for approval by Serbia of Kosovo's final status. If the Council had intended to decide that such consent must exist prior to the resolution of Kosovo's status, it certainly could have said so, but it did not.
Council resolutions pre-dating resolution 1244 had gone so far as to call for negotiations between Belgrade and Pristina[155] . In resolution 1244, however, even that language has been dropped.

20. So what did the Council say in resolution 1244 about Kosovo's final status?

21. The Court will note that most of the resolution was not directed at the issue of Kosovo's final status. It was directed at the role of the international community during an interim period. In paragraph 1 of resolution 1244, the Council states that a political solution to the 1999 Kosovo crisis will be based on the general principles expressed in Annexes 1 and 2 to the resolution, which were the principles on which NATO's military campaign were brought to a close, such as the withdrawal of all Serbian military and police forces from Kosovo. Paragraphs 2 through 4 of the resolution then indicate the various steps

149 Security Council resolution 1225 (1999), 28 Jan. 1999, para. 3; Security Council resolution 1255 (1999), 30 July 1999, para. 5; emphasis added.
150 Remarks of Hans Corell, Proceedings of the American Society of International Law 2008, p. 134.
151 E.g., S/2009/300, para. 6.
152 E.g., S/PV.6144, p. 4.
153 E.g., S/PV.6144, p. 10, Vietnam; ibid., p. 15, China; ibid., p. 19, Uganda; S/PV.6202, p. 20, China.
154 E.g., S/PV.6202, p. 7, statement of Serbian Foreign Minister Jeremić.
155 KFWC, para. 5.32.

for the withdrawal of those forces, while paragraphs 5 through 11 elaborate on the deployment of the international military and civilian presences to Kosovo. Virtually all of these provisions are addressing the interim period.

22. Now, in its written and oral pleadings, Serbia relies upon the preambular reference in resolution 1244, which reaffirms the commitment of Member States to the "territorial integrity" of the Federal Republic of Yugoslavia. Now, this provision is not addressing a commitment of the Security Council, let alone an obligation or prohibition imposed by the Council. Further, this preambular provision only refers to "territorial integrity" "as set out in Annex 2", and in Annex 2 the issue of "territorial integrity" relates solely to "the interim political framework", meaning the political framework existing prior to final status.

23. Counsel for Serbia laments that the Security Council could not possibly have been reaffirming a commitment of Member States that would last only during the interim period. But the language says what it says. And it differs from formulations in prior resolutions. This preambular provision also refers to "territorial integrity" as set out in the Helsinki Final Act. But as we explained, at page 147 of our Written Contribution, the principles expressed within the Helsinki Final Act recognize a variety of competing concepts, ones that seek to protect territory from external uses of force but that also seek to promote human rights and the rule of law. As such it is not possible to ascribe to the Helsinki Final Act a single fixed notion disfavouring the legality of declarations of independence.

24. Rather than look at the preamble to determine the Council's position on Kosovo's final status, it is necessary to look at the operative part of the resolution, and specifically to paragraph 11, which sets forth the responsibilities of the international civilian presence. Again, most of paragraph 11 is addressing the interim period. However, subparagraphs 11 (e) and 11 (f) state that the international civilian presence's responsibilities include two things: "(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648); (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement."

25. Those are the provisions in resolution 1244 that speak to Kosovo's final status and the Declaration of Independence did not violate them. When the time came, the United Nations did facilitate the final status talks that were launched in 2005 and concluded in 2007, without any interference by Kosovo authorities, let alone interference in the form of a declaration that was issued in the following year. Nor did the Declaration impede the overseeing of the transfer of authority to institutions established under a final status settlement.

26. Again, to the extent that it addresses these provisions in resolution 1244, Serbia simply tries to read into subparagraphs 11 (e) and (f) a requirement of Serbian consent to the Declaration of Independence. Serbia tries to insist that the words "political process" in subparagraph 11 (e) or the words "political settlement" in subparagraph 11 (f) must mean "Serbian consent to Kosovo's final status". Obviously the language of paragraph 11 does not say that. Rather, what it does say in subparagraph 11 (e) is that the future status must take into account "the Rambouillet accords". Now, the background and language of those Accords make abundantly clear that Serbia's interpretation of paragraph 11 as requiring Serbian consent to final status is completely wrong. And to confirm this requires some attention to what happened both before and during the Rambouillet Conference, which takes me to my second point.

B. By contemplating a political process for Kosovo's final status that takes into account "the Rambouillet accords", the Council accepted that the final status determination would not require Serbian consent

27. In 1998, the Contact Group tasked Ambassador Christopher Hill with achieving an agreement that would stabilize the unfolding Kosovo crisis. The four drafts of the agreement considered during this "Hill Process" pre-dated the Rambouillet Accords and resolution 1244, but they were important in setting the stage for both these instruments. Analysis of the texts confirms that the idea of a Belgrade-Pristina mutual agreement on final status was rejected and ultimately replaced instead with the idea of a final status settlement based on various factors, the first of which is the "will of the people" of Kosovo[156] .

28. Turning first to the Hill Process, all four drafts of the proposed Hill agreement reflect that it was not thought possible to resolve Kosovo's final status at the outset. Instead, the central focus of the negotiations had to be on establishing an interim stage, one designed to create the immediate conditions for the return to a peaceful and normal life for the inhabitants of Kosovo.

29. A short provision found at the end of each of the Hill drafts very briefly addressed the process for Kosovo's final status. This provision avoided prejudging what the final status would be and, in its fourth and final version, avoided giving Serbia any veto over resolution of that status.
30. In the first Hill proposal of 1 October 1998, the relevant clause stated: "In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption[157]." Hence, the first Hill proposal included an express requirement that the final status determination would require "mutual agreement" between Belgrade and Pristina. The second Hill proposal, 1 November 1998, repeated this final provision [158]. The third Hill proposal, 2 December 1998, also repeated this provision, but replaced the word "sides" with "Parties"[159] .

31. Yet because this language of "mutual agreement" would have given Serbia a veto over future developments, it was not acceptable to the Kosovo delegation. Consequently, in the fourth and final Hill proposal of 27 January 1999, this provision was altered and placed in brackets, so as to read as follows: "In three years, there shall be a comprehensive assessment of this Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps, by a procedure to be determined taking into account the Parties' roles in and compliance with this Agreement.[160]"

32. In other words, the last version of the Hill proposals, in that last version, the reference to "mutual agreement" by the "sides" or the "Parties" is completely dropped. Instead, the proposed provision adopted an approach to Kosovo's final status that would involve a "comprehensive assessment" under "international auspices" of a "procedure" that would "take into account" the two sides' roles in compliance with the agreement. No aspect of this (or any other) provision precluded the possibility of the people of Kosovo declaring independence or required Serbian consent prior to determination of Kosovo's final status.

156 KFWC, paras. 5.05-5.18.
157 KFWC, para. 5.07; emphasis added.
158 KFWC, para. 5.07 ("In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving the implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption.").

159 KFWC, para.5.07 ("In three years, the Parties will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption.").
160 KFWC, para. 5.08; emphasis added.

33. The final Hill proposal was produced after the Yugoslav offensive of December 1998, and after the massacre of some 45 Kosovo Albanians in the village of Reçak/Račak on 15 January 1999. Two days after it was issued, the Contact Group called upon the parties to meet at Rambouillet for further negotiations. Thus, coming only days after the end of the Hill Process, and including Ambassador Hill himself as one of the negotiators, the Rambouillet negotiations built upon the Hill Process.

34. Like the Hill proposals, the Rambouillet Interim Agreement envisaged an interim period of substantial Kosovo autonomy followed by a final settlement. Indeed, the formal title of the accord is "Interim Agreement for Peace and Self-Government in Kosovo".

35. Moreover, like the final Hill proposal, the Rambouillet Interim Agreement abandoned the idea of Kosovo's final status being determined by "mutual agreement" between Belgrade and Pristina. The first draft of the Rambouillet Interim Agreement, dated 6 February 1999, drew upon that relevant clause in the final part of the last Hill proposal, stating: "In three years, there shall be a comprehensive assessment of the Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps.[161]"

36. During the course of the Rambouillet negotiations, however, it became apparent that some greater content had to be given to the means by which Kosovo's final status would be determined. In doing so, the negotiators did not return to that original language of "mutual agreement" in the first three Hill proposals, but instead emphasized the need to base the final status upon "the will of the people" of Kosovo, in conjunction with certain other factors.

37. Specifically, Chapter 8, Article I, paragraph 3, of the final version of the Rambouillet Interim Agreement stated: "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.[162]"

38. So, Mr. President, Members of the Court, looking at the progression of text from the first Hill proposal of October 1998 to the final version of the Rambouillet Interim Agreement of March 1999, it is quite apparent that the idea of a Belgrade-Pristina mutual agreement on final status had been dropped, and replaced with the idea of a final status settlement based on various factors, the first of which is the "will of the people" of Kosovo.

39. Kosovo signed the Rambouillet Interim Agreement. Serbia did not. Instead, Serbia sought a wholesale revision of the Rambouillet Accords which, among other things, would have replaced that final status provision referring to "the will of the people" with a different provision that would have required Serbia's consent to a final status settlement. Specifically, the Serbian authorities proposed to change the final clause so as to read: "After three years, the signatories shall comprehensively review this Agreement with a view to improving its implementation and shall consider the proposals of any signatory for additional measures, whose adoption shall require the consent of all signatories." [163] The negotiators at Rambouillet rejected Serbia's proposed revision. This failed effort by Serbia confirms that the Rambouillet Interim Agreement, in its final form, contemplated a final status process in which "the will of the people" was assigned a pivotal role, and in which there was no requirement of Serbian consent.

161 KFWC, para. 5.12.

162 Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999, Chap. 8, Art. I (3), reproduced in S/1999/648, Dossier No. 30.

163 KFWC, para. 5.13: FRY Revised Draft Agreement, 15 Mar. 1999, Chap. 8, Art. I (4), reprinted in Weller, pp. 489-490; emphasis added.

40. Mr. President, in its pleadings to this Court, including this morning, Serbia asserts that the Rambouillet Interim Agreement accepted that Kosovo would remain a part of the Federal Republic of Yugoslavia unless Serbia consented. Yet, in the immediate aftermath of the Rambouillet meeting, the Government in Belgrade had a very, very different view, stating to the Security Council that the "solution" proposed at Rambouillet constituted an "ultimatum" in which Belgrade was being asked to voluntarily give up Kosovo [164]. Further, in explaining its rejection of the Rambouillet Accords, Belgrade asserted to the Council that it "cannot agree to the secession of Kosovo and Metohija, either immediately or after the interim period of three years"[165] . Such assertions were exaggerated, in that the Rambouillet Interim Agreement did not expressly provide that Kosovo would become an independent State after three years. Yet, by Belgrade's own contemporaneous admission in 1999, the Rambouillet Interim Agreement cannot be interpreted as requiring Serbian consent to independence and Serbia itself did not see it that way.

41. Rather, the provision in the Rambouillet Accords calling for a final status to be resolved after three years based on "the will of the people" was well understood at that time, even by Serbia, as including the possibility — indeed, perhaps the likelihood — of Kosovo's emergence as an independent State after the interim period. And as such, resolution 1244's authorization for the international civilian presence to facilitate a final status process "taking into account the Rambouillet accords" cannot be viewed as requiring a process in which Belgrade's consent was necessary to a final status settlement. That simply is not what the Rambouillet Accords contemplated.

C. The political process that ultimately unfolded, including the issuance of the Declaration of Independence, was fully consistent with requirements of resolution 1244

42. Mr. President, allow me to turn to my third point, which is that the political process on Kosovo's final status that ultimately unfolded, including the issuance of the Declaration of Independence in February 2008, was fully consistent with the requirements of resolution 1244.

43. Sir Michael Wood has already described the final status negotiations, as do our written pleadings[166] , and I will not repeat the details of that process, but I do wish to highlight certain elements that establish consistency with the requirements of resolution 1244, specifically the requirement that the international civilian presence facilitate a "political process designed to determine Kosovo's future status, taking into account the Rambouillet accords".

44. First, the Security Council itself determined in 2005 to launch the final status negotiations. After Ambassador Kai Eide, in October 2005, found that the interim situation in Kosovo was no longer sustainable, the Security Council agreed with that assessment. Moreover, the Council expressly stated that it supported "the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244". It further welcomed "the Secretary-General's readiness to appoint a Special Envoy to lead the Future Status process" [167]. Hence, there is no question that, in 2005, the Security Council commenced the final status process envisaged by paragraph 11 of resolution 1244.

45. Second, there is also no question as to who was to lead this final status process. As Sir Michael noted, the Secretary-General proposed the appointment of former Finnish President Martti Ahtisaari as his Special Envoy for supervising the process[168] , a proposal welcomed by the President of the Security

164 S/PV.3989, p. 11.
165 S/PV.3988, p. 14.
166 KWC, Chaps. V and IX.
167 Dossier No. 195.
168 Dossier No. 196.

Council[169] . As I am sure that this Court is aware, this was not a casual selection. President Ahtisaari was already, at that time, a highly regarded and experienced diplomat, one who was well respected for his fairness and effectiveness, and who had a proven track record for resolving difficult conflicts.

46. In addition to welcoming the appointment of President Ahtisaari, the Security Council provided to the Secretary-General for his "reference" certain "guiding principles" for the final status talks that had been developed by the Contact Group, including the Russian Federation. Those principles called for the "launch" of a "process to determine the future status of Kosovo in accordance with Security Council resolution 1244" and made clear that this was a process that the Special Envoy would "lead".

47. Third, the Security Council fully understood that this process, once begun, must be taken to a conclusion; it could not continue indefinitely, based on the intransigence of one party or the other. In those same "guiding principles", it was stated that "[o]nce the process has started, it cannot be blocked and must be brought to a conclusion" [170]. Thus, the Security Council fully understood in 2005, even in the face of strongly held and quite possibly irreconcilable positions between Belgrade and Pristina, that the Council was commencing a political process that could not be blocked and would have to reach a conclusion at the end of the process.

48. Fourth, contrary to the suggestion made this morning by counsel for Serbia, there was no doubt as to who was to decide whether the process had run its course. The terms of reference provided by the Secretary-General to President Ahtisaari made clear that while he must engage in consultations with all the relevant actors, it was he — and he alone — who would determine the "duration" of the process [171].

49. Nowhere in the Secretary-General's recommendation and appointment in 2005 of the Special Envoy, or in these terms of reference of the Special Envoy, was it stated that the process would only end when there was consent by Serbia or a Belgrade-Pristina agreement.

50. Fifth, the Special Envoy clearly fulfilled the mandate given to him by the Security Council. After receiving his instructions, President Ahtisaari set to work immediately and, over the course of 15 months, conducted extensive negotiations with all the relevant parties, including authorities in Belgrade and Pristina. Most of these meetings took place in Vienna, and while Kosovo and Serbia were certainly central to them, the meetings also involved a wide array of experts from the European Union, NATO, the OSCE, the Council of Europe, international financial institutions, and others.

51. As Minister Hyseni noted earlier this afternoon, no stone was left unturned. But on the issue of autonomy versus independence, the two sides' positions remained thoroughly entrenched and diametrically opposed. The Government in Belgrade insisted that Kosovo remain a part of Serbia, while Kosovo authorities, reflecting the long-standing desire of the people of Kosovo, insisted upon independence.

52. After fully exploring all these avenues, President Ahtisaari determined in 2007 that nothing more could be accomplished through negotiations. He said the potential for "any mutually agreeable outcome was "exhausted". No "additional talks, whatever the format," could overcome the "impasse" [172]; and this conclusion by President Ahtisaari about the futility of further negotiations is certainly consistent with this Court's own recognition, such as in the South West Africa cases, that there comes a time in negotiations when "a deadlock" is reached - when "both sides remain adamant" in their positions- in which case, the Court said "there is no reason to think that the dispute can be settled by further negotiations between the Parties" (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary

169 Dossier No. 197.
170 Ibid., Ann.
171 Dossier No. 198.
172 Dossier No. 203.

Objections, Judgment, I.C.J. Reports 1962, p. 346; Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 13 (the same)) [173]. President Ahtisaari not only concluded that such a deadlock had been reached, he also concluded that "the only viable option" for Kosovo was independence[174] .

53. Thus, in accordance with his terms of reference, which stated that the duration of the status process would be determined by him, President Ahtisaari concluded that the time for ending the process had come, and that the only viable political settlement, as envisaged in resolution 1244, paragraph 11, was independence for Kosovo.

54. To that end, President Ahtisaari advanced his "Comprehensive Proposal for a Kosovo Status Settlement" and recommended independence, a proposal and recommendation fully supported by the Secretary-General[175] . Extensive efforts thereafter to secure Serbian co-operation failed. And it is only then, with a "real risk of progress beginning to unravel and of instability in Kosovo and the region"[176] , that Kosovo's democratically elected representatives declared independence. When one steps back and looks at the totality of this process, it simply cannot be said that the Declaration was a sudden, surprising, unilateral act, nor one that violated paragraph 11 of resolution 1244.

55. When adopting resolution 1244, the Security Council authorized the international civilian presence, in paragraph 11, to facilitate a political process designed to determine Kosovo's final status. That process moved forward and it resulted in conclusions by the Secretary-General and by his Special Envoy that the status quo was unsustainable, and that further negotiations would serve no purpose, and that independence was the only viable option. Under such circumstances, it simply cannot be said that the Declaration of Independence of February 2008 contravened paragraph 11 of resolution 1244. Rather, the Declaration was an obvious and necessary next step for achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very authorities charged by the Security Council with leading the final status process.

D. United Nations bodies charged with overseeing implementation of resolution 1244 and setting aside inconsistent measures in Kosovo did not set aside the Declaration

56. Mr. President, allow me to turn to my fourth point, which concerns the reaction of relevant United Nations officials and bodies to the issuance of the Declaration of Independence.

57. As the Court is aware, efforts to secure Security Council endorsement of certain institutional steps envisaged in the Ahtisaari Settlement were unsuccessful. While such endorsement was politically desirable, and would have allowed for the termination of UNMIK's mandate, such endorsement was not required prior to the issuance of a declaration of independence. Indeed, contrary to the assertion made this morning by counsel for Serbia, the draft resolution circulated within the Security Council in July 2007, even if it had been adopted, would not have addressed or authorized the issuance of a declaration of independence.

58. For present purposes, the important fact is that after issuance of the Declaration of Independence, neither the Security Council, nor the SRSG, chose to proclaim the Declaration null and void, or to set it aside, though they were empowered to do so. Resolution 1244 specifically charged the international civilian presence in Kosovo with "overseeing the development of provisional democratic self-governing

173 See also Oppenheim's International Law (Robert Jennings and Arthur Watts, eds.), Vol. 1, 1182-1183 (9th ed. 1992) (States "are under no legal obligation to reach an agreement; nor does any obligation to negotiate necessarily involve an obligation to pursue lengthy negotiations if the circumstances show that such negotiations would be superfluous.").
174 Dossier No. 203.
175 Dossier No. 204.
176 Dossier No. 82

institutions in Kosovo"[177] and, further, the provisional Constitutional Framework adopted by the SRSG stated that he would take "appropriate measures whenever [PISG] actions are inconsistent with resolution 1244 (1999) or this Constitutional Framework" [178]. Counsel for Serbia this morning confirmed that the SRSG was essential the supreme legislative and executive authority within Kosovo.

59. In fact, prior to the completion - prior to the completion of the final status process -the SRSG had - on several occasions - taken steps to prevent or set aside actions or declarations by the interim Kosovo authorities that constituted a move toward independence[179] . Yet the SRSG did not take any such action with respect to the February 2008 Declaration of Independence, which came after the end of the final status process. By not doing so, we submit, the "supreme administrative authority"[180] in Kosovo acted in a manner that does not fit Serbia's claim that the Declaration violated resolution 1244.

60. There can be no doubt that the SRSG and other United Nations officials considered whether they should take such action. After issuance of the Declaration, Serbia formally demanded that the Secretary-General take steps to have the Declaration set aside, by instructing the SRSG to that effect[181] . The Secretary-General did not do so. Nor did the Security Council, either by resolution or through a statement of its President.

61. Our submission, Mr. President, is that the fact that neither the SRSG, nor the Secretary-General acted to set aside the Declaration strongly supports the proposition that the issuance of the Declaration in February 2008 did not violate resolution 1244.

E. The Declaration of Independence was neither an ultra vires act of the PISG or a contravention of UNMIK's constitutional framework

62. I now turn to my fifth and final point. With no support in the language or in the negotiating history of resolution 1244, or in the subsequent practice under that resolution, for the proposition that the resolution prohibited a declaration of independence in February 2008, Serbia resorts to the argument that the Declaration was unlawful in a different way. Specifically, Serbia attempts to argue that the Declaration was an ultra vires act of the Provisional Institutions of Self-Government, the PISG, or a contravention of the SRSG's provisional Constitutional Framework for governance within Kosovo. Serbia's anxious attempt to find some kind of violation of some instrument is perhaps understandable as a litigation tactic, but it is wholly unpersuasive as a matter of law, for several reasons[182] .

63. First, as discussed by Mr. Müller, the Declaration of Independence was not adopted by the PISG. Rather, this particular action was of a very special and extraordinary nature, one taken by the democratically-elected representatives of the people of Kosovo. That act simply cannot be judged as the act of a body established under the Constitutional Framework and charged with day-to-day administrative responsibilities, governing responsibilities, in Kosovo during the interim period.

64. Second, even if this action of the representatives of Kosovo were to be regarded as an action of the PISG, the legality of that action cannot be judged against standards set forth for the governance during the interim period. Since the final status process had concluded, issuance of the Declaration in February 2008 was not an act of an interim institution transgressing its limited authority; rather, it was the act of a constituent body declaring, in the name of the people, its readiness to exercise governing authority on a permanent basis, as contemplated by the political process that unfolded in resolution 1244.

177 Resolution 1244, para. 11 (c).
178 Constitutional Framework, Chap. 12, Dossier No. 156.
179 KWC, paras. 9.24-26.
180 Serbia Written Statement, paras. 895-96.
181 KWC, para. 9.27.
182 KFWC, paras. 5.61-5.66.

65. Third, whether or not the PISG issued the Declaration, it fell to the Secretary-General's Special Representative, the SRSG, to determine whether the Declaration was an ultra vires act or whether it violated the Constitutional Framework that he had promulgated, if that was truly the case. Yet, as I previously noted, the SRSG took no such action.

66. Now, in this regard, an important point of United Nations institutional law arises. In this case, the Security Council delegated authority to the Secretary-General and to his Special Representative in charge of civilian administration within Kosovo. In doing so, the Council provided those officials with authority to develop whatever regulations were deemed necessary to implement the Council's resolution in theatre. If there is a question about whether there was a transgression in theatre of the rules adopted by the SRSG to regulate local matters, considerable weight should be accorded to that representative to determine whether a transgression has occurred and, if so, to correct it [183]. In this instance, the SRSG's decision not to declare null, or void, or to set aside the Declaration as an ultra vires act, or as a violation of his Constitutional Framework, was an authoritative, or at least highly persuasive, interpretation of what UNMIK's regulations required.

67. Fourth, even if one hypothesizes that the Declaration constituted an ultra vires act of the PISG, or that it violated the SRSG's Constitutional Framework, Serbia errs in regarding any such action as a violation of international law as referred to in the question put to this Court by the General Assembly. Such action would only have been a violation of the domestic law applicable in Kosovo, for the Constitutional Framework was an UNMIK regulation and, like all UNMIK regulations, was part of the local law established for the interim administration of Kosovo. In this respect, the Declaration of Independence would have been ultra vires only in the same way that most declarations of independence are — as a contravention of the constitutional or other domestic law of the State concerned.

68. Finally, given the several assertions this morning that the Declaration brought to an end the régime under resolution 1244, I note that the issuance of the Declaration did not terminate or seek to terminate the role of UNMIK under resolution 1244. Resolution 1244 contemplated a role for UNMIK in both the interim and post-interim periods, which UNMIK continues to fulfil. Serbia itself accepts that the Declaration did not set aside the mandate of UNMIK and that UNMIK continued to perform certain functions after the adoption of the Declaration[184] . Kosovo accepts that it is for the Security Council to terminate the international civilian presence in Kosovo and that resolution 1244 remains the United Nations basis for UNMIK's presence in Kosovo.

F. Conclusion

69. Mr. President, Members of the Court, as Sir Michael indicated, Kosovo's basic position consists of the following five propositions.

70. First, the Court will need to consider the propriety of answering the question put by the General Assembly. A number of States have raised serious questions in this regard.

71. Second, if it is to be answered, the General Assembly's question to this Court is narrow and precise, relating solely to the Declaration of Independence that was issued in February 2008. It does not concern questions of statehood, recognition, or membership in international organizations.

72. Third, general international law contains no rules by which the legality of a declaration of independence may be assessed.

183 Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37.
184 Serbia Written Statement, paras. 827 and 834.

73. Fourth, as I have discussed, resolution 1244 of 1999 did not preclude the issuance in 2008 of the Declaration of Independence.

74. Fifth, while some States have focused on the principle of self-determination, we have referred to it only as a subsidiary point, since we do not think the Court need reach the issue. But if it does, it is our submission that the people of Kosovo clearly were entitled to exercise the right of self-determination, and did so by choosing independence.

75. Mr. President, Members of the Court, for the reasons set forth in our written pleadings, and at the present hearing, we respectfully request that the Court - if it deems it appropriate to respond to the request for an advisory opinion contained in General Assembly resolution 63/3 - to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

76. This concludes our oral contribution. On behalf of all those who have spoken this afternoon, I have the honour to thank the Court for its very kind attention.

The Republic of Albania

The Republic of Albania is represented by:

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

Professor Jochen Frowein,
Professor Terry D. Gill,
as Legal Advisers;
Mr. Gentian Zyberi,
as Co-Adviser;
Ms Ledia Hysi, Director of Legal Affairs and International Law at the Ministry of Foreign Affairs;
Mr. Sami Shiba, Director for Kosovo, Macedonia and Montenegro at the Ministry of Foreign Affairs;
Mr. Genc Pecani, Minister Plenipotentiary at the Embassy of Albania in the Kingdom of the Netherlands.

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

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

Mr. BARBULLUSHI:

I. BACKGROUND TO THE CASE

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

2. Twenty years ago, in 1989, Kosovo was illegally stripped of its autonomy and its right to self-determination under the 1974 Yugoslav Constitution. Ten years of State-sanctioned discrimination followed where widespread and systematic violations of human rights occurred. Ten years ago, in 1999, the population of Kosovo was subjected to the largest ethnic cleansing campaign since the Second World War. Thousands were killed and disappeared, and tens of thousands of homes were damaged or destroyed. As the International Criminal Tribunal for the former Yugoslavia found, and as other sources also confirm, Serbian forces and paramilitaries implemented a systematic campaign to ethnically cleanse Kosovo, which included the forcible displacement of civilians, the looting of homes and businesses, wanton destruction of property, summary executions, rape, torture and inhuman and cruel treatment. Over 1.5 million Kosovar Albanians were forcibly expelled from their homes. During those dark days Albania hosted about 700,000 Kosovars. All of these facts are a matter of public record and have been brought to your attention by a large number of States during these proceedings.

H.E. Mr. Gazmend Barbullushi, Ambassador Extraordinary and Plenipotentiary at the Embassy of Albania in the Kingdom of the Netherlands

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

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

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

Mr. FROWEIN:

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

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

3. My first point will be a few remarks concerning the general approach. The second part will discuss under which circumstances declarations of independence may be in violation of international law. The third part will deal with the relationship between a declaration of independence and the rule of territorial integrity. The fourth part will discuss the interpretation of resolution 1244. The fifth part on self-determination will be presented by my colleague, Professor Gill. I shall then come to a conclusion. I am afraid, Mr. President, there will be repetitions, but I hope to shed some new light on some of the problems.

II. JURISDICTION AND PROPRIETY

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

1. Possible action of the General Assembly

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

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

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

8. Therefore, it would seem that in this particular case the Court must ask the question whether an advisory opinion could be useful for any function to be performed by the General Assembly. Could the General Assembly draw any conclusions from the findings? Assume that Kosovo, one day, will apply for membership in the United Nations, as many of us hope.

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

2. The argument that the Declaration was ultra vires

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

11. However, even assuming that the Court should find that the Declaration as such was in that sense ultra vires, what could be the effect of such a finding for action of the General Assembly? It is clear that the Declaration would remain the exercise of the pouvoir constituant of the Kosovo people. Even if the provisional organs had no mandate for such a declaration this would not change, in my submission, the situation at all. You can in fact compare it to the famous action by the tiers état in Paris in 1789. This was within a State, but it is exactly the same with an act of secession forming a new State. The pouvoir constituant is not bound by rules existing under the previous constitutional system. This is, I submit, an additional reason why it seems doubtful whether the Court should entertain the advisory opinion. And let me add this, which we should I think not forget, a considerable majority of States Members of the United Nations did not express the wish to have an advisory opinion by your Court.

III. CONFORMITY OF THE DECLARATION WITH INTERNATIONAL LAW

1. General approach

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

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

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

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

15. Where intervention by a third State, be it by the use of force or by other means, is decisive for the declaration of independence this is of course a severe violation of international law. Therefore, the Security Council and sometimes also the General Assembly have called upon States not to recognize the newly formed entity. A particular telling example is, of course, Northern Cyprus. No State, except the one having intervened, recognized the declaration of independence of Northern Cyprus.

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

3. Declaration of independence in violation of ius cogens

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

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

IV. DECLARATION OF INDEPENDENCE AND TERRITORIAL INTEGRITY

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

20. The creation of a new State by secession has nothing to do with the disregard of territorial integrity of the State. This is shown by the practice of States which has never used the argument that a declaration of independence by a secessionist group is a violation of the principle of territorial integrity.

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

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

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

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

25. The resolution reaffirms that "all foreign military, paramilitary and advisory personnel not under the United Nations Command, and all mercenaries" must be withdrawn. And in its operative part the resolution states under paragraph 1:
"Strongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga with the aid of external resources and manned by foreign mercenaries."
This shows that this was clearly a case of outside intervention.

26. The same is of course true for resolution 787 (1992) concerning Bosnia and Herzegovina. In paragraph 5, the Security Council, in that resolution, demands "that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the country of irregular units and personnel, cease immediately". I think it is somewhat ironic that this resolution should be quoted by Serbia for its arguments.

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

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

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

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

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

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

V. THE IMPORTANCE OF RESOLUTION 1244

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

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

35. But this reference to Rambouillet creates a very important balance in resolution 1244. The Rambouillet Accords - as we heard yesterday and we all know - envisaged as one possible solution the full independence of Kosovo as a sovereign State on the basis of the will of the people, as expressly mentioned there. By referring to these Accords, resolution 1244 confirms this possibility. On the other hand, the resolution refers to the sovereignty and territorial integrity of the FRY. By that reference it is made clear that at the time when resolution 1244 was adopted, no final decision was taken. It is also made clear that the process would not in any way affect the sovereignty and territorial integrity of Yugoslavia.

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

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

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

39. It is indeed quite telling that the Serbian Comments quote a remark by President Ahtisaari and interpret it as showing that Ahtisaari's view from the very beginning was that independence was the only option. However, the language used by President Ahtisaari does not in any way convey this meaning. I repeat what Serbia quotes in paragraph 106 as the words of President Ahtisaari. According to this quotation he said: "L'une des conditions formulées au départ était de ne surtout pas revenir à la situation d'avant 1999." This does not in any way show that independence was the only possible solution President Ahtisaari had in mind. Before 1999, as we all know, Kosovo had no longer any autonomy and at that time the human rights of the people of Kosovo were severely violated. It was clear from resolution 1244 that

at least a high degree of autonomy was envisaged. To interpret this statement by President Ahtisaari as being biased, taking only the possibility of full independence, is a complete reversal of the meaning of the sentence expressed in the statement.

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

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

VI. SELF-DETERMINATION AND THE RIGHT TO REMEDIAL SECESSION

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

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

1. Self-determination under international law

May it please the Court:

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

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

6. The holders of the right of self-determination are of course peoples. While the question of what constitutes a people can differ according to the context in which it is used, there can be no doubt that the population of Kosovo constitutes a people, as has been recognized in the Rambouillet Accords, in the Constitutional Framework for Kosovo adopted by UNMIK, by the Ministers of the Contact Group and by the Special Representative of the Secretary-General on behalf of the United Nations, and this is

all referred to, Your Honours, in paragraphs 61-65 of the Albanian Written Statement of July 2009. And I might point out that this is in contrast to what our respected colleagues from Serbia said to the Court yesterday in regard to the question of the Kosovars being a people. While the Court is not called upon to pronounce whether the population of Kosovo constitutes a people for the purpose of self-determination, there can be no doubt that they do so qualify and this could be relevant if the Court should decided to exercise its jurisdiction.

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

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

Albania is represented by Professor Terry D. Gill, Legal Adviser

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

9. Mr. President, Members of the Court, this is by no means a passport to secession, but neither can it be viewed as an unconditional right to maintain territorial integrity at the price of the practice of discrimination and exclusion from participation in the political life and denial of representation of part of the population. This is how it is widely viewed in academic opinion and in the advisory opinion handed down by the Canadian Supreme Court in re Secession of Quebec of 1998. In that decision, which is unique in that it squarely addresses the issue of when a possible lack of prohibition of secession could arise in the context of the exercise of self-determination, the Court reasoned that since Canada met the requirements of a democratic State, guaranteeing full participation of the entire population in the political life and administration of Canada, there was no entitlement to unilateral secession on the part of the Quebec population.

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

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

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

12. The question whether the Declaration of Independence in any way violates the right of self-determination is of signal importance to these proceedings. The question can only be answered by applying the law to the specific factual and historical circumstances surrounding the declaration. These facts are set out in detail in the Written Statement of Albania and other States and are incontestable and a matter of public record. They document a series of events extending over a period of some ten years, which constituted a policy of systematic discrimination and exclusion of the Kosovar Albanians from the public life of the province; consisting of cancellation of all representative bodies of government, exclusion of the Kosovar Albanian population from all levels of governmental administration, and suppression of the Albanian language and culture, resulting in mass opposition and the spread of the armed conflict in the Former Yugoslavia to Kosovo, ending finally in international intervention and the placing of the territory under international administration.

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

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

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

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

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

Albania is represented by Professor Jochen Frowein, Legal Adviser

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

VII. CONCLUSIONS

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

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

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

4. I conclude our intervention. No case before the International Court of Justice and of course no request for an advisory opinion has had such far-reaching possible importance for a new member of the international community, recognized today by almost one third of this community,among them three permanent members of the Security Council, all but one of the neighbouring States, and the great majority of States of the region, organized in the European Union.

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

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

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

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

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

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

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

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

The Federal Republic of Germany

The Federal Republic of Germany is represented by:

Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office, Berlin;
H.E. Mr. Thomas Läufer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands;
Mr. Guido Hildner, Head of Division, Federal Foreign Office, Berlin;
Mr. Felix Neumann, Counsellor, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands.

Ms WASUM-RAINER:

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

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

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

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

Members of the Delegation of the Federal Republic of Germany

continue by elaborating, in the fourth section, that the existence of this State is based on the exercise of the right to self-determination by the people of Kosovo (IV). My conclusion will confirm that the Declaration of Independence in question is in accordance with international law (V).

I. GENERAL ASSEMBLY RESOLUTION 63/3 OF 8 OCTOBER 2008

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

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

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

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

II. POSSIBLE NORMS PROHIBITING THE DECLARATION OF INDEPENDENCE

9. Germany shares the opinion that a declaration of independence leading to secession, and indeed secession itself, are merely factual events. The question of that declaration's legality may well be governed by domestic, notably constitutional, law. International law, however, is silent on this point.

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

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

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

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

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

15. The fact that there are Security Council resolutions which address specific conflict situations and require that in these specific situations also non-State actors respect the territorial integrity of a specific State does not contravene this finding. Contrary to what Serbia had stated yesterday, the inclusion of such an obligation in a Security Council resolution can also be seen - and this is our position - as establishing an obligation which otherwise would not exist.

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

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

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

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

20. Resolution 1244 contained the requirement that the final status process must take into account the March 1999 Rambouillet Accords. But it did not exclude a declaration of independence. The fact that neither the Special Representative of the Secretary-General, nor the
Secretary-General, nor the Security Council, acted to set aside the Declaration of Independence of February 2008 strongly supports the proposition that the issuance of the Declaration of Independence did not violate resolution 1244.

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

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

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

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

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

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

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

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

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

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

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

IV. RIGHT TO SELF-DETERMINATION

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

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

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

34. In the debate about the right to self-determination, concerns have been voiced that a broad exegesis of its content might trigger risks for stability, peace and security. In order to prevent the concept getting out of hand, attempts have been made to narrow and limit the scope of the right to self-determination.

Mrs. Susanne Wasum-Rainer, acting legal counsel, Federal Ministry of Foreign Affairs, Berlin. (Germany)

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

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

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

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

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

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

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

V. CONCLUSION

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

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

Thank you, Mr. President.

The Kingdom of Saudi Arabia

The Kingdom of Saudi Arabia is represented by:

H.E. Mr. Abdullah A. Alshaghrood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands, as Head of Delegation;
Mr. Mohammad I. Alaqeel, Counsellor,
Mr. Fahad M. Alruwaily, Counsellor,
as Members of Delegation.

The PRESIDENT: I call upon His Excellency Mr. Abdullah Alshaghrood to make his presentation on behalf of Saudi Arabia.

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

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

H.E. M. Abdullah A. Alshaghrood, ambassador. (Saudi Arabia)

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

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

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

The Republic of Austria

The Republic of Austria is represented by:

H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of European and International Affairs;
H.E. Mr. Wolfgang Paul, Ambassador of Austria to the Kingdom of the Netherlands;
H.E. Mr. Werner Senfter, Deputy Ambassador of Austria to the Kingdom of the Netherlands.

The PRESIDENT: Please be seated. I shall now give the floor to His Excellency Mr. Helmut Tichy.
Mr. TICHY:

I. INTRODUCTORY REMARKS

1. Mr. President, distinguished Members of the Court, Austria is pleased to contribute to the proceedings before this Court.

2. Austria has already expressed its views on the question put to this Court, namely, "Is the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" in its Written Statement in April. Austria stressed in this Written Statement that it sees the Declaration of Independence of Kosovo as being in conformity with international law. Austria now wishes to elaborate on some particularly important points. It hopes that the solution of the legal issues at stake will contribute to dialogue and co-operation between Serbia and Kosovo as well as to peace and security in the region.

3. In Austria's view the question submitted to this Court is of limited scope: it refers only to the Declaration of Independence and its legality under international law. Accordingly, my statement will focus on the matters directly addressed by this question. In particular, it will show that the Declaration of Independence is in conformity with international law, including Security Council resolution 1244. And, in this regard, the question is not whether there exists a permissive rule of international law enabling declarations of independence to be made, but whether international law prohibits such declarations. Our conclusion is that there is no rule of international law prohibiting declarations of independence.

Members of the Delegation of Austria.

II. THE DECLARATION OF INDEPENDENCE WAS NOT ISSUED BY A PROVISIONAL INSTITUTION OF SELF-GOVERNMENT

4. The formulation of the question submitted to this Court is obviously based on the assumption that the Declaration of Independence was issued by one of the Provisional Institutions of Self-Government of Kosovo, namely the Assembly. This, however, was not the case. The Declaration of Independence was voted upon and signed by the elected representatives of the people of Kosovo acting in this capacity, expressing the will of the people outside the framework of the Assembly. The Declaration's language, form and method of adoption in an "extraordinary meeting"[1] demonstrate that it was not an act of the Provisional Institutions of Self-Government. One quotation might suffice to confirm this conclusion. Already the first operative paragraph of the Declaration starts with the words "[w]e, the democratically-elected leaders of our people", which indicate that the authors of the Declaration acted not as members of a Provisional Institution of Self-Government but as representatives of the people of Kosovo.

III. DECLARATIONS OF INDEPENDENCE ARE NOT CONTRARY TO INTERNATIONAL LAW

5. Mr. President, distinguished Members of the Court, no rule of international law has been identified which prohibits the population of a certain territory represented by its elected leaders to issue declarations of independence. International law does not address such declarations. A declaration of independence as such does not have legal effects under international law; the possible establishment of a State depends on a variety of facts[2] and their legal assessment - but that is a different question, which was not put to the Court.

1 Declaration of Independence, 17 Feb. 2008, preambular paragraph 1.
2 Art. 1, Montevideo Convention on the Rights and Duties of States, 26 Dec. 1933, 156 LNTS 19. (fusnota)

IV. THE DECLARATION, EVEN IF CONSIDERED A DECLARATION OF THE ASSEMBLY, IS NOT CONTRARY TO INTERNATIONAL LAW

6. As I have said, Austria is of the view that the authors of the Declaration acted as representatives of the people of Kosovo and not as members of the Assembly. In our view, however, the legal statement that international law does not address declarations of independence applies irrespective of whether the Declaration is regarded as an act of the representatives of the people of Kosovo or, for the sake of argument, as an act of the Assembly or of any other institution.

7. Moreover, as far as Security Council resolution 1244 is concerned, the Declaration - even if considered as an act of the Assembly - does not contradict this resolution. The resolution provided for increasing powers of the Provisional Institutions, powers which, in a final stage, included also the competence to issue a declaration of independence.

8. Let me explain this in more detail. Resolution 1244 as well as the UNMIK Constitutional Framework provided for the gradual transfer of authority and competences to the Provisional Institutions of Self-Government during the interim period so that in the subsequent final stage these institutions would have all powers necessary for a peaceful solution. According to operative paragraph 11 of the resolution, the international civil presence was tasked to oversee in a final stage the transfer of authority from the Provisional Institutions to institutions established under a political settlement. The UNMIK Constitutional Framework had established that activities of the Assembly falling within the purview of external competences had to be conducted in agreement with the Special Representative of the Secretary-General[3]. In practice, however, the Special Representative ceased to object to the autonomous exercise of competence by the Assembly, as was confirmed by several reports of the Secretary-General indicating that the powers of UNMIK were being adjusted to the changing situation[4].

9. Accordingly, if - contrary to the position of Austria - the Declaration of Independence were to be considered as an act of the Assembly, it would not have constituted an ultra vires act and would have been in conformity with resolution 1244.

V. THE DECLARATION OF INDEPENDENCE DOES NOT VIOLATE THE PRINCIPLE OF TERRITORIAL INTEGRITY

10. As already stated, a declaration of independence as such does not have the effect of creating secession or establishing a State. Such declarations serve mainly as manifestations of the will of the people and are not addressed by international law, so that they cannot be measured against the rules of general international law relating to changes of territory. Practice and doctrine of international law are unequivocal in this regard, as already pointed out in the Austrian Written Statement[5].

11. It is certainly true that international law increasingly contains rules regulating activities of non-State actors and even individuals. However, these rules concern other issues such as human rights, humanitarian law or individual criminal responsibility, issues that are not at stake in the present context.

12. Supporters of the view that the Declaration of Independence is contrary to international law have not been able to show in their written statements that there is any rule prohibiting declarations of independence. Nor is there any precedent establishing that the mere act of declaring independence or

3 Chap. 8, Sect. 8.1 (o), Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001.
4 Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211, 28 Mar. 2008, para. 30; S/2008/254, 12 June 2008, para. 7; S/2008/692, 24 Nov. 2008, para. 21. (fusnota)
5 See paras. 22 et seq.

H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of European and International Affairs. (Austria)

proclaiming the existence of a State is contrary to international law. Unilateral declarations of independence were found to be illegal only when they were made in combination with a violation of a rule of international law: examples for such violations are the unlawful use of force, the breach of an international agreement (as in the case of Cyprus)[6] or racial discrimination (as in the case of Southern Rhodesia)[7].

13. The argument was made that declarations of independence are contrary to the duty to respect the territorial integrity of States. We believe, however, that this duty does not apply in the present context for at least three reasons.

14. First, Article 2, paragraph 4, of the United Nations Charter declares that this duty applies only to Member States of the United Nations and in their international relations. Therefore it does not apply internally to entities seeking secession. Some have argued that this obligation is of an erga omnes nature[8]. However, such an obligation binds only subjects of international law. The authors of the Declaration, as representatives of the people of Kosovo, are consequently not addressed by this rule, as - at the time of the Declaration - they did not represent a subject of international law. Various legal instruments establishing the inviolability of the territorial integrity of States confirm this conclusion. Even resolution 1244 itself mentions territorial integrity only with regard to States when it declares in its preamble:

"Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2."

15. The commitment to territorial integrity contained in this preambular paragraph was not intended to be absolute: it is qualified by the reference to the Helsinki Final Act, which places the respect

6 UN Security Council resolution 541 (1983), 18 Nov. 1983 (Cyprus).

7 UN Security Council resolutions 216 (1965), 12 Nov. 1965 and 217 (1965), 20 Nov. 1965 (Southern Rhodesia).

8 Written Statement of Romania, paras. 80, 108; Written Statement of Serbia, paras. 440 et seq., 501, Written Statement of Iran, paras. 3.1-3.6. (fusnota)

for the territorial integrity of States on equal footing with other rights and obligations, including the respect for human rights and fundamental freedoms and the right to self-determination.

16. It is the practice of the Security Council to reaffirm respect for the territorial integrity of the State concerned when it acts under Chapter VII of the Charter. It did so in resolution 1272 (1999) on East Timor[9] while explicitly welcoming the will of the Timorese people for independence[10], which led to the emergence of a new State. This shows that the Security Council sees no contradiction between the respect for territorial integrity and processes leading towards independence. Therefore, the preambular reference in resolution 1244 to the territorial integrity of the Federal Republic of Yugoslavia in no way determines that the future status of Kosovo must be within the borders of Yugoslavia.

17. Second, if the principle of respect for territorial integrity were applicable in this context, other principles such as non-intervention would also have had to apply in the relations between Serbia and Kosovo, even before Kosovo became an independent entity. Any other approach would be selective and is therefore inadmissible.

18. Third, pertinent precedents confirm that declarations of independence do not violate the duty to respect the territorial integrity of States. Several other parts of former Yugoslavia, such as Slovenia, Croatia, the former Yugoslav Republic of Macedonia and Bosnia and Herzegovina, made similar declarations during and after 1991 which did not meet with any objection from the international community. Although the Federal Republic of Yugoslavia originally contested the legality of these declarations under internal as well as under international law, its opposition did not create a rule prohibiting declarations of independence under international law, especially since no other State concurred with the position of Yugoslavia. All these new States were admitted to the United Nations by consensus[11], which indicates that all United Nations Member States were of the view that these States fulfilled the criteria of Article 4 of the Charter. This would not have been the case had their creation been affected by an unlawful act. Furthermore, the Federal Republic of Yugoslavia did not object to the declarations of independence when it entered into treaty relations with these States. It became a party to the Agreement on Succession Issues signed in 2001 in Vienna[12] by all new States emerging from former Yugoslavia. These facts corroborate the conclusion that declarations of independence cannot be regarded as unlawful under international law.

VI. INTERNATIONAL LAW DOES NOT PROHIBIT SECESSION

19. Mr. President, distinguished Members of the Court, my remarks so far have concentrated on the issuance of the Declaration itself and have established that such issuance is not contrary to international law. Let me now turn to the substance of the Declaration where it is equally clear that no violation of a rule of international law has occurred, in particular since the Declaration alone is incapable of effectuating secession or independence.

20. While the coming into existence of a new State despite opposition by the predecessor State is not taken lightly, no rule of international law prohibiting secession has been ascertained. More precisely, no rule of international law addresses secession. In fact, international law remains neutral concerning the separation of a part of a State. As the late Professor Thomas Franck declared:
"It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognized in international law and the law imposes no duty on any people not to secede."[13]

9 Preambular para. 12.
10 Preambular para. 3.
11 See General Assembly resolutions A/RES46/236, 22 May 1992, A/RES46/237, 22 May 1992, A/RES46/238, 22 May 1992 and A/RES47/225, 8 Apr. 1993.
12 Adopted at the Conference on Succession Issues, Vienna, 29 June 2001.
13 Professor Thomas Franck, Experts Report, para. 2.11, reproduced in A.F. Bayefsky (ed.), Self-determination in Interna-

21. Accordingly, international law does not prohibit secession. While the community of States may not favour secession, there is no rule prohibiting secession, in particular since the principle of territorial integrity applies only in inter-State relations, as I have said before. In fact, secession appears to be a political fact from which conclusions may be drawn under international law when it leads to the establishment of effective and stable State authorities[14].

22. In addition to having established that international law does not prohibit declarations of independence nor secession, allow me to respond to some points which were made in relation to the Arbitration Commission of the Peace Conference of the former Yugoslavia (commonly known as Badinter Arbitration Commission)[15]. It was argued that Opinion No. 9 of 4 July 1992 of the Badinter Commission disqualified the possibility of any further secession on the territory of former Yugoslavia so that the Declaration of Independence of Kosovo would run counter to the opinions of the Commission.

23. However, Opinion No. 9 could not anticipate the future development and the events unfolding several years after the elaboration of this opinion; accordingly, the conclusion expressed therein has no significance for the present question. The Badinter Commission itself had to adjust its views according to the developing events: in 1991, it assumed the continuing existence of the Socialist Federal Republic of Yugoslavia, whereas in 1992 it had to recognize the dissolution of this State. Furthermore, the view of the Commission is phrased in very careful terms since it recognizes only the completion of the specific dissolution process which was addressed in its Opinion No. 1 and does not address any other dissolution or secession processes. So, for instance, the Badinter Commission could not preclude the creation of the State of Montenegro. Montenegro's emergence as an independent State was not contested by any State and corroborates this conclusion. Therefore, the opinions of the Badinter Commission cannot be used as an argument that the Declaration of Independence of Kosovo was illegal.

VII. THE SUBSTANCE OF THE DECLARATION IS IN ACCORDANCE WITH RESOLUTION 1244

24. I will now elaborate on the point that also resolution 1244 does not preclude a declaration of independence. Resolution 1244 defines the further development of the situation of Kosovo in two different stages: the first is the interim period; the second, the situation of the final political settlement. Operative paragraph 11 (a) explicitly distinguishes the interim period from the final political settlement when it defines as task of the international civil presence "[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords".

25. Whereas the organs of Kosovo during the interim period were established by the resolution, the exact substance of the final political settlement was not defined therein. The events leading to the Declaration of Independence demonstrated very convincingly that the interim period had already come to an end and that a further development within this period was no longer possible. All efforts to achieve a solution by agreement had been exhausted.

26. Resolution 1244 likewise did not define the mode for reaching a political settlement, so that the consent of Serbia was not required for a final political settlement to be in conformity with resolution 1244. The requirement which was laid down, however, was the respect for the will of the people of Kosovo, in accordance with the Rambouillet Accords[16].

tional Law: Quebec and Lessons Learned, 2000, p. 335.

14 See Austrian Written Statement, paras. 37 et seq.

15 See, e.g., Written Statement by Romania, 14 Apr. 2009, paras. 69, 127 et seq.; Written Statement by Serbia, 14 July 2009, para. 265.

16 Chap. 8, Art. 1, para. 3 of the Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999.

27. While the resolution did not explicitly indicate that a possible solution could encompass the independence of Kosovo, it nowhere prohibited independence as an option for a final settlement. An attempt to modify the wording of the resolution to rule out independence did not find its way into the final text of the resolution. Therefore, resolution 1244 does not contain a prohibition of secession of Kosovo from Serbia and does not exclude the creation of a new State. In fact, in the absence of a clear definition of the final political settlement in this resolution, any political settlement remains only subject to the limits of general international law.

28. The Declaration's conformity with international law is expressed by the Declaration of Independence itself - in paragraph 12, consistency with the principles of international law, including Security Council resolution 1244, is explicitly declared. Therefore, in accordance with the principle of good faith it cannot be argued that the Declaration of Independence contradicts
18Chap. 8, Art. 1, para. 3 of the Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999.
international law, since the Declaration itself announces conformity with it. Accordingly, the substance of the Declaration of Independence is to be interpreted as being in conformity with international law.

VIII. NO OBJECTION BY UNITED NATIONS ORGANS

29. A further indication that the Declaration of Independence - even if, for the sake of argument, considered as an act of the Assembly - was in accordance with international law, including resolution 1244, is that neither the Special Representative of the Secretary-General nor the Security Council voiced any objection to the Declaration. The Special Representative did not invalidate the Declaration of Independence, despite his power to annul acts of the Provisional Institutions he considered in violation of resolution 1244. The responsibilities of the Special Representative in accordance with operative paragraph 6 of the resolution include control over the implementation of the international civil presence. Had he considered the Declaration as violating resolution 1244 and in particular the UNMIK Constitutional Framework, it would have been his duty to object to the Declaration of Independence either by public statement, in a report to the Secretary-General or directly to the Security Council. However, he obviously abstained from doing so.

30. Generally speaking, the Special Representative was not reluctant to use his powers to invalidate acts which he did consider contrary to resolution 1244. One such occasion was, for example, the Assembly's "Resolution on the Protection of the Territorial Integrity of Kosovo" in 2002 that was immediately declared null and void by the Special Representative[17] and subsequently deplored by the Security Council[18].

31. Like the Special Representative, neither the Security Council nor the Secretary-General objected to the Declaration. The absence of objections signifies that the issuance of the Declaration was accepted as lawful by both the Secretary-General and the Security Council, as has been elaborated in the Austrian Written Statement[19]. Even if this attitude of the United Nations organs could be considered as taking a neutral stance, it has a legal effect in so far as United Nations organs would have been required to act if they had considered the Declaration unlawful. In giving its advisory opinion, this Court, therefore, may wish to give due consideration to the reactions of United Nations organs, including the fact that they did not raise any objection against Kosovo's Declaration of Independence.

17 "Determination" by the Special Representative of the Secretary-General, Michael Steiner, 23 May 2002, UNMIK Press Release, 23 May 2002, PR/740.

18 Statement by the President of the Security Council, 24 May 2002, S/PRST/2002/16.

19 Austrian Written Statement, para. 42 et seq.

IX. SUBSEQUENT DEVELOPMENTS

32. After having presented the legal arguments speaking in favour of the Declaration of Independence being in accordance with international law, let me now emphasize the relevance of certain factual developments after the issuance of the Declaration, which support our legal conclusions. Such subsequent developments confirm the lawfulness of the Declaration of Independence.

33. Apart from the legal relevance of the absence of any objections by United Nations organs to the Declaration of Independence, the factual transition of effective control over Kosovo from UNMIK to the Kosovo Government[20] illustrates the conformity of this Declaration with international law. This factual transition includes the adoption of a Constitution, which envisages no role for the international administration[21]. This transition has to be seen also in the light of the unsustainability of the situation that existed before the Declaration of Independence.

34. Moreover, it cannot be disregarded that Kosovo has been recognized by 63 States, including Austria, that embassies and other diplomatic missions have been established, that Kosovo has been admitted as a member to the IMF[22] and the World Bank Group institutions[23] and that it has concluded a bilateral border demarcation agreement with the former Yugoslav Republic of Macedonia[24]. Although this Court is not called upon to evaluate the legality of recognitions, the relevance of the substantial degree of international recognition accorded to the Declaration of Independence seems obvious.

X. CONCLUSION

35. In conclusion, Mr. President, distinguished Members of the Court, Austria believes that the answer to the question submitted to this Court is clear: international law does not address the legality of declarations of independence per se and, moreover, there is no rule of international law prohibiting the Declaration of Independence by Kosovo. For these reasons, Austria respectfully requests this Court to declare that Kosovo's Declaration of Independence is in accordance with international law.
Mr. President, Members of the Court, I thank you.

20 Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 24 Nov. 2008, S/2008/692, para. 21.

21 Constitution of the Republic of Kosovo, adopted 9 April 2008.

22 IMF Press Release No. 09/240, 29 June 2009. According to Article II of its Articles of Agreement of 22 July 1944, IMF membership is open to countries.

23 World Bank Group Press Release No. 2009/448/ECA, 29 June 2009.

24 17 Oct. 2009.

The Republic of Bulgaria

The Republic of Bulgaria is represented by:

Dr. Zlatko Dimitroff (S.J.D.), Director of the International Law Department, Ministry of Foreign Affairs,
as Head of Delegation;
Mr. Danail Chakarov, Legal Adviser, Ministry of Foreign Affairs;
Mr. Krassimir Bojanov, Legal Adviser, Ministry of Foreign Affairs;
Mr. Ivan Yordanov, Political Adviser, Ministry of Foreign Affairs.

The PRESIDENT: I now call upon Mr. Zlatko Dimitroff to take the floor.

Mr. DIMITROFF:

1. Mr. President, Members of the Court, it is an honour and privilege to take the floor on behalf of the Government of Bulgaria and present observations in connection with the request by the United Nations General Assembly for an advisory opinion on the Accordance with International Law of the Declaration of Independence of Kosovo.

2. The 20 March 2008 decision of the Bulgarian Government to recognize the Republic of Kosovo was in conformity with the aspirations of the Republic of Bulgaria in favour of the maintenance of stability and the security environment in the Western Balkans, in order to prevent tensions from escalating in and around Kosovo. Our understanding was and remains that, by the end of 2007, blocking the resolution of the status of Kosovo would have led to a stalemate with severe consequences, including for the countries like Bulgaria in close proximity to Kosovo. The status quo at that particular moment could not be kept any longer, for it was becoming a burden for the development of both Kosovo and Serbia, as well as for the progress of the region as a whole.

3. Today, if considered within a long-term perspective, there can be no doubt that the decision to recognize Kosovo, taken almost two years ago, was the right one. It is quite wrong to argue that the great majority of States opposed the declaration of independence. The fact is, that one third of the United Nations Member States have already recognized Kosovo while many others have not yet taken a position. Today, we in Bulgaria are more than ever convinced that the recognition of Kosovo corresponded to Bulgaria's consistent policy to ensure not only maximum stability and security but also to deepen the integration process in the region. It contributes to both the achievement of the purposes I have already mentioned and the promotion of a democratic political process in Kosovo itself. Bulgaria's choice was a choice for the sake of prosperity and a clear European perspective for all countries of the Western Balkans, particularly the Republic of Serbia. We expect also that our good neighbourly relations with Serbia and the Serbian people will be preserved and further developed as an inherent component of the European mainstream.

Members of the Delegation of Bulgaria.

4. In this statement, I intend to address, first, the issue of the historical background of the Declaration of Independence, in particular the situation in 2005-2007, and then to present some observations on the special nature of the Kosovo case, followed by Bulgaria's views on the scope of the question before the Court and the accordance of the Declaration with international law, including Security Council resolution 1244.

I. HISTORICAL BACKGROUND AND THE SITUATION IN 2005-2007

5. Mr. President, Members of the Court, the international community's concerns over Kosovo go back a long way. Deeply concerned with the continuing violence in the former Yugoslavia, the Parliamentary Assembly of the Conference for Security and Co-operation in Europe (CSCE) adopted, back in 1992, the Budapest Declaration on Yugoslavia, which condemned the denial of fundamental rights and freedoms of the ethnic majority community in Kosovo. On 12 June 1992 the Committee of Senior Officials of the Conference for Security and Co-operation in Europe decided to send an exploratory mission to Kosovo, Sandjak and Vojvodina. A few months later, the CSCE decided to send, in accordance with paragraphs 9 and 10 of Chapter III of the Helsinki Decisions, a mission of long duration, thus establishing the continuous presence of the international community in Kosovo.

6. The Members of the United Nations expressed their concern about the deteriorating human rights situation in Kosovo by adopting General Assembly resolutions 47/147 of 18 December 1992 and 48/153 of 20 December 1993. The Federal Republic of Yugoslavia authorities were urged to "take all necessary measures to bring to an immediate end the human rights violations" inflicted upon the majority community in Kosovo and "in particular, discriminatory measures and practices, arbitrary detention and the use of torture and other cruel, inhuman and degrading treatment and the occurrence of summary executions", and to "re-establish the democratic institutions of Kosovo, including the Parliament and judiciary".

7. Furthermore, the human rights situation in Kosovo was the focus of several United Nations General Assembly resolutions in the period 1994 to 1999. In a Report on the Situation of Human Rights in Kosovo of 27 September 1999, the United Nations High Commissioner referred to "the mass exodus" from Kosovo of more than one million Kosovo Albanians.

8. The United Nations Security Council endorsed the efforts of the Contact Group to achieve a peaceful solution to the crisis and reach agreement between the FRY and the majority community leadership of Kosovo. These efforts resulted in an international conference, held at Rambouillet and Paris in February and March 1999, but the Federal Republic of Yugoslavia failed to sign the agreements negotiated there. In March 1999 all diplomatic efforts ended in a stalemate and the NATO Member States decided to use force against the Federal Republic of Yugoslavia, in order to stop the violence which threatened not only the security of the civilian population of Kosovo but also the security of the whole region.

9. With the adoption of United Nations Security Council resolution 1244 of 10 June 1999, the overall sovereignty of the FRY over Kosovo — political, economic, military, etc. — was practically suspended by a United Nations Interim Administration (UNMIK) and a NATO-led peacekeeping Kosovo Force (KFOR). Resolution 1244 authorized the United Nations to facilitate a political process that will determine Kosovo's future status "taking full account . . . of the Rambouillet accords".

10. In 2005 Ambassador Kai Eide was appointed by the United Nations Secretary–General as Special Envoy for Kosovo "to undertake a comprehensive review of the situation in Kosovo" with a mandate "to assess whether the conditions are in place to enter into a political process designed to determine the future status of Kosovo". In his report, S/2005/635, the Special Envoy concluded that the time had come to move to the next phase of the political process because Kosovo could not remain indefinitely under international administration.

11. In November 2005 the United Nations Secretary–General appointed former Finnish President Mr. Martti Ahtisaari as his Special Envoy for the Future Status for Kosovo. In February 2006 Mr. Ahtisaari initiated a direct dialogue between the parties and facilitated negotiations on the issues of decentralization of local government, property rights, protection of the Orthodox Church heritage, and the institutional guarantees for the rights of Kosovo's minorities with special emphasis on the rights of the Serbian community. In this regard, and as a former member of the United Nations office of the Special Envoy for Kosovo, I reject absolutely any assertion that Mr. Ahtisaari was biased. This is simply not true.

12. After over a year of intensive negotiations, which failed to produce an agreement since the two sides remained diametrically opposed in their positions, Mr. Martti Ahtisaari submitted to the United Nations Secretary–General, on 26 March 2007, his report on Kosovo's future status and a Comprehensive Proposal for the Kosovo Status Settlement (document S/2007/168/Add.1). According to the report, uncertainty over the future status of Kosovo had become "a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation". Such uncertainty was only leading to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risked challenging not only its own stability but the peace and stability of the region as a whole. Under these circumstances Mr. Ahtisaari recommended independence supervised for an initial period by the international community as the only viable option for Kosovo. The report explained Kosovo's independence proposal as the "last episode in the dissolution of the former Yugoslavia" which will "allow the region to begin a new chapter in its history — one that is based upon peace, stability and prosperity for all". Having taken into account the developments in the process designed to determine Kosovo's future status, the United Nations Secretary-General, in a letter to the United Nations Security Council, fully supported both the recommendation made by the Special Envoy in the report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement (United Nations Security Council document S/2007/168).

13. However, during the ensuing months, the United Nations Security Council remained divided on the Ahtisaari plan despite the intensive consultations. The countries of the Contact Group launched an initiative to establish a Troika comprising representatives of the European Union, the Russian Federation and the United States, to engage in a period of further intensive negotiations on the future status of Kosovo. On 1 August 2007, the Secretary-General welcomed this initiative, restating his belief that the status quo was unsustainable and requested a report from the Contact Group on these efforts by 10 December 2007. The Troika facilitated high-level, intense and substantive discussions between Belgrade and Pristina. Nonetheless, the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.

14. Following the discussion of the Troika's report at the closed formal session of the United Nations Security Council on 19 December 2007 the United States and European Union members of the Council read a joint statement which concluded that the potential for a negotiated solution had been exhausted. Any attempts to encourage further negotiations on the final status were unrealistic and to recommend such negotiations would be destabilizing for Kosovo and the region.

15. On 17 February 2008, elected representatives of the people of Kosovo adopted a Declaration of Independence, and on 18 February 2008, the Council of the European Union took note of that Declaration and concluded that the European Union Member States will decide, in accordance with national practice and international law, on their relations in Kosovo.

II. THE SPECIAL NATURE OF THE KOSOVO CASE

16. Let me turn now to the special nature of the Kosovo case. On 19 March 2008, Bulgaria, Hungary and Croatia released a joint statement with regard to their forthcoming national decisions on the recognition of Kosovo. It was the firm conviction of the three States that Kosovo was a special case arising from the unique circumstances of the disintegration of the former Yugoslavia as well as the continued period of international administration. The unusual combination of factors found in the Kosovo situation - the violent dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the grave hu-

Dr. Zlatko Dimitroff (S.J.D.), Director of International Law Department, Ministry of Foreign Affairs. (Bulgaria)

manitarian crisis, and the gross violations of human rights which led to the NATO intervention in 1999, the continued administration of Kosovo under United Nations Security Council resolution 1244 (1999) and the efforts of the international community to facilitate a solution between Serbia and Kosovo on the basis of the Contact Group Guiding Principles- are not found elsewhere and therefore make Kosovo a special case.

III. SCOPE OF THE QUESTION BEFORE THE COURT

17. Mr. President, for the purpose of the present proceedings, it is necessary to address the issue of the scope of the question contained in the request by the United Nations General Assembly for an advisory opinion.

18. The narrow wording of the question predetermines a limited number of issues the Court should pronounce itself on.

19. First, it is certainly beyond the scope of the question whether the so-called "Unilateral" Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo has led to the creation of a State or has produced any other legal effects in the field of international law. The issue of the recognition of Kosovo as independent State by other States is also not covered by the question.

20. Second, the wording of the question indicates that the opinion of the Court is sought only with regard to the accordance of the Declaration of Independence as such with international law. It has been argued in some of the submissions to the Court that the question encompasses also the issue of the legal consequences arising from the Declaration and all of its legal aspects. This could have been so in the case of a different wording of the question. Many possible formulations could have been chosen by the United Nations General Assembly, as had been the case with earlier requests for an advisory opinion, if the intention was indeed to request the Court's opinion on broader matters.

21. In order for the Court to answer this question, it should examine whether there exists in international law a rule- a general rule or a treaty rule- prohibiting declarations of independence. The main arguments submitted by some of the States advocating the position that the Declaration of Independence is in violation of international law are related to the principle of territorial integrity and to United Nations Security Council resolution 1244. For that reason the Bulgarian Government would like to express its views on these particular arguments.

IV. UNILATERAL DECLARATION OF INDEPENDENCE AND INTERNATIONAL LAW

22. Mr. President, Members of the Court, it is commonly accepted that declarations of independence are a matter of fact that are neither prohibited nor authorized by international law. A declaration of independence is an expression of will by an entity aimed at the creation of a new State. Whether this result will be achieved depends on a number of conditions and prerequisites, among which are population, territory, effective government over this territory and recognition by other States.

23. The issuance of the Declaration of Independence is governed only by domestic constitutional law. In some of the written submissions, an argument was expressed that the unlawfulness of the Declaration within domestic law unconditionally excludes its intended effect- the creation of a new State. This argument is based on the position that consequences in international law stem directly from the Declaration of Independence, as recognitions have only a declaratory effect and cannot validate an unlawful act. Bulgaria's understanding is that a declaration of independence could be only one of a number of constituent elements of statehood. Besides, it is not even a compulsory one, for it is well known that new States have emerged through secession without adopting declarations of independence. It is up to the members of the international community to accept or reject the fact that a new subject of international law has

appeared, based on their judgment of the specific situation and whether the necessary conditions are being met by the seceding entity - in this particular case, by the former autonomous province of Kosovo. Having said this, I would like to fully subscribe to the conclusion made yesterday by the delegation of Belarus, namely, that the autonomous province of Kosovo had equal rights with the six Republics under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia. In other words, Kosovo was a constituent element of the former Federation.

24. On the other hand, it is wrong to associate unlawfulness in domestic law with international unlawfulness. It is also wrong to state that the agreement of the parent State is a condition sine qua non for the birth of a new sovereign State. Suffice is to mention the example of the States that emerged from the break-up of the Soviet Union and the former Yugoslav Federation.

25. The international community has, indeed, treated some declarations of independence those of Southern Rhodesia and Katanga, for example- as unlawful, but this approach was motivated either by the intervention of a third State, or by a violation of international human rights rules such as prohibition of apartheid and racial discrimination.

26. Bulgaria wishes to reaffirm its commitment to respect for territorial integrity and sovereign equality of all States as fundamental principles of international law. As to the argument that the Declaration of Independence is, in itself, a violation of these principles, it is widely accepted that territorial integrity applies only to inter-State relations and it is not related to events within States. The principle enshrined in Article 2, paragraph 4, of the United Nations Charter provides for an obligation imposed on Member States to refrain from the threat or use of force against the territorial integrity of any State. On the other hand, this obligation does not apply to the actions of non-State actors. Furthermore, it does not restrict the political processes occurring within a State, even if they result in a territorial disintegration. This can be illustrated again by the events in the former Yugoslavia in the early 1990s of the twentieth century.

27. Mr. President, I now turn to the question of the accordance of Kosovo's Declaration of Independence with United Nations Security Council resolution 1244 (1999).

28. Kosovo's Declaration of Independence did not affect the applicability of Security Council resolution 1244. The authors of the Declaration of Independence explicitly stated that they: "shall act consistent with principles of international law and resolutions of the Security Council . . ., including resolution 1244".

29. In the resolution, the Security Council established a particular order to deal with the unique circumstances of the Kosovo situation. For a provisional period Kosovo would remain a part of the Federal Republic of Yugoslavia, but Kosovo's future status would remain open. Resolution 1244 did not preclude any of the possible outcomes for the future status of Kosovo. In the resolution, the Security Council stressed the importance of the political process that sought to determine Kosovo's future status, and tasked the international civil presence with responsibility for assisting that process.

30. From the legal point of view there was no requirement that the future status be "agreed". In other words, the resolution did not require specific agreement between Kosovo and Serbia, because the Security Council was aware of all the political obstacles to such an agreement.

31. The resolution did not require that Kosovo remain an autonomous province if no political agreement could be reached acceptable to both parties. According to paragraph 11 of the Security Council resolution, "the substantial autonomy" of Kosovo within the Federal Republic of Yugoslavia, pending the final settlement, was in the framework of an interim solution.

32. In resolution 1244 there is no answer to the question how the principles of sovereignty and territorial integrity should be taken into account in the final status of Kosovo. Resolution 1244 did not preclude the possibility that independence might be most appropriate and/or the only viable option for Kosovo.

33. The territorial integrity of Yugoslavia is mentioned in resolution 1244 in connection with the interim period. When the political process irretrievably failed it was clear that resolution 1244 had started to operate in a completely different situation. When it was obvious that the process of further negotiations was useless and further efforts were pointless, the Declaration of Independence became one of the possible outcomes of the situation. Otherwise we have to assume that the parties had to live in conflict with unpredictable consequences which, indisputably, is not the case and the purpose of resolution 1244. This would be incompatible with the primary responsibility of the Security Council according to the United Nations Charter - the maintenance of international peace and security.

V. CONCLUSION

34. Mr. President, Members of the Court, in conclusion, the Government of the Republic of Bulgaria submits that the Declaration of Independence of Kosovo of 17 February 2008 did not violate any public international legal rule, including Security Council resolution 1244 and, therefore, respectfully asks the Court to find in its opinion that the Declaration is to be considered in accordance with international law.

The PRESIDENT: I thank Mr. Zlatko Dimitroff for his presentation. I now call upon His Excellency Mr. Thomas Barankitse to take the floor.

The Republic of Burundi

The Republic of Burundi is represented by:

Maître Thomas Barankitse, Legal Attaché;
Mr. Jean d'Aspremont, Associate Professor, Universities of Amsterdam and of Louvain,
Mr. Alain Brouillet, former Senior Lecturer, University of Paris I (Panthéon-Sorbonne), and former First Secretary of the International Court of Justice,
as Counsel.

Mr. BARANKITSE:

Mr. President, Members of the Court, I appear before you on behalf of the Republic of Burundi, and I should first like to say how honoured I feel at this moment. Honoured, to begin with, to represent my country, Burundi. Honoured also to speak before you distinguished Court, the International Court of Justice, in this mythical setting which nourishes the mind and exalts the imagination: the Peace Palace. Added to or mingled with this feeling of honour is one of profound gratitude to the Court, which has permitted the State which I represent to join the procession of States participating in this advisory case. The Republic of Burundi did not take part in the vote, in October 2008, on General Assembly resolution 63/3 on the request for an advisory opinion. Nor has it submitted written comments. But from the outset, Burundi has felt that, at some point, it would be its lot to appear before you, to join in the deliberations in this case. The Republic of Burundi is doing so today, and is infinitely grateful to the Court for permitting it to do so.

1. Object of the oral comments of the Republic of Burundi

The question put to the Court, while relating to an essentially European case, sui generis in nature, potentially touches on many points of law which concern all States, and particularly States in the African continent. In view of its own history and that of the Great Lakes region, the Republic of Burundi is particularly alive to the legal problems raised by the appearance of entities which aspire to the status of subjects of international law. This is why it seeks to make a number of remarks on the scope of the question put to the Court, in order to help the principal judicial organ of the United Nations to reply as pragmatically as possible to the question put by the General Assembly, avoiding any incursion into peripheral legal disputes.

According to Burundi, rare indeed have been the occasions for the Court to rule on the State character of an entity claiming the status of subject of international law. In a legal system where the law is essentially created by entities able to claim the status of subjects of international law, and bearing in mind the disastrous effects which wars of secession may have on the international order, it is crucially important to shed light on some of the contemporary disputes surrounding the birth of new subjects of law.

Members of the Delegation of Burundi.

The Republic of Burundi is aware that advisory proceedings constitute the most appropriate framework for putting an end to some of these disputes pragmatically. The history of the Court has already shown the great importance of the advisory function. By virtue of the ratione personae scope of the advisory function - it is addressed to all States, and, moreover, we know that it is not limited by Article 59 of the Statute and cannot be accompanied by reservations- the Court has, in the past, clarified fundamental legal disputes which were compromising relations between States. By their pragmatism, the advisory opinions delivered by the Court have thus made a decisive contribution to the durability and development of the international legal system as a whole, to its organization and also to its operation. The exercise of the advisory function in the present advisory opinion is consistent with that development.

While international society is a decentralized order, the deliberations between States are increasingly taking place in a centralized system. The advisory procedure in which we are participating today is an example of this: it is an extension of a debate which took place before the General Assembly. All States had an opportunity to participate in the debate held in New York. All could, if they so wished, speak before your distinguished Court, the foremost court of the international community. Over and above these oral proceedings, your Court has, in turn, embarked upon another debate, a judicial deliberation, the conclusions of which will, in turn, be communicated to all States. Such are the parameters of the international deliberation process. Be it political, diplomatic or judicial, in all cases international deliberation takes place in the context of a growing process of centralization.

2. Propriety of the seisin, jurisdiction of the Court and importance of the question posed

The Republic of Burundi considers that, on the basis of Article 65 of the Statute, it was entirely proper to submit the present request for an opinion to the Court. Notwithstanding the Court's discretionary power not to reply to the question put to it, the Republic of Burundi urges it, in view of its central role, its responsibility at the heart of the United Nations system[1], to seize the opportunity offered to it

1 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; see also, e.g., the Advisory Opinion in the case concerning the Difference Relating to Immunity

today to clarify certain aspects of a particularly important problem. Moreover, Burundi does not see what "decisive reason" should prevent it from doing so[2].

It is in this spirit that Burundi, in the observations it addresses to the Court, now seeks to pinpoint what, in its view, constitutes the true subject of the question raised and what elements call for a reply. The following observations are aimed particularly at showing that, in the first place, the question submitted to the Court in no way raises an issue of validity and that, secondly, that issue principally raises a question of responsibility.

And, Mr. President, it is to develop the argument of the Republic of Burundi that I would now ask you to give the floor to Professor Jean d'Aspremont, counsel of Burundi.

Mr. d'ASPREMONT:

Mr. President, Members of the Court, let me first say what an honour it is for me to take the floor before the Court for the first time. Also what an honour it is to represent the republic of Burundi which has thus placed its trust in me.

As Mr. Barankitse has just said, the purpose of the comments which I am about to make is to clarify the scope of the question put to the Court in order to help it to give a useful reply in the interests of all States, particularly in the African continent.

Mr. President, I will not tax the Court's patience by reading out all the references and sources in my statement, all of which appear in the written text and form an integral part of my oral argument.

1. THE QUESTION PUT TO THE COURT IS A QUESTION OF LEGALITY

The question, as formulated by the General Assembly, stresses the conformity with international law of the Declaration of Independence. The emphasis placed on conformity with international law clearly shows that it is a question of legality which has been put to the Court. By no means is the Court therefore asked to rule on the question whether Kosovo constituted a State on the day independence was declared and when the request for an advisory opinion was made[3].

2. SCOPE OF THE QUESTION OF LEGALITY PUT TO THE COURT

The Republic of Burundi contends that the question of legality put to the Court in the present advisory proceedings literally concerns only the legality of the Declaration of Independence itself. Nor is the Court asked to rule on the legality of the process of the creation of the Kosovo entity or on the legality of the acts of recognition following the Declaration. The sole aim of these comments is to identify, for the benefit of the Court, what precisely the question of the legality of the Declaration of Independence covers. Burundi would first emphasize that, in its view, legality in international law may beconstrued in two ways. On the one hand, legality refers to the question of validity, in other words the question of whether a legal act has been adopted in conformity with the rules of the legal order in which it is supposed to have effect. On the other hand, legality in international law refers to a question of responsibility, in other words to the determination of the legal effects resulting from the conduct of a subject of law, if it infringes international law. Burundi contends that the question of legality, which is raised in the present advisory opinion, is exclusively a question of responsibility and in no way implies a judgment of validity.

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from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29.

2 Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155 or the advisory opinion in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29.

3 Along the same lines, see Germany's Written Comments, p. 6; Written Comments of the Netherlands, para. 2.1.

2.1. The question of legality put to the Court is not a question of validity

2.1.1. The Declaration of Independence is a fact in the eyes of international law and cannot be the object of a judgment of validity

Burundi first wishes to indicate to the Court why the question of the legality of the Declaration of Independence must not, in its view, be regarded as a question of validity. On this point, Burundi would first state that no question of the international validity of the Declaration of Independence has been put to the Court, because the Declaration in question is a fact as regards international law. It is true that a declaration of independence can constitute a legal act and that, like every act, must comply with the rules of the legal order in which it is supposed to have effect. However, it is important to underline at this point that a declaration of independence, on the supposition that it is a legal act, constitutes a purely internal legal act and not an international legal act. The question whether it is a legal act in the Serbian legal order, or in the legal order of a now-independent entity, is no doubt a subject for debate. However, the Court does not have to determine under which legal order the Declaration of Independence falls. It need only find that it is not a legal act in the international legal order. As it is not an international legal act but a simple internal legal act, the Declaration of Independence does not constitute a legal act and, as regards international law, constitutes a fact[4].

The idea that an internal legal act constitutes a fact for international law is not just an idea of legal theory[5]. It was expressly stated by the Permanent Court in the case relating to Certain German Interests in Polish Upper Silesia in 1926[6]. This principle was also asserted by the International Tribunal for the Law of the Sea in the case concerning the vessel "Saiga" in 1999 (1 July 1999, para. 120)[7]. Burundi contends that international jurisprudence, State practice and doctrine very clearly show that the Declaration of Independence, just like a law, a judicial decision or an administrative act, constitutes a fact and not an international legal act. Consequently, the question of the legality of the fact constituted by the Declaration of Independence is not a question of validity. Indeed, there is no question of validity which arises for a fact, albeit a legal fact. Being not an international legal act but a simple fact, the Declaration of Independence cannot be either valid or invalid in international law. Apart from the question of its validity as an internal legal act as regards internal law, the Declaration of Independence, as a fact, does not derive its existence, in the international legal order, from its validity as regards the rules of that international legal order.

4 Along the same lines, see the Written Comments of Germany, p. 27.

5 See G. Gaja, "Dualism - a Review", in J. Nijman and A. Nollkaemper, New Perspectives on the Divide Between National and International Law, OUP, 2007, pp. 58-59; M.N. Shaw, International Law, 5th ed., p. 127; D. Anzilotti, Corso di diritto internazionale private, Rome, Anthenaeum, 1925, p. 57. This is what is indirectly confirmed by the majority opinion of the experts, namely, that international law neither authorizes nor prohibits an entity from declaring itself independent. See, for example, J. Crawford, The Creation of States in International Law (2006), p. 390; H. Lauterpacht, Recognition in International Law (1947), p. 8; T. Christakis, "The State as a 'primary fact'", in M. Kohen, Secession, (2006), p. 145; G. Abi-Saab, "Conclusions" in M. Kohn (dir. publ.), Secession (2006), p. 474.

6 "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts, manifestations of the will and the activity of States, just as judicial decisions or administrative measures are. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Convention." (Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926,P.C.I.J., Series A, No. 7, p. 19.)

7 In the view of the Tribunal, there is nothing to prevent it from considering the question whether or not, in applying its laws to the Saiga in the present case, Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention and general international law".

Mr. Jean d□Aspremont, Associate Professor, Universities of Amsterdam and of Louvain. (Burundi)

2.1.2 The creation of a State is a question of fact and cannot be the object of a judgment of validity

Even if the question addressed to the Court literally concerns only the legality of the Declaration of Independence itself, Burundi recognizes that the Declaration of Independence is part of a wider process of secession which potentially led to the creation of a State. This is why Burundi finds it necessary to emphasize that no judgment of validity is involved, not only as regards the Declaration of Independence itself, but also as regards the process of the creation of the Kosovo entity. Indeed, Burundi maintains that the creation of a subject of law also constitutes a pure question of fact which, while it may be subject to a judgment of value, is in any event not subject to a judgment of validity. Should the Court nevertheless decide to consider the legality of the process of the creation of the Kosovo entity, it could not, in Burundi's view, make any judgment of validity, since the creation of a State in international law is never either valid or invalid.

For Burundi, to pursue an argument of validity in this case would be tantamount to espousing what, in the theory of international law, is traditionally regarded as a "Kelsenian" approach, if I may say so. Such an approach would presuppose that, of itself, international law validates the creation of subjects of the international legal order[8]. According to Burundi, this concept does not correspond to positive international law. International law does not regulate the creation of States as regards the exercise of the right to self-determination[9], the violation of the latter having no consequence as regards validity, only as regards responsibility, for example with respect to the obligation not to recognize (cf. infra 2.2.2.). This is

8 See H. Kelsen, "La naissance de l'Etat et la formation de sa nationalité: les principes; leur application au cas de la Tchécoslovaquie", Revue de droit international, 3rd Year, Vol. 4, 1929, pp. 613-641, also produced in C. Leben(directed by), Hans Kelsen, Ecrits français de droit international, PUF, 2001, pp. 27 et seq.

9 See J. d'Aspremont, "Regulating Statehood: The Kosovo Status Settlement", 20 Leiden Journal of International Law (2007), pp. 649-668; G. Gaja, "Dualism - a Review", in J. Nijman and A. Nollkaemper, NewPerspectives on the Divide Between National and International Law, OUP, 2007, p. 57.

confirmed by practice, as the case of Rhodesia illustrates[10]. Moreover, it is because international law does not validate the creation of States that secessions are almost always regarded, in doctrine, as pure questions of fact which are not subject to any judgment of validity as regards international law[11]. According to Burundi, the Court therefore has no need to rule on the validity of the process of the creation of the Kosovo entity.

2.1.3. Replying to the question of legality put to the Court from the standpoint of validity would have no practical consequence

The idea that it is not conceivable to invalidate a declaration of independence or the process of the creation of an entity is corroborated by the fact that, if the Court were to venture to make any "invalidation" of the Declaration of Independence or the process of the creation of the Kosovo entity, it would have no practical consequence[12]. In any event, the Kosovo entity would continue to exist in the facts, and the "invalidation" of its Declaration of Independence or the invalidation of the process having led to its creation would have no effect whatever on the internal and external effectivity[13] on which that entity may, in certain circumstances rely. Considering the question of legality put to the Court from the standpoint of validity therefore entails the risk that the Court's reply might, in reality, have no practical consequence, which would certainly be prejudicial to the advisory function.

2.2. The question of legality put to the Court is a question of responsibility

2.2.1. A legal fact does not raise a question of responsibility

Thus far, Burundi has explained that it is not for the Court, in the context of the present request for an advisory opinion, to make a judgment of "validity" as regards the process of the creation of the Kosovo entity or as regards the Declaration of Independence, because those too are facts in the eyes of international law. Burundi contends that the only aspect of the question of the legality of the Declaration of Independence which arises for the Court refers to a question of responsibility. In international judicial proceedings, viewing legality from the angle of responsibility is relatively common. In exercising its advisory jurisdiction, the International Court of Justice has itself often had to deal with the question of whether the adoption or application of an internal legal act by a subject constitutes an internationally unlawful act engaging the latter's responsibility[14].
The question of legality raised in the present advisory case is no different.

10 Whereas, on occasion, the Security Council has condemned the adoption of a declaration of independence - as was the case on Rhodesia's Declaration of Independence in 1965 (see Security Council resolutions 215 (1965) and 216 (1965) - nothing justifies the conclusion that, in these cases, any judgment of validity was made. First because, as a political organ, it does not have the power to do so. Secondly, and above all, by condemning a declaration of independence, the Security Council is merely expressing its disapproval. Moreover, it is indeed because the Security Council generally adds sanctions to its condemnation, that its action does not equate to any form of invalidation. If the Council had "invalidated" the declaration of independence which it condemned, the latter would have ceased to exist and it would not have been necessary to adopt any sanctions whatever.

11 See, for example, J. Crawford, The Creation of States in International Law (2006), p. 390; H. Lauterpacht, Recognition in International Law (1947), p. 8; T. Christakis, "The State as a 'primary fact'", in M. Kohen, Secession, (2006), p. 145; G. Abi-Saab, "Conclusions" in M. Kohen (dir. publ.), Secession (2006), p. 474. Along the same lines, see the Written Comments of the United Kingdom, para. 6.4; see also the Written Comments of the United States, pp. 50-52.

12 See the Written Comments of France, paras. 10 et seq.

13 On the distinction between internal and external effectivity, see J. d'Aspremont, "Regulating Statehood: TheKosovo Status Settlement", 20 Leiden Journal of International Law (2007), pp. 649-668.

14 See, for example, the cases concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Pulp Mills on the River Uruguay (Argentina v. Uruguay), Certain Criminal Proceedings in France (Republic of the Congo v. France), Avena and Other Mexican Nationals (Mexico v. United States of America), ArrestWarrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).

2.2.2. The question put to the Court is limited to the responsibility of the authors of the Declaration of Independence

Burundi now wishes to clarify the scope of the question of responsibility put to the Court. In Burundi's view, the question of responsibility which has been raised is that of the responsibility of the authors of the Declaration of Independence. For Burundi contends that the Declaration of Independence constitutes a fact which is attributable only to the Provisional Institutions of Self-Government. In this respect, it matters little, contrary to what may have been suggested by some of the participants in the proceedings[15], that the Declaration of Independence should have been adopted, following a process deemed to be democratic, by representative organs. All that counts, as regards determining its author, is that the Declaration of Independence was adopted by organs within the ambit of the Provisional Institutions of Self-Government acting as an organ. Burundi therefore maintains that the Declaration of Independence is an act of the Provisional Institutions of Self-Government.

Under the classical rules of attributing a fact to the State[16], it is not possible to attribute the Declaration of Independence to any other entity whatever. The participation of a State in the self-governing administration of Kosovo does not suffice for attributing the Declaration of Independence to it. Even if some third States have exercised effective control over the territory during the provisional administration of Kosovo, it is also not possible to deduce from this sufficient effective control under the rules of attribution[17]. Burundi further contends that the recognition by 63 States of the Kosovo entity does not mean that they have "adopted" the conduct of that entity "as their own"[18]. Consequently, the Declaration of Independence can only be attributed to the Provisional Institutions of Self-Government. The question of responsibility therefore arises only with respect to them.

Even if the Declaration of Independence cannot be attributed to third States, it is conceivable that the responsibility of certain third States could, at least theoretically, be engaged for other acts committed before or after the Declaration of Independence. Although some third States may have committed internationally unlawful acts before or after the adoption the Declaration of Independence, Burundi contends that the Court has no need to rule on this point. Admittedly, it would have been desirable, at any even from a legal theory standpoint, for some of the difficulties linked to the conduct of third States to be clarified by the Court - one thinks, for example, of the difficulties relating to the scope of the obligation of non-recognition[19]. However, to consider the responsibility of third States would manifestly exceed the scope of the question put to the Court in connection with the present request for an advisory opinion. The question of legality put to the Court today is therefore exclusively limited to the question of the responsibility of the authors of the Declaration of Independence. It excludes that of third States.

2.2.3. Scope of the question of the responsibility of the authors of the Declaration of Independence to which the Court is asked to reply

2.2.3.1. Difficulty of the question of the responsibility of the authors of the Declaration of Independence

Burundi acknowledges that the question of the responsibility of the authors of the Declaration

15 See the Written Comments of Austria, paras. 16 et seq.: Written Comments of Germany, p. 6.

16 Arts.4 et seq. of the articles on the responsibility of States adopted by the International Law Commission.

17 See the jurisprudence of the International Court of Justice on this subject: in particular, the case relating to Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007, pp. 206 et seq., paras. 396 et seq.

18 Article 11 of the ILC's Articles on the international responsibility of States.

19 See Article 41 of the ILC's Articles on the State responsibility. On this matter, see the remarks by J. d'Aspremont, "Regulating Statehood: The Kosovo Status Settlement", 20 Leiden Journal of International Law 3 (2007), pp. 649-668. For a previous application of the obligation of non-recognition, see the Advisory Opinion of the Court on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 56, para. 126.

Maître Thomas Barankitse, Legal Attaché, Embassy of Burundi to the Benelux, the United Kingdom of Great Britain and Northern Ireland and the European Union.

of Independence is particularly tricky, for it touches on a rather atypical question of responsibility. Because Kosovo certainly did not constitute a State on the day independence was declared, the authors of the Declaration did not act as the organ of an existing State. So it is not a question of State responsibility which is asked. The question of the responsibility of the authors of the Declaration of Independence can only be viewed from the angle of their individual criminal responsibility or their responsibility as their non-State group.

Burundi doubts whether, in adopting the Declaration of Independence, its authors had committed an act engaging their "individual" criminal responsibility under international criminal law. The responsibility of the authors of the Declaration of Independence must therefore be viewed from the angle of their responsibility as an infra-State group, without it being necessary to attribute their conduct to any individual State[20].

2.2.3.2. Necessity of clarifying certain aspects of the responsibility of the non-State actors

Burundi is well aware of the complexity of the question of the responsibility of the authors of the Declaration of Independence, all the more so as it is a question with which the Court has never had to deal. However, these problems should not dissuade the Court from replying to it. Admittedly, in order to consider a problem of the responsibility of non-State actors, the Court must, first, reply to the question of whether the latter are linked by rules of international law[21]. A positive response would mean presupposing that such groups possess international legal personality. According to Burundi, such a conclusion would, however, be nothing fundamentally new, it being commonly accepted that States and personified international organizations are not the only subjects in the international legal order[22]. Burundi also stress-

20 On this question, see, for example, J. d'Aspremont, "State Responsibility and Rebellion", 58 International andComparative Law Quarterly, 427-442 (2009).

21 Along the same lines, see the Written Comments of Switzerland, para. 29.

22 See in general C. Dominicé, La personnalité juridique dans le système du droit des gens, J. Makarczyk (ed.), Theory of

es that this is not a purely abstract problem with no practical consequences. In fact questions raised by the capacity of non-State actors to possess rights and obligations, and questions concerning their responsibility arise daily on the international scene, particularly on the African continent. According to Burundi, the role of non-State actors has become too important in the contemporary period for the question of their international obligations and their responsibility to be glossed over. That is why Burundi contends that the Court would certainly be performing a useful service by clarifying the position on this in international law.

2.2.3.3. The participation of the authors of the Declaration of Independence in the proceedings should encourage the Court to consider the issue of their responsibility.

According to Burundi, the fact that the authors of the Declaration of Independence have been able to participate in these proceedings should also encourage the Court to consider the issue of their responsibility[23].

2.2.3.4. Need to take into account the sui generis character of the situation in which the responsibility of the authors of the Declaration of Independence arises

Although it encourages the Court to clarify the disputes raised by the question of the international responsibility of the authors of the Declaration of Independence, the Republic of Burundi invites it to take into account the specific features of the case before it today, and particularly its European character. The credibility of international justice, as moreover shown by the Court's jurisprudence, remains subject to the capacity of the international court to distinguish between situations that are not identical.

2.2.3.5. A particular dispute that the Court might usefully clarify by answering the above-mentioned three questions: inapplicability of the right to self-determination outside decolonization situations

This being said, there can be no doubt that the responsibility of the authors of the Declaration of Independence gives rise to tricky legal questions which go beyond the strictly European context and concern the international legal system as a whole. For example, the question of whether the authors of the Declaration of Independence were bound by Security Council resolution 1244, and if so whether that resolution prohibited the adoption of such a declaration[24]. Similarly, the question of the responsibility of the authors of the Declaration of Independence involves determining whether they were bound by any obligation corresponding to the principle of respect for the territorial integrity of States[25]. According to Burundi, these are questions absolutely crucial to determining the responsibility of the authors of the Declaration of Independence.

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international law at the threshold of the 21st century, essays in honour of Krzysztof Skubiszewski, The Hague,Kluwer, 1996, pp. 147-171; see the various contributions in Société française pour le Droit international, Le sujet en droit international: colloque du Mans, Paris, Pedone, 2005 and in particular H. Ruiz Fabri, Les catégories de sujets dudroit international, pp. 55-71; P. Dumberry, "L'entreprise sujet de droit international?: retour sur la question à la lumière des développements récents du droit international des investissements", Revue générale de droit international public, Vol. 108, 2003, pp. 103-122 ; J. Nijman, The concept of international legal personality: an inquiry into the history and theory of international law, The Hague, T.M.C. Asser Press, 2004.

23 Burundi points out that the requirements of equity regarding participation in proceedings by a legal entity whose responsibility is at issue are therefore not applicable in the present case because advisory proceedings do not lead to any final conclusion on responsibility. Therefore the Court's jurisprudence in this respect is inapplicable. See, for example, the decision of the ICJ in the case concerning Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), 15 June 1954, I.C.J. Reports 1954, p. 32.

24 On this question see inter alia Written Comments by Switzerland, paras. 42 et seq.; Written Comments by Germany, paras. 37 et seq; Written Comments by the United Kingdom, paras. 6.6 et seq.; Written Comments by Austria, paras. 17 et seq.

25 See Written Comments by the United States, para. 16 et seq.

It is not Burundi's intention to discuss these problems at length. Other States have already supplied the Court with valuable information on this in the written proceedings, but also in their oral comments during the last few days. Burundi considers it pointless to revert to it, other than to stress that, contrary to what certain States have claimed, these questions must be tackled from the viewpoint of responsibility, not of validity. Rather, in this respect, it is important for Burundi to draw the Court's attention to the difficulties raised by what some have called — not without a measure of semantic ambiguity — the "right to secession". In the context of the question of legality put to the Court, Burundi particularly requests it to establish once and for all that the — undisputed — right of peoples to self-determination is, in its external dimension, strictly confined to decolonization — and to certain similar situations — and that there is no international right for an infra-State group to set up an independent State[26]. This position concurs with the opinion of the African States[27] and the majority of States in the international community[28]. Burundi takes the view that it is time to put an end to the legal uncertainties that prevail in this respect, used and abused by many infra-State groups in the world, particularly on the African continent, where they are the source of serious disturbances.

Although Burundi is asking the Court to make it clear that no right to set up an independent State outside decolonization situations (and certain similar circumstances) exists, it considers it useful to point out that such a conclusion does not prejudge whether Kosovo exists as a State or not. The lack of a right to self-determination in the present case — which Burundi defends — still has no effect on the existence of the entity that invokes it. To maintain the contrary would imply a return to the standpoint of validity. Burundi hopes that it has amply demonstrated that the question submitted to the Court does not entail any question of validity.

2.2.3.6. Consequences of finding that the authors of the Declaration have engaged their international responsibility

Because it cannot be excluded that, in its advisory opinion, the Court may find that, in adopting the Declaration of Independence, its authors have disregarded their international obligations and incurred their responsibility, it seems important to Burundi to conclude its statement with some comments on the effects of such a finding in terms of reparation. As the Court's Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory showed, the fact that a finding of responsibility is made in the context of advisory proceedings does not prevent the Court from considering the possible consequences that stem from it in terms of reparation[29].

26 See J. d'Aspremont, "Regulating Statehood: The Kosovo Status Settlement", 20 Leiden Journal of International Law 3 (2007), 649-668.

27 See Art. 3 (b) of the Constitutive Act of the African Union concerning respect for territorial integrity. See also the prevailing restrictive interpretation of Art. 20 of the African Charter of Human and Peoples' Rights. On this subject see F. Ouguergouz and D. L. Tehindrazanarivelo "The question of secession in Africa" in M. Kohen (ed.) Secession (2006), p. 282. In addition, African Union practice seems to demonstrate that African States generally favour any solution that does not infringe the territorial integrity of States.

28 The a contrario interpretations of the saving clause in resolution 2625 (XXV) adopted on 24 Oct. 1970 that certain writers defend does not accord with the position of the majority of States. See the analysis by J. d'Aspremont, L' Etat non démocratique en droit international. Etude critique du droit international positif et de la pratique contemporaine, Paris, Pedone, 2008, pp. 109-113. See, on the same lines, M. Kohen, "Création d'Etats en droit international contemporain", Cours euro-méditerranéens Bancaja de droit international, Vol. VI, 2002, pp. 546-635; G. H. Fox, International Law and Entitlement to Democracy After War", 9 Global Governance (2003), p. 188. The late T. Franck himself admitted that "that aspect of self-determination . . . is far less clear at present than the entitlement to democratic participation in governance." ("The Emerging Right to Democratic Governance", 86 American Journal of International Law (1992), p. 59).

29 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, p. 197 et seq., paras. 148 et seq.

Burundi starts by pointing out that finding that the authors of the Declaration of Independence have incurred their international responsibility would entail an obligation for them to repair any damage caused by the unlawful act. This at least is what the application by analogy of Article 31 of the International Law Commission's Articles on the international responsibility of States would require. This obligation of reparation may sometimes imply that the author of the violation must restore the situation that would have existed before the unlawful act was committed[30].

As the Court declared, moreover, in the Arrest Warrant case[31], the obligation to restore the situation that would have existed before the unlawful act was committed may necessitate the withdrawal of the internal legal instrument that is the source of the unlawfulness. However, Burundi emphasizes that if the Court, in these advisory proceedings, were to find that the authors of the Declaration of Independence were in breach of one of their international obligations, this does not mean that it would have to deduce from this an obligation to withdraw the Declaration of Independence. The situation contemplated by the present advisory opinion is fundamentally different from the situation that the Court faced in the advisory proceedings between the Congo and Belgium in the case concerning the Arrest Warrant. The withdrawal of the warrant in that Arrest Warrant case was necessary because, although it was no longer directed against a minister in office, the warrant continued to be operative. Restoration of the situation as it would have been if the unlawful act had not been committed was therefore inconceivable without the withdrawal of the warrant. This is certainly not the case with the Declaration of Independence, which was fully operative when it was adopted. The Declaration of Independence as such no longer has any effect. Thus there is no reason to demand its withdrawal by way of reparation. So the obligation of reparation that would ensue from a finding that the authors of the Declaration of Independence have incurred international responsibility would therefore not require the withdrawal of the Declaration in question.

3. CONCLUSION

In conclusion, the Republic of Burundi reiterates that the Court is not being asked to rule on whether the Kosovo entity has the character of a State or on the validity of the Declaration of Independence or on the process of the creation of that entity. The question of legality that is put to the Court in connection with the present request for an advisory opinion is solely limited to a question of responsibility. Burundi maintains that the question of responsibility submitted to the Court refers more specifically to the question of the responsibility of the authors of the Declaration of Independence, because the question of the responsibility of third parties manifestly exceeds the scope of the request for an advisory opinion addressed to it by the General Assembly. An answer to the question of the responsibility of the authors of the Declaration of Independence calls for certain recurring legal disputes to be clarified, in particular the right of self-determination outside decolonization situations. Were the Court to find that the authors of the Declaration of Independence had incurred their international responsibility because of the adoption of that Declaration, that conclusion, in the opinion of Burundi, would have no effect upon the existence of the Kosovo entity or on the validity of the Declaration of Independence. Lastly, Burundi has argued that reparation for the damage caused by a possible unlawful act by the authors of the Declaration of Independence does not involve an obligation to withdraw the said Declaration. These few comments, Mr. President, Members of the Court, conclude the presentation that the Republic of Burundi intended to make to the Court. I say again how grateful Burundi is to the Court for giving it the opportunity to be heard.

30 Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 19, para. 46.

31 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 19, para. 46.

The Republic of Croatia

The Republic of Croatia is represented by:

H.E. Madam Andreja Metelko-Zgombić, Ambassador, Chief Legal Adviser in the Ministry of Foreign Affairs and European Integration of the Republic of Croatia;
H.E. Mr. Josip Paro, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands;
Ms Mirta Mandić, Minister Plenipotentiary, Head of Department in the Ministry of Foreign Affairs and European Integration;
Ms Snježana Sremić, Minister Plenipotentiary in the Ministry of Foreign Affairs and European Integration.

The PRESIDENT: I now call Her Excellency Madam Andreja Metelko-Zgombić to the floor.
Ms METELKO-ZGOMBIĆ:

1. Mr. President, honourable Members of the Court, it is my honour and privilege to appear before you again on behalf of the Republic of Croatia.

2. In my presentation I will offer our Government's reply to the submitted question, furnish certain information and express the viewpoints of my Government. We offer this contribution in the spirit of assisting the Court and contributing to the clarification of the circumstances pertinent to this matter.

I. INTRODUCTION

3. The Republic of Croatia recognized Kosovo as a sovereign and independent State on 19 March 2008. Some of the reasons for recognizing Kosovo's independence have previously been outlined in the joint statement issued by the Governments of the Republics of Croatia, Hungary and Bulgaria prior to their concurrent recognition of the Republic of Kosovo. The statement recalled the failure of the efforts by the international community to reach a negotiated solution between Belgrade and Priština on the status of Kosovo, and underlined the fact that in such circumstances the status quo was unacceptable and change was needed. It pointed out that Kosovo was a sui generis case arising from the unique circumstances of the disintegration of the former SFRY, together with the continued period of international administration. The joint statement confirmed that the Kosovo institutions had committed themselves inter alia to fully implement the principles and arrangements envisaged in the Secretary-General Special Envoy's Comprehensive Proposal for the Kosovo Status Settlement.

Members of the Delegation of the Republic of Croatia.

4. In the joint statement the three countries emphasized that they attached paramount importance to stability in South-East Europe. They also affirmed their commitment to developing ties with Serbia that maintained good relations with its neighbours, enjoyed economic growth and kept a European orientation.

5. The Republic of Croatia established diplomatic relations with the Republic of Kosovo on 24 June 2008. That was after the Republic of Kosovo had adopted a Constitution and other fundamental documents outlining the legal structure of the newly formed State, that provided, inter alia, guarantees for the exercise and protection of human rights, in particular the rights of minorities.

6. The Republic of Croatia is confident that by recognizing the Republic of Kosovo, it recognized an international legal fact, namely, the existence of a new State. Croatia believes that by this recognition it has contributed to the creation of conditions for peace and stability in the region.

7. In the meantime, among the other countries in the region that have recognized the Republic of Kosovo are its two immediate neighbours that also adjoin the Republic of Serbia: the Republic of Macedonia and Montenegro, the latter of which formed a part, during an important period of time, of the same State of which Kosovo was also a part after the dissolution of the former Yugoslavia.

8. Now, when this case is before you, and after a large number of States have presented their positions on this issues, Croatia, as a successor State to the former Socialist Federal Republic of Yugoslavia (SFRY) and as a State from the region, considers it appropriate to present its views and put forward the information it possesses.[1]

1 Written Statement of the United States of America, p. 50; Written Contribution of the Republic of Kosovo, paras. 8.08-8.10; Written Statement of the Federal Republic of Germany, pp. 27-29, etc.

II. REPLY TO THE QUESTION BEFORE THE COURT

9. The question before the Court is this: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" In replying to the question Croatia submits that "the Declaration of Independence of Kosovo", adopted at the extraordinary session of the Assembly of Kosovo held on 17 February 2008, is not contrary to any applicable rule of international law. I shall also state that the Declaration violated no applicable principle of international law or binding act of the international community adopted in relation to the status of Kosovo.

10. Croatia considers that the question before the Court is a specific and narrow one, and that the answer to the question should equally relate only to the legality of the Declaration of Independence. In our reply, our starting premise is that there is no rule of international law that regulates, let alone prohibits, the issuance of a declaration of independence. By taking into account the presumption of permissibility endorsed by this Court and its predecessor in the cases in which the international legality of a contested action was assessed (such as the Lotus case, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10) and the Nuclear Weapons Advisory Opinion (I.C.J. Reports 1996 (I)), Croatia submits that this Declaration is not contrary to international law. In this way it may be said to be "in accordance with international law".

11. State practice confirms that the adoption of a declaration of independence, or similar legal acts, frequently occurs during the creation of a new State. As such, this very act -he act of declaring independence-is legally neutral. Numerous scholars have treated this issue, and reference has been made in particular to some of them in a number of written submissions of States addressed to this Co[u]rt. The Republic of Croatia supports the views of many States that took the same line of reasoning in their written statements. The Republic of Croatia is of the opinion that, on this occasion, no further explanations are needed.

12. In addition, it should also be pointed out that it is not the act of declaring independence that leads to the creation of a new State. International law sets criteria that must be met in order for a State to emerge or exist. However, these conditions may be met, and very frequently are met, in succession. Thus, the creation of an independent and sovereign State of Kosovo also needs to be viewed as a process that was unfolding before the adoption of the Declaration of Independence, and is now being assessed through the legitimate functioning of the institutions of the newly formed State.

III. CIRCUMSTANCES THAT LED TO KOSOVO'S INDEPENDENCE

13. Mr. President, it may be that the Court feels a need to consider the circumstances leading to the Kosovo accession to independence. Croatia would therefore like to draw to the Court's attention certain circumstances that it deems to be particularly relevant.

14. Above all, Croatia wishes to refer to:

- the constitutional position of Kosovo within the Socialist Federal Republic of Yugoslavia;
-the illegal removal of the autonomy of Kosovo and the events that influenced the position of Kosovo during the process of dissolution of the Socialist Federal Republic of Yugoslavia;
- the grave violations of the human rights of- and systematic repression against - the Kosovo Albanians by the Federal Republic of Yugoslavia, now Republic of Serbia;
-the establishment of the international administration in Kosovo pursuant to resolution 1244 and the development of the self-government institutions under the interim administration;
- the failure of all the efforts of the international community to reach a negotiated solution between Belgrade and Priština on the final status of Kosovo; and, finally,
- the adoption of the Declaration of Independence.

1.Constitutional position of Kosovo in the former SFRY

2.

15. Reference to the constitutional position of Kosovo as an autonomous province within the Socialist Federal Republic of Yugoslavia almost two decades after this Federation ceased to exist, in the context of answering this question currently before the Court, is important for two reasons.

16. First, under the 1974 SFRY Constitution, Kosovo was a constituent unit of the former Federation, possessing a high degree of political and territorial autonomy. As a constituent unit of the former Federation, Kosovo possessed strong elements of statehood that were largely equal with those of the Republics.

17. Second, in the period following the dissolution of the former Federation, Kosovo's status was not adequately resolved. In the events that ensued, the elements of statehood enjoyed by Kosovo in the former Federation laid a foundation for Kosovo's international personality.

18. The 1974 Constitution of the SFRY introduced a federalist system that featured strong confederate elements. Yugoslavia was defined as a federal State made up of eight constituent units -six Republics (Bosnia and Herzegovina, Croatia, Montenegro, Macedonia, Slovenia and Serbia), and two autonomous provinces (Kosovo and Vojvodina). These were the parts of both the Federation and the Socialist Republic of Serbia.

19. The significance and status of the autonomous provinces are immediately evident from the constitutionally defined procedure whereby the federal Constitution was to be adopted and amended with the consent of the Assemblies of the republics and the autonomous provinces. Therefore, no change of their status as envisaged by the Constitution was possible without first obtaining their consent.

20. The constituent units of the Federation had primary jurisdiction over the performance of internal affairs. All affairs that were not explicitly granted to the federal State by the federal Constitution were reserved for the republics and the autonomous provinces.

21. The Constitutional Court of the SFRY decided on disputes between the Federation and any of its constituent units, as well as on disputes between any of its eight constituent units.

22. The functioning of the Federation, the composition of the federal bodies and the decision-making process bear out the principle of constitutional equality of the republics and autonomous provinces. All collective bodies of the Federation were based on the equal representation of the republics and the appropriate representation of the autonomous provinces.

23. The collective Head of State, the SFRY Presidency, was composed of one representative from each republic and each autonomous province. The President of the Presidency was elected for a period of one year according to a pre-determined order of the republics and the autonomous provinces.

24. The Assembly of the SFRY, which was the Federation's highest organ of authority, consisted of the Federal Chamber and the Chamber of Republics and Provinces. Both these houses of parliament ensured an appropriate representation of the republics and provinces.

25. The Chamber of Republics and Provinces was an important instrument for the exercise of the will of the republics and provinces at the federal level. It ensured that agreements which were reached among the Assemblies of the republics and autonomous provinces in those fields in which the federal

H.E. Mrs. Andreja Metelko-Zgombic, Ambassador, Chief Legal Advisor in the Ministry of Foreign Affairs and European Integration of the Republic of Croatia.

laws and the enactments needed the agreement of all the Assemblies. This procedure was followed in reaching the most important decisions, such as the adoption of the federal budget the passing of federal legislation regulating the relationships within the monetary system, foreign exchange system, foreign trade relations, economic relations with foreign countries, etc., and in the ratification of international agreements signed by the SFRY.

26. The Chamber of Republics and Provinces decided jointly and on equal footing with the Federal Chamber on the appointment and removal from office of the highest Federation officials, such as the president and members of Yugoslavia's Constitutional Court and Supreme Court.

27. Even when electing members of the Government of the Federation, the so-called Federal Executive Council, account was taken of the principle of equal representation of the republics and appropriate representation of the autonomous provinces. These principles were also applied for the filling of the most senior positions in the federal bodies and of State administration.

28. As with the republics, the autonomous provinces had their territories and boundaries that could not be altered without their consent. Article 5 of the 1974 Constitution of the SFRY provided that the territory of republics may not be altered without the consent of the republic. The same applied for the territory of an autonomous province.

29. The 1974 Constitution provided for the strengthening of the statehood of the republics and autonomous provinces and their institutions. Each autonomous province had its own assembly and its executive council, as its government was termed, its own central bank, its judiciary, its police and its educational system. The Albanian language was one of the officially used languages in the autonomous province of Kosovo.

30. As with the republics, the autonomous provinces also had their own constitutions and legislation relating to the areas that were not within the exclusive jurisdiction of the Federation. Federal legislation consisted of laws regulating the procedural rules (on civil, criminal and enforcement proceedings) and only of certain fundamental substantive laws (for example, criminal or civil obligations law). Therefore, the republics and provinces had their own laws regulating matters such as family relations, inheritance, property rights and criminal law. Due to the strong confederative element of the Federation, the SFRY also had a federal law on the resolution of conflicts of laws among its republics and provinces, in addition to federal law on the resolution of conflicts of laws with other States.

31. These factors indicate that Kosovo possessed strong elements of statehood within the SFRY, which were guaranteed and regulated by the Federal Constitution, the Constitution of the Republic of Serbia and the Constitution of the autonomous province of Kosovo. These elements of statehood meant that Kosovo as an autonomous province enjoyed a status that was largely equal with that of the republics in this Federation.

32. I shall conclude this part of my presentation by quoting the President of the Republic of Croatia, Stjepan Mesić, who was a member of the Presidency of the former SFRY at the time of its dissolution and who witnessed first-hand the events of the period. The article published in the Večernji list cited the following words of President Mesić, concerning the structure of the former State and the position of the republics within it:

"Firstly- Yugoslavia consisted of republics and provinces, so provinces were the constituent elements of the Federation. Secondly - the provinces were parts of Serbia, which meant that -in addition to having constituent ties with the Federation - they were also linked with one of its federal units. Thirdly - the republics and provinces had united of their own free will to form Yugoslavia, from which it is to be concluded that they cannot be retained against their will within this state framework. In the case of provinces, this relates to both the framework of the Federation and the framework of the federal unit. And fourthly and finally - citizens, i.e.,nations and nationalities in the provinces, exercise their sovereign rights."

33. Mr. President, Members of the Court, the events that unfolded during 1989/1990 and the circumstances surrounding the dissolution of the former Yugoslavia indicated that the political and legal conditions for the resolution of Kosovo's status did not exist at the time.

2. Illegal removal of Kosovo's autonomy

34. The March 1989 amendments to the Constitution of the Socialist Republic of Serbia brought about the destruction of the basic federalist concept of the 1974 Constitution. Through the adoption of these amendments the powers of the autonomous provinces were considerably decreased. Allow me to single out on one such amendment, namely, the one that revoked Kosovo's jurisdiction to object to amendments to the Constitution of Serbia.

35. This triggered demonstrations in Kosovo that led to the Federal Presidency decision to deploy the armed forces and federal police forces in Kosovo. Nevertheless, on 22 March 1989, the Government of Kosovo, under direct pressure of Serbia's political intervention, approved the amendments to the Constitution of the Socialist Republic of Serbia. Under such questionable circumstances of duress, also described in the ICTY judgment in the Milutinović et al.2 ᶜase, and while Serbian police and military vehicles were on the streets of Priština, the Assembly of Kosovo agreed to amendments of the 1974 Constitution of Serbia. The Assembly of Serbia eventually adopted these amendments in Belgrade on 28 March 1989.

2 Milutinović et al., Judgement, IT-05-87-T, Vol. I, para. 219.

36. Notwithstanding the resistance and unrest from the Kosovo Albanians, in 1990 the Socialist Republic of Serbia adopted a new Constitution that fully abolished the autonomy of Kosovo and Vojvodina. This Constitution deprived the provinces of all their elements of statehood and the province of Kosovo was renamed "Kosovo and Metohija".

37. It was by these actions and pressures that Serbia revoked the high degree of political autonomy which Kosovo and Vojvodina had had until then. They were divested of the right to their own Constitution, legislative power, presidency, constitutional and supreme courts.

38. The 1990 Constitution also stripped Kosovo and Vojvodina of their territorial autonomy. The autonomous province was no longer entitled to give or withhold its consent to potential changes of its territory, and issues relating to its territory were to be solved by statute in the adoption of which the province played no role. The Constitution of the autonomous province of Kosovo was replaced by the "Statute" that was adopted by the National Assembly of Serbia.

39. By stripping Kosovo and Vojvodina of their status of constituent units of the Yugoslav Federation, the Assembly of the Socialist Republic of Serbia violated the 1974 SFRY Constitution and undermined the very foundations of this State.

40. An analysis of how these constitutional changes affected Kosovo's status, as well as an assessment of their constitutionality with regard to the 1974 SFRY Constitution, is in detail elaborated in the Written Comments of the Republic of Slovenia. On this occasion I am pleased to confirm that we agree with the views expressed therein.

41. By taking the above-described steps, Serbia abolished the autonomy of Kosovo and Vojvodina, guaranteed by the federal Constitution. Serbia kept their representatives on the Federation's bodies, thus ensuring dominance in political decision making. This created the conditions for Serbia's continued assertion of dominance over the SFRY's collective Presidency and the other bodies of the Federation, which no longer functioned in accordance with the principles of the 1974 Constitution.

42. Let me state at this point that at the constitutional level the process of the abolishment of the autonomous provinces related to both provinces. However, at the statutory level the various laws and measures adopted related only to Kosovo. With respect to Kosovo, a series of new measures entitled "Programme for the Realization of Peace and Prosperity in Kosovo" were adopted in order to improve the status of the Kosovo Serbs. While Serbs were offered various benefits relating to investments and related matters, the Kosovo Albanians were subject to a series of measures and laws degrading their position in Serbia. These measures constituted serious violations of their human rights, as the international community recognized. These discriminatory measures would result in the banning of Albanian-language newspapers and the closing of the Kosovo Academy of Sciences and Arts. A substantial majority of Kosovo Albanians was expelled from public and State services.

43. During the 1990s the Kosovo Albanians, which represented 90 per cent of Kosovo's inhabitants, clearly demonstrated their desire for their status to be regulated on a different basis than that imposed by Belgrade. The fundamental right guaranteed by the international law - namely, the right of equality and self-determination of peoples - in relation to the participation and representation of the Kosovo Albanians in the government and administration of their parent State - was denied to them through the unlawful abolition of Kosovo's autonomy.

44. As early as then, the people of Kosovo sought to re-establish and reclaim for "Kosovo" the characteristics of a constituent unit within the Federation. The Albanian members of the Assembly of Kosovo passed a resolution declaring Kosovo "an equal and independent entity within the framework of the Yugoslav Federation". The aspirations of the people of Kosovo to their own identity and the realiza-

tion of the right to self-determination in a State in which these rights were denied to them developed into Kosovo's clearly expressed will to become an independent and sovereign State. This was confirmed in the 1991 referendum on the adoption of the Declaration of Independence. Of 87 per cent of the eligible voters that took part in the referendum, 99 per cent voted for the adoption of the Declaration.

45. With regard to the dissolution of the Federation and the effect which this inevitably had on its constitutional elements, especially Kosovo, President Mesić, in the article I have already mentioned, emphasized the following:

"This Federation dissolved. The constituent element associated with it disappeared but this does not mean that this element automatically passed on to what is today the Republic of Serbia merely because the province of Kosovo also formed a part of the Republic of Serbia in the Federal Yugoslavia. Precisely because the element of Kosovo's tie to the former Federation disappeared, and only the element of its tie to Serbia remained, the need to determine the new and final status of Kosovo arose."

3.The dissolution of the former SFRY and Kosovo's position in this process

4.

46. Mr. President, honourable Members of the Court, the 1990s in Yugoslavia w**e**re marked by the first truly democratic elections. These resulted in the establishment of multi-party parliaments and multi-party systems in the republics of Croatia and Slovenia and eventually in the passing of declarations of independence and sovereignty in these two States on 25 June 1991. By the end of 1991 the same had also been done by Bosnia and Herzegovina and Macedonia.

47. The work of the Arbitration Commission, set up in 1991 within the framework of the Peace Conference of the former Yugoslavia, is of decisive importance for understanding the legal aspects of the dissolution of the Federation and the emergence of new States on the territory of the former Yugoslavia.

48. In its Opinion No. 1 of 29 November 1991, the Arbitration Commission concluded that the SFRY was in the process of dissolution. It also expressed a set of important views on the application of international law in the concrete case of the SFRY's dissolution, which in our opinion are still of value. Thus, the Commission pointed out that the existence or disappearance of a State is a question of fact, that the effects of recognition by other States are purely declaratory, and that it is international law which defines the conditions on which an entity constitutes a State.

49. The Arbitration Commission reached the conclusion that the SFRY was in the process of dissolution on the basis of the already adopted declaration of independence of the four republics - Bosnia and Herzegovina, Croatia , Macedonia and Slovenia - and the fact that the composition and functioning of important federal organs no longer satisfied the criteria of participation and representation of a[l] members of the Federation, which embodies the essence of every federal State. It is worth noting that the conformity of these decisions on independence with international law was never questioned by the Arbitration Commission. In Opinion No. 8 the Commission confirmed that the process of dissolution of Yugoslavia was complete and that this State no longer existed.

50. In this period, the European Community adopted the Declaration concerning the Conditions for Recognition of New States and Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. This meant that, by taking international law as the starting-point, they would assist the member States in reaching political decisions concerning the recognition of States that had formed on the territory of the SFRY.

51. The fulfilment of conditions set in the Declaration and Guidelines by Bosnia and Herzegovina, Croatia, Macedonia and Slovenia was considered in Opinions Nos. 4, 5, 6 and 7 of the Arbitration Commission. This cleared the way for the recognition of these States.

52. At the same time, Serbia and Montenegro did not raise the issue of their accession to independence and recognition. They claimed - without any legal basis - that they were the sole legal successors to the former Yugoslavia and the continuation of the SFRY, and that the other four republics had seceded illegally.

53. The views of the SFRY Presidency, in which Serbia was already at the time dominant, was presented in an extensive text entitled "Assessments and Positions of the SFRY Presidency Concerning the Proclamation of the Independence of the Republic of Croatia and Republic of Slovenia"3. This was drawn up in Belgrade on 11 October 1991. It irresistibly brings to mind views which have recently been heard in this courtroom and which are expounded in the written materials of the State that now, as it did then, contests the independence of the new State. This document states that the independence may be gained only with the agreement of Yugoslavia, the secessionist acts of Slovenia and Croatia are described as a direct threat to the territorial integrity of Yugoslavia and every attempt to recognize these two States is assessed as a flagrant interference into the internal affairs of the State, as an act directed against Yugoslavia's international subjectivity and territorial integrity.

54. As has been already stated, although the will of the people of Kosovo was already then clearly expressed, the settlement of the issue of Kosovo's status was not discussed in that context at the time.

55. Kosovo, the constituent unit of the already former Federation, continued to be a territorial unit within the Federal Republic of Yugoslavia but enjoyed no autonomy. The events to come, however, increased the awareness of the international community that the issue of Kosovo status needed to be addressed.

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3 Reprinted in Snežana Trifunovska (ed.), Yugoslavia Through Documents: From its Creation to its Dissolution, p. 354.

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4. Human rights violations of and systematic repression against the Kosovo Albanians

56. Mr. President, honourable Members of the Court, we consider that the continued and grave violations of the human rights of the Albanian population in Kosovo and the systematic repression of those individuals by the Federal Republic of Yugoslavia is of the utmost importance in considering the question before the Court.

57. The human rights violations took on great dimensions. In this way the resistance of the population of Kosovo to the actions taken by the Serbian authorities, its long-time passive resistance and its expressed desire for independence may be regarded as a form of expression of a legitimate right to self-defence.

58. The international community recognized the illegality of these acts. In the early 1990s the international community firmly and repeatedly condemned discrimination against and the violations of the human rights of the Albanian population in Kosovo.

59. The OSCE verification mission in Kosovo voiced its deep concern over the escala‘ion of violence and the violations of human rights in Kosovo, as early as 1992. After the Federal Republic of Yugoslavia declined to give its consent for the extension of the said mission's mandate, the United Nations Security Council in its resolution 855 (1993) expressed its deep concern at this position of the Federal Republic of Yugoslavia and called upon it to reconsider its refusal to allow the extension of the OSCE mission in Kosovo.

60. The documents in which the international community considers and condemns such acts are numerous. An important example is the Report of the Interagency Needs Assessment Mission5 submitted to the Security Council in 1999.

61. The widespread human rights abuses and crimes are also described in detail in the ICTY judgment in the Milutinović et al. case6.

62. The international community's answer to this situation was the adoption of the resolution 1244 under Chapter VII of the United Nations Charter. The continued human rights abuses created a situation that constituted a threat to peace and security in the region.

5. Interim administration for Kosovo

(United Nations Security Council resolution 1244 (1999))

63. Mr. President, I will briefly now turn to some aspects of the international presence in Kosovo.

64. Croatia submits that the Declaration of Independence is not in contravention to resolution 1244. The resolution did not prejudge the final status of Kosovo. It only envisaged the initiation, at a later stage, of a political process that would lead to the determination of Kosovo's final status. What the outcome of that process would be remained open for discussion. Thus, the independence of Kosovo was definitely one of the possible solutions to the final status of Kosovo in terms of the resolution. Both sides that participated in the negotiations were aware of this fact.

5 Report of the Inter-Agency Needs Assessment Mission dispatched by the Secretary-General of the United Nations to Federal Republic of Yugoslavia (S/1999/662).

6 Milutinović et al., Judgment, IT-05-87-T, especially in Vol. II, paras. 534-555, 669-690, 795-802, 1150-1265.

65. Indeed, the part of the resolution that announced the political process aiming at determining Kosovo's final status referred to the Rambouillet Accords (S/1999/648), in which the will of the people took centre stage on the list of factors that would be taken into account when deciding on the final status of Kosovo. This makes it even more clear that the independence of Kosovo, to which the will of the people had been referring for some time already, was, if not very probable, foreseen as one of the possible outcomes of the political process envisaged by the resolution.

66. May I now turn your attention to several more elements of the resolution's implementation which confirm that even during the United Nations interim administration in Kosovo, Kosovo was recognized as a separate territorial unit and entity. It was in this period that Kosovo's international personality developed and crystallized.

67. In the Constitutional Framework for Provisional Self-Government in Kosovo of 2001, Kosovo was defined as an "entity under interim international administration" which is an "undivided territory". As such, Kosovo was defined as an integral and complete territorial entity that in the politico-administrative sense was completely separate from Serbia.

68. Under United Nations administration, Kosovo's continuity with respect to the law applicable in Kosovo at the time of the former SFRY was recognized. The UNMIK Regulation (UNMIK/REG/2000/59) provided that, in addition to the law passed by the Interim Administration, the law applicable in Kosovo was also "the law in force in Kosovo on 22 March 1989".

69. Furthermore, it is worth noting that, already under the Interim Administration, Kosovo had a certain international personality. The Interim Administration concluded international agreements, such as CEFTA, ECAA and a number of bilateral free trade agreements, on behalf of Kosovo.

6. Efforts of the international community to reach the final settlement on Kosovo's future status

70. From the adoption of resolution 1244 (1999) to May 2005 when the Secretary-General launched the process that would lead to the final settlement of Kosovo's future status, Kosovo had been under the interim international administration for six years.

71. As is elaborated in a number of written submissions, comprehensive negotiations took place with a view to exploring all possible aspects of an agreed solution.

72. Even after two years of negotiations, the points of view of Belgrade, which insisted on Kosovo remaining a part of Serbia, and of Priština, which strived for independence, were not brought any closer.

73. In view of the documents adopted throughout this period (such as the Report of the Special Envoy for Kosovo of 26 March 2006, the Report of the United Nations Security Council Mission in Kosovo of 4 May 2007 and the Kosovo Contact Group's Statement on Kosovo issued in7 Report of the Special Envoy of the Secretary-General on Kosovo Future Status, paras. 1-3.

New York on 27 September 2007), it became clear that further maintenance of the status quo in Kosovo was unsustainable.

7 Report of the Special Envoy of the Secretary-General on Kosovo Future Status, paras. 1-3.

74. Finally, the Special Envoy of the Secretary-General for Kosovo, Martti Ahtisaari, ended this process by concluding that " the potential to produce any negotiated and mutually agreeable outcome on Kosovo's status is exhausted" and that "the only viable option for Kosovo is independence, to be supervised for an initial period by the international community"29.

7. Adoption of the Declaration of Independence

75. In this context, the representatives of the people of Kosovo adopted the Declaration of Independence at the extraordinary plenary session of the Assembly of Kosovo on 17 February 2008, confirming the creation of a new and independent State. The very fact that the Declaration was signed by the President of Kosovo, the Prime Minister and the President of the Assembly and all the members of the Assembly present, called one by one by name to sign the Declaration, points to the fact that this act was adopted outside the regular framework of the Assembly. It is plain that all those present had the clear intention to act on behalf of the people of Kosovo.

76. By this Declaration the people of Kosovo confirmed their readiness to fully respect the obligations for Kosovo contained in the Comprehensive Proposal for the Kosovo Status Settlement. We see this Declaration as a clear commitment of the people of Kosovo to respect the rule of law and the protection of the rights of all ethnic groups living in Kosovo, including their active participation in political and decision-making processes.

77. Having this in mind, Croatia wishes to point out that the obligations assumed by the new State are an important indicator of the democratic development of the Republic of Kosovo and the future guarantee of peace and stability in the region.

IV. CONCLUSIONS

78. Mr. President, Members of the Court, in this presentation Croatia has elaborated the special set of circumstances that, from Croatia's point of view, have been met in the concrete case of Kosovo's accession to independence. The existence of the Republic of Kosovo is a fact of international law that has occurred in accordance with international law.

79. In conclusion, Mr. President, taking into account that international law does not regulate the issuance of the declaration of independence as such, Croatia invites the Court to declare that Kosovo's Declaration of Independence is in accordance with international law.

80. Mr. President, distinguished Members of the Court, I thank you for your kind attention.

The Kingdom of Denmark

The Kingdom of Denmark is represented by:

H.E. Ambassador Thomas Winkler, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs, as Head of Delegation;
Mr. Michael Braad, Head of the Department for International Law, Ministry of Foreign Affairs,
Mr. David Michael Kendal, Deputy Head of the Department for International Law, Ministry of Foreign Affairs, H.E. Madam Kirsten Malling Biering, Ambassador of Denmark to the Kingdom of the Netherlands, as Alternates; Mr. Ole Spiermann, University of Copenhagen,
Mr. Jacques Hartmann, Head of Section, Ministry of Foreign Affairs, Mr. Christian Nygård Nissen, Royal Danish Embassy in the Kingdom of the Netherlands, Ms Lisbeth Holm Ravn, Junior Assistant, Royal Danish Embassy in the Kingdom of the Netherlands, Ms Lisbeth Funck Hansen, Junior Assistant, Ministry of Foreign Affairs, Ms Katrine Rosenkrantz de Lasson, Junior Assistant, Ministry of Foreign Affairs, Mr. Tom Elkjær Kristensen, Junior Assistant, Ministry of Foreign Affairs, as Advisers.

The PRESIDENT: I now call upon His Excellency Mr. Thomas Winkler to take the floor.

Mr. WINKLER:

INTRODUCTION

Mr. President, distinguished Members of the Court, it is a great honour for me as Agent of the Kingdom of Denmark to appear before you today in these important proceedings.

In the view of my Government the essence of the question before the Court is: Whether the Declaration of Independence by the representatives of the people of Kosovo was contrary to international law?

Denmark believes that the answer to this question is: No. And we do so for the following three reasons:

(a) firstly, there is no general prohibition in international law against declarations of independence. The Security Council and General Assembly have in particular instances condemned declara tions of independence. But this has been in situations where these declarations were part of an overall scheme violating fundamental norms of international law. There is no such condemna tion in this case. Further, those opposing Kosovo's independence have shown no general prohibi tive rule. In the absence of a prohibition, illegality cannot be presumed;

(b) secondly, resolution 1244 did not exclude independence for Kosovo as the possible outcome of the status process. Indeed, the resolution left the outcome open. On 17 February 2008 the process has been decisively exhausted. Intensive, good-faith efforts by Special Envoy Ahtisaari, the result of which was endorsed by the United Nations Secretary-General, did not meet with Serbian approval. Nor did further efforts of the Troika, established by the Contact Group, produce a result. There was broad consensus that further negotiations would not have led to agreement between the parties on the status of Kosovo. And the status quo was untenable. Against this background resolution 1244 cannot be read to prohibit either the Declaration of Independence nor, indeed, independence itself;

(c) thirdly, this is a very particular case. Its unique factual and legal characteristics have been made abundantly clear during these oral proceedings. Both the events leading up to - and after - the dissolution of Yugoslavia in the 1990s, as well as the international community's exceptional in volvement in Kosovo through resolution 1244, mark out this case as special. Therefore, we do not share the fear of some that Kosovo's Declaration of Independence will serve as a precedent that leads to instability. And we urge the Court not to give credence to such fears.

DENMARK'S PERSPECTIVE

Mr. President, before I address these three submissions in more detail, let me briefly set out the background for Denmark's participation in these advisory proceedings. I will do so by outlining the elements that have shaped our perspective.

My distinguished colleague from Croatia has just provided you with an important perspective from the near region. She has comprehensively explained the changes imposed on Yugoslavia's constitutional system in the late 1980s. The perspective of Denmark is also that of a European State, but we are somewhat further removed and therefore informed by a different background.

There have been no particular historical ties, or any special relations of trade, commerce or otherwise, between Denmark and the South-Eastern region of Europe. I believe it is a fair description to say

Members of the Delegation of the Kingdom of Denmark.

that for many Danes it was the tragic events of the 1990s that brought particular attention to the Western Balkans. The events of that period were a stark reminder that the unspeakable horrors we had thought confined to history could still happen in Europe. So, like other members of the world community, we were faced with the acute challenge of how to bring peace and stability to the region.

In response, Danish forces have served continuously in peacekeeping missions in the Balkans since the early 1990s. Since 1999, there have continually been approximately 400 Danish peacekeepers in Kosovo, in implementation of resolution 1244. These troops have primarily been stationed in the ethnically diverse town of Mitrovica in Northern Kosovo.

The guiding principles of these and other Danish efforts in the region have been the promotion of human rights, stability and the promotion of economic development.

Mr. President, Denmark is a friend of both Serbia and Kosovo. Our presence here today in no way detracts from this. It is rather an expression of our firm commitment to working continuously for peace and prosperity for both nations. It goes without saying that Denmark would strongly have preferred Kosovo's final status to have been settled by negotiations between the parties. We worked hard to help forge the basis for such arrangement. But it proved elusive. And the status quo was not sustainable.

INTERNATIONAL LAW DOES NOT ADDRESS THE LEGALITY OF DECLARATIONS OF INDEPENDENCE

Mr. President, distinguished Members of the Court, I shall now address the first submission of the Danish Government: that there is no prohibition in general international law against declarations of independence.

Let me recall first, however, the very limited subject-matter of the question before the Court. It is narrow and it is specific. It only concerns the Declaration of Independence.

As has been stated by my distinguished Serbian colleague here in this hall less than a week ago: "[T]he question is a narrow one inasmuch as it deals with the UDI and does not address related, but clearly distinct, issues such as recognition"[1]. Denmark agrees.

The Court has not been asked by the General Assembly to advise on possible consequences of its findings. This is an issue which the General Assembly must be understood to have reserved for the political processes within the United Nations and beyond.

Secondly and related, a comment on the temporal character of the question before the Court. The question is somewhat oddly framed in the present tense: "Is the declaration of independence", etc. But, of course, the question concerns a factual event which took place in the past.

The way the question is phrased is similar to asking: "Is it illegal when I took the apple?"

In Denmark's view, the correct approach to the temporal aspects of the question is the following: the factual occurrence of the Kosovo Declaration of Independence can only be considered in view of the law and facts at the time of the Declaration. 17 February 2008 is the crucial date. The Court has not been requested to pronounce on the possible effect on the Declaration of subsequent events during the almost two years since the Declaration was made.

Mr. President, it is essentially Denmark's submission that general international law does not address the legality of declarations of independence by entities or peoples within a territory.

1 CR 2009/24, p. 41, para. 17.

Evidently, as a matter of domestic law such declarations may very well be - and indeed often are - prohibited. But as a matter of international law the issuance of a declaration of independence is primarily a factual event. A factual event which together with other facts, such as a defined territory and permanent population, may be deemed to result, immediately or over time, in the creation of a new State. General international law does not pronounce on the existence of such facts. It is silent.

Only in rare circumstances has the Security Council or the General Assembly expressed a negative view of declarations of independence, namely, where such declarations were part of an overall scheme that violated fundamental norms of international law. As detailed in Denmark's Written Statement, examples include Katanga, Rhodesia and Northern Cyprus[2]. This shows that declarations have been condemned when completing a set of events that already constituted a serious breach of international law.
Significantly, there has been no condemnation of Kosovo's Declaration of Independence. On the contrary, as shall be shown, this Declaration was fully compatible with resolution 1244.

We have heard references to resolution 1246 of 11 June 1999 regarding East Timor, which explicitly provides for a popular consultation on independence of the East Timorese people. This is used to argue that declarations of independence can only be made if explicitly authorized[3].
On the other hand, we have also heard references to Security Council resolution 787 adopted in 1992 regarding Republika Srpska containing a provision to the effect that the Council would not accept any unilateral declarations of independence. This is, among others, used to argue that there is no prohibition in the absence of a specific determination[4].

While there should be no doubt that Denmark favours the latter line of argument, at least these conflicting views should be sufficient to demonstrate that there are no general rules of international law on declarations of independence.

Mr. President, I submit that it is for those maintaining that the Declaration is unlawful to show the existence of a general prohibitive rule of international law. Prohibitions cannot be presumed. Support for this view- whether it be termed the "Lotus" or the residual principle -can be found in the Court's practice referred to in Denmark's Written Statement[5]. This, in my view, is the guidance given to us by international law and it is sufficient to answer the question before the Court.
Again today we have heard arguments on the existence of such a prohibitive rule. With all due respect, Mr. President, Denmark is far from convinced. There seems to be a tendency to confuse the narrow question before the Court with much broader issues; issues which are clearly outside the ambit of these proceedings. Thus, some opposing the Declaration have argued that it is for others, for example, "to show . . . that title had lawfully passed to a new State of 'Kosovo'"[6].

Calls to explain the legal basis for transfer of title to territory secession and membership of international organizations, as we have heard this morning, in my view goes well beyond the issue of these advisory proceedings, which I respectfully repeat, is the Declaration of Independence.
In conclusion of this, my first submission, I propose a simple, but fully sufficient answer to the question before the Court: international law neither authorizes nor forbids declarations of independence and, therefore, Kosovo's Declaration of Independence did not contravene international law.

2 WS, pp. 4-5.
3 CR 2009/24, p. 51, para. 9.
4 CR 2009/25, p. 48, para. 10.
5 P. 3
6 WS, Cyprus, para. 88.

H.E. Ambassador Thomas Winkler, Undersecretary for Legal Affairs,
Ministry of Foreign Affairs. (Denmark)

SECURITY COUNCIL RESOLUTION 1244

Mr. President, distinguished Members of the Court, a number of issues relating to resolution 1244 have been raised in other submissions. Even though Denmark favours a simple answer to the question before the Court, I believe it appropriate to provide some considerations on resolution 1244 and the process leading up to the declaration of independence.

This brings me to my second submission, which falls in two parts: firstly, it will be shown that all efforts to find a negotiated settlement on Kosovo's status as prescribed in resolution 1244 had been exhausted at the end of 2007; secondly, that resolution 1244 cannot be read to prohibit Kosovo's Declaration of Independence, nor did it require Serbian consent to this Declaration.

In regard to the first part, those opposing the Declaration of Independence argue that resolution 1244 required further negotiations between the parties. We respectfully disagree.

I shall not in detail repeat the comprehensive account of the status process already given. It seems, however, necessary to spend some time on this issue, especially given the attempts by some during these proceedings to portray President Ahtisaari's leadership of the process as flawed and his conclusions as unwarranted. To counter these claims, a brief reminder of the historical facts is necessary.
President Ahtisaari was appointed in November 2005 by the United Nations Secretary-General as his Special Envoy on Kosovo's future status process.

He was to lead the process on behalf of the Secretary-General and was authorized to determine the pace and duration of the process in consultation with the Secretary-General. Neither his mandate as Special Envoy nor resolution 1244 required that the settlement must be based on Serbian consent or for that matter exclude independence for Kosovo.

Significantly, Mr. President, this was never meant to be an open-ended process. On the contrary, there was broad agreement, as expressed by the Contact Group in 2006; "[t]hat the process must be brought to a close, not least to minimise the destabilising political and economic effects of continuing uncertainty over Kosovo's future status"[7].

After numerous rounds of consultations and intensive efforts, President Ahtisaari in 2007 forwarded a detailed set of recommendations to the United Nations Secretary-General.

These recommendations, which were explicitly endorsed by the United Nations Secretary-General, were based on the premise that status quo of a continued international administration was unsustainable and that all avenues for reaching a negotiated settlement had been exhausted.

When the Security Council could not agree to endorse the Ahtisaari Plan, a last effort was made through a Troika established by the Contact Group. The unsuccessful attempt of the Troika brought to an end an unprecedented effort for reaching agreement on the status of Kosovo, an effort that had fully respected and honoured the process envisaged by resolution 1244.

This conclusion, Mr. President, is central to the analysis of Security Council resolution 1244, which is the subject of the second part of this submission. My point is this: resolution 1244 cannot be read to prohibit Kosovo's Declaration of Independence, nor did it require Serbian consent to this Declaration. The central provisions in this regard are paragraphs 11 (e) and 11 (f) of resolution 1244. These operative provisions address the issue of final status. Neither implicitly or explicitly do they rule out the Declaration of Independence, nor do they require Serbian consent hereto. Rather, resolution 1244 leaves open the outcome of the status process. Resolution 1244 is "status neutral".

Had the Security Council wished to exclude specific outcomes of the status process it could have done so -as has been the case with numerous other Council resolutions on territorial disagreement. But it is common knowledge that already in 1999 there were diverging views in the Council on the desirability of this in relation to Kosovo. Some States on the Council, as we heard this morning, believed that the reference to territorial integrity in the preamble of the resolution was to be the overriding principle. Other

Council members laid emphasis on the specific reference in the resolution to the Rambouillet Accords, which in turn referred to "the will of the people".

This reference, Mr. President, is crucial. It was clear, both during the negotiations at Rambouillet in the immediate period after the 1999 crisis, and throughout the years of the UNMIK administration, that the wish of the overwhelming majority of the population of Kosovo was to gain independence. This cannot be ignored.

Also relevant in this regard is the fact that the final version of the Rambouillet Accords excluded language from previous drafts which required "mutual agreement" by the parties. Counsel for Kosovo during his oral statement convincingly set out the significance hereof[8].

Mr. President, Security Council resolutions are legal documents which result from a political process. Often being the result of compromise, they are not always unambiguous or clear, even in the most central paragraphs. What is clear about resolution 1244, however, is that it initiated a status process for Kosovo.

7 CR 2009/25, p. 23, para. 32.

8 Cf. CR 2009/25, pp. 53-54

It did so in the aftermath of brutal repression of the people of Kosovo and in parallel with the establishment of a United Nations administration that supplanted all Serbian exercise of jurisdiction in Kosovo. The outcome of the status process was, however, not predetermined. Resolution 1244 did not exclude Kosovo's Declaration of Independence, but - from a good faith reading of the resolution - it left the outcome open.

This, Mr. President, brings me to near the end of my second submission. I would, however, be remiss not to touch on the principle of self-determination, which a number of other statements have dwelt upon.

Numerous aspects of this principle have already been clarified by this Court. Yet a number of aspects remain unsolved and indeed controversial. The Danish Government does not expect the Court to advise on these questions here. Indeed, Denmark considers that the Court need not necessarily address the issue of self-determination, which to some extent is outside the ambit of the narrow question before the Court.

Let me, however, point out that the Danish Government takes the view that some of the specific circumstances of this case are in fact reflective of the same values and interests that underpin the principle of self-determination.

Indeed, it can be argued that resolution 1244, in essence if not in word, recognized the people of Kosovo as a self-determination entity. This is clear from the fact that resolution 1244 was based on the premise that Kosovo's final status should not be determined without the involvement and consent on the part of the people of Kosovo.

The Rambouillet Accords' provision for the establishment of a mechanism for a final settlement on the basis of "the will of the people" is telling. These words are more explicit than Article 22 of the Covenant of the League of Nations addressed by this Court in the 1971 Namibia Opinion. Article 22 (1) of the Covenant was concerned with people not yet able to stand by themselves and their development which formed "a sacred trust of civilization".

In the Namibia Opinion, the Court interpreted this language in the light of subsequent developments enshrined in the principle of self-determination, concluding, that "[t]hese developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned" (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, para. 53). I note that this was a majority Opinion by this Court.

Mr. President, with this I conclude my second submission. The process foreseen in resolution 1244 had been fully respected in a manner compatible with underlying principles of international law.

THE UNIQUE CHARACTER OF THIS CASE

Mr. President, distinguished Members of the Court, I now turn to my third and final submission: that the case of Kosovo's Declaration of Independence has unique factual and legal characteristics. It cannot and should not serve as a precedent for secessionist movements.

Two particular issues gave this case its sui generis character: first, gross human rights violations against the Kosovo population in the 1990s followed by an eight-year international administration in Kosovo under resolution 1244 and its unique status process; second, the particular constitutional role of Kosovo within Yugoslavia, prior to the events of the 1990s that led to the break-up of Yugoslavia.

My distinguished colleague from Croatia has just in detail described the constitutional framework, and together with the written contribution of Slovenia, I believe a comprehensive and convincing picture hereof has already been given.

It is not for Denmark to add to this, but merely to point out that the constitutional role of Kosovo, a self-governing province up to 1989, would seem quite closely to resemble that of the then constituent republics within Yugoslavia, republics that gained independence in the 1990s.

Mr. President, other entities might well find inspiration in the case of Kosovo and seek to promote their agendas in this context. But false parallels must, of course, be rejected. We see no credible reason to believe that such parallels should exist in reality or be promoted in practice.

We also note that there is broad consensus on Kosovo being a special case. This point was made in statements by all 27 countries of the European Union, including the Republic of Cyprus, by the United States and Russian representatives, by the United Nations Secretary-General and many more. This, and I think this is an important point to stress, is not a call to suspend the law as was argued this morning, but a call to make it clear that particular facts obviously have different legal consequences.

CONCLUSION

Mr. President, I now come to my conclusion. As stated initially, peace, stability and prosperity for the region and Europe as a whole has been the key focus for Denmark's involvement in the Western Balkans during the last two decades.

Denmark has been a strong proponent for the integration of both Serbia and Kosovo into European structures as appropriate. We note that the situation in Kosovo is now steadily improving, and that there is a European perspective for both Serbia and Kosovo.

Through the EULEX mission the European Union, including Denmark, is engaged in supporting Kosovo's institutions, and building the framework for an effective, transparent public administration for all the inhabitants of Kosovo.

This process, we believe, neither should- nor could -be reversed. It is time to look forward and address the real, daily needs of the people of Kosovo and of the region.

Mr. President, distinguished Members of the Court, this concludes Denmark's oral contribution. I thank you for your attention.

The French Republic

The French Republic is represented by:

Ms Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, Member and former Chairman of the United Nations International Law Commission, Associate of the Institut de droit international;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense;

Ms Sandrine Barbier, Chargée de mission, Directorate of Legal Affairs, Ministry of Foreign and European Affairs;

Mr. Antoine Ollivier, Chargé de mission, Directorate of Legal Affairs, Ministry of Foreign and European Affairs.

The PRESIDENT: I shall now give the floor to Mme Edwige Belliard, representing the view of France.
Mme BELLIARD :

1. Monsieur le président, Messieurs les juges, c'est pour moi un privilège de représenter une nouvelle fois la France devant vous. Au vu des échanges écrits et oraux déjà nombreux auxquels a donné lieu la présente procédure consultative, il n'est nul besoin pour nous de répéter aujourd'hui ce qui figure dans nos propres contributions.

2. En écoutant les représentants de la Serbie la semaine dernière, nous avons trouvé dans chacun de leurs arguments la confirmation que rien, décidément, ne permettait de conclure que la déclaration d'indépendance du Kosovo était contraire au droit international, confortant ainsi les thèses que nous avions développées dans nos écritures. En même temps, nous avons éprouvé aussi une gêne réelle à voir la discussion se poursuivre sur toute une série de sujets dont nous persistons à penser qu'ils demeurent étrangers à la fois à la question inscrite dans la résolution 63/3 de l'Assemblée générale, par laquelle vous avez été saisis, et aux fonctions judiciaire et consultative de la Cour telles qu'elles résultent de la Charte des Nations Unies, de votre Statut et de votre jurisprudence.

Members of the delegation of France.

3. En effet, et en définitive, de quoi vous ont parlé essentiellement les représentants de la Serbie il y a tout juste une semaine ? De l'indépendance du Kosovo- beaucoup plus que de sa déclaration[1]-, du processus politique qui y a conduit[2], de l'importance, que personne au demeurant ne conteste, du principe de l'intégrité territoriale dans les relations internationales entre Etats[3], et de l'importance, enfin, des missions d'administration internationale que peuvent mettre en place les Nations Unies afin de maintenir ou rétablir la paix et la sécurité internationales[4]. Sur tous ces points, la Serbie a essayé de dresser un tableau fort inquiétant des menaces que ferait peser la situation du Kosovo et a prié votre Cour :

- de lui apporter son aide afin de revenir au statu quo ante - la situation d'avant l'indépendance - dans lequel des négociations sur le statut du Kosovo, manifestement vouées à l'échec, pourraient reprendre[5] ;

- de fournir des directives juridiques en ce sens et à destination au premier chef du Conseil de sécurité[6] -quand bien même ce dernier n'a jamais formulé le voeu d'en recevoir et alors même que vous n'êtes pas interrogés sur les conséquences à tirer de la qualification à donner à la déclaration d'indépendance ;

-enfin, plus généralement, de restaurer l'autorité des Nations Unies, de réaffirmer les fondations de l'ensemble de l'ordre juridique international et de garantir la paix et la sécurité internationales.

1 CR 2009/24, p. 41, par. 17 (Djerić) ; p. 51 (Zimmermann) («Resolution 1244 precludes the unilateral separation of Kosovo») ; p. 74-75, par. 33-36 (Shaw) («Failure to meet the requirements of statehood»).
2 CR 2009/24, p. 32, par. 9 (Bataković) ; p. 57, par. 44 (Zimmermann).
3 CR 2009/24, p. 63-72, par. 1-27 (Shaw
4 CR 2009/24, p. 60, par. 60-62 (Zimmermann).
5 CR 2009/24, p. 32, par. 6, p. 35, par. 13 (Bataković) ; p. 57-58, par. 42-46 (Zimmermann).
6 Par exemple, CR 2009/24, p. 39, par. 12 (Djerić) ; p. 57, par. 43 (Zimmermann).

4. Vous en conviendrez, tout ceci est manifestement fort éloigné de l'unique question que comporte la résolution 63/3, à savoir : «la déclaration unilatérale d'indépendance des autorités provisoires d'administration autonome du Kosovo [était]-elle conforme au droit international ?» Aussi éloignés de cette question que soient les développements de la Serbie, ils n'en sont pas moins très révélateurs : ils démontrent en effet l'impasse dans laquelle la Serbie se trouve pour répondre à la question posée.

5. Tout ceci reflète finalement les limites de l'exercice auquel nous sommes aujourd'hui confrontés. Ces limites tiennent tout à la fois à la demande très précise qui vous a été faite, demande qui soulève d'importantes questions préliminaires (I), et à la présentation objective des circonstances dans lesquelles le Kosovo s'est déclaré indépendant (II), points que j'évoquerai tour à tour. Avant de donner la parole, si vous me le permettez, Monsieur le président, au professeur Mathias Forteau, je conclurai mon exposé en dressant le cadre juridique général dans lequel s'inscrit la demande qui nous occupe (III).

I. LA QUESTION POSEE SE HEURTE AUX LIMITES DE LA FONCTION CONSULTATIVE DE LA COUR

6. Monsieur le président, Messieurs les juges, la question posée se heurte aux limites de la fonction consultative de la Cour. Il a été maintes fois répété, y compris par la Serbie elle-même[7], que l'indépendance acquise par le Kosovo ne fait pas l'objet de la présente procédure. Point n'est donc besoin d'y revenir à ce stade[8]. Au demeurant, cette indépendance est devenue une réalité qu'ont déjà reconnue la France et soixante-deux autres Etats Membres des Nations Unies. Il est également important de souligner que le Kosovo a commencé à prendre toute sa place dans la communauté des Nations, comme en témoigne notamment son admission au sein des principales institutions financières internationales[9]. Ces éléments ne font que renforcer le caractère purement virtuel, car dénué inévitablement de tout effet pratique, d'une réponse à la question de la conformité au droit international d'une déclaration d'indépendance. Ce caractère virtuel devrait dissuader la Cour d'examiner plus avant la question posée[10]. L'inutilité d'un éventuel avis est d'autant plus certaine que les prétendues «conséquences déstabilisantes» de la déclaration d'indépendance, avancées par la Serbie pour justifier la demande d'avis[11], se sont finalement avérées dénuées de tout fondement, comme l'a montré encore tout récemment la très bonne tenue du premier tour des élections municipales au Kosovo[12].

7. Votre Cour s'est plus largement fait une obligation de toujours vérifier, avant de répondre à une demande d'avis consultatif, non seulement sa compétence mais également l'opportunité d'exercer sa fonction judiciaire[13]. A ces deux égards, la République française a déjà exprimé ses doutes dans ses exposés écrits[14].

8. La Cour doit, en premier lieu, s'assurer, et cela en matière contentieuse comme en matière consultative, que la réclamation juridique ou la demande dont elle est saisie, en admettant que les faits allégués soient exacts, peut être effectivement rattachée à la base de compétence sollicitée15. Certes, s'agissant d'une procédure consultative, la base de compétence semble très large et peut couvrir, comme

7 CR 2009/24, p. 35, par. 11 (Bataković)

8 Voir entre autres, les observations écrites de la France, par. 10.

9 Voir les observations écrites du Kosovo, par. 2.09.-2.10.

10 Voir l'exposé écrit de la France, par. 1.13-1.19 et les observations écrites de la France, par. 10-13.

11 Lettre du représentant permanent de la République de Serbie auprès de l'Organisation des Nations Unies en date du 15 août 2008, A/63/195, cf. exposé écrit de la France, par. 5, note 3

12 Voir la déclaration de la présidence de l'Union européenne en date du 17 novembre 2009, <http://www. se2009. eu/fr/reunions_actualites/2009/11/17/presidency_statement_on_the_first_round_of_municipal_elections_ in _kosovo_of_15_november>.

13 Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I), p. 235, par. 14 et la jurisprudence citée

14 Exposé écrit de la France, par. 1.1-1.42. Observations écrites de la France, par. 4-23.

M. Mathias Forteau, professor at the Université Paris Ouest, Nanterre- La Défense (France)

l'a indiqué la Cour, toute question «soulev[ant] des problèmes de droit international» (Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004, p. 153, par. 37). Mais cela suppose au moins de constater qu'il existe, prima facie, de véritables «problèmes de droit international». Or, ceux-ci font défaut dans le cas présent tant le droit international est clairement fixé en matière de déclarations d'indépendance : il ne les prohibe pas per se.

9. Quoi qu'il en soit, des obstacles plus sérieux encore pourraient se dresser, en second lieu, sur le terrain de l'opportunité judiciaire. La présente demande est sans nul doute sans précédent dans l'histoire de votre Cour comme de sa devancière. La demande d'avis a été inscrite sous un nouveau point de l'ordre du jour de l'Assemblée générale et en dehors de toute activité de cette dernière concernant le processus politique sur le statut définitif du Kosovo[15]. Elle a en revanche été explicitement présentée comme ayant trait à une controverse intéressant les seuls Etats Membres des Nations Unies et dans le seul objectif de fournir à ces Etats un avis qui pourrait guider leur action future à l'égard du Kosovo[16]. La question qui vous a été transmise a ainsi été artificiellement importée au sein de l'Assemblée générale, laquelle, pourtant, ne pourrait à aucun titre agir sur la situation du Kosovo à l'heure actuelle, pas plus qu'elle n'a de compétence en matière de formation d'Etat.

10. Que certains Etats cherchent à obtenir de la sorte ce qu'ils n'ont pu obtenir des organes directement compétents à l'égard de la question du Kosovo et, au premier chef, du Conseil de sécurité des Nations Unies, n'est pas seulement voué à l'échec. Cette entreprise traduit surtout l'incompatibilité de la présente requête avec les finalités d'une procédure consultative qui doit, tout[17] au contraire, permettre à la Cour de «prêt[er] son assistance à la solution d'un problème qui se pose à [l'organe demandeur]» (Sahara

15 Exposé écrit de la France, par. 1.37-1.41.
16 Ibid., par. 1.26.
17 Voir l'opinion individuelle de Mme le juge Higgins dans l'affaire des Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II), p. 857, par. 36. Exposé écrit de la France, par. 1.5.

occidental, avis consultatif, C.I.J. Recueil 1975, p. 21, par. 23). La Cour saurait d'autant moins se transformer en un organe d'appel des positions prises par d'autres organes des Nations Unies qu'en l'espèce les organes compétents ont justement adopté une position de neutralité sur la déclaration d'indépendance du Kosovo. La France, pour sa part, voit là une raison décisive pour que la Cour refuse de répondre à la demande qui lui a été adressée.

II. LA DECLARATION D'INDEPENDANCE DU KOSOVO A CONCLU UN PROCESSUS POLITIQUE DONT TOUTES LES POSSIBILITES ONT ETE EPUISEES

11. Monsieur le président, la deuxième limite qui s'impose à l'ensemble des participants à la présente procédure est celle de l'objectivité, laquelle doit naturellement présider à toute présentation des faits devant une Cour de justice. A ce titre, nous avons souligné dans notre exposé écrit de nombreux traits tout à fait inédits de la situation qu'a connue le Kosovo depuis 1999 et ceci jusqu'à son indépendance, en qualifiant avec d'autres Etats cette situation de sui generis[18]. Je n'y reviendrai aujourd'hui que pour formuler deux séries d'observations.

12. En premier lieu, je tiens à souligner que le caractère inédit de la situation dans laquelle le Kosovo a déclaré son indépendance n'a jamais constitué dans notre esprit le fondement juridique de la déclaration d'indépendance du 17 février 2008 ou une justification exceptionnelle d'un acte qui serait intrinsèquement illicite[19]. La France a insisté dans son exposé écrit sur la nature avant tout factuelle que revêt le processus de formation d'un Etat -processus qui est toujours sui generis, comme l'a fort bien relevé la Finlande hier matin, et dans lequel s'inscrit - parmi d'autres éléments - la déclaration d'indépendance. En conséquence, une sécession ne peut être contraire au droit international que lorsque les conditions dans lesquelles elle s'est réalisée ont conduit à heurter les règles applicables de ce droit. C'est dans ce seul cas que la déclaration d'indépendance pourrait elle-même faire l'objet d'un contrôle de licéité de la part de la Cour. A défaut, la Cour devrait refuser d'examiner plus avant un acte, sans valeur constitutive, qui n'est contraire à aucune règle de droit international et n'est dès lors susceptible d'être déclaré ni contraire ni conforme à ce droit. La Serbie semble au demeurant le concéder en qualifiant d'illicite non pas la déclaration d'indépendance en tant que telle, mais les conséquences qui en auraient résulté, question dont vous n'êtes pas saisis[20].

13. Les circonstances dans lesquelles le Kosovo s'est déclaré indépendant appellent une seconde série d'observations de ma part. Il me paraît inutile de répondre longuement aux allégations que nous avons lues[21] et entendues[22] relatives à la conduite du processus politique sur le statut du Kosovo. La France a souligné dans son exposé écrit qu'il ne saurait être question ici de désigner quelque responsable dans l'échec des négociations menées[23]. Il revenait évidemment aux deux parties - la Serbie et le Kosovo - de tout faire pour que celles-ci aboutissent, et la communauté internationale les a longuement assistées à cette fin comme elle s'en était fixé la mission dans la résolution 1244 (1999) du Conseil de sécurité des Nations Unies. A cet égard, le processus a été conduit de façon impartiale et objective. Les appréciations portées sur ses progrès limités ou ses faibles chances de succès par ceux qui y ont été directement

18 Voir ainsi la position adoptée par les Etats membres de l'Union européenne au lendemain de la déclaration d'indépendance, conclusions du Conseil de l'Union européenne en date du 18 février 2008, reproduites in S/2008/105, annexe.

19 Exposé écrit de la France, par. 2.16 ; comparer avec CR 2009/24, 1er décembre 2009, p. 88-89, par. 33 (Kohen), p. 92, par. 8 (Obradović).

20 Voir les observations écrites de la Serbie, par. 32, 46 iii), 52, 214, 224 iii) et ix), et l'ensemble du chapitre 6 («The UDI Is In Contradiction With The Principle of Respect For The Territorial Integrity Of States» (par. 412 et suiv.) ; ainsi que les observations écrites de l'Argentine, par. 28-32. Voir aussi CR 2009/24, p. 41, par. 17 (Djerić) : «The UDI is not merely a verbal act, a declaratory statement. Most importantly, the UDI has been an attempt to create an independent State, to violate Serbia's territorial integrity and to terminate or modify the international legal régime for the administration of Kosovo».

21 Observations écrites de la Serbie, par. 100-123 et 465-466.

22 Voir CR 2009/24, 1er décembre 2009, p. 32, par. 9 (Bataković) ; p. 57, par. 44 (Zimmermann).

23 Exposé écrit de la France, par. 2.42.

impliqués, sur lesquelles s'appuie la critique de la Serbie[24], ne reflètent pas autre chose qu'un constat lucide et objectif d'une réalité devenue par la suite irréversible. Le constat d'échec de ces négociations ne saurait donc être mis sur le compte de parties tierces, telles que M. Martti Ahtisaari - l'envoyé spécial du Secrétaire général sur le statut du Kosovo- parties tierces qui ont tout au contraire apporté leur neutralité et leur autorité à la recherche d'un règlement consensuel sur la question du statut du Kosovo[25]. Cette recherche, il faut le souligner, s'est au demeurant poursuivie jusqu'en décembre 2007 sous l'égide du Conseil de sécurité puis de la troïka. A cet égard, la Serbie reconnaît elle-même l'impasse dans laquelle se sont trouvées les négociations et l'impossibilité de parvenir à un accord des deux parties sur le statut final du Kosovo[26]. Selon elle, en effet, dès après la remise du rapport de M. Ahtisaari, «the negotiations appeared to lose any prospect of success»[27].

14. Cet échec des négociations, reconnu par tous, ne peut rendre illicite la déclaration d'indépendance du Kosovo, laquelle est non pas la cause mais la conséquence de cet échec. Cet échec devait par ailleurs être surmonté à partir du moment où l'hypothèse du maintien du statu quo avait été clairement rejetée par l'ensemble des acteurs concernés, y compris la Serbie, comme n'étant ni une véritable solution ni une hypothèse réellement viable pour la stabilité et la sécurité des Balkans occidentaux[28]. Tout au contraire, les risques que cette impasse faisait peser sur la paix étaient tout à fait réels[29].

15. C'est dans ce contexte que le Kosovo a choisi de se déclarer indépendant par la voie de ses représentants démocratiquement élus, réunis à Pristina le 17 février 2008, et en formulant l'engagement solennel de respecter les droits de l'homme et ceux de toutes les communautés présentes sur son sol[30].

16. La communauté internationale, loin d'isoler une entité qui se serait rendue responsable de violations du droit international, continue d'apporter un soutien important à la jeune démocratie kosovare. Il convient à cet égard de souligner, comme j'y ai déjà fait allusion, que les Nations Unies n'ont pas entendu se détourner du Kosovo, ni condamner son indépendance, et y poursuivent au contraire leurs missions au service de la paix de la région. Les organes directement compétents, le Conseil de sécurité ou le Secrétaire général et les personnes agissant pour le compte de ce dernier, n'ont à aucun moment conclu que la déclaration d'indépendance mettait directement en jeu le droit international ou la sécurité internationale. Ils ont tout à l'inverse adopté une attitude de neutralité à l'égard de l'indépendance du Kosovo alors même qu'il leur était demandé par certains de la condamner. Une telle attitude de neutralité nous paraît être particulièrement significative du contenu des règles offertes par le droit international afin de répondre à la question posée par l'Assemblée générale - le professeur Mathias Forteau y reviendra tout à l'heure plus en détail. Auparavant, je souhaiterais m'attacher à rappeler rapidement le cadre juridique général dans lequel s'inscrit, selon mon gouvernement, la question qui vous a été adressée -et ce sera mon dernier point.

24 Observations écrites de la Serbie, par. 100-123. Voir aussi CR 2009/24, p. 57-58, par. 44-45 (Zimmermann).
25 Exposé écrit de la France, par. 2.49.
26 Observations écrites de la Serbie, par. 466.
27 Ibid., par. 122.
28 Exposé écrit de la France, par. 2.50-2.56.
29 Voir le rapport de la mission du Conseil de sécurité conduite au printemps 2007, la déclaration du Secrétaire général le 1er août 2007 et les conclusions de la troïka, le 10 décembre 2007, rappelés dans l'exposé écrit de la France, par. 2.50-2.54
30 Exposé écrit de la France, par. 26-27 et 2.63-2.64.

III. LA DECLARATION D'INDEPENDANCE DU 17 FEVRIER 2008 NE PEUT ETRE TENUE POUR CONTRAIRE AU DROIT INTERNATIONAL

17. Il importe une nouvelle fois de rappeler le sens exact de la question posée, laquelle porte sur le seul acte par lequel le Kosovo s'est déclaré indépendant. L'insistance mise par la Serbie sur la clarté et la simplicité de la question dont elle était l'auteur[31] devrait vous inciter, s'il en était besoin, Messieurs de la Cour, à vous y tenir de manière particulièrement stricte. Il est troublant toutefois que la Serbie ait paru revenir au fil de ses écritures sur ses premières intentions[32] pour finalement appeler la Cour à traiter de façon extensive, «comprehensive», de la déclaration d'indépendance du Kosovo[33] et évoquer tant les conditions d'émergence de l'Etat en droit international que l'effet des reconnaissances en la matière[34]. Il est vrai que la déclaration du 17 février 2008 ne constitue en soi qu'une pure revendication - dont il n'y a guère de sens à vouloir la juger conforme ou non au droit international.

18. Or, à l'instar de nombreux Etats participants, nous avons rappelé, dans notre exposé écrit, que la formation de l'Etat, comme sa déclaration ou sa revendication, sont des phénomènes en grande partie étrangers à la sphère du droit international[35]. Ce dernier tolère la sécession dans le sens propre et précis de ce verbe ; il ne l'autorise pas, mais ne l'interdit pas par principe et il en va à plus forte raison de même d'une déclaration d'indépendance. Ce constat n'est en rien synonyme d'une quelconque incitation à la sécession ni d'une indifférence totale du droit international aux tentatives sécessionnistes, comme la Serbie veut le lire dans nos écritures[36] ; il est le simple résultat de la nature éminemment factuelle du processus de formation de l'Etat. A ce titre également, le principe de l'intégrité territoriale tel que le défend la Serbie est inopérant en l'espèce. Il a été déjà amplement démontré que ce principe, tel que le consacre le droit international, ne peut concerner les rapports entre un Etat et sa propre population mais uniquement les relations d'Etats entre eux et je n'y reviendrai pas ici[37].

19. Enfin, le Conseil de sécurité des Nations Unies n'a pas jugé que la déclaration d'indépendance du 17 février 2008 remettait en cause les résolutions qu'il avait adoptées, en particulier sa résolution 1244 (1999) ; il a bien au contraire réorganisé la présence internationale déployée en son nom au Kosovo afin de poursuivre au mieux sa mission en l'adaptant à cette situation nouvelle dans l'intérêt de la paix et de la sécurité internationales[38], sans imposer ni condamner l'indépendance du Kosovo. Le Conseil de sécurité, avec toute l'autorité qui s'attache à ses prises de position, ce dont la Cour ne manquera pas de prendre acte, n'a ainsi nullement entendu déroger à la neutralité de principe avec laquelle le droit international accueille l'apparition d'un nouvel Etat, laissant aux Etats leur libre appréciation pour décider de reconnaître ou non ce dernier - question qui n'est pas, je le souligne à nouveau, soumise à la Cour.

20. Monsieur le président, Messieurs les juges, en définitive, dans l'hypothèse, qui suscite - comme vous l'aurez compris - de notre part plus que des doutes, où vous ne verriez aucune raison décisive de refuser de rendre l'avis consultatif qui vous a été demandé, il vous reviendrait d'identifier quelle règle du droit international pouvait spécifiquement interdire au Kosovo de déclarer son indépendance à la date et dans les circonstances où il l'a fait[39]. Vous n'en trouveriez aucune, ni dans le droit international général ni dans les résolutions pertinentes du Conseil de sécurité. Il vous incomberait donc seulement dans

31 Voir A/63/PV.22 (8 octobre 2008), p. 2. Cf. les observations écrites de la France, par. 10.
32 Voir ainsi l'exposé écrit de la Serbie, par. 19, 22-23.
33 Observations écrites de la Serbie, par. 45. Voir également supra.
34 Exposé écrit de la Serbie, par. 964-985, cf. observations écrites de la France, par. 10 et les références qui sont données aux exposés écrits d'Etats soutenant la Serbie. Voir également les observations écrites de la Serbie, par. 501-517 et les références aux exposés oraux de cette dernière, supra, note 1.
35 Voir exposé écrit de la France, par. 2.2-2.15.
36 Observations écrites de la Serbie, par. 215 et suiv.
37 Exposé écrit de la France, par. 2.6.
38 S/PRST/2008/44 (26 novembre 2008).
39 Voir à cet égard l'exposé écrit de la France, par. 2.3-2.15 ; ainsi que ses observations écrites, par. 24-28.

un tel cas de constater l'absence manifeste de contrariété de la déclaration d'indépendance du Kosovo avec le droit international. Nul ne serait besoin dès lors de rechercher plus avant, de l'avis de la France, l'existence d'un très hypothétique «droit à la sécession» que viendrait consacrer le droit international.

21. Monsieur le président, Messieurs les juges, je vous remercie pour la patiente attention avec laquelle vous avez bien voulu m'écouter et je laisserai maintenant la parole, si vous me le permettez Monsieur le président, pour le reste du temps imparti à la France, au professeur Mathias Forteau.
Je vous remercie.
M. FORTEAU : Monsieur le président, Messieurs les juges, c'est un honneur renouvelé d'apparaître devant vous et c'est un honneur auquel je suis d'autant plus sensible aujourd'hui que j'interviens au nom de mon pays.

1. Monsieur le président, après que Mme Belliard a rappelé la position générale de la France, il m'incombe de répondre plus en détail aux arguments avancés à l'appui de la prétendue illicéité de la déclaration d'indépendance du Kosovo.

2. A vrai dire, il me suffirait à cet effet, Monsieur le président, de formuler les deux remarques suivantes :

- premièrement, la question de la conformité au droit international de la déclaration d'indépendance constitue en réalité un faux débat puisque l'indépendance constituait en février 2008 une perspective obligée : les négociations se trouvaient, selon les critères fixés par votre jurisprudence, dans une impasse insurmontable[40] ; l'indépendance était la seule option viable et respectueuse de la volonté du peuple du Kosovo ; et comme tous les acteurs impliqués l'avaient constaté, il n'était pas possible de laisser se perpétuer le statu quo, qui mettait la paix en danger[41] ;

- deuxièmement et en tout état de cause, la Serbie admet expressément au paragraphe 198 de ses observations écrites qu'il n'existe pas de règle spécifique interdisant les déclarations d'indépendance[42]. Nous en prenons acte, en constatant que ceci suffit à disposer de la question, en même temps que nous regrettons que la Serbie ne soit pas restée cohérente avec cette affirmation puisqu'elle continue, par ailleurs, de considérer que la déclaration d'indépendance n'en serait pas moins illicite.

3. Pour qu'il en soit ainsi, Monsieur le président, il faudrait cependant établir : soit qu'il existait une présomption de violation du droit international, qui n'aurait pas été renversée (I) ; soit qu'il existait une interdiction de déclarer l'indépendance, qui n'aurait pas été respectée (II). La Serbie soutient ces deux arguments. L'un et l'autre sont pourtant privés de tout fondement.

I. L'ABSENCE DE TOUTE PRESOMPTION DE VIOLATION DU DROIT INTERNATIONAL

4. Pour ce qui concerne le premier, la Serbie revendique de manière très surprenante l'existence d'une présomption de violation du droit international qu'il appartiendrait aux Etats ayant reconnu le Kosovo de renverser. Cette présomption prendrait deux formes principalement.

5. La Serbie se fonde tout d'abord sur le libellé de la question qui vous a été soumise pour en déduire que cette question ne porterait pas seulement sur la licéité internationale de la déclaration d'indépendance, mais aussi, et selon elle, plus largement, sur sa conformité au droit international[43]. Il se déduirait de cette distinction que la déclaration d'indépendance ne serait pas conforme au droit international même si elle n'était pas interdite, du moment qu'on ne parviendrait pas à établir qu'elle était expressément autorisée. L'argument est bien entendu totalement artificiel - ce qui explique certainement que la Serbie ne l'ait pas réitéré lors de ses plaidoiries orales - puisqu'on ne voit pas comment votre Cour pourrait déclarer «non conforme au droit international» une déclaration qui n'y porterait pas atteinte.

40 Voir l'exposé écrit de la France, par. 2.61.
41 Voir l'exposé écrit de la France, par. 2.40-2.62.
42 Observations écrites de la Serbie, par. 198 : «It is quite obvious that there does not exist a specific rule prohibiting the issuance of unilateral declarations of independence.»
43 Observations écrites de la Serbie, par. 204-205 ; contra cependant exposé écrit de la Serbie, par. 19.

6. La Serbie prétend ensuite qu'il existerait un principe général d'interprétation au terme duquel il faudrait présumer la protection des intérêts souverains de l'Etat lorsque ceux-ci sont en cause[44]. A l'aune de ce principe, la résolution 1244 (1999) devrait s'interpréter, à défaut de disposition contraire, comme interdisant toute déclaration d'indépendance[45]. Un tel principe est évidemment opportunément avancé par la Serbie pour faire dire à la résolution 1244 (1999) ce que celle-ci n'a justement pas dit. Quoi qu'il en soit, un tel «principe» est contredit par la jurisprudence contemporaine qui considère qu'il n'existe aucune règle selon laquelle une interprétation restrictive s'imposerait en cas de limitations à la souveraineté[46]. Vous l'avez rappelé le 13 juillet dernier dans l'affaire du Fleuve San Juan : les normes internationales ayant «pour objet de limiter les pouvoirs souverains d'un Etat doi[ven]t être interprétée[s] comme toute autre disposition» (affaire du Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt du 13 juillet 2009, par. 48 (www.icj-cij.org)).

7. Conformément à cette directive générale, il convient uniquement, Monsieur le président, de déterminer si les règles applicables en l'espèce interdisaient ou n'interdisaient pas la déclaration d'indépendance du Kosovo.

II. L'ABSENCE DE TOUTE INTERDICTION DE DECLARER L'INDEPENDANCE

8. La Serbie soutient à cet égard que le droit international général interdirait par principe les déclarations d'indépendance et que la résolution 1244 (1999) aurait interdit en particulier celle du Kosovo[47].

A. Le droit international général

9. Je ne m'attarderai pas sur la première idée, fondée sur la prétendue opposabilité du principe de l'intégrité territoriale aux entités non étatiques[48]. Comme la Serbie l'admet, cela supposerait de constater une modification récente du champ d'application de la règle coutumière classique[49], qu'elle n'est pas parvenue à étayer. Il est évident à cet égard que ce ne peut pas être seulement parce que le Conseil de sécurité aurait interdit une sécession dans d'autres situations que le Kosovo50 qu'il en découlerait de ce seul fait une modification de la règle classique de l'intégrité territoriale. Pour paraphraser votre arrêt rendu dans l'affaire Diallo, le fait que des actes juridiques - en l'occurrence quelques résolutions du Conseil de sécurité - auraient prévu une solution qui diverge du droit coutumier «ne suffit pas à démontrer que les règles coutumières ... auraient changé ; il pourrait tout aussi bien se comprendre dans le sens [inverse]» (Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), exceptions préliminaires, arrêt, C.I.J. Recueil 2007, p. 615, par. 90)[50]. Ce n'est évidemment pas non plus parce que des normes internationales imposent dans d'autres domaines que celui en cause ici des obligations aux entités non étatiques[51] que ces entités seraient devenues, pour cette seule raison, destinataires de l'ensemble du droit international. Elles ne le sont certainement pas du principe de l'intégrité territoriale qui ne joue que dans les relations entre Etats - ce que votre Cour a rappelé dans l'affaire du Détroit de

44 Voir également CR 2009/29, p. 39, par. 15 (Chypre, Lowe).

45 Observations écrites de la Serbie, par. 391-393 ; CR 2009/24, p. 32, par. 15 in fine (Serbie, Zimmermann).

46 Voir ainsi la sentence arbitrale de la Cour permanente d'arbitrage du 24 mai 2005 dans l'affaire du Rhin de fer, RSA, vol. XXVII, p. 64-66, par. 50-56 et p. 75-76, par. 87.

47 Voir les observations écrites de la Serbie, par. 14 ; et de Chypre, par. 26 in fine ; CR 2009/24 (Serbie, Bataković), p. 35, par. 12.

48 Observations écrites de la Serbie, par. 253-284 ; CR 2009/24, p. 65-68 (Serbie, Shaw), II ; exposé écrit de l'Argentine, par. 75-82. Voir sur ce point les observations écrites des Etats-Unis, p. 15-20, et du Kosovo, par. 4.06-4.13

49 Voir les observations écrites de la France, par. 28 et note 59 ; CR 2009/24 (Serbie, Shaw), p. 65, par. 6 in fine («Whatever the position may have been in the past current international law now establishes the contrary»), et p. 66, par. 8 («international law now increasingly adresses non-State entities directly») ; (Serbie, Kohen), p. 86, par. 27 («la formule «la création d'Etats est un fait qui n'est pas régi par le droit international» ne reflète plus la réalité d'aujourd'hui»).

50 Voir les observations écrites de la Serbie, par. 262-274 ; CR 2009/24, p. 66-67 (Serbie, M. Shaw), par. 9-10. Voir également les observations écrites de l'Argentine, par. 37-49.

50 Voir également CR 2009/26, p. 27-28, par. 15 (Allemagne, Wasum-Rainer).

51 Observations écrites de Chypre, par. 18 ; CR 2009/24, p. 43-49, par. 27-41 (Serbie, Djerić).

Corfou[52], ce que tous les instruments internationaux pertinents se sont toujours limités à faire et ce que la pratique, y compris récente, n'a jamais démenti[53].

B. La résolution 1244 (1999)

10. La résolution 1244 (1999) aurait-elle alors interdit ce que tolère le droit coutumier ?

11. Il convient à cet égard de ne pas perdre de vue que cette résolution suit une approche différente des résolutions qui l'ont précédée, qui ne sont donc pas pertinentes en la présente instance, pas plus que ne le sont les résolutions adoptées au sujet de la Bosnie-Herzégovine à la suite des accords de Dayton qui ne concernaient pas le Kosovo[54], pas plus que ne le sont non plus les dispositions de la résolution 1244 (1999) relatives au statut intérimaire du Kosovo.

12. Selon la Serbie, en adoptant cette résolution, le Conseil de sécurité aurait interdit l'option de l'indépendance ; à tout le moins aurait-il prohibé toute indépendance survenant sans le consentement préalable de la Serbie et du Conseil de sécurité[55].

13. Pour qu'il en aille ainsi, il aurait fallu cependant que le Conseil de sécurité ait estimé que l'indépendance du Kosovo était de nature à menacer la paix et la sécurité internationales car, d'une part, ce n'est que dans de telles circonstances qu'il a dans le passé interdit une sécession ou imposé sa non-reconnaissance[56] et car, d'autre part, ce n'est que dans ce type de situations qu'il est habilité par la Charte à imposer une telle interdiction, comme du reste l'admet la Serbie[57]. Or, le Conseil de sécurité n'a rien fait de tel ni en 1999, ni entre 1999 et la déclaration d'indépendance, ni après celle-ci - et cela à juste titre puisque le cas du Kosovo n'a rien de comparable avec les affaires du Katanga, de la Rhodésie, de Chypre ou des bantoustans - les seules que citent la Serbie et les Etats soutenant sa thèse : dans ces affaires, les indépendances revendiquées reposaient sur des violations graves de droits fondamentaux, sur l'usage illicite de la force armée ou sur une intervention étrangère[58]. Tel n'a pas été le cas de la déclaration d'indépendance du Kosovo.

14. Une telle interprétation est par ailleurs contraire au texte clair de la résolution :
i) aucune disposition de la résolution 1244 (1999) ne peut être interprétée comme interdisant l'option de l'indépendance ; la résolution se contentait de renvoyer à la facilitation d'un «processus politique», dont les aboutissements possibles n'étaient circonscrits que par le renvoi aux accords de Rambouillet, dont le chapitre 8 visait comme seule condition impérative le respect de la «volonté du peuple», ce qui visait bien entendu le peuple du Kosovo[59].
II) La résolution 1244 (1999) n'interdisait pas plus une solution qui n'aurait pas été acceptée par la Serbie. Le chapitre 8 des accords de Rambouillet ne prévoyait que de recueillir «l'avis» des autorités com-

52 Observations écrites de la Bolivie, par. 26 : «As the Court of the Hague stated in the Corfou case» «between independent States, the respect of territorial sovereignty is one of the fundamentals of international relations»» [cet extrait de l'arrêt de la Cour du 9 avril 1949 se trouve à la page 35 du Recueil de l'année 1949 : «Entre Etats indépendants, le respect de la souveraineté territoriale est l'une des bases essentielles des rapports internationaux.»].

53 Voir l'exposé écrit de la France, par. 2.3-2.10 ; observations écrites de la France, par. 29, avec les références citées ; CR 2009/27, p. 10-11, par. 18 (Autriche, Tichy).

54 Voir les observations écrites de la Serbie, par. 234 et par. 263-267.

55 Observations écrites de la Serbie, chapitre 9 ; CR/2009/24, p. 53-60, par. 23-63 (Serbie, Zimmermann).

56 Voir les observations écrites de la Serbie, par. 208-211 ; CR 2009/24, p. 86-87, par. 28 (Serbie, Kohen).

57 CR/2009/24, p. 44, par. 27 (Serbie, Djerić) («there is nothing in it that would restrict Security Council action with respect to non-State entities and individuals, if such action is necessary for the maintenance or restoration of the international peace and security» ; les italiques sont de nous.

58 Voir l'exposé écrit de la France, par. 2.13.

59 Voir à cet égard les observations écrites des Etats-Unis, p. 22, avant-dernier point ; CR 2009/30, p. 61, par. 22 (Finlande, Koskenniemi) répondant à CR 2009/30, p. 43, par. 16 (Russie, Gevorgian). Voir également les déclarations du groupe de contact citées in exposé écrit de la France, par. 2.36-2.37. Voir d'ailleurs CR/2009/24, p. 83-85, par. 17-22 (Serbie, Kohen).

pétentes - là où «la volonté» du peuple du Kosovo était en revanche visée dans ce chapitre 8. De même la mention, là encore entièrement neutre, d'un «règlement politique» (et non d'un «accord politique») dans la résolution 1244 (1999) n'impliquait pas, à elle seule, qu'il fallait nécessairement obtenir le consentement de la Serbie à la fin du processus politique, sauf à lui accorder un droit de veto qui aurait empêché toute réelle négociation.

III) sur ces différents points, la résolution 1244 (1999) se démarque nettement de résolutions qui lui sont contemporaines. A la même époque en effet que celle-ci, le Conseil de sécurité a expressément refusé toute sécession à Chypre et en Géorgie et le fait que, par contraste, il se soit abstenu de le faire dans le cas du Kosovo est tout à fait significatif[60].

IV) La résolution 1244 (1999) ne prévoyait pas davantage l'adoption d'une décision du Conseil de sécurité dont l'objet aurait été d'imposer un statut définitif pour le Kosovo. Si le Conseil pouvait prendre acte de la solution retenue, s'il pouvait l'endosser, il ne lui appartenait pas d'en décider[61]. Le projet de résolution déposé en juillet 2007 le confirme, quoi qu'en dise la Serbie[62] : ce projet prévoyait uniquement que le Conseil prît acte de l'issue envisagée par le plan Ahtisaari, aux seules fins d'en tirer les conséquences appropriées quant aux mandats des missions du Conseil de sécurité au Kosovo[63].

15. Monsieur le président, Messieurs les juges, au cas où l'on estimerait (quod non) que le texte de la résolution 1244 (1999) ne serait pas parfaitement clair, il conviendrait de toute manière, selon votre avis du 3 mars 1950, confirmé depuis, de «rechercher par d'autres méthodes d'interprétation ce que les parties avaient en réalité dans l'esprit quand elles se sont servies des mots dont il s'agit» (Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies, avis consultatif, C.I.J. Recueil 1950, p. 8 ; affaire relative à la Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991, p. 69, par. 38)[64]. Particulièrement déterminantes à cet égard, comme vous l'avez rappelé dans l'affaire Congo c. Ouganda et dans l'affaire du Génocide, sont les «informations fournies à l'époque des événements par des personnes ayant eu de ceux-ci une connaissance directe», «une attention toute particulière [devant être prêtée] aux éléments de preuve dignes de foi attestant de faits ou de comportements défavorables à l'Etat que représente celui dont émanent lesdits éléments» (Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005, p. 201., par. 61 ; Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007, p. 130-131, par. 213).

16. A ce titre, l'attitude adoptée par la Serbie avant, puis au moment du vote de la résolution 1244 (1999) suffit à lever toute équivoque. Si la Serbie s'était vu octroyer, comme elle l'a plaidé[65], un droit de veto sur le statut définitif du Kosovo, les propos tenus par son représentant lors de l'adoption de la résolution n'auraient eu strictement aucun sens. Permettez-moi de vous en rappeler la teneur : «au paragraphe 11 du dispositif, la résolution établit un protectorat, prévoit la création d'un système économique et politique séparé dans la province et ouvre la possibilité à une sécession du Kosovo …»[66]. Voilà des propos bien embarrassants pour la Serbie. La défense qu'elle oppose dans ses observations écrites n'est pas moins embarrassée et, d'ailleurs, la Serbie s'est bien gardée d'y revenir lors de sa présentation orale. Ces propos, a-t-elle dit dans ses observations écrites, devaient uniquement se comprendre comme un avertissement que le paragraphe 11 de la résolution pouvait être utilisé pour justifier une tentative de

60 Voir les observations écrites du Kosovo, par. 4.26-4.28.

61 Voir en particulier l'exposé écrit du Kosovo, p. 169, notes 532 et 534.

62 Observations écrites de la Serbie, par. 446 ; CR 2009/24, p. 59-60, par. 57-59 (Serbie, Zimmermann).

63 Voir sur la question observations écrites des Etats-Unis, p. 42-43, et celles du Kosovo, par. 5.55 in fine [le projet de résolution en question est annexé à l'exposé écrit de l'Allemagne, en annexe 3].

64 Voir également Cour permanente d'arbitrage, Apurement des comptes entre les Pays-Bas et la France, décision du 12 mars 2004, RSA, vol. 25, p. 297-298, par. 69.

65 CR 2009/24, p. 72, par. 25 (Serbie, Zimmermann).

66 S/PV.4011 (10 juin 1999), p. 6 ; les italiques sont de nous.

sécession[67]. Cela revient de nouveau à reconnaître que la résolution ne contient aucune interdiction qui aurait prémuni la Serbie d'une telle issue. C'est d'ailleurs la raison pour laquelle la RFY demanda au moment du vote aux membres du Conseil de sécurité de rejeter le projet de résolution afin de protéger son intégrité territoriale : «En s'opposant [aux] dispositions [de la résolution], le Conseil de sécurité défendra … l'intégrité territoriale et la souveraineté de la République fédérale de Yougoslavie»[68].

17. Ces propos étaient en réalité tout à fait cohérents avec ce qui s'était passé pendant les négociations des accords de Rambouillet lors desquelles la Serbie avait tenté d'obtenir un droit de veto quant au statut définitif du Kosovo. Celui-ci lui fut refusé[69] de même que furent refusées les propositions faites dans le même sens en vue de modifier le projet de résolution qui deviendra la résolution 1244 (1999)[70]. Il était dès lors logique que la Serbie interprétât comme elle l'a fait cette résolution lorsqu'elle fut adoptée. J'ajouterai que dès mars 1999, la Serbie avait officiellement motivé son rejet des accords de Rambouillet, auxquels la résolution 1244 (1999) renvoie, par le fait qu'elle ne pouvait pas accepter «la sécession du Kosovo» que ces accords n'interdisaient pas, et justement parce qu'ils ne l'interdisaient pas[71].

18. L'attitude adoptée par les organes des Nations Unies compétents au Kosovo à la suite de la déclaration d'indépendance va exactement dans le même sens.

19. Le fait tout d'abord que ceux-ci n'aient pas condamné la déclaration d'indépendance est hautement significatif, contrairement à ce que soutient la Serbie qui affirme que rien ne pourrait être déduit d'un silence[72]. L'Espagne a invoqué à ce propos hier votre avis sur la Namibie[73]. Mais dans celui-ci, vous n'avez pas exclu qu'un silence puisse être parlant. Vous avez souligné au contraire que l'absence d'adoption d'une proposition «n'implique pas nécessairement qu'une décision collective inverse ait été prise» Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971, p. 36, par. 69 (les italiques sont de nous). Tout dépend effectivement du contexte, et le contexte dans notre affaire est tout à fait clair. Si vraiment la déclaration d'indépendance avait été contraire à une décision du Conseil de sécurité relative à l'administration d'un territoire en vertu du chapitre VII de la Charte, le Conseil, ou ses mandataires au Kosovo, n'auraient pas manqué, à tout le moins, de condamner cette initiative, comme ils n'avaient pas manqué de le faire avant 2005 lorsque et parce que le processus politique n'avait pas encore été enclenché[74]. Ils ont estimé ne pas devoir le faire en 2008. Or, et je le dis avec respect, il n'appartient pas à votre Cour de se substituer à eux à cet égard.

20. Le Conseil n'est d'ailleurs pas resté silencieux. Tout au contraire, ses mandataires au Kosovo - le Secrétaire général et son représentant spécial - qui disposaient, comme l'a reconnu la Serbie, il y a huit jours encore par la voix du professeur Kohen, de l'«autorité suprême au Kosovo»[75], les mandataires du Conseil de sécurité ont pris position en faveur de la neutralité des Nations Unies en fondant juridiquement celle-ci sur la neutralité de la résolution 1244 (1999)[76]. Selon eux, l'ONU devait maintenir «une position de stricte neutralité vis-à-vis de la question du statut du Kosovo» conformément à «la position de neutralité énoncée dans la résolution 1244 (1999)»[77]. Cette citation contredit l'affirmation serbe selon

67 Observations écrites de la Serbie, par. 408 («the reference to the «possibility» of secession by Kosovo could only be understood ... as a political statement and a warning that the formula used in paragraph 11 might be misused for a future attempt to secession»).

68 S/PV.4011 (10 juin 1999), p. 6.

69 Voir les observations écrites du Kosovo, par. 5.05-5.18.

70 Voir l'exposé écrit de la Suisse, par. 49-50 ; observations écrites de la France, par. 26.

71 Voir les observations écrites des Etats-Unis, p. 28 ; observations écrites du Kosovo, par. 5.15-5.16.

72 Observations écrites de la Serbie, par. 486-494, de Chypre, par. 24-25 et de l'Espagne, par. 12 ; CR 2009/24, p. 60-61, par. 64-68 (Serbie, Zimmermann) ; CR 2009/25, p. 52-56, B (Kosovo, Murphy).

73 CR 2009/30, p. 20, par. 49 (Espagne, Escobar Hernández).

74 Voir l'exposé écrit de la France, par. 2.74.

75 Exposé écrit de la Serbie, par. 896 ; CR 2009/24, p. 87, par. 29 in fine (Serbie, Kohen).

76 Voir l'exposé écrit de la France, par. 2.70-2.81 ; observations écrites de la France, par. 8 et de l'Albanie, par. 27.

77 Voir le rapport du Secrétaire général sur la MINUK, S/2009/300, 10 juin 2009, par. 6 et 40, ainsi que les observations écrites de la France, par. 8 et note 35.

laquelle cette position de neutralité n'aurait été adoptée que dans l'attente de directives du Conseil de sécurité[78]. Cette position de neutralité a été au contraire assumée juridiquement, par des organes habilités à le faire, qui en ont tiré les conséquences appropriées quant à la redéfinition du mandat de la MINUK, ce dont le Conseil de sécurité a finalement pris acte par une déclaration de son président en date du 26 novembre 2008[79]. J'ajouterai d'ailleurs que la neutralité de l'ONU a été réclamée, paradoxalement, par ceux-là mêmes qui sont à l'initiative de la présente demande d'avis consultatif[80].

21. Messieurs de la Cour, deux interprétations s'offrent ainsi à vous en définitive :

I) l'une, que défend la Serbie, suppose d'établir que la tolérance classique du droit international coutumier en matière de déclarations d'indépendance aurait été abandonnée ces dernières années, elle suppose également d'ajouter au texte de la résolution 1244 (1999) une interdiction qui non seulement n'y figure pas mais qui ne correspond pas à l'interprétation donnée officiellement par la Serbie des accords de Rambouillet et de la résolution 1244 (1999) au moment de leur adoption. Elle suppose enfin que vous vous reconnaissiez le pouvoir de décider, avec les limites inhérentes à un tel contrôle[81], que les organes compétents des Nations Unies auraient commis une double erreur manifeste d'appréciation dans l'interprétation de la résolution 1244 (1999) d'une part, dans la détermination des suites à donner à la déclaration d'indépendance, d'autre part ;

II) la seconde interprétation se déduit simplement du texte de la résolution 1244 (1999), elle est par ailleurs cohérente avec la neutralité classique du droit international en matière de sécession, avec les positions adoptées par la Serbie lors de la négociation des accords de Rambouillet puis au moment de l'adoption de la résolution 1244 (1999) ainsi qu'avec l'attitude des organes compétents des Nations Unies au Kosovo. Cette interprétation ne suppose pas par ailleurs d'en revenir à l'impasse qui existait en février 2008, au risque de menacer la paix dans la région. Elle permettrait enfin à votre Cour de ne pas se trouver en porte-à-faux avec les organes compétents au Kosovo, avec les difficultés qui en résulteraient pour eux[82].

22. Il ne fait pour la France strictement aucun doute que seule cette seconde interprétation peut, et doit être, retenue. Aussi maintient-elle que la déclaration d'indépendance du Kosovo ne peut être considérée, à quelque titre que ce soit, comme non conforme au droit international.

Monsieur le président, Messieurs les juges, ces derniers mots viennent conclure l'exposé oral de la République française. Qu'il me soit permis, au nom de sa délégation, de vous remercier de votre écoute bienveillante et attentive.

English translation of the Franch presentation

Ms BELLIARD:

1. Mr. President, Members of the Court, it is a privilege for me once again to represent France before you. In light of the already numerous written and oral exchanges generated by the present advisory proceedings, there is no need for us to repeat today what is in our own contributions.

2. Listening to the representatives of Serbia last week, in each of their arguments we found confirmation that there was absolutely nothing to justify the conclusion that Kosovo's Declaration of Independence was at variance with international law, which thus confirmed the arguments we developed in our written pleadings. At the same time, we also found it worrying to see the discussion range over a number

78 Observations écrites de la Serbie, par. 488 ; CR 2009/24 (Serbie), p. 39, par. 11 (Djerić) et p. 61, par. 66 (Zimmermann).
79 S/PRST/2008/44.
80 Voir l'exposé écrit de la France, par. 2.78 in fine.
81 Voir mutatis mutandis Cour permanente d'arbitrage, The Government of Sudan and The Sudan People's Liberation Movement/Army, sentence finale du 22 juillet 2009 (www.pca-cpa.org), par. 398-411
82 Voir les observations écrites de la France, par. 8.

Mrs. Edwige Belliard, Director of Legal affairs, Ministry of Foreign and European Affairs (France)

of subjects which we continue to believe are alien to both the question included in General Assembly resolution 63/3, through which the Court was seised, and to its judicial and advisory functions under the United Nations Charter, the Statute and its jurisprudence.

3. In fact, and lastly, what essentially did the representatives of Serbia speak to you about just a week ago? The independence of Kosovo- much more than its Declaration1 -, the political process leading up to it2, the importance — which, moreover, no one disputes — of the principle of territorial integrity in international relations between States3, and lastly, the importance of the international administration missions which may be put in place by the United Nations to maintain or restore international peace and security4. On all these points Serbia sought to paint a most worrying picture of the threats allegedly posed by the situation in Kosovo and asked the Court:

- to provide it with aid to restore the statu quo ante - the situation before independence - in which negotiations on the status of Kosovo, which had manifestly failed, might resume5;
- to provide legal guidelines to that effect for the head of the Security Council6 - even though he has never expressed the wish for any and even though the Court has not pondered what conclusions might be drawn from the characterization to be given to the Declaration of Independence;
- lastly and more generally, to restore the authority of the United Nations, to reaffirm the bases of the international legal order as a whole and guarantee international peace and security.

4. As you will agree, all of this is patently far removed from the single question contained in resolution 63/3, namely: "[was] the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?". Far removed from this question as Serbia's arguments may be, they are nevertheless most revealing, showing as they do the impasse in which Serbia finds itself as regards replying to the question put.

5. Lastly, all of this reflects the limits of the exercise facing us today. These limits are dictated both by the very precise request which has been made to you, a request which raises important preliminary questions (I), and the objective presentation of the circumstances in which Kosovo declared itself independent (II), which points I shall deal with in turn. Before giving the floor, if you will allow me, Mr. President, to Professor Mathias Forteau, I will conclude my statement by outlining the general legal framework of the request which concerns us (III).

I. THE QUESTION POSED IS CONSTRAINED BY THE LIMITS OF THE COURT'S ADVISORY FUNCTION

6. Mr. President, Members of the Court, the question posed is constrained by the limits of the Court's advisory function. It has been repeated over and again, including by Serbia itself7, that the independence acquired by Kosovo is not the subject of these proceedings. So it is pointless to revert to it at this stage8. In any event, that independence has become a reality already recognized by France and 62 other United Nations Member States. It is also important to emphasize that Kosovo has begun to take its full place in the community of nations, as indicated, among other things, by its admission to the chief international financial institutions9. These facts merely underline the purely virtual nature - inasmuch as inevitably devoid of any practical effect- of a reply to the question of whether a declaration of independence accords with international law. This virtual aspect should dissuade the Court from giving any further consideration to the question posed10. The pointlessness of an opinion is all the more certain because the alleged "destabilizing effects" of the Declaration of Independence, put forward by Serbia to justify the request for an opinion11, have finally proved to be totally baseless, as shown once again quite recently by the smooth conduct of the first round of municipal elections in Kosovo12.

7. In general terms, the Court has made it an obligation for itself, before replying to a request for an advisory opinion, always to verify not only that it has jurisdiction but also whether it is appropriate to exercise its judicial function13. In both these respects, the French Republic has already voiced its doubts in its written statements.

8. The Court must, first of all, ensure, in contentious and advisory cases alike, that the legal claim or request submitted to it, assuming that the alleged facts are correct, may effectively be linked to the basis of jurisdiction relied on15. Admittedly, where advisory proceedings are concerned, the basis of jurisdiction seems very broad and, as indicated by the Court, may cover any question "rais[ing] problems of international law" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 153, para. 37). But this supposes at least the conclusion that there are, prima facie, true "problems of international law". In the present case, however, these are lacking, because international law is so clearly fixed as regards declarations of independence: it does not prohibit them per se.

9. Be this as it may, more serious obstacles could arise, secondly, in the area of what is judicially appropriate. The present request is without any doubt unprecedented in the history of the Court and its predecessor. The request for an opinion has been included under a new General Assembly agenda item and outside any of the Assembly's activity concerning the political process on the definitive status of Kosovo16. On the other hand, it has been explicitly presented as relating to a dispute involving only United Nations Member States and for the sole purpose of providing those States with an opinion which could guide their future action on Kosovo17. The question which was transmitted to you has thus been artificially imported into the General Assembly which, however, could not on any basis act on the present situation in Kosovo, any more than it has jurisdiction as regards the formation of a State.

10. The attempts by certain States to obtain what they have not been able to obtain from the directly competent organs with respect to the Kosovo question and, in the first place, the United Nations Security Council, are not just certain to fail. Above all, they reveal the incompatibility of the present

request with the aims of advisory proceedings which must, on the contrary, permit the Court to "[lend] its assistance in the solution of a problem confronting the [requesting body]" (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 21, para. 23). The Court is even less able to transform itself into an appeal body for the positions taken by other United Nations bodies because, in this case, the competent bodies have, precisely, adopted a position of neutrality on Kosovo's Declaration of Independence. France, however, sees this as a decisive reason for the Court to decline to answer the request which has been put to it.

II. KOSOVO'S DECLARATION OF INDEPENDENCE CONCLUDED A POLITICAL PROCESS ALL OF WHOSE POSSIBILITIES HAVE BEEN EXHAUSTED

11. Mr. President, the second limit on all the participants in the present proceedings is that of the objectivity which must naturally preside over any presentation of the facts before a court of justice. Accordingly, in our Written Statement we have emphasized many completely unique features of the situation experienced by Kosovo since 1999 and until its independence, and like other States we have characterized this situation as sui generis18. I will only revert to this today to make two sets of comments.

12. First, I wish to underline that the uniqueness of the situation in which Kosovo declared its independence in our view never constituted the legal basis of the Declaration of Independence of 17 February 2008 or an exceptional justification for an intrinsically unlawful act19. In its Written Statement, France has stressed the overridingly factual nature of the process of the formation of a State — a process which is always sui generis, as Finland rightly pointed out this morning, and is the framework — along with other elements — of the Declaration of Independence. Consequently, a secession can only be contrary to international law when the conditions in which it is made have resulted in the infringement of the applicable rules of that law. In that case alone could the Declaration of Independence itself be subject to review by the Court with respect to its lawfulness. Failing that, the Court should decline to further consider an act which does not create a new status, which is not contrary to any rule of international law and is therefore likely to be declared neither contrary to that law nor in accordance with it. Moreover, Serbia seems to concede this by characterizing as unlawful not the Declaration of Independence as such, but the consequences which supposedly resulted from it, a question which has not been put to you20.

13. The circumstances in which Kosovo declared itself independent require me to make a second set of comments. There seems to me to be no point in answering at length the allegations which we have read21 and heard22 relating to the conduct of the political process on Kosovo's

Indeed, according to Serbia, from immediately after the submission of Mr. Ahtisaari's report, "the negotiations appeared to lose any prospect of success". status. In its Written Statement, France has emphasized that there can be no question here of designating someone as responsible for the failure of the negotiations conducted23. It was clearly for the two parties — Serbia and Kosovo — to do their utmost for a successful outcome, and the international community long gave them assistance to that end, as it had taken upon itself to do in United Nations Security Council resolution 1244 (1999). In this connection, the process was conducted impartially and objectively. The assessments of their limited progress or poor chances of success by those directly involved, on which Serbia's criticisms are based24, merely reflect a clear and objective acknowledgement of a reality which has subsequently become irreversible. The acknowledgement of the failure of these negotiations cannot thus be ascribed to third parties, such as Mr. Martti Ahtisaari — the Secretary-General's Special Envoy on the Status of Kosovo — third parties who, quite to the contrary, brought neutrality and authority to the search for a consensual settlement of the question of Kosovo's status25. Moreover, this search, it should be emphasized, continued until December 2007 under the aegis of the Security Council and then the Troïka. In this connection, Serbia itself recognizes the deadlock in which the negotiations found themselves and the impossibility of reaching an agreement between the two parties on the final status of Kosovo2627

14. This commonly acknowledged failure of the negotiations cannot render Kosovo's Declaration of Independence unlawful, which is not the cause but the consequence of that failure. Moreover, the failure ought have been surmounted once the possibility of maintaining the status quo had been clearly rejected by all those involved, including Serbia, as being neither a true solution nor a genuinely viable scenario for stability and security in the Western Balkans28. Quite the contrary, the risks to peace from that deadlock were very real29.

15. It is in this context that Kosovo chose to declare itself independent through its democratically-elected representatives, meeting in Pristina on 17 February 2008, and making a solemn undertaking to respect human rights and the rights of all communities present in its territory.

16. Far from isolating an entity which is allegedly responsible for violations of international law, the international community continues to provide major support to the fledgling Kosovo democracy. In this connection, it should be emphasized, as I have already indicated, that the United Nations did not aim to turn away from Kosovo, or to condemn its independence and on the contrary is pursuing its missions in the service of peace in the region. The directly competent bodies, the Security Council or the Secretary-General and those persons acting on the latter's behalf have at no time concluded that the Declaration of Independence directly jeopardized international law or international security. Quite the contrary, they have adopted an attitude of neutrality as regards the independence of Kosovo, whereas some people had asked them to condemn it. Such an attitude of neutrality seems to us particularly indicative of the content of the Rules provided by international law for replying to the question put by the General Assembly - Professor Mathias Forteau will come back to this in greater detail shortly. Before that, I would like to try and briefly recall the general legal framework in which, according to my Government, the question addressed to you belongs - that will be my last point.

III. THE DECLARATION OF INDEPENDENCE OF 17 FEBRUARY 2008 CANNOT BE REGARDED AS CONTRARY TO INTERNATIONAL LAW

17. It is important once again to recall the exact meaning of the question posed, which relates only to the act by which Kosovo declared itself independent. Serbia's emphasis on the clarity and simplicity of the question of which it was the author31 should prompt you, if there was any need, Members of the Court, to adhere to it with the utmost strictness. However, it is worrying that, in the course of its written pleadings, Serbia appears to have gone back on its original intentions32 finally calling upon the Court to take a "comprehensive" approach to Kosovo's Declaration of Independence33 and to refer both to the conditions of the emergence of the State in international law and the effect of the associated recognitions34. It is true that the Declaration of 17 February 2008 is in itself no more than a simple claim - which there is little point in seeking to deem compatible with international law or not.

18. Like many participating States, we have pointed out, in our Written Statement, that the formation of the State, like declaring or claiming it, are phenomena for the most part alien to the sphere of international law35. The latter tolerates secession in the proper, precise meaning of this verb; it does not authorize it, but does not prohibit it in principle and the same applies all the more so to a declaration of independence. This fact is in no way synonymous with any incitement to secession or with the total indifference of international law to secessionist attempts, as Serbia seeks to read into our written pleadings36; it is the simple result of the eminently factual nature of the process of the formation of the State. In this respect also, the principle of territorial integrity as defended by Serbia is inoperative in this case. It has already been amply demonstrated that this principle, as enshrined by international law, cannot relate to relations between a State and it's own population but only to relations of States between themselves and I shall not rehearse this again here37.

19. Lastly, the United Nations Security Council did not consider that the Declaration of Independence of 17 February 2008 invalidated the resolutions it had adopted, in particular its resolution 1244 (1999); on the contrary, it reorganized the international presence deployed in its name in Kosovo in order to pursue its mission as effectively as possible, adapting it to this new situation in the interest of international peace and security38, without either imposing or condemning the independence of Kosovo. The Security Council, with all the authority which attaches to the positions it adopts, a fact which the Court will certainly take note of, thus in no way sought to derogate from the neutrality of principle with which international law welcomes the appearance of a new State, leaving individual States free to recognize or not to recognize that new State- a question which, I would again stress, has not been put to the Court.

20. Mr. President, Members of the Court, lastly, in the, in our view — as you will have realized — more than doubtful event, that you should see no decisive reason to decline to deliver the advisory opinion for which you have been asked, you would have to identify which rule of international law might specifically prohibit Kosovo from declaring its independence on the date and in the circumstances in which it did so39. You will not find one, either in general international law or in the relevant Security Council resolutions. Only in that event, therefore, would it be incumbent upon you to rule that Kosovo's Declaration of Independence was manifestly not at odds with international law. In France's view, there would therefore be no need to make any further attempt to establish the existence of a very hypothetical "right to secession", which would be recognized by international law.

21. Mr. President, Members of the Court, thank you for the patient attention with which you have listened to me. For the rest of the time allotted to France, I will now give the floor, if you will allow me, Mr. President, to Professor Mathias Forteau.
Thank you.

Mr. FORTEAU: Mr. President, Members of the Court, it is an honour again to appear before you, an honour which affects me all the more because I am speaking for my country.

1. Mr. President, after Ms Belliard has set out France's general position, it falls to me to respond in greater detail to the arguments advanced in support of the alleged illegality of the Declaration of Independence of Kosovo.

2. To tell the truth, Mr. President, it would be enough for this purpose for me to make the following two comments:

- firstly, in fact the question of the Declaration of Independence's accordance with international law is not a real issue, because independence was an inevitable prospect in February 2008: according to the standards set by your jurisprudence, the negotiations were completely deadlocked40; independence was the only viable option, and the only solution that respected the wishes of the people of Kosovo; and as all the actors involved had observed, it was not possible to let the status quo, which was endangering peace41, drag on;
- secondly and in any event, Serbia expressly admits in paragraph 198 of its Written Comments that there is no specific rule prohibiting declarations of independence42. We take note of this, observing that this is enough to dispose of the question, at the same time regretting that Serbia has not remained consistent with this assertion, because it continues otherwise to consider that the Declaration of Independence is nonetheless unlawful.

3. For such to be the case, Mr. President, it would however be necessary to establish either that there is a presumption of violation of international law which has not been rebutted (I), or that there is a prohibition on declaring independence which has not been respected (II). Serbia makes both these arguments. Yet both are completely without foundation.

I. ABSENCE OF ANY PRESUMPTION OF VIOLATION OF INTERNATIONAL LAW

4. As regards the first, Serbia claims most surprisingly that there exists a presumption of violation of international law which it is for the States that have recognized Kosovo to rebut. This presumption is said to take two main forms.

5. Serbia relies first of all on the wording of the question submitted to you to deduce from it that the question does not only relate to the international lawfulness of the declaration of independence but also, and more generally according to Serbia, to its conformity with international law43. It allegedly follows from this distinction that the Declaration of Independence is not in accordance with international law even if it was not prohibited, so long as it is not established that it was expressly permitted. Of course this is a completely artificial argument - which certainly explains why Serbia did not repeat it in its oral statements - because one cannot see how your Court could find a declaration to be "not in accordance with international law" when it did not infringe it.

6. Serbia then claims that there is a general principle of interpretation whereby protection of the sovereign interests of a State must be presumed when these are at stake44. Pursuant to this principle, resolution 1244 (1999) should be interpreted, given the absence of any provision to the contrary, as prohibiting any declaration of independence45. This principle is obviously conveniently asserted by Serbia to make resolution 1244 (1999) say exactly what it did not say. However that may be, the "principle" is contradicted by contemporary jurisprudence, which takes the view that there is no rule whereby a narrow interpretation is required in the event of limitations on sovereignty46. You said so again on 13 July last in the case concerning the San Juan River: international norms "which ha[ve] the purpose of limiting the sovereign powers of a State must be interpreted like any other provision" (case concerning Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, para. 48 (www.icj-cij.org)).

7. In accordance with this general guideline, Mr. President, all that remains is to determine whether the rules applicable in the present case did or did not prohibit the Declaration of Independence of Kosovo.

II. ABSENCE OF ANY PROHIBITION ON DECLARING INDEPENDENCE

8. Serbia maintains in this connection that general international law in principle prohibits declarations of independence and that resolution 1244 (1999) specifically prohibited the Declaration of Independence of Kosovo47.

A. General international law

9. I will not spend time on the first idea, based as it is on the assertion that non-State entities are bound by the principle of territorial integrity48. As Serbia admits, this would assume finding a recent amendment to the scope of the classic customary rule49, and Serbia has not managed to back this up. It is obvious in this respect that it cannot simply be because the Security Council prohibited secession in situations other than Kosovo50 that this alone resulted in changing the classic rule of territorial integrity. To paraphrase your judgment in the Diallo case, the fact that legal instruments - in this case a few Security Council resolutions - have provided a solution that diverges from customary law "is not sufficient to show that there has been a change in the customary rules . . .; it could equally show the contrary" (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 615, para. 90)51. Nor obviously is it simply because international norms impose obligations on non-State entities in areas other than the one at issue here52 that the whole of international law becomes directed to them. They are certainly not subject to the principle of territorial

integrity, which operates only in relations between States - which your Court pointed out in the Corfu Channel case53, which all relevant international instruments have always limited themselves to doing and which practice, including recent practice, has never denied54.

B. Resolution 1244 (1999)

10. So did resolution 1244 (1999) prohibit what customary law tolerates?

11. We should not lose sight of the fact in this respect that this resolution follows an approach different from those that preceded it, which are therefore not relevant in the present case, any more than are the resolutions adopted about Bosnia and Herzegovina following the Dayton Accords, which did not concern Kosovo55, and any more than are the provisions of resolution 1244 (1999) relating to the interim status of Kosovo.

12. According to Serbia, by adopting this resolution the Security Council barred the independence option; at the very least it prohibited any independence taking place without the prior consent of Serbia and the Security Council56.

13. For this to be true, however, the Security Council would have had to consider that Kosovo's independence was likely to threaten international peace and security, because on the one hand these are the only circumstances in which it has prohibited a secession or mandated non-recognition of it in the past57, and on the other this is the only type of situation in which it is empowered by the Charter to impose such a prohibition, as moreover Serbia admits58. The Security Council did nothing of the sort in 1999, between 1999 and the Declaration of Independence or afterwards - rightly, because the Kosovo situation has nothing in common with the cases of Katanga, Rhodesia, Cyprus or the Bantustans - the only instances cited by Serbia and the States supporting its argument: in those cases the independence claimed was based on serious violations of fundamental rights, the unlawful use of armed force or foreign intervention59. This was not true in the case of the Declaration of Independence of Kosovo.

14. Moreover, such an interpretation is contrary to the clear wording of the resolution:

(i) no provision in resolution 1244 (1999) can be interpreted as barring the independence option; the resolution contented itself with referring to the facilitation of a "political process", the possible outcomes of which were circumscribed only by the reference to the Rambouillet Accords, Chapter 8 of which envisaged respect for the "will of the people", which of course meant the people of Kosovo, as the sole essential condition60;

(ii) neither did resolution 1244 (1999) bar a solution not accepted by Serbia. Chapter 8 of the Rambouillet Accords only made provision for obtaining the "opinions" of relevant authorities- there where, on the other hand, that Chapter refers to the "will" of the people of Kosovo. Similarly the mention, here again entirely neutral, of a "political settlement" (and not a "political agreement") in resolution 1244 (1999) did not by itself imply that Serbia's consent necessarily had to be obtained at the end of the political process, unless it was to be granted a right of veto that would have prevented any real negotiation;

(iii) on these various points, resolution 1244 (1999) clearly differs from resolutions contemporary with it. At the same time as the resolution, the Security Council expressly rejected any secession in Cyprus and Georgia, and the fact that by contrast it refrained from so doing in the case of Kosovo is quite significant61;

(iv) neither did resolution 1244 (1999) provide for the adoption of a Security Council decision whose aim would have been to impose a final status for Kosovo. Although the Council might take note of the solution adopted, although it could endorse it, it was not for it to take the decision62. The draft resolution submitted in July 2007 confirms this, whatever Serbia may say about it63: this draft only provided that the Council should take note of the outcome contemplated by the Ahtisaari Plan, solely for the purpose of drawing appropriate consequences from it as to the mandates of the Council missions in Kosovo64.

15. Mr. President, Members of the Court, in case one were to think (quod non) that the wording of resolution 1244 (1999) was not perfectly clear, it would in any event, according to your opinion of 3 March 1950, since confirmed, be appropriate, "by resort to other methods of interpretation, [to] seek to ascertain what the parties really did mean when they used these words" (Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8; case concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 69, para. 38)65. As you remarked in the Congo v. Uganda case and the Genocide case, particularly decisive in this regard is "contemporaneous evidence from persons with direct knowledge" and "particular attention [must be given] to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them" (Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 201, para. 61; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 130-131, para. 213).

16. On this basis Serbia's attitude before and at the time of the vote on resolution 1244 (1999) is enough to dispel any ambiguity. If, as it has pleaded66, Serbia had been granted a right of veto over the final status of Kosovo, the remarks by its representative when the resolution was adopted would have been absolutely meaningless. Allow me to remind you of what was said: "in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and opens up the possibility of the secession of Kosovo . . ."67. These remarks are most embarrassing for Serbia. Its defence in its Written Comments is no less embarrassed, and, what is more, Serbia took great care not to return to it in its oral presentation. It stated in its Written Comments that these remarks should only be understood as a warning that paragraph 11 of the resolution might be used to justify an attempt at secession68. This again amounts to a recognition that the resolution contains no prohibition that would have protected Serbia from such an outcome. That, incidentally, is why the FRY asked the members of the Security Council at the time of the vote to reject the draft resolution in order to protect its territorial integrity: "By opposing th[e] provisions [of the Resolution], the Security Council shall stand up in defence . . . of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia".

17. In fact these remarks were quite consistent with what had happened during the negotiations for the Rambouillet Accords, during which Serbia had attempted to obtain a right of veto as to the final status of Kosovo. This was refused70, as were the proposals to the same end to amend the draft resolution that would become resolution 1244 (1999). Consequently it was logical for Serbia to interpret this resolution as it did when it was adopted. I will add that already in March 1999 the official justification given by Serbia for its rejection of the Rambouillet Accords, to which resolution 1244 (1999) refers, was the fact that it could not accept "the secession of Kosovo", which those accords did not prohibit, and precisely because they did not prohibit it.

18. The attitude adopted by the competent United Nations authorities in Kosovo following the Declaration of Independence is precisely along the same lines.

19. The fact first of all that these authorities did not condemn the declaration of independence is highly significant, contrary to Serbia's assertion that nothing can be deduced from silence73. Yesterday Spain cited your opinion on Namibia in this connection74. In that instance, however, you did not exclude the possibility that silence may speak volumes. On the contrary, you emphasized that the fact that a proposal is not adopted "does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed" (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,

20. Moreover, the Council has not kept silent. Quite the contrary, its representatives in Kosovo - the Secretary-General and his Special Representative - who, as Serbia acknowledged again eight days ago in the words of Professor Kohen, exercise "the supreme authority in Kosovo", the Security Council's representatives have come down in favour of the neutrality of the United Nations, justifying it in law by the neutrality of resolution 1244 (1999). According to them, the United Nations should maintain "a position of strict neutrality on the question of Kosovo's status" in accordance with "the status-neutral framework of Security Council resolution 1244 (1999)". This quotation contradicts Serbia's assertion that this position of neutrality had only been adopted pending guidance from the Security Council79. On the contrary, this position of neutrality was adopted legally by the organs empowered to do so, and they drew the appropriate consequences from it as to the redefinition of the UNMIK mandate, of which the Security Council eventually took note in a statement by its President dated 26 November 2008. I will also add by the way that neutrality on the part of the United Nations was demanded, paradoxically, by those very parties which are the initiators of the present request for an advisory opinion.

21. So, Members of the Court, in the final analysis two interpretations present themselves to you: (i) one, which Serbia advocates, presupposes a showing that the classic tolerance of customary international law regarding declarations of independence has been abandoned in recent years; it also presupposes the addition to the text of resolution 1244 (1999) of a prohibition which not only does not appear in it but is not in accordance with the interpretation given officially by Serbia to the Rambouillet Accords and resolution 1244 (1999) at the time of their adoption. Lastly, it presupposes that you find yourselves empowered to decide, with the limits inherent in such a review82, that the competent organs of the United Nations committed an obvious double error of judgement: first, in interpreting resolution 1244 (1999) and, second, in deciding how to react to the Declaration of Independence;
(ii) the second interpretation follows in straightforward fashion from the text of resolution 1244 (1999); it is moreover consistent with the classic neutrality of international law regarding secession, with Serbia's positions in the negotiations for the Rambouillet Accords and then at the time of adoption of resolution 1244 (1999), and with the attitude of the competent United Nations organs in Kosovo. Moreover, this interpretation does not call for a return to the deadlock that existed in February 2008, at the risk of threatening peace in the region. Lastly, it would enable your Court to avoid finding itself out of step with the competent organs in Kosovo, with the difficulties for them which would result83.

22. France is in absolutely no doubt that this second interpretation alone can and should be adopted. Consequently, it maintains that the Declaration of Independence of Kosovo cannot be regarded as not being in accordance with international law, for any reason whatever.

Mr. President, Members of the Court, these last few words conclude the oral statement by the French Republic. Allow me on behalf of its delegation to thank you for your kind attention.

The Hashemite Kingdom of Jordan

The Hashemite Kingdom of Jordan is represented by:

H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America,
as Head of Delegation;

H.E. Dr. Khaldoun Talhouni, Ambassador of the Hashemite Kingdom of Jordan to the Kingdom of the Netherlands;

H.E. Mr. Walid Obeidat, Counsellor, Director of the Legal Directorate of the Ministry of Foreign Affairs of the Hashemite Kingdom of Jordan;
Mr. Mahmoud Hmoud, Counsellor of Political and Legal Affairs, Embassy of the Hashemite Kingdom of Jordan in the United States of America, Member of the International Law Commission;
Mr. Akram Harahsheh, Third Secretary, Embassy of the Hashemite Kingdom of Jordan in the Kingdom of the Netherlands.

The PRESIDENT: I shall now give the floor to His Royal Highness Prince Zeid Raad Zeid Al Hussein.
H.R.H. Prince AL HUSSEIN:

1. Mr. President, Members of the Court, it is a great honour for me to appear before you again on behalf of the Hashemite Kingdom of Jordan. Jordan has long taken an interest in the conflict that unfolded in the Balkans during the 1990s, and particularly the extremely difficult
conditions faced by the people of Kosovo, which led to the intense and extended involvement by the international community.

2. My presentation on behalf of Jordan will begin by considering the narrowness and specificity of the question before you. I will then turn to some of the factual background relevant to the question. I will then address why those living in Kosovo should be considered a "People", why they have a right to self-determination in the form of the exercise of statehood, and how that right relates to the principle of territorial integrity. Finally, I will relate those points to the key question actually before you, which is whether the Declaration of Independence contravened either general international law or Security Council resolution 1244 (1999). In Jordan's view, it did not.

The narrowness and the specificity of the question

3. Turning first to the question put by the United Nations General Assembly to the Court, the question is specific and narrow: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?". On this, Jordan would like to stress that the sole sponsor of General Assembly resolution 63/3, Serbia, was careful to draft and table a question that represented the lowest common denominator. The narrowness of the question is what secured its adoption by the General Assembly, and even then it was supported by less than 40 per cent of the membership of the Assembly, with almost two-thirds of the membership voting against or abstaining. It would go beyond the question for the Court to make pronouncements on matters not within the specific scope of the question.

4. The recognition by a State of the independence of Kosovo is a sovereign decision reserved to each State in the exercise of its international relations. Recognition is not a prerequisite for statehood, although it allows the State declaring independence to expand its foreign and international relations. In any case, the General Assembly's question to the Court does not extend to the issue of recognition. As such, the question does not call upon this Court to consider the recognition of Kosovo by 63 United Nations Member States, nor the admission of Kosovo to the World Bank and the International Monetary Fund. Indeed, were the Court to address such issues it would not constitute a legal response to a legal question, rather, it would be a political matter which falls exclusively within the domain of States.

5. Whether Kosovo is now a State is also outside the question put to the Court. Had the General Assembly intended to seek the Court's opinion on that matter it would have expressly stated so in the resolution. The likelihood of the resolution being adopted would have been jeopardized, had the issue of Kosovo's statehood been raised as part of the question.

6. Finally, the question does not call upon this Court to decide on the consequences of the conformity or non-conformity of the Declaration of Independence with international law. In particular, it is not necessary to decide whether further negotiations should be undertaken by Serbia and Kosovo. Nor

Members of the delegation of Jordan.

does the question ask the Court to recommend any other course of action on the status of Kosovo and the international presence there. Indeed, doing so would be inconsistent with the Security Council's mandate in deciding the future and status of UNMIK and would limit the United Nations Secretary-General's political and legal options in relation to UNMIK's operations and its future. This Court has refrained consistently from dealing with matters essentially reserved in the Charter for other United Nations bodies.

The factual background

7. Mr. President, allow me to turn to the factual background upon which the Court must base its answer to this question. I must start by noting that, since the issuance of the Declaration of Independence, the Government of Kosovo has been a stable government that has been exercising effective control over the territory of Kosovo, treating all its people and its communities in accordance with the guarantees for their rights and freedoms enshrined in the Constitution of Kosovo, and in conducting its foreign relations peacefully in accordance with the standards applicable to any State under international law.

8. The people of Kosovo have endeavoured for decades to settle the issue of the status of Kosovo with, successively, the authorities of the Socialist Federal Republic of Yugoslavia, or SFRY, and then with the Federal Republic of Yugoslavia, or FRY, then with the Republic of Serbia and Montenegro, and finally with Serbia. I wish to highlight the two points within this context.

9. The first is that, in 1989, the autonomous status of Kosovo, as a federal unit, enshrined by the 1974 SFRY Constitution, wherein Kosovo enjoyed the same rights and representation in the Federation as the other republics in the Federation, was forcibly destroyed. The aim of this particular action was nationalistic and directed against one ethnic group - the majority ethnic Kosovo Albanians.

10. Second, since the start of the process of dissolution of the SFRY in the early 1990s, and again acting under a nationalistic pretext, Kosovo was subjected to a policy of absorption by Serbia, wherein the people of Kosovo were denied any chance of exercising their right to self-determination. In response, the Kosovars chose a peaceful approach towards the settlement of Kosovo's status, without relinquishing Kosovo's right to be treated in the same manner as the republics of the former SFRY - ultimately with the aim of attaining independence. Undeterred, the authorities in Belgrade proceeded to commit serious human rights violations in Kosovo, including discrimination against ethnic Albanians, police brutality, arbitrary imprisonment, torture, mistreatment, and removal from public office, all well documented in the reports of the Special Rapporteur on Yugoslavia and condemned by the General Assembly even as early as 1992.

11. Once peace was established in Bosnia and Herzegovina, measures against Kosovo were sharpened and a policy of ethnic cleansing in Kosovo was directed against the ethnic Albanians. This policy was conducted through various measures identified in the reports submitted by the United Nations Secretary-General to the Security Council, including the terrorizing of the population, the collective punishment of the Kosovars and the waging of indiscriminate attacks against the civilians of Kosovo. War crimes and crimes against humanity were therefore committed against Kosovo Albanians on a massive scale, as was amply documented by the International Criminal Tribunal for the former Yugoslavia in its recent Milutinović judgment.

12. In the period leading up to the military operation prosecuted by NATO, which began on 24 March 1999, the Kosovo representatives had co-operated genuinely with the international community and the Contact Group to resolve the issue of the status of Kosovo, in order to regain the rights of their people. They signed the Rambouillet Accords on the interim arrangements for Kosovo, pending a settlement on the issue of final status, to be based on what the Rambouillet document referred to as "the will of the people" of Kosovo. The Belgrade authorities refused to sign the Accords following a month of tactical negotiations on their part to diffuse the pressure of the international community to settle, at

H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America. (Jordan)

least temporarily, the Kosovo issue and allow life to resume in the territory. Following the cessation of hostilities and the establishment of the international civil and military presences in Kosovo, UNMIK and KFOR, through Security Council resolution 1244, governmental authority was transferred from the FRY and then Serbia to an international administration, such that the FRY and then Serbia no longer exercised military, police, or any other authority in Kosovo. The international administration, in turn, progressively established and fostered governing authority by Kosovo institutions.

13. When the United Nations Security Council decided to launch final status negotiations in 2005, Belgrade did not want to accept the new realities; that the Kosovars were finally able to govern themselves after several years of international protection and through the institutions of self-government established and nurtured by UNMIK. Belgrade's positions led to the stalling of the final status process. Its subsequent proposals relating to autonomy could not be viewed as genuine in light of the adoption of a new Serbian Constitution in 2006. The new Constitution -adopted without the participation of the people of Kosovo in its drafting or in the referendum on it - declared Kosovo to be an integral part of the State and fully exposed Kosovo to political decision-making by Belgrade.

14. After two years of intensive, internationally-sanctioned final status negotiations, which included extensive involvement by senior representatives from both Belgrade and Pristina, Mr. Maarti Ahtisaari, the United Nations Secretary-General's Special Envoy, came to the conclusion that the Serbian and Kosovar positions were irreconcilable. It is important to note here that, under the Terms of Reference given to Ahtisaari (United Nations Dossier No. 198), the Special Envoy was instructed to determine the pace and duration of the future status process which he was to lead. It was clear from the outset that the process could not be allowed to drag on indefinitely. Thus, Mr. Ahtisaari issued his report in March 2007 containing the Comprehensive Settlement with a separate recommendation to the Security Council that no mutually agreed settlement could be reached and that the only option was independence for Kosovo. The report and recommendation were endorsed by the Secretary–General.

15. Nevertheless, further efforts were made. A Security Council mission to the region, and three months of intensive negotiations by the United States-Russia-European Union Troika were embarked upon. Only when all these efforts failed, and it was clear that further delay would bring no progress and would be highly destabilizing, did the democratically-elected leaders of the people of Kosovo declare independence on 17 February 2008. The Declaration was followed by the adoption of a Constitution by Kosovo that binds Kosovo with the obligations under the Ahtisaari Plan. In its Constitution, Kosovo made provision for international supervision of its independence, and provided for the highest international standards of individual human and community rights guarantees.

16. With respect to the question put forward by the General Assembly, Jordan would like to comment on the issue of the entities declaring independence, i.e., the Provisional Institutions of Self-Government. We have noted and agree with Kosovo's position, supported by many States, that the Declaration was made by the democratically-elected representatives of the people of Kosovo, meeting as a constituent body. The Declaration was adopted unanimously, including the representatives of all the communities in Kosovo other than the Kosovo Serbs. The Assembly members were democratically elected by the people of Kosovo under United Nations supervision in November 2007. The results of that election, taking into account the atmosphere that followed the deadlock in the final status negotiations, made it clear that the Kosovar population elected their representatives with a mandate to declare independence. As such, the Declaration was an act reflecting the will of the Kosovar population in seeking independence, not an unlawful act by a body overstepping its competences. The Special Representative of the Secretary-General never objected nor attempted to nullify the Declaration, despite calls by Serbia for him to use his authority under Security Council resolution 1244.

The Kosovo population as "People"

17. On the issue whether there is a "people" of Kosovo, which is my next point, Serbia has made clear to the Court in its submission that it does not consider the Kosovo population as a "People" for the purpose of exercising self-determination. This is another indication that the autonomy for Kosovo that Serbia has been advancing as a part of its claim of sovereignty over Kosovo lacks credibility. If the Kosovo people do not qualify as "People", how can Serbia offer them internal self-determination?

18. History has shown that the people of Kosovo are a stable population with cultural, linguistic, social and economic ties to the territory. They have lived there for centuries and long preceded the Kingdom of Serbia. The Balkan territories, that included Kosovo, were incorporated into the Ottoman Empire in the fifteenth century.

19. The people of Kosovo continued to exist under the Ottoman Empire up until the territory was seized by Serbia in 1912 from the Ottomans. This action by Serbia circumvented the demands of the Kosovar population at the time, for independence from the Ottoman Empire. However, even at that stage, Kosovo was never formally or constitutionally incorporated into Serbia. The control by the Kingdom of Serbia over the ethnic Albanian majority in Kosovo during World War I was through repression. Indeed, a 1914 International Commission of Inquiry reported that a veritable policy of ethnic cleansing against Albanian ethnicity was being committed by the Kingdom of Serbia to effect the entire transformation of the ethnic character of the region.

20. Following the First World War, Serbia controlled Kosovo and engaged in a process of introducing Serb settlers to the region. Still, the ethnic Albanian majority in Kosovo remained in the territory and continued to do so during World War II and following the establishment of the SFRY in 1945. The 1974 Constitution of the SFRY recognized the right to self-determination for the people of Kosovo by granting the territory autonomy and a federal status equal to that of the republics of the SFRY. Thus, to claim the people of Kosovo do not qualify as a "people" for the purposes of self-determination contradicts any objective reading of history, including that of the SFRY, of which Serbia was a republic. With

the rise of Serbian nationalism at the governmental level in 1986, the people of Kosovo were further denied self-determination through the continuous erosion of Kosovo's autonomous status.

21. In summary, the people of Kosovo, or the population of Kosovo, has enjoyed the status of a "people" for centuries. Recent history indicates that the international community has recognized the Kosovars as a "people". The Rambouillet Accords, Security Council resolution 1244, UNMIK's Constitutional Framework — which defined Kosovo as an entity which, because of its people, had unique historical, legal and cultural attributes — all recognized the Kosovar population as a "people".

Self-determination

22. The question then arises whether the people of Kosovo can exercise self-determination by declaring independence, an issue to which I now turn.

23. Much has been said about Serbia's territorial integrity with its relevance to the Declaration of Independence made by Kosovo. The history of the SFRY and its subsequent disintegration makes clear that Kosovo should have been treated in the same manner as the republics of the former SFRY in terms of their right to independence. However, for political, and not legal, reasons, international and regional actors involved in the settlement of the war in the Balkans, set aside the status of Kosovo for a period that ultimately lasted ten years. It should be noted in this respect that, reacting to the 1989 Serbian Constitution - which had the effect of integrating Kosovo fully into Serbia illegally and without the former's consent, thereby unilaterally abolishing its autonomy and federal status -the Kosovo Assembly in 1990 declared independence. A year later, the declaration was submitted to a referendum in Kosovo and won 100 per cent of the vote, of the 80 per cent participating in it.

24. Since the republics were given the right to independence under the 1974 Federal Constitution, there was no reason to treat another federal entity, Kosovo, differently. Kosovo had a government, a territory, and a population satisfying the elements of statehood. The loss of the federal status by Kosovo in 1989 due to unlawful acts committed by the SFRY and by Serbia under the 1974 Federal Constitution were essentially a violation of jus cogens norms under international law; in other words, such acts were a denial of a right of self-determination which, under the principles of State responsibility, ought not to be recognized by the international community.

25. Consequently, in the early 1990s, Kosovo should have been treated as a federal entity seeking independence from a dissolving federation of which no State continued its legal personality. Until the late 1990s, the people of Kosovo chose the peaceful assertion of their vested right to self-determination to avoid being subjected to the atrocities committed against Bosnia and Herzegovina and Croatia. This is how Belgrade exercised de facto control over Kosovo until the late 1990s, even though it was not acting as a representative government of the Kosovar population. Rather, the Belgrade authorities, as documented by relevant international actors, including the Special Rapporteur on Yugoslavia and the ICTY, engaged in a process of discrimination against the ethnic Albanian majority, including systematic and widespread violations of their human rights and the denial of any group rights.

26. That de facto control over Kosovo was removed from Belgrade with the establishment of the international administration under United Nations Security Council resolution 1244. Since February 2008, with the Declaration of Independence, both de facto and de jure control over the territory of Kosovo belongs to the Government of Kosovo which is representative of the people of Kosovo.

27. The inability of Serbia to claim a de jure right to sovereignty over an SFRY federal unit based on rights inherited from the time of the SFRY is clear from the rejection of Serbia's claim to be the continuator of the SFRY. In 2000, the FRY accepted the fact it was not a continuing State of the SFRY when it applied to United Nations membership as a new State. To base its argument regarding sovereignty over

Kosovo before this Court - a United Nations organ - on Kosovo's status under the SFRY Constitution contradicts the FRY application and admission to the United Nations as a new State. Since the date of admission and until today, the FRY (and then Serbia) has not had any effective control over Kosovo. Indeed one of the three components of the former FRY - Montenegro - recognized the independence of Kosovo in October 2008, which casts doubt about Serbia's claim to sovereignty over Kosovo as the continuation of the SFRY.

28. In summary, Serbia may not be considered a sovereign over Kosovo by virtue of a continuous title to the territory of Kosovo. A dissolving SFRY produced the FRY, which had a new legal personality. Throughout the 1990s, the FRY's control over Kosovo was only de facto in nature, characterized by a non-representative government whose claim to sovereignty over the territory was consistently contested by the people and Government of Kosovo. This brief de facto control of eight years was lost for good in June 1999 and, since February 2008, the control and representative government of the territory belong to the State of Kosovo.

Is territorial integrity absolute?

29. Given the population of Kosovo is a "people" entitled to exercise a right of self-determination, consideration must be given to the argument that the territorial integrity principle is absolute, overriding the right to self-determination. This is not the case.

30. First, as enshrined in Article 2 (4) of the United Nations Charter, the principle of territorial integrity concerns only inter-State relations and provides legal protection for the territorial integrity of the State against the threat or use of force by other States. So, obviously, the principle enshrined under Article 2 of the United Nations Charter is irrelevant to Kosovo's Declaration of Independence in February 2008, which was not precipitated by such action.

31. Second, even if one assumes, arguendo, that the principle of territorial integrity is relevant to internal changes of government, the principle of self-determination for peoples is itself unconditional under Article 1 (2) of the United Nations Charter. Indeed, self-determination has been recognized by this Court as a jus cogens principle, although its exercise takes different forms. On the one hand, to treat the principle of territorial integrity as absolute has no basis in international law. Modern international law has placed several restrictions on it, including permitting actions taken against territorial integrity when done under the authority of Chapter VII of the United Nations Charter, and permitting the application of jus cogens norms of international law. The prohibition of genocide, for example, cannot be overridden by an "absolute" principle of territorial integrity.

32. Third, relying on the existence of a general principle of territorial integrity beyond the inter-State, non-use of force parameters has been based on certain instruments and judicial decisions that clearly put limitations on this "general" principle of territorial integrity.

33. For example, the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations asserts:
"Nothing . . . shall be construed as authorizing or encouraging any actions which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."

34. It is worth noting that the Declaration is certainly not authorizing nor encouraging any such actions, but it does not preclude them either. In addition, the clause sets a limitation by providing that States enjoy the privilege of territorial integrity if they are:
"conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

35. What the Declaration says is that no perceived conflict exists between self-determination and territorial integrity, but if the State violates the self-determination principle, then the protection of the State's territorial integrity ceases to exist. Belgrade unlawfully revoked the federal status of Kosovo and its autonomy under the 1974 Constitution in 1989, and it clearly violated the self-determination right of the people of Kosovo. The violation continued until the total loss of governmental authority over Kosovo, subsequent to Belgrade's withdrawal from the territory in June 1999. Still today, Serbia's alleged commitment to a right of self-determination for the people of Kosovo is more than doubtful, as the 2006 Constitution has revealed. When a State revokes the status of a territory as autonomous, denies its people their acquired rights under such autonomy, engages in a policy of ethnic cleansing against such people, and commits grave breaches of international humanitarian law, systematic human rights violations and crimes against humanity against them, then such people's right to self-determination has been violated by the State. And in such circumstances, that State can no longer claim a right of territorial integrity.

36. Such limitation on the principle of territorial integrity was also confirmed in the 1993 Vienna Declaration and Programme of Action at the World Conference on Human Rights. The Vienna Declaration was adopted long after the end of the colonial era, which confirms that the limitation on territorial integrity, by virtue of the violation of the principle of self-determination and the non-representation by the government of the people, are applicable in post-colonial situations.

37. Much has been said in the written and oral pleadings before this Court about the ruling of the Canadian Supreme Court in its 1998 Reference re Secession of Quebec. The Canadian Court made a distinction between what it described as an internal right of self-determination and the external right of self-determination. It stated that "the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination - a people's pursuit of its political, economic, social and cultural development within the frame of the existing State".
It added: "A right to external self-determination (which in the case takes the form of the assertion of a right to unilateral secession) arises in only the most extreme cases and even then, under carefully defined circumstances." After distinguishing this situation from that of colonial domination and foreign occupation, it explained further that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled as a last resort, to exercise it by secession". The ruling clearly demonstrates that the principle of territorial integrity is not absolute.

38. Even with the high threshold the Canadian court set for external self-determination (that is, the total frustration of internal self-determination or blocking its meaningful exercise), the threshold in the Kosovo case certainly has been crossed. As mentioned earlier, since 1988 there has been a consistent denial and revocation of the Kosovo people's right to self-determination. The Declaration of Independence by Kosovo in February 2008 constituted a decision to exercise the right to self-determination through independence. It was exercised as a last resort, after all negotiating avenues were exhausted.

39. To return to that which existed prior to the Declaration of Independence would be yet another violation of the people of Kosovo's right to self-determination. The same can be said of imposing a settlement on Kosovo that falls short of its people's current exercise of self-determination that led to the Declaration of Independence. There can be no return to status negotiations.

40. One remaining point on the exercise of self-determination by Kosovo through independence: the Declaration of Independence was issued by the representatives of the people of Kosovo, who were elected democratically. It was in accordance with the standards set in the Ahtisaari plan. The Constitution adopted by the Kosovo Assembly, and which came into force in June 2006, sets the highest standards for the respect of human and community rights in Kosovo, and is dedicated to the principles of equality and representation of all in government. Such principles are irreversible.

Does general international law consider the Declaration of Independence by Kosovo unlawful?

41. Now that the issue of the relationship between the principle of territorial integrity and the people of Kosovo's right to self-determination has been considered, I would like to address the question before this Court.

42. The Declaration of Independence itself is a political pronouncement that is not regulated in international law. It does not reflect whether the entity in question has or has not gained full independence. Entities, throughout history, declared independence but not all achieved their goal. This is because the requirements for the creation of the State have to be satisfied before international law considers the State as one of its subjects. As such, the mere declaration of independence by Kosovo nearly two years ago was a political statement that the rules of general international law do not deal with. If the opponents of the Declaration want to treat it in terms of its conformity to international law, then they have to demonstrate that the representatives of the people of Kosovo, or even, if they were right, the Assembly, were subjects of international law capable of violating this law. If they do not, then the point is moot and the issue should not have been brought before this Court. On the other hand, if they do consider the authors of the Declaration of Independence subjects of international law that are capable of committing, through the Declaration, an internationally wrongful act, then they are indeed recognizing that the authors of the Declaration represented the State of Kosovo and were conducting an act of State.

43. Nevertheless, it can also be said that international law is neutral regarding the independence of the State. International law considers the matter as a factual one and only sets the criteria of statehood. If such criteria (territory, people and effective government) are met, then international law considers the entity as an independent State. As far as legality is concerned, a violation of international law would only occur if the independence was achieved through a violation of jus cogens rules of international law, for example, through the use of force, apartheid or racial discrimination. There is no evidence that Kosovo's independence has been achieved through violation of jus cogens rules. Even if we assume that Kosovo's act was secession, international law neither recognizes nor condemns such an act. It is simply neutral about it, considering secession as a factual matter, once it is successfully achieved. Prior to that point, international law would govern whether and to what extent a certain people's right to self-determination can be exercised in a territory of a State leading to secession. But once secession is achieved, international law lets reality take its course and would only test the existence of the elements of the State, to rule whether the emerging State actually exists as such.

44. Indeed, although this question is not before the Court, Kosovo has become a State. It has a defined territory, a permanent population and a government that is democratically elected which exercises the authorities of a government peacefully. It has been recognized by 63 States to date. Less than a month ago, it held municipal elections which were successful and peaceful, with the participation of all communities of Kosovo. It has a Constitution that protects minorities and communities rights above the highest international standards and which guarantees the peaceful character of the State of Kosovo in its relationships with its neighbours and the international community. For all of this, international law considers those facts as having satisfied the conditions of statehood for Kosovo. However, Members of the Court, this is not a point you are called to decide upon.

Does Security Council resolution 1244 (1999) consider the Declaration of Independence unlawful?

45. It has been claimed that the Declaration of Independence by Kosovo violates Security Council resolution 1244 (1999) -a resolution adopted under Chapter VII of the United Nations Charter. Jordan disagrees.

46. The resolution was adopted to end the humanitarian disaster in Kosovo, including the FRY and Serb military campaign in the territory and to ensure withdrawal of the FRY and Serb troops and police; and to authorize the creation of an interim international civil and military presence in the territory to ensure, inter alia, self-government in Kosovo towards a final settlement of its status.

47. Nowhere in the resolution has it been decided that Kosovo will ever be part of the sovereignty of the FRY in any settlement to the Kosovo status. Although the representative of the FRY requested during the 10 June 1999 session of the Security Council - the day the resolution was adopted - guarantees that Kosovo would be part of the FRY in any final political solution, that demand was rejected. This is because the Security Council did not want to prejudice the future political status of Kosovo. After careful examination of the relevant paragraphs of the resolution (see, e.g., CR 2009/25, p. 51), one can conclude that the issue of FRY sovereignty and territorial integrity were either tackled as a general statement or in relation to the interim process. There is not a single reference to Kosovo as falling within the jurisdiction of the FRY in any future final settlement.

48. UNMIK transferred substantial authorities to institutions of self-government during the interim period and in accordance with its authorization under the resolution. The Security Council, and the Secretary-General through his Special Envoy, launched the final settlement process in 2005. His Special Envoy, Mr. Ahtisaari, submitted to the Council a report with a plan for a final settlement. Seeing that the only possible final outcome would be independence, Mr. Ahtisaari recommended independence for Kosovo, supervised by the international community. In 2007, the Secretary-General reported to the Security Council that the political process negotiations had reached a dead end and supported his Special Envoy's conclusions. As such, all the benchmarks and mandates of the resolution were met.

49. The Council has yet to determine the future of UNMIK, however nothing in the Declaration of Independence does or will interfere with any potential decision by the Council in this regard. On the contrary, the Declaration of Independence, in paragraph 12, reaffirms the validity and the continued application of resolution 1244, and to this day, the Government of Kosovo continues to co-operate with the Secretary-General and UNMIK in the fulfilment of the authorization for the Secretary-General and the mandate for UNMIK under resolution 1244. And as stated earlier, neither the Secretary-General nor UNMIK, considered the Declaration of Independence invalid or attempted to nullify it. They would have done so had they concluded the Declaration is incompatible with the mandates and authorizations contained in resolution 1244. Yet nothing in the Declaration of Independence contradicts the object and purpose or the letter of resolution 1244.

50. Furthermore, the Security Council has not adopted any decision in reaction to the Declaration of Independence. It has neither approved nor disapproved the Declaration. While it would have been preferable that the Council react positively to the Declaration of Independence, the validity of the Declaration is not subject to the Council's approval. The Declaration is an expression of the exercise of self-determination by the people of Kosovo. This expression itself is a political statement that should not be examined from a legal perspective against the provisions of the Security Council resolution. Moreover, the act of exercising self-determination through independence is not per se subject to the mandate of the Security Council.

51. For the reasons stated above, Jordan considers that the Declaration of Independence of Kosovo did not violate resolution 1244.

Conclusion

52. Mr. President, Members of the Court, allow me to conclude.

53. Kosovo is now a peaceful and stable State that has been recognized by 63 other States, including Jordan. This recognition should not be viewed as directed against any particular State. It is a recognition of a right. The people of Kosovo have been denied consistently their right to self-determination; through revocation of constitutional rights to govern themselves; through a policy of discrimination and ethnic cleansing; through a massive campaign against their human and community rights; through military attack directed against them; and through an international political reality that gave priority to the resolution of other territorial disputes in the Balkans. As stated earlier, the 1989 unilateral revocation of Kosovo's autonomy was unlawful and procured by force. Yet, coupled with the disintegration of the SFRY in 1991, this meant that the people of Kosovo were entitled under such law to exercise self-determination through independence. Sovereignty, since then, belonged to the Kosovo people, for no State had title to the territory. The FRY's control in the 1990s was de facto and unlawful; as it contravened a jus cogens right for the people of Kosovo, i.e., the right to self-determination. And the FRY did not continue the legal personality of the SFRY.

54. Therefore, Kosovo's independence is not an act of secession. It is statehood on a territory that no State since the dissolution of the SFRY had sovereignty over. No rule of general international law, nor any provision of resolution 1244, was contravened when the democratically-elected representatives of Kosovo issued the Declaration of Independence in February 2008.

55. Now that the people of Kosovo have been able to achieve independence and, for the first time govern themselves and their territory, we urge this Court not to set the clock back. Serbia and Kosovo should instead discuss and negotiate their bilateral relations as sovereign States with a common border, for the good of their two peoples, and for the sake of preserving peace and stability in the Balkans, a peace that proved so difficult to achieve.

56. I thank the Court for its kind attention.

The Kingdom of Norway

The Kingdom of Norway is represented by:

Mr. Rolf Einar Fife, Director General, Legal Affairs Department, Ministry of Foreign Affairs,
as Head of Delegation;

H.E. Madam Eva Bugge, Ambassador Extraordinary and Plenipotentiary of the Kingdom of Norway to the Kingdom of the Netherlands,
Mr. Olav Myklebust, Acting Director General, Legal Affairs Department, Ministry of Foreign Affairs,
Mr. Martin Sørby, Deputy Director General, Legal Affairs Department, Ministry of Foreign Affairs,
Mr. Jo Høvik, Senior Adviser, Legal Affairs Department, Ministry of Foreign Affairs,
Mr. Irvin Høyland, Minister (Legal Affairs), Royal Norwegian Embassy in the Kingdom of the Netherlands, as Members of the Delegation.

The PRESIDENT: I shall now give the floor to Mr. Rolf Einar Fife.
Mr. FIFE:

Introduction

1. Mr. President, distinguished Members of the Court, I have the honour of appearing before you on behalf of the Government of Norway in the present oral proceedings related to the request of the General Assembly for an advisory opinion.

2. Norway welcomes this opportunity to appear before this Court, the principal judicial organ of the United Nations. Our fundamental concerns and approach are solely dictated by the need to contribute to international peace and stability in the region, in accordance - and I would like to underline that in accordance- with international law. We are convinced that the Court will contribute to these objectives when considering the question before it.

3. Norway hopes that the Republic of Serbia and the Republic of Kosovo will soon be able to integrate relevant European institutions. We hope that they will fully take part in the project of helping the region to put its troubled past behind it. As also stated in the Statute of the Council of Europe, the aim must be to achieve greater unity between States[1]. The purpose must be to safeguard and realize the ideals and principles which are their common heritage and facilitate their economic and social progress.

1 Statute of the Council of Europe, 5 May 1949, Art. 1 (a), UNTS, Vol. 87, p. 103.

Members of the delegation of Norway.

4. Mr. President, Members of the Court, a number of oral statements have eloquently led us through the arguments previously submitted in two rounds of written contributions. In some cases they have also usefully provided further in-depth analysis of particular questions that have been raised. Aiming as far as possible for conciseness is in line with the practice directions of the Court. I will not therefore repeat the factual background as provided in our Written Statement of the 16 April this year, nor will I rephrase the views of my Government, a summary of which is provided in our Written Comments of 6 July this year. In these, we concluded that the Declaration of Independence issued on 17 February 2008 does not contravene any applicable rule of international law.

5. The arguments that I now submit will only address particular questions that would seem to be pivotal points in the structure of arguments presented in these proceedings. These seem to us to revolve around, first, the exact nature of the question put to the Court; second, the rules applicable to unilateral declarations of independence, if any; and, finally, the question as to whether Security Council resolution 1244 (1999) exceptionally contained prohibitions that made the Declaration of Independence of 17 February 2008 contravene an applicable rule of international law. I will not give references during my presentation; these are included in the text handed to the Registry, and will appear in the transcript.

The request contained in General Assembly resolution 63/3

6. Mr. President, Members of the Court, I would first like to consider the exact nature of the request put to the Court. An initial question is related to the assertion that "a great majority of States participating in the present proceedings" accepts that there are no reasons that would prevent the Court from exercising its advisory jurisdiction[2]. In our view, this somewhat sweeping statement requires further qualification. The vote on resolution 63/3 in the General Assembly of the United Nations on 8 October 2008 was in itself an indication by the international community of the need to pause to reflect and exercise due caution.

2 CR 2009/24, p. 36, para. 2 (Djerić, Serbia).

7. In the vote 74 Member States abstained, 35 refrained from participating, and six voted against the draft resolution. In other words, 115 Member States of the United Nations did not support the resolution.

8. In addition, we would like to recall that it is not possible to equate the 77 votes in favour of the resolution with opposition to the Declaration of Independence. Our own vote is evidence of that. Our being in favour of the request to the Court did not signify any such opposition or, as stated in our explanation of vote, that the matter was considered to have a bearing on Norway's recognition of the Republic of Kosovo[3].

9. We held it to be in keeping with basic principles of fairness in international law that the Republic of Serbia be given this opportunity to express and explain its position, as would be the case for the representatives of the Republic of Kosovo. In voting in favour of the draft resolution, Norway was furthermore confident that the Court will carefully analyse the question put to it and respond accordingly, and on the basis of established rules of international law.

10. Mr. President, Members of the Court, the question put before the Court is both specific and limited in scope. It concerns only the Declaration of Independence that was issued on 17 February last year. In its 2007 Advisory Opinion on the Wall, the Court confirmed that it had to limit itself to the confined question the General Assembly had chosen to put to the Court, and "only examine other issues to the extent that they might be necessary to its consideration of the question put to it" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 160, para. 54). An assessment as to whether the Declaration of Independence is in accordance with international law is distinct from issues of statehood or recognition. We cannot fail to note, however, some significant and undisguised departures from the question put before the Court, in particular during the presentation made by Professor Shaw on the first morning of these oral proceedings[4].

11. The question put to the Court, albeit specific, gives in turn rise to certain derivative question marks. As stated in its 1975 Advisory Opinion on Western Sahara, the Court must satisfy itself that questions put to it are "relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose" (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 37, para. 73)[5]. This conflict-ridden area in the region has experienced indisputably positive developments in the almost two years that have passed since the Declaration was issued. Furthermore, as many have pointed out, 63 States have so far recognized the Republic of Kosovo. Norway is confident that all the relevant circumstances will, also in light of the guidance provided in the Western Sahara Opinion, be carefully weighed and considered by the Court when formulating its opinion.

12. We also note, in this context, another question mark. The formulation of the question put to the Court seems to presume that it was the Provisional Institutions of Self-Government of Kosovo, acting as such, i.e., acting in an organic capacity, that issued the Declaration of Independence. We respectfully maintain otherwise[6].

3 Official Records of the General Assembly, Sixty-Third Session, Twenty-Second Plenary Meeting, A/63/PV.22, 8 Oct. 2008.
4 CR 2009/24, for example, p. 74, paras. 33-36 (Shaw, Serbia).
5 See also Written Comments of France, pp. 4-10, paras. 10-23.
6 Written Statement of Norway, pp. 5-6, paras. 13-15, as well as Written Comments, p. 4, paras. 9-11.

The nature of the Unilateral Declaration of 17 February 2008

13. Turning now to the nature of the Declaration of 17 February 2008, we have expounded in our written contributions its particular form, content and circumstances, as well as the background for its adoption[7]. The evidence before us clearly supports the view that neither the authors nor the document itself purported to enact organic powers of the Provisional Institutions of Self-Government of Kosovo, as referred to in Security Council resolution 1244 (1999) and the Constitutional Framework of 2001.

14. Instead, the Declaration has been taken by Norway to be a statement of democratically elected leaders, on a par with that of members of a constituent assembly, whose explicit aim is to express the will of the people[8].

15. Serbia's Written Statement in April this year referred also, on its part, to the authors of the Declaration being "members of the Assembly of Kosovo who adopted the document on

88See also Written Comments of France, pp. 4-10, paras. 10-23.

89Written Statement of Norway, pp. 5-6, paras. 13-15, as well as Written Comments, p. 4, paras. 9-11.

90Written Statement, pp. 5-6, paras. 13-15, as well as Written Comments, p. 4, paras. 9-11. For a photographic reproduction of the Declaration, see Written Contribution of Kosovo, Ann. 1, pp. 207-209.

17 February 2008"[9]. This quite precise choice of words, "members who adopted", including the personal pronoun used, refers to action carried out by persons, an indeterminate number of individuals, as opposed to acts of any organs. Overall, we believe there is ample confirmation of the reality of the social facts before us.

16. Moreover, we maintain that a declaration of independence is not, as such, the object of regulation by public international law[10]. By this, we do not advocate legal arbitrariness, we do not advocate any abdication of the rule of law. We do not speak in favour of carving out a domaine réservé for politics in hard cases of international law. On the contrary, considering such a declaration as inherently being a social and political fact follows from the structure of international law, and is based on its established practice. And I say this not only because I represent a State whose modern political history and international relations follow the unilateral declaration of the dissolution of the Union between Norway and Sweden, made by the Norwegian Parliament on 7 June 1905. Significantly, we would like to underline that considering any unilateral declaration of such nature as a political fact and not as the object of regulation by public international law is not the same as accepting, condoning, denying or encouraging secession.

17. Mr. President, Members of the Court, declarations of independence do not "create" or constitute States under international law. It is not the issuance of such declarations that satisfies the factual requirements, under international law, for statehood or recognition. Under international law, such declarations do not constitute the legal basis for statehood or recognition.

18. It is not to say that the Security Council cannot take explicit action requiring, for example, non-recognition of a situation as it notably has done in the context of blatantly unlawful use of armed force. The Council did so notably in resolution 541 with regard to the declaration in November 1983 of the establishment of the so-called "Turkish Republic of Northern Cyprus". It did so in resolution 662, as regards the Iraqi annexation of Kuwait in August 1990. But there is no such situation here, and no such action has been taken by the Security Council with regard to Kosovo.

7 Written Statement, pp. 5-6, paras. 13-15, as well as Written Comments, p. 4, paras. 9-11. For a photographic reproduction of the Declaration, see Written Contribution of Kosovo, Ann. 1, pp. 207-209.

8 Written Statement, p. 6, paras. 14-15; Written Comments, p. 4, paras. 11-12.

9 Written Statement of Serbia, p. 25, para. 17.

10 Written Statement, p. 5, paras. 9-10.

Mr. Rolf Einar Fife, Director General Legal Affairs Department, Royal Norwegian Ministry of Foreign Affairs. (Norway)

19. Permit me to briefly repeat that it is necessary to distinguish between declarations of independence — which usually challenge a domestic legal order — and issues of statehood or recognition, which depend on separate factual assessments under international law. To claim otherwise would also be to blur the various and necessary requirements for establishment of international legal personality or attribution of responsibility. This would also have broader consequences as to the concept of recognition itself, which is fundamentally based on an acceptance by a State of an existing situation, occurring in its relations with other States[11]. This is also clearly illustrated by the international practice of recognition of governments coming to power abnormally and in a revolutionary manner, which is not an issue here, but nevertheless is amply covered in the standard textbooks, such as Oppenheim's International Law[12].

20. In the 2007 Bosnia and Herzegovina Judgment, the Court itself referred to a number of unilateral declarations of independence that were made in the former Yugoslavia. These included — and were not limited to — the first resolution by the Parliament of Bosnia and Herzegovina on 14 October 1991 and the official declaration of independence of the latter Republic on 6 March 1992[13]. In its account of the facts, the Court differentiated between unilateral proclamations of independence, the enjoyment of some de facto independence, including de facto control of substantial territory, and international recognitions as sovereign States. And in doing so the Court also recalled that the validity of certain declarations of independence had been contested, and put before the Badinter Commission[14]. The latter did not find

11 Robert Jennings and Arthur Watts (eds.), Oppenheim's International Law, 9th ed., 1992, Vol. 1, p. 127, para. 38.
12 Ibid., pp. 148-150, para. 44.
13 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (hereinafter referred to as the 2007 Bosnia and Herzegovina Judgment), p. 138, paras. 233-234.
14 Ibid., p. 138, para. 233 (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia, p. 3).

any reason to examine the alleged legality or illegality of the declarations[15]. In fact one could add that a similar approach was actually taken by the Security Council in resolution 787 (1992) when, in the concrete circumstances obtaining at the time in the Republic of Bosnia and Herzegovina, it affirmed "that any entities unilaterally declared . . . will not be accepted"[16]. This formulation underscores the object of the concrete measures adopted by the Council under the circumstances at hand. Resolution 1244 does, in any case, not provide for any such measure.

21. Moreover, we have on a general basis questioned whether a resolution of the Security Council actually imposes direct international legal obligations on non-State actors[17]. States have international legal personality as well as the legal obligations referred to in Articles 25 and 103 of the Charter. Individuals may be held responsible for breaches of international humanitarian law and criminal law, and certain other international legal rules setting out obligations and responsibilities may apply directly to them. Nevertheless the emergence of legal obligations and responsibilities incumbent on non-State actors is limited and it is carefully circumscribed. Such international legal obligations and responsibilities for non-State actors can at any rate not be assumed without a clear legal basis in international law. We have recently seen certain concrete measures or demands adopted by the Security Council, in the context of internal armed conflict, that have been directed also against non-State entities. This does not signify, however, that international legal obligations, nor attribution of responsibility for internationally wrongful acts, can suddenly be inferred to apply to such entities.

22. In the context of an analysis of the principle of territorial integrity, our learned colleague Professor Shaw, on the first day of those oral proceedings, stated that "international practice now clearly regards non-State entities as direct subjects of international law" and that the "classical structure of international law has changed"[18]. These are quite sweeping assertions that made us carefully consider the basis for such claims.

23. In the bulk of the resolutions of the Security Council that were invoked to support that claim, the Council basically reaffirmed in preambular paragraphs its own commitment to, or its respect for, territorial integrity, or it generally reaffirmed the importance of the principle. This was the case for the resolutions referred to on the situations of the Democratic Republic of the Congo, Iraq and Somalia[19]. The provisions referring to non-State actors in these resolutions largely confirm the role of States holding violators of breaches of international humanitarian and criminal law accountable[20], or they call on all parties in internal armed conflict and peace negotiations to respect their commitments to particular agreements[21]. We thus do not see any convincing evidence in the resolutions invoked of any such change in the structure of international law as announced by Professor Shaw.

24. Furthermore, particular emphasis was put by him on resolution 787 of 16 November 1992 concerning the situation in Bosnia and Herzegovina. The exact quotation is, however, that the Security Council "strongly reaffirm[ed] its call on all parties and others concerned" (emphasis added) to respect the territorial integrity of Bosnia and Herzegovina[22]. What was the context and import of this reaffirmation?

15 See, inter alia, CR 2009/25, p. 41, para. 22 (Müller, Kosovo

16 Security Council resolution 787 (1992), 16 Nov. 1992, para. 3

17 Written Comments, p. 5, para. 13.

18 CR 2009/24, pp. 66-67, paras. 8-12 (Shaw, Serbia).

19 Security Council resolution 1756 (2007), preambular para. 2; resolution 1771 (2007), preambular para. 2; resolution 1766 (2007), preambular para. 3; resolution 1784 (2007), preambular para. 3; resolution 1830 (2008), preambular para. 2 ; resolution 1846 (2008), preambular para. 3.

20 E.g., resolution 1846 (2008), paras. 14-15.

21 E.g., resolution 1784 (2007), para. 3.

22 Resolution 787 (1992), para. 3.

25. A reaffirmation follows from a previous affirmation: in resolution 752 of 15 May 1992 the Council had made a similar demand, but this also included "that all forms of interference from outside Bosnia and Herzegovina, including units of the Yugoslav People's Army as well as elements of the Croatian Army, cease immediately, and that Bosnia and Herzegovina's neighbours take swift action to end such interference" (emphasis added)[23]. This was repeated again in resolution 787 and underscores the international nature of the threats to the territorial integrity of Bosnia and Herzegovina[24]. The resolution further called on "all other concerned parties in the former Yugoslavia" to immediately fulfil their obligations[25]. We thus see here how the principle of territorial integrity continues to regulate inter-State relations.

26. And in its 2007 Bosnia and Herzegovina Judgment the Court also found it established that, following the official withdrawal in May 1992 of the Yugoslav People's Army from the Republic of Bosnia and Herzegovina, considerable foreign military support was still being made available to entities within the Republic[26]. Against this background, we really do not find the 1092007 Bosnia and Herzegovina Judgment, p. 142, para. 241 ("The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities."). reference to resolution 787 to be conclusive as regards any change in the structure of international law. Instead, we incidentally find a large measure of support for the opposite view. We have thus found no basis for stating that international legal obligations are directly applicable to non-State actors, at least without a clear and express basis for doing so[27].

27. Mr. President, Members of the Court, any declaration of independence is by its very nature unilateral. It will appear to be a colliding political claim to legitimacy; it will appear to be challenging an existing domestic legal order. However, the Declaration that was issued on 17 February 2008 can hardly be characterized as unilateralist action. It does not contain any single element, let alone any exhortatory language, that invokes or speaks in favour of a general or a specific right to secession. On the contrary, it refers to a lengthy process of multilateral diplomacy that had repeatedly failed and it referred to the full and undivided acceptance of all the recommendations issued by the Special Envoy of the Secretary-General of the United Nations, and subsequently endorsed by the Secretary-General himself. Most of the Declaration actually contains an expression of commitments as to future respect for international legal norms, human rights protection and endorsement of all guarantees for the Serbian minority and the Serbian Orthodox Church in Kosovo, that all were contained in the recommendations of the Special Envoy. Let alone on other bases, we see no precedential value as regards any right to secession in this text nor, as we shall see, in the sequence of events that led to the issuance of this Declaration.

28. Also the commitments expressed in the declaration illustrate the document's particular nature. When the Court invited Member States to furnish information likely to shed light upon the questions submitted, we included, on our part, in an Annex to our Written Statement of April this year the Norwegian Royal Decree adopted by the King in Council on 28 March 2008. The Royal Decree highlighted the extraordinary situation facing the international community due to the long-standing impasse in Kosovo and the legal basis for our recognition of the Republic of Kosovo. Moreover, in so far as the Declaration subsequently was referred to by authoritative representatives of the Republic of Kosovo, its contents then became part of a binding unilateral declaration under international law, of the nature of an Ihlen Declaration[28].

23 Resolution 752 (1992), para. 3.
24 Resolution 787 (1992), para. 5.
25 Resolution 787, para. 4.
26 2007 Bosnia and Herzegovina Judgment, p. 142, para. 241 ("The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.").
27 Ibid., p. 138, paras. 233-234.
28 Written Statement, p. 10, para. 34 and Ann. 2.

Security Council resolution 1244 (1999) does not prohibit the unilateral declaration of independence

29. Mr. President, Members of the Court, we have shown why we do not consider a declaration of independence to be the object of regulation by public international law. I now turn to the residual question as to whether Security Council resolution 1244 exceptionally contained particular prohibitions that would make a declaration of independence of Kosovo on 17 February 2008 contravene an applicable rule of international law[29].

30. Resolution 1244 decided in paragraph 1 that a political solution to the Kosovo crisis shall be based "on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2". Both these Annexes require "taking full account of the Rambouillet accords", to which also paragraph 11 (e) of the resolution makes reference[30]. The Rambouillet Accords had explicitly identified the "will of the people" of Kosovo as one of the key relevant factors constituting the basis for considerations of a final settlement for Kosovo[31]. There is, therefore, incidentally no need in this case to undertake any further analysis of the principle of self-determination in international law. Resolution 1244 establishes, in the confined context of Kosovo, the unequivocal relevance of the will of the people of Kosovo in the determination of Kosovo's future status. The history that led to the situation was precisely and eloquently summarized by H.R.H. Prince Zeid Raad Al Hussein of Jordan this morning. And this is fully confirmed by the Statement made by the Contact Group on The Future of Kosovo in London on 31 January 2006: "Ministers look to Belgrade to bear in mind that the settlement needs, inter alia, to be acceptable to the people of Kosovo." As noted by Finland yesterday, the import of this language is unmistakable. The formulation was agreed by all concerned, including the representative of Russia[32].

31. The issue of Kosovo's final status was put on the Security Council's agenda in October 2005, as recommended in a report produced by Ambassador Kai Eide after a thorough review of the situation had been carried out[33]. A competent mechanism was thereafter established in November 2005 in accordance with resolution 1244, under the leadership of former President Ahtisaari of Finland, the Special Envoy of the Secretary-General, to lead the political process designed to determine Kosovo's future status, bearing in mind its fundamental importance for international peace and security. We respectfully refer to the exhaustion in March 2007 of negotiations and other diplomatic initiatives under this competent multilateral mechanism, followed by yet other efforts, as referred to in our own Royal Decree of 28 March 2008. We do recall, yet again, that the determination of both the pace and the duration of the future status process was entrusted to the Special Envoy, not to any other institution or body. His terms of reference provided explicitly for such powers[34]. This factor and the final assessments made by the competent mechanism established in accordance with resolution 1244 were deemed by Norway to be particularly pertinent in the legal and political analysis of subsequent factual events[35].

32. Holding any view to the contrary might in fact have amounted to inferring that, under the particular circumstances that had evolved over time, the international community and, ultimately, the international military presence in Kosovo, would have had to repress the expression of the will of the people of Kosovo - the will expressed by democratically elected representatives of its people, in the im-

29 See, in particular, Written Statement, pp. 5-6, paras. 11-17, as well as Written Comments, p. 3, para. 8 and pp. 4-5, para. 12

30 Security Council resolution 1244 (1999), Ann. 1, sixth item and Ann. 2, para. 8.

31 Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 Feb. 1999, Chap. 8, Art. I (3) (UN document S/1999/648, 7 June 1999, p. 85).

32 CR 2009/30, p. 61, para. 22 (Koskenniemi, Finland).

33 See, inter alia, A comprehensive review of the situation in Kosovo, S/2005/635, 7 Oct. 2005.

34 Letter from the Secretary-General of the United Nations to Mr. Martti Ahtisaari, 14 Nov. 2005, Dossier No. 198, in the Dossier provided to the Court from the United Nations Secretariat.

35 Written Statement, p. 8, para. 27.

passe that had long been reached and had been steadily deepening. Monsieur le président, membres de la Cour, comme l'a dit fort bien Madame Belliard de la France ce matin, la déclaration n'était pas «la cause mais la conséquence de [l']échec» du processus multilatéral. We also note that none of the competent organs established under resolution 1244, nor the Secretary-General of the United Nations nor the Security Council, have expressed the view that the Declaration or the events of 17 February 2008 contravened international law. Mr. President, Members of the Court, for the reasons I set out, resolution 1244 could simply not be read to that effect.

33. We are sensitive to the words of late Judge Manfred Lachs, when he stated that "(i)n law we must beware of petrifying the rules of yesterday and thereby halt progress in the name of process. If one consolidates the past and calls it law he may find himself outlawing the future"[36]. We subscribe to the vision he hereby encapsulated. At the same time, however, the very particular framework established by resolution 1244 of the Security Council, and the unique background and sequence of events that has been documented in the course of these proceedings do not really require any fear of petrification of rules of the past or any outlawing of the future. We respectfully cannot see that the question put to the Court requires any determination of issues pertaining to the general principles of territorial integrity or of self-determination, nor does it require any precedent setting in this regard.

34. Norway is fully confident that the Court will exercise due caution in considering the issues concerned. Almost two years have passed since the Declaration of Independence was issued. The situation in the region is developing in ways that bear a promise of a future of prosperity and peace for all populations in the region. The Court is, at the same time, well aware of the risks inherent in local narratives or simplified portrayals which may deepen rather than heal existing wounds, exacerbate latent tensions instead of promoting reconciliation, and adding in such a case yet another painful chapter to the history of the Balkans.

35. Mr. President, Members of the Court, before I conclude, allow me to briefly summarize the following three key points: firstly, the question put to the Court is specific and limited in scope; second, the Unilateral Declaration is not, as such, the object of regulation by public international law; and thirdly, and finally, Security Council resolution 1244 does not prohibit the issuance of the Declaration of 17 February 2008. Those are our three key points.

36. Furthermore, I should like to refer yet again to the unequivocal reference to the "will of the people" in the legal framework established by resolution 1244 under Chapter VII of the Charter and to the particular international mechanism entrusted, in accordance with that resolution, with the task of leading and of deciding the duration of the process designed to determine Kosovo's future status. It is in our view therefore not necessary for the Court to consider on a general basis the principles of territorial integrity and of self-determination in order to respond to the confined question put to it by the General Assembly.

37. For the reasons set out in our submissions, Norway respectfully upholds its request that the Court find that the Declaration of Independence issued on 17 February 2008 does not contravene any applicable rule of international law.

38. Mr. President and distinguished Members of the Court, this brings me to the end of the oral submissions which I am making on behalf of the Kingdom of Norway, and I thank you for the opportunity that you have afforded me of addressing you.

36 Judge Manfred Lachs, President of the International Court of Justice, Commemorative Speech at the United Nations General Assembly, 12 Oct. 1973, quoted by Thomas Franck, Fairness in International Law and Institutions, 1995, Oxford, p. 48.

The Kingdom of the Netherlands

The Kingdom of the Netherlands is represented by:

Dr. Liesbeth Lijnzaad;
Professor Dr. Niels Blokker;
Professor Dr. René Lefeber;
Mr. Tom van Oorschot;
Mr. Siemon Tuinstra;
Mr. Michel van Winden;
Ms Daniëlle Best.

The PRESIDENT: I shall now give the floor to thefirst speaker, Dr. Liesbeth Lijnzaad, representing the Netherlands.

Ms LIJNZAAD:

1. Introduction

1. Good morning, Mr. President, Members of the Court, it is an honour for me to address this Court and to clarify my Government's views on the question before you. I feel particularly privileged to address you today on Human Rights Day: an affirmative answer to the question before the Court will deliver a clear message to States that effective, dissuasive and proportionate remedies are available in the event they violate the human rights of peoples within their borders.

2. The law should serve us, the people of the world. Law has developed to facilitate and regulate the interaction between individuals and groups of individuals, such as a people or a State. For the law to achieve its purpose, it must provide stability. However, it must also provide the flexibility to allow for societal adjustment when developments in society so require, and it must provide for effective, dissuasive and proportionate remedies when there has been a breach of the law. In this case, the law allowed the proclamation of independence by the people of Kosovo.

3. I will address the following points in my statement:
- the existence and exercise of the post-colonial right to self-determination, in particular the conditions that must be satisfied for a people to exercise the right to external self-determination; and
- the lawful exercise of the right to external self-determination by the people of Kosovo.

Members of the delegation of The Netherlands.

2. The post-colonial right to self-determination

4. Mr. President, Members of the Court, in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court, for the first time, accepted a right of self-determination outside the context of decolonization. The right to self-determination includes the right of peoples to freely determine their political status. The proclamation of independence by a people is but one method of exercising this right of political self-determination.

5. A people must exercise its right to political self-determination in accordance with international law. International law includes the principle of territorial integrity. It is therefore necessary to determine whether the right to self-determination has been exercised in a manner that preserves international boundaries, that is, internal self-determination, or in a manner that involves a change of international boundaries, that is, external self-determination. The proclamation of independence by the people of Kosovo was directed at a change of international boundaries and, therefore, constitutes an instance of the exercise of the right to external self-determination.

6. A people must first seek to exercise its post-colonial right to political self-determination with due respect for the principle of territorial integrity, that is, within existing international boundaries. The right to political self-determination may, however, evolve into a right to external self-determination in exceptional circumstances. This is an exception to the rule and it is therefore to be construed narrowly. The resort to external self-determination is a last resort and it is subject to conditions.

7. First, there are substantive conditions. A right to external self-determination only arises in the event of a serious breach of either:
- the obligation to respect and promote the right to self-determination due to the absence of a government representing the whole people belonging to the territory, or the denial of fundamental human rights to a people; or
- the obligation to refrain from any forcible action which deprives people of this right.

8. There is also a procedural condition. All effective remedies must have been exhausted in the pursuit of a settlement before a people may have resort to the exercise of the right to external self-determination. Accordingly, all avenues must have been explored to secure the respect for and the promotion of the right to self-determination through available procedures, including bilateral negotiations, the assistance of third parties and, where agreed or accessible, recourse to domestic or indeed international courts and arbitral tribunals.

9. Mr. President, Members of the Court, in the course of these proceedings, it has been argued that the existence of the post-colonial right to external self-determination has not been demonstrated by the States supporting it. There is an abundance of literature on the law of self-determination. It provides a wealth of material, including on the exercise of the right to external self-determination. It is informative, but it may not be authoritative. The divergence of views in doctrine prevents, in our view, its use as a source of international law under Article 38 of the Statute of the Court. To answer the question before it, the Court will need to interpret treaty provisions relating to self-determination and ascertain the legal opinions and the practice of States on the matter. Indeed, the written statements, written comments and oral statements in these proceedings will enable the Court to do exactly that.

10. It is hardly surprising that there are not many instances of the lawful exercise of the right to external self-determination outside the context of non-self-governing territories and foreign occupation. First, the post-colonial right to external self-determination only emerged in the second half of the last century. Second, as mentioned before, substantive and procedural conditions must be satisfied before a people may resort to external self-determination. In the course of these proceedings, many instances have been cited where the people concerned did, indeed, fail to meet these conditions and could not lawfully exercise the right to external self-determination. Yet, there are several instances where the international community has accepted the exercise of the right to external self-determination. We would cite the establishment of Bangladesh and Croatia as examples.

11. Instances where States disintegrated on the basis of consensual agreement differ from the present case, but are not necessarily irrelevant. In some of these instances, the peoples concerned acknowledged that the violation of the right to self-determination in the past had made it impossible for them to continue living together in one State. We would cite the establishment of Eritrea and Slovenia as examples.

3. The exercise of the right to self-determination by the people of Kosovo

12. Mr. President, Members of the Court, the violation of human rights in Kosovo at the end of the last century has been well documented, in particular by the United Nations Special Rapporteur on the former Yugoslavia, and has been recognized by several organs of the United Nations, including the General Assembly, the Security Council and the International Criminal Tribunal for the former Yugoslavia. Even Serbia has recognized in these proceedings that human rights violations have occurred in Kosovo.

13. These violations are at the root of our view that the people of Kosovo are, as a people, entitled to external self-determination. In our Written Comments, we have submitted that there is a people in Kosovo. We would point out that, in contrast to what was stated by Serbia in these proceedings, the Swiss Government has adopted the same position in these proceedings and in domestic parliamentary proceedings. Today, I will further argue that the right to external self-determination in this case originates in the serious breaches by Serbia of the right to self-determination of the people of Kosovo and its corresponding obligations, namely, its obligation to respect and promote this right, and its obligation to refrain from any forcible action which deprives the people of Kosovo of this right.

3.1 The breach of the obligation to respect and promote the right to self-determination

14. Thus, there has been a serious breach of the obligation to respect and promote the right to self-determination of the people of Kosovo, because:
- there was no government representing the whole people in the Federal Republic of Yugoslavia; and
-there has been a denial of the fundamental human rights in Kosovo.

3.1.1 The absence of a government representing the whole people

15. Mr. President, Members of the Court, allow me to address the first point. There was no government representing the whole people in the Federal Republic of Yugoslavia. In the Socialist Federal Republic of Yugoslavia, Kosovo had the status of an autonomous province. The Yugoslav and Serbian authorities gradually brought Kosovo's autonomy to an end and aimed to take control.
Their success in doing so led to the complete marginalization of the Kosovo Albanians in Kosovo.
This process was described by the International Criminal Tribunal for the former Yugoslavia in its Milutinović judgment of February this year[1].

16. In the early 1980s, after the death of President Tito, Kosovo Albanians sought full recognition for Kosovo as a republic. This led to demonstrations, some of which turned violent, and the police and Yugoslav army were deployed. At the same time, there were increasing calls by the Serbs to reduce the autonomy of Kosovo. Against the backdrop of the break-up of Yugoslavia, measures were put in place which involved the federal authorities usurping responsibility for security within Kosovo. The Tribunal concluded that:

"from around 1989 differences between the aspirations of the majority of the Kosovo Albanian population and the designs of the [Federal Republic of Yugoslavia] and Serbian state authorities created a tense and unstable environment. Efforts by the authorities to exert firmer control over the province and to diminish the influence of the Kosovo Albanians on local governance, public services, and economic life-polarised the community. Indeed, laws, policies, and practices were instituted that discriminated against the Albanians, feeding into local resentment and feelings of persecution.

. . . . . .

A so-called 'parallel system' thus developed, involving an unofficial 'government' and the provision of services to the Kosovo Albanian population financed by a substantial émigré community and a voluntary 'solidarity tax'."

17. These findings demonstrate the absence of a government representing the whole people belonging to the Federal Republic of Yugoslavia, which amounts to a breach of the obligation to respect and promote the right to self-determination in Kosovo. This breach was serious because it was systematic: the abrogation of autonomous powers together with the discriminatory laws, policies and practices constitutes evidence that the breach was organized and deliberate. The breach was also serious in that it was gross: the necessity for Kosovo Albanians to develop a parallel system of government constitutes evidence of the flagrant nature of the breach, which amounted to a direct and outright assault on the values protected by the rule on a representative government.

3.2 The denial of fundamental human rights

18. Mr. President, Members of the Court, I now turn to the second point. There has also been a denial of fundamental human rights to the people of Kosovo. From mid-1998 the political crisis in Kosovo culminated in an armed conflict, involving forces of the Federal Republic of Yugoslavia and Serbia,

1 It may be noted that appeals have been filed after the submission of the Written Statement by the Kingdom of the Netherlands on 17 April 2009 which are still pending.

Dr. (Mrs.) Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs. (The Netherlands)

and forces of the Kosovo Liberation Army. The armed conflict continued throughout the NATO aerial bombardment campaign from 24 March to 10 June 1999. Throughout the armed conflict incidents occurred in which excessive and indiscriminate force was used by the Yugoslav army and the forces of the Serbian Ministry of the Interior. This resulted in damage to civilian property, population displacement, and civilian deaths. The Tribunal found that: "the common purpose of the joint criminal enterprise was to ensure continued control by the [Federal Republic of Yugoslavia] and Serbian authorities over Kosovo and that it was to be achieved by criminal means. 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 members of the joint criminal enterprise were aware that it was unrealistic to expect to be able to displace each and every Kosovo Albanian from Kosovo, so the common purpose was to displace a number of them sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission."

19. Forces of the Federal Republic of Yugoslavia and Serbia deliberately expelled at least 700,000 Kosovo Albanians, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. Across Kosovo, forces of the Federal Republic of Yugoslavia and Serbia conducted a broad campaign of violence directed against the Kosovo Albanian population, involving killing, sexual assault and the intentional destruction of mosques.

20. These findings of the Yugoslavia Tribunal demonstrate that the campaign of terror and violence involved war crimes and crimes against humanity, and resulted in the denial of fundamental human rights in Kosovo. This amounted to a breach of the obligation to respect and promote the right to self-determination within Kosovo. This breach was serious because it was systematic, the joint criminal enterprise in particular evidencing that the breach was organized and deliberate. 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, which amounted to a direct and outright assault on fundamental human rights.

3.2.2 The breach of the obligation to refrain from any forcible action

21. In Kosovo, there has additionally been a serious breach of the obligation to refrain from forcible action which deprives people of their right to self-determination. This also follows from the findings of the Tribunal, particularly in respect of the forcible displacement of Kosovo Albanians.

3.3 The exhaustion of all effective remedies

22. Mr. President, Members of the Court, not only the substantive condition, but also the procedural condition that applies to the exercise by the people of Kosovo of the right to external self-determination has been met. After all, all effective remedies that could be employed to settle the status of Kosovo had been exhausted. For this purpose, a political process was implemented under the auspices of the Security Council. It was only after the failure of all efforts to achieve a settlement that the Special Envoy of the Secretary-General concluded on 26 March 2007 that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status had been exhausted and the only viable option for Kosovo was independence. These conclusions were fully supported by the Secretary-General of the United Nations.

23. Subsequently, when it appeared that the Security Council was unable to agree on a resolution that would have endorsed the proposals made by the Special Envoy, a Troika was established, composed of representatives of the European Union, the Russian Federation and the United States, to try to find a solution. The Troika worked intensively for four months on the issue of the future status of Kosovo and delivered its report on 4 December 2007. Its objective had been to facilitate an agreement between the parties. Notwithstanding the high-level, intensive and substantive discussions between Belgrade and Pristina that the Troika was able to facilitate, an agreement on the final status of Kosovo could not be reached. As the Troika reported, neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.

24. Extensive further discussions took place in a number of meetings of the Security Council, but did not result in a solution. It was therefore only after the exhaustion of the political process and in the absence of further guidance from the Security Council that the independence of Kosovo was proclaimed on 17 February 2008.

25. The observation of Serbia in its Written Comments, that the procedural condition to exhaust all effective remedies had not been met, because of the very fact of the holding of these advisory proceedings, is beside the point. The request for an advisory opinion was clearly not an effective remedy for the people of Kosovo as this people could not have submitted a proposal to that effect to the General Assembly, could not have negotiated the terms of reference or the request in the General Assembly with the Members of the United Nations, and secured a vote in favour of such a request. It would have been for Serbia to propose to seek an advisory opinion from this Court during the status negotiations or, alternatively, to refer the question of the exercise of the right of external self-determination by the people of Kosovo to an arbitral tribunal. Serbia, however, has not done so at that time.

26. It has also been said that the people of Kosovo cannot exercise the right to external self-determination in 2008, because the situation in Kosovo has not aggravated since 1999. We have already submitted in our Written Statement that, in this case, the right to self-determination was not affected by the passage of time since the serious breaches of this right. The time was used, first, to establish international security and civil presences in Kosovo and, second, to facilitate a political process to achieve a political solution of the situation relating to Kosovo. Thus, the time was used to satisfy the procedural condition for the exercise of the right to self-determination, namely, the exhaustion of all effective remedies to achieve a settlement on the status of Kosovo.

4. REFLECTIONS

27. Mr. President, Members of the Court, the emergence of the right to external self-determination has not been without controversy. On the one hand, the exercise of this right results in a reconfiguration of the international community and may affect the essential requirement of stability referred to by the Court in the case concerning the Frontier Dispute. On the other hand, as a result of past events, it may be that stability can only be achieved through change. The law, in particular the law on self-determination, provides guidance in this difficult process of change.

28. In the case before us, the law supports the people of Kosovo. Following the serious failure of Serbia to comply with its obligations relating to the self-determination of the people of Kosovo, the people of Kosovo could no longer be expected to live together with the people of Serbia in one State. In this case, lawful use has been made by the people of Kosovo of the remedy that international law provides for these very serious human rights violations.

29. Is there reason to fear, as has been argued in these proceedings, that the recognition by the Court of the right to external self-determination of the people of Kosovo would be a dangerous precedent - a precedent that could easily be followed by other groups of individuals who declare themselves to be a people entitled to self-determination? In our view, such fear is not justified. On the contrary, it would be the absence of an effective, dissuasive and proportionate remedy for the violation of the right to self-determination that endangers peace and stability. The recognition by the Court of this remedy of last resort, including the conditions that must be satisfied to have recourse to it, will contribute to peace and stability. It will deter States from violating human rights, and peoples from too readily seeking to avail themselves of this remedy. The conditions set the bar high. They set it very high indeed.

5. CONCLUSIONS

30. Mr. President, Members of the Court, it is the legal opinion of the Kingdom of the Netherlands that the right to political self-determination includes the right to external self-determination in the case of a serious breach of the obligation to respect and promote the right to self-determination, or the obligation to refrain from any forcible action which deprives peoples of this right where all effective remedies have been exhausted. The recognition of Kosovo by the Kingdom of the Netherlands is based on this view and constitutes an instance of State practice in a case where, exceptionally, the conditions for the exercise of the right to external self-determination were satisfied.

31. We reaffirm the submissions made in our Written Statement and Written Comments. In particular, in our statement, we have reaffirmed and argued:
- the existence and exercise of the post-colonial right to self-determination, in particular the conditions that must be satisfied to resort to the right to external self-determination; and
- the lawful exercise of the right to external self-determination by the people of Kosovo.

32. Furthermore, we have reaffirmed and demonstrated that lawful use was made by the people of Kosovo of the right of external self-determination, because:
- there has been a serious breach of the obligation to respect and promote the right to self-determination in Kosovo;
- there has also been a serious breach of the obligation to refrain from forcible action which deprives peoples of their right to self-determination in Kosovo; and
- all effective remedies to settle the status of Kosovo have been exhausted.

33. It is, therefore, the opinion of my Government that the answer to the question should be that the proclamation of independence of Kosovo on 17 February 2008 is in accordance with international law.

Thank you for your attention.

The United Kingdom of Great Britain and Northern Ireland

The United Kingdom of Great Britain and Northern Ireland is represented by:

Mr. Daniel Bethlehem QC, Legal Adviser to the Foreign and Commonwealth Office,
Representative of the United Kingdom of Great Britain and Northern Ireland,
as Counsel and Advocate;
Mr. Kanbar Hosseinbor, Deputy Representative of the United Kingdom of Great Britain and Northern Ireland;
Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international,
as Counsel and Advocate;

The PRESIDENT: I shall now give the floor to Mr. Daniel Bethlehem to make the oral submission of the United Kingdom.

Mr. BETHLEHEM:

1. Mr. President, Members of the Court, it is an honour for me to appear before you today in these proceedings in my capacity as Legal Adviser to the United Kingdom Foreign and Commonwealth Office. This is the eighth day of these oral hearings. We have followed the submissions closely. Virtually everything of substance that can be said has been said, and eloquently so. For these submissions we will therefore endeavour to stand back from the issues and focus on what we see as the pivotal points for the Court's deliberations as well as addressing a number of points made during the course of the hearings. We refer you to our written submissions for our more detailed arguments.

The pivotal issues in these proceedings

2. As we see it, there are two pivotal issues. The first is whether resolution 1244 prohibited Kosovo's Declaration of Independence. The second is whether Kosovo's Declaration of Independence was prohibited by general international law. There are other points, to be sure, but they arise along the way to these two central questions. There are also wider elements, such as the effect of the many recognitions of Kosovo's independence, the effect of other post-independence developments, and Kosovo's present status. But these are not part of the question addressed to the Court.

3. Mr. President, I will address the first of these issues, Professor Crawford will address the second.

Members of the delegation of the United Kingdom

General observations

4. Before I turn to resolution 1244, four observations of a more general nature are warranted, addressing, first, the outcome that Serbia seeks in response to the question referred to the Court; second, the current situation in and the status of Kosovo; third, the concerns expressed by some States at the potentially destabilizing effect of an acceptance of Kosovo's independence; and, fourth, the status of those who issued the Declaration of Independence.

5. Turning, first, to the outcome that Serbia seeks in response to the question referred to the Court. The question as formulated does not engage Kosovo's present status or the effect of the recognition of that independence by other States. Behind the question, however, as it is conceived by its author, is a challenge to Kosovo's independence and existence as a State. In his opening remarks for Serbia last week, Ambassador Bataković observed that the purpose of the advisory opinion was to secure an outcome in which Kosovo would engage with Serbia in good faith to achieve a solution to the question of its status that was consistent with international law[1].

6. Given this objective, the question that arises, and it is an appropriate question for a court of law, is where the outcome proposed by Serbia would take the two sides; where would it take us, the international community. In other words, would the outcome that Serbia seeks be sustainable? Professor Shaw, also speaking for Serbia, in seeking to make the point that international law now addresses non-State entities in certain specific circumstances, observed: "The clock may not be turned back."[2] But that is precisely the outcome that Serbia would wish from the Court. It seeks an advisory opinion that would compel Kosovo to re-engage with Serbia over its status. There is, however, no reason whatever to believe

1 CR 2009/24, p. 35, para. 13.
2 CR 2009/24, p. 66, para. 8.

that an agreed outcome would be any more achievable now than it was in the past. Serbia has made it quite clear that it will never accept an independent Kosovo. Kosovo, for its part, has made it quite clear, that, given the legacy of abuse, it cannot again become part of Serbia. That impasse is as plain now as it was to the Contact Group, to the Secretary-General's Special Envoy, to the Troika, and to others. That impasse cannot be ignored.

7. A cardinal concern of every court must be to address whether the decision that is asked of it is capable of meaningful implementation. Courts strive not to order the unsustainable. They do not order estranged spouses to continue in a broken marriage. They seldom compel employers to re-hire aggrieved employees with whom the working relationship has broken down. In the present case, what we must hope for and what we must work towards is a rapprochement over time between Serbia and Kosovo under the umbrella of the European Union.

8. Turning, second, to the current situation in and status of Kosovo. We are almost two years on from Kosovo's Declaration of Independence. Foreign Minister Hyseni noted in his opening remarks that Kosovo is at peace today, with stable political institutions, successful elections recently held, engagement with international partners[3]. This stability is in many respects a feature and consequence of Kosovo's independence.

9. In his opening remarks for Serbia, Ambassador Bataković suggested that most States around the world opposed Kosovo's independence[4]. This is not accurate. There is no evidence of widespread opposition to Kosovo's independence. On the contrary, as the Court has heard, all of Kosovo's neighbours, with the exception of Serbia, have recognized Kosovo's independence. The vast majority of the member States of both the European Union and the Council of Europe have done so. A voting majority of the members of the Security Council at the point at which resolution 1244 was adopted - that is nine members - have recognized Kosovo. The total number of recognitions is 63, with upwards of 40 more having voted for Kosovo's membership of the International Monetary Fund and the World Bank[5]. In all likelihood, the vast majority of States that have not recognized Kosovo have no firm view on the matter, are hesitating in the face of the chilling effect of the present proceedings, or do not engage in formal practices of recognition. Apart from those 15 to 20 States that have participated in these proceedings and have, for their own very particular reasons, declared their opposition to Kosovo's independence, there is no evidence of widespread opposition to Kosovo's independence.

10. Turning, third, to the concerns expressed by some States at the potentially destabilizing effect of an acceptance of Kosovo's independence. The United Kingdom understands these concerns and takes them very seriously. In the circumstances that pertain, however, we do not believe that the concerns are warranted. It is nonetheless important that they are addressed. We sought to do so in our Written Statement in the clearest of terms which, given their importance, I reaffirm here today explicitly[6]. Stability in the international system is important and States in other parts of the world must have a clear understanding that the events in the Balkans, and Kosovo's Declaration of Independence, do not create risks of instability for them. We are very clear that the situation in Kosovo does not constitute a precedent for developments elsewhere. Kosovo's independence does not open the door for the fracturing of States more generally.

Mr. President, Members of the Court, given these concerns, we would encourage the Court to consider saying in terms in its advisory opinion that the circumstances pertaining in Kosovo are highly particular and cannot be relied upon as a precedent in any other situation.

3 CR 2009/25, pp. 6-9, paras. 2-14.
4 CR 2009/24, pp. 31-32, para. 4.
5 CR 2009/25, p. 8, para. 10. See also the United Kingdom's Written Comments, para. 6.
6 Written Statement, para. 0.19.

11. Let me dwell a moment longer on the special character of the Kosovo situation. This is, once again, a point that we have addressed fully in our written submissions, and I do not rehearse it in any detail here[7]. Contrary to the mischaracterization of this argument by some, we do not assert that Kosovo is to be judged by special rules of international law, or that it stood outside of the law. We do not assert a sui generis legal régime. The United Kingdom's contention is that, for reasons of the confluence of very particular factual circumstances, the situation of Kosovo does not create a precedent elsewhere.

12. In his closing remarks for Serbia last week, Mr. Obradović nonetheless stated that "[a] number of similar situations exist throughout the world and the independence of Kosovo would certainly be used as a precedent by separatist movements"[8]. He did not, however, quote any examples of such similar situations. In his submissions for Serbia, however, Professor Zimmermann gave two examples, Cyprus and Palestine, commenting that, "[f]ollowing the very logic of the authors of the UDI, it may become possible to argue that in the situations [of] Palestine or Cyprus, the respective situation has similarly reached a deadlock and that the international community should accordingly give in to so-called 'realities on the ground' . . ."[9].

13. Let me take these examples in turn. In the case of northern Cyprus, an example also referred to with concern in the Cypriot submissions to the Court, the Security Council expressly concluded that the attempt to establish a State in the north of Cyprus was contrary to the 1960 Treaty establishing the Republic of Cyprus and the 1960 Treaty of Guarantee[10]. The Council went on, again expressly, to call upon all States not to recognize any State other than the Republic of Cyprus[11]. In that case, two resolutions of the Security Council expressly called for the non-recognition of northern Cyprus. That call has been steadfastly adhered to by the international community. An advisory opinion which affirms the legality of Kosovo's Declaration of Independence would have no precedential effect in the context of Cyprus.

14. Kosovo's Declaration of Independence is not incompatible with any treaty. The Security Council has not called upon the international community not to recognize Kosovo. The Council had competence to do so. It did not do so. Resolution 1244 (1999) could have said in express terms what some members of the Security Council at the time now contend that the resolution intended, namely, that no independence for Kosovo was possible without Serbian consent. The resolution did not so provide.

15. The Palestine example is interesting for other reasons, as there is some discussion about whether the Palestinian governmental institutions might declare the independence of Palestine. On Serbia's reasoning, were the Palestinian Legislative Council or other Palestinian representative body to declare the independence of Palestine, that declaration would not be in conformity with international law as it would have been declared by the Palestinian institutions of self-government established pursuant to the Oslo Accords between Israel and the Palestinian Liberation Organization and without any apparent competence to make such a declaration. We very much doubt whether the analysis that Serbia advances would be a tenable or credible analysis in that situation. It is not a tenable and credible analysis in the matter now before you.

16. This brings me to the fourth of my general points, the status of those who issued the Declaration of Independence. The Declaration of Independence was not an act of the Provisional Institutions of Self-Government. Nor did it purport to be. It was a Declaration of the representatives of the people of Kosovo, reflecting what we have described in our Written Statement as "a unique constitutional moment in the history of Kosovo in which those elected by the people of Kosovo expressed the will of those they

7 Written Statement,para. 0.22; Written Comments, paras. 11-14.
8 CR 2009/24, p. 92, para. 8.
9 CR 2009/24, p. 56, para. 38.
10 Security Council resolution 541 (1983).
11 Security Council resolutions 541 (1983) and 550 (1984).

represented"[12]. The key issues for consideration in such circumstances are whether those issuing a declaration of independence represented those for whom they purported to speak and whether, in doing so, their voice was effective. Those declaring Kosovo's independence met both criteria.

Kosovo - retrospect and prospect

17. Mr. President, it is useful to recall the events of 20 years ago, in 1989, when Kosovo's autonomy within the then Socialist Federal Republic of Yugoslavia was crushed when Serbian tanks took up positions outside the Kosovo Assembly. I recall this event, and this passage of time, to highlight three points. The first is the tragedy that befell the region, and Kosovo, as that period opened and as the decade unfolded. We have a responsibility not to downplay, not to diminish, the extent of the human rights catastrophe that befell the people of the region, very largely at the hands of a dictatorial régime in Belgrade. And the Milutinović judgment of the International Criminal Tribunal for the former Yugoslavia confirms that atrocities on a very significant scale were committed against the people of Kosovo.

18. The second reason for recalling 1989, and the passage of 20 years since then, is to note how long it took to secure the measure of stability that we now have, and how this was achieved. The Serbian tanks in front of the Kosovo Assembly building were followed by ten years of trauma. After this came almost a decade of a search for a solution. This was not a search for a quick fix. It was rather a search for an enduring accommodation. This aspect was addressed in detail in our Written Statement, and I adopt the analysis set out therein.

19. Mr. President, Members of the Court, the third reason for recalling 1989, and the 20 years that have passed since then, is to look to the future. We are almost two years from Kosovo's independence. Kosovo is at peace today. This stability flows from Kosovo's independence. As Bulgaria noted in its submissions before the Court, a failure, in 2007-2008, to unblock the dispute over Kosovo's status would have led to a stalemate with severe consequences for the region as a whole[13]. Croatia observed that it considered that its recognition of Kosovo's independence contributed to the creation of conditions for peace and stability in the region[14]. We hope that the next ten years will bring a stable and brighter future than the two decades that have gone before.

Resolution 1244 (1999)

20. Mr. President, Members of the Court, I turn to resolution 1244 (1999). A number of States speaking before you have recalled that they were members of the Security Council in 1999 at the time of the adoption of resolution 1244 (1999). Argentina has made the point, and Brazil. China and Russia, as two of the permanent members, were of course closely involved in the process. The United States was also engaged, and France, and the Netherlands and Slovenia, all of which have also presented their views to the Court on the interpretation of the resolution. The United Kingdom was also intimately involved in the process.

21. Given the submissions before you, there is no escaping the point that there are duelling appreciations of what resolution 1244 (1999) meant.

22. What there can be no dispute about, however, is the words on the page. Those words do not prohibit Kosovo's independence. The disagreement comes down to what some contend must be implied into the resolution. It is also about the way forward when the political process contemplated by the resolution reached an unbridgeable impasse.

12 Written Statement, para. 1.12.
13 CR 2009/28, p. 18, para. 2.
14 CR 2009/29, p. 51, para. 6.

23. In saying this, I must emphasize that the United Kingdom did not come to support independence for Kosovo quickly or easily. Kosovo independence was not our default or presumed appreciation. The status-neutral character of the resolution was clear. It did not preordain any outcome. But, importantly, nor did it preclude any outcome.

24. In essence, resolution 1244 (1999) did four things. It adopted measures to secure and maintain an end to violence in Kosovo. It established interim institutions to ensure conditions for peace and normal life for all inhabitants in Kosovo. It established an interim framework based on substantial self-government for Kosovo taking full account of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. And it put in train a political process designed to determine Kosovo's future status.

25. This differentiation between the interim phase and the political process is most clearly illustrated by paragraphs 11 (a) and 11 (e) of the resolution. Our good friends and colleagues, Romania, commented on this earlier today. Paragraph 11 (a) addresses substantial autonomy and self-government in Kosovo, pending a final settlement, and taking full account of Annex 2 of the resolution and the Rambouillet Accords. The reference to Annex 2 of the resolution addresses the principle of sovereignty and the territorial integrity of the Federal Republic of Yugoslavia during the interim period. In contrast to subparagraph (a), subparagraph 11 (e) uses different language when addressing the political process designed to determine Kosovo's future status. Here, there is no reference to Annex 2 and the language of territorial integrity of the Federal Republic of Yugoslavia. The reference is simply to the Rambouillet Accords.

26. Both Spain and Russia addressed these provisions in their oral submissions[15]. Romania made more detailed submissions on this this morning. They failed, however, to address the clearly intentional decision to exclude reference to Annex 2 as an element to be taken into account in the political process designed to determine Kosovo's future. As you have heard in these proceedings, Rambouillet was based on the Hill final draft, which also excluded any Serbian right of veto to the permanent status outcome. We endorse Professor Murphy's analysis of this process last week. I note also that resolution 1244 (1999) did not reaffirm the Security Council's earlier resolutions. It simply recalled them.

27. My purposes in making this point are three: first, to emphasize that resolution 1244 (1999) contemplated two processes, an interim process and a political process designed to determine Kosovo's future, and that these processes were addressed differently in the resolution; second, to highlight that, in line with the appreciation that everything was open for discussion, the territorial integrity of the Federal Republic of Yugoslavia was quite explicitly not a cornerstone of the political process; and, third, to emphasize that the resolution did not do what i could have done, had this been in the minds of the members of the Council. It neither precluded Kosovo's independence nor required Serbia's consent to such a development.

28. In the face of the unbridgeable impasse in the political process, the question was how resolution 1244 (1999) was properly to be construed and applied. On this, our analysis was, and remains, clear. The resolution was status neutral, neither scripting independence nor precluding it. Exhaustive efforts had been made by the international community, over an eight-year period, to secure an agreed solution. Those efforts had not been successful. They had, however, culminated in a carefully considered recommendation by the United Nations Secretary-General's Special Envoy in favour of independence. There was nothing in the resolution which either precluded independence in these circumstances or required Serbia's consent.

29. Mr. President, as others have said before us, there was a moment after Kosovo's Declaration of Independence when the Security Council might have addressed Kosovo's independence. It did not do so. The legality of the Declaration of Independence was not impugned by the Secretary-General. Nor

15 CR 2009/30, respectively pp. 13-14, paras.24-26, and p. 47, paras. 36-40.

was it impugned by the Secretary-General's Special Representative. These developments, or rather their absence, bolster our assessment that Kosovo's Declaration of Independence was not precluded by resolution 1244 (1999).

30. Mr. President, Members of the Court, before I hand over to Professor Crawford, let me conclude by saying that we do not see these proceedings as adversarial to Serbia. The past two decades have witnessed considerable trauma in the Balkans. Stability is fragile and needs to be protected, for the benefit of all of the peoples in the region. Serbia's democracy is not much older than Kosovo's. And, in the endeavour of enhancing stability and prosperity in the region, Serbia is an important partner with whom we are engaging in friendship and co-operation. We look forward to enhancing that co-operation, even as we seek, even through this legal process, to put the remaining ghosts of the past to rest. In his opening remarks, Foreign Minister Hyseni observed that "the common future for both Kosovo and Serbia lies in eventual membership for both States in the European Union"[16]. The United Kingdom supports that vision and we will continue to work towards its realization.

31. Mr. President, with your permission, I would now like to ask Professor Crawford toaddress the second point that will be central to the Court's deliberations. Together with the American Declaration of Independence, his text has probably been the most widely quoted in these proceedings.

Mr. CRAWFORD:

DECLARATIONS OF INDEPENDENCE UNDER INTERNATIONAL LAW

The question before the Court

1. Mr. President, Members of the Court, according to Serbia, the question you are asked "is a narrow one inasmuch as it deals with the UDI and does not address related, but clearly distinct issues, such as recognition"[17]. Correspondingly it says that the legality of Kosovo's Declaration must be assessed as at 17 February 2008[18]. In short, Serbia wants this Court to condemn the Declaration of Independence in isolation, and to condemn it as such.

2. But Serbia's focus on the Declaration and on 17 February is misleading. Recognition and other "clearly distinct issues" was precisely what its presentation was about. Professor Zimmermann discussed recognition[19]. Professor Shaw did likewise[20]: he also included in the question the requirements of statehood[21]. And you have heard how, this morning, our Romanian friends had to completely rewrite the question in order to give the answer they wanted to it.

3. In fact, Serbia's focus on the Declaration of 17 February is a sleight of hand. Serbia wants the Court to say one historical thing so that it can say another current thing. It wants to draw conclusions from your answer about 17 February, conclusions that relate to the position now - while withholding from your jurisdiction the many events subsequent to that date which are a necessary part of any assessment. In other words, it wants you to judge the book of Kosovo without reading the later chapters - while nonetheless asserting that it will follow from your ruling, confined to the Declaration of 17 February, that all subsequent steps, including recognition, are unlawful. You heard counsel for Serbia cite Sir Hersch Lauterpacht in support of the principle ex injuria jus non oritur[22]. The injuria that Serbia refers to is the

16 CR 2009/25, p. 9, para. 13.
17 CR 2009/24, p. 41, para. 17 (Djerić).
18 Serbia R2/518-522.
19 CR 2009/24, pp. 51-52, paras. 8-16 (Zimmerman).
20 CR 2009/24, pp. 73-74, paras. 28-32 (Shaw).
21 CR 2009/24, p. 74, para. 33 (Shaw).
22 CR 2009/24, p. 88, para. 30 (Kohen), citing H Lauterpacht, Recognition in International Law (Cambridge, CUP, 1948) 421.

Mr. Daniel Bethlehem QC, Legal Adviser to the Foreign and Commonwealth Office, Representative of the United Kingdom of Great Britain and Northern Ireland, Counsel and Advocate.

Declaration of Independence. The injuria Lauterpacht was referring to was the invasion of Manchuria; in the following paragraph he referred to the annexation of Ethiopia. These were acts in international relations which were contrary to the most fundamental norms of the time in response to which the international community articulated the Stimson doctrine of non-recognition. They are quite unlike the present case.

4. Lauterpacht's own view of declarations of independence was precisely the opposite. I quote:

"International law does not condemn rebellion or secession aiming at acquisition of independence. The formal renunciation of sovereignty by the parent State has never been regarded as a condition of the lawfulness of recognition."[23]

5. Mr. President, Members of the Court, I am a devoted but disgruntled South Australian. "I hereby declare the independence of South Australia." What has happened? Precisely nothing. Have I committed an internationally wrongful act in your presence? Of course not. Have I committed an ineffective act? Very likely. I have no representative capacity and no one will rally to my call. But does international law only condemn declarations of independence when made by representative bodies and not, for example, by military movements? Does international law only condemn declarations of independence when they are likely to be effective? It simply does not make any sense to say that unilateral declarations of independence are per se unlawful-yet no State in this case has suggested that general international law contains any more limited prohibition of such declarations; and none has been articulated in any of the sources of the law.

23 Ibid., 8-10.

6. The reason is simple. A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community. That reaction may take time to reveal itself. But here the basic position is clear. There has been no condemnation by the General Assembly or the Security Council; there have been a substantial number of recognitions.

This is all in sharp contrast to cases where there has been a fundamental breach of international law in the circumstances surrounding the attempt to create a new State- as with the Bantustans, Southern Rhodesia, Manchukuo or the TRNC. In such cases the number of recognitions can be counted on the fingers of one hand, whether or not it is clapping.

7. In this context it must be stressed that international law has an institution with the function of determining claims to statehood. That institution is recognition by other States, leading in due course to diplomatic relations and admission to international organizations. A substantial measure of recognition is strong evidence of statehood, just as its absence is virtually conclusive the other way. In this context, general recognition can also have a curative effect as regards deficiencies in the manner in which a new State came into existence.

8. In common with many others who have appeared before you[24], the United Kingdom stresses that the Court has been asked a specific question. That question is intelligible and non-contradictory. Its proponent, Serbia, insisted on its formulation in the face of comments from the United Kingdom and others that it was the wrong question[25]. The question having been asked in those terms should be answered in those terms.

Illegality of declarations of independence as such- where is the evidence?

9. Mr. President, Members of the Court, it is said that declarations of independence are, as such, unlawful. Historically, they were the main method by which new States came into existence. Since when, and by what legal processes, have they been outlawed?

10. Let us look at the sources of international law enumerated in Article 38 (2). No one has said that Kosovo's Declaration is prohibited by a particular treaty, comparable to the Cyprus Treaty of Guarantee which forbids separation of any part of Cyprus[26]. So that source of law is not at issue.

11. What about a general practice accepted as law? A prohibition on secession is certainly not to be found in pre-1919 international law.

24 Anti-Declaration States: CR 2009/24, p. 41, para. 17 (Djerić, Serbia); CR 2009/30, p. 9, para. 7 (Escobar Hernández, Spain); CR 2009/30, pp. 40-41, para. 4 (Gevorgian, Russian Federation). Pro-Declaration States: CR 2009/25, p. 14, para. 5 (Wood, Kosovo); CR 2009/25, p. 63, para. 71 (Murphy, Kosovo); CR 2009/26, p. 10, para. 7 (Frowein, Albania); CR 2009/26, p. 25, para. 4 (Wasum-Rainer, Germany); CR 2009/28, p. 23, paras. 18-20 (Dimitroff, Bulgaria); CR 2009/29, p. 52, para. 10 (Metelko-Zgombić, Croatia); CR 2009/29, pp. 67, 69, 72 (Winkler, Denmark); CR 2009/30, pp. 23, 36-38, paras. 2-3, 35-40 (Koh, USA). See also Argentina, which urges consideration of wider issues, but concedes that the question is not of the type concerning "'les conséquences juridiques' d'une situation donnée", CR 2009/26, p. 49, para. 36 (Ruiz Cerutti, Argentina). And see also Burundi, CR 2009/28, pp. 29-30 (no para. nos.) (d'Aspremont, Burundi): "L'accent mis sur la conformité au droit international montre très clairement que c'est une question de légalité qui est posée à la Cour. Il n'est donc nullement demandé à la Cour de se prononcer sur la question de savoir si le Kosovo constituait un Etat au jour de la déclaration d'indépendance ou au moment de la requête pour avis consultatif." (Emphasis in original.)

25 See Written Statement of the United Kingdom, pp. 19-20, paras. 1.3-1.5.

26 Treaty of Guarantee (Cyprus-Greece-United Kingdom-Turkey), 16 Aug. 1960, 382 UNTS 2. See also Treaty of Alliance (Cyprus-Greece-Turkey), Art. II, 16 Aug. 1960, 397 UNTS 287

12. Nor did the position change after 1919. The Aaland Islands Commissioners denied that any national group had the right "to separate themselves from the State of which they form part by the simple expression of a wish"[27], but there was no suggestion that international law made this expression of a wish into an internationally wrongful act.

13. Under the Charter too, the position did not change. In order to guarantee the territorial integrity of States, the Charter prohibited threat or use of force against the territorial integrity of Member States, but this prohibition is directed at other States. The Charter says nothing as to the lawfulness or otherwise of declarations of independence adopted by groups or peoples within a State.

14. State practice since 1945 has been consistent with the earlier position. To take the region in issue here, the events in the early 1990s in Yugoslavia were the subject of close scrutiny but neither the United Nations nor the European Union treated the multiple declarations of independence as themselves violative of international law[28]. They may or may not have been affected, but that is a different thing. Similarly with the Badinter Committee[29].

15. Nor is there any indication of such a prohibition as a general principle of law.

16. I turn to judicial decisions and the opinions of jurists. Issues of statehood have only occasionally arisen before you. But in dealing with Bosnia and Herzegovina you have not suggested that the declarations of independence were internationally unlawful; you simply cited them as facts[30]. But there is a precedent: the Quebec reference to the Canadian Supreme Court. There was a major difference in that case. Question 2 concerned whether Quebec had "the right to effect the secession of Quebec from Canada unilaterally"; here the question is whether Kosovo's Declaration of Independence was unlawful under international law. But one cannot have a right to do that which it is unlawful to do, and the Supreme Court proceedings and opinion are thus relevant here.

17. Seven international law experts gave evidence to the Supreme Court. Yet none of them suggested that there was such a rule. For example, Professor Abi-Saab -who cannot be accused of insensitivity to the concerns about the stability of developing States - said: "[W]hile international law does not recognize a right of secession outside the context of self-determination, this does not mean that it prohibits secession. The latter is basically a phenomenon not regulated by international law . . . it would be erroneous to say that secession violates the principle of the territorial integrity of the state, since this principle applies only in international relations . . . it does not apply within the state."[31]
And that was written on behalf of Quebec.

27 Report of the Commission of Jurists (Larnaude, Huber, Struycken), League of Nations Special Supplement No. 3 (Oct. 1920), pp. 5-6.

28 E.g., CR 2009/30, p. 24, para. 4 (Koh, USA); CR 2009/30, p. 55, paras. 8-9 (Kaukoranta, Finland).

29 See, e.g., respecting Croatia, Opinion No. 5 (11 Jan. 1992), 92 ILR 179, 180; respecting Slovenia, Opinion No. 7 (11 Jan. 1992), 92 ILR 188, 189. States noting that the Declarations of Independence of Slovenia and Croatia attracted no international censure: CR 2009/30, p. 29, para. 16 (Koh, USA); CR 2009/30, p. 55, para. 9 (Kaukoranta, Finland); CR 2009/27, pp. 10-11, para. 18 (Tichy, Austria). See also CR 2009/29, pp. 60-61, para. 49 (Metelko-Zgombić, Croatia) (noting that the Badinter Commission did not treat the Declarations of Independence as unlawful).

30 See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), pp. 604-605, para. 14. Yugoslavia's third and fourth preliminary objections asserted the unlawfulness of Bosnia and Herzegovina's "acts on independence" and declaration of independence. The fourth preliminary objection was eventually withdrawn; the third the Court rejected, fourteen votes to one (ibid., p. 623, para. 47).

31 Ibid., pp. 72-73.

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate. (United Kingdom)

18. The lamented Professor Thomas Franck said:

"[S]ecession is a well-known means of achieving statehood. It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession . . . [T]he law imposes no duty on any people not to secede."[32]
Those propositions were expressly accepted by the experts for Canada[33]. All the experts agreed[34].

19. So too did the Supreme Court, in its unanimous opinion, though speaking in the context,as I have said, of a right to secede. Under the heading "Absence of a Specific Prohibition" it said: "International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination . . ."

International law contains neither a right to unilateral secession nor the explicit denial of such a right - and the quote then went on with the passage which my friend Mr. Dinescu quoted this morning, without quoting the introductory words. It is true that the Court emphasized the principle of territorial integrity to which I will revert, but the point is that international law, according to the Court, properly informed, while disfavouring secession, does not prohibit it. Except in extreme cases there is no "right of unilateral secession" but nor is there the "explicit denial of a right".

32 Ibid., p. 79; emphasis in original.

33 See Crawford, "Response to Experts Reports of the Amicus Curiae": ibid., p. 159, para. 9, pp. 160-161, paras. 13-14.

34 Reprinted in Anne Bayefsky (ed.), Self-Determination in International Law. Quebec and Lessons Learned (Kluwer, The Hague, 2000); George Abi-Saab, "The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law," Pt. III, p. 72; Christine Chinkin, 233 ff; James Crawford, "Response to Experts Reports of the Amicus Curiae", p. 159, para. 9, p. 160, para. 13; Thomas M. Franck, "Opinion Directed at Question 2 of the Reference", para. 2.9, p. 78, "Opinion Directed at Response of Professor Crawford and Wildhaber", pp. 179-180, paras. 3-4, p. 181, para. 8; Alain Pellet, "Legal Opinion on Certain Questions of International Law Raised by the Reference", p. 122, para. 44, "Legal Opinion on Certain Questions of International Law Raised by the Reference", p. 212; Malcolm Shaw, "Re: Order in Council PC 1996-1497 of 30 September 1996", p. 136, para. 43, "Observations Upon the Response of Professor Crawford to the Amicus Curiae's Expert Reports", p. 221, para. 24.

20. Moreover the Supreme Court was acutely aware of the possibility of international recognition, if Quebec had declared its independence, even though it had no right to secede in the first place[35].

21. Turning to that other element of Article 38 (2) (d), la doctrine, it is instructive to search standard texts for the proposition that declarations of independence are unlawful and cannot be validly recognized. It is not to be found in the sixth edition of Shaw, the eighth edition of Brownlie or the ninth edition of Oppenheim edited by Jennings and Watts[36]. It is not in the eighth edition of Dallier, Forteau and Pellet[37]. Instead these books contemplate the continued possibility of secession. For example Malcolm Shaw -to take a random example - says:

"There is, of course [there is, of course], no international legal duty to refrain from secession attempts: the situation remains subject to the domestic law. However, should such a secession prove successful in fact, then the concepts of recognition and the appropriate criteria of statehood would prove relevant and determinative as to the new situation."[38]

I particularly like the phrase "of course".

22. To conclude, there is no basis for asserting a new rule of international law prohibiting declarations of independence as such.

Why does international law not condemn declarations of independence as unlawful?

23. Mr. President, Members of the Court, in principle that should complete my task; international law does not regulate declarations of independence as such, and there is nothing in the surrounding circumstances, including resolution 1244, to impose any contrary obligation.

24. But it is worth exploring the reasons why international law takes this position. The first of them is that international law does not attempt to regulate - in the manner of Article 2 (4) of the Charter - the course of conflicts within a State. It is difficult enough to regulate inter-State conflict, as the Court is only too well aware.

25. A second reason is a formal one. Professor Shaw sought support for his submission that international law does prohibit declarations of independence by relying on the general category of subjects of international law. Waving in the direction of international human rights law, he implied that we are all subjects now[39]. But as you pointed out in the Reparation case, to be a subject of international law says

35 Reference re Secession of Quebec, 1998, 2 SCR 217, para. 142; Bayefsky, pp. 500-501.

36 Oppenheim's International Law, 9th ed., Harlow: Longman, 1992, Sec. 276, p. 717: "Revolt followed by secession has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition. The question at what time a loss of territory through revolt is consummated cannot be answered once and for all, since no hard and fast rule can be laid down regarding the time when a state which has broken off from another can be said to have established itself safely and permanently. It is perhaps now questionable whether the term revolt is entirely a happy one in this legal context. It would seem to indicate a particular kind of political situation rather than a legal mode of the loss of territorial sovereignty. If a revolt as a matter of fact results in the emergence of a new state, then this is the situation [of acquisition of territory by the new state]."

37 Droit International Public, 8th ed., Paris: Lextenso éditions, 2009, Sec. 344, p. 585: "S'opposent également les environnements juridiques des deux phénomènes: alors que le droit international réglemente aujourd'hui de façon très précise le processus de décolonisation, la sécession n'est pas prise en compte en elle-même par le droit international. Elle l'est seulement en tant que perturbation des relations internationales, sous l'angle de la belligérance et de l'insurrection . . . La pratique confirme en général ce 'désengagement' du droit international en la matière. Quelle que soit sa légalité au plan interne, la sécession est un fait politique au regard du droit international, qui se contente d'en tirer les conséquences lorsqu'elle aboutit à la mise en place d'autorités étatiques effectives et stables."

38 Malcolm Shaw, International Law, 6th ed., Cambridge: Cambridge University Press, 2008, p. 218; emphasis added.

39 CR 2009/24, p. 66, para 8 (Shaw).

nothing at all about the content of your rights and duties[40]. It would be odd if human groups were given status as subjects precisely to deny them capacity to become really effective subjects, that is, States. That irony is replicated at the level of Kosovo. When Serbia actually controlled Kosovo, it eliminated its constitutional status, it went close to expelling its population: after lawfully losing control, in the aftermath of resolution 1244, it now seeks to elevate Kosovo into a subject of international law -but only in order to regain the sovereignty it so signally abused.

26. The third reason relates to the principle of territorial integrity. Territorial integrity is not a trump card which overrides or negates the rest of established international law. It applies, in the context of instruments such as the Friendly Relations Declaration, to relations between States. Its primary function is the protection of the State from external intervention; it is not a principle which determines how the State shall be configured internally, still less is it a guarantee against change. True, when new rights are announced in international law - such as the rights of indigenous peoples[41] - great care is taken to ensure that this is not understood as an authorization to secede. But the question before you is not phrased in terms of authorization.

Summary of the law on declarations of independence

27. Mr. President, Members of the Court, during the course of these proceedings a number of governments have cited my work on secession in support of what you will already have realized are apparently contrasting conclusions[42]. I hope I can be forgiven, by way of summary, for setting the record straight. The relevant passage reads: "It is true that the hostility by all governments to secession in respect of their
own territory has sometimes led to language implying that secession might be contrary to international law . . . But this language does not imply the existence of an international law rule prohibiting secession . . . The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."[43]

28. The text goes on to emphasize that this position of legal neutrality is accompanied by deference to the territorial sovereign and a reluctance to accept secession unless there is no other alternative. That is why the doomsday scenarios of which you have been told do not reflect reality. The crucial point here, however, is that this reluctance does not mean either that declarations of independence are internationally unlawful, nor does it take the form of a general prohibition. It is still a matter for States, through their recognition practice, and international organizations through their admission practice, to consider each case in the light of the circumstances. What Serbia cannot do is to treat 17 February 2008 as a critical date, exclude all developments and responses thereafter, and pretend that international law definitively determined the status of Kosovo on that day. As I have shown, it did not.

Self-determination (including "remedial secession")

29. Mr. President, Members of the Court, finally, I should say a word about the right of self-determination. If it were necessary to find an authorization — an express authorization — in international law for the independence of Kosovo, then it would be necessary for the Court to address this question. But it is not necessary for you to find an authorization in order for you to answer the question, as I have shown. If the Court finds that the Declaration of 17 February 2008 was not, as such, contrary to international law, it need not reach the issue of self-determination. In fact, as the pleadings before you have shown, there is

40 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 178-180.

41 See, e.g., CR 2009/24, p. 67, para. 11 (Shaw, Serbia), citing Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295, 13 Sep. 2007, Art. 46.

42 CR 2009/24, pp. 79-80, para. 10 (Kohen, Serbia); CR 2009/26, p. 39, para. 10, p. 45, para 24 (Ruiz Cerutti, Argentina); CR 2009/27, p. 19, paras. 18-19 (Mehdiyev, Azerbaijan); CR 2009/28, p. 31 (d'Aspremont, Burundi).

43 James Crawford, The Creation of States in International Law, 2nd ed., Oxford, OUP, 2006, pp. 389-390.

considerable support for the exercise of self-determination outside the colonial context. And that position is tentatively put forward in the book from which I have quoted. For example, common Article 1 of the two Human Rights Covenants does not limit self-determination to colonial cases but articulates a general right, which must have some content, especially in extremis.

30. Remedial self-determination was left open by the Canadian Supreme Court which did not need to decide it, given the advanced position of Quebec within Canada[44]. But you would need to decide it before you could answer the question in the negative, against Kosovo. I stress that Quebec has never had its distinct status negated and then constitutionally denied, nor two thirds of its people chased violently from their homes and lands.

Mr. President, Members of the Court, that concludes the United Kingdom's presentation.

Thank you for your patient attention.

44 Reference re Secession of Quebec, [1998] 2 SCR 217, para. 135; reprinted in Bayefsky (ed.), pp. 499-500.

The United States of America

The United States of America is represented by:

Mr. Harold Hongju Koh, Legal Adviser, U.S. Department of State, as Head of Delegation and Advocate;

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Mr. Todd F. Buchwald, Assistant Legal Adviser for United Nations Affairs, U.S. Department of State,
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The PRESIDENT: I shall now give the floor to Mr. Harold Hongju Koh, to make the oral statement on behalf of the United States of America.

Mr. HONGJU KOH:

1. Mr. President, honourable Members of the Court, it is a great honour to appear before you today on behalf of the United States of America, a nation born of a declaration of independence more than two centuries ago, to urge this Court to leave undisturbed the Declaration of Independence of the people of Kosovo.

2. The United States appears today as a friend of both Serbia and Kosovo. The people of the United States share a bond of friendship with the people of Serbia marked by co-operation in two world wars and long-standing political and economic ties that date back at least to the bilateral Treaty of Commerce of 1881. Our relationship with the people of Kosovo, strengthened through crisis these last two decades, continues to grow. That said, our sole task today is to address the narrow legal question before this Court.

3. Over the past week, those pleading before you have discussed a broad range of issues, including the validity of recognitions of Kosovo, the effectiveness of the United Nations, the legality of military actions in 1999, and the potential responsibility of non-State actors for internationally wrongful acts. Yet the precise question put to this Court is much narrower: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The

Members of the delegation of the United States of America.

answer to that question, we submit, is: Yes. For as a general matter, international law does not regulate declarations of independence, nor is there anything about Kosovo's particular Declaration that would render it not "in accordance with international law"[1]. Standing alone, a declaration neither constitutes nor establishes political independence; it announces a political reality or aspiration that must then be achieved by other means. Declaring independence is fundamentally an act of popular will - a political act, made by a body politic, which other States then decide whether to recognize or not[2].

4. To say that international law does not generally authorize or prohibit declarations of independence signals no lack of respect either for international law or for the work of this Court. Rather, such a statement merely recognizes that international law does not regulate every human event, and that an important measure of human liberty is the freedom of a people to conduct their own affairs. In many cases, including Kosovo's, the terms of a declaration of independence can mark a new nation's fundamental respect for international law. As our own Declaration put it, a "decent respect to the Opinions of Mankind" dictates "that facts be submitted to a candid world".

Of the more than 100 declarations of independence issued by more than half of the countries in the world[3], we know of none that has been held by an international court to violate international law. We submit that this Court should not choose Kosovo's Declaration of Independence as the first case for such unprecedented judicial treatment. For few declarations can match the political legitimacy of Kosovo's peaceful declaration, which issued from a body representing the will of the people, which was born of a successful, decade-long United Nations effort to bring peace and security to the Balkans region, and reflected the capacity of the people of Kosovo to govern themselves. As the principal judicial organ of the United Nations, this Court should decline the invitation to undo the hard work of so many other parts of the United Nations system, potentially destabilizing the situation and unravelling the gains so painstakingly achieved under resolution 1244[4].

1 Written Statement of the United States of America ("US Statement"), pp. 50-55.
2 Id., pp. 51-52.
3 David Armitage, The Declaration of Independence: A Global History 3, 20 (2007).
4 See Written Comments of the United States of America ("US Comments"), pp. 3-4.

5. Mr. President, a careful consideration of the pleadings before this Court compels three conclusions, which will structure the rest of my presentation:

- First, Kosovo's Declaration of Independence brought a necessary and stabilizing end to a turbulent chapter in the history of the Western Balkans, and made possible a transition to a common European future for the people of Kosovo and their neighbours. The real question this Court faces is whether to support reopening of this tragic past or whether instead to let Kosovo and Serbia look forward to this more promising future.

- Second, as a legal matter, there is no inconsistency between Kosovo's peaceful Declaration of Independence and principles of international law, including Security Council resolution 1244. Like others attending these proceedings who participated in these historical events, I attended the Rambouillet negotiations as United States Assistant Secretary of State for Democracy, Human Rights and Labor, and observed the great pains taken to respect international law and to preserve human rights throughout the lengthy diplomatic negotiations that led to resolution 1244, and ultimately to Kosovo's Declaration. We respectfully submit that a Security Council resolution drafted with such an intent did not give birth to a declaration of independence that violates international law.

- Third, and finally, we question whether this case - which involves an unprecedented referral of a narrow, anomalous question - marks the appropriate occasion for this Court to exercise its advisory jurisdiction. But should the Court decide that it must render an advisory opinion, the Court would best be served by answering that narrow question in the affirmative: Kosovo's Declaration of Independence is in accordance with international law.

I. KOSOVO'S DECLARATION OF INDEPENDENCE

6. Mr. President, you have now heard many times the story of Kosovo's Declaration of Independence and the trauma from which it was born. That Declaration was the product of not one, but three overlapping historical processes, which did not preordain Kosovo's Declaration, but do help to explain it - the disintegration of Yugoslavia; the human rights crisis within Kosovo; the United Nations response.

7. First, from the Bosnia case, this Court knows well the painful story of the Yugoslav process: the rise of Serb nationalism in the 1980s, followed by the break-up first of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991-1992, then of the Federal Republic of Yugoslavia (FRY) more than a decade later. You know of the successive independence of Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and, finally, of Kosovo[5].

8. Second, you have heard about Kosovo's internal process: the grim, well-chronicled background of atrocities and ethnic cleansing; how the people of Kosovo suffered years of exclusion from public facilities and offices; how some 10,000 people were killed in State-sponsored violence, how 1 million people were driven from the territory, and how the people of Kosovo developed self-government over nearly ten years of separation from Belgrade. You know of the dramatic escalation of oppression by Belgrade in the late 1990s; of the atrocities that were recorded by the United Nations and human rights organizations; of the unsuccessful attempt to achieve a solution acceptable to both Serbia and Kosovo at Rambouillet; of the brutal campaign of ethnic cleansing launched by Belgrade against ethnic Albanians in the spring of 1999; and of the eventual adoption of Security Council resolution 1244 in June of that year[6].

9. Third, the Declaration at issue did not happen spontaneously; it emerged only after an extended United Nations process, in which a United Nations administration focused on developing Kosovo's self-governing institutions, and a sustained United Nations mediation effort exhausted all available avenues for a mutually agreed solution, before finally concluding - in Martti Ahtisaari's words - that "the only viable option for Kosovo is independence"[7].

5 See US Statement, pp. 8-9, 77-78.

6 See ibid., pp. 8-22.

7 Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 Mar. 2007, para. 5; em-

10. By adopting resolution 1244, the Security Council sought to create a framework to promote two goals. The first was to protect the people of Kosovo, by building an interim environment where they would be protected by an international security presence - the NATO-led KFOR - and where they could develop political institutions free from Belgrade's coercion under an international civil presence in the form of UNMIK[8]. Second, the resolution authorized the international civil presence to facilitate a political process designed to determine Kosovo's future status, but only at a later stage[9].

11. This United Nations umbrella and game plan provided critical breathing space for Kosovo to stabilize and develop effective Provisional Institutions of Self-Government (PISG): an elected assembly, a president, a prime minister, ministries and a judiciary[10]. UNMIK steadily devolved authority to those Kosovo institutions, allowing the people of Kosovo to rule themselves free from Belgrade's influence[11]. In 2005, the Secretary-General's Special Envoy Kai Eide found the status quo unsustainable, which led the United Nations Security Council to launch a political process, led by Special Envoy Martti Ahtisaari, to determine Kosovo's future status[12]. But after many months of intensive negotiations involving all interested parties, Special Envoy Ahtisaari concluded in March 2007: (1) that even with autonomy, Kosovo's reintegration with Serbia was "simply not tenable"; (2) that continuing interim administration without resolving Kosovo's future status risked instability; and (3) that further efforts to find common ground between Kosovo and

Serbia were futile[13]. In Mr. Ahtisaari's words, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted", and "[n]o amount of additional talks, whatever the format, will overcome this impasse"[14]. Going forward, the Envoy concluded, "the only viable option for Kosovo is independence, to be supervised for an initial period by the international community"[15].

12. While some in these proceedings have questioned the integrity and impartiality of the Special Envoy, a most distinguished Nobel Laureate, the Secretary-General confirmed his full support for the Special Envoy's recommendations, having himself, in the Secretary-General's words, "taken into account the developments in the process designed to determine Kosovo's future status"[16]. The entire Contact Group "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable"[17]. And the Council of the European Union - including even those members who would later decline to recognize Kosovo's independence - expressed its "full support" for the Special Envoy and "his efforts in conducting the political process to determine Kosovo's future status"[18].

13. Nevertheless, a "Troika" of senior negotiators was charged to make a last-ditch effort to find a negotiated solution[19]. According to their report, the Troika "left no stone unturned in trying to achieve

phasis added, Dossier No. 203; see also United States Statement, pp. 22-32.

8 See US Statement, pp. 19-20.

9 See ibid., pp. 20-21.

10 See ibid., p. 23.

11 See ibid., p. 24.

12 See ibid., pp. 25-26.

13 See Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 Mar. 2007, paras. 3-9, 16, Dossier No. 203.

14 Ibid., paras. 3, 5.

15 Ibid., para. 3; emphasis added.

16 See Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, attaching Report of the Special Envoy of the Secretary-General on Kosovo's Future State, S/2007/168, 26 Mar. 2007, Dossier No. 203; see also United States Statement, p. 30.

17 Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 Dec. 2007, Ann. 3 (Statement on Kosovo by Contact Group Ministers, New York, 27 Sep. 2007), Dossier No. 209.

18 Council of the European Union, 2756th External Relations Council Meeting of 16-17 October 2006, para. 6, available at http://www.westernbalkans.info/upload/docs/91337.pdf.

19 See US Statement, p. 31.

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a negotiated settlement of the Kosovo status question"[20]. But when those Troika talks also reached impasse, Kosovo's elected leaders consulted widely and, on 17 February 2008, issued their Declaration announcing Kosovo as "an independent and sovereign state"[21].

14. Like many declarations of independence, Kosovo's Declaration was a general manifesto, published to all the world, that affirmed the new State's commitments as a member of the international community. The Declaration accepted the obligations in the Ahtisaari Plan, and announced Kosovo's desire for friendship and co-operation with Serbia and all States[22].

15. Today, nearly two years later, we see that the Declaration of Independence was the ultimate product of all three processes I have described: it brought closure to Yugoslavia's disintegration; it enshrined human rights protections for all communities within Kosovo; and it broke the impasse in the United Nations process. Yesterday (CR 2009/29), counsel for Cyprus colourfully but inaptly suggested that the United Nations Security Council was involved in the "amputation" of Kosovo and the "dismemberment" of Serbia. But Cyprus never mentioned that Kosovo became independent not because of unilateral, brutal United Nations action, but through the interaction between a United Nations process that helped end brutality, and the parallel processes of Yugoslavia's disintegration and increasing Kosovo self-governance.

16. The simple fact is that resolution 1244 works. Without preordaining, it permitted Kosovo's independence. Kosovo is now independent and functioning effectively. Kosovo has been recognized by 63 nations, and all but one of its immediate neighbours, including former Yugoslav republics Slovenia,

20 Statement of the Federal Republic of Germany, Ann. 5 (Letter of 5 December 2007 from German Ambassador Wolfgang Ischinger to European Union High Representative Javier Solana).
21 See US Statement, pp. 32-33.
22 See Declaration of Independence, Docket No. 192; US Statement, pp. 33, 56-57.

Croatia, Macedonia, and Montenegro. No fewer than 115 of the world's nations have treated Kosovo as a State, by either formally recognizing it or voting for its admission to international financial institutions. And the 2008 Declaration of Independence has opened the way for a new European future for the people both of Kosovo and the wider Balkans region.

II. LEGAL ARGUMENTS

17. Mr. President, against this reality, Serbia now seeks an opinion by this Court that would turn back time, although doing so would undermine the progress and stability that Kosovo's Declaration has brought to the region. As a legal matter, this Court should find that Serbia's desired outcome is dictated neither by general principles of international law, nor by Security Council resolution 1244.

A. General international law

18. As we detailed in our written pleadings, Kosovo's Declaration of Independence declared a political aspiration, which cannot by itself violate international law. General international law does not as, a general matter, prohibit or authorize declarations of independence[23]. Other nations accept or reject the legitimacy of a declaration of independence by their willingness or refusal to treat the entity as a State: and that test only confirms the legitimacy of Kosovo's Declaration here. But without citing any authority, Serbia asks this Court to adopt the opposite, sweeping rule: that when territory has not been illegally annexed, Serbia claims, the international law principle of territorial integrity prohibits all non-consensual secessions, a fortiori, prohibits all declarations of independence, except where domestic law grants a right of secession or the parent State accepts the declaration before or soon after the secession[24]. Yet as our written filings establish, no such general international law rule bars declarations of independence, nor can there be such ad hoc exceptions to a general rule that does not exist[25].

19. To see that international law does not prohibit declarations of independence simply because they were issued without the parent State's consent, one need look no further than Yugoslavia, where the Slovenian and Croatian declarations of independence initiated Yugoslavia's break-up in 1991. When those declarations issued, Belgrade also declared, wrongly, that both declarations violated both Yugoslav and international law. But today, Belgrade no longer makes those claims. To the contrary, Serbia now asserts that Slovenia's and Croatia's secessions were lawful under international law because they were permitted under Yugoslav domestic law, although Belgrade took precisely the opposite position at the time[26]. In reversing its position, Belgrade nowhere explains how the international law rule in this area

23 See Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in Self-Determination in International Law: Quebec and Lessons Learned, p. 136 (Anne Bayefsky, ed. 2000) ("It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law."); John Dugard and David Raič, "The Role of Recognition in the Law and Practice of Secession", in Secession: International Law Perspectives, p. 102 (Marcelo Kohen, ed. 2006) ("One will search in vain for an explicit prohibition of unilateral secession in international instruments. The same is true for the explicit recognition of such a right."); Daniel Thürer, "Secession", in Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum, ed.) available at http://www.mpepil.com, p. 2 ("International law, thus, does not state conditions of legality of a secession, and neither does it provide for a general 'right of secession'. It does not in general condemn movements aiming at the acquisition of independence, either."); see generally US Statement, pp. 50-55; US Comments, pp. 13-14.

24 Written Statement of the Government of the Republic of Serbia ("Serbia Statement"), para. 943.

25 See US Written Comments, pp. 13-20; see also US Written Statement, pp. 50-55.

26 Compare Written Comments of the Government of the Republic of Serbia ("Serbia Comments"), para. 201 ("With regard to domestic law, some constitutions provide for a right to secession, as it was the case of the S.F.R.Y., only with regard to the six constituent nations"), with Stands and Conclusions of the S.F.R.Y. Presidency Concerning the Situation in Yugoslavia, 27 June 1991 (reprinted in Yugoslavia Through Documents: From Its Creation to Its Dissolution, Snezana Tifunovska (ed.), 1994, p. 305 (describing the Slovenian and Croatian declarations as "anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane").

can turn on a question of domestic law that the international community cannot knowledgeably evaluate. And the second ad hoc exception that Serbia offers - that a parent State can make lawful an unlawful declaration by later acceptance- conflicts with its own arguments in these proceedings: that the illegality of a declaration cannot be cured by subsequent events.

20. Neither did Kosovo's Declaration violate the general principle of territorial integrity. For that basic principle calls upon States to respect the territorial integrity of other States. But it does not regulate the internal conduct of groups within States, or preclude such internal groups from seceding or declaring independence[27]. Citing Security Council resolutions, Serbia claims that the obligation to respect territorial integrity also regulates non-State actors and precludes them from declaring independence, whether peacefully or not. But none of the resolutions it cites support that claim[28]. We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms, such as the prohibition against apartheid. But that is hardly the case here, where those declaring independence did not violate peremptory norms. In fact, Kosovo's Declaration makes such a deep commitment to respect human rights precisely because the people of Kosovo had experienced such egregious human rights abuses.

B. Resolution 1244

21. Mr. President, Kosovo's Declaration of Independence comports not just with general rules of international law, but also with resolution 1244, which - as our written submissions detail -anticipated, without predetermining, that independence might be an appropriate outcome for Kosovo's future status[29].

22. Mr. President, Members of the Court, if you will look with me at the text of resolution 1244, you will see it was overwhelmingly driven by the Council's overriding concern for resolving the humanitarian and human rights tragedy occurring in Kosovo. It demands that the Federal Republic of Yugoslavia "put an immediate and verifiable end to violence and repression in Kosovo" by beginning a verifiable phased withdrawal of security forces on a timetable synchronized with the phased insertion of an international security presence[30]. And the key paragraphs 10 and 11 authorize the establishment of an international civil presence to "[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[31].

23. Serbia claims that 1244's explicit reference to Rambouillet "clearly adopt[ed] the principle of the continued territorial integrity and sovereignty of the F.R.Y. over Kosovo"[32]. But at the time, Serbia claimed the opposite: it called the Rambouillet Accords an "unprecedented attempt to impose a solution clearly endorsing the separatists' objectives"[33]. This is not surprising, because as you heard yesterday from Denmark, a prime objective at Rambouillet was to respect the will of the people of Kosovo. That is why, as we have seen, Rambouillet carefully avoided predetermining any particular political outcome, on the one hand, neither favouring independence, but on the other, never ruling that possibility out.

27 See Georges Abi-Saab, "Conclusion", in Secession: International Law Perspectives, Marcelo Kohen (ed.), 2006, p. 474 ("[I]t would be erroneous to say that secession violates the principle of territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours; it does not apply within the State."); Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996", in Self-Determination in International Law: Quebec and Lessons Learned, Anne Bayefsky (ed.), 2000, p. 136) ("[I]t must be recognized that international law places no analogous obligation [of respect for territorial integrity] upon individuals or groups within states. The provisions contained in the relevant international instruments bind states parties to them and not persons and peoples within states."); see generally US Comments, pp. 15-20.

28 See US Comments, pp. 18-20.

29 See US Statement, pp. 68-79; US Comments, pp. 24-34.

30 See Security Council resolution 1244 (1999), S/RES/1244, para. 3, Dossier No. 34.

31 Ibid., paras. 10, 11; emphasis added.

32 Serbia Statement, para. 784; see also CR 2009/24, p. 71, para. 24 (Shaw, Serbia).

33 See US Statement, pp. 16-17, 65.

24. Nor did anything in resolution 1244's description of the future status process give Serbia a veto over a future Kosovo declaration of independence[34]. To the contrary, the Rambouillet Accords, to which resolution 1244 refers, rejected any requirement that the FRY consent to Kosovo's future status[35]. In the negotiations over the Accords - and the four so-called "Hill Agreements" upon which Rambouillet was modelled -the negotiators rejected any requirement that the Federal Republic of Yugoslavia consent before Kosovo's future status could be finally determined[36]. As Professor Murphy explained last Tuesday (CR 2009/25), the first three drafts of the Hill Agreements would have required the FRY's express agreement to change Kosovo's status at the end of the interim period. But, in the fourth draft of the Hill Agreement, that language was placed in brackets, and no similar requirement for Belgrade's approval of future status appeared in the final version of either the Rambouillet Accords or resolution 1244.

25. Some have claimed during these oral proceedings that the reference in the preamble of resolution 1244 to the "territorial integrity" of the Federal Republic of Yugoslavia proved that the Security Council was foreclosing independence as a possible outcome. During these proceedings, one State that sat on the Security Council at the time suggested that all States understood resolution 1244 to guarantee permanently the "territorial integrity"[37] of the Federal Republic of Yugoslavia. But if that were true, why did the Federal Republic of Yugoslavia protest at the time that the resolution "opens up the possibility of the secession of Kosovo . . . from Serbia and the Federal Republic of Yugoslavia"[38]? And why did nine of the States that were on the Security Council when it adopted resolution 1244- Bahrain, Canada, France, Gambia, Malaysia, Netherlands, Slovenia, the United Kingdom and the United States -later recognize Kosovo, if they had already supposedly voted for a resolution that permanently barred its independence?

26. What Serbia's argument leaves out is the telling silence in resolution 1244, the dog that did not bark. Resolution 1244 said absolutely nothing about the territorial integrity of the Federal Republic of Yugoslavia beyond the interim period. Unlike the previous United Nations Security Council resolutions on Kosovo, resolution 1244 qualifies its reference to territorial integrity with the phrase "as set out in Annex 2". But Annex 2 refers to territorial integrity only in paragraph 8,which in turn describes only the political framework agreement that will cover the interim period. And while the text of 1244 reaffirms the commitment of "member states" not internal groups to the territorial integrity of the FRY, even this it did only during the interim period, without limiting the options for future status[39].

27. As important, the resolution refers not to preserving the territorial integrity of Serbia, but the territorial integrity of the Federal Republic of Yugoslavia, an entity that no longer exists[40]. Even though the resolution required Kosovo to remain within the FRY, it never required Kosovo to remain within "Serbia". To the contrary, as we have explained, the resolution specifically avoided any such implication, to preserve the possibility of what were called at the time "third republic options", under which Kosovo might end up as a third republic within the borders of a three-republic Federal Republic of Yugoslavia, alongside Serbia and Montenegro[41].

34 See US Comments, pp. 32-37.
35 See US Statement, pp. 65-68.
36 See ibid.
37 CR 2009/26, p. 40, para. 12 (Ruiz Cerutti, Argentina).
38 Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6, Dossier No. 33.
39 See US Statement, pp. 68-71; US Comments, pp. 25-29.
40 No one is challenging that Serbia is the legal continuity of the FRY, but the law of State succession does not mean that all references in international documents to a parent are automatically considered to apply to a continuation State. See US Comments, p. 29.
41 See US Statement, pp. 74-78; US Comments, pp. 29-31. Our Written Comments describe Belgrade's desire to avoid this possibility. Belgrade called such proposals "the most perfidious fraud Serbia has ever been exposed to", US Comments, pp. 30-31.

28. Resolution 1244's reference to territorial integrity was further qualified by the resolution's explicit reference, in preambular paragraph 10, not just to Annex 2, which as I have explained applied only during the interim period, but also to the Helsinki Final Act. The Helsinki reference underscored the Security Council's overriding humanitarian concern with protecting civilians, by keeping Kosovo detached from the Serbia that had so harshly oppressed them[42]. Kosovo had famously suffered massive, systematic human rights abuses throughout the decade, which led the FRY to be suspended from participation in the OSCE. And thus, 1244's pointed reference to the Helsinki Final Act underscored that the Security Council was reaffirming the FRY's territorial integrity, not as an absolute principle, but as only one of many principles — including most obviously, Helsinki human rights commitments — that would need to be considered with each principle in the Final Act's words "being interpreted taking into account the others"[43].

29. Serbia and its supporters never specify precisely which words in resolution 1244 they believe that Kosovo violated. But some suggest that Kosovo violated international law by preventing UNMIK from carrying out its mandate under paragraph 11 (e) "to facilitate a political process" designed to determine Kosovo's future status. But that paragraph required only that the international civilian presence facilitate "a" political process not multiple political processes[44]. And by the time that Kosovo declared independence in February 2008, the specific political process envisioned by resolution 1244 had ended. The future status process had run its course, the negotiations' potential to produce any mutually agreed outcome on Kosovo's status had been exhausted. With the Secretary-General's support, the Special Envoy who was charged with determining the scope and duration of that political process had announced that "[n]o amount of additional talks, whatever the format, will overcome this impasse", and the Envoy had specifically declared that the only viable option for Kosovo was independence.

30. In these proceedings, some argue that the effort by some States, including the United States, to secure a new Security Council resolution on Kosovo in July 2007[45] somehow proves that we considered a successor resolution to 1244 legally necessary for Kosovo to become independent. But the draft 2007 resolution, like resolution 1244, was entirely "status-neutral". Its central legal purpose was to terminate UNMIK's operations in Kosovo, as the Ahtisaari Plan had envisioned. Nothing in the draft resolution would have decided on, or even endorsed a recommendation for, Kosovo's independence. Its non-enactment meant only that adjustments would be needed in the roles of UNMIK and the international actors envisioned in the Ahtisaari Plan. If anything, the success of the subsequent co-ordination only underscores the consistency of the declaration of independence with the operation of United Nations entities under resolution 1244.

31. In short, by February 2008, the absence of any prospect of bridging the divide between Serbia and Kosovo had rendered any further negotiations pointless[46]. In these proceedings, Serbia ironically charges Kosovo with bad faith, suggesting that Kosovo's position favouring independence in the negotiations is in "sharp contrast" with 1244's requirements that "the The Contact Group admonished Serbia, not Kosovo, "to demonstrate much greater flexibility" and "to begin considering reasonable and workable compromises". sovereignty and territorial integrity of Serbia should be safeguarded"[47]. But neither UNMIK, Ahtisaari, nor the Troika ever suggested that Kosovo was negotiating in bad faith. Serbia claims that Kosovo did not need independence because Serbia had offered Kosovo the "highest degree of autonomy" under resolution 1244[48]. But anyone who has read the factual findings of the Trial Chamber in the Milutinović case, who has seen photographs of Serbian tanks stationed outside the Kosovo Assembly

42 See US Statement, pp. 71-74.
43 Helsinki Final Act, 1 Aug. 1975, available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.
44 See US Comments, pp. 32, 36.
45 A draft of the resolution is attached as exhibit 36 to Serbia's Statement.
46 US Statement, pp. 79-84.
47 Serbia Statement, para. 919.
48 CR 2009/24, p. 58, para. 46 (Zimmermann, Serbia); Serbia Statement, para. 203.

building in March 1989, or who followed events in the Balkans during the last two decades, understands why the entire Contact Group identified Belgrade's "disastrous policies of the past [as lying] at the heart of the current problem"[49][50]

32. Nor would it establish any violation of international law to argue that the Declaration of Independence was an ultra vires act by the Kosovo Assembly[51]. For even if it were true that the Declaration somehow exceeded the authority conferred on the Assembly by UNMIK under the Constitutional Framework, that would only amount to a claim that it was issued by the wrong persons in Pristina. But if the Declaration were considered flawed because it issued from the Provisional Institutions of Self-Government, that technicality could now easily be fixed simply by having a different constituent body within Kosovo reissue it. No one doubts that the people of Kosovo wanted independence, or that the Declaration expressed their will. The people of Kosovo declared independence not under a "top-down" grant of domestic law authority from UNMIK, but rather, from a "bottom-up" expression of the will of the people of Kosovo, who left no doubt of their desire for independence.

33. Finally, even assuming for the sake of argument that the Declaration did somehow violate the Constitutional Framework, that Framework, like other regulations adopted by UNMIK, operated as domestic, not international, law[52]. We have previously demonstrated that UNMIK regulations must be domestic law because they operated at the domestic level, replace existing laws, and regulate local matters[53]. In these proceedings Serbia has conceded the accuracy of this point, but argued that UNMIK rules somehow constitute international law because they were issued by the Security Council, an international authority[54]. But just because the Security Council authorized UNMIK to establish Kosovo's domestic law did not automatically convert that domestic law into international law. For example, an automobile driver in Kosovo might violate a speed limit in an UNMIK traffic regulation, but he surely does not violate international law simply because the entity that promulgated the law against speeding was created by an international body[55].

34. Mr. President, if there were ever a time when United Nations officials could have acted to set aside the Declaration of Independence, it was soon after that Declaration issued in February 2008. But the responsible organs of the United Nations made a considered decision nearly two years ago not to invalidate that Declaration of Independence. They made that decision with full awareness of that Declaration's specific acceptance of resolution 1244 and the international presences established by it, and fully aware of Kosovo's pledge to act consistently with all Security Council resolutions and requirements of international law[56].

49 Statement by the Contact Group on the Future of Kosovo, London, 31 Jan. 2006, available at http://pristina.usembassy.gov/press20060131a.html.

50 Contact Group Ministerial Statement, Vienna, 24 July 2006, available at http://www.diplomatie.gouv.fr /en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf.

51 US Statement, p.57, Note 231; US Comments, pp. 38-39.

52 UNMIK's grant of authority was to exercise "legislative and executive powers" - that is what it was doing when it promulgated Regulation 2001/9 - and its responsibility was to "change, repeal or suspend existing laws to the extent necessary for the carrying out of [its] functions", Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, Dossier No. 37. A contemporaneous 2001 commentary noted that Regulation 2001/9, the Constitutional Framework, assigns to the Special Representative of the Secretary-General and KFOR "the powers that are typically associated with a federal government", A. Zimmerman and C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State", 70 Nordic Journal of International Law 423, 428 (2001).

53 See US Comments, pp. 39-42.

54 See CR 2009/24, p. 48, paras. 39-41 (Djerić, Serbia).

55 See US Comments, pp. 39-42 and citations therein.

56 See US Statement, pp. 84-89; US Comments, pp. 43-45.

III. THE COURT SHOULD ANSWER ONLY THE NARROW QUESTION POSED

35. Finally, Mr. President, the Court should answer only the narrow question posed. What all this has demonstrated is just how anomalous and narrow is the question presented in this case. It is not a question about whether Kosovo is an independent State today, nor whether it has been properly recognized. Nor is this case about whether UNMIK and the United Nations should be doing anything differently. It is not about whether United Nations institutions empowered to do so acted properly in declining to invalidate the Declaration of Independence nearly two years ago. Finally, it is not about whether Kosovo's future status talks which were properly ended as "exhausted" years ago could or should now be resumed.

36. The usual premise upon which the Court's advisory jurisdiction rests is that the requesting organ here, the General Assembly needs the Court's legal advice to carry out its functions effectively[57]. But here the question has been asked not to give the Assembly legal advice, so much as to give advice to Member States[58]. Resolution 63/3, which referred the advisory question to the Court, nowhere indicates how the Court's opinion would relate to any planned activity of the General Assembly nor does it identify any constructive use to which the General Assembly might put a Court opinion. And unlike every prior occasion on which the General Assembly has requested an advisory opinion, resolution 63/3 was adopted not in connection with a substantive agenda item for the General Assembly's work, but rather, only under an ad hoc agenda item created for the sole purpose of requesting an advisory opinion from this Court[59].

37. Ironically, the Member State who supported the referral of this narrow question has avowed that the Court's answer will not change even its conduct. Serbia has repeatedly said that it will not recognize Kosovo "at any cost, even in the event that the [Court's] decision is in favor of Pristina"[60]. But, Mr. President, this Court has no obligation to issue advisory opinions that the moving State has already suggested it might ignore, that seek to reopen long ended political negotiations that responsible United Nations officials have concluded are futile, or that seek to enlist the Court to unravel delicate political arrangements that have brought stability to a troubled region.

38. We therefore urge this Court to leave Kosovo's Declaration undisturbed either by refusing to issue an opinion or by simply answering in the affirmative the question presented: whether Kosovo's Declaration of Independence accords with international law[61]. As our written pleadings make clear, the Court may answer the question posed to it and opine that international law did not prohibit Kosovo's Declaration of Independence, without addressing other political situations or complex issues of self-determination raised by a number of States in these proceedings[62].

39. But if the Court should find it necessary to examine Kosovo's Declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case, which include the extensive Security Council attention given to Kosovo; the large-scale atrocities against the people of Kosovo that led to Rambouillet and the 1244 process; the United Nations concern for the will of the people of Kosovo, their undivided territory and the unique historical, legal, cultural and linguistic

57 See US Statement, pp. 42-45; US Comments, pp. 10-12.

58 As this Court has emphasized in the past, advisory opinions serve to advise the organs of the United Nations, not individual Member States. In seeking support for its resolution, Serbia continually emphasized not the need of the General Assembly for an answer to the question, but the purported right of Member States to refer a question to the Court. Serbia frankly described this case as being "about the right of any member State of the United Nations to pose a simple, elementary question", asserting before the General Assembly that "[n]o country should be denied the right to refer such a matter to the ICJ"; and that a vote against the resolution "would in effect be a vote to deny the right of any country to seek - now or in the future - judicial recourse through the United Nations system". See US Statement, p. 44

59 See US Comments, pp. 11-12.

60 See ibid., p. 10.

61 See US Statement, pp. 45-49; US Comments, p. 10.

62 See US Comments, pp. 21-23.

attributes; the lengthy history of Kosovo's autonomy; the participation of Kosovo's representatives in the internationally led political process; the commitment of the people of Kosovo in their Declaration to respect prior Security Council resolutions and international law; and the decision by United Nations organs to leave undisturbed Kosovo's move to independence[63].

40. Mr. President, in its presentation yesterday, Cyprus pointedly sought to analogize the 1244 process to the heart-wrenching, but misleading, case where a parent sends a small child off to State supervision, only to lose her forever. But upon reflection, the far better analogy would be to acknowledge the futility of the State forcing an adult child to return to an abusive home against her will, particularly where the parent and child have already long lived apart, and where repeated efforts at reconciliation have reached impasse. There, as here, declaring independence would be the only viable option, and would certainly be in accordance with law.

IV. CONCLUSION

41. In conclusion, Mr. President, Kosovo's Declaration of Independence has proven to be necessary and politically stabilizing. The 2008 Declaration of Independence, and the ensuing recognition of Kosovo by many nations, brought much needed stability to the Balkans and closed the books on the protracted break-up of what once was Yugoslavia[64]. Kosovo's Declaration of Independence emanated from a process supervised by the United Nations, which through resolution 1244 and the institutions it established, was deeply involved in Kosovo's past and present. And the Declaration of Independence has now made possible a future in which Kosovo is not merely independent politically, but also self-sufficient economically, administratively, and civilly.

42. Although Serbia, acting through the General Assembly, has urged the Court to issue an advisory opinion it hopes will reopen status negotiations to redetermine Kosovo's future, it has given this Court no reason to upend what has become a stable equilibrium. For Kosovo is now independent. Both Kosovo and Serbia are part of Europe's future. As the principal judicial organ of the United Nations, this Court should not be conscripted into a Member State's effort to roll back the clock nearly a decade, undoing a careful process accomplished under resolution 1244 and overseen by so many other United Nations bodies: the Security Council; the Special Representative of the Secretary-General; two Special Envoys, UNMIK and the Troika[65]. And when Kosovo's independence has finally closed one of the most painful chapters in modern European history, this Court should not use its advisory jurisdiction to reopen that chapter. Instead, we should all look to a common future in which Serbia and an independent Kosovo have vitally important roles to play.

43. Mr. President, honourable Members of the Court, on behalf of my country, I thank you for your thoughtful attention.

63 See ibid., pp. 21-23.
64 See ibid., p. 3.
65 See ibid.

The Republic of Finland

The Republic of Finland is represented by:

Ms Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs;
Professor Martti Koskenniemi, University of Helsinki;

H.E. Mr. Klaus Korhonen, Ambassador of Finland to the Kingdom of the Netherlands;
Mr. Kai Sauer, Director, Unit for U.N. and General Global Affairs, Political Department, Ministry of Foreign Affairs;
Ms Sari Mäkelä, Legal Counsellor, Unit for Public International Law, Legal Service, Ministry of Foreign Affairs;
Ms Miia Aro-Sanchez, First Secretary, Embassy of Finland in the Kingdom of the Netherlands.

The PRESIDENT: I shall now give the floor to Ms Päivi Kaukoranta to make the oral statement on behalf of Finland.

Ms KAUKORANTA:

1. Mr. President, Members of the Court, on behalf of Finland I am honoured to take part in these proceedings. We are convinced that the advisory opinion will contribute to the stability and security on the Balkans and that the future of both States - Serbia and Kosovo - will be based on friendly relations and integration in the European Union. Let me say a few introductory words. The position of Finland in this case has been set out in our Written Statement of 16 April 2009. The legal status of Kosovo's Declaration of Independence of 17 February 2008 should be determined by situating it in the long process that began with the unilateral changes in Kosovo's constitutional status and the violent break-up of the Socialist Federal Republic of Yugoslavia. The Declaration, for its part, was not regulated through any detailed rules of international law. It was a political act with a certain history. However, as the Arbitration Commission on the Former Yugoslavia has stated, the emergence of statehood is "a question of fact"[1]. Once the negotiations on Kosovo's future had ended in a stalemate and the Provisional Institutions of Self-Government of Kosovo had transformed themselves into representatives of the people of the province, the law must take cognizance of the situation. It must, I suggest, recognize that history as leading up to the creation of a new State.

2. Mr. President, it is impossible to read the facts accumulating at least since the 1989 revocation of Kosovo's autonomy and the 1991 unofficial referendum in which the Kosovo Albanians voted overwhelmingly for independence and leading up to the ethnic cleansing of Kosovo Albanians in 1999 as anything else than an indication of the total inability or unwillingness of the Yugoslav Government to

1 Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI ILM (1992), p. 1495.

Members of the delegation of Finland.

create the kind of conditions of internal self-determination of Kosovo Albanians to which international law entitles them. Of course, as many have reminded the Court, the law attaches great importance to the principle of territorial integrity of States. But that principle is not determining in this case, as my colleague Professor Koskenniemi will argue in his presentation.

3. In the Frontier Dispute case in 1986 this Court observed in an African context that the principle of uti possidetis was based on the need of avoiding "fratricidal struggles" (Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 565, para. 20). In the territory of the former Yugoslavia those struggles had already been under way since 1991-1992, spreading to Kosovo in late 1998 and early 1999. In the case of Prosecutor v. Milutinović, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia determined that the crimes that had been committed there included "hundreds of murders, several sexual assaults, and the forcible transfer and deportation of hundreds of thousands of people"[2]. In Kosovo, the territorial order had broken down, and it had done so owing to actions taken or supported by the institutions of the Federal Republic of Yugoslavia and Serbia. In these circumstances, it is necessary to create conditions in which the communities of Kosovo can finally live in peace and justice. The years of the wars in Yugoslavia were also a period of the fall of the Berlin wall, the emergence of a new consensus in Europe and the world on the need to respect human rights and fundamental freedoms. Against this background, the facts that culminated in the Declaration of Independence of 17 February can only be read in one way: as the emergence of the State of Kosovo.

2 International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Milutinović et al, Judgement of 26 Feb. 2009, para. 1172, Vol. 3 of 4.

4. Our statement is in two parts. I will first say a few words about how international law lacks any mechanical rule on the attainment of statehood and how, instead, it takes account of the political facts leading up to the Declaration of Independence. I will show how this is supported by the locus classicus on the law on self-determination, a case of great importance to my country, the Aaland Islands case. My colleague Professor Koskenniemi will thereafter apply the law to the Kosovo situation, as it appears under the modern law of self-determination.

I. THERE IS NO MECHANICALLY APPLICABLE RULE ON THE ATTAINMENT OF STATEHOOD

5. Mr. President, the opponents of the lawfulness of the Declaration of Independence attack the view that the process leading to the independence of Kosovo is sui generis and must be assessed and adjudged as such. They say that international law must be applied consistently and globally and that to direct attention to what is special in the Kosovo situation is appeal to an exception to move from law to politics, arbitrary and conducive to risks to peace and stability.

6. With respect, this position, superficially appealing in its apparent respect for legality, is altogether beside the point and in fact relies on what it seems to deny. The argument about the special nature of Kosovo's process to independence does not at all deny the need of consistency or stability but is based on those concerns. A lasting outcome must take full account of the history of the Balkan populations, including their relations in the recent years. Serbia and its supporters have been trying to avoid the examination of this history by giving the impression that an absolute and inflexible rule -the rule on territorial integrity - decides the matter mechanically, as a kind of trump card. But this is wrong. We agree with Serbia that the matter must be resolved by reference to legal rules and principles. The Montevideo criteria of statehood, as well as the principles of territorial integrity and self-determination are, however, of a general character. They cannot be mechanically applied but must be weighed against each other for their relevance to the facts of this case. Serbia, too, stresses that the matter will require "an examination that entails both factual and legal elements"[3]. It could hardly be otherwise. And a balanced assessment of those facts accepts the Declaration of Independence and dismisses the alternative possibility of return to the status quo.

7. It has become one of the well-entrenched principles of twentieth century international and public law that statehood emerges from fact. Accordingly, the effects of recognition, as affirmed by the Arbitration Commission of the Conference on Yugoslavia- so-called Badinter Commission - are not constitutive but "purely declaratory"[4]. There is no difference between the mother State and others here. Statehood is not a gift that is mercifully given by others; it emerges from the new entity itself, its will and power to exist as a State. In the words of the great French public lawyer Carré de Malberg:

"la formation initiale de l'Etat, comme aussi sa première organisation, ne peuvent être considérées que comme un pur fait, qui n'est susceptible d'être classé dans aucune catégorie juridique, car ce fait n'est point gouverné par des principes de droit"[5].

To think otherwise would be to subsume the birth of States to the discretion of other States. But which State accepts that its statehood is a grant by others, given in reward for compliance with some rule? No State, I suggest. For every State, its statehood is sui generis, and dependent on its own history and power, not on the discretion of others, or the way geography may have situated it in one place rather than another. As Judge Dillard pointed out in the Western Sahara case, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people" (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, separate opinion of Judge Dillard, p. 122).

3 Written Comments of the Government of the Republic of Serbia, para. 44.

4 Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI ILM (1992), p. 1495.

5 Raymond Carré de Malberg, Contribution à la théorie générale de l'Etat spécialement d'après des données fournies par le droit constitutionnel français (2 vols., Paris, Sirey, 1920-1922), II, 490.

M. Martti Koskenniemi, Academy Professor (University of Helsinki) (Finland)

8. Mr. President, there are some facts that can be assessed by mechanical application of rules and other cases where many rules seem prima facie applicable and require careful attention to the facts of the situation. Or in other words, there is a difference between distributing parking tickets and legal assessment of a declaration of independence. In the former case, there is no need to examine the particularities. The type of car, or where it came from, are facts -but legally irrelevant. The rule of "no parking" applies mechanically because what is being regulated is a matter of routine: everyday cases that repeat themselves in the millions. Independence is not like that. Here there is no routine - a recent history of the declarations of independence lists only "more than one hundred cases", each one distinguished historically, politically and factually from the others[6]. And here the differences are not irrelevant but at the heart of the statehood of each entity. A State is a State because it is special, not because it has come about by some procedural routine or some mechanical criterion. This is what those who attack the sui generis view appear to deny. As if deciding on statehood were like distributing parking tickets. Let me just take one example.

9. The opponents of Kosovo's independence suggest that the "Provisional Institutions" did not possess competence to declare independence. First, the Declaration was not issued by the Provisional Institutions of Self-Government but it was voted upon and signed by the representatives of the people of Kosovo acting as a constituting power, pouvoir constituant. Second, such contention suggests as if there were a rule to lay out which institutions may and which may not declare independence. The independence of my country, Finland, for example, was declared by a Parliament that was an organ of an autonomous part of the Russian empire in December 1917. From the perspective of Russian law, this was blatantly ultra vires. But, as confirmed by the recognitions in due course, that was no obstacle to Finnish independence. Furthermore, declarations issued earlier by Slovenia and Croatia were not regarded by the international community as prohibited by international law, even though they were made without

6 David Armitage, The Declaration of Independence: A Global History, Harvard University Press, 2007, p. 20.

prior authorization by the Socialist Federal Republic of Yugoslavia. A first declaration emerges virtually always from a domestic illegality; internationally, it is simply a political fact. But international law does intervene later, to assess the fact by reference to overriding concerns of peace and stability, on the principles of territorial integrity, human rights and self-determination.

10. Mr. President, let me now say a few words on the two important reports presented to the Council of the League of Nations in the Aaland Islands question in 1920 and in 1921. As is well known, the question relates to a dispute between Finland and Sweden as to whether the inhabitants of the Åland Islands, an archipelago in the Baltic Sea, were allowed to choose between remaining under Finnish sovereignty and being incorporated in the Kingdom of Sweden. The Committee of Jurists appointed by the League Council stated that the principle of self-determination of peoples comes into play in situations where "the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure or uncertain from the legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established"[7].

11. The Committee acknowledged that minority protection by way of an extensive grant of liberty was a compromise solution where, for one reason or another, self-determination could not be accorded a complete recognition. Most importantly, however, it acknowledged that there were cases where minority protection could not be regarded as sufficient. In the words of the Commission of Rapporteurs appointed by the Council to recommend a programme of action in view of the Jurists' report:
"The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[8]
In this case the Commission concluded that the Åland Islanders had neither been persecuted nor oppressed and that there was no justification for a separation.

12. Mr. President, already in the Aaland Islands case, the locus classicus of the law on self-determination, the eventuality was foreseen that persecution and oppression, combined with a situation of "abnormality", such as "the formation, transformation and dismemberment of States as a result of revolutions and wars"[9], might entitle a minority population to secession. This was thereafter reiterated by the Canadian Supreme Court in the case Secession of Quebec[10]. Similarly, in the present case, the Court is called upon to weigh the facts pertaining as against the criteria of statehood, and the principles of territorial integrity and self-determination as they are understood today.

Mr. President, with your permission, I will now give the floor to my colleague Professor Koskenniemi.

Mr. KOSKENNIEMI: Mr. President, I am delighted to address this Court again as the representative of my country Finland.

7 Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations, Official Journal, Special Supplement, No. 3, Oct. 1920, p. 6.

8 Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations, doc. B.7. 21/68/106, 1921, p. 28.

9 Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations, Official Journal, Special Supplement, No. 3, Oct. 1920, p. 6.

10 Reference re Secession of Quebec, [1998], 2 SCR., p. 217, 20 Aug. 1998.

II. SELF-DETERMINATION AS THE GOVERNING PRINCIPLE IN THE CASE OF KOSOVO

13. We have stressed the limited and open-ended nature of the law governing statehood. In this regard, the formulation of the request posed to the Court was perhaps unfortunate: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" This suggests the presence of precise rules of international law regulating matters such as the making of independence declarations. But there are no such rules. No treaty, no custom regulates the matter. No international law rule gave the Finnish autonomy organs in December 1917 the competence to declare independence. This is the case of every single declaration of independence we know of. A declaration is simply a fact, or the endpoint of an accumulation of facts. Just like possession of territory, population or government are facts. There is - as Madam Kaukoranta pointed out - no rule on how States are born. But once the requisite facts are there, the law cannot be oblivious to them. There is a brief, formally correct response that may be given to the General Assembly's request: namely, that the Declaration was in accordance with international law.

14. And yet, the absence of such a rule might not seem the end of the matter. Should the Court deem it necessary to address the significance of a declaration in more detail, we would like to add the following.

15. In the Anglo-Norwegian Fisheries case some years ago, this Court observed, in a situation where it had recognized that there were no detailed rules on the limits of the territorial sea, as follows:

"It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom . . ., the delimitation undertaken . . . is not subject to certain principles which make it possible to judge as to its validity under international law" (Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p. 132).

From that point the Court went on to examine the facts of the case by reference to what it later chose to call "equitable principles" - precisely an assessment of the particularities - including in that early case, the interests of Norwegian fishermen "peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (ibid., p. 133). In a parallel way, the fact that there are no mechanical rules on declarations of independence may not make it impossible to judge what their effect should be. Such judgment must only be based on a balanced assessment of the relevant facts, including - as the Court then stated - the needs of the communities as can be detected from their histories.

16. Now, Serbia and its supporters claim that the rule of territorial integrity and consent of the parent State regulate the process of independence. But surely this is both conceptually and historically wrong? Was the United States born out of a legal process that peaked in the consent of Britain? Or Russia or Germany? Venezuela, Algeria or Bangladesh - or indeed Serbia? Did any of the republics formerly part of the SFRY emerge from a process that respected the integrity of the mother State or out of the consent of the latter? They did not. There are around 200 States in the world and around 200 histories of State-emergence each of which is different - it tempts me to say sui generis - though each is also capable of being assessed under the old Montevideo criteria: territory, population, effective government, you all know those[11]. But they of course do not apply mechanically. China has a population of 1.3 billion, Tuvalu less than 12,500. There are States with huge territories and States with very small ones and their governmental capacities vary enormously.

11 According to these criteria, 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 other States.

Mrs. Päivi Kaukoranta, Director General, Legal Affairs, Ministry of Foreign Affairs. (Finland)

17. The supporters of Kosovo's independence, including Spain today, claim that the supporters of the legality of the Declaration seek to replace law by what they call "politics". The Court has already heard parallel accusations in many earlier cases and they have given it occasion to distinguish, for example, between decisions ex aequo et bono - something that does involve political compromises - and what it chose to call equity infra legem, the case where the rule itself calls for the appreciation of circumstances[12]. This is how the Montevideo criteria, territorial integrity and self-determination, operate: they lay out broad criteria to appreciate the facts on the ground, what is and what is not relevant. The Serbian Written Comments acknowledge the significance of the Court's jurisprudence in this respect[13]. We agree that this, and only this is needed here: neither mechanical rule application, nor recourse to an exception, or indeed to politics, but to the application of the relevant legal principles - including those of territorial integrity and self-determination - in a way, in a way Mr. President, that is equitable in the circumstances. The case is not, after all, about distributing parking tickets.

18. Mr. President, Serbia and its supporters suggest that the principle of territorial integrity and consent of the parent State disqualifies the declaration of independence as conferring statehood on Kosovo. Nobody would deny that the principle of territorial integrity is well established in international law. But, as many have already noted here, the principle does not at all concern the relation between a State and an entity seeking self-determination. Under their very formulation and raison d'être instruments such as the Friendly Relations Declaration, from 1970[14], and the Helsinki Final Act of 1975[15] deal with inter-

12 North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 48, para. 88.

13 Written Comments of the Government of the Republic of Serbia, para. 128.

14 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, United Nations General Assembly resolution 2625 (XXV), 24 Oct. 1970.

15 Conference on Security and Co-operation in Europe, Final Act, Helsinki 1975, http://www.osce.org/documents/mcs/1975/08/4044_en.pdf (4 Dec. 2009).

State relations and in particular the duty of other States not to intervene in internal political processes. Let me quote the 1970 Declaration. It lays out: "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". States shall refrain in their international relations. Nowhere about other entities. International law does contain rules relating to individuals today: those rules appear in the fields of human rights, economic relations and the environment. But rules about sovereignty or territorial integrity are not among those — and we understand well why. It would be absurd to claim that international law takes any position beyond respect of human rights and non-violence in respect of the agendas of domestic groups or federalist movements, for example.

19. It may be said that as a general principle, territorial integrity nevertheless lays out a general value - the value of unharmed statehood - that international law seeks to protect. But in that case it should be weighed against countervailing values, among them the right of oppressed people to seek self-determination including by way of independence. Again, it is the factual context that should decide which value should weigh heaviest. The relevant facts we all know from the Milutinović case — and I quote from the case:

"[T]he Trial Chamber is satisfied that there was a broad campaign of violence directed against the Kosovo Albanian population during the course of the NATO air strikes conducted by forces under the control of the FRY and Serbian authorities . . ."

The Chamber goes on, and I quote again:

"In all of the 13 municipalities the Chamber has found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians from their homes, either by ordering them to leave, ory creating an atmosphere of terror in order to effect their departure. As these people left their homes and moved either within Kosovo or towards or across its borders, many of them continued to be threatened, robbed, mistreated, and otherwise abused. In many places men were separated from women and children, their vehicles stolen or destroyed, houses deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents."[16]

20. This campaign, as is well known, caused the departure of over 700,000 Kosovo Albanians in the period between March and June 1999 during which, also, many documented cases of killing, sexual assault and intentional destruction of civil infrastructure and religious sites occurred. The Security Council recognized the gravity of the situation in resolution 1244, as did the ICTY later. An international security and civilian presence was set up and has continued to govern or supervise Kosovo for a decade. What can, in such conditions, be the worth of territorial integrity? As I have stated, it does express a value of protecting the State. But is it the State that needs protection in this case? Even if the principle does have relevance, it cannot be mechanically applicable. We are not dealing with parking violations but historical facts of concern to large populations.

123International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Milutinović et al., Judgement of 26 Feb. 2009, para. 1156 (Vol. 2 of 4).

21. The facts leading up to the Declaration of Independence of 17 February strikingly illustrate the situation, mentioned by the Commission of Rapporteurs in the Aaland Islands case where "the State lacks either the will or the power to enact and apply just and effective guarantees". Nothing was done on the Serbian side during the Ahtisaari negotiations in 2006-2007 or the later Troika period to alleviate the concerns Kosovo Albanians had for the return of a situation resembling the one in which the Milošević régime had already once removed the autonomy of the province. Indeed, in 2006, in the middle of the

16 International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Milutinović et al., Judgement of 26 Feb. 2009, para. 1156 (Vol. 2 of 4).

international status negotiations, Serbia unilaterally adopted a new Constitution which astonishingly insisted that Serbian State bodies in Kosovo should "uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations"[17]. Kosovo Albanians were ineligible to participate in this process.

22. Members of the Contact Group - representatives of Britain, France, Germany, Italy, United States and Russia - agreed on the impossibility of a return to any status quo ante. Already the Rambouillet Accords had stated, as we have heard today, that the "final settlement for Kosovo" was to be based on the famous statement, and I quote: "will of the people"[18]. No concept of mutual consent was incorporated in the Accords. It is true that, as our colleague from Russia said a moment ago, no people of Kosovo is identified in the Rambouillet Accords. But, of course, the story does not end there. In January 2006, just before President Ahtisaari began his 14-month-long effort to seek a negotiated solution, the Contact Group had occasion to specify what this meant. Let me quote them — the Contact Group. They agreed, and this is a verbatim quote, "that the settlement needs, inter alia, to be acceptable to the people of Kosovo"[19]. "Acceptable to the people of Kosovo." Everything is here - including the identification of the people of Kosovo. That formulation was agreed by all concerned - including the representative of Russia. In view of what was known of the attitude of the people of Kosovo, it could only mean recognition of independence as the fallback if no other arrangement could be found.

23. Those who deny the applicability of self-determination in this case do this by making a familiar distinction - namely, the distinction between the case of independence under colonial subjugation or alien domination - borrowing language from the 1970 Friendly Relations Declaration - and Kosovo on the other hand. Familiar distinction, I say. But how strong is it? What good reason of practice or principle might there be to limit the right to secession to decolonization? None. As Madam Kaukoranta observed, already in the Aaland Islands case, well before the decolonization period, the Committee of Jurists and the Commission of Rapporteurs agreed that secession was thinkable when the State was "undergoing transformation or dissolution" and cannot or will not give, as it put it, "effective guarantees for protection". It was this traditional position, and not any new law, that became operative during decolonization. It was this law that the Supreme Court of Canada had in mind when it stated "when a people is blocked from the meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession"[20]. A broad body of scholarship today addresses such a "qualified right of secession"[21]. I suggest, however, that instead of us, here, imagining a new rule, it is better to think of this as part of the traditional law of self-determination that was always to be balanced against territorial integrity and contained the possibility of its application, as the Aaland Islands case demonstrates, through an external solution.

24. But, of course, the Court is not called upon to rule on the validity of any such principle in abstracto. All it is asked to do is to assess the legality of a declaration of independence as part of a history that includes grave oppression by the FRY and Serbian authorities. This history also includes the unilateral adoption by Serbia of a Constitution in 2006 that sought to prejudice the result of the status talks and it includes the deadlock in the status negotiations as reported by the Special Envoy of the Secretary-General. In President Ahtisaari's words "[n]o amount of additional talks, whatever the format,

17 Constitution of the Republic of Serbia, 2006, preamble, http://www.srbija.gov.rs/extfile/en/29554/ constitution_of_serbia.pdf (4 Dec. 2009).

18 Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999, Chap. 8, Art. I (3):
"Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures." (S/1999/648).

19 Press Release, 31 Jan. 2006, para. 7, http://www.unosek.org/docref/fevrier/STATEMENT%20BY% 20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf (4 Dec. 2009).

20 Reference Re Secession of Quebec, [1998] 2 SCR 217, para. 134.

21 See especially Raic, Statehood and Self-Determination, 313-332.

will overcome this impasse"[22]. Ahtisaari was not alone in this assessment. It was reiterated by the Troika representatives from the European Union, the United States and the Russian Federation after four months of further negotiations. The Troika concluded that the parties were unable to reach an agreement[23].

25. Against this, Serbia and its supporters now suggest that the negotiations should be continued. But, of course, the duty to negotiate cannot be dependent on one party's assessment that not all avenues have been exhausted. One party cannot possess indefinite right of veto over a permanent solution. We now have the clear statement by the Special Envoy of the United Nations Secretary-General, endorsed by the Secretary-General himself, that there was no prospect of progress in further negotiation and that independence was the only viable solution. Who could be in a better position to determine this? In putting forward his proposal for "internationally supervised independence", the Special Envoy was fulfilling his mandate. Let me quote the Terms of Reference that were given to him. They stated:

"the peace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General taking into account the co-operation of the parties and the situation on the ground".

"[W]ill be determined by the Special Envoy . . ." Now, the feasibility of negotiations is a matter of political judgment and not judicial determination. Surely best placed to determine this is the chief negotiator, who, as we all know, also happened to receive the Nobel Peace prize for brokering peace not only in Kosovo but in many places, including Namibia, Bosnia Herzegovina and Aceh. To suggest otherwise, or to hint at bias, as Serbia has done, speaks more eloquently about Serbia's negotiating attitudes than anything otherwise produced in this case.

26. Mr. President, let me reiterate the main points of the Finnish argument.

- First, there is no specific rule on declarations of independence. They must be seen as parts of the history of State-building that international law regulates by general principles such as the Montevideo criteria on statehood, non-use of force, territorial integrity, self-determination.
- Second, in this specific case, the two prima facie applicable principles are those of territorial integrity and self-determination. Because territorial integrity only governs relations between and not inside States, its power is limited to that of a general value of protecting existing States that must be weighed against countervailing considerations.
- Third, the most important countervailing consideration is that of self-determination that has always implied the possibility of secession in case the parent State is unable or unwilling to give guarantees of internal protection. In view of the violent history of the break-up of the SFRY and, in particular, the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State. This was achieved by the facts of history and symbolized by the Declaration of Independence of 17 February 2008.

I thank you, Mr. President.

22 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, para. 3.

23 Report of the European Union/United States/Russian Federation Troika on Kosovo of 4 Dec. 2007, S/2007/723, paras. 2 and 11.

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