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La Haye, le 14 avril 2009

Monsieur le Greffier,

J'ai l'honneur de vous transmettre ci-joint l'exposé écrit que la Roumanie entend présenter à la Cour dans *l'affaire concernant la conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo (requête pour avis consultatif).*

Veuillez recevoir, Monsieur le Greffier, l'expression de ma considération la plus distinguée.

Călin Fabian,
Ambassadeur

M. Philippe COUVREUR
Greffier
COUR INTERNATIONALE DE 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 STATEMENT OF ROMANIA

TABLE OF CONTENTS

Chapter 1

Introduction

1. On 8 October 2008, the General Assembly of the United Nations adopted Resolution A/RES/63/3 by which it requested the International Court of Justice to render an advisory opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

2. The Resolution was adopted by the General Assembly with 77 votes in favour, 6 votes against and 74 abstentions[1]; Romania was one of the States that voted in favour of the said Resolution; it explained its vote with the following statement:

> "[...] Compliance with international law is the very essence of our Organization and the matrix on which we strive to build international peace, stability and security. Draft resolution A/63/L.2 contains a question that is fully in line with the simple right of recourse to international law, to which any United Nations Member is entitled to benefit under the Charter itself. Romania fully trusts the advisory opinions of the International Court of Justice, the main judicial organ of the United Nations, a prominent promoter and guardian of international law. We are absolutely sure that its opinion on the question raised in the draft resolution will assist us in making decisions in the future, in particular when fundamental issues such as the sovereignty and territorial integrity are at stake. In the light of those considerations, Romania has decided to vote in favour of draft resolution A/63/L.2".[2]

3. Following the communication of the Resolution to the Registry of the International Court of Justice, by an Order of 17 October 2008 the Court decided, *inter alia*, that Member States of the United Nations are likely to be able to furnish information on the question and fixed 17 April 2009 as the time-limit within which written statements may be submitted to it in accordance with Article 66 paragraph 4 of the Statute.[3] The Written Statement of Romania is submitted in accordance with this Order.

4. The Declaration of Independence of the Provisional Institutions of Self-Government of Kosovo (which will be hereafter referred to in this Written Statement as the DOI) was adopted

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[1] A/RES/63/3;
[2] A/63/PV.22, p. 6;
[3] Order of 2008 17 October, General List No. 141;

on 17 February 2008. The document purported to establish "Kosovo to be an independent and sovereign state".[4]

5. Following the adoption of the DOI, Romania did not recognize the newly proclaimed "Republic of Kosovo" as an independent State. The official position of Romania was expressed in the statement of the President of Romania delivered on 18 February 2008:

> "[...] Romania maintains its position and will not recognize the independence of the province of Kosovo. The situation that we all witness, announced yesterday in Pristina – the unilateral declaration of independence of this province – was generated, in our opinion, by several factors. Firstly, the parties could not reach a common solution by direct negotiations. Pristina and Belgrade could not define a common position, which could have been in both parties' advantage. [...] From our point of view, unrecognizing Kosovo's independence is based not only on the fact that the two parties could not reach an understanding, but also on the fact that there is no UN Security Council resolution to legalize the declaration of independence made yesterday in Pristina. As well, Romania will not recognize Kosovo's independence for other reasons such as: granting of collective rights to [national] minorities, non-respecting the territorial integrity of Serbia, non-respecting the principle of the inviolability of Serbia's borders and non-respecting the sovereignty of Serbia. [...]".[5]

6. The Parliament of Romania also adopted, on 18 February 2008, the following declaration:

> "The Parliament of Romania took note with deep concern of the unilateral proclamation of the independence of the province of Kosovo, on 17 February 2008, by the authorities in Pristina.
> [...]
> consistent with its position stated in its Declaration of 20 December 2007 in which it expressed its regrets for the failure of the negotiations for a solution regarding the status of Kosovo [which should have been] equitable and in conformity with the international law, the Parliament of Romania does not recognize the unilateral declaration of independence of the province of Kosovo, considering that the conditions to recognize the new entity are not met.
> The Parliament of Romania underlines that the decision of the authorities in Pristina, as well as the eventual recognition of the unilaterally-declared independence by other States, cannot be interpreted as a precedent for other regions or as recognizing or guaranteeing collective rights for national minorities".[6]

7. As it results from these official statements of the Romanian authorities, Romania's position of non-recognition of the unilaterally-proclaimed independence of Kosovo is grounded in international law. After a thorough analysis, Romania came to the conclusion that, in view of

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[4] Declaration of Independence of Kosovo of 17 February 2008, available at http://www.icj-cij.org/docket/files/141/15038.pdf;

[5] 18 February 2008 Press Statement of the President of Romania regarding the official position of [Romania] towards the unilateral declaration of independence of Kosovo province, available on http://www.presidency.ro/pdf/date/9628_ro.pdf (translation provided by Romania);

[6] Monitorul Oficial (Official Gazette) part. II, year 176 (XIX), no. 12 of 28 February 2008, p. 3 (translation provided by Romania);

the specificities of the case, the authorities in Pristina had no right to lawfully declare independence in a unilateral manner, and the legal conditions for Kosovo to become a State were not met. Since *ex injuria jus non oritur*, Romania did not recognize the DOI; nor does it recognize the subsequent acts based on the purported statehood of Kosovo.

8. This Written Statement contains the elements of fact and law, which Romania considers relevant for this matter and able to support the Court in reaching its opinion. Since it is a *legal* matter which is before the Court, the Written Statement focuses on the *elements of law*, and covers factual issues only and inasmuch as they are pertinent and necessary for the appropriate application of international law. This Written Statement answers the question which is before the Court, as requested by the General Assembly, and is not covering related, yet different, legal matters.

9. This Written Statement is structured in five chapters. *Chapter 2* analyses the lawfulness of the DOI from the perspective of the relevant applicable UN resolutions, concluding that the DOI was not in conformity with the provisions of the applicable UN resolutions and that, by adopting it, the Provisional Institutions of Self-Government of Kosovo went beyond and against the mandate conferred to them by the relevant regulations adopted by the UN Mission in Kosovo (UNMiK). *Chapter 3* makes an application of the fundamental principles of international law to the case, as enshrined in applicable universal and European documents, reaching the conclusion that the DOI disregarded the necessity to uphold international law principles such as the respect for sovereignty of States or respect for the territorial integrity of States. *Chapter 4* considers the concept of *secession* in the international law and the applicability to this case of the right of peoples to self-determination; it concludes that there is no established right of secession in international law and that the right of peoples to self-determination could not be relied upon to declare Kosovo's independence. Finally, *Chapter 5* presents the conclusions reached by Romania, according to which the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo *is not* in accordance with international law.

Chapter 2

Was the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in Conformity with Relevant United Nations Security Council Resolutions and other Documents?

I. Introduction

10. The United Nations Security Council approached the situation in Kosovo from two perspectives. First, in the broader context of putting an end to the conflict in the former Yugoslavia, the Council adopted Resolution 855 (1993) of 9 August 1993. This resolution addressed the refusal of the authorities in the then Federal Republic of Yugoslavia (Serbia and Montenegro) to allow the long-term missions of the Conference on Security and Cooperation in Europe to continue their activities. The resolution also specifically referred to the territorial integrity of the Federal Republic of Yugoslavia in the following terms:

> "Stressing its commitment to the territorial integrity and political independence of all States in the region"[7]

Second, beginning with 1998, the issue of Kosovo was dealt with, specifically, by the Council in several resolutions adopted under Chapter VII of the United Nations Charter. These resolutions addressed the issue and set out the framework for a future final settlement of the serious situation the Council was faced with.

11. It is important to note here that none of the Security Council resolutions adopted between 1993 and 1999 have raised the matter of independence of Kosovo, or prejudiced the territorial integrity of the Federal Republic of Yugoslavia and Serbia. It is also worth noting that all these resolutions contain an affirmation of the commitment of all UN Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.

12. The Security Council, when adopting these resolutions, acted on behalf of the members of the United Nations as a whole in performing its functions, and therefore its decisions are binding upon all member States according to Article 25 of the Charter.

13. As the Court showed in the 21 June 1971 Advisory Opinion concerning the Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970):

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[7] S/RES/855 (1993);

"[w]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter".[8]

14. These resolutions did not bind only the Member States and the organs of the United Nations (such as the United Nations Interim Administration Mission in Kosovo), but also the Provisional Institutions of Self-Government in Kosovo. According to Chapter 2 of the Constitutional Framework for Provisional Self-Government, promulgated by the Special Representative of the Secretary General in Kosovo:

"The Provisional Institutions of Self-Government and their officials shall:
Exercise their authorities consistent with the provisions of U[nited] N[ations] S[ecurity] C[ouncil] R[esolution] 1244 (1999) and the terms set forth in this Constitutional Framework [...]"[9]

As UNSC Resolution 1244[10] recalls previous determinations made by the Council in relation to the Kosovo situation, more specifically resolutions 1160 (1998) of 31 March 1998[11], 1199 (1998) of 23 September 1998,[12] 1203 (1998) of 24 October 1998[13] and 1239 (1999) of 14 May 1999,[14] this means that *these previous documents must also be dully observed by the Provisional Institutions of Self-Government of Kosovo.*

15. In addressing the exact legal content of these resolutions, they should be interpreted according to the rules contained in the 1969 Vienna Convention on the Law of Treaties, as reflecting customary international law, especially Article 31, which provides:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...".[15]

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[8] 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;
[9] Regulation 2001/9 , published in the UNMIK Official Gazette, available at http://www.unmikonline.org /regulations/unmikgazette/02english/E2001regs/RE2001_09.pdf;
[10] S/RES/1244 (1999);
[11] S/RES/1160 (1998);
[12] S/RES/1199 (1998);
[13] S/RES/1203 (1993);
[14] S/RES/1239 (1999);
[15] United Nations Treaty Series, vol. 1155, p. 340;

While the Security Council resolutions are not treaties, still, they come about as a result of the agreement between states and therefore it is clearly reasonable to interpret them according to the rules of interpretation provided for by the Vienna Convention[16]. Moreover, the International Court of Justice has held that the principles of interpretation embodied in Articles 31 and 32 reflect customary international law.[17] Therefore, it is appropriate to take due account of these principles and rules in order to interpret United Nations Security Council resolutions.

16. In the context of assessing the conformity of the DOI with relevant United Nations Security Council resolutions, the role of the *preambular part* of various resolutions is also important. As the Court showed in its Judgment of 20 June 1959 in the Case concerning sovereignty over certain frontier lands (Belgium/Netherlands), in the preamble [of a convention], the interpreter finds the "common intention" [of the Parties].[18]

The Arbitration Tribunal underlined in the Case concerning a dispute between Argentina and Chile concerning the Beagle Channel:

> "Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance—(in short they are not operative clauses)—*it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to "situate" it in respect of its object and purpose*" .[19] (emphasis added)

while the European Court of Human Rights showed that:

> "... the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed".[20]

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[16] As the former Commissaire du gouvernement, R. Abraham showed "... the techniques of interpretation resulting from the general principles of public international law and recalled by Articles 31 to 33 of the Vienna Convention on the Law of Treaties ... are not that far from those used in the interpretation of domestic laws" – R. Abraham quoted in *Les Conventions de Vienne sur le droit des traités, commentaire article par article*, Olivier Corten, Pierre Klein (eds), Bruylant, Bruxelles 2006, p. 1317;

[17] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 174, para. 94; Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 1345, para. 98; Avena and Other Mexican Nationals (Mexico v. United Slates of America), Judgment, I. C. J. Reports 2004 p. 48 para. 83; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 645, para. 37; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999, p. 1059, para. 18; Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II) p. 812, para. 23;

[18] Case concerning sovereignty over certain frontier lands, Judgment of 20 June 1959, I.C.J. Reports 1959, p. 221;

[19] Case concerning a dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, Reports of International Arbitral Awards, vol. XXI, p. 89;

[20] Case of Golder v. the United Kingdom, Application no. 4451/70, Judgment, Strasbourg, 21 February 1975, available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en;

17. The preambles of the relevant UNSC Resolutions, by recalling either previous resolutions or specific provisions contained therein, and always including an express reference to the territorial integrity of the Federal Republic of Yugoslavia, create a clear framework of interpretation of the operative parts of these resolutions.
The relevance of the preamble of relevant UNSC Resolution was also acknowledged by the Court in the 21 June 1971 Advisory Opinion concerning the Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970) .[21]

18. Before proceeding to analyze the provisions of various relevant UN resolutions, it is appropriate to approach the issue of the continuation by the present Republic of Serbia of the legal personality of the former Federal Republic of Yugoslavia since, in accordance with the legal and political situation of the time of their adoption, the UN resolutions referred to the "Federal Republic of Yugoslavia".

19. The Federal Republic of Yugoslavia (FRY) was one of the successor States of the former Socialist Federative Republic of Yugoslavia, which ceased to exist following its dissolution after the events in 1991-1992. Although it had an uncertain legal status for a rather long period,[22] these uncertainties disappeared after the FRY was admitted as a UN member on 1 November 2000. The FRY was made up of two constituent federated republics – Serbia and Montenegro.

20. After a process of reorganization of the federal State, the FRY transformed itself in 2002 in the State Union of Serbia and Montenegro. The Constitutional Charter of the State Union referred to:

> "the equality of the two member states, the state of Montenegro and the state of Serbia which includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija, the latter currently under international administration in accordance with UN SC resolution 1244".[23]

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[21] 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, p. 46 para. 92, p. 51 para. 107, p. 52 para. 109, p. 53 para. 115;
[22] The 26 February 2007 Judgment 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) provides for a complete characterization of the legal status of the FRY between 1992 and 2000 at paras. 88-99, available at http://www.icj-cij.org/docket/files/91/13685.pdf;
[23] Preamble of the Constitutional Charter of the State Union of Serbia and Montenegro, available at http://www.mfa.gov.yu/Facts/const_scg.pdf;

The Constitutional Charter also established that "Serbia and Montenegro shall be a single personality in international law"[24] and that:

> "[u]pon the entry into force of the Constitutional Charter, all the rights and duties of the Federal Republic of Yugoslavia shall be transferred to Serbia and Montenegro in line with the Constitutional Charter".[25]

Consequently, the State Union of Serbia and Montenegro continued the international legal personality of the former FRY.

21. The Constitutional Charter of Serbia and Montenegro also had specific provisions to regulate the right of either of the two constituent republics to break away from the State Union and the legal consequences deriving from such a situation. More specifically, the Constitutional Charter dealt with the legal consequences of the eventual decision of the Republic of Montenegro to leave the Union, in the following terms:

> "[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 the successor".[26]

22. On 3 June 2006, the Republic of Montenegro made use of this constitutional right and, following a referendum organized accordingly, proclaimed its independence. Consequently, according to the constitutional provisions of the former State Union, all international instruments applying to the former FRY or the State Union continued to apply to Serbia.

23. This state of affairs was repeatedly confirmed by the authorities of Serbia, including in official positions taken in the UN context. For instance, on 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the declaration of independence adopted by the National Assembly of the Republic of Montenegro,

> "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia, on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro".

The president of Serbia also stated that the Republic of Serbia:

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[24] Article 14 of the Constitutional Charter of the State Union of Serbia and Montenegro, available at http://www.mfa.gov.yu/Facts/const_scg.pdf;
[25] Article 63 of the Constitutional Charter of the State Union of Serbia and Montenegro, available at http://www.mfa.gov.yu/Facts/const_scg.pdf;
[26] Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, available at http://www.mfa.gov.yu/Facts/const_scg.pdf;

"remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".[27]

24. This Court also acknowledged the continuation by the Republic of Serbia of the legal personality of the former state union of Serbia and Montenegro, in its judgments in the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*[28] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).*[29]

25. The present Republic of Serbia is therefore to be considered the continuator of the legal personality of the former FRY, and all UN resolutions referring to the latter are to be read as referring now to the Republic of Serbia.

II. Resolutions of the organs of the United Nations pertaining to the situation in Kosovo adopted prior to UN SC Resolution 1244 (1999)

26. In the second preambular paragraph of Resolution 1244, the Council, by

"Recalling its resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998 and 1239 (1999) of 14 May 1999"[30]

sets out all its determinations made in relation to the Kosovo situation beginning with 1998.

27. This reminder has the purpose of bringing, in the corpus of UNSC Resolution 1244, elements regarding the final settlement of the Kosovo crisis. It also partially explains why there are so few express references to the final settlement of the Kosovo crisis in the text of Resolution 1244. Romania believes that UNSC Resolution 1244 cannot be correctly interpreted outside the framework provided by the previous UNSC resolutions, which are recalled in the second preambular paragraph. It should be underlined that this express reference to the previous UNSC resolutions is a clear indication that these earlier resolutions

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[27] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) 18 November 2008 Judgment on the Preliminary Objections, paras.23-34 available at http://www.icj-cij.org/docket/files/118/14891.pdf;

[28] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007 Judgment, paras.67-79 available at http://www.icj-cij.org/docket/files/91/13685.pdf;

[29] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) 18 November 2008 Judgment on the Preliminary Objections, paras.23-34 available at http://www.icj-cij.org/docket/files/118/14891.pdf;

[30] S/RES/1244 (1999);

need to be regarded as still operative, in those particular aspects, which were not replaced by subsequent resolutions.

28. Of the four UNSC resolutions recalled, the most important in assessing the conformity of the DOI with the relevant United Nations resolutions is UNSC Resolution 1160 (1998) of 31 March 1998.[31]

29. UNSC Resolution 1160 was expressly adopted under Chapter VII, although the source of the threat to the peace requiring the actions contained therein is not identified in its text. It contains, in its operative part, paragraphs 1, 4 and 5, several highly important provisions concerning the settlement of the Kosovo crisis. These paragraphs read:

> "1.Calls upon the Federal Republic of Yugoslavia immediately to take further necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated in the Contact Group statements of 9 and 25 March 1998;
>
> [...]
>
> 4. Calls 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, and notes the readiness of the Contact Group to facilitate such dialogue;
>
> 5. Agrees, without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that *the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia* and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe in 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for *an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration*".[32] (emphasis added)

30. While this language ("calls upon") may not be regarded as directly mandatory, the binding nature of the requirements was clarified in operative paragraphs 8 and 16. In operative paragraph 8, the resolution imposed an arms embargo upon the Former Republic of Yugoslavia, including Kosovo. Paragraph 16 contains the requirements for lifting such embargo:

> "16. ...decides also to reconsider the prohibitions imposed by this resolution, including action to terminate them, following receipt of the assessment of the Secretary-General that the Government of the Federal Republic of Yugoslavia, cooperating in a constructive manner with the Contact Group, have:

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[31] S/RES/1160 (1998);
[32] S/RES/1160 (1998);

begun a substantive dialogue in accordance with paragraph 4 above, including the participation of an outside representative or representatives, unless any failure to do so is not because of the position of the Federal Republic of Yugoslavia or Serbian authorities ...".[33]

31. UNSC Resolution 1160 does not address the substance of the political solution to the issue of Kosovo. The only specific requirement set out by the resolution is that the substance of the long-term status of Kosovo must be found through a meaningful dialogue. Nevertheless, the language of the resolution is clear: the future solution for the Kosovo situation should be based on "the territorial integrity of the Federal Republic of Yugoslavia", and ought to include a "substantially greater degree of autonomy and meaningful self-administration" for Kosovo. Such solution was to be found, according to the provision of UNSC Resolution 1160, through meaningful dialogue (and not through unilateral measures).

32. As it is evidently clear from the provisions of UNSC Resolution 1160, there is no indication towards any sort of solution that would imply a unilateral declaration of independence for Kosovo. On the contrary, the Security Council refers twice, in the preambular and operative part of Resolution 1160 to the territorial integrity of the Federal Republic of Yugoslavia. This is also clearly stated in the Contact Group statement on Kosovo, adopted in London, on 9 March 1998, and referred to in operative paragraph 5:

"9. No one should misunderstand our position on the core issue involved. We support neither independence nor the maintenance of the status quo. As we have set out clearly, the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia, and be in accordance with OSCE standards, Helsinki principles, and the UN Charter [...]".[34]

33. The specific requirements of the OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe in 1975, and the Charter of the United Nations, referred to in UNSC Resolution 1160 and the Contact Group statements will be addressed in Chapter 3 of this Written Statement.[35]

34. In UNSC Resolution 1199 (1998) of 23 September 1998, the Council adopted a more determined wording, although it took no further enforcement measures. It reaffirmed the proposed guidelines for the process of finding a political solution to the Kosovo issue, in preambular paragraphs 12 and 13, which read:

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[33] S/RES/1160 (1998);
[34] S/1998/223;
[35] See infra paras. 81-96 of the Written Statement of Romania;

"Reaffirming the objectives of resolution 1160 (1998), in which the Council expressed 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*,

Reaffirming also the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[36] (emphasis added)

These two guidelines – enhanced status for Kosovo, a substantially greater degree of autonomy, meaningful self-administration and the commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia - are to be found throughout all determinations made by the Security Council in relation to the Kosovo problem.

35. The Council reiterated, in the operative part of Resolution 1199, its requirement that the substance of the long-term status of Kosovo must be found through a meaningful dialogue[37]. It should be underlined, once again, that the wording of UNSC Resolution 1199, much like UNSC Resolution 1160, clearly provides only for a negotiated political solution to the long-term status of Kosovo. Such negotiations should have been conducted between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership, with international involvement.

36. The requirements stated in UNSC Resolution 1160 and restated in UNSC Resolution 1199, of entering into negotiations and meaningful dialogue towards finding a long-term solution to the Kosovo issue, were to be observed not only by the Federal Republic of Yugoslavia, but also by the Kosovo Albanian leadership. Thus, the latter were not allowed the recourse to a unilateral solution.

37. UNSC Resolution 1203 (1998) of 24 October 1998 endorsed the latest evolutions in finding a solution to the Kosovo situation, following the demarches of NATO and OSCE. At the same time, this Resolution maintained the stringent requirement put by the Security Council on the Belgrade authorities and the Kosovo Albanian leadership. Thus, the relevant preambular paragraphs of the Resolution read as follows:

"Recalling its resolutions 1160 (1998) of 31 March 1998 and 1199 (1998) of 23 September 1998, and the importance of the peaceful resolution of the problem of Kosovo, Federal Republic of Yugoslavia [...]

Recalling the objectives of Resolution 1160 (1998), in which the Council expressed 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* [...]

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[36] S/RES/1199 (1998);
[37] para. 3 of S/RES/1199 (1998);

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[38] (emphasis added)

38. The stringent requirement referred to above is underlined in the operative part of UNSC Resolution 1203:

> "3. Demands that the Federal Republic of Yugoslavia comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)...
>
> 4. Demands that the Kosovo Albanian leadership and all other element of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)...
>
> 5. Stresses the urgent need for 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."[39]

39. The wording of these operative paragraphs leaves no doubt as to the obligation of the two parties to reach a negotiated political solution to the issue of Kosovo. In Romania's view, this wording - besides excluding any possibility of a unilateral solution to the Kosovo issue - also transformed the proposed guidelines for negotiations, first set out in UNSC Resolution 1160, into straightforward guarantees for the outcome of the negotiations. Neither the Federal Republic of Yugoslavia could diminish the future enhanced status for Kosovo, substantially greater degree of autonomy and meaningful self-administration, nor could the Kosovo Albanian community terminate unilaterally the Yugoslav territorial title over Kosovo.

40. UNSC Resolution 1239 (1999) of 14 May 1999, addressed a specific issue, namely the "enormous influx of Kosovo refugees into Albania, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, and other countries, as well as [the] increasing numbers of displaced persons within Kosovo, the Republic of Montenegro and other parts of the Federal Republic of Yugoslavia"[40] and did not concern the negotiated solution for the Kosovo problem. It referred, however, to the determinations made previously by the Security Council regarding the Kosovo situation and, also, to the "territorial integrity and sovereignty of all States in the region".[41]

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[38] S/RES/1203 (1998);
[39] S/RES/1203 (1998);
[40] S/RES/1239 (1998);
[41] S/RES/1239 (1998);

III. United Nations Security Council Resolution 1244 (1999) of 10 June 1999

41. While the provisions of UNSC Resolution 1244 play a very important role in assessing the conformity of the DOI with relevant United Nations Security Council resolutions, Romania underlines that an equally important role in such assessment is played by the provisions of UNSC Resolutions 1160, 1199, 1203 and 1239. These resolutions, *together* with UNSC Resolution 1244 have a combined and cumulative effect. This is not something unusual, as the Court observed in 1971 in relation to UNSC Resolutions 264 (1969), 267 (1969) and 276 (1970) .[42] Romania also reminds in the context its conclusions regarding the legal value of preambles in legal documents, as presented above.[43]

42. UNSC Resolution 1244 was in force at the moment of the DOI and continues to be in force, since it was not modified or terminated by another UNSC resolution or by becoming obsolete.

43. Security Council Resolution 1244 was aimed directly, as expressly mentioned in preambular paragraph 4, at resolving "... the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia" and providing "... for the safe and free return of all refugees and displaced persons to their homes". The relevant paragraph reads as follows:

> "Determined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes,"[44]

The two main objectives of UNSC Resolution 1244 can be clearly seen in this paragraph. The first task taken up by the Council was to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia at that time and, the second, to provide for the safe and free return of all refugees and displaced persons to their homes.

44. Preambular paragraphs 5 to 8 present the rationale behind the two objectives while preambular 9 to 11 establish the guidelines and guarantees in accomplishing the two objectives mentioned above. These guidelines and guarantees are mentioned as follows:

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[42] 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. 51, para. 108: "Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and a cumulative effect";
[43] See supra para. 16 of the Written Statement of Romania;
[44] S/RES/1244 (1999);

"Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 [...] and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 [...], and the Federal Republic of Yugoslavia's agreement to that paper,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States in the region, as set out in the Helsinki Final Act and annex 2,

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo...".[45]

45. As it was shown above, these preambular paragraphs are a basis for the interpretation of the main part of the Resolution, since they display the authentic will of the Security Council. They have the same binding force as the preambular paragraphs reaffirming, for instance, the right of the refugees to return to their homes.

46. Moreover, the objective of UNSC Resolution 1244 is not to find a long-term solution to the Kosovo situation but to provide for short-term and medium-term political solution to the crisis following the principles contained in annexes 1 and 2 to the Resolution. Romania will not expound on this political solution. However, it observes that the annexes to the Resolution expressly state that the interim political framework agreement providing for substantial self-government in Kosovo needs to take full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia. The almost identical paragraphs read:

"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 other countries of the region [...]".[46]

47. The Rambouillet accords, whilst intended to afford Kosovo meaningful autonomy, ruled out the redrawing of the existing borders. In a statement to the press, the Security Council:

"... took note of the conclusions of the co-chairmen of the Rambouillet Conference at the end of the two weeks of intensive efforts aimed at reaching an agreement on substantial autonomy for Kosovo, which respects the national sovereignty and territorial integrity of the FRY".[47]

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[45] S/RES/1244 (1999);
[46] S/RES/1244 (1999);
[47] *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, Heike Krieger (ed.), Cambridge University Press, Cambridge, 2001, at. 143 p. 278;

48. It is to be noted that references to the sovereignty and territorial integrity of Serbia are found in the Preamble of the Interim Agreement for Peace and Self-Government in Kosovo ("Rambouillet Agreement"), in Article 1 of its Framework, in the Preamble of its Chapter 1 (Constitution) and in Article 1 of its Chapter 7 (Implementation II).

49. In the preambular part the emphasis is on "the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia", whereas, Article 1 of the Framework refers to the principles of the agreement. One of this principles, specified in paragraph 2 of the mentioned article, ensures to the national communities and their members additional rights, which can not be used, however, against, *inter alia*, the sovereignty and territorial integrity of Serbia:

> "National communities and their members shall have additional rights specified in Chapter 1. Kosovo, Federal, and Republic authorities shall not interfere with the exercise of these additional rights. The national communities shall be legally equal as specified herein, and shall not use their additional rights to endanger the rights of other national communities or the rights of citizens, the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, or the functioning of representative democratic government in Kosovo".[48]

50. Hence, the agreement guarantees, on one hand, an enhanced right to self-government to Kosovo and its inhabitants and additional rights within Serbia, and on the other, the respect for the sovereignty and territorial integrity of Serbia. The political solution for Kosovo, therefore, should not go beyond the long established principles of international law to which the international community committed itself.

51. Similar references are to be found in the preambular part of Chapter 1,

> "Desiring through this interim Constitution to establish institutions of democratic self-government 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 (...)"[49]

and in Article 1 paragraph 1 letter a) of Chapter 7 of the Rambouillet Agreement:

> "The United Nations Security Council is invited to pass a resolution under Chapter VII of the Charter endorsing and adopting the arrangements set forth in this Chapter, including the establishment of a multinational military implementation force in Kosovo. The Parties invite NATO to constitute and lead a military force to help ensure compliance with the provisions of this Chapter.

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[48] *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, Heike Krieger (ed.), Cambridge University Press, Cambridge, 2001, at. 141 p. 261;

[49] *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, Heike Krieger (ed.), Cambridge University Press, 2001, at. 141 p. 261;

They also reaffirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY)".[50]

Thus, the right to self-government itself is rooted in the sovereignty and territorial integrity of Serbia, which should be maintained and respected by the international community, undoubtedly on the basis of the provisions of the UN Charter.

52. This agreement was meant to provide an interim solution for Kosovo. The Rambouillet Agreement itself provided in its final chapter (Amendment, Comprehensive Assessment, and Final Clauses) 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", as well as of the opinions of relevant authorities, the good will of the Parties in implementing the Agreement as well as of the Helsinki Final Act (Article 1 paragraph 3 of Chapter 8 of the Rambouillet Agreement).

53. Hence, the solution for the final settlement would have not, in any case, been based on a unilateral reaction on the part of one side or another, but on a complex of factors which would have considered, as well, the position of Serbia, *vis-à-vis* the principles of sovereignty and territorial integrity as illustrated in the 1970 Resolution 2625 (XXV) of the UN General Assembly, concerning the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" and the Helsinki Final Act.

54. By recalling Resolutions 1160, 1199, 1203 and 1239, the Security Council deliberately reaffirmed its adherence to the already established principles for a solution to the Kosovo issue. Through the same recalling of previous resolutions, the obligations of the two parties to the Kosovo conflict were implicitly reconfirmed. There is nothing in the text of UNSC Resolution 1244 to bear the meaning that, in 1999, the Council authorized the separation of Kosovo at sometime in the future. Nor there is any mention of the right to self-determination for the population of Kosovo.

55. The difference between the references to the territorial integrity of the Federal Republic of Yugoslavia found in preambular paragraph 10 of the Resolution and the two annexes lies in the fact that the references in the two annexes concern only the interim political agreement, while the reference in the preambular paragraph concerns any future settlement.

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[50] *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, Heike Krieger (ed.), Cambridge University Press, 2001, at. 141 p. 272;

56. Romania believes that the guidelines and guarantees in accomplishing the objectives of Resolution 1244 are not aimed exclusively at the interim status of Kosovo. They are also a reaffirmation of the guidelines for the final settlement. Along with the substantial autonomy and meaningful self-administration mentioned in preambular paragraph 11 of the Resolution, principle 9 mentioned in the annex 2 to the document, provides that "[n]egotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions".[51] Negotiations at the time of the adoption of the resolutions mentioned above spoke in terms of self-government, not merely interim but as a feature of the future regime for Kosovo.

57. Thus, UN SC Resolution 1244 expressly acknowledged the territorial integrity of Serbia and established that this principle had to be taken into account by any solution for the status of Kosovo, which was to be reached through meaningful dialogue between the interested parties. *Consequently, the unilateral act of the Provisional Institutions of Self-Government of Kosovo of adopting the DOI ran contrary to UN SC Resolution 1244.*

IV. Competence of the Provisional Institutions of Self-Government in Kosovo

58. Another aspect which needs to be analyzed concerns *the competence of the Provisional Institutions of Self-Government of Kosovo.* These institutions have been established by UNMiK Regulation 2001/9 of 15 May 2001 on the Constitutional Framework for Self-Government of Kosovo.[52] The Regulation was adopted in conformity with, and in application of, UN SC Resolution 1244. Hence, the competences and responsibilities it establishes for the Provisional Institutions of Self-Government cannot go beyond the principles embodies in the said resolution, including the respect for the territorial integrity of Serbia.

59. Chapter 5 of UNMiK Regulation 2001/9, as subsequently amended, regulates the responsibilities of the Provisional Institutions of Self-Government; there is no specific, not even indirect, provision enabling the Provisional Institutions to decide on the status of Kosovo, and no existent provision can be interpreted as suggesting such an authority. In fact such a disposition could not have found its place in the UNMiK regulation, since it was the

[51] S/RES/1244 (1999);
[52] Regulation 2001/9, published in the UNMIK Official Gazette, available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2001regs/RE2001_09.pdf;

Security Council which established the framework of the political solution for Kosovo. Moreover, the Regulation expressly provides for the fact that:

> "The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244(1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244(1999) or this Constitutional Framework".[53]

60. It is obvious that the Provisional Institutions of Self-Government could not overpass, in exercising their mandate, the legal framework created by the UN SC Resolution 1244. Consequently, *they had no mandate to take unilateral decisions on the final status of Kosovo*, which must be decided in accordance with the relevant provisions of UN SC Resolution 1244 itself.

61. Whether the Provisional Institutions of Self-Government in Kosovo, as representative bodies of the population of Kosovo, could lawfully adopt the DOI in the exercise of its right under general international law is a different aspect, which Romania analyzes in Chapter 4 of this Written Statement.[54]

V. Conclusion

62. It is clear from all the above that, according to the relevant United Nations resolutions, mainly UN SC Resolution 1244 (1999), any solution for the final status of Kosovo must take account of the territorial integrity of Serbia and must be obtained in a consensual manner, through meaningful dialogue. Hence, *by disregarding the territorial integrity of Serbia and by being unilaterally adopted, the 2008 DOI was not in accordance with the provisions of the said UN resolutions*. Furthermore, *the DOI went beyond and against the competence of these Provisional Institutions of Self-Government, as established by the relevant UNMiK regulations.*

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[53] Chapter 12 of Regulation 2001/9 , published in the UNMIK Official Gazette, available at http://www.unmikonline.org /regulations/unmikgazette/02english/E2001regs/RE2001_09.pdf;
[54] See infra paras. 110-159 of the Written Statement of Romania;

Chapter 3

Serbia's Right to Territorial Integrity

I. Introduction

63. The contemporary international law has been faced, after 1945, with a number of challenges regarding the right to self-determination and the principle of territorial integrity, as enshrined in the main documents of international law. This is more so given the post-colonial context, when entities constantly invoked "the right to self-determination" to tentatively secede from existing States, while States constantly refrained form recognizing such unilateral declarations of independence unless agreed by the former State against which the secession occurred.

64. As Professor Crawford wrote,

> "International law has always favoured the territorial integrity of states and, correspondingly, the government of a state was entitled to oppose the unilateral secession of part of a state by all lawful means".[55]

However, there is a constant need and an endless search for a balanced solution between the principles of sovereignty and territorial integrity, on one hand, and the principles of equal rights and self-determination of peoples, on the other.

65. To use the words of the Secretary General in his report of 17 June 1992, entitled "An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping",

> "The foundation-stone of this work [the maintenance of international peace and security under the Charter] is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. (...). Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.
>
> One requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic (...).
>
> (...) The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for

[55] James Crawford, State Practice and International Law in Relation to Unilateral Secession – Report to the Government of Canada concerning unilateral secession by Quebec, para. 8;

> peoples, both of great value and importance, must not be permitted to work against each other in the period ahead. Respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States. Our constant duty should be to maintain the integrity of each while finding a balanced design for all".[56]

66. Therefore, fragmentation of States does not prefigure itself as the solution for the effective exercise of the right to self-determination, as it could be a potential danger to international peace and security. Respect for human rights and the assurance of effective participation in the internal affairs of a State could represent, on the other hand, an authentic solution for maintaining the integrity of the principle of self-determination.

67. The main arguments with respect to the right to self-determination and its (lack of) application to Kosovo will be advanced in the following chapter of this Written Statement;[57] the present chapter will focus on the principle of territorial integrity in order to permit a conclusion pursuant to which the principle of territorial integrity must be observed. Such a conclusion would be valid and applicable to the situation of Serbia/Kosovo even in the absence of the particular *regime* set forth by the sum of relevant UN resolutions and other documents.[58]

68. This analysis of the principle of territorial integrity is twofold: first, Romania will consider the relevant universal and regional instruments pertinent for the consideration of the issue in view; second, Romania will apply these instruments to the particular case under discussion.

II. Regulation of the principle of territorial integrity of States

69. As the Arbitration Commission established by the International Conference on Yugoslavia stated 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 Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlines Article 11 of the

[56] paras. 17 to 19 of the Report - A/47/277 - S/24111;
[57] See infra paras. 117-159of the Written Statement of Romania;
[58] See supra paras. 26-57 of the Written Statement of Romania;

Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties".[59]

A. Documents of universal significance

70. As reflected in the doctrine, "few principles in present-day international law are so firmly established as that of territorial integrity of States".[60]

71. The whole United Nations establishment is based on the principle of sovereign equality among States, as one of the most important principles in international relations, as seen in art. 2 of the UN Charter.

72. The fourth principle listed in art. 2 of the UN Charter protects the territorial integrity and political independence of States, asserting 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".

Therefore, territorial integrity of States, alongside political independence, is a fundamental principle of the UN Charter, dealt with in relation with the prohibition of the use of force.

73. In case the sovereignty of a State or its territorial integrity is affected, amounting to a threat to peace, breach of peace or act of aggression, the Security Council has the right to make the decisions it deems appropriate to maintain or restore international peace and security, in accordance with the provisions of the UN Charter.

74. These principles are the basis upon which the UN and its Members act in pursue of the objectives of the Organization, such as the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (art. 1 of the UN Charter).

75. The 1970 Resolution 2625 (XXV) of the UN General Assembly, concerning the "Declaration on Principles of International Law Concerning Friendly Relations and

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[59] Arbitration Commission, Opinion No. 3, 11 January 1992, European Journal of International Law, no. 3 (1992), p. 185;

[60] Thomas Franck et al., The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty, Report prepared for the Quebec Department of International Relations (8 May 1992), para. 2.16;

Cooperation among States in accordance with the Charter of the United Nations" enunciates, as its first principle,

> "the principle that States shall refrain in their international relations from the threat or us of 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".[61]

76. Further on, the Resolution itself provides, for an unambiguous "safeguard clause" in favor of the principle of territorial integrity of States, by underlying, under the principle of equal rights and self determination of peoples, that,

> "nothing (...) 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".[62]

77. This obligation is incumbent upon those to which the principle of equal rights and self determination addresses, but also upon the international community, as,

> "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".[63]

78. This is, however, closely linked to the next principle – of sovereign equality of States – which defines, as one of the elements of sovereign equality, the inviolability of the territorial integrity and political independence of States (the principle of sovereign equality of States, letter d).

79. Therefore,

> "a State whose government represents the whole people of its territory without distinction of any kind, that is to say, on the basis of equality, and in particular without discrimination on grounds of race, creed or colour, complies with the principle of self determination in respect of all of its people and is entitled to the protection of its territorial integrity".[64]

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[61] A/RES/2625 (XXV) in Resolutions adopted on the Report of the Sixth Committee, available at http://www.un.org/Docs/asp/ws.asp?m=A/RES/2625%20(XXV);
[62] A/RES/2625 (XXV) in Resolutions adopted on the Report of the Sixth Committee, available at http://www.un.org/Docs/asp/ws.asp?m=A/RES/2625%20(XXV);
[63] A/RES/2625 (XXV) in Resolutions adopted on the Report of the Sixth Committee, available at http://www.un.org/Docs/asp/ws.asp?m=A/RES/2625%20(XXV);
[64] James Crawford, State Practice and International Law in Relation to Unilateral Secession – Report to Government of Canada concerning unilateral secession by Quebec, para. 61;

80. Even if the international documents referred to above apparently establish a general obligation of *States* to fully observe the principle of territorial integrity in their mutual relations, this principle imposes an *erga omnes* obligation with regard to its observance.

B. Documents of regional significance

81. The Final Act of the Conference on Security and Cooperation in Europe (1 August 1975) (*Helsinki Final Act*) reiterates, at European level, in a more comprehensive way, the main principles of the Charter of the United Nations, which are to guide the relations between the States participating in its adoption.

82. The adoption of this act was motivated by the desire

> "to improve and intensify [the] relations [between the Participating States] and to contribute in Europe to peace, security, justice and co-operation as well as to rapprochement among themselves and with the other States of the world".[65]

83. The Declaration on Principles, comprised in the Helsinki Final Act, contains ten principles of "primary significance" for the mutual relations between the States.

84. The first of the enumerated principles refers to the sovereign equality and respect for the rights inherent in sovereignty. It is worth mentioning some of the elements envisaged by this principle as it applies in the European framework:

- the principle of sovereign equality and the rights inherent in sovereignty include the right of every State to juridical equality, to territorial integrity and to freedom and political independence;
- with due respect to the principle of sovereign equality, States must respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations;
- States consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement.[66]

Therefore, this principle recognizes the territorial integrity of States, their right to internally dispose of themselves and the inviolability of frontiers, which can be altered only by peaceful means and in a consensual manner.

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[65] preambular paragraph 4, available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf;
[66] http://www.osce.org/documents/mcs/1975/08/4044_en.pdf;

85. The distinction between territorial integrity and inviolability of frontiers distinguishes this Declaration from the UN Charter, as the latter principle is dealt with separately from the former.

86. Notwithstanding the positive approach taken within the context of the principle of sovereign equality, the principle of the inviolability of frontiers forbids at any time any contestation of the frontiers of the States in Europe as they are deemed inviolable. This also rules out "any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State" (Principle III).

87. This principle has its counterpart in the doctrine of *uti possidetis* or "the permanence and stability of land frontiers".[67] As seen in the context of the discussion on sovereign equality, this principle does not entail that the frontiers are immutable, but that they can only be changed by agreement between or among the parties concerned and without the use of force.

88. The principle of territorial integrity of States asserts the territorial integrity of States and the obligation of all the Participating States to respect it. This includes their obligation

> "to refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force" (Principle IV)

89. In connection with this principle comes the principle of equal rights and self-determination of peoples, which should be respected

> "at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (Principle VIII)

90. Therefore, the full exercise of the principle of equal rights and self determination of peoples should in no way undermine the territorial integrity of States and should not come at the expense of the territorial integrity of States (that is territorial integrity *per se*, political independence and unity of the State). The problem will be dealt with in the following chapter.[68]

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[67] Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 66 para. 84;
[68] See paras. 117-159 of the Written Statement of Romania;

91. Out of all norms of international law which should be observed when exercising the right to self-determination, the principle of territorial integrity was singled out within the context of the principle of equal rights and self-determination of peoples. This stresses once more that, as conceived, the right to self-determination has a preponderant internal character.

92. The principles of the Final Act are reasserted in the Charter of Paris for a New Europe (1990), which, under the heading "Friendly Relations among Participating States" affirms that,

> "our relations will rest on our common adherence to democratic values and to human rights and fundamental freedoms. We are convinced that in order to strengthen peace and security among our States, the advancement of democracy and respect for and effective exercise of human rights, are indispensable. We reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, *including those relating to territorial integrity of States*".[69]

93. The principles of the Helsinki Final Act and of the Paris Charter are referred to as well in the *Declaration of the European Council on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"*, issued on 16 December 1991, according to which the Community and its member States declared their readiness to recognize the new States established on the territories of the former Soviet Union and Yugoslavia. Recognition was however circumscribed to various requirements, which should be observed in the process of recognition. One such requirement was

> "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement".[70]

94. Therefore, similarly to the principle of the inviolability of frontiers within the Helsinki Final Act, the frontiers of States can only be changed by peaceful means and by common agreement.

95. Further-on, the Declaration states that "all questions concerning State successions and regional disputes" must be settled "by agreement, including where appropriate by recourse to arbitration".

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[69] http://www.osce.org/documents/mcs/1990/11/4045_en.pdf;

[70] 16 December 1991 Declaration of the European Council on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" available in European Journal of International Law, no. 4(1993), p. 72;

96. The Declaration does not explicitly refer to the principle of territorial integrity, but such a reference is made in the context of the general statement concerning the respect for the provisions of the UN Charter and to the commitments subscribed to in the Helsinki Final Act and in the Paris Charter.

C. Conclusion

97. The principles of territorial integrity and of the inviolability of frontiers have an absolute character. This means that no changes to a State's territory or to its frontiers can occur except in those cases when the State concerned consents to that end.

98. Therefore, the territorial integrity of States can not be affected as a result of a unilateral right of secession, which is not recognized as such by international law, as it would be demonstrated in the next Chapter, but only as a result of a mutual agreement between or among the parties involved.

III. The case of Serbia

99. From the outset it should be underlined that Serbia never relinquished its sovereign rights over the province of Kosovo which it considers as an integral part of it.

100. The 1974 Constitution of the Socialist Federal Republic of Yugoslavia granted autonomy to the province of Kosovo, recognizing it as "[an] autonomous, socialist, self-managing, democratic, socio-political [community]" within the Socialist Republic of Serbia and the Socialist Federal Republic of Yugoslavia.[71] The 1990 Constitution brought no changes to the matter.

101. UN SC Resolution 1244 (1999) did not operate any transfer of sovereignty from Serbia to the international community or the UN. As seen above, in fact UN SC Resolution 1244 *reaffirmed* in clear terms the territorial integrity of Serbia (the FRY).

102. At the same time, UN SC Resolution 1244 specifically provides that the then-Yugoslavia will continue to exercise acts deriving from its sovereignty over Kosovo. For instance, para. 4 refers to the fact that:

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[71] The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999, Heike Krieger (ed.), Cambridge University Press, Cambridge, 2001, at. 1 p. 3;

"an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2".[72]

103. Annex 2 specifies that Yugoslav military and police personnel are to perform certain acts which would have been incompatible with a transfer of sovereignty from Yugoslavia to the international community, such as maintaining presences at Serb patrimonial sites or at key border crossings.[73]

104. Serbia did not relinquish its title over Kosovo at any subsequent moment; on the contrary, Serbia continued to reaffirm its sovereignty over the territory and continued to perform acts of sovereignty concerning Kosovo, such as delivery of identity documents or passports to Kosovo inhabitants or organizing polling stations in Kosovo, on the occasion of Serbian electoral processes.

105. The present Constitution of Serbia, adopted by the National Assembly of the Republic of Serbia on 30 September 2006 and endorsed by referendum on 28 and 29 October 2006, specifies in its Preamble that "the Province of Kosovo and Metohija is an integral part of the territory of Serbia".[74] This Constitution was in force at the moment of the DOI.

106. All official Serbian positions taken before, on and after the adoption of the DOI clearly indicate that Serbia was not and is not willing to give up its title over the territory of Kosovo.

107. Considering this fact, it cannot even remotely be sustained that Serbia consented to the alteration of its frontiers or its territorial integrity at any given moment.

108. Under these circumstances, there is an *erga omnes* obligation to respect the territorial integrity of Serbia and the inviolability of its frontiers. Therefore, according to the international law, the territorial integrity of Serbia or its frontiers cannot be affected or modified by a unilateral act of the Provisional Institutions of Self-Government of Kosovo.

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[72] S/RES/1244 (1999);
[73] S/RES/1244 (1999);
[74] Constitution of the Republic of Serbia, available at http://www.predsednik.yu/ mwc/ epic/ doc/ ConstitutionofSerbia.pdf;

IV. Conclusion

109. In conclusion, under the whole edifice of international law, as reflected in instruments of universal and regional importance, at the moment of the DOI the State of Serbia had the right to territorial integrity and inviolability of its frontiers. The international community had the correlative obligation to respect this right. Serbia's right and the corresponding obligation of all other subjects of international law existed according to international law and the provisions of the relevant UN documents, which were in fact based on this right and this obligation and reinforced them. Consequently, *the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was not in conformity with this right under international law.*

Chapter 4

Does Kosovo Have a Right to Self-Determination Implying Secession from Serbia?

I. Secession in international law

110. As evident from its content, the DOI of the Provisional Institutions of Self-Government of Kosovo aims at establishing a new State on the territory of the Serbian province of Kosovo – the "Republic of Kosovo". On the moment of the DOI, the title of sovereignty over Kosovo undisputedly belonged to Serbia. Placing Kosovo under the provisional administration of the UN, by UNSC Resolution 1244/1999, by no means signified a transfer of title from Serbia to the international community or the UN and, as already seen, Serbia did not relinquish its title over Kosovo at any moment.

111. Under these circumstances, the establishment of a new State in Kosovo - a territory legally belonging to Serbia - could only be done, out of the generally identified modes of creation of States in international law, through the process commonly-referred to as *secession,* which implies the creation of a State without the consent of the former sovereign. Any other modality, such as acquisition, occupation, explicit grant of independence or implicit devolution,[75] is excluded.

112. As a modality of creation of States, secession has been analyzed in doctrine from various perspectives. Authorities in international law have treated differently the cases of secession which occurred prior or after 1945 and further differentiated the latter according to whether they happened in the context of the decolonization process or outside the colonial context.[76]

113. In analyzing secession in relation to the Kosovo case, it is important to keep in mind the actual question which is before the Court and to delimit it from related but, nevertheless, different matters. Thus, the subject-matter of the case on which the Court is to render an advisory opinion regards *the accordance or the lack of accordance of the DOI with the international law,* not other issues such as whether Kosovo presently meets the factual criteria of statehood, whether recognition of States is declaratory or constitutive or which are the legal consequences of the recognition of the statehood of Kosovo by certain States.

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[75] For a complete analysis of the modes of the creation of States in international law, see James Crawford, *The Creation of States in International Law*, Second Edition, Clarendon Press, Oxford, 2006, p. 255-501;

[76] James Crawford, *The Creation of States in International Law*, Second Edition, Clarendon Press, Oxford, 2006, p. 374-448;

114. Thus, in the concrete context of the actual question which is before the Court, after having analyzed the DOI from the perspective of the UN relevant resolutions, UNMiK pertinent regulations and the principles of international law regarding the inviolability of frontiers and the territorial integrity of States, the question is whether there might be other principles of, or rights established under, international law which would have entitled the Kosovo authorities to lawfully declare independence, thereby establishing a new State seceding from Serbia.

115. An accurate presentation of the current state of play regarding secession in international law was given by the Supreme Court of Canada in its 1998 opinion regarding the *Secession of Quebec:*

> "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, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people [...] [I]nternational law places great importance on territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part [...] *Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion, subject to the right of peoples to self-determination* [...]".[77] (emphasis added)

116. In other words, since the constitutional framework of Serbia, in force on 17 February 2008, did not allow for the unilateral secession of parts of it, the determination of the conformity with the international law of the DOI – which equates with the determination of their right to unilaterally declare Kosovo's secession from Serbia – becomes a matter of determining if Kosovo qualified at that moment as a subject of the right to self-determination.

II. Right of peoples to self-determination – the rule

117. The right of peoples to self-determination is presently considered a fundamental principle of international law. As the Court put it in *East Timor* case,

> "[Portugal's] assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and by the jurisprudence of the

[77] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, para. 112, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf;

Court [...]; it is one of the essential principles of contemporary international law".[78]

118. Although mostly spoken of in the context of the process of decolonization, the principle of the right of peoples to self-determination has a general, broad application.

119. At universal level, the principle of self-determination is enshrined in the UN Charter, the UN Covenants on Civil and Political Rights and respectively on Economic, Social and Cultural Rights, as well as in the UN General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)).

120. Thus, the latter document states that

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue as they wish their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> [...]
>
> The territory of a colony or other non self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory has exercised the right of self-determination in accordance with the Charter [...]
>
> 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 color.
>
> Every State shall refrain from any action aimed at the partial or total disruption of die national unity and territorial integrity of any other State or country".[79]

121. Almost similar language was used by the Vienna Declaration of the UN World Conference on Human Rights, adopted on 25 June 1993[80], as well as by the UN General

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[78] Case Concerning East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 102, para. 29;
[79] A/RES/2625 (XXV) in Resolutions adopted on the Report of the Sixth Committee, available at http://www.un.org/Docs/asp/ws.asp?m=A/RES/2625%20(XXV);
[80] A/CONF.157/24 (Part I);

Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, adopted by GA Resolution 50/6, on 9 November 1995.[81]

122. At European level, the principle is included among the ten principles regulating the relations among the States participating to the Conference on Security and Co-operation in Europe (later-on, OSCE) – the Helsinki Final Act – which states that

> "The Participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
>
> 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".[82]

123. Based on these texts, the doctrine and relevant case-law concur in concluding that, outside the colonial context, the rule established by the principle of self-determination is that peoples exercise this right within the existing States. As the Supreme Court of Canada stated,

> "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states".[83]

The Court also found that

> "[t]he recognized sources of international law establish that the right of 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 framework of an existing state".[84]

124. The Committee on the Elimination of Racial Discrimination, in its General Recommendation XXI on the right to self-determination, came to the conclusion that:

> "international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paragraphs 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however,

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[81] A/RES/50/6;
[82] http://www.osce.org/documents/mcs/1975/08/4044_en.pdf;
[83] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, para. 122, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf;
[84] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, para. 126, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf;

exclude the possibility of arrangements reached by free agreements of all parties concerned".[85]

125. The Human Rights Committee also views the right to self-determination as having an internal character, the States being under the obligation of reporting on the measures undertaken at normative level on the implementation of the right to self-determination. General Comment 12 (Right to self-determination) of the Human Rights Committee illustrates the view of the Committee to that end:

> "Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely "determine their political status and freely pursue their economic, social and cultural development". The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.
>
> Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties' reports should contain information on each paragraph of article 1.
>
> With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right".[86]

126. In 2006, the Association of the Bar of the City of New York issued a report titled *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, which concludes the following:

> "The assumption is that such a pursuit of economic, social and cultural development would occur under the auspices of an existing State, and would not require the establishment of a new State".[87]

127. The Arbitration Commission established by the European Communities in 1991 in order to provide legal advice in the context of the dissolution of Yugoslavia (commonly known as the *Badinter Commission*), was confronted, among others, with the issue of self-determination. Following the rendering of Opinion No.1 of the Commission, the European Community issued the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, which refer to "the principles of the Helsinki Act and the Paris Charter, in

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[85] Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.7, p. 213-214;
[86] paragraphs 2-4 of General Comment nr. 12 in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.7, p. 134;
[87] http://www.nycbar.org/pdf/report/NYCity%20BarTransnistriaReport.pdf;

particular the principle of self-determination".[88] The Commission itself, in its Opinion No. 2, considered that:

> "[...] it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".[89]

128. This assessment was given by the Commission while considering whether the Serbian population in Croatia and Bosnia and Herzegovina had a right to self-determination. The Commission went on to specify that

> "[w]here there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.
>
> [...]
>
> Article 1 of the two 1966 International Covenants on Human Rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Commission's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Hercegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned".[90]

129. Thus, the Commission expressly denied that the right to self-determination has an "external" facet implying a right of secession from existing States. On the contrary, the Commission emphasized the "internal" facet of the right of self-determination: as a rule of international law, the right of self-determination implies its exercise within the frontiers of the existing States, of course with States taking due account of their obligations under international law to respect human rights, including rights of persons belonging to national, ethnic or linguistic minorities.

130. This conclusion is also supported by doctrine. Professor Crawford summarizes the situation as follows:

> "[...] the principle of self-determination applies in the following cases:

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[88] 16 December 1991 Declaration of the European Council on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" available in European Journal of International Law, no. 4(1993), p. 72;

[89] Arbitration Commission, Opinion No. 2, 11 January 1992, European Journal of International Law, no. 3 (1992), p. 183-184;

[90] Arbitration Commission, Opinion No. 2, 11 January 1992, European Journal of International Law, no. 3 (1992), p. 183-184;

> First, it applies to entities whose right to self-determination is established under or pursuant to international agreements, and in particular to mandated, trust and non-self-governing territories.
>
> Second, *it applies to existing States* [...]. In this case *the principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a State, a central element of which is the right of the people of the State to choose for themselves their own form of government.* In this sense, at least, self-determination is a continuing, and not a once-for-all right. Since self-determination units are coming increasingly to be States [...] it is likely that self-determination in the future will be a more conservative principle than has sometimes been feared".[91] (emphasis added)

131. Applying these findings to the Kosovo case, the following conclusions are apparent:

- since there was no agreement in force at the date of the DOI (neither in the form of a bilateral or multilateral treaty, nor, as shown above,[92] in the form of a binding UN document) providing for the application of the right of self-determination to Kosovo, *Kosovo was not at that moment (and is not now) an entity entitled to the right of self-determination implying unilateral secession from Serbia*;

- at the moment of the DOI, the inhabitants of Kosovo were entitled (and are entitled now) to exercise their right to self-determination, together with the rest of the inhabitants of Serbia, by freely pursuing their political, economic, social and cultural development *within the State of Serbia*;

- conversely, the authorities of Serbia were (and are) under the obligation to ensure the free exercise of the right of self-determination of all the people of Serbia (including Kosovo); this obligations subsumes the obligation to ensure that no part of the people of Serbia (including Kosovo) is abusively or discriminatory excluded from the exercise of its right to self-determination on grounds of ethnicity, language or religion;

- Serbia was also (and still is) under the obligation to fully respect and implement human rights, including the rights of persons belonging to national minorities, such as the non-Serbian inhabitants of Kosovo, as provided for by the applicable international treaties.

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[91] James Crawford, *The Creation of States in International Law*, Second Edition, Clarendon Press, Oxford, 2006, p. 126;
[92] See supra paras 10-57 of the Written Statement of Romania;

III. Right of peoples to self-determination – the exception

132. From the general rule according to which the primary units to which the right to self-determination applies are the existing States, the doctrine formulated a possible exception: the application of the principle to parts of existing States in exceptional circumstances, in case those specific parts are denied a meaningful exercise of the right to self-determination. Professor Crawford terms this as

> "'remedial secession' in the case of a State that does not conduct itself in compliance with the principle of equal rights and self-determination of peoples; e.g. in the case of total denial to a particular group or people within the State any role in their own government, either through their own institutions or the general institution of the state".[93]

133. This exception may tentatively be justified by the language found in the UN General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)), according to which

> "[n]othing 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 color*" (emphasis added). [94]

134. Taking into account this text, it might be argued that in cases where States do not conduct themselves in compliance with the principle of self-determination of peoples and discriminatory exclude from the exercise of this right parts of, or groups from, their people, the oppressed groups might invoke, as a remedy, a right to self-determination of their own.

135. This theory was analyzed by the Supreme Court of Canada as well, in the case on *Quebec Secession.* The Court described it as

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[93] James Crawford, *The Creation of States in International Law*, Second Edition, Clarendon Press, Oxford, 2006, p. 119;

[94] A/RES/2625 (XXV) in Resolutions adopted on the Report of the Sixth Committee, available at http://www.un.org/Docs/asp/ws.asp?m=A/RES/2625%20(XXV). See also the Vienna Declaration of the UN World Conference on Human Rights, adopted on 25 June 1993, which states that the right to self-determination "shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity or sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."* (emphasis added) - A/CONF.157/24 (Part I);

"the underlying proposition is 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".[95]

Earlier in the same Opinion, the Court had made it very clear that

"[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme of cases and, even then, under carefully defined circumstances".[96]

136. The Association of the Bar of the City of New York, in its 2006 report on the Transnistrian conflict, also referred to the "external" aspect of the right to self-determination, by trying to identify the conditions needed for a claim to "remedial secession":

"At the very least, an argument for external self-determination would need to prove that (*a*) the secessionists were a "people", (*b*) the state in which they are currently part brutally violates human rights, and (*c*) there are no other effective remedies under either domestic law or international law".[97]

137. In both instances it was found that, under the particular circumstances, the respective entities - *i.e.* Quebec and Transnistria – did not qualify as meeting the criteria necessary to entitle them to "remedial secession" in the application of the right to self-determination.

138. Even though the "remedial secession" theory is not yet fully established in international law and is still wanting of meaningful State practice, it is of interest to make its application to the case under discussion, in order to establish whether, at the moment of the proclamation of the DOI, the people of Kosovo found themselves in such an exceptional situation that could have justified "remedial secession". Only in such a case, the Provisional Institutions of Self-Government in Kosovo could be said to have acted in the exercise of the right to self-determination, thereby ensuring the lawfulness of their unilateral declaration of independence.

139. In assessing this case, two aspects may be considered:

- first, whether the people of Kosovo were subject, on the moment of the DOI, to gross violation of human rights or other form of oppression capable to deny it any meaningful exercise of its right to self-determination internally, together with the rest of the people of Serbia;

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[95] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, para. 134, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf;

[96] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, para. 126, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf;

[97] http://www.nycbar.org/pdf/report/NYCity%20BarTransnistriaReport.pdf;

- second, whether in such a case there was no option available to the people of Kosovo to ensure the full exercise of their right to self-determination internally within the State of Serbia (since, to quote the Supreme Court of Canada, remedial secession is only the "last resort").[98]

140. Romania remarks that the second aspect should come into play only if the answer to the first were in the positive. Indeed, only if found that the people of an entity are abusively denied the meaningful exercise of their right to self-determination internally within their State, the assessments of remedial options arise, with secession coming in the end as "the last resort".

141. This statement will not analyze whether the population of Kosovo represent "a people". Romania's firm conviction is that, in fact, the population of Kosovo is *not* a people, but is made up of various ethnicities, which – in view of Serbia's total population - represent national minorities (*e.g.* Albanians, Turks, Bosnians), ethnic minorities (*e.g.* Goranis, Roma, Ashkalis, Egyptians) or are part of the Serb majority.

142. It is generally admitted that the international law does not recognize a right to self-determination for national minorities distinct from the right to self-determination of the entire "people" of their State and implying a right of secession therefrom. The persons belonging to national minorities are entitled to the exercise of the *internal* right to self-determination together with all the other inhabitants of the existing States, *within* these States.[99] But not the external self-determination.

143. As Rosalyn Higgins observes,

> " [...] minorities *as such* do not have a right of self-determination. This means, in effect, that they have no right to secession, to independence, or to join with comparable groups in other states".[100]

144. The non-recognition of a special right to self-determination or secession for national minorities is perfectly compatible with the requirements of *stability* and *predictability* of the international relations and the international law. On the contrary, the recognition of such an unqualified right could irreparably affect these stability and predictability. In the already quoted treatise, Professor Rosalyn Higgins explains:

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[98] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, para. 134, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.pdf.
[99] See supra para. 123 of the Written Statement of Romania;
[100] Rosalyn Higgins, *Problems & Process. International Law and How We Use it*, Clarendon Press, Oxford, 1996, p. 124;

"the reality is that secession may not cure all the problems. There may be an area in a state where a particular minority is regionally predominant. [...] But within this regional area there may be a minority of the predominant minority – perhaps persons belonging to the national majority, or to yet another ethnic minority. [...] Virtually every minority has its own minority [...] The lesson we must draw is that the right of self-determination is interlocked with the proper protection of minority rights – but that they are discrete rights, not to be confused with each other".[101]

145. The first issue at stake is hence whether the population of Kosovo, irrespective of its national or ethnic characteristics, was subject, *at the moment of the DOI*, to gross violation of human rights or other form of oppression capable to deny it any meaningful exercise of its right to self-determination internally, together with the rest of people of Serbia.

146. It is undisputed that, starting with 1996, serious violations of human rights were committed in Kosovo, mainly by military and paramilitary forces under the command or control of the Serbian authorities. The graveness of the situation prompted the international community to intervene and in 1999, Kosovo was provisionally placed under the UN administration.

147. Thus, it could be effectively argued that, until the moment of the intervention of the international community in 1999, the population of Kosovo was arbitrarily denied the exercise of its right to self-determination internally, by reasons of nationality or ethnicity. Consequently, it might be said that, at that moment, Kosovo could have successfully claimed the right to self-determination leading to remedial secession. Still, not even then was this the case: UN SC Resolution 1244 mentioned nowhere the notion of "self-determination", but affirmed for several times the territorial integrity of the then-Yugoslavia.[102] Obviously, the international community did not consider in 1999 the situation in Kosovo of such a nature as to justify a case of remedial secession.

148. Of relevance is the view of the Committee on the Elimination of Racial Discrimination on the adoption of its decision on Kosovo on 9 August 1999 (Decision 1(55)). The Committee took account of the events that occurred in Kosovo and of the entire context in the region, and asserted at the same time its support for multi-ethnic societies. Further-on, the Committee emphasized that:

"the implementation of the principle of self-determination requires every State to promote, through joint and separate action, universal respect for an observance of

[101] Rosalyn Higgins, *op.cit.*, p. 125;
[102] For a detailed analysis of UNSC Resolution 1244 see supra paras. 41-46 of the Written Statement of Romania;

human rights and fundamental freedoms in accordance with the Charter of the United Nations. Equally, the Committee has expressed its view that international law has not recognized a general right of peoples unilaterally to declare secession from a State".[103]

149. In any case, it is not the period previous to 1999 or the precise moment of the adoption of UN SC Resolution 1244 which is the point of reference. The DOI was unilaterally adopted by the Provisional Institutions of Self-Government of Kosovo *almost a decade after the events in 1999*, respectively on 17 February 2008; *it is this moment which must be considered.*

150. From the outset it must be mentioned that, by and large, on 17 February 2008 Kosovo was not under the *de facto* control of Serbia, having provisionally been placed under the administration of the UN, by UN SC Resolution 1244. Therefore, as a matter of fact, the population of Kosovo was not, at that moment, subject to any mistreatment from the Serbian authorities such as to justify a remedial secession.

151. Nevertheless, in order to have a clear and accurate picture of the case, the *probability* of such mistreatment, should Kosovo have been under the jurisdiction of Serbia on the moment of the DOI must be assessed.

152. The present Serbian Constitution (also in force on the moment of the DOI) defines Serbia as a state "based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values." According to Article 2 of the Constitution, "[s]overeignty is vested in citizens [...]" and "[n]o state body, political organization, group or individual may usurp the sovereignty from the citizens, nor establish government against freely expressed will of the citizens".

153. The Constitution dedicates its Part II to "Human and Minority Rights and Freedoms". This part comprises 64 articles and covers a wide range of rights, to which we might add articles 82 to 90 from Part III of the Constitution ("Economic System and Public Finances"), which deal also with fundamental human rights.

154. The Opinion on the Constitution of Serbia adopted by the European Commission for Democracy Through Law (Venice Commission) at its 70th plenary session (17-18 March

[103] Report of the Committee on the Elimination of Racial Discrimination Fifty-fourth session (1–19 March 1999), Fifty-fifth session (2–27 August 1999), Supplement No. 18 (A/54/18), para. 4 of Decision 1(55) p. 11;

2007)[104] – which is a rather critical report regarding various aspects of the Constitution - refers to its part dedicated to human rights in the following terms:

> "[...] In sum, nearly 70 Articles are dedicated to fundamental rights, i.e. approximately one third of the 206 Articles of the Constitution. From an international and a comparative perspective this number is quite remarkable, in absolute and in relative terms. It shows that Human Rights form an integral and an important part of constitutional law and it makes it clear that attention is paid to this element and basic feature of a democratic society in the sense of European Standards such as the European Convention on Human Rights.
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> Part II resembles the previous Charter on Human and Minority Rights and Freedoms of the State Union [...]. It must be recalled at the outset, that the Charter of the State Union was very positively assessed by the Venice Commission in 2003. [...]
>
> Part II fully covers all areas of "classical" human rights. Their content is in line with European standards and goes in some respect even beyond that".[105]

155. The 2008 Human Rights Report of the State Department on Serbia (released on 25 February 2009), while noting various shortcomings, concludes that "[t]he government generally respected the human rights of its citizens"[106] and, referring to the 2008 elections, that "[t]he OSCE and other election observers, including domestic organizations, judged these elections mostly free and fair".[107] It must be noted that the phrase "generally respected human rights" is, according to the Explanatory Notes to the Reports, "the standard phrase used to describe all countries that attempt to protect human rights in the fullest sense, and is thus the highest level of respect for human rights"[108] assigned by the State Department's reports.

156. In this context, the obvious conclusion is that the general situation of Serbia, in particular regarding human rights and people's participation to the government, meets presently the generally recognized universal and European standards, and so it did at the moment of the DOI. Consequently, there is no reason to believe that Kosovo, *at the moment of the DOI,* have been under Serbia's control and its population would have been victim of oppression, brutal violation of human rights or unjust exclusion from the exercise of its right of internal self-determination together with the rest of people of Serbia – which would have justified a case of "remedial secession".

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[104] Opinion no. 405/2006, CDL-AD(2007)004, available at http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf;
[105] Opinion no. 405/2006, CDL-AD(2007)004, available at http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf;
[106] available at http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119103.htm;
[107] http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119103.htm;
[108] http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119103.htm;

157. Having come to this conclusion, there is no need to analyze whether on the moment of the DOI there was an option available to Kosovo to ensure the full exercise of its right to self-determination internally within the State of Serbia. Having found that at that moment the inhabitants of Kosovo were not subject to mistreatment from the Serbian authorities and there was no reason to believe that they would have been denied the exercise of their right to self-determination *within* Serbia, such a discussion is not required.

158. The present Serbian constitutional establishment, as well as Serbia's approach during the status negotiations which took place between 2006 and 2008, represent guarantees ensuring that, even if on the moment of the DOI there could have been fears that the inhabitants of Kosovo would have been denied the exercise of their right of self-determination within Serbia, such fears remain objectless. The recourse to secession was, thus, unjustified.

159. To conclude, at the moment of the DOI – 17 February 2008 – the criteria which might have justified the application of the "remedial secession" of Kosovo from Serbia, as an exercise of the external right of self-determination for the population of Kosovo, were not met. *Kosovo was not at that moment (and is not now) an entity entitled to the right of self-determination implying unilateral secession from Serbia.*

Chapter 5

Conclusions

160. This Written Statement was confined to a legal examination, from the point of view of the international law, of the right - or lack thereof – of the Provisional Institutions of Self-Government of Kosovo to unilaterally declare the independence of Kosovo from Serbia. This analysis was based on the relevant international law in force on the moment of the DOI – principles of international law, as enshrined in universal and regional instruments, as reflected by State practice and case-law of international courts and as commented by relevant doctrine, as well as documents adopted by the United Nations.

161. This Written Statement refrained from including historical or political analyses or assessments, since it is *the law* which is on the docket of the World Court. Romania brought this contribution with the conviction that, thus, it will contribute to reaching a sustainable solution to the Kosovo issue and to promoting peace, stability and development in the Western Balkans region.

162. Having considered the legal and factual resources relevant to the case, in conclusion, on the moment of the adoption of the declaration of independence:

- under the provisions of the relevant United Nations Resolutions, including but not limited to UN SC Resolution 1244 (1999), the Provisional Institutions of Self-Government of Kosovo had no right to unilaterally adopt a solution for the final status of Kosovo which disregarded the territorial integrity of Serbia;
- under the provisions of UN SC Resolution 1244 (1999) and the relevant regulations of the United Nations Mission in Kosovo, the Provisional Institutions of Self-Government of Kosovo had no competence to unilaterally adopt any solution for the final status of Kosovo;
- under the principles of international law, Serbia had the right to territorial integrity and inviolability of its frontiers; consequently, the Provisional Institutions of Self-Government of Kosovo had no right to adopt any unilateral solution for the final status of Kosovo in disregard of these rights;
- under the principles of international law, the population of Kosovo had no right to self-determination implying unilateral secession from Serbia; consequently, the Provisional Institutions of Self-Government of Kosovo had no right to adopt any unilateral solution for the final status of Kosovo implying such an outcome.

163. Consequently, *the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.*

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