

**INTERNATIONAL COURT OF JUSTICE**

**Request for an Advisory Opinion**

*“Is the Unilateral Declaration of Independence by the Provisional  
Institutions of Self-Government of Kosovo in accordance with  
international law?”*

**STATEMENT BY THE GOVERNMENT OF AUSTRIA**

Vienna, 16 April 2009

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## I. INTRODUCTION

1. On 8 October 2008 the United Nations General Assembly adopted Resolution A/RES/63/3 whereby it decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice pursuant to Article 65 of the Statute of the Court to render an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” By an Order dated 17 October 2008, concerning the case of *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for an Advisory Opinion), the Court established the procedures to be followed in this case. By that Order, the Court decided, *inter alia*, that “the United Nations and its Member States are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion”. Accordingly, the following statement is submitted.

2. The question addressed to the Court is concerned solely with the lawfulness of the Declaration of Independence (further: “Declaration”) by the Provisional Institutions of Self-Government of Kosovo (further: “PISG”) under international law. It relates neither to the question of a right to self-determination under international law and the scope of such right, to the statehood of Kosovo nor to the legality of the recognition of Kosovo by other states. Consequently, this statement does not deal with the substance of self-determination, the existence of a State of Kosovo and the latter’s recognition. Neither does it address the issue of conformity of the Declaration with national law, such as the present Constitution of the Republic of Serbia of 30 September 2006.

3. Austria's interest in the case results from its geographical proximity as well as its close historical ties with the region. With rising concern Austria has witnessed the occurrence of conflict, atrocities and grave injuries to the civilian population. As a matter of regional stability it is important to Austria that a permanent peaceful solution can be found and that further suffering must not be endured by the people in Kosovo.

4. The purpose of this statement is to demonstrate that international law including Resolution 1244 does not prohibit the authors of the Declaration from issuing it, that the fact of the issuance of the Declaration is not addressed by international law and that the content of the Declaration is in accordance with international law including Resolution 1244. It will be further established that the organs of the UN, namely the Special Representative of the Secretary-General (SRSG), the Secretary-General and the Security Council, did not object to the issuance of the Declaration and by this conduct accepted the conformity of this act with international law including Resolution 1244.

## II. FACTUAL BACKGROUND

5. Under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) Kosovo enjoyed the status of an autonomous province of Yugoslavia while remaining a constituent part of the Republic of Serbia.<sup>1</sup> As an autonomous province, Kosovo was entitled to participate in the federal institutions (including some veto rights)<sup>2</sup> and it had the right to maintain its own constitution, a parliamentary assembly and its own judiciary.

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<sup>1</sup> Constitution of the Federal Socialist Republic of Yugoslavia, 21 February 1974, Basic Principles Arts. I and II, reproduced in: *Blaustein, A. P./ Flanz G. H.* (eds.), *Historic Constitutions of the Countries of the World*, Vol. 17, issued December 1974.

<sup>2</sup> See *e.g.*, *Ibid.*, Art. 398 concerning amendments to the constitution.

6. On 28 March 1989, the Assembly of Serbia approved constitutional changes which effectively revoked the autonomy granted in the 1974 constitution.<sup>3</sup> Thereby Kosovo's status was reduced to that of a municipality and formerly autonomous rights were now attributed to the central authorities in Belgrade. The Constitutional Court of Serbia was vested with the power to invalidate legal acts of the institutions of Kosovo.<sup>4</sup> In addition, autonomous provinces were deprived of their right to veto future amendments to the Serbian constitution.<sup>5</sup> In 1990 the Government of the Serbian Republic dissolved the Assembly and the status of autonomy of Kosovo lost all of its substance.

7. After the disintegration of the SFRY, a new Constitution of the Federal Republic of Yugoslavia (Serbia and Montenegro) was adopted in April 1992. In this Constitution no reference to a status of autonomy for certain provinces was included: Kosovo was part of the Republic of Serbia without any special rights.<sup>6</sup> Conflicts erupted between Albanians living in Kosovo and Serb authorities which escalated in 1998 with the occurrence of massive violations of human rights. The Independent International Commission on Kosovo documents "a humanitarian catastrophe for the civilian Kosovar Albanian population"<sup>7</sup> and the occurrence of "numerous atrocities that appeared to have the character of crimes against humanity"<sup>8</sup>. In the recent *Milutinović* Judgment the ICTY's Trial Chamber held that crimes against humanity, violations of the laws or customs of war, deportation, forcible transfer and

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<sup>3</sup> *Prosecutor v. Slobodan Milošević and others*, Indictment, 22 May 1999, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Former Yugoslavia since 1991 (hereinafter ICTY) Case No. IT-99-37 at para. 11.

<sup>4</sup> Constitution of the Republic of Serbia, 28 September 1990, Art. 130, available at [www.unpan.org](http://www.unpan.org) (last visited 17 February 2009).

<sup>5</sup> See *Stahn, C.*, Constitution without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government, 14 *Leiden Journal of International Law* 531 (2001); *Malcolm, N.*, Kosovo: A Short History, Chapter 17 (1998).

<sup>6</sup> The Constitution of the Socialist Federal Republic of Yugoslavia (Serbia and Montenegro) of 27 April 1992 does not mention autonomous provinces or regions. Available at <http://www.uta.edu/cpsees/YUGOCON.htm> (last visited 17 February 2009).

<sup>7</sup> *Independent International Commission on Kosovo*, The Kosovo Report 163 (2000).

<sup>8</sup> *Ibid.*, p. 164.

persecution on ethnic grounds were committed by the Yugoslav army and Serbian MUP forces between 1 January and 20 June 1999 in Kosovo.<sup>9</sup> The Chamber also established that acts were committed by Nikola Šainović, a Deputy Prime Minister of the Federal Republic of Yugoslavia (FRY) and others with the intent to forcibly displace part of the Kosovo Albanian population, both within and without Kosovo, and thereby to change the ethnic balance in the province.<sup>10</sup>

8. In an attempt to diffuse tensions in Kosovo, an international peace conference was organised in Rambouillet, France beginning in February 1999. The Interim Agreement for Peace and Self-Government of Kosovo (Rambouillet Accords), resulting from this conference, would have enabled democratic self-government of Kosovo during a 3-year interim period<sup>11</sup> as well as an international implementation mission for this purpose<sup>12</sup>. The document was signed on 18 March 1999 only by the representatives of Kosovo. The Republic of Serbia, as part of the FRY, and the FRY in its own right refused to accept the agreement.

9. This failure to conclude an agreement and the continuing massive violations of human rights prompted NATO intervention on 24 March 1999. As held by the ICTY's Trial Chamber in the *Milutinović* case, during the course of NATO intervention a broad campaign of violence was directed against the Kosovo Albanian civilian population, conducted by forces under the control of the FRY and Serbian authorities.<sup>13</sup> On 9 June 1999 KFOR, the FRY and the Republic of Serbia signed the "Military Technical Agreement" which provided

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<sup>9</sup> *Prosecutor v. Milan Milutinović and others*, Trial Chamber Judgment, 26 February 2009, ICTY, Case No. IT-05-87-T, Volume III paras. 475, 788, 930, 1138.

<sup>10</sup> *Prosecutor v. Milan Milutinović and others*, Trial Chamber Judgment, 26 February 2009, ICTY, Case No. IT-05-87-T, Volume III, para 466.

<sup>11</sup> Chapter 1, Art. 1 and Chapter 8, Art. 1(3) of the Agreement, UN Doc. S/1999/648 (7 June 1999).

<sup>12</sup> See *Ibid.*, Chapter 4A.

<sup>13</sup> *Prosecutor v. Milan Milutinović and others*, Trial Chamber Judgment, 26 February 2009, ICTY, Case No. IT-05-87-T, Volume II, para 1156.

for withdrawal of FRY military forces (Article II 2) and the presence of an international security force following an appropriate UN Security Council Resolution (Article I 2). This Resolution, adopted on 10 June 1999 as UNSC Resolution 1244 (further: "Resolution 1244"), regulated the security presence as foreseen (operative paras 5, 7 and 9) and established an international civil presence in order to provide interim administration (operative paras 5 and 10).

10. Subsequent negotiations to reach a political settlement for the status of Kosovo under UN auspices have failed to achieve their objective. In 2005 the Secretary-General appointed Martti Ahtisaari as his Special Envoy for the Future Status Process for Kosovo. The appointment was approved by the Security Council on 10 November 2005.<sup>14</sup> In his capacity as Special Envoy, Mr. Ahtisaari's task was to lead the political process to determine the future status of Kosovo in the context of Resolution 1244. After 15 months of United Nations-sponsored negotiations, Mr. Ahtisaari prepared a Comprehensive Proposal for the Kosovo Status Settlement. He recommended a status of independence for Kosovo, supervised by the International Community. His recommendation and settlement proposal was approved by the Secretary General,<sup>15</sup> and accepted by the representatives of Kosovo. However, neither the Security Council reacted nor did Serbia accept the proposal and recommendations. The Special Envoy was of the view that "negotiation's potential to produce any mutually agreeable outcome on Kosovo's status is exhausted".<sup>16</sup>

11. Further negotiations with representatives of Serbia and Kosovo took place between August and December 2007 under the supervision of the "Troika" (consisting of

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<sup>14</sup> Letter from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2005/709 (10 November 2005).

<sup>15</sup> Letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168 (26 March 2007).

<sup>16</sup> *Ahtisaari, M.*, Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc S/2007/268 (26 March 2007), para. 3.

representatives of the European Union, the Russian Federation and of the United States) which was appointed by the Secretary-General.<sup>17</sup> The Troika was able to facilitate high-level, substantive discussions between Belgrade and Pristina. Nonetheless, after intensive negotiations the parties were unable to reach an agreement on Kosovo's status. Subsequent meetings of the Security Council were also inconclusive on the matter of a status settlement and no action was taken by the Security Council.<sup>18</sup>

12. On 17 February 2008, at an extraordinary meeting in Pristina, the representatives of the Kosovar people, gathered in the Assembly of Kosovo, issued the Declaration which is the object of the present request. It declared the independent and sovereign state of Kosovo while at the same time announcing respect for international law as well as Resolution 1244, welcoming the international presence and pledging conformity with the Ahtisaari Plan.

13. The Republic of Serbia requested the inclusion in the agenda of the sixty-third session of the UN General Assembly of a supplementary item entitled "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law".<sup>19</sup> The draft Resolution presented by Serbia as well as the Resolution subsequently adopted set out the following question addressed to the Court: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"<sup>20</sup> The Resolution was adopted

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<sup>17</sup> See Statement by the Secretary-General on the new period of engagement in Kosovo of 1 August 2007, UN Doc. S/2007/723, Annex I (10 December 2007).

<sup>18</sup> Cf. UN Doc. S/PV.5811 (19 December 2007); UN Docs. S/PV.5822 and S/PV.5821 (16 January 2008); UN Doc. S/PV.5835 (14 February 2008); UN Doc. S/PV.5839 (18 February 2008).

<sup>19</sup> Letter dated 15 August from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, UN Doc. A/63/195 (22 August 2008).

<sup>20</sup> UN Docs. A/63/L.2 (23 September 2008) and A/63/3 (8 October 2008).



at the 22<sup>nd</sup> meeting of the General Assembly on 8 October 2008 with 77 in favour, 6 against and 74 abstentions.<sup>21</sup>

### **III. THE CONFORMITY OF THE DECLARATION WITH RESOLUTION 1244 AND OTHER RULES OF INTERNATIONAL LAW**

#### ***A. Content of the Declaration***

14. The Declaration of 17 February 2008 “declare[s] Kosovo to be an independent and sovereign state”.<sup>22</sup> Its paragraph 3 states that the leaders of Kosovo “accept fully the obligations for Kosovo contained in the Ahtisaari Plan” and assures implementation of these obligations. The Declaration, in preambular paragraph 11, expresses regret “that no mutually-acceptable status outcome was possible” and in preambular paragraph 13 emphasises the reasons why a permanent solution to the status is indispensable to “move beyond the conflicts of the past and to realise the full democratic potential of our society”. The Declaration explicitly welcomes an international civilian presence to implement the Ahtisaari Plan as well as the international military presence according to Resolution 1244 (paragraph 5). In its final paragraph 12 the Declaration expresses a commitment to the principles of international law and Resolution 1244.

#### ***B. The signatories of the Declaration are not debarred by international law including Resolution 1244 from acting in the field of external relations***

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<sup>21</sup> Verbatim Records of the 22<sup>nd</sup> meeting of the UN General Assembly at its 63<sup>rd</sup> session, UN Doc. A/63/PV.22 (8 October 2008).

<sup>22</sup> Declaration of Independence of 17 February 2008 (hereinafter Declaration), para. 1.

15. The main objective of the Declaration is to determine the international legal status of Kosovo. As such, it is an act within the field of external relations. This is confirmed in paragraph 11 of the Declaration that emphasizes, in particular, the desire to establish good relations to neighbouring states.

*1. The signatories of the Declaration acted as representatives of the Kosovar people*

16. The Declaration was signed by the President of Kosovo, the Assembly President, the Prime Minister of Kosovo (who also presented the Declaration) and the 109 elected members present.<sup>23</sup> As indicated by this method of adoption, the members present at this Special Session did not formally act as the Assembly forming part of the PISG, but as representatives of the Kosovar people. Precisely for this purpose the text of the Declaration refers to “we, the democratically-elected leaders of our people” as the signatories of the Declaration. Despite the adoption by a vote of the members of the Assembly, it is the signature of the Declaration that demonstrates externally that the will of the Kosovar people is expressed. Elections regularly held since 2001 and open to the entire population of Kosovo entitle the members of the Assembly to act as representatives of the Kosovar people.<sup>24</sup> Acting in this capacity, the signatories are not bound by Resolution 1244. The signatories as representatives of the Kosovar people are not an entity created by Resolution 1244 and as such do not exercise competences derived from this Resolution. In the same vein, the conduct of the signatories acting in their capacity as representatives of the Kosovar people is not governed by international law as they are not acting as subjects of international law.

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<sup>23</sup> Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence, 18 February 2008, prepared by the Transcript Unit within the Assembly of Republic of Kosovo.

<sup>24</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc.S/2007/768 (3 January 2008), paras. 3 *et seq*; Cf. UNMIK Regulations No. 2007/26 and 2007/28 on Elections for the Assembly of Kosovo (29 August 2007).

2. *The signatories, as Assembly, acted in conformity with international law including Resolution 1244*

17. But even if the Declaration is seen as emanating from the Assembly as the highest representative and legislative Provisional Institution of Self-Government in Kosovo (further: PISG)<sup>25</sup>, it must be acknowledged that the Assembly is not debarred from acting in the field of external relations. It was, together with the other PISG (the President, the Prime Minister and several Ministries as well as a Judicial System), established pursuant to Resolution 1244 through the means of the international civil presence (UNMIK).<sup>26</sup>

18. Resolution 1244 provides in its paragraphs 11 (c) and (d) that the functions of the Provisional Institutions shall be “democratic and autonomous self-government” and “administrative responsibilities”. Originally, alongside the competences reserved to the SRSG in the field of external relations to be conducted in consultation and cooperation with the PISG,<sup>27</sup> the Assembly was explicitly granted competences concerning “international and external cooperation, including the reaching and finalising of agreements”.<sup>28</sup> Such activities were, however, to be coordinated with the SRSG.<sup>29</sup> Resolution 1244 stipulates that gradually a transfer of administrative responsibilities<sup>30</sup> as well as a transfer of authority<sup>31</sup> from the international civil presence to Kosovo’s institutions shall occur. Also, the Constitutional

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<sup>25</sup> Art. 9.1.1., Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9 (15 May 2001), as amended by UNMIK/REG/2007/29 and UNMIK/REG/2002/9 (hereinafter Constitutional Framework) available at <http://www.unmikonline.org/constframework.htm> (last visited 17 February 2009).

<sup>26</sup> Paras. 10 and 11 (c), UN Security Council Resolution 1244 (1999), UN Doc. S/RES/1244 (10 June 1999), (hereinafter Resolution 1244).

<sup>27</sup> Chapter 8, Constitutional Framework provides: “(o) External relations, including with states and international organisations, *as may be necessary for the implementation of his mandate*. In exercising his responsibilities for external relations, the SRSG will *consult and co-operate* with the Provisional Institutions of Self-Government with respect to matters of concern to the institutions” [emphasis added].

<sup>28</sup> Art. 5.6 Constitutional Framework.

<sup>29</sup> *Ibid.*

<sup>30</sup> Para. 11(d) Resolution 1244.

<sup>31</sup> Para. 11 (f) Resolution 1244.

Framework for Provisional Self-Government, promulgated by the SRSG as a further basis for the establishment and composition of the PISG, refers to a transfer of responsibilities several times.<sup>32</sup> Thus, the fact of the issuance of the Declaration is to be regarded as a manifestation of the transfer of competences to the Assembly as stipulated in Resolution 1244.

19. When the Assembly issued the Declaration without consulting the SRSG, it assumed the competence to act autonomously in the field of external relations, reflecting thereby the transfer of responsibilities as foreseen by Resolution 1244. The SRSG did not object to this exercise of power by the Assembly in the field of foreign relations,<sup>33</sup> despite the fact that, at least at that moment, the Constitutional Framework still provided that “the exercise of responsibilities by the PISG does not affect or diminish the authority of the SRSG to oversee the Provisional Institutions”<sup>34</sup>, and despite the fact that the Declaration was issued autonomously by the Assembly. Similarly, the Secretary-General and the Security Council did not voice objections.<sup>35</sup> By abstaining from a negative reaction, the Security Council has accepted the competence of the Assembly to act in this field. Moreover, since this conduct consisting of non-objection is decisive for the interpretation of Resolution 1244 as subsequent practice,<sup>36</sup> the act of the issuing the Declaration has to be recognized as being in conformity with Resolution 1244.

20. It is clear that the Assembly has relied on the conduct of the SRSG and other UN organs. By adopting Kosovo’s constitution on 8 April 2008<sup>37</sup> and going forward with the assumption

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<sup>32</sup> See Preamble, Arts. 5.2.(i) and 14.2.

<sup>33</sup> See *infra*, para. 41.

<sup>34</sup> Chapter 12, Constitutional Framework.

<sup>35</sup> See UN Doc. S/PV.5839 (18 February 2008).

<sup>36</sup> Wood, M., The Interpretation of Security Council Resolutions, 2 Max Planck Yearbook of United Nations Law 73, 90 and 91-92 (1998).

<sup>37</sup> The Text of the Constitution is available at <http://www.kosovoconstitution.info/> (last visited 17 February 2009).

of powers to the detriment of UNMIK's competences, the Assembly demonstrated its reliance on the continued non-interference by the SRSG as well as other UN organs and their acceptance of the Declaration.

21. The assumption of increasing powers of the Assembly concurred with the reduction of the powers exercised by the SRSG. Several months after the Declaration was issued, the Secretary-General recognized that his SRSG's authority in practice was diminishing and that his functions could no longer be exercised to their full extent.<sup>38</sup> Thus the UN has recognized the waning of the powers of the Special Representative so that parts of Resolution 1244 and the powers conferred upon the Special Representative by this resolution and the Constitutional Framework are no longer applicable. This is a further indication that the Secretary-General is accepting the assumption of powers of the Assembly. The transfer of powers is in accordance with paragraph 11 of Resolution 1244 and therefore the relegation of the SRSG's authority is in conformity with the objectives of the Resolution.

*C. The issuance of the Declaration breaches neither Resolution 1244 nor other rules of international law*

22. The issuance of the Declaration itself cannot cause a breach of international law including Resolution 1244 since international law leaves "a wide measure of discretion which is only limited in certain cases by prohibitive rules."<sup>39</sup> Therefore, only if there were an explicit international obligation incumbent on the signatories not to adopt such a Declaration, could

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<sup>38</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008) para. 21.

<sup>39</sup> *The Case of the SS Lotus*, Judgment of 7 September 1928, PCIJ Series A, No. 10, pp. 18 and 19; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226 at para 21.

the issuance of the Declaration be in breach of international law. Such an obligation does not exist.

23. Resolution 1244 does not address the issuance of a declaration of independence and therefore does not prohibit such an act.<sup>40</sup> The same applies to the Constitutional Framework. Nevertheless, it has been alleged that the Declaration proclaiming the independence of Kosovo is not in conformity with the duty to respect the territorial integrity of the Federal Republic of Yugoslavia.<sup>41</sup> The respect for territorial integrity is referred to in preambular paragraph 11 and Annex 2 of Resolution 1244. However, the question whether the representatives of the people of Kosovo could issue a declaration of independence is not addressed. If there were an obligation to respect the territorial integrity of the FRY it would first, apply only for a limited period of time, namely the interim period, and second, apply only to member states of the UN. However, the Declaration itself did not constitute a state, let alone a member state of the UN.<sup>42</sup>

24. Generally, it has to be recognized that a declaration of independence as such is not addressed by international law since it cannot be attributed to a subject of international law capable of acting with international effect. International law is silent with regard to declarations of independence, thus no prohibition of the Declaration can be derived from international law. This is proved by the precedents furnished by the Republic of Slovenia's Declaration of Independence<sup>43</sup> as well as the Declaration on the Establishment of the

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<sup>40</sup> See *infra* paras.28 et seq. on the conformity of a status of independence for Kosovo with international law including Resolution 1244.

<sup>41</sup> See Statements made in the Security Council, UN Doc. S/PV.5839 (18 February 2008): Statement by President *Tadić* (Serbia) at p. 5, Statement by Mr. *Churkin* (Russian Federation) at p. 6 and Mr. *Wang Guangya* (China) at p. 8; *Orakhelashvili A.*, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo, 12 *Max Planck Yearbook of United Nations Law* 1, 17 (2008).

<sup>42</sup> See *infra*, paras. 33 et seq.

<sup>43</sup> Republic of Slovenia Assembly Declaration of Independence, Ljubljana, 25 June 1991, reproduced in *Trifunovska, S.* (ed), *Yugoslavia Through Documents: From its creation to its dissolution*, 286 (1994).

sovereign and independent Republic of Croatia of 25 June 1991.<sup>44</sup> Both were issued without the preceding consent of the then existing state of Yugoslavia, and no argument was made that these declarations could be seen as violating international law.<sup>45</sup>

25. In any event, it must be acknowledged that a mere declaration does not suffice in order for an independent state to come into existence. Independence is a formal legal status resulting from social fact<sup>46</sup> that cannot be established by simple proclamation. Arbitrator Max Huber has defined independence as the right to exercise within a territory “to the exclusion of any other state, the functions of a state”.<sup>47</sup>

26. Similarly, such a declaration alone cannot establish a state since other elements are required for this purpose such as: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.<sup>48</sup> State practice has applied the principle of effectiveness to the constitutive elements of the state.<sup>49</sup> Accordingly, doctrine and practice unequivocally illustrate that a declaration alone does not suffice to establish the status of an “independent and sovereign state”. Since the Declaration is unable to create statehood it cannot be measured against rules of general international law relating to the creation of a new State or change of territory.

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<sup>44</sup> Declaration on the Establishment of the Sovereign and Independent Republic of Croatia, Zagreb, 25 June 1991, reproduced in *Trifunovska, S.* (ed), *Yugoslavia Through Documents: From its creation to its dissolution*, 301 (1994); see also the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, Zagreb, 25 June 1991, reproduced in *Trifunovska*, p. 299.

<sup>45</sup> See Assessments and Positions of the SFRY Presidency concerning the Proclamation of the Independence of the Republic of Croatia and Slovenia, Belgrade, 11 October 1991, reproduced in *Trifunovska*, p. 353. This document does not allege illegality under international law, but refers only to the unconstitutionality of the declarations. See also Weller, M., *The International Response to the Dissolution of the SFRY*, 86 *AJIL* 569 (1992).

<sup>46</sup> *Kreijen, G.*, *Transformation of Sovereignty and African Independence: No Shortcuts to Statehood*, in: *State, Sovereignty and International Law* (*Kreijen, G.* ed.) 45, 52 (2002).

<sup>47</sup> *Island of Palmas (Netherlands v. USA)*, Award, 4 April 1928, 2 *RIAA* 829, 839 (1928).

<sup>48</sup> Art. 1, *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 156 *L.N.T.S.* 19.

<sup>49</sup> *Kreijen, G.*, *Transformation of Sovereignty and African Independence: No Shortcuts to Statehood*, in: *State, Sovereignty and International Law* (*Kreijen, G.* ed.) 45, 53 (2002).

***D. The substance of the Declaration is not contrary to Resolution 1244 or other rules of international law, irrespective of its inability to create independence or statehood.***

27. Notwithstanding that international law including Resolution 1244 neither infringes upon the signatories' competence to issue the Declaration nor prohibits the factual issuance thereof, it is further established that the content of this Declaration is equally in accordance with international law including Resolution 1244.

***1. The substance of the Declaration is not in breach of Resolution 1244***

28. In order to determine whether or not certain conduct is in conformity with Resolutions of the Security Council, it is necessary to interpret them. In doing so, regard shall be had to teleological as well as logical and systematic interpretation taking into account the object and purpose of the Resolution, as set forth in the *Tadić* case.<sup>50</sup> In particular, the overall political background as well as the surrounding circumstances of adoption must be taken into account due to the essentially political nature of Security Council Resolutions.<sup>51</sup>

***a) Resolution 1244 does not preclude independence***

***(i) Independence constitutes a political settlement not excluded by Resolution 1244***

29. Neither the language of the Resolution nor the language of its Annexes excludes independence as an option for the future status of Kosovo. Resolution 1244 refers to a "political solution" to Kosovo's status (para 1) and a "political settlement" several times (para

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<sup>50</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ICTY, Case No. IT-94-1-AR72, 35 ILM 32 *et seq.* paras. 71-93 (1996).

<sup>51</sup> *Wood, Interpretation, supra*, p. 74.



11), though it lacks clarification as to what form a political settlement is supposed to take. Operative paragraph 1 states that a political solution shall be based on the principles set forth in the Annexes that, however, also remain silent as to the precise form of the final status. Though an agreement by all parties to the conflict would have been ideal, numerous attempts to reach such an agreement have failed (most recently in December 2007)<sup>52</sup> and a negotiated status settlement seemed unattainable to the Secretary-General's Special Envoy<sup>53</sup>.

30. With regard to a determination of the future status of Kosovo, Resolution 1244 is, in fact, open and does not exclude independence. Rather than presenting an obstacle to Kosovo's development towards independence, the final settlement envisaged in Resolution 1244 comprises also a settlement by independence. If this were not so, independence would have also been excluded as a solution to a political settlement by negotiation. Resolution 1244 links the political settlement with the holding of elections (paragraph 11 c). Indeed, the legitimacy of the signatories of the Declaration was confirmed in several successive elections.<sup>54</sup> These signatories, as the legitimate representative organ of the people of Kosovo are therefore engaged in the political process referred to by Resolution 1244.

31. Notwithstanding that the signatories of the Declaration are not bound by Resolution 1244 and that the Declaration alone cannot create statehood or affect territory, the Resolution does not contain an obligation to respect by all means the territorial integrity of the (then) Federal Republic of Yugoslavia since this language is confined to preambular paragraph 11. Given the general political climate at the time of adoption of the Resolution, which must be taken into

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<sup>52</sup> See Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, UN Doc. S/2007/723, Enclosure, (10 December 2007).

<sup>53</sup> *Ahtisaari, M.*, Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168 (26 March 2007), para. 16.

<sup>54</sup> Elections to the Assembly were most recently held on 17 November 2007. See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2007/268 (3 January 2008), para 29; Council of Europe, Election Observation Mission, Press Release - 801(2007), 19 November 2007, available at <http://www.coe.int> (last visited 17 February 2009).

account when interpreting resolutions of the Security Council,<sup>55</sup> this paragraph is to be qualified as a reference to proposals which are not acceptable in the operative part and therefore moved to the Preamble.<sup>56</sup> Although the preamble may give some indication of the object and purpose of the resolution, the reference to territorial integrity cannot be considered as the main aim of the Resolution. Rather, as set out below, the object and purpose was to ensure peace and stability in the region.<sup>57</sup>

32. A reference to territorial integrity is also made in Annex 2 of Resolution 1244. This can equally not amount to an obligation to respect the territorial integrity of the FRY in any case as the language in the Annex concerning territorial integrity is directed only towards an interim settlement and the interim period, not a final status settlement. It has to be noted that the Declaration can no longer be regarded as an element of the interim settlement so that it is not subject to this obligation to respect the territorial integrity of the FRY as reflected in Annex 2 of Resolution 1244.

(ii) The international civil presence does not hamper  
independence

33. It cannot be contended that independence is excluded by the continuation of the international civil presence established by Resolution 1244. The wording of the Resolution signals that the international civil presence is meant to exist beyond the end of the interim period, after a political settlement has been achieved. Paragraph 10 indicates that UNMIK will be present for the duration of an interim period while paragraph 11 (d) makes it clear that

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<sup>55</sup> Wood, Interpretation, *supra*, p. 74.

<sup>56</sup> Wood, Interpretation, *supra*, p. 87.

<sup>57</sup> See *infra*, para 34.

the civil presence shall remain to oversee a transfer of authority to permanent institutions. This open-ended mandate of the civil presence envisaged in Resolution 1244 is in line with the Rambouillet Accords, that, as a constituent part of Resolution 1244 (paragraph 11 (a)), also provide for an international mission to implement the agreement.<sup>58</sup> The recommendations of the Special Envoy of the Secretary-General on Kosovo's future status explicitly provide for a status of independence, which shall be supervised by the international community<sup>59</sup> so that they combine independence with international supervision. Additionally, in his Comprehensive Proposal for a Kosovo Status Settlement the Special Envoy elaborated provisions for international supervision until the terms of the Settlement have been implemented (Annex IX) and for a withdrawal of UNMIK only after a 120-day transition period (Article 15).<sup>60</sup> The Secretary-General has expressed his full support for these recommendations<sup>61</sup> and the Assembly of Kosovo has accepted them in its Declaration. This corroborates the conclusion that continued international supervision cannot be an impediment to independence as envisaged by the Declaration.

b) *The substance of the Declaration is not contrary to the object and purpose of Resolution 1244*

34. The substance of the Declaration is in conformity with the object and purpose of Resolution 1244. The object and purpose of the Resolution can be drawn from preambular

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<sup>58</sup> Cf. Chapter 4A, Art. 1 of the Interim Agreement for Peace and Self-Government (Rambouillet Accords), UN Doc. S/1999/648 (7 June 1999).

<sup>59</sup> Ahtisaari, M., Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, UN Doc. S/2007/168 (26 March 2007).

<sup>60</sup> Ahtisaari, M., Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/168/Add.1 (26 March 2007).

<sup>61</sup> Letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168 (26 March 2007).

paragraph 4 in which the Security Council expresses its determination to “resolve the grave humanitarian situation in Kosovo”. Further expressing the Security Council’s chief concern is the binding formulation in operative paragraph 10 which authorizes the Secretary-General to take certain measures with a view to “ensure conditions for a peaceful and normal life for all inhabitants of Kosovo”. Efforts to achieve a negotiated solution on the basis of Resolution 1244 have been exhausted unsuccessfully.<sup>62</sup> The determination of the future status by the Declaration remains, therefore, the only means to achieve the political settlement and a peaceful solution. This is in accordance with the Recommendation of the Special Envoy, who is of the view that “negotiation’s potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted”.<sup>63</sup> More importantly, his recommendation did in fact consist in a status of independence for Kosovo, supervised by the international community, which was endorsed by the Secretary-General.<sup>64</sup>

c) *The Declaration excludes any conflict with Resolution 1244 and the principles of international law*

35. In its paragraph 12 the Declaration explicitly excludes any conflict with Resolution 1244 and the principles of international law and affirms that

“Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially the obligations for it under the Ahtisaari Plan. In all these matters we [i.e. the leaders of Kosovo] shall act consistently with the principles of international law and the resolutions of the Security Council, including Resolution 1244 (1999).”

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<sup>62</sup> See *supra*, paras. 10 and 11.

<sup>63</sup> Ahtisaari, M., Report of the Special Envoy of the Secretary-General on Kosovo’s future status UN Doc. S/2007/268 (26 March 2007), para. 3.

<sup>64</sup> Ahtisaari, M., Report of the Special Envoy of the Secretary-General on Kosovo’s future status UN Doc. S/2007/268 (26 March 2007).

It renders itself as well as the status of independence anticipated therein subject to the rules and principles of international law. Accordingly, the intention of the Assembly in issuing the Declaration was to submit its status of independence to Resolution 1244 and to international supervision, as contained in the Ahtisaari Plan.

36. In conformity with the principle *ut res magis valeat quam pereat* that precludes the interpretation of a clause in such a way that it is devoid of purport or effect<sup>65</sup>, paragraph 12 of the Declaration which expresses the Declaration's conformity with international law must not be interpreted in such a way as to render it meaningless. It follows from this principle as well as from the obligation of a contextual interpretation that is firmly enshrined in Article 31 (1) of the Vienna Convention on the Law of Treaties<sup>66</sup> that the Declaration in its entirety, including the independence envisaged therein, is to be interpreted as being in conformity with Resolution 1244 and the principles of international law.

*2. The substance of the Declaration is not in breach of general international law*

37. The proclamation of independence in the Declaration does not contradict general international law, which does not prohibit any part of a population of a State to declare its independence. As such it is not subject to the obligation to respect the territorial integrity of States as was confirmed by the ILC. When discussing the Declaration on the Rights and Duties of States the Commission reiterated that the duty not to recognize acquisitions of

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<sup>65</sup> *Corfu Channel (UK v. Albania)* Judgment of 4 April 1949, ICJ Reports 1949, p. 24.

<sup>66</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. See also *Orakhelashvili, A.*, The Interpretation of Acts and Rules in Public International Law, 339, 468 (2008) and for the application of these principles also to declarations *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, PCIJ Series A/B, No. 64 at 16-17.

territory by the use of force did not apply to secessions as it addressed only States.<sup>67</sup> Secession in this sense needs no justification by the right to self-determination.

38. A review of state practice has shown that in most cases, the issue was not whether or not the secession movement was internationally lawful, but whether or not this movement was successful.<sup>68</sup> Although in most cases secessionist movements did not achieve the independence they sought, their failure to do so did not render the secessionist movement illegal under international law because secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.<sup>69</sup> As *Lauterpacht* has pointed out “international law does not condemn rebellion or secession aiming at the acquisition of independence.”<sup>70</sup> In debates on resolutions of the Security Council which declared as unlawful the declaration of independence of Congo and Rhodesia<sup>71</sup> no reference was made to the illegality of secession under international law. Moreover, characterizing the acts of a seceding entity as illegal under international law would grant it the status of a subject of international law.<sup>72</sup>

39. This question of the legality of secession under international law has to be distinguished from that of alleged illegality of secessionist movements under the internal law of the states. In this line, as the Canadian Supreme Court put it in the Case *Reference re Secession of Quebec* in 1998:

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<sup>67</sup> *ILC*, Draft Declaration on the Rights and Duties of States, UN Doc. A/CN.4/SR.14, YBILC 113 (1949).

<sup>68</sup> Cf. *Crawford, J.*, *The Creation of States in International Law*, Chapter 9 (2006).

<sup>69</sup> *Crawford.*, *Creation, supra*, p. 389.

<sup>70</sup> *Lauterpacht, Sir H.*, *Recognition in International Law*, 8 (1947) as cited in: *Crawford, Creation, supra*, p. 390.

<sup>71</sup> *Infra*, para. 35.

<sup>72</sup> *Crawford, Creation, supra*, p. 389.

“Although there is no right, under the Constitution or at international law, to unilateral secession [...] this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession.”<sup>73</sup>

40. The Declaration cannot be compared to those unilateral declarations of independence that were declared unlawful by Security Council Resolutions. In 1965 the Security Council explicitly condemned the unilateral declaration of independence by the Smith regime in Southern Rhodesia.<sup>74</sup> The Council decided “to condemn the unilateral declaration of independence made by a racist minority in Southern Rhodesia” and decided to call upon all states not to recognize this regime. In another case the Security Council characterized secessionist activities as illegal. For example, Resolution 169 (1961) “strongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga” and declared “that all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* and Security Council decisions and specifically demands that all such activities [...] cease forthwith”. These cases occurred in the framework of the decolonization process so that any comparison with the case of Kosovo is excluded. Further more, in the case of Kosovo, the Security Council refrained from taking similar action. Therefore, the decisions of the Council concerning Rhodesia and Katanga cannot be used as a precedent.

#### *E. Absence of objections by UN Organs*

41. None of the organs of the UN which were competent and called upon to act, such as the Special Representative of the Secretary-General, the Security Council or the Secretary-General, issued an objection or similar statement in relation to the Declaration. The SRSG did

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<sup>73</sup> *Reference re Secession of Quebec*, Supreme Court of Canada, 20 August 1998, 2 S.C.R. 217(1998) para. 155.

<sup>74</sup> UN Security Council Resolution 215 (12 November 1965); UN Security Council Resolution 216 (20 November 1965).

not object to the Declaration and did not exercise his competence to invalidate the Declaration,<sup>75</sup> despite requests to do so<sup>76</sup> and contrary to former executive decisions invalidating resolutions of the Assembly in the field of foreign relations. On some occasions the SRSG has made use of his power to overrule acts of the PISG and has determined that a resolution of the Assembly was not in conformity with Resolution 1244. One pertinent example concerns the *Resolution on the Protection of the Territorial Integrity of Kosovo* of 23 May 2002. The Kosovo Assembly declared not to respect the Border Demarcation Agreement between FRY and FYRoM of 23 Feb 2001 since Kosovo had not participated in this agreement that encroached upon the territory of Kosovo. This Resolution was immediately declared null and void by the SRSG<sup>77</sup> and it was promptly deplored by the Security Council<sup>78</sup>. On 17 November 2005 the SRSG was faced with a *Resolution on Reconfirmation of the Political Will of the People of Kosovo for an independent and sovereign state*.<sup>79</sup> This resolution was interpreted by the SRSG as providing a mandate for the Delegation of Kosovo for the upcoming status talks.<sup>80</sup> This act was therefore not seen as being in violation of Resolution 1244 and it was not invalidated by the SRSG. On the contrary, by this interpretative statement the SRSG acknowledged the independence of Kosovo as a possibility for a final status settlement.

42. After the Declaration of 17 February 2008 the SRSG did not issue an executive decision declaring its nullity nor a statement to that effect. Likewise, the Security Council did not react

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<sup>75</sup> See *supra*, para. 19. Chapter 12 of the Constitutional Framework grants the SRSG the authority to annul and declare invalid acts of the Provisional Institutions of Self-Government which are in violation of Resolution 1244 and the Constitutional Framework.

<sup>76</sup> See Statement by *Boris Tadić*, UN Doc. A/62/703-S/2008/111, Annex (19 February 2008); Statement of the Ministry of Foreign Affairs of the Russian Federation on Kosovo, UN Doc. A/62/700-S/2008/108, Annex (19 February 2008).

<sup>77</sup> Determination by SRSG *Michael Steiner* (23 May 2002), UNMIK Press Release PR/740 (23 May 2002).

<sup>78</sup> Statement by the President of the Security Council, UN Doc. S/PRST/2002/16 (24 May 2002).

<sup>79</sup> Assembly of Kosovo, *Resolution on the Reconfirmation of the Political Will of the People of Kosovo*, 17 May 2005, available at <http://www.assembly-kosova.org/common/docs/Resolution.%20english,%20version.17.11.05.pdf> (last visited 17 February 2009).

<sup>80</sup> Statement by SRSG *Soren Jessen-Petersen*, UNMIK Press Release PR/1445 (17 November 2005).



negatively to the reports of the Secretary-General where it was stated that the SRSG could no longer exercise his powers to the full extent.<sup>81</sup> The choice not to pronounce the Declaration invalid is an action attributable to the United Nations since the SRSG is an organ of that organization.<sup>82</sup> Moreover, from the SRSG's and the Security Council's competences with regard to UNMIK and the PISG an obligation to react to void acts contrary to international law, including Resolution 1244, may be inferred. Since the Secretary-General as well as the Security Council were immediately aware of the events in Kosovo<sup>83</sup> and, nevertheless, none of the organs of the UN took action in this regard, the impression is created that the UN has agreed to the Declaration. In the *Gulf of Maine* case, this Court stated that "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent".<sup>84</sup> Judge *Fitzmaurice*, in his separate opinion to the *Temple of Preah Vihear* case, declared that: "...acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or waiver of rights."<sup>85</sup> The judgment itself expressed this view similarly:

"the circumstances were such as called for some reaction, within a reasonable period, [...], if they wished to disagree. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"<sup>86</sup>

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<sup>81</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/211 (28 March 2008) para. 30; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/254 (12 June 2008) para. 7 stating that UNMIK can exercise only residual powers.

<sup>82</sup> Cf. ILC, Responsibility of States for Internationally Wrongful Acts, Art. 4, Report of the ILC on the work of its 45<sup>th</sup> Session, UN Doc. A/56/10, YBILC Vol.II (Part Two), 30 (2001).

<sup>83</sup> See Session of the Security Council of 18 February 2008, UN Doc. S/PV.5839 (18 February 2008).

<sup>84</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA)* Judgment of 12 October 1984, ICJ Reports 1984, p. 305 para. 130; *Thirlway, H.*, The Law and Procedure of the International Court of Justice 1960-1989, 60 BYIL 1, 38 (1989).

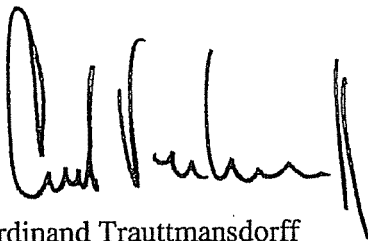
<sup>85</sup> *Temple of Preah Vihear (Cambodia v. Thailand)* Judgment of 15 June 1962, Separate Opinion Judge Fitzmaurice, ICJ Reports 1962 p. 23, 62.

<sup>86</sup> *Temple of Preah Vihear (Cambodia v. Thailand)* Judgment of 15 June 1962, ICJ Reports 1962, p. 21.

Estoppel, based on the principle of good faith has the effect of precluding that party from later asserting a claim that contradicts its prior attitude which has given rise to reliance and legitimate expectations.<sup>87</sup> Accordingly, on the part of the UN this declaration must have been considered lawful. Its organs involved in this matter refrained from a negative reaction to the Declaration despite their competence to do so and can be considered debarred from taking actions not in conformity with its previous conduct.

#### IV. CONCLUSION

43. For the reasons set out in this statement the Government of Austria is of the view that the Declaration of Independence of 17 February 2008 is not contrary to international law including Resolution 1244.



Ferdinand Trauttmansdorff

(Representative of the Republic of Austria)

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<sup>87</sup> *Cheng, B.*, General Principles of Law, 141-142 (1953); *Bowett, D.W.*, Estoppel before International Tribunals and its Relation to Acquiescence, 33 BYIL 176, 176 (1957).