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*From the Legal Adviser*

17 April 2009

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

*Excellency,*

**Request for an Advisory Opinion of the International Court of Justice on the Question  
“Is the unilateral declaration of independence by the Provisional Institutions of Self-  
Government of Kosovo in accordance with international law?”**

I have the honour to refer to your letters dated 10 October 2008 (No.133294) and 20 October 2008 (No.133310), and to the Court's Order of 17 October 2008, in respect of the above-mentioned request for an advisory opinion of the International Court of Justice.

In accordance with the Court's Order of 17 October 2008 and your letter of 20 October 2008, I have the honour to enclose a signed original, and 29 copies, of the United Kingdom's written statement, and two accompanying volumes of annexed documents, in this matter.

Having regard to the Court's Practice Direction III, and the dossier of documents transmitted to the Court by the United Nations Secretariat, subsequently posted on the Court's website, the United Kingdom has appended to its written statement only a strictly selected list of additional documents. The United Kingdom, however, remains at the Court's disposal in the event that it may be able to assist the Court further in providing copies of other documents to which the Court may wish to refer.

As requested in your letter of 20 October 2008, also enclosed is an electronic copy of the United Kingdom's written statement and annexes.

Please accept, Excellency, the assurances of my highest consideration.

**Daniel Bethlehem QC**  
Legal Adviser

Representative of the United Kingdom  
of Great Britain and Northern Ireland



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I have the honour to refer to your letters dated 10 October 2008 (No.133294) and 20 October 2008 (No.133310), and to the Court's Order of 17 October 2008, in respect of the above-mentioned request for an advisory opinion of the International Court of Justice.

Having regard to Articles 40(1) and 102(2) of the Rules of Court, and to your letter of 20 October 2008, I confirm that, as Legal Adviser of the Foreign & Commonwealth Office of the United Kingdom, I am duly empowered to sign the United Kingdom's written statement transmitted to the Court under cover of a separate letter of today's date. Mr Akbar Khan is duly empowered as Deputy Representative in this matter.

The address for service of all communications to the United Kingdom in respect of this matter is as follows:

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Please accept, Excellency, the assurances of my highest consideration.

*Daniel Bethlehem*

**Daniel Bethlehem QC**  
Legal Adviser

Representative of the United Kingdom  
of Great Britain and Northern Ireland

**REQUEST FOR AN ADVISORY OPINION OF THE  
INTERNATIONAL COURT OF JUSTICE  
ON THE QUESTION  
“IS THE UNILATERAL DECLARATION OF  
INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS  
OF SELF-GOVERNMENT OF KOSOVO IN ACCORDANCE  
WITH INTERNATIONAL LAW?”**

**WRITTEN STATEMENT OF THE UNITED KINGDOM**

**17 APRIL 2009**

## CONTENTS

|  | <i>Page</i> |
|--|-------------|
| <b>I. Overview of Issues and Summary of Argument</b>   | <b>4</b>    |
| 1. Introduction  | 4           |
| 2. How we reached the present situation  | 6           |
| 3. The Place of the Advisory Opinion   | 8           |
| 4. The <i>sui generis</i> character of the Kosovo situation  | 9           |
| 5. Summary of Arguments  | 15          |
| <br>   |             |
| <b>Chapter One: The Question Posed</b>   | <b>18</b>   |
| 1. Serbia's Request for an Advisory Opinion  | 18          |
| 2. The Meaning of the Question   | 22          |
| <br>   |             |
| <b>II. Chapter Two: 1989 – 1999: The Disintegration of the SFRY<br/>and Associated Developments</b>                  | <b>28</b>   |
| 1. Kosovo before 1989  | 28          |
| 2. 1989-1999 Part I: Constitutional Changes  | 29          |
| 3. 1989-1999 Part II: the Disintegration of the SFRY   | 30          |
| 4. 1989-1999 Part III: Human Rights Abuses   | 35          |
| 5. Conclusion  | 41          |
| <br>   |             |
| <b>Chapter Three: Security Council Resolution 1244 (1999) and the Search for a<br/>Solution to the Kosovo Crisis</b> | <b>42</b>   |
| 1. Security Council resolution 1244 (1999) and its immediate implementation  | 42          |
| 2. Administration by UNMIK: steps towards substantial<br>autonomy and self-government in Kosovo                      | 49          |

|   |  |         |
|---|--|---------|
| 3.  | The multiple (unsuccessful) searches for a solution  | 54      |
| 4.  | The position as of end-2007: the absence of any workable solution  | 67      |
| <br><b>Chapter Four: Kosovo’s Declaration of Independence and<br/>Events Subsequent to 17 February 2008</b>       |  | <br>70  |
| 1.  | Kosovo’s Declaration of Independence of 17 February 2008   | 70      |
| 2.  | The meeting of the Security Council on 18 February 2008  | 72      |
| 3.  | Events subsequent to 17-18 February 2008   | 76      |
| 3.1   | Recognition by third States  | 75      |
| 3.2   | The Constitution of the Republic of Kosovo   | 76      |
| 3.3   | Reconfiguration of the international civil presence in Kosovo  | 78      |
| <br><b>III. Chapter Five: The Creation of States: General Issues</b>  |  | <br>84  |
| 1.  | Introduction   | 84      |
| 2.  | Irrelevance of internal law  | 85      |
| 3.  | The Principle of Territorial Integrity   | 86      |
| 4.  | Secession is not as such Contrary to International Law   | 87      |
| 4.1   | Secession before 1945  | 88      |
| 4.2   | The relevance of the United Nations Charter  | 89      |
| 4.3   | “Remedial Self-determination”  | 92      |
| 4.4   | Conclusion   | 93      |
| 5.  | Relevance of coordinated practice of non-recognition in certain cases  | 93      |
| 6.  | Relevance of recognition by the predecessor State and third States   | 99      |
| 7.  | Membership in the United Nations is not a pre-requisite for Statehood  | 100     |
| 8.  | Conclusion   | 101     |
| <br><b>Chapter Six: The Declaration of Independence of Kosovo was<br/>not Incompatible with International Law</b> |  | <br>101 |
| 1.  | The Simple Answer to the Question  | 102     |
| 2.  | The Declaration of Independence was not precluded by<br>Resolution 1244 (1999) or any subsequent Security Council decision | 103     |

|  |            |
|--|------------|
| 3. The circumstances preceding and surrounding the Declaration of Independence of Kosovo | 107        |
| 3.1 Violation of Kosovo's rights pre-1999  | 107        |
| 3.2 The significance of Security Council Resolution 1244 (1999)                          | 108        |
| 3.3 The international presence in Kosovo   | 110        |
| 3.4 The unsustainability of the situation established under Resolution 1244 (1999)       | 111        |
| 3.5 Exhaustion of avenues for bilateral settlement                                       | 113        |
| 3.6 Conclusions of the Ahtisaari Report  | 114        |
| 4. Subsequent Developments   | 115        |
| 4.1 Response of the UN Secretary-General and UN Special Representative                   | 115        |
| 4.2 Evolution of UNMIK since the Declaration of Independence                             | 116        |
| 4.3 Representative government and development of public institutions                     | 119        |
| 4.4 Developments in the field of the rule of law   | 120        |
| 4.5 Respect for human rights in Kosovo   | 122        |
| 4.6 Recognition of Kosovo by the international community                                 | 123        |
| 5. Conclusions   | 124        |
| <b>Chapter Seven: Conclusion</b>   | <b>130</b> |

## **PART I**





## OVERVIEW OF ISSUES AND SUMMARY OF ARGUMENT

### 1. Introduction

**0.1** In accordance with the Court's Order of 17 October 2008, the United Kingdom submits this Written Statement on the General Assembly's request for an advisory opinion of 8 October 2008 on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" This Statement is divided into three Parts as follows:

#### **Part I**

Overview of Issues and Summary of Argument

Chapter 1 – The Question Posed

#### **Part II**

Chapter 2 – 1989 – 1999: The Disintegration of the SFRY and Associated Developments

Chapter 3 – Security Council Resolution 1244 (1999) and the Search for a Solution to the Kosovo Crisis

Chapter 4 – Kosovo's Declaration of Independence and Events Subsequent to 17 February 2008

#### **Part III**

Chapter 5 – The Creation of States: General Issues

Chapter 6 – The Declaration of Independence of Kosovo was not Incompatible with International Law

Chapter 7 – Conclusion

**0.2** In essence, this Written Statement is an elaboration and explanation of views previously expressed by the United Kingdom, transparently and on the record, through its

Permanent Representative to the United Nations, Sir John Sawers, speaking in the General Assembly and Security Council, and in other statements and documents.<sup>1</sup>

**0.3** Before turning to the detail of the issues before the Court, it may be helpful to place both the advisory opinion request and the United Kingdom's appreciation of the matter in a wider context.

**0.4** As an initial observation, it is important to stress that the United Kingdom does not perceive or approach the advisory opinion request and its statement of views as adversarial to Serbia. The past two decades have witnessed difficult and challenging times in the Balkans in general and in Serbia in particular. The legacy of these developments has not yet finally played itself out. But a measure of stability is now evident in the region which has long been elusive. The United Kingdom stresses the importance of fostering and safeguarding this stability. The medium for doing so, and the wider goal, is membership of the European Union for both Serbia and Kosovo, so that both States can move forward within a framework which will help secure and safeguard interaction between the peoples of both States. In approaching the present situation in Kosovo and Serbia it is necessary to have proper regard to the past, and learn lessons from it. But it is necessary also to have regard for the future and how relations between peoples in that part of the world might be better structured to cultivate the shoots of stability that are emerging from the recent period of turmoil.

**0.5** The United Kingdom is working closely with the government in Belgrade to cement the important gains that have been secured in recent years. In this regard, although the manner in which Serbia approached the request for an advisory opinion was less than ideal (see chapter 1 below), the United Kingdom nonetheless welcomes the fact that Serbia has chosen to address the issue of Kosovo independence, sharply emotive in the domestic context, through diplomatic and legal processes rather than by succumbing to voices on the fringe which would seek to drag the region backwards. It is in this constructive spirit that the United Kingdom submits this Written Statement. The exploration of the past that is an inevitable feature of legal argument will undoubtedly bring to the surface some difficult

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<sup>1</sup> See the United Kingdom's "Note of Issues" circulated under cover of a letter dated 1 October 2008 from its Permanent Representative to the United Nations to the President of the General Assembly, A/63/461 of 2 October 2008, **Dossier No.5**; General Assembly Debate of 8 October 2008, A/63/PV.22, **Dossier No.6**; S/PV.5839, **Dossier No.119**; and Statement of Sir John Sawers, Permanent Representative of the United Kingdom to the United Nations in the Security Council, 18 February 2008 and legal annex (circulated to the Security Council informally), **Annex 1**.

issues. But, although the United Kingdom's appreciation of the issues now before the Court is necessarily informed by the past, the United Kingdom is also firmly focussed on the future and what it believes to be an attainable outcome of enduring stability in the Balkans.

## **2. How we reached the present situation**

**0.6** As the Court knows from other proceedings that have come before it in respect of events in the Balkans over the past 20 years, the recent history of the Balkans has been difficult. The Socialist Federal Republic of Yugoslavia (SFRY) disintegrated in the early 1990s. The Federal Republic of Yugoslavia (Serbia and Montenegro), one of the successor States of the SFRY, was fractured with the independence of Montenegro. The Declaration of Independence of Kosovo on 17 February 2008, after two decades of uncertainty and a decade of searches for a different solution, is a legacy of these developments. This Declaration of Independence cannot but be seen in the context of these wider historic events. The sending of Serbian troops into Kosovo and the declaration of a state of emergency in February 1989, and developments through the 1990s, including human rights atrocities committed against the people of Kosovo, are essential to an understanding of recent developments.

**0.7** These developments, addressed in Judgments of the Court, have also been addressed by the International Tribunal for the Former Yugoslavia (ICTY). On 26 February 2009, the Trial Chamber of the ICTY gave a Judgment in four volumes in the case of the *Prosecutor v. Milutinović and others* which upheld key allegations of Serbian atrocities in Kosovo in 1999.<sup>2</sup> The first named defendant in this case was initially former Serbian President Slobodan Milosevic, his name being subsequently removed from the list following his death in custody in The Hague.

**0.8** It is in the events memorialised in these Judgments that the roots of the recent developments in Kosovo are to be found. It was with a clear determination not to allow any repetition of these events that the international community, acting through the Security Council, put in train a search for a better framework of relations between Serbia and Kosovo in Resolution 1244 (1999).

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<sup>2</sup> *Prosecutor v Milutinović and others* (26 February 2009), Case No. IT-05-87-T

**0.9** As chapter 3 below describes, that search for a better framework of relations was arduous and ultimately unproductive. It was this appreciation that drove Martti Ahtisaari, the United Nations Secretary-General's Special Envoy for the Future Status Process for Kosovo (the Special Envoy), and now a Nobel Peace Prize laureate, to conclude in his Report to the Security Council of 26 March 2007 *inter alia* as follows:<sup>3</sup>

“... after more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status.

...

The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that **the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.**”<sup>4</sup>

**0.10** The Special Envoy went on to recall “Belgrade's reinforced and brutal repression”<sup>5</sup> of the Kosovo Albanian majority and that, from 1999, “Kosovo and Serbia have been governed in complete separation”.<sup>6</sup> He added as follows:

“This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia – however notional such autonomy may be – is simply not tenable.”<sup>7</sup>

**0.11** There followed a further 11 months of intense diplomatic engagement in an attempt to reach a solution which would have the agreement of both sides. That search for consensus, as with all other efforts over the preceding decade, failed. Kosovo declared independence on 17 February 2008. That independence, now a practical reality, has been formally recognised by

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<sup>3</sup> S/2007/168 of 27 March 2007; **Dossier No.203**.

<sup>4</sup> S/2007/168 of 27 March 2007, paras.1, 5 (emphasis added); **Dossier No.203**.

<sup>5</sup> S/2007/168 of 27 March 2007, para. 6; **Dossier No.203**

<sup>6</sup> S/2007/168 of 27 March 2007, paras.7-8; **Dossier No.203**.

<sup>7</sup> S/2007/168 of 27 March 2007, para.7; **Dossier No.203**.

57 States from every region in the world and accepted by others whose domestic practice does not accord formal recognition of statehood.<sup>8</sup>

**0.12** While the past is important, it does not hold the key to a sustainable and peaceful future. On the contrary, there can be no going back. The Special Envoy was driven to his assessment by a clear and articulated understanding that there was no other accommodation to be had other than independence for Kosovo. The United Kingdom, with caution and deliberation, ultimately came to the same view.

**0.13** The future promises every prospect of a close and fraternal interaction between Serbia and Kosovo, both bilaterally and under the umbrella and with the support of the European Union and its Member States. This is not some unrealistic and remote illusion. On the contrary, discussions and practical steps towards this reality are underway.

### **3. The Place of the Advisory Opinion**

**0.14** In its document circulated to the General Assembly in advance of the vote on Serbia's draft resolution requesting an advisory opinion, the United Kingdom noted "the sensitivity of the issues [surrounding Kosovo's independence] for Serbia's internal political debate".<sup>9</sup> This is a legitimate dimension. Stability in Serbia has fragile roots, and seeking the engagement of the principal judicial organ of the United Nations sends a signal about the importance of democratic institutions and the rule of law. The advisory opinion process thus has the capacity to contribute to a better future in the Balkans.

**0.15** The approach taken by the Court will, of course, also be significant. The United Kingdom considers that the Declaration of Independence of Kosovo was not incompatible with international law. It was not made in haste or in a political vacuum. Rather, it flowed from the failure of the two sides, and of the international community, after long and sustained effort, to secure any other framework for peaceful relations between the people of Serbia and the people of Kosovo. If, contrary to this view, the Court concludes that the Declaration of Independence was in some manner inconsistent with international law at the point that it was

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<sup>8</sup> An example of a State which does not confer explicit recognition is New Zealand. New Zealand does not make formal statements of recognition or non-recognition. Recognition may be inferred from its dealings with other States.

<sup>9</sup> A/63/461 of 2 October 2008, para.5; **Dossier No.5**.

made, the United Kingdom considers that developments since 17 February 2008 have crystallised Kosovo independence and cured any deficiency that might initially have existed. As the 1776 Declaration of Independence of the United States of America illustrates (a Declaration of Independence which the United Kingdom opposed at the time), many States emerge to independence in what at the time were controversial circumstances. This does not vitiate their subsequent emergence into full statehood.

**0.16** Whatever analysis is adopted, it is clear that that it is not possible to go back to any *status quo ante*. Indeed, despite its advisory opinion request, Serbia does not now appear to be proposing any other accommodation between Serbia and Kosovo that is different to those proposals which, in some variation, were the subject of intensive consideration with the UN's Special Envoy or in other prior or subsequent discussions.

#### **4. The *sui generis* character of the Kosovo situation**

**0.17** Speaking in the Security Council debate on Kosovo on 18 February 2008, the day after Kosovo's Declaration of Independence, the United Kingdom's Permanent Representative to the United Nations said *inter alia* as follows:

"I began by saying that the Security Council was facing an extraordinary set of circumstances. It is not ideal for Kosovo to become independent without the consent of Serbia and without consensus in the Council. My Government believes that the unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented United Nations administration of Kosovo make this a *sui generis* case that creates no wider precedent – a point that all EU member States agreed upon today."<sup>10</sup>

**0.18** The United Kingdom has throughout emphasised the *sui generis* character of the Kosovo situation. It has done so publicly and repeatedly for two reasons. First, it is the United Kingdom's considered view that the circumstances leading up to and surrounding, and pertinent to an appreciation of, Kosovo's Declaration of Independence are indeed unique. There is no parallel or analogy from this situation to other circumstances in other places in which some group or other may wish to assert independence.

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<sup>10</sup> S/PV.5839, p.14; **Dossier No.119**.

**0.19** Second, it is important that the unique character of the Kosovo situation is clearly and forcefully articulated. Stability in the international system is important and States in other parts of the world must have a clear understanding that events in the Balkans, and Kosovo's Declaration of Independence, do not create risks of internal instability for them. They must also know that the United Kingdom (and other States that have recognised Kosovo's independence) does not regard these events as creating a precedent for developments elsewhere. Kosovo's independence does not open the door to the fracturing of States more generally. The independence of Kosovo cannot be relied upon as a template for secessionist or self-determination claims elsewhere – whether in Cyprus or Canada, Morocco or Mexico, Somalia or Spain, Turkey or Tanzania, or in any other place.

**0.20** It is to be regretted that Serbia, in support of its contentions before the Court in these proceedings, has sought to alarm others with catastrophic visions of a slippery slope. It has played on vulnerabilities, real or imagined, to draw others to its corner. On 23 January 2009, in a letter of wide circulation, the Foreign Minister of Serbia wrote to other States *inter alia* in the following terms:

“To contend that Kosovo's unilateral declaration of independence (UDI) is *sui generis* amounts to a claim that it should be treated as an exception to international law. We believe no-one should be permitted to take upon himself the right to proclaim such exceptions.

If this is permitted, UDI would become a dangerous precedent with global reach. It would legitimise at least three perilous doctrines that stand in absolute contradiction to the cornerstone legal principles we all have a stake in upholding: **First**, the *ad hoc* imposition of solutions to ethnic conflicts in defiance of the Security Council; **Second**, the forced partition of UN member States; and **Third**, unilateral secession by a provincial or other non-state actor.

As a result, any separatist group in the world would be supplied with a clear precedent on how to further its ambitions. Inevitably, the international system would become more unstable, more insecure, and more unpredictable.

...

The case of Kosovo's UDI marks the first time ever that the ICJ has been asked to consider the legality of an attempt at secession from a UN member State. Accordingly, the Court's conclusions will constitute a strong precedent, with far-reaching consequences for the United Nations system. The outcome will either strongly deter other separatist movements from attempting to secede, or produce a result that could encourage them to act in similar fashion.

I kindly propose to you to consider submitting a written statement to the ICJ expressing [your] legal point of view on this matter of profound importance, by the April 17<sup>th</sup>, 2009 deadline.

If we can be of any assistance, my Ministry and its legal team stand ready to provide it”.<sup>11</sup>

**0.21** The United Kingdom rejects this apocalyptic view. It is not in any way consonant with the facts. It ignores Serbia’s own highly problematical role over two decades and throughout the course of attempts by the international community to find a sustainable framework for Serb-Kosovo relations.

**0.22** Given this apocalyptic vision, it is important that the *sui generis* characteristics of the Kosovo situation are properly identified. There are multiple elements which, taken together, make it plain why there cannot be any read-across from the Kosovo situation to any other circumstance.

**(a)** Kosovo’s Declaration of Independence emerged from a constitutional framework of the SFRY which was both particular and problematic. As is described in chapter 2 below, Kosovo’s status within the SFRY, the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serbia was never settled. Its autonomous character under various constitutions was ill-defined. Constitutional changes were deployed by Serbia as a means of depriving the majority population of Kosovo of its own voice. States of emergency were declared and new constitutions adopted with the clear purpose of curtailing meaningful dialogue between Pristina and Belgrade. As recently as November 2006, in the midst of international attempts to find a workable accommodation between the two sides, Serbia adopted a new constitution that described Kosovo as an integral part of Serbia.<sup>12</sup> The SFRY/Federal Republic of Yugoslavia/Serbian constitutional context from which Kosovo emerged on 17 February 2008 contributes fundamentally to the appreciation of the *sui generis* character of the Kosovo situation.

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<sup>11</sup> **Annex 2**

<sup>12</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/906 of 20 November 2006, para.6; **Dossier No.78**



- (b) Also highly particular has been the process of dissolution, reformation and reconfiguration of States in the Balkans. First, the SFRY disintegrated, leading to the independence of five successor States: Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia (Serbia and Montenegro), Slovenia and The Former Yugoslavian Republic of Macedonia. Next came the fracturing of the union of the Federal Republic of Yugoslavia (Serbia and Montenegro), as Montenegro decided to go its own way. The independence of Kosovo follows on the heels of this process.
- (c) A fundamental thread in all of these developments has been the bloody and brutal conflict that afflicted the Balkans for a decade from 1989 – 1999. While Serbia is not alone in having responsibility for these events, there is no doubt that it, and its leaders during this period, bear a very heavy responsibility for them. In respect of Kosovo, an already sensitive situation deteriorated significantly in 1989 when Serb troops were sent into Kosovo and a state of emergency declared. Serb functionaries, instructed from Belgrade, intruded into the session of the Kosovo provisional assembly in March 1989. The next 10 years witnessed significant human rights atrocities committed against the Kosovo Albanian population, all as set out in Reports of the United Nations Secretary-General (the Secretary-General) and other documents and reflected in Judgments of the Court and of the ICTY.
- (d) The involvement of the Security Council is another element that contributes to the appreciation of the *sui generis* character of the Kosovo situation. Security Council involvement is not, of course, unique to Kosovo but, as the dossier of documents prepared by the United Nations Office of Legal Affairs illustrates – a dossier that only captures documents from 1998 – the involvement of the United Nations, through the United Nations Mission in Kosovo (UNMIK) and in other ways, and through the involvement of the Special Envoy, was extensive in scope and remarkable in substance.
- (e) The deep and sustained involvement of the international community through the United Nations, the European Union, the Contact Group, and in other ways, in an attempt to find an agreed framework for Serb-Kosovo relations, also marks out the Kosovo situation as unusual. It is not simply the fact and duration of this engagement

that is relevant but, perhaps more important, that the Declaration of Independence that came at the end of it is testimony to the failure of these endeavours to find some other accommodation which might have promised a durable peace.

- (f) The Special Envoy's Report, and his finely considered and focused conclusions, point perhaps most acutely to the unique character of the Kosovo situation. The Special Envoy himself describes the circumstances as "extraordinary" and Kosovo as "a unique case that demanded a unique solution".<sup>13</sup> It is not simply the Special Envoy's characterisation of the situation as unique that matters. The point is that he was entrusted by the Secretary-General to consider the way forward. He reached his unequivocal and – in the United Kingdom's view – unavoidable conclusion in the exercise of this United Nations mandate.
- (g) Almost a decade of separate government of Serbia and Kosovo followed Resolution 1244 (1999). This also marks the Kosovo situation as fundamentally different from other disputes. As the Special Envoy wrote in his March 2007 Report:

"For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible."<sup>14</sup>

- (h) The absence of any other credible framework for Serb-Kosovo relations than separation is another distinguishing feature of the Kosovo situation. Kosovo's Declaration of Independence of 17 February 2008 was not a rush to judgement. It was not the cavalier expression of an unrepresentative political clique. It came at the end of an exhaustive search for other alternatives, conducted by thoughtful and expert interlocutors who explored every other conceivable avenue that might have led to a different outcome. They found nothing that could be sustainable. Kosovo's Declaration of Independence of 17 February 2008 was the visible expression, by the representatives of the people of Kosovo, of an appreciation that most in the

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<sup>13</sup> S/2007/168 of 27 March 2007, para. 15; **Dossier No. 203**.

<sup>14</sup> S/2007/168 of 27 March 2007, para. 7; **Dossier No. 203**.

international community who had been engaged on this issue had already come to recognise as the only viable way forward.

- (i) The vision of the future marks out Kosovo's Declaration of Independence as of quite particular character. There are two elements to this, the immediate and the longer term.
- a. The immediate is reflected in the Declaration of Independence itself – the commitments voluntarily assumed and the rapprochement with Serbia that is sought. The Declaration of Independence formally accepts “the obligations for Kosovo contained in the Athisaari plan”,<sup>15</sup> as well as accepting other standard-setting instruments, including the undertakings entered into on Kosovo's behalf by UNMIK. The Declaration of Independence also expresses, “in particular” the desire of the people of Kosovo “to establish good relations with all our neighbours, including the Republic of Serbia with whom we have deep historical, commercial and social ties”.<sup>16</sup>
- b. More significant, is the vision for the longer term. The Declaration of Independence expressly contemplates that Kosovo will seek “full membership in the European Union as soon as feasible”.<sup>17</sup> The vision of both Serbia and Kosovo as members of the European Union, co-existing under an umbrella which has as its function the facilitation of movement and engagement between the peoples and territories of its Member States, highlights an aspect of the situation that is qualitatively different from the apocalyptic visions portrayed by Serbia in its search for support in these proceedings. Kosovo's Declaration of Independence amounts to a decisive break with the brutality of the past. It contemplates a new beginning. But, it does so within a multilateral framework that would see the development of strong ties, protected by laws and by supra-national institutions, with Serbia.

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<sup>15</sup> Kosova Declaration of Independence by the Assembly of Kosovo, para. 3; **Dossier No.192**

<sup>16</sup> Ibid. Para. 11; **Dossier No.192**

<sup>17</sup> Ibid. Para. 6; **Dossier No.192**

**0.23** It is noted that, even though there is no common EU position on recognition, there is a consensus amongst EU Member States that developments in Kosovo cannot be taken as a green light for, in the words of the Serbian Foreign Minister, “any separatist movement in the world ... to further its ambitions”.<sup>18</sup>

## **5. Summary of Arguments**

**0.24** Given the formulation of the question, there is a simple answer to the question posed, namely, that international law does not address the legality of declarations of independence *per se* and that, accordingly, the Declaration of Independence by Kosovo is not incompatible with international law. This response stems from the proposition that, as a general matter, international law neither forbids nor authorises any particular institution or institutions within a territory from declaring independence. No exception to this general proposition is applicable here. The “Provisional Institutions of Self-Government” of Kosovo were acting as the representative of the people of Kosovo as a whole in declaring the independence of Kosovo. In the light of the drafting history of the question, the United Kingdom proposes that it would be appropriate for the Court to respond to the question in these terms.

**0.25** If, however, the Court decides to construe the question more broadly and expands the scope of its review to include Security Council resolution 1244 (1999) and other texts and instruments, the United Kingdom considers that, by this yardstick too, Kosovo’s Declaration of Independence was compatible with international law. Should the Court pursue a wider review along these lines, the United Kingdom considers that the following conclusions would be warranted:

- (1)** Resolution 1244 (1999) mandated UNMIK to facilitate a framework within which a final settlement of the status of Kosovo would be reached. It did not, however, indicate any particular outcome, including independence. Notably, Resolution 1244 (1999) did not pre-judge the outcome of the political process. The consequence of Resolution 1244 (1999) was that the future of the territory of Kosovo ceased to be a matter for Serbia alone to decide upon. It became a

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<sup>18</sup> Conclusions on Kosovo, 2851<sup>st</sup> External Relations Council meeting, Brussels, 6496/08 (Presse 41), 18 February 2008; **Annex 3**

matter to be resolved having regard to the interests and wishes of the inhabitants of Kosovo.

- (2) Everything was done, within the framework of the United Nations and more broadly, to produce a negotiated settlement of the Kosovo crisis on a basis other than independence. These attempts failed. As the Special Envoy's report of 26 March 2007 concluded, the potential for negotiations to produce any mutually agreeable outcome on Kosovo's status was exhausted. This conclusion was reinforced by a further period of 11 months of engagement at the highest political level, which proved equally fruitless.

**0.26** In the event that the Court considers that the Declaration of Independence was not – *quod non* – in accordance with international law at the time it was made, the United Kingdom considers that developments since that point have crystallized Kosovo's independence, resolving any doubts as to the position and curing any deficiency that may have existed. Subsequent to the Declaration of Independence, the Kosovo authorities have acted in a manner fully consistent with the Comprehensive Proposal for the Kosovo Status Settlement, and the situation has been significantly normalized, creating an irreversible situation of fact which is not inconsistent with any rule of international law. In effect, the principle of independence under international supervision, recommended by the Special Envoy, has been implemented by Kosovo to the fullest extent possible.

**0.27** However, the Court construes the question posed, the United Kingdom considers that it will be important that the Court state clearly that developments concerning Kosovo are *sui generis*, that Kosovo's independence is fundamentally contingent on its facts, and that these developments do not create a precedent for any other situation.



## CHAPTER 1

### THE QUESTION POSED

#### 1. Serbia's Request for an Advisory Opinion

**1.1** Kosovo declared independence on 17 February 2008. On 15 August 2008, the Permanent Representative of Serbia to the United Nations transmitted a request from Serbia for the inclusion in the agenda of the 63<sup>rd</sup> Session of the General Assembly of a supplementary item entitled "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law".<sup>19</sup> The General Committee of the General Assembly recommended the inclusion of the item in question in the draft agenda on 17 September 2008.<sup>20</sup> The General Assembly approved this recommendation on 19 September 2008, including it in the agenda of the plenary session under the heading "Promotion of justice and international law".<sup>21</sup> There had been no debate on the substance of Serbia's request to this point.

**1.2** On 23 September 2008, Serbia submitted draft resolution A/63/L.2 under the heading "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>22</sup> The draft resolution was unusual in its brevity and formulation, given Serbia's objective of seeking the imprimatur of the General Assembly for a request for an advisory opinion from the Court on a key element of a dispute between Serbia and Kosovo which had antecedents going back at least two decades. In contrast to the General Assembly's resolution requesting an advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>23</sup> Serbia's draft resolution did not formulate its request by reference to the wider legal and political context of the Kosovo situation. Nor was there any indication of the anticipated utility and importance of the proposed Opinion of the Court for the work of the United Nations organ – the General Assembly – that was being asked to

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<sup>19</sup> A/63/195 of 22 August 2008; **Dossier No.1.**

<sup>20</sup> A/63/250 of 17 September 2008; **Dossier No.2.**

<sup>21</sup> A/63/PV.2; **Dossier No.3.**

<sup>22</sup> A/63/L.2 of 23 September 2008, **Dossier No.4.**

<sup>23</sup> A/RES/10/14 of 8 December 2003.

request the advisory opinion. As regards the formulation of the question proposed to be addressed to the Court, whereas the draft resolution was transmitted under a heading which was cast in terms of the unilateral declaration of independence of “Kosovo”, the question that Serbia proposed to be addressed to the Court was cast in terms of the unilateral declaration of independence “by the Provisional Institutions of Self-Government of Kosovo”. No explanation was given by Serbia for this language, and its relevance and significance remains unclear.

**1.3** When it became apparent that Serbia was lobbying hard for its draft resolution to be voted on without any substantive debate, and that there was concern in some quarters that a failure to support the draft might be characterised as indicating a lack of support for the Court, the United Kingdom circulated a “Note of Issues” under cover of a letter dated 1 October 2008 from its Permanent Representative to the United Nations to the President of the General Assembly.<sup>24</sup> In this letter, the United Kingdom stated *inter alia* as follows:

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

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

**1.4** The “Note of Issues” appended to this letter underlined the United Kingdom’s strong support for the Court and stated that it looked forward to engaging constructively in the General Assembly debate on the agenda item in due course. It went on to identify in the following terms “some of the questions that it believes would merit closer consideration” in that debate:

“6. If an advisory opinion is to be requested, it will be important to ensure that the resolution sets the context of the question posed in order to assist the Court in its consideration of the issues. ... In the matter under discussion, any consideration of the

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<sup>24</sup> A/63/461 of 2 October 2008; **Dossier No.5.**



issues by the Court would necessarily have to take place in the context of the events associated with the wider dissolution of the former Socialist Federal Republic of Yugoslavia in the period from 1991. It would facilitate the task of the Court, therefore, for further contextualisation to be added by expanding the preambular paragraphs of the draft resolution.

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

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

**1.5** As the record shows, there was virtually no discussion of any issues of substance in the plenary meeting of the General Assembly at which the draft resolution was adopted.<sup>25</sup> The Foreign Minister of Serbia introduced the draft *inter alia* in the following terms:

“To vote against [the draft resolution] would be in effect a vote to deny the right of any country to seek – now or in the future – judicial recourse through the United Nations system. To vote against it would also mean accepting that nothing can be done when secessionists in which ever part of the globe assert the uniqueness of their cause and claim exception to the universal scope of the international legal order.

...

We believe that the draft resolution in its present form is entirely non-controversial. It represents the lowest common denominator of the positions of the Member States on this question, and hence there is no need for any changes or additions.”<sup>26</sup>

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<sup>25</sup> A/63/PV.22; **Dossier No.6.**

<sup>26</sup> A/63/PV.22, pp.1-2; **Dossier No.6.**

**1.6** Five other states spoke – the United Kingdom, Albania, Turkey, the United States of America and Mexico. Twenty-nine States spoke briefly in explanation of vote. Speaking in the debate, the Permanent Representative of the United Kingdom, Sir John Sawers, said *inter alia* as follows:

“Let me start by making clear that the United Kingdom is a strong supporter of the International Court of Justice. ...

Why, it might be asked, are we now raising questions about the Serbian request? The reason is that the Serbian request is primarily for political rather than legal reasons. It is designed to slow down Kosovo’s emergence as a widely recognised independent nation, playing its part in the international institutions of the world. Many members of the United Nations emerged into independence during what, at the time, were controversial circumstances. These circumstances normalise over time and the clock of history is rarely turned back. Kosovo’s independence is and will remain a reality. The Government of Serbia will have to decide how it comes to terms with that reality.

...

In terms of the draft resolution before us, my delegation regrets that our Serbian colleagues have declined to seek a consensual way forward. They have, on the contrary, decided to push this draft resolution through the General Assembly with minimal debate about the issues. That is not the custom in the General Assembly, and it is regrettable that Serbia had decided to pursue that course. In the light of our reservations on matters of both substance and procedure, the United Kingdom will abstain on this resolution.

If the resolution is adopted, the question will need to be addressed against the background of the full context of the dissolution of Yugoslavia in so far as it affects Kosovo, starting with Belgrade’s unilateral decision in 1989 to remove Kosovo’s autonomy through to events of the present day.”<sup>27</sup>

**1.7** Serbia’s draft resolution was subsequently adopted by 77 votes in favour, 6 votes against, and 74 abstentions. Speaking in explanation of the vote after the adoption of the resolution, the United Kingdom’s Permanent Representative noted that it was “striking that more Member States felt unable to support the resolution than voted in favour of it. We might infer from this that we are far from alone in having deep reservations.”<sup>28</sup>

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<sup>27</sup> A/63/PV.22, pp.2-3; **Dossier No.6.**

<sup>28</sup> A/63/PV.22, p.11; **Dossier No.6.**

## 2. The Meaning of the Question

1.8 The procedural history of the request is material to an important aspect of the present proceedings, namely, the issue is what exactly is meant by the question. The question before the Court is as follows:

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

1.9 Four observations on the formulation of the question are warranted.

1.10 First, although nothing of significance may ultimately turn on this point, the United Kingdom observes that the characterisation of Kosovo’s Declaration of Independence as “unilateral” is not material to an appreciation of the issues, other than as an indicator that the Declaration of Independence was not consensual. Any non-consensual declaration of independence would be unilateral. As is addressed more fully in chapter 5 below, the authority of an entity declaring independence, by reference to the constitution of the predecessor state, cannot be determinative of the legality of that declaration of independence as a matter of international law. Any other analysis would effectively give the predecessor State a veto over declarations of independence in a way that would call into question the independence of many States around the world. While questions of the domestic constitutionality of declarations of independence may be relevant in some cases, where, for example, the issue is whether available constitutional procedures have been complied with, this factor can have no relevance in the present case for at least two reasons. In the first place, as is described in chapters 2 and 3 below, Serbia quite deliberately and unilaterally sought, on a number of occasions since 1989, to manipulate its constitutional framework to stifle the voice of the majority population in Kosovo and to preclude any possibility of Kosovo’s independence. It did so most recently in November 2006, in the face of attempts by the international community to find an agreed framework for Serbia-Kosovo interaction. In the second place, the focus of the question referred to the Court is the compatibility of Kosovo’s Declaration of Independence with international law. The status of Kosovo’s Declaration of Independence as a matter of Serbian constitutional law is not relevant. The

fact that the Declaration of Independence – an act performed by the elected representatives of the people of Kosovo – was unilateral does not determine its legality under international law.

**1.11** Second, as has already been noted, the reference to the “Provisional Institutions of Self-Government of Kosovo” was never explained by the drafters of the resolution. There is nonetheless a hint of what may be behind this formulation in the opening statement by the Serbian Foreign Minister in the General Assembly session at which the draft resolution was adopted, viz.: “On 17 February 2008, the provisional institutions of self-government of Serbia’s southern province of Kosovo and Metohija unilaterally declared independence”.<sup>29</sup> If the implication in this statement is that those declaring independence did not have the authority to do so under the Serbian constitution, it is useful to recall that the Serbian constitution was for 20 years used as a tool by Serbia to control the voice of the majority population of Kosovo. It cannot be controlling in the present circumstances.

**1.12** More significant is that the Declaration of Independence was not a declaration by any institution, whether provisional or otherwise, of Kosovo self-government. It was a declaration by the elected representatives of the people of Kosovo. Although the gathering from which the Declaration of Independence issued brought together the members of the Kosovo Assembly, it did so in the form of a “Special Plenary Session” with participation which included other elected representative figures in Kosovo, notably the President of Kosovo (not a member of the Kosovo Assembly) and the Prime Minister. It was not simply a meeting of the Kosovo Assembly, the conduct of which can be judged by reference to grants of authority or rules of procedure that governed its day-to-day business. It was a gathering that reflected a unique constitutional moment in the history of Kosovo in which those elected by the people of Kosovo expressed the will of those they represented. The Declaration of Independence says as much explicitly: “We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state”.<sup>30</sup> The same appreciation is evident from the transcript of the Special Plenary Session of the Assembly from which the Declaration of Independence issued.<sup>31</sup>

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<sup>29</sup> A/63/PV.22, p.1; **Dossier No.6.**

<sup>30</sup> Declaration of Independence by the Assembly of Kosovo, operative para. 1; **Dossier No.192.**

<sup>31</sup> **Annex 4**

**1.13** There is a point of wider significance that flows from this. There are many circumstances in which representative institutions of peoples or groups are established under fiat of a domestic constitutional arrangement or as an interim arrangement between two sides of a dispute or under the umbrella of an internationally-brokered process or settlement. In such circumstances, the competence of such institutions will invariably be limited. While the day-to-day functioning of such institutions might be assessed by reference to the previously declared scope of their authority, the representative character of such institutions, or of their delegates, acting exceptionally in special session to declare the will of those they represent cannot simply be determined by reference to preceding arrangements, especially where these are arrangements of an interim kind. This assessment would also be true for any other representative institution that sought extraordinarily, on the basis of an overwhelming consensus of its members, to reflect the will of those it represented beyond the limits of its declared and interim competence.

**1.14** Third, the question as formulated implies that, to be consistent with international law, Kosovo's Declaration of Independence must have been expressly authorised by a permissive rule of international law: is Kosovo's declaration of independence "in accordance with international law". The question, however, is not whether international law authorised Kosovo's Declaration of Independence but rather whether it precluded it. On this point, as is addressed in chapter 5 below, while international law is focused on securing the stability of States, it does not guarantee the permanence of a State as it exists at any given time. It is the United Kingdom's position that international law contains neither a right of unilateral secession nor the denial *per se* of such a right.

**1.15** Adopting this appreciation, the advisory opinion request could be answered simply with the proposition that Kosovo's Declaration of Independence is not incompatible with international law. International law does not *per se* preclude the creation of states by operation of declarations of independence which properly reflect the will of a people and garner sufficient support to enable the territorial entity in question to function effectively as a state in the international community. These issues are addressed in chapters 5 and 6 below.

**1.16** Fourth, it is appropriate to highlight what does not come within the ambit of the advisory opinion request, and what accordingly is not the subject of comment in this Written Statement. The question posed to the Court is not about Kosovo's existence as an independent State at the present time or at the eventual date of the Court's Opinion. It is not about the entitlement of other States to recognise Kosovo as an independent State and to conduct their relations with Kosovo, and with Serbia, on that basis. It is not about the internal constitutional arrangements of Kosovo as an independent State. It is not about whether Kosovo fulfils the conditions for membership of the United Nations under Article 4 of the UN Charter. It is not about any issue that may arise between Serbia and Kosovo concerning any delimitation or demarcation of the border between them. These questions, and others, fall outside the purview of the request for an advisory opinion. The focus of the present proceedings, by the hand of the author of the question posed, is whether Kosovo's Declaration of Independence, a declaration on a given day, is compatible with international law. It is to this issue that the United Kingdom turns, addressing, in chapters 2 to 4, factual aspects relevant to its legal assessment, and, in chapters 5 and 6, its appreciation of the legal position in view of these facts.

## **PART II**





## CHAPTER 2

### 1989 – 1999: THE DISINTEGRATION OF THE SFRY AND ASSOCIATED DEVELOPMENTS

**2.1** The seeds of the events that were to lead to Kosovo's Declaration of Independence were sown in the period 1989 – 1999. Three related elements of the developments in this period warrant comment: constitutional changes, the disintegration of the SFRY and the widespread human rights violations committed against the ethnic majority population of Kosovo. By way of preliminary comment, the first section below provides some broader historical context of the period prior to 1989.

#### 1. Kosovo before 1989

**2.2** Kosovo has for centuries been the home of a largely ethnic-Albanian Muslim community. This community has been overwhelmingly the majority population in the territory. In the 1870s, Kosovo's population was around 60–70% Muslim, with the remaining population being mainly ethnic Serbs. The Serb population declined further after this period to around 25% in the latter part of the 19<sup>th</sup> century and into the 20<sup>th</sup> century, with a further drop from these levels to below 10% of the total population of Kosovo in the 1990s.<sup>32</sup>

**2.3** Some brief background is also useful on the constitutional front, although, for the avoidance of doubt, the United Kingdom notes that it does not in this Statement advance any submissions on the question posed to the Court which is contingent on an appreciation of Yugoslav or "internal" Serb-Kosovo constitutional arrangements.

**2.4** Following fluctuating fortunes in the preceding period which saw parts of Kosovo occupied during the First World War, by the end of this conflict Kosovo was back under Serbian rule. The Serb-Croat-Slovene State, known from 1929 as Yugoslavia, was proclaimed in December 1918. In 1945–46, under Marshall Tito, a new federal structure consisting of six republics and two autonomous units of Serbia (Kosovo and Vojvodina) was

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<sup>32</sup> The historical aspect set out in these paragraphs is drawn from Malcolm, *Kosovo: A Short History* (London, Pan, 1998) (hereafter "Malcolm"). As the United Kingdom is not making submissions which are contingent on an appreciation of the constitutional arrangements summarised below, documentary material going to these issues is not annexed.

adopted. This was reflected in a new Constitution of the Federal Republic of Yugoslavia of 1946. With the adoption of a further Constitution in 1963, the distinction between autonomous provinces and autonomous regions was removed, with both Kosovo and Vojvodina becoming autonomous provinces. A further Constitution was adopted in 1974, which referred to the autonomous provinces of Kosovo and Vojvodina alongside the Republics and provided that they would have a status almost equivalent to that of the Republics. The provisions of the 1974 Constitution were reflected both in the Constitution of the Republic of Serbia and the Constitution of the Socialist Autonomous Province of Kosovo of the same year.

## **2. 1989-1999 Part I: Constitutional Changes**

**2.5** In early 1989, following wider inter-ethnic tensions in the SFRY, the Serbian Assembly prepared amendments to the Serbian Constitution which would severely restrict Kosovo's powers. There followed a series of protests by the majority population in Kosovo which in turn saw Serb troops enter Kosovo and a state of emergency declared by the end of February 1989. On 23 March 1989, the Provincial Assembly of Kosovo met in unusual circumstances with tanks and armoured cars in front of it. Members of the security police and Communist Party functionaries from Serbia mixed with the delegates. Constitutional amendments were adopted, although in the absence of the two-thirds majority required for such changes. Kosovo's autonomy was severely diminished.

**2.6** A new Constitution of the Republic of Serbia, adopted in 1990, made permanent the abolition of Kosovo's independent powers. In 1992 this was consolidated in a new Constitution for the Federal Republic of Yugoslavia ("FRY"), which by then consisted of the Republics of Serbia and Montenegro. By this Constitution, the status of Kosovo was further reduced.

**2.7** In parallel with these developments within Serbia, in July 1990, the "Assembly of Kosova" adopted a constitutional declaration "on Kosova as an independent and equal constituent unit within the framework of the Federation (Confederation) of Yugoslavia entitled to the same constitutional denomination as other constituent units". In September 1990, the Assembly of Kosova passed a resolution declaring Kosovo "an equal member

within the Yugoslav Community”. In response, the Serbian authorities closed down the Kosovo assembly. A Constitution of the “Republic of Kosova” proclaimed by the majority community in September 1990 was followed by a referendum in October 1991 and Kosovo-wide elections, which led to the election of a government headed by Ibrahim Rugova in 1992.

### **3. 1989-1999 Part II: the Disintegration of the SFRY**

**2.8** In 1990 Croatia and Slovenia declared “sovereignty” and, on 25 and 26 June 1991 respectively, independence. The ensuing dispute led ultimately to the dissolution of the SFRY during the process of which attempts were made by the international community to achieve a reconciliation. The key attempts, insofar as are relevant to Kosovo, are set out below.

**2.9** The first reconciliation attempt by the international community was the EC-sponsored Peace Conference on Yugoslavia under the chairmanship of Lord Carrington. When it became clear that the SFRY could no longer survive as a cohesive federal State, the EC established an Arbitration Commission, headed by Robert Badinter, the President of the French Constitutional Council, to address claims to independent statehood. In the course of this work, the Badinter Commission concluded that the SFRY was in the process of dissolution and that, once this process was complete, all the entities emerging from it were to be regarded as new States. This analysis was subsequently adopted more widely, including by the General Assembly and Security Council in, for example, General Assembly resolution 47/1 of 22 September 1992, which required that the FRY (Serbia and Montenegro) apply for membership of the United Nations, and its parallel Security Council resolution 777 (1992).

**2.10** Another attempt at resolving the crisis was made at the London Conference on Yugoslavia in August 1992. Belgrade opposed the discussion of the Kosovo issue at this meeting. Kosovo thus attended the Conference only in a very limited capacity. Ultimately, there was no substantive engagement with the Kosovo issue during the Conference although Lord Carrington indicated, in a unilateral statement issued as a “Paper by the Chairman”, that Serbia and Montenegro had committed themselves to the restoration of “the full civil and constitutional rights of the inhabitants of Kosovo”.<sup>33</sup> The modalities for the restoration of

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<sup>33</sup> Co-Chairman’s Paper on Serbia and Montenegro, 27 August 1992; **Annex 5**

civil and constitutional rights were, however, unspecified. Eventually a “Special Group” was set up to work on the Kosovo issue, chaired by Ambassador Gert Ahrens of Germany. Rather than focus on the issue of status, however, it considered practical improvements to life in the territory. These talks soon stagnated.

**2.11** A further attempt to stabilise the situation was made by the Conference on Security and Co-operation in Europe (CSCE).<sup>34</sup> The most significant early CSCE actions were the exploratory missions and the deployment of the Mission of Long Duration in Kosovo, Sandjak and Vojvodina in the exercise of the early warning and preventative action functions. The Mission of Long Duration was established according to a decision of the CSCE of 14 August 1992, in parallel with the London Conference, and started operations in early September 1992. Its mandate included the promotion of dialogue between the authorities and representatives of the populations and communities in Kosovo and the collection of information on and promotion of solutions to human rights violations. It gradually established a significant presence in the FRY and went beyond reporting into mediation and active protection of threatened individuals. The Mission remained in place until June 1993, when Belgrade withdrew consent to its operation in response to the decision to suspend the FRY from participation in the CSCE’s work. International protest marked the termination of the Mission, including a call in Security Council resolution 855 (1993) for the CSCE operation to be readmitted.

**2.12** In July 1997, Slobodan Milosevic was elected President of the FRY. By September 1997, when the escalation of wider hostilities in Kosovo emerged, the Contact Group (composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States) began to take a more active role in Kosovo. In a statement of 24 September 1997, the Contact Group declared: “[w]e do not support independence and we do not support the status quo. We support an enhanced status for Kosovo within the FRY.”<sup>35</sup>

**2.13** In March 1998, in response to the outbreak of widespread fighting, the Security Council, by Resolution 1160 (1998), prohibited the sale or supply of arms and related

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<sup>34</sup> The CSCE became an organisation: the Organization for Security and Co-operation in Europe (the OSCE) on 1 January 1995

<sup>35</sup> Contact Group Statement, 24 September 1997; **Annex 6**

equipment to the FRY, including Kosovo (in operative paragraph 8), and established a Committee to monitor compliance.<sup>36</sup>

**2.14** By early summer 1998, in response to a deteriorating situation in Kosovo, the Contact Group called for enhanced negotiation efforts. The attempt was led by the US Ambassador to Macedonia, Christopher Hill. At its Bonn meeting of 8 July 1998, the Contact Group recommended basic elements for a resolution of the question of Kosovo's status. Its statement indicated that action in the Security Council might follow if its demands were not met by one or other of the parties.<sup>37</sup>

**2.15** In early September 1998, the Secretary-General reported that he was "alarmed" by the lack of process in arranging negotiations.<sup>38</sup> The Security Council subsequently adopted Resolution 1199 (1998) identified the deteriorating situation in Kosovo as a threat to peace and security in the region and, acting under Chapter VII to the Charter, demanded that immediate steps be taken to improve the humanitarian situation to avert "the impending humanitarian catastrophe".<sup>39</sup> The Council also expressed grave concern at the increased fighting, referring both to the "excessive and indiscriminate use of force by Serbian security forces" and to the actions of the Kosovo Liberation Army (KLA). It also demanded the immediate cessation of action by security forces affecting the civilian population and the withdrawal of security units used for civilian repression as well as other action aimed at agreeing confidence building measures and finding a political solution to the problems of Kosovo.

**2.16** Throughout this period the Contact Group and Security Council were focussed on the future status of Kosovo. It became apparent, however, that an agreement on status would be impossible. Ambassador Hill accordingly reported to the OSCE that an informal understanding had been reached about a three-year stabilisation and normalisation period to allow for the re-establishment of democratic institutions, after which a new approach could

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<sup>36</sup> When conflict broke out in Bosnia and Herzegovina, the FRY and Bosnia and Herzegovina were subjected to a comprehensive Security Council sanctions regime.

<sup>37</sup> Statement of the Contact Group, 8 July 1998, S/1998/657; **Annex 6**

<sup>38</sup> Report of the Secretary-General pursuant to S/RES/1160 (1998), S/1998/834, para.28. **Dossier No.15.**

<sup>39</sup> S/RES/1199 (1998), **Dossier No.17.**

be envisaged. He stressed the vital importance of an international presence in Kosovo during the implementation period and the important role that the OSCE would have to play.<sup>40</sup>

**2.17** On 15 and 16 October 1998 two formal agreements were concluded. In the Kosovo Verification Mission agreement, between the FRY and NATO, the FRY agreed to an “air surveillance system for Kosovo”. This was to verify compliance of all parties with the provisions of Security Council resolution 1199 (1998). It also meant that NATO could check whether the FRY was complying with various military undertakings in which it was agreed that Serbia would withdraw its forces and heavy weapons introduced into Kosovo after February 1998. The second agreement, concluded between the FRY and the OSCE, was for the deployment of 2,000 unarmed “verifiers”, together with expert personnel on the ground, also to monitor compliance with the terms of Resolution 1199 (1998) (“the OSCE Verification Mission”).

**2.18** The Security Council endorsed and supported both of these agreements.<sup>41</sup> Kosovo representatives were not party to the agreements.

**2.19** On 2 November 1998 a more detailed draft agreement was put forward by Ambassador Hill. This failed to attract support. A further text was presented by Ambassador Hill in early December 1998. Both parties immediately rejected it and, despite further attempts by the Hill team, the peace process appeared to have reached a dead end. A final Hill draft was produced two days before the Contact Group decision to summon the parties to talks at Rambouillet.<sup>42</sup>

**2.20** Although a draft agreement eventually emerged from the Rambouillet Conference, neither Kosovo nor the FRY was in a position to sign the agreement by the deadline of 23 February 1999. The Chairmen’s Conclusions noted, however, that a political framework was in place and that the groundwork had been laid for finalising the implementation chapters of

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<sup>40</sup> See the OSCE Report, annexed to UN Secretary-General’s Report, 3 October 1998, (S/1998/912 of 3 October 1998; **Dossier No.18**.

<sup>41</sup> SC RES/1203 (1998); **Dossier No.20**.

<sup>42</sup> Final Hill Proposal, 27 January 1999; **Annex 7**.

the agreement, including the modalities of the invited international civilian and military presence in Kosovo.<sup>43</sup>

**2.21** Following Rambouillet, the Contact Group indicated that the parties had committed themselves to attending a further conference covering all aspects of implementation on 15 March 1999.<sup>44</sup> The Contact Group negotiators and the delegations of the FRY and Kosovo met again in Paris on 15 March 1999. At this point, the Kosovo delegation presented the Co-Chairmen of the Conference with a letter confirming the decision it had taken at Rambouillet to accept the agreement, and Kosovo subsequently signed the agreement. In contrast, the FRY delegation presented its own version of the political part of the agreement, which effectively sought to resurrect discussion on the political settlement as a whole. Faced with this impasse, the conference was adjourned pending acceptance of the agreement by the FRY.<sup>45</sup>

**2.22** In this interval in the talks, the Belgrade government massed troops on the border with Kosovo and within Kosovo. These forces carried out significant attacks, leading to the withdrawal of the OSCE Verification Mission.

**2.23** On 22 March 1999, Ambassador Holbrooke travelled to Belgrade to try to persuade the FRY to stop these attacks. The following day, the Belgrade parliament rejected the interim agreement. In response to the rapidly deteriorating human rights situation, NATO military action began on 24 March 1999. Two months later the International Criminal Tribunal for Yugoslavia (“ICTY”) issued indictments against the senior leadership of the FRY in respect of allegations of war crimes and crimes against humanity in Kosovo. This is addressed further below.

**2.24** After various attempts at settlement, a set of agreed principles on the political solution of the Kosovo crisis was adopted by the G-8 on 6 May 1999. Serbia accepted the G-8

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<sup>43</sup> See Contact Group statement, Rambouillet Accords: Co-Chairman’s Conclusions, 23 February 1999; **Annex 6**.

<sup>44</sup> Ibid, para.4; **Annex 6**.

<sup>45</sup> Statement by the Co-Chairs of the Contact Group, France, 19 March 1999; extract from *The crisis in Kosovo 1989-1999: from the dissolution of Yugoslavia to Rambouillet and the outbreak of hostilities*, (2nd ed, Weller, (2001)), ch.16, “Paris Conference and Hostilities” at p.493; **Annex 6**.

principles on 29 May 1999 and informed the Security Council of its decision on 1 June 1999. On 10 June 1999, the Security Council adopted Resolution 1244 (1999).

#### 4. 1989-1999 Part III: Human Rights Abuses

**2.25** Between 1989 and 1999 the majority Kosovo population was subject to extensive human rights abuses at Serbian hands.

**2.26** In 1990, Serbia issued measures focussed on consolidating the position of the Serbian minority in Kosovo through a series of discriminatory laws, programmes and decrees. Amongst these measures, the Albanian language newspaper was suppressed, the Kosovo Academy of Arts and Sciences was closed, thousands of State employees were dismissed (including judges and police officers), and a law was passed which made possible the dismissal of more than 80,000 ethnic Albanians. In addition, there were arbitrary arrests and police violence, homes were raided without explanation, and goods and money confiscated.<sup>46</sup>

**2.27** These actions, continued over some time, amounted to the liquidation of all but trivial vestiges of Kosovo public administration. They discriminated against and violated the human rights of the majority ethnic population in Kosovo. As the Committee on the Elimination of Racial Discrimination (CERD) noted:

“... attention was drawn to reports of patterns of discrimination perpetrated by the State Party [the FRY] against a number of minority groups, including people of Albanian origin in the Kosovo region ... Among the discriminatory practices cited were police harassment, deprivation of education rights, mass dismissals from employment and restrictions on freedom of expression ...”

“Great concern is expressed regarding the situation of the Albanian population of Kosovo. Reports continue to be received of campaigns of discrimination, harassment and, at times, terrorization, directed against them by State authorities. Dismissals from jobs in the public sector, principally from the police and education services, continue. Numerous reports have been received of physical attacks and robbery either committed by persons in the service of the State or inadequately investigated by the police. It can be concluded that the ethnic Albanians of Kosovo continue to be deprived of effective enjoyment of the most basic human rights provided in the Convention.”<sup>47</sup>

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<sup>46</sup> See the Report of the UN Special Rapporteur of 31 October 1997; **Annex 8**.

<sup>47</sup> Report of the CERD, Yugoslavia, A/50/18, 22 September 1995, paras.229 and 237; **Annex 9**.



**2.28** In August 1992, a special session of the UN Commission on Human Rights was convened. It established a Special Rapporteur for Yugoslavia. Over successive years, the Special Rapporteur detailed human rights abuses in Kosovo. For example:

- (a) in 1992, the Special Rapporteur observed that there was “a real danger” that “widespread violence including armed conflict” might spread to Kosovo, Vojvodina and Sandzak;<sup>48</sup>
- (b) in 1993, the Special Rapporteur addressed the continued receipt of reports that “Serbian police and state security services act in excess of their powers and in breach of the law in their dealings with the Albanian population in Kosovo. These reports have increase significantly since July 1993”;<sup>49</sup>
- (c) the Special Rapporteur continued receiving reports of discriminatory and abusive treatment of ethnic Albanians by the Serb authorities into 1994, especially towards the end of that year, and into 1995;<sup>50</sup>
- (d) by 1996 the Special Rapporteur noted that:

“The human rights situation in the [FRY] remains a serious concern. Current legislation dealing with freedom of expression, freedom of movement and freedom of association should be examined with a view to the enactment of new laws. The present system for dealing with the question of citizenship is subjective and open to abuse. The media in the [FRY] is not assured of its independence, nor is the State-funded media impartial. The education system in Kosovo is in a dire situation ... Medical services in Kosovo are a source of mistrust for ethnic Albanians ... There are random home searches, arbitrary arrests and systematic beating of detainees whilst in custody in the Kosovo and Sandzak regions ...”<sup>51</sup>

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<sup>48</sup> Report of Special Rapporteur for Yugoslavia, 17 November 1992, para.137; **Annex 10**.

<sup>49</sup> Report of Special Rapporteur for Yugoslavia, 17 November 1993, para.189. **Annex 10**.

<sup>50</sup> Report of Special Rapporteur for Yugoslavia, 21 February 1994, paras.139-143; and 4 November 1994, paras.182-185; Report of 16 January 1995, para.84. **Annex 10**.

<sup>51</sup> Report of Special Rapporteur for Yugoslavia, 14 March 1996, paras.162-168; **Annex 11**.

- (e) the ill-treatment of ethnic Albanians by ethnic Serbs continued into 1997 and beyond.<sup>52</sup>

**2.29** In parallel, the human rights monitoring committees under various instruments also reported on the problems arising from the conflict. The following examples illustrate these observations, by the Committee on the Rights of the Child and the Committee Against Torture:

“The Committee [on the Rights of the Child] ... expresses grave concern about the situation of Albanian-speaking children in Kosovo, especially with regard to their health and education, as well as the degree to which this population is protected from abuse by the police.”

“... the Committee [against Torture] is extremely concerned over the numerous accounts of the use of torture by the State police forces that it has received from non-governmental organizations ... [including] information describing numerous instances of brutality and torture by the police, particularly in the districts of Kosovo and Sandzack. The acts of torture perpetrated by the police, and especially by its special units, include beatings by fists, beatings by wooden or metallic clubs mainly on the head, on the kidney area and on the soles of the feet, resulting in mutilations and even death in some cases. There were instances of use of electroshock ...”<sup>53</sup>

**2.30** In June 1998, the EU condemned the “wide-spread house-burning and indiscriminate artillery attacks of whole villages [indicating] a new level of aggression on the part of Serb security forces.” It expressly identified these practices as the beginning of a new phase of ethnic cleansing.<sup>54</sup>

**2.31** The Secretary-General also made detailed reported on the situation in Kosovo. His Report of 2 July 1998 stated:

“A new outbreak of violence in early June led to an influx of refugees to Albania and to an increase in internally displaced persons in Kosovo and Montenegro. The number of registered refugees in Albania at the end of June was 6,900. In addition, an estimated 3,150 have departed to southern Albania. It is estimated, however, that there may be as many as 13,000 refugees more in Albania. As of 19 June, the

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<sup>52</sup> See, for example, the Reports of Special Rapporteur for Yugoslavia, 29 January 1997; and 11 September 1998; **Annex 11**.

<sup>53</sup> Respectively, the Concluding Observations of the Committee on the Rights of the Child: Yugoslavia, 13 February 1996, CRC/C/15/Add.49, para.7 and the Conclusions and Recommendations of the Committee Against Torture: Yugoslavia, 21<sup>st</sup> session 9-20 November 1998, para.47; **Annex 12**.

<sup>54</sup> EU Statement on Kosovo, 9 June 1998; **Annex 13**.

Montenegrin authorities have registered another 10,177 internally displaced persons from Kosovo. According to estimates of the Office of the United Nations High Commissioner of Refugees (UNHCR), some 45,000 people have been displaced within Kosovo itself. UNHCR is unable to assess the situation on the ground more precisely, since it cannot gain access to the affected areas.”<sup>55</sup>

**2.32** The situation worsened progressively in the following months.<sup>56</sup>

**2.33** In these circumstances, the International Committee of the Red Cross (ICRC) departed from its practice of not publicly commenting on developments and issued regular reports on its findings. By September 1998, the situation had reached such proportions that the ICRC issued a formal statement on its position on the crisis in Kosovo, confirming that, from a humanitarian perspective, “it has become apparent that civilian casualties are not simply what has become known as „collateral damage“. In Kosovo, civilians have become the main victims – if not the actual targets – of the fighting.”<sup>57</sup>

**2.34** These and other reports were fed into various bodies, including the UN Commission on Human Rights,<sup>58</sup> and the UN General Assembly.<sup>59</sup> These bodies adopted resolutions condemning FRY practices and demanding that the conduct cease. For example, the UN Commission on Human Rights demanded “that the authorities of the [FRY] respect the human rights and fundamental freedoms of ethnic Albanians in Kosovo ...”<sup>60</sup> and “strongly condemn[ed] in particular the measures and practices discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large scale repression committed by the Serbian authorities ...”<sup>61</sup>

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<sup>55</sup> S/1998/608 of 2 July 1998, para. 10; **Dossier No.12**.

<sup>56</sup> See the Reports of 5 August 1998, **Dossier No.13**; 4 September 1998, **Dossier No.15**; 3 October 1998, **Dossier No.18**; and 30 October 1998, A/53/563, **Annex 14**.

<sup>57</sup> ICRC Position Statement, 15 September 1998; **Annex 15**.

<sup>58</sup> For example, UN Commission on Human Rights resolutions 1992/S-1/8 of 14 August 1992; 1992/S-2/6 of 3 December 1992; 1993/7 of 23 February 1993; 1994/72 of 9 March 1994; 1994/76 of 9 March 1994; 1995/89 of 8 March 1995; 1996/71 of 23 April 1996; 1997/57 of 15 April 1997 and 1998/79 of 22 April 1998; **Annex 16**.

<sup>59</sup> See, for example, A/RES/47/147 of 18 December 1992; A/RES/48/153 of 20 December 1993; A/RES/49/196 of 23 December 1994; A/RES/49/204 of 23 December 1994; A/RES/50/190 of 22 December 1995; A/RES/51/111 of 12 December 1996, A/RES/51/116 of 12 December 1996; A/RES/52/147 of 12 December 1997; A/RES/52/139 of 12 December 1997; A/RES/53/163 of 9 December 1998; and A/RES/53/164 of 9 December 1998; **Annex 17**.

<sup>60</sup> Resolution of the Commission on Human Rights 1993/7 of 23 February 1993, para.25; **Annex 18**.

<sup>61</sup> Resolution of the Commission on Human Rights 1994/72 of 9 March 1994, para.25; 1994/76 of 9 March 1994, paras.1-3; **Annex 18**

**2.35** In successive resolutions, the General Assembly:

“Expresse[d] its grave concerns at the Special Rapporteur’s report on the dangerous situation in Kosovo, Sandjak and Vojvodina ... and call[ed] upon the Serbian authorities to refrain from the use of force, to stop immediately the practice of “ethnic cleansing” and to respect fully the rights of persons belonging to ethnic communities or minorities, in order to prevent the extension of the conflict to other parts of the former Yugoslavia.”<sup>62</sup>

“Strongly condemn[ed] in particular the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities ... Also urge[d] the authorities of the [FRY] to respect the human rights and fundamental freedoms of ethnic Albanians in Kosovo, and expresse[d] the view that the best means to safeguard human rights in Kosovo is to restore its autonomy.”<sup>63</sup>

“Strongly condemn[ed] the increase of police violence against the non-Serb populations in Kosovo, the Sandjak, Vojvodina and other areas of the [FRY] ...”<sup>64</sup>

“Strongly condemn[ed] the measures and practices of discrimination and the violations of human rights of ethnic Albanians in Kosovo committed by the authorities of the [FRY]; Condemn[ed] the large scale repression by the police and military of the [FRY] against the defenceless ethnic Albanian population and the discrimination against the ethnic Albanians in the administrative and judiciary branches of government, education, health care and employment, aimed at forcing ethnic Albanians to leave; Demand[ed] that the authorities of the [FRY] (a) Take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo ...”<sup>65</sup>

“Urgently demand[ed] that the authorities of the [FRY] take immediate action to put an end to the repression of and prevent violence against non-Serb populations in Kosovo, including acts of harassment, beatings, torture, warrantless searches, arbitrary detention and unfair trials ...”<sup>66</sup>

“[Expressed grave concern] about the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, inter alia, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians,

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<sup>62</sup> A/RES/47/147 of 18 December 1992, para.14; **Annex 17**.

<sup>63</sup> A/RES/48/153 of 20 December 1993, paras.18; 20; **Annex 17**.

<sup>64</sup> A/RES/49/196 of 23 December 1994, para.19; **Annex 17**.

<sup>65</sup> A/RES/49/204 of 23 December 1994, paras.1-3; A/RES/50/190 of 22 December 1995, paras.1-3; A/RES/51/111 of 12 December 1996, paras.1-2; **Annex 17**.

<sup>66</sup> A/RES/51/116 of 12 December 1996, para.10; **Annex 17**.

summary executions and illegal detention of ethnic Albanian citizens of the [FRY] by the police and military”.<sup>67</sup>

**2.36** In similar vein, Security Council resolution 1199 (1998) of 23 September 1998 stated:

*“The Security Council ... Demands further that the Federal Republic of Yugoslavia ... implement immediately the following concrete measures towards achieving a political solution to the situation in Kosovo ... (a) cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression; (b) enable effective and continuous international monitoring ... (c) facilitate ... the safe return of refugees and displaced persons to their homes ...”*<sup>68</sup>

**2.37** Early January 1999 saw further attacks by ethnic Serbs, culminating in the Racak massacre of 45 unarmed ethnic Albanian civilians, 22 of whom were found together in a gully, apparently killed execution-style, and including several elderly men and a child.<sup>69</sup>

**2.38** Serb violence towards the Kosovo-Albanians community continued in the period after March 1999. Some of these events are now the subject of a Judgment by the ICTY in *Prosecutor v Milutinović and others*. This case concerned allegations of crimes against humanity and war crimes, including deportation, forcible transfer, murder and persecution. The Tribunal upheld the key charges, finding that, between late March 1999 and April 1999, Serb forces and authorities “directly expelled” a “significant number” of ethnic Albanians from Pec/Peja; harassed, strip searched and physically assaulted villagers in Beleg, raping and sexually assaulting women; expelled ethnic Albanian villagers from the Reka/Carago valley and killed around 287 of them; shot at the village of Bella Crka/Bellaceka, forcing hundreds of the inhabitants to flee and killing around 50 people, including women and children; attacked the village of Mala Krusa/Krusha e Vogel by shelling it, looting and burning the houses and killing around 111 individuals; shelled the village of Turicevac/Turicec, shot and killed 89 men in Izbica; burned houses and at least one mosque in Vucitrn/Vushtria and expelled ethnic Albanians from their homes.

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<sup>67</sup> A/RES/53/164 of 9 December 1998, preamble; **Annex 17**.

<sup>68</sup> S/RES/1199 (1998), operative para.4; **Dossier No.17**.

<sup>69</sup> Report of the EU Forensic Team, 17 March 1999; **Annex 19**.

**2.39** A report compiled in 2000 for UNHCR, which processed the flows of refugees, put the total number of who had fled or been displaced from Kosovo at 859,000, including 444,600 to Albania, 344,500 to Macedonia and 69,900 to Montenegro.<sup>70</sup>

## **5. Conclusion**

**2.40** It was against the background of these human rights violations and successive, ultimately fruitless, attempts by the international community to secure reconciliation within the region, that the Security Council adopted Resolution 1244 (1999) on 10 June 1999. It is to this aspect, and the search for a solution on the basis of this resolution, that this Statement now turns.

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<sup>70</sup> UNHCR Evaluation and Policy Analysis Unit, “The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR’s Emergency Preparedness and Response”, February 2000, para.31.  
<http://www.unhcr.org/research/RESEARCH/3ba0bbeb4.pdf>

## CHAPTER 3

### SECURITY COUNCIL RESOLUTION 1244 (1999) AND THE SEARCH FOR A SOLUTION TO THE KOSOVO CRISIS

#### 1. Security Council resolution 1244 (1999) and its immediate implementation

**3.1** As noted in chapter 2, the Security Council adopted Resolution 1244 (1999) on 10 June 1999,<sup>71</sup> building on the general principles adopted by the G-8 Foreign Ministers on 6 May 1999 (annex 1 to the resolution) and the principles at points 1 to 9 of the paper presented in Belgrade on 2 June 1999 and accepted by the FRY (annex 2 to the resolution).

**3.2** Thus, pursuant to paragraphs 1 and 2 of Resolution 1244 (1999), acting under Chapter VII of the UN Charter, the Security Council:

“1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2;

2. *Welcome[d]* the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and demand[ed] the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation.”

**3.3** The general principles set out in annexes 1 and 2 to Resolution 1244 (1999) sought to address the Kosovo crisis by a stepped approach, providing (a) for a series of principles related to the immediate and verifiable end of violence and repression in Kosovo, the establishment of an interim administration for Kosovo to be decided by the Security Council, and (b) for “[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarisation of the KLA”.<sup>72</sup> The “political process” provided for in annexes 1 and 2 did not look beyond an

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<sup>71</sup> S/RES/1244 (1999); **Dossier No. 34**.

<sup>72</sup> S/RES/1244 (1999), annex 1, sixth principle, annex 2, para.8. Annex 2, para.8, continues: “Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.”

interim position (“the establishment of an interim political framework agreement”). By contrast, the main body of the resolution addressed the issue of the determination of Kosovo’s future status and envisaged a final “political settlement”.

**3.4** As with the general principles set out in its annexes, the focus of the main body of Resolution 1244 (1999) was on both the immediate humanitarian crisis and on the longer-term political process.

**3.5** So far as concerns the immediate humanitarian crisis, paragraph 3 of the Resolution demanded “in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable”. Pursuant to paragraph 5 of the Resolution, the Security Council decided on the deployment in Kosovo, under UN auspices, of international civil and security presences, the powers and responsibilities of the security presence being further defined in paragraphs 7 and 9.

**3.6** So far as concerns the longer-term political process, pursuant to paragraph 10 of the Resolution, the Secretary-General was authorised to establish an international civil presence in Kosovo to provide an interim administration for Kosovo. This reflected principle 4 of the general principles (at annex 1 to the resolution). The Security Council further decided, at paragraph 11, that the main responsibilities of the international civil presence would include:

“a. Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

...

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

...

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



f. In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement ...<sup>73</sup>

3.7 Thus, the key features of Resolution 1244 (1999) were as follows.

- In an exceptional step, the FRY was to lose all civil and military presence, and authority, in Kosovo: the Security Council had recognised that the human rights of the people of Kosovo and the stability of the region could be secured only if the FRY had no presence in Kosovo and no role in its government.<sup>74</sup> Instead, government in Kosovo, on an interim basis, was to be by an international civil presence.
  
- The Resolution mandated UNMIK to facilitate the framework for a political process leading to the determination of Kosovo's future status, and it established the broad principles that would apply pending that determination: substantial autonomy and self-government in Kosovo. Notably, Resolution 1244 (1999) did not seek to pre-judge what the outcome of the political process would be, and did not seek to entrench the principles of sovereignty and territorial integrity of the FRY beyond the interim period.<sup>75</sup> While the resolution did not expressly repeat that the mechanism for a final settlement for Kosovo should be determined (*inter alia*) "on the basis of the will of the people", as had been provided for in the amendment and comprehensive assessment clauses of the Rambouillet accords,<sup>76</sup> it did provide that the Rambouillet accords should be taken into account.

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<sup>73</sup> Pursuant to its paragraphs 9 and 11, Resolution 1244 (1999) attributed separate responsibilities to the international civil and security presences. Pursuant to paragraph 9(f), one of the responsibilities of the international security presence (KFOR) was to support, as appropriate, and coordinate closely with the work of the international civil presence (UNMIK). KFOR was not, however, under the authority of UNMIK.

<sup>74</sup> This was subject to paragraph 4 of Resolution 1244 (1999), confirming that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel would be permitted to return to Kosovo to perform certain functions in accordance with annex 2 to the resolution.

<sup>75</sup> See S/RES/1244 (1999), annex 2, para.8.

<sup>76</sup> Rambouillet accords, Chapter 8, Article I(3); attached to the letter dated 4 June 1999 from the Permanent Representative of France to the United Nations addressed to the Secretary-General of the UN (S/1999/648 of 7 June 1999); **Dossier No.30**.

- The resolution did not seek to address what would happen if no political settlement could be reached. There was, however, no intention that the international civil presence could become permanent.

**3.8** Resolution 1244 (1999) was rapidly implemented through deployment of the International Security Force (KFOR) and the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), as further outlined below.

### ***1.1 The International Security Force (KFOR)***

**3.9** The deployment of KFOR in Kosovo had already been provided for prior to Resolution 1244 (1999), by means of the Military Technical Agreement of 9 June 1999.<sup>77</sup> The first elements of KFOR, newly mandated under Resolution 1244 (1999), entered Kosovo on 12 June 1999.

**3.10** The Military Technical Agreement of 9 June 1999 established a series of general obligations, including Article I.2, which provided for the deployment of KFOR following the adoption of Resolution 1244 (1999), permitting it to “operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission.”

**3.11** Further, pursuant to Article I.4(b), KFOR was authorised “to take such actions as are required, including the use of necessary force, to ensure compliance with this Agreement and protection of [KFOR], and to contribute to a secure environment for the international civil implementation presence, and other international organisations, agencies, and non-governmental organisations”.

**3.12** The Agreement of 9 June 1999, like Resolution 1244 (1999), provided for the cessation of hostilities and the withdrawal of FRY ground and air forces. The removal of the FRY’s military, paramilitary, and police apparatus marked a further element of the complete

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<sup>77</sup> Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia concluded at Kumanovo (Macedonia) on 9 June 1999; **Dossier No. 32**.

discontinuity so far as concerns the situation in the years and months leading to Resolution 1244 (1999).

**3.13** Paragraph 4 of Resolution 1244 (1999) provided that Kosovo would host “an agreed number of Yugoslav and Serb military and police personnel” in accordance with specified terms. The Yugoslav personnel were to (i) liaise with the international civil mission and the international security presence; (ii) mark and clear minefields; (iii) maintain a presence at Serb patrimonial sites; and (iv) maintain a presence at key border crossings.<sup>78</sup> The personnel were not a continuation from the situation before Resolution 1244 (1999). They were to be admitted only “*after* the withdrawal” demanded under paragraph 3.<sup>79</sup>

**3.14** The Agreement of 9 June 1999 likewise subjected this to “a subsequent separate agreement”.<sup>80</sup> Pursuant to Article II, paragraph 2(e) of the Agreement, within eleven days of its entry into force, the senior force commanders of the FRY “shall confirm in writing to the international security force (KFOR) commander” that their forces have completed the phased withdrawal. So far as concerns border controls, Article II, paragraph 2(h) of the Agreement provided: “The international security force (KFOR) will provide appropriate control of the borders of the Federal Republic of Yugoslavia in Kosovo with Albania and the Former Yugoslav Republic of Macedonia until the arrival of the civilian mission of the United Nations.” No provision was made for FRY deployment at border control points. Provision was included for the re-extension, on technical grounds, of Yugoslav central air traffic control over Kosovo airspace for civil aviation purposes; but this was to be done after the cessation of NATO air operations (at that time still underway) and upon delegation by the KFOR commander and at his discretion.<sup>81</sup>

**3.15** In other words, the FRY personnel and institutions that Resolution 1244 (1999) and its associated arrangements allowed to be admitted to Kosovo did not continue the *status quo ante* even in a residual way. Their admission came after the mechanisms of effective central government control had been completely removed and an international security apparatus

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<sup>78</sup> S/RES 1244, annex 2, para.6: **Dossier No. 34.**

<sup>79</sup> S/RES/1244, para..4 (emphasis added).

<sup>80</sup> Military-technical agreement, 9 June 1999, Art I, para.4(a), transmitted as enclosure to letter of NATO Secretary-General to UN Secretary-General dated 10 June 1999: S/1999/682, circulated 15 June 1999: **Dossier No. 32.**

<sup>81</sup> *Ibid.*, Art II, para.3(c).

vested with plenary power and installed in their place. The situation after Resolution 1244 (1999) was entirely new. In the event, by 20 June 1999, the withdrawal of FRY forces was complete.<sup>82</sup>

### ***1.2 The UN Interim Administration Mission in Kosovo (UNMIK)***

**3.16** The provisions of Resolution 1244 (1999) establishing a civil administration also involved a fresh start having no prior analogue; and the removal of the FRY from any role in the government of Kosovo was similarly effected without delay. While Resolution 1160 (1998) had referred to an indeterminate future autonomy status without prescribing any immediate institutional configuration pending settlement, Resolution 1244 (1999), in contrast, established a framework for a full-scale international government in Kosovo entering into force with immediate effect.

**3.17** As early as 12 June 1999, the Secretary-General had made a report to the Security Council pursuant to paragraph 10 of Resolution 1244 (1999), presenting “a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)”.<sup>83</sup> The Report stated that UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (paragraph 3). In the event, on 2 July 1999, Dr Bernard Kouchner was appointed as the Secretary-General’s first Special Representative. In addition, the Report provided that there would be four Deputy Special Representatives each responsible for one of four major components of UNMIK (paragraph 5), with each component assigned to an agency that would take a lead role, as follows: (a) interim civil administration: the United Nations; (b) humanitarian affairs: the Office of the United Nations High Commissioner for Refugees (UNHCR); (c) institution-building: the OSCE; (d) reconstruction: the European Union.

**3.18** In the Secretary-General’s second report to the Security Council, dated 12 July 1999, the structure and activities of these four components (which became the “four Pillars”) was

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<sup>82</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/1999/779 of 12 July 1999, para.4: **Dossier No. 37**.

<sup>83</sup> Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), S/1999/672 of 12 June 1999: **Dossier No. 35**.

further addressed, and the Secretary-General also outlined in greater detail the authority and competencies of UNMIK.<sup>84</sup> So far as concerns the overall authority of UNMIK, the Secretary-General stated: “The Security Council, in its Resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK.”<sup>85</sup>

**3.19** The Report of 12 July 1999 also noted that, at the functional level, UNMIK had established joint civilian commissions (JCCs) to facilitate the process of a mediated and controlled transition to integrated public institutions and to address such contentious issues as administration and staffing of various public facilities. As of 12 July 1999, JCCs had been established in the areas of health, universities, education and culture, municipalities and governance, post and telecommunications, and power.<sup>86</sup> The Secretary-General further reported that consultations were continuing for the formation of the Kosovo Transitional Council, which would provide a mechanism for enhancing cooperation between UNMIK and the people of Kosovo, restore confidence between the communities and identify candidates for interim administration structures at all levels.<sup>87</sup> As noted further below, the Kosovo Transitional Council was later integrated into the Joint Interim Administrative Structure (JIAS).

**3.20** On 25 July 1999, the first UNMIK regulation was promulgated by Dr Kouchner. Regulation 1999/1 concerning the authority of UNMIK,<sup>88</sup> section 1.1, echoed the Secretary-General’s Report of 12 July 1999 in providing that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.”

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<sup>84</sup> S/1999/779 of 12 July 1999: **Dossier No. 37**. See in particular section IV, Authority and Competencies of the Mission, section V, Structure of the Mission, and section VI, Main Components of the Mission.

<sup>85</sup> *Ibid.*, para.35.

<sup>86</sup> *Ibid.*, para.19.

<sup>87</sup> *Ibid.*, para.20. The Secretary-General continued: “This broadly representative body, which will be composed of representatives of all main ethnic and political groups in Kosovo, is intended to ensure participation of the people of Kosovo in the decisions and actions of UNMIK. It will be chaired by the Special Representative, and will provide him with advice, be a sounding board for proposed decisions and help to elicit support for those decisions among all major political groups. In addition to facilitating the work of UNMIK, the Kosovo Transitional Council will promote democratization and institution-building.”

<sup>88</sup> UNMIK regulation 1999/1. Pursuant to its section 7, the regulation was deemed to have entered into force as of 10 June 1999: **Dossier No.138**.

**3.21** Consistent with Resolution 1244 (1999), and as a further element of the discontinuity with the situation prior to the resolution, the FRY had been excluded from any role in the new pillars of administration. All legislative and executive authority in Kosovo had devolved on UNMIK. The exercise of authority by UNMIK, to the exclusion of the FRY, was further reflected in section 6 of Regulation 1999/1, establishing the extent of UNMIK's authority in relation to property of the FRY or Serbia in the territory of Kosovo. This provided that: "UNMIK shall administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo."

## **2. Administration by UNMIK: steps towards substantial autonomy and self-government in Kosovo**

**3.22** The initial years of the UNMIK administration were characterised by the need to achieve consolidation and to establish provisional institutions (as further described in this section), and then by a series of (unsuccessful) attempts to find a medium or even longer term solution to the government of Kosovo (as further described in section 3 below).

### ***2.1 The Joint Interim Administrative Structure (JIAS)***

**3.23** The administration by UNMIK of Kosovo in the initial period following Resolution 1244 (1999) was complicated by competing attempts at self-government by various Kosovo-based political factions. In his report of 23 December 1999, the Secretary-General noted that the limited UNMIK presence in the regions and municipalities during the early stages of the Mission had allowed parallel local structures to take root in some areas. Such structures, mainly affiliated with the former KLA, were competing with UNMIK for interim administration authority, by seeking, for example, to collect taxes. In response to this, the Special Representative had taken measures to make it widely known that UNMIK was the only legitimate authority in Kosovo.<sup>89</sup> Further, UNMIK sought to incorporate the competing

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<sup>89</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/1999/1250 of 23 December 1999, para.35: **Dossier No. 40.**

political structures into the legitimate administration by conclusion of an “Agreement on a Kosovo-UNMIK Joint Interim Administrative Structure (JIAS)” dated 15 December 1999.<sup>90</sup>

**3.24** UNMIK gave legislative effect to the Agreement by Regulation 1/2000 of 14 January 2000 on the Joint Interim Administrative Structure (JIAS).<sup>91</sup> Section 1 of Regulation 1/2000 established the principles governing the JIAS, including that the “[c]urrent Kosovo structures, be they executive, legislative or judicial (such as the „Provisional Government of Kosovo“ and „Presidency of the Republic of Kosovo“), shall be transformed and progressively integrated, to the extent possible and in conformity with the present regulation, into the Joint Interim Administrative Structure, which should be operational by 31 January 2000 by which time these and all other Kosovo structures of an executive, legislative or judicial nature shall cease to exist”; and that “[a]ll communities of Kosovo shall be involved in the provisional administrative management through procedures set out in the present regulation with a fair representation of all communities.”<sup>92</sup>

**3.25** Involvement in the provisional administrative management under the JIAS operated at four levels, i.e. through:

- the consultative role of the Kosovo Transitional Council, which was maintained but with its membership enlarged (section 2 of regulation 1/2000);<sup>93</sup>
- an Interim Administrative Council, established to make recommendations to the Special Representative of the Secretary-General for amendments to the applicable law and for new regulations (section 3);<sup>94</sup>

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<sup>90</sup> Ibid., para.5.

<sup>91</sup> UNMIK/REG/2000/1 on the Kosovo Joint Interim Administrative Structure; **Dossier No.148**.

<sup>92</sup> Ibid., sections 1(c) and (d).

<sup>93</sup> Ibid. Membership of the Kosovo Transitional Council was originally set at 12 members and was eventually enlarged to 36 members.

<sup>94</sup> Pursuant to section 4.1 of Regulation 1/2000, the Interim Administrative Council consisted of 8 members appointed by the Special Representative of the Secretary-General, of whom 4 members were from Kosovo and 4 members were deployed from UNMIK. Pursuant to section 4.2, the 4 members from Kosovo consisted of 3 Kosovo-Albanians and 1 Kosovo-Serb; **Dossier No. 148**.

- a series of 14 Administrative Departments, jointly led by a Kosovo and UNMIK Co-Head of Department, the role of which was to implement the policy guidelines formulated by the Interim Administrative Council and also to make policy recommendations to the Interim Administrative Council (section 7);<sup>95</sup>
- Municipal Administrative Boards headed by a UNMIK Municipal Administrator, who would in turn consult with a Municipal Council representing the citizens of the municipality and appointed by the Municipal Administrator (section 8).

**3.26** In line with the mandate under Resolution 1244 (1999) to develop provisional institutions for democratic and autonomous self-government pending a political settlement, the Special Representative of the Secretary-General then sought to develop a “contract” on self-government, to include legislative, executive and judiciary structures, as well as other provisions necessary for self-administration, building upon the already existing joint bodies of the JIAS.<sup>96</sup> In the event, no such “contract” was concluded, and attention focused on the drafting of a new legal framework for provisional self-government,<sup>97</sup> with a Working Group established to include representatives from all Kosovo’s major political parties and communities.<sup>98</sup> The drafting process led eventually to promulgation by the Secretary-General’s Special Representative on 15 May 2001 of the Constitutional Framework for Provisional Self-Government.<sup>99</sup>

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<sup>95</sup> The number of Administrative Departments subsequently grew to 20.

<sup>96</sup> S/2000/538, Secretary-General’s Report on UNMIK of 6 June 2000, para.18; see also at para.132; **Dossier No.44.**

<sup>97</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2000/1196 of 15 December 2000, para.10, **Dossier No.46**; also Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2001/218 of 13 March 2001, paras.21-22: **Dossier No. 47.**

<sup>98</sup> As noted in the Report of the Secretary-General of 13 March 2001, op. cit., at para.22, the overarching aim of the Working Group was to ensure the participation of all the Kosovo communities in the final definition of the legal framework, and it comprised 7 Kosovo experts including one Kosovo Serb, and seven international experts. However, on 9 March 2001, the Kosovo Serb representative had withdrawn. The Group was generally boycotted by the Kosovo Serb representative and some of the ethnic Albanian experts also resigned towards the end of the drafting process; **Dossier No.47.**

<sup>99</sup> UNMIK Regulation 2001/9 on Constitutional Framework for Provisional Self-Government on 15 May 2001, 15 May 2001: **Dossier No.156.** The promulgation was expressly pursuant to the authority given to the Special Representative of the Secretary-General under Resolution 1244 (1999), taking into account UNMIK Regulation No.1999/1 of 25 July 1999, as amended; **Dossier No.138.** By this stage, there was a new Special Representative, Mr Hans Haekkerup, who had been appointed on 13 January 2001.



## ***2.2 The 2001 Constitutional Framework***

**3.27** The Constitutional Framework for Provisional Self-Government of 15 May 2001 (the “2001 Constitutional Framework”) marked a significant, but at the same time carefully circumscribed, step towards substantial autonomy in Kosovo. It remained in place for 7 years.

**3.28** The Basic Provisions of the 2001 Constitutional Framework defined Kosovo as “an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes” (Article 1.1), and “an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities” (Article 1.2). The basic territorial unit of local self-government was stated to be the municipality, with responsibilities as set out in UNMIK legislation in force on local self-government and municipalities in Kosovo (Article 1.3), while the Provisional Institutions of Self-Government were established as an Assembly of 120 members elected by secret ballot, a President elected by the Assembly by secret ballot, a Government, Courts, and other bodies and institutions set forth in the Constitutional Framework (Article 1.5 and chapter 9).

**3.29** However, there were significant limits to the degree of autonomy accorded to the Provisional Institutions of Self-Government. Chapter 8 of the 2001 Constitutional Framework reserved a broad series of powers and responsibilities “exclusively” to the Secretary-General’s Special Representative, including final authority for the budget, monetary policy, control over customs, cross-border transit and external relations, and final authority regarding the appointment of judges. Chapter 12, reflecting a principle affirmed in the Preamble, also provided that the exercise of the responsibilities of the Provisional Institutions should not “affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244(1999)”, while the limits on the autonomy being accorded were further reinforced by the Special Representative’s power under Article 14.3, on his own

initiative or upon a request supported by two-thirds of the members of the Assembly, to affect amendments to the Constitutional Framework.<sup>100</sup>

**3.30** The reserved powers of the Special Representative were also aimed at minority protection, and included full authority to ensure that the rights and interests of the Communities (i.e. minorities) were fully protected (Article 8.1(a)), and also the power to dissolve the Assembly and call for new elections in circumstances where the Provisional Institutions were deemed to be acting in a manner inconsistent with Resolution 1244 (1999).

**3.31** Under the 2001 Constitutional Framework, the individual Communities did not benefit from institutions of their own, but instead were protected by a series of general rights set out in chapter 4 that applied to all Communities and their members, including the right to fair representation in employment in public bodies at all levels (Article 4.5). So far as concerns representation in the Assembly and in the Government, 20 of the 120 seats of the Assembly were reserved for the additional representation of non-Albanian Kosovo Communities,<sup>101</sup> while two Ministers had to be from Communities other than the Community having a majority representation in the Assembly.<sup>102</sup> In the event, in the 17 November 2001 Assembly election, the Kosovo-Serb and other minorities won 35 seats (including the seats expressly set aside by the 2001 Constitutional Framework).

**3.32** The November 2001 election was generally regarded as a success and, notwithstanding difficulties in the President obtaining the required majority in the votes of the Assembly, a Government was formed and the transfer of the specified powers and responsibilities could commence in early 2002.<sup>103</sup> However, in the years that followed and in

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<sup>100</sup> For the avoidance of doubt, the United Kingdom considers that the limits on the degree of autonomy accorded to the Provisional Institutions of Self-Government are not material to the response to the question before the Court.

<sup>101</sup> See Article 9.1.3, providing that 10 seats shall be reserved to those representing the Kosovo Serb Community and that 10 seats shall be reserved to other minority Communities, UNMIK Regulation 2001/9 on Constitutional Framework for Provisional Self-Government on 15 May 2001: **Dossier No.156**.

<sup>102</sup> Ibid. See Article 9.3.5, also providing that at least one of these two Ministers should be from the Kosovo Serb Community and that, in the event that there were more than twelve Ministers, a third Minister should be from a non-majority Community.

<sup>103</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, UN Doc. S/2002/62 of 15 January 2002, para.3; **Dossier No.53**; Report of the Secretary-General on the United Nations Interim Administration of Kosovo, UN Doc. S/2002/436 of 22 April 2002, para.2; **Dossier No.54**. It is to be noted that there were various instances of the Kosovo Assembly overstepping its competences. See Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2003/113 of 29 January 2003,

particular from 2004, the implementation of the 2001 Constitutional Framework as intended was significantly impeded by the fact that the Kosovo-Serb Community chose not to engage with the political institutions that had been formed.<sup>104</sup>

### **3. The multiple (unsuccessful) searches for a solution**

#### ***3.1 Search for a Solution I: the “Standards before Status” policy***

**3.33** The 2001 Constitutional Framework did not seek to address any final status issues. Pursuant to the Rambouillet accords an international meeting to determine a mechanism for a final settlement for Kosovo was to have been convened in early 2002.<sup>105</sup> However, the process to determine Kosovo’s future status was delayed pending implementation of the “standards before status” policy, and did not commence until October 2005. That policy constitutes one of the various (unsuccessful) attempts to delineate a pathway to the final status of Kosovo.

**3.34** In his Report to the Security Council of 22 April 2002, the Secretary-General underlined his understanding that UNMIK would not stay in Kosovo indefinitely. He saw the need for a political roadmap and the development of benchmarks against which progress could be measured in critical areas, including the rule of law and the functioning of democratic institutions.<sup>106</sup> In his presentation to the Security Council of 24 April 2002, the Special Representative, Mr Steiner, stated in clear terms that the time to begin the political process designed to determine Kosovo’s future status, as foreseen in paragraph 11(e) of Resolution 1244 (1999), had not yet come, and that Kosovo society and institutions would have to show that they were ready for this process. To this end, he put forward a series of

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para.12, noting that “in December [2002], UNMIK headed off a draft resolution on independence prepared by AAK”; **Dossier No. 60.**

<sup>104</sup> See e.g. the report of Ambassador Eide of 7 October 2005, UN Doc. S/2005/635, at p.2: “The Kosovo Serbs have chosen to stay outside the central political institutions and maintain parallel structures for health and educational services. The Kosovo Serbs fear that they will become a decoration to any central-level political institution, with little ability to yield tangible results.” See also *ibid.* at para.21; **Dossier No.193.**

<sup>105</sup> Rambouillet accords, Chapter 8, Article I(3); **Dossier No.30.**

<sup>106</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2002/436 of 22 April 2002, para. 54, noting that “the current level of support cannot continue indefinitely”: **Dossier No. 54.**

benchmarks to be achieved before launching a discussion on status, including the existence of effective, representative and functioning institutions and enforcement of the rule of law.<sup>107</sup>

**3.35** This benchmarks process was endorsed by the Security Council,<sup>108</sup> and became known as the “standards before status” policy. In his Report to the Security Council of 30 July 2002, the Special Representative further explained that the benchmarks process would allow him to decide, when the time was right, to begin the process to determine Kosovo’s future status. While he could not say what shape that future status would be, he could say what it would not be. In particular, there would be “no return to the status quo ante of 1999”.<sup>109</sup>

**3.36** Progress on the implementation of the “standards before status” policy was made throughout 2002-2003, with UNMIK developing a benchmarks implementation plan to set clear timelines and success criteria<sup>110</sup> and the launching of a review mechanism following an initiative of the Contact Group.<sup>111</sup> In its meeting of 12 December 2003, the Security Council envisaged that the first opportunity for a comprehensive review of the specific benchmark standards would occur around mid-2005 and stressed that further advancement towards a process to determine the future status of Kosovo in accordance with Resolution 1244 (1999) would depend on the positive outcome of this comprehensive review.<sup>112</sup> However, this framework for commencement of the status process was interrupted, at least temporarily, by the inter-ethnic violence in Kosovo of March 2004, described by the Secretary-General as a serious setback for the efforts to build a democratic, multi-ethnic and stable Kosovo.<sup>113</sup>

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<sup>107</sup> S/PV.4518, 24 April 2002, at p.4. He further stated in relation to the benchmarks process: “I offer this to the Council as an exit strategy which is, in reality, an “entry strategy” into the European integration process. The benchmarks complement the preconditions that Kosovo needs to meet to qualify for the stabilization and association process.” **Dossier No.103.**

<sup>108</sup> Ibid.

<sup>109</sup> S/PV.4592, 30 July 2002; **Dossier No.105.**

<sup>110</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2003/996 of 15 October 2003, para.4; **Dossier No.64.** The Standards Implementation Plan was concluded in March 2004, but contained more than 400 detailed progress indicators.

<sup>111</sup> S/PV.4880, 12 December 2003. The Contact Group comprised France, Germany, Italy, the Russian Federation, the United Kingdom and the United States, with representatives from the European Union.

<sup>112</sup> Ibid. The Security Council’s meeting of 12 December 2003 followed the presentation of the “Standards for Kosovo” document to the Security Council on 10 December 2003.

<sup>113</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2004/348 of 30 April 2004, para.52. See also at paras.2-17, describing the violence and the immediate reactions thereto; **Dossier No.67.**

**3.37** Following the events of March 2004, the Secretary-General requested that a comprehensive review of the policies and practices of all actors in Kosovo be conducted and that options and recommendations be provided as a basis for further thinking on the way forward. Ambassador Kai Eide of Norway was asked to conduct that review.<sup>114</sup>

### ***3.2 Search for a Solution II: the Eide reports, and commencement of the future status process***

**3.38** In his Report of 15 July 2004, Ambassador Eide pointed to failings in the “standards before status” policy, notably because implementation of a highly ambitious set of standards before the status talks even began was perceived by the Kosovo majority as unachievable. He advocated a “priority-based and realistic standards policy”.<sup>115</sup> He also considered that future status discussions could not be postponed much longer, and pointed to the key importance of Belgrade’s participation in the process, stating:

“There will not be any ideal moment for starting such preparations – not even a good moment. However, while a gradual reduction of the international presence in Kosovo can be expected, the economic situation will continue to worsen and the frustrations and dissatisfaction inside Kosovo will grow. Raising the future status question soon seems – on balance – to be the better option and is probably inevitable.

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The international community should intensify its dialogue with Belgrade. The authorities in Belgrade have a sense of not being sufficiently included. That impression should be corrected as soon as possible. Belgrade will, of course, be one of the parties to the future status negotiations. Belgrade’s support and participation will also be a key to success at each and every stage of the process.”<sup>116</sup>

**3.39** Ambassador Eide recommended that “[s]erious exploratory discussion of the future status question should be undertaken by the United Nations beginning this autumn.”<sup>117</sup>

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<sup>114</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2004/613 of 30 July 2004, para.60; **Dossier No.69**.

<sup>115</sup> Letter dated 17 November 2004 from the Secretary-General addressed to the President of the Security Council, S.2004/932, 30 November 2004, p. 4. At para.28 of his report, Ambassador Eide referred to a growing recognition that the “standards before status” approach was untenable in its present form; **Dossier No.71**.

<sup>116</sup> Ibid., p.4. So far as concerns the potential for deterioration of the situation in the absence of a move to resolve the future status question, see e.g. International Crisis Group, “Kosovo: Towards Final Status”, 24 January 2005, noting in its executive summary that: “Time is running out in Kosovo. The status quo will not hold.” <http://www.crisisgroup.org/home/index.cfm?l=1&id=3226>

<sup>117</sup> Ibid., p.7. Ambassador Eide also recommended, at p.6: “An ambitious policy of transferring further competencies should be launched without delay, giving the Provisional Institutions of Self-Government a greater sense of ownership and responsibility as well as accountability.”

**3.40** Following consultations with key Member States (the Contact Group plus the other European members of the Security Council) as well as the leadership of the partner organisations in Kosovo, the European Union and the OSCE, the Secretary-General furnished his own recommendations to the Security Council following the first Eide report. While his recommendations were more cautious, and achieving progress on the eight standards was put forward as remaining the basis of the policy in Kosovo, that process was to be carried out in a dynamic and priority-based way.<sup>118</sup> On future status, consistent with the position taken by the Security Council in December 2003, the Secretary-General stated: “A comprehensive review may be conducted in mid-2005 on the basis of which the Security Council will determine whether to initiate the political process leading to a determination of the future status of Kosovo.”<sup>119</sup>

**3.41** In his report to the Security Council of 23 May 2005, having taken into careful consideration the efforts made by the Provisional Institutions in the implementation of the eight standards, the Secretary-General stated his belief that the comprehensive review should be initiated and that he intend to appoint a Special Envoy to this effect.<sup>120</sup> The Special Envoy, Ambassador Eide, completed his Report on 7 October 2005. He concluded that, although the record of implementation in the standards implementation process was so far uneven, an overall assessment led to the conclusion that the time had come to commence the future status process. He stated:

“There is now a shared expectation in Kosovo and in Belgrade, as well as in the region, that the future status process will start. During this comprehensive review, there has been a gradual shift in the preparedness for such a process among the interlocutors. Furthermore, all sides need clarity with regard to the future status of

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<sup>118</sup> In his presentation to the Security Council of 29 November 2004, the Special Representative of the Secretary-General, Mr Jessen-Petersen stated: “Achieving progress on all eight standards remains our basic policy. At the same time, against the planned timeline of a review in mid-2005, one cannot expect the more than 400 detailed indicators laid out in the Standards Implementation Plan to be fulfilled. But one can expect – and one must demand – real progress in the implementation of those standards that together contribute most to the establishment of a multi-ethnic Kosovo. Therefore, in agreement with the Secretary-General and with the support of the Contact Group, I am placing particular emphasis on key priorities in the areas of the rule of law, freedom of movement, returns of displaced persons, functioning local institutions and security.” UN Doc. S/PV.5089, 29 November 2004. **Annex 20**

<sup>119</sup> Letter dated 17 November 2004 from the Secretary-General addressed to the President of the Security Council, S.2004/932, 30 November 2004, p.28, para.5; **Dossier No.71**.

<sup>120</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2005/335 of 23 May 2005, para.21. The Secretary-General emphasised (para.23): “It should be clearly understood that the outcome of the comprehensive review is not a foregone conclusion.” **Dossier No.73**

Kosovo. It is of great importance that the future status process takes place at a time when the international community is still present in Kosovo in sufficient strength.

The future status process must be moved forward with caution. All the parties must be brought together – and kept together – throughout the status process. The end result must be stable and sustainable. Artificial deadlines should not be set. Once the process has started, it cannot be blocked and must be brought to a conclusion.”<sup>121</sup>

**3.42** In his letter of 7 October 2005 to the Security Council, the Secretary-General accepted Ambassador Eide’s conclusion, stating that he therefore intended to initiate preparations for the possible appointment, in the light of the outcome of the then forthcoming Council deliberations, of a Special Envoy to lead the future status process.<sup>122</sup>

**3.43** The Contact Group supported the recommendation by the Secretary-General and, in issuing 10 Guiding Principles for the outcome of the status process, it also emphasised that once the process had started, it could not be blocked and had to be brought to a conclusion.<sup>123</sup> The Contact Group called on the parties to engage in the process in “good faith and constructively”. It reaffirmed the importance which it attached to constructive and sustained dialogue at all levels between Belgrade and Pristina and between the different communities in Kosovo, and asked the authorities in Belgrade actively to encourage the Serbs of Kosovo to take their place in Kosovo’s institutions. The Contact Group, in its 10 Guiding Principles, did not reaffirm the sovereignty and territorial integrity of Serbia.

**3.44** The Guiding Principles focused on matters such as compatibility with international human rights standards, democratic values and ensuring a multi-ethnicity that was sustainable in Kosovo. Pursuant to the sixth principle, the Contact Group sought to protect against any return to the pre-March 1999 situation and also to entrench the requirement of active participation by all parties in the final status process, while ruling out any potential exchanges of territory. Thus this principle provided: “Any solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any

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<sup>121</sup> Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/635, at p.5; **Dossier No.193**.

<sup>122</sup> Ibid.

<sup>123</sup> Guiding principles of the Contact Group for a settlement of the status of Kosovo, 7 October 2005; **Annex 21**.

country. The territorial integrity and internal stability of regional neighbours will be fully respected.”

**3.45** At its meeting of 25 October 2005, the Security Council accepted Ambassador Eide’s conclusion on commencement of the future status process and welcomed the Secretary-General’s readiness to appoint a Special Envoy to lead the future status process, looking forward to an early appointment.<sup>124</sup> On 10 November 2005, the Security Council endorsed the appointment of Mr Martti Ahtisaari as the Special Envoy.<sup>125</sup>

### *3.3 Search for a Solution III: the future status process begins*

**3.46** At the outset of the future status negotiations, both the Kosovo Assembly and Serbia had adopted seemingly irreconcilable positions. At a plenary meeting on 17 November 2005, the Kosovo Assembly unanimously adopted a resolution that provided a mandate to the delegation of Kosovo for the future status process and also reconfirmed the political will of the people of Kosovo for an independent and sovereign state of Kosovo.<sup>126</sup> That position reflected the violence and repression that Kosovo had endured at the hands of the SFRY and the FRY. So far as concerns the Serbian position, on 21 November 2005, its National Assembly issued a mandate to its delegation, declaring: “Any attempt at imposing a solution towards de facto legalisation of partition of the Republic of Serbia by a unilateral secession of part of its territory would not only be legal violence against a democratic state, but violence against the [*sic*] international law itself.”<sup>127</sup>

**3.47** Serbia set out its position in further detail in its “Platform on the future status of Kosovo and Metohija” of 5 January 2006. This envisaged the “substantial autonomy of Kosovo and Metohija” but also that a range of competencies would be reserved to Serbia, namely: “foreign policy, control of borders, monetary policy, customs policy, special customs inspections and control, final legal recourse in the protection of human rights, and the protection of Serbian religious and cultural heritage.” In addition, although the Platform

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<sup>124</sup> S/PV.5920.

<sup>125</sup> S/2005/709; **Dossier No.197**. Mr Ahtisaari had been involved as the EU representative in a Troika (with representatives of the Russian Federation and the United States) in the negotiations prior to Resolution 1244.

<sup>126</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/45 of 25 January 2006, para.4; **Dossier No.75**.

<sup>127</sup> Resolution of the Serbian National Assembly, 21 November 2005; **Annex 22**.



envisaged that the “province could have direct access to international financial institutions”, this would be “in accordance with the provisions of the Constitution of the Republic of Serbia that would make this possible”; such “access would assume prompt and regular reporting to the relevant central institutions in Serbia, and it would involve a measure of control by the National Bank of Serbia”. There were thus very real limits on the degree of autonomy that was being put forward, reducing the prospect of the future status process arriving at a middle ground.

**3.48** The initial talks, commencing in February 2006, focused on decentralisation issues. Talks on cultural heritage and religious sites and economic issues commenced in May 2006. The negotiations on these topics continued throughout the summer of 2006, with the first “high-level” meeting, i.e. with participation from the President and the Prime Minister of Serbia and the President and the Prime Minister of Kosovo, being held on 24 July 2006.<sup>128</sup> While the parties maintained their respective divergent positions on substantial autonomy and independence,<sup>129</sup> in its statement issued subsequent to the meeting, the Contact Group made contrasting assessments of the flexibility shown by the parties in the negotiations to date.<sup>130</sup> The Contact Group noted “that Pristina has shown flexibility in the decentralization talks”. While it was stated that Pristina would need to be even more forthcoming on many issues before the status process could be brought to a successful conclusion, so far as concerns the positions adopted by Serbia in the negotiations, the Contact Group stated:

“Belgrade needs to demonstrate much greater flexibility in the talks than it has done so far.”

**3.49** The Contact Group also renewed its call on Belgrade to cease obstruction of Kosovo-Serb participation in Kosovo’s institutions.<sup>131</sup> That call was not heeded.<sup>132</sup>

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<sup>128</sup> See Report of the Secretary-General on the United Nations Interim Administration of Kosovo, UN Doc. S/2006/361 of 5 June 2006, para.2; **Dossier No. 76**. Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/707 of 1 September 2006, para.2; **Dossier No.77**.

<sup>129</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/707 of 1 September 2006, para.2; **Dossier No.77**.

<sup>130</sup> High-Level Meeting on the Future Status of Kosovo, Contact Group statement (24 July, 2006), Vienna; [http://www.unosek.org/pressrelease/UNOSEK-PR-11-High-Level\\_delegations\\_from\\_Serbia\\_Kosovo\\_hold\\_first\\_Status\\_talks\\_in\\_Vienna.pdf](http://www.unosek.org/pressrelease/UNOSEK-PR-11-High-Level_delegations_from_Serbia_Kosovo_hold_first_Status_talks_in_Vienna.pdf)

<sup>131</sup> See also, to similar effect, the position of the Secretary-General at e.g. Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/361 of 5 June 2006, para.4; **Dossier No.76**, Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/707 of 1

**3.50** On 20 September 2006, the Contact Group issued a Ministerial Statement which emphasised the fact that neither party could unilaterally block the status process from advancing. The Special Envoy was encouraged to prepare a comprehensive proposal for a status settlement and on this basis to engage the parties in moving the negotiating process forward.<sup>133</sup>

**3.51** On 8 November 2006, Serbia appeared to entrench its position by adopting a new Constitution that described Kosovo as an integral part of Serbia.<sup>134</sup> Although the new Constitution appeared to grant substantial autonomy to Kosovo, the European Commission for Democracy through Law (the Venice Commission) concluded, in an Opinion of 19 March 2007, as follows:

“7. With respect to substantial autonomy, an examination of the Constitution, and more specifically of Part VII, makes it clear that this substantial autonomy of Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the legislature. In Part I on Constitutional Principles, Article 12 deals with provincial autonomy and local self-government. It does so in a rather ambiguous way: on the one hand, in the first paragraph it provides that state power is limited by the right of citizens to provincial autonomy and local self-government, yet on the other hand it states that the right of citizens to provincial autonomy and local self-government shall be subject to supervision of constitutionality and legality. Hence it is clear that ordinary law can restrict the autonomy of the Provinces.

8. This possibility of restricting the autonomy of the Provinces by law is confirmed by almost every article of Part 7 of the Constitution ... Hence, in contrast with what the preamble announces, the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not.”<sup>135</sup>

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September 2006, paras.9-10, **Dossier No.77**, and Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/906 of 20 November 2006, para.28, **Dossier No.78**.

<sup>132</sup> See for example the Report of the Secretary-General on the United Nations Interim Administration of Kosovo, UN Doc. S/2007/134 of 9 March 2007, paras.2-3; **Dossier No.79**.

<sup>133</sup> Contact Group Ministerial Statement, New York City, 20 September, 2006; [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/declarations/91037.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/91037.pdf)

<sup>134</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2006/906 of 20 November 2006, para.6; **Dossier No.78**.

<sup>135</sup> Council of Europe, European Commission for Democracy through Law (the Venice Commission), Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007; **Annex 23**.

**3.52** As Ambassador Eide had stated earlier, Serbia's support and participation were key to the success of the future status process, yet that support and participation was lacking in the negotiations chaired by the Special Envoy.<sup>136</sup>

**3.53** Publication of the comprehensive proposal, delayed pending elections in Serbia, was finally submitted in draft to the delegations on 2 February 2007.<sup>137</sup> In a short statement, the Contact Group encouraged both Belgrade and Pristina to engage fully and constructively with the Special Envoy in this phase of the process.<sup>138</sup> Serbia rejected the draft proposal on the basis that it "by many of its provisions directly violates the sovereignty and territorial integrity of Serbia", and stated that it was "particularly important for Mr Ahtisaari to introduce the substantive autonomy model as the fundamental issue in the discussions".<sup>139</sup> This was effectively seeking the re-opening of all the negotiations.

#### ***3.4 Search for a Solution IV: the Special Envoy's Comprehensive Proposal and Recommendations of 26 March 2007***

**3.54** The final Comprehensive Proposal for the Kosovo Status Settlement was completed by the Special Envoy with relatively minor changes and was placed before the Security Council on 26 March 2007.

**3.55** While the Comprehensive Proposal was silent as to the final status of Kosovo, certain key attributes of statehood were incorporated within the General Principles of the Proposal. In particular, Articles 1.5 and 1.7 provided:

"1.5 Kosovo shall have the right to negotiate and conclude international agreements and the right to seek membership in international organizations.

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<sup>136</sup> Letter dated 17 November 2004 from the Secretary-General addressed to the President of the Security Council, UN Doc. S.2004/932, 30 November 2004, p.4; **Dossier No.71**.

<sup>137</sup> See e.g. Report of the Secretary-General on the United Nations Interim Administration of Kosovo, UN Doc. S/2007/134 of 9 March 2007, para.7; **Dossier No.79**.

<sup>138</sup> Contact Group Statement, 2 February 2007;  
<http://belgrade.usembassy.gov/archives/press/2007/b070202a.html>

<sup>139</sup> Statement by the Prime Minister of the Republic of Serbia, HE Vojislav Kostunica, 10 March 2007;  
[http://www.mfa.gov.yu/Policy/Priorities/KIM/kostunica100307\\_e.html](http://www.mfa.gov.yu/Policy/Priorities/KIM/kostunica100307_e.html)

1.7 Kosovo shall have its own, distinct, national symbols, including a flag, seal and anthem, reflecting its multi-ethnic character.”<sup>140</sup>

**3.56** The Proposal included detailed measures to ensure the promotion and protection of minorities. A series of human rights and fundamental freedoms were entrenched by Article 2 of the Proposal while, through extensive decentralisation provisions, the Serb community was to have a high degree of control over its internal affairs.<sup>141</sup> To safeguard and support implementation, the Proposal provided for international civilian and military presences, the latter being endowed with “strong corrective powers”. Further, ultimate supervisory authority over implementation of the settlement was with an International Civilian Representative, the Proposal providing: “Among his/her powers is the ability to annul decisions or laws adopted by Kosovo authorities and sanction and remove public officials whose actions he/she determines to be inconsistent with the Settlement”.<sup>142</sup>

**3.57** The Comprehensive Proposal was accompanied by the Special Envoy’s recommendation that “Kosovo’s status should be independence, supervised by the international community”.<sup>143</sup> That recommendation was fully supported by the Secretary-General.<sup>144</sup> In his report, the Special Envoy described the scope and performance of his mandate, and the impasse that had been reached in the negotiations, as follows:

“1. In November 2005, the Secretary-General appointed me as his Special Envoy for the future status process for Kosovo. According to my terms of reference, this process should culminate in a political settlement that determines the future status of Kosovo. To achieve such a political settlement, I have held intensive negotiations with the leadership of Serbia and Kosovo over the course of the past year. My team and I have made every effort to facilitate an outcome that would be acceptable to both sides. But after more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo’s future status.

2. Throughout the process and on numerous occasions, both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept nothing short of

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<sup>140</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168, Add. 1; **Dossier No. 204**.

<sup>141</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168, p. 6. See also Annexes II and III to the Comprehensive Proposal; **Dossier No.203**.

<sup>142</sup> Ibid., p.8.

<sup>143</sup> Ibid., p.2.

<sup>144</sup> Ibid., p.1.

independence. Even on practical issues such as decentralization, community rights, the protection of cultural and religious heritage and economic matters, conceptual differences – almost always related to the question of status – persist, and only modest progress could be achieved.

3. My mandate explicitly provides that I determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground. It is my firm view that the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

...

5. The time has come to resolve Kosovo’s status. Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.”<sup>145</sup>

**3.58** The Special Envoy further explained why the reintegration of Kosovo into Serbia was not viable, why continued international administration was not sustainable, and why independence with international supervision was the only viable option. In particular, with respect to the option of some form of substantial autonomy within Serbia, the Special Envoy explained:

“6. A history of enmity and mistrust has long antagonized the relationship between Kosovo Albanians and Serbs. This difficult relationship was exacerbated by the actions of the Milosevic regime in the 1990s. After years of peaceful resistance to Milosevic’s policies of oppression – the revocation of Kosovo’s autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life – Kosovo Albanians eventually responded with armed resistance. Belgrade’s reinforced and brutal repression followed, involving the tragic loss of civilian lives and the displacement and expulsion on a massive scale of Kosovo Albanians from their homes, and from Kosovo. The dramatic deterioration of the situation on the ground prompted the intervention of the North Atlantic Treaty Organization (NATO), culminating in the adoption of Resolution 1244 (1999) on 10 June 1999.

7. For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it

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<sup>145</sup> Ibid., p.2.

is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia – however notional such autonomy may be – is simply not tenable.”<sup>146</sup>

**3.59** In making his final recommendation, the Special Envoy underlined that Kosovo was a unique case that demanded a unique solution, correctly characterising the circumstances of Kosovo’s case as “extraordinary”.<sup>147</sup>

**3.60** The Security Council met in closed session on 3 April 2007 to hear a briefing from the Special Envoy.<sup>148</sup> Following a proposal from the Russian Federation, the Security Council decided to give its members the opportunity to inform themselves on the situation on the ground, and a mission to Serbia and Kosovo was undertaken.<sup>149</sup> The mission report was discussed by the Security Council on 10 May 2007.<sup>150</sup> Further negotiations between Serbia and Kosovo were supported in particular by the Russian Federation and China.<sup>151</sup> In circumstances where it became clear that there would be no Security Council endorsement of the Special Envoy’s Recommendation or Comprehensive Proposal, the Contact Group decided to establish a Troika comprising representatives of the European Union (Ambassador Ischinger), the Russian Federation (Ambassador Bosan-Harchenko) and the United States (Mr Wiesner) to lead a period of further negotiations between Serbia and Kosovo on the future status of Kosovo.<sup>152</sup>

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<sup>146</sup> Ibid., p.3.

<sup>147</sup> Ibid., p.4.

<sup>148</sup> S/PV.5654, 3 April 2007. Statements were made by the Prime Minister of Serbia, Mr Kostunica, and by the Secretary-General’s Special Representative on behalf of the President of Kosovo, Mr Sejdiu; <http://daccessdds.un.org/doc/UNDOC/GEN/N07/294/69/PDF/N0729469.pdf?OpenElement>

<sup>149</sup> S/PV.5672, 2 May 2007. This was headed by Mr Johan Verbeke, Permanent Representative of Belgium. He noted *inter alia* that Serbia was asking for further negotiations leading to a solution based on substantial autonomy. He also noted: “Kosovo’s society is still recovering from the wounds inflicted by the conflict”; **Dossier No.113**.

<sup>150</sup> S/PV.5673, 10 May 2007; **Dossier No.114**.

<sup>151</sup> The States supporting some form of solution based on the Special Envoy’s Recommendation or Comprehensive Proposal included Peru, France, Qatar, Ghana, Panama, Italy, Belgium, the United Kingdom and the United States.

<sup>152</sup> See letter dated 10 December 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/723; **Dossier No.209**.

### *3.5 Search for a Solution V: further negotiations on future status led by the Troika*

**3.61** In his statement of 1 August 2007, the Secretary-General welcomed the Contact Group's new initiative. He emphasised that the international community had to find a solution that "is timely, addresses the key concerns of all communities living in Kosovo and provides clarity for Kosovo's status".<sup>153</sup> He also emphasised that the status quo was not sustainable, a position endorsed by the Contact Group Ministers on 27 September 2007,<sup>154</sup> and reiterated by the Troika at the first direct talks between the parties, held on 28 September 2008.<sup>155</sup> In their statement of 27 September, the Contact Group Ministers also underlined that "any settlement needs to be acceptable to the people of Kosovo, ensure standards implementation with regard to Kosovo's multi-ethnic character and promote the future stability of the region".

**3.62** In all, the Troika had ten meetings with the parties, who were represented at "the highest possible level", including six face-to-face meetings. As to the level of representation, the Troika recorded:

"During the process, Belgrade was represented by President Boris Tadić, Prime Minister Vojislav Koštunica, Foreign Minister Vuk Jeremić and Minister for Kosovo Slobodan Samardžić. Pristina was represented by the "Team of Unity" composed of President Fatmir Sejdiu, Prime Minister Agim Çeku, President of the Assembly Kolë Berisha, Hashim Thaçi and Veton Surroi. The Troika appreciated the fact that both delegations were represented at the highest possible level, underlining the importance they attached to the process."<sup>156</sup>

**3.63** As it explained in its Report of 4 December 2007, the Troika had no intention of imposing a solution on the parties, and its role would be primarily to facilitate dialogue and identify areas of possible compromise. Its starting position was that it would "leave no stone unturned" in the search for a mutually acceptable outcome, as evidenced not least by the fact that the Troika was willing to broach some form of territorial partition of Kosovo (which in

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<sup>153</sup> Ibid., Annex I: Statement by the Secretary-General on the new period of engagement in Kosovo.

<sup>154</sup> Ibid., Annex III: Statement on Kosovo by Contact Group Ministers, New York, 27 September 2007.

<sup>155</sup> Ibid., Annex V: New York Declaration (28 September).

<sup>156</sup> Ibid., p.3, para.7.

the event was not acceptable to either party).<sup>157</sup> Accordingly, there is no sense in which this is a case about the delimitation or demarcation of Kosovo.

**3.64** However, notwithstanding the very considerable efforts of the Troika, and although it was able to report that both sides were fully engaged in the negotiations, and also that important commitments including on the non-use of violence had been extracted, the parties were unable to reach any agreement on Kosovo's status.<sup>158</sup>

**3.65** It is also to be noted that, on 17 November 2007, elections were held in Kosovo for the Assembly of Kosovo, 30 municipal assemblies, and the new position of mayor for each of the 30 municipalities. As recorded in the Secretary-General's report: "The elections took place without incident following a generally fair and calm campaign period, and were confirmed by the Council of Europe to have been in compliance with international and European standards."<sup>159</sup> The Secretary-General also noted that, throughout the election campaign, the members of the Kosovo Unity Team had remained engaged in the Troika-led negotiations on Kosovo's future status. However, he also noted:

"Public pressure on the new Government and Assembly to act swiftly to declare independence following the end of the period of engagement is high."<sup>160</sup>

#### **4. The position as of end-2007: the absence of any workable solution**

**3.66** Thus, as of 10 December 2007, when the Secretary-General transmitted the Troika's report to the Security Council, the situation as established on the basis of the reports or statements of the interested persons or bodies (including the Secretary-General's Special Representatives, Ambassador Eide, Mr Ahtisaari, the Secretary-General and the Contact Group) was as follows:

- ***The status quo was not sustainable.*** This had repeatedly been recognised, including by the Secretary-General's Special Representative,<sup>161</sup> Ambassador

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<sup>157</sup> Ibid., p.4, para.10.

<sup>158</sup> Ibid., p.4, paras.11-13.

<sup>159</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2007/768 of 3 January 2008, para.3; **Dossier No.84.**

<sup>160</sup> Ibid., para.8.



Eide,<sup>162</sup> the Special Envoy Mr Ahtisaari,<sup>163</sup> the Secretary-General,<sup>164</sup> the Contact Group<sup>165</sup> and the Troika.<sup>166</sup> Further, there had never been any intention that the interim arrangements put in place by Resolution 1244 (1999) would become permanent or semi-permanent in nature.

- ***There could be no turning back to the pre-1999 status of Kosovo***, as was widely agreed and also reflected in the “Troika assessment of negotiations: principal conclusions”.<sup>167</sup>
  
- ***There was no way forward available through negotiations***, as the efforts of the Troika had themselves amply demonstrated. The failure of the Troika to facilitate an agreement on final status was entirely consistent with the Special Envoy’s earlier conclusion in March 2007 that “the negotiations” potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.”<sup>168</sup>
  
- ***Serbia’s position was not tenable***. Serbia’s position – that Kosovo should be returned to Serbian sovereignty, but with substantial autonomy – was not actively supported by any other State during the negotiation process. No one (not even Serbia) suggested in practical terms how this goal could be achieved, against the strongly-held views of the great majority of the

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<sup>161</sup> Special Representative, Mr Steiner, report to the Security Council, S/PV.4592, 30 July 2002; **Dossier No.105**.

<sup>162</sup> Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/635, at p.5; **Dossier No.193**.

<sup>163</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168, p.3, paras.8-9; **Dossier No. 204**.

<sup>164</sup> Letter dated 10 December 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/723, Annex I: Statement by the Secretary-General on the new period of engagement in Kosovo; **Dossier No. 209**.

<sup>165</sup> Ibid., Annex III: Statement on Kosovo by Contact Group Ministers, New York, 27 September 2007.

<sup>166</sup> Ibid., Annex V: New York Declaration (28 September).

<sup>167</sup> Ibid., Annex VI: “Troika assessment of negotiations: principal conclusions.” As to these conclusions, the Troika noted in its report, at para.9: “We developed our assessment in the form of the “Fourteen Points” of possible overlap in the parties’ positions (see annex VI). The parties responded to these points, without accepting them fully.”

<sup>168</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168, p.2; **Dossier No. 204**.

population of Kosovo.<sup>169</sup> Those who disagreed with independence continued to call for further talks, but could not suggest how these could achieve any progress in view of the failure of all previous talks.

- *A settlement had to be found that was acceptable to the people of Kosovo*, as stated by the Contact Group Ministers on 27 September 2007, but as may also be traced back to Chapter 8, Article I(3), of the Rambouillet accords.<sup>170</sup> In the light of the legacy of mutual mistrust and sense of historical grievance,<sup>171</sup> no settlement would be acceptable to the people of Kosovo other than one resulting in independence, as had been the substance of the Special Envoy's conclusion in March 2007.

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<sup>169</sup> See e.g. *ibid.*, p.3, para.7.

<sup>170</sup> Chapter 8, Article I(3), provided in relevant part: "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act ... ." **Dossier No.30.**

<sup>171</sup> The Troika acknowledged in its report that: "Our sessions were long and often difficult, as we confronted a legacy of mutual mistrust and sense of historical grievance about the conflicts of the 1990s." See letter dated 10 December 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/723, p.4, para.7; **Dossier No. 209.**

## CHAPTER 4

### KOSOVO'S DECLARATION OF INDEPENDENCE AND EVENTS SUBSEQUENT TO 17 FEBRUARY 2008

#### 1. Kosovo's Declaration of Independence of 17 February 2008

**4.1** Notwithstanding the failure of the Troika to facilitate an agreement on final status, Serbia continued to seek further negotiations and sought a decision of the Security Council on the resumption of negotiations.<sup>172</sup> No such decision was forthcoming.

**4.2** On Sunday 17 February 2008, at an urgent Special Plenary Session of the Kosovo Assembly, attended by the President and Prime Minister of Kosovo, 109 (out of 120) Members of the Assembly, and guests, Kosovo declared its independence. As the Preamble to the Declaration notes, this was in answer to “the call of the people to build a society that honors human dignity and affirms the pride and purpose of its citizens”.<sup>173</sup> In his speech to those present, the President of the Kosovo Assembly emphasised that these were “historical moments for the future of the people of Kosovo”, while the Prime Minister, Hashim Thaçi, stated: “Kosovo, both people and territory, are united today in a historical moment to improve the lives of each citizen within our borders, regardless of ethnic origin.” The President of Kosovo, Dr. Fatmir Sejdiu, stated:

“The declaration of independence is the will of the people. It is a moral and logical consequence of our history and it is in full accordance with the recommendations of the Special Envoy – President Martti Ahtisaari.”<sup>174</sup>

**4.3** The first three substantive paragraphs of the Declaration read as follows:

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

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<sup>172</sup> See for example the meeting of the Security Council of 16 January 2008, at which a presentation was made by President Boris Tadić, S/PV.5821; **Dossier No.115**.

<sup>173</sup> Kosovo's Declaration of Independence, 17 February 2008; **Dossier No.192**.

<sup>174</sup> Transcript of the Special Plenary Session of the Kosovo Assembly, 17 February 2008; **Annex 4**.

2. We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

3. We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.”

4.4 In addition, at paragraph 12, the Declaration provides:

“12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.”

4.5 Three important points follow:

(a) The Declaration was made by the democratically elected leaders of Kosovo reflecting the will of the people. It is correctly construed as a declaration made by the representatives of the people of Kosovo meeting within the Assembly,<sup>175</sup> not a resolution of the Kosovo Assembly acting *ultra vires* the powers accorded to it by the 2001 Constitutional Framework. It follows that, insofar as the question before the Court assumes that the Declaration of Independence was made by the Provisional Institutions of Self-Government of Kosovo, it is incorrectly formulated. As noted in chapter 1 above, the Declaration of Independence was not a declaration by any institution, whether provisional or otherwise, of Kosovo self-government.

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<sup>175</sup> As noted by the Secretary-General at the meeting of the Security Council of 18 February 2008, all of the 109 deputies present in the Assembly voted in favour of the Declaration. The 10 Kosovo-Serb deputies did not attend the session; S/PV.5839, at p.2; **Dossier No.119**.

- (b) Both by its express terms and by the unequivocal acceptance of the obligations for Kosovo contained in the Ahtisaari Plan, the Declaration ensured the protection of the minorities in Kosovo.<sup>176</sup> The Declaration (at paragraph 5) also included an express invitation to an international civilian presence to supervise implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.
- (c) The Declaration intended to create legal obligations for Kosovo owed *erga omnes*, including, especially, with respect to the obligations for it under the Ahtisaari Plan.

## 2. The meeting of the Security Council on 18 February 2008

**4.6** The Declaration was discussed at a meeting of the Security Council on 18 February 2008.<sup>177</sup> A statement was made by the President Tadić of Serbia denouncing the Declaration as illegal. He requested the Secretary-General to give an instruction to his Special Representative to use his powers to declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void, and also to dissolve the Kosovo Assembly on the basis that it had declared independence contrary to Resolution 1244 (1999).<sup>178</sup> The Russian Federation supported Serbia's position, and also demanded that the Special Representative "declare the unilateral declaration of independence by the Kosovo Albanian leadership null and void".<sup>179</sup> In the event, no such declaration was made by the Special Representative.<sup>180</sup> Further statements to the effect that the Declaration was unlawful and/or not in conformity with Resolution 1244 (1999) were made by China, Vietnam and South Africa.

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<sup>176</sup> On the issue of the implementation of standards, the Secretary-General stated as follows at the meeting of the Security Council of 18 February 2008: "Kosovo has made considerable progress through the years on the implementation of standards, and the standards implementation process is now fully integrated into the European approximation process." S/PV.5839, at p.3; **Dossier No.119**.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid., p.6. President Tadić raised the possibility of a "new ethnic cleansing campaign directed against Serbs remaining in Kosovo and Metohija". There has been no such campaign and there is no reason to suspect one is likely.

<sup>179</sup> Ibid., p.7.

<sup>180</sup> The position of UNMIK and the Special Representative may be compared to the response to earlier attempts to declare independence. See Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2003/113 of 29 January 2003, para.12, noting that "in December [2002], UNMIK headed off a draft resolution on independence prepared by AAK"; **Dossier No. 60**.

**4.7** The United Kingdom Permanent Representative, Sir John Sawers, emphasised the exceptional nature of the circumstances leading to the Declaration of Independence, referring back to Resolution 1244 (1999), as follows:

“It is important to understand how this came about and to understand why the events of recent months, of yesterday and today, and of the weeks and months to come are inevitable as well as exceptional. At the heart of today’s controversy is a resolution adopted at this table in June 1999. In that resolution, the Council took an unprecedented step: it effectively deprived Belgrade of the exercise of authority in Kosovo. It did so because the then regime in Belgrade had not just unilaterally deprived Kosovo of its powers of self-government, thereby triggering a rebellion; it had tried in 1999 to expel the majority population from the territory of Kosovo. Hundreds of thousands of men, women and children were driven from Kosovo by the State security forces of Slobodan Milosevic. People being herded onto trains provoked images from the 1940s. The events of 1999 shape the events we see now.”<sup>181</sup>

**4.8** The United Kingdom’s Permanent Representative further described the two tasks of UNMIK under Resolution 1244 (1999): first, to help Kosovo establish its own institutions of self-government and to pass authority progressively to those institutions; and, second, to facilitate a process to determine Kosovo’s future status, taking into account the Rambouillet accords, which had specified that such a settlement had to be based on “the will of the people of Kosovo”. In doing so, he noted that “Resolution 1244 (1999) placed no limits on the scope of that status outcome, and paragraph 11 (a) of the resolution is clear that the substantial autonomy which Kosovo was to enjoy within the Federal Republic of Yugoslavia was an interim outcome pending a final settlement.”<sup>182</sup>

**4.9** In addition, Sir John Sawers emphasised that “the legacy of Milosevic’s oppression and violence has made it impossible for Kosovo to return to control by Belgrade.” He continued:

“When, in the middle of the final status process, the Government of Serbia changed its constitution to exclude any future for Kosovo outside Serbia, it effectively ended any chance of a negotiated settlement. The international community cannot be party to a settlement that is opposed by more than 90 per cent of the territory’s population.

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<sup>181</sup> S/PV.5839, p.12; **Dossier No.119**.

<sup>182</sup> Ibid., p.13.

Apart from anything else, that would be contrary to our overriding priority of upholding peace and security.”<sup>183</sup>

**4.10** In these circumstances, the United Kingdom recognised Kosovo.

**4.11** The need to take account of the reality of events on the ground was reflected other statements.

- (a) The representative of Belgium stated: “we cannot ignore the reality on the ground: the Kosovar authorities have declared independence in keeping with the will of a broad majority of the population of Kosovo”.<sup>184</sup>
- (b) The Costa Rican representative stated: “We believe that with this recognition, we are responding primarily to the will of the people of Kosovo – a people who find it impossible to live together with the Serb majority in the same country after the 1998 campaign of ethnic cleansing, as their Prime Minister indicated to us in this very Chamber. That is a reality that Costa Rica cannot ignore and that the membership of the Organization must take carefully into account.”<sup>185</sup>
- (c) The representative of Croatia noted that the hope of an agreed settlement had proved futile and that the attempts of the Security Council to agree on a way forward had been equally unsuccessful.<sup>186</sup>
- (d) The representative of France spoke of the recognitions which had taken place and which would continue in the coming days, adding: “Faced with this new reality, the international community must shoulder its responsibilities by ensuring, in the immediate future, that the process under way takes place in a calm manner, without violence, avoiding any destabilization of Kosovo or of

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid., p.8.

<sup>185</sup> Ibid., p.17.

<sup>186</sup> Ibid., p.16.

the region. He referred to Kosovo as a “unique situation” which marked the outcome of a “particular historic process”.<sup>187</sup>

- (e) The representative of Italy noted: “the potential for reaching a negotiated solution has been exhausted”. He continued: “if the status quo remains unsustainable, with no room for a negotiated solution, the United Nations Special Envoy’s proposal for Kosovo’s internationally supervised independence is the only viable option.”<sup>188</sup>
- (f) The representative of Libya stated: “We are confronted with an exceptional situation in an exceptional region in an exceptional time, during which a certain group – unfortunately, for cultural and ethnic purposes – has suffered from repercussions of blind violence, ethnic cleansing and deprivation of the most basic of their rights. That has led to intervention in order to put a stop to those inhuman practices, and it led to the developments that have just taken place.”<sup>189</sup>
- (g) The representative of Panama accepted that events had created a new reality and, while expressing concern that the events in Kosovo should not be used as an example in other situations, also emphasised the unique nature of the Kosovo situation, including that Kosovo had “enjoyed an autonomy very much like the autonomy of the old republics of greater Yugoslavia, and an attempt was made to deprive it of that autonomy.”<sup>190</sup>
- (h) The representative of the United States stated: “The recognition of Kosovo’s sovereignty by a substantial number of ...Governments...has ensured that that fact is irreversible. Our collective efforts must now focus on working constructively with Kosovo and Serbia to help them turn a new page<sup>191</sup>.” He,

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<sup>187</sup> Ibid., p.19.

<sup>188</sup> Ibid., pp. 9-10.

<sup>189</sup> Ibid., p.15. The Libyan representative also stated: “My country cannot accept that the situation before us today constitutes a precedent in order to undermine the territorial integrity of States.”

<sup>190</sup> Ibid., p.21.

<sup>191</sup> Ibid., p.19



too, characterised Kosovo as a “special case”, which the United States would not accept as a precedent for any other conflict or dispute.

### **3. Events subsequent to 17-18 February 2008**

#### ***3.1 Recognition by third States***

**4.12** As of the date of this submission, 57 States have recognised Kosovo’s independence, drawn from all geographic regions of the world.

#### ***3.2 The Constitution of the Republic of Kosovo***

**4.13** Kosovo adopted a Constitution on 9 April 2008, which came into force on 15 June 2008. The Constitution consists of fourteen Chapters and contains extensive provisions on fundamental rights and freedoms (Chapter II) and rights of communities and their members (Chapter III). The Constitution is compliant with, and also accords supremacy to, the Comprehensive Proposal of March 2007 (including its extensive provisions on minority protection). Article 143 of the Constitution (in Chapter XIII, Final Provisions) provides:

“Notwithstanding any provision of this Constitution:

1. All authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo’s obligations under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. They shall take all necessary actions for their implementation.
2. The provisions of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.
3. The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail.”<sup>192</sup>

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<sup>192</sup> **Dossier No.192.**

**4.14** This provision is in turn entrenched by Article 144(2) of the Constitution, which provides that any amendments must be approved by a two thirds majority, such to include two thirds of the deputies representing Kosovo's minorities.<sup>193</sup> The protection of minorities is further achieved through the Law on the Promotion and Protection of the Rights of Communities and Persons Belonging to Communities in Kosovo, which also came into force on 15 June 2008, and expands on the constitutional protections. Articles 1.1 to 1.3 of the Law provide:

“1.1 The Republic of Kosovo shall guarantee full and effective equality for all people of Kosovo. Kosovo regards its national, ethnic, linguistic and religious diversity as a source of strength and richness in the further development of a democratic Society based on the rule of law. In the development of the Republic of Kosovo, the active contributions of all persons belonging to communities is encouraged and cherished.

1.2 The Republic of Kosovo shall take special measures to ensure the full and effective equality of communities and their members, taking into consideration their specific needs. Such measures shall not be considered act of discrimination.

1.3 Persons belonging to communities in the Republic of Kosovo shall be entitled to enjoy individually or jointly with others the fundamental and human rights and freedoms established in international legal obligations binding upon the Republic of Kosovo. These rights and freedoms are guaranteed by the constitution, other laws, regulations and state policies.”

**4.15** This Law, together with further implementing laws on matters such as use of languages and education, is also entrenched by reference to the provisions of the Constitution.

**4.16** Laws covering, *inter alia*, decentralisation were passed with the adoption of the new Constitution, alongside laws authorising the creation of a Kosovo Foreign Ministry and an Intelligence Service.<sup>194</sup> A Central Election Commission and a Ministry for Security Forces

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<sup>193</sup> Ibid. Article 144(2) of the Constitution provides: “Any amendment shall require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo”.

<sup>194</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 July 2008: S/2008/458 p. 2, para.4; **Dossier No.89**.

were established by November 2008.<sup>195</sup> The legislation also provided that Kosovo Protection Corps (KPC), an interim institution, would be phased out.<sup>196</sup>

**4.17** A complication in the development of Kosovo institutions after the Declaration of Independence has been the boycott by the Kosovo-Serbs. This has included a boycott of the Kosovo Assembly by Kosovo-Serb deputies, of UNMIK Customs, the Kosovo Police Service, the Kosovo Corrections Service, the judicial system, municipal administration, and UNMIK railways by Kosovo-Serb personnel, and of Reconstruction Implementation Commission meetings by senior representatives of the Serbian Orthodox Church and the Serbian Institute for the Protection of Monuments.<sup>197</sup> However, 6 of the Kosovo-Serb members of the Kosovo Assembly who had boycotted the Assembly after the Declaration of Independence ended their boycott on 19 March 2008.<sup>198</sup> As at 24 November 2008, 7 Kosovo-Serb Assembly members were regularly attending Assembly sessions.<sup>199</sup>

### ***3.3 Reconfiguration of the international civil presence in Kosovo***

**4.18** In connection with the adoption of the Constitution on 9 April 2008, the Government of Kosovo indicated that it would welcome a continued United Nations presence in Kosovo. In the Secretary-General's Report of 12 June 2008, Kosovo's agreement to the United Nations presence is described as being subject to the United Nations carrying out "limited residual tasks."<sup>200</sup> The United Nations role in Kosovo, post-Constitution, was seen to entail tasks in four fields: (i) monitoring and reporting; (ii) facilitating Kosovo's engagement in international agreements; (iii) facilitating dialogue between the Kosovo and Serbian

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<sup>195</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 24 Nov 2008: S/2008/692, p.1, para.2; Annex II, para.2; **Dossier No.90**.

<sup>196</sup> Ibid., para.7.

<sup>197</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 Mar 2008: S/2008/211, paras. 3, 8, 20; **Dossier No. 86**

<sup>198</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 July 2008: S/2008/458, Annex I, para. 1; **Dossier No. 89**

<sup>199</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 24 Nov 2008: S/2008/692, Annex II, para. 4; **Dossier No. 90**

<sup>200</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008: S/2008/354, p. 2, para. 7; **Dossier No. 88**

governments on issues of practical concern; and (iv) functions relating to police, courts, customs, transportation and infrastructure, boundaries, and Serbian patrimony.<sup>201</sup>

**4.19** In the event, the Declaration of Independence has led to a very substantial reconfiguration of the international civil presence in Kosovo, with an enhanced role played by the European Union's Rule of Law mission (EULEX Kosovo).

**4.20** At Kosovo's invitation, EULEX Kosovo was launched on 16 February 2008, the European Union having announced in December 2007 that it was ready to play an enhanced role in Kosovo.<sup>202</sup> The launch of this mission has been a source of controversy. At the Security Council meeting of 18 February 2008, the Russian Federation raised an issue as to compliance of EULEX Kosovo with Resolution 1244 (1999), stating that this had been launched without the necessary decision of the Security Council and that the international civil presence in Kosovo was allocated to UNMIK alone.<sup>203</sup> Subsequently, and following an initiative of the Secretary-General aimed at achieving a compromise, Serbia and the Kosovo-Serbs indicated that they would find an enhanced operational role for the European Union in the area of the rule of law acceptable, provided that such activities would be undertaken under the overall status-neutral authority of the United Nations.<sup>204</sup>

**4.21** In his Report to the Security Council of 12 June 2008, the Secretary-General gave his "assessment that the objectives of the United Nations would be best obtained through an enhanced operational role for the European Union in the area of the rule of law under the umbrella of the United Nations, headed by my Special Representative".<sup>205</sup> Thus, he intended to reconfigure the international civil presence in Kosovo, noting the practical need for a

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<sup>201</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008: S/2008/354, p. 4, para. 16; **Dossier No. 88**. The details were set out in the Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr. Boris Tadić, S/2008/354, Annex I.

<sup>202</sup> Council of the European Union, S060/08, 16 February 2008, also stating that Mr Pieter Feith was appointed as the EU Special Representative in Kosovo. The announcement also recorded: "The European Council on 14 December 2007 stated the EU's readiness to assist Kosovo in the path towards sustainable stability, including by an European Security and Defence Policy (ESDP) mission and a contribution to an international civilian office as part of the international presences in Kosovo.": [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/98772.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98772.pdf)

<sup>203</sup> S/PV.5839, p. 7; **Dossier No.119**.

<sup>204</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2008/354 of 12 June 2008, para.12; **Dossier No.88**.

<sup>205</sup> *Ibid.*, para.13.

recalibrated international presence that was better suited to address the current and emerging operational requirements in Kosovo.<sup>206</sup>

**4.22** It is to be noted that the last Regulation listed under the official UNMIK documents register as having been promulgated by UNMIK was dated 14 June 2008,<sup>207</sup> the day before entry into force of the new Constitution. The last Administrative Direction listed under the official UNMIK documents register as having been adopted by UNMIK was also dated 14 June 2008.<sup>208</sup>

**4.23** In his Report of 15 July 2008, the Secretary-General stated that, taking into account the profoundly changed reality in Kosovo, he had decided to move forward with the reconfiguration of the international civil presence within the framework of Resolution 1244 (1999) and as set out in his earlier special report, and that he had instructed UNMIK to cooperate with the European Union to that effect.<sup>209</sup> In his Report of 24 November 2008, the Secretary-General noted that the reconfiguration was both timely and necessary, and was being accelerated in order to adapt it fully to the prevailing circumstances on the ground.<sup>210</sup>

**4.24** In his Report of 23 March 2009, the Secretary-General noted that EULEX had deployed Kosovo-wide without incident on 9 December 2008 and that, since then, it had

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<sup>206</sup> Ibid., para.19. At para.16, the Secretary-General further identified the enhanced operational role of the EU: “The European Union will perform an enhanced operational role in the area of the rule of law under the framework of resolution 1244 (1999) and the overall authority of the United Nations. The European Union will, over a period of time, gradually assume increasing operational responsibilities in the areas of international policing, justice and customs throughout Kosovo. It is understood that the international responsibility of the United Nations will be limited to the extent of its effective operational control. The United Nations presence will carry out the following functions, among others to be defined: (a) monitoring and reporting; (b) facilitating, where necessary and possible, arrangements for Kosovo’s engagement in international agreements; (c) facilitating dialogue between Pristina and Belgrade on issues of practical concern; and (d) functions related to the dialogue concerning the implementation of the provisions specified in my letter to Mr. Tadić and referenced in my letter to Mr. Sejdiu.”

<sup>207</sup> UNMIK/REG/2008/34, 14 June 2008 (On the Promulgation of the Law on the Supplementation and Amendment of the Labour Inspectorate Law adopted by the Assembly of Kosovo); [http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008\\_34.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008_34.pdf)

<sup>208</sup> UNMIK/AD/2008/7, 14 June 2008 (Implementing UNMIK Regulation No.2006/25 on a Regulatory Framework for the Justice System in Kosovo); [http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008\\_07.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008_07.pdf)

<sup>209</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2008/458 of 15 July 2008, para.30; **Dossier No.89.**

<sup>210</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2008/692 of 24 November 2008, para.50. He continued: “It is taking place in a transparent manner with respect to all stakeholders and is consistent with the United Nations position of strict neutrality on the question of Kosovo’s status.” **Dossier No.90**

continued to build up its presence to a current total of 1,687 international and 806 national employees. He stated:

“Along with UNMIK’s ongoing reconfiguration and the related drawdown of UNMIK rule of law personnel, the reporting period was marked by the resumption by EULEX of operating functions in the rule of law sector. This coordinated effort took place without significant security incidents, and with the support of both Pristina and Belgrade and all international stakeholders. It constitutes a major milestone in the international involvement in Kosovo, and a positive example of cooperation between the United Nations and the European Union.”<sup>211</sup>

**4.25** As to events on the ground, the Secretary-General noted that the overall security situation in Kosovo remained stable, and that celebrations on the occasion of the one-year anniversary of the Declaration of Independence had passed off without incident.<sup>212</sup> He also noted that, although many Kosovo-Serbs continued to reject the authority of Kosovo’s institutions in line with Belgrade’s official policy, increasing numbers were applying for Kosovo identity cards, driver’s licenses and other Kosovo documentation that facilitated their ability to live, work and move about freely in Kosovo.<sup>213</sup>

**4.26** These indicia of increasing stability are in marked contrast to conditions prevailing in Kosovo a decade beforehand when Resolution 1244 (1999) was adopted.

**4.27** Against the background of these developments, the United Kingdom addresses, in chapter 5, the legal principles relevant to the question before the Court. In chapter 6, those principles are applied to the factual background as set out in this Part in response to the question referred to the Court.

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<sup>211</sup> Report of the Secretary-General on the United Nations Interim Administration of Kosovo, UN Doc. S/2009/149 of 17 March 2009, para.36; **Annex 24**. This report noted that EULEX had begun submitting reports to the UN on its activities and attached the first such report. He continued: “It is taking place in a transparent manner with respect to all stakeholders and is consistent with the United Nations position of strict neutrality on the question of Kosovo’s status.”

<sup>212</sup> Ibid., paras.3, 9.

<sup>213</sup> Ibid., para.8.

## **PART III**





## CHAPTER 5

### THE CREATION OF STATES: GENERAL ISSUES

#### 1. Introduction

**5.1** Before turning to the question asked of the Court, some general issues concerning the creation of States should be touched on. These constitute the legal landscape against the background of which the question posed falls to be considered.<sup>214</sup> Six such general issues will be discussed, as follows:

- the relevance or otherwise of issues of legality under internal law, in particular the constitutional law of the predecessor State;
- the operation of the principle of territorial integrity;
- the legality or otherwise of secession under general international law;
- the practice of coordinated non-recognition in cases where fundamental norms of international law are engaged;
- the relevance or otherwise of recognition by the predecessor State and third States in other cases;
- the relevance or otherwise of membership in the United Nations.

The implications of these issues in the context of the present request will be discussed in chapter 6.

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<sup>214</sup> There is a substantial literature on secession, but it is variable in quality. Particular reference is made to the various expert opinions tendered to the Canadian Supreme Court, reprinted in Anne Bayefsky, *Self-Determination in International Law. Quebec and Lessons Learned* (Kluwer, The Hague, 2000). None of the experts engaged in that case supported the view that secession is *per se* unlawful under international law: J Crawford, “Response to Experts Reports of the Amicus Curiae”, para.9, p.159, para.13, p.160; Thomas M Franck, “Opinion Directed at Question 2 of the Reference”, para.2.9, p.78, “Opinion Directed at Response of Professor Crawford and Wildhaber”, paras.3-4, pp.179-180, para.8, p.181; Alain Pellet, “Legal Opinion on Certain Questions of International Law Raised by the Reference”, para.44, p.122, “Legal Opinion on Certain Questions of International Law Raised by the Reference”, p.212; Malcolm Shaw, “Re: Order in Council PC 1996-1497 of 30 September 1996”, para.43, p.136, “Observations Upon the Response of Professor Crawford to the Amicus Curiae's Expert Reports”, para.24, p.221.

## 2. Irrelevance of internal law

5.2 As a general matter, the domestic legality or illegality of an act does not determine whether it is in accordance with international law or is capable of producing effects under international law. International law is a distinct legal order with its own criteria of legality and validity and its own autonomous standards for determining the legal effects of conduct of public authorities.

5.3 This principle is reflected across the whole of international law. For example, Article 4 of the Articles on State Responsibility, adopted by the International Law Commission and appended to General Assembly resolution 56/83 of 14 December 2001, establishes that:

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

5.4 Similarly, Article 43, dealing with the consequences of an internationally wrongful act, provides:

“The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.”

5.5 Consistent with this general approach, international law has not treated the legality of the act of secession under the internal law of the predecessor State as determining the effect of that act on the international plane. In most cases of secession, of course, the predecessor State’s law will *not* have been complied with: that is true almost as a matter of definition.<sup>215</sup>

5.6 Nor is compliance with the law of the predecessor State a condition for the declaration of independence to be recognised by third States, if other conditions for recognition are fulfilled. The conditions do not include compliance with the internal legal requirements of the predecessor State. Otherwise the international legality of a secession would be

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<sup>215</sup> On the few occasions (including the SFRY itself) where the constitution of the predecessor State expressly made provision for separation or secession, its provisions have not in fact been followed.

predetermined by the very system of internal law called in question by the circumstances in which the secession is occurring.

**5.7** For the same reason, the constitutional authority of the seceding entity to proclaim independence within the predecessor State is not determinative as a matter of international law. In most if not all cases, provincial or regional authorities will lack the constitutional authority to secede. The act of secession is not thereby excluded. Moreover, representative institutions may legitimately act, and seek to reflect the views of their constituents, beyond the scope of already conferred power.

### **3. The principle of territorial integrity**

**5.8** By contrast with the internal law of the predecessor State – which has no special status in international law – the principle of territorial integrity of States is a principle of international law. It is reflected in particular in Article 2(4) of the UN Charter:

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles ...

4. 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.”

**5.9** The protection of the territorial integrity of States is a protection in “international relations”. It is not a guarantee of the permanence of a State as it exists at any given time. Nor does it apply to secessionist movements within the territory of a State. Generally speaking, international law does not prohibit the separation of part of the territory of a State arising from internal processes.<sup>216</sup>

**5.10** To put the same proposition in other terms, although a State’s territorial integrity is protected under international law, as a general matter this protection has been extended only insofar as the use of force and intervention by third States are concerned. It has not been extended to the point of providing a guarantee of the integrity of a State’s territory against

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<sup>216</sup> In certain cases specific guarantees against separation of parts of a State may be established: see e.g., concerning Cyprus, the Treaty of Guarantee, London, 16 August 1960, UKTS 1961 No.5; 382 UNTS 3.

internal developments which may lead over time to the dissolution or reconfiguration of the State.

**5.11** This is not to say that international law *favours* the dismemberment of a State's territory, nor, in particular, that it favours secessionist claims. Rather, international law favours the territorial integrity of States in the interests of stability and the peaceful settlement of disputes, including disputes arising within a State. Under international law, secessionist movements – or the populations they claim to represent – have no legal right to independence, outside the special context of colonial self-determination. International law seeks to avoid the dissolution or dismemberment of its subjects, but not to the point of guaranteeing that these situations can never occur.

#### **4. Secession is not as such contrary to international law**

**5.12** Secession involves the unilateral, non-consensual separation of part of the territory of a State for the constitution of a new State. The claim is normally presented in declarations adopted by the leaders of the seceding entity, i.e., by way of a “unilateral declaration of independence”.<sup>217</sup> Historically, secession has been an often-used method for the creation of new States. It was, without doubt, the most important method up to the First World War, and it has gained relevance again after 1989.

**5.13** It is not surprising that existing States have generally felt an aversion to secession. This aversion has sometimes led them to adopt language suggesting the unlawfulness of secession as a matter of international law. Of course attempts at secession may well – as already noted – be contrary to the municipal law of the State concerned. The Declaration of Independence of 4 July 1776 was (at the time) considered an act of treason under British law. But, from the standpoint of international law there was, and is, no prohibition *per se* of secession.

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<sup>217</sup> As noted in Chapter 1 above, the phrase “unilateral” in these cases adds little. Declarations of independence are by definition unilateral acts.

#### 4.1 Secession before 1945

**5.14** It is hardly necessary to recall, in the period after 1776, such events as the dissolution of the Spanish and Portuguese Empires in Central and South America and the separations of Greece and Belgium. The establishment of these new States was generally achieved through wars of independence, which made recognition of the seceding entities by third States particularly relevant.

**5.15** That international law accepted these factual situations did not mean that international law gave the emerging entities a “right” to statehood. This was made clear by the Committee of Jurists appointed by the League of Nations to determine whether the Aaland Islands’ claim to independence fell within the domestic jurisdiction of Finland. In its Report of 1920, the Committee said that:

“Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the rights of other States to claim such a separation. Generally speaking, the grant or the refusal of such a right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitely constituted.”<sup>218</sup>

**5.16** The Commission of Rapporteurs subsequently advised that:

“To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity”.<sup>219</sup>

**5.17** But it is one thing to say that there is no right to secede in international law and another to say that secession is *contrary* to international law or that it is legally impossible. Seceding entities did not rely on international law as giving them a right to independence. International law, however, was flexible enough to acknowledge these situations, once they

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<sup>218</sup> Report of the Committee of Jurists, LNOJ, Special Supplement No. 3 (1920), pp.5-6.

<sup>219</sup> Report of the Commission of Rapporteurs, 16 April 1921: LN Council Doc.B7/21/68/106[VII], pp.27-28.

had achieved the necessary stability and effectiveness, so that a successful reassertion of sovereignty by the former State was practically excluded.

#### ***4.2 The relevance of the United Nations Charter***

**5.18** Article 1(2) of the UN Charter provides that it is a purpose of the Organization:

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”

**5.19** Article 55 provides that:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

**5.20** Article 80 of the Charter states that Mandated territories and peoples were to preserve all their previous rights pending agreement on their final status or their transfer to the Trusteeship system.

**5.21** The principle of self-determination was articulated as a right of all colonial countries and peoples by General Assembly resolution 1514 (XV).<sup>220</sup>

**5.22** The scope of the principle of colonial self-determination was not simply equated with independence. In Resolution 1541, the General Assembly indicated the possible outcomes from the application of the principle:

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<sup>220</sup> A/RES/1514 (XV), 14 December 1960.

- “(a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.”<sup>221</sup>

**5.23** Similarly, the Declaration on Friendly Relations spoke of “any political status” which represented the free will of the people concerned.<sup>222</sup> In practice, independence was the normal outcome of the process of self-determination.

**5.24** Under the United Nations Charter the process of decolonization was carried out and virtually completed, resulting in the creation of over 100 States. The principle of self-determination, now developed into a legal principle, played an important role in this process, as the Court noted in the *Namibia Opinion*:

“In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.”<sup>223</sup>

**5.25** It is not necessary to trace the steps by which the principle of self-determination developed through the institutions of the Mandate and Trusteeship systems as well as in the practice of the United Nations under Chapter XI of the Charter. The Court itself has dealt with certain of these developments on a number of occasions, and has attached legal significance to them. In *Western Sahara*, the Court defined the principle of self-determination in terms of “the need to pay regard to the freely expressed will of peoples”.<sup>224</sup> In *East Timor* it held that it was “irreproachable” to maintain that “the right of peoples to self-determination, as it evolved from the Charter and United Nations practice, has an *erga omnes* character”.<sup>225</sup> This was further reaffirmed in the Court’s advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>226</sup>

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<sup>221</sup> A/RES/1541 (XV), 15 December 1960, Principle VI.

<sup>222</sup> A/RES/2625 (XXV), 24 October 1970.

<sup>223</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep 1971, p.16, at p.31, para.53.

<sup>224</sup> *Western Sahara Advisory Opinion*, ICJ Rep 1975, p.12, at p.33, para.59.

<sup>225</sup> *East Timor (Portugal v Australia)*, ICJ Rep 1995, p.90, p.102, para.29.

<sup>226</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, p.136, at p.199, paras.155-156.

**5.26** But the processes of decolonization which were variously at stake in those cases left open the possibility, which existed under previous law and practice, of secession occurring, in special circumstances, in independent States and independently of the application of Chapters XI and XII of the Charter. More than 20 new States have come into existence since 1945 outside the colonial context, some of them by secession.

**5.27** The language used by States in condemning particular cases of secession does not imply the existence of a *general* prohibition under international law. Security Council resolution 169 (1961), adopted in reaction to the purported declaration of independence of Katanga from the Congo, “strongly deprec[at]ed” the secession 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 such activities which are now taking place in Katanga shall cease forthwith.”<sup>227</sup>

**5.28** In the case of Southern Rhodesia, the Security Council adopted several resolutions condemning the Smith regime, an “illegal racist minority regime”<sup>228</sup> that had “usurped power”.<sup>229</sup> The Council held the unilateral declaration of independence to have “no legal validity”, as it was considered by the United Kingdom, the colonial power, as an “act of rebellion”.<sup>230</sup>

**5.29** No *general* rule of international law prohibiting secession may be implied from this language. These resolutions did not articulate such a general rule but were concerned with specific features of those cases, which will be discussed in more detail shortly. Furthermore, to maintain that a seceding entity is acting unlawfully under international law is to recognize some form of international subjectivity to the entity, precisely when the objective of such condemnations – in the cases referred to – is the denial of any status whatever.

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<sup>227</sup> S/RES/169 (1961), 24 November 1961, para.8.

<sup>228</sup> S/RES/216 (1965), 12 November 1965, para.2.

<sup>229</sup> S/RES/217 (1965), 20 November 1965, para.3.

<sup>230</sup> *Ibid.*, preamble.



### 4.3 “Remedial self-determination”

**5.30** General Assembly resolution 2625 (XXV), the Friendly Relations Declaration, included in paragraph 7 of principle 5, the following statement:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.”

**5.31** This clause was reaffirmed in the Vienna Declaration of 1993, adopted during the United Nations World Conference on Human Rights. The Declaration establishes that:

“In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.”<sup>231</sup>

**5.32** The Supreme Court of Canada in the *Quebec Secession Reference*, after referring to these declarations, noted that:

“A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, 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 ... While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.”<sup>232</sup>

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<sup>231</sup> United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, 32 ILM 1661 (1993), p.1665.

<sup>232</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras.134-135.

#### **4.4 Conclusion**

**5.33** To summarise, international law favours the territorial integrity of States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any “right to secede”. But neither, in general, does it prohibit secession or separation, or guarantee the unity of predecessor States against internal movements leading to separation or independence with the support of the peoples concerned.

#### **5. Relevance of coordinated practice of non-recognition in certain cases**

**5.34** The statement which concluded the previous paragraph was qualified by the phrase “in general”. This is because there can be cases where separation or secession from a State raises issues of illegality under international law; indeed such cases can involve issues of fundamental concern. They may involve external aggression or intervention, or widespread violation of basic human rights. In the Charter period, the response to such cases has involved general non-recognition – concerted and in some cases mandated by the Security Council acting under Chapters VI or VII of the Charter. Collective non-recognition in these cases is a means of preventing the development and consolidation of situations which are unlawful under international law, including situations involving secession or otherwise affecting the status of territory.

**5.35** The practice of the Security Council and the General Assembly has been to call on States not to recognize territorial situations raising fundamental questions of illegality under international law. But in no case has the Security Council or the General Assembly acted on the basis that secession is *per se* unlawful under international law. In each case, the unlawfulness – and consequent non-recognition – flowed from an assessment of the gravity of the particular circumstances and the threat they presented to international peace and security, in light of applicable fundamental principles. This can be demonstrated from the following brief review.

## 5.1 Katanga

**5.36** It will be recalled that the Katanga situation involved substantial foreign intervention, mercenarism and other external threats to the newly-independent Congo (now Democratic Republic of the Congo).<sup>233</sup> The Security Council responded to the secession of Katanga from the Congo by “completely” rejecting “the claim that Katanga is a „sovereign independent nation““.<sup>234</sup> As noted at paragraph 5.27 above, it further declared that secessionist activities in Katanga were contrary to the *Loi Fondamentale* of the Congo and Security Council resolutions, and demanded their immediate cessation.<sup>235</sup> Although the Security Council did not expressly call for non-recognition of Katanga, the call was implicit in the language used in Resolution 169 (1961) to deny the statehood of Katanga.

## 5.2 Southern Rhodesia

**5.37** In the case of Southern Rhodesia, the Security Council called for the non-recognition of the declaration of independence of the Smith regime, which had been issued in a manner that not only breached the laws of the United Kingdom but was also unlawful under international law. Its international unlawfulness derived from violations of the right to self-determination of the people of Southern Rhodesia as a whole, and the racial discrimination inherent in the rule of a small white minority.<sup>236</sup>

**5.38** Thus the Council called for the non-recognition of the “illegal regime” of Ian Smith.<sup>237</sup> Non-recognition was combined with economic sanctions in Resolution 216 (1965). The Council adopted further resolutions in relation to the situation of Southern Rhodesia, and in Resolution 277 (1970), acting under Chapter VII of the Charter, the Council called States

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<sup>233</sup> The Court had occasion to examine aspects of the UN response to the situation in the Congo in *Certain Expenses of the United Nations*, I.C.J. Rep 1962, p.151, at pp.175-179.

<sup>234</sup> S/RES/169 (1961), 24 November 1961, preamble.

<sup>235</sup> S/RES/169 (1961), 24 November 1961, para.8.

<sup>236</sup> S/RES/232 (1966), 16 December 1966, para.4; S/RES/318 (1972), 28 July 1972, para.1; S/RES/328 (1973), 10 March 1973, para.3; S/RES/411 (1977), 30 June 1977, preamble; S/RES/424 (1978), 17 March 1978, preamble.

<sup>237</sup> S/RES/216 (1965), 12 November 1965, para.2; S/RES/217 (1965), 20 November 1965, para.6; S/RES/277 (1970), 18 March 1970, para.2.

not to recognize the legal status of Southern Rhodesia and to treat as null and void the acts adopted by that regime.<sup>238</sup>

**5.39** The Security Council, through these resolutions, spelt out the consequences of the duty of non-recognition. States were called not to entertain diplomatic or economic relations with Southern Rhodesia,<sup>239</sup> to withdraw consular and trade representation,<sup>240</sup> not to recognize passports issued by the authorities of Southern Rhodesia,<sup>241</sup> not to pump or deliver oil,<sup>242</sup> not to import or export products to Southern Rhodesia,<sup>243</sup> not to recognize the “internal settlement”, and in consequence consider null and void the “so-called” elections held by the regime and not to recognize the elected authorities.<sup>244</sup> The Council further requested States to deny the regime any participation in international organizations by rejecting any application for membership and to ensure its exclusion from organizations in which it already had some form of representation.<sup>245</sup> These demands were fully supported by the General Assembly, which indeed urged even stronger action.<sup>246</sup>

### ***5.3 The South African Bantustans***

**5.40** Between the 1970s and 1980s, South Africa purported to grant independence to four of the ten Bantustans established within its territory: Transkei,<sup>247</sup> Bophuthatswana,<sup>248</sup> Venda<sup>249</sup>

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<sup>238</sup> S/RES/277 (1970), 18 March 1970, para.3.

<sup>239</sup> S/RES/217 (1965), 20 November 1965, para.6; S/RES/232 (1966), 16 December 1966; S/RES/277 (1970), 18 March 1970, para.9; S/RES/318 (1972), 28 July 1972, para.5; S/RES/333 (1973), 22 May 1973, para.3.

<sup>240</sup> S/RES/253 (1968), 29 May 1968, para.10; S/RES/277 (1970), 18 March 1970, para.9.

<sup>241</sup> S/RES/253 (1968), 29 May 1968, para.5.

<sup>242</sup> S/RES/221 (1966), 9 April 1966.

<sup>243</sup> S/RES/232 (1966), 16 December 1966, prohibiting the import of “asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather” originating from Southern Rhodesia, at, para.2(a). See also S/RES/253 (1968), 29 May 1968; S/RES/333 (1973), 22 May 1973, para.4.

<sup>244</sup> S/RES/423 (1978), 14 March 1978, para.2; S/RES/445 (1979), 8 March 1979, para.6; S/RES/448 (1979), 30 April 1979.

<sup>245</sup> S/RES/277 (1970), 18 March 1970, paras.12, 13.

<sup>246</sup> See for example A/RES/2379 (XXIII), 25 October 1968; A/RES/2383 (XXIII), 7 November 1968; A/RES/2508 (XXIV), 21 November 1969; A/RES/2652 (XXV), 3 December 1970; A/RES/2769 (XXVI), 22 November 1971; A/RES/2945 (XXVII), 7 December 1972; A/RES/3115 (XXVIII), 12 December 1973; A/RES/3297 (XXIX), 13 December 1974; A/RES/3396 (XXX), 21 November 1975; A/RES/31/7, 5 November 1976; A/RES/32/116, 16 December 1977; A/RES/33/38, 13 December 1978; A/RES/34/192, 18 December 1979.

<sup>247</sup> Status of Transkei Act 1976 (Act No. 100 of 1976), 15 ILM 1175 (1976)

<sup>248</sup> Status of Bophuthatswana Act 1977 (Act No. 89 of 1977).

<sup>249</sup> Status of Venda Act 1979 (Act No. 107 of 1979).

and Ciskei.<sup>250</sup> The Security Council called for non-recognition of the Bantustans, on the basis that their establishment was incompatible with the right of self-determination of the people of South Africa as a whole.<sup>251</sup>

**5.41** In the case of Transkei, the first “homeland” to be granted independence, the Security Council endorsed the General Assembly’s recommendations condemning the establishment of the Bantustans, and called for the non-recognition of the “so-called” independent State of Transkei.<sup>252</sup> In further resolutions, the Council generally condemned the policy of bantustanization,<sup>253</sup> calling for its dismantling as the “necessary step towards the full exercise of the right to self-determination” of the whole of the South African people.<sup>254</sup>

**5.42** The President of the Security Council, in response to the independence of Venda, maintained, on behalf of the Council, that:

“The Security Council condemns the proclamation of the so-called „independence“ of Venda and declares it totally invalid. This action by the South African régime, following similar proclamations of Transkei and Bophuthatswana, denounced by the international community, is designed to divide and dispossess the African people and establish client states under its domination in order to perpetuate *apartheid*. It further aggravates the situation in the region and hinders international efforts for just and lasting solutions.

The Security Council calls upon all Governments to deny any form of recognition to the so-called „independent“ Bantustans; to refrain from any dealings with them; to reject travel documents issued by them; and urges Member Governments to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called „independent“ Bantustans.”<sup>255</sup>

**5.43** Again, these demands were fully supported by the General Assembly.<sup>256</sup>

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<sup>250</sup> Status of Ciskei Act 1981 (Act No. 110 of 1981).

<sup>251</sup> S/RES/473 (1980), 13 June 1980, para.4; S/RES/554 (1984), 17 August 1984, para.4; S/RES/556 (1984), 23 October 1984, paras. 4,6.

<sup>252</sup> S/RES/402 (1976), 22 December 1976, para.1.

<sup>253</sup> S/RES/417 (1977), 31 October 1977, para.2(f).

<sup>254</sup> S/RES/556 (1984), 23 October 1984, paras.4, 6.

<sup>255</sup> SCOR, 2168<sup>th</sup> mtg., UN Doc. S/13549, 21 September 1979. Similar statements were issued in relation to the independence of Ciskei: *Statement of the President of the Security Council, on Behalf of the Council, Concerning the Proclamation of the “Independent” State of Ciskei*, UN Doc. S/14794, 15 December 1981.

<sup>256</sup> See for example on Transkei: A/RES/2775E (XXVI), 29 November 1971; A/RES/2923E (XXVII), 15 November 1972; A/RES/3151G (XXVIII), 14 December 1973; A/RES/3324E (XXIX), 16 December 1974;

#### 5.4 Namibia

**5.45** Similarly, the Security Council called for the non-recognition of the presence of South Africa in Namibia, upon termination of the mandate over the territory by the General Assembly.<sup>257</sup> South Africa's continued presence in the territory was a violation of the Namibian people's right to self-determination.<sup>258</sup> In Resolution 264 (1969), the Council reiterated the General Assembly's decision to terminate South Africa's Mandate over South West Africa, and declared the continued presence of South Africa in the territory illegal.<sup>259</sup> Subsequently it requested all States to "refrain from all dealings with the Government of South Africa purporting to act on behalf of the Territory of Namibia",<sup>260</sup> and declared all acts performed on behalf of South Africa as illegal and invalid.<sup>261</sup>

**5.46** In Resolution 283 (1970), the Security Council adopted a policy of non-recognition, requesting States to refrain from any kind of relations with South Africa implying a recognition of that Government's authority over Namibia and calling on States to issue formal statements to the Government of South Africa indicating that they do not recognize any authority of South Africa in Namibia, and that South Africa's continued presence in the territory is illegal.<sup>262</sup>

**5.47** In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, this Court confirmed the illegality of South Africa's presence in Namibia and held that the Security Council resolutions were binding under Article 25 of the Charter.<sup>263</sup> It thus upheld

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2411D (XXX), 28 November 1975; A/RES/31/6A, 26 October 1976; on Bophuthatswana: A/RES/32/105N, 14 December 1977; on Venda: A/RES/34/93G, 12 December 1979; on Ciskei: A/RES/36/172A, 17 December 1981

<sup>257</sup> S/RES/264 (1969), 20 March 1969, para.1.

<sup>258</sup> S/RES/276 (1970), 30 January 1970, preamble; S/RES/283 (1970), 29 July 1970, preamble.

<sup>259</sup> S/RES/264 (1969), 20 March 1969, para.2.

<sup>260</sup> S/RES/269 (1969), 12 August 1969, para.7; S/RES/276 (1970).

<sup>261</sup> S/RES/276 (1970), 30 January 1970, para.2.

<sup>262</sup> S/RES/283 (1970), 29 July 1970.

<sup>263</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, p.16, at pp.52-53, paras.113-116.

the call for non-recognition, indicating the consequences flowing from the non-recognition.<sup>264</sup>

The Court held that Member States must:

“recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and ... refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.”<sup>265</sup>

### ***5.5 Turkish Republic of Northern Cyprus***

**5.48** The Turkish Republic of Northern Cyprus was created following hostilities in Cyprus and an invasion by Turkey in 1974. In 1983, the Security Council declared the TRNC to be “legally invalid” and called on States “not to recognize any Cypriot State other than the Republic of Cyprus”.<sup>266</sup>

### ***5.6 Kuwait***

**5.49** The occupation of Kuwait by Iraq, and the purported annexation of the territory to Iraq, were condemned by the Security Council. The Council called for the non-recognition of the annexation in several resolutions, and accompanied the policy of non-recognition with a series of sanctions, including blockades and embargoes.

**5.50** Resolution 661 (1990), adopted before the annexation of Kuwait, called upon all States “not to recognize any regime set up by the occupying power”.<sup>267</sup> In Resolution 662 (1990), adopted after the purported annexation, the Council “called upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”.<sup>268</sup> It further maintained that the annexation was null and void.<sup>269</sup>

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<sup>264</sup> *Ibid.*, p.55, paras.122-127.

<sup>265</sup> *Ibid.*, p.58, para.133(2).

<sup>266</sup> S/RES/541 (1983), 18 November 1983, para.7; S/RES/550 (1984), 11 May 1984, para.3.

<sup>267</sup> S/RES/661 (1990), 6 August 1990, para.9(b).

<sup>268</sup> S/RES /662 (1990), 9 August 1990, para.2.

<sup>269</sup> S/RES /664 (1990), 18 August 1990, para.3.

## **6. Relevance of recognition by the predecessor State and third States**

**5.51** The practice of collective non-recognition is only applied in very limited cases and only for good, evident reasons. Its rationale is to prevent the consolidation of status that general recognition, and concomitant participation in international relations, brings in cases where fundamental values or norms of international law are at stake. By contrast, in the absence of collective action by the international community, individual States are left to an appreciation of the position, the consequences of which are reflected in the practice of each State in dealing with the new entity on a State-to-State basis, in opening diplomatic relations and/or in extending formal recognition.

**5.52** When secession occurs, there will be a range of matters that the seceding State and the predecessor State need to regularize. Secession usually implies a series of claims and counterclaims on issues of property, succession, etc. The existence of such outstanding issues cannot be taken to preclude recognition by third States when it becomes clear that the independence of the new State is the only way forward.

**5.53** The practice of recognition in the case of Yugoslavia provides a good example. The situation was seen initially as one concerning the unilateral declarations of independence by some of the constituent republics of the SFRY. But when it became apparent that the Federation was dissolving, many third States extended recognition to the constituent republics that had declared their independence. Third parties, and eventually, all parties concerned, came to the conclusion that the dissolution of the SFRY was a fact, and acted accordingly. This characterization, for a considerable time unaccepted by Belgrade, influenced the handling of the situation from that point onwards.

**5.54** To summarise, just as collective non-recognition has legal significance in denying status to the entity in question, so widespread recognition is significant in confirming status. Since it is usually accorded piece-meal, recognition by all or virtually all States may take a considerable period to be achieved. By contrast there can be no mistaking – in cases such as those reviewed above – the practice of collective non-recognition, which has been maintained and been effective, even to the point of unanimity, over considerable periods of time.



## 7. Membership in the United Nations is not a pre-requisite for statehood

**5.55** Article 4 of the United Nations Charter provides that:

“1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”

**5.56** For an entity to be qualified for admission to the United Nations it must be a State and be judged to fulfil the other requirements of Article 4. That decision is made by the General Assembly on the recommendation of the Security Council.

**5.57** United Nations membership is not a condition for statehood; rather the reverse. As the Court said in the advisory opinion on *Admission of a State to the United Nations*:

“The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.”<sup>270</sup>

**5.58** Neither is the act of admission to the United Nations equivalent to recognition by individual States. A General Assembly resolution admitting a State to the United Nations is an act of the Organization. By contrast, recognition is a unilateral act by which a State recognizes that an entity has fulfilled the requirements of statehood.

**5.59** During the San Francisco Conference the Norwegian delegation proposed an amendment of the Dumbarton Oaks text to the effect that the new Organization would be empowered to recommend collective recognition: but the proposal was not adopted.<sup>271</sup> In 1950 the Secretary-General maintained that:

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<sup>270</sup> *Admission of a State to the United Nations (Charter, Art. 4)*, ICJ Rep 1948, p.57 at p.62.

<sup>271</sup> United Nations Conference on International Organization, Amendments and Observations on the Dumbarton Oaks Proposals, submitted by the Norwegian Delegation, 4 May 1945, Doc. 2, G/7, n.(1), pp.2-3.

“... the United Nations does not possess any authority to recognize either a new State or a new Government of an existing State. To establish the rule of collective recognition by the United Nations, would require either an amendment to the Charter or a treaty to which all members would adhere”.<sup>272</sup>

**5.60** Membership of the United Nations is thus *evidence* that the Member is a State. But it is not constitutive.

## **8. Conclusion**

**5.61** To summarise, international law does not accord to entities within a State any *right* to separate, whether by way of a declaration of independence or otherwise. But neither does it guarantee the territorial integrity of the State against internal developments which may lead to separation or even dissolution. In the absence of some pronounced international illegality leading to collective non-recognition, international law neither authorises nor prohibits secession.

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<sup>272</sup> Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, UN Doc. S/1466, 9 March 1950.

## CHAPTER 6

### THE DECLARATION OF INDEPENDENCE OF KOSOVO WAS NOT INCOMPATIBLE WITH INTERNATIONAL LAW

#### 1. The simple answer to the question

**6.1** The conclusion reached in paragraph 5.61 above has implications for the question asked by the General Assembly. The question is as follows:

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

**6.2** As has been seen, international law – as a general matter – neither forbids nor authorises any particular institution or institutions within a territory to declare independence. No exception to this general proposition is applicable here.

**6.3** The drafting history of General Assembly resolution 63/3 was set out in chapter 1 above. The United Kingdom pointed out some of the difficulties with the formulation of the question in its Note of 2 October 2008.<sup>273</sup> The proponents of the request declined to change it in any way.<sup>274</sup>

**6.4** In these circumstances, the United Kingdom considers that a literal answer to the question asked by the General Assembly would be appropriate. The United Kingdom accordingly considers that it would be a complete and sufficient answer to the question posed for the Court to state that international law does not address the legality of declarations of independence *per se* and that, accordingly, the Declaration of Independence by Kosovo is not incompatible with international law.

**6.5** It is of course well established that the Court has power to interpret and rephrase the question posed if it considers that this is necessary in order for it to provide appropriate

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<sup>273</sup> A/63/461, 2 October 2008; **Dossier No.5**.

<sup>274</sup> See above; paras 1.3-1.6, chapter 1

guidance to the requesting organ.<sup>275</sup> In the circumstances, it is not for the United Kingdom to propose the rewriting of the question. Without taking any position as to the appropriateness of the Court's reformulating the question, the United Kingdom sets out in the following sections of this chapter its views as to the subject matter underlying the request. In doing so, it is proposed to start with the specific question whether the Declaration of Independence was precluded by Security Council resolution 1244 (1999) or any subsequent decision of the Security Council adopted under Chapter VII of the Charter.

## **2. The Declaration of Independence was not precluded by Resolution 1244 (1999) or any subsequent Security Council decision**

**6.6** Neither Resolution 1244 (1999), nor any subsequent decision of the Security Council precluded the Declaration of Independence of Kosovo. Resolution 1244 (1999) mandated UNMIK to facilitate a framework within which a final settlement of the status of Kosovo would be reached, but it did not indicate any particular required outcome. The final settlement envisaged had to be consistent with the interests of the people of Kosovo and with international peace and security. The intent of the resolution was:

“to provide an interim administration in Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”<sup>276</sup>

**6.7** Furthermore, despite having the power under the Charter to intervene in the situation and to call for, or even demand, the non-recognition of Kosovo – a practice which has developed within the Council when faced with situations related to unlawful territorial arrangements – the Security Council has taken no such action in relation to the Declaration of Independence of Kosovo.

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<sup>275</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 136, at pp.153-154, para.38 (references to earlier cases omitted)..

<sup>276</sup> S/RES/1244 (1999), 10 June 1999, para.10; **Dossier No.34**. This purpose may be seen in the speeches of the Security Council representatives during the debates on the Resolution: See 4011th Meeting, 10 June 1999, S/PV.4011. See, for example, the statement by Mr Hasmy (Malaysia) stressing the “need to ensure one very fundamental element in the peace settlement: the fulfilment of the legitimate aspirations and expectations of the Kosovar Albanian people, the majority inhabitants of Kosovo. Any departure from this fundamental point will risk unravelling the entire exercise which is being painstakingly put together”, at p.16.

## 2.1 Resolution 1244 (1999)

**6.8** As explained in chapter 3 of this Statement, Resolution 1244 (1999) authorized the establishment of an international presence with both civil (UNMIK) and military (KFOR) components in the territory of Kosovo to restore peaceful conditions of life for inhabitants of the region and pave the way for a future settlement on the status of Kosovo.

**6.9** Effectively, Resolution 1244 (1999) created a new situation in Kosovo. The new situation created by the resolution was to last until a final settlement for the status of Kosovo could be achieved. The resolution, while stressing the need for a final settlement, is silent on the content of this settlement, a silence that was acknowledged by representatives to the Security Council during the debates of the resolution and in subsequent UN documents.<sup>277</sup>

**6.10** Rather, the resolution laid the groundwork for the achievement of the final settlement of Kosovo's status through the creation of an international administration of the territory. This was a notable departure from the situation of a firmly-constituted predecessor State with control over the territory in question – the situation which characterizes most cases of attempted secession. Not merely was the authority of the central government in Belgrade excluded in fact in Kosovo – it was *lawfully* excluded.<sup>278</sup> In the circumstances, the future of the territory ceased to be a matter for Serbia to decide on its own. It was a matter to be resolved having regard, in particular, to the interests and wishes of the inhabitants of Kosovo.<sup>279</sup>

**6.11** Resolution 1244 reaffirmed the commitment to Serbia's territorial integrity. The Council:

“Reaffirm[ed] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2.”

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<sup>277</sup> See, for instance, Security Council, S/PV.4011, 19 June 1999, Statement by Mr Türk (Slovenia), pp.10-11; Mr Hasmy (Malaysia), p.16; S/PV.4518, **Dossier No.103**; 24 April 2002, Statement by Mr Steiner (Special Representative of the Secretary-General for Kosovo and Head of the United Nations Interim Administration Mission in Kosovo), p.4; Mr Yap Ong Heng (Singapore), p.14.

<sup>278</sup> A limited number of Serb forces were re-introduced at a later stage, pursuant to para.4 of Resolution 1244 (1999); **Dossier No. 34**.

<sup>279</sup> S/RES/1244 (1999), Annex 2, para.5: **Dossier No. 34**.

**6.12** But this reference to Serbia's territorial integrity in Resolution 1244 (1999) did not involve any guarantee of the permanence and stability of the territorial borders of the State of Serbia. This was so *inter alia* for the following reasons:

- (1) The reference to territorial integrity was included in a preambular paragraph, not an operative clause of the resolution. It was a *considerandum*, not a guarantee.
- (2) The preambular paragraph referred to Annex 2, dealing with the interim administration and other immediate and medium-term priorities and principles. It did *not* guarantee the territorial integrity of Serbia as against the long-term "political solution to the Kosovo crisis", which was the subject of the Statement of 6 May 1999 endorsed in operative paragraph 1 of resolution 1244 (1999) and attached as Annex 1.
- (3) This is not merely a verbal distinction: it reflected an underlying reality. The intention of the drafters of the resolution was to leave all options open, up to and including independence. It was not to create a situation in which Serbia, excluded from the Government of Kosovo, would have a veto over its future and would be free – as it purported to do in November 2006 – simply to declare that Kosovo would always be an "integral part" of Serbia. That would have been to pre-empt the issue of future status before the negotiations had even started.
- (4) It should be stressed that when the Security Council intends to create an explicit guarantee or prohibition, or an obligation of non-recognition consequent on such a guarantee, it knows how to do so and it does so explicitly, not in a preamble.<sup>280</sup>

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<sup>280</sup> See the examples given above at paras.5.36-5.50

**6.13** As noted in chapter 3 above, UNMIK, which had plenary powers over the territory of Kosovo,<sup>281</sup> organized its structure for the implementation of its mandate in four “Pillars”.<sup>282</sup> In 2001, following the adoption of the Constitutional Framework, elections were held for the establishment of the Provisional Institutions of Self-Government of Kosovo, which began administering the territory in conjunction with UNMIK.<sup>283</sup> With the gradual and progressive devolution of power to the local institutions, the goal of UNMIK was the consolidation of the local institutions of self-government.<sup>284</sup> The government of Kosovo was thus distributed among local self-government institutions and the interim international presence.

**6.14** Resolution 1244 (1999) contained no limitation as to the development of these institutions. The Provisional Institutions of Self-Government of Kosovo were “provisional” within the framework of Resolution 1244 (1999), i.e., while the mandate of UNMIK and KFOR was being implemented.

**6.15** Moreover, the reference to “self-government” is not to be read as prescribing or limiting the final status outcome. No preference was expressed in Resolution 1244 (1999) as to whether self-government was to be achieved within Serbia or as an independent State.

## ***2.2 Security Council action following the Declaration of Independence***

**6.16** The Security Council has taken no action consequent upon the Declaration of Independence. In particular, it has not pronounced itself in relation to the recognition of Kosovo or the lawfulness of its establishment under international law. By contrast, the Security Council has in previous occasions called for the non-recognition of unlawful situations.

**6.17** The practice of collective non-recognition of internationally unlawful situations was reviewed in chapter 5. By contrast, in the case of Kosovo, there has been no such practice.

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<sup>281</sup> UNMIK/REG/1999/1, On the Authority of the Interim Administration in Kosovo, 25 July 1999, Sec.1.1; **Dossier No.138**.

<sup>282</sup> Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), S/1999/672, 12 July 1999, p.2, paras.5 ff; **Dossier No. 35**.

<sup>283</sup> UNMIK Regulation 2001/9 on Constitutional Framework for Provisional Self-Government on 15 May 2001, 15 May 2001; **Dossier No. 156**.

<sup>284</sup> S/RES/1244 (1999), 10 June 1999, para.11; **Dossier No. 34**.

In particular, the Security Council did not adopt (expressly or by implication) any resolution condemning the unilateral Declaration of Independence of Kosovo or calling for its non-recognition. Nor did the General Assembly. These facts provide an important indication that the Declaration of Independence, as issued by the Kosovo Self-Government Transitional Authorities was not in breach of international law.

### **3. The circumstances preceding and surrounding the Declaration of Independence of Kosovo**

**6.18** The fact that the competent organs of the United Nations neither condemned the Declaration of Independence nor called for non-recognition of Kosovo is to be explained in large measure by the preceding and surrounding circumstances.

#### ***3.1 Violation of Kosovo's rights pre-1999***

**6.19** Starting in the late 1980s, the Belgrade authorities began to abrogate the rights of the majority community in Kosovo and to suspend Kosovo's institutions. This conduct undermined the basis on which Kosovo had until then participated in the SFRY. It also presaged the disappearance of the federal system as a whole.

**6.20** The situation in Kosovo following the extinction of the SFRY was unusual. It was part of a drastically curtailed State in which previous constitutional safeguards and political balances had been destroyed. The consequences of this situation were not inevitable. By conciliation and compromise the Belgrade authorities might have maintained stability and respect for the equal rights of all segments of the population. The very opposite occurred, however.

**6.21** Chapter 2 above describes in some detail the erosion of autonomous Kosovo institutions and other breaches of human rights in the period from 1989 to 1999. This culminated in the humanitarian crisis of 1998-1999, during which a significant part of the civilian population was forcibly displaced from their homes and in many cases from Kosovo itself. By that time, no semblance of normal relations remained intact between the territory and the central government. Public order vanished, being replaced by violent and arbitrary



action by various units of the Yugoslav security apparatus. It was in response to these developments, in particular the humanitarian crisis and the inevitable responses to it, that the Security Council adopted Resolution 1244 (1999).

### ***3.2 The significance of Security Council Resolution 1244 (1999)***

**6.22** The significance of Resolution 1244 (1999) is in sharp contrast with the international measures previously taken. For example, the 18 October 1991 draft settlement proposal presented by Lord Carrington did not expressly refer to Kosovo, though it referred to “established provisions for the benefit of ethnic and national groups, and for autonomous provinces which were given a special constitutional status”. The terms of the “established provisions” were to be applied “fully and in good faith”.<sup>285</sup>

**6.23** Measures actually implemented were for monitoring, verification, and confidence-building. The OSCE Mission of Long Duration, the principal international modality in Kosovo prior to Resolution 1244 (1999), contained no enforcement component. Neither the Mission’s mandate nor any other proposed plans put forward any institutional solution. Under the international response prior to Resolution 1244 (1999), there was no loosening of the central government’s apparatus, much less replacement of that apparatus by Kosovo institutions. During the period of the Mission of Long Duration, the misconduct of the Belgrade government escalated.<sup>286</sup>

**6.24** With respect to the future configuration of Government in Kosovo, the most explicit terms adopted by the Security Council prior to Resolution 1244 (1999) were those in Resolution 1160 (1998). Resolution 1160 (1998) expressed support for “an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration”.<sup>287</sup> But there was no specific mandate for a new administrative or governmental structure in the territory. The concern expressed in Resolution 1160 (1998) was the same that led the Security Council to adopt the next three resolutions (Resolutions 1199 (1998), 1203 (1998) and 1239 (1999), namely to secure a cessation of violence, to address the humanitarian situation, and to seek a negotiated solution. Resolution 1160

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<sup>285</sup> See Chapter 3.

<sup>286</sup> See Chapter 2.

<sup>287</sup> S/RES/1160 (1998), 31 March 1998, para.5; **Dossier No. 9**.

neither established nor envisaged international or local institutions during a transition to a negotiated solution. Resolution 1160 (1998) required that “special police units” withdraw (they did not); but, as regards other “security forces”, it was concerned only with Yugoslavia’s obligation to cease action “affecting the civilian population”.<sup>288</sup>

**6.25** Resolution 1244 (1999) was completely different in character. Under paragraph 3 of the resolution, the Security Council demanded that Yugoslavia “begin and complete verifiable phased withdrawal from Kosovo of *all military, police and paramilitary forces* according to a rapid timetable...”<sup>289</sup> In the abnormal situation that had escalated in 1998-1999 from martial law to the systematic intimidation of the civilian population,<sup>290</sup> Kosovo had little by way of a normal civil presence, local or Yugoslav. The forces listed in paragraph 3 constituted the actual power of Yugoslavia in Kosovo. Paragraph 3 made clear that this power was to be removed root and branch, and supplanted by an “international security presence,” the arrival of which was to be “synchronized” with the Yugoslav withdrawal. As explained in chapter 3 above, as far as the Yugoslav effective presence was concerned, Resolution 1244 (1999) aimed for, and achieved, a clean slate.<sup>291</sup> Previous international mandates had been piecemeal and ultimately unsuccessful attempts to address an escalating series of abuses by Yugoslav forces in Kosovo. By contrast, Resolution 1244 (1999) established basic public order in Kosovo and created international and local transitional institutions as a framework for a final settlement of Kosovo’s internal and external affairs.

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<sup>288</sup> *Ibid.*, para.16(b)

<sup>289</sup> S/RES/1244 (1999), 10 June 1999, para.3 (emphasis added), **Dossier No. 34**

<sup>290</sup> A/RES/53/164, 9 December 1998, preamble. Para.5 referred to “the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) by the police and military.”

<sup>291</sup> As for the KLA and other armed Kosovo-Albanian groups, their disposition was governed by an “Undertaking of demilitarisation and transformation by the UCK”, which was offered by Hashim Thaçi, Commander-in-Chief, UCK, and received by Lt. Gen. Mike Jackson, Commander KFOR (COMKFOR) on 21 June 1999. The Undertaking is referenced in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, S/1999/779, p.2, para.4; **Dossier No. 37**. See Undertaking of Demilitarisation and Transformation by UCK, 21 June 1999: (1999) 45 *Keesing’s Record of World Events* 43015. All Kosovo personnel, except for individuals “not of local origin” (Undertaking para.23(e)), were permitted to stay, but only after demilitarization. Demilitarisation was overseen by a Joint Implementation Commission (JIC) based in Pristina and chaired by COMKFOR: Undertaking, para.20. Demilitarisation was formally confirmed as of 20 September 1999: see *KFOR Chronicle* 01/99, Monday, 27 September 1999, p.3. JIC was chaired by COMKFOR and consisted of senior commanders of KFOR and of the UCK and a representative from the interim civil administration. The Undertaking provided for no FRY participation in the JIC: Undertaking, paras.20-21.

### 3.3 *The international presence in Kosovo*

**6.26** The implementation of the mandate of Resolution 1244 (1999) had further transformative effects on the situation in Kosovo. The military component (KFOR) and the civil component (UNMIK) together comprised a full institutional structure for public order in the territory. They supplanted the Yugoslav military and paramilitary apparatus that had held sway before Resolution 1244 (1999) and had carried out atrocities against Kosovo's inhabitants. UNMIK Regulation 1999/1, promulgated on 25 July 1999 *inter alia* stated that all public property of Serbia or the FRY was now in UNMIK control and reiterated that UNMIK's powers in Kosovo were plenary.<sup>292</sup> The installation of KFOR and UNMIK in itself transformed the fabric of public power in Kosovo.

**6.27** As set out in chapter 3 above, the installation of KFOR and UNMIK did not lead to a static situation. Resolution 1244 (1999) and attendant provisions for an international administrative presence set in train a process of internal change. Relative to the laws and institutions of Kosovo, the process was comprehensive. Starting with a Joint Interim Administrative Structure (JIAS), Kosovo institutions were established, including the Kosovo Transitional Council, the Interim Administrative Council, a series of Administrative Departments, and Municipal Administrative Boards. A body of new legislation was adopted under the extensive reserved powers of UNMIK. UNMIK established courts and other administrative organs and chose personnel to fill them. With a view to the transition to self-government, a Working Group of representatives from Kosovo's political parties and communities was constituted for the purpose of drafting a new constitutional instrument. An act of the Special Representative on 15 May 2001 promulgated the Constitutional Framework for Provisional Self-Government.<sup>293</sup> The development of the 2001 constitutional framework went hand-in-hand with the development of new organs of self-government.<sup>294</sup> An Assembly of 120 elected members was created. Elections were held in November 2001.

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<sup>292</sup> UNMIK/REG/1999/1, On the Authority of the Interim Administration in Kosovo, 25 July 1999, Sec.1.1; **Dossier No.138.**

<sup>293</sup> Chapter 4, para.3.27.

<sup>294</sup> Chapter 4, para.3.28.

### ***3.4 The unsustainability of the situation established under Resolution 1244 (1999)***

**6.28** The situation established under Resolution 1244 (1999) was, however, unsustainable in the long term. As the Secretary-General's Special Envoy noted in his Report on Kosovo's future status: "... Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation."<sup>295</sup>

**6.29** Resolution 1244 (1999) contained multiple references to a future final settlement (paras.11(a), (c), (f), Annex 2, para.8), in contradistinction to the interim measures and provisional institutions established under its mandate. Moreover, the process envisaged under Resolution 1244 (1999) set the course for the eventual completion of the work of the mandate. As provided under paragraph 11 of Resolution 1244 (1999), the international civil presence in Kosovo operated together with "Kosovo's local provisional institutions". The purpose of setting up local provisional institutions was to transfer authority from the international civil presence over time, until all authority was vested in local institutions, whose character at that point would – unless otherwise agreed – no longer be provisional.

**6.30** That the situation after 1999 rested on the support of the Security Council and of the States contributing to the international civil and security presences was also clear. Paragraph 19 of Resolution 1244 (1999) established an initial term of 12 months for the international civil and security presences. The term was to continue unless the Security Council decided otherwise. The Security Council permitted the presences to continue after the initial term. However, in stipulating periodic review (para.20) and underscoring the authority of the Security Council to discontinue the situation, the legal mandate reflected the reality that the situation was not intended to be permanent in character.

**6.31** One relevant aspect of this was the sheer cost of the international presence. For example, UNMIK annual budgets for the years 2005-8 were as follows:

|        |                 |
|--------|-----------------|
| 2005/6 | US\$239,889,800 |
|--------|-----------------|

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<sup>295</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, A/2007/168, 26 March 2007, p.2, para.4 ; **Dossier No.203**.

|        |                                |
|--------|--------------------------------|
| 2006/7 | US\$217,962,000                |
| 2007/8 | US\$210,676,800 <sup>296</sup> |

**6.32** It is an illusion to think that such expenditures could have been sustained indefinitely. Notably, it is anticipated that expenditure for 2009/10 will be reduced to approximately US\$47 million.<sup>297</sup>

**6.33** The situation under Resolution 1244 (1999) was also unsustainable from the macro-economic point of view. Paragraph 17 *inter alia* welcomed the European Union’s efforts to foster economic development. The ambiguities inherent in unsettled status, however, posed a barrier to economic development. A report prepared in 2002 and primarily based on the work of an IMF team that visited Kosovo in 2001, for example, noted that “uncertainty complicates the establishment of property rights and the process of economic policymaking.”<sup>298</sup> The report concluded that “domestic and especially foreign private investors are unlikely to undertake major projects in Kosovo as long as uncertainty about the province’s final status persists.”<sup>299</sup> The Special Envoy in 2007 also noted that the unsettled question of status impeded economic development.<sup>300</sup>

**6.34** The temporary character of the situation created after 1999 under Resolution 1244 (1999) is further reflected by the new governing arrangement that has since emerged. Significant changes have taken place in Kosovo in particular since the Declaration of Independence in 2008. These, in the words of the Secretary-General, have required the “reconfiguration of UNMIK”, which has taken place “within the framework of resolution 1244 (1999)”.<sup>301</sup> In the view of the Secretary-General, Resolution 1244 (1999) comprised both the mandate to create a new situation after 1999 and the capacity to accommodate the transition that would bring that situation to a close.

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<sup>296</sup> See <http://www.unmikonline.org/intro.htm>.

<sup>297</sup> See UNMIK budget proposal for 1 July 2009-30 June 2010; A/63/803.

<sup>298</sup> Dimitri G. Demekas, Johannes Herderschee & Davina F. Jacobs, *Kosovo. Institutions and Policies for Reconstruction and Growth* (Washington, DC: International Monetary Fund, 2002) p.4.

<sup>299</sup> *Ibid.*, p.14.

<sup>300</sup> A/2007/168, para.4.

<sup>301</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, p.11, para.49; **Dossier No. 90**.

### 3.5 Exhaustion of avenues for bilateral settlement

**6.35** According to the Special Envoy, by March 2007 the “potential [for negotiations] to produce any mutually agreeable outcome on Kosovo’s status [was] exhausted.” Moreover, “[n]o amount of additional talks, whatever the format, will overcome this impasse.”<sup>302</sup> The Special Envoy’s terms of reference had provided that it was for him to determine “the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground”.

**6.36** The Special Envoy expressed these conclusions after attempts had been made to formulate a settlement which would have established Kosovo autonomy in a formal relationship with Serbia. As detailed in chapter 3, none of the attempts succeeded. The process of searching for a mutually acceptable settlement was drawn out. It had absorbed the energies of the Secretary-General, his Special Envoy, the Security Council, the Contact Group, UNMIK, and the provisional institutions of self-government in Kosovo through 2006 and 2007. Chapter 3 set out in detail the post-Security Council Resolution 1244 (1999) search for a solution and the eventual breakdown of the bilateral settlement process. By the time of the adoption of the Declaration of Independence in 2008, the avenues for bilateral settlement had been exhausted.

**6.37** Where the avenues for a bilateral, negotiated settlement have been exhausted, and no renewed injunction to negotiate has been issued, for example by the Security Council, there exists no general international law rule requiring negotiations to continue. In the *Oil Platforms Case*, jurisdiction depended on whether the dispute had “not [been] satisfactorily adjusted by diplomacy”.<sup>303</sup> This was held not to entail any particular course of diplomatic negotiations, still less any given outcome.<sup>304</sup> Where negotiations have been prescribed by treaty, such as under Articles 74 and 83 of the Law of the Sea Convention, the treaty rule

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<sup>302</sup> A/2007/168, Dossier No. 203

<sup>303</sup> The requirement under Article XXI, paragraph 2 of the Treaty of Amity, Economic and Consular Rights between the United States and Iran, 15 Aug 1955: *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ Rep 2003, p.161, at p.210, para.6.

<sup>304</sup> *Oil Platforms* ICJ Rep 2003, p.161, at p.210, para.107.

does not “require that ... negotiations should be successful”.<sup>305</sup> To negotiate is “rather an obligation of conduct than of result”.<sup>306</sup>

**6.38** In respect of Kosovo, further negotiations were futile. By 2008, it could be said that the avenues for bilateral settlement were truly exhausted.

### ***3.6 Conclusions of the Ahtisaari Report***

**6.39** This is not just an *ex parte, post hoc* assessment. It was the conclusion reached at the time by knowledgeable, experienced authorities mandated by the United Nations to determine precisely this point. The Comprehensive Proposal for the Kosovo Status Settlement, presented to the Security Council on 26 March 2007 by the Special Envoy, Mr Martti Ahtisaari,<sup>307</sup> and the Report of the Special Envoy of the Secretary-General on Kosovo’s future status,<sup>308</sup> have been discussed in chapter 3 above. The Special Envoy concluded that the point had been reached beyond which any further attempt at negotiated settlement was futile. Given the extended course of negotiations, and having consulted the parties and the Secretary-General, the Special Envoy also adopted a conclusion as to what substantive final result should be established for Kosovo:

“Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.”<sup>309</sup>

**6.40** In support of this conclusion, the Special Envoy noted *inter alia* that it had been eight years since there had been any effective Serbian rule over Kosovo, and that the recent history

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<sup>305</sup> *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* ICJ Rep 2002, p.303, at p.424, para.244.

<sup>306</sup> *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of the Congo v Rwanda)* Order of 10 July 2002 (Provisional Measures), Sep. Op. Judge *ad hoc* Mavungu, ICJ Rep 2002, p.219, at p.280, para.30.

<sup>307</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007; **Dossier No. 204**.

<sup>308</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 26 March 2007, pp.2 *ff*, **Dossier No. 203**.

<sup>309</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 26 March 2007, p.2, para.5; **Dossier No. 203**.

of brutal repression, loss of civilian lives, and displacement and expulsion “on a massive scale” made a return to any form of Serbian rule “simply not tenable”.<sup>310</sup>

**6.41** The Special Envoy’s Comprehensive Proposal for the Kosovo Status Settlement elaborated a plan for the independence of Kosovo under international supervision. In particular, Kosovo would “have the right to negotiate and conclude international agreements and the right to seek membership in international organizations.”<sup>311</sup> Kosovo would adopt national symbols.<sup>312</sup> The Comprehensive Proposal, in its provisions concerning external relations, projected the independent international status of Kosovo. These included provisions relating to external debt,<sup>313</sup> to the proposed International Civilian Representative,<sup>314</sup> and to privileges and immunities of the proposed International Military Presence.<sup>315</sup> With the exception of the debt provisions, the provisions concerning Kosovo’s external relations made no provision for participation by the Serbian government.

#### **4. Subsequent developments**

**6.42** Since the Declaration of Independence on 17 February 2008, significant institutional developments have occurred in Kosovo. These include the winding down of UNMIK, the adoption and implementation of a new Constitution, strengthening of links through the European Union’s EULEX Project and substantial third State recognition. There is simply no going back.

##### ***4.1 Response of the UN Secretary-General and UN Special Representative***

**6.43** On 17 February 2008, the Secretary-General said as follows:

“I have been informed by my Special Representative and Head of the United Nations Interim Administration Mission in Kosovo, Joachim Rucker, that the Assembly of

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<sup>310</sup> *Ibid.*, paras.6-7.

<sup>311</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, Art.1, para.5; **Dossier No. 204**.

<sup>312</sup> *Ibid.*, para.7.

<sup>313</sup> *Ibid.*, Annex VI.

<sup>314</sup> *Ibid.*, Annex IX.

<sup>315</sup> *Ibid.*, Annex XI, Art.2, para.3.



Kosovo's Provisional Institutions of Self-Government held a session earlier today during which it adopted a resolution declaring Kosovo's independence.

I am informed that the declaration pledges continued adherence to resolution 1244, expresses gratitude to the United Nations for what it has done for Kosovo and pledges to continue to work constructively with UNMIK. Kosovo Prime Minister Thaci reaffirmed Kosovo's commitment to the Ahtisaari Settlement Proposal and stated that there would be equal opportunities and no discrimination against any of Kosovo's inhabitants."<sup>316</sup>

**6.44** The Secretary-General noted that the situation in Kosovo was "calm".<sup>317</sup>

**6.45** The Special Representative, in exercising the authority vested in UNMIK, had the power to "change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration."<sup>318</sup> The Special Representative also had the power to remove any official in the interim civil administration.<sup>319</sup> Faced with the Declaration of Independence, the Special Representative took no action.

**6.46** The International Civilian Representative, "on the first anniversary of the independence of the Republic of Kosovo," extended "warmest congratulations" to all Kosovo citizens.<sup>320</sup>

#### ***4.2 Evolution of UNMIK since the Declaration of Independence***

**6.47** The Kosovo Constitution, in force on 15 June 2008, "does not envisage a real role for UNMIK ..."<sup>321</sup> Other measures adopted by Kosovo authorities have further resulted in Kosovo institutions assuming UNMIK's powers. According to the Secretary-General in his Report of 28 March 2008, the first after the Declaration of Independence, "[t]he declaration of independence and subsequent events in Kosovo have posed significant challenges to the

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<sup>316</sup> Press release, SG/SM/11424, 17 February 2008; **Annex 25**

<sup>317</sup> *Ibid* and SG/SM/11428 – SC/9255, 18 February 2008; **Annex 25**

<sup>318</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, S/1999/779, p.9, para.39; **Dossier No.37**.

<sup>319</sup> *Ibid.*, p.9, para.40.

<sup>320</sup> International Civilian Office (ICO) News Release 07/2009, 15 February 2009; **Annex 26**

<sup>321</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 July 2008: S/2008/458 p.1, para.2; **Dossier No.89**

ability of UNMIK to exercise its administrative authority in Kosovo.”<sup>322</sup> According to the Secretary-General in his Report of 15 July 2008, “[t]hese events have contributed to creating a profoundly new reality in which UNMIK can no longer perform as effectively as in the past the vast majority of its tasks as an interim administration.”<sup>323</sup> Four months after the Declaration of Independence, the Secretary-General reiterated that developments in Kosovo “pose[d] significant challenges to the Mission’s ability to exercise its administrative authority.”<sup>324</sup> In that context, the Secretary-General said he believed “that the United Nations is confronting a new reality in Kosovo ...”<sup>325</sup> The Secretary-General observed in conclusion that “[f]ollowing the entry into force of the Kosovo constitution ... UNMIK will no longer be able to perform effectively the vast majority of its tasks as an interim administration.”<sup>326</sup> UNMIK indeed faced “fundamental challenges to its authority and role”, with the result that by summer 2008 it could no longer “perform as effectively as in the past the vast majority of its tasks as an interim administration throughout all of Kosovo.”<sup>327</sup>

**6.48** Following the Declaration of Independence, the European Commission informed the Secretary-General’s Special Representative that it would end funding for the economic reconstruction pillar of UNMIK (pillar IV) as from 30 June 2008. The Government of Kosovo at the same time passed legislation, which entered into force on 15 June 2008, taking over tasks and competencies of UNMIK under pillar IV. This marks a reduction in UNMIK authority over economic reconstruction in Kosovo.<sup>328</sup> In fact, UNMIK “ceased all substantive operations” under pillar IV as of 30 June 2008.<sup>329</sup> Reflecting the transition, UNMIK on 26 June 2008 announced the start of a “reconfiguration process”. Under the reconfiguration process, the UNMIK Department of Civil Administration and the Office of

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<sup>322</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 Mar 2008: S/2008/211, p.7, para.30; **Dossier No.89**

<sup>323</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 July 2008: S/2008/458 p.1, para.3; **Dossier No.89**

<sup>324</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008: S/2008/354, p.3, para.10; **Dossier No.88**.

<sup>325</sup> Ibid.

<sup>326</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008: S/2008/354, p.5, para.17; **Dossier No.88**.

<sup>327</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 July 2008: S/2008/458, p.9, para.29; **Dossier No.89**

<sup>328</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, pp.2-3, para.9; **Dossier No.88**.

<sup>329</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, p.6, para.20; **Dossier No.90**.

Communities, Returns and Minority Affairs have ceased operations. Their residual activities will be incorporated into the UNMIK Office of Political Affairs.<sup>330</sup>

**6.49** In connection with the adoption of the Constitution on 9 April 2008, the Government of Kosovo indicated that it would welcome a continued United Nations presence in Kosovo carrying out “limited residual tasks.”<sup>331</sup> The United Nations role in Kosovo, post-Constitution, was seen to entail tasks in four fields:

- (i) monitoring and reporting;
- (ii) facilitating Kosovo’s engagement in international agreements;
- (iii) facilitating dialogue between the Kosovo and Serbian governments on issues of practical concern;
- (iv) functions relating to police, courts, customs, transportation and infrastructure, boundaries, and Serbian patrimony.<sup>332</sup>

**6.50** The last Regulation listed under the official UNMIK documents register as having been promulgated by UNMIK was dated 14 June 2008,<sup>333</sup> the day before entry into force of the Constitution. The last Administrative Direction listed under the official UNMIK documents register as having been adopted by UNMIK was also dated 14 June 2008.<sup>334</sup>

**6.51** By autumn 2008, the “challenges” to UNMIK to which the Secretary General referred in his reports since the Declaration of Independence had been addressed. This was done by re-calibrating the activities of the Mission to account for the operation of permanent Kosovo institutions. Since the Declaration of Independence and adoption of the new Constitution, responsibility for maintenance of public order in Kosovo (with the partial exception of Serb-majority areas) has passed from the international administration to Kosovo institutions.

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<sup>330</sup> *Ibid.*, p.7, para.22..

<sup>331</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, p.2, para.7; **Dossier No.88**.

<sup>332</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, p.4, para.16. The details were set out in the Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr. Boris Tadić, S/2008/354, Annex I; **Dossier No.88**.

<sup>333</sup> UNMIK/REG/2008/34, 14 June 2008, On the Promulgation of the Law on the Supplementation and Amendment of the Labour Inspectorate Law adopted by the Assembly of Kosovo; [http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008\\_34.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008_34.pdf)

<sup>334</sup> UNMIK/AD/2008/7, 14 June 2008, Implementing UNMIK Regulation No.2006/25 on a Regulatory Framework for the Justice System in Kosovo; [http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008\\_07.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2008ads/ADE2008_07.pdf)

### 4.3 Representative government and development of public institutions

**6.52** As previously noted, the Kosovo Assembly adopted a Constitution on 8 April 2008,<sup>335</sup> which entered into force on 15 June 2008.<sup>336</sup> Prior to that date, the Government also established representative institutions at the level of municipalities.<sup>337</sup> Laws covering *inter alia* decentralization were passed with the adoption of the new Constitution.<sup>338</sup> Under the legislation, by March 2008, municipal boundaries were set and the number of municipalities in Kosovo increased from 30 to 38.<sup>339</sup>

**6.53** Laws authorizing the creation of a Kosovo Foreign Ministry and an Intelligence Service were also passed.<sup>340</sup> A Central Election Commission and a Ministry for Security Forces were established by November 2008.<sup>341</sup> The Kosovo Protection Corps (KPC), an interim institution, is being phased out.<sup>342</sup>

**6.54** A complication in the development of institutions of representative self-government after the Declaration of Independence has been the boycott of Kosovo institutions by the Serb component of the population. This has included a boycott of the Kosovo Assembly by Kosovo-Serb deputies,<sup>343</sup> of UNMIK Customs, the Kosovo Police Service, the Kosovo Corrections Service, the judicial system, municipal administration, and UNMIK railways by

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<sup>335</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, p.2, para.7; **Dossier No.88**.

<sup>336</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 July 2008, S/2008/458, p.2, para.4; **Dossier No.89**.

<sup>337</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 March 2008, S/2008/211, p.4, para.17; **Dossier No.86**.

<sup>338</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008, S/2008/458, p.2, para.4; **Dossier No.89**.

<sup>339</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 March 2008, S/2008/211, p.5, para.19; **Dossier No.86**.

<sup>340</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008, S/2008/458, p.2, para.4; **Dossier No.89**.

<sup>341</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, p.1, para.2; *ibid.*, Annex II, para.2; **Dossier No.90**.

<sup>342</sup> *Ibid.*, pp.2-3, para.7. UNMIK Regulation No. 1999/8, 20 September 1999 (**Dossier No.141**) had established the Kosovo Protection Corps. Its dissolution was projected under Art.9, para.6 of the Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1; and Annex VIII, Art.6. The Comprehensive Proposal also called for the establishment of the Kosovo Security Force as a replacement for the KPC: *ibid.*, Art.9, para.4 and Annex VIII Art.5; **Dossier No.204**.

<sup>343</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 March 2008, S/2008/211, p.1, para.3; **Dossier No.86**.

Kosovo Serb personnel,<sup>344</sup> and of Reconstruction Implementation Commission meetings by senior representatives of the Serbian Orthodox Church and the Serbian Institute for the Protection of Monuments.<sup>345</sup> However, 6 of the Kosovo-Serb members of the Kosovo Assembly who had boycotted the Assembly after the Declaration of Independence ended their boycott on 19 March 2008.<sup>346</sup> As at 24 November 2008, 7 Kosovo Serb Assembly members were regularly attending Assembly sessions.<sup>347</sup>

**6.55** A result of the development of Kosovo legislative, executive and administrative institutions has been the curtailment of effective executive decision-making by the Secretary-General's Special Representative. According to the Secretary-General's Report dated 24 November 2008, since the Declaration of Independence "the space in which UNMIK can operate has changed". "[V]ery few executive decisions have been issued by [the] Special Representative since 15 June [2008]."<sup>348</sup> This indicates the transition of effective control from the international administration to the Kosovo government. As of November 2008, the Kosovo Assembly ceased referring to the powers of the Special Representative when adopting legislation.<sup>349</sup>

#### *4.4 Developments in the field of the rule of law*

**6.56** In June 2008, the European Union offered to assume a greater role in the field of rule of law matters. Serbia and Kosovo-Serbs have accepted this development, provided that it takes place under the "overall status-neutral authority of the United Nations."<sup>350</sup> The Secretary-General, in June 2008, observed that an enhanced EU operational role should be part of a "recalibrated international presence that is better suited to address current and

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<sup>344</sup> *Ibid.*, p.2, para.8.

<sup>345</sup> *Ibid.*, p.5, para.20.

<sup>346</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008, S/2008/458, Annex I, para.1, **Dossier No.89**.

<sup>347</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, Annex II, para.4; **Dossier No.90**.

<sup>348</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, pp.6-7, para.21; **Dossier No.90**.

<sup>349</sup> *Ibid.*, p.1, para.2.

<sup>350</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, p.3, para.12; **Dossier No.88**. The Secretary-General saw the enhanced European Union role in the rule-of-law mission as "usefully complement[ing] the work of the United Nations." *Ibid.*, p.4, para.15.

emerging operation requirements in Kosovo.”<sup>351</sup> The EU would operate under Resolution 1244 (1999) and under a “United Nations umbrella” headed by the Secretary-General’s Special Representative.<sup>352</sup> By November 2008, EULEX (the acronym for the European Union rule of law program in Kosovo) had taken over office space in Pristina and field offices elsewhere in Kosovo no longer needed by UNMIK.<sup>353</sup>

**6.57** The attempt by Kosovo-Serbs to establish parallel public administrative bodies in the parts of the country containing Serb majorities has presented difficulties. Attempts have been made by the Government of Serbia to assert its authority in Kosovo Serb-majority areas, for example by exerting operational control over railways and courts there.<sup>354</sup> Four municipal structures in the north of Kosovo purportedly function on the basis of the Serbian law on local self-government. The Kosovo-Serbs in the municipalities in which they hold majorities do not recognize EULEX; they recognize UNMIK as the “sole and legitimate civilian international interlocutor under Resolution 1244 (1999).”<sup>355</sup>

**6.58** Boycott of courts by Kosovo-Serb personnel in Kosovo Serb-majority areas resulted in the cessation of judicial activities and an “ongoing legal vacuum”.<sup>356</sup> In Mitrovica, the court reopened on 3 October 2008 after the Special Representative negotiated an arrangement with the Government of Serbia whereby international judges and prosecutors would staff the courthouse temporarily.<sup>357</sup> Courts in other municipalities remained closed. A further problem has arisen in municipalities where competing Kosovo-Serb and Kosovo-Albanian administrations exist.<sup>358</sup> The processing of property claims has been hindered by the decision of the Government of Serbia to close the offices of the Kosovo Property Agency (KPA) in Belgrade, a measure hindering access to property records material to outstanding claims.<sup>359</sup> Notwithstanding the closure of the KPA offices in Belgrade, the Kosovo Property Claims

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<sup>351</sup> *Ibid.*, p.5, para.19.

<sup>352</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008, S/2008/458, pp.1-2, para.3, p.9, para.30; **Dossier No.89**.

<sup>353</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, p.7, para.23; **Dossier No.90**.

<sup>354</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008, S/2008/458, p.2, para.5; **Dossier No.89**.

<sup>355</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 Nov 2008: S/2008/692, p.2, paras.4-5; **Dossier No.90**.

<sup>356</sup> *Ibid.*, p.3, para.8.

<sup>357</sup> *Id.*

<sup>358</sup> *Ibid.*, p.3, para.10.

<sup>359</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, p.4, para.14; **Dossier No.90**.

Commission as of November 2008 had adjudicated over fourteen thousand claims, 39% of the claims received.<sup>360</sup> The Kosovo Cadastral Agency has taken steps to establish a system of property registration for apartments throughout Kosovo.<sup>361</sup>

#### ***4.5 Respect for human rights in Kosovo***

**6.59** During its period of full operation, UNMIK delivered human rights reports under the UN treaty system, e.g. to the Committee on Economic, Social and Cultural Rights.<sup>362</sup> Human rights mechanisms within Kosovo were progressively developed during the period of interim administration. By the time of the Declaration of Independence, Kosovo Government ministries had complied with approximately 70% of the Kosovo Prime Minister's administrative instructions regarding establishment of human rights units.<sup>363</sup> An Acting Ombudsperson for human rights, in place for more than two years, is to be replaced by an Ombudsperson chosen by the Kosovo Assembly.<sup>364</sup>

**6.60** The Declaration of Independence states that Kosovo fully accepts the obligations contained in the Comprehensive Proposal for the Kosovo Status Settlement.<sup>365</sup> Annex II to the Comprehensive Proposal contains extensive provisions protecting the rights of national or ethnic, linguistic, or religious groups "traditionally present on the territory of Kosovo".<sup>366</sup> Annex I requires that the Constitution provide that the rights and freedoms contained in certain international human rights instruments be "directly applicable in Kosovo and have priority over all other law" and that these be entrenched as against any future constitutional amendment.<sup>367</sup> The Constitution, consistent with the Comprehensive Proposal for the

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<sup>360</sup> *Ibid.*, Annex II, para.36.

<sup>361</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 March 2008, S/2008/211, Annex I, para.65; **Dossier No.86**.

<sup>362</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 March 2008, S/2008/211, p.6, para.22; **Dossier No.86**.

<sup>363</sup> *Ibid.*, p.6, para.23.

<sup>364</sup> *Ibid.*, p.6, para.25. The Kosovo Assembly had not appointed an Ombudsperson as of the Eighth Annual Report of the Republic of Kosovo Ombudsperson Institution, 21 July 2008: see Eighth Annual Report, pp.7-8.

<sup>365</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 March 2008, S/2008/211, p.1, para.3; **Dossier No.86**.

<sup>366</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, Annex II, Arts.1 *et seq*; **Dossier No.204**.

<sup>367</sup> *Ibid.*, Annex I, Art.2, para.1. The international instruments incorporated by reference under Art. 2 are the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; ICCPR and its Protocols; Council of Europe Framework Convention for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination;

Kosovo Status Settlement, contains extensive provision for group minority rights and individual human rights.

**6.61** In addition to adopting the Comprehensive Proposal, the Kosovo Government has kept in place the human rights mechanisms set up during the interim period, including reporting to UN treaty bodies and other international monitoring.

#### ***4.6 Recognition of Kosovo by the international community***

**6.62** Since the Declaration of Independence, Kosovo has been accorded substantial levels of international recognition. According to available information, the following 57 States recognized Kosovo at the dates noted:

|                |                  |
|----------------|------------------|
| Afghanistan    | 18 February 2008 |
| Albania        | 18 February 2008 |
| Australia      | 19 February 2008 |
| Austria        | 28 February 2008 |
| Belgium        | 24 February 2008 |
| Belize         | 7 August 2008    |
| Bulgaria       | 20 March 2008    |
| Burkina Faso   | 24 April 2008    |
| Canada         | 18 March 2008    |
| Colombia       | 6 August 2008    |
| Costa Rica     | 18 February 2008 |
| Croatia        | 19 March 2008    |
| Czech Republic | 21 May 2008      |
| Denmark        | 21 February 2008 |
| Estonia        | 21 February 2008 |
| Finland        | 7 March 2008     |
| France         | 18 February 2008 |
| Gambia         | 7 April 2009     |
| Germany        | 20 February 2008 |
| Hungary        | 19 March 2008    |
| Iceland        | 5 March 2008     |
| Ireland        | 29 February 2008 |
| Italy          | 21 February 2008 |
| Japan          | 18 March 2008    |
| Latvia         | 20 February 2008 |
| Liberia        | 30 May 2008      |
| Liechtenstein  | 25 March 2008    |

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Convention on the Elimination of all Forms of Discrimination Against Women; Convention on the Rights of the Child; and Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.



|                                  |                   |
|----------------------------------|-------------------|
| Lithuania                        | 6 May 2008        |
| Luxembourg                       | 21 February 2008  |
| Macedonia                        | 9 October 2008    |
| Malaysia                         | 14 October 2008   |
| Malta                            | 21 August 2008    |
| Micronesia                       | 5 December 2008   |
| Monaco                           | 19 March 2008     |
| Montenegro                       | 9 October 2008    |
| Netherlands                      | 4 March 2008      |
| Norway                           | 28 March 2008     |
| Panama                           | 16 January 2009   |
| Peru                             | 22 February 2008  |
| Poland                           | 26 February 2008  |
| Portugal                         | 7 October 2008    |
| Republic of Maldives             | 19 February 2009  |
| Republic of Nauru                | 23 April 2008     |
| Republic of Palau                | 9 March 2009      |
| Republic of the Marshall Islands | 17 April 2008     |
| Samoa                            | 15 September 2008 |
| San Marino                       | 11 May 2008       |
| Senegal                          | 19 February 2008  |
| Sierra Leone                     | 13 June 2008      |
| Slovenia                         | 5 March 2008      |
| South Korea                      | 28 March 2008     |
| Sweden                           | 4 March 2008      |
| Switzerland                      | 27 February 2008  |
| Turkey                           | 18 February 2008  |
| United Arab Emirates             | 14 October 2008   |
| United Kingdom                   | 18 February 2008  |
| United States                    | 18 February 2008  |

**6.63** The Kosovo Government on 17 June 2008 authorized the establishment of 9 embassies in UN Member States that had recognized Kosovo.<sup>368</sup> By November 2008, 10 diplomatic missions had been opened.<sup>369</sup>

## 5. Conclusions

**6.64** The question asked of the Court is whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law.

<sup>368</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 15 July 2008, S/2008/458, p. 2, para. 4; **Dossier No.89**.

<sup>369</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692, p. 1, para. 2; **Dossier No.90**.

**6.65** It would be a complete and sufficient answer to the question for the Court to state that international law does not address the legality of declarations of independence *per se* and that, accordingly, the Declaration of Independence by Kosovo is not incompatible with international law. As noted previously in chapters 1 and 4, the Institutions were representative of the people of Kosovo as a whole. International law did not prevent them acting as they did.

**6.66** If the Court construes the question to focus on whether the Declaration of Independence is in accordance with a wider range of factors, the conclusion is no different. The following points are stressed by way of conclusion.

**6.67** Unlike previous measures, Resolution 1244 (1999) specified a full-scale international interim administration for Kosovo. It did not, however, predetermine the final status of Kosovo. The operative provisions of Resolution 1244 (1999), which referred to Kosovo enjoying substantial autonomy “within” Yugoslavia (para.10 and Annex 2, para.5), concerned only the interim administration that commenced in 1999. Those provisions did not constrain or predetermine the form or substance of the final settlement. Taking account of Resolution 1244 (1999) as a whole, it is clear that the resolution neither required that Kosovo remain within Yugoslavia nor precluded its independence as a final status. Resolution 1244 (1999) did not prohibit or preclude the independence of Kosovo. Nor did it grant Serbia a veto over proposals for a final settlement.

**6.68** By the terms of Resolution 1244 (1999), the new international administration and interim local institutions were not super-imposed upon a pre-existing Yugoslav apparatus or set up in parallel with it. There was complete discontinuity with the military, paramilitary and police apparatus recently removed from Kosovo. The new administrative situation found its legal basis in Security Council action. The measures taken were internationally lawful.

**6.69** Although Resolution 1244 (1999) did not prescribe the form a final settlement would take, it referred repeatedly to the eventual attainment of that settlement (paras.11(a), (c), (f), Annex 2, para.8). Moreover, the mandate provided for the progressive transition of authority from the international civil presence to local institutions of self-government (paras.11 (a), (c),

(d), (f) – a process which, carried to its conclusion, would eventually bring the international civil presence to an end.

**6.70** Neither the General Assembly nor the Security Council condemned the independence of Kosovo or called for its non-recognition. This is itself an indication of the compatibility of Kosovo’s declaration of independence with international law. It does not stand alone. A large number of States have recognized Kosovo’s independence. In none of the post-1945 cases of controverted secession reviewed in chapter 5 above did the number of recognizing States rise above a handful.<sup>370</sup> The contrast is striking.

**6.71** The Court is not asked to review the individual acts of recognition noted above. It is asked whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law. Whatever clarification in interpretation might be adopted, the developments reviewed in this chapter are highly relevant in answering the underlying question. The following points are emphasised:

- (1) The question concerns international law, not the law of the predecessor State or the law applied in Kosovo prior to the declaration. All unilateral declarations of independence are by definition contrary to – or at least not provided for under – the law of the predecessor State.
- (2) The competence of the constitutional authority of the Provisional Institutions of Self-Government to issue and implement the Declaration of Independence is not before the Court. It is significant, however, that:

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<sup>370</sup> The largest number appears to have been Biafra, which was recognized by 5 States: Tanzania (13 April 1968), Statement by the Government of Tanzania issued on 13 April 1968, reprinted in Anthony Hamilton Millard Kirk-Greene ed *Crisis and conflict in Nigeria: a documentary sourcebook 1966-1969* (London: Oxford University Press, 1971) v. 2 p. 211, doc 148; Gabon (8 May 1968) *Fraternité Matin* (Abidjan), 9 May 1968, cited in John J. Stremlau *The International Politics of the Nigeria Civil War 1967-1970* (Princeton: Princeton University Press, 1977) p 138 n 83; Ivory Coast/Côte d’Ivoire (14 May 1968) *Fraternité Matin* (Abidjan), 15 May 1968, cited in Stremlau p. 139, n. 87; Zambia (20 May 1968), Statement by the Zambian Foreign Minister issued in Lusaka, Zambia House Press Release No. 750/1968, 20 May 1968, reprinted in Kirk-Greene v. 2, p. 221, doc. 155; Haiti (23 March 1969), sourced to interviews by author, Stremlau p 141. See also as to Haiti *Confidential State Department Central Files: Biafra-Nigeria 1967-1969*. Political Affairs. Reel 1 Frame 0569 Pol 16 Biafra; Reel 2 Frame 0152 POL Biafra-Hai (archived on LexisNexis). No State established diplomatic relations with Biafra.

- (a) the Declaration evidently had the strong support of the people of Kosovo: it reflected the will of that people substantially declared;
  - (b) following a careful investigation of options, it was specifically envisaged and foreshadowed by the Ahtissari Report;
  - (c) it was not condemned or criticized by any United Nations organ;
  - (d) it was an internal act in no way inconsistent with any peremptory norm of general international law;
  - (e) far from a concerted policy of non-recognition being adopted against it, Kosovo's independence has attracted numerous recognitions by other States.
- (3) The Kosovo authorities have subsequently acted in a manner fully consistent with the Comprehensive Proposal for the Kosovo Status Settlement, and the situation has been significantly normalized. In effect, the principle of independence under international supervision recommended by the Special Envoy has been implemented by Kosovo to the fullest extent possible in the circumstances.

**6.72** To summarise, in the circumstances, there is no basis for the suggestion that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was contrary to international law.

**6.73** Even if, however – *quod non* – the Declaration of Independence was not “in accordance with international law“ at the time it was made, the developments that have occurred since 17 February 2008 have crystallized Kosovo's independence, resolving any doubts as to the position and curing any deficiency that may have existed. Of particular significance in this regard are: (1) the fact that the Declaration of Independence has not been criticised or condemned by any competent United Nations organ; (2) the fact that the Kosovo authorities peacefully control and administer most of the territory and command the

allegiance of the vast majority of the people of Kosovo; (3) far from a concerted policy of non-recognition, the independence of Kosovo has been recognised by many other States.



## CHAPTER 7

### CONCLUSION

7.1 For the reasons set out in this Written Statement, the United Kingdom submits as follows.

- (a) International law does not address the legality of declarations of independence *per se*. Accordingly, the Declaration of Independence by Kosovo is not incompatible with international law.
- (b) In any event, the Declaration of Independence by Kosovo was in accordance with international law.
- (c) In the event that the Court concludes that the Declaration of Independence was not – *quod non* – in accordance with international law at the time it was made, developments since that point have crystallized Kosovo's independence, resolving any doubts as to the position and curing any deficiency that may have existed.



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(Representative of the United  
Kingdom of Great Britain  
and Northern Ireland)

**17 April 2009**





## **ANNEXES TO THE WRITTEN STATEMENT OF THE UNITED KINGDOM**

- Annex 1** - Statement of John Sawers, Permanent Representative of the United Kingdom to the United Nations, in the Security Council debate of 18 February 2008 and legal annex
- Annex 2** - Letter from the Minister of Foreign Affairs of Serbia, 23 January, 2009
- Annex 3** - Conclusions on Kosovo, 2851<sup>st</sup> External Relations Council meeting, Council of the European Union, 18 February 2008
- Annex 4** - Transcript of the Special Plenary Session of the Kosovo Assembly, 17 February 2008
- Annex 5** - Co-Chairman's Paper on Serbia and Montenegro, 27 August 1992
- Annex 6** - Statements of the Contact Group, 24 September 1997 and 8 July 1998; Contact Group statement, Rambouillet Accords: Co-Chairman's Conclusions, 23 February 1999; Statement by the Co-Chairs of the Contact Group, 19 March 1999
- Annex 7** - Final Hill Proposal, 27 January 1999
- Annex 8** - Report of the UN Special Rapporteur for Yugoslavia, 31 October 1997
- Annex 9** - Report of the Committee on the Elimination of Racial Discrimination, 22 September 1995
- Annex 10** - Reports of the Special Rapporteur for Yugoslavia, 17 November 1992, 17 November 1993, 21 February 1994, 4 November 1994 and 16 January 1995
- Annex 11** - Reports of the Special Rapporteur for Yugoslavia, 14 March 1996, 29 January 1997 and 11 September 1998
- Annex 12** - Concluding Observations of the Committee on the Rights of the Child, 13 February 1996; Conclusions and Recommendations of the Committee Against Torture, 9-20 November 1998
- Annex 13** - EU Statement on Kosovo, 9 June 1998
- Annex 14** - Report of the Secretary-General on the human rights situation in Kosovo, 30 October 1998
- Annex 15** - ICRC Position Statement, 15 September 1998
- Annex 16** - Resolutions of UN Commission on Human Rights:

- 14 August 1992 – 22 April 1998
- Annex 17** - General Assembly resolutions: 18 December 1992 – 9 December 1998
- Annex 18** - Resolutions of the Commission on Human Rights 1993/7 of 23 February 1993, 1994/72 of 9 March 1994 and 1994/76 of 9 March 1994
- Annex 19** - Report of the EU Forensic Team, 17 March 1999
- Annex 20** - S/PV.5089, 29 November 2004
- Annex 21** - Guiding principles of the Contact Group for a settlement of the status of Kosovo, 7 October 2005
- Annex 22** - Resolution of the Serbian National Assembly, 21 November 2005
- Annex 23** - Council of Europe, European Commission for Democracy through Law (the Venice Commission) on 19 March 2007, Opinion No. 405/2006
- Annex 24** - Report of the Secretary-General on the United Nations Interim Administration of Kosovo, 17 March 2009
- Annex 25** - Press releases of Secretary-General, 17 February and 18 February 2009, International Civilian Office (ICO) News Release 07/2009, 15 February 2009