United States Department of State

Washington, D.C. 20520

www.state.gov

April 17, 2009

Sir,

Pursuant to the Court's Order of 17 October 2008, I have the honor to enclose thirty copies of the Written Statement of the United States of America concerning the request of the United Nations General Assembly for an advisory opinion on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. I have also enclosed a diskette containing the text of the Statement.

Accept, sir, the assurances of my highest consideration.

Joan E. Donoghue
Acting Legal Adviser

Enclosures:
As stated

Mr. Philippe Couvreur,
Registrar,
International Court of Justice,
Peace Palace,
The Hague.

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT OF THE UNITED STATES OF AMERICA

APRIL 2009

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CHAPTER I

INTRODUCTION

In its Order dated 17 October 2008, this Court invited States to submit written statements on the question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The United States appreciates the opportunity to submit this written statement, and to present to the Court the bases for its conclusion that Kosovo's declaration of independence in February 2008 is fully in accordance with international law.

Ever since the dissolution of federal Yugoslavia, the issue of Kosovo has confronted the Western Balkans region and the broader international community. "This is a unique issue deriving from the unique autonomous province status of Kosovo within the Yugoslav Federation," wrote the last holder of the presidency of the Socialist Federal Republic of Yugoslavia on the eve of Kosovo's declaration of independence. "The Federation fell apart. ... [T]he need to determine the new and final status of Kosovo asserted itself precisely because the element of Kosovo's tie with the former federation is no longer there."[1]

The United States has maintained a longstanding and close engagement with the states and the people of the Western Balkans region. Mindful that events in the region ignited the First World War, and of the more recent violent conflicts stemming from the breakup of the former Yugoslavia, the United States shares the strong interest of the international community in assuring that such bloodshed and turmoil never return. The Court has previously addressed various aspects of the problems that have beset the region in the last two decades, including in the Court's conclusions about the atrocities that had been committed in the course of the conflict in Bosnia during the mid-1990s. The tragic and tumultuous recent history of the region, and the importance of not letting that history repeat itself, has clearly shaped the way that the United States and others in the international community have had to deal with events as they unfolded in Kosovo. It is the hope of the United States that the resolution of this case will play a role in turning the page on this chapter of Balkans history.

The United States underscores that its support for Kosovo's declaration of independence—in this advisory proceeding, and in other contexts—reflects no weakening

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[1] Stjepan Mesić, *Kosovo -- problem koji ne trpi odgađanje ("Kosovo -- A Problem that Tolerates No Delay")*, Večerni List, 16 February 2008 [Annex 1]. Mesić was Prime Minister of Croatia from May to August 1990, then Vice-President of the federal Presidency, serving as Yugoslavia's last President from June to December 1991; he has been President of Croatia since 2000.

of the 127-year bond between the United States and Serbia, or of its desire for close and respectful relations with Serbia. The United States is proud to have nurtured a strong friendship with Serbia and the Serbian people, marked by cooperation in two world wars and longstanding successful economic and cultural ties, albeit disrupted by the actions of the Milošević regime in the 1990s. In recent years, the United States has supported Serbia's Stabilization and Association Agreement with the European Union, supported its bid for accession to the World Trade Organization, provided significant amounts of bilateral assistance, promoted trade between the two countries, and conducted extensive cultural and academic exchanges as well as a broad range of other programs with the people of Serbia. Today, the United States approaches its relations with Serbia as it does its relations with Kosovo: in a regional context, centered on promoting integration into Euro-Atlantic institutions with a mission to foster peace, prosperity and human rights across the continent.

Thus, consistent with United States policy toward the Western Balkans since the end of the Cold War, and since Kosovo's independence, the United States hopes that its written observations in this advisory opinion proceeding, and the proceeding's ultimate outcome, will contribute to the cause of preserving stability and safeguarding human rights of citizens throughout the region. Kosovo's independence has closed one of the most tragic chapters of modern European history—the violent breakup of Yugoslavia. Now, the time has come to look to the future.

With these initial remarks in mind, the United States respectfully requests the Court to consider its observations on the question referred by the General Assembly.

As explained in more detail below, the recent history of the region—including the circumstances surrounding the violent dissolution of the former Yugoslavia, the massive violence and repression of the 1990s, the events that led to the adoption by the Security Council of Resolution 1244, and the extended period of international administration under that resolution—are important for understanding the circumstances surrounding Kosovo's declaration of independence. Chapter II provides an overview of that recent history. Chapter III then presents considerations relating to the nature of the question presented to the Court about Kosovo's declaration of independence and how the Court might address it.

Chapter IV of this submission next explains that international law does not as a general matter regulate declarations of independence. It describes Kosovo's declaration in considerable detail and concludes there is nothing about its declaration of independence that would lead to a different conclusion in this case. Chapter V proceeds to explain that Kosovo's declaration of independence was fully in accordance with Resolution 1244. That resolution was designed to create an environment in which Kosovo could develop politically and to facilitate a political process for seeking a

resolution of Kosovo's future status; the resolution plainly anticipated that independence might be the most appropriate future status for Kosovo and did not seek to preclude it. As further discussed in that chapter, Kosovo declared independence only after the Special Envoy authorized to lead that process, with the full support of the Secretary-General, had concluded that the political process under Resolution 1244 had been exhausted and specifically recommended that Kosovo's status should be independence, the only feasible and reasonable outcome. This conclusion was embraced by key states which worked, and continue to work, cooperatively with Kosovo to develop and implement the necessary framework for Kosovo's supervised independence.

Chapter VI concludes the United States submission.

CHAPTER II

OVERVIEW AND KEY FACTUAL CONSIDERATIONS BEARING ON THE SITUATION IN KOSOVO

The history of the relationship between Kosovo and Serbia over the past century is largely one of conflict between Kosovo's desire for self-rule and Serbia's wish to control the territory and people of the region. As explained in this chapter, this tension manifested itself in an increasingly destructive cycle between 1988 and 1999, a decade which began with repressive actions in Kosovo by the Belgrade authorities that precipitated the breakup of Yugoslavia, and ended with action by the international community to protect Kosovo's ethnic Albanian majority population from forcible and violent displacement. That decade concluded with the establishment of an international administration in substitution for that of Belgrade. For almost another decade thereafter, the United Nations and other international actors implemented the terms of Security Council Resolution 1244 in Kosovo, including conducting a political process aimed at producing a political solution to the ongoing question of Kosovo's status. Only after that process had been exhausted—failing to produce a solution acceptable to all, despite monumental diplomatic efforts—did Kosovo declare its independence. As of early April 2009, Kosovo's statehood had been recognized by 57 states, including nine members of the Security Council, all of its neighbors except Serbia, and 22 of 27 EU member states.

The background and history of the Kosovo issue is complex, but that background and history are sufficiently important for understanding the legal issues involved that this chapter goes into significant detail in describing key elements of it. As the Contact Group agreed soon after the future status process was launched, the "character of the Kosovo problem" has been "shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing . . . , and the extended period of international administration under UNSCR 1244", all of which needed to be "fully taken into account in settling Kosovo's status."[2]

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[2] Statement by the Contact Group on the Future of Kosovo, London, 31 January 2006, available at: http://pristina.usembassy.gov/press20060131a.html. Many of the events alluded to in this chapter are described in greater detail in such general works as Noel Malcolm, *Kosovo: A Short History* (1998) ("Malcolm"); Miranda Vickers, *Between Serb and Albanian: A History of Kosovo* (1998) ("Vickers"); Tim Judah, *Kosovo: What Everyone Needs to Know* (2008) ("Judah") and Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009) ("Weller").

Section I. Kosovo's Constitutional Position In The Former Yugoslavia

Kosovo, long home to an overwhelmingly ethnic-Albanian population, was formally attached to an ethnically Serb state following Serbia's victory in the Balkan Wars of 1912-13. Relations between Belgrade and Kosovo—and in particular, Kosovo's ethnic Albanian majority—were troubled from 1912 until Yugoslavia's destruction in World War II.[3]

The architects of post-war Yugoslavia were acutely aware of the damage done to the country during the period between the First and Second World Wars by ethnic conflict, and sought to structure the new Yugoslavia to prevent its recurrence.[4] The first post-World War II constitution, adopted in 1946, accordingly characterized the federation both as a voluntary coming together of peoples and as a union of six republics (with Kosovo and Vojvodina[5] expressly included as part of Serbia).[6] In succeeding constitutions, Kosovo was treated both as an autonomous part of the Serbian republic and as an entity with its own constitutional status under the federal Yugoslav constitution.[7] This dual legal status endured throughout the following quarter-century, although Kosovo's legal autonomy was tempered by a disproportionate Serb role and influence in its political, social and economic institutions.

In the late 1960s, relaxation of centralized political control and a more tolerant approach by the federal authorities to ethnic diversity in Yugoslavia allowed greater opportunity for ethnic Albanians to advance in both the political and the cultural spheres, as well as for protests against poor economic and other conditions in Kosovo. A number of steps followed, ranging from opening of the first full-fledged university in Pristina to a

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[3] *See, e.g.*, Vickers, pp. 103-08, 116-20.

[4] *See, e.g.*, Decision to Create Yugoslavia on Federal Principles, Jajce, 29 November 1943 (reprinted in Snežana Trifunovska (ed.), *Yugoslavia Through Documents: From its creation to its dissolution* ("Trifunovska"), pp. 206-07); Vickers, pp. 146-47. *See also* Misha Glenny, *The Balkans: Nationalism, War and the Great Powers, 1804-1999* (2001), pp. 402-12, 428-36; Bogdan Denitch, *The Legitimation of a Revolution* (1976), pp. 105-48.

[5] Vojvodina's Hungarian population shared the province with a larger Serb community and significant other minority populations, and did not present issues of the same intensity as Kosovo.

[6] Constitution of the Federal People's Republic of Yugoslavia, 1946, Part 1, Chap. 1, Arts. 1-2 (reprinted in Marc Weller, *The Crisis in Kosovo 1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (1999) ("*Crisis*"), pp. 51-52).

[7] Constitution of the Federal People's Republic of Yugoslavia, 1953, Arts. 113-14 (reprinted in *Crisis*, pp. 52-53); Constitution of the Socialist Federal Republic of Yugoslavia, 1963, Arts. 111-12 (reprinted in *Crisis*, p. 53); Constitution of the Socialist Federal Republic of Yugoslavia ("1974 SFRY Constitution"), Arts. 1, 2, 4 (Original on file with the International Criminal Tribunal for the former Yugoslavia, filed as Exhibit P01623 in *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić*).

series of constitutional amendments expanding the autonomy of Kosovo and its role within the overall federal structure. Serbian control over the province began to give way to a significant strengthening of the position of ethnic Albanians in Kosovo, and concomitant decline in that of Kosovo Serbs.[8]

This process led in 1974 to enactment of a new Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY"). Under the new Constitution, the two autonomous provinces of Kosovo and Vojvodina, while remaining formally part of Serbia, were direct participants in federal institutions virtually on a par with the six republics, and held almost complete jurisdiction over their own internal affairs. The Constitution referred to the "sovereign rights" of both nations and nationalities and stated that all Yugoslavia's nations and nationalities had joined together on a free and equal basis.[9] The new 1974 Serbian and Kosovo constitutions likewise each specified that Kosovo and Vojvodina had united both with Serbia and within Yugoslavia, on the basis of "the freely expressed will" of the population, nations and nationalities of both the provinces and Serbia.[10]

Under the 1974 SFRY and associated new Serbian and Kosovo constitutions, Kosovo enjoyed virtually complete self-government, and had full control over its own educational system, judiciary, taxation and internal security and police.[11] Kosovo had the right to approve, and thus the right to block, changes in the federal and Serbian constitutions that affected the province.[12] It had a right to conduct or participate in some aspects of international affairs.[13] Under the federal constitution, Kosovo was also a full and equal participant with the six republics and Vojvodina in the collective Presidency; the autonomous provinces each possessed a representation equal to two-thirds of that of a

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[8] *See, e.g.*, Frederick Singleton, *Twentieth-Century Yugoslavia* (1976), pp. 234-36.

[9] 1974 SFRY Constitution, Basic Principles, Arts. 3, 4 and 245; 1974 Constitution of the Socialist Republic of Serbia ("1974 Serbian Constitution"), Basic Principles, para. 2 (Original on file with the International Criminal Tribunal for the former Yugoslavia, filed as Exhibit P01848 in *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić*).

[10] 1974 Serbian Constitution, Introductory Part, Basic Principles, para. 6. Constitution of the Socialist Autonomous Province of Kosovo, 1974 ("1974 Kosovo Constitution") (reprinted in Krieger, *The Kosovo Conflict And International Law - An Analytic Documentation 1974-99* (2001) ("Krieger"), p. 7).

[11] Periodic report submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 45 of Commission resolution 1996/71 of 25 October 1996, E/CN.4/1997/8 ("Rehn Report"), para. 32. *See also* Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić ("Milutinović *et al.*"), Trial Judgement, 26 February 2009, Vol. I, para. 221, available at http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf; Judah, p. 57; Weller, pp. 34-35.

[12] 1974 SFRY Constitution, Art. 398; 1974 Serbian Constitution, Art. 427; 1974 Kosovo Constitution, Art. 301 (reprinted in Krieger, p. 8). *See also* Rehn Report, E/CN.4/1997/8, para. 33.

[13] 1974 SFRY Constitution, Art. 271.

republic in each house of the federal legislature, with the result that the two autonomous provinces together possessed more votes than Serbia itself.[14] Disputes between Kosovo and the federal authorities or the republics were decided in the federal constitutional court.[15]

Thus, while still a part of Serbia, after 1974 Kosovo was acknowledged to possess sovereign rights and to have joined Serbia and Yugoslavia of its own volition. Kosovo enjoyed constitutional rights and legal powers and exercised governing authority at all levels of government that were largely (and in important ways entirely) identical to those of the six republics. As later summarized by a figure deeply involved in Yugoslav and post-Yugoslav politics:

> Yugoslavia consisted of republics and provinces; accordingly, the provinces were constituent elements of the Federation. Second, the provinces were within Serbia, meaning that - in addition to their constituent tie with the Federation - they were also connected with one of its federal units. Third, the republics and provinces united in Yugoslavia of their own free will, and this clearly implies that they could not be kept within that state framework against their will. Where provinces are concerned this regards both the federal framework and the framework of a federal unit. And, finally, fourth, in the provinces the nations and nationalities exercised their sovereign rights.[16]

Kosovo both governed itself and participated actively in federal affairs under the 1974 constitutional structure until the forcible overthrow of the constitutional order in 1989.

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[14] 1974 SFRY Constitution, Arts. 291 and 292.

[15] *Ibid.*, Art. 375(5) ("The Constitutional Court of Yugoslavia shall: ... 3) decide disputes involving rights and duties ... between the Republics and the Autonomous Provinces ...").

[16] Stjepan Mesić, *Kosovo -- problem koji ne trpi odgađanje ("Kosovo -- A Problem that Tolerates No Delay")*, Večerni List, 16 February 2008 [Annex 1]. *See also* note 1, *supra.*

Section II. Repression And Response

A series of actions beginning in the late 1980s catalyzed the violent breakup of the Yugoslav state and the departure from the union of most of the republics whose presence had hitherto helped protect Kosovo's autonomy within Serbia and separate status within the SFRY. This opened the way for a decade of increasingly harsh repression against Kosovo through deliberate state policy.

Despite the increase in autonomy brought by the 1974 SFRY constitution, many ethnic Albanians continued to agitate for full republic status and greater local control. Also, Kosovo's continuing poverty led to economic emigration by residents of all ethnicities, and riots in 1981 contributed to the further departure of many Kosovo Serbs and Montenegrins.[17] By the late 1980s, the combination of nationalist agitation and the declining place of Serbs in Kosovo led Serbian leaders to seek to re-establish Serbian dominance over the province. Among those leaders was Slobodan Milošević, whose speech at Kosovo Polje in 1987 marked his decision to embrace the cause of Kosovo Serbs.[18] He then moved to purge Serbian political leaders who did not support a policy of Serbian domination, and was successful in ascending to the Serbian presidency on that platform. In 1988 and 1989, Milošević engineered the modification of the SFRY and Serbian constitutions to all but eliminate Kosovo's autonomy as a practical matter and give Serbia control over Kosovo's internal affairs. In March 1989, under pressure of intimidation and a display of force, the Kosovo Assembly nominally consented to the Serbian amendments.[19]

In June 1990, Serbian authorities closed the Kosovo Assembly altogether.[20] Nevertheless, the members of the Assembly met a week later and adopted a resolution formally asserting Kosovo's "independence" and voiding the Assembly's vote on removal of its autonomy.[21] The Serbian Assembly then voted to close the Kosovo

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[17] Judah, pp. 57-61; Vickers, pp. 183-213.

[18] Malcolm, pp. 341-42.

[19] *Ibid.*, pp. 343-46. *See also* Milutinović *et al.*, Vol. I, paras. 219-220, available at: http://www.icty org/x/cases/milutinovic/tjug/en /jud090226-e1of4.pdf.

[20] Law on the Actions of Republic Agencies under Special Circumstances, 26 June 1990 (reprinted in *Crisis*, pp. 60-61); Decision about the Existence of Special Circumstances on the Territory of the SAP of Kosovo, 26 June 1990 (reprinted in *Crisis*, p. 61).

[21] Assembly of Kosova, Constitutional Declaration, 2 July 1990 (reprinted in *Crisis*, p. 64).

Assembly permanently, seeking to end the last genuine vestige of the province's political autonomy within the Yugoslav constitutional system.[22]

Once again, however, in July 1990, the members of the Kosovo Assembly met to adopt a "constitutional declaration," emphasizing that they were doing so as an "act of political self-determination within the framework of Yugoslavia."[23] In adopting a constitution for the "Republic of Kosova" two months later, they underscored the newly proclaimed republic's "commitment to Yugoslavia" and "status ... as an equal member within the Yugoslav Peoples community."[24] In September 1991, still without breaking its link to Yugoslavia, the members of the Assembly proclaimed Kosovo "a sovereign and independent state, with the right to participate as a constituent republic in Yugoslavia", declared Kosovo's "equality ... with all other federal units" and asserted "all constitutional rights in relation with other Yugoslav republics."[25] A referendum held two weeks later overwhelmingly confirmed this declaration of sovereignty and independence.[26]

By the end of 1991, four of Yugoslavia's original six republics—Slovenia, Croatia, Bosnia and Herzegovina and Macedonia—had declared their independence from the SFRY. Although Yugoslav forces continued to support separatists in both Croatia and Bosnia and Herzegovina, the collapse of the SFRY led Serbia and Montenegro, the only two republics that had not declared independence, to form a new state, the Federal Republic of Yugoslavia ("FRY"), in April 1992. Suppression of Kosovo's autonomous political status within Yugoslavia denied Kosovo any role in this decision, including the veto it possessed under the 1974 SFRY Constitution. The resulting FRY constitution described the new state as a "voluntary association between Serbia and Montenegro" based on the "equality of its member republics" and made clear that only the two republics had federal status; neither the autonomous provinces in general nor Kosovo specifically were mentioned.[27]

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[22] Law Terminating Work of SAP of Kosovo Assembly and the Executive Council, 5 July 1990 (reprinted in *Crisis*, p. 61). The province's continuing nominal autonomy allowed Milošević to control its vote (along with those of Serbia, Vojvodina and Montenegro) in the Federal presidency.

[23] Assembly of Kosova, Constitutional Declaration, 2 July 1990 (reprinted in *Crisis*, pp. 64-65).

[24] Resolution of the Assembly of Kosova, 7 September 1990 (reprinted in *Crisis*, p. 65).

[25] Resolution of the Assembly of the Republic of Kosova on Independence, 22 September 1991 (reprinted in *Crisis*, p. 72).

[26] The margin was 99.87% in favor, on an 87.01% turnout (914,802 out of a total electorate of 1,051,357). Central Board of Kosova for the Conduct of the Referendum, Result, 7 October 1991 (reprinted in *Crisis*, p. 72).

[27] Constitution of the Federal Republic of Yugoslavia, April 1992, Preamble and Art. 1, available at: http://www.worldstatesmen.org/Yugoslav_Const_1992.htm.

Serbia's moves against Kosovo's political autonomy were paralleled by a series of statutory and other actions discriminating against ethnic Albanians. Even before it suspended the Kosovo Assembly, the Serbian Assembly adopted laws that effectively prohibited property transfers that would result in the departure of Serbs from Kosovo[28] and required that university training be conducted only in the Serbo-Croatian language.[29] In 1992, it extended that same requirement to the high school and elementary levels as well, and mandated the use of the Serbian curriculum rather than the Kosovo curriculum previously employed.[30]

Further, tens of thousands of teachers, health workers and other ethnic Albanians were dismissed from employment in state institutions and enterprises.[31] Kosovo Albanians responded with a general strike and other protests, which were met with police violence. Confrontation and political conflict continued to build, and international observers reported an escalation in human rights abuses.[32] Belgrade authorities exacerbated tensions by resettling Serb and Montenegrin refugees from Croatia and Bosnia and Herzegovina in Kosovo, while encouraging ethnic Albanian emigration.[33]

As early as 1991, barely a year after Serbia had suppressed Kosovo's autonomy, the human rights situation in Kosovo had become "highly unsatisfactory", with reports of torture and police mistreatment, according to a Special Rapporteur appointed by the Conference on Security and Cooperation in Europe.[34] A CSCE fact-finding mission reported in June 1992 the fear of ethnic Albanians that "the Serbs would eventually try to create an armed conflict to force the Albanians out of Kosovo. If it started, it would produce a massacre and vast numbers of refugees."[35] In November, the CSCE Mission in Kosovo reported:

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[28] Law of the Restriction of Real Property Transactions, 1989, as amended, Art. 3 (reprinted in *Crisis*, p. 60). *See also* Malcolm, p. 346.

[29] Amendment of the University Law, 1990, Art. 43 (reprinted in *Crisis*, p. 60).

[30] Elementary School Law, 1992, Arts. 4 and 5 (reprinted in *Crisis*, p. 63); Secondary School Law, 1992, Art. 5 (reprinted in *Crisis*, p. 63); High School Law, 1992, Art. 4 (reprinted in *Crisis*, p. 63).

[31] Rehn Report, E/CN.4/1997/8, para. 35; Judah, pp. 72-73.

[32] Malcolm, pp. 346-50. *See also* documents cited in notes 36-40 below.

[33] Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, A/48/92-S/25341, 26 February 1993; Krieger, pp. 25-27; CSCE Mission in Kosovo, Report on Kosovo Stalemate, 16 November 1992 (reprinted in *Crisis*, pp. 107-08). *See also* Malcolm, pp. 352-53.

[34] Report of the Human Rights Rapporteur Mission to Yugoslavia, 24 January 1992, CSCE Communication No. 41, Prague, 24 January 1992 (reprinted in *Crisis*, pp. 97-99).

[35] Report of the Conflict Prevention Centre Fact-finding Mission to Kosovo, 5 June 1992, Sec. II (reprinted in *Crisis*, pp. 102-03).

> Kosovo has settled into an uneasy stalemate. ... President Milosevic intended to rebuild and stabilise Serbian influence in Kosovo, in particular by shifting the population balance in favour of the Serbs and by replacing the Albanians in all positions of political, social and economic significance. In part this was to be achieved by attracting large numbers of Serbs to settle in the Province. ... To make room for Serbs and reduce Albanian influence, the Serbian administration initiated a policy of removal of Albanians from all sectors except the private sector. ... This process is reported to be virtually completed in the public service at the central and township levels. ... Public funding of educational services in Albanian has been discontinued. ... Albanian controlled radio and television services have ceased to exist. The judiciary has been all but cleansed of Albanian judges and magistrates. Albanians in the Kosovo police force were early victims of the cleansing operation. ...
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> The parallel Federation of Free Trade Unions of Kosovo reports that at the end of September 41 per cent of its membership of 240,000 had been fired and 57% were unemployed. ... It is difficult to lend credence to the Serbian claim that all dismissals were undertaken to weed out surplus and incompetent employees and to deal with massive insubordination. There is no doubt about official intentions....[36]

The CSCE mission was ordered by Belgrade to leave the FRY in June 1993.

In December 1992, following reports by the United Nations High Commissioner for Refugees (UNHCR), the General Assembly condemned "ethnic cleansing" both in Bosnia and Croatia and within the FRY, including in Kosovo.[37] It continued to condemn human rights violations in annual resolutions of increasing specificity through the end of 1998.[38] In early 1995, for example, the General Assembly took note of a UNHCR Special Rapporteur's report[39] describing

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[36] CSCE Mission in Kosovo, Report on Kosovo Stalemate, 16 November 1992 (reprinted in *Crisis*, pp. 107-08).

[37] General Assembly resolution 47/147, A/RES/47/147, 14 December 1992 (Situation of human rights), para. 14.

[38] General Assembly resolution 48/153, A/RES/48/153, 20 December 1993 (Situation of human rights in Kosovo); General Assembly resolution 49/196, A/RES/49/196, 23 December 1994 (Situation of human rights in Kosovo); General Assembly resolution 49/204, A/RES, 23 December 1994 (Situation of human rights in Kosovo); General Assembly resolution 50/190, A/RES/50/190, 22 December 1995 (Situation of human rights in Kosovo); General Assembly resolution 50/193, A/RES/50/193, 22 December 1995 (Situation of human rights in Kosovo); General Assembly resolution 51/111, A/RES/51/111, 12 December 1996 (Situation of human rights in Kosovo); General Assembly resolution 51/116, A/RES/51/116, 12 December 1996 (Situation of human rights in Kosovo); General Assembly resolution 52/147,

discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo and the continuing deterioration of the human rights situation in Kosovo, including:

(a) Police brutality against ethnic Albanians ...;
(b) Discriminatory and arbitrary dismissals of ethnic Albanian civil servants ...;
...
(e) The dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin;
(f) The elimination in practice of the Albanian language, particularly in public administration and services;
(g) The serious and massive occurrence of discriminatory and repressive practices aimed at Albanians in Kosovo, as a whole, resulting in widespread involuntary migration.

The General Assembly then "*Demanded*" that the FRY authorities:

(a) Take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo ...;
(b) Revoke all discriminatory legislation ...;
(c) Establish genuine democratic institutions in Kosovo ....;[40]

Kosovo Albanians, meanwhile, created their own governmental institutions, headed by Dr. Ibrahim Rugova as president of the "Republic of Kosova." This parallel government provided important government services, employing thousands of doctors, teachers and others to run schools, health clinics and other services shut down or denied to ethnic Albanians by the Serbian authorities.[41] The Kosovo authorities also conducted elections for the Kosovo Assembly, which continued to function despite harassment and arrests by the FRY authorities. The parallel government, supported by the vast majority

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A/RES/52/147, 12 December 1997 (Situation of human rights in Kosovo); General Assembly resolution 52/139, A/RES/52/139, 1 December 1996 (Situation of human rights in Kosovo); General Assembly resolution 53/163, A/RES/53/163, 9 December 1998 (Situation of human rights in Kosovo); General Assembly resolution 53/164, A/RES/53/164, 9 December 1998 (Situation of human rights in Kosovo).

[39] Situation of Human Rights in the former Yugoslavia, A/49/641-S/1994/1252, 4 November 1992.

[40] General Assembly resolution 49/204, A/RES/49/204, 13 March 1995 (Situation of human rights in Kosovo).

[41] Judah, pp. 69-74; CSCE Mission in Kosovo, Report on Kosovo Stalemate, 16 November 1992 (reprinted in *Crisis*, pp. 107-08); Rehn Report, E/CN.4/1997/8, para. 37.

of the population, pursued a policy of non-violence, while refusing to engage with the Serbian authorities. From 1991 onward, the Serbian authorities thus continued to exercise formal authority and coercive power, while significant functions of civil government were performed by a "shadow" government democratically elected and actively supported by the great majority of Kosovo's population.

Section III. Kosovo And The International Community After Dayton

The international community has engaged on issues associated with the breakup of Yugoslavia from the moment Slovenia and Croatia declared independence in 1991. These efforts initially focused on efforts to keep the SFRY intact, but soon evolved into a search for ways to facilitate a peaceful and orderly break-up. These included an arms embargo and a peacekeeping force in Croatia and Bosnia and Herzegovina following the outbreak of hostilities in those two republics. A "Contact Group" made up of France, Germany, Russia, the United Kingdom and the United States was formed in response to the Bosnian conflict and was able, with the assistance of the North Atlantic Treaty Organization ("NATO") and the strong backing of the Security Council, to persuade the warring parties to conclude the 1995 Dayton Accords which brought peace to Bosnia and Herzegovina.[42] The Dayton Accords were, however, silent about the situation in Kosovo.

Having failed in supporting the secession of Serb-majority areas from the territory of Croatia and Bosnia, Belgrade turned to establishing full control over Kosovo, including through use of force. In this context, some ethnic Albanians concluded that the nonviolent policies of the Republic of Kosova would fail and that only armed resistance could protect Kosovo from Belgrade.[43] The Kosovo Liberation Army ("KLA") began to undertake significant armed operations in 1997.[44] A growing volume of KLA attacks was met by extensive FRY/Serbian military campaigns and harsh and arbitrary measures against the ethnic Albanian civilian population that increasingly took on the character of ethnic cleansing. International observers recounted a lengthening litany of human rights abuses, including police brutality, repression by the military and police, arbitrary detention, torture and summary executions.[45] As the humanitarian situation in Kosovo

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[42] Since 1995, a Peace Implementation Council (PIC) has supported a High Representative empowered by the parties to the Dayton Accords to supervise the implementation of the Accords.

[43] Judah, pp. 78-79; Weller, pp. 67-68, 74, 77.

[44] Milutinović *et al.*, Vol. I, para. 793, available at: http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf.

[45] *See, e.g.*, Report of the Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/63, 14 March 1996; Report of the Special Rapporteur of the Commission on Human Rights, E/CN.4/1997/9, 22 October 1996; Report of the Special Rapporteur of the Commission on Human Rights, E/CN.4/1997/8, 25 October 1996; Report of the Special Rapporteur of the Commission on Human Rights, E/CN.4/1997/56, 29 January 1997; Report of the Special Rapporteur of the Commission on Human Rights, E/CN.4/1998/9, 10

worsened dramatically in the period 1997-1999, the international community—determined to forestall a repetition of the carnage that had torn apart Bosnia and Herzegovina earlier in the decade, elements of which have previously been considered by this Court in the *Bosnia Genocide* case[46]—became increasingly engaged in seeking a political solution to the conflict in Kosovo.

The Contact Group (now including Italy) reconvened in the latter half of 1997, urging "peaceful dialogue" and stating the position of the Contact Group countries at that time: "we do not support independence .... We support an enhanced status for Kosovo within the FRY."[47] As the situation worsened, the Security Council adopted Resolution 1160, a Chapter VII resolution imposing an arms embargo on the FRY, encouraging negotiations between FRY/Serbia and Kosovo and calling for "enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration."[48] Six months later, the Security Council expressed its concern about the intensified fighting in Kosovo, "in particular" the FRY's indiscriminate use of force against civilians "which [has] resulted in ... the displacement of over 230,000 persons from their homes", affirmed that the deterioration of the situation in Kosovo "constitutes a threat to peace and security in the region" and demanded that the FRY authorities and Kosovo Albanian leadership "take immediate steps to ... avert the impending humanitarian catastrophe."[49]

The FRY's failure to comply with UN demands was followed by statements by NATO that it was prepared to use force to avert a humanitarian catastrophe. An intensive, two-pronged diplomatic initiative, led by United States Ambassador Richard Holbrooke and United States Ambassador Christopher Hill, and supported by the Security Council and the Contact Group,[50] resulted in agreement by the FRY to a ceasefire and NATO overflights to confirm compliance with its terms. The FRY agreed

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September 1997; Report of the Special Rapporteur of the Commission on Human Rights, E/CN.4/1998/15, 31 October 1997; Periodic Report of the Commission on the situation of human rights, A/51/652 - S/1996/903, 4 November 1996; Periodic Report of the Commission on the situation of human rights, A/52/490, 17 October 1997; Periodic Report of the Commission on the situation of human rights, A/53/322, 11 September 1998.

[46] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).*

[47] Statement of the Contact Group Foreign Ministers, New York, 24 September 1997 (reprinted in Krieger, p. 121).

[48] Security Council resolution 1160 (1998), S/RES/1160, para. 5 [Dossier No. 9]. An earlier arms embargo had been largely suspended following conclusion of the Dayton Accords. Security Council resolution 1021 (1995), S/RES/1021; Security Council resolution 1074 (1996), S/RES/1074.

[49] Security Council resolution 1199 (1998), S/RES/1199 [Dossier No. 17].

[50] Statement by the President of the Security Council, S/PRST/1998/25, 24 August 1998 [Dossier No. 14]; Contact Group Statement, Bonn, 8 July 1998 (reprinted in Krieger, pp. 147-48).

as well to an agreement with OSCE providing for significant withdrawal from Kosovo of FRY/Serbian security forces and an OSCE observation mission in Kosovo to confirm compliance with Security Council resolution 1199.[51] The Security Council, acting under Chapter VII, endorsed these arrangements, noting the "public commitment of the Federal Republic of Yugoslavia to complete negotiations on a framework for a political settlement by 2 November 1998 and calling for the full implementation of those commitments."[52]

In conjunction with this agreement, and through January 1999, Ambassador Hill actively negotiated with FRY/Serbian and Kosovo representatives on a detailed agreement on autonomy for Kosovo. While the negotiations did not result in final agreement, the mediation efforts produced a text which reflected considerable back-and-forth between the parties; this text largely formed the basis for the text that would be presented by the international mediators at Rambouillet a few months later.[53] Among the Hill text's most important elements was that the agreed arrangements were intended to be in place only for an interim period. The question of Kosovo's ultimate status—on which the Kosovo and FRY/Serbian positions were diametrically opposed—was to be left unresolved, and revisited after a three-year interim period during which the situation in Kosovo was to be stabilized and democratic institutions re-established.[54]

The OSCE observer mission established under the arrangements worked out by Ambassador Holbrooke began to function in November 1998. Its activities included not only verification of the ceasefire and withdrawal of FRY/Serbian forces but also efforts to head off armed conflict through negotiations and mediation. Nevertheless, fighting continued in portions of Kosovo, as both FRY/Serbia and the KLA increased their forces and military activity in the province. The OSCE mission was present in Kosovo to report the discovery of the bodies of 45 ethnic Albanian civilians in the village of Racak on 15 January 1999. The Security Council "strongly condemn[ed] the massacre of Kosovo Albanians in the village of Racak".[55] Other groups, including the OSCE, the EU and the Contact Group, reacted similarly.[56] The Islamic Group at the United Nations expressed

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[51] OSCE-FRY, Agreement on the OSCE Kosovo Verification Mission, 16 October 1998 (reprinted in Krieger, p. 188). NATO-FRY, Agreement Providing for the Establishment of an Air Verification Mission over Kosovo, Belgrade, 15 October 1998 (reprinted in Krieger, pp. 291).

[52] Security Council resolution 1203 (1998), S/RES/1203, 24 October 1998, para. 2 [Dossier No. 20].

[53] The four successive texts produced through these diplomatic efforts, and associated documents, can be found in Krieger, pp. 155-87.

[54] *See, e.g.,* Final Hill Proposal, 27 January 1999, Art. X(3) (reprinted in Krieger, p. 181).

[55] *See, e.g.,* Security Council Presidential Statement, S/PRST/1999/2, 19 January 1999 [Dossier No. 24].

[56] OSCE Press Release, "OSCE Permanent Council Chairman shocked over killings in Kosovo", 18 January 1999, available at: http://www.osce.org/item/4807.html; EU, Statement of the Presidency of the European Union on the Racak Massacre, PRES/99/14, Brussels, 20 January 1999 (reprinted in Krieger, p.

> deep shock and anger over the Racak massacre, which was reminiscent of the widespread crimes of genocide and ethnic cleansing witnessed in Bosnia and Herzegovina, and strongly condemns the massacre of innocent civilians and the ongoing Serbian policy of ethnic cleansing in Kosova.
> . . .
> [and] [s]trongly condemn[ed] crimes against humanity being committed by the Serbian security forces in Kosova.[57]

Two weeks later, with the explicit support of the Security Council,[58] the Contact Group called the FRY and Serbian governments and representatives of the Kosovo Albanians to meet at Rambouillet, France, for the purpose of negotiating and concluding an interim agreement. The negotiation was to be based on a set of principles articulated by the Contact Group, which provided, *inter alia*, for a "mechanism for a final settlement after an interim period of three years"; self-government in Kosovo by democratically accountable institutions including Kosovo legislative, executive, and judicial bodies; and, participation as necessary by the OSCE and other international entities.[59]

The negotiations at Rambouillet were difficult, but on 23 February 1999, resulted in a text containing the political elements of an "Interim Agreement for Peace and Self-Government in Kosovo" that provided for democratic self-government in Kosovo while Kosovo remained part of Yugoslavia pending an international meeting that would address the question of Kosovo's future status. The interim agreement provided for an extensive international civil presence in Kosovo with directive powers and final authority to interpret the agreement, as well as for a NATO military force. The FRY was to retain a defined security presence and limited but important federal powers in and over Kosovo.

Among the agreement's key provisions was that

> [t]hree years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, ...[60]

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195); Contact Group, Chairman's Conclusions, 22 January 1999 (reprinted in Krieger, p. 197).

[57] Letter dated 26 January 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Qatar to the United Nations addressed to the President of the Security Council, Annex (Statement of the Islamic Group at the United Nations on the situation in Kosova), S/1999/76, 26 January 1999.

[58] Security Council Presidential Statement, S/PRST/1999/5, 29 January 1999 [Dossier No. 25].

[59] Contact Group Negotiators' Proposal, 30 January 1999 (reprinted in Krieger, pp. 256-57).

[60] Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 February 1999, ch. 8, art.

The parties and the Contact Group committed to reconvene in mid-March. On 15 March 1999, following consultations in Kosovo with both civilian and KLA leaders, the chairman of the Kosovo delegation announced that "this delegation and I personally say 'yes' to this agreement."[61] The FRY, however, returned with a radically revised "Agreement for Self-Government in Kosmet" which eliminated key elements of the agreed draft, including almost all international oversight as well as reference to the "will of the people" of Kosovo, and which would have permitted changes to the agreement, after three years, only with the unanimous agreement of the signatories.[62] The co-chairs of the negotiations described this move as an effort to "unravel the Rambouillet Accords" and adjourned the negotiations, concluding that there was no purpose in extending the talks any further.[63]

Following the failure to reach a negotiated solution at Rambouillet, FRY/Serbian forces immediately began a major offensive, ostensibly directed against the KLA but including actions directed against the ethnic Albanian population that forced thousands of Kosovars from their homes in its first 24 hours.[64] After a final diplomatic effort to obtain FRY/Serbian agreement to sign the Rambouillet Accords failed, NATO commenced military action on March 24. This was immediately followed by a massive intensification of actions directed against the Kosovar population by FRY/Serbian forces.[65]

The UNHCR reported in late May 1999 on the displacement of Kosovars both to other countries and internally:

I(3) (reprinted in Krieger, pp. 261-78).

[61] Kosovo Delegation Letter of Agreement Addressed to the French and British Foreign Ministers, 15 March 1999 (reprinted in Krieger, p. 280).

[62] FRY, Agreement for Self-Government in Kosmet, Paris, 18 March [*sic*] 1999 (reprinted in Krieger, pp. 280-86). For a version of the document showing deleted and added text, *see* FRY Revised Draft Agreement, 15 March 1999 (reprinted in *Crisis*, pp. 480-90).

[63] Declaration of the Co-Chairmen Hubert Vedrine and Robin Cook, Paris, 19 March 1999 (reprinted in Krieger, p. 286).

[64] UN Inter-Agency Update on Kosovo Humanitarian Situation Report 84, 22 March 1999, paras. 2-3, available at: http://www.reliefweb.int/rw/rwb.nsf/db900sid/OCHA-64C89A?OpenDocument&query=21%20March%201999%20Kosovo; Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), Bern, 23 March 1999, available at: http://www.unhcr.org/admin/ADMIN/3ae68fbf2.html. *See also* U.S. Department of State, Erasing History: Ethnic Cleansing in Kosovo, May 1999, available at: http://www.state.gov/www/regions/eur/rpt_9905_ethnic_ksvo_1.html; U.S. Department of State, Ethnic Cleansing in Kosovo: An Accounting, December 1999, available at: http://www.state.gov/www/ global/human_rights /kosovoii/ homepage.html.

[65] *See, e.g.,* Milutinović *et al.*, Trial Judgment, 26 February 2009, Vol. III, paras. 41-42, available at: http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf.

13. Forced displacement and expulsions of ethnic Albanians from Kosovo have increased dramatically in scale, swiftness and brutality.

14. A large number of corroborating reports from the field indicate that Serbian military and police forces and paramilitary units have conducted a well planned and implemented programme of forcible expulsion of ethnic Albanians from Kosovo. More than 750,000 Kosovars are refugees or displaced persons in neighbouring countries and territories, while according to various sources there are hundreds of thousands of internally displaced persons (IDPs) inside Kosovo. This displacement appears to have affected virtually all areas of Kosovo as well as villages in southern Serbia, including places never targeted by NATO air strikes or in which the so-called Kosovo Liberation Army (KLA) has never been present.[66]

The OSCE estimated that over ninety percent of the Kosovo Albanian population had been displaced by early June, when the FRY/Serbian forces ended the military operations and withdrew from Kosovo and that "only a small fraction of the Kosovo Albanian population was not displaced by the conflict in some way."[67] A final UNHCR report in September referred to "the mass exodus of more than 1 million ethnic Albanians from Kosovo," virtually all as a result of direct violence or intimidation by FRY/Serbian forces.[68]

In May 1999, in response to these atrocities, the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted several high-ranking FRY and Serbian civilian officials and military officers, including former President Milošević, for crimes against humanity and violation of the laws and customs of war in Kosovo.[69] In February 2009, in the *Milutinović* et al. case, an ICTY Trial Chamber concluded, in relation to these events in Kosovo during 1999:

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[66] Report by the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, E/CN.4/2000/7, 31 May 1999, paras. 13-15.

[67] OSCE: Kosovo/Kosova -- As Seen, As Told (1999), Ch. 14 (Forced Expulsion), p. 1, available at: http://www.osce.org/publications/odihr/1999/11/17755_506_en.pdf.

[68] Report by the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, E/CN.4/2000/10, 27 September 1999.

[69] International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković*, Case No. IT-99-37, Indictment for Crimes Against Humanity and Violations of the Laws or Customs of War, 24 May 1999, available at http://www.un.org/icty/indictment/english/mil-ii990524e.htm. Milošević was tried by the ICTY both for crimes committed in Kosovo and elsewhere, but died before the conclusion of his trial.

> [T]here was a broad campaign of violence directed against the Kosovo Albanian civilian population ..., conducted by forces under the control of the FRY and Serbian authorities ....
> It was the deliberate actions of these forces during this campaign that caused the departure of at least 700,000 Kosovo Albanians from Kosovo in the short period of time between the end of March and beginning of June 1999. . .[70].

Concluding that there was "a common purpose to use violence and terror to force a significant number of Kosovo Albanians from their homes and across the borders," the ICTY convicted five FRY/Serbian defendants of participation in a "joint criminal enterprise to modify the ethnic balance in Kosovo in order to ensure continued control by the FRY and Serbian authorities over the province."[71]

Section IV. UN Security Council Resolution 1244

Efforts to reach an agreement on Kosovo continued throughout the spring of 1999, largely on the basis of principles adopted by the G-8 and advanced by an EU-U.S.-Russia negotiating team.[72] These principles built on earlier diplomatic work, in particular the Hill text and the texts developed at Rambouillet. Belgrade agreed to a modified version of these principles (the "Ahtisaari-Chernomyrdin Principles"[73]) in early June and days later, in conjunction with conclusion of a Military Technical Agreement,[74] the Security Council adopted Resolution 1244.

Adoption of Resolution 1244 prevented FRY/Serbia from exercising governmental authority in Kosovo, substituting for it, under the authority of the United

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[70] *Milutinović et al.*, Trial Judgement, 26 February 2009, Vol. II, paras. 1156, 1178, available at: http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e2of4.pdf.

[71] Summary of Judgement read from the bench by Judge Bonomy, in *Milutinović et al.*, 26 February 2009, available at: http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf.

[72] Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, S/1999/516, 6 May 1999 [Dossier No. 29]; Security Council resolution 1244 (1999), S/RES/1244, Annex 1 [Dossier No. 34].

[73] Security Council resolution 1244 (1999), S/RES/1244, Annex 2 [Dossier No. 34]. The principles are named for the international negotiators who secured their agreement in Belgrade, former Finnish President Martti Ahtisaari and former Russian Prime Minister Viktor Chernomyrdin.

[74] Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, concluded on 9 June 1999 [Dossier No. 32].

Nations, a political and legal framework to guide future developments in Kosovo. Principal objectives of the resolution included:

- to end the hostilities in Kosovo and provide for its security;
- to establish an interim international administration in Kosovo in substitution for that of the FRY/Serbia;
- to establish provisional institutions of self-government and progressively transfer governing responsibilities to them both before and after determination of Kosovo's ultimate political status; and
- to conduct a political process that would culminate in definitive resolution of Kosovo's political status.

Running through all of these objectives was the importance of ensuring that Kosovo could develop free of coercion by the FRY/Serbia. To assist in accomplishing these aims, Resolution 1244 provided for both an international security presence and an international civil presence.

The international security presence was to be deployed in close coordination with the complete withdrawal of FRY military, police, and paramilitary forces. The resolution enumerated specific tasks for the international security presence, including demilitarizing the KLA, maintaining a ceasefire, and ensuring public safety and order until the international civil presence could take responsibility for the task. The security presence was provided by the NATO-led "Kosovo Force" ("KFOR").

Two days after adoption of Resolution 1244, the Secretary-General announced a concept of operations for an international civil presence, to be headed by a Special Representative of the Secretary-General ("SRSG") and known as the United Nations Interim Administration Mission in Kosovo ("UNMIK").[75]

The framework set out by Resolution 1244 established successive responsibilities for the international civil presence, to be carried out in phases:

- Following restoration of order in the immediate aftermath of the FRY/Serbian withdrawal, UNMIK's first major task was to perform basic civilian administrative functions and to establish provisional institutions for democratic and autonomous self-government and oversee their development.[76]

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[75] *See* Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), S/1999/672, 12 June 1999 [Dossier No. 35].

[76] Security Council resolution 1244 (1999), S/RES/1244, paras. 11(a)-(c) [Dossier No. 35].

- As those institutions were established, UNMIK was charged with progressively transferring responsibility for civil administration to those institutions.[77]
- At a later time, UNMIK was to facilitate a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords.[78]
- Finally, UNMIK was to oversee the transfer of authority from the provisional institutions to those created once Kosovo's status had been determined.[79]

The resolution also established continuing responsibilities to be undertaken by UNMIK throughout its existence, including supporting the reconstruction of key infrastructure and other economic reconstruction; supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; maintaining civil law and order, both through the deployment of international police personnel to serve in Kosovo and by establishing local police forces; protecting and promoting human rights; and assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.[80]

The political provisions of Resolution 1244 were particularly complex. The preamble "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," but added a qualifying reference to the Helsinki Final Act and to annex 2 of the resolution. The operative paragraphs, moreover, provided for the effectively complete exclusion of the FRY/Serbia from any administrative role in Kosovo, while the civil presence was to establish new institutions of self-government without any reference to existing or earlier structures.[81] Finally, the resolution

> 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;[82]

Both annexes referred in turn to the need to "tak[e] full account of the Rambouillet accords." The civil presence was separately charged with "[f]acilitating a political

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[77] Security Council resolution 1244 (1999), S/RES/1244, para. 11(d) [Dossier No. 35].

[78] *Ibid.*, para. 11(e).

[79] *Ibid.*, para. 11(f).

[80] *Ibid.*, paras. 11(g)-(k).

[81] *Ibid.*, paras. 3, 4, 5, 6, 9, 10 and 11, and Annex 2, para. 6.

[82] *Ibid.*, para. 1.

process designed to determine Kosovo's future status, taking into account the Rambouillet accords."[83]

Section V. The Period of UN Administration

Implementation of Resolution 1244 was undertaken by a range of UN organs and responsible officials as well as NATO, the EU and the OSCE. Between 1999 and 2008, the international presences protected Kosovo's autonomy, while creating space and time for provisional institutions of self-government to develop in Kosovo. The FRY, however, strongly objected from the outset to central aspects of UNMIK's and KFOR's implementation of Resolution 1244, *inter alia* asserting "illegal conduct and direct violations of the key provisions of the resolution and its related documents by KFOR and UNMIK", and the failure of the Security Council to undertake the necessary measures to ensure implementation "despite its clear obligations."[84]

There was significant disorder in the immediate wake of the FRY/Serbian withdrawal, including widespread violence by Kosovo Albanians directed, in particular, against Kosovo Serbs and Serb cultural sites, and many thousands of Serbs departed the province. After working with NATO to restore order, UNMIK turned to organizing local government. In May 2000, it established the Joint Interim Administrative Structure ("JIAS"), including advisory bodies with membership drawn from the Kosovo Albanian as well as Kosovo Serb and other communities; administrative departments (in effect, ministries) jointly headed by UNMIK and Kosovo personnel; and municipal boards headed by UNMIK personnel.[85] With the agreement of the ethnic Albanian political parties, the JIAS expressly provided for the termination of the parallel governmental structures of the "Republic of Kosova" that had been put in place following adoption of the Kosovo Constitution in September 1990.

Although from the time of its arrival the NATO-led KFOR exercised authority throughout Kosovo, UNMIK and the institutions of self-government established by it were less consistently successful in doing so. From the beginning, and continuing after the fall from power of President Milošević in September 2000, Belgrade actively sought to discourage participation by Kosovo Serbs in structures intended to ensure them a full voice in developing and working within Kosovo's governmental institutions, and "parallel

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[83] Security Council resolution 1244 (1999), S/RES/1244, para. 11(d) [Dossier No. 35].

[84] Memorandum of the Government of the FR Yugoslavia on the Implementation of UN Security Council Resolution 1244 (1 March 2000), available at: http://www.arhiva.serbia.sr.gov.yu/news/2000-03/06/17631.html.

[85] UNMIK Regulation 2000/1, 14 January 2000 [Dossier No. 148].

structures" supported by Belgrade continued to exercise a measure of *de facto* authority in the Serb-majority areas, in particular those in the north around Mitrovica.[86]

After Kosovo-wide elections, in May 2001 the SRSG issued a Constitutional Framework for the Provisional Self-Government of Kosovo.[87] The Provisional Institutions of Self-Government of Kosovo ("PISG") included an elected Assembly of Kosovo with seats reserved for non-majority communities including Kosovo Serbs and six other smaller communities, a president elected by the Assembly, a prime minister nominated by the president and approved by the Assembly, a government and ministries, and a judiciary nominated by the Assembly and appointed by the SRSG. Significantly, the Constitutional Framework made no reference to the institutions and structures of the pre-1999 FRY/Serbian administration.[88]

Under the Framework, UNMIK also established municipal governments and a Kosovo Police Force supervised by UNMIK. Four rounds of elections for either the Assembly or local government were held. Kosovo was represented internationally by UNMIK, which entered into agreements on Kosovo's behalf.[89] UNMIK also issued its own identification and travel documents to Kosovo residents, destruction of whose identification documents had been a particular focus of the ethnic cleansing in 1999.[90]

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[86] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council attaching the report of his Special Envoy, Kai Eide, on "A comprehensive review of the situation in Kosovo", S/2005/635, 7 October 2005, Annex, paras. 21, 23 [Dossier No. 193]. *See also, e.g.,* Contact Group Ministerial Statement, Vienna, 24 July 2006, available at: http://www.diplomatie.gouv.fr/en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf; Contact Group Ministerial Statement, New York City, 20 September 2006, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/91037.pdf.

[87] UNMIK Regulation 2001/9, 15 May 2001 [Dossier No. 156], subsequently amended by UNMIK Regulations 2002/9, 3 May 2002 [Dossier No. 157], and 2007/29, 4 October 2007, available at: http://www.unmikonline.org/regulations/unmikgazette/02english/E2007regs/RE2007_29.pdf.

[88] UNMIK determined that the law applicable in Kosovo would not include Yugoslav legislation adopted after 22 March 1989. UNMIK Regulation 1999/24, 12 December 1999 [Dossier No. 146]; UNMIK Regulation 2000/59, 27 October 2000. [Dossier No. 147].

[89] *See* Note Verbale from the Assistant Secretary-General for Legal Affairs of the United Nations to the Permanent Mission of Germany concerning the treaty-making power of UNMIK dated 12 March 2004. [Dossier No. 168]. The only new international obligation entered into by the authorities in Belgrade accepted as binding on Kosovo was the May 2001 border demarcation agreement with Macedonia, which, like the other elements of the Ahtisaari plan, Kosovo specifically accepted in its declaration of independence and constitution. Declaration of Independence, para. 8 [Dossier No. 192]; Constitution of the Republic of Kosovo (2008), Art. 143, available at: http://www.assembly-kosova.org/common_/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf.

[90] Milutinović *et al.*, Vol. III, paras. 31-40, available at: http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e2of4.pdf; U.S. Department of State, Erasing History: Ethnic Cleansing in Kosovo, May 1999, available at: http://www.state.gov/www/regions/eur/rpt_9905_ethnic_ksvo_1.html; *ibid.*, Ethnic Cleansing in Kosovo: An Accounting, December 1999, available at: http://www.state.gov/www/global/

Over the course of the following seven years, the SRSG progressively devolved authority to the PISG. The pace of transfer increased in 2005, following the decision described below to move toward initiation of the political process to determine Kosovo's future status. By 2007 the PISG was exercising very extensive governmental power within Kosovo, with the exception of certain authorities reserved by the SRSG under the Constitutional Framework.[91] These reserved powers included authority over the exercise of Kosovo's foreign affairs powers and over the Kosovo Protection Corps, as well as exercising closer oversight over and involvement in the working of the police and judicial systems. The SRSG also retained authority to annul any action of the PISG that in his opinion was inconsistent with Resolution 1244; successive SRSGs employed this authority on several occasions through 2005, including to annul actions by the Kosovo Assembly, ministries or municipalities,[92] as well as threatening nullification in the event certain actions, notably to declare independence, were taken.[93]

Section VI. The Political Process To Determine Kosovo's Future Status

The UN administration of Kosovo was intended as an interim measure. UNMIK temporarily assumed governmental authority in Kosovo, but Resolution 1244 contemplated that, following an "interim" period during which Kosovo's capacity for self-government would be restored, a "political process" would be undertaken to seek a resolution of Kosovo's future status.

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human_rights/ kosovoii/homepage.html. *See also* Report by the High Commissioner for Human Rights on the situation of human rights in Kosovo, Federal Republic of Yugoslavia, E/CN.4/2000/7, 31 May 1999, para. 19.

[91] *See, e.g.,* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 28 September 2007, S/2007/582, para. 28 and Annex [Dossier No. 82]; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 3 January 2008, S/2007/768, para. 29 and Annex [Dossier No. 84].

[92] *See, e.g.,* "Determination" by the Special Representative of the Secretary-General on the "resolution on the protection of the territorial integrity of Kosovo" of 23 May 2002 [Dossier No. 179]; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2008/458, 15 July 2008, para. 6 [Dossier No. 89].

[93] UNMIK Press Briefing, 16 November 2005, pp. 4-5, available at: http://www.unmikonline.org/dpi/transcripts.nsf/p0401?OpenPage; UNMIK Press Briefing, 21 November 2005, p. 3, available at: http://www.unmikonline.org/DPI/Transcripts.nsf/0/8E2671F635881CFFC12570C1002AF51A/$FILE/tr211105.pdf. In 2002, in response to drafts of the 2003 Constitutional Charter of the State Union of Serbia and Montenegro which expressly described Kosovo ("Kosovo and Metohija") as part of Serbia, the SRSG stated that that draft "appears to prejudge the status of Kosovo." Letter dated 6 November 2002 from the Special Representative of the Secretary-General to the President of the Assembly of Kosovo [Dossier No. 185]; "Pronouncement" by the Special Representative of the Secretary-General of 7 November 2002 [Dossier No. 187]. *See also* n. 108 below.

In April 2002, the SRSG proposed the development of a set of "benchmarks" to be achieved by Kosovo before initiation of the political process to resolve its status—a process which the Security Council adopted as the policy of "standards before status".[94] The original concise benchmarks evolved into a highly complex implementation plan that it was anticipated would be reviewed periodically starting in mid-2005.[95]

In March 2004, however, widespread anti-Serb riots in Kosovo that resulted in a number of deaths, considerable destruction of property, and the flight of many Serbs underscored the fragility of the existing political situation. The Secretary-General named a Special Envoy, Norwegian Ambassador Kai Eide, to assess the situation and provide a report that would serve as the basis for the Secretary-General's "political judgement on whether the situation is conducive to the initiation of the future status process."[96] In an initial report, Eide reported a shared view that the international community in Kosovo, led by UNMIK, was "in disarray, without direction and internal cohesion", that the "'standards before status' policy lacks credibility" and that the main cause of frustration and stagnation in Kosovo was "not of an inter-ethnic nature, but stems from what is rightly seen as a serious lack of economic opportunities and an absence of a clear political perspective."[97] In a later report, Eide noted that the international administration was "increasingly being seen as engaged in a holding operation unwilling to address [the] crucial issue [of future status]" and that frustration and stagnation were growing in Kosovo.[98] Eide further noted the importance of resolving Kosovo's future status to improving its "precarious" economic situation, the "diminishing" leverage of the United Nations in Kosovo and expectations in both Kosovo and Serbia for a beginning of the status resolution process. He concluded that the existing situation could not be maintained indefinitely.[99] Eide recommended to the Secretary-General initiation of the

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[94] Statement by the President of the Security Council, S/PRST/2002/11, 24 April 2002 [Dossier No. 55]; Statement by the President of the Security Council, S/PRST/2003/1, 6 February 2003 [Dossier No. 61].

[95] Kosovo Standards Implementation Plan, 31 March 2004, available at: http://www.unmikonline.org/pub/misc/ksip_eng.pdf; Statement by the President of the Security Council, S/PRST/2003/26, 12 December 2003 [Dossier No. 65].

[96] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/635, 7 October 2005, Appendix (Terms of reference of the Special Envoy of the Secretary-General for the comprehensive review of the situation in Kosovo), p. 23 [Dossier No. 193].

[97] Letter dated 17 November 2004 from the Secretary-General addressed to the President of the Security Council, S/2004/932, 30 November 2004, Annex I, Enclosure (Report on the Situation of Kosovo), pp. 2-4 [Dossier No. 71].

[98] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council attaching the report of his Special Envoy, Kai Eide, on "A comprehensive review of the situation in Kosovo," S/2005/635, 7 October 2005, Annex, para. 5 [Dossier No. 193].

[99] *Ibid.*, paras. 26, 32, 39, 26, 65-66, 79, 86.

future status process, while cautioning that "[o]nce the process has started, it cannot be blocked and must be brought to a conclusion."[100]

The Security Council endorsed this recommendation, welcomed the Secretary-General's decision to name former Finnish President Martti Ahtisaari as Special Envoy to lead the political process and encouraged the active involvement of the Contact Group in support of the process.[101] In response to this invitation, the Contact Group repeated Eide's conclusion that the process could not be blocked and must continue to its conclusion and during this process "call[ed] on the parties to engage in good faith and constructively [and] to refrain from unilateral steps."[102] It adopted a set of "guiding principles" that underscored the importance of strengthening regional security, ensuring no return to the "pre-March 1999 situation", and avoiding either partition of Kosovo or its union with any country.[103]

In January 2006 the Contact Group further admonished Belgrade that the "disastrous policies of the past lie at the heart of the current problems" and underscored that "the settlement needs, inter alia, to be acceptable to the people of Kosovo,"[104] a formulation that had also been reflected in the reference to the "will of the people" included in the Rambouillet Accords.

Over the course of the following fourteen months, Special Envoy Ahtisaari arranged and participated in discussions of both political and technical issues between the Belgrade and Pristina teams, engaged in extensive negotiations with the parties and consulted widely with UNMIK and other experts. The Contact Group was active as well, repeatedly reminding the parties that "no one side" could prevent the process from resolving Kosovo's status, and observing that

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[100] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council attaching the report of his Special Envoy, Kai Eide, on "A comprehensive review of the situation in Kosovo," S/2005/635, 7 October 2005, Annex, paras. 62, 70. [Dossier No. 193].

[101] Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005 [Dossier No. 195]; Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709, 10 November 2005 [Dossier No. 197].

[102] Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709, 10 November 2005, Annex, p. 2 [Dossier No. 197].

[103] *Ibid.*, p. 3, para. 6.

[104] Statement by the Contact Group on the Future of Kosovo, London, 31 January 2006, available at: http://pristina.usembassy.gov/press20060131a.html. No reference was made to the views of the people of Serbia.

> Pristina has shown flexibility in the decentralisation talks. However, Pristina will need to be even more forthcoming on many issues before the status process can be brought to a successful conclusion. ...
>
> Belgrade needs to demonstrate much greater flexibility in the talks than it has done so far. Belgrade needs to begin considering reasonable and workable compromises for many of the issues under discussion, particularly decentralisation.[105]

Recognizing continuing differences between the parties over the question of independence, in September the Contact Group invited Ahtisaari to prepare a "comprehensive proposal for a status settlement" as a basis for moving the negotiating process forward.[106]

On the fundamental question of status, however, the two sides began and ended with diametrically opposed positions—positions that had remained essentially unchanged since Rambouillet. Kosovo insisted on independence, while Serbia was equally adamant that Kosovo must remain part of Serbia albeit with some form of autonomy. As later summarized by Ahtisaari, "Kosovo's development since [1999] ... has been accompanied by an expectation among the vast majority of its population that Kosovo would become independent before long", whereas "Serbian expectations were directed at an extension of the existing muddled legal status, with confirmed Serbian sovereignty over Kosovo as the linchpin."[107]

In October 2006, at the height of the negotiations, the Serbian government abruptly proposed and conducted a referendum on a new draft constitution which included a preamble that described Serbia expressly as "a state of the Serbian people."[108] In effect, the constitution made clear its tactical purpose of bolstering Serbia's negotiating position by precluding its negotiators from agreeing to any future status under which Kosovo would not remain part of Serbia. Strikingly, Serbia made no effort to include Kosovo Albanians in development of this constitution or to register Kosovo Albanians as

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[105] Contact Group Ministerial Statement, Vienna, 24 July 2006, available at: http://www.diplomatie.gouv.fr/en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf.

[106] Contact Group Ministerial Statement, New York, 20 September 2006, available at: http://www consilium. europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/91037.pdf.

[107] Martti Ahtisaari, "Kosovo Is Not the Problem – Is Serbia?", in *The Ahtisaari Legacy: Resolve and Negotiate* (2008), pp. 19-20.

[108] Constitution of Serbia, 30 September 2006, available at: http://www.mfa.gov.yu/YugFrameset.htm. The 1990 Serbian constitution, by contrast, made no reference at all to Kosovo. The 2003 Constitutional Charter of the State Union of Serbia and Montenegro described Kosovo as part of Serbia. *See* n. 93 above.

voters.[109] The text of the constitution neither specified the content or extent of the autonomy to be afforded Kosovo, nor provided any constitutionally embedded guarantee of that autonomy. The Council of Europe's Venice Commission accordingly concluded that the constitution "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 realized or not."[110]

In early February 2007, Special Envoy Ahtisaari provided a draft Comprehensive Proposal for the Kosovo Status Settlement to Serbia and Kosovo. The document did not directly address the status question, instead focusing on substantive protections to ensure the rights of all ethnic communities in Kosovo, including governmental structures providing extensive protections for the interests of Kosovo Serbs and other non-majority communities. Serbia, however, rejected the text on grounds that it "does not take into consideration the sovereignty and territorial integrity of the Republic of Serbia in relation to Kosovo-Metohija" and was therefore inconsistent with the requirement in the newly adopted constitution that Serbia's negotiators defend its sovereignty over Kosovo.[111]

The proposal itself contained elements for inclusion in a Kosovo constitution, detailed provisions on protections for the various Kosovo communities, and provision for wide-ranging decentralization providing extensive local control over many governmental functions. It also provided for international civil and military presences to replace UNMIK and to supervise Kosovo – at Kosovo's invitation – for an interim period as it put the provisions of the proposal into effect. The international civil presence would be guided by an International Steering Group made up of the countries included in the Contact Group, as well as the European Union, the European Commission and NATO, all of which had increasingly participated in Contact Group deliberations. The international civil presence would have authority (similar to that of the High Representative in Bosnia

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[109] Comments of Prime Minister Vojislav Koštunica, press release, government of Serbia, "New constitution combines both state and national interests," available at: http://www.srbija.gov.rs/vesti/vest.php?id=27231. Barely 90,000 electors voted in Kosovo—less than one-tenth the number who reportedly participated in the 1991 vote on the Republic of Kosovo constitution. *See* Central Board of Kosova for the Conduct of the Referendum, Result, 7 October 1991 (reprinted in *Crisis*, p. 72). *See also* Centre for Free Election and Democracy, Election Results Estimation: Referendum for Confirmation of Proposition of Constitution of the Republic of Serbia, available at: http://www.cesid.org/eng/rezultati/sr_okt_2006/index.jsp. As the overall turnout and proportion of "yes" votes barely exceeded the constitutional minimums, excluding Kosovo Albanians proved critical to adoption of the constitution.

[110] European Commission for Democracy through Law (Venice Commission), Opinion 405/2006 on the Constitution of Serbia, 19 March 2007, para. 8, available at: http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp.

[111] Serbian Parliament, Resolution on UN Special Envoy Martti Ahtisaari's "comprehensive proposal for the Kosovo status settlement," 2 February 2007, available at: http://www.mfa.gov.yu/Foreinframe1.htm.

and Herzegovina established by the Dayton Accords) to interpret the terms of the Comprehensive Proposal and take binding corrective action to preserve its integrity.[112]

On 26 March 2007, Ahtisaari forwarded to the Secretary-General his Comprehensive Proposal for the Kosovo Status Settlement ("Comprehensive Settlement Proposal" or "CSP," also commonly referred to as the "Ahtisaari Plan"), under cover of a recommendation on status. In an accompanying "Report", Ahtisaari concluded:

> 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.[113]

Among the reasons Ahtisaari cited for reaching this conclusion was that the other two basic options for Kosovo's future status – Serbian rule and indefinite UN administration – were either infeasible or unsustainable:

> 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 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.
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> ...
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> 8. While UNMIK has made considerable achievements in Kosovo, international administration of Kosovo cannot continue.
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> ...
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> 9. Further, while UNMIK has facilitated local institutions of self-government, it has not been able to develop a viable economy. Kosovo's uncertain political status has left it unable to access international financial

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[112] The text of the Comprehensive Proposal can be found in 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].

[113] Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 March 2007, para. 5 [Dossier No. 203].

> institutions, fully integrate into the regional economy or attract the foreign capital it needs to invest in basic infrastructure and redress widespread poverty and unemployment. Unlike many of its western Balkans neighbours, Kosovo is also unable to participate effectively in any meaningful process towards the European Union — an otherwise powerful motor for reform and economic development in the region and the most effective way to continue the vital standards implementation process. Kosovo's weak economy is, in short, a source of social and political instability, and its recovery cannot be achieved under the status quo of international administration.

The Secretary-General forwarded Ahtisaari's report and recommendation to the Security Council, stating that "I fully support both the recommendation of my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement".[114] Following the Special Envoy's presentation of his proposal to the Security Council on April 3, the Kosovo Assembly and government formally endorsed the proposal. Serbia demanded that negotiations be restarted under a new mediator.[115]

Subsequently, there were discussions in New York about developing a Security Council resolution on the situation in Kosovo. Proponents considered a new resolution as the best way to provide clear mandates, under chapter VII, for the ICR and EU missions envisioned in the Ahtisaari Proposal, and to phase out the mandate of the international civil presence established in 1999, which paragraph 19 of Resolution 1244 had provided would continue until the Security Council decided otherwise. From a political perspective, a resolution was seen as a way to help consolidate and build political support for Kosovo.[116]

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[114] 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 [Dossier No. 203].

[115] Address by Prime Minister Vojislav Koštunica to the UN Security Council, 3 April 2007, available at: http://www.mfa.gov.yu/Foreinframe1.htm.

[116] Under the Ahtisaari Plan as drafted, there would have been a transition period after which UNMIK's mandate would have expired. The absence at that time of a Security Council resolution to end UNMIK's mandate complicated the arrangements for the transition to the international supervision regime contemplated under the Ahtisaari report for an independent Kosovo, though as a practical matter there has been coordination on the ground and on the whole the international supervision of Kosovo has proceeded satisfactorily.

When discussions in New York were unable to produce a political consensus,[117] the Contact Group then proposed the formation of a "Troika" of senior negotiators to explore, over a period of 120 days beginning in early August, whether any agreement would be possible. Emphasizing again that "[t]he international community must find a solution" and that "[t]he status quo is not sustainable", the Secretary-General welcomed this proposal and requested a report in early December 2007.[118] After a mid-September meeting with the Troika negotiators and the Secretary-General, the Contact Group "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable" and stated that "an early resolution of Kosovo's status is crucial to the stability and security of the Western Balkans and Europe as a whole."[119] The Contact Group "reiterated that striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing."[120]

Vowing to "leave no stone unturned",[121] the Troika conducted intensive discussions with Kosovo and Serbia. These took the form of separate talks with each side and no fewer than seven joint sessions, including a three-day final meeting that explored a wide range of approaches to structuring their relationship in an effort to identify any approach with the potential for reaching an agreement between the parties. The Troika's search went so far as to broach the possibility of partition, an option that had been expressly excluded by the Contact Group's Guiding Principles which formed part of the Troika's mandate; both parties, as well as the Contact Group itself, rejected this possibility. While these negotiations allowed the parties to engage in "the most sustained and intense high-level direct dialogue since hostilities ended in Kosovo in 1999,"[122] the Troika's efforts were unsuccessful. On December 10, the Secretary-General forwarded to the Security Council the Troika's report that the parties had been unable to reach an agreement on Kosovo's status due to their continuing fundamental disagreement on the basic question of sovereignty.[123]

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[117] Letter dated 17 August 2007 from the Permanent Representative of China to the United Nations addressed to the President of the Security Council, S/2007/473, Annex, p. 7.

[118] Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 December 2007, Annex I (Statement by the Secretary-General on the new period of engagement on Kosovo 1 August 2007), paras. 7-9 [Dossier No. 209].

[119] *Ibid.*, Annex III (Statement on Kosovo by Contact Group Ministers, New York, 27 September 2007).

[120] *Ibid.*

[121] *Ibid.*, enclosure (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007), p. 2, para. 5.

[122] *Ibid.*

[123] Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 December 2007 [Dossier No. 209].

Special Envoy Ahtisaari, with the full support of the Secretary-General, had previously declared the political process provided for in Resolution 1244 to have concluded without success. With the failure of the Troika negotiations, it was clear that all hope for achieving an agreement between Serbia and Kosovo on Kosovo's future status had come to an end. As the Troika noted:

> Throughout the negotiations both parties were fully engaged. After 120 days of intensive negotiations, however, the parties were unable to reach an agreement on Kosovo's status. Neither side was willing to yield on the basic question of sovereignty.[124]

The political process that had been "designed to determine Kosovo's future status"[125] was pursued with creativity and persistence, and was strongly supported by the international community. In the end, however, the differences between the parties were simply too great to achieve a result that was acceptable to both Belgrade and Pristina.

Section VII. The Declaration of Independence

With the failure of the Troika talks and the political process under Resolution 1244 to achieve an agreement between the two parties, it essentially became a matter of when, not whether, a declaration of independence by Kosovo would occur. In the days and weeks preceding 17 February 2008, Serbia lobbied intensively against independence.[126] Kosovo's elected leaders, meanwhile, consulted extensively with UNMIK, interested governments and others both in Pristina and elsewhere regarding its intention to declare independence. A central goal was to ensure full coordination with both the international presences created under Resolution 1244 and those to be put in place as part of Kosovo's implementation of the obligations laid out for it in the Comprehensive Settlement Proposal.[127] Representatives of foreign liaison offices in Pristina, including from the United States and members of the European Union, were then invited to attend the extraordinary meeting in the Assembly of Kosovo on February 17,[128] where Kosovo's president, prime minister, and parliamentarians—against a

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[124] Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 December 2007, enclosure (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007), p. 4, para. 11 [Dossier No. 209].

[125] Security Council resolution 1244 (1999), S/RES/1244 [Dossier No. 34].

[126] Letter dated 12 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/92, 12 February 2008.

[127] Judah, p. 142.

[128] Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence Held on 17 February 2008 [Annex 2].

backdrop of thousands celebrating in the center of Pristina—gathered to adopt and sign the declaration of independence.

The declaration itself expressed "the will of our people" for independence and declared Kosovo "to be an independent and sovereign state."[129] Kosovo expressly undertook to implement in full the obligations for it contained in the Ahtisaari Plan, "particularly those that protect and promote the rights of communities and their members."[130] Further provisions, *inter alia,* welcomed and invited the international civilian and military presences established under Resolution 1244; aspired to accession to Euro-Atlantic institutions; expressed gratitude to the United Nations for its work in rebuilding from war and building institutions of democracy; and emphasized Kosovo's acceptance of international obligations, its commitment to regional peace and stability, and its desire for friendship and cooperation with Serbia and all states.[131] The declaration concluded with an affirmation that Kosovo would be "legally bound to comply with the provisions contained in this Declaration."[132]

The declaration of independence was followed within days by recognition of Kosovo's independence by the United States and four of the other five members of the Contact Group, and within three weeks by most other members of the European Union. Serbia, meanwhile, "demand[ed]" in a letter to the Secretary-General that the SRSG use his powers to nullify the declaration as in violation of Resolution 1244.[133] At a meeting of the UN Security Council on February 18, President Boris Tadić requested the Secretary-General to instruct the SRSG to declare the declaration null and void; the Russian permanent representative made a similar demand.[134] The SRSG, however, did not take any such action.[135]

By mid-April 2009, 57 countries, representing every continent, had announced their recognition of Kosovo.

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[129] Declaration of Independence, para. 1 [Dossier No. 192].

[130] *Ibid.*, para. 3. *See also* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211, 28 March 2008, Annex 1 [Dossier No. 86] (assessing that the Declaration of Independence "committed Kosovo to continuing the implementation of reforms required for European integration, and noted Kosovo's obligation to protect and promote the rights of all communities.").

[131] *See* Declaration of Independence, paras. 5-12 [Dossier No. 192].

[132] *See ibid.*, para. 12 [Dossier No. 192]; *see also* Chapter IV, Section IV, *infra.*

[133] Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General. A/62/703-S/2008/111, 19 February 2008, Annex (Letter of President Boris Tadić), p. 2 [Dossier No. 202].

[134] Security Council, Sixty-third year, 5839th meeting, S/PV/5839, 18 February 2008, pp. 5-7.

[135] *See infra* Chapter V, Section VII.

Section VIII. Independent Kosovo

Although the question before the Court does not concern itself with Kosovo's status today, a brief survey of developments since the declaration of independence serves to round out the story of Kosovo's recent history, from autonomy within the Socialist Federal Republic of Yugoslavia in the 1970s and 1980s, to harsh repression in the 1990s, to recovery under United Nations guardianship in the early/mid-2000s, and finally to stability and maturity in the context of independence today. This history confirms the reasonableness of Kosovo's having declared independence, and why Kosovo has garnered such widespread international support.

These post-independence developments can be summarized by reviewing four main factors that undergirded the United States' support for and recognition of Kosovo's independence on 18 February 2008.

First, while the sequence and nature of events that led to Kosovo's independence were exceptional, there were important similarities between the situation facing Kosovo in 2008 and that which had confronted the republics of the former Yugoslavia that gained their independence in the early 1990s.[136] The former federal state and the constitutional checks and balances it provided had disappeared, and a campaign of violence directed by Belgrade had created widespread human suffering. In choosing to accord recognition to Kosovo, the United States thus had in mind fundamental considerations similar to those that underlay its recognition of Slovenia, Croatia and Bosnia and Herzegovina in April 1992, and Macedonia in February 1994, when faced with the dissolution of the old Yugoslavia.

Second, based on its assessment of Kosovo's development during the period of UNMIK administration, the United States was satisfied that Kosovo's viability as a state was not in doubt and that it met the criteria of statehood outlined in Article 1 of the 1933 Montevideo Convention: (1) a permanent population, (2) a defined territory, (3) a functioning government, and (4) the capacity to enter into foreign relations.[137] Consideration of these criteria had likewise been a cornerstone of U.S. recognition of other states seeking independence in the former Yugoslavia in the early 1990s.

Third, the United States was influenced by the conviction both that the status quo of international administration could not be maintained and that there was no viable alternative to Kosovo's independence. The "political process" that Resolution 1244

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[136] *See* Stjepan Mesić, "Kosovo—A Problem that Tolerates No Delay" [Annex 1].

[137] The Inter-American Convention on the Rights and Duties of States, 26 December 1933, LNTS, Vol. 165, p. 19. The Montevideo Convention is often regarded as a general codification of customary international law. *See* David Raič, *Statehood and the Law of Self-Determination* (2002), p. 24, and n. 15.

envisioned had run its course.[138] As the senior U.S. diplomat for European affairs stated in testimony before Congress in March 2008, recognizing Kosovo's independence "was the only responsible decision to take. ... The status quo in Kosovo was unsustainable and undesirable. ... If left unaddressed, Kosovo would have turned into an incubator for frustrations, extremism and instability, which would then threaten to infect all of southeast Europe."[139]

Finally, the United States placed great weight on Kosovo's commitments, assumed in its declaration of independence and subsequently in its constitution, to protect the rights and interests of all communities in Kosovo.[140] As the U.S. President wrote to President Sejdiu in recognizing Kosovo as an independent and sovereign state, the United States "support[s] your embrace of multi-ethnicity as a principle of good governance and your commitment to developing accountable institutions in which all citizens are equal under the law."[141] The United States welcomed Kosovo's "unconditional commitment" to fulfilling the obligations for it under the Ahtisaari Plan, and its willingness to cooperate fully with the international community during the period of international supervision to which Kosovo agreed.[142] In view of the many supervisory responsibilities accruing to the new International Civilian Office and the important responsibilities of the

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[138] *See* discussion *supra* in Chapter II, Section IV and *infra* Chapter V, Section I.

[139] Testimony of Daniel Fried, Assistant Secretary of State for European and Eurasian Affairs before Senate Committee on Foreign Relations, 4 March 2008 ("Fried Testimony"), pp. 5-6, available at: http://foreign.senate.gov/testimony/2008/FriedTestimony080304a.pdf.

[140] *See, e.g.*, Declaration of Independence, para. 2 [Dossier No. 192] ("We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes"); *see also* http://www.assembly-kosova.org/common/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf. These commitments correspond fully to the highest objectives reflected in the standards applied by the Badinter Commission in its review of the "applications" for recognition by several Yugoslav republics in 1991-92. Among those standards for recognition were respect for the UN Charter and the Helsinki Final Act and "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE." The standards are found in the Declaration on Yugoslavia, Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991 (reprinted in Danilo Türk, *Recognition of New States: A Comment*, Annex 2, 4 Eur. J. Int'l L. 63 (1993), p. 73), and the Declaration on the Guidelines on Recognition of the New States in Eastern Europe and in the Soviet Union, 16 December 1991 (reprinted in Danilo Türk, *Recognition of New States: A Comment*, Annex pp. 1, 4 Eur. J. Int'l L. 63 (1993), p. 72).

[141] Letter dated 18 February 2008 from United States President George W. Bush to President of Kosovo Fatmir Sejdiu, 18 February 2008, Weekly Compilation of Presidential Documents, Volume 44, No. 7, 25 February 2008, p. 236, available at: http://fdsys.gpo.gov/fdsys/pkg/WCPD-2008-02-25/pdf/WCPD-2008-02-25-Pg236.pdf.

[142] *Ibid.*

EULEX rule-of-law mission, the United States has subsequently committed substantial resources and personnel to both missions.[143]

Beyond contributing to the effective and inclusive governance of Kosovo today, the United States believed attention to these priorities would lay the foundation for Kosovo's eventual accession to European institutions. This in turn usefully reinforced the commitments of the Government of Kosovo to human rights, democracy, and peaceful relations with neighbors. The United States was persuaded that integration into the EU and Euro-Atlantic structures is key to the long-term stability of Kosovo, Serbia and the region, as well as the well-being of all their residents. "[T]he future of Kosovo, the future of Serbia, the future of the region really lies in the European Union."[144]

Kosovo has fully met the hopes and expectations that the United States had in deciding to recognize its statehood.[145] Upon independence, Kosovo established institutions for the few areas of governmental responsibility in which ministries or other bodies were not put in place and functioning under UNMIK administration, including ministries of foreign affairs and security forces as well as an election commission. As of 1 April 2009, Kosovo's executive branch included seventeen ministries, in addition to the Presidency and the Office of the Prime Minister.[146] As the Special Representative of the Secretary-General in Kosovo recently observed, "UNMIK was really no longer needed to exercise co-governance with the Kosovo side."[147]

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[143] To the ICO, Washington pledged to cover 25% of its operating costs, and to provide a senior U.S. Foreign Service officer as a deputy, in addition to secondments of other State Department staff and assignment of contractors to the operation. *See* Fried testimony, p. 7, available at: http://foreign.senate.gov/testimony/2008/FriedTestimony080304a.pdf. To EULEX, although the mission is overwhelmingly European, Washington has pledged to provide personnel for as many as 88 positions, in addition to financial support. Daniel Fried, Signing of European Union Rule of Law Mission (EULEX) Agreement, 22 October 2008, available at: http://2001-2009.state.gov/p/eur/rls/rm/111171.htm.

[144] U.S. Ambassador to Kosovo Tina Kaidanow, interview with TV PULS, 19 March 2009, available at: http://pristina.usembassy.gov/03192009_interview2.html.

[145] For a general report on Kosovo's progress in meeting its obligations under the CSP, and its political development more broadly, *see* Report of the International Civilian Office, ("ICO Report"), 27 February 2009, available at: http://www.ico-kos.org/d/ISG%20report%20finalENG.pdf [Annex 3], as well as International Civilian Office, International Steering Group for Kosovo, Implementation of the Comprehensive Settlement Proposal - State of Implementation Matrix and Narrative, 27 February 2009 ("ICO Implementation Matrix"), available at: http://www.ico-kos.org/?id=3.

[146] *See* Government of Kosovo website, available at: http://www.ks-gov.net/portal/eng.htm.

[147] *See, e.g.*, Interview with Lamberto Zannier, Special Representative of the Secretary-General (reprinted in Pristina newspaper *Koha Ditore*, 17 March 2009 ("Zannier Interview"), available at: http://www.unmikonline. org/ DPI/LocalMed.nsf/0/76B1D2956FA6537DC125757C0031AB31/$FILE /lmm170309.pdf) ("[W]hat has happened is that UNMIK has remained but the new tasks of UNMIK have been affected on the one hand by the developments on the ground, by the fact that the Kosovo institutions have developed, have taken root, and that UNMIK was really no longer needed to exercise co-governance with the Kosovo side" (emphasis added)).

A signal achievement in governance in Kosovo's first year of independence was the adoption of its constitution, which entered into force on 15 June 2008, after a period of public comment and adoption by the Kosovo Assembly. Among other things, the constitution incorporates the obligations for Kosovo contained in the Comprehensive Settlement Proposal[148] and undertaken in its declaration of independence. The constitution made directly applicable, as supreme law, the human rights and fundamental freedoms guaranteed by instruments such as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, and the Council of Europe Framework Convention for the Protection of National Minorities.[149] The Assembly of Kosovo has adopted more than 90 laws. The Assembly has enacted legislation on matters such as budget and tax issues, the constitutional court, privatization and property, and economic regulation.[150]

With respect specifically to protection for minorities, the Assembly has adopted more than 50 laws directly related to implementation of the provisions of the Ahtisaari Plan, including laws on decentralization and the rights and protection of members of all of Kosovo's communities.[151] Members of all non-majority communities, including Kosovo Serbs, are represented in the Assembly and government ministries, including the prime minister's office. The Kosovo Police have successfully assumed responsibility for guarding many Serbian Orthodox Church sites. The Kosovo Security Force recruits among all communities, and a member of the Serb community serves in the top leadership of the Kosovo Police Force.

In the sphere of foreign relations, 57 states have recognized Kosovo, including 22 of the 27 members of the European Union, which both Kosovo and Serbia aspire to join. Recognizing states include all of Kosovo's immediate neighbors, other than Serbia, and all of the other former Yugoslav republics except Bosnia and Herzegovina.[152] Montenegro, a recognizing state that is both a neighbor and a former republic, was one of the two republics making up the Federal Republic of Yugoslavia at the time Resolution

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[148] Constitution of the Republic of Kosovo, Art. 143, available at: http://www.assembly-kosova.org/common/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf.

[149] *Ibid.*, Art. 22.

[150] *See* "Evidence of the processed and adopted laws," 2 March 2009, pp. 7-12, available at: http://www.assemblyofkosovo.org. *See also* ICO Report, p. 1, [Annex 3]; ICO Implementation Matrix, available at: http://www.ico-kos.org/?id=3.

[151] ICO Report, Secs. II.1, II.3 [Annex 3]; *see also* ICO Implementation Matrix, available at: http://www.ico-kos.org/?id=3.

[152] Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.

1244 was adopted. Kosovo has already established ten embassies and is in the process of establishing more. Kosovo's passport is widely accepted, including by states that have not yet formally recognized it diplomatically.

Additionally, Kosovo has applied for membership in the International Monetary Fund, which has determined that it is a state eligible for membership and is now reviewing its application on the merits.[153] It also has applied for membership in the World Bank, whose decisions follow those of the IMF. Kosovo has accepted as binding on it obligations under applicable treaties entered into by the SFRY, as well as by UNMIK on its behalf during the period between 1999 and 2008,[154] and is now engaged in negotiations with the United States and other countries on the applicability of treaties under state succession principles. Working with UNMIK, Kosovo participates in the Central European Free Trade Agreement ("CEFTA"), the Energy Community and the South-East Europe Transport Observatory, and has participated in launching a treaty establishing a transport community of the western Balkans.[155] In addition to setting up its Ministry of Foreign Affairs, Kosovo has adopted relevant legislation such as laws on diplomatic immunities and a foreign service. Its president, prime minister, foreign minister and other officials have addressed UN bodies on behalf of Kosovo and engaged actively in bilateral diplomacy.[156]

While much has changed in Kosovo since February 2008, the international civilian and military presences operating in Kosovo under Resolution 1244 remain, albeit with modifications in light of the new conditions following the declaration of independence, and complemented by the addition of important new international actors, welcomed and invited by Kosovo in its declaration of independence. The chief continuing presences include:

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[153] International Monetary Fund, Statement on Membership of the Republic of Kosovo in the IMF, Press Release No. 08/179, 15 July 2008, available at: http://www.imf.org/external/np/sec/pr/2008/pr08179.htm ("On July 10, 2008, the International Monetary Fund (IMF) received an application for admission to membership in the IMF from the Republic of Kosovo. In the context of this application, it has been determined that Kosovo has seceded from Serbia as a new independent state and that Serbia is the continuing state."). *See also* ICO Report, III [Annex 3].

[154] Declaration of Independence, para. 9 [Dossier No. 192].

[155] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, para. 18 [Dossier No. 90]. *See, e.g.,* Treaty Establishing the Energy Community of 25 October 2005 with attached Declaration dated 4 October 2005 signed by the Special Representative of the Secretary-General on the terms of UNMIK's signature, and Statement of the Serbian Delegation at the ceremony of signing of the Treaty on 25 October 2005 [Dossier No 175]. *See generally* Dossier, Part II.G.

[156] *See generally* Ministry of Foreign Affairs of the Republic of Kosovo website, available at: http://www.ks-gov.net/mpj/.

- UNMIK, which has scaled back its operations in light of changed conditions on the ground following Kosovo's assumption of full administrative responsibilities and the EU's readiness to conduct rule of law programs. Nevertheless, UNMIK continues to fulfill important functions under Resolution 1244, including monitoring and reporting, and facilitating Kosovo's engagement with international institutions.[157]
- KFOR, the NATO-led Kosovo Force, focusing on security issues, including preservation of a safe and secure environment for all Kosovo citizens, and mentoring and training of Kosovo security institutions.[158]
- OSCE, focusing on institution- and democracy-building, and promoting human rights and the rule of law.[159]

New presences include:

- EULEX Kosovo, the European Union's rule-of-law mission, focusing on "monitoring, mentoring, and advising" Kosovo authorities, judicial authorities and law enforcement agencies.[160] EULEX has taken over rule-of-law functions formerly conducted by UNMIK.[161] Its activities are conducted within the overall framework of Resolution 1244, and have been endorsed by the Security Council.[162]

- The International Civilian Office ("ICO"), established by the International Steering Group ("ISG"),[163] to advise Kosovo's government and municipal leaders on implementation of its obligations under the Comprehensive

[157] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/354, 12 June 2008, para. 16. Annex I [Dossier No. 88]. *See also* Zannier Interview, available at: http://www.unmikonline. org/ DPI/LocalMed.nsf/0/76B1D2956FA6537DC125757C0031AB31/$FILE/lmm170309.pdf; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, paras. 4, 18, 21-25, 48-53 [Dossier No. 90].

[158] *See* KFOR website, available at: http://www.nato.int/issues/kfor/index.html.

[159] *See* OSCE website, available at: http://www.osce.org/kosovo.

[160] *See* Council of the European Union Joint Action 2008/124/CFSP of 4 February 2008, available at: http://eulex-kosovo.eu/home/docs/JointActionEULEX_EN.pdf; *see also* EULEX Programme Strategy, available at: http://eulex-kosovo.eu/strategy/EULEX%20Programmatic%20Approach.pdf.

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

[162] *See* Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008 [Dossier No. 91]; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008 [Dossier No. 90].

[163] ICO Report, pp. 1, 8 [Annex 3].

> Settlement Proposal, in particular its provisions related to protections for communities and their members. The ICO is headed by an International Civilian Representative ("ICR"), appointed by the ISG, who exercises supervisory authority over Kosovo's implementation of the CSP and certifies legislation for consistency with the CSP. The ICR also serves as the European Union Special Representative ("EUSR") in Kosovo.[164]

Other than the ICO, these presences operate on the basis of a "status-neutral" approach—neither accepting nor rejecting Kosovo's statehood—owing to the participation of non-recognizing states in the missions or organizations. Nevertheless, their activities, undertaken in close coordination with national and local authorities, are intended to and in fact have the practical effect of strengthening Kosovo's democratic development and bolstering its governing institutions. As the ICO observed in its report to the ISG on Kosovo's first year of independence:

> The past year witnessed much progress in Kosovo, progress in building institutions, anchoring Rule of Law, in the creating and consolidating of the elements of statehood, and in taking its place in the community of nations as a multi-ethnic democracy. ... Through continued effort and vigilance, we believe that 2009 will be a year of progress for Kosovo – progress in meeting its commitments to itself and to its international partners to implement the CSP, and progress toward the destiny foreseen in its Constitution, "as a free, democratic, and peace-loving country that will be a homeland to all of its citizens."[165]

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[164] *See* ICO Report, pp. 1, 8 [Annex 3]; *see also* Council of the European Union Joint Action 2008/123/CFSP of 4 February 2008, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:042:0088:0091:EN:PDF.

[165] ICO Report, pp. 1, 8 [Annex 3].

CHAPTER III

CONSIDERATIONS RELATING TO THE NATURE OF THE QUESTION REFERRED AND HOW THE COURT MIGHT ADDRESS IT

The question referred by the General Assembly in Resolution 63/3 is:

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

This Chapter provides the observations of the United States on the nature of the question and how the Court might address it. Section I discusses the Court's jurisprudence regarding advisory opinions and its implications for the rendering of an opinion in this case. Section II describes why, if the Court does decide to render an opinion in this case, the response should be confined to the question posed.

Section I. Questions Related To Whether Rendering An Opinion Would Be A Proper Exercise Of The Court's Judicial Function

The Court's authority to issue an advisory opinion is discretionary.[166] The Court has, however, been mindful of the fact that—as the principal judicial organ of the United Nations—its "answer to a request for an advisory opinion 'represents its participation in the activities of the Organization.'"[167] The Court's advisory opinions "furnish[] to the requesting organs the elements of law necessary for them in their action," and for this reason the Court has stated that it should decline a request only for "compelling reasons."[168]

The Court has also repeatedly "underlined its duty to reply – a duty arising from its status as an organ of the United Nations – by referring to the interest which the requesting organ has in having a reply to its request."[169] As the purpose of the Court's

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[166] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 234-35, para. 14.

[167] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p.136, at p. 156, para. 44.

[168] *Ibid.*, paras. 44, 60.

[169] Kenneth Keith, *The Extent of the Advisory Jurisdiction of the ICJ* (1970), p. 148.

advisory jurisdiction is to assist the other organs in the performance of their functions, "its resultant obligation to reply is dependent at least to some extent on the presence of that interest [by the requesting organ]."[170] The Court reiterated this point in *Construction of a Wall*, stating that there should be a "relationship between the question[,] the subject of a request for an advisory opinion and the activities of the General Assembly."[171] For this reason, the Court often looks to the interest that the requesting organ has in receiving its guidance before deciding to issue an opinion.[172]

The present case is unusual in that there is a genuine question whether the General Assembly has a need for legal clarification on the question posed to perform any of its functions, and accordingly whether the Court's opinion would contribute to its activities.

The question referred by the General Assembly concerns Kosovo's declaration of independence. The text of Resolution 63/3 does not offer a reason for the requested opinion nor any background on the matter. The resolution does not refer to any issue related to Kosovo before the General Assembly, and the General Assembly did not have relevant items related to Kosovo on its agenda when the question was posed.[173] This

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[170] Kenneth Keith, *The Extent of the Advisory Jurisdiction of the ICJ*, p. 148 (1970).

[171] *Construction of a Wall, Advisory Opinion, I.C.J. Reports 2004,* p. 136 at p. 145, para. 16.

[172] In *Threat or Use of Nuclear Weapons*, the Court rejected the argument that it should decline the request for an opinion, stating that "[t]he question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law." *Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports,* p. 226, at p. 233, para. 12. In the *Peace Treaties* case, the Court dismissed several parties' arguments that it should refuse to issue an opinion after noting that "the sole object of [the requested opinion] is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it." *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 72. Similarly, in the *Namibia* case, the Court responded to an argument that it should decline to issue an opinion by noting that the request was "put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 24, para. 32. The Court also noted the General Assembly's interest in receiving its opinion in the *Reservations to the Convention on Genocide* case, stating: "The object of this request for an Opinion is to guide the United Nations in respect of its own action. It is indeed beyond dispute that the General Assembly, which drafted and adopted the Genocide Convention, and the Secretary-General, who is the depository of the instruments of ratification and accession, have an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations." *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p.19.

[173] *See* Agenda of the sixty-third session of the General Assembly, A/63/251, 19 September 2008. A matter related to the financing of UNMIK is listed on the agenda, but there is no indication that the Assembly needs the Court's legal advice in order to address this agenda item, nor was it suggested during the debate that it does.

omission contrasts with prior requests for advisory opinions from the General Assembly that explicitly stated the need for the Court's advice,[174] identified a specific problem confronting the Assembly,[175] or cited to relevant General Assembly resolutions.[176]

Nor can such a reason be gleaned from the circumstances under which the question was formulated. During the diplomatic discussions and the debate in the General Assembly leading to the adoption of Resolution 63/3, neither Serbia nor other member states indicated that the General Assembly, as a body, needed this opinion.

The United States recognizes this Court's previous opinions rejecting the argument that the General Assembly should have made clear "what use it would make of an advisory opinion",[177] and noting that "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions."[178] But in those instances it was clear that the General Assembly was actively considering matters related to the subject matter of the opinion requested.[179] The same is not true here.

Indeed, this case is striking because the debate in the General Assembly itself reveals that the purpose of the question seems to have been solely to aid individual states in their capacity as states, not to aid the General Assembly in a matter before it.

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[174] General Assembly resolution 3292, 13 December 1974 ("it is highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem"); General Assembly resolution 42/229B, 2 March 1988 (explaining the dispute between the United Nations and a Member State and noting that attempts "at amicable settlement were deadlocked"); General Assembly resolution 1731, 20 December 1961 ("*Recognizing* its need for authoritative legal guidance as to obligations of Member States . . . in the matter of financing the United Nations operations in the Congo and in the Middle East") (emphasis in original).

[175] *See* General Assembly resolution 942, 3 December 1955 (explaining that the General Assembly has been requested to "decide whether or not the oral hearings of petitioners on matters relating to the Territory of South West Africa is admissible before that Committee").

[176] *See* General Assembly resolution ES-10/14, A/RES/ES-10/14, 8 December 2003.

[177] *Construction of a Wall, I.C.J. Reports 2004*, p.136, para. 61.

[178] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 236, para. 6.

[179] *Construction of a Wall, Advisory Opinion, I.C.J. Reports 2004*, p. 136, paras. 17, 49. For example, in *Construction of a Wall*, the Court was asked to state the "legal consequences arising from the construction of the wall being built by Israel" in the West Bank. Although the General Assembly did not say how it would use the Court's opinion, it was evident that the General Assembly was actively involved in issues related to the Palestinian/Israeli conflict. *Ibid.* at para. 49. Prior to requesting an advisory opinion, the General Assembly had demanded that Israel halt construction of the wall, and the Secretary General had issued a report on Israel's compliance with those demands. *See* Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, A/ES-10-248, 24 November 2003.

Specifically, the diplomatic discussions and the debate in the General Assembly make clear that Resolution 63/3 was not designed to refer a question to the Court because the General Assembly as an institution needed such advice. Rather, the debate focused upon the asserted right of any member state to seek an advisory opinion on matters of importance to it. For example, the sponsor of the resolution, Serbia, circulated a letter to missions in New York indicating that the proposed resolution was intended to

> underline the fact that the issue that will be presented before the General Assembly is about the right of any member State of the United Nations to pose a simple, elementary question on a matter of international law; it is about the fundamental right to seek an advisory opinion of the International Court of Justice, consistent with the UN Charter, on a principle of utmost importance to all. *No country should be denied the right to refer such a matter to the ICJ.*[180]

This point was renewed more strongly during the General Assembly debate on 8 October 2008:

> Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek — now or in the future — judicial recourse through the United Nations system.[181]

It is true that any member state can seek an advisory opinion on any legal issue—in the sense that any state can seek to persuade the General Assembly that it should exercise its right to seek the Court's advice. What stands out in this situation, however, is that the opinion appears to have been sought solely for the benefit of individual states—in effect requesting the Court to serve as the Legal Adviser to those states. But the Court has stated that its role is to advise the organs of the United Nations, not the individual member states. It has made clear that "[t]he Court's opinion is given not to the States, but to the Organ which is entitled to request it."[182] In *Threat or Use of Nuclear Weapons*, the Court emphasized that "[t]he purpose of the advisory function is not to settle ... disputes between States, but to offer legal advice to the organs and institutions requesting

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[180] Letter dated 22 August 2008 from Vuk Jeremić, Minister of Foreign Affairs of the Republic of Serbia addressed to Condoleezza Rice, Secretary of State, United States of America, p.2 (emphasis added). Similar letters were also written to other foreign ministers of states with missions in New York.

[181] 22nd plenary meeting of the sixty-third session of the General Assembly, A/63/PV.22, 8 October 2008, p.1 (Remarks of Foreign Minister Vuk Jeremić) [Dossier No. 6].

[182] *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 71.

the opinion."[183] The Court reiterated this principle in *Construction of a Wall*, stating that its "opinion is to be given to the General Assembly, and not to a specific State or entity."[184] The fact that a state, or group of states, might desire an advisory opinion for their own national purposes does not present the same institutional basis for Court action as is presented when an organ has requested an opinion in connection with its own work.

Such considerations well might not provide the Court sufficient reason to decline a request where the record indicates that the Court's legal clarification is being sought for the General Assembly to carry out its duties, rather than to vindicate the purported "right of any member State" to refer a question to the Court. In the present case, however, there are significant questions as to whether the Court's providing an opinion would further the purpose of its advisory jurisdiction. These considerations thus take on added weight, and the question whether the Court should proceed to render the requested opinion warrants particular scrutiny.

Section II. If The Court Does Decide To Render An Opinion, The Importance Of Confining The Response To The Question Posed

A great many questions, both political and legal, may bear upon the matter of Kosovo's independence. But the General Assembly has not posed those questions to the Court, and has not indicated—either in its question or in the context in which it was formulated—that it is seeking answers from the Court to such questions. The record reflects that this was not inadvertent. The sponsor of the resolution formulating the question stated that it "should not be changed because it is precise and clear,"[185] that it represented "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,"[186] and stressed that "there is no room for maneuvering space for [] amendments" in the way it was formulated.[187] There is no indication that the General Assembly actually sought an answer to anything other than the question as it was posed.

The most noteworthy aspect of the question is that it is focused on the legality of the act of declaring independence. It does not address a broad range of other questions

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[183] *See also* Kenneth Keith, *The Extent of the Advisory Jurisdiction of the ICJ* (1970), p. 142 ("The opinions are, in theory, directed *only* to that organ") (emphasis in original).

[184] *Construction of a Wall, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 164, para. 64.

[185] "Jeremić: Good Chances for Serbia at UN General Assembly," summary of interview with *Politika*, 22 September 2008, available at Serbian Ministry for Kosovo and Metohija website: http://www.kim.sr.gov.yu/cms/item/news/en.html? view=story&id=6290&sectionId=11.

[186] General Assembly, 63rd Session, 8 October 2008, A/63/PV.22, p. 2 [Dossier No. 6].

[187] Foreign Minister: Amendments to Resolution Unacceptable, 27 September 2008, available at Serbian Ministry of Foreign Affairs website: http://www.mfa.gov.yu/Bilteni/Engleski/b290908_e.html#N3.

that might have been asked about Kosovo's path to independence or the international community's response.

The General Assembly, for example, could have asked about the legal consequences of the declaration of independence, but it did not. In contrast, in the most recent advisory opinion, the Court was asked:

> What are *the legal consequences* arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[188]

Similarly, in the *Namibia* case, the Court was asked:

> What are the *legal consequences for States* of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?[189]

In both these cases, it was appropriate for the Court to examine—and the Court did in fact examine—the "legal consequences" of particular acts, as opposed to examining solely the lawfulness of the acts themselves. The General Assembly was surely aware of both these cases when it referred the question to the Court in this case. Yet, the question here was specifically framed to address solely the act of the declaration of independence and not its legal consequences.

The significance of this fact is reinforced by the prevalence of other aspects of Kosovo's independence raised by individual states at the time the question was formulated. Indeed, the resolution's sponsor, Serbia, had pointedly and publicly complained about many of the actions that states and the United Nations had taken in response to Kosovo's declaration of independence, including specific complaints about the recognition of Kosovo by other states, the failure of the Secretary-General (and the SRSG) to annul the declaration of independence,[190] and the activities being undertaken by the United Nations Mission in Kosovo to facilitate a smooth transition following the declaration of independence, including UNMIK's efforts to commence new security

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[188] *Construction of a Wall, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 141, para. 1.

[189] *South West Africa, Advisory Opinion, I.C.J. Reports* 1971, p. 16, at p. 17, para. 1 (emphasis added).

[190] *See* Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, A/62/703—S/2008/111, 19 February 2008, Annex pp. 2-3 [Dossier No. 202].

measures in Kosovo.[191] Despite this, the question was drafted to focus on the one issue its text addresses – the lawfulness of the declaration itself.[192]

Reformulating the question to encompass other issues would therefore be inconsistent with the decision of the General Assembly. The Court has previously re-formulated or broadened a question where "the wording of a request . . . did not accurately state the question on which the Court's opinion was being sought" [193] or where the question presented did not correspond to the "true legal question" under consideration.[194] The present request does not raise any such concerns.

This case is thus not like the Advisory Opinion in *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, where the referral to the Permanent International Court of Justice "[did] not exactly state the question upon which its opinion is sought" but simply referred to letters that were forwarded to the court.[195] In that case, the PCIJ found it necessary to reformulate the question "in order more particularly to avoid dealing with points of law upon which it was not the intention of the Council or the

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[191] Letter dated 17 April 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/260, 18 April 2008, para. 15 [Dossier No. 87].

[192] There are of course numerous other questions related to Kosovo that could have been, but were not, referred by the General Assembly. These include:

-- questions about whether subsequent acts of Kosovo to adopt its new Constitution or to adopt new laws, including those related to the commitments for it under the Ahtisaari Plan, are permissible;

-- questions about whether Kosovo may be admitted as a member to the United Nations (or other organizations and entities);

-- questions about proposals for partitioning Kosovo;

-- questions about whether (or in what form) further talks between Kosovo and Serbia should be held, and how they might best be conducted; and

-- questions about the lawfulness of the 1999 NATO military campaign (which the FRY earlier submitted separately to the Court via a contentious case).

Again, the fact that these questions were not encompassed by resolution 63/3 cannot be considered accidental.

[193] *Construction of a Wall, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 154, para. 38 (citing *Interpretation of the Greco-Turkish Agreement of 1 December 1926, Advisory Opinion, 1928, P.C.I.J., Series B, No 16(I)*, pp. 14-16).

[194] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at pp. 87-89, paras. 34-36. Subject to such considerations, however, the Court has concluded that its role is to provide an "answer to the question posed", leaving it to the requesting body—here, the General Assembly—to "draw conclusions from the Court's findings." *Construction of a Wall, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 62.

[195] *Greco-Turkish Agreement, Advisory Opinion, 1928, P.C.I.J., Series B, No 16(I)*, p.14.

Commission to obtain [the court's] opinion."[196] Nor is this case like *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, where this Court determined that the question referred to it was

> on the face of it, at once infelicitously expressed and vague; and in the second place, the records and report of the Committee cast doubt on whether the question as framed really corresponds to the intentions of the Committee in seising the Court.[197]

In that case, this Court concluded that the process by which the question was formulated was "formally defective," which caused the question "not to correspond to the intentions of the Committee in that it [was] worded in such a way that it [did] not disclose the two grounds of objection . . . which clearly lie at the basis of the question intended to be referred to the Court by the Committee."[198] Here, the question was referred to the Court in precisely the form that its sponsor requested, both its sponsor and the General Assembly as a whole were well aware of the range and type of questions that Resolution 63/3 did not pose, and there are no allegations that Serbia was deprived of any procedural ability to formulate the question in the manner it saw fit.

Finally, there is no indication that the question does not correspond to the "true legal question" under consideration.[199] This is in contrast to the advisory opinion in *Interpretation of Agreement*, where this Court determined that although the request only cited one section of the legal agreement in question, the factual and legal context in which the request was made left no doubt that the true question under consideration could not be answered without examining the entire agreement and other rules that would apply to the situation at hand. In that instance, failing to address those questions would be "not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization."[200] The same is not true here, where

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[196] *Greco-Turkish Agreement, Advisory Opinion, 1928, P.C.I.J., Series B, No 16(I)*, p.14.

[197] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, at p. 349, para. 46.

[198] *Ibid.*, paras. 41, 46.

[199] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at pp. 87-89, paras. 34-36.

[200] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at pp. 88-89, para. 35. *See also Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at pp. 156-57 (noting that rejection of an amendment posed in the General Assembly to add express sub-questions concerning whether the expenses in question were adopted in conformity with the Charter did not "preclude the Court from interpreting Article 17 in light of the other articles of the Charter, that is, in the whole context of the treaty").

the question inquires whether the declaration of independence is in accordance with "international law".

In sum, the General Assembly chose not to ask about the "legal consequences" of the declaration of independence, nor did it ask other legal questions concerning the situation in Kosovo, but instead adopted the wording of Serbia's question as Serbia requested. There accordingly is no basis on which the General Assembly's question could or should be expanded or reformulated. As the Court has noted in other cases, the Court's role now—if it finds that providing an Advisory Opinion is appropriate—is "to provide an answer to the question posed" and it is then up to the General Assembly to "draw conclusions from the Court's findings" that it believes appropriate.[201]

[201] *Construction of a Wall, Advisory Opinion, I.C. J. Reports 2004*, p. 136, at p. 163, para. 62.

CHAPTER IV

THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH GENERAL PRINCIPLES OF INTERNATIONAL LAW

As discussed in this chapter, international law does not as a general matter regulate declarations of independence, nor is there anything about Kosovo's declaration of independence in particular that would render it not "in accordance with international law." Chapter V will then describe how Kosovo's declaration of independence is also in accordance with Resolution 1244.

Section I. International Law Does Not As A General Matter Regulate Declarations Of Independence

It is widely accepted that declarations of independence, standing alone, present matters of fact, which are neither authorized nor prohibited by international law.[202] Neither the United Nations Charter, nor other general international agreements, nor customary international law regulate the act of declaring independence.[203] The fact that

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[202] *See, e.g.,* Théodore Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness", in *Secession: International Law Perspectives*, p. 145 (Kohen, ed. 2006) ("...une declaration d'indépendence par une entité sécessionniste, qui constitue la manifestation on ne peut plus claire du rejet de toute soumission à l'ordre juridique de l'Etat prédécesseur, ne produit, en elle-même, aucun effect juridique."). This is evidenced by the broad consensus among commentators that secession—which frequently involves a declaration of independence as an early step—is a matter of fact, which occurs outside the regulatory context of international law. *See, e.g.,* Lauterpacht, *Recognition in International Law* (1947) ("International law does not condemn rebellion or secession aiming at acquisition of independence."); Daniel Thürer, "Secession", in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum, ed.), available to subscribers at: http://www.mpepil.com, p. 2 ("International law, thus, does not state conditions of legality of a secession, and neither does it provide for a general 'right for secession'. It does not in general condemn movements aiming at the acquisition of independence, either."); Antonello Tancredi, "A normative 'due process' in the creation of States through secession", in *Secession: International Law Perspectives*, p. 189; Christian Tomuschat, "Secession and self-determination", in *Secession: International Law Perspectives*, p. 43 and n. 81 ("Internal strife, including initiatives for secession from an existing State, is not prohibited as such by international law. On this issue, there exists broad consensus in the legal literature.").

[203] *See* Marcelo Kohen, "Introduction", in *Secession: International Law Perspectives*, p. 20 ("[No] international rule prevents a political movement or an entity within a State from seeking secession through non-forcible means."); John Dugard & David Raič, "The role of recognition in the law and practice of secession", in *Secession: International Law Perspectives*, p. 102 ("One will search in vain for an explicit prohibition of unilateral secession in international instruments. The same is true for the explicit recognition of such a right.").

international law does not address declarations of independence is not surprising. As a general rule, international law governs the relations between States, not the conduct of entities within States.[204] There are certain exceptions, such as those found in international humanitarian law,[205] but declarations of independence do not by themselves fall into these exceptions. "Events leading to the creation of a new State generally entail matters within the domestic jurisdiction of a State."[206]

It is certainly the case that declarations of independence may—and in their nature often do—violate domestic law. However, that does not mean that there has been a violation of international law.[207] As Oppenheim has observed in the context of rebellion: "Although a rebellion will involve a breach of the law of the state concerned, no breach of international law occurs through the mere fact of a rebel regime attempting to overthrow the government of the state or to secede from the state."[208]

Thus, it is widely accepted that, from the standpoint of international law, the process of State formation presents a matter of fact.[209] A declaration of independence is an expression of a will or desire by an entity to be accepted as a state by the members of the international community. There may be other events associated with a particular declaration of independence that can be regulated by international law, but as one commentator has remarked:

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[204] *See, e.g.,* 1 *Oppenheim's International Law* § 6 (9th ed. 1992) ("[I]nternational law is primarily a law for the international conduct of states, and not of their citizens.").

[205] *See, e.g., ibid.* § 7 ("States may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of international law."); § 148 ("[M]uch of the law of war is binding not only upon states but also upon their nationals, whether members of their armed forces or not.... Individual criminal responsibility under international law has also, for example, been affirmed or established in relation to genocide, grave breaches of the 1949 Geneva Conventions (and of the 1977 Protocols to them) and apartheid.")

[206] Thürer, *Secession,* in Max Planck Encyclopedia of Public International Law, available at: http://www.mpepil.com, p. 2; *see also* Li-Ann Thio, "International Law and Secession in Asia and the Pacific Regions", in *Secession: International Law Perspectives*, p. 299 ("Positive international law neither prevents nor prohibits secession, treating secessionist conflicts as matters of domestic jurisdiction.").

[207] *See* 1 *Oppenheim's International Law* § 21 ("From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law.").

[208] *See ibid.* § 49.

[209] Kohen, "Introduction", in *Secession: International Law Perspectives*, p. 4 ("The creation of States has traditionally been perceived as a matter of fact. For most authors, international law does not impact upon this process, and is limited to taking note of the existence of a new sovereign entity, with all the legal consequences attached to it, i.e., the existence of rights and obligations in the international realm.").

> [T]he State in the contemplation of international law is not a mere legal or 'juristic' person (*personne morale*), whose process of coming into being is prescribed by law. It is rather a 'primary fact', i.e. a fact that precedes the law, and which the law acknowledges only once it has materialised, by attributing certain effects to it, including a certain legal status.[210]

In this case, the question before the Court is not whether any of these associated events—such as the subsequent recognitions of Kosovo's statehood by other States—are permissible under international law, but rather whether the declaration itself was consistent with international law. The fact that international law does not generally seek to regulate the act of declaring independence means that this declaration must be deemed to be in accordance with international law.[211]

Section II. Confirmation From Recent State Practice Concerning Dissolution Of Yugoslavia

One need look no further than the events surrounding the break-up of former Yugoslavia for confirmation that declarations of independence—even where they are rejected by the parent State—are consistent with international law. Croatia and Slovenia adopted declarations of independence from the SFRY in June 1991, and Macedonia and Bosnia and Herzegovina issued similar declarations in September and October of that year.[212] Significantly, prior to these events, many in the international community had opposed the independence of the republics[213] and, in each case, the declarations occurred

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[210] Georges Abi-Saab, "Conclusion", in *Secession: International Law Perspectives*, p. 470.

[211] To some extent, the question posed to the Court may be founded on the misconception that a source of positive international law must be identified to justify the Declaration. As discussed above, however, international law does not regulate declarations of independence. In this respect, the legal backdrop is somewhat different from the *Nuclear Weapons* case, where the Court's examination of state practice revealed that there was no "principle or rule of international law which would make the [legal use of weapons] dependent upon a specific authorization," but did find a broad set of specific prohibitions applicable to weapons generally. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 52; *see also Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), I.C.J. Reports 1986*, p. 14, para. 269 ("in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all states without exception."). As to declarations of independence, however, no specific prohibitions exist, save the one important—and in this case, inapplicable—distinction discussed in Section III below.

[212] *See* Conference on Yugoslavia Arbitration Commission: Opinion 1, 29 November 1991 (*reprinted in* International Law Reports, Vol. 92, 1993, pp. 162, 165) [Dossier No. 233]. In particular, Macedonia adopted a declaration of sovereignty and independence on 17 September 1991, and Bosnia and Herzegovina adopted a resolution on sovereignty on 14 October 1991. *Ibid.*

[213] *See, e.g.*, Letter dated 28 March 1991 from President Bush to the Yugoslav Prime Minister, *quoted in* Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, p. 174

against the wishes of the federal government. Nevertheless, once confronted with the facts of the actual declarations, the international community did not conclude that they violated international law, or that they were regulated by international law.

Following the declarations of independence of Slovenia and Croatia, the Presidency of the SFRY issued a statement characterizing the declarations as "anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane," and stating that they "directly threaten the territorial integrity of Yugoslavia, the country's state frontiers and its sovereignty according to international law."[214] The European Community called for a three-month moratorium on independence in the hopes of negotiating a peaceful resolution to the conflict.[215] Yet, significantly, the European Community's statements do not suggest that the declarations of independence were unlawful under international law.[216] Slovenia and Croatia agreed to the moratorium effective 7 July 1991, but reaffirmed their proclamations of independence on October 8, once the moratorium lapsed.[217] Meanwhile, Macedonia had declared independence on 17 September 1991, and Bosnia and Herzegovina's sovereignty resolution followed soon thereafter. The SFRY government continued to oppose the republics' declarations, and in early October issued another statement asserting that the Slovenian and Croatian declarations of independence violated the federal constitution and posed a direct threat to Yugoslavia's territorial integrity.[218]

(2002) ("The United States ... will not encourage those who would break the country apart."); *see also* State Department Declaration, May 1991, quoted in Lalonde, *Determining Boundaries in a Conflicted World*, p. 174 ("the United States will not encourage or reward secession"). In addition, an EC Delegation issued a statement in late May 1991 expressing support for Yugoslavia's unity, and the EC foreign ministers issued a statement on 23 June 1991 declaring that the European Community would not recognize declarations of independence by Slovenia and Croatia. *See* Lalonde, *Determining Boundaries in a Conflicted World*, p. 174.

[214] Stands and Conclusions of the SFRY Presidency Concerning the Situation in Yugoslavia, 27 June 1991, (reprinted in *Yugoslavia Through Documents: From Its Creation to its Dissolution*, p. 305 (Trifunovska, ed. 1994) ("Trifunovska")).

[215] *See* Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 *Am. J. Int'l L.*, p. 573 (1992); Declaration on Yugoslavia, Adopted at the 82nd EPC Ministerial Meeting, The Hague, 10 July 1991 (reprinted in Trifunovska, pp. 315-16).

[216] *See generally* Trifunovska, pp. 308-44.

[217] *See* Conference on Yugoslavia Arbitration Commission: Opinion 1, 29 November 1991, p. 165 [Dossier No. 233].

[218] *See* Assessments and Positions of the SFRY Presidency Concerning the Proclamation of the Independence of the Republic of Croatia and Slovenia, 11 October 1991 (reprinted in Trifunovska, p. 354) ("By their secessionist acts Slovenia and Croatia pose a direct threat to the territorial integrity of Yugoslavia, which is the only subject recognized in international law, the constituent parts of which are these Republics."); *see also* Position of the SFRY Presidency, 30 December 1991 (reprinted in Trifunovska, p. 484) ("In view of the fact that the decisions of some Yugoslav republics proclaiming their 'sovereignty and independence' constitute acts of secession, from the standpoint of both the national law

Statements by others in the international community during this period reflect concern with the ongoing violence, but they do not include judgments on the legality of the declarations of independence themselves as a matter of international law.[219] When a meeting of the UN Security Council was convened in late September 1991, the crisis in Yugoslavia was still widely considered to be an internal conflict, not one governed by international law.[220]

Significantly, the Badinter Commission, which specifically considered "principles of public international law" in its first opinion, did not treat the republics' declarations of independence as prohibited or governed by international law. Instead, the Commission described the declarations as facts indicating the republics' "desire for independence."[221] The Commission reiterated the well-established tenet that "the existence or disappearance of the State is a question of fact."[222] When the Commission subsequently considered in January 1992 whether each republic had met the European Community's legal and political conditions for recognition, it made no mention of the permissibility of the earlier declarations of independence under international law.[223]

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and the UN Charter and CSCE documents, and the fact that such decisions are not based on equal rights to self-determination of constituent nations, the resulting transformation of administrative into state borders of these republics has no legal grounds and their borders cannot be considered in terms of international public law.").

[219] *See, e.g.*, Declaration on Yugoslavia issued by the European Community, the U.S.S.R., and the United States, 18 October 1991 (reprinted in Trifunovska, p. 356) ("We call upon the Presidents of the Republics... to reaffirm their commitment to the peace process and to adhere absolutely to the commitments they have already made.... Our common desire is to promote a speedy and complete halt to all military activities as an essential precondition to a settlement."); Declaration on the Situation in Yugoslavia issued by the European Community, 28 October 1991 (reprinted in Trifunovska, p. 369) (condemning Serbian efforts to establish a Greater Serbia and stating that unless the Serbian reserve is lifted "the Conference will proceed with the cooperative republics to obtain a political solution, in the perspective of recognition of the independence of those republics wishing it, at the end of a negotiating process conducted in good faith..."); Peace Conference on Yugoslavia: Treaty Provisions for the Convention, 1 November 1991 (reprinted in Trifunovska, pp. 370-78) (proposing that new relations between the republics be based on "Sovereign and independent republics with an international personality for those that wish it.").

[220] *See* Weller, "The International Response", pp. 577-81.

[221] *See* Conference on Yugoslavia Arbitration Commission: Opinion 1, 29 November 1991, p. 165 [Dossier No. 233].

[222] *Ibid.*, p. 165; *see also* Thürer, *Secession*, in Max Planck Encyclopedia of Public International Law, available at http://www.mpepil.com, p. 6 ("The commission thus pointed out the limited role of international law in the crisis ...").

[223] *See* Conference on Yugoslavia Arbitration Commission: Opinions 4-7, 11 January 1992 (reprinted in 31 I.L.M. 1488, pp. 1501-1517 (1992)).

The Commission's failure to consider whether the declarations of independence were internationally lawful cannot be explained on the basis that the SFRY had already dissolved. The declarations occurred in June, September, and October of 1991, yet when the Commission issued its first opinion in November 1991, it clearly still viewed the SFRY as existing, noting that the SFRY had "retained its international personality."[224] (It was not until July 1992 that the Commission ultimately concluded that the SFRY had dissolved.)[225] In the end, the Commission simply viewed the declarations of independence as factual events, which were part of a series of circumstances that ultimately led to the final dissolution of the SFRY. As Dugard and Raič have commented, the opinions of the Badinter Commission

> leave no doubt that, according to the Commission, the SFRY was still in existence on the date of the (reaffirmed) proclamations of independence by Croatia and Slovenia on 8 October 1991. Therefore, the acts by Croatia and Slovenia, first in June 1991 and later in October 1991, set in motion the process of dismemberment of the SFRY, which eventually culminated in the latter's extinction. Accordingly, the proclamations of independence of these two republics – and also that of Macedonia on 17 September 1991, which was, as in the case of Slovenia, subsequently acquiesced in by the SFRY – must be seen as acts of secession which, in combination with other factors, *led to the dissolution of the SFRY.*[226]

This recent State practice in the specific context of the former Yugoslavia confirms that declarations of independence have not been viewed as regulated by or inconsistent with international law. To the contrary, the international community regarded such occurrences as facts, by themselves neither authorized nor prohibited by nor subject to international law.

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[224] Conference on Yugoslavia Arbitration Commission: Opinion 1, 29 November 1991, p. 165 [Dossier No. 233].

[225] *See* Conference on Yugoslavia Arbitration Commission: Opinion 8, 4 July 1992 (reprinted in International Law Reports, Vol. 92, 1993, pp. 199, 202) [Dossier No. 235] ("[T]he process of dissolution of the SFRY referred to in Opinion 1 of 29 November 1991 is now complete and ... the SFRY no longer exists.").

[226] *See* Dugard & Raič, "The role of recognition in the law and practice of secession", in *Secession: International Law Perspectives*, p. 129 (emphasis in original); *see also* Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, p. 270 (1995) (noting that Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina achieved independence in a process that occurred "beyond the regulation of the existing body of laws").

Section III. The Situation May Differ When Declarations Of Independence Are Conjoined With Actions That Themselves Violate International Law

Although declarations of independence do not by themselves violate international law, they are at times conjoined with other events or acts in combination with which they might be characterized as serious international law violations. This is an important distinction. For example, where a declaration of independence is adopted in conjunction with an effort to establish an apartheid regime—which would amount to a serious violation of a peremptory norm of international law[227]—declarations of independence have been characterized as unlawful. Thus, the United Nations Security Council adopted a resolution that condemned the "usurpation of power" by the white supremacist leader of the Southern Rhodesian government, Ian Smith, and stated the Security Council's view that his government's declaration of independence had "no legal validity."[228] Even in that case, however, the Security Council characterized the declaration of independence as "legally invalid," rather than proclaiming that the declaration itself was a violation of international law.[229] Thus, it is possible to view this condemnation as focused on the legal consequences of the declaration rather than the legality of the act of declaring independence as such. In any event, as discussed in the next section, Kosovo's declaration of independence was not conjoined with any such violation of international law.

Section IV. Kosovo's Declaration Of Independence Is In Accordance With International Law

Kosovo's declaration of independence addressed a variety of issues in addition to independence itself, but there is nothing in these other provisions that is not "in accordance with international law." To the contrary, the provisions of Kosovo's declaration of independence, including notably its emphasis on the protection of human rights for the members of all communities within Kosovo, are consistent with the highest international human rights protections. As the Secretary-General's Special Representative indicated at the time, the declaration of independence "committed Kosovo to continuing

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[227] *See, e.g.*, Crawford, Fourth Report on State Responsibility, A/CN.4/517, 2 April 2001, para. 41.

[228] Security Council resolution 217 (1965), S/RES/217.

[229] *Ibid.*; *see also* Security Council Official Records, 1258th meeting, S/PV.1258, 12 November 1965, para. 19 (Statement by the Representative of Uruguay) ("The declaration of independence does not shock us because it is unilateral; it shocks us, fundamentally, because it is made by a racist minority. Throughout history declarations of independence have always been unilateral acts. The declaration we are considering is therefore not evil because it is unilateral; it is evil because it has been made by a racist minority to oppress and coerce a huge majority... Therefore, we point out that the legal aspect of the condemnation of the declaration arises, not from the fact that the declaration was made unilaterally, but from the fact that it was made by a racist minority in furtherance of political goal which should be condemned.").

the implementation of reforms required for European integration, and noted Kosovo's obligation to protect and promote the rights of all communities."[230] The rule that declarations of independence are simply facts, neither specifically authorized nor prohibited under international law, therefore applies in this case.[231]

Among other things, the declaration of independence provided that Kosovo will be "a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law."[232] Through the declaration of independence, Kosovo "fully accept[ed] the obligations for Kosovo contained in the Ahtisaari Plan, and welcome[d] the framework it proposes for the years ahead."[233] It committed Kosovo's leaders to adopt a Constitution—which they subsequently adopted—"that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined in the European Convention on Human Rights."[234] The importance of reaching out to the members of all Kosovo's communities, including in particular the Serb community, is at the core of the Ahtisaari Plan. It was emphasized not just in the declaration of independence itself but virtually continuously in the political events and speeches surrounding the Declaration, including specifically at the session at which the declaration of independence was adopted,[235] and

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[230] *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211, 28 March 2008, Annex 1, para. 2 [Dossier No. 86].

[231] The text of the question referred to the Court refers to a declaration of independence "by the Provisional Institutions of Self-Government of Kosovo." The wording suggests the possibility that the authors of the question may be seeking to establish that the declaration was unlawful not for substantive reasons—that is to say, not because it would have been unlawful for Kosovo to declare independence as such—but because those declaring independence were acting as the Provisional Institutions of Self-Government and yet lacked a formal grant of positive authority from the SRSG to adopt the declaration. Such an argument would be meritless. As described in Section VII of chapter V, the SRSG—the person whose authorization would be lacking under this theory—did not, in fact, object to the adoption of the declaration of independence. Beyond that, the declaration's own first paragraph makes clear that it was intended as an expression of the "will of the people", not the exercise of a formal grant of authority from UNMIK. Indeed, if it were seriously contended that the declaration of independence was unlawful simply because it was issued by the "PISG" rather than by a body unrelated to the institutions of self-government created through the UN administration, that technical flaw could easily have been remedied by convening a new constituent body for the purpose of "re-declaring" independence.

[232] Declaration of Independence, para. 1 [Dossier No. 192].

[233] *Ibid.*, para. 3.

[234] *Ibid.*, para. 4.

[235] *See, e.g.*, Speech of Hashim Thaçi, 17 February 2008:

> On this historical day, honorable assembly members, I wish to reaffirm our political will to create the necessary conditions for respecting and protecting the communities and for further improving relations between them in Kosovo. . . .
>
> Our commitments will be embodied in three main elements:

in the laws that have been adopted subsequently by Kosovo in furtherance of the provisions of the Ahtisaari Plan.

The declaration of independence also welcomed the continued support of the international community for Kosovo's development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244; invited "an international civil presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission"; welcomed KFOR's continued support; committed to "cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability"; expressed its gratitude for the work of the United Nations in building democratic institutions after the 1999 conflict; and committed "to working constructively with the United Nations as it continues its work in the period ahead."[236]

The document reflects the intention of the new Kosovo state "to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration."[237] Kosovo declared "its commitment to peace and stability in our region" and committed itself to "work together with our neighbours to advance a common European future."[238] Also of particular note, the declaration expressed Kosovo's desire to establish good relations with

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> The first, a strong and irreversible guarantee by law of equal rights of all communities in Kosovo.
>
> The second, establishment of permanent mechanisms to guarantee that the communities play a complete and active role in developing the future of our country, and
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> The third, is our responsibility to take effective and immediate measures to ensure that our commitments result with positive change, for all those living in Kosovo, especially members of minority communities. . . . There is no place for fear, discrimination or unequal treatment for anyone. We are building Kosovo with equal rights for everyone, with equal opportunities for everyone.

Transcript of Special Plenary Session, 17 February 2008, pp. 5-6 [Annex 2]. *See also ibid.*, p. 9 (Statement of President Sejdiu) (speaking in Serbian):

> I would once again like to take this solemn opportunity to again invite all citizens of Kosovo, above all the citizens of the Serb community in Kosovo, to give their contribution in a common building of a European Kosovo, where each citizen will feel like home. Kosovo is equally your home and your homeland. Your rights and the rights of members of other communities in an independent Kosovo will be a continuous obligation of our state institutions. Serb cultural and religious heritage will be entirely protected. Your ethnic and language identity will be entirely honored, and we will achieve this by working together in our daily lives and in the institutions of Kosovo.

Ibid., p. 9.

[236] Declaration of Independence, paras. 5, 7 [Dossier No. 192].

[237] *Ibid.*, para. 6.

[238] *Ibid.*, para. 10.

its neighbors, including specifically Serbia, noting that it shares "deep historical, commercial and social ties that we seek to develop further in the near future."[239] The declaration stated: "We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people."[240]

Kosovo also accepted "the duty of responsible membership in the international community"; committed itself to "abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states"; and undertook to "refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[241] It undertook to abide by international obligations concluded by UNMIK on its behalf, as well as relevant treaty obligations of the former Socialist Federal Republic of Yugoslavia, and to cooperate fully with the International Criminal Tribunal for the former Yugoslavia.[242]

In its final paragraph, the declaration stated:

> 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.[243]

This final paragraph of the declaration of independence clearly represents Kosovo's intent that its declarations be regarded as binding obligations under international law. This is consistent with the approach set forth in decisions of this Court and the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" that were adopted by the International Law Commission in

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[239] Declaration of Independence, para. 11.

[240] *Ibid.*

[241] *Ibid.*, para. 8.

[242] *Ibid.*, para. 9.

[243] *Ibid.*, para. 12.

2006.[244] As this Court is aware, the International Law Commission concluded that, depending on the circumstances, states may by virtue of unilateral declarations bind themselves to certain courses of action as a matter of international law, and adopted the Guidelines to assist those attempting to formulate such declarations. This is particularly important in light of the language in paragraph 1 of those Guiding Principles, which provides that:

> [T]he binding character of such [unilateral] declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.[245]

A suggestion that the declaration of independence is not in accordance with international law could thus affect the viability of the commitments made by Kosovo on a broad range of important and sensitive issues beyond the issue of independence, and could threaten the ability of the international community to rely on the assurances contained in it, including the extent to which Kosovo is obligated to implement the provisions aimed at guaranteeing protections for members of its minority communities.[246] Appropriately in light of Kosovo's own history, the declaration of independence ties the issue of independence to the protection of minorities, much in the way that the Ahtisaari Report considered these principles as the basic foundation for a supervised independence. Other states, including the United States, accordingly viewed their support for the declaration of independence as consistent with the Ahtisaari approach and the overall objective of ensuring the protection of members of minority communities in a new state, while codifying and cementing support for such protections from the government.[247]

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[244] *See* Report of the International Law Commission, Fifty-eighth session, A/61/10, 1 May-9 June and 3 July-11 August 2006, Supplement No. 10, para. 176; *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, p. 252 at pp. 267-268, paras. 43, 46; *Case concerning the Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at pp. 573-574, para. 39.

[245] Report of the International Law Commission, Fifty-eighth session, A/61/10, 1 May-9 June and 3 July-11 August 2006, Supplement No. 10.

[246] In this regard, one of the effects of Serbia's campaign to prevent the recognition of Kosovo is that it hinders Kosovo's ability to join the Council of Europe and therefore to become a state party to the European Convention on Human Rights. Although Kosovo is not formally a party to the Convention, it has legally bound itself under international law to implement the provisions of the Convention through its Declaration of Independence. However, individuals within Kosovo, including ethnic Serbs, are prevented from bringing cases against Kosovo before the European Court of Human Rights because Kosovo is not a party to the Convention, which undermines the ability of individuals within Kosovo from fully availing themselves of the protections offered by the European human rights system.

[247] Letter of President Bush to President Sejdiu, 18 February 2008, Weekly Compilation of Presidential Documents, Volume 44, No. 7, 25 February 2008, p. 236, available at: http://fdsys.gpo.gov/fdsys/pkg/WCPD-2008-02-25/pdf/WCPD-2008-02-25-Pg236.pdf.

CHAPTER V

THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH RESOLUTION 1244

As explained in this Chapter, Kosovo's declaration of independence in February 2008 was in accordance with Security Council Resolution 1244.

Chapter II described how Resolution 1244 was an effort both to address the most urgent and pressing needs in Kosovo and to provide an environment in which Kosovo could develop politically, free of coercion from Belgrade. In adopting the resolution, the Security Council authorized establishment of a special regime to deal with the unique features of the Kosovo situation, in recognition that Belgrade's actions over the previous decade and their consequences threatened international peace and security. Kosovo would remain formally a part of the FRY for an interim period, but Kosovo's status in the longer term would remain open, to be determined later. Resolution 1244 anticipated that independence might be most appropriate for Kosovo's future status and did not seek to preclude it. This conclusion is supported by the overall approach of the resolution, the language used in referring to the Rambouillet Accords and the territorial integrity of the FRY, the long history of negotiations between Serbia and Kosovo that had been facilitated by the international community, the nature of the future status process that was described in the resolution itself, and the manner in which the United Nations administered that process.

By the time that Kosovo declared independence, there was agreement that the status quo was unsustainable and that the future status process, led by the Secretary-General's Special Envoy, former Finnish President Martti Ahtisaari, had run its course. Ahtisaari had concluded that "the only viable option for Kosovo is independence" and that "Kosovo's status should be independence, supervised by the international community."[248] The Secretary-General specifically supported Ahtisaari's recommendation.[249] Even then, another round of negotiations, facilitated by a EU-Russian-U.S. "Troika," was conducted, providing further confirmation of the Special Envoy's view that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted."[250] As explained in more detail below, it was only after all this—with no viable alternatives left and facing an unsustainable status quo—that Kosovo declared independence in February 2008.

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[248] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168, 26 March 2007, p. 2 [Dossier No. 203].

[249] *Ibid.*, p. 1.

[250] *Ibid.*, p. 2.

Section I. The Fundamental Approach Of Resolution 1244 Was To Protect The People Of Kosovo, Create An Environment In Which Kosovo Could Develop Politically And, Subsequently, Facilitate A Process To Seek A Resolution of Kosovo's Future Status

The fundamental approach of Resolution 1244 was to protect the people of Kosovo, create an environment in which Kosovo could develop politically and, at a later stage, facilitate a process designed to determine Kosovo's future status. Four key elements of this approach are apparent from the text of the resolution itself.

First, paragraph 1 sets forth the threshold decision made by the Council in Resolution 1244 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." Annex 1 contained the Statement by the Chairman of the meeting of the G-8 Foreign Ministers of 6 May 1999; Annex 2 contained the Ahtisaari-Chernomyrdin principles that were presented to, and accepted by, the government of the Federal Republic of Yugoslavia as a basis for ending the immediate crisis in Kosovo. Both Annex 1 and Annex 2 addressed the need for arrangements under which Kosovo would be protected against rule from Belgrade for an interim period. The resolution demanded the full cooperation of the Federal Republic of Yugoslavia in the rapid implementation of the principles elaborated in the two annexes, and demanded in particular that the FRY "put an immediate and verifiable end to violence and repression in Kosovo."[251]

Second, the resolution authorized the establishment of an international security presence to establish a safe environment for all people in Kosovo. The international security presence was established as the Kosovo Force, or "KFOR". Paragraph 9 of the resolution set out elements of KFOR's mandate, including its responsibilities to deter renewed hostilities and to ensure the withdrawal and prevent the return of the military, police and paramilitary forces of the Federal Republic of Yugoslavia. Thus, KFOR's responsibilities were directed at excluding Belgrade from exercising further governmental authority in Kosovo.

Third, paragraph 10 of the resolution authorized the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence that could provide interim administration—in substitution of the FRY and Serbian authority that was required to withdraw—and, subsequently, to establish institutions of democratic self-government for Kosovo. Although the resolution gave the Secretary-General broad discretion regarding how to organize the international civil

[251] Security Council resolution 1244 (1999), S/RES/1244, paras. 2-3 [Dossier No. 34].

presence, the main responsibilities of the civil presence are set out in paragraph 11 of the resolution. The Secretary-General responded at the time by establishing UNMIK.[252]

Fourth, the responsibilities of the international civil presence included "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords."[253] Resolution 1244 left the process undefined except to characterize it as "political," but this language made clear the expectation that Kosovo's autonomous status was for an interim period, and would at a subsequent point be superseded by a "future status."

In sum, Resolution 1244 described "an interim administration for Kosovo" that was "a part of an international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia."[254] To that end, the state of affairs contemplated under the resolution was one in which:

- The international civil presence would assist the people of Kosovo to develop their own political institutions in an environment in which Kosovo would be free of the influence of the FRY;
- Belgrade's governing authority would be displaced by the international civil presence, and by the democratic institutions of self-government that the civil presence would create to assist the people of Kosovo to develop and to which it would progressively transfer responsibilities;
- KFOR would prevent the return of Belgrade's security forces and apparatus, and provide security in their stead;
- Kosovo would as a formal matter remain "within the Federal Republic of Yugoslavia," but the period of time during which this would be the case would be an "interim" period;
- The international civil presence would facilitate "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"; and
- There was no requirement that the future status be "agreed," only an authorization for the international civil presence to facilitate a political process.

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[252] *See* Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244, S/1999/672, 12 June 1999 [Dossier No. 35] and Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/1999/779, 12 July 1999 [Dossier No. 37].

[253] Security Council resolution 1244 (1999), S/RES/1244, para. 11(e) [Dossier No. 34].

[254] *Ibid.*, para. 10.

Section II. The References To The Rambouillet Accords In Resolution 1244 Underscore That Independence Was Recognized As A Legitimate And Possible Outcome And That Serbia Had No Veto Over The Political Process

The references to the Rambouillet Accords in paragraph 11 of Resolution 1244 were both intentional and important. When examined in light of the relevant prior negotiations between Pristina and Belgrade, they support the conclusion that independence was recognized as a possible future status for Kosovo, and that the future status of Kosovo did not require the FRY's consent.

A. The References in Resolution 1244 To The Rambouillet Accords Confirm That Independence Was A Possible Future Status For Kosovo

The two references to the Rambouillet Accords ("Rambouillet Accords" or "Rambouillet") in the body of Resolution 1244 confirm that independence was contemplated as a possible outcome of the future status process.

1. Rambouillet reference in paragraph 11(a). The first reference to the Rambouillet Accords is contained in paragraph 11(a) of the resolution and establishes that, in promoting the establishment of substantial autonomy and self-government in Kosovo, the international civil presence must "tak[e] full account" of the Rambouillet Accords.[255] This language indicated that the arrangements put in place during the interim period would involve the kind of autonomy contained in the provisions for governing the interim period in the Rambouillet Accords; and furthermore that those arrangements should be undertaken with an eye toward the arrangements for future status suggested under Rambouillet. As described in Chapter II, the arrangements put in place during the interim period involved the development of Kosovo's own governmental institutions and the progressive transfer of authority to these institutions, and thus prepared Kosovo well for the independence that was to come. On the day after Kosovo declared independence, the Secretary-General of the United Nations summarized the situation in this way:

> The United Nations has been instrumental in moving Kosovo away from the humanitarian and emergency phase to peace consolidation and the establishment of functional local self-government and administration. Since 1999, the United Nations has overseen the creation and consolidation of Provisional Institutions of Self-Government at the central and municipal levels, with minority representation. The United Nations has created a functional justice system and a multi-ethnic police force, and has successfully organized and overseen five elections. Kosovo now has a

[255] Security Council resolution 1244 (1999), S/RES/1244, para. 11(a) and Annex 1 [Dossier No. 34].

> vibrant and diversified political party scene. Freedom of movement has improved, and inter-ethnic crimes have been reduced. Kosovo has made considerable progress through the years on the implementation of standards, and the standards implementation process is now fully integrated into the European approximation process.[256]

2. Rambouillet reference in paragraph 11(e). The second reference to Rambouillet is in paragraph 11(e) of Resolution 1244, and established the requirement that the international civil presence take account of the Rambouillet Accords in facilitating a political process designed to determine Kosovo's future status. This reference further reinforces the conclusion that independence was a possible outcome under Resolution 1244. While, as noted in Chapter II, the provisions of the Rambouillet Accords addressing the process for determining Kosovo's future status did not prejudge the outcome of that process, they had identified the bases upon which a final settlement for Kosovo would be determined, the first of which was the "will of the people."[257] Given the aspirations toward independence reflected by Kosovo's elected representatives in July 1990 and September 1991, and the referendum in October 1991, as well as the tragic events that took place during the remainder of the decade, the implication that the phrase "will of the people" potentially encompassed independence was unmistakable. Thus, just as independence would have been a possible outcome under the Rambouillet Accords, so too was this anticipated under Resolution 1244.

B. The References In Resolution 1244 To The Rambouillet Accords Also Confirm That The Outcome Did Not Require The FRY's Consent

The references to the Rambouillet Accords in Resolution 1244 also confirm that the consent of the FRY was not a prerequisite in order for future status to be determined. This is evident not only from the text of Rambouillet itself, but by comparing the Rambouillet text with the texts of the four drafts of the earlier "Hill Agreement" (described above in Chapter II) upon which the relevant provisions of Rambouillet were modeled.

The Rambouillet Accords and each draft of the Hill Agreement contemplated an interim period in which Kosovo would have some version of autonomous status, and each contained provisions for changes to that status at the end of the interim period. Under the first three drafts of the Hill Agreement, however, FRY agreement would have been required in order to make changes at the end of the interim period. (The relevant

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[256] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, S/PV.5839, 18 February 2008, p. 3 [Dossier No. 119].

[257] *See* Chapter II, Section III, *supra.*

language was placed in brackets in the fourth draft of the Hill Agreement.) In sharp contrast, no similar requirement for Belgrade's approval would have been required under the Rambouillet Accords. Like the Rambouillet Accords, Resolution 1244 similarly included no requirement for Belgrade's approval. This is reflected both in the absence of provisions of this type in the text of Resolution 1244, and by the reference to the Rambouillet approach in the political process provision, paragraph 11(e). To illustrate this more clearly, the following discussion considers the relevant provisions of the draft Hill Agreements and the Rambouillet Accords in more detail.

Chapter 8(1) of the Rambouillet Accords contained provisions related to future status. It provided:

> 1. Amendments to this Agreement shall be adopted by agreement of all the Parties, except as otherwise provided by Article X of Chapter 1.
>
> 2. Each Party may propose amendments at any time and will consider and consult with the other Parties with regard to proposed amendments.
>
> 3. Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.[258]

Chapter 8(1) was modeled on the draft Hill Agreements but differed significantly in that it omitted the provision under which FRY consent would have been needed for changes in Kosovo's status following the interim period.[259]

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[258] Rambouillet Accords, S/1999/648, 18 February 1999, p. 85 [Dossier No. 30].

[259] The wording of paragraphs 1 and 2 of Article VIII of the first draft Hill Agreement makes apparent that Chapter 8(1) of Rambouillet was modeled upon it:

> 1. Amendments to the Agreement shall be adopted by signature of the parties.
>
> 2. Each signatory may propose amendments at any time and will consider and consult with the other with regard to proposed amendments.

First Hill Proposal, 1 October 1998 (reprinted in Krieger, p. 155). Subsequent versions of the draft Hill Agreements, containing similar language, were dated 1 November 1999 and 2 December 1999, and are reproduced in Krieger at pages 158 and 169, respectively. The Final Hill Proposal, also containing similar language, was dated 27 January 1999, and is reproduced in Krieger at page 176. Under these provisions, the agreement of the parties would be needed to modify the arrangements applicable *during* the three-year interim period.

In contrast, the third paragraph of Chapter 8(1) of the Rambouillet Accords differed from the third paragraph contained in the Hill Agreements in addressing what would happen at the end of the interim period. Under the first three drafts of the Hill Agreement, there was to be an assessment at the end of the

For its part, Kosovo had objected at Rambouillet that the earlier approach of the draft Hill Agreements—under which FRY consent would have been required—was unacceptable. Kosovo's position had been that, in light of their fundamental differences over the question of Kosovo's governance, vesting each party with a veto at the end of the three-year period precluded any change, in effect rendering the arrangements permanent, and belying the proposition that the agreement was in fact of an interim nature. Kosovo therefore issued a statement that talks should proceed on the basis that Kosovo should be able to decide for itself on its future status.[260] Paragraph 10 of its statement contained its counter-proposal:

> At the conclusion of the interim period, the future status of Kosovo will be determined or confirmed in accordance with the principle of self-determination of the people of the Republic of Kosovo. A referendum will be conducted with international involvement.

By the time of the negotiations at Rambouillet, it was clear that Kosovo would not agree to a provision under which Belgrade would have an ability to veto proposed changes to Kosovo's status at the end of the interim period.[261] Thus, Rambouillet dropped the language providing that further steps "will require mutual agreement for adoption." In its place, it left the process for determining Kosovo's future status open-ended, describing factors that should be taken into account in a decision on future status, but not addressing the substance of the outcome. There was no doubt that this approach was inconsistent with the FRY's insistence that it should have a veto over any future status arrangements. Indeed, the FRY/Serbian delegation sought to re-insert the language from the Hill Agreements requiring their consent, but they were unsuccessful in their attempts to do so.[262]

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three-year period. At that point, as under Rambouillet, either side could put forward proposals for additional steps. Unlike under Rambouillet, however, the Hill Agreements also provided that such proposals for additional steps "will require mutual agreement for adoption." *See* First Hill Proposal, 1 October 1998, para. 3 of Article VIII (reprinted in Krieger, p. 158); Revised Hill Proposal, 1 November 1999, para. 3 of Article IX (reprinted in Krieger, p. 165); and Revised Hill Proposal, 2 December 1998, para. 3 of Article XI (reprinted in Krieger, p. 175). The draft Hill Agreements thus specified a right of veto for Belgrade over any proposals for modification of Kosovo's status at the end of the interim period as well as during it. The Rambouillet Accords did not.

[260] *See* Statement on Fundamental Principles for a Settlement of the Kosovo Question Issued by the Government of the Republic of Kosovo, 3 November 1998, para. 10 (reprinted in Krieger, pp. 165-66).

[261] *Ibid.* The evolution to the Rambouillet approach had begun in the fourth draft of the Hill Agreement of 29 January 1999. That draft contained language, in brackets, stating that the assessment of whether to implement proposals for additional steps at the end of the three-year period would be made "by a procedure to be determined taking into account the Parties' roles in and compliance with this Agreement." *See* Final Hill Proposal, 27 January 1999, Article X(3) (reprinted in Krieger, pp. 176, 181).

[262] *See* Federal Republic of Yugoslavia Revised Draft Agreement, 15 March 1999, proposed changes to

This point is noteworthy not because of anything it says about the relative merits of the positions taken by Belgrade and Pristina during the negotiations, but rather because it highlights that the omission in the Rambouillet Accords (compared with the earlier draft Hill Agreements) of any reference to a requirement for Belgrade's consent to changes in Kosovo's status at the end of the interim period was deliberate and highly significant. Thus, when Resolution 1244 provided that the Rambouillet Accords shall be taken into account in the status process that the international civil presence was mandated to facilitate, it referred to arrangements that allowed for the possibility of a future status outcome that did not have Belgrade's consent.

In the final analysis, to the extent Resolution 1244 speaks to future status, it foresees that there will be a process, it authorizes the international civil presence to facilitate that process, and it recognizes that the process will be political in nature. The reference to the Rambouillet Accords in Resolution 1244, and the background of the Accords, underscore that the result of the future status process was left open and that its outcome was not made dependent upon the consent of Belgrade.

Section III. The Qualified Reference In Resolution 1244 To The 'Territorial Integrity' Of The FRY Further Underscores That Independence Was Seen As A Legitimate And Possible Outcome

Preambular paragraph 10 of Resolution 1244 reaffirmed the commitment of UN 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." The manner in which this language is framed underscores that the Security Council was not requiring that the then-existing borders of the FRY were forever fixed, regardless of other legal or political considerations or processes. Rather, the resolution was drafted to reflect that independence following the interim period was a possible outcome, and that territorial integrity needed to be viewed and understood in the totality of the circumstances surrounding the situation in Kosovo.[263]

Chapter 8, Article 1 (reprinted in *Crisis*, pp. 480, 489-90).

[263] To be clear, the United States recognizes that preambular paragraph 10 is not cast in the form of a decision of the Security Council that would create binding legal obligations for member states under Article 25 of the Charter of the United Nations. The language is nevertheless suggestive that the Council understood that Kosovo was for the time being, but might well not end up as, part of the FRY, and that there were many principles and factors in play that would inevitably bear on Kosovo's final status.

A. Principles Of Territorial Integrity Do Not Preclude The Emergence Of New States On The Territory Of Existing States

The principle that states should respect the sovereignty and territorial integrity of other states is axiomatic and applies to all states. The UN Charter, for example, addresses the issue of territorial integrity in Article 2(4), stating that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Under Article 2(1), "the Organization is based on the principle of the sovereign equality of all members." But the fact that these principles are axiomatic does not preclude entities from seeking to emerge or actually emerging as new states on the territory of the original state.[264]

In the early 1990s, authorities in Belgrade made arguments that the emergence of new states on the territory of former Yugoslavia violated the principle of territorial integrity. The SFRY asserted, for example, that the declarations of independence by Slovenia and Croatia in 1991 "constitute a flagrant violation of the territorial integrity of the Socialist Federal Republic of Yugoslavia" and that the SFRY "will consider every attempt to recognize these acts of Slovenia and Croatia as . . . directed against its international subjectivity and territorial integrity."[265] Such assertions were unavailing. Like every other state, the SFRY was entitled to respect for its sovereignty and territorial integrity. But standing by itself, that entitlement no more meant that international law prohibited the emergence of new states on the territory of the SFRY in the early 1990s than it precluded the emergence of a new state on the territory of the FRY thereafter.

B. Differences Between The Reference To Territorial Integrity In Resolution 1244 And In Previous Kosovo Resolutions Underscore That Independence Was Considered A Legitimate And Possible Outcome

In the particular case of Resolution 1244, whatever meaning might otherwise be attributed to references to territorial integrity, the wording of preambular paragraph 10 underscores that eventual independence for Kosovo was considered a legitimate and possible outcome.

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[264] By its terms, preambular paragraph 10 refers to the commitment "of all Member States." It is not clear how that could be relevant to the question that has been referred to the Court in this case, namely whether Kosovo—which is not a Member State—acted in accordance with international law in declaring independence.

[265] Assessment and Positions of the SFRY Presidency Concerning the Proclamations of the Independence of the Republic of Croatia and Slovenia, Belgrade, 11 October 1991, paras. 1-2 (reprinted in Trifunovska, pp. 353-54).

The reference to territorial integrity in Resolution 1244 is tellingly different from the resolutions that preceded it. Resolution 1244 followed a series of Security Council resolutions regarding the political situation in Kosovo in the period preceding the 1999 military campaign: Resolution 1160 (31 March 1998), Resolution 1199 (23 September 1998), and Resolution 1203 (24 October 1998). Each of these resolutions contained a preambular paragraph that used identical language to "affirm" or "reaffirm" "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."[266]

In contrast, preambular paragraph 10 of Resolution 1244 reads as follows:

> Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, *as set out in the Helsinki Final Act and annex 2* (emphasis added).

Thus, unlike the language that appeared in the earlier resolutions, preambular paragraph 10 speaks of the sovereignty and territorial integrity of the FRY as set out in the two referenced documents – that is, as set out in the Helsinki Final Act and Annex 2 of the resolution. As explained in greater detail below, the reference to Annex 2 underscored that the Council was reaffirming the FRY's territorial integrity only with respect to the interim period that is the subject of Annex 2. At the same time, the reference to the Helsinki Final Act indicated that the principle of territorial integrity was only one of a number of Helsinki principles to be balanced and applied, taking into account each of the other Helsinki principles.

1. The reference to territorial integrity 'as set out in ... Annex 2'. Preambular paragraph 10 refers to the commitment of all states to the FRY's sovereignty and territorial integrity "as set out in Annex 2." Annex 2 contains the Ahtisaari-Chernomyrdin principles, agreed to by the SFRY in early June 1999, which paved the way for the adoption of Resolution 1244.[267] The only part of Annex 2 that refers to principles of "sovereignty and territorial integrity" is paragraph 8. Paragraph 8 refers to

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[266] *See* Security Council resolution 1160 (1998), S/RES/1160, preambular para. 7 [Dossier No. 9]; Security Council resolution 1199 (1998), S/RES/1199, preambular para. 13 [Dossier No. 17]; Security Council resolution 1203 (1998), S/RES/1203, preambular para. 14 [Dossier No. 20]. A further resolution adopted during the military campaign addressed the humanitarian situation and used similar language "[r]eaffirming the territorial integrity and sovereignty of all States in the region". Security Council resolution 1239 (1999), S/RES/1239, preambular para. 7 [Dossier No. 28]. Similar language has also appeared in other resolutions relating to the countries of the region. *See, e.g.*, Security Council resolution 1174 (1998), S/RES/1174, preambular para. 2 and subsequent Bosnia resolutions.

[267] Annex 2 contained a list of ten principles to which the FRY agreed and that provided the basis for ending the immediate humanitarian crisis in Kosovo and the ending by NATO of the military campaign. The list included, for example, "an immediate and verifiable end to violence and repression in Kosovo,"

> [a] political process towards the establishment of *an interim political framework agreement* providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of [the Kosovo Liberation Army]. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.[268]

Thus, preambular paragraph 10 speaks of taking principles of sovereignty and territorial integrity into account only in the arrangements designed to govern the interim period. When contrasted with the language in the Kosovo resolutions that the Council had adopted the previous year, the "as set out in Annex 2" language underscores that the period referred to was only the interim period. Resolution 1244 thus expressed no prejudgment as to how the principles of sovereignty and territorial integrity should be taken into account in future status arrangements.

2. The reference to territorial integrity 'as set out in the Helsinki Final Act'. At the same time, the reference to the Helsinki Final Act underscored that the commitment to territorial integrity should not be read in isolation, but rather in a broader context in which other principles must be given equal consideration, and in which human rights and other considerations are of particular importance.

The Helsinki Final Act, adopted by 35 states at the meeting of the Conference on Security and Cooperation in Europe in Helsinki in 1975, dealt with three "baskets" of issues, related generally to traditional European security issues; cooperation in economics, science, and technology; and a broad range of human rights matters. The first basket included a Declaration on Principles Guiding Relations between Participating States. The declaration elaborated ten principles, including territorial integrity of states (addressed in Principle IV), as well as principles related to respect for human rights and fundamental freedoms; equal rights and self-determination of peoples; general provisions based on the need to promote a stable security environment in Europe; and commitments for states in exercising their sovereign rights to conform with their legal obligations under international law and implement the provisions of the Helsinki Final Act itself.[269]

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verifiable withdrawal of Yugoslav security forces, deployment of an international security presence, and deployment of an international civil presence.

[268] Security Council resolution 1244 (1999), S/RES/1244, para. 8 (emphasis added) [Dossier No. 34].

[269] Helsinki Final Act, 1 August 1975, available at: http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

There are at least two reasons that the placement of the term "territorial integrity" in the context of the Helsinki Final Act is important in understanding the language of preambular paragraph 10 of Resolution 1244.

First, the inclusion of the language on Helsinki highlighted that the principle of territorial integrity should be understood not as an absolute, but as one of among many considerations that were relevant in the approach to Kosovo. The concluding paragraphs of the Helsinki Declaration on Principles contain specific language tying the various strands of the Helsinki Final Act together and underscoring their inter-relationship. Specifically, Principle X provides:

> All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

The significance of the statement concerning the inter-relationship of the Helsinki Principles has been recognized and reaffirmed repeatedly in the decades following its adoption.[270] Since its inception, a fundamental tenet of the Helsinki Final Act has remained: "There is no hierarchy of principles and they are all inter-linked."[271] The

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[270] Thus, the equal status of the principles was also explicitly reaffirmed by all CSCE participating states in the concluding document of the Vienna Meeting (1986-1989). Principle (1) of the Concluding Document of that Meeting states:

> The participating States reaffirm their commitment to all ten principles of the Final Act's Declaration on Principles Guiding Relations between participating States and their determination to respect them and put them into practice. The participating States reaffirm that all these principles are of primary significance and, accordingly, will be equally and unreservedly applied, each of them being interpreted taking into account the others.

Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, held on the basis of the provisions of the Final Act relating to the follow-up to the Conference, 19 January 1989, available at: http://www.osce.org/documents/mcs/1989/01/16059_en.pdf. It was also adopted by participating states as part of an OSCE "Code of Conduct on Politico-Military Aspects of Security" in 1994. Thus, paragraph 7 of the Code of Conduct states:

> The participating States recall that the principles of the Helsinki Final Act are all of primary significance and, accordingly, that they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

Code of Conduct on Politico-Military Aspects of Security, 3 December 1994, OSCE DOC.FSC/1/95, available at: http://www.osce.org/documents/fsc/1994/12/4270_en.pdf. It is highlighted today in the "OSCE Handbook" alongside a summary list of the ten principles from the Declaration. *See* OSCE Handbook, 2007, p. 3, available at: http://www.osce.org/item/22286.html.

[271] Ján Kubiš, "Management of Change in a Time of Transition," in proceedings of a conference entitled "Democracy and Security in the 21st Century and the Evolving Role of Regional Organizations," sponsored

reference to the Helsinki Final Act thus served to underscore that—whatever one might otherwise read into the principle of territorial integrity—it must be understood in the context of other equally important principles.

Second, the reference to the Helsinki Final Act was important because principles related to human rights lie at the heart of the Helsinki process.[272] Among other things, the Helsinki Final Act underscored the commitment of participating states

> -- to respect human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion;
>
> -- to promote and encourage the effective exercise of civil, political, economic, social, cultural, and other rights and freedoms;
>
> -- to recognize and respect the freedom of the individual to profess and practice religion, alone or in community with others;
>
> -- to respect the right of persons belonging to national minorities equality before the law, and to afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms; and
>
> -- to recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

The human rights provisions of the Helsinki Final Act had particular salience with respect to the FRY, which had been responsible for vast atrocities directed against ethnic Albanians in Kosovo. The OSCE had issued numerous reports documenting those atrocities.[273] The FRY had been suspended from participation in the OSCE since 8 July

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by the Austrian Center for International Studies in cooperation with the Organization for Security and Co-operation in Europe, 2005, available at: http://www.osce.org/documents/sg/2005/12/17389_en.pdf.

[272] *See* T. Buergenthal, D. Shelton, and D. Stewart, *International Human Rights* (2002), p. 206 (the OSCE principles and process "gave human rights an important place on the political agenda" of Europe and have enabled the OSCE to play such a major role "to influence the human rights policies of many of its nations."). The Conference on Security and Cooperation in Europe (CSCE) was the primary vehicle for carrying forward the results of the Helsinki Final Act; the CSCE became the Organization for Security and Cooperation in Europe (OSCE) in 1995. For ease of exposition, the present name of the organization -- OSCE -- is used throughout the text here.

[273] *See, e.g.*, "Kosovo/Kosova -- As Seen, As Told" (1999), OSCE report, available at: http://www.osce.org/publications/odihr/1999/11/17755_506_en.pdf; *see also* CSCE reports cited in Chapter II, Section II.

1992,[274] and the FRY had fueled fears that it would consider itself responsible for abiding by OSCE human rights commitments only "assuming that the membership rights and obligations of [the FRY] are renewed."[275]

The reference to the Helsinki Final Act thus highlighted the central importance of the human rights situation and the Helsinki human rights principles in Kosovo, affirmed that the Helsinki principles remained relevant notwithstanding the fact that the FRY had been suspended from participation in OSCE, and underscored that the reaffirmation of the principle of territorial integrity was not intended to be understood in a vacuum.[276]

Section IV. Resolution 1244 Refers Only To The Territorial Integrity Of 'The Federal Republic Of Yugoslavia', Not To That Of 'Serbia'

Serbia has characterized Resolution 1244 as reaffirming the sovereignty and territorial integrity of "Serbia". For example, writing to the United Nations Secretary-

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[274] *See* OSCE Handbook, p. 14, available at: http://www.osce.org/publications/sg/2007/10/22286_952_en.pdf. The FRY was not finally admitted to membership until 10 November 2000. *See* Organization for Security and Co-Operation in Europe, *Vienna Declaration on the Role of the OSCE in South-Eastern Europe*, 8th Meeting of the Ministerial Council, 27-28 November 2000, document MC.DOC/2/00, para. 1, available at: http://www.osce.org/documents/mcs /2000/11/4170_en.pdf.

[275] Declaration by Milan Milutinović, President of the Republic of Serbia on the Political Process Initiated for Kosovo and Metohija, 11 March 1998 (reprinted in Krieger, p. 123); Letter dated 18 March 1998 from the Chargé d'affaires, a.i., of the Permanent Representative of Yugoslavia to the United Nations addressed to the Secretary-General, S/1998/250, Annex , 18 March 1998.

[276] The treatment of territorial integrity in the Declaration on Principles in the Helsinki Final Act, 1 August 1975, available at: http://www.osce.org/documents/mcs/1975/08/4044_en.pdf, also underscores that it is considered as an element of relations among states. Specifically, Principle IV on territorial integrity of states makes clear that the issue is being addressed in the context of relations between states, as opposed, for example, to the context of whether there are conditions in which new states can emerge on the territory of old ones. Principle IV reads as follows:

> The participating States will respect the territorial integrity of each of the participating States.
>
> Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.
>
> The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

In addition to being reflected in the language of Principle IV itself, the notion that territorial integrity is an element of relations among states is reflected in the fact that the document of which it is a part is named the "Declaration on Principles Guiding Relations between Participating States."

General immediately following Kosovo's declaration of independence on 17 February 2008, Serbian President Tadić asserted that Resolution 1244 "explicitly reaffirms the sovereignty and territorial integrity of the Republic of Serbia."[277] In fact, the reference in Resolution 1244 is to the sovereignty and territorial integrity of the "Federal Republic of Yugoslavia,"and the distinction is quite important. As discussed in this section, even if one assumes *arguendo* that Resolution 1244 addresses whether Kosovo should remain within the borders of the "Federal Republic of Yugoslavia", this would not have required Kosovo to remain inside "Serbia."

1. The position of FRY and Serbian leaders throughout the relevant period was that Kosovo must remain part of Serbia, and not just part of the FRY. As described in Chapter II, Kosovo had a dual status in the period before the break-up of the Socialist Federal Republic of Yugoslavia. During that period, there had been consistent calls within Kosovo for republic status -- a status that would match that of Serbia, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, and Slovenia in form as well as substance, under which Kosovo might exist under a common Yugoslav roof. In the late 1990s, a similar idea was discussed in another form: that Kosovo might exist under a similar common roof, alongside Serbia and Montenegro, as a third republic within the FRY. This would have been a way to maintain the FRY's external borders while simultaneously acknowledging the fact that it was becoming increasingly untenable for Kosovo to remain part of Serbia itself.

For their part, FRY and Serbian leaders were insistent in opposing this idea, and on ensuring that Kosovo must remain part of Serbia itself. They maintained this position before, during and after the adoption of Resolution 1244. The Yugoslav government and then-FRY (not Serbian) President Milošević repeatedly emphasized this distinction, asserting that the issue was one of *Serbia's* borders and of *Serbia's* sovereignty, to be dealt with by the *Serbian* rather than the federal government.

For example, in the period leading to the adoption of the Yugoslav arms embargo under Security Council resolution 1160, the FRY submitted a "Declaration on the Political Process in Kosovo and Metohija" by Serbian President Milutinović avowing that it was Milutinović who would be the "guarantor" of talks on a political dialogue on Kosovo's status, that he would do so "in [his] capacity of President of the Republic of

[277] Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General with an annexed letter from the Prime Minister of the Republic of Serbia to the Secretary-General, S/20008/111, 19 February 2008 [Dossier No. 202]. *See also* Resolution of the National Assembly of the Republic of Serbia on the confirmation of the Decision of the Government of the Republic of Serbia on the annulment of the illegitimate acts of the Provisional Institutions of Self-Government in Kosovo and Metohija concerning the proclamation of unilateral independence, S/2008/260, 18 February 2008, Enclosure 2 [Dossier No. 87] (asserting that "United Nations Security Council resolution 1244 (1999) explicitly stipulated that Kosovo and Metohija forms an integral part of the Republic of Serbia").

Serbia," and that the agenda of the talks was the status of Kosovo "within the framework of *Serbia*."[278] As another example, following the adoption of Resolution 1160, FRY President Milošević wrote a letter to his colleagues in the Serbian Government, noting his rejection of the calls in Resolution 1160 for international participation in what he termed "the problem in Kosovo and Metohija *which is an internal issue for Serbia*."[279] In the debate on the resolution in the Security Council, the Yugoslav Permanent Representative to the United Nations took specific aim against the idea of keeping Kosovo within the FRY but not within Serbia as he criticized proposals by some "for solutions to be sought outside Serbia – or, as they say, within the Federal Republic of Yugoslavia." He maintained that such a solution "constitutes a violation of the territorial integrity of Serbia."[280]

2. The failure to include provisions in Resolution 1244 referring to Kosovo as part of Serbia (even for the interim period) was significant and deliberate. The language of the G-8 principles, the Ahtisaari-Chernomyrdin principles and the body of Resolution 1244 itself were drafted so as to characterize Kosovo as part of the FRY, rather than Serbia. FRY and Serbian representatives raised this issue in the discussions that former President Ahtisaari and former Prime Minister Chernomydrin conducted in Belgrade in early June 1999 with FRY President Milošević and Serbian President Milutinović. They challenged the idea that the language in the principles would refer to Kosovo's having substantial autonomy "within the Federal Republic of Yugoslavia," and not also "within Serbia." They were specifically concerned that "if Montenegro broke away from Serbia, Kosovo would be in a position to argue that it was independent

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[278] Declaration by Milan Milutinović, President of the Republic of Serbia on the Political Process Initiated for Kosovo and Metohija, 11 March 1998 (reprinted in Krieger, p. 123); Letter dated 18 March 1998 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, A/53/89, S/1998/250 Annex, 18 March 1998 (emphasis added). *See also* Declaration of the National Assembly of the Republic of Serbia, issued at Belgrade on 24 March 1998, A/53/91 Annex, para. 2 ("The Serbian nation . . . shall never agree to endangerment of the rights of the Serbian people, or of the sovereignty and territorial integrity of Serbia, by anyone").

[279] Letter dated 2 April 1998 from the President of the FRY to the Presidents of the Republic of Serbia, of the Serbian Government, and of the Assembly of Serbia, on the Referendum whether or not Foreign Representatives Should be Involved in Dealing with the Problem of Kosovo, 2 April 1998 (reprinted in Krieger, p. 137) (emphasis added).

[280] Security Council, 3868th meeting, S/PV.3868, 31 March 1998, p. 18 [Dossier No. 8]. The distinction between the FRY and Serbia continued to be observed in the negotiations of the Hill Agreements and the Rambouillet Accords. Both the draft Hill Agreements and the Rambouillet Accords were structured so that the FRY and Serbia would have signed as separate parties. Indeed, it has been reported that, to underscore the lengths to which Belgrade went in insisting on the distinction, the stationery of the FRY/Serb delegation at Rambouillet referred to the "Delegation of Serbia" to underscore Belgrade's view "that issues concerning Kosovo would need to be principally addressed by the Serb Republic, according to the constitutional changes which that entity had brought about unilaterally." *See* M. Weller, The Rambouillet Conference on Kosovo, 75:2 *International Affairs* 211, at 226 (1999).

because the Federal Republic of Yugoslavia no longer existed."[281] In the end, this is precisely the situation that unfolded.

3. The issue took on added significance as negotiations began between Serbia and Montenegro to reconstitute the FRY into a new "State Union." There were further discussions related to this issue after the adoption of Resolution 1244, particularly in the period of negotiations between Serbia and Montenegro to reconstitute the FRY into a new "State Union," and the possibility that this would lead to the break-up of the two republics. It was increasingly recognized that the possibility of such a break-up had potentially important implications for the future status of Kosovo.[282] In order to reconstitute the FRY as the State Union of Serbia and Montenegro, the President of the Federal Republic of Yugoslavia, the Deputy Federal Prime Minister, the President of the Republic of Montenegro, and the Serbian and Montenegrin Premiers signed an agreement on principles of relations between Serbia and Montenegro on 14 March 2002.[283] The Agreement provided that, following the expiration of a three-year period, Montenegro would be entitled to institute proceedings to withdraw from the Union and thereby become independent. In light of its concerns about the implications that Montenegro's withdrawal from the Union would have for Serbian arguments about Kosovo's status under Resolution 1244, Serbia secured inclusion of a special provision into that agreement, which stated:

> Upon the expiration of a three-year period, the member states shall be entitled to institute proceedings for the change of the state status, that is, withdrawal from the state union. If Montenegro withdraws from the state union, international documents related to the FRY, the U.N. Security Council Resolution 1244 in particular, shall relate to and fully apply on Serbia as its successor.

The substance of this provision was then incorporated into Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro that was adopted in

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[281] J. Norris, *Collision Course: NATO, Russia and Kosovo* (2005), p. 185. The distinction between the FRY and Serbia is also reflected in the Military Technical Agreement (MTA), agreed to just before the Security Council adopted resolution 1244, with both the Government of the Federal Republic of Yugoslavia and the Government of Serbia signing the MTA as separate parties.

[282] *See, e.g.*, comments by Dragoljub Mićunović, *Radio Slobodna Evropa*, 1 April 2001 (cited in E. Hasani, "Self-Determination Under the Terms of the 2002 Union Agreement Between Serbia and Montenegro: Tracing the Origins of Kosovo's Self-Determination", 80 *Chicago-Kent Law Review* 305 (2005), p. 320, n. 70) (noting that Montenegro's secession from the FRY (Serbia and Montenegro) would make highly probable the secession of Kosovo as well).

[283] Proceeding Points for the Restructuring of Relations Between Serbia and Montenegro, signed at Belgrade, 14 March 2002, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/EN/declarations/73447.pdf.

February 2003, at which point the FRY was renamed "Serbia and Montenegro."[284]

The transformation and re-naming of the Federal Republic of Yugoslavia as the "State Union of Serbia and Montenegro" was not considered by the Security Council to affect the terms of Resolution 1244.[285] But the situation changed when Montenegro declared independence on 3 June 2006, Serbia declared independence on 5 June 2006, and Montenegro and Serbia thereby broke apart. At that point, Kosovo could not as a practical matter remain within the same country as Serbia without being part of Serbia itself. But this result would not have been required even under a reading of preambular paragraph 10 of Resolution 1244 that would have precluded Kosovo from separating from the "FRY." Prospects of a viable solution other than Kosovo's independence became that much more remote. With the break-up of Serbia and Montenegro in 2006, any "inside Yugoslavia but outside Serbia" solutions to the future status question became infeasible.

In sum, then, the reference to the FRY rather than Serbia in preambular paragraph 10 is highly significant. In the final analysis, even under a reading of that paragraph that would have required Kosovo to remain part of the FRY, that would not have required Kosovo to remain within "Serbia." Reading the resolution so as to require such a result would not only disregard its terms, but significantly change its effect.

Section V. The FRY Itself Recognized That Resolution 1244 Left Open The Possibility Of Independence For Kosovo

For its part, at the time of the adoption of Resolution 1244, the FRY—no doubt concerned about inclusion of language that suggested future status might be decided without its consent—objected to the terms of the resolution. Specifically, the FRY complained that:

> [I]n operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the

[284] Constitutional Charter of the State Union of Serbia and Montenegro, available at: http://www.mfa gov.yu/Facts/const_scg.pdf.

[285] *See* Statement by the President of the Security Council, S/PRST/2003/1, 6 February 2003 [Dossier No. 61]: "The Council notes the transformation of the Federal Republic of Yugoslavia into Serbia and Montenegro and, in this context, reaffirms that resolution 1244 (1999) remains fully valid in all its aspects."

province *and opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia.*[286]

Thus, in addition to being inconsistent with the terms of Resolution 1244, Serbia's position today that Resolution 1244 consituted a guarantee against Kosovo's independence flatly contradicts what the FRY said at the time Resolution 1244 was adopted.

Section VI. By The Time Of The Declaration Of Independence, The 'Political Process' Envisioned By Resolution 1244 Had Run Its Course

Resolution 1244 did not foreclose any of the possible options for future status of Kosovo, but rather envisioned a political process that sought to determine Kosovo's future status. It expressly authorized the international civil presence to facilitate that process, giving wide discretion to the Secretary-General how best to pursue these efforts. As discussed in this section, at the time Kosovo declared its independence in February 2008, that political process had run its course. However, unlike in earlier periods during which the Secretary-General was still planning or actively conducting the future status process, neither the Secretary-General nor the SRSG denounced or annulled the 17 February 2008 declaration of independence.

In 2002, with the support of the Security Council, UNMIK embarked upon the policy of "standards before status." In briefing the Security Council in April 2002, the Secretary-General's Special Representative described the situation as follows:

> We are transferring our responsibilities to [the Kosovo] institutions in the process of building substantial autonomy. This will bring us closer to a stage at which it will be time to begin the political process designed to determine Kosovo's future status. This will be one of my main responsibilities, as foreseen in paragraph 11 (e) of resolution 1244 (1999).
>
> But let me say clearly that the time for this has not yet come. Kosovo society and institutions will have to show that they are ready for this process -- without prejudging its outcome. We must make clear what is expected from them. Therefore, I am embarking on a benchmarks process. These benchmarks should be achieved before launching a discussion on

[286] Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6 (emphasis added) [Dossier No. 33].

status, in accordance with resolution 1244 (1999).[287]

UNMIK made clear that, at that stage, the SRSG would reject a declaration of independence by Kosovo as inconsistent with Resolution 1244, noting specifically that "moves to address the issue of final status of Kosovo are not supported at this time by the International Community."[288]

UNMIK pursued this "standards before status" approach until the Secretary-General, following the March 2004 riots, commissioned a comprehensive review of the situation in Kosovo that found that "[t]oday's Kosovo is characterized by growing dissatisfaction and frustration"; that there was a widespread belief that the existing policy was a "policy of status quo, which can only lead to a further worsening of difficult economic and social conditions"; and that UNMIK's credibility had deteriorated among both Kosovo Albanians and Kosovo Serbs.[289] In October 2005, the Secretary-General's envoy, Norwegian Ambassador Kai Eide, reported that the commencement of the future status process could not be delayed any longer, noting that the situation was such that "once the process has started, it cannot be blocked and must be brought to a conclusion."[290] The Security Council's President issued a statement that the Council agreed with this, that it supported the Secretary-General's intention to begin the status process, and that it welcomed his intention to support a Special Envoy to lead it.[291]

As described in Chapter II, the Secretary-General, with the support of the Security Council, appointed former Finnish President Martti Ahtisaari to lead that process, with the members of the Contact Group agreeing at the time that "once the process has started, it cannot be blocked and must be brought to a conclusion."[292] As the future status process was about to commence, there was again talk about a possible declaration of independence in Kosovo, and UNMIK again indicated that it would not accept such a declaration of independence, though it had no objection to the Kosovo Assembly

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[287] Security Council, 4518th meeting, S/PV.4518, 24 April 2002, p. 4 [Dossier No. 103].

[288] Letter dated 7 February 2003 from the Deputy Special-Representative of the Secretary-General to the President of the Assembly of Kosovo, 7 February 2003 [Dossier No. 189].

[289] *See* Letter dated 17 November 2004 from the Secretary-General addressed to the President of the Security Council, S/2004/932, paras. 2-3, 30 November 2004 [Dossier No. 71].

[290] Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/635, Annex, 7 October 2005 [Dossier No. 193].

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

[292] Letter dated 31 October 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/708, 10 November 2005 [Dossier No. 196] and Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709, 10 November 2005 [Dossier No. 197].

adopting a platform for the Kosovo team that would engage with Special Envoy Ahtisaari in support of independence.[293] The Kosovo Assembly then proceeded to adopt a resolution stating such a platform.[294]

Special Envoy Ahtisaari thereafter held intensive negotiations but concluded that the parties were entrenched in their "diametrically opposed positions." Regrettably, despite an enormous devotion of resources over a protracted period of time by the United Nations and others in the international community, including the United States, it became clear that the parties were not able to reach an agreement on Kosovo's future status.[295] Ahtisaari reported to the Security Council as follows:

> 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.*[296]

Ahtisaari concluded that, "nonetheless, resolution of this fundamental issue is urgently needed" and that "the only viable option for Kosovo is independence, to be supervised for an initial period by the international community." He presented a Comprehensive Proposal and recommendation for independence. The Secretary-General then made clear that

> [h]aving taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement.[297]

Thereafter, in a last-ditch effort to determine if an agreement could be reached, a

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[293] UNMIK Press Briefing, Transcript of Press Conference by SRSG Søren Jessen-Petersen at UNMIK Headquarters, 21 November 2005, available at: http://www.unmikonline.org/DPI/Transcripts.nsf/0/8E2671F635881CFFC12570C1002AF51A/$FILE/tr211105.pdf.

[294] Resolution, 21 November 2005, available at: http://www.assembly-kosova.org/common /docs/Resolution.%20english,%20version.17.11.05.pdf.

[295] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, paras. 1-2 [Dossier No. 203].

[296] *Ibid.*, para, 3 (emphasis added).

[297] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168, 26 March 2007 [Dossier No. 203].

"Troika" of diplomats from Russia, the European Union and the United States conducted a final four months of negotiations between Belgrade and Pristina. The Troika "vowed to 'leave no stone unturned' in the search for a mutually acceptable outcome"[298] but was required at the end of the four month period to report that:

> The Troika was able to facilitate high-level, intense and substantive discussions between Belgrade and Pristina. Nonetheless, the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.[299]

Once the status process had run its course, the situation fundamentally changed. While the international civil presence was actively engaged in efforts to facilitate final status negotiations to reach agreement between Serbia and Kosovo, declarations by one side or the other attempting to determine Kosovo's status (either declarations of independence such as those that were discussed but not actually adopted by Kosovo in 2005, or declarations by Serbia like those contained in its 2006 Constitution that Kosovo was part of Serbia and barring "state bodies" from considering any alternative status for Kosovo) might be seen as frustrating those efforts.[300] Such declarations were seen as inconsistent with the way that events were supposed to unfold under Resolution 1244, and not conducive to the efforts of the international civil presence to "facilitat[e] a political process designed to determine Kosovo's future status" as the resolution required.

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[298] Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723 enclosure, 10 December 2007, para. 5 [Dossier No. 209].

[299] *Ibid.*, para. 2. The Troika went to extraordinary lengths to try to develop alternative models that might be appealing to the parties.

> Under our guidance, the parties reviewed outcomes ranging from independence to autonomy, as well as alternate models such as confederal arrangements, and even a model based on an "agreement to disagree" in which neither party would be expected to renounce its position but would nonetheless pursue practical arrangements designed to facilitate cooperation and consultation between them. Other international models, such as Hong Kong, the Åland Islands and the Commonwealth of Independent States, were discussed. While it was broached, we did not dwell on the option of territorial partition, which was deemed unacceptable by both the parties and the Contact Group. None of these models proved to be an adequate basis for compromise.

Ibid., para. 10. For its part, Serbia characterized the work of the Troika far less charitably, asserting that direct negotiations between Kosovo and Serbia "lasted nominally 120 days, but effectively only 13 hours." Letter dated 17 April 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, Comments on the report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/260 Annex, 18 April 2008, para. 6 [Dossier No. 87].

[300] *See* discussion *supra* in Chapter II, Section V.

At the point in February 2008 that Kosovo declared independence, however, there was no longer an ongoing future status process. The Special Envoy had declared that process over, and that there was no prospect of its successful resumption. Kosovo had accepted the Comprehensive Proposal put forward by Ahtisaari and supported by the Secretary General—a posture that was supportive of the Secretary-General's efforts to implement Resolution 1244.[301] There is no suggestion in the language of Resolution 1244 that the international civil presence was required at that point to initiate yet a further status process—paragraph 11(e) of the resolution speaks about the international civil presence facilitating "a" political process. More importantly, the absence of any prospect of bridging the divide between Serbia and Kosovo would have made further such negotiations pointless, and there is no prospect of the Security Council—nine of the members of which (including three permanent members) have already recognized Kosovo—requiring further iterations of the political process.[302]

In adopting Resolution 1244, the Security Council envisioned a political process that sought to determine Kosovo's future status, and charged the international civil presence with responsibility for facilitating that process. However desirable an agreement between Kosovo and Serbia might have been, the Council was well aware of the difficulties of achieving one, and did not require it. Nor did the resolution provide that the approval of the Council or the consent of Serbia was a prerequisite to the conclusion of the status process. Nor did it prohibit Kosovo's independence as the outcome of the process. As long as that process was alive and viable, it was considered appropriate to preclude Kosovo from declaring independence; but this was no longer the case by the point at which Kosovo declared independence. To conclude otherwise would be to read into Resolution 1244 precisely the veto for Serbia that had been omitted from the resolution.

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[301] In briefing the Council, the Secretary-General described the declaration of independence as follows:

> The declaration states that Kosovo fully accepts the obligations contained in the comprehensive proposal for a Kosovo status settlement prepared by my Special Envoy, Martti Ahtisaari. In his address to the Assembly, Prime Minister Thaçi stated that there would be equal opportunities for all of Kosovo's inhabitants and that any discriminatory practices against members of any of Kosovo's communities would be eliminated. The declaration pledges continued adherence to resolution 1244 (1999), commits Kosovo to continue to work constructively with the United Nations and expresses gratitude to the United Nations for what it has done for Kosovo.

Security Council, 5839th meeting, S/PV.5839, 18 February 2008, p. 2 [Dossier No. 119].

[302] *See* discussion *supra* in Chapter II, Section VII.

Section VII. Neither The UN Secretary-General Nor His Special Representative Denounced Or Sought To Annul The Declaration of Independence

The decision by the Secretary-General and his Special Representative not to challenge Kosovo's declaration of independence is highly significant, given the responsibilities entrusted to them for implementing Resolution 1244, and their earlier decisions to forestall such steps. The Court has made clear that its jurisdiction over legal issues is not impaired by the fact that the political organs of the United Nations may at the same time be exercising their authority under the Charter.[303] Nonetheless, the Court has given careful consideration to decisions taken in the exercise of authority under the Charter by United Nations organs and by bodies or officials to whom such authority has been delegated.

For example, in the *Certain Expenses* case, the Court advised that there is a presumption that action taken by UN organs is not *ultra vires* when it is "appropriate for the fulfillment" of any of the purposes of the United Nations, and that this applied to the exercise by the Secretary General of functions delegated to him by the Council.[304] A more recent example of such deference was the Court's extensive reliance in the *Bosnia Genocide* case on the findings of the International Criminal Tribunal for the former Yugoslavia, a body that the Council had created with authority to determine criminal responsibility for persons accused of certain international crimes.[305] As Judge Lachs said of the Court's decision in the *Lockerbie* case to decline to grant provisional measures that would be inconsistent with a decision of the Council under Chapter VII, such deference is not "an abdication of the Court's powers" but simply "a reflection of the system within which the Court is called upon to render justice" and a means of ensuring that the two organs "act in harmony . . . ."[306]

Appropriate weight should likewise be given to the decisions of the Secretary-General and the Special Representative of the Secretary-General (SRSG) in their administration of Kosovo. As discussed in this Section, they exercised broad authority over the implementation of the "civil presence" and repeatedly struck down or threatened

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[303] *See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392 at pp. 433-35.

[304] *Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151 at pp. 168, 176-77.

[305] *See Case Concerning the Application of the Convention on Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, pp. 77-78, paras. 213-14.

[306] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahariya v. United States of America), Provisional Measures, I.C.J. Reports 1992*, p. 138 (Separate Opinion of Judge Lachs).

to strike down actions they believed were inconsistent with Resolution 1244, but they declined to strike down the declaration of independence.

A. The Secretary General And His Special Representative Had Previously Exercised Their Authority To Strike Down Actions That They Considered Inconsistent With Resolution 1244

Resolution 1244 authorized the Secretary-General to establish the international civil presence and to appoint a Special Representative "to control the implementation of the international civil presence."[307] As described earlier, the responsibilities of the international civil presence included organizing and overseeing the development of the provisional institutions of self-government, facilitating the political process to determine Kosovo's future status, and overseeing the transfer of authority from the provisional authorities upon completion of that process.[308] Pursuant to this authorization, the SRSG exercised wide powers over the administration of Kosovo, including the appointment and removal of all public officials, the administration of all public funds and property, and the promulgation of laws governing various aspects of life in Kosovo.[309] Chapter 12 of the Constitutional Framework that the SRSG promulgated in May 2001 provided:

> The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework.[310]

The Secretary-General and the SRSG took seriously their responsibility to ensure that actions by the various actors in Kosovo were consistent with Resolution 1244 and declared void actions that they considered inconsistent. In the years following the promulgation of the Constitutional Framework, the SRSG nullified a number of actions

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[307] Security Council resolution 1244 (1999), S/RES/1244, para. 6 [Dossier No. 34].

[308] *Ibid.*, para. 11.

[309] *See, e.g.*, UNMIK Regulation 1999/1 [Dossier No. 138], UNMIK Regulation 1999/3, available at: http://www.unmikonline.org/regulations/1999/re99_03.pdf; UNMIK Regulation 1999/4, available at: http://www.unmikonline.org/regulations/1999/re99_04.pdf; UNMIK Regulation 1999/9, available at: http://www.unmikonline.org/regulations/1999/re99_09.pdf; UNMIK Regulation 1999/20 available at: http://www.unmikonline.org/regulations/1999/re99_20.pdf; and UNMIK Regulation 1999/24 [Dossier No. 46].

[310] UNMIK Regulation 2001/9 [Dossier No. 156].

by the Assembly, ministries and municipalities on the grounds that they were beyond the competence of the entity in question or otherwise inconsistent with Resolution 1244.[311] For example, following adoption by the Kosovo Assembly of a resolution rejecting a border demarcation agreement between the FRY and Macedonia, the SRSG in May 2002 rejected the resolution, saying that he was bound to do so by the Constitutional Framework and that "I had *no other choice* than to declare, after the adoption of the resolution, this resolution as null and void."[312]

Similarly, as discussed above, the SRSG was particularly attentive to assertions by the Assembly about the status of Kosovo, indicating in both 2002 and 2005 that UNMIK would reject a declaration of independence by Kosovo while the future status process was still pending.[313] This stands in stark contrast to his decision not to do so in 2008.

B. The Secretary-General And The SRSG Did Not Declare The Declaration Of Independence To Be Void Or Unlawful

With the exhaustion of the future status process, the situation had changed, and the Secretary-General and the SRSG refrained from any statement suggesting that the February 2008 declaration was unlawful or void. The President of Serbia immediately sent a letter to the Secretary-General demanding that such action be taken:

> The Republic of Serbia demands that the Special Representative of the Secretary-General take all necessary measures, in accordance with Resolution 1244 (1999) and other Security Council decisions, as he has on previous occasions, to abrogate, without delay, all acts and actions by which unilateral independence has been declared, as well as prevent any further violation of said resolution, and all other Security Council documents, the United Nations Charter, and all other existing norms and regulations of international law. I, therefore, call upon you to ensure that your Special Representative in Kosovo exercises his powers and responsibilities by immediately declaring this illegal act null and void. I

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[311] *See* B. Knoll, *The Legal Status of Territories Subject to Administration by International Organizations* (Cambridge Univ. Press, 2008), pp. 345-46.

[312] *See* UNMIK Press Briefing, 23 May 2002, Press Conference by UNMIK SRSG, Michael Steiner (emphasis added), available at: http://www.unmikonline.org/press/2002/trans/tr230502.htm.

[313] UNMIK Press Briefing, 16 November 2005, pp. 4-5, available at: http://www.unmikonline.org/DPI/Transcripts.nsf/0/C9441381369BB41BC12570BC002D69D7/$FILE/tr161105.pdf; Letter dated 7 February 2003 from the Principal Deputy Special Representative of the Secretary-General to the President of the Assembly of Kosovo [Dossier No. 189].

> also expect him to act pursuant to the Constitutional Framework for Provisional Self-Government in Kosovo . . . and dissolve the Assembly of Kosovo, since its "declaration of independence" is not in conformity with Security Council resolution 1244 (1999). [314]

The Secretary-General and the SRSG took none of these actions. Instead, the Secretary-General said that "the position of the United Nations on the question of the status of Kosovo has been one of strict status neutrality" and that "Security Council resolution 1244 (1999) continues to be in force until the Security Council decides otherwise."[315] He later reported to the Council that "UNMIK has begun to adapt its structure and profile in response to the profoundly changed reality in Kosovo following Kosovo's declaration of independence and the adoption of a Constitution" in light of the "new roles assumed by the Kosovo authorities under the Constitution."[316]

The Secretary-General's adoption of a position of "status neutrality" indicated that the United Nations officers charged by the Security Council with overseeing the situation in Kosovo had determined that the purposes of Resolution 1244 would best be served by not taking a position on the desirability of Kosovo's independence; the Secretary-General stated that recognition of countries is a matter for individual Member States.[317] This is especially significant given the fact that the Secretary-General and the SRSG had the responsibility for ensuring compliance with Resolution 1244 and had firmly exercised their authority to act against such measures in the past.

In closing the February 18, 2008 Security Council meeting, the Secretary-General highlighted that "[t]he situation today on the ground, as well as in the Security Council, is very different from the earlier period of the United Nations Interim Administration Mission in Kosovo (UNMIK)" and that, "[w]ithin the mandate provided by resolution 1244 (1999), elements of international civil presence have, over the years, evolved to address differing needs and changing circumstances." He concluded that

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[314] Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, S/2008/111, Annex, 17 February 2008 [Dossier No. 202]. Serbian President Tadić made the same demand when he addressed the Security Council on February 18. Security Council, provisional verbatim record, sixty-third year, 5839th meeting, S/PV.5839, 18 February 2008, p. 5 [Dossier No. 119].

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

[316] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, para. 48 [Dossier No. 90].

[317] Interfax Information Service Interview, "UN Secretary-General Ban Ki-moon: I wish to note that Kosovo is a highly distinctive situation," March 2008, available at: http://www.interfax.com/17/373003/Interview.aspx.

> As we seek to manage the situation on the ground, I would like in closing to underline to the members of this Council that my principal objectives are to ensure the safety and security of the population in Kosovo, with particular attention to the minority communities; to uphold international peace and security and the overall stability in Kosovo and regional stability; to ensure the safety of United Nations staff; and to safeguard the achievements and legacy of the United Nations in Kosovo and the Balkans.[318]

Serbia argued that the actions of the Secretary-General and the SRSG were inconsistent with Serbia's position that the declaration of independence was unlawful. In particular, Serbia complained that the UN position of neutrality on the status of Kosovo, the SRSG's recognition of "a new reality on the ground", and its transfer of certain competences to the "government of Kosovo" were all inconsistent with the Serbian position that Kosovo's independence was contrary to Resolution 1244.[319]

Serbia also brought its demands to the Security Council, but the Council likewise declined to make any statements declaring or suggesting that the declaration was void, contrary to Resolution 1244, or otherwise unlawful or inappropriate. Indeed, far from disapproving of the SRSG's decision not to annul the declaration of independence, a majority of states represented on the Council proceeded formally to recognize Kosovo within the next ten weeks.[320] The Council subsequently agreed to the appointment of a new SRSG for Kosovo, and the new SRSG has similarly decided to take no action against the declaration.[321]

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[318] Security Council, provisional verbatim record, sixty-third year, 5839th meeting, S/PV.5839, 18 February 2008, p. 23 [Dossier No. 119].

[319] Letter dated 17 April 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/260, 18 April 2008, pp. 3, 7 [Dossier No. 87].

[320] Costa Rica, France, the United Kingdom, and the United States recognized Kosovo on 18 February 2008; Italy recognized Kosovo on 21 February 2008; Belgium recognized Kosovo on 24 February 2008; Croatia recognized Kosovo on 19 March 2008; and Burkina Faso declared its recognition on 24 April 2008. Most of these countries announced at the February 18 meeting of the Security Council that they had recognized the independence of Kosovo or would initiate the process of doing so. *See* Record of the 5839th meeting of the Security Council, S/PV.5839, 18 February 2008, [Dossier No. 119].

[321] Letter dated 24 June 2008 from the Secretary General to the President of the Security Council, S/2008/411, 24 June 2008.

C. The Court Should Fully Take Into Account The Appropriate Decisions Of The Responsible Officers Of The United Nations Not To Declare The Declaration Of Independence Unlawful

It is apparent from the sequence of events described above that the Security Council, the Secretary-General and the SRSG refrained from declaring Kosovo's declaration of independence to be unlawful or void. During earlier periods when status negotiations were pending, firm action was taken to nullify actions by either party that could have disrupted that process. However, the situation fundamentally changed once it became clear that a negotiated resolution of the future status of Kosovo was no longer feasible and the negotiating process had been exhausted. The Secretary-General's Special Envoy recommended independence under initial international supervision; Kosovo accepted and implemented this proposal; and the Secretary-General and SRSG began adapting their operations to take account of what had happened. The Secretary-General and SRSG each had the authority to declare invalid any action by the parties if doing so was necessary to implement Resolution 1244—a power they had exercised many times in the past—but declined every demand to do so in the context of Kosovo's declaration of independence in 2008. The Security Council itself declined to take action against the declaration of independence, instead appointing a new SRSG who similarly declined to accede to Serbia's demand to annul it.[322]

Under these circumstances, the Court should give considerable weight to the appropriate judgment of these responsible officials. These were officials to whom the Security Council gave responsibility for making judgments about specific actions under Resolution 1244. They are intimately familiar with the legal, operational and political circumstances of Kosovo, including the complications any pronouncements to the contrary could pose for international peace and security in the area, and the other objectives that the Secretary-General described in addressing the Security Council on the day after Kosovo's independence was declared.

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[322] Serbia itself recognized (and complained) that the failure of UNMIK to annul the declaration of independence was a change in how it had acted in the past, arguing:

> that the United Nations (UNMIK) failed to react to the unilateral proclamation of independence of the province of Kosovo and Metohija. The Republic of Serbia expected the United Nations representatives in Kosovo and Metohija to annul this illegal act. These expectations were based upon previous UNMIK practice in line with its mandate. Contrary to that, the United Nations took a neutral stance in regard to the "status of Kosovo."

Letter dated 17 April 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/260, Annex, 18 April 2008, para. 9 [Dossier No. 87].

CHAPTER VI

CONCLUSION

For the foregoing reasons, the United States respectfully submits that, if the Court chooses to answer the question referred by the General Assembly, it should conclude that Kosovo's declaration of independence is in accordance with international law.

Respectfully submitted,

Joan E. Donoghue
Acting Legal Adviser
United States Department of State

Washington, D.C.
17 April 2009

I have the honor to certify that each of the Annexes is a true and complete copy of the original.

Joan E. Donoghue
Acting Legal Adviser
United States Department of State

ANNEX

1. Stjepan Mesić, *Kosovo -- problem koji ne trpi odgađanje ("Kosovo -- A Problem that Tolerates No Delay")*, Večerni List, 16 February 2008, available at: http://www.predsjednik.hr/default.asp?ru=143&gl=200802200000002&sid=&jezik=1 (translation provided by Office of the President, Republic of Croatia).

2. Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence Held on 17 February 2008.

3. International Civilian Office, International Steering Group for Kosovo, Report of the International Civilian Office, 27 February 2009, available at: http://www.ico-kos.org/d/ISG%20report%20finalENG.pdf

ANNEX 1

Kosovo - A Problem That Tolerates No Delay[1]

Stjepan Mesić, President of the Republic of Croatia

As we are faced with the impending end of a long and not infrequently toilsome process of defining the final status of Kosovo, I would find it advisable to present, once more and as clearly as possible, my views on this complex problem, on its roots and genesis, but also indicate what the position of the Republic of Croatia could be, and I would also say should be, at this point in time.

The mere repetition of the formula that we as an EU candidate country shall behave like most of the members of the Union and follow their example is simply not enough. One should also say why. Croatia is a sovereign country and we will not follow anyone blindly and unthinkingly, either today or in the future, while neglecting our own interests and needs. This is precisely why I find it necessary to remind the public - primarily the Croatian public but not only the Croatian public - of certain things, to present the reasons guiding us in shaping our position within the context of the Kosovo issue. Anything else would mean shrinking from responsibility and I have never - as President of the Republic of Croatia and constitutionally empowered co-creator of its foreign policy - shrunk from responsibility.

In this case, we are faced with responsibility for peace and security in the region and beyond. We are faced with the end of a long process of disintegration of the former Yugoslav federation, but also with the final stages in the establishment of an at least basic new architecture in South Europe.

I shall not resort to historic arguments because this is a political issue. Due knowledge of history is required, of course, but any attempt to seek the solution of a current problem based on the status of any people, any ethnic community, in the distant or ancient past would take us nowhere. Therefore, in my mind the argument about Kosovo as the cradle of Serb national feeling is as worthless as the argument whereby the Illyrians, the ancestors of the Albanians, settled present-day Kosovo even before the ancient Romans, not to mention the Slavs and specifically the Serbs. As far as history is concerned, we only need to go

[1] Translation provided by the Office of the President, Republic of Croatia.

back to the time of the former Yugoslav federation because the resolution of the problem facing us is rooted in the status of Kosovo within Yugoslavia and in the process of disintegration of the latter. But let me make just one point in order to avoid any confusion: when I am talking about Yugoslavia, I have in mind the Yugoslavia which existed until the early nineteen-nineties, that is, the Socialist Federal Republic of Yugoslavia.

Its 1974 constitution specified that Yugoslavia was "a federal state and a state community of nations and their Socialist Republics, and Socialist Autonomous Provinces of Kosovo and Vojvodina within the Socialist Republic of Serbia, united of their own free will". The constitution also specified that in the Socialist Autonomous Provinces "working people and citizens, nations and nationalities exercise their sovereign rights". Let me draw attention to several elements from the above quotations. First, Yugoslavia consisted of republics and provinces; accordingly, the provinces were constituent elements of the Federation. Second, the provinces were within Serbia, meaning that - in addition to their constituent tie with the Federation - they were also connected with one of its federal units. Third, the republics and provinces united in Yugoslavia of their own free will, and this clearly implies that they could not be kept within that state framework against their will. Where provinces are concerned this regards both the federal framework and the framework of a federal unit. And, finally, fourth, in the provinces the nations and nationalities exercised their sovereign rights. This requires no comment.

Bearing all this in mind, we must arrive at the incontestable conclusion that the Kosovo issue is a problem *sui generis*. This means that its resolution is not and cannot be a precedent for subsequent action in any of only apparently similar issues anywhere in the world. Therefore, to make myself fully clear, the resolution of the Kosovo issue is not prejudicial to the resolution of any other problem and cannot be a model for such a resolution. This is a unique issue deriving from the unique autonomous province status of Kosovo within the Yugoslav Federation. The Federation fell apart. The constitutive element associated with it disappeared, but that does not mean that it was automatically transferred to the present-day Republic of Serbia just because the province of Kosovo had been within the Republic of Serbia in federal Yugoslavia.

Therefore, the need to determine the new and final status of Kosovo asserted itself precisely because the element of Kosovo's tie with the former federation is no longer there and only the element of its tie with Serbia has been retained.

In this context the Republic of Croatia proceeds from two undeniable facts and insights.

First, no return to the previous state of affairs is possible; I also have in mind the time before Milošević abolished all the elements of autonomy and then tried to forcefully banish the Albanians from Kosovo. Second, the current condition, that is, the one established after the NATO military intervention prevented the expulsion of the Albanians from Kosovo, cannot be sustained indefinitely either.

Past negotiations, let me say quite clearly, maybe even with undiplomatic clarity, have more or less been reduced, good intentions notwithstanding, to buying time, to postponing the inevitable, because the two sides which were supposed to agree were firmly entrenched in their opposite positions. Nevertheless, the negotiations did produce certain ideas, certain models which must not be neglected and which must be given their due in the determination of the final status, and in defining the answer to the question of what tomorrow's Kosovo will be like.

Of course, it would be ideal if the solution could be obtained through direct negotiations of the parties directly involved, or under the umbrella of the United Nations. Both have proved to be impossible and no effort should be wasted in that regard. They simply did not work, and we are faced with the current impasse.

We are very much aware that the Kosovo issue is very painful for the Republic of Serbia. Therefore, I believe that Serbia should be helped in every possible way, first of all by opening up realistic prospects of accession to the European Union along with steps focused on promoting, developing and reinforcing democracy. This could help Serbia to face reality with open eyes and avoid any confrontation that could involve Serbia's self-isolation in the region and in Europe.

At the same time we are also aware of the legitimate aspirations of the Kosovo Albanians. We neither want nor may deny to others the right to self-determination which we claimed for ourselves and which we had to win by force of arms in the process of disintegration of the Yugoslav federation - when they tried to prevent us by force from exercising our rights under the 1974 Constitution while the international community did

not want to or could not identify the problem and make the right moves at the right time. This is precisely why I am emphasizing, at this point in time, that no one is entitled to repeat the already committed mistakes and omissions. And the lessons learned must not be forgotten either. The already manifested failure to act responsibly may not turn into a policy of irresponsibility.

The starting point must be awareness of the specific features of the Kosovo issue and the equally specific and unique way of its resolution. And the target must be a clear definition of a democratic Kosovo, a region in which the fundamental human and minority rights will be respected, protected and exercised at all times and throughout, with the assistance and under the supervision of the international community, primarily the European Union. In this process the key word is responsibility: responsibility for peace, security and stability, responsibility for the achievement of the goals formulated in the United Nations Charter by their founders more than sixty years ago.

Another point must be known, clearly stated and, if required, reinforced as well. Neither the directly involved parties nor the region are capable of coping with the problems on their own. They must resort to the assistance of the international community. Within that context the Republic of Croatia is prepared to offer help to the extent of its objective possibilities. Kosovo cannot cope on its own: it is our responsibility to help it along the first steps in its new life. Similarly, Serbia cannot cope on its own either, and it is our responsibility to help it in facing new circumstances and in finding its own place in the global community in which a democratic and stable Serbia will always be welcome. Finally, Southeast Europe cannot cope on its own either, and it should be helped on the track it has taken, the track of overcoming the aftermath of recent wars and establishing good relations among the new states, the track which will lead all the countries in the region to the destination to which the Republic of Croatia has already drawn very close - the European Union.

No one may escape these responsibilities: in the region, in Europe and worldwide. Having said that, let me stress that there is no justification for selfishness which would place the satisfaction of individual, limited and short-term interests above the achievement of long-term global interests. I sincerely believe that responsibility to one's own people and state in the current globalized world cannot be expressed

and achieved independently of responsibility for the community of nations and states. This applies to small and large countries alike.

These are the views which will determine the position of the Republic of Croatia with respect to the Kosovo issue. I would like to believe that they will also be understood by those who (still) think differently.

KOSOVO – PROBLEM KOJI NE TRPI ODGAĐANJE[1]

Piše: Stjepan Mesić, predsjednik Republike Hrvatske

U danima kada smo suočeni sa završetkom dugog i nerijetko mukotrpnog procesa definiranja konačnog statusa Kosova čini mi se uputnim još jednom, najjasnije što je moguće, iznijeti svoje poglede na taj složeni problem, na njegove korijene i genezu, ali ujedno i naznačiti kako se Republika Hrvatska može, a rekao bih i: mora, postaviti u sadašnjem trenutku.

Nije, naime, dovoljno ponavljati formulu da ćemo se mi, kao zemlja-kandidat za članstvo u Evropskoj uniji, ponašati kao većina članica Unije, odnosno da ćemo ih slijediti. Treba reći i: zašto. Hrvatska je suverena zemlja i mi nećemo ni danas, a ni u budućnosti, naprosto samo slijepo, bez razmišljanja, slijediti bilo koga, zanemarujući pri tome vlastite interese i potrebe. Upravo zato smatram potrebnim da javnost, u prvome redu hrvatsku, ali ne i samo hrvatsku, podsjetim na neke stvari, odnosno da iznesem razloge kojima se vodimo pri koncipiranju našega stanovišta u kontekstu kosovskoga pitanja. Sve drugo bilo bi ravno bježanju od odgovornosti, a ja – kao predsjednik Republike Hrvatske i kao Ustavom određeni sukreator njezine vanjske politike - od odgovornosti nikada nisam bježao.

U ovome slučaju riječ je o odgovornosti za mir i sigurnost – u regiji, ali i šire. Riječ je o završetku dugoga procesa dezintegracije nekadašnje jugoslavenske federacije, ali u isto vrijeme i o dovršetku uspostavljanja makar osnovne konstrukcije nove arhitekture prostora jugoistočne Europe.

Neću pribjegavati povijesnim argumentima, jer riječ je o političkome pitanju. Povijest, naravno, treba poznavati, ali traženje rješenja problema današnjice na osnovi statusa ovoga ili onoga naroda, ove ili one etničke zajednice u daljoj ili dalekoj prošlosti, ne vodi nikamo. Pa stoga smatram argument o Kosovu kao kolijevci srpstva jednako malo vrijednim kao i onaj da su Iliri, praoci Albanaca, došli na prostore današnjega Kosova još i prije Rimljana, a da Slavene – konkretno: Srbe i ne spominjem. U povijest se moramo vratiti samo do vremena bivše jugoslavenske federacije, jer razrješavanje problema s kojime smo suočeni ima svoje korijene u statusu Kosova unutar Jugoslavije, kao i u procesu dezintegracije Jugoslavije. Da ne bi bilo nikakve zabune: kada govorim o Jugoslaviji, mislim na onu Jugoslaviju koja je postojala

[1] Available at the website of the President of Croatia, at: http://www.predsjednik.hr/default.asp?ru=143&gl=200802200000002&sid=&jezik=1.

do početka devedesetih godina dvadesetoga stoljeće, dakle na Socijalističku Federativnu Republiku Jugoslaviju.

Njezin ustav iz godine 1974. kaže kako je „Jugoslavija savezna država kao državna zajednica dobrovoljno ujedinjenih naroda i njihovih socijalističkih republika, te socijalističkih autonomnih pokrajina Kosova i Vojvodine koje su u sastavu Socijalističke Republike Srbije". Taj ustav također precizira da u socijalističkoj autonomnoj pokrajini „radni ljudi i građani, narodi i narodnosti ostvaruju svoja suverena prava".

Upozoravam na nekoliko elemenata iz ovih navoda. Prvo, Jugoslavija se sastojala od republika i pokrajina, dakle pokrajine su bile konstitutivni elementi federacije. Drugo, pokrajine su bile u sastavu Srbije, što znači da su – osim konstitutivne veze s federacijom, bile povezane i s jednom od njezinih federalnih jedinica. Treće, republike i pokrajine dobrovoljno su se ujedinile u Jugoslaviju, iz čega proizlazi jasan zaključak kako ih se protiv njihove volje u tim državnim okvirima ne može zadržavati. U slučaju pokrajina to se odnosi kako na okvir federacije, tako i na okvir federalne jedinice. I, napokon, četvrto: građani, odnosno narodi i narodnosti u pokrajinama ostvaruju svoja suverena prava. Tome nikakav komentar nije potreban.

Imajući sve to u vidu, moramo doći do nepobitnoga zaključka kako je kosovski problem – problem sui generis. Što znači da njegovo razrješavanje nije i ne može biti presedan za dalje postupanje u bilo kojemu od samo naoko sličnih problema bilo gdje u svijetu. Dakle, da budem do kraja jasan: rješavanje problema Kosova ni na koji način ne prejudicira rješavanje bilo kojeg drugog problema, niti može biti uzorom za takvo rješavanje. Riječ je o jedinstvenom problemu koji proizlazi iz jedinstvenog statusa što ga je Kosovo, kao autonomna pokrajina, imalo u sklopu jugoslavenske federacije. Ta se federacija raspala. Element konstitutivnosti vezan uz nju nestao je, ali to ne znači da je on automatski prešao na današnju Republike Srbiju – samo zato što je pokrajina Kosovo nekada bila i dijelom republike Srbije u federativnoj Jugoslaviji.

Upravo zbog toga što je element povezanosti Kosova s nekadašnjom federacijom otpao, a što se zadržao samo element povezanosti sa Srbijom, nametnula se i potreba utvrđivanja novoga i konačnoga statusa Kosova.

Republika Hrvatska polazi u tome kontekstu od dvije neprijeporne činjenice, odnosno spoznaje.

Prvo - nije moguć povratak na nekadašnje stanje, mislim pri tome i na ono stanje prije no što je Milošević ukinuo sve elemente autonomije, a potom silom pokušao prognati Albance sa Kosova. Drugo - nije moguće ni održavanje u nedogled sadašnjega stanja, dakle onoga što je uspostavljeno nakon što je Atlantski pakt vojnom intervencijom spriječio izgon Albanaca s Kosova.

Dosadašnji pregovori, reći ću krajnje jasno, možda i nediplomatski jasno, svodili su se, dobrim namjerama usprkos, manje-više na kupovanje vremena, na odgađanje neizbježnoga . . . Jer, dvije su strane što su se trebale dogovoriti, bile

čvrsto ukopane na suprotnim pozicijama. No, u pregovorima ipak su se iskristalizirale i neke ideje, neki modeli što ih nikako ne bi trebalo zanemariti i koji moraju dobiti svoje zasluženo mjesto pri utvrđivanju konačnoga statusa, odnosno u definiranju odgovora na pitanje: kakvo će biti sutrašnje Kosovo.

Naravno, idealno bi bilo da se do rješenja moglo doći u izravnim pregovorima neposredno zainteresiranih strana, ili pak „pod kapom" Ujedinjenih naroda. I jedno, i drugo pokazalo se nemogućim i stoga je danas suvišno trošiti na to riječi. Naprosto – nije išlo. I sada smo tu, gdje jesmo.

Mi smo itekako svjesni toga da je kosovsko pitanje za Republiku Srbiju vrlo bolno. Stoga smatram da bi Srbiji trebalo pomoći na sve moguće načine, u prvome redu otvaranjem realne perspektive za ulazak u Evropsku uniju, uz mjere poticanja, razvoja i daljeg jačanja demokracije, kako bi se s tim pitanjem suočila na način koji neće biti ni zatvaranje očiju pred realnostima, niti zauzimanje konfrontirajućega stava koji bi u sebi nosio i opasnost samoizolacije Srbije u regiji, ali i u Evropi.

U isto vrijeme svjesni smo i legitimnih težnji Albanaca na Kosovu. Mi niti hoćemo, niti možemo drugima poreći pravo na samoopredjeljenje koje smo za sebe tražili i morali s oružje u ruci izboriti u procesu raspada jugoslavenske federacije, kada su nas pokušali silom spriječiti u ostvarivanju prava što smo ih imali na osnovi Ustava iz godine 1974., dok međunarodna zajednica nije htjela, ili mogla prepoznati problem i povući – onda kada je trebalo - prave poteze. Zato upravo u sadašnjem trenutku naglašavam kako jednom učinjene greške i propuste nitko nema pravo ponavljati. Niti se jednom naučene lekcije smiju zaboravljati. Jednom iskazana nesposobnost da se odgovorno djeluje ne može se pretvoriti u politiku neodgovornosti.

Polazišna točka mora biti spoznaja o specifičnosti kosovskoga problema, pa slijedom toga i o specifičnosti, dakle neponovljivosti načina njegovoga razrješavanja. A ciljna točka mora biti jasna definicija demokratskoga Kosova, na kojemu će se, uz pomoć i pod nadzorom međunarodne zajednice, u prvome redu Europske unije, u svakome trenutku i na svakome pedlju poštivati, štititi i ostvarivati temeljna ljudska i manjinska prava. Pri svemu tome ključni je pojam - odgovornost; odgovornost prema miru, sigurnosti i stabilnosti, odgovornost prema ostvarivanju ciljeva što su ih u Povelji Ujedinjenih naroda formulirali njihovi osnivači, prije više od šest desetljeća.

I još nešto treba znati, ali i jasno reći, ako treba i ponoviti. Ni neposredni akteri, ni regija ne mogu se s problemom uhvatiti u koštac sami. Upućeni su na pomoć međunarodne zajednice, a u tome kontekstu Republika Hrvatska spremna je pružiti ono i onoliko, koliko objektivno može. Dakle: Kosovo ne može samo – naša je odgovornost da mu pomognemo pri prvim koracima u novome životu. Isto tako ni Srbija ne može sama – naša je odgovornost da joj pomognemo u suočavanju s novim okolnostima i u pronalaženju njezinoga mjesta u svjetskoj zajednici u kojoj će demokratska, stabilna Srbija uvijek biti dobrodošla. I, napokon, jugoistočna Evropa ne može sama; treba joj, dakle, pomoći na putu

kojim je krenula, na putu prevladavanja posljedica nedavnih ratova i uspostavljanja dobrih odnosa među novim državama, na putu koji će sve zemlje regije odvesti prema odredištu kojemu se Republike Hrvatska već prilično primakla, prema Evropskoj uniji.

Od tih odgovornosti nitko ne smije pobjeći. Nitko u regiji, nitko u Europi, ali ni u svijetu. Kada to kažem, želim naglasiti kako nema opravdanja za egoizam koji bi zadovoljavanje pojedinačnih, odnosno uskih, kratkoročnih interesa htio pretpostaviti ostvarivanju dugoročnih interesa cijeloga svijeta. Iskreno vjerujem da je odgovornost prema vlastitome narodu i državi u današnjem globaliziranom svijetu nemoguće iskazivati i ostvarivati nezavisno od odgovornosti prema široj zajednici naroda i država, što vrijedi kako za male, tako i za velike zemlje.

To su stanovišta koja će određivati pozicioniranje Republike Hrvatske prema kosovskome kompleksu. Volio bih vjerovati da će ih razumjeti i oni koji (još) misle drugačije.

ANNEX 2

TRANSCRIPT

OF THE SPECIAL PLENARY SESSION OF THE ASSEMBLY OF KOSOVO

ON THE DECLARATION OF INDEPENDENCE

HELD ON 17 FEBRUARY 2008

FEBRUARY 2008

Session opened at 15.00.

Session is chaired by Mr. Jakup Krasniqi, President of the Kosovo Assembly

Co-chairs were Mr. Xhavit Haliti and Mr. Sabri Hamiti, members of the Assembly Chairmanship

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Today, Kosovo is opening a new page in history, and is changing the political map of Europe

Leaving behind bitter memories of hatred and tragic strife we went through, we are now entering the age of independence, peace and prosperity of our country.

There can be real peace and freedom only between equals. An independent Kosovo will be the homeland of equal and happy citizens, building upon foundations of the best values of its tradition as well as principles of modern democracy.

It is a special privilege for the present generation in Kosovo to experience this great historical turn, an honor for them, but also a great responsibility for the democratic and European development of the home country and the generations that will succeed us.

Our solemn oath for Kosovo, a democratic country, is a contract with its citizens and a partnership with the international community; it is the promise for lifelong dedication towards the most prosperous underlying values of today's society.

Kosovo has never in its life had as many friends as today. However, tomorrow there will be even more. A democratic culture and society, rule of law, peacemaking commitment, friendly neighborhood and the spirit of dialogue, respect and good faith – will be the basis for expanding friendships and cooperation and partnership.

I will take this solemn opportunity to express feelings of the people of Kosovo who humbly bow before the ones who were sacrificed on the altar of freedom for Kosovo.

With special respect, I thank all our friends, who with great commitment helped Kosovo in its historical and decisive moments.

The Albanian people and the citizens of Kosovo will be grateful forever.

On this special day, I feel honored to welcome the representative of the great family Jashari – Mr Rifat Jashari.

(applause)

The Jashari family represents all sacrifices for freedom of the Albanian people, it is the institution of morals for Kosovo now and forever.

Honorable Mr. President of Kosovo
Honorable Mr. Prime Minister of Kosovo
Honorable Members of the Assembly of Kosovo
Honorable representatives of the international presence in Kosovo
Honorable friends and guests
Honorable citizens of Kosovo and compatriots, wherever you are
Ladies and Gentlemen,

It is with great pleasure that on behalf of the Assembly of Kosovo and on my personal behalf, I welcome and thank you all, and those who are following us anywhere in the world, on these historical moments for the future of the people of Kosovo!

(applause)

Honorable Assembly Members,

Welcome to the special solemn plenary session on this day, February 17th, 2008, at 15.00 hours

It is an honor for me to present to you today's agenda

The first item on our agenda is:

DECLARATION OF INDEPENDENCE

(applause)

The second item on our agenda is:

APPROVAL OF STATE SYMBOLS

104 Assembly members are present,

I ask the assembly members, to cast their vote on the approval of this proposed agenda.

Thank you!

Any votes "against"? None.

I declare that the Assembly has approved the agenda by unanimous vote

109 assembly members are now present

I would like to invite the Prime Minister of Kosovo, Mr. Hashim Thaçi, to provide justification for the request for the special and solemn Assembly session.

THE PRIME MINISTER OF KOSOVO, HASHIM THAÇI:

Honorable Mr. Chairman,
President of Kosovo,
Honorable ministers,
Honorable Assembly Members,
Leaders of Political Parties,
Honorable guests – internationals, locals
Honorable Jashari Family,
Honorable representatives, guests from religious communities,
Honorable contributors to the agenda for the present special Assembly session,

Today, the President of Kosovo and myself, as the Prime Minister of Kosovo, have officially requested from the President of the Assembly, Mr Krasniqi; to call for a special session with two agenda items,

This invitation for a special session is extended in accordance with the Kosovo Constitutional Framework, whereby we present two items on the agenda:

1. DECLARATION OF INDEPENDENCE FOR KOSOVO, and
2. PRESENTATION OF KOSOVO STATE SYMBOLS

Mr. Chairman, thank you for calling this urgent session and for prompt approval by the Chairmanship of the Assembly, as well as for the approval of this agenda. Let us continue.

Honorable Assembly President,
Honorable Assembly Members
Honorable President,
Honorable guests, citizens of Kosovo,

We have waited too long for this day. Many people gave so much to make this a reality, this big day – the Day of Kosovo Independence.

Today, we honor those who have honored us with their sacrifice for freedom and state. We forever remember and respect their names and their deeds. We keep their memory forever in our hearts.

We are deeply grateful to our friends and allies in the country and beyond, who have assisted us to jointly reach this point.

I welcome all of those who are with us today, and I express my deepest gratitude, my highest respect to those who are following us on these moments, on behalf of my institutions and my people.

This day has come! From now on, Kosovo is proud, independent, sovereign and free!

My family, as well as your family and all families throughout Kosovo, never hesitated and never lost faith in us, we never lost faith in God, in justice and in power.

Let me mention the brother who left his family to go to war, the farmer who left his land a waste, the women and men who opened their doors to teach our children, and the students, who as always, raised and said – enough!

To all of those who came back to build a better life for their children, we never lost faith on a dream that one day, we will be among free and independent countries of the democratic world.

All of us together, brought Kosovo to this moment and we all need to be proud, very proud.

As my parents and my grandparents, who taught me about sacrifice and what it means to be free, I ask you to talk to your children, to your nephews and nieces and to explain to them the meaning of today's day. It was a long, difficult road, a road of sacrifice, but also a road of victory.

Carry on this story to the next generations, the story about the joy and pride we feel today, and never forget to remind them to remember great sacrifice of the generations before us.

Kosovo will face many challenges in the coming years

However, no challenge will make us surrender our way forward, with one joint spirit as one united people, with a clear, pro-western political vision.

Our challenges, including economy, education and health, infrastructure and European integration, are important challenges, but they cannot resist the positive spirit of our citizens and our fate.

Kosovo, both people and territory are united today in a historical moment, to improve the lives of each citizen within our borders, regardless of ethnic origin.

Our hopes have never been higher. Our faith has never been bigger. The people of Kosovo have never been more united. Our dreams know no limit. Kosovo has never had more international support.

The challenges before us are great, but nothing can stop us from moving forward – towards new historical moments, which a new history will give us and we are jointly making the new history.

Today, the whole world is with us, and we are becoming an equal part of the democratic world. We are becoming an equal part of a world we deserve.

Until now, we did a great deal to guarantee our commitment towards communities

On this historical day, honorable assembly members, I wish to reaffirm our political will to create the necessary conditions for respecting and protecting the communities and for further improving relationships between them in a new Kosovo.

Our constitution and our laws will reflect this, together with an inter-institutional strategy at all levels of our new country.

Our commitments will be embodied in three main elements:

The first, a strong and irreversible guarantee by law of equal rights of all communities in Kosovo

The second, establishment of permanent mechanisms to guarantee that the communities play a complete and active role in developing the future of our country, and

The third, is our responsibility to take effective and immediate measures to ensure that our commitments result with positive change, for all those living in Kosovo, especially members of minority communities

Our Constitution states that Kosovo is a state of all its citizens. There is no place for fear, discrimination or unequal treatment for anyone. We are building Kosovo with equal rights for everyone, with equal opportunities for everyone.

Each discriminatory practice will be eradicated from our state institutions. Each discriminatory practice will be eradicated from our society. In Kosovo, there will only be tolerance, understanding, living together, solidarity and progress.

We all agree that diversity brings positive benefits for all

Honorable Assembly Members,

[in Serbian language] Honorable co-citizens,

Today's day brings the end of a long process

This is the end of the last threats and blunders that Belgrade will ever rule Kosovo again,

Kosovars themselves, of all ethnic, religious and language origins will together carry their responsibility for their country.

We make Kosovo independent, aiming that all citizens enjoy the freedom and other benefits of our country.

Let this day be the day of a new beginning!

Let this day mark a beginning of a better future for all citizens of the state of Kosovo

[continues in Albanian language]

Honorable President of the Assembly
Honorable President
Honorable Assembly members
Honorable guests
Honorable citizens of Kosovo, wherever you are, in the Diaspora,

Kosovo is bringing a historical decision. Kosovo is declaring its independence in accordance with the comprehensive proposal of President Ahtisaari.

The independence of Kosovo marks the end of the dissolution of former Yugoslavia. Implementation of the Ahtisaari provisions, which are incorporated in the Kosovo Constitution, are a national priority to us

all, to the institutions and to the people of Kosovo. The Assembly of Kosovo will soon adopt all the main laws resulting from the Ahtisaari document, in the coming days.

Honorable Assembly Members,

Kosovo highly appreciates the role played by the United Nations Organization in reconstructing Kosovo and in building our democratic institutions. We expect to work with the United Nations Organization to promote our joint efforts for peace, security and democratic development.

In addition, we welcome the new international mission, led by the European Union, which will assist us in our democratic development and supervise the implementation of Ahtisaari plan, which is already a Kosovo plan.

On this occasion, I would like to assure all of you, through the voice of Kosovo institutions, and I would like to send this message and to assure our neighbors that Kosovo will do the best possible to establish and maintain good relationships with all neighboring countries. We aspire to have good mutual relationships at a mutual interest with Serbia as well, having faith that this is in our common interest and that of investment of our friends for peace and stability in the region.

From today on, Kosovo will be a democratic and multi-ethnic country of all of its citizens, in its fast journey towards Euro-Atlantic integrations. Thank you!

Thank you Mr. Chairman!

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Thank you, Mr. Prime Minister! I give the floor to the President of Kosovo, Mr. Fatmir Sejdiu

PRESIDENT OF KOSOVO, FATMIR SEJDIU:

Honorable President of the Assembly of Kosovo,
Honorable Chairmanship
Honorable Mr. Prime Minister, Hashim Thaçi,
Honorable Assembly Members and Ministers
Honorable family of President Rugova
Honorable Jashari family,
(applause)
Honorable representatives of Kosovo institutions
Representatives of Diplomatic missions
Representatives of science, culture, cults
Honorable citizens of Kosovo

[in Serbian language]

Honorable ministers,

Honorable citizens of Kosovo,

[continues in Albanian language]

Ladies and Gentlemen,

Today's day separates the history of Kosovo in two: the times before and after independence

The independence of Kosovo was created by generations, with their works of life, with hard work and the sacrifice they have made.

We are declaring our independence before the world, and with the blessing of the world, among friends who stood by us through decades, especially one decade ago, when the atrocities had spread in this part of the Balkans. The same friends stood by us during recovery after the war, during reconstruction after destruction caused by war and occupation. They stand by us today; they will stand by us tomorrow.

Today, we remember the sacrifices which led to this extraordinary day. We remember the mothers and fathers, who went through hardship that cannot be described so that their sons and daughters can live in freedom. Today, we remember President Ibrahim Rugova, the great leader and establisher of our country, who brought Kosovo out of chaos into a democratic order. Today, we remember Adem Jashari and the Kosovo Liberation Army who brought forward the will of the people to live in freedom. We also remember our neighbors of all ethnic, ideological and religious backgrounds who helped us during the years of repression and war. We remember all of this, not as a token of revenge for our violent past, but to build a future full of trust, which will offer an environment for reconciliation and forgiveness.

These great events of our history, our sacrifices and the hopes and achievements, have brought us here to declare our independence. The declaration of independence is the will of the people. It is a moral and logical consequence of our history and it is in full accordance with recommendations of the Special Envoy – President Martti Ahtisaari.

The independence for Kosovo is the end of a long process of dissolution of Yugoslavia. After two years of engagement in negotiations over status with Belgrade, and despite serious and constructive engagement of the Kosovo Unity Team, achieving an acceptable solution for both parties was not possible. Therefore, we had to act to offer our people a clear perspective with the aim of advancing our political, social and economic development.

Our vision for Kosovo is very clear. We wish to build Kosovo on fundamental democratic principles. This means that Kosovo will be a democratic, multi-ethnic state, well integrated in the region, with good relationships with its neighboring countries, a state that moves fast towards full membership in the Euro-Atlantic community. The people of Kosovo are determined and desire a European future for their country.

The comprehensive proposal on a status settlement for Kosovo in March of last year has been supported by the Assembly of Kosovo. This package gives the Serbs, as well as other minorities: Turks, Bosniaks, Roma, Ashkali and Egyptians, a strong guarantee on the protection of their political and cultural rights, which in many points even exceed the most advanced international standards on rights of the minorities.

The Constitution of the Republic of Kosovo guarantees multi-faceted and meaningful participation of minorities in the decision making process.

Honorable participants of this historical session of the Kosovo Assembly,

A national priority for the Kosovo Republic in the coming weeks and months is the full implementation of the Ahtisaari plan. Very soon, we aim to adopt the laws and the new Constitution of Kosovo, which also embodies Ahtisaari principles. All this will be followed with actual actions in the field in terms of implementation of provisions contained in the Ahtisaari plan.

With today's act, Kosovo also assumes responsibilities as a state. At the same time, Kosovo reaffirms its dedication for close cooperation with the international community to build a country in accordance with the most advanced norms and principles of democracy. For this reason, Kosovo welcomes the deployment of an international civilian presence, which will support further democratic development of our country, as well as supervise the implementation of the Ahtisaari plan. Specifically, we value the willingness of the European Community to assume a greater role in Kosovo. In addition, we welcome the continuous military presence of the NATO troops. We are committed to cooperating closely with the civilian and military representatives in Kosovo.

We are aware that members of minority communities in Kosovo see independence with a degree of fear and skepticism. We will do all that is possible to ensure that the rights, the culture and their property are strictly honored in the independent Kosovo.

[in Serbian language]

Honorable citizens of Kosovo,

Honorable representatives,

I would once again like to take this solemn opportunity to again invite all citizens of Kosovo, above all the citizens of the Serb community in Kosovo, to give their contribution in a common building of a European Kosovo, where each citizen will feel like home. Kosovo is equally your home and your homeland. Your rights and the rights of members of other communities in an independent Kosovo will be a continuous obligation of our state institutions. Serb cultural and religious heritage will be entirely protected. Your ethnic and language identity will be entirely honored, and we will achieve this by working together in our daily lives and in the institutions of Kosovo.

[continues in Albanian language]

Honorable Assembly Members

We want to strongly point out that Kosovo wishes to have good neighboring relations with Serbia as well, on a basis of mutual respect. We hope that our aim to normalize relations with Belgrade as soon as possible will be supported by Serbia.

We are grateful for the role and the work done by the Organization of United Nations in reconstructing post-war Kosovo. The United Nations Organization shall continue to have a role in Kosovo, for as long as

UN Resolution 1244 will be in force. We will continue to cooperate with the UN in order to make progress in our common goals of peace, security and democratic development for Kosovo, until full membership of Kosovo in this prestigious organization.

Our integration will flow naturally, as with its values, Kosovo has always culturally belonged to this family, but now, under new circumstances, Kosovo needs political integration to create new opportunities, such that human and natural resources are put at the service of overall social and economic development of our country.

Ladies and Gentlemen

The Republic of Kosovo today asks for the world's embrace. As we await recognition by many countries of the world, with a special piety we remember many worldly personalities who stood by the people of Kosovo through decades, especially in its most difficult hours

Our people will be eternally grateful to the United States of America, the countries of the European Union, NATO and other countries of the democratic world for the extraordinary support to our dear country – Kosovo.

God bless Kosovo and its people!

God bless the Republic of Kosovo!

God bless all friends of Kosovo!

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Thank you, Mr. President!

I invite the Prime Minister of Kosovo, Mr. Hashim Thaçi, to present the Draft Declaration of Independence

(applause)

I invite the participants to stand up!

PRIME MINISTER OF KOSOVO, HASHIM THAÇI:

Honorable President of the Assembly
Honorable President,
Honorable Members of the Assembly
Honorable guests,
Honorable Jashari family
Honorable Rugova family

Thank you, United States of America, European Union and NATO! Respect!

Now allow me to, by feeling the heartbeats of our ancestors, with the highest honor and privilege, read the Declaration of Independence of Kosovo

(applause)

DECLARATION

OF INDEPENDENCE OF KOSOVO

Convened in a solemn extraordinary plenary session, on February 17, 2008, in the capital of Kosovo,

Answering the call of the people to build a society that honors human dignity and affirms pride and purpose of its citizens;

Committed to confront the painful legacy of the recent past and in the spirit of forgiveness and reconciliation;

Dedicated to protection, promotion and honoring the diversity of our people;

Reaffirming our wish to be fully integrated in the Euro-Atlantic family of democracies;

Observing that Kosovo is a special case arising from the non-consensual dissolution of Yugoslavia and is no precedent to any other situation;

Recalling the years of strife and violence in Kosovo, that disturbed the conscience of all civilized people;

Grateful to the whole world that intervened in 1999, thereby removing Belgrade's governance over Kosovo and placing Kosovo under interim administration of the United Nations;

Proud that Kosovo has since developed functional multi-ethnic institutions of democracy, which freely express the will of our citizens;

Recalling the years of negotiations sponsored by internationals between Belgrade and Prishtina over the question of our future political status;

Regretting that no mutually acceptable outcome was possible, in spite of the good-faith engagement of Kosovar leadership and the important international role;

Confirming that recommendations of the Special Envoy of the United Nations, President Martti Ahtisaari, provide a comprehensive framework for its future development, are in line with the highest European standards on human rights and good governance;

Determined to see our status resolved in such a way as to provide to our people clarity about their future and to move beyond conflicts of the past, and to achieve full democratic potential of our society;

Honoring all the men and women who made great sacrifice to build a better future for Kosovo

1. We, the democratically elected leaders of our people, through this

DECLARATION

HEREBY DECLARE KOSOVO AN INDEPENDENT AND DEMOCRATIC STATE

(applause)

This declaration reflects the will of our people and is in full accordance with recommendations of the Special Envoy of the United Nations, Martti Ahtisaari, and his comprehensive proposal for the Kosovo Status Settlement.

We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law.

We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

We fully accept the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead.

We shall implement those obligations in full, including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights.

The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244 in 1999.

We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

We also invite and welcome the NATO to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 from year 1999 and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities.

We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability

For reasons of culture, geography and history, we believe our future lies with the European family.

We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy.

We are committed to working constructively with the United Nations as it continues its work in the period ahead.

With independence comes the duty of responsible membership in the international community. We fully accept this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states.

Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors.

Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations.

We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia.

We intend to seek membership in international organizations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

Kosovo declares its commitment to peace and stability in our region of southeast Europe.

Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation.

We shall therefore work together with our neighbors to advance a common European future.

We express, in particular, our desire to establish good relations with all our neighbors, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future.

We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people.

We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the

Ahtisaari Plan.

In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999).

We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

Thank you! Thank you very much!

(frenetic applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Thank you, Mr. Prime Minister!
Honorable Assembly Members,
I inform you that the vote will be cast electronically, thus I propose we proceed.
I declare that 109 assembly members are present.
Are there any members who do not have their cards with you?
If any of you have no cards, you may vote by raising your hand.
I ask you, shall we vote electronically, or by raising our hand.

(from the hall: Let us vote by raising hand)

Who is "in favor"? Thank you!
This was the explanation on the voting method.

Who is in favor of the Declaration presented by the Prime Minister of Kosovo?
Thank you!
Any votes "against"? None.

(applause)

I state that with all votes "in favor" of the present members, Members of the Assembly of Kosovo, today, on February 17, 2008, have expressed their will and the will of the citizens of Kosovo, for Kosovo an independent, sovereign and democratic state.

(applause)

And from this point on, the political position of Kosovo has changed. Kosovo is:

A REPUBLIC, AN INDEPENDENT, DEMOCRATIC AND SOVEREIGN STATE

(applause)

Congratulations to you and all of those who are watching us!

(applause)

CHAIRMAN, XHAVIT HALITI:
Honorable Assembly Members, please take your seats so we can proceed.
We proceed with solemn signature of the Declaration.
I invite the President of Kosovo, Mr. Fatmir Sejdiu, to sign the Declaration of Independence!

I invite the Assembly President and the Prime Minister of Kosovo, to sign the Declaration of Independence together!

(the invitees sign the declaration)

(applause)

CHAIRMAN, IBRAHIM GASHI:
I invite members of the Chairmanship, Mr. Xhavit Haliti and Mr. Sabri Hamiti to sign the Declaration of Independence.
(signature follows)

I invite the member of Chairmanship, Mr. Eqrem Kryeziu, to sign the Declaration.
(signature follows)

CHAIRMAN, XHAVIT HALITI:

I invite the member of Chairmanship, Mr. Ibrahim Gashi, to sign the Declaration.
(signature follows)

I invite the member of Chairmanship, Mr. Nexhat Daci, to sign the Declaration
(signature follows)

I invite the member of Chairmanship, Naim Maloku.
(signature follows)

I invite the member of Chairmanship, Xhezair Murati.
(signature follows)

I invite the member of Chairmanship, Slobodan Petrovic. Absent.

I invite the Head of the Kosovo Democratic Party Parliamentary Group, Rame Buja
(signature follows)

I invite the Head of New Kosova Alliance Parliamentary Group, Ibrahim Makolli
(signature follows)

I invite the Head of Dardania Democratic League Parliamentary Group, Lulzim Zeneli
(signature follows)

I invite the Head of Kosovo Future Alliance Parliamentary Group, Ardian Gjini
(signature follows)

I invite the Head of "7+" Parliamentary Group, Zylfi Merxha
(signature follows)

I invite the Head of SLS Parliamentary Group, Bojan Stojanovic. Not present!

I invite the member of Kosovo Assembly, Adem Grabovci.
(signature follows)
I invite the member of Kosovo Assembly, Adem Hajdaraj.
(signature follows)
I invite the member of Kosovo Assembly, Adem Salihaj.
(signature follows)
I invite the member of Kosovo Assembly, Agim Veliu.
(signature follows)
I invite the member of Kosovo Assembly, Ahmet Isufi.
(signature follows)
I invite the member of Kosovo Assembly, Ali Lajçi.
(signature follows)
I invite the member of Kosovo Assembly, Alush Gashi.
(signature follows)
I invite the member of Kosovo Assembly, Anita Morina-Saraçi.
(signature follows)
I invite the member of Kosovo Assembly, Armend Zemaj.
(signature follows)
I invite the member of Kosovo Assembly, Arsim Bajrami.
(signature follows)
I invite the member of Kosovo Assembly, Arsim Rexhepi.
(signature follows)
I invite the member of Kosovo Assembly, Bahri Hyseni.
(signature follows)
I invite the member of Kosovo Assembly, Bajram Kosumi.
(signature follows)
I invite the member of Kosovo Assembly, Behxhet Pacolli.
(signature follows)
I invite the member of Kosovo Assembly, Berat Luzha.
(signature follows)
I invite the member of Kosovo Assembly, Berim Ramosaj.
(signature follows)
I invite the member of Kosovo Assembly, Besa Gaxherri.
(signature follows)
I invite the member of Kosovo Assembly, Branislav Grbić. Not present!
I invite the member of Kosovo Assembly, Bujar Bukoshi.
(signature follows)
I invite the member of Kosovo Assembly, Donika Kadaj.
(signature follows)
I invite the member of Kosovo Assembly, Dragiša Mirić. Not present!
I invite the member of Kosovo Assembly, Drita Kadriu.
(signature follows)
I invite the member of Kosovo Assembly, Drita Maliqi.
(signature follows)
I invite the member of Kosovo Assembly, Driton Tali.

(signature follows)
I invite the member of Kosovo Assembly, Edita Tahiri.
(signature follows)
I invite the member of Kosovo Assembly, Elheme Hetemi.
(signature follows)
I invite the member of Kosovo Assembly, Emrush Xhemajli.
(signature follows)
I invite the member of Kosovo Assembly, Enis Kervan.
(signature follows)
I invite the member of Kosovo Assembly, Enver Hoxhaj.
(signature follows)
I invite the member of Kosovo Assembly, Esat Brajshori.
(signature follows)
I invite the member of Kosovo Assembly, Etem Arifi.
(signature follows)
I invite the member of Kosovo Assembly, Ethem Çeku.
(signature follows)
I invite the member of Kosovo Assembly, Fatmir Limaj.
(signature follows)
I invite the member of Kosovo Assembly, Fatmir Rexhepi.
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I invite the member of Kosovo Assembly, Fatmire Berisha.
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I invite the member of Kosovo Assembly, Fehmi Mujota.
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I invite the member of Kosovo Assembly, Flora Brovina.
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I invite the member of Kosovo Assembly, Gani Buçinca.
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I invite the member of Kosovo Assembly, Gani Geci.
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I invite the member of Kosovo Assembly, Gani Koci.
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I invite the member of Kosovo Assembly, Gjylnaze Syla.
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I invite the member of Kosovo Assembly, Hafize Hajdini.
(signature follows)

CHAIRMAN, IBRAHIM GASHI:

I invite the member of Kosovo Assembly, Hajdin Abazi.
(signature follows)
I invite the member of Kosovo Assembly, Hajredin Hyseni.
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I invite the member of Kosovo Assembly, Hajredin Kuçi.
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I invite the member of Kosovo Assembly, Haki Shatri.
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I invite the member of Kosovo Assembly, Heset Cakolli.
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I invite the member of Kosovo Assembly, Hydajet Hyseni.
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I invite the member of Kosovo Assembly, Ibrahim Selmanaj.
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I invite the member of Kosovo Assembly, Ismet Beqiri.
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I invite the member of Kosovo Assembly, Kaçusha Jashari.
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I invite the member of Kosovo Assembly, Kolë Berisha.
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CHAIRMAN, XHAVIT HALITI:

I invite the member of Kosovo Assembly, Kosara Nikolić. Absent!

I invite the member of Kosovo Assembly, Ljubiša Zivić. Absent!

I invite the member of Kosovo Assembly, Luljeta Shehu.
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I invite the member of Kosovo Assembly, Lutfi Haziri.
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I invite the member of Kosovo Assembly, Mahir Yagcilar.
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I invite the member of Kosovo Assembly, Mark Krasniqi.
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I invite the member of Kosovo Assembly, Melihate Tërmkolli.
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I invite the member of Kosovo Assembly, Memli Krasniqi.
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I invite the member of Kosovo Assembly, Mihajlo Ščepanović. Absent!

I invite the member of Kosovo Assembly, Mimoza Ahmetaj.
(signature follows)

I invite the member of Kosovo Assembly, Mursel Halili. Absent!

I invite the member of Kosovo Assembly, Mufera Shinik.
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I invite the member of Kosovo Assembly, Myrvete Pantina.
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I invite the member of Kosovo Assembly, Myzejene Selmani.
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I invite the member of Kosovo Assembly, Naim Rrustemi.
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I invite the member of Kosovo Assembly, Nait Hasani.
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I invite the member of Kosovo Assembly, Naser Osmani.
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I invite the member of Kosovo Assembly, Naser Rugova.
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I invite the member of Kosovo Assembly, Nekibe Kelmendi.
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I invite the member of Kosovo Assembly, Nerxhivane Dauti.
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I invite the member of Kosovo Assembly, Numan Balić.
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I invite the member of Kosovo Assembly, Nurishahe Hulaj.
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I invite the member of Kosovo Assembly, Njomza Emini.
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I invite the member of Kosovo Assembly, Qamile Morina.
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I invite the member of Kosovo Assembly, Radmila Vujović. Absent!

I invite the member of Kosovo Assembly, Ramadan Avdiu.
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I invite the member of Kosovo Assembly, Ramadan Gashi.
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I invite the member of Kosovo Assembly, Ramë Manaj.
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I invite the member of Kosovo Assembly, Rasim Selmanaj.
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I invite the member of Kosovo Assembly, Rita Hajzeraj.
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I invite the member of Kosovo Assembly, Riza Smaka.

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I invite the member of Kosovo Assembly, Rrustem Mustafa.
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I invite the member of Kosovo Assembly, Sabit Rrahmani.
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I invite the member of Kosovo Assembly, Sadik Idriz.
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I invite the member of Kosovo Assembly, Safete Hadërgjonaj.
(signature follows)

I invite the member of Kosovo Assembly, Sala Berisha-Shala.
(signature follows)

I invite the member of Kosovo Assembly, Sanije Aliaj.
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I invite the member of Kosovo Assembly, Selvije Halimi.
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I invite the member of Kosovo Assembly, Skender Hyseni.
(signature follows)

I invite the member of Kosovo Assembly, Slaviša Petković. Absent!

I invite the member of Kosovo Assembly, Suzan Novobërdaliu.
(signature follows)

I invite the member of Kosovo Assembly, Synavere Rysha.
(signature follows)

I invite the member of Kosovo Assembly, Shkumbin Demalijaj.
(signature follows)

I invite the member of Kosovo Assembly, Shpresa Murati.
(signature follows)

I invite the member of Kosovo Assembly, Teuta Hadri.
(signature follows)

I invite the member of Kosovo Assembly, Vezira Emrush.
(signature follows)

I invite the member of Kosovo Assembly, Vladimir Todorović. Absent!

I invite the member of Kosovo Assembly, Vlora Çitaku.

(signature follows)

I invite the member of Kosovo Assembly, Xhevdet Neziraj.
(signature follows)

I invite the member of Kosovo Assembly, Zafir Berisha.
(signature follows)

I invite the member of Kosovo Assembly, Zef Morina.
(signature follows)

I invite the member of Kosovo Assembly, Zylfije Hundozi.
(signature follows)

Honorable Ladies and Gentlemen,

I declare that we have fulfilled our obligation by each of us signing the Declaration of Independence.

I invite the Chairman of the Parliament to resume chairmanship of the Assembly.

(applause)

PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:

Honorable Assembly members,

Let us continue with the second item on the agenda:

ADOPTION OF KOSOVO STATE SYMBOLS – THE FLAG AND SEAL

You, honorable assembly members, have before you the symbols – Flag and Seal

To shorten the procedure, let us immediately proceed with voting

As we agreed to vote by hand, I invite you to vote.

Who is "in favor"? Thank you!

(applause)

(At this point the flag is brought and placed in the hall)

(applause)

Honorable assembly members,

This is the flag of the youngest state in Europe and the world, of the state of Kosovo!

May we all enjoy it! Congratulations!

(applause)

Honorable assembly members

By congratulating you again on the Republic of Kosovo, independent and sovereign, and on the approval of the flag of Kosovo, I hereby declare the session adjourned.

(applause)

Prepared by:

The Transcript Unit within the Assembly of Republic of Kosovo

ANNEX 3

Report of the International Civilian Office

27 February 2009

Vienna, Austria

Report of the International Civilian Office

27 February 2009

Report of the International Civilian Office

27 February 2009

I. INTRODUCTION

February 2009 marks several significant milestones for the Republic of Kosovo and its international partners. Just days ago, Kosovo completed its first year as an independent, sovereign state, and 27 February, marks the completion of the first year of the mandate of the International Civilian Representative (ICR). The past year witnessed much progress in Kosovo, progress in building institutions, anchoring Rule of Law, in the creating and consolidating of the elements of statehood, and in taking its place in the community of nations as a multi-ethnic democracy. Through all its actions the state of Kosovo has proven its independence and shown that independence is irreversible. Kosovo has also made strides, in partnership with the International Civilian Office (ICO), in fulfilling the promises made to its citizens and to the world when, in its Declaration of Independence, it committed itself to full implementation of the Comprehensive Proposal for the Kosovo Status Settlement (CSP).

The ICO has successfully assumed the role assigned to it by the CSP and enshrined in Kosovo's Constitution. We have forged strong ties with a range of Kosovo's leaders, both in the capital and in the municipalities. To supervise and support CSP implementation, we work closely with them as they prepare decisions. A spirit of cooperation prevails. Our approach is to hold frank and confidential talks early on, rather than to pass judgment after they act.

Several moments stand out in the ICR's exercise of his responsibilities: his certification in April 2008 of the Constitution as in accordance with the terms of the CSP; his certification, over a period of months, of some 50 Ahtisaari-related laws as consistent with the CSP; his endorsement of the President's decision in January 2009 to allow Assembly mandates to continue and not to terminate them to force new elections this year; and his speech in the Assembly in February 2009 reflecting on the first anniversary of Kosovo's independence. These moments illustrate the range of ICR activities, including political and ceremonial aspects.

The member states of the International Steering Group (ISG) have invested and continue to invest significant resources, both financial and human capital, in Kosovo's future, directly and through the ICO and other international organizations. Moreover, the ISG and ICO share an ambitious vision for a rapid and thorough implementation of the CSP. Such a vision conforms to the CSP itself, which requires a review of the ICR's powers and mandate within two years of the CSP's entry into force, with a view toward "reducing the scope of the powers of the ICR and the frequency of intervention." Cognizant of this ambitious time horizon and grateful for the

resources that ISG states have committed, the ICO offers this report to apprise ISG member states both of the progress that has been achieved and the challenges that lie ahead.

II. MEETING ITS COMMITMENTS – KOSOVO'S PROGRESS IN CSP IMPLEMENTATION

When on 17 February 2008 the democratically-elected leaders of the people of Kosovo took the step of declaring Kosovo an independent and sovereign state, they committed themselves without reservation to the implementation of the CSP, embedding these commitments into the Declaration of Independence itself. By doing so, they reflected the will of the people of Kosovo.

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

Just weeks after independence, on 1 April, the Constitutional Commission of Kosovo adopted a draft constitution, which incorporated, *inter alia*, Kosovo's obligations to comply with the CSP as well as the authority of the ICR as the final interpreter of the CSP into the domestic legal sphere. One day after its approval by the Commission, the ICR certified that the draft text was in accordance with the terms of the CSP and on 9 April 2008 it was adopted by the Assembly of Kosovo. The Constitution of Kosovo entered into force 15 June 2008 together with 41 laws promulgated by the President of the Republic the same day.

In the first ten months of its existence as the supreme legislative body, the Assembly of Kosovo passed over 50 laws directly related to the implementation of the provisions of the CSP. Included among these legislative provisions were acts to decentralize governing authority to Kosovo's municipalities; to build Kosovo's governing capacity; and to safeguard the rights and freedoms of Kosovo's communities, including through the protection of religious and cultural heritage.

1. Decentralization

Among the earliest CSP implementing laws were those concerning the vitally important process of decentralization. Laws on Local Self-Government, Boundaries of Municipalities, Local Government Finance, Local Education and Local Health not only establish the framework for the new municipalities to be formed under the CSP, but just as importantly codify the central principle of decentralization itself – that the interests of democracy and efficacy are best served by moving governing capacity closer to citizens. Consistent with these laws, EUR 3.9 million has been set aside for the expenses of the new municipalities to be formed according to the CSP; the Ministry of Local Self-Government has led a nationwide publicity campaign on the benefits of decentralization; and the ICO is working closely with the Government of Kosovo's Inter-Ministerial Working Group on Decentralization to determine the modalities for the formation of

the Municipal Preparation Teams that will be tasked with building the governing infrastructure of the new municipalities. The first transfer of competencies took place in January 2009. The ICO has worked closely with both the Government and the Assembly in order to ensure the timely adoption of relevant legislation and its implementation.

Establishing a Mitrovica North municipality, as foreseen by the CSP, still remains a challenge for the overall perception of the decentralization process.

2. Institution Building

- Security Sector Reform

Another set of CSP-implementing legislation passed early on by the Assembly concerned laws designed to establish the institutions needed to exercise the full measure of sovereignty. The Law on the Kosovo Security Council, the Law on the Ministry for the Kosovo Security Force, the Law on Service in the Kosovo Security Force, the Law on the Civil Aviation Authority, and the Law on the Establishment of the Kosovo Intelligence Agency are just a few that have been passed in the framework of a coherent reform of the security sector, according to the principles and provisions of the CSP.

Minister Fehmi Mujota was named Kosovo's first Minister for the Kosovo Security Force (KSF); he has played an important role – consistent with his position and the principle of civilian control of security bodies – in the selection of the KSF commander and KSF officers. Though not without difficulties, this process permitted the deactivation of the Kosovo Protection Corps on 20 January 2009, and the beginning of KSF training.

In September 2008, the Government of Kosovo named Driton Gjonbaljaj as the Director General of Kosovo's Civil Aviation Authority. The KCAA has taken the lead in assuring the safety of civil aviation in Kosovo and represented Kosovo in regional civil aviation fora.

On 6 February 2009, the Assembly of Kosovo confirmed Bashkim Smakaj as the first Director of the Kosovo Intelligence Agency, and he has been charged with the development of an agency that is multi-ethnic and apolitical. The Kosovo Security Council held its first meeting 11 February 2009 and efforts are underway to build a KSC Secretariat that will permit this body to take its proper role in coordinating Kosovo's national security and safety policy, while not duplicating the functions of government ministries.

In accordance with provisions of the CSP, the Republic of Kosovo has undertaken to demarcate its border with the former Yugoslav Republic of Macedonia. Both countries named representatives to a Joint Technical Commission (JTC), which has held numerous sessions. Together, the JTC has agreed on the location of the placement of all of the primary border stones. A small section of the border, near the villages of Debellde/Debelde and Tanusevci,

remains to be demarcated. The ICO has been closely involved in the process of border demarcation, both in the JTC and along the border.

- Rule of Law

One major element for the future development of a functioning Rule of Law sector was to deploy the largest ESDP mission to date, EULEX, throughout the country in late 2008. Its police, judges, prosecutors and customs officials will provide indispensable support to Kosovo's efforts to strengthen the rule of law. Efforts to establish a Constitutional Court also made important progress in the course of the last twelve months. A Law on the Constitutional Court was adopted in late 2008, and an interim mechanism for registering prospective cases for this court has been established. The process of the selection of judges, both international and national, is now underway. International judges will be appointed in coordination with the President of the European Court of Human Rights.

The Constitution of Kosovo has established the Kosovo Judicial Council (KJC), an independent body responsible, inter alia, for all decisions on the proposal of candidates for judicial office. Kosovo has, since then, adopted implementing legislation in order to regulate further the composition and organization of the KJC.

Efforts are also underway regarding the comprehensive Kosovo-wide review and reappointment process of all judges and prosecutors foreseen by Annex IV of the CSP and the Constitution. The President of the Republic of Kosovo has appointed all members on the Independent Judicial and Prosecutorial Commission in January (IJPC). The IJPC has recently launched the reappointment process for all judges and prosecutors.

- Economy

A comprehensive set of CSP-implementing legislation passed by the Assembly concerned laws designed to establish the institutions needed to define the legal framework for the economy as defined and prescribed by CSP. This included legislation on publicly-owned enterprises; on the Privatization Agency of Kosovo (PAK); the Kosovo Property Agency (KPA); and on the various independent economic regulators of Kosovo. Following the adoption of the laws, the PAK successfully started to work last summer and KPA accelerated the settlement of claims. Furthermore the ICR made key appointments in the area of economics as foreseen by the CSP, including the Auditor-General of Kosovo, a member of the board of the Kosovo Pensions Savings Trust (KPST) and members of the Board of PAK.

3. Community Rights and Religious and Cultural Heritage

The protection of community rights and of religious and cultural heritage are at the very heart of the CSP and central to the Kosovo Constitution's inclusion of rights for this multi-ethnic, secular, democratic state. Among the first of such laws passed by the Kosovo Assembly was the

Law on the Protection and Promotion of Rights of Communities and their Members and the Law on the Establishment of Special Protective Zones. The first piece of legislation provides the legal framework for community rights in the constitution, including in the realms of education, identity and the use of Kosovo's official languages. The rights of communities and their members, and their inclusion in Kosovo's public life are also the work of the Communities Consultative Council (CCC). The CCC was established in accordance with the Kosovo Constitution and was formed by a decree of the President of Kosovo. It held its first session in December 2008.

The Law on the Establishment of Special Protective Zones sets up a mechanism to protect Kosovo's rich religious and cultural patrimony, including but not limited to the sites of the Serbian Orthodox Church (SOC). These protections aim to prohibit land use that would detract from the character or appearance of the sites or disturb the monastic life of the clergy. While Special Protective Zones are designed to protect some SOC sites from development, the Kosovo authorities have taken practical steps to support the physical protection of SOC sites and the economic sustainability of the Church. The Government of Kosovo, through its Ministry of Culture Youth and Sport, contracted a private security firm to provide round-the-clock protection to SOC sites considered to be in the greatest danger. In February 2009, this contract was suspended and the Kosovo Police assumed its responsibility with a 24-hour-a-day protection of these sites.

The Kosovo Police's implementation of their Operational Order for protection of SOC holy sites will permit international partners, like KFOR, to proceed with plans to withdraw from such tasks, without placing these churches and monasteries in additional danger. The implementation of the Operational Order is done in close collaboration with the ICO. As for the economic sustainability of the SOC, the Kosovo Customs Code, passed in late 2008, included CSP-related provisions exempting the SOC from the payment of certain customs duties. Similar exemptions will have to be adopted to implement other CSP provisions on SOC self-sustainability.

It has been a challenge for the Government of Kosovo to address the needs of the Kosovo Serb community appropriately due to lack of dialogue between the majority community and the Kosovo Serb community. The ICR, primarily in his capacity as EUSR, is facilitating a Round Table between key government ministers and Kosovo Serb representatives. Its goal is to discuss an effective implementation of the CSP with regard to the needs of the Kosovo Serb community.

For a complete picture of the progress made to date on CSP implementation, please refer to the most recent version of ICO's CSP Implementation Matrix.

III. THE REPUBLIC OF KOSOVO'S GROWING NETWORK OF INTERNATIONAL RELATIONS

17 February 2008 witnessed the declaration of Kosovo's independence, and hence its entry into the family of independent, sovereign states; the year that followed has seen Kosovo's leadership, together with its international partners, consolidate its statehood through the establishment of a growing network of international relations.

Since its Declaration of Independence, 55 states have formally recognized Kosovo's statehood, including 22 of the 27 member states of the European Union, and states from every continent. It has also been recognized by three of the four states with which it shares common borders. Kosovo has issued its citizens with identity documents, including passports. These passports have been recognized as valid for travel by other states.

In March 2008, the Assembly of Kosovo passed a Law on the Ministry of Foreign Affairs and Diplomatic Service of Kosovo. Skender Hyseni was named Kosovo's first Foreign Minister and was charged with building both his ministry and Kosovo's diplomatic representations abroad. Laudable efforts are underway on both fronts. The initial legislation was followed by a Law on the Foreign Service of the Republic of Kosovo and a Law on the Consular Service in Diplomatic and Consular Missions of the Republic of Kosovo. These laws provided the legal basis for the establishment of Kosovo's first diplomatic and consular presences abroad. Kosovo's first foreign missions, to be headed by ten Chargés d'affaires, were announced in August 2008. The ICO has supported the build-up of the Ministry of Foreign Affairs by establishing the External Relations Working Group, which includes officials from the Ministry and ISG representatives.

The Government of Kosovo has received numerous diplomatic delegations including several Heads of State and Government, and numerous ministers including ministers of foreign affairs. The Kosovo Prime Minister, Foreign Minister and other Ministers have also been invited abroad to further cooperation.

In July 2008, the Republic of Kosovo submitted official applications for membership in the International Monetary Fund and the World Bank. These applications have the full support of the ICO, and the ICR has lobbied for their acceptance. The IMF membership committee has been formed and is about to start its work.

IV. THE YEAR AHEAD

Kosovo and the ICO now enter their second year. ICO's partnership with the Kosovo Government and institutions remains strong. It would be irresponsible, however, to assume that the progress achieved to date ensures a successful conclusion. Much work lies ahead, particularly in monitoring the implementation of CSP laws.

Our strategic priorities for the coming months are to:

- help ensure a successful completion of the reform of the security sector;
- keep our focus on decentralization;
- help strengthen the rule of law, in close cooperation with EULEX;
- attend to good governance and economic reform.

Of all sectors, that involving public security and safety has seen the most institutional progress over recent months. All security institutions set forth in Annex VIII of the CSP and Chapter XI of the Constitution are now moving ahead. But some are untried in practice and incomplete in personnel. Resource needs will continue. The ICO and the international community will have to offer steady support to ensure that the fledgling institutions, given their central role in society, will develop.

As in 2008, ICO will continue its work with the Government of Kosovo to advance the process of decentralization, both the creation of the five-plus-one municipalities foreseen in the CSP and the transfer of competencies to all of Kosovo's local governments. A successful decentralization process, which will allow all communities to determine their own affairs on the local and municipal level, will be a key element for a sustainable reconciliation in Kosovo.

Further efforts to enhance good governance and the Rule of Law are needed. The ICO will continue to work closely with the EULEX mission, in order to foster the rule of law in Kosovo. The challenges range from enabling the operations of Customs throughout the territory; efficient, fair and competent courts; as well as a competent multiethnic police throughout the entire territory of Kosovo.

Finally, the accelerated reform of the economy must include several elements, all of which touch on CSP responsibilities. The ICO will continue to encourage fiscal responsibility from the Government of Kosovo, mainly by enhancing the sustainability and the quality of the budget, through CSP-mandated budget consultations. ICO will also encourage its Kosovo partners to keep their pledge to complete quickly, through the Privatization Agency of Kosovo, the privatization of socially-owned enterprises and the assessment of creditor and ownership claims over them. Kosovo also needs to start privatizing large publicly owned enterprises in a

transparent manner, as well as to improve standards of the governance of all publicly-owned enterprises, with a view toward their eventual privatization. The ICO will work together closely with the Kosovo authorities to push for a transparent and objective process of selecting and appointing members of boards and other key positions, as foreseen in the CSP. The ICR will also support the reform of the energy sector in order to help establishing a viable economic development.

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