Република Србија
МИНИСТАРСТВО СПОЉНИХ ПОСЛОВА
Кнеза Милоша 24-26
БЕОГРАД

Republic of Serbia
MINISTRY OF FOREIGN AFFAIRS
Kneza Milosa 24-26
BELGRADE

17 April 2009

Sir,

With reference to the request for an advisory opinion submitted to the International Court of Justice by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo and to the Order of the Court dated 17 October 2008, I have the honour to present to the Court the Written Statement of the Government of the Republic of Serbia, in accordance with Article 66, paragraph 2, of the Statute of the Court.

With reference to your communication dated 20 October 2008 (No. 133310), I have the honour to inform you that the Written Statement is being submitted to the Court in 30 written copies in English, as one of the official languages of the Court, as well as in one electronic copy. In case of any discrepancy between written and electronic version, the electronic version of the Written Statement should be deemed authoritative.

Mr. Philippe Couvreur
Registrar
International Court of Justice
The Hague

Moreover, I have the honour to inform you that the Written Statement is annexed with 83 relevant documents. When some of the documents are not in one of the official languages of the Court, their relevant parts are accompanied by translations into English. In accordance with Article 50, paragraph 1, and Article 51, paragraph 3, of the Rules of Court, I now certify that all documents submitted to the Court are the genuine copies of the original documents, as well as that all translations from the original language into English are accurate.

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

Saša Obradović,
Head of the Legal Team

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 GOVERNMENT OF THE REPUBLIC OF SERBIA

15 APRIL 2009

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Chapter 1
INTRODUCTION

1. This Written Statement is filed pursuant to the Court's Order of 17 October 2008 concerning the request for an advisory opinion made by the General Assembly of the United Nations in its resolution 63/3 of 8 October 2008.[1]

2. This introductory chapter will discuss the origin as well as the terms and scope of the present request for an advisory opinion. It will also address certain issues of procedure and terminology and outline the structure of the present written statement.

A. Origin of the Request

3. The General Assembly's request concerns the legality, under international law, of the unilateral declaration of independence adopted by the Assembly of Kosovo on 17 February 2008 (hereinafter "UDI").[2]

4. Kosovo and Metohija (hereinafter "Kosovo") is an autonomous province of the Republic of Serbia which is under international administration pursuant to Security Council resolution 1244 (1999) and with the full consent and agreement of the Republic of Serbia (hereinafter "Serbia").[3]

5. The Assembly of Kosovo is one of the provisional institutions of self-government in Kosovo established under the Constitutional Framework for Provisional Self-

[1] See Annex 1 in Documentary Annexes accompanying this Written Statement.
[2] See Annex 2 in Documentary Annexes accompanying this Written Statement.
[3] See Security Council resolution 1244 (1999), Preamble, para. 9, Annex 20 in Documentary Annexes accompanying this Written Statement.

Government in Kosovo (hereinafter "Constitutional Framework"),[4] which was promulgated by the Special Representative of the Secretary-General, who heads the international civil presence in Kosovo under Security Council resolution 1244 (1999).

6. The purported "declaration of independence" claimed "Kosovo to be an independent and sovereign state".[5] The position of Serbia has been, and continues to be, that the UDI was an attempt at unilateral secession of Kosovo from Serbia, and that it is null and void and without any legal effect both in Serbia and within the international legal order.[6]

7. The UDI, as well as the actions by the Provisional Institutions of Self-Government in Kosovo that have since followed, flagrantly violate Security Council resolution 1244 (1999) and the international legal regime established by it, as well as the sovereignty and territorial integrity of Serbia and other principles of international law. Serbia has reacted to these violations with restraint and responsibility, fully conscious of the need to maintain international peace and stability in the region. As the President of Serbia stated in his address to the General Assembly:

> "[f]rom the very onset of this grave crisis, Serbia has ruled out the use of force. And we have not exercised other unilateral options, such as the imposition of economic sanctions against our breakaway province. Instead, we have opted for a peaceful and

[4] See Constitutional Framework for Self-Government in Kosovo, UNMIK Regulation No. 2001/9, UNMIK/REG/2001/9 (15 May 2001), Annex 3 in Documentary Annexes accompanying this Written Statement (hereinafter: "Constitutional Framework"). For a detailed discussion of the international civil presence in Kosovo, see Chapter 8, Section B.

[5] UDI, Article 1.

[6] See Letter dated 17 February 2008 from Mr. Boris Tadic, President of the Republic of Serbia, to the Secretary-General, UN Doc. A/62/703-S/2008/111, Annex (19 February 2008), Annex 5 in Documentary Annexes accompanying this Written Statement, and *Odluka Narodne Skupštine Republike Srbije o potvrđivanju odluke Vlade Republike Srbije o poništavanju protivpravnih akata privremenih organa samouprave na Kosovu i Metohiji o proglašenju jednostrane nezavisnosti* [Decision of the National Assembly of the Republic of Serbia on confirmation of the decision on the annulment of the illegal acts of the provisional institutions of self-government in Kosovo and Metohija on their declaration of unilateral independence], *Službeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 19/2008, Annex 4 in Documentary Annexes accompanying this Written Statement.

> diplomatic approach, the result of which is that the vast majority of States Members of the United Nations have refrained from recognizing Kosovo's UDI.
> (...)
> We have chosen to use the law."[7]

8. Consequently, Serbia proposed to the General Assembly that it seek an advisory opinion of the Court on the legality, under international law, of the UDI.[8] It explained that

> "... the most principled, sensible way to overcome the potentially destabilizing consequences of Kosovo's unilateral declaration of independence is to transfer the issue from the political to the juridical arena."[9]

9. On 8 October 2008, at the 22nd meeting of its 63rd Session, the General Assembly adopted resolution 63/3 requesting an advisory opinion of the Court with only six States voting against the request.[10]

B. The Terms of the Present Request

10. In resolution 63/3, the General Assembly decided, in accordance with Article 96 of the Charter of the United Nations, to request the Court, pursuant to Article 65 of the Statute of the International Court of Justice (hereinafter "Statute of the Court"), to render an advisory opinion on the following question:

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[7] UN Doc. A/63/PV.5 (23 September 2008), p. 29.
[8] See UN Doc. A/63/195 (22 August 2008) and UN Doc. A/63/L.2 (23 September 2008).
[9] UN Doc. A/63/195 (22 August 2008), Annex, Enclosure – Explanatory Memorandum, at p. 3.
[10] The vote was 77 in favor, 6 against, and 74 abstentions, see UN Doc. A/63/PV.22 (8 October 2008), at pp. 10-11.

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

11. In making this request, the General Assembly was "[m]indful of the purposes and principles of the United Nations".[11] The request was also made with the awareness that the UDI had been received with "varied reactions by the Members of the United Nations as to its compatibility with the existing legal order."[12]

C. The Court's Order of 17 October 2008

12. The resolution was transmitted to the Court under cover of a letter from the Secretary-General dated 9 October 2009.[13] On 10 October 2008, the Registrar gave notice of the request to all States entitled to appear before the Court.[14]

13. By its Order of 17 October 2008, the Court decided that the United Nations and its Member States are considered likely to be able to furnish information on the question submitted to the Court, and fixed 17 April 2009 as the time-limit for the submission of written statements and 17 July 2009 as the time-limit for the submission of written comments on the other written statements.[15]

14. Further, the Court decided that "the authors" of the UDI "are considered likely to be able to furnish information on the question" and invited them to make "written contributions" within the above time-limits.[16]

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[11] General Assembly resolution 63/3, Preamble, Annex 1 in Documentary Annexes accompanying this Written Statement.
[12] *Ibid.*
[13] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government in Kosovo (Request for Advisory Opinion)*, Order, 17 October 2008 [hereinafter: Order of 17 October 2008]
[14] *Ibid.*
[15] *Ibid.*, paras. 1-3.
[16] *Ibid.*, para. 4.

15. Prior to the Court's Order of 17 October 2008, Serbia conveyed its initial observations on the conduct of procedure in the present case in a letter dated 14 October 2008. One of the issues raised was the possible participation of the so-called "Republic of Kosovo" in the proceedings before the Court. In this regard, Serbia's unequivocal position has been that

> "... the so-called independent "Republic of Kosovo" cannot participate in the proceedings before the Court under the relevant provisions of the United Nations Charter and the Statute of the Court."

16. Serbia notes that the Court's Order of 17 October 2008 has not allowed participation of the so-called "Republic of Kosovo" in the proceedings. The Court has simply invited the "authors" of the UDI to make "written contributions".

17. The "authors" of the UDI are members of the Assembly of Kosovo who adopted the document on 17 February 2008. The Assembly, as one of the Provisional Institutions of Self-Government in Kosovo, has only limited powers in the field of foreign affairs, which must always be exercised in coordination with the Special Representative of the Secretary-General.[17] Moreover, the Special Representative has reserved a broad power to conduct "[e]xternal relations, including with states and international organisations, as may be necessary for the implementation of his mandate."[18] It should be noted that pursuant to Security Council resolution 1244 (1999), UNMIK has acted on behalf of Kosovo in international organizations and conferences,[19] and before the International Criminal Tribunal for the Former Yugoslavia,[20] both preceding and following the UDI.

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[17] Constitutional Framework, Article 5.6, Annex 3 in Documentary Annexes accompanying this Written Statement.

[18] *Ibid.*, Article 8.1 (o).

[19] For example, UNMIK represented Kosovo at ILO meetings, see, e.g., International Labour Conference, Supplement to the Provisional Record, 97th Sess., 12 June 2008, "Final List of Delegations", at p. 106; Provisional Record, 95th Sess., 6th sitting, 7 June 2006, pp. 38-39; Provisional record, 96th Sess., 12th sitting, 12 June 2007, p. 16; available at http://www.ilo.org/global/lang--en/index.htm; UNMIK also represented Kosovo before the Committee on Economic, Social and Cultural Rights, for example, at its 41st session held on 10 November 2008, see http://www2.ohchr.org/english/bodies/cescr/cescrs41.htm; UNMIK also

18. Accordingly, it follows that information by the "authors" of the UDI should be furnished to the Court under the auspices of UNMIK. The participation by the "authors" of the UDI in the present proceedings constitutes a considerable departure from the previous practice of the Court, and raises significant issues under Article 93 of the Charter, as well as Articles 34, 35, and 66, paragraph 2, of the Statute of the Court. Serbia reserves its rights in respect to any participation of the "authors" of the UDI in a way which would be incompatible with Security Council resolution 1244 (1999), general international law and the Statute of the Court.

D. Scope of the Present Request

19. According to the terms of the present request, the Court is invited to give its opinion on whether the UDI is "in accordance with international law". Thus, the present request is confined to legal issues and concerns the legality of the UDI under applicable rules of international law. It is no more and no less than this.

20. As the Court has stated in a previous case,

> "... the Court must identify the existing principles and rules, interpret them and apply them... thus offering a reply to the question posed based on law."[21]

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represented Kosovo at regional meetings, such as in the establishment of the Regional Co-Operation Council (RCC), see *Joint Declaration on the Establishment of the Regional Co-operation Council (RCC)*, 27 February 2008, para. 1, available at http://www.stabilitypact.org/rt/RCC%20Joint%20Declaration%20-%20Final.pdf .

[20] For instance, it has been a consistent practice of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY") to request and receive guarantees for the provisional release of accused originally from Kosovo solely from UNMIK, not from any of the institutions of provisional self-government. See, e.g., *Prosecutor v. Limaj et al*, IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, paras. 8-9; *Prosecutor v. Haradinaj et al*, IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 14 December 2007, para. 16 (stating that under resolution 1244 "UNMIK is entrusted with ensuring public safety and order in Kosovo/Kosova, and therefore UNMIK is the proper authority to provide such guarantees"). See also *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009, paras. 6 & 12, all available at http://www.icty.org/action/cases/4 .

[21] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 234, para. 13, hereinafter '*Legality of the Threat or Use of Nuclear Weapons.*'

21. As will be seen in Parts III and IV of this Written Statement, the UDI in the present case is subject to international legal norms which can be, at least conceptually, separated into two categories. First, there are those norms that fall within the ambit of general international law. Secondly, there is the legal regime established by Security Council resolution 1244 (1999), which includes regulations and decisions of the international civil administration in Kosovo. It is against these two sets of principles and rules that the Court will have to assess the legality of the UDI.

22. It should be noted that the present request does not directly relate to the question of recognition of the so-called "Republic of Kosovo" by certain States, although the Court's opinion as to the legality of the UDI will be of considerable relevance to those States that have recognised this entity as a State.

23. Finally, it should also be noted that the present request is not primarily concerned with facts relating to the situation in Kosovo and its history. Serbia has focused its present Written Statement on the legal question before the Court. However, the facts related to the Kosovo situation, as well as the legal status of Kosovo until the present day, will be discussed only to the extent necessary to provide the Court with the necessary background information. Serbia reserves its position in respect of all questions and matters not specifically addressed in this Written Statement.

E. Continuity between the FRY/Serbia and Montenegro and Serbia

24. As is well known, Serbia continues the international legal personality of the Federal Republic of Yugoslavia (hereinafter "FRY") which was proclaimed on 27 April 1992 and was renamed the State Union of Serbia and Montenegro in 2003.

25. The continuity under international law between the FRY / State Union of Serbia and Montenegro, on the one hand, and Serbia, on the other, was confirmed in

Article 60 of the Constitutional Charter of Serbia and Montenegro,[22] which also specifically confirmed that in the case of a separation of Montenegro from the State Union of Serbia and Montenegro

> "the international instruments pertaining to the Federal Republic of Yugoslavia, particularly resolution 1244 of the United Nations Security Council, would concern and apply in their entirety to Serbia...".[23]

26. The Constitutional Charter of Serbia and Montenegro also confirmed in its preamble that it was the state of Serbia, as one of the constituent entities forming the State Union, that

> "... includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija which is in accordance with resolution 1244 of the United Nations Security Council currently under international administration..."[24]

27. The continuity between the FRY / State Union of Serbia and Montenegro, on the one hand, and Serbia, on the other, was also accepted in the relevant United Nations practice. It has not been challenged that after the separation of Montenegro from the State Union of Serbia and Montenegro, Serbia continued to exercise all membership rights and obligations the FRY / State Union of Serbia and Montenegro had previously exercised.

28. Further, the Court in its 2007 judgment in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), took note of the fact that Serbia had

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[22] *Ustavna povelja Državne zajednice Srbija i Crna Gora* ["Constitutional Charter of Serbia and Montenegro"], Službeni list Srbije i Crne Gore [Official Gazette of Serbia and Montenegro"], No. 1/2003, Annex 58 in Documentary Annexes accompanying this Written Statement.

[23] *Ibid.*, Art. 60.

[24] *Ibid.*, Preamble.

accepted such continuity,[25] and for that reason also considered that Serbia had remained the respondent in that case.[26]

29. This view was reaffirmed in its recent judgment in the Case concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).[27]

30. In light of this legal continuity, it follows that any reference to the territorial integrity of the FRY (Serbia and Montenegro) / State Union of Serbia and Montenegro in the practice of United Nations organs and of individual States must be understood as referring to the territorial integrity of Serbia.

F. Structure of the Written Statement

31. This Written Statement is divided into five Parts.

32. Part I addresses the questions of jurisdiction and admissibility and demonstrates in Chapter 2 that the Court is competent to give the advisory opinion requested by the General Assembly in the present case, while Chapter 3 demonstrates that the request is admissible.

33. Part II addresses the relevant factual elements. Chapter 4 deals with the geographical and historical setting of Serbia and its autonomous province of Kosovo. Chapter 5 examines the legal and factual background of the Kosovo crisis. Sections A and B of Chapter 5 deal with legal status of Kosovo in Serbia and Yugoslavia, and with standards of minority rights protection applicable to Kosovo. This is followed by an examination of the development of the Kosovo crisis from 1981 to the UDI in 2008.

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[25] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, General List No. 91, p. 31, para. 75.

[26] *Ibid.*, p. 32, para. 77.

[27] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 18 November 2008, General List No. 118, para. 32.

34. Part III examines the legality of the UDI from the point of general international law. It consists of two chapters. The first chapter (Chapter 6) deals with the principle of territorial integrity of States and its consequences on the legality of the UDI, while the second chapter (Chapter 7) deals with the right to self-determination.

35. Part IV deals with the impact of Security Council resolution 1244 (1999) on the question put to the Court. In particular, Chapter 8 examines in detail the international legal regime for Kosovo established by Security Council resolution 1244 (1999), while Chapter 9 examines whether the UDI is in accordance with this legal regime.

36. Part V which consists of Chapter 10 examines various possible justifications for the UDI under international law and concludes that none of them applies in the present case.

37. The Written Statement ends with Chapter 11 which contains conclusions and submissions to the Court.

38. Attached to the Written Statement are 7 appendices containing maps.

39. Annexed to this Written Statement is a volume of 83 documentary annexes, which are reproduced for the convenience of the Court.

40. As a final clarification, it should be noted that the present Written Statement will address events that have taken place over a considerable period of time, and during which some designations – such as, for example, "Yugoslavia" – have frequently changed meaning. For the sake of clarity, the designations used in this Written Statement should be understood in accordance with the historical context in which they are discussed, unless otherwise indicated in the text.

Part I
QUESTIONS OF JURISDICTION AND PROPRIETY

Chapter 2
THE COURT IS COMPETENT TO GIVE THE ADVISORY OPINION REQUESTED

41. The present chapter will show that the Court is competent to give an advisory opinion in the present case.

42. According to Article 65, paragraph 1, of the Statute of the Court:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

43. In this regard, the Court stated that

> "[i]t is… a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." [28]

[28] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 144, para. 14, hereinafter '*Wall*'; *Legality of the Threat or Use of Nuclear Weapons,* pp. 232-234, paras. 10-13.

44. Thus, as a precondition of the Court's competence to exercise its advisory jurisdiction in the present case, the request for an advisory opinion must be made by (i) a duly authorized organ and (ii) the question posed to the Court must be a legal one. The fulfilment of the first condition in the present case is discussed in sections A and B, while the condition that the opinion is requested on a legal question is discussed in section C.

A. The Request Was Made by a Duly Authorized Organ

45. With regard to the first condition – that the request for an advisory opinion has been submitted by a duly authorized organ – the relevant provision in the present proceedings is Article 96, paragraph 1, of the Charter of the United Nations which provides:

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

46. Accordingly, as the Charter expressly authorizes the General Assembly to request an advisory opinion from the Court, it is clear that the General Assembly is, in the words of the Court, "an organ duly authorized to seek [an advisory opinion] under the Charter".[29] Consequently, the first precondition for the exercise of the advisory jurisdiction under Article 65, paragraph 1, of the Statute of the Court is fulfilled.

B. The Requesting Organ Acted within Its Competence

47. According to Article 96, paragraph 1, of the Charter, the General Assembly and the Security Council have a broad competence to request an advisory opinion

[29] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 333, para. 21.

from the Court "on any legal question". In contrast, other organs of the United Nations and specialized agencies are authorized to request an advisory opinion only on "legal questions arising within the scope of their activities" (Article 96, paragraph 2 of the Charter). In light of these provisions, it is submitted that the General Assembly's competence to request an advisory opinion cannot be doubted as long as the question put before the Court is a *legal* one.

48. The General Assembly also has broad powers under the Charter which clearly allow it to discuss the question forming the request for an advisory opinion of the Court. Under Article 10 of the Charter, the General Assembly has the authority to

> "… discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter …"

49. As the Court noted, Article 10 of the Charter

> "has conferred upon the General Assembly a competence relating to 'any questions or any matters' within the scope of the Charter..."[30]

50. In addition to its general powers under Article 10, the General Assembly also has specific competences under the Charter, *inter alia*, (i) to consider the general principles of cooperation in the maintenance of international peace and security (Article 11, paragraph 1); (ii) to discuss any questions relating to the maintenance of international peace and security (Article 11, paragraph 2); and to decide on the admission of new Members (Article 4, paragraph 2).

51. The present request for an advisory opinion concerns a so-called "declaration of independence" by provisional institutions of self-government in a territory which is administered by the United Nations for the purpose of maintenance and restoration of international peace and security under the authority of a binding Security Council resolution. This so-called "declaration of independence" has

[30] *Wall*, p. 145, para. 17, *Legality of the Threat or Use of Nuclear Weapons*, p. 233, para. 11.

directly affected the authority of the United Nations Organization in general, and its administration in Kosovo, in particular. As stated by the Secretary-General,

> "[t]he declaration of independence and subsequent events have posed significant challenges to the ability of UNMIK to exercise its administrative authority in Kosovo."[31]

52. It is clear that the question of the legality of an act which "posed significant challenges" to the authority of UNMIK and the United Nations in general is a matter that squarely falls under the competence of the General Assembly and is a matter of its direct concern. Similarly, the fact that the Security Council has not been able to reach a decision on how to respond to this challenge is also a matter of direct concern to the General Assembly and clearly within its competence because *inter alia* it relates "to the powers and functions of any organs provided for in the present Charter" (Article 10 of the Charter).

53. Further, the UDI has raised questions concerning respect for the Charter, in particular its purposes and principles, respect for decisions of the United Nations organs, as well as compliance with norms of general international law. All these issues clearly fall under the competences of the General Assembly and it has had a long-standing interest in them.[32]

54. In particular, the General Assembly has for a long time dealt with the situation in Kosovo, including in the context of the maintenance of international security in the region of South-Eastern Europe.[33] In that context, the General Assembly has repeatedly reaffirmed the need for full observance of the Charter, including the principles of territorial integrity and sovereignty, and emphasized the importance

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[31] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/211 (28 March 2008), para. 30.

[32] See, e.g., the *2005 World Summit Outcome Document*, General Assembly resolution 60/1, paras. 2-6. 69-80, 134, 149-151. See also, e.g., *Question of East Timor*, General Assembly resolution 37/30 and its predecessor resolutions on the status of East Timor; *Policies of apartheid of the Government of South Africa - The so-called "independent" Transkei and other Bantustans*, General Assembly resolution 31/6 on the invalidity of the independence of the so-called Bantustans in South Africa; *Question of Cyprus*, General Assembly resolution 37/253 and its predecessor resolutions affirming the sovereignty of Cyprus and denying the validity of the independence of the so-called Turkish Republic of Northern Cyprus.

[33] See, e.g., General Assembly resolutions 54/62; 55/27; 56/18; 57/52; 59/59, and 61/53 on the maintenance of international security – good neighborliness, stability and development in South-Eastern Europe.

of full implementation of Security Council resolution 1244 (1999) and the role and responsibility of UNMIK in that regard.[34]

55. As a matter of principle, the General Assembly has a direct concern in all situations in which violations of the Charter of the United Nations and general international law, as well as challenges to the authority of the United Nations, are at issue, because they constitute a serious and direct threat to the functioning of the organization and of the international community as a whole. The so-called "declaration of independence" is clearly one such case. It is submitted that the General Assembly not only has a legitimate interest, but also a duty, to address it and, in that context, to seek legal guidance from the Court as the principal judicial organ of the United Nations.

56. Finally, by exercising its authority to request an advisory opinion from the Court in the present case, the General Assembly is acting consistently with its own position that the United Nations and its organs should make greater use of the Court by seeking its guidance on legal questions.[35]

57. In conclusion, the General Assembly clearly acted within its competence when it adopted the present request for an advisory opinion. The fact that, at the same time, the situation in Kosovo was dealt with by the Security Council did not affect the power of the General Assembly in this regard. While Article 12 of the Charter limits the authority of the General Assembly to make recommendations with regard to a dispute or situation in respect of which the Security Council is exercising the functions assigned to it by the Charter, it is well-established by the Court's jurisprudence that this limitation in any case does not apply to requests for advisory opinions.[36]

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[34] See General Assembly resolution 54/62, preamble, para. 5, & operative para. 3; resolution 55/27, preamble, para. 7, & operative paras. 3-4; resolution 56/18, preamble, para. 5, & operative paras. 1-2; resolution 57/52, preamble, para. 5, & operative paras. 1-2; resolution 59/59, preamble, para. 8, & operative paras. 1-2 & 5; and resolution 61/53, preamble, paras. 1 & 9, & operative paras. 1-2.

[35] See General Assembly resolution 171 (II). See also the reports of the UN Secretary-General, *An Agenda for Peace*, UN Doc. S/24111 (17 June 1992), para. 38; UN Doc. A/45/1 (16 September 1990), p. 7; and UN Doc. A/46/1 (6 September 1991), p. 4.

[36] *Wall*, p. 150, para 28.

C. The Question Submitted Is a Legal One

58. A further precondition for the competence of the Court to deal with a request for an advisory opinion under Article 65 of the Statute of the Court is that the request concerns a "legal question". Likewise, under Article 96, paragraph 1, of the Charter, the General Assembly may request an advisory opinion only on legal questions.

59. According to the Court, legal questions are those that

> "... have been framed in terms of law and raise problems of international law..."

and which

> "... by their very nature [are] susceptible of a reply based on law, indeed, they are scarcely susceptible of a reply otherwise than on the basis of law ... [and] appear ... to be questions of a legal character" [37]

60. The Court has also explained that

> "[t]he question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law."[38]

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[37] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15, hereinafter "*Western Sahara*".
[38] *Legality of the Threat or Use of Nuclear Weapons*, p. 234, para. 13.

61. The question put to the Court in the present case is whether the UDI is "in accordance with international law". This is clearly a legal question. First, it has been "framed in terms of law" and "raises problems of international law".[39] In order to answer it, the Court will have to perform an essentially judicial task – to assess the compatibility of the UDI with relevant principles and rules of international law. This entails the identification of the relevant principles and rules of international law, their interpretation and, finally, their application to the UDI.[40] The result of such an exercise must be a "reply based on law". Indeed, the question in the present case is, to use the words of the Court, "scarcely susceptible of a reply otherwise than on the basis of law".[41]

62. Therefore, the question which forms the subject-matter of the present advisory proceedings is a question of a legal character. With respect to this question, the General Assembly was competent to request an advisory opinion from the Court, and the Court has jurisdiction to give an advisory opinion.

63. Like many other pertinent legal questions, this question does have strong political aspects. This does not, however, deprive the question of its legal character and does not deprive the Court of its advisory competence.[42] As the Court stated on a previous occasion, and which it has positively reaffirmed in its recent advisory opinions

> "[i]ndeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate..."[43]

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[39] See *Western Sahara*, p. 18, para. 15.
[40] See *Legality of the Threat or Use of Nuclear Weapons*, p. 234, para. 13.
[41] See *Western Sahara*, p. 18, para. 15.
[42] See *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, pp. 171-172, para. 14.
[43] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 87, para. 33, see also, *Wall*, p. 155, para. 41; *Legality of the Threat or Use of Nuclear Weapons*, p. 234, para. 13.

D. Conclusion

64. The request for an advisory opinion in the present case was made by the General Assembly which is duly authorized to make such a request under Article 96, paragraph 1, of the Charter. The request concerns a legal question as required by this same provision and Article 65 of the Statute of the Court. Consequently, the Court has jurisdiction to give the advisory opinion requested.

Chapter 3

THERE ARE NO COMPELLING REASONS PREVENTING THE EXERCISE OF ADVISORY JURISDICTION IN THE PRESENT PROCEEDINGS

65. When the Court, as in the present case, has jurisdiction to render an advisory opinion, it still has a discretionary power under Article 65 of the Statute of the Court to refuse to exercise its competence.[44] The present chapter will demonstrate that there are no reasons that would lead the Court to decline to provide an advisory opinion in the present case on that basis.

66. As a matter of principle, the Court's position has been that a request for an advisory opinion,

> "represents its participation in the activities of the Organization, and, in principle, should not be refused."[45]

67. Accordingly, the discretionary power to decline a request for an advisory opinion should be used exceptionally, only when there are "compelling reasons" for doing so.[46] These "compelling reasons" are related to the propriety of the exercise of the Court' judicial function.[47]

68. As is well known, the present Court has never refused to entertain a request for an advisory opinion on the basis of its discretion.

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[44] *Wall*, p. 156, para. 44; *Legality of the Threat or Use of Nuclear Weapons*, p. 234, para. 14.

[45] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.

[46] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999*, pp. 78-79, para. 29.

[47] See *Wall*, p. 157, para. 45.

69. It is submitted that, in the present case, there are no compelling reasons that should lead the Court to decline to entertain the request for an advisory opinion. On the contrary, as the Court said in the *Western Sahara* opinion:

> "By lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its functions as the principal judicial organ of the United Nations."[48]

70. Moreover, since the United Nations has a special responsibility with respect to the situation in Kosovo, there are indeed compelling reasons for the Court, as "the principal judicial organ of the United Nations" (Article 92 of the Charter), to share the burden of this responsibility by providing, in the present case, legal guidance to the General Assembly and the Organization as a whole.

A. The United Nations Bears Responsibility with regard to the Question

71. In the *Wall* case, the Court considered that

> "[g]iven the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations."[49]

72. Similarly, the question before the Court in the present case directly concerns the United Nations "given the powers and responsibilities of the United Nations in questions relating to international peace and security". Indeed, the present advisory proceedings concern a matter which is clearly "of particularly acute concern to the United Nations".[50]

73. As stated by the Secretary-General of the United Nations, the UDI has presented a significant challenge to the authority of the United Nations and its administration

[48] *Western Sahara*, p. 21, para. 23.
[49] *Wall*, p. 159, para. 49.
[50] *Ibid.*, p. 159, para. 50.

in Kosovo,[51] which was established by Security Council resolution 1244 (1999) adopted under Chapter VII of the Charter.

74. The UDI also raises important issues in the context of the maintenance of international peace and security in the whole region of South-Eastern Europe, which has been the subject of the General Assembly's and the Security Council's interest for a long time.[52]

75. It is clear that the question of the legality of the UDI has broad repercussions and raises issues of direct and acute concern to the United Nations. The question is also of general importance to the international system as a whole. It is clear that it is proper for the Court to exercise its advisory jurisdiction with respect to such a question.

B. The Consent of Serbia, the Interested State, Is Not Required and, in Any Case, Serbia Has Given Its Consent

76. The present Court held that its jurisdiction to give advisory opinions does not depend on the consent of interested States.[53] The consent of an interested State may solely be relevant "for the appreciation of the propriety of giving an opinion".[54] As the Court explained,

> "An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle

[51] See Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/211 (28 March 2008), para. 30.

[52] For the General Assembly action see, e.g., resolutions 54/62; 55/27; 56/18; 57/52; 59/59; 61/53 on the maintenance of international security – good neighborliness, stability and development in South-Eastern Europe; for the Security Council action with respect to the various conflicts in the former Yugoslavia, see, e.g., resolutions 713 (1991); 808 (1993); 827 (1993); as well as resolutions 1031 (1995); 1088 (1996); 1160 (1998); 1199 (1998); 1203 (1998); 1244 (1999); 1423 (2002); 1491 (2003); 1551 (2004); 1639 (2005); and 1845 (2008) reprinted in Annexes 14-18, 20-23, 25, and 28 in Documentary Annexes accompanying this Written Statement.

[53] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara*, p. 24, para. 31.

[54] *Ibid.*, p. 25, para. 32.

that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[55]

77. The application of the foregoing principle, however, is narrow. As the Court said in its most recent advisory opinion,

> "The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground."[56]

78. Thus, the consent of an interested State loses its relevance for the propriety of giving an advisory opinion if the question before the Court is also a matter "of particularly acute concern" to the United Nations, such as in the present case. Conversely, the consent is much more important if the matter arose "independently in bilateral relations".[57] Indeed, this was precisely the situation in the *Eastern Carelia* case, where the object of the request for an advisory opinion was exclusively a pending dispute between Finland and Russia, which was not a matter of proper concern of the League of Nations in the absence of Russia's consent.[58]

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[55] *Ibid.*, p. 25, para. 33.

[56] *Wall*, p. 159, para. 50.

[57] *Western Sahara*, p. 25, para. 34; see, also, *Wall*, pp. 158-159, para. 49.

[58] "... Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion. The Court therefore finds it impossible to give its opinion on a dispute of this kind." (*Status of Eastern Carelia, Advisory Opinion, P.C.I.J., Series B, No. 5*, p. 28, hereinafter "*Eastern Carelia*").

79. In conclusion, the consent of an interested State is not required in the present proceedings, because this case raises issues of direct and acute concern to the United Nations and the international system as a whole.

80. While the issue of State consent does not arise in the present case, it is nevertheless clear and should be noted that Serbia has a direct and compelling interest in the present proceedings which concern an act of illegal secession of a part of its territory. As such, Serbia is the interested State. Thus, if the consent of the interested State were necessary for the exercise of the Court's advisory function in the present case (*quod non*) this requirement would be fulfilled because Serbia expressly consents to the present proceedings. Indeed, it was Serbia that proposed to the General Assembly to adopt resolution 63/3 and request an advisory opinion in the present case.[59]

C. The Court Has Sufficient Information to Give the Advisory Opinion

81. One consideration in the exercise of the Court's discretion to give an advisory opinion may be the sufficiency of factual evidence before it. The question is

> "... whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character."[60]

82. The lack of information was one of the principal reasons for the refusal of the Permanent Court of International Justice to give an advisory opinion in the *Eastern Carelia* case.[61]

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[59] See UN Doc. A/63/L.2 (23 September 2008).
[60] *Western Sahara*, pp. 28-29, para. 46.
[61] See *Eastern Carelia*, pp. 28-29.

83. In contrast to the *Eastern Carelia* case, the present proceedings do not raise significant issues of fact. It is further submitted that, in any case, most of the relevant facts are uncontroversial. Also, the situation in Kosovo has been the subject of international attention for many years and all relevant events in, or related to, the province, are well documented. This has been especially so after June 1999 when Kosovo came under United Nations administration. It is submitted that the available evidence is more than sufficient to enable the Court to give an advisory opinion in the present case.[62]

D. The Advisory Opinion Will Help the United Nations and Member States in Their Subsequent Actions

84. The Court has described its advisory function in the following way:

> "The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose."[63]

85. However, the Court has also clearly set the limits of inquiry as to the existence of the object and purpose of the question put to it:

> "... it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs."[64]

86. This was reiterated in the most recent advisory opinion of the Court:

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[62] See *Wall*, p. 161, para. 56.
[63] *Western Sahara*, p. 37, para. 73.
[64] *Legality of the Threat or Use of Nuclear Weapons*, p. 237, para. 16.

> "The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly."[65]

87. The relevance of the question put before the Court in the present case is clear from the preceding discussion: the UDI has had a direct effect on the ground, in Kosovo, as it presented a significant challenge to the authority of the United Nations and its administration in Kosovo.[66] Further, it has raised issues concerning respect for the Charter of the United Nations, in particular its purposes and principles, respect for decisions of the United Nations organs, as well as compliance with norms of general international law.

88. The relevance of the question put before the Court is also seen from the fact that the UDI, as noted by General Assembly resolution 63/3,

> "... has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order."

89. The question put before the Court is not only painfully relevant but clearly has "a practical and contemporary effect". What the Court said at an earlier occasion applies equally in the present situation:

> "The object of this request for an Opinion is to guide the United Nations in respect of its own action."[67]

90. Further, as the Court noted in the *Wall* case

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[65] *Wall*, p. 163, para. 62.

[66] See Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/211 (28 March 2008), para. 30

[67] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28th, 1951, I.C.J. Reports 1951*, p. 19.

> "The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly - and the Security Council - may then draw conclusions from the Court's findings."[68]

91. In the present case, the Court's answer to the question posed by the General Assembly will provide legal guidance to the United Nations, as well as to its Member States, in their contemporary attitudes and actions with respect to the situation in Kosovo – it will provide them with "enlightenment as to the course of action [they] should take."[69] This is confirmed *inter alia* by the fact that some States that have recognized the so-called "Republic of Kosovo" have still supported the request for an advisory opinion.[70]

92. The exercise by the General Assembly of its competences under the Charter will be informed by the advisory opinion. As already discussed, the General Assembly has a direct interest in the matter because it concerns a significant challenge to the authority of the United Nations and its administration in Kosovo, as well as the respect for the Charter, decisions of United Nations organs and international law in general.

93. The Security Council will also receive authoritative legal guidance and would, perhaps, be able to forge the political will to take a position with respect to this matter. Presently, the Secretary-General was forced, in the absence of guidance from the Security Council with respect to the purported "declaration of independence" and ensuing events, to reconfigure the international civil presence in Kosovo in order, *inter alia*, "to ensure international peace and security".[71]

94. It is clear that the Secretary-General, as well as his Special Representative in Kosovo, who has a direct interface with the Provisional Institutions of Self-

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[68] *Wall,* p. 163, para. 62.
[69] *Interpretation of Peace Treaties*, p. 71.
[70] This is the case with Norway and Costa Rica, see UN Doc. A/63/PV.22 (8 October 2008), pp. 10 & 14.
[71] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/354 (12 June 2008), para. 18.

Government in Kosovo, will benefit from the legal guidance supplied by the Court in the present case.

95. Further, as noted in the explanatory memorandum accompanying the draft resolution 63/3 requesting an advisory opinion in the present case,

> "[m]any Member States would benefit from the legal guidance an advisory opinion of the International Court of Justice would confer. It would enable them to make a more thorough judgement on the issue."[72]

96. Moreover,

> "... an advisory opinion of the International Court of Justice, rendered in a non-contestable, non-adversarial manner, would go a long way towards calming tensions created by Kosovo's unilateral declaration of independence, avoiding further negative developments in the region and beyond and facilitating efforts at reconciliation among all parties involved." [73]

97. In other words, the Court's opinion will have beneficial diplomatic and political effect not only for those involved, but also for the wider region of South-Eastern Europe which is still fraught with political tensions and fresh memories of recent wars.

98. However, there have been views that the Court's advisory opinion in the present case would serve no useful purpose. For example, according to the Permanent Representative of the United Kingdom to the United Nations

> "The United Kingdom has recognized Kosovo's independence and considers that *the pragmatic reality of the circumstances warrant*

[72] UN Doc. A/63/195 (22 August 2008), Annex.
[73] *Ibid.*

wider recognition of this status. If a question is referred to the Court for an advisory opinion, the United Kingdom would engage constructively in the proceedings, as it has done in previous advisory opinions. *The United Kingdom is not, however, currently persuaded of the utility of the proposal* or that some of the issues of detail that it considers to be important have been fully addressed."[74]

99. In this context, it should be noted that the "Republic of Kosovo" is far from exercising independent governmental authority. It is a territory governed by an international administration which retains ultimate power in the province.

100. The international security presence, KFOR, was established under Security Council resolution 1244 (1999).[75] As described by the European Court of Human Rights, KFOR has the mandate "to exercise complete military control in Kosovo".[76] Even following the UDI, KFOR "continues to stand ready to deal with unrest or violence, regardless of where it comes from."[77] In other words, KFOR remains the ultimate military and security authority in the province.

101. The international civil presence in Kosovo retains the authority to annul all acts of Kosovo's Provisional Institutions of Self-Government which are not in accordance with Security Council resolution 1244 (1999) and the Constitutional Framework for Kosovo promulgated by the Special Representative of the Secretary-General of the United Nations.[78]

102. Further, the mandate of the European Union mission in Kosovo, EULEX, also illustrates the extent to which the powers of Kosovo institutions are limited. EULEX shall "monitor, mentor and advise the competent Kosovo institutions on

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[74] Letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly, UN Doc.A/63/461 (2 Oct. 2008), Annex, para. 10 (emphasis added).

[75] For a more detailed discussion of the international security presence in Kosovo, see Chapter 8, Section C.

[76] European Court of Human Rights, *Behrami v. France and Saramati v. France, Germany and Norway*, Decision on admissibility of 2 May 2007, para. 70.

[77] *Monthly Report to the United Nations on the Operations of the Kosovo Force*, UN Doc. S/2008/638, Annex (8 October 2008), para. 28.

[78] See Constitutional Framework, Chapter 12, Annex 3 in Documentary Annexes accompanying this Written Statement. For a more detailed discussion of powers of the international civil presence in Kosovo, see Chapter 8, Section B.

all areas related to the wider rule of law",[79] and has the power to reverse or annul decisions of the Kosovo authorities "in consultation with the relevant international civilian authorities in Kosovo".[80] It should be noted that EULEX operates

> "... under the overall authority of the United Nations, under a United Nations umbrella headed by [Secretary-General's] Special Representative, and in accordance with resolution 1244 (1999)..."[81]

This arrangement was endorsed by the Security Council.[82]

103. It is therefore clear that Kosovo constitutes part of Serbian territory under international administration and this international administration has both the legal authority and instruments of effective control to act fully in accordance with legal opinion of the Court.

E. Conclusion

104. In conclusion, the Court is competent to give the advisory opinion requested by the General Assembly resolution 63/3 and there are no compelling reasons that should lead the Court to decline to provide an advisory opinion in the present case. Indeed, its advisory opinion will provide authoritative and vital legal guidance to the United Nations and its Member States with respect to a relevant and contemporary legal question of great practical importance.

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[79] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, O.J. L 42/92 (16 February 2008), Article 3, para. 1(a), Annex 70 in Documentary Annexes accompanying this Written Statement.

[80] *Ibid.*, Article 3, para. 1(b).

[81] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/692 (24 November 2008), para. 23; see, also, para. 50.

[82] See Statement by the President of the Security Council, UN Doc. S/PRST/2008/44 (26 November 2008), Annex 33 in Documentary Annexes accompanying this Written Statement.

Part II
THE RELEVANT FACTUAL ELEMENTS

Chapter 4
THE GEOGRAPHICAL AND HISTORICAL SETTINGS

A. Description of Serbia

105. Serbia is a continental country situated in South-East Europe. Located in the central part of the Balkan Peninsula, Serbia extends into the southern part of the Pannonian Plain. Serbia borders Hungary in the North, Romania and Bulgaria in the East, Macedonia and Albania in the South, and Croatia, Bosnia and Herzegovina, and Montenegro in the West.

106. Serbia has two autonomous provinces: Vojvodina, situated in Northern Serbia, and Kosovo, situated in the Southern part of the country. The capital of Serbia is Belgrade. The administrative centres of the autonomous provinces are Novi Sad and Priština, respectively. Serbia covers an area of approximately 88,500 km²: the region of central Serbia measures some 56,000 km², while Vojvodina covers an area of 21,500 km² and Kosovo 11,000 km².[83]

107. The population of Serbia is roughly 9,400,000, including approximately 6,350,000 Serbs, 1,700,000 Albanians, 300,000 Hungarians, 160,000 Bosniacs, 140,000 Romas and numerous other ethnic groups. While Serbs represent a majority of the population in the regions of central Serbia and Vojvodina, Albanians are a majority in Kosovo. These figures are estimates. Due to the Kosovo Albanian

[83] For a map of Serbia, see Appendix 1.

boycott of the 1991 and 2002 official censuses, precise figures exist only for Vojvodina and central Serbia.[84]

B. Description of Kosovo

I Geographic position of Kosovo

108. Kosovo is situated in the Southern part of the Republic of Serbia, and borders Montenegro in the North-West, Albania in the West and Macedonia in the South. It covers an area of approximately 11,000 km^2. The administrative centre is Priština and other major urban centres are Pec, Prizren, Kosovska Mitrovica, and Gnjilane.

109. Metohija is a region encompassing the southern and western part of the Autonomous Province of Kosovo and Metohija. The name Metohija derives from Greek word "metokhia", meaning "monastic estates"- a reference to the large estates in that region owned by the Serbian Orthodox monasteries since the Middle Ages.

II Demographic data on Kosovo

110. A complete census has not been conducted in Kosovo since 1981 due to a boycott of public institutions organized by Kosovo Albanians. According to an UNMIK assessment from 2003, between 1,700,000 to 1,900,000 people reside in Kosovo, 88% of which are ethnic Albanians, 6% ethnic Serb, 3% Muslim Slavs (Bosnjak, Gorani), 2% Roma, and 1% Turk.[85] Since 1999, more than 200,000 Serbs and other non-Albanians fled from Kosovo and are still living in central Serbia where they are internally displaced persons.[86]

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[84] Official census in Serbia 2002,p.2 available at: http://webrzs.statserb.sr.gov.yu/axd/Zip/eSn31.pdf
UNMIK fact sheet 2003 available at: http://www.unmikonline.org/eu/index_fs.pdf

[85] UNMIK fact sheet 2003 available at: http://www.unmikonline.org/eu/index_fs.pdf

[86] UNHCR source 1 July 2008 available at: http://www.unhcr.org.yu/utils/File.aspx?id=321

111. Over the centuries, the demographic composition of the territory which comprises Kosovo today has changed significantly.

112. According to several sources, Serbs predominantly inhabited the territory of present-day Kosovo in the 14th and 15th centuries.[87]

113. Around the 17th century, there is evidence of an increasingly noticeable Albanian population, which was initially concentrated in Metohija. The war of 1683–1699, in which the principal combatants were the Ottomans and Austria, led a substantial part of Kosovo's Serbian population to flee to the Austrian-held southern Hungary (Vojvodina) and the Military Frontier. Subsequently, there was an influx of Muslim Albanians from the highlands (Malesia) in the area. This process continued into the 18th century, when the "Second Migration of Serbs" took place in 1737.[88]

114. A study conducted in 1871 by an Austrian colonel for the internal use of the Austro-Hungarian army showed that the *mutesarifluk* of Prizren (an area that largely corresponds to present-day Kosovo) had roughly 500,000 inhabitants, of which: 318,000 were Serbs (64%), 161,000 Albanians (32%), 10,000 Roma and Circassians, and 2,000 Turks.[89]

115. In the fighting which precipitated the Berlin Congress in 1878, ethnic violence took place in both the territory of present-day Kosovo, which remained part of the Ottoman Empire, and in the regions of Nis and Vranje, which were ceded to Serbia as part of the Berlin settlements. This violence led to forced migration of both the Albanians from the Nis and Vranje region and the Serbs from Kosovo.

> "Before and after the [Serbian] army's withdrawal, the new Ottoman Sultan, Abduh Hamid II, unleashed Kosovar Albanian auxiliaries on the remaining Serbs. Depredations on both sides

[87] See Esref Kovačević et. al., *Oblast Brankovića - Opširni katastarski popis iz 1455* (1972).

[88] See Gustav Weigand, *Ethnographie von Makedonien* (1924); see also Dusan Batakovic, "Kosovo and Metohija – Identity, Religions & Ideologies", *in Kosovo and Metohija – Living in the Enclave* (2007), pp. 26-28.

[89] See Peter Kukolj, *Das Fürstenthum Serbien und Türkisch-Serbien, eine militärisch-geographische Skizze* (1871).

forced perhaps 30,000 Serbs from the four Kosovo villayets and an equal number of Albanians from the Nis triangle."[90]

116. Immediately after the Balkan Wars of 1912-1913 and the incorporation of the territory of present-day Kosovo into Serbia, another round of ethnic violence took place, forcing thousands of Albanians to leave Kosovo, while during World War I thousands of Serbs were forced to leave Kosovo. Between 1918 and 1929, the period of the Kingdom of Serbs, Croats and Slovenes, the Serbian population in Kosovo increased.

> "In the same way that the Ottoman authorities up to 1912 had encouraged the colonization of Kosovo by Albanian Muslims from elsewhere in the Balkans, the Yugoslav regime during the 1920s sponsored the migration of Serbs and Montenegrins."[91]

117. According to the 1931 Kingdom of Yugoslavia population census, there was at that time 552,064 inhabitants in the territory that now comprises Kosovo. The 1931 census recorded the religious affiliation and the mother tongue of the Kingdom's population. The breakdown for the region is as follows. In relation to the native language of the population, 60.1% (331,549) declared their mother tongue to be Albanian, 32.6% (180,170) Serb, Croat, Slovene, and 7% (38,907) declared other languages to be their mother tongue. With respect to religion, members of the Muslim faith (Albanians and Slavs) comprised 68.8% (379,981) of the population, members of the Serbian Orthodox Church 27.3% (150,745), and members of the Roman Catholic Church 3.7% (20,568).[92]

118. During World War II thousands of Serbs were forced out of Kosovo by armed ethnic Albanian groups.[93] Administrative measures adopted after World War II by

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[90] See John R. Lampe, *Yugoslavia as History: Twice There Was a Country* (2000), p. 55.

[91] See Leonard J. Cohen. *Serpent in the Bosom: The Rise and Fall of Slobodan Milosevic* (2001), p. 11.

[92] See Milan Vuckovic and Goran Nikolic, *Stanovnistvo Kosova u razdoblju 1918-1991.godine* (1996), pp. 80-82; see also Julie A. Mertus, *Kosovo, How Myths and Truths Started a War* (1999), pp. 315-316.

[93] See Noel Malcolm, *Kosovo A short history* (2002), pp. 293-294. According to one estimate, between 70,000 and 100,000 of Serbs were forced out of Kosovo during World War II, while around 11,000 died as an immediate result of harassment and atrocities, see M. Bjelajac, "Migrations of Ethnic Albanians in Kosovo", 38 *Balcanica* 219, 227 (2007).

the Communist authorities significantly hampered the return of displaced persons.[94]

119. According to the 1961 Yugoslav population census, Kosovo had a total population of 963,988, of which 646,805 were Albanians (67,2%), 227,016 Serbs (23,6%), and 37.588 (3,9%) Montenegrins.[95]

120. In the period from 1960 to 1990, another 70,000 Serbs left Kosovo.[96] According to the 1981 Yugoslav population census, Kosovo had a total population of 1,584,558: 1,226,736 Albanians (77.4%), 209,498 Serbs (13.2%), and 27,028 Montenegrins (1.7%).[97]

121. By 1991, Albanians comprised the great majority of the population in the Southern and Western parts of Kosovo. In the central and Eastern parts of Kosovo, Albanians constituted the majority of the population, although in these regions a significant Serbian population was also present. In the Northern part of Kosovo, which borders central Serbia, Serbs represented a majority.

122. Kosovo Albanians boycotted the Yugoslav census organized in 1991. The Federal Bureau of Statistics made corrections and projections based on the previous census results (1948-1981), and estimated the total population of Kosovo to constitute 1,956,196 citizens: 1,596,072 Albanians (81.6%), 194,190 Serbs (9.9%), 66,189 Muslims (3.4%), 45,760 Romas (2.34%), 20,365 Montenegrins (1%), 10,445 Turks (0.5%), 8,062 Croats (Janjevci) (0.4%), 3,457 Yugoslavs (0.2%), and 11,656 others (0.6%).[98] However, these figures are only estimates.

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[94] See Batakovic, *op. cit.*, pp. 58-59.

[95] See Momcilo Pavlovic, *Kosovo Under Autonomy 1974-1990*, p. 10, available at: http://www.cla.purdue.edu/academic/history/facstaff/Ingrao/si/Team1Reporte.pdf

[96] *Ibid.* p. 26, see, also, Hivzi Islami, *Conflict or dialogue* (1994), author estimates that around 52,000 Serbs left Kosovo between 1966 and 1981 and that after 1981 another 20,000 Serbs left Kosovo.

[97] See "Popis stanovništva, domaćinstava i stanova u 1981. godini", *Statistički bilten SFRJ br. 1295*, pp. 16-17;Some authors claim that Kosovo Albanians drastically overestimated their own numbers, see Pavlovic, *op.cit.*, p. 10.

[98] "Procena za Kosovo i Metohiju – podaci po naseljima i opstinama", *Popis stanovnistva, domacinstava i stanova i poljoprivrednih gazdinstava 1991. godine*, vol. 17 (1997), pp. 68-69..

123. Since June 1999, more than 200,000 Serbs and other non-Albanians have fled their homes in Kosovo. Most went to central Serbia, while some re-located to a few Serbian enclaves within different parts of Kosovo, particularly in the Northern part of Kosovo.

C. Kosovo in Historic Perspective

124. Slavs came to the territories that form today's Kosovo in the seventh-century. The largest influx of migrants occurred during the decade beginning 630 AD. Serbs were Christianized in several waves during the course of the seventh to ninth centuries, with the last wave taking place during the second part of the 9th century. In the second half of the 9th century, the North-Western part of Kosovo became part of the Serbian Principality of Rascia, nominally as a Byzantine fiefdom, while the South – also populated largely by Slavs - remained part of the Byzantine Empire proper.[99]

125. In the late 830s and 840s, the territory of present-day Kosovo was seized by the Bulgarian Empire. After almost 250 years of conflict between the Bulgarian and Byzantine Empires, Byzantine forces re-established control over the territory of present-day Kosovo in the second half of the 11th century.[100]

126. After a series of conflicts between Racsia and the Byzantine Empire that took place from the 11th to 13th centuries, Kosovo became part of the Serbian State. In 1217 Serbia was recognized as a kingdom. In the 13th century, Kosovo became the centre of Serbian political and religious life.

127. In 1389, during the Ottoman advance through the Balkans, the Ottomans invaded Serbia and met the Serbian Army in Kosovo, at Kosovo Polje near Priština. Leaders of both armies died in the battle, and the battle itself ended without a decisive victor. After another great battle between the Hungarian and Ottoman

[99] See Vladimir Corovic, *Istorija Srba* (2000), pp. 85-88.
[100] *Ibid.*, pp. 96-100.

troops in 1448, Kosovo was directly incorporated into the Ottoman Empire after a decisive defeat of Serbia in 1459.

128. The Ottoman rule over Kosovo lasted almost five hundreds years. During this period, the Ottoman Empire represented the greatest political and commercial power in the Balkans, although this position declined considerably since the 19th century.

129. Through the centuries of Ottoman rule, different administrative arrangements existed. During the first centuries of Ottoman rule, several administrative districts, known as "sanjaks", governed the territory of present-day Kosovo.

130. In the second half of the 19th century, a new administrative division of the Ottoman Empire was introduced, with vilayets as new administrative districts. From that period until 1912, the vilayet of Kosovo was a territorial entity within the Ottoman Empire. However, the Kosovo vilayet covered an area which was much larger than today's Kosovo and which was also known as Old Serbia ("Alt-Serbien"). Thus, the territory of the Kosovo vilayet also incorporated parts of what is today North-Western Macedonia, including the vilayet capital city Skopje (then Üsküb), parts of the present-day Sanjak (Sandzak) region cutting into present-day central Serbia and Montenegro (formerly Sanjak of Novi Bazar), along with the Kukes municipality and the surrounding region in present-day Northern Albania.[101]

131. The vilayet boundaries shifted as the Ottoman Empire lost territory to neighbouring States in the Treaty of Berlin of 1878, while parts were also internally transferred to Monastir vilayet and from Salonica vilayet. In 1878, the Sanjak of Novi Bazar, a subdivision of the Kosovo vilayet, fell under Austro-Hungarian military administration, as stipulated by the Treaty of Berlin.

132. In 1912, during the First Balkan War, in which Serbia, Montenegro, Greece and Bulgaria fought against the Ottoman Empire, the latter lost most of its European

[101] For a map of the Kosovo Vilayet, see Appendix 7.

territories. Most of the territory of present-day Kosovo was incorporated into the Kingdom of Serbia, while the region of Metohija was incorporated into Montenegro. The new borders of Serbia and of Montenegro were determined in a series of treaties, starting with the Treaty of London of 17/30 May 1913, the Treaty of Bucharest of 28 July/10 August 1913, and border agreements between Greece and Serbia as well as Montenegro and Serbia.[102] Under Article 3 of the Treaty of London, the frontiers of Albania, including those between Serbia and Albania, were to be determined by the Great Powers and this was done after World War I.[103] It follows that the integration of the territory of present-day Kosovo to Serbia was internationally recognized and guaranteed by the aforementioned international treaties and decisions.

133. In the aftermath of World War I, in 1918, Montenegro joined Serbia, which was then continued by the Kingdom of the Serbs, Croats and Slovenes. The latter was renamed the Kingdom of Yugoslavia in 1929.[104]

134. During World War II, the occupation and partition of Yugoslavia by the Axis Powers from 1941 until 1945 led to the annexation of most of Kosovo's present territory to the Italian-occupied Albania. A smaller part of northern Kosovo, including Mitrovica, remained with Serbia (under German occupation), while the western part of Kosovo, including Kacanik, was occupied by Bulgaria.

135. Following the end of World War II, Yugoslavia's occupation ended and a new government led by Communist guerrilla leader Josip Broz (Tito) was formed. A Constitution adopted in 1946 established the Federal People's Republic of Yugoslavia, which was subsequently renamed the Socialist Federal Republic of

[102] See Traité de Paix conclu à Londres le dix-sept (trente) mai mil neuf cent treize entre la Turquie et les Alliés balkaniques; Traité de Paix conclu et signé à Bucarest le 28 juillet 1913 entre la Serbie, la Grèce, le Monténégro et la Roumanie d'une part et la Bulgarie d' autre part; Accord intervenu entre le Royaume de Serbie et le Royaume de Grèce concernant la frontière serbo-grecque [3/16 August 1913]; Accord intervenu entre le Royaume de Serbie et le Royaume de Monténégro concernant la frontière serbo-monténégrine [30 October 1913 (Julian calendar)]; all reprinted in Annexes 6-9 in Documentary Annexes accompanying this Written Statement. For a map of Serbia and the Balkans in 1914, see Appendix 6.

[103] See *Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion of 4 September 1924, P.C.I.J., Series B, No. 9*, especially pp. 9-15.

[104] See *Zakon o nazivu i podeli Kraljevine na upravna područja* [Law on the Name and Division of the Kingdom into Administrative Regions,], *Službene novine Kraljevine Jugoslavije [*Official Gazette of the Kingdom of Yugoslavia], no. 233/1929, §§ 2-3.

Yugoslavia (hereinafter: "SFRY" or "the former Yugoslavia"). Kosovo became an autonomous province (region) of Serbia.[105]

136. After the dissolution of the SFRY, Serbia and Montenegro formed the Federal Republic of Yugoslavia (FRY) on 27 April 1992. Kosovo continued to be an autonomous province of Serbia. After two years of the conflict between Serbian government forces and the Kosovo Albanian rebels and 78 days of NATO bombing of Serbia, the UN Security Council passed UN Security Council Resolution 1244 on 10 June 1999, which placed Kosovo under UN administration.[106]

[105] See *infra* Chapter 5, Section A.
[106] See *supra* Chapter 8, para. 705 ff.

Chapter 5
THE KOSOVO CRISIS - LEGAL AND FACTUAL BACKGROUND

A. Legal Status of Kosovo

I The Kingdom of Serbia (1912-1918)

137. The territory of present-day Kosovo was ruled by the Ottoman Empire until 1912. During this time it formed part of the Kosovo vilayet, an administrative unit of the Ottoman Empire, which was much larger than the territory of present-day Kosovo because it included other parts of what is now Serbia, as well as parts of what are now States of Montenegro, Macedonia and Albania.[107]

138. As already noted, following the Balkan wars of 1912-1913, the Kingdom of Serbia assumed control over, *inter alia*, most of the present territory of Kosovo, with the Kingdom of Montenegro assuming control over the rest of it. At the time, Serbia was a State divided into districts ("okrug"); districts were divided into counties ("srez"), which were, in turn, divided into municipalities ("opština").[108] Municipalities and districts were units of local self-government.[109] In addition to self-governing competences, they performed State competences that were assigned to them.[110] After integration into Serbia, the present territory of Kosovo was also divided into districts, counties and municipalities.[111] However, the constitutional provisions and laws of Serbia were gradually introduced to the

[107] For a map of the Kosovo Vilayet, see Appendix 7

[108] *Ustav Kraljevine Srbije* [Constitution of the Kingdom of Serbia], *Srpske novine* [Serbian Gazette], No. (7 June 1903), Article 5.

[109] *Ibid.*, Articles 160-161.

[110] *Ibid.*, Article 164.

[111] *Uredba o uređenju oslobođenih oblasti* [Decree on Organization of Liberated Regions], *Srpske novine* [Serbian Gazette], No. 181/1913 (21 August 1913); *Administrativna podela oslobodjenih krajeva* [Administrative division of liberated areas], *Srpske novine* [Serbian Gazette], No. 186/1913 (27 August 1913).

territory and the guarantees of local self-government were not applied until after World War I, i.e. 1919.[112]

II The Kingdom of Serbs, Croats and Slovenes/Yugoslavia (1918-1941)

139. After World War I, the Kingdom of Serbia was continued by the Kingdom of the Serbs, Croats and Slovenes. Its 1921 Constitution divided the State into administrative units – municipalities ("opštine"), counties ("srez"), districts ("okrug") and, finally, regions ("oblasti").[113] It also established elected local self-government for municipalities, counties and regions and endowed them with certain self-governing competences.[114] Acts of local self-government authorities were subject to control of legality by the regional prefect ("župan") and a high administrative court (State Council).[115]

140. The territory of present-day Kosovo was divided into three different regions (Raška region, Kosovo region, and Vranje region).[116]

141. In 1929, the Kingdom of the Serbs, Croats and Slovenes changed its name to Yugoslavia and was divided into 9 provinces ("banovina"), which were in turn divided into administrative units called counties ("srez") and municipalities ("opština").[117] Administrative lines between the provinces were intentionally drawn to avoid borders established along ethnic lines or pre-World War I borders. The territory of present-day Kosovo was divided between the Zeta province in the East, the Vardar province in the South-East, and the Morava province in the North-East.

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[112] See Dragoslav Janković and Mirko Mirković, *Državnopravna istorija Jugoslavije* (1997), pp. 157-158.

[113] *Ustav Kraljevine Srba, Hrvata i Slovenaca* [Constitution of the Kingdom of the Serbs, Croats and Slovenes], *Službene novine Kraljevine Srba, Hrvata i Slovenaca* [Official Gazette of the Kingdom of the Serbs, Croats and Slovenes], No.142 a/1921, Article 95. For a map of the Kingdom of the Serbs, Croats and Slovenes, see Appendix 5.

[114] *Ibid.*, Article 96.

[115] *Ibid.*, Articles 99 and 101.

[116] See *Uredba o podeli zemlje na oblasti* [Decree on the division of the country into regions], *Službene novine Kraljevine Srba, Hrvata i Slovenaca* [Official Gazette of the Kingdom of the Serbs, Croats and Slovenes], No. 92/1922.

[117] *Zakon o nazivu i podeli Kraljevine na upravna područja* [Law on the Name and Division of the Kingdom into Administrative Regions,], *Službene novine Kraljevine Jugoslavije* [Official Gazette of the Kingdom of Yugoslavia], No. 233/1929, §§ 2-3. For a map of the Kingdom of Yugoslavia, see Appendix 4.

142. The administrative division of the Kingdom of Yugoslavia was reflected in the new Yugoslav constitution of 1931 with slight changes of the administrative lines.[118] The 1931 constitution also provided for self-government in provinces and municipalities, but the legality of their acts was subject to control by provincial prefects ("*ban*") and the high administrative court (State Council).[119] Institutions of provincial self-government comprised directly elected chambers with the power to adopt decrees with the force of law, and a council which was an executive body elected by the chamber.[120]

143. In April 1941, Yugoslavia was occupied by the Axis powers.

III. Yugoslavia after World War II (1945-1991)

(1) Decisions of the Anti-fascist Council of National Liberation of Yugoslavia

144. The constitutional order of post-World War II Yugoslavia[121] originated in decisions of the Anti-fascist Council of National Liberation of Yugoslavia ("Antifašističko veće narodnog oslobođenja Jugoslavije" – AVNOJ) that were adopted during World War II. According to its decision on "the building of Yugoslavia on the federal principle" adopted on 29 November 1943,

> "... in order to effect the principle of sovereignty of the nations of Yugoslavia... Yugoslavia is built and will be built on the federal principle, which shall ensure full equality of Serbs, Croats, Slovenes, Macedonians and Montenegrins, that is the nations of Serbia, Croatia, Slovenia, Macedonia, Montenegro and Bosnia and Herzegovina."[122]

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[118] *Ustav Kraljevine Jugoslavije* [Constitution of the Kingdom of Yugoslavia], *Službene novine Kraljevine Jugoslavije* [Official Gazette of the Kingdom of Yugoslavia], No. 207/1931, Articles 82-83.

[119] *Ibid.*, Articles 9 and 93.

[120] *Ibid.*, Article 89, paras. 1-2, and Article 90, para. 1.

[121] For a map of the former Yugoslavia, see Appendix 3.

[122] Deklaracija drugog zasedanja Antifašističkog veća narodnog oslobođenja Jugoslavije o izgradnji Jugoslavije na federativnom principu [*Decision of the Second Session of the Anti-fascist Council of National Liberation of Yugoslavia on the building of Yugoslavia on the federal principle]*, Anti-fascist Council of

145. Further, this decision also provided that "[n]ational minorities in Yugoslavia shall be guaranteed all national rights."[123]

146. Thus, the new constitutional order was to be established by the five "nations" ("narodi") of Yugoslavia (Serbs, Croats, Slovenes, Macedonians and Montenegrins) on the federal principle with six federal units (Serbia, Croatia, Slovenia, Macedonia, Montenegro, and Bosnia and Herzegovina). The national minorities on the territory of Yugoslavia, including Kosovo Albanians, were to be accorded all rights, but were not regarded as constituent components of the Yugoslav federation.

(2) Establishment of Kosovo as a territorial unit

147. The territory of present-day Kosovo was for the first time established as a single territorial unit in 1945 by two laws adopted by the Presidency of the National Assembly of Serbia. First, according to the Law on the Administrative Division of Serbia,[124] Serbia consisted of administrative districts, as well as of the Autonomous Province of Vojvodina and the Autonomous Kosovo-Metohija Region (Article 1). Second, the Law on the Establishment and Organizational Set Up of the Autonomous Kosovo-Metohija Region[125] determined the territory of this region by specifying administrative districts that belonged to it (Article 1). It also set out the structure and competences of regional organs (Articles 3 & 5-9), as well as providing the principle of equality of all nationalities ("narodnosti")[126] and citizens and the right to education in their own language (Article 4-5).

National Liberation of Yugoslavia, Decision No. 329 November 1943, Annex 42 in Documentary Annexes accompanying this Written Statement.

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

[124] *Zakon o administrativnoj podeli Srbije* [Law on the Administrative Division of Serbia], *Službeni glasnik Srbije* [Official Gazette of Serbia], No. 28/1945, Annex 43 in Documentary Annexes accompanying this Written Statement.

[125] *Zakon o ustanovljenju i ustrojstvu Autonomne kosovsko-metohijske oblasti* [Law on the Establishment and Organizational Set Up of the Autonomous Kosovo–Metohija Region], *Službeni glasnik Srbije* [Official Gazette of Serbia], No. 28/145, Annex 44 in Documentary Annexes accompanying this Written Statement.

[126] For the meaning of the term "nationality" ("*narodnost*") in the constitutional practice of the former Yugoslavia, see *infra* para. 157.

(3) The 1946 Constitution of Yugoslavia and the 1947 Constitution of Serbia

The 1946 Constitution of Yugoslavia

148. A federal constitution adopted in 1946[127] defined the Federal People's Republic of Yugoslavia as a federal and the peoples' republic and as a community of equal nations which, on the basis of their right to self-determination, including the right to secession, had expressed their will to live together in a federal state (Article 1). The nations of Yugoslavia were Serbs, Croats, Slovenes, Macedonians and Montenegrins, as noted in the decisions of the Anti-fascist Council of National Liberation of Yugoslavia of 29 November 1943. Later on, ethnic Muslims (Bosniacs) were also to be recognized as a nation in Yugoslavia.

149. The Federal People's Republic of Yugoslavia consisted of six republics: Serbia, Croatia, Slovenia, Macedonia, Montenegro, and Bosnia and Herzegovina (Article 2, paragraph 1).

150. The 1946 Federal Constitution confirmed that Serbia included the Autonomous Province of Vojvodina and the Autonomous Kosovo-Metohija Region (Article 2, paragraph 2). It should be noted that, in contrast to Vojvodina which was an autonomous province, Kosovo-Metohija was an autonomous region which was a status of lesser autonomy than an autonomous province. The 1946 Federal Constitution further provided that the scope of the autonomy of these two territories was to be determined by the republican constitution (Article 103). The highest legal act adopted in an autonomous province or region was a statute, which had to be in accordance with the federal and republican constitutions, and was subject to the approval of the republican parliament (Article 104). The federal National Assembly consisted of two chambers: the Federal Chamber elected on the basis of equal vote of all citizens; and the Chamber of Peoples in which

[127] *Ustav Federativne Narodne Republike Jugoslavije* [Constitution of the Federal People's Republic of Yugoslavia], *Službeni list Federativne Narodne Republike Jugoslavije* [Official Gazette of the Federal People's Republic of Yugoslavia], No. 10/1946, Annex 45 in Documentary Annexes accompanying this Written Statement [hereinafter: "1946 Federal Constitution].

citizens of each republic, autonomous province, and autonomous region elected 30, 20, and 15 representatives, respectively (Articles 53-54).

The 1947 Constitution of Serbia

151. In 1947, Serbia adopted its constitution. The 1947 Constitution of Serbia defined its territory to include, *inter alia*, the Autonomous Kosovo-Metohija Region (Article 3).[128] It guaranteed rights of autonomy to both Kosovo-Metohija and Vojvodina, which were granted the right to adopt their own statutes subject to approval of the National Assembly of Serbia (Article 13).

152. The 1947 Constitution of Serbia also regulated the administrative structure and autonomous competences of Vojvodina (Articles 90-105) and Kosovo-Metohija (Articles 106-118). The competences of Kosovo-Metohija related to the management of economic and cultural development of the region, securing respect for law and rights of citizens; protection of equality and cultural rights of nationalities in the region; management of social protection and health services, as well as management of elementary and high schools within the framework of the Serbian educational plan (Article 106).

153. According to the 1947 Constitution of Serbia, Kosovo-Metohija had a representative body which, *inter alia*, adopted its statute, its budget and decisions as binding regulations (Article 107). It also elected an executive and administrative body (Article 116). Decisions adopted by provincial organs had to be in accordance with the constitutions and laws of Yugoslavia and Serbia, as well as in accordance with decisions of the presidiums of the federal and Serbian parliaments, failing which they could be reversed or annulled by the central authorities (Article 152). Kosovo, unlike Vojvodina, did not have its own courts.

[128] *Ustav Narodne Republike Srbije* [Constitution of the People's Republic of Serbia], *Službeni glasnik Narodne Republike Srbije* [Official Gazette of the People's Republic of Serbia], No. 3/1947, Annex 46 in Documentary Annexes accompanying this Written Statement.

154. After the federal constitution amendments of 1953, the statutes of the Autonomous Province of Vojvodina and the Autonomous Kosovo-Metohija Region were no longer subject to the approval of the Serbian parliament.[129]

(4) The 1963 Constitution of Yugoslavia, the 1963 Constitution of Serbia and amendments thereto

The 1963 Constitution of Yugoslavia

155. The new federal Constitution of Yugoslavia was adopted in 1963 and it changed the name of the federation to the Socialist Federal Republic of Yugoslavia (hereinafter SFRY).[130]

156. In its preamble, the 1963 Federal Constitution reaffirmed that the nations of Yugoslavia, on the basis of their right to self-determination, including the right to secession, had united in "a federal republic of free and equal nations and nationalities ["narodnosti"] and created a socialist federal community of the working people – the Socialist Federal Republic of Yugoslavia." (Preamble, I).

157. In addition to the "nations" of Yugoslavia, there were thus also "nationalities". The term "nationality" ("narodnosti") needs to be explained in more detail, as it is relevant for the further discussion of the constitutional system of Yugoslavia. The term is difficult to translate into foreign languages. Its original meaning is "the fact of belonging to a people", but in the law and political language of the SFRY it was used as a term for national minorities.[131] In the present submission, the terms "nationality" and "national minority" will be used interchangeably.

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[129] *Ustavni zakon o osnovama društvenog i političkog uređenja Federativne Narodne Republike Jugoslavije i saveznim organima vlasti* [Constitutional Law on the Basis of Social and Political Order of the Federal People's Republic of Yugoslavia and Federal Organs of Power], *Službeni list Federativne Narodne Republike Jugoslavije* [Official Gazette of the Federal People's Republic of Yugoslavia], No. 3/1953, Article 114.

[130] *Ustav Socijalističke Federativne Republike Jugoslavije* [Constitution of the Socialist Federal Republic of Yugoslavia], *Službeni list Socijalističke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 14/1963, Annex 47 in Documentary Annexes accompanying this Written Statement [hereinafter: "1963 Federal Constitution"].

[131] See Vojin Dimitrijević, "Nationalities and Minorities in the Yugoslav Federation", in Yoram Dinstein & Mala Tabory (eds.), *The Protection of Minorities and Human Rights* (1992), pp. 423-424.

158. Article 1 of the 1963 Federal Constitution defined the SFRY as a "federal state of voluntarily united and equal nations" and "a social democratic community based on the power of the working people and self-management". As before, the SFRY was composed of Bosnia and Herzegovina, Macedonia, Slovenia, Serbia, Croatia and Montenegro (Article 2, paragraph 1). These republics were defined as a "state socialist democratic community ["državna demokratska socijalistička zajednica"]" (Article 108, para. 1).

159. The 1963 Federal Constitution envisaged a general possibility of establishing autonomous provinces within republics, and determined that Vojvodina, and Kosovo and Metohija were two autonomous provinces existing within Serbia (Article 111). Autonomous provinces were defined as "socio-political communities within a republic" ("u sastavu republike", Article 112, para. 1). Like the 1946 Federal Constitution, the 1963 Federal Constitution provided that the competences of autonomous provinces and the organization of their organs were to be determined by republican constitutions (Art. 112, para. 2).

The 1963 Constitution of Serbia

160. The new Constitution of Serbia, adopted in 1963, defined the competences of the autonomous provinces to include: regulating matters of general interest for the province in the fields of economy, education, culture, health and social protection; execution of federal and republican legislation when so authorized; and the maintenance of public order and peace (Article 129).[132]

161. Autonomous provinces had an assembly as a representative body and an executive council (Articles 136-138). A province could also create its own agencies in the fields of provincial competence (Article 135). The provincial assembly had the competence to adopt a provincial statute, as well as to issue decisions as regulations of general application (Articles 129 & 139). These had to be in accordance with the constitution and laws of Serbia (Article 161).

[132] *Ustav Socijalističke Republike Srbije* [Constitution of the Socialist Republic of Serbia], *Službeni glasnik Socijalističke Republike Srbije* [Official Gazette of the Socialist Republic of Serbia], No. 14/1963, Annex 48 in Documentary Annexes accompanying this Written Statement.

The 1968 amendments to the 1963 Constitution of Yugoslavia

162. The 1963 Federal Constitution was amended in 1968.[133] One of the amendments provided that Article 2, paragraph 1, of the 1963 federal constitution should be changed and instead of the word "Serbia", it should contain the following clause:

> "Socialist Republic of Serbia with the Socialist Autonomous Region of Vojvodina and the Socialist Autonomous Region of Kosovo which are its parts" ("u njenom sastavu").[134]

163. The 1968 federal constitutional amendments expanded the rights of autonomous provinces. Most importantly, they were granted the right to adopt a constitutional law that would define their competences (Amendment XVIII, para. 2(1)). This provincial constitutional law had to be in accordance with the principles of the Constitution of Yugoslavia, as well as in accordance with the republican constitution (*ibid.*, para. 2(2)).

164. Autonomous provinces were also granted the right to establish their own judiciary headed by a supreme court (*ibid.*, para. 4).

The 1969 amendments to the 1963 Constitution of Serbia

165. As a consequence of these changes, the 1963 Constitution of Serbia was amended to implement the federal amendments.[135] The principle on which the legislative competence was exercised was also changed so that the provinces gained a general competence to legislate in all areas, while the laws applicable to the whole territory of Serbia could be adopted by Serbian parliament only in the areas

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[133] *Ustavni amandmani* [Constitutional Amendments], *Službeni list Socijalističke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 55/1968, Annex 49 in Documentary Annexes accompanying this Written Statement.

[134] *Ibid.*, Amendment VII.

[135] *Ustavni amandmani* [Constitutional Amendments], *Službeni glasnik Socijalističke Republike Srbije* [Official Gazette of the Socialist Republic of Serbia], No. 5/1969, Annex 50 in Documentary Annexes accompanying this Written Statement.

enumerated by the Constitution itself.[136] The same principle applied to executive authorities.[137]

166. In 1969, the Kosovo assembly adopted a constitutional law in which it further specified the competences of the province.[138]

The 1971 amendments of the 1963 Constitution of Yugoslavia

167. Subsequent amendments to the 1963 Federal Constitution were adopted in 1971.[139] The SFRY was defined as:

> "a federal state having the form of a state community of voluntarily united nations and their socialist republics, and of the socialist autonomous provinces of Vojvodina and Kosovo which are parts of the Socialist Republic of Serbia..." (Amendment XX, para. 2)

The republics were defined as

> "state[s] based on the sovereignty of the people and the power of and self-management by the working class and all working people, and socialist self-managing democratic communit[ies] of working people and citizens, and of nations and nationalities having equal rights" (*ibid.*, Amendment XX, para. 3)

The autonomous provinces were defined as

> "autonomous socialist self-managing democratic socio-political communities in which working people, nations, and nationalities

[136] *Ibid.*, Amendment V, para. 4.
[137] *Ibid.*, Amendment V, para. 10.
[138] *Ustavni zakon Socialističke Autonomne Pokrajine Kosova* [Constitutional Law of the Socialist Autonomous Province of Kosovo], *Službeni list Socijalističke Autonomne Pokrajine Kosova* [Official Gazette of the Socialist Autonomous Province of Kosovo], No. 6/1969.
[139] *Ustavni Amandmani XX do XLII* [Constitutional Amendments XX to XLII], *Službeni list Socijalističke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 29/1971, Annex 51 in Documentary Annexes accompanying this Written Statement.

realize their sovereign rights, and when so specified by the Constitution of the Socialist Republic of Serbia in the common interests of the working people, nations and nationalities of the republic as a whole – they do so, also within the republic." (*ibid.*, Amendment XX, para. 4)

168. A comparison of these definitions shows that republics and autonomous provinces differed so whereas the former were "states" and "based on the sovereignty of the people", the latter were not. Thus, an autonomous province was neither a "state" nor "based on the sovereignty of the people", but rather an "autonomous... communit[y]" in which "the working people, nations and nationalities realize their sovereign rights".

169. By virtue of the 1971 amendments, the autonomous provinces were granted the right to have representatives in federal organs in addition to the federal parliament, namely the presidency, the government (federal executive council), and the federal constitutional court (*ibid.*, Amendments XXXVI, para. 1; XXXVIII, para. 1; and XL). Further, the federal constitution could not be amended without consent of all republics and autonomous provinces (*ibid.*, Amendment XXXII).

IV Subsequent amendments to the Constitution of Serbia and the Constitution of Kosovo

170. Subsequent to federal constitutional amendments, Serbia adopted amendments to its constitution in 1972.[140] These amendments, *inter alia*, enumerated areas which could be regulated by laws applicable to the whole territory of the republic and allowed for a possibility to adopt such laws in other areas as well, on the basis of agreement with the autonomous provinces (Amendment IX, paras. 1 & 2).

[140] *Ustavni amandmani IX do XVI* [Constitutional Amendments IX to XVI], *Službeni list Socijalističke Republike Srbije* [Official Gazette of the Republic of Serbia], No. 8/1972.

171. The province of Kosovo also amended its Constitutional Law in 1972.[141] The amendments *inter alia* further specified the competences of the province and its organs, and created the National Bank of Kosovo as an "institution of the unified monetary system of Yugoslavia", as well as the Constitutional Court of Kosovo (Amendment IV, para. 1, & Amendment X).

(5) The 1974 constitutions and their amendments

172. A new constitution of the SFRY was adopted in 1974,[142] and this was shortly followed by the adoption of new constitutions of the republics, including Serbia,[143] and of the autonomous provinces, including Kosovo.[144]

The 1974 Federal Constitution

173. The 1974 Federal Constitution retained the definition of the federation introduced by the 1971 amendments (1974 Federal Constitution, Article 1, and *supra* para. 167). As before, the two autonomous provinces of Vojvodina and Kosovo were mentioned as being an integral part of Serbia ("u njenom sastavu").[145]

174. The Preamble to the 1974 Federal Constitution repeated what was contained in the previous Yugoslav constitutions after the Second World War – that "the nations of

[141] *Amandmani I-X na Ustavni zakon SAP Kosova* [Amendments I-X to the Constitutional Law of SAP Kosovo], *Službeni list Socijalističke Autonomne Pokrajine Kosova* [Official Gazette of the Socialist Autonomous Province of Kosovo], No. 4/1972.

[142] *Ustav Socijalističke Federativne Republike Jugoslavije* [Constitution of the Socialist Federal Republic of Yugoslavia], *Službeni list Socijalističke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 9/1974, (hereinafter: 1974 Federal Constitution), Annex 52 in Documentary Annexes accompanying this Written Statement [hereinafter: "1974 Federal Constitution'].

[143] *Ustav Socijalističke Republike Srbije* [Constitution of the Socialist Republic of Serbia], *Službeni glasnik Socijalističke Republike Srbije* [Official Gazette of the Socialist Republic of Serbia], No. 8/1974, (hereinafter: 1974 Serbian Constitution), Annex 53 in Documentary Annexes accompanying this Written Statement.

[144] *Ustav Socijalističke Autonomne Pokrajine Kosova* [Constitution of the Socialist Autonomous Province of Kosovo], Službeni list Socijalističke Autonomne Pokrajine Kosova [Official Gazette of the Socialist Autonomous Province of Kosovo], No. 4/1974, (hereinafter: 1974 Kosovo Constitution), Annex 54 in Documentary Annexes accompanying this Written Statement.

[145] 1974 Federal Constitution, Article 2.

Yugoslavia" had the right to self-determination, including secession.[146] As discussed above, the nations of Yugoslavia were the Serbs, Croats, Slovenes, Macedonians and Montenegrins, as noted in the decisions of the Anti-fascist Council of National Liberation of Yugoslavia of 29 November 1943.[147] In addition, ethnic Muslims (Bosniacs) were subsequently also recognized as a nation of Yugoslavia and one of the three constituent nations in Bosnia and Herzegovina, together with Croats and Serbs.[148]

175. The 1974 Federal Constitution specified areas of federal legislative competence (Article 281). In certain cases, most of which concerned the economic sphere, federal laws were adopted with consent of the republics and provinces (Article 286). Federal legislation was in principle enforced by republican and provincial authorities, unless the 1974 Federal Constitution provided otherwise (Article 273, para. 1).

176. Amendments to the 1974 Federal Constitution were to be adopted following a complicated procedure. Decisions were taken by the Federal Chamber of the SFRY parliament, with the consent of the assemblies of all republics and autonomous provinces.[149] The consent of the republics and autonomous provinces was required at two stages: first, for the decision to initiate the amending procedure and, second, for the decision to adopt an amendment, which was taken by a two-thirds majority of members of the federal chamber of the SFRY parliament (Articles 400-402).

177. Federal bodies were composed on the basis of equal participation of the republics. As for the provinces, their participation was in principle less than that of the republics. For example, each republic had thirty delegates and each province had

[146] Basic Principle I of the 1974 Federal Constitution starts with the following words: "[t]he nations of Yugoslavia proceedings from the right of every nation to self-determination, including the right to secession..."

[147] See *supra* paras. 144-146.

[148] See Article 1 of the Constitution of Bosnia and Herzegovina, *Službeni list Bosne i Hercegovine* [Official Gazette of Bosnia and Herzegovina], No. 4/1974.

[149] If the changes concerned relations between republics or between republics and federation, they required only consent of assemblies of the republics and not of provinces, see the 1974 Federal Constitution., Article 398.

twenty delegates in the federal chamber of the SFRY Assembly (1974 Federal Constitution, Article 291, para. 1). The Chamber of Republics and Provinces in the SFRY Assembly was composed of 12 delegates from each republican assembly and 8 delegates from each provincial assembly (Article 292, para. 1). The Federal Executive Council (federal government) and the Federal Court were composed on the basis of equal participation of the republics and the appropriate ("odgovarajuće") representation of the provinces (Art. 348, para. 1, & Art. 370, para. 2). The Constitutional Court of Yugoslavia was composed of two members from each republic and one member from each autonomous province. The SFRY Presidency had one member from each republic and province (Article 321).

178. Despite their participation in the federal bodies and their role in the Yugoslav federation, the autonomous provinces were not federal units. Definitions of republic and autonomous province in the 1974 federal Constitution remained almost identical to those introduced by the 1971 amendments.[150] As discussed above, the main difference between republics and autonomous provinces (in the 1971 amendments and consequently in the 1974 federal Constitution) was that republics were defined as "states" "based on sovereignty of people" while autonomous provinces were not (see *supra* para. 168), and were expressly described as part of Serbia.

179. The Constitutional Court of Yugoslavia confirmed that the autonomous provinces were not federal units of the Yugoslav federation when it held that

> "... under the SFRY Constitution, the SAP [Socialist Autonomous Province] of Vojvodina and the SAP of Kosovo *are not federal units like the republics*, but that they are autonomous socio-political communities within the SR [Socialist Republic] of Serbia."[151]

[150] Except that an autonomous region was also said to be "based on power and self-management of the working class and all working peoples" (*ibid.*, Articles 3-4 and *supra* para. 167).

[151] "To znači da, po ustavu SFRJ, SAP Vojvodina i SAP Kosovo nisu federalne jedinice, kao što su republike, već su to autonomne društveno-političke zajednice u sastavu SR Srbije." Constitutional Court of Yugoslavia, Decision of 19 February 1991, II-U-broj 87/90, [*Odluka o ocenjivanju ustavnosti Ustavne deklaracije o Kosovu kao samostalnoj i ravnopravnoj jedinici u okviru federacije (konfederacije) Jugoslavije kao ravnopravnog subjekta sa ostalim jedinicama u federaciji (konfederaciji)*], Official

180. In conclusion, while the autonomous provinces of Kosovo and Vojvodina were an important part of the SFRY, they were not federal units. At the same time, they were consistently, and from the very beginning of the federal Yugoslavia, expressly referred to as constituting part of Serbia.

The 1974 Constitution of Serbia

181. The 1974 Constitution of Serbia defined autonomous provinces in the same way as the 1974 Federal Constitution.

182. It also adopted the principle that legislative powers were to be exercised at the provincial level unless expressly provided otherwise by the Constitution itself.[152] Areas in which the Serbian Assembly could adopt laws applicable to the whole territory of Serbia, including the autonomous provinces, were expressly enumerated (*ibid.*, Article 300). Other areas could also be regulated by law applicable to the whole territory of Serbia on the basis of agreement with autonomous provinces (*ibid.*, Article 301). In other cases, laws were adopted for the territory of Serbia excluding the territory of autonomous provinces (*ibid.*, Article 343).

183. The 1974 Constitution of Serbia provided that enforcement and application of laws on the territory of an autonomous province was in principle the competence of provincial authorities (*ibid.*, Article 294, para. 1)

184. The 1974 Constitution of Serbia could be amended by the Serbian Assembly. Consent of assemblies of the autonomous provinces was required both for the initiation of the amendment procedure and for the adoption of an amendment, if it concerned Serbia as a whole (*ibid.*, Articles 427-428 and 430). The amendments had to be adopted by two-thirds of the Serbian Assembly members (*ibid.*, 430, para. 2).

Gazette of the SFRY, No. 37/1991, p. 618 (emphasis added), Annex 56 in Documentary Annexes accompanying this Written Statement.

[152] 1974 Constitution of Serbia, Article 293, para. 1, see Annex 53 in Documentary Annexes accompanying this Written Statement.

The 1974 Kosovo Constitution

185. The 1974 Kosovo Constitution regulated the autonomous system of government in the province. It defined the competences of the province.[153] As noted above, the 1947 Federal Constitution and 1974 Constitution of Serbia enumerated competences of the federation and of the republic, respectively. The principle was that everything that was not assigned to the federation and the republic belonged to the provincial domain.

186. Under the 1974 Kosovo Constitution, the provincial organs comprised the assembly, the presidency, and the government (executive council) (*ibid.*, Chapters X, XI & XIII). There was also a constitutional court and judiciary (*ibid.*, Chapters XV & XVI).

187. Constitutional changes were enacted by a two-thirds majority of all deputies in the provincial assembly, who also had to give their consent to the changes of the SFRY and Serbian constitutions (*ibid.*, Article 397, para. 2, & Article 399; cf. *supra* paras. 176& 184).

Constitutional amendments of 1988-1989

188. Constitutional amendments to the 1974 Federal Constitution were adopted in 1988, with the consent of all republics and autonomous provinces.[154] They primarily dealt with economic issues, as well as strengthening federal powers to some extent.

189. Following these 1988 federal constitutional amendments, the 1974 Constitution of Serbia was amended in 1989,[155] its amendments having been duly adopted with

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[153] 1974 Kosovo Constitution, Article 283, see Annex 54 in Documentary Annexes accompanying this Written Statement.

[154] *Amandmani na Ustav Socijalističke Federativne Republike Jugoslavije* [Amendments to the Constitution of the Socialist Federal Republic of Yugoslavia], *Službeni list Socijalističke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 70/1988.

[155] *Amandmani IX do XLIX na Ustav Socijalističke Republike Srbije* [Amendments IX to XLIX to the Constitution of the Socialist Republic of Serbia], *Službeni glasnik Socijalističke Republike Srbije* [Official

the consent of the assemblies of the autonomous provinces of Kosovo and Vojvodina.[156]

190. The 1989 Serbian constitutional amendments made important changes to the relationship between the institutions of the Republic of Serbia and those of the autonomous provinces. These changes were a result of dissatisfaction with the original 1974 constitutional arrangement in Serbia which may be described as one in which the institutions of the Republic of Serbia (which included representatives of the autonomous provinces) were responsible only for the affairs in Serbia proper, while the autonomous provinces were ruled almost exclusively by their own institutions.[157] Even in the limited areas in which the Republic could adopt the laws applicable to the whole of its territory, it could not ensure their implementation and enforcement on the territory of the autonomous provinces if the latter was uncooperative in this respect (cf. Articles 294-296 of the 1974 Constitution of Serbia). Moreover, if provincial constitutions were contrary to the 1974 Constitution of Serbia, in violation of its Article 226, there was no legal mechanism in place that would ensure the latter's primacy.[158]

191. With respect to the relationship between the Republic of Serbia and its autonomous provinces, the 1989 Serbian constitutional amendments introduced, *inter alia*, the following changes:

- the Serbian Assembly could decide, on the basis of an opinion of the Constitutional Court of Serbia, whether a certain provision of a provincial constitution was contrary to the Constitution of Serbia; if the provincial assembly concerned did not change the unconstitutional provision within one year, it would cease to be applied (Amendment XXIX);
- the role of the republican administrative organs with respect to enforcement of the republican laws applicable on the whole territory of Serbia was

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Gazette of the Socialist Republic of Serbia], No. 11/1989, (hereinafter: 1989 Serbian constitutional Amendments), Annex 55 in Documentary Annexes accompanying this Written Statement.

[156] *Odluka o proglašenju amandmana IX do XLIX na Ustav Socijalističke Republike Srbije* [Decision on promulgation of amendments IX to XLIX to the Constitution of the Socialist Republic of Serbia], *Službeni glasnik Socijalističke Republike Srbije* [Official Gazette of the Socialist Republic of Serbia], No. 11/1989;

[157] See Dimitrijević *op. cit.*, p. 425.

[158] See, e.g., Pavle Nikolić, "Prilog pitanju odnosa Ustava SR Srbije i ustava pokrajina", *Anali Pravnog Fakulteta u Beogradu*, 4/1998, pp. 459-461.

expanded, including their power to enforce such laws on the territory of an autonomous province if the latter failed to do so (Amendment XXXI, especially para. 7);

- the Presidency of Serbia could decide that republican authorities directly organize or execute measures for the protection of the constitutional order on the territory of Serbia or part thereof, if this was required by the special interests of security of the Republic in order to put an end to activities aimed at undermining or destroying the constitutional order (Amendment XLIII, para. 3). This meant that the republican authorities could directly exercise powers on the territory of an autonomous province in such emergency situations, which was not previously the case.
- the consent of the provincial assemblies was no longer required for amending the Constitution of Serbia; rather, they had the right to issue their opinions on constitutional amendments, and if such opinions were not accepted by the Serbian Assembly, to request that constitutional amendments be adopted in a Serbian referendum (Amendment XLVII).

192. The 1989 Serbian constitutional amendments could only partially modify the relationship between the Republic of Serbia and its autonomous provinces, because the autonomy of the provinces was also guaranteed at the level of the SFRY, by the 1974 Federal Constitution.

193. The 1989 Serbian constitutional amendments (as well as constitutional amendments in other republics of the SFRY) were assessed by the (federal) Constitutional Court of Yugoslavia which examined their compatibility with the 1974 Federal Constitution (as amended in 1988). While the Constitutional Court of Yugoslavia found that some of the amendments were contrary to the federal constitution, this was not the case with the amendments that concerned the status and competences of the autonomous provinces, discussed in the preceding paragraph.[159]

[159] Constitutional Court of Yugoslavia, Opinion of 18 January 1990, IU-broj 105/1-89, *Službeni list Socijalističke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 10/1990.

"The Constitutional Declaration on Kosovo"

194. The following year, on 3 July 1990, 111 members of the Kosovo Provincial Assembly issued a "Constitutional Declaration on Kosovo as an autonomous ("samostalnoj") and equal unit within the federation (confederation) of Yugoslavia as an equal legal subject with other units within the federation (confederation)".[160] The authors of the "declaration" did not include any Serb members of the Kosovo Provincial Assembly. The "declaration" *inter alia* proclaimed Kosovo to be "an equal unit within Yugoslavia" and expressed an expectation that this would be confirmed in the constitution of Yugoslavia (para. 2). It also stated that Albanians should be considered a nation and not a nationality (national minority)[161] in Yugoslavia (para. 3). Further, the "declaration" stated that "until final legal implementation of this constitutional declaration", the Assembly and other authorities in Kosovo should work on the basis of the federal constitution and not on the 1989 Serbian constitutional amendments (para. 4). Finally, the declaration purported to "annul" the Kosovo Assembly's previous consent to these amendments (para. 4).

195. This "declaration" was subsequently annulled in its entirety by the Constitutional Court of Yugoslavia, as contrary to the federal constitution.[162] The court *inter alia* stated that Kosovo was not a federal unit and that its constitutional status could not be changed without an amendment to the federal and Serbian constitutions.[163] In the opinion of the court, if Kosovo were to become a self-standing and equal unit with other republics in the SFRY, this would constitute a change of the

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[160] *Ustavna deklaracija o Kosovu kao samostalnoj i ravnopravnoj jedinici u okviru federacije (konfederacije) Jugoslavije kao ravnopravnog subjekta sa ostalim jedinicama u federaciji (konfederaciji)[*, Constitutional Declaration on Kosovo as an autonomous ("*samostalnoj*") and equal unit within the federation (confederation) of Yugoslavia as an equal legal subject with other units within the federation (confederation)] *Službeni list Socijalističke Autonomne Pokrajine Kosova* [Official Gazette of the Socialist Autonomous Province of Kosovo], No. 21/1990, Annex 75 in Documentary Annexes accompanying this Written Statement.

[161] For the term "nationality" see *supra* para. 157

[162] Constitutional Court of Yugoslavia, Decision of 19 February 1991, II-U-broj 87/90, [*Odluka o ocenjivanju ustavnosti Ustavne deklaracije o Kosovu kao samostalnoj i ravnopravnoj jedinici u okviru federacije (konfederacije) Jugoslavije kao ravnopravnog subjekta sa ostalim jedinicama u federaciji (konfederaciji)*], Official Gazette of the SFRY, No. 37/1991, p. 618, Annex 56 in Documentary Annexes accompanying this Written Statement.

[163] *Ibid.*

territory and borders of Serbia, which was contrary to the SFRY constitution.[164] Finally, the court stated that Albanians in Kosovo were a nationality (national minority) and, as such, could not use the right to self-determination and proclaim Kosovo to be a federal unit because the right to self-determination belonged exclusively to the nations of Yugoslavia and not to nationalities.[165]

The 1990 Constitution of Serbia

196. A new constitution of Serbia was adopted in 1990[166] after it had been approved in a referendum by 75.76 % of the entire Serbian electorate, including voters in the autonomous provinces Kosovo and Vojvodina. [167]

197. According to the 1990 Constitution of Serbia, the Autonomous Province of Kosovo and Metohija and the Autonomous Province of Vojvodina were territorial autonomies (Article 6). The autonomous provinces had *inter alia* the competence to regulate matters of interest to their citizens in the fields of education, culture, official use of minority languages, public information, health and social protection, child care, environment and urbanism (Article 109, para. 1(3). Other matters could also be brought within the provincial competence by law (*ibid.*, para. 3). Provincial authorities had the power to enforce provincial regulations, and could also enforce Serbian legislation if this authority was delegated to them by the central authorities (Article 109, para. 1(4)).

198. The highest legal act of a province was a statute, which established provincial competences and the organization of the provincial organs (Article 110). Provincial organs comprised an assembly, directly elected by secret vote, a government (executive council) and an administration (Article 111).

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[164] *Ibid.*, p. 619.

[165] *Ibid.*

[166] *Ustav Republike Srbije* [Constitution of the Republic of Serbia], *Službeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 1/90. English translation available at: http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019071.pdf see, also, Annex 57 in Documentary Annexes accompanying this Written Statement.

[167] See *Sluzbeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 35/1990.

IV The Federal Republic of Yugoslavia (Serbia and Montenegro) (1992-1999)

199. During the process of the dissolution of the SFRY, the constituent republics of Serbia and Montenegro created the Federal Republic of Yugoslavia (FRY) on 27 April 1992.[168] Its constitution[169] did not refer to autonomous provinces, but only to the two constituent republics of the FRY. However, throughout the existence of the FRY/Serbia and Montenegro, the 1990 Constitution of Serbia and its provisions dealing with autonomous provinces continued to apply.

200. In 2003, the FRY was renamed the State Union of Serbia and Montenegro.[170] At the time, Kosovo was already administered by the United Nations pursuant to Security Council resolution 1244 (1999). The Constitutional Charter of the State Union specifically stated that Serbia included the autonomous provinces of Vojvodina and Kosovo, but noted that the latter was under international administration.[171] It also provided that if Montenegro were to leave the State Union, international documents pertaining to the FRY, in particular Security Council resolution 1244 (1999), would continue to apply to Serbia (Article 60, para. 4).

V Security Council resolution 1244 (1999-present)

201. In June 1999, Kosovo was placed under international administration pursuant to Security Council resolution 1244 (1999). This international regime is discussed in detail in Chapter 8.

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[168] For a map of the FRY (Serbia and Montenegro), see Appendix 2.

[169] *Ustav Savezne Republike Jugoslavije*, [the Constitution of the Federal Republic of Yugoslavia], *Službeni list Savezne Republike Jugoslavije* [Official Gazette of the FRY], No. 1/1992 (hereinafter: FRY Constitution).

[170] See Chapter I, Section E.

[171] Preamble, reproduced in Annex 58 in Documentary Annexes accompanying this Written Statement.

VI The 2006 Constitution of Serbia

202. In 2006, Serbia adopted a new constitution in a referendum.[172] It was not possible to organize a referendum vote for this constitution in the entire territory of Kosovo. The 2006 Constitution of Serbia reaffirms that Kosovo is part of Serbia, and has a status of substantial autonomy (Preamble). Further, it determines that Kosovo and Vojvodina constitute autonomous provinces, and leaves open the possibility to create new autonomous provinces (Article 182).

203. The 2006 Constitution of Serbia regulates the status and competences of Vojvodina, but not of Kosovo (Articles 182-187). The latter's status is defined as one of "substantial autonomy", the precise content of which will be regulated by a special constitutional law (Article 182, para. 2). Since the 2006 Constitution of Serbia was adopted at the time of negotiations on the status of Kosovo, the precise content of "substantial autonomy" is to be determined as a part of a negotiated settlement for Kosovo.

B. Standards of Minority Protection Applicable to Kosovo

I. Minority protection in the SFRY

(1) The 1974 constitutions

204. The 1974 Federal Constitution contained a list of fundamental human rights (Chapter III), as well as specific guarantees of the rights of persons belonging to nationalities (national minorities) which appeared to be above the international standards of minority protection applicable at the time.[173] The minority rights in the

[172] *Ustav Republike Srbije* [Constitution of the Republic of Serbia], *Službeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 98/2006 (hereinafter: 2006 Serbian Constitution). English translation available at http://www.parlament.sr.gov.yu/content/eng/akta/ustav/ustav_1.asp, Annex 59 in Documentary Annexes accompanying this Written Statement.

[173] See Dimitrijević, *op. cit.*, pp. 427.

institutional field were also at a very high level. According to Vojin Dimitrijević, who was Vice-Chairman of the UN Human Rights Committee at the time,

> "In the institutional field, nationalities have real possibilities of securing the preservation of their language and culture. There are television and radio stations that operate only in Albanian (Priština), Hungarian (Novi Sad) and Italian (Koper-Capodistria). Other nationalities have guaranteed time on television and radio stations for news and other broadcasts. Education in the languages of nationalities is guaranteed in ordinary and secondary schools financed by the States. In Priština, there is one of the largest universities in Yugoslavia which is also the largest Albanian university in existence. In the Priština and Novi Sad universities, lectures are offered simultaneously and separately in Serbo-Croat, Albanian and Hungarian, even though the vast majority of students in Priština are Albanian. Both autonomous provinces have their own academies of arts and sciences, with the majority of members of the Kosovo Academy being Albanian. "[174]

205. The SFRY was a party to most of the major human rights treaties concluded under UN auspices, including the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture (CAT) and the Convention on the Rights of the Child (CRC).[175]

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[174] *Ibid.*, p. 430.

[175] The status of ratifications of each of these treaties, including references to the specific instruments of ratification deposited by the former Yugoslavia, is available in the *United Nations Treaty Collection*, Chapter IV: Human Rights, at: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

206. Despite these extensive guarantees, however, there were numerous violations of individual human rights in practice, even in the late 1980s which were marked by the rise of political pluralism in the SFRY. According to Vojin Dimitrijević:

> "The conclusion can be drawn that the general human rights situation in Yugoslavia has been unsatisfactory, and that this has affected all citizens in Yugoslavia, not only members of national minorities. For example, most "dissidents" who have been persecuted because of their public or private utterances in violation of the laws pertaining to freedom of opinion and expression have belonged to Yugoslav nations, but because of the large numbers of their members this was not perceived as a measure directed against any particular nation. When the victim was an Albanian, a connotation of discrimination became inevitable.
>
> The course of events in Kosovo has unfortunately created an impression of discrimination at home and abroad, and this is why most reasonable people in Yugoslavia believe that the first step toward the solution of the Kosovo problem (which affects both Albanians and non-Albanians) should begin with the securing, strengthening, and the observation of human rights of all individuals in Yugoslavia."[176]

(2) The 1990 Constitution of Serbia

207. The 1990 Constitution of Serbia set out a list of generally applicable human rights and civil liberties in Articles 11 to 50. Additionally, Article 8(2) of the Constitution provided for the official use of the languages of national minorities, in the parts of Serbia where national minorities live. Article 32(4) protected the right of national minorities to education in their own language, while Article 49 guaranteed the right of every citizen to express his or her national affiliation and culture, and the freedom to use his or her language and alphabet.

[176] See Dimitrijević, *op. cit.*, p. 433.

II Minority rights guarantees in the FRY (Serbia and Montenegro)

(1) The FRY Constitution

208. A significant portion of the 1992 FRY Constitution was dedicated to the protection of human rights generally, and of minority rights specifically. Article 10 of the Constitution provided that the FRY 'recognize[d] and guarantee[d] the freedoms and rights of man and citizen that were recognized by international law.' Article 11 further provided that the FRY

> "shall recognize and guarantee the rights of national minorities to preserve, foster and express their ethnic, cultural, linguistic and other peculiarities, as well as to use their national symbols, in accordance with international law."

209. Articles 19 to 68 of the Constitution enumerated and protected a wide variety of civil, political and socio-economic rights. Four of these Articles were expressly dedicated to the rights of national or ethnic minorities. Article 45 protected the freedom of expression of national sentiments and culture, and the use of a minority's mother tongue and script. Article 46 guaranteed members of national minorities the right to education, as well as the right to have information media in their own language. Article 47 gave members of national minorities the right to establish educational and cultural organizations or associations. Finally, Article 48 guaranteed the right of members of national minorities to establish and foster unhindered relations with co-nationals within the FRY and outside its borders with co-nationals in other states, and to take part in international non-governmental organizations.

(2) International human rights commitments undertaken by the FRY (Serbia and Montenegro)

210. As is well known, the FRY had initially claimed continuity with the SFRY, and thus considered itself bound by the SFRY's treaties. After it renounced its claim

to continuity, in 2001 the FRY filed notifications of succession and accession to all of the human rights treaties to which the SFRY was a party.[177] It also assumed additional obligations. It became a party to the Second Optional Protocol to the ICCPR abolishing the death penalty.[178] It recognized the jurisdiction of all competent United Nations treaty bodies to examine individual petitions, including the Human Rights Committee (by accepting the First Optional Protocol to the ICCPR),[179] the Committee against Torture (by accepting both the Committee's jurisdiction under the Convention Against Torture, and by ratifying the Optional Protocol to it),[180] the Committee on the Elimination of Discrimination against Women,[181] and the Committee on the Elimination of Racial Discrimination.[182]

211. In 2003, Serbia and Montenegro became a member of the Council of Europe,[183] and in 2004 a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), together with its additional protocols.[184] Since 2001, it was a party to the Framework Convention for the Protection of the Rights and Freedoms of National Minorities and the European Charter for Regional or Minority Languages.[185] The FRY also signed bilateral

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[177] The FRY lodged notifications of succession or accession to the multilateral treaties deposited with the UN Secretary-General on 12 March 2001. See, e.g., the Secretary-General's communication regarding the ICCPR, C.N.233.2001.TREATIES-4, 23 March 2001, available at: http://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Related%20Documents/CN.233.2001-Eng.pdf and the same communication regarding the ICESCR, C.N.175.2001.TREATIES-1, 16 March 2001, available at: http://treaties.un.org/doc/Treaties/2002/01/20020103%2009-57%20PM/Related%20Documents/CN.175.2001-Eng.pdf.

[178] The FRY acceded to the Protocol on 6 September of 2001. Status of ratifications available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=137&chapter=4&lang=en.

[179] Status of ratifications available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=323&chapter=4&lang=en.

[180] Serbia acceded to the Optional Protocol to the CAT on 26 September 2006. Status of ratifications available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en.

[181] Serbia and Montenegro acceded to the Optional Protocol to the CEDAW on 31 July 2003. Status of ratifications available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=128&chapter=4&lang=en.

[182] The FRY accepted the competence of the CERD Committee upon succession. Status of ratifications available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en.

[183] Serbia and Montenegro acceded to the Statute of the Council of Europe on 3 April 2003. Status of ratifications available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=001&CM=8&DF=2/20/2009&CL=ENG.

[184] Serbia and Montenegro ratified the ECHR on 3 March 2004. Status of ratifications available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=2/20/2009&CL=ENG.

[185] The FRY acceded to the Framework Convention for the Protection of the Rights and Freedoms of Nations Minorities on 11 May 2001 and ratified the European Charter for Regional or Minority Languages on 5 September 2001, see http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp.

agreements on minority protection with four neighbouring countries, Romania, Hungary, Croatia and Macedonia.[186] As a participating state of the Organization for Security and Co-operation in Europe (hereinafter: "OSCE"), the FRY undertook to comply with the OSCE's standards on minority rights.

(3) The 1990 Constitution of Serbia

212. The 1990 Constitution of Serbia continued to be in force during the FRY/Serbia and Montenegro. The minority rights provisions of the 1990 Constitution of Serbia are described in paragraph 207 above.

(4) Law on the Protection of Rights and Freedoms of National Minorities 2002

213. The Law on the Protection of Rights and Freedoms of National Minorities[187] was adopted at the federal level of the FRY, and provided a framework for the protection of national minorities even after the FRY's transformation into Serbia and Montenegro. It elaborated in detail the constitutional safeguards outlined above. Its most significant institutional mechanism was the establishment of a Federal Council for minorities, as well as national councils for each national minority. The adoption of the Law was welcomed *inter alia* by the UN Human Rights Committee.[188]

(5) Constitutional Charter of Serbia and Montenegro and the Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro 2004

214. The Constitutional Charter transformed the FRY into the State Union of Serbia and Montenegro. The Charter on Human and Minority Rights and Civil Liberties was an integral part of the Constitutional Charter of the State Union. Besides a considerable catalogue of generally applicable human rights and freedoms, it

[186] See *Službeni list Srbije i Crne Gore* [Official Gazette of Serbia and Montenegro], Nos. 14/2004, 3/2005 & No. 6/2005.

[187] Zakon o zaštiti prava i sloboda nacionalnih manjina [Law on the Protection of Rights and Freedoms of National Minorities], *Službeni list Savezne Republike Jugoslavije* [Official Gazette of the FRY], No. 11/2002. English translation available at: http://www.osce.org/documents/fry/2002/03/124_en.pdf.

[188] U.N. Doc. CCPR/CO/81/SEMO (12 August 2004), para. 5.

guaranteed numerous individual and collective rights and freedoms of national minorities.[189]

215. International human rights treaties to which Serbia and Montenegro was a party were directly applicable in domestic law (Article 7), while courts were obliged to interpret the Charter in accordance with international human rights jurisprudence (Article 10).

216. The Charter was highly commended by international institutions. For example, its adoption was particularly welcomed by the UN Human Rights Committee,[190] while the European Commission for Democracy through Law (Venice Commission) deemed it "excellent", and paid "tribute to its high quality."[191]

III Minority rights guarantees currently in force in the Republic of Serbia

(1) The 2006 Constitution of Serbia

217. The 2006 Constitution of Serbia, which is currently in force, has adopted most of the provisions of the Charter on Human and Minority Rights of Serbia and Montenegro contained in its catalogue of human rights and civil liberties in Articles 18 to 81. Article 75 of the Constitution contains a general clause on the protection of individual and collective rights of national minorities, and prescribes the creation of a national council elected by members of each minority, through which they may exercise their right to self-governance in the fields of culture, education, media and the official use of their spoken and script . Articles 76 to 81 of the Constitution in particular prohibit discrimination against and the forcible assimilation of national minorities, and protect their identity rights, their right to freely associate with other individuals belonging to the same group, and enshrine

[189] *Povelja o ljudskim i manjinskim pravima i gradjanskim slobodama*, [The Charter on Human and Minority Rights and Civil Liberties], *Sluzbeni list Srbije i Crne Gore,* [Official Gazette of Serbia and Montenegro], No. 1/2003, Arts. 48-56.

[190] U.N. Doc. CCPR/CO/81/SEMO (12 August 2004), para. 4.

[191] Venice Commission, Comments on the Draft Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro, Opinion No. 234/2003, CDL (2003) 10 fin, 2 April 2003, available at: http://www.venice.coe.int/docs/2003/CDL(2003)010fin-e.asp, paras. 2 and 3.

the duty of the State to promote a spirit of tolerance. The Venice Commission has again commended the guarantees of human rights in the 2006 Constitution of Serbia.[192]

(2) Serbia's international commitments regarding human and minority rights

218. As the continuator State of the State Union of Serbia and Montenegro, Serbia remains a party to all treaties on human and minority rights to which the State Union of Serbia and Montenegro was a party.[193] When it comes to minority rights in particular, it is a party to the two major Council of Europe treaties on the matter, the Framework Convention for the Protection of the Rights and Freedoms of National Minorities and the European Charter for Regional or Minority Languages.[194] Serbia has bilateral agreements on minority protection with four neighbouring countries: Romania, Hungary, Croatia and Macedonia.[195] As a participating State of the Organization for Security and Co-operation in Europe (OSCE), Serbia has undertaken to comply with the OSCE's standards on minority rights.

219. The progress that Serbia has made since 2001 in improving its compliance with international standards for the protection of human and minority rights has generally been evaluated positively by international monitoring bodies.[196] In regard to minority rights in particular, Serbia was commended for taking "decisive steps to protect national minorities."[197] The principal issues of concern raised by international bodies were mainly in relation to some of the practical difficulties in implementing binding legal standards, especially in relation to the economic and

[192] Venice Commission, Comments on the Constitution of Serbia, Opinion No. 405/2006, CDL-AD (2007) 004, 19 March 2007, available at: http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp, para. 105.

[193] See *supra* paras. 210-211. On the continuity between Serbia and the FRY / Serbia and Montenegro, see Chapter 1, Section E.

[194] See *supra* note 185.

[195] See *supra* para. 211.

[196] See UN Doc. CCPR/CO/81/SEMO (12 August 2004); UN Doc. E/C.12/1/Add.108 (23 June 2005); UN Doc. CRC/C/SRB/CO/1 (20 June 2008).

[197] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Serbia and Montenegro, ACFC/INF/OP/I (2004) 002 (2004), p. 3.

social plight of the Roma minority, a problem that is not only confined to Serbia, but is endemic to the whole of Eastern Europe.[198]

220. The human and minority rights situation in Serbia outside of the province of Kosovo during the past eight years compares favourably to that in Kosovo administered by UNMIK and the Provisional Institutions of Self-Government. Thus, for example, in 2006 the Human Rights Committee

> "note[d] with concern that members of minority communities have only limited access to the conduct of public affairs [in Kosovo], as well as to public service, and that discrimination against minorities, including the Roma, is widespread in Kosovo."[199]

The Advisory Committee on the Framework Convention for the Protection of National Minorities likewise noted that

> "[t]he implementation of practically all principles of the Framework Convention is made extremely difficult by the fact that inter-ethnic violence has seriously eroded trust between communities"

and that

> "Serbs outside their compact areas of settlement see their basic rights, including freedom of movement and freedom of expression, threatened, and discrimination and intolerance towards persons belonging to minority communities continue."[200]

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[198] See, e.g., European Court of Human Rights, *D.H. and others v. the Czech Republic*, App. No. 57325/00, Judgment, 13 November 2007; UN Doc. CERD/C/CZE/CO/7 (11 April 2007), UN Doc. CERD/C/65/CO/7 (10 December 2004), UN Doc. CERD/C/60/CO/4 (20 March 2002).

[199] U.N. Doc. CCPR/C/UNK/CO/1 (14 August 2006), para. 21.

[200] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Serbia and Montenegro, ACFC/INF/OP/I (2004) 002 (2004).

C. Kosovo and the Kosovo Albanians 1981-1991

I 1981-1986

221. The constitutional changes enacted in 1974, described above in Section A, provided Kosovo with a broad autonomy.[201] However, the situation in practice was described to be as follows:

> "The new constitution emphasized equalities and equal rights and duties. These included the right to the development and free expression of the national language, culture and history, and its recognition precipitated two trends: a spate of translation, normally from Serbo-Croat, and demand by employers for knowledge of both Albanian and Serbo-Croat in workplaces, even when this was not actually required. The matter was aggravated when this trend received official sanction from the League of Communists of Kosovo and the educational and cultural authorities including Pristina University. The new policy placed the Serb and Montenegro nationality group as a whole at a great disadvantage, since only a few from this group spoke both Serbo Croat and Albanian. Many members of the Serb-Montenegrin nationality group began sending their children to schools outside the province because of alleged nationalistic pressure and the schools` new language equality rules. 1974 constitution caused "positive discrimination" in favour of the Albanians in Kosovo: bilingualism became a condition for employment in public services, four fifths of available posts were reserved for the Albanians on a parity bases and national quotas were strictly applied when nomination were made for public functions. Thus began the virtual Albanisation of public life in Kosovo"[202]

[201] See *supra* paras. 173-187
[202] See Vickers, *op. cit.*, pp. 179-180.

222. This further aggravated the situation of many Serbs leaving Kosovo that had been occurring since 1960. The situation was described as follows:

> "At least 50,000 Serbs left during the 1970s. A similar number of Albanians returned from other parts of Yugoslavia for the longer period of 1966-1986. These goings and comings, plus the high Albanian birth rate, pushed the officially recorded Kosovar majority in the province to 74 percent and 78 percent by 1978. By then, the Kosovar share of employment in social enterprises was even higher."[203]

223. The situation in Kosovo deteriorated with the Albanian uprising in 1981. The uprising began as a student riot and continued with rallies in which the main demands included calls for a "Kosovo Republic" and "state unity with Albania." The scope and intensity of the protests led to the proclamation of a state of emergency by the SFRY Presidency. The clashes between demonstrators and police led to 11 people being killed, including 2 police officers, and 57 people being seriously injured.[204]

224. This crisis led to a further exodus of Serbs and Montenegrins from Kosovo:

> "The intensification of ethnic tension between Slavs and Albanians as a result of the 1981 demonstrations led to a new exodus of Serbs and Montenegrins from Kosovo. It was estimated, for example, that between March and October approximately 10,000 people left the province, and although the authorities condemned the trend and its cause, reports of continued Serbian and Montenegrin emigration persisted throughout the 1980s." [205]

225. The political crisis went hand in hand with ethnically motivated violence against Serbs:

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[203] See Lampe, *op.cit.*, pp. 303-304.
[204] See Tim Judah, *War and Revenge* (2002), p. 40.
[205] See Lenard J Cohen, *Serpent in the Bosom: The Rise and Fall of Slobodan Milosevic* (2000), p. 31.

> "It was true that Serbs were leaving Kosovo and that especially after 1981, there were frequent expression of hostility towards them. Some Serbian churches and graveyards were vandalized and many Serbs did indeed feel pressure to leave."[206]

226. Warren Zimmermann, the last US Ambassador before the dissolution of the SFRY, wrote in his book:

> "I had been warned by American journalists not to believe anything I heard in Kosovo, so I decided to give Rugova a truth test. Referring to the Serbian abuses against Albanians, no aspect of which was ever conceded by Serbian officials, I asked him how Albanians had treated Serbs when they held the upper hand before the Milosevic period. "Unfortunately", he answered without hesitation, "there were many crimes committed against Serbs"[207]

227. There were many official reactions and attempts to find a solution to the escalating Kosovo crisis in the early 1980s.

228. The 13th Congress of the League of Communist of Yugoslavia held in 1986 addressed the issue. It is obvious from the Congress documents that the situation in Kosovo had been deteriorating prior to 1986. The official Congress statement concluded that:

> "The fleeing of Serbs and Montenegrins from Kosovo under the pressure is directed to the gradual achievement of the enemy strategic objectives articulated in the requests for the 'ethnical clean Kosovo', 'Kosovo Republic' and 'the Great Albania'. It is necessary to analyze why previously taken measures and activities for neutralization of the reasons for the eviction did not accomplish the desired results ... That is, why the Communist Party must

[206] See Judah, *op. cit.*, p. 43.

[207] See Warren Zimmermann, *Origins of a Catastrophe: Yugoslavia and Its Destroyers — America's Last Ambassador Tells What Happened and Why* (1996), p. 80.

mobilize all social forces in Kosovo, Serbia and in entire state to prevent any eviction under pressure".[208]

229. In August 1988 the SFRY Assembly adopted its "Conclusions" on the security conditions in Kosovo, which stated that:

> "The political and security situation in Kosovo is very complex and difficult. Serbs and Montenegrins are still leaving Kosovo, and one of the main reasons for that is the pressure made by Albanian separatists".[209]

230. Since the situation had not improved substantially since the 1981 uprising, between 1988 and 1990 the SFRY Assembly adopted various measures to prevent the exodus of Serbs and Montenegrins from Kosovo and for the return of those who had left.[210] The representatives of the Kosovo Albanians took part in the adoption of these measures.

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[208] *13. Kongres SKJ – Dokumenti* (25-28.jun 1986), (Izdavacki centar Komunist, Beograd 1986), p. 191 [XIII Congress of the Yugoslav Communist Party – Documents (June 25-June 28, 1986), Publishing Center Communist, 1986, p.191].

[209] *Zakljucci Savezne Skupštine*, [Federal Assembly's Conclusions], *Službeni glasnik SFRJ*, [SFRY Official Gazette], No. 46/88, Chairman of the Federal Assembly`s Chamber of Republics and Provinces (Vece Republika I Pokrajina) at the time was Abaz Kabazi an ethnic Albanian from Kosovo.

[210] *Jugoslovenski program mera i aktivnosti za zaustavljanje iseljavanja Srba i Crnogoraca s Kosova, brzi povratak onih koji su ga napustili i dolazak svih koji zele da zive i rade na Kosovu* [Yugoslav Program of measures and activities for stopping Serbs and Montenegrins to leave Kosovo, faster Return of those who left Kosovo and settlement of all who are willing to live and work in Kosovo], *Sluzbeni list SFRJ* [Official Gazette of the SFRY], No. 2/1988; *Zakon o programu pribavljanja stanova za potrebe kadrova i povratak iseljenih lica u SAP Kosovo u periodu od 1989. do 1993. godine* [The Law on Program of securing ammount needed for the premises for returnees in Kosovo in the period from 1989 to 1993], *Sluzbeni list SFRJ*, [SFRY Official Gazette], No. 83/89; *Zakon o programu pribavljanja stanova za potrebe kadrova i povratak iseljenih lica u SAP Kosovo u periodu od 1989. do 1993.godine* [The Law on securing the premises for the needs of the human resources and returnees to Kosovo in the period from 1989 to 1993], *Sluzbeni list SFRJ*, [SFRY Official Gazette], No. 9/90; *Program pribavljanja stanova za potrebe kadrova i povretak iseljenih lica u SAP Kosovo u periodu od 1989. do 1990.godine* [The Program on securing the premises for the needs of the human resources and returnees to Kosovo in the period from 1989 to 1993], *Sluzbeni list SFRJ*, [SFRY Official Gazette], No. 9/90.

231. The SFRY Assembly's acts were followed by similar acts of the Serbian Assembly, which adopted "Program for realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo" in March 1990.[211]

II The 1989 amendments to the 1974 Serbian Constitution

232. The late 1980s were marked by the rise of nationalism throughout the SFRY. These years also marked a period when all republics increasingly perceived themselves as sovereign entities and signs of dissolution of the SFRY started to be visible.

233. In Serbia, Slobodan Milosevic became the new leader of the League of Communist of Serbia in 1987 and immediately embarked on establishing his full control over Serbia's State institutions, including in the autonomous provinces.

234. As discussed above,[212] the SFRY constitution was amended in 1988. These amendments were followed by amendments to the constitutions of the republics.

235. In early 1989, the process of amending the Constitution of Serbia also began. On 24 February 1989, the Serbian Assembly unanimously adopted a proposal for amendments to the 1974 Serbian Constitution, with no representatives from Kosovo voting against the proposal.[213] According to the procedure, the proposal had to then be accepted by the assemblies of autonomous provinces, following which it would be submitted for adoption before the Serbian Assembly.

236. The sitting of the Kosovo Assembly during which the proposed amendments to the Constitution of Serbia were to be discussed was scheduled for March 1989. The period preceding this sitting was marked by widespread protests against the constitutional amendments in Kosovo.[214]

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[211] *Program za ostvarivanje mira, slobode, ravnopravnosti, demokratije i prosperiteta SAP Kosova* [Program for Realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo], *Sluzbeni glasnik Rebublike Srbije*, [Official Gazette of the Republic of Serbia], No. 15/90.

[212] *Supra* para. 188

[213] Marc Weller, *Crisis in Kosovo 1989-1999* (1999), p. 47.

[214] See Judah, *op. cit.*, pp. 55-56.

237. On 27 February 1989, the SFRY Presidency, the collective head of state of the SFRY, proclaimed a state of emergency in Kosovo.[215] This decision was followed by imposition of the mandatory working duties in some industry branches in Kosovo. These measures were supported by the SFRY Assembly.[216]

238. On 22 March 1989, a meeting of the SFRY Presidency took place in Belgrade, with all its members present: The President of the SFRY Presidency, Mr. Raif Dizdarevic (Bosnia and Herzegovina), Mr. Nikola Ljubicic (Serbia), Mr. Radovan Vlajkovic (Vojvodina), Mr. Lazar Mojsov (Macedonija), Mr. Josip Vrhovec (Croatia), Mr. Stane Dolanc (Slovenia), Mr. Sinan Hasani (Kosovo), Mr. Branko Kostic (Montenegro), and Mr. Stipe Suvar (the representative of the League of Communists of Yugoslavia). Other high federal officials were present as well, including the federal prime minister, Mr. Ante Markovic, and federal ministers of the interior, defence and the foreign affairs. The Presidency concluded:

> "[The] SFRY Presidency assessed that all the necessary political conditions were being created so that the Assembly of the Socialist Autonomous Province of Kosovo could decide, on 23 March, under the normal conditions and within the regular procedure, on giving its consent to the proposed amendments to the Constitution of SR Serbia. In that context, the Presidency underlined the need to have the competent state organs take all the necessary measures to provide the conditions, also in the security area, conducive to the normal work of the Assembly of the SAP of Kosovo. During the discussion it was assessed that reactions to the decision of the Assembly of the SAP Kosovo could be expected irrespective of the nature of that decision, which therefore required all the organs to be fully alert."[217]

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[215] See Vickers, *op. cit.*, p. 236; Batakovic, *op. cit.*, p. 73.

[216] *Zakljucci Savezne Skupstine SFRJ 3. mart 1989.godine*, [SFRY Assembly, Conclusions of 3 March 1989], *Sluzbeni glasnik SFRJ*, [SFRY Official Gazette], No.13/89, p. 321.

[217] *Zapisnik sa 253. sednice Predsednistva SFRJ odrzane 22.marta 1989*, [Minutes of the 253rd SFRY Presidency session of 22 March 1989], pp. 2-3, Annex 60 in Documentary Annexes accompanying this Written Statement.

239. During the discussion, the member of the Presidency representing Kosovo, Mr. Sinan Hasani, an ethnic Albanian, stated that constitutional changes would be accepted in the Kosovo Assembly since:

> "all structures of the province have voted for those changes, as well as all social, political and state structures, while the identical standing is within the municipalities."[218]

240. On the same day that the SFRY Presidency session was held, the Kosovo government (executive council) approved the constitutional amendments. On 23 March 1989, the Kosovo Provincial Assembly accepted the constitutional changes with 177 votes in favour and 10 votes against.[219]

241. That same day, riots broke out in Kosovo, and 22 protesters and 2 police officers were killed.[220] It should be noted that the two murdered policemen were an Albanian and a Serb.

242. At the meeting of the SFRY Presidency held on 24 March 1989, a further "Conclusion" on the situation in Kosovo was adopted:

> "[The] SFRY Presidency noted that the events from 23 March 1989 – demonstrations in Urosevac and among students in Pristina, with violent behaviour and brutal disruption of public peace and order, and assaults against the security authorities - were an attempt at direct countering the legitimate decision by the Assembly of the

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[218] *Stenografske beleske sa 253. sednice od 22.marta 1989*, [Stenographic notes of the 253rd SFRY Presidency session of 22 March 1989], p. 35, reprinted in Annex 60 in Documentary Annexes accompanying this Written Statement .

[219] *Odluka o proglasenju Amandmana IX do XLIX na Ustav Socijalisticke Republike Srbije*, [Decision on the promulgation of Amendments IX-XLIX], *Sluzbeni glasnik Srbije*, [Official Gazette], No. 11/89, and Weller, *op. cit.*, p. 47.

[220] See Judah, *op. cit.*, p. 55.

SAP of Kosovo, and were detrimental to the situation in the Province and its status".[221]

243. On March 28 1989, the Serbian Assembly proclaimed amendments to the Serbian Constitution.[222]

244. In July 1989, after tensions in Kosovo subsided, the SFRY Presidency adopted a Decision that terminated the Decision of February 1989 on the establishment of the emergency management of certain industry branches in Kosovo.[223]

III The 1990 escalation of the crisis and the proclamation of a "Republic of Kosovo"

245. Violent demonstrations resumed in Kosovo in early 1990. Demonstrators demanded that Kosovo be granted the status of a republic. The Federal Executive Council (Savezno izvrsno vece), headed by Mr. Ante Markovic from Croatia, declared on 29 January 1990 that:

> "The latest developments in the SAP of Kosovo – continuation of separatist activity evidenced in the trend of separation of the SAP of Kosovo from the SR of Serbia and the Socialist Federal Republic of Yugoslavia - in the opinion of the Federal Executive Council, pose the most direct threat to the integrity of the country, freedom and the rights of citizens, as well as to the implementation of the Programme of reform."[224]

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[221] *Zapisnik sa 245. sednice Predsednistva SFRJ odrzane 24.marta 1989*, [Minutes of the 245th SFRY Presidency session of 24 March 1989], p. 2, Annex 61 in Documentary Annexes accompanying this Written Statement.

[222] *Amandmani IX do XLIX na Ustav Socijalističke Republike Srbije* [Amendments IX to XLIX to the Constitution of the Socialist Republic of Serbia], *Službeni glasnik Socijalističke Republike Srbije* [Official Gazette of the Socialist Republic of Serbia], No. 11/1989, Annex 55 in Documentary Annexes accompanying this Written Statement.

[223] *Odluka Predsednistva SFRJ O. br. 51 od 12. jula 1989. godine* [Decision of the SFRY Presidency O. No. 51 of 12 July 1989]. The Decision was signed by the President of the Presidency and member from Slovenia, Mr. Janez Drnovsek], Annex 62 in Documentary Annexes accompanying this Written Statement.

[224] *Ocene SIV-a o aktuelnoj politicko-bezbednosnoj situaciji u zemlji od 29. januara 1990. godine* [The Federal Executive Council evaluations in relation to the temporary political situation and security issues in

The Federal Executive Council further demanded that all rallies and strikes, violence and other threats to personal security of citizens should be terminated immediately. This would, in the opinion of the Federal Executive Council, create conditions for political discussions.

246. During the session of the SFRY Presidency held on 29 January 1990, with all members present, the discussion of the political and security situation in Kosovo revealed a broad consensus on the seriousness of the outbreak of violence. The Presidency decided that the territorial integrity and borders of Kosovo, as well as SFRY's constitutional order, were under threat and had to be protected by all means. On 31 January, the SFRY Presidency adopted the decision on the use of armed forces in Kosovo.[225] The Decision was signed by the President of the SFRY Presidency Dr Janez Drnovsek, who was a member of the Presidency representing Slovenia.

247. After the decline of tensions in March, the SFRY Presidency terminated the state of emergency on 18 April 1990.[226]

248. This decrease of tensions lasted only until May 1990, when all ethnic Albanians resigned from the Kosovo provincial government in protest at what they called Serbian interference.[227]

249. The Serbian Assembly, on 26 June 1990, adopted the Law on the Actions of the Republic Agencies in the Special Circumstances[228] and on the same occasion, the

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the country, 29 January 1990], p. 111, Annex 63 in Documentary Annexes accompanying this Written Statement.

[225] *Odluka Predsednistva SFRJ O. br. 1 od 31. januara 1990. godine* [Decision of the SFRY Presidency O. No. 1 of 31 January 1990], Annex 64 in Documentary Annexes accompanying this Written Statement.

[226] *Odluka Predsednistva SFRJ br. 13 od 18. aprila 1990. godine* [Decision of the SFRY Presidency O. No. 13 of 18 April 1990], Annex 65 in Documentary Annexes accompanying this Written Statement.

[227] See Alan Day, *Eastern Europe and the Commonwealth of Independent States* (1999), p. 946; see, also, International Crisis Group, *Kosovo Spring Report* (1998), p. 10 available at: http://www.crisisgroup.org/home/index.cfm?id=1601&l=1.

[228] *Zakon o postupanju republickih organa u posebnim okolnostima* [Law on the Actions of the Republic Agencies in the Special Circumstances], *Sluzbeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 30/90.

Decision about the existence of Special Circumstances on the Territory of Kosovo.[229]

250. On 3 July 1990, 111 members of the Kosovo Provincial Assembly (all of them Kosovo Albanians), issued a "Constitutional Declaration on Kosovo as a self-standing and equal federal unit within the federation (confederation) Yugoslavia as an equal subject with other units in the federation (confederation)". This "declaration" was subsequently annulled in its entirety by the Constitutional Court of Yugoslavia, as being contrary to the federal constitution.[230]

251. In response to this unconstitutional assumption of powers that the provincial bodies in Kosovo did not possess, the Serbian Assembly adopted the Law on Termination of the Kosovo Provincial Assembly activities and the activities of the Executive Council of Kosovo on 5 July 1990.[231]

252. Following these events and the general situation of unrest in Kosovo, that endangered the security and economy of the region, the Serbian Assembly adopted the Law on Labour Relations under Special Circumstances on 26 July 1990.[232]

253. These measures led to the replacement of the leadership in State institutions and State-owned companies, including the dismissal of many Albanians. Human Rights Watch described the situation as follows:

> "Since the Serbian government took direct control of Kosovo's administration in 1990, thousands of ethnic Albanian workers in government and public enterprises have been dismissed from their

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[229] *Odluka o postojanju posebnih okolnosti na teritoriji Kosova i Metohije* [The Decision about the existence of Special Circumstances on the Territory of the SAP Kosovo and Metohija], *Sluzbeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 30/90.

[230] See *supra* paras. 194-195.

[231] *Zakon o prestanku rada Skupstine SAP Kosova i pokrajinskog Izvrsnog veca* [The Law on Termination of the SAP Kosovo Assembly activities and the activities of the Executive Council of Kosovo], *Sluzbeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 33/1990.

[232] *Zakon o radnim odnosima u posebnim okolnostima* [Law on Labour Relations under Special Circumstances], *Sluzbeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], No. 40/90.

> jobs because their loyalty to the Serbian government or their professional competence was questioned by the Serbian authorities. Others have been dismissed because they refused to recognize Belgrade's authority or to accept the imposition of 'special measures' in Kosovo. Other ethnic Albanians have been dismissed due to an alleged 'surplus of labour' in a given establishment or because an employee made an unfavourable comment to the press. Many Albanians dismissed from their jobs were replaced by Serbs or Montenegrins.
>
> "On September 3, 1990, ethnic Albanians participated in a general strike to protest the imposition of 'special measures' in Kosovo. Many participants were fired from their jobs. Those private proprietors who closed their shops in support of the strike were fined and some were not allowed to re-open their business for one year. Other workers faced disciplinary measures for having taken part in the demonstration (e.g., a temporary cut in pay)."[233]

254. Subsequently, former Albanian delegates from the Kosovo Provincial Assembly, at a secret meeting held in the village of Kacanik on 7 September 1990, adopted a "Constitution" for the so-called "Republic of Kosovo". At the time, they were advocating for Kosovo to be the seventh Yugoslav republic, and not an independent State.

255. On 28 September 1990, the Serbian Assembly promulgated a new Constitution of Serbia.[234]

256. In October 1990, the SFRY Presidency discussed again the political and security situation in Kosovo, and concluded that it was difficult and complex. It was emphasised that the Presidency was determined to fight against those who

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[233] Human Rights Watch , *Human Rights Abuses in Kosovo 1990-1992* (October 1992), p. 21, available at: http://www.hrw.org/legacy/reports/1992/yugoslavia/

[234] For more see *supra* paras. 196-198.

proclaimed a "Republic of Kosovo", since this proclamation was contrary to the SFRY Constitution and the vital interests of the Albanian nationality.[235]

IV Dissolution of the SFRY and the situation in Kosovo

257. In June 1991, Slovenia and Croatia declared independence from the SFRY. After a brief armed conflict in Slovenia in June 1991 and the retreat of the Federal Army from Slovenia, a much more extensive conflict broke out in Croatia in July 1991. By the Brioni agreement of 7 July 1991, decisions by both Croatia and Slovenia on independence were postponed for three months.

258. During this period, Kosovo Albanians began a broad campaign of boycotting public institutions and began to establish parallel institutions of governance, education and social protection.

259. On 22 September 1991 Albanian former members of the Kosovo Provincial Assembly adopted a "resolution on independence"[236] which was supported by an unofficial vote organized among Kosovo Albanians. According to one observer, the programme of the Kosovo Albanian leadership was

> "[n]o 'special status', no third republic, but only independence! has been the official programme of the LDK [Democratic League of Kosovo – the leading Kosovo Albanian party at the time] since the referendum of 1991 and is by now the sole interpretation of 'Kosova Republika.'"[237]

260. This "resolution of independence" was not recognized by any government, except Albania's. In addition, it was not accepted by any of the international conferences or diplomatic initiatives organized to resolve the conflicts on the territory of the SFRY.

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[235] *Zapisnik sa 77. sednice Predsednistva SFRY odrzane 10. oktobra 1990. godine* [Minutes of the 77th SFRY Presidency session of 10 October 1990], p. 2, Annex 66 in Documentary Annexes accompanying this Written Statement.

[236] Kosovo Assembly, Resolution on Independence (7 September 1999), reprinted in Weller, *op. cit.*, p. 72.

[237] See Stefan Troebst, *Conflict in Kosovo: Failure of prevention* (1998), pp. 23-24, available at: http://ecmi.de/download/working_paper_1.pdf .

261. In order to deal with the conflicts on the territory of the SFRY, the European Community (EC) and its member States convened a peace conference on Yugoslavia, which also included an Arbitration Commission, also known as the "Badinter Commission" after its president.[238]

262. On 16 December 1991, EC first issued Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, and in another declaration, published on same day, the EC invited all former Yugoslav republics to state if they wished to be recognized as independent States.[239] Slovenia, Croatia, Bosnia and Herzegovina and Macedonia submitted their requests. The Kosovo Albanians attempted to submit their request for recognition,[240] but only republics of the SFRY were addressees of the EC invitation for recognition.

263. The requests for recognition submitted by the SFRY republics were assessed by the Arbitration Commission. The request submitted by the Kosovo Albanians was not even considered.

D Kosovo 1992-1997

I Parallel institutions

264. In addition to the policy of boycotting public institutions in the Republic of Serbia, by 1992 the Kosovo Albanians tried to establish parallel institutions of governance, including an office of the so-called "Kosovo president", a "Kosovo assembly", a "Kosovo government", and parallel educational and health care institutions, as well as a separate system of tax collection.

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[238] European Community Declaration, adopted at EPC extraordinary Ministerial Meeting, Brussels, 27 August 1991 (EPC Press Release P.82/91), reprinted in Snezana Trifunovska, *Yugoslavia through documents from its creation to its dissolution* (1994), pp. 333-334.

[239] European Community Declaration on Yugoslavia, 16 December 1991, UN Doc. S/23293 (17 December 1991), Annex 1; EC Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", 16 December 1991, 16 December 1991, UN Doc. S/23293 (17 December 1991), Annex 2.

[240] Letter from Dr. Rugova to Lord Carrington, 22 December 1991, Annex 76 in Documentary Annexes accompanying this Written Statement.

265. This was tolerated by the Serbian government. According to one observer,

> "The authorities at Belgrade tolerated most of the parallel structures built up by the Kosovo Albanians. Neither did they enforce the collection of taxes nor insist on the recruitment of Albanians for the army. This far-reaching separation of Serbian and Albanian societies and "states" contributed to the low degree of political friction. Sensitive issues, however, remained – the issuing of birth certificates, passports, or drivers' licenses and other legal matter like selling, buying and inheriting of landed property and real estate."[241]

266. It should be noted, however, that in many spheres of social and public life in Kosovo functional relationships between "parallel structures" and public institutions continued to exist. The Kosovo Albanian boycott did not fully extend to the State health care system, nor to other parts of the public sector, such as publicly-owned companies where Kosovo Albanians continued to work throughout the whole period discussed in this section. The Kosovo Albanians, in short, did accept a number of Serbia's state institutions, even if grudgingly.[242]

267. In the field of education, the boycott ensued after the Serbian Assembly adopted uniform curricula for primary and secondary education throughout Serbia in August 1990. Prior to the adoption of these new curricula, in June 1990, all national minorities had been invited to propose their own teaching programs. Whilst representatives of other ethnic groups made proposals, Kosovo Albanians did not.[243] The 1990 curriculum reform precipitated the Kosovo Albanians boycott of public education. Kosovo Albanian educators chose to resign from their posts and to establish a parallel educational system.

268. State authorities attempted to find a solution to the problem of education in Kosovo throughout the period covering 1992 to 1998. For example, both Prime Minister Panic, in 1992, and President Milosevic, in 1996, attempted to find a

[241] See Stefan Troebst, *op. cit.*, pp. 19-20, available at: http://ecmi.de/download/working_paper_1.pdf.
[242] International Crisis Group, *Kosovo Spring Report* (1998), p. 12.
[243] UN Doc. E/CN.4/1994/47 (17 November 1993), p. 30, para. 202.

solution with the assistance of international mediators.[244] Due to an absence of a settlement, tertiary and some secondary education of Kosovo Albanians was organized and funded solely by the so-called "Kosovo government". However, primary and much of secondary education of Kosovo Albanian pupils was substantially funded by the State authorities. Specifically, public State funds covered expenses associated with keeping primary and secondary schools open and running, including employing support staff, paying for operational costs such as electricity etc. Those teachers who refused to follow the new curricula received salaries from the so-called "Kosovo government."

269. As with the boycott of the public education system, the boycott of the public health system by Kosovo Albanians requires further explanation. It is clear that Kosovo Albanian leaders invested considerable resources towards creating and maintaining parallel health institutions, yet at the same time the Kosovo Albanian community continued to use the State public health system throughout the period in question. Similar to education, the State authorities did not simply stop financing the health system in the territory of Kosovo in response to the boycott. Indeed, the number of staff members who were receiving salaries from medical institutions, all of whom were public employees, remained stable between 1989 and 1999 and *en masse* resignations of Kosovo Albanian health care providers did not occur.[245]

270. During the period under consideration (1992-1997), the human rights situation in Kosovo was very serious. There were numerous reports of police harassment, ill-treatment and torture. There were trials against Kosovo Albanians that did not meet fair trial standards. It should be noted, however, that the human rights situation was not much better in the rest of Serbia and the FRY at the relevant time. According to Amnesty International's country report of 1994:

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[244] For more on the 1992 negotiations, see, e.g., CSCE Mission to Kosovo, Sandjak and Vojvodina Interim Report, 17 November 1992, reprinted in Weller, *op.cit.*; for more on the negotiations between 1996 and 1998, see International Crisis Group, *Kosovo Spring Report* (1998), pp. 22-24.

[245] See, generally, International Crisis Group, *op. cit.*, pp. 25-26. See, also, CSCE Mission Kosovo, *Substantial Deduction of Djakovica Hospital*, reprinted in Weller, *op. cit.*, p. 114.

> "[T]here were numerous reports of police ill-treatment and torture. The majority of victims were ethnic Albanians in Kosovo province but they also included Serbian and Montenegrin political opponents of the government. At least three people died following ill-treatment in detention by police. Some 30, and probably more, ethnic Albanians sentenced to prison terms of up to 60 days for non-violent political activity were prisoners of conscience. Over 90 other ethnic Albanians were detained on charges of seeking the secession of Kosovo by violence."[246]

271. In accordance with their policy of boycotting Serbian State institutions, the Kosovo Albanians refused to try to protect their rights through the procedures already in place. According to a report of the mission of the Conference on Security and Cooperation in Europe (hereinafter "CSCE") in November 1992,

> "Our experience confirms that Albanians are reluctant to employ proper grass root tactics with the authorities, often in the mistaken belief that a formal, documented approach would constitute some form of acknowledgement of the legitimacy of the regime."[247]

272. This consequence of the boycott of public institutions merits close attention. Other minorities residing in Serbia, including the Hungarians in Vojvodina, Muslims in Sandzak, and Turks in Kosovo, chose to participate in public institutions and in so doing achieved some success in addressing their demands. These experiences offer evidence that a policy of engagement with public institutions provided an opportunity for improvements in these communities. By choosing to boycott institutions, and thus employ a policy of disengagement, the Kosovo Albanian leadership effectively abandoned means with which to improve the human rights situation.

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[246] Amnesty International Report 1994 Yugoslavia, AI Doc. EUR 01/02/95, available at: http://www.unhcr.org/refworld/country,,AMNESTY,,SRB,,3ae6aa0d4,0.html; See also Amnesty International Report 1995 Yugoslavia, AI Doc. EUR 01/01/96, available at: http://www.unhcr.org/refworld/country,,AMNESTY,,SRB,,3ae6aa1263,0.html.

[247] CSCE Missions to Kosovo, Sandjak and Vojvodina Interim Report, 17 November 1992, reprinted in Weller, *op. cit.*, pp. 108-110.

II Elections

273. Kosovo Albanians persistently boycotted official elections, beginning with the elections held in 1990. This boycott was respected by Kosovo Albanians with respect to elections for all levels of government (federal, republic and local).

274. The Kosovo Albanians held their own elections on 24 May 1991, which the Federal and Republic authorities deemed illegal.[248]

275. Despite the attitude of the Kosovo Albanians, State institutions continued to organize elections in Kosovo in 1989 (elections for the Provincial and Republican Assemblies), in 1990 (Republican Assembly), in 1992 (Federal and Republic Assemblies elections, Presidential elections, and local elections), in 1993 (Republic Assembly election), in 1996 (elections for the Federal Assembly and local elections), and in 1997 (Republican Assembly election and Presidential election).

276. Kosovo Albanians and their political parties could participate at all these elections under the same conditions as all other citizens and political parties in Serbia, but refused to do so. According to the CSCE Mission to Kosovo:

> "The Albanians seem more than ever entrenched in their position to stay apart from the political system now in force in Kosovo. Illustrative hereof is their negative approach to the coming Federal and Republic elections (1992)."[249]

277. Even when the Serbian democratic leaders opposing Milosevic in the elections, invited the Kosovo Albanians to participate, they refused. According to 1992 CSCE Mission report:

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[248] CSCE Report of the Exploratory Mission to Kosovo, Vojvodina and Sandjak, 2-8 August 1992, para. (I) (2), reprinted in Weller, *op. cit.*, pp. 104-106.

[249] CSCE Missions to Kosovo, Sandjak and Vojvodina Interim Report , 17 November 1992, reprinted in Weller, *op. cit.*), pp. 108-110.

"Although crediting some members of the federal government with good intentions, they think little of any government's power to enforce changes in Kosovo. Certain Albanian leaders, one must suspect, would view the elections as being important only to the extent that they move Serbia closer to chaos through a victory for the present Serbian regime and its supporters."[250]

278. Similarly, in relation to participation in the electoral process, the following observation highlights several relevant points:

"Those Kosovars who advocated Albanian participation in the rump Yugoslav elections were dismissed as traitors by the LDK, which excused their non-participation in the December (1992) elections:

> 'The result of the elections in Serbia and Montenegro has confirmed our predictions that Milosevic and Seselj would win and that the Albanian vote would have no influence on the final result since Milosevic would manufacture the votes he needed in the same way as his regime printed as much money as it needed.'

In reality, however, the million Albanian votes could undoubtedly have ousted Milosevic, but as the Kosovar leadership admitted at the time, they did not want him to go. Unless Serbia continued to be labelled as profoundly evil – and they themselves, by virtue of being anti-Serb, as the good guys – they were unlikely to achieve their goals. It would had been a disaster for them if a peace monger like Panic [the FRY prime minister at the time and Milosevic's opponent at the elections] had restored human rights, since this would have left them with nothing but a bare political agenda to change borders".[251]

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[250] *Ibid.*

[251] See Vickers, *op. cit.*, pp. 267-268.

III International involvement in the Kosovo crisis and attempts at dialogue (1992-1997)

279. As mentioned above, the Kosovo Albanian insistence for recognition of the province of Kosovo as an independent State was not even discussed at the peace conference on Yugoslavia convened by the EC in 1991. However they have continued to repeat this same request from the beginning of 1992 onwards. In May 1992, an CSCE fact-finding mission visited the FRY and concluded that:

> "The main problem is the relationship between the overwhelming Albanian population and the existing Serbian administration. The aim of ethnic Albanians, who are refusing any direct contact with the Serbian authorities, is an independent Kosovo. The Federal and Serbian authorities insist that Kosovo must remain an integral part of the Serbian state."[252]

280. In August 1992, there was a new diplomatic attempt to find a solution for the crisis in the former Yugoslavia, known as the London Conference. Representatives of the Kosovo Albanians were not invited to attend.

281. The leaders of the Kosovo Albanians presented a memorandum to the London Conference in which they argued for their participation, but to no avail.[253] In the memorandum, they also reiterated that they were not interested in any kind of autonomy or self-government within Serbia or FRY, but only in full independence:

> "Any measures going beyond the interim protection for the people of Kosovo which might be imposed upon them, such as an enforced

[252] CSCE, Report on Conflict Prevention Centre Fact-finding mission to Kosovo, 5 June 1992, reprinted in Weller, *op. cit.*, p. 102..

[253] Kosovo Albanians Memorandum to the International Conference on Former Yugoslavia, 26 August 1992, reprinted in Weller, *op. cit.*, pp. 86-88.

> merger with the new "Yugoslav" entity on the basis of so-called autonomy, is bound to be rejected by them..."[254]

282. In contrast to the Kosovo Albanians' unconditional request for independence, the conclusions of the London Conference reiterated the basic principles of negotiated settlement for the problems present in the region of the former Yugoslavia. Two principles were of crucial importance for such a solution to the tensions in the region. The first was that a negotiated settlement was needed. The second principle reiterated fundamental rules of international law that were applicable:

> "(viii) the fundamental obligation to respect the independence, sovereignty and territorial integrity of all states in the region; and to respect the inviolability of all frontiers in accordance with the UN Charter, the CSCE Final Act and the Charter of Paris. Rejection of all efforts to acquire territory and change borders by force;"[255]

283. At the end of the London Conference, on 27 August 1992, it was decided that the International Conference on Former Yugoslavia would remain active until a final settlement of the problems in the former Yugoslavia was reached, and that the activities of the Conference would be continued by six Working groups. The Kosovo issue was discussed by a Special Group within one of these six Working groups that addressed ethnic and national communities and minorities.[256]

284. The representatives of the Kosovo Albanians accepted to participate in the Working group on ethnic and national communities and minorities, the Special Group for Kosovo. However in so doing, they nonetheless stuck to their previous position that the Kosovo Albanians were not a national minority.[257]

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[254] *Ibid.*, p. 88.
[255] Statement of Principles, 26 August 1992, reprinted in B.G. Ramcharan (ed.), *The International Conference on Former Yugoslavia* (1997), pp. 33-34.
[256] See Working program of the Conference, 26 August 1992, reprinted in *ibid.*, pp. 34-37..
[257] Kosovo Albanians letter to Geneva Conference, undated, reprinted in Weller, *op. cit.*, p. 90.

285. The work of the Special Group on Kosovo started in September 1992, in Geneva, and subsequent talks took place in Pristina and Belgrade. Due to the fact that the representatives of the Kosovo Albanians remained fixed to their position neither to recognize Serbian State institutions nor the authority of the Government of Serbia in Kosovo, the Special Group tried to focus on areas where progress could be achieved. For those reasons, efforts focused on the fields of education and health care. Unfortunately, even in these fields the representatives of the Kosovo Albanians remained entrenched in their position, and the negotiations quickly reached an impasse.[258]

286. Following a fact-finding mission in August 1992, the CSCE established a Mission of long duration in Kosovo, Vojvodina, and Sanjak in September 1992.[259] The basic objectives of the CSCE mission were to promote dialogue among ethnic communities, to collect information on the infringement of human rights, and to protect minority rights.[260] The CSCE mission established offices in Kosovo and facilitated dialogue between State institutions and the Kosovo Albanians. The work of the Mission ended in July 1993, due to the refusal of the FRY Government to prolong the residence permits of the Mission members. One of the reasons for this decision was, *inter alia*, the fact that after July 1992 the FRY was suspended from participation in the CSCE.[261]

287. The final report of the head of the CSCE mission dated 29 June 1993 explains the position of Kosovo Albanians:

> "Albanian leaders have not been greatly concerned about the CSCE efforts to promote dialogue with Serbia. In the drawn-out educational talks and more recently in the negotiation to retain an independent press, they have been less flexible than their Serbian counterparts. The latter have offered significant concessions but

[258] See Ramcharan, *op. cit.*, pp. 1602-1614..
[259] UN.Doc. A/47/392-S/24461 (14 August 1992), Annexes I,II,III.
[260] *Ibid.*, Annex III.
[261] CSCE, Committee of Senior Officials, Decision of 8 July 1992, reprinted in *Rev. of Int'l Aff.* (Belgrade) Nos. 1005-1006 (1992), p. 22.

asked in return for some form of acknowledgment of Serbian law and order. The former reject all conditions that in the narrow and at times inconsistent perception of their people could be interpreted as acceptance of Serbian sovereignty over Kosovo."[262]

288. From mid-1993 until the end of 1995, the focus of the international community was on the armed conflicts in Bosnia and Herzegovina and Croatia, and not on Kosovo. In November 1995, the General Framework Agreement for Peace in Bosnia and Herzegovina (also known as "Paris-Dayton Agreement")[263] was signed, ending the conflict in Bosnia and Herzegovina. Subsequently, the Peace Implementation Council (PIC) was established.[264] It focused on the implementation of the Paris-Dayton Agreement in Bosnia and Herzegovina and thus paid very little attention to other regions of the former Yugoslavia. It should be noted that the PIC also undertook functions of the International Conference on the Former Yugoslavia.

289. After the signing of the Paris-Dayton Agreement, another attempt at negotiations concerning educational issues was made. In September 1996, an agreement was signed between Mr. Ibrahim Rugova and Mr. Slobodan Milosevic, who was the president of Serbia at the time, on the normalization of education in Kosovo. According to this agreement, a group consisting of three individuals of Serbian nationality, three individuals of Albanian nationality and three mediators was formed in order to monitor the implementation of the agreement (plan 3+3).[265] However, armed rebellion in Kosovo started before the agreement could be fully implemented.[266]

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[262] Special Report: Kosovo– Problems and Prospects, by Tore Bogh, the Head of Mission (29 June 1993), reprinted in Weller, *op. cit*,, pp. 117-120.

[263] UN Doc. S/1995/999 (30 November 1995).

[264] Conclusion of the Peace Implementation Conference, London, 9 December 1995 reprinted in Trifunovska, *Yugoslavia through documents from its creation to its dissolution* (1994) pp. 531-541, para. 21.

[265] St. Egidi [St Egidio] Education Agreement, 1 September 1996, and Agreed Measures for the Implementation of the Agreement on Education, 23 March 1988, Annex 79 in Documentary Annexes accompanying this Written Statement.

[266] During the first half of 1998, in accordance with the above mentioned agreement, the authorities handed over buildings belonging to the Faculties of the University of Pristina to Kosovo Albanian teaching staff and students, see Report of the Secretary-General, UN Doc. S/1008/470 (4 June 1998), para. 44: However, due the outbreak of armed rebellion, 1998/99 academic year was postponed and never started, and at that point Kosovo Albanian's demands extended far beyond the sphere of education.

E. Conflict 1997/1999

I "Kosovo Liberation Army"

290. Before discussing the events that occurred between the second half of 1997 and the beginning of 1998, it is necessary to first introduce a new element that emerged in the Kosovo crisis during this period: the so-called "Kosovo Liberation Army" (hereinafter "KLA").[267]

291. In several of its statements, the KLA declared that it considered itself to be a military organization of the Kosovo Albanians, and that its ultimate goals were Kosovo's independence, and its reunion with what it saw as the Albanian homeland. Accordingly, the KLA was based in Kosovo, but it also conducted operations in Macedonia and Montenegro, with the goal of creating a "Greater Albania".[268]

292. It should be noted that the emergence of the KLA was a direct challenge to the policy of a peaceful boycott pursued by the Kosovo Albanian political parties at the time.

293. One of the first public announcements made by the KLA was a statement in which it claimed responsibility for carrying out a terrorist action against refugee camps in February 1996. These camps were inhabited by Serbian refugees, part of some 200,000 people who were expelled from Croatia in August 1995 as part of the so-called "Operation Storm" of the Croatian army. Fewer than 10,000 of these refugees had settled in Kosovo, but they almost immediately became the target of Albanian extremist groups.

294. In its public announcements, the KLA also invited other countries, especially the United States of America, to recognize the independence of Kosovo. The

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[267] In Albanian: "Ushtria Çlirimtare e Kosovës" or "UÇK"; in Serbian: "Oslobodilačka vojska Kosova" or "OVK". For more on the creation of the KLA, see, e.g., ICTY, *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66, Judgment, 30 November 2005, paras. 43-44.

[268] Der Spiegel, 6 July 1998, "Reality is war", interview with Jakup Krasnici, spokesmen for the Kosovo Liberation Army, pp. 122-123.

alternative, claimed the KLA, was the unavoidable outbreak of armed conflict in Kosovo. The KLA also made death threats against Kosovo Albanian leaders who would sign any agreement with Serbia concerning Kosovo's autonomy.[269]

295. This shows that the aim of the KLA was not only to conduct operations against the Serbian population living in Kosovo, but also to conduct operations against those Albanians who "collaborated" in any way with Serbian State institutions. By undertaking attacks against Albanians who were perceived to "cooperate" with Serbia, and the statement that any Albanian who signed any agreement on autonomy would be considered a traitor, the KLA did not leave any room for negotiations on anything else but independence.

296. Attacks on "collaborators" continued throughout the entire period of the armed conflict and was clearly intended to dissuade Kosovo Albanians from engaging in any way with either Serbian inhabitants of Kosovo or with the Government of Serbia.

297. According to the official sources, by February 1998 the KLA murdered 10 policemen and 24 civilians[270] The United States Balkan Envoy, Mr. Robert Gelbard, characterized the KLA as a terrorist organization during his visit to Kosovo on 23 February 1998.[271]

II Armed conflict: February-October 1998

298. Four police officers were killed in a KLA ambush in the village Likosane (central Kosovo) on 28 February 1998. In police operations that followed from 28 February to 5 March, 2 police officers and more than 80 Kosovo Albanians were killed in the villages Likosane, Cirez and Prekaz.[272]

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[269] See Judah, *op. cit.*, p. 131.

[270] It conducted 31 terrorist attacks in 1996, 55 in 1997, and 66 in January and February of 1998 alone, see, generally, FRY Ministry of Foreign Affairs, *White book- Terrorism on Kosovo and Metohija and Albania*, (1998); See also International Crisis Group, *Kosovo Spring Report* (1998), p. 30.

[271] Agency France press, 23 February 1998.

[272] See Judah, *op. cit.*, pp. 138-140.

299. Almost immediately after these hostilities, on 5 March 1998, NATO stated that it had:

> "legitimate interest in developments in Kosovo, inter alia, because of their impact on the stability of the whole region which is of concern of the Alliance".[273]

300. During March, both the Kosovo Serbs and Kosovo Albanians organized massive demonstrations throughout Kosovo. At the same time, in the central and Western part of Kosovo armed clashes between police forces and KLA occurred, while KLA continued targeting both Serb and Albanian "collaborators" through a series of terrorist actions. [274]

301. On 9 March 1998, the Contact Group, comprising France, Germany, Italy, Russia, the United Kingdom and the United States, issued a statement on the Kosovo crisis. The Contact group reaffirmed its commitment to uphold human rights values, and their condemnation of both violent repression of non-violent expression of political views, including peaceful demonstrations, as well as terrorist action, including those of the so- called Kosovo Liberation Army.[275]

302. On 10 March 1998, the Government of the Republic of Serbia invited representatives of the Kosovo Albanians to negotiations and appointed its negotiators for:

> "Unconditional talks about all issues relating to Kosmet [Kosovo and Metohija], whenever and wherever in the territory of Serbia".[276]

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[273] NATO Statement, 5 March 1998, NATO Press Release (98)29, available at: http://www.nato.int/docu/pr/1998/p98-029e.htm.
[274] Foreign & Commonwealth Office, *Kosovo chronology: 1997 to the end of the conflict* (1999), available at: http://www.fco.gov.uk/resources/en/pdf/pdf5/fco_pdf_kosovochronolgy.
[275] UN Doc. S/1998/223 (9 March 1998).
[276] FRY Government Statements 13 and 14 March 1998 reprinted in Weller, *op. cit.* , p. 351.

303. The Kosovo Albanian representatives discarded this invitation and failed to appear at the meeting scheduled for 12 March 1998. Mr. Ibrahim Rugova articulated, once again, the position of Kosovo Albanians:

> "Former Yugoslavia has ceased to exist. Kosovo has its own borders and we have not asked for a change of borders. Perhaps Serbia does not think that way but an independent Kosovo is a good thing for Serbia".[277]

304. Despite the failure of direct negotiations in March 1998, some constructive steps were made in the field of education. Serbian and Albanian commissions tasked with the implementing of the plan "3+3" signed an agreement to open Albanian institutions and faculties on 23 March 1998. Following the agreement, the Institute of Albanology was reopened in Pristina on 31 March.[278]

305. On 22 March 1998, the so-called Kosovo Albanian "parliamentary" and "presidential" elections were organized in Kosovo. The Serbian State authorities did not take any forceful measures to prevent the elections, but equally they did not recognize their results. The Kosovo Albanians again elected Mr. Ibrahim Rugova as "president".

306. On 31 March 1998, the Security Council adopted resolution 1160 (1998), which addressed the deteriorating situation in Kosovo. In the preamble, the Security Council

> "Condemn[ed] the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other

[277] Reuters News Agency, 12 March 1998; See also International Crisis Group, Kosovo Spring Report, 1998, p. 11, available at: http://www.crisisgroup.org/home/index.cfm?id=1601&l=1.

[278] Report of the Secretary-General pursuant to Security Council resolution 1160, UN Doc. S/1998/470 (4 June 1998), para. 44.

> group or individual and all external support for terrorist activity in Kosovo including finance, arms and training".[279]

Security Council resolution 1160 (1998) also affirmed the commitment of all member States of the United Nations to "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia", and expressed support for an "enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration".[280]

In resolution 1160 the Security Council also

> "Call[ed] upon the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue…[281]

and

> Call[ed] upon the Kosovar Albanians leadership to condemn all terrorist action, and emphasizes that all elements in the Kosovo Albanian community should pursue their goals by peacefully means only."[282]

307. Operative paragraph 8 of the same resolution imposed an arms embargo on the FRY, including Kosovo. The decision on whether or not the embargo would be lifted was contingent on the following substantive requirements: substantive dialogue with an international presence, withdrawal of special police units and cessation of their action affecting civilians, humanitarian and human rights monitoring access, and the introduction of a new OSCE presence.

308. Meanwhile, the situation on the ground deteriorated due to clashes between Government forces and the KLA. According to the UN Human Rights Field Operation in the Former Yugoslavia Report of 30 April 1998, the UNHCR

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[279] See Security Council resolution 1160 (1998), Preamble, para. 3, Annex 16 in Documentary Annexes accompanying this Written Statement.
[280] *Ibid.*, Preamble, para. 6, and operative para. 5.
[281] *Ibid.*, para. 1.
[282] *Ibid.*, para. 2.

estimated that around 17,500 people were displaced inside Kosovo and that between 5,000 and 6,000 had fled to Montenegro and Albania.[283]

309. Following intensive diplomatic efforts by the international community, especially the United States Special Representative Robert Gelbard, on 15 May 1998 a meeting between Mr. Slobodan Milosevic and Mr. Ibrahim Rugova was held and an agreement on the commencement of negotiations was reached.[284] On the same day and according to the "3+3" plan, the Serbian authorities handed over three faculties of the University of Pristina to the Kosovo Albanian staff.[285]

310. The first meeting between the Serbian government and the Kosovo Albanians negotiation teams was held on 22 May 1998. After this meeting, both sides issued positive statements on the future of the negotiations.[286]

311. However, the Kosovo Albanian delegation did not appear at the next meeting, which had been scheduled for 5 June 1998, effectively bringing negotiations to a halt once again. The official explanation from the Albanian delegation was that they refused to participate in further negotiations due to the military and police operations that had commenced in the territory of South-West Kosovo in late May and beginning of June.[287]

312. Previously, during the run-up to the negotiations and notably following the meeting held between Mr. Milosevic and Mr. Rugova on 15 May 1998, the KLA had publicly declared their disapproval of the meeting and any form of negotiation. The KLA representatives strongly reiterated their objective, namely the independence of Kosovo.[288]

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[283] UN High Commissioner for Human Rights, *Field Operation in Former Yugoslavia*, 30 April 1998, para. 52, available at: http://www.unhchr.ch/html/menu2/5/ex_yug/yug_pr12.htm.

[284] Statement on the talk of the FRY President Slobodan Milosevic with Dr Ibrahim Rugova and his Delegation, 15 May 1998 reprinted in Weller, *op. cit.*, p. 353.

[285] Report of the Secretary-General pursuant to Security Council resolution 1160, UN Doc. S/1998/470 (4 June 1998), para. 44.

[286] FRY on talks in Pristina including statement by Kosovo Albanian side, 22 May 1998, reprinted in Weller, *op. cit.*, p. 353.

[287] UN Doc. S/1998/608 (2 July 1998), para. 3, Annex V.

[288] See Judah, *op. cit.*, pp. 154-156.

313. During the spring of 1998 the KLA started to blockade the main transportation routes through Kosovo, and attacked positions held by the police forces (MUP) and Federal Army units (VJ). These KLA operations resulted in some serious casualties. In response to these attacks, Government forces started an offensive in the central-Western region of Kosovo, including the municipalities of Decani, Orahovac, Djakovica, Klina, and Glogovac.[289]

314. After direct negotiations between the Serbian State and Kosovo Albanian negotiating teams in May and June 1998 had failed, the next step towards mediated negotiations was made at the Bonn meeting of the Contact Group, held on 8 July 1998, initiating what was to be called the Hill negotiation process (after United States envoy Mr. Christopher Hill).[290]

315. Mr. Hill conducted shuttle diplomacy between State and Kosovo Albanian representatives, eventually achieving an outline agreement, which envisaged a three year stabilization and normalization period to allow the re-establishment of democratic institutions.[291]

316. In the meantime, towards the end of May and beginning of June, the situation on the ground further deteriorated. The KLA controlled an area of 3,000 square kilometres (roughly 30% of Kosovo's territory), including some 250 villages, and a population of 700,000 to 800,000 individuals, most of whom were located in the Drenica region.[292]

317. From the second half of June 1998 onwards, the KLA modified its tactics and tried to take control of some strategic industrial facilities:

> "On or about 23 June 1998 KLA took control of a coal mine and the village of Bardhi-i-Madh/Veliki Belacevac, 10 km west of

[289] ICTY, *Prosecutor v. Fatmir Limaj et al.* (IT-03-66), Judgment, 30 November 2005, paras. 144-158.
[290] Contact Group Statement, Bonn, 8 July 1998, reprinted in Weller, *op. cit.*, p. 238.
[291] UN Doc. S/1998/912 (3 October 1998), para. 4, Annex.
[292] Information on the situation in Kosovo and on measures taken by the Organization for Security and Cooperation in Europe, UN Doc. S/1998/608, Annex V (2 July 1998), para. 3.

> Prishtina/Pristina. Shooting could be heard in the area for the entire day and Kosovo Albanian residents were reported to have fled to Prishtina/Pristina… About a week later the Serbian forces attempted to retake the mine."[293]

318. One month latter from 18 to 22 July, the KLA attacked and seized for the first time, over a period of a few days, a larger urban centre in Kosovo called Orahovac:

> "On 19 July 1998 the KLA offensive was launched in Rahovec/Orahovac, an operation described as KLA`s first major attack on a larger city…The KLA captured approximately 85 ethnic Serbs. Reports indicated that 40 of them were never seen again." [294]

319. These KLA actions provoked a fierce reaction from Government forces (both from the Ministry of Interior of the Republic of Serbia (MUP), and the Federal Army (VJ)), which launched an offensive that lasted throughout the months of August and into September 1998. The affected area was the central, Western, and Southern parts of Kosovo, encompassing around 40 to 50 percent of the province's territory.

320. A serious surge in the number of refugees and internally displaced persons occurred after the KLA's seizure of Orahovac and the commencement of the Government forces' counter-offensive in late July 1998. According to the United Nations report from 29 July 1998, around 150,000 people fled their homes, 100,000 of whom were displaced within Kosovo, while 35,000 to 40,000 were displaced in central Serbia, Montenegro or Albania.[295]

321. During the period from June to September 1998, the State Government and its negotiating team issued several more invitations to the Kosovo Albanian

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[293] ICTY, *Prosecutor v. Fatmir Limaj et al.* (IT-03-66), Judgment, 30 November 2005, para. 159.
[294] *Ibid.*, para. 162.
[295] UN Inter Agency Update on Kosovo, Situation Report 48, 29 July 1998, reprinted in Weller *op. cit.*, p. 264, available at: http://www.reliefweb.int/rw/rwb.nsf/0/75b905c83c260125c125665100338975?OpenDocument&Click;.

negotiation team for the continuation of the negotiations. None of these invitations were accepted.[296]

322. Government forces had largely completed their major offensive activities by the end of September 1998. According to some estimates, the hostilities that took place between March and September 1998 led to more than 600 civilian deaths on both sides.[297] Another consequence of this cycle of fighting was the significant increase of the number of refugees and internally displaced persons, which affected both sides of the conflict. According to the United Nations, at the beginning of October 1998, the total number of refugees and internally displaced persons stood at some 280,000, of which 200,000 were internally displaced persons within Kosovo, and 80,000 were located in central Serbia or neighbouring countries.[298]

323. Due to the events in Kosovo between August and September, on 24 September 1998 the United Nations Security Council adopted resolution 1199 (1998) which reaffirmed once again its demand for all parties to immediately cease hostilities. The resolution requested that the authorities of the FRY and Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to enter into a meaningful dialogue without preconditions. In its closing paragraphs, the resolution again requested the FRY authorities to cease all action by its security forces affecting the civilian population, to facilitate effective international monitoring missions such are European Community Monitoring Mission, UNCHR and ICRC, and to make rapid progress in its dialogue with Kosovo Albanians.[299]

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[296] Press release of the Ministry of Interior of the Republic of Serbia, 5 June 1998 reprinted in Weller, *op. cit.*, p. 354; See also *Kosovo chronology: 1997 to the end of the conflict* (1999)

[297] Report of the Secretary-General pursuant to Security Council resolution 1160, UN Doc. S/1998/834 (4 September 1998), para. 7.

[298] Report of the Secretary-General, UN Doc. S/1998/912 (3 October 1998), para. 11.

[299] See Security Council resolution 1199 (1998), Annex 17 in Documentary Annexes accompanying this Written Statement.

324. Only one day after this Security Council resolution was adopted, NATO threatened military action against the FRY and raised its level of military preparedness for that purpose.[300]

325. In early October 1998, the United States Special Envoy, Mr. Richard Holbrooke, travelled to Belgrade in order to find a diplomatic solution to the crisis. On 13 October 1998, NATO issued an activation order for both limited air-strikes and a phased air campaign to commence after the expiry of a period of 96 hours.

326. Following the negotiations between the Special Envoy and the Government, the OSCE and the FRY signed an agreement on the OSCE Kosovo Verification Mission on 16 October 1998.[301] On the same day, an agreement was reached regarding NATO air surveillance over Kosovo.[302] The United Nations Security Council resolution 1203 of 24 October 1998 welcomed these agreements.[303]

327. In the meantime, the Hill negotiation process moved further along. The parties received the first formal proposal on 1 October 1998. The proposal suggested an intricate system of public authorities in Kosovo, according to which Kosovo would have the highest possible level of self-governance but not independence. Importantly, the concluding provision stipulated that the agreement could be changed only through mutual agreement on both sides.[304]

328. During November and December 1998, Special Envoy Hill presented two new drafts, while the government of Serbia presented its own suggestions for modifying the plan.[305]

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[300] Statement by the NATO Secretary General following the ACTWARN decision, 24 September 1998, available at: http://www.nato.int/docu/pr/1998/p980924e.htm.

[301] OSCE/FRY Agreement, 16 October 1998, UN Doc. S/1998/978 (16 October 1998).

[302] NATO/FRY Agreement, 16 October 1998, UN Doc. S/1998/991 (23 October 1998)

[303] See Security Council resolution 1203 (1998), Annex 18 in Documentary Annexes accompanying this Written Statement.

[304] First Draft proposal for the Settlement of the Crisis in Kosovo, 1 October 1998, reprinted in Weller, *op. cit.*, pp. 359-362.

[305] Second Draft proposal for the Settlement of the Crisis in Kosovo, 2 November 1998, reprinted in Weller, *op. cit.*, pp. 362-369; Third Draft proposal for the Settlement of the Crisis in Kosovo, 2 December 1998, reprinted in Weller, *op. cit.*, pp. 376-382; Joint proposal of Political Framework of Self-governance of Kosovo, 20 November 1998, reprinted in Weller, *op. cit.*, pp. 372-375.

329. The position of the Kosovo Albanians to the Hill proposals is best illustrated by the statements of their representatives. In its statement of 3 November 1998, the so-called "Government of the Republic of Kosova" requested recognition of the right to self-determination and full independence that would be facilitated through an interim agreement.[306]

330. Mr. Fehmi Agani, the head of the Kosovo Albanian negotiation team reaffirmed on 1 December 1998 that the issue of independence was non-negotiable.[307]

331. Representatives of the KLA were even more resolute than the Kosovo Albanian negotiators. The KLA statement of 5 December 1998 proclaimed that KLA was not ready to accept even temporary coexistence with Serbia before full independence of Kosovo could be achieved.[308]

332. Regardless of these statements, the Hill team continued its work and produced one more draft on 27 January 1999,[309] two days before the Contact Group decided to summon parties to talks in Rambouillet, France.

333. The period covering October 1998 to January 1999 was characterized by an increasing number of returnees to Kosovo, a reduction in the number of Government forces on the ground, coupled with the readiness of KLA units to re-establish control over an even greater part of the territory from which the Government forces had withdrawn according to the agreement. In the territory under its control, the KLA established its own authority, as well as its own check points in numerous locations.[310]

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[306] Kosovo Statement on Fundamental Principles for Settlement, 3 November 1998, reprinted in Weller, *op. cit.*, p. 369.

[307] Kosova Press Release, 1 December 1998 reprinted in Weller, *op. cit.*, p. 375.

[308] Kosova Press Release, 5 December 1998 reprinted in Weller, *op. cit.*, p. 382.

[309] Final Draft proposal for the Settlement of the Crisis in Kosovo, 27 January 1999, reprinted in Weller, *op. cit.*, pp. 383-393.

[310] Report of the Secretary-General, UN Doc. S/1998/1068 (12 November 1998), paras. 11-17; Report of the Secretary-General, UN Doc. S/1998/1147 (4 December 1998), paras. 7-12; Report of the Secretary-General, UN Doc. S/1998/1221 (24 December 1998), paras. 5-16.

334. Special Envoy Holbrooke confirmed that throughout this period the KLA took very provocative steps in an effort to draw NATO into the crisis.[311]

335. The UN's Inter Agency Update of 11 January 1999 reported fighting between Government forces and the KLA in the area of Podujevo, in North-Eastern Kosovo. This area had previously been outside the main area of conflict. The report also contained information about a great number of incidents and violence in urban centres throughout Kosovo.

III February-March 1999: Rambouillet conference and a new cycle of violence

336. On 29 January 1999, the Contact Group issued a statement in which it condemned the escalation of violence for which both Belgrade security forces and the KLA were responsible. It also decided to

> "summon representatives from the Federal Yugoslav and Serbian Governments and representatives of the Kosovo Albanians to Rambouillet by February, under the co-chairmanship of Hubert Vedrine and Robin Cook, to begin negotiations with the direct involvement of the Contact Group."[312]

337. On 30 January 1998, NATO declared that it was "ready to take whatever measures are necessary in the light of both parties' compliance with international commitments and requirements".[313] The NATO Secretary-General was authorized to use air strikes against the FRY.[314]

338. The Rambouillet negotiations commenced on 6 February 1999 and lasted until 23 February 1998. During the negotiations, three Drafts of Interim Agreements for Peace and Self-Governance on Kosovo were proposed by three Contact Group negotiators: Ambassador Hill (USA), Mr. Petritsch (European Union) and Mr.

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[311] See Judah, *op. cit.*, p. 191.
[312] See UN Doc. S/1999/96 (29 January 1999), para. 3 (d).
[313] See UN Doc. S/1999/107 (2 February 1999), p. 4.
[314] *Ibid.*

Mayorski (Russia).[315] Apart from numerous disagreements in relation to various minor issues (i.e. use of the term "constitution"), there were fundamental disagreements over the presence of NATO forces throughout the territory of the FRY and over the process by which a final settlement would be reached.

339. In relation to the issue of a final settlement, the position of the Kosovo Albanian delegation was very clear from the very beginning of the negotiations and remained unchanged until their end: the final settlement was to be established by a referendum in Kosovo. Taking into account the ethnic composition of the province, it was clear that such referendum could lead to only one result, namely the secession of Kosovo from the FRY and Serbia.

340. The draft Rambouillet Accords in Chapter 8, Article I, paragraph 3 provided that an international conference would 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...".[316]

This provision is the only place where the text of the Rambouillet Accords uses the term 'people'. It otherwise only refers to the 'Kosovo population'.[317] It follows that the drafters deliberately did not equate the 'Kosovo population' with the term 'people'.

341. Further, no understanding was reached during the Rambouillet negotiations on the issue of whether the 'will of the people' was tantamount to that of the sole population of Kosovo. It should be noted that the delegation of Kosovo had during the negotiations *unilaterally* stated that it was *their understanding* that the 'will of

[315] Drafts of Interim Agreements for Peace and Self-Governance on Kosovo: 6 February, 18 February, 23 February 1999, reprinted in Weller, *op. cit.*, pp. 421, 434, 453.
[316] See UN Doc. S/1999/648 (7 June 1999).
[317] *Ibid.*, Framework, Art. II, No. 6; Chapter I, Art. II, No. 1, b (i) and (ii), No. 3; Chapter II, Art. VI, No. 1, a (ii).

the people' in the aforementioned clause referred to "the will of the people in Kosova"[318]

342. However, this understanding was not shared by either the FRY, the territorial sovereign, or other States involved in the negotiations. Indeed, there was *only one* third party participating in the negotiation process which

> "*may* have indicated a willingness to give *certain bilateral* assurances to the effect that this formulation [*i.e.* the one referring to the will of the people] did indeed refer to a right of the people of Kosovo to make manifest their will in relation to the future status of the territory."[319]

343. After the deadline for the completion of the negotiations at Rambouillet had expired, neither side was ready to sign the agreement; both postponed their decision until 15 March 1999. Subsequently, the FRY delegation sent a new revised draft agreement while the Kosovo Albanians accepted the plan.[320]

344. The letter of acceptance of the agreement signed by the Kosovo Albanian delegation once more stressed their (unilateral) understanding of the agreement:

> "The Delegation of Kosova confirms again that at the termination of interim period of three years the people of Kosova will exercise their will through a referendum…"[321]

345. Events on the ground during the Rambouillet negotiations followed the pattern seen in the preceding period. While the level of military conflict between the KLA and the government forces remained low, the main target of the conflict were

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[318] Letter from the Delegation of Kosovo to US Secretary of State Albright of 23 February 1999, , Annex 78 in Documentary Annexes accompanying this Written Statement.

[319] Marc Weller, *The Rambouillet Conference on Kosovo, International Affair*s (1999), pp. 211, 232 (emphasis added).

[320] FRY Revised Draft Agreement, March 15 1999, reprinted in Weller, *Crisis in Kosovo 1989-1999* (1999), p. 480; Kosovo Albanian Delegation Statement of Formal Signing of Interim Agreement, March 18 1999, reprinted in Weller, *op. cit.*, pp. 490-491.

[321] Declaration of Kosovo Albanian delegation, 18 March 1999, reprinted in Weller, *op. cit.*, p. 490.

civilians. According to the United Nations Secretary-General Report of 31 January 1999, violence spread to the areas of Kosovo that had previously been relatively calm - such as Podujevo and Stimlje - leading an additional 20,000 people to flee their homes.[322] The same cycle of violence with the KLA provocations followed by Government forces responses is described in the United Nations Secretary-General's Report of 17 March 1999.[323]

346. The OSCE Chairman in Office in his 20 March 1999 letter to the Secretary-General stated that

> "Non-attributable murders continued and most victims of these were Albanians. The recent abduction of Albanian civilian employed by the Prizren police revealed that centrally controlled KLS (KLA security forces) carried the act... This year, in the west of the Province in the area from Pec to Prizren, several eyewitnesses have given similar description of a KLA unit slaying Albanian loyal to the Serbs. Previous claims that the perpetrators of these murders were rogue KLA elements are now less plausible than the conclusion that some "punishment shooting" are being indicated at the highest level of KLA Command."[324]

347. Further, this OSCE report contains information on the events in Kosovo only a few days before the NATO intervention. According to this report:

> "Unprovoked attacks by the KLA against the police continued and the number of casualties sustained by security forces has increased. Indiscriminate urban terrorist attacks targeting civilians continued..."[325]

[322] Report of the Secretary-General, UN Doc. S/1999/99 (30 January 1999), paras. 8-10 and 25-28.
[323] Report of the Secretary-General, UN Doc. S/1999/293 (17 March 1999), paras. 4-15.
[324] See UN Doc. S/1999/315 (20 March 1999), p. 5.
[325] *Ibid.*, p. 4.

348. The OSCE report also contains the UNHCR estimate that in March 1999 – before the NATO bombing of the FRY started – there were at least 230,000 people displaced within Kosovo, while a further 170,000 people had left the province. The UNHCR also reported that over 90 villages with Serbian and Albanian populations in Kosovo had been emptied of their Serbian inhabitants The Yugoslav Red Cross estimated that there was more than 30,000 non-Albanians displaced and in need of assistance in Kosovo, most of them Serbs.[326]

IV NATO bombing of the FRY 1999

349. Following the end of the Paris Conference on 18 March, as well as a final – and unsuccessful - attempt by Mr. Richard Holbrooke to convince Mr. Milosevic to accept the Agreement, NATO Secretary-General, Mr. Javier Solana, ordered the initiation of offensive aerial operations on the territory of the FRY on 23 March 1999. The NATO aerial bombing of the FRY lasted from the evening of 24 March 1999 to 10 June 1999.

350. The NATO aerial bombing of the FRY constituted an unlawful use of force and involved numerous other violations of international law.[327]

351. During the NATO intervention, unrestrained armed conflict broke out in Kosovo. The beginning of the NATO bombing, and intensified clashes between Government forces and the KLA led to massive displacement of Kosovo's population, including more than 800,000 refugees by June 1999, many of whom were forcibly displaced from their homes.[328] Both Government forces and paramilitaries committed serious crimes against Kosovo Albanians.[329]

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[326] Report of the Secretary-General, UN Doc. S/1999/293 (17 March 1999), para. 26; See also UN Doc. S/1999/315 (20 March 1999), p. 6.

[327] See generally *Cases Concerning Legality of Use of Force (Yugoslavia v. United States of America Serbia and Montenegro v. United Kingdom, Yugoslavia v. Spain, Serbia and Montenegro v. Portugal, Serbia and Montenegro v. Netherlands, Serbia and Montenegro v. Italy, Serbia and Montenegro v. Germany, Serbia and Montenegro v. France, Serbia and Montenegro v. Canada, Serbia and Montenegro v. Belgium), Memorial of the Federal Republic of Yugoslavia, 5 January 2000.*

[328] UNHCR, Kosovo Refugee Crisis, February 2000, available at: http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RESEARCH&id=3ba0bbeb4.

[329] See OSCE, *Kosovo/Kosova As seen as told, and Vol. I October 1998/June 1999.*

352. The Foreign Ministers of the G-8 met on 6 May 1999 at Petersberg, Germany, and adopted general principles on the political solution to the Kosovo crisis and terms for a cessation of hostilities.[330]

353. On 3 June 1999, the National Assembly of the Republic of Serbia approved a peace plan that formally put the United Nations in charge of Kosovo.[331]

354. On 9 June 1999, the International Security Force (KFOR), on the one side, and the FRY and the Republic of Serbia, on the other, signed a Military-Technical Agreement,[332] which regulated the withdrawal of Yugoslav forces and the entry of KFOR in Kosovo.

355. On 10 June 1999, the Security Council passed resolution 1244, which placed Kosovo under international administration (UNMIK).

356. The same day, NATO air bombing of the FRY ended following 78 days of bombing, while the withdrawal of the Yugoslav armed forces from Kosovo began, and was completed by 20 June 1999.

357. Shortly after the NATO intervention came to an end, the Kosovo Albanian refugees and internally displaced persons returned to their homes. At the same time, and particularly from June to November 1999, more than 200,000 Serbs and other non-Albanians fled Kosovo.[333]

V Results of the Conflict

358. The conflict in Kosovo 1998-1999 resulted in thousands of deaths, an even greater number of injured and in enormous destruction. The democratic Government of

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[330] Conclusion of the meeting of the G8 at the Petersberg of 6 May 1999, Security Council resolution 1244 (1999), Annex 1.

[331] Serbian Assembly Resolution of 3 June 1999, *Sluzbeni glasnik Republike Srbije,* [Official Gazette of the Republic of Serbia], No. 25/99.

[332] See UN Doc. S/1999/682 (15 June 1999), Annex 10 in Documentary Annexes accompanying this Written Statement.

[333] See *infra* paras 365-387.

Serbia sincerely regrets all tragedies and pain that were inflicted by the persons acting in the name of the FRY during the conflict. What is particularly important at this time is that those responsible for the misdeeds inflicted be brought to justice in international and domestic criminal proceedings.

359. The International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor indicted Mr. Slobodan Milosevic (President of the FRY at the time), Mr. Milan Milutinovic (President of Serbia at the time), Mr. Nikola Sainović (Deputy Prime Minister of the FRY at the time), Yugoslav Army Generals Mr. Dragoljub Ojdanic, Mr. Nebojsa Pavkovic and Mr. Vladimir Lazarevic, as well as Mr. Sreten Lukic (high official of the Ministry of the Interior of Serbia), for the death of at least 1,000 Kosovo Albanians and for the crimes of deportation, forcible transfer, and persecution in thirteen municipalities in Kosovo, in the period from 23 March to 10 June 1999. Mr. Slobodan Milosevic died during his trial.[334] In separate proceedings, Mr. Milan Milutinovic was acquitted of all counts, while other accused were sentenced to imprisonment between 15 to 22 years.[335] This judgment is not final pending appeal.

360. The ICTY Prosecutor indicted the KLA members Mr. Fatmir Limaj, Mr. Haradin Bala, and Mr. Isak Musliu for crimes against humanity. The accused were indicted as KLA commanders and KLA prison guards in the Lapusnik area in 1998. Mr. Haradin Bala was sentenced to 13 years imprisonment while Mr. Fatmir Limaj and Mr. Isak Musliu were acquitted.[336]

361. The ICTY Prosecutor also indicted Mr. Ramush Haradinaj, Mr. Idriz Balaj and Mr. Lahmi Brahimaj for war crimes against the Serbs. Mr. Ramush Haradinaj was the prime minister of Kosovo at the time of his indictment. He was acquitted, along with Mr. Idriz Balaj, while Mr. Lahi Brahimaj received a six-year prison sentence.[337] As of this writing, the appeal procedures are still pending. It should be noted that in this case the ICTY emphasized that it encountered serious obstacles in

[334] ICTY, *Prosecutor v. Slobodan Milosevic* (IT-02-54), Order Terminating the Proceedings, 14 March 2006.
[335] ICTY, *Prosecutor v. Milan Milutinovic et al.* (IT-05-87) Judgment, 26 February 2009.
[336] ICTY, *Prosecutor v. Fatmir Limaj et al.* (IT-03-66), Judgment, 30 November 2005.
[337] ICTY, *Prosecutor v. Ramush Haradinaj et al.* (IT-04-84), Judgment, 3 April 2008.

securing witnesses for the trial.[338] Two individuals were found guilty of contempt of the ICTY for intimidating a protected witness in the *Haradinaj* case.[339]

362. NATO's conduct during the bombing of the FRY was also considered by the ICTY but, regrettably, the Prosecutor decided not to conduct an investigation. A committee established by the ICTY Prosecution on 14 May 1999 concluded that in all cases it examined, "either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences" and recommended that no investigation be conducted by the ICTY Prosecutor.[340]

363. Further, as the result of the conflict numerous trials against persons accused of committing ethnically-motivated crimes are pending before domestic courts in Serbia.

F. Security Council Resolution 1244 (1999) - Present

364. Security Council resolution 1244 (1999) created an international legal regime for Kosovo, which is described in detail in Chapter 8. The present chapter will deal with the human rights situation in Kosovo since it has been placed under international administration, as well as with negotiations that preceded the adoption of the UDI in 2008.

I The position of Serbs and other non-Albanians in Kosovo since 1999

365. After 10 June 1999, more than 200,000 non-Albanians (the majority of them Serbs) fled Kosovo. In addition, since that time non-Albanians in Kosovo have

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

[339] ICTY, *Prosecutor v. Astrit Haraqija & Bajrush Morina* (IT-04-84-R77.4), Judgment, 17 December 2008 (appeal pending).

[340] Final report to the ICTY Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia, [undated], paras. 90-91, available at: http://www.un.org/icty/pressreal/nato061300.htm

faced attacks and other security problems, restrictions on their freedom of movement, and the absence of the protection of their property rights and many other serious human rights violations. Although some minor improvements were made between 1999 and 2008, even today, nearly ten years after the conflict, there is still no rule of law or full freedom of movement for Serbs in the province of Kosovo. A number of towns in Kosovo, including the provincial capital Pristina, are ethnically cleansed from Serbs.

366. Statistics from the Republic of Serbia Ministry of Interior show that 662 non-Albanians were murdered, and 1,091 disappeared in Kosovo between 10 June 1999 and the end of 2006.

367. In parallel with the persecution of the non-Albanian population, numerous Serbian Orthodox churches have become the target of attacks. In 1999 alone more than 70 churches and monasteries were plundered, desecrated or completely destroyed.[341] Even today the most important medieval monasteries, such as Patriarchate of Pec, Visoki Decani and Gracanica depend upon continuous KFOR protection.

368. As early as July 1999, the UNHCR and OSCE reported the following:

> "The weeks following the withdrawal of Yugoslav forces and the arrival of KFOR have seen an exodus of the ethnic minority population, particularly the Serbs from Kosovo. The security situation for those who stayed remains very tense and extremely volatile with significant numbers facing arson attacks, threats and in extreme cases murder".[342]

369. In November 1999, the OSCE and UNHCR reported that:

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[341] Fr. Sava Janjic, *Crusified Kosovo: Destroyed and Desecrated Serbian Ortodox Chruches in Kosovo and Metohija* (1999), available at: http://kosovo.net/sk/crucified/default.htm.

[342] UNHCR/OSCE, Preliminary Assessment of the Situation of Ethnic Minorities in Kosovo, 10 July 1999, p. 1, para. 1, available at: http://www.osce.org/documents/html/pdftohtml/1119_en.pdf.html.

> "The overall situation of ethnic minorities in Kosovo remains precarious" (...) "that there is a climate of violence and impunity, as well as widespread discrimination, harassment and intimidation directed against non-Albanians".[343]

370. The OSCE and UNHCR, in their February 2000 Report stated that the situation had not improved since their November report, and noted that conditions had in many instances in fact deteriorated:

> "Minorities remain vulnerable to attack and they do not enjoy the same quality of life experienced by the majority".[344]

371. The following events were recounted in the February 2000 Report:

> "Horrific incidents such as the one on Albanian Flag Day, 28 November 1999, when an elderly Kosovo Serb man was dragged from his car in central Pristina/Prishtina and killed by a mob while his wife and mother-in-law were severely assaulted; the killing of a family of four Muslim Slavs (Torbesh) in their home in Prizren on 12 January; the triple murder of three Kosovo Serbs near Pasjane/Pasjan (in Gnjilane/Gjilan municipality) on 16 January; and, the double murder of two Roma in Djakovica/Gjakove on 15 January as they attempted to protect Roma owned property from unwarranted attack, are a chilling reminder of the dangers faced by minorities in Kosovo. There are numerous and regular other non-fatal attacks and incidents of harassment and intimidation of varying degrees recorded daily. Against this hostile backdrop the minorities of Kosovo struggle to carry on their daily lives."[345]

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[343] UNHCR/OSCE, Overview of the Situation of Ethnic Minorities in Kosovo, 3 November 1999, p. 1, para. 2, available at: http://www.osce.org/documents/html/pdftohtml/1117_en.pdf.html.

[344] UNHCR/OSCE, Assessment of the Situation of Ethnic Minorities in Kosovo, 11 February 2000, p. 1, available at: http://www.osce.org/documents/html/pdftohtml/1116_en.pdf.html.

[345] UNHCR/OSCE, Assessment of the Situation of Ethnic Minorities in Kosovo, 11 February 2000, p. 2, available at: http://www.osce.org/documents/html/pdftohtml/1116_en.pdf.html.

372. The situation of the Serb minority in Kosovo remained unchanged during 2000:

> "Lack of security and freedom of movement remain the fundamental problems affecting minority communities in Kosovo... Serbs, who are the hardest hit, were identified as the victims in 105 incidents of arson, 49 incidents of aggravated assault, and 26 incidents of murder reported throughout Kosovo between 30 January and 27 May 2000."[346]

373. In 2002, minority communities in Kosovo continued to face varying degrees of harassment, intimidation and provocation, as well as limited freedom of movement.[347]

374. The UNHCR reported that 12 Kosovo Serbs were murdered between January and November 2003.[348] In mid-2004, UNHCR assessed the situation as follows:

> "Kosovo Serbs remained the primary targets of inter-ethnic violence, not only in terms of the number of incidents or victims, but also in terms of the severity and cruelty of the crime. Serbs were victims of shootings and killings or even murders in Prishtine/Pristina, Peje/Pec and Gjilan/Gnjilane regions, and grenade and bomb attacks in Gjilan/Gnjilane region."[349]

375. In March 2004, the situation drastically deteriorated for Kosovo Serbs who experienced an increase in violence against them:

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[346] UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo, 31 May 2000, p. 1, para. 2, available at: http://www.osce.org/documents/html/pdftohtml/1115_en.pdf.html.

[347] See UNHCR/OSCE, Tenth Assessment of the Situation of Ethnic Minorities In Kosovo (Period covering May 2002 to December 2002), March 2003, p. 5, available at: http://www.osce.org/documents/html/pdftohtml/903_en.pdf.html

[348] "*Kosovo minorities still need international protection, says UNHCR*", 24 August 2004, available at: http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=412b5f904&page=news.

[349] UNHCR Kosovo, Update on the Kosovo Roma, Ashkaelia, Egyptian, Serb, Bosniac, Gorani and Albanian communities in a minority situation of June 2004, p. 5, available at: http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=412b0b674.

"On 16-18 March 2004, Kosovo witnessed an eruption of ethnic violence against the non-Albanian communities and UNMIK."[350]

"The widespread and systematic nature of the violence took Kosovo's civil and military authorities by surprise. As a result, during the first waves of attack, KFOR, UNMIK Police and KPS struggled to maintain control. In many locations they failed to protect minorities, their property and municipal infrastructure, and were unable to prevent the large scale displacement of minority communities fearful for their lives."[351]

"The campaign of ethnic violence lasted for three days and left 19 dead, 954 injured, 4100 displaced, 550 houses and 27 Orthodox churches and monasteries burnt and an additional 182 houses and two churches/monasteries damaged".[352]

376. Some leading Kosovo Albanian politicians publicly supported the violence or failed to condemn it. According to Human Right Watch, Mr. Nexhat Daci, the speaker of the Kosovo Assembly, "speaking on behalf of parliament," described the injured and killed Albanians from ethnic violence directed against non-Albanians on March 17 as "people [who] died fighting for democracy and freedom"[353]

377. Mr. Hasim Thaci, the current "prime minister" of the so-called "Republic of Kosova" stated that:

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[350] CoE, Venice Commission, Opinion on Human Rights in Kosovo, October 2004, p. 8, para. 28, available at: http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp.

[351] UNHCR Kosovo, Update on the Kosovo Roma, Ashkaelia, Egyptian, Serb, Bosniac, Gorani and Albanian communities in a minority situation, June 2004, p. 32, available at: http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=412b0b674.

[352] OSCE, Human Rights Challenges – following the March riots, 25 May 2004, p. 4, available at: http://www.osce.org/documents/html/pdftohtml/2939_en.pdf.html.

[353] HRW, *The Response of the Kosovar Leadership to the Violence*, p. 1, available at: http://199.173.149.140/reports/2004/kosovo0704/8.htm.

> "Serbs are misusing the Albanians' goodwill to create an equal society for all. They don't want to integrate in Kosovar society. Proof of this is yesterday's [children's drowning] and today's [Mitrovica violence] events. Their will has remained in the previous five years only for violence against Albanians. This can no longer be tolerated."[354]

378. The judiciary failed to respond adequately to the violence. According to OSCE Mission in Kosovo, the perpetrators who were brought to trial before the local courts were released or sentenced with inappropriately low sentences.[355]

379. In 2004 the Venice Commission of the Council of Europe reported that:

> "the security of the non-Albanian communities in Kosovo (Serbs, Roma, Ashkali, Egyptian, Bosniac and Gorani communities) has been and is seriously and continuously threatened. Numerous incidents, including fatal ones, have occurred since 1999".[356]

The Venice Commission also reported on the lack of freedom of movement for members of non-Albanian communities in Kosovo, the insufficient protection of their property rights, the lack of investigation into abductions and serious crimes, the climate of impunity in Kosovo, the lack of fairness of judicial proceedings, corruption and human trafficking.[357]

380. In 2006, the situation had not improved to any great extent in comparison with the previous period:

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[354] *Ibid.*

[355] See OSCE Mission in Kosovo, Four Years Later Follow up of March 2004 Riots, Cases before the Kosovo Criminal Justice System. (2008), pp. 14-16, available at: http://www.osce.org/documents/html/pdftohtml/32022_en.pdf.html

[356] CoE, Venice Commission, Opinion on Human Rights in Kosovo, October 2004, No.280/2004, CDL-AD (2004) 033, p. 8, para. 27.

[357] CoE, Venice Commission, Opinion on Human Rights in Kosovo, October 2004, Opinion No.280/2004, CDL-AD (2004) 033, paras. 24-50.

"While the number of reported serious ethnically-motivated crimes has decreased, the Serb community continues to be affected by a considerable number of incidents. Members of ethnic minorities continue to suffer also from "low scale" ethnically motivated security incidents such as physical and verbal assaults/threats, arson, stoning, intimidation, harassment, looting, and "high-scale" incidents such as shootings and murders. Many of these incidents remain unreported, as the victims fear reprisals from the perpetrators of the majority community."[358]

381. The UNHCR estimated in 2006 that:

"Serbia (excluding Kosovo) is currently hosting some 225,000 IDPs [Internally Displaced Persons] from Kosovo and some 115,000 refugees, in a context where the overall difficult socio-economic situation is characterized by high unemployment and a severely strained social welfare system".[359]

382. In 2007, OSCE reported that:

"the fact that returns remain a priority eight years after the conflict reflects the reality that all mechanisms and strategies developed were not successful in providing adequate protection of the rights of returnees". [360]

383. In 2008, OSCE reported that there were no significant returns to Kosovo, although Kosovo authorities officially encouraged them[361] and concluded that

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[358] UNHCR's Position on the Continued International Protection Needs of Individuals from Kosovo, June 2006, p. 3, paras. 9-10, available at: http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=4492bdaa2

[359] *Ibid.*, p. 9, para. 33.

[360] OSCE Eight years after - Minority returns and housing and property restitution in Kosovo, June 2007, p. 6, available at: http://www.osce.org/documents/html/pdftohtml/25813_en.pdf.html.

[361] OSCE Mission in Kosovo, Human Rights, Ethnic Relations and Democracy in Kosovo (Summer 2007 – Summer 2008), September 2008, p. 12, para. 39, available at: http://www.osce.org/documents/html/pdftohtml/32879_en.pdf.html.

> "[t]he return process is mainly hampered by a general feeling of insecurity among displaced persons, their difficult access to property, and blocked or delayed property restitution proceedings."

and

> "[t]he legal and institutional framework regulating and protecting property rights in Kosovo remains weak. All communities, particularly the Kosovo Serb community, are affected by these weaknesses since many remain displaced from their homes or await restitution of residential, agricultural or commercial property." [362]

384. Serbs in Kosovo overwhelmingly live in so-called enclaves, where they remain the ethnic majority in these pockets. Major enclaves are located in Northern Kosovo (in the municipalities of Leposavic, Zubin Potok and Zvecan), and smaller enclaves are located in central Kosovo such as Gracanica and Strpce.[363] Serbs from Northern Kosovo do not accept the Kosovo authorities and the new structure of the so-called "Republic of Kosova". They however recognize UNMIK and maintain close connections with Belgrade:

> "In northern Kosovo, with its majority Kosovo Serb population, separation has actually advanced through the extension of parallel administrative institutions into the political field. In the rest of Kosovo, the outcome of efforts to integrate the Kosovo Serb community remains unclear. Here, despite some efforts by the Kosovo government to encourage the Kosovo Serbs to participate in the administrative and political structures, there is a widespread perception among the Kosovo Serb community of insecurity and mistrust which prevents interaction outside enclaves. A large number of unresolved property claims affect above all the Kosovo

[362] *Ibid.*, p. 13.

[363] *See* 2005 Ethnic Map of Kosovo in -OSCE Mission in Kosovo, Background Report Human Rights, Ethnic Relations and Democracy in Kosovo (Summer 2007 – Summer 2008), Annex I, p. 32, available at: http://www.osce.org/documents/html/pdftohtml/32879_en.pdf.html.

> Serbs. The two separated educational systems – the Kosovo schools and the parallel Kosovo Serb schools – do not offer instruction in the other community's language and thus drive the two communities further apart."[364]

385. In conclusion, after June 1999 the great majority of members of the Serb and other non-Albanian communities in Kosovo were displaced or expelled from the province of Kosovo. According to UNHCR data there are currently more than 200,000 internally displaced persons from Kosovo registered elsewhere in Serbia.

386. After June 1999 more than 600 Serbs and other non-Albanians were murdered while more than 1,000 Serbs and other non-Albanians disappeared. Most of these ethnically motivated crimes were not properly investigated and consequently the perpetrators were never brought to justice.

387. In Kosovo, Serbs live only in the North or in several enclaves. Living conditions in the enclaves are such that even nowadays, almost 10 years after the arrival of international peacekeepers, the inhabitants continue to receive humanitarian assistance and armed protection from KFOR, while their freedom of movement and right to life is not guaranteed.

II Standards for Kosovo

388. The Special Representative of the Secretary-General in Kosovo mentioned so-called benchmarks, which later became standards, for the first time at the Security Council meeting on 24 April 2002:

> "These benchmarks should be achieved before launching a discussion on status, in accordance with resolution 1244. The benchmarks are: existence of effective, representative, and functioning institution; enforcement of the rule of law; freedom of movement for all; respect for the right of all Kosovar to remain and

[364] *Ibid.*

to return; development of a sound basis for a market economy; clarity of property title; normalized dialogue with Belgrade; reduction and transformation of the Kosovo Protection Corps in line with its mandate".[365]

389. On 10 December 2003, a document entitled "Standards for Kosovo" was published which set out the following standards that Kosovo was supposed to achieve: functioning democratic institutions; rule of law; freedom of movement; sustainable returns and rights of communities; economy; property rights; dialogue; Kosovo protection force.[366]

390. The Security Council endorsed the "Standards for Kosovo" in a statement by the President of the Security Council on 12 December 2003:

> "The Security Council supports "The Standards for Kosovo" presented on 10 December 2003."[367]

391. The 2003 standards for Kosovo have been elaborated in a number of different documents such as Kosovo Standards Implementation Plan (KSIP) of 31 March 2004, Action plan and Outreach program of June 2005, the 46 point Action plan of December 2005 and the 3-months Action plan of January 2006. [368]

392. In June 2005, the Secretary-General decided to appoint a Special Envoy, Mr. Kai Eide, whose task was to assess the current situation in Kosovo regarding the standards and conditions for the possible next steps in the process.[369]

393. During the preparation of his report, Mr. Eide held consultations with political leaders in Belgrade and Pristina, leaders of all communities in Kosovo, as well as

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[365] UN Doc. S/PV. 4518 (24 April 2002), p. 4.
[366] Document "Standards for Kosovo", 10 December 2003, available at: http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf .
[367] UN Doc. S/PV.4880 (12 December 2003).
[368] Kosovo Standards Implementation Plan (KSIP), 31 March 2004, available at: http://www.unmikonline.org/pub/misc/ksip_eng.pdf,; see also Kosovo Standard Process 2003-2007, UNMIK Report, available at: http://www.unmikonline.org/standards/docs/KSP2003-2007.pdf.
[369] UN Doc. S/2005/364 (3 June 2005).

with representatives of Security Council members, various United Nations member States and regional organizations (EU, OSCE, NATO and the Council of Europe).[370]

394. In his report, Mr. Eide focused on two main issues. The first one was the situation with respect to the standards for Kosovo. According to Mr. Eide:

> "The record of implementation so far is uneven… Kosovo Serbs have chosen to stay outside the central political institutions and maintain parallel structures for health and educational services. The Kosovo Serbs fear that they will become a decoration to any central-level political institution, with the little ability to yield tangible results. The Kosovo Albanians have done little to dispel this fear... The unemployment rate is still high and poverty is widespread... Today, the rule of law is hampered by a lack of ability and readiness to enforce legislation at all levels... The Kosovo police and judiciary are fragile institutions. Further transfer of competences in these areas should be considered with great caution... With regard to the foundation for a multi-ethnic society, the situation is grim... The overall return process has virtually come to a halt… There are frequently unreported case of low-level, inter-ethnic violence and incidents. This affects freedom of movement in a negative way… At present, property rights are neither respected nor ensured… This represents a serious obstacle to returns and sustainable livelihoods."[371]

395. In the second part of his report, Mr. Eide focused on the question of the status of Kosovo:

> "There will not be any good moment for addressing Kosovo's future status. It will continue to be a highly sensitive political issue.

[370] See UN Doc. S/2005/635 (7 October 2005), para. 2.
[371] *Ibid.*, p. 2.

> Nevertheless, an overall assessment lead to the conclusion that the time has come to commence this process..."[372]

396. On 7 October 2005, the United Nations Secretary-General submitted Mr. Eide's report to the Security Council. In the letter that accompanied the report, the Secretary-General summarized Mr. Eide's report and outlined his own future steps:

> "Based on the assessment provided in the report and further consultations I have undertaken, in particular with my Special Representative, Mr. Soren Jessen-Petersen, I accept Mr. Eide's conclusion. I therefore intend to initiate preparations for the possible appointment of the special envoy to lead the future status process."[373]

397. On 24 October 2005, the Security Council President issued a statement in which he endorsed Mr. Eide's report.[374]

III The status negotiations and their aftermath

(1) Ahtisaari negotiations

398. On November 10 2005, United Nations Secretary-General appointed former Finnish President, Mr. Martti Ahtisaari, as his Special Envoy for the Future Status Process for Kosovo.[375] Before negotiations started, the Contact Group issued guiding principles, which, *inter alia*, stated:

> "6. The settlement of Kosovo's status should strengthen regional security and stability. Thus, it will ensure that Kosovo does not return to the pre-March 1999 situation. Any solution that is

[372] *Ibid.*, pp. 3-4.
[373] *Ibid.*
[374] UN Doc. S/PRST/2005/51 (24 October 2005).
[375] UN Doc. S/2005/708 (10 November 2005).

> unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected."[376]

399. Mr. Ahtisaari organized negotiations through a series of meetings-negotiations on different issues, starting with less problematic issues, such as decentralization and the protection of cultural heritage, then moving to more contentious matters, such as economic issues, and the issue of the final status of Kosovo.

400. The direct negotiations on the status issue occurred on 24 July 2006. Both Serbia and Kosovo sent delegations of the highest level. After a full day of negotiations Mr. Ahtisaari concluded:

> "It is evident that the positions of the parties remain far apart: Belgrade would agree to almost anything but independence, whereas Pristina would accept nothing but full independence."[377]

401. On 2 February 2007 Mr. Ahtisaari presented his Comprehensive Proposal, and suggested that both parties work together on this proposal.[378]

402. The final round of negotiations was conducted in Vienna, Austria, from 21 February until 10 March 2007. During this meeting, the Serbian delegation submitted Amendments to the Comprehensive Proposal which envisaged both sovereignty of Serbia and the broadest possible autonomy of Kosovo.[379] These Amendments were not accepted, except for some technical details in relation to

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[376] UN Doc. S/2005/709 (10 November 2005).

[377] United Nations Office of the Special Envoy of the Secretary-General for the Future Status Process for Kosovo, Press Release of 24 July 2006, UNOSEK PR/11.

[378] UNOSEK PR/16 (2 February 2007).

[379] Amendments to Comprehensive proposal for the Kosovo Status Settlement by the Negotiating Team of the Republic of Serbia, 2 March 2007, available at: http://www.media.srbija.sr.gov.yu/medeng/documents/amendments_eng.pdf.

the issue of cultural heritage and municipality borders. It should be noted, however, that most of the Comprehensive Proposal was not discussed.

403. On 26 March 2007 Mr. Ahtisaari presented his Comprehensive Proposal to the United Nations Secretary-General. His cover letter stated:

> "Recommendation: Kosovo Status should be independence, supervised by the international community.:"

404. Serbia has never accepted Mr. Ahtisaari's Comprehensive Proposal. The Serbian Parliament adopted a resolution in which it determined that the Comprehensive Proposal violated fundamental principles of international law, since it did not take into account the sovereignty and territorial integrity of Serbia. At the same time, Serbia has advocated a compromise, consensual solution to the future status of Kosovo.[380]

(2) Security Council mission to the region in April 2007

405. After the Secretary-General presented the Comprehensive Proposal to the Security Council, the Security Council sent a mission to Belgrade and Kosovo to obtain first-hand information on progress made in Kosovo since the adoption of Security Council resolution 1244 (1999). The head of the mission, Ambassador Verbeke, together with 15 diplomats visited the region from 25 to 28 April, and submitted a report to the Security Council on 4 May 2007.[381] During their stay in Belgrade, the delegation of the Serbian government presented the mission with a proposal for further negotiations and its proposed solution to the status issue.[382]

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[380] See *Rezolucija Narodne skupstine Republike Srbije povodom "Predloga za sveobuhvatno resenje statusa Kosova" Specijalnog izaslanika generalnog sekretara UN Martija Ahtisarija i nastavka pregovora o buducem statusu Kosova i Metohije*, *Sluzbeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 18/2007; English translation available at http://www.srbija.gov.rs/kosovo-metohija/index.php?id=31735

[381] UN Doc. S/2007/220 (20 April 2007).

[382] Republic of Serbia Status Proposal, 26 April 2007, Annex 81 in Documentary Annexes accompanying this Written Statement.

406. The mission submitted its report to the Security Council on May 4 2007.[383] The report concluded:

> "The position of the sides on the Kosovo settlement proposal remains far apart. The Belgrade authorities and the Kosovo Serb interlocutors... called for a solution based on genuine compromise, to be reached through further negotiations between the sides...
>
> Kosovo Albanian representatives and representatives of non-Serb communities, on the other hand, expressed clear and unambiguous support for the Kosovo settlement proposal and recommendation on Kosovo's future status. Expectations among the majority Kosovo Albanian population for an early resolution of Kosovo's future status were very high. The representatives looked to the Security Council to move rapidly towards a solution, without any further need for negotiations between the sides."

407. From May to June 2007 different drafts of a resolution relating to the Comprehensive Proposal were discussed, but finally on 17 July 2007 Belgium, France, Germany, Italy, United Kingdom and the United States submitted their draft resolution to the Security Council.[384] However, they failed to attain the necessary support within the Security Council for a vote in favour of their draft resolution. On 20 July 2007, the co-sponsors of the draft resolution issued a statement in which they stated that it had been impossible to secure a Security Council resolution which would support the Comprehensive Proposal.[385]

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[383] UN Doc. S/2007/256 (4 May 2007), para. 59.

[384] UN Doc. S/2007/437 (17 July 2007), Annex 36 in Documentary Annexes accompanying this Written Statement.

[385] Statement issued on 20 July 2007 by Belgium, France, Germany, Italy, United Kingdom and the United States of America, co-sponsors of the draft resolution on Kosovo presented to the UNSC on 17 July, available at: http://www.unosek.org/docref/2007-07-20%20-%20Statement%20issued%20by%20the%20co-sponsors%20of%20the%20draft%20resolution%20.doc, Annex 37 in Documentary Annexes accompanying this Written Statement.

(3) The Troika negotiations

408. On 1 August 2007, the President of the Security Council received information from the Contact Group that a new initiative for negotiations on Kosovo had been established and he gave his full support to this initiative. A Tripartite negotiation team composed of representatives from the EU, the Russian Federation, and the United States of America was established. The Troika negotiations were conducted through series of meetings and ended in early December 2007.[386]

409. On 10 December 2007 Troika submitted its report to the United Nations Secretary-General. The conclusion of this report was as follows:

> "... 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. This is regrettable, as a negotiated settlement is in the best interests of both parties."

(4) The unilateral declaration of independence (UDI)

410. On 17 February 2008, the Kosovo Assembly adopted the UDI. The deputies representing the Serbian national minority in Kosovo boycotted the session of the Kosovo Assembly at which the UDI was adopted.[387] Subsequently, a so-called "constitution of Kosovo" was adopted on 8 April 2008.

411. By 1 April 2009, from a total of 192 United Nations member States, the so-called "Republic of Kosovo" had only been recognized by 56 States.

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[386] UN Doc. S/2007/723 (10 December 2007).

[387] See statement of the Secretary-General at Security Council meeting on Kosovo held on 18 February 2008, UN Doc. S/PV.5839 (18 February 2008), p. 2.

Part III
GENERAL INTERNATIONAL LAW PROVIDES NO GROUND FOR THE INDEPENDENCE OF KOSOVO

Chapter 6
THE UNILATERAL DECLARATION OF INDEPENDENCE IS IN CONTRADICTION WITH THE PRINCIPLE OF RESPECT FOR THE TERRITORIAL INTEGRITY OF STATES

412. The principle of respect for the territorial integrity of States constitutes a foundational principle of international law. It is one of the key constituent principles of the overarching concept of the sovereignty of States and from it flows a series of consequential norms. For the international community to accept a rule of international law positing a non-consensual right of secession from sovereign States would be tantamount to breaking the previously entrenched international consensus concerning the territorial integrity of States in a way that would have quite dramatic consequences. Such would be the inevitable result of accepting the UDI by the provisional institutions of self-government of Kosovo.

413. In this section, it is submitted that:

(i) The principle of territorial integrity of States is one of the key elements of international law;

(ii) It guarantees the spatial definition of States in a way that is binding on all members of the international community;

(iii) The principle is reflected in extensive international and regional practice;

(iv) All States are bound to respect the territorial integrity of other States;

(v) The obligation to respect territorial integrity extends beyond States and binds non-state actors in situations of non-consensual attempts at breaching the territorial integrity of independent States;

(vi) The fact that non-state actors may be bound by the principle of territorial integrity is illustrated by reference to a number of Security Council resolutions;

(vii) In addition, the range of Security Council resolutions dealing generally with the former Yugoslavia and specifically with the Kosovo problem demonstrates clearly the intention that the Kosovo Albanian leadership and community be bound by the principle of the territorial integrity of Serbia.

A. The Nature and Importance of the Principle of Territorial Integrity

414. International law is founded upon the centrality of the independence, sovereignty and equality of States. The doctrine of State sovereignty has at its centre the concept of sovereign equality, which has been authoritatively defined in terms of the following propositions:

> "(a) States are judicially equal;
> (b) Each State enjoys the rights inherent in full sovereignty;
> (c) Each Sate has the duty to respect the personality of other States;
> (d) The territorial integrity and political independence of the State are inviolable;
> (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
> (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States".[388]

415. States are the prime subjects of international law and the sovereignty of States reflects both the internal supremacy of the State within its own territory and the external protection of the existence and territorial limits of the State with regard to other States and other actors in the international political and legal system. Oppenheim, for example, has noted that, "[t]he exclusive dominion of a State

[388] General Assembly resolution 2625 (XXV).

within its territory is basic to the international system".[389] This exclusive dominion exists and is recognised as constituting the basis of international law. Without it, international law would not be the State-based system that it is and has been since classical times. It would be a very different system indeed and one far from current perceptions and realities.

416. The requirements of statehood focus upon the criteria of population, territory and governance.[390] But however one defines the requirements of statehood and however one weighs the relative balance between the relevant requirements, the criterion of territory is indispensable. As Oppenheim has noted, "a State without a territory is not possible".[391] Territory is the essential framework for the exercise of State sovereignty. It is the spatial context for the very existence of the State and thus at the very heart of international law.

417. In any system of international law founded upon sovereign and independent States, the principle of the protection of the integrity of the territorial expression of such States is bound to assume major importance. Oppenheim has confirmed that, "the importance of State territory is that it is the space within which the State exercises its supreme, and normally exclusive, authority".[392] Bowett regarded this principle as fundamental in international law and an essential foundation of the legal relations between States.[393]

418. Together with the consequential principles of domestic jurisdiction, non-intervention and the prohibition of the use of force, the foundational norm of respect for the territorial integrity of States is crucial with regard to the evolution of the principles

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[389] R.Y. Jennings and A.D. Watts (eds.), *Oppenheim's International Law* (1992), p. 564. See generally M.G. Kohen, *Posession Contestée et Souveraineté Territoriale* (1997); J. Castellino and S. Allen, *Title to Territory in International Law: A Temporal Analysis* (2002); G. Distefano, *L'Ordre International entre Légalité et Effectivité: Le Titre Juridique dans le Contentieux Territorial*(2002); R. Y. Jennings, *The Acquisition of Territory in International Law* (1963); M. N. Shaw, "Territory in International Law", 13 Netherlands YIL(1982), p. 61; N. Hill, *Claims to Territory in International Law and Relations* (1945); J. Gottman, *The Significance of Territory* (1973); and S. P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997).

[390] See J. Crawford, *The Creation of States in International Law* (2nd ed., 2006).

[391] *Op.cit.*, p. 563.

[392] *Op.cit.*, p. 564.

[393] D. W. Bowett, *Self-Defence in International Law* (1958), p. 29.

associated with the maintenance of international peace and security. It also underlines the decentralized State-orientated character of the international political system and both reflects and manifests the sovereign equality of States as a legal principle. Territorial integrity and State sovereignty are thus inextricably linked concepts in international law.

419. It was emphasised in the *Island of Palmas* case, the starting-point of any analysis of this branch of international law, that:

> "Territorial sovereignty … involves the exclusive right to display the activities of a State",[394]

while:

> "Sovereignty in the relations between States signifies independence. Independence in relation to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries, and as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."[395]

420. Accordingly, the concept of State sovereignty can only be exercised through exclusive territorial control so that such control becomes the cornerstone of international law, while the exclusivity of control means that no other State may exercise competence within the territory of another State without the express consent of the latter. To put it another way, the development of international law upon the basis of the exclusive authority of the State within an accepted territorial framework meant that territory became "perhaps the fundamental concept of

[394] *Island of Palmas case (Netherlands v. USA),* 1 RIAA 829, 839 (1928).
[395] *Ibid.*, p. 838.

international law".[396] This principle is two-sided. It establishes both the supervening competence of the State over its territory and the absence of competence of other States over that same territory. Recognition of a State's sovereignty over its territory imports also recognition of the sovereignty of other States over their territory. The International Court clearly underlined in the *Corfu Channel* case, that, "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations".[397]

421. These principles have been further discussed by the world court. The Permanent Court of International Justice, for example, emphasised in the *Lotus* case that:

> "... the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State",[398]

while the International Court underlined in the *Corfu Channel* case, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[399] and noted in the *Asylum* case that, "derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case".[400]

422. The juridical requirement, therefore, placed upon States is to respect the territorial integrity of other States, something that the Court emphasised in the *Nicaragua* case, in reaffirming "the duty of every State to respect the territorial sovereignty of others".[401] It is an obligation flowing from the sovereignty of States and from the

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[396] D. P. O'Connell, *International Law* (2nd ed., 1970), vol. I, p. 403.

[397] *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of April 9th 1949, I.C.J. Reports 1949*, p. 35.

[398] *The Case of the S.S. "Lotus" (France v. Turkey), Judgment of 7 September 1927*, PCIJ, Series A, No. 10, p. 18.

[399] *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of April 9th 1949*, I.C.J. Reports 1949, p. 22.

[400] *Asylum case (Colombia v. Peru), Judgment of 20 November 1950, I.C.J. Reports 1950*, p. 275.

[401] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 26 June 1986, I.C.J. Reports 1986*, p. 111, para. 213, and p. 128, paras. 251-252 (hereinafter: "*Nicaragua Case*").

equality of States. This has been reflected in academic writing. Vattel emphasised that, "Non seulement one ne doit point usurper le territoire d'autrui, il faut encore le respecter et s'abstenir de tout acte contraire aux droits du souverain".[402] One writer has noted that, "For States, respect for their territorial integrity is paramount … This rule plays a fundamental role in international relations".[403] It has also been stated that, "Few principles in present-day international law are so firmly established as that of the territorial integrity of States".[404]

423. It is, of course, important to note that this obligation is not simply to protect territory as such or the right to exercise jurisdiction over territory or even territorial sovereignty, the norm of respect for the territorial *integrity* of States imports an additional requirement and this is to sustain the territorial wholeness or definition or delineation of particular States. It is a duty placed on all States and relevant non-state actors to recognise that the very territorial structure and configuration of a State must be respected. While the principle of territorial sovereignty focuses upon the nature of the relationship between the State and its territory and defines its essential legal character, the principle of territorial integrity takes the matter a step further in affirming that this relationship is one that must be protected internationally, as a matter of international law and within a defined spatial context.

424. To put it another way, the obligation upon all States is not simply to avoid trespassing across international borders, but to acknowledge and positively protect the territorial composition of other States. It is the positive side to the negative requirement of non-intervention. This obligation, as will be seen below, also falls upon relevant non-state actors.

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[402] E. de Vattel, *Le Droit des Gens,* reprint of 1758 edition (Washington, 1916), volume I, Book II, p. 323, para. 93.

[403] M.G. Kohen, "Introduction" in M.G. Kohen (ed.), *Secession: International Law Perspectives* (2006), p. 6.

[404] See the Opinion on the Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty by Professors Franck, Higgins, Pellet, Shaw and Tomuschat on 8 May 1992, para. 2.16, available at http://www.uni.ca/library/5experts.html

425. An important corollary of the principle of territorial integrity is the strong presumption against dismemberment,[405] as reflected, for example, in the concept of the stability of boundaries.[406] This concept has received considerable judicial support. The International Court, for example, referred particularly to "the permanence and stability of the land frontier" in the *Tunisia/Libya Continental Shelf* case[407] and to the need for "stability and finality" in the *Temple of Preah Vihear* case.[408]

426. In the *Libya/Chad* case, the Court underlined that the "fixing of a frontier depends on the will of the sovereign States directly concerned"[409] and further noted that:

> "Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court".[410]

427. The importance of this concept in current circumstances is that it serves to underline the principle that territorial change must be brought about by consent. Accordingly, were the international community to accept as proposed the UDI by the provisional institutions of self-government of Kosovo a radical re-orientation of international law would in effect be proposed which would significantly undermine the principle of the stability of boundaries. It would, in the Court's words, render "precarious" established boundary lines on the basis of a "continuously available process", *viz.* an international right of secession from sovereign States extending to non-consensual secession.

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[405] Crawford, *The Creation of States*, *op.cit.*, p. 415.

[406] M.N. Shaw, "The Heritage of States: The Principle of *Uti Possidetis Juris* Today", 67 *British Year Book of International Law* (1996), pp. 75, 81, see also K.H. Kaikobad, "Some Observations on the Doctrine of Continuity and Finality of Boundaries", 54 *British Year Book of International Law* (1983), p. 119 and S. Lalonde, *Determining Boundaries in a Conflicted World* (2002), chapter 5.

[407] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 66, para. 84. See also *the Grisbadarna case*, Scott, *Hague Court Reports*, 1916, pp. 122, 130.

[408] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C. J. Reports 1962*, p. 34.

[409] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994*, p. 23, para. 45.

[410] *Ibid.*, p. 37, para. 72.

428. Thus, the importance of the principle of respect for the territorial integrity of States has been repeatedly affirmed by judicial authority and confirmed in academic writing.

B. The United Nations Has Repeatedly Affirmed the Principle of Territorial Integrity

I Generally

429. The international community, through international and regional organizations, has emphasised the importance of the principle of territorial integrity. For example, Article 10 of the Covenant of the League of Nations provided that the Members of the League

> "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League".[411]

430. In the Charter of the United Nations, the following provisions are particularly relevant. Article 2, paragraph 1, provides that the Organisation itself is based on "the principle of the sovereign equality of all its Members", while Article 2, paragraph 4, declares 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..."

The latter principle is, of course, one of the core principles of the United Nations.

[411] See also the last of President Woodrow Wilson's Fourteen Points delivered to Congress on 8 January 1918 referring to the need to establish a general association of nations under specific covenants for the purpose of "affording mutual guarantees of political independence and territorial integrity to great and small States alike", available at: http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points.

431. While the norm calling for respect for territorial integrity applies to independent States, it is not so limited. The international community has both sought to preserve the particular territorial configuration of colonial territories as the movement to decolonisation gathered pace and has made increasing reference to non-state actors within the context of respect for territorial integrity. Point 4 of General Assembly resolution 1514 (XV) (the Declaration on the Granting of Independence to Colonial Countries and Peoples) adopted on 14 December 1960 specifically called for an end to armed action against dependent peoples and emphasized that the "integrity of their national territory shall be respected".[412]

432. The United Nations, while underlining the presumption of territorial integrity with regard to colonial territories in the move to independence, was equally clear with regard to the need for respect for the territorial integrity of States. According to point 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"

433. General Assembly resolution 2625 (XXV) adopted on 24 October 1970 (Declaration on Principles of International Law) stressed the importance of the respect for territorial integrity, first, in paragraph 7 of the principle of equal rights and self-determination of peoples, referred to as the "safeguard clause",[413] and secondly, in the following provision

> "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country".

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[412] General Assembly resolution 1514 (XV); see also, General Assembly resolution 2625 (XXV), "The principle of equal rights and self-determination of peoples", para. 6.

[413] See further, below, Chapter 7, para. 589 and following.

434. The Declaration on the Right to Development adopted by the General Assembly on 4 December 1986 in resolution 41/128 called in Article 5 for States to take resolute action to eliminate "threats against national sovereignty, national unity and territorial integrity". General Assembly resolution 48/182, dated 19 December 1991, adopting a text on Guiding Principles on Humanitarian Assistance, provides in paragraph 3 that,

> "The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".

435. Further, resolution 52/112 concerning the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination, adopted by the General Assembly on 12 December 1997, explicitly reaffirmed "the purposes and principles enshrined in the Charter of the United Nations concerning the strict observance of the principles of sovereign equality, political independence, territorial integrity of States …"

436. The United Nations Millennium Declaration, adopted by the General Assembly on 8 September 2000,[414] noted the rededication of the heads of State and of government gathered at the United Nations to supporting *inter alia* "all efforts to uphold the sovereign equality of all States, [and] respect for their territorial integrity and political independence". This Declaration was reaffirmed in the World Summit Outcome 2005, in which world leaders agreed to "to support all efforts to uphold the sovereign equality of all States, [and] respect their territorial integrity and political independence".[415] In its turn, this provision in the World

[414] General Assembly resolution 55/2.
[415] General Assembly resolution 60/1, para. 5.

Summit Outcome was explicitly reaffirmed by the United Nations Global Counter-Terrorism Strategy 2006.[416]

437. This approach whereby the recognition of particular rights in international law of non-State persons is accompanied by a reaffirmation of the principle of territorial integrity finds recent expression in the United Nations Declaration on the Rights of Indigenous Peoples, adopted on 7 September 2007.[417] Article 46 of the Declaration provides that:

> "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".

438. It will be noticed that this provision expressly refers to "any State, people, group or person" with regard to the prohibition of conduct adversely affecting *inter alia* the territorial integrity of States. It demonstrates, therefore, both that obligation to obey the norm of territorial integrity is not exclusive to States and the range of non-state actors that may be subject to the norm.

439. Accordingly, it is beyond contention that the United Nations has in terms of the elucidation of the fundamental principles of international law repeatedly confirmed that respect for the territorial integrity of States forms a part of that body of law.

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[416] General Assembly resolution 60/288. See also General Assembly resolutions 57/337 on the Prevention of Armed Conflict which reaffirmed the Assembly's commitment to the principles of the political independence, the sovereign equality and the territorial integrity of States; 59/195 on Human Rights and Terrorism, paragraph 1 of which refers to the territorial integrity of States; and resolution 53/243, the Declaration and Programme of Action on a Culture of Peace, paragraph 15 (h) of which calls on states to refrain from any form of coercion aimed against the political independence and territorial integrity of States.

[417] General Assembly Resolution 61/295.

II With regard to internal conflicts in particular

440. The United Nations has, however, moved beyond the confirmation of the right of respect for the territorial integrity of States. It has also specifically emphasised that the principle of territorial integrity applies to non-state actors in civil war/secessionist situations.

441. The norm of territorial integrity has also been referred to, and reaffirmed, in a large number of United Nations resolutions adopted with regard to particular situations, virtually all of them concerning internal conflicts.[418] An indicative survey only needs to be made in order to demonstrate how critical the international community deems the principle of territorial integrity to be and how the principle is deemed to apply not only to third States but also to internal groups.

(1) The conflicts in Bosnia and Herzegovina and Croatia

442. In the case of Bosnia and Herzegovina, a series of Security Council resolutions combined a reaffirmation of the territorial integrity of the State with calls upon all parties to resolve the dispute. For example, operative paragraph 1 of resolution 752 (1992):

> "Demands that all parties and others concerned in Bosnia-Herzegovina stop the fighting immediately, respect immediately and fully the cease-fire signed on 12 April 1992, and cooperate with the efforts of the European Community to bring about urgently a negotiated political solution respecting the principle that any change of borders by force is not acceptable".

[418] Situations concerning external aggression by one State against another will not be examined in this section, see, e.g., Security Council resolution 687 (1991) on the Iraqi invasion and purported annexation of Iraq and General Assembly resolutions 3212 (XXIX) and 37/253 with regard to Cyprus; nor will colonial situations, see e.g. Security Council resolution 389 (1976) calling upon all States to respect the territorial integrity of East Timor.

443. Resolution 770 (1992) also reaffirmed both the territorial integrity of Bosnia and Herzegovina and its demand that "all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately".

444. In resolution 787 (1992), the Council expressed its deep concern at "the threats to the territorial integrity of the Republic of Bosnia and Herzegovina". In particular, operative paragraph 3:

> "*Strongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina*, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted". (emphasis added)

445. This powerful call on all parties, clearly including internal groups, to strictly respect the territorial integrity of Bosnia and Herzegovina is of particular importance in the current proceedings.

446. In resolution 836 (1993), the Council reaffirmed the "sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina and the responsibility of the Security Council in this regard" and condemned "military attacks, and actions that do not respect the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina", while in resolution 847 (1993), the Council strongly condemned "continuing military attacks within the territory of the Republics of Croatia and of Bosnia and Herzegovina, and reaffirm[ed] its commitment to ensure respect for the sovereignty and territorial integrity of the Republic of Croatia and of the other Member States where UNPROFOR is deployed". In resolution 859 (1993), the Council, in operative paragraph 6, affirmed that "a solution to the conflict in the Republic of Bosnia and Herzegovina must be in conformity with the Charter of the United Nations and the principles of international law; and, further affirms the continuing relevance in this context of: (a) the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina".

447. In resolution 942 (1994), the Security Council affirmed its "commitment to a negotiated settlement of the conflict in the former Yugoslavia, preserving the territorial integrity of all the States there within their internationally recognized borders" and strongly condemning "the Bosnian Serb party for their refusal to accept the proposed territorial settlement, and demands that that party accept this settlement unconditionally and in full", proceeded to impose sanctions upon it.

448. In resolution 982 (1995), the Council further affirmed "its commitment to the search for an overall negotiated settlement of the conflicts in the former Yugoslavia, ensuring the sovereignty and territorial integrity of all the States there within their internationally recognized borders, and stressing the importance it attaches to the mutual recognition thereof", reaffirmed in particular "its commitment to the independence, sovereignty and territorial integrity of the Republic of Bosnia and Herzegovina."[419] and called on

> "all parties and others concerned to comply fully with all Security Council resolutions regarding the situation in the former Yugoslavia to create the conditions that would facilitate the full implementation of UNPROFOR's mandate".

449. Similar approaches were taken with regard to the question of Croatia and the Serb-populated Krajina region in the south of that country. Security Council resolution 981 (1995), for example, affirmed generally "its commitment to the search for an overall negotiated settlement of the conflicts in the former Yugoslavia ensuring the sovereignty and territorial integrity of all the States there within their internationally recognized borders, and stressing the importance it attaches to the mutual recognition thereof" and specifically "its commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia". In this context, the Council called upon "the Government of the Republic of Croatia and the local Serb authorities to refrain from the threat or use of force and to reaffirm their commitment to a peaceful resolution of their differences".[420]

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[419] See also similar terminology used with regard to Croatia in Security Council resolution 1009 (1995).
[420] See also Security Council resolutions 990 (1995), 994 (1995) and 1009 (1995).

450. The Security Council, in its resolutions 1088 (1996), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005), 1722 (2006), 1785 (2007) and 1845 (2008)[421] supported the General Framework Agreement for Peace in Bosnia and Herzegovina (also known as "Paris-Dayton Agreement")[422] and the Dayton Agreement on implementing the Federation of Bosnia and Herzegovina of 10 November 1995.[423] This support was manifested in the first operative paragraph of the resolution, appearing immediately after the reference to the Council acting under Chapter VII of the Charter. The parties to these agreements were further called upon to comply strictly with their obligations under these agreements, such obligations, of course, including that of respecting the territorial integrity of Bosnia and Herzegovina. Indeed, the very purpose of these agreements was securing the territorial integrity and sovereignty of Bosnia and Herzegovina.

451. The parties to the General Framework Agreement were Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia, while the obligations in its annexes were also undertaken by the central government and entities of Bosnia and Herzegovina. The parties to the Dayton agreement on implementing the Federation of Bosnia and Herzegovina were the central authorities of Bosnia and Herzegovina and the authorities of one of its entities, the Federation of Bosnia and Herzegovina, while the annex to the agreement was signed by two mayors of the city of Mostar and its EU administrator.

452. The parties – including the entities of Bosnia and Herzegovina - must, therefore, be regarded as doubly bound to respect existing frontiers, both by virtue of the peace agreements and as a consequence of the binding Security Council resolutions.

(2) The situation in Somalia

453. One constant of the international community's concern with the continuing civil war in Somalia, extending essentially since 1991, has been the focus upon the

[421] See Annex 15 and Annexes 21 to 28 in Documentary Annexes accompanying this Written Statement.
[422] UN Doc. S/1995/999, Annex (30 November 1995).
[423] UN Doc. S/1995/1021, Annex (8 December 1995).

territorial integrity of that State, despite secessionist pressures from, for example, "Somaliland" and "Puntland", and continuing internal armed conflict leading to the absence of an internationally recognised government with effective control over the territory of the State. For example, Security Council resolution 1766 (2007) reaffirmed "the importance of the sovereignty, territorial integrity, political independence and unity of Somalia", while extending the mandate of the Monitoring Group referred to in paragraph 3 of resolution 1558 (2004) concerning an arms embargo and stressing the need for the Transitional Federal Institutions to continue "working towards establishing effective national governance in Somalia".[424]

454. Security Council resolution 1772 (2007) repeated the reaffirmation of "its respect for the sovereignty, territorial integrity, political independence and unity of Somalia", sought to encourage the national reconciliation process and authorized Member States of the African Union to maintain a mission in Somalia for an additional six months. The Security Council reaffirmed its strong support for the African Union mission in Somalia (AMISOM) in a Presidential Statement of 19 December 2007, while repeating its "respect for the sovereignty, territorial integrity, political independence and unity of Somalia".[425] The African Union in continuing its mission has reaffirmed "its commitment to the respect of the unity, territorial integrity and sovereignty of Somalia".[426]

455. Security Council authorization for AMISOM has been further renewed,[427] as has the mandate of the Monitoring Group,[428] both in resolutions explicitly reaffirming respect for the sovereignty, territorial integrity and unity of Somalia. Further, in its resolutions encouraging States to take action with regard to piracy off the Somali coast in cooperation with the Transitional Federal Government, the Security Council reaffirmed "its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, including Somalia's rights with

[424] See also Security Council resolutions 733 (1992),1519 (2003), 1558 (2004), 1587 (2005) and 1744 (2007).
[425] UN Doc. S/PRST/2007/49 (19 December 2007).
[426] See the Decision of the Peace and Security Council of the African Union, Communiqué of the 163rd Meeting, December 2008, para. 3.
[427] See, e. g., Security Council resolutions 1801 (2008), 1816 (2008) and 1831 (2008).
[428] See, e.g., Security Council resolutions 1811 (2008) and 1853 (2008).

respect to offshore natural resources, including fisheries, in accordance with international law".[429]

456. This continuing emphasis upon the territorial integrity of Somalia in the face of both secessionist pressures and internal conflict has clearly been aimed not only at States but also at relevant non-state actors.

(3) The situation in Georgia

457. In the case of Georgia, the Security Council adopted a Presidential Statement on 8 April 1994 in which the Council called upon "both parties to observe strictly the cease-fire and other commitments under the agreements" that had been signed. A further Presidential Statement was adopted on 2 December 1994 in which it was stated that:

> "The Security Council has received with deep concern a report from the Secretariat concerning a statement of 26 November 1994 attributed to the Supreme Soviet of Abkhazia, Republic of Georgia. It believes that any unilateral act purporting to establish a sovereign Abkhaz entity would violate the commitments assumed by the Abkhaz side to seek a comprehensive political settlement of the Georgian-Abkhaz conflict. The Security Council reaffirms its commitment to the sovereignty and territorial integrity of the Republic of Georgia.
>
> The Security Council calls upon all parties, in particular the Abkhaz side, to reach substantive progress in the negotiations under the auspices of the United Nations and with the assistance of the Russian Federation as facilitator and with the participation of representatives of the CSCE aimed at achieving a comprehensive political settlement of the conflict, including on the political status of Abkhazia, respecting fully the sovereignty and territorial

[429] See Security Council resolutions 1846 (2008) and 1851 (2008).

integrity of the Republic of Georgia, based on the principles set out in all the relevant resolutions of the Security Council".[430]

458. The Security Council proceeded to adopt resolutions reaffirming the "sovereignty, independence and territorial integrity of Georgia within its internationally recognised borders", and calling upon "both sides" of the Georgia-Abkhaz conflict to settle their dispute only by peaceful means "and within the framework of the Security Council resolutions".[431] Further, in resolution 1781 (2007), the Council called on "the Abkhaz side to exercise restraint" and on "both sides" to use existing mechanisms to come to a peaceful settlement and in resolution 1808 (2008), the Council noted that the United Nations would "continue to support the process of conflict resolution between the Georgian and Abkhaz sides" but reaffirmed the territorial integrity of Georgia and supported all efforts by the United Nations to settle the Georgian-Abkhaz dispute "only by peaceful means and within the framework of the Security Council resolutions".

(4) The situation in the Democratic Republic of the Congo

459. With regard to the continuing civil war in the Democratic Republic of the Congo ("DRC"), which has also seen numerous secessionist trends, the United Nations has been meticulous in reaffirming "its commitment to respect the sovereignty, territorial integrity and political independence" of that State. Such resolutions have extended the mandate and deployment of the United Nations Mission in the DRC (MONUC), part of whose responsibility has included the territorial security of the DRC, while all Governments in the region (particularly those of Burundi, Rwanda and Uganda, as well as that of the DRC itself) have been urged to resolve in a constructive manner their shared security and border problems.[432]

460. For example, Security Council resolution 1756 (2007) reaffirmed its commitment to respect the "sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo", within the context of referring to the

[430] UN Doc. S/PRST/1994/78 (2 December 1994).
[431] See, e.g., Security Council resolutions 1752 (2007), 1781 (2007), and 1808 (2008).
[432] See, e.g., Security Council resolution 1756 (2007); See also Security Council resolutions 1316 (2000), 1493 (2003), 1565 (2005) and 1711 (2006).

importance of urgently carrying out security sector reform and of disarming, demobilizing, resettling or repatriating, as appropriate, and reintegrating Congolese and foreign armed groups for the long-term stabilization of the Democratic Republic of the Congo; reiterating its grave concern at the presence of "armed groups and militias"; deploring the violations of human rights and international humanitarian law carried out by such "militias and armed groups"; noting that amongst the functions of MONUC was the obligation to observe and report on the position of "armed movements and groups" and deter any attempt at the use of force to threaten the political process from "any armed group, foreign or Congolese"; demanding that "militias and armed groups" still present in the eastern part of the DRC lay down their arms and urging all governments in the region to prevent the use of their territories "in support of activities of armed groups present in the region".[433]

461. Further, Security Council resolution 1771 (2007) repeated its reaffirmation with regard to the sovereignty, territorial integrity and political independence of the DRC, reiterated its concern regarding the presence of "armed groups and militias", emphasised the importance of "reintegrating Congolese and foreign armed groups for the long-term stabilisation" of the country, and called upon "all parties and all States" to cooperate with the work of the Group of Experts established under resolution 1533.

462. Resolution 1804 (2008), similarly reaffirming the territorial integrity of the DRC (and indeed of Rwanda and all other States in the region), emphasised that:

> "the arms embargo imposed by resolution 1493 (2003), as expanded by resolution 1596 (2005), prohibits the provision of arms and any related materiel or technical training and assistance to all foreign armed groups and illegal Congolese militias in the Democratic Republic of the Congo …",

[433] See Security Council resolution 1756 (2007).

while resolution 1807 (2008) *inter alia* imposed a travel ban and an assets freeze on persons and entities, including those impeding the demobilisation and reintegration of combatants.

463. In addition, General Assembly resolution 60/170, adopted on 9 March 2006, after specifically referring (in paragraph 4) to "militia groups" and "groups linked to the mining and trading of .. resources", provides as follows:

> "5. *Urges* all the parties, including non-signatories of the Global and All-Inclusive Agreement on the Transition, in the Democratic Republic of the Congo:
> (a) To respect and further implement the Global and All-Inclusive Agreement and to cease immediately any action which impedes the consolidation of the sovereignty, unity and territorial integrity of the Democratic Republic of the Congo;
> (b) To support the transitional Government and its institutions in order to allow for the re-establishment of political and economic stability and for the gradual reinforcement of State structures over the entire territory of the Democratic Republic of the Congo ..".

(5) The situation in Sudan

464. The civil war in Sudan has also been the subject of continuing concern by the United Nations and the African Union. In resolution 1556 (2004), the Security Council endorsed the "deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region of Sudan under the leadership of the African Union", while reaffirming "its commitment to the sovereignty, unity, territorial integrity, and independence of Sudan".

465. In resolution 1769 (2007), the Security Council reaffirmed its "strong commitment to the sovereignty, unity, independence and territorial integrity of Sudan".[434] and specifically recalled the statement of the President of the African Union endorsing the Addis Ababa and Abuja agreements and calling for them to

[434] See Security Council resolution 1769 (2007), preambular para. 2.

be fully implemented "by all parties without delay and for all parties to facilitate the immediate deployment of the United Nations Light and Heavy Support packages to the African Union Mission in the Sudan (AMIS) and a Hybrid operation in Darfur".[435]

466. In that resolution the Security Council authorised and mandated the establishment of an AU/UN Hybrid operation in Darfur (UNAMID) based upon a report of the Secretary-General and Chairperson of the African Union Commission and in the light of proven egregious human rights violations.[436] The Security Council also urged "all parties" to the conflict in Darfur not to act in a way that would impede the implementation of the Darfur Agreement and in operative paragraph 4 called on "all parties" to urgently facilitate the full deployment of the United Nations Light and Heavy Support packages to the African Union Mission in the Sudan (AMIS) and preparations for UNAMID. In operative paragraph 13, the Security Council also called on "all parties to the conflict in Darfur to immediately cease all hostilities and commit themselves to a sustained and permanent cease-fire".

467. In operative paragraph 18, the Council also:

> "*Emphasises* there can be no military solution to the conflict in Darfur, *welcomes* the commitment expressed by the Government of Sudan and some other parties to the conflict to enter into talks and the political process under the mediation, and in line with the deadlines set out in the roadmap, of the United Nations Special Envoy for Darfur and the African Union Special Envoy for Darfur, who have its full support, *looks forward* to these parties doing so, *calls* on the other parties to the conflict to do likewise, and *urges* all the parties, in particular the non-signatory movements, to finalise their preparations for the talks".

468. The Secretary General was requested to report to the Council on *inter alia* "the implementation of the Darfur Peace Agreement and the parties' compliance with

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[435] *Ibid.*
[436] UN Doc. S/2007/307/Rev.1 (5 June 2007).

their international obligations and their commitments under relevant agreements".[437]

469. Finally, in operative paragraph 22, the Council:

> "*Demands* that the parties to the conflict in Darfur fulfil their international obligations and their commitments under relevant agreements, this resolution and other relevant Council resolutions".

470. One of the relevant agreements is obviously the Darfur Peace Agreement which expressly affirms "the sovereignty, unity, and territorial integrity of Sudan."[438]

471. The commitment to respect the territorial integrity of Sudan was mentioned in all relevant Security Council resolutions.[439] In resolution 1784 (2007), for example, the Council called on "all parties" to agree immediately to full unrestricted UNMIS monitoring and verification in the Abyei region (between north and south Sudan). Accordingly, the repeated reference by the Security Council in operative paragraphs to "all parties" which in the circumstances clearly included non-state actors in Sudan, constitutes a crucial point with regard to the obligation on such non-state actors to respect the territorial integrity of the State concerned.

472. Further, in addressing the cross-over of the civil wars of Sudan, the Central African Republic and Chad into each other's territory, the Security Council in resolution 1778 (2007) emphasised "its commitment to the sovereignty, unity, territorial integrity and political independence of Chad and the Central African Republic" and after noting the role specifically of those two States proceeded to call upon "all the parties" to cooperate fully in the deployment and operations of the United Nations Mission in the Central African Republic and Chad (MINURCAT) and the European Union operation and reaffirmed the obligation of

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[437] *Ibid.*, operative paragraph 21 (d).
[438] Darfur Peace Agreement, available at: http://allafrica.com/peaceafrica/resources/view/00010926.pdf, Preamble.
[439] See Security Council resolutions 1590 (2005), 1828 (2008) and 1841 (2008).

"all parties" to implement fully the rules and principles of international humanitarian law.[440]

(6) Other situations

473. In other situations as well, the United Nations has been consistent in reaffirming the territorial integrity of States facing internal disputes and conflicts. In the case of Iraq, for example, the Security Council both in establishing and subsequently extending the mandate of the United Nations Assistance Mission for Iraq (UNAMI) and with regard to the multi-national force in Iraq, has consistently reaffirmed "the independence, sovereignty, unity and territorial integrity" of the State.[441]

474. With regard to Afghanistan, the Council, in imposing sanctions on the Taliban regime in 1999, reaffirmed "its strong commitment to the sovereignty, independence, territorial integrity and national unity" of the country and insisted that the Taliban "comply promptly with its previous resolutions",[442] as it did subsequently in resolutions concerning the United Nations Assistance Mission in Afghanistan (UNAMA) and the International Security Assistance Force (ISAF).[443]

475. In addition, the territorial integrity of number of other States involved in internal conflicts or disputes has been explicitly and specifically reaffirmed.[444] In the case

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[440] See Security Council resolution 1778 (2007), operative paragraphs 13 and 17.

[441] See Security Council resolutions 1500 (2003), 1546 (2004), 1557 (2004), 1619 (2005), 1700 (2006), 1770 (2007), 1790 (2007) and 1830 (2008). In resolution 1770 (2007), for example, the Security Council after reaffirming the territorial integrity of Iraq emphasised "the need for all communities in Iraq to reject sectarianism, participate in the political process, and engage in an inclusive political dialogue and national reconciliation for the sake of Iraq's political stability and unity". This formulation was repeated in resolution 1830 (2008).

[442] See Security Council resolution 1267 (1999).

[443] See, e.g., Security Council resolutions 1386 (2001), 1510 (2003), 1707 (2006), 1746 (2007) and 1776 (2007).

[444] See, e.g., Security Council resolutions 1780 (2007) and 1840 (2008) with regard to Haiti; resolution 1796 (2008) with regard to Nepal; resolution 1719 (2006) and 1791 (2007) with regard to Burundi; resolutions 1782 (2007), 1765 (2007), 1795 (2008) and 1826 (2008) with regard to Côte d'Ivoire; resolution 1268 (1999) and General Assembly resolution 52/211 with regard to Angola; Security Council resolution 1306 (2000) with regard to Sierra Leone; General Assembly resolution 37/43 with regard to the Comoros; Security Council Presidential statement of 20 July 1993, S/26118, with regard to Ukraine; Security Council resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993) and General Assembly resolution 62/243 with regard to Azerbaijan and all other States in the region.

of Lebanon, for example, the Security Council in resolution 1701 (2006) in reiterating its "strong support … for the territorial integrity, sovereignty and political independence" of that country in the light of the Israel - Hezbollah conflict that year, also affirmed that "all parties are responsible for ensuring that no action is taken" that might adversely affect the search for a long-term solution.[445]

476. It is, therefore, beyond dispute that international practice has been remarkably consistent in affirming the territorial integrity of States, both generally and particularly with regard to States faced with internal conflicts or disputes. Such practice, which confirms and reinforces the foundational norm of territorial integrity, demonstrates that there exists an international rule to that effect which applies not only to neighbouring and other States, but also to those groups within the State in question that seek non-consensual secession.

C. Regional Treaty Law Has Also Consistently Upheld the Principle of Territorial Integrity

477. References to territorial integrity occur with considerable frequency in regional treaties and other instruments. The following indicative examples may be given.

478. Insofar as Europe is concerned, Principle IV of the Declaration on Principles Guiding Relations Between Participating States contained in the Helsinki Final Act adopted on 1 August 1975 by the Conference on Security and Cooperation in Europe declares that:

> "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

[445] See also Security Council resolutions 347 (1974), 425 (1978), 436 (1978), 444 (1979), 467 (1980), 490 (1981), 508 (1982), 509 (1982), 520 (1982), 542 (1983), 564 (1985), 587 (1986), 1052 (1996), 1559 (2004), 1655 (2006), and 1757 (2007). See also General Assembly resolution 36/226.

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."[446]

479. The Charter of Paris for a New Europe adopted by the renamed Organisation for Security and Cooperation in Europe in November 1990 reaffirmed that:

> "In accordance with our obligations under the Charter of the United Nations and commitments under the Helsinki Final Act, we renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the principles or purposes of those documents".[447]

480. The Council of Europe has adopted two conventions of particular relevance. First, Article 5 of the European Charter for Regional or Minority Languages adopted on 5 November 1992, provides that:

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[446] Declaration on Principles Guiding Relations Between Participating States contained in the Helsinki Final Act adopted on 1 August 1975. Note also the provisions in Principle I that participating states will "respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every state to juridical equality, to territorial integrity and to freedom and political independence"; Principle II that participating states "will refrain in their mutual relations, as well as in their international relations in general, 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 and with the present Declaration" and Principle III that participating states "regard as inviolable all one another's frontiers as well as the frontiers of all states in Europe".

[447] Charter of Paris for a New Europe (19-20 November 1990), available at: www.osce.org/documents/mcs/1990/11/4045_en.pdf; see also the Lisbon Declaration On a Common and Comprehensive Security Model for Europe for the Twenty-First Century (1996), point 6; the Charter for European Security (1999), point 16 and the Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe (1999) by participating states reaffirming "their obligation to refrain in their mutual relations, as well as in their international relations in general, 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 and principles of the Charter of the United Nations".

> "Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States".[448]

481. Secondly, the Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, called for cooperation between States "without prejudice to the constitution and territorial integrity of each State" and for:

> "the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of States;"

while Article 21 emphasises that:

> "Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States".[449]

482. The Charter of the Commonwealth of Independent States, adopted at Minsk on 22 January 1993,[450] notes as amongst its principles listed in Article 3, the inviolability of State borders, the recognition of existing borders and the rejection of unlawful territorial annexations; together with the territorial integrity of States and the rejection of any actions directed towards breaking up alien territory.

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[448] European Charter for Regional or Minority Languages (opened for signature 5 November 1992, entered into force 1 March 1998), CETS No. 148.

[449] Framework Convention for the Protection of National Minorities (opened for signature 1 February 1995, entered into force 1 February 1998), CETS No. 157.

[450] The Charter of the Commonwealth of Independent States (1993), available at: http://therussiasite.org/legal/laws/CIScharter.html.

483. The Charter of the Collective Security Organisation 2002 (replacing the CIS Collective Security Treaty) sought to ensure the "security, sovereignty and territorial integrity" of States parties as noted in the preamble, while Article 3 described the purposes of the organisation as being

> "to strengthen peace and international and regional security and stability and to ensure the collective defence of the independence, territorial integrity and sovereignty of the member States, in the attainment of which the member States shall give priority to political measures".[451]

484. Outside of the European area, Article 1 of the Charter of the Organisation of American States 1948[452] provides that the American States parties to the Charter thereby establish an international organisation "to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence".

485. The Framework Treaty on Democratic Security in Central America, adopted on 15 December 1995,[453] noted in Article 26 as amongst its regional security principles renunciation of the threat or the use of force against the sovereignty, territorial integrity and political independence of any country in the region; collective defence and solidarity in the event of armed attack by a country outside the region against the territorial integrity, sovereignty, and independence of a Central American country and the national unity and territorial integrity of the countries in the framework of Central American integration. Article 46 further provides that any armed aggression, or threat of armed aggression, by a State outside the region against the territorial integrity, sovereignty or independence of

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[451] See also the Charter of GUAM (Georgia, Ukraine, Azerbaijan and Moldova), (2006), Article II which calls for cooperation based on "the principles of respect for sovereignty and territorial integrity of the states, inviolability of their internationally recognized borders and non-interference in their internal affairs and other universally recognized principles and norms of international law".

[452] The Charter of the Organisation of American States (1948), as amended in 1967, 1985, 1992 and 1993, available at: http://www.oas.org/juridico/English/charter.html.

[453] Framework Treaty on Democratic Security in Central America (1995), available at: http://www.state.gov/p/wha/rls/70979.htm.

a Central American State is to be considered an act of aggression against the other Central American States".

486. The Charter of the Organisation of African Unity 1963[454] declares in Article II, paragraph 1(c), that among the purposes of the organisation are the defence of their "sovereignty, their territorial integrity and independence", while Article III lists the principles to which the Members of the OAU adhere in fulfilling the Stated purposes of the organisation. These include the sovereign equality of all Member States; non-interference in the internal affairs of States and "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". The OAU was transformed into the African Union by the Constitutive Act of the African Union 2000.[455] Article 3 includes among the objectives of the Union, defence of the "sovereignty, territorial integrity and independence of its members", while Article 4 provides that the Union is to function in accordance with a number of principles, including "sovereign equality and interdependence among member States of the Union" and "respect of borders existing on achievement of independence".

487. The norm of territorial integrity also appears explicitly in the constitutional documents of sub-regional organisations. For example, the Heads of State and Government of the Member States of the Economic Community of West African States (ECOWAS) reaffirmed in Article II of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security adopted on 10 December 1999[456] a series of "fundamental principles", including "territorial integrity and political independence of Member States".

488. The preamble to the Protocol on Politics, Defence and Security Cooperation adopted by the Heads of State and Government of the Member States of the

[454] The Charter of the Organisation of African Unity (1963), available at: http://www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf.
[455] The Constitutive Act of the African Union (2000), available at: http://www.africa-union.org/root/AU/Documents/Treaties/List/Constitutive%20Act%20of%20the%20African%20Union.pdf.
[456] The Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (1999), available at: http://www.oecd.org/dataoecd/55/62/38873520.pdf.

Southern African Development Community (SADC) on 14 August 2001[457] recognised and reaffirmed the principles of "strict respect for sovereignty, sovereign equality, territorial integrity, political independence, good neighbourliness, interdependence, non-aggression and non-interference in internal affairs of other States" and declared in Article 11, paragraph 1 (a), that "State Parties shall refrain from the threat or use of force against the territorial integrity or political independence of any State, other than for the legitimate purpose of individual or collective self-defence against an armed attack".

489. The Charter of the Organisation of the Islamic Conference 1972[458] provides that amongst its principles laid down in Article II are "respect for the sovereignty, independence and territorial integrity of each member State" and "abstention from the threat or use of force against the territorial integrity, national unity or political independence of any member States". The Islamabad Declaration adopted at the Extraordinary Session of the Islamic Summit 1997 reaffirmed in its preamble respect for the principles of "sovereignty, territorial integrity and non-interference in internal affairs of States."[459] The Charter of the Organisation was replaced with an amended document dated 14 March 2008,[460] which refers twice in its preambular paragraph to the determination of the organisation to "respect, safeguard and defend the national sovereignty, independence and territorial integrity of all member States". Article 1 noted as one of the objectives of the organisation to respect the "sovereignty, independence and territorial integrity of each Member State", while another objective is to "support the restoration of complete sovereignty and territorial integrity of any member State under occupation, as a result of aggression, on the basis of international law and cooperation with the relevant international and regional organisations". Article 2 states the principles of the organisation, including the principle that all Member States "undertake to respect national sovereignty, independence and territorial

[457] The Protocol on Politics, Defence and Security Cooperation (2001), available at: http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/sadc/1Protocol_on_Defence_Organ.pdf.
[458] Available at: http://www.oic-oci.org/is11/english/Charter-en.pdf.
[459] See UN Doc. A/51/915, Annex (6 June 1997).
[460] Charter of the Organisation of the Islamic Conference, amended on 14 March 2008, available at: www.oic-oci.org/35cfm/english/res/35CFM-DW-RES-FINAL.pdf.

integrity of other member States and shall refrain from interfering in the internal affairs of others".

490. The Association of South East Asian Nations (ASEAN) was created on 8 August 1967. In the Treaty of Amity and Cooperation in Southeast Asia 1976,[461] the States parties agreed to be bound by a number of "fundamental principles" laid down in Article 2, including "Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations". Article 10 provides that, "Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party". The ASEAN Charter was signed on 20 November 2007, with the preamble noting respect for the "principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity".[462] Article 2, paragraph 2, provides that ASEAN and its Member States are to act in accordance with a number of principles, including "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member States".[463]

491. The above summary of some of the regional treaties embedding the principle of territorial integrity is sufficient to demonstrate the extent to which this principle forms the bedrock of international relations across the international community, covering all major regions, cultures and civilisations.

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[461] Treaty of Amity and Cooperation in Southeast Asia (1976), available at: http://www.aseansec.org/1217.htm.

[462] The ASEAN Charter (2007), the member states currently are Brunei, Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. Available at: www.aseansec.org/ASEAN-Charter.pdf.

[463] See also the Charter of the South Asian Regional Association for Regional Cooperation (India, Pakistan, Bangladesh, the Maldives, Nepal, Sri Lanka and Bhutan) adopted on 8 December 1986 which affirmed "respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force and non-interference in the internal affairs of other States and peaceful settlement of all disputes" and emphasised in Article II (1) that, "Cooperation within the framework of the Association shall be based on respect for the principles of sovereign equality, territorial integrity, political independence, non – interference in the internal affairs of other States and mutual benefit."

D. Consequential principles

492. This central norm of territorial integrity has generated a series of relevant consequential principles which need to be noted. The International Court, for example, noted that the principle of respect for State sovereignty was "closely linked with the principles of the prohibition of the use of force and of non-intervention"[464] and pointed out that the "effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention".[465]

493. Such principles would include that of domestic jurisdiction, which emphasises that as a direct consequence of the norms of State sovereignty, State equality and territorial integrity, there is a core of activity within the territorial framework of each State which is presumptively a matter for domestic regulation only.

494. A second consequential principle is that of non-intervention. The International Court has declared that:

> "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected.... The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States".[466]

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[464] *Nicaragua Case*, p. 111, para. 212.
[465] *Ibid.*, p. 128, para. 251.
[466] *Ibid.*, p. 106, para. 202; see also *ibid.* p. 126, para. 246.

495. United Nations practice has also been clear and consistent in this matter. The duty not to intervene in matters within the domestic jurisdiction of any State was reaffirmed in General Assembly resolution 2131 (XX) 1965 and in General Assembly resolution 2625 (XXV) adopted in October 1970.[467]

496. A third consequential principle is the prohibition of the threat or use of force against the territorial integrity of States laid down in Article 2, paragraph 4, of the United Nations Charter. This prohibition is accepted not only as a rule contained in the United Nations Charter and in customary international law, but also as being contrary to the rules of *jus cogens*, or a higher or peremptory norm.[468]

497. Linked to this rule of *jus cogens*, is the associated principle that boundaries cannot in law be changed by the use of force. Security Council resolution 242 (1967), for example, emphasised the "inadmissibility of the acquisition of territory by war".[469]

E. The UDI Contradicts the Internationally Affirmed Territorial Integrity of Serbia

498. The territorial integrity of the Republic of Serbia has been consistently and repeatedly reaffirmed, so that any non-consensual violation of its territorial integrity must be seen as contrary to international law and practice.

499. The Arbitration Commission established by the European Communities' Conference on Yugoslavia, when asked whether the Serbian population in Croatia and Bosnia and Herzegovina had the right to self-determination, declared in its

[467] See General Assembly resolution 36/103 and General Assembly resolution 2734 (XXV) containing the Declaration on the Strengthening of International Security; General Assembly resolution 3314 (XXIX) containing the Definition of Aggression; General Assembly resolution 31/91, General Assembly resolution 32/153, General Assembly resolution 33/74, General Assembly resolution 34/101 and General Assembly resolution 35/159 on non-interference in the internal affairs of States.

[468] See *Yearbook of the International Law Commission* (1966), vol. II, pp. 247-248 and J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), p. 246; see also Vienna Convention on the Law of Treaties, Article 53 and the *Nicaragua Case*, pp. 14, 100-101.

[469] See Declaration on Principles of International Law (1970), Security Council resolution 662 (1990) and the *Wall* advisory opinion, at p. 171, para. 87.

Opinion No. 2 of 11 January 1992 that "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".[470] This, therefore, affirmed and confirmed the territorial integrity of the post-Socialist Federal Republic of Yugoslavia republics, including explicitly Croatia and Bosnia and Herzegovina and implicitly today's Republic of Serbia. This position has been repeated, reiterated and re-emphasised continually since 1991.

500. Security Council resolution 1031 (1995) reaffirmed "its commitment to a negotiated political settlement of the conflicts in the former Yugoslavia, preserving the territorial integrity of all States there within their internationally recognized borders"[471] and specifically welcomed the signing on 14 December 1995 at the Paris Peace Conference of the General Framework Agreement for Peace in Bosnia and Herzegovina (also known as the "Dayton-Paris Agreement"),[472] as well as the Dayton Agreement on implementing the Federation of Bosnia and Herzegovina of 10 November 1995,[473] and the conclusions of the Peace Implementation Conference held in London on 8 and 9 December 1995. The General Framework Agreement specifically provided in Article 1 that:

> "the Parties shall fully respect the sovereign equality of one another, shall settle disputes by peaceful means, and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State".[474]

501. The express commitment by the Security Council to a settlement of the Yugoslav conflicts "preserving the territorial integrity of all States there within their

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[470] Opinion No. 2 of the Arbitration Commission on former Yugoslavia, 31 ILM 1497 (1992), Annex 39 in Documentary Annexes accompanying this Written Statement.
[471] Security Council resolution 1031 (1995), Annex 14 in Documentary Annexes accompanying this Written Statement.
[472] UN Doc. S/1995/999 (30 November 1995).
[473] UN Doc. S/1995/1021 (8 December 1995).
[474] UN Doc. S/1995/999 (30 November 1995).

internationally recognized borders" was reaffirmed in resolutions 1088 (1996), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005), 1722 (2006), 1785 (2007) and 1845 (2008).[475] As already noted,[476] each of these resolutions also called upon the parties to the General Framework Agreement (Dayton-Paris Agreement) to comply strictly with their obligations under this agreement, such obligations including the respect for territorial integrity of Bosnia and Herzegovina and "any other State". The obligation to respect the territorial integrity is, therefore, based both on the Dayton-Paris Agreement and the binding Security Council resolutions. What has been regularly underlined in a binding Security Council resolution as an obligation for the parties to the peace agreements cannot be regarded as of no consequence in international law for all Member States of the United Nations and for all those subject to international law.

502. This repeated confirmation of the territorial integrity of the Republic of Serbia in the general context of the settlement of the conflicts arising out of the former Yugoslavia was further manifested in resolutions relating specifically to Kosovo.

503. Security Council resolution 1160 (1998),[477] while condemning the "use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army", specifically affirmed the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia". The resolution also called for a political solution to the developing problem and imposed an arms embargo on the Federal Republic of Yugoslavia. All States and all international and regional organizations were called upon to act strictly in conformity with the resolution. Further, in operative paragraph 3, the resolution emphasised that the Council:

> "Agrees, without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that the principles for a solution of the Kosovo problem should be

[475] See Annex 15 and Annexes 21 to 28 in Documentary Annexes accompanying this Written Statement.
[476] See *supra* paras. 450-452.
[477] Security Council resolution 1160 (1998), Annex 16 in Documentary Annexes accompanying this Written Statement.

based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration".

504. The "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" was specifically underlined in the Presidential Statements of 24 August 1998,[478] 19 January 1999[479]and 29 January 1999.[480] The same commitment was specifically and expressly reaffirmed in Security Council resolutions 1199 (1998) and 1203 (1998), while resolution 1239 (1999) reaffirmed "the territorial integrity and sovereignty of all States in the region".[481]

505. However, such obligation must be taken as going beyond United Nations Member States alone. Resolution 1203 (1998), for example, while reaffirming the territorial integrity of the Federal Republic of Yugoslavia, also demanded that "the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)". This is important. As noted above, resolution 1160 (1998) specifically agreed that a political solution to the Kosovo problem be based on the territorial integrity of the Federal Republic of Yugoslavia, while resolution 1199 (1998)[482] in turn reaffirmed both the territorial integrity principle and "the objectives of resolution 1160 (1998), in which the Council expressed support for a peaceful

[478] UN Doc. S/PRST/1998/25 (24 August 1998), Annex 29 in Documentary Annexes accompanying this Written Statement.
[479] UN Doc. S/PRST/1999/2 (19 January 1999), Annex 30 in Documentary Annexes accompanying this Written Statement.
[480] UN Doc. S/PRST/1999/5 (29 January 1999), Annex 31 in Documentary Annexes accompanying this Written Statement.
[481] See Annexes 17 to 19 in Documentary Annexes accompanying this Written Statement.
[482] Annex 16 in Documentary Annexes accompanying this Written Statement.

resolution of the Kosovo problem which would include an enhanced status for Kosovo". Operative paragraph 3 also called upon "the authorities in the Federal Republic of Yugoslavia and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo".

506. This consistent and invariable pattern of reaffirming the territorial integrity of the Federal Republic of Yugoslavia, despite allegations concerning its treatment of the Albanian population of Kosovo, culminated in the critical and seminal resolution 1244 (1999) adopted on 10 June 1999.[483] This resolution, it must be emphasised, reaffirmed the sovereign title of the Federal Republic of Yugoslavia over Kosovo, while establishing an international presence with regard to certain administrative matters.

507. Resolution 1244 (1999) commenced by recalling previous resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999).[484] In this way, the Security Council underlined the earlier resolutions that had called for a political solution based on the territorial integrity of the Federal Republic of Yugoslavia and autonomy for Kosovo and had also demanded that the Kosovo Albanian leadership and community accept this.

508. Resolution 1244 (1999) also reaffirmed "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". Principle IV of the Declaration on Principles Guiding Relations Between Participating States contained in the Helsinki Final Act 1975 declared that participating States would respect the territorial integrity of participating States and would 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.[485]Annex 2 of resolution 1244

[483] Annex 20 in Documentary Annexes accompanying this Written Statement.
[484] Annexes 16 to 18 and 19 in Documentary Annexes accompanying this Written Statement.
[485] See further above, para. 478.

(1999) lays down a number of principles for the resolution of the Kosovo crisis upon which agreement should be reached and of these, principle 8 stipulates:

> "A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK [Kosovo Liberation Army]".

509. In addition, preambular paragraph 11 reaffirmed "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo".

510. Such preambular provisions, so clearly laying down the two guiding principles of respect for the territorial integrity of the Federal Republic of Yugoslavia and the need for self-government for Kosovo, were reinforced by provisions contained in the operative paragraphs of resolution 1244 (1999), following the statement that the Security Council was acting under Chapter VII of the Charter and thereby making a binding decision.

511. Operative paragraph one states that the Security Council:

> "Decides 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".

512. As already noted, the principles of sovereignty and territorial integrity of the FRY are mentioned in Annex 2 of resolution 1244 (1999). As far as its Annex 1 is concerned, it consists of the Statement made by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999. This Statement declares that the G-8 Foreign Ministers adopted a number of general principles on the political solution to the Kosovo crisis. This list included the following general principle:

> "A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA".

513. The debate in the Security Council on 10 June 1999 concerning and culminating in the adoption of resolution 1244 (1999) also demonstrated support for the principle of territorial integrity in relation to the Federal Republic of Yugoslavia.[486] No State contradicted unequivocal statements by Russia, China and Argentina that the resolution would reaffirm the commitment of States, and indeed of the Security Council, to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. No State sought to modify such views or to challenge their accuracy at all. The inevitable interpretational conclusion, therefore, is that the member States of the Security Council were well aware that the package of measures adopted in relation to Kosovo rested upon an affirmation and confirmation of the territorial integrity of that territory.

514. In other words, one constant feature of international practice throughout the crises concerning the former Yugoslavia and Kosovo was the continual reaffirmation of the territorial integrity of the State currently called the Republic of Serbia. This range of consistent State practice affirmed that no alteration in the recognised territorial boundaries was possible without the consent of the relevant parties. However the dissolution of the former Yugoslavia may be characterised over the relevant period, the international agreements that brought the conflicts to an end emphasised the principle of the territorial integrity of the States that emerged from the former Yugoslavia (including, of course, the Federal Republic of Yugoslavia that became the State Union of Serbia and Montenegro in 2003 and then the Republic of Serbia after the consensual separation of Montenegro in 2006[487]).

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[486] See UN Doc. S/PV.4011 (10 June 1999), Annex 34 in Documentary Annexes accompanying this Written Statement. For a more detailed analysis of Security Council resolution 1244 (1999) and the process of its adoption, see *infra* Chapter 8, Section A (III).

[487] On the continuity between the FRY and the Republic of Serbia, see *supra* Chapter 1, Section E

515. In addition, however one characterises the events of 1999 concerning Kosovo, one factor that was clearly beyond dispute was that any resolution of the problem would be based upon the respect for the territorial integrity of the FRY (Serbia) and upon some form of autonomy for Kosovo within the FRY (Serbia). The constant reaffirmation of the territorial integrity of the Federal Republic of Yugoslavia was especially marked. Whatever the nature of the post-1999 situation, it was internationally agreed that the territorial integrity of the Federal Republic of Yugoslavia was unaffected. A whole series of binding Security Council resolutions, culminating in the seminal resolution 1244 (1999), affirm and confirm this proposition and in a manner that was, and remains, obligatory for all Member States of the United Nations.

516. At no point in the resolutions discussed above was the affirmation of the territorial integrity of the Federal Republic of Yugoslavia made conditional upon any event or circumstance and at no point was such affirmation made contingent upon any non-consensual circumstance.

517. This is confirmed by a consideration of the UNMIK-FRY 'Common Document' signed on 5 November 2001 by the Special Representative of the Secretary-General of the United Nations for Kosovo, Mr. Hans Haekkerup, and the Special Representative of the President of the Federal Republic of Yugoslavia and the Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia, Mr. Nebojša Čović. Point 1 of the Document

> "confirms the basic principle of United Nations Security Council resolution 1244 (1999) and the shared belief that the resolution can only be successfully implemented through the joint efforts of all concerned parties".[488]

518. Point 4 of the Document provides for:

[488] UNMIK-FRY, Common Document (5 November 2001), Annex 12 in Documentary Annexes accompanying this Written Statement.

"the protection of the rights and interests of Kosovo Serbs and other communities in Kosovo, based on the principles stated in UNSCR 1244, including the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia, as well as [in] the Constitutional Framework for Provisional Self-government".

519. Point 5 of the Document explicitly:

"Reaffirms that the position on Kosovo's future status remains as stated in UNSCR 1244, and that this cannot be changed by any action taken by the Provisional Institutions of Self-government".

520. The Common Document was welcomed by the United Nations Security Council in a Presidential Statement on 9 November 2001.[489] It also received support from individual States and other international organisations. The United States, for example, stated that:

"The U.S. Office Pristina welcomes the "UNMIK-FRY Common Document" signed in Belgrade on November 5, which reaffirms the principles and process set forth in UN Security Council resolution 1244. There is nothing in this document that contravenes 1244. It signals a clear commitment by both parties to intensify efforts to fulfill the goals of 1244. In this connection, we emphasize the importance of the upcoming elections and their importance in building Kosovo's democratic self-government".[490]

[489] UN Doc. S/PRST/2001/34 (9 November 2001), Annex 32 in Documentary Annexes accompanying this Written Statement.

[490] See *U.S. Office Supports "UNMIK-FRY Common Document"*, Press release of the United States Office Pristina (6 November 2001), available at: http://pristina.usembassy.gov/press20011106a.html, Annex 67 in Documentary Annexes accompanying this Written Statement. See also the references to the Common Document in the Memorandum from the Foreign and Commonwealth Office on the Foreign Affairs Committee Report entitled "Federal Republic of Yugoslavia and the Wider Region following the fall of Milosevic: an update", available at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/ /826/826ap06.htm.

521. The Document was also welcomed by the Council of the EU on 22 July 2002.[491]

522. As Orakhelashvili concludes:

> "In the period between the 1999 NATO attack on the FRY and the Ahtisaari Plan, nothing in the practice of States or the United Nations has ever divulged any attitude aimed at disrupting the territorial integrity of the FRY and subsequently Serbia".[492]

523. Finally, it is worth noting that Mr. Ahtisaari himself in putting forward his plan in 2007 on the future political status of Kosovo recognised that in order for this to be accomplished further action by the Security Council would be required. He noted in the letter accompanying his 'Comprehensive Proposal for the Kosovo Status Settlement' that: "[i]n unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance".[493] The use of the term 'governance' was important for it demonstrates his understanding that the resolution had no effect upon the sovereignty or territorial integrity of the Federal Republic of Yugoslavia. Mr Ahtisaari concluded by urging "the Security Council to endorse my Settlement proposal".[494] In so doing, he was recognising that an amendment to resolution 1244 (1999) would be required in order for Kosovo to be declared independent. While Serbia rejects the possibility that this could have happened as a matter of law, what is important to note at this stage is the affirmation that resolution 1244 (1999) constituted an absolute impediment to any declaration of Kosovo's independence without Serbia's consent.

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[491] Statement of the Council of the European Union, C/02/210; 10945/02 (Presse 210) (22 July 2002), available at: http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/02/210&format=HTML&&aged=0&lg=hu&guiLanguage=en, Annex 68 in Documentary Annexes accompanying this Written Statement; see also European Union Presidency Statement of 30 July 2002, available at: http://www.europa-eu-un.org/articles/es/article_1529_es.htm, Annex 69 in Documentary Annexes accompanying this Written Statement.

[492] A. Orakhelashvili, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo , 12 *Max Planck Yearbook of United Nations Law* (2008), pp. 1, 17.

[493] UN Doc. S/2007/168 (26 March 2007), p. 4, para. 15.

[494] *Ibid.*, p. 5, para. 16.

524. Accordingly, the UDI adopted on 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo violates the internationally agreed and confirmed territorial integrity of the Republic of Serbia. Such unilateral declaration violates the applicable law, the domestic law of Serbia, and international law, as repeated on numerous occasions by the Security Council. It also constitutes a violation of binding Security Council resolutions, particularly resolution 1244 (1999). This resolution cannot be overturned by unilateral action, especially by a non-state entity, nor may it be bypassed by a desultory collection of individual State recognitions.

Chapter 7
SELF-DETERMINATION GIVES NO BASIS FOR A UNILATERAL DECLARATION OF INDEPENDENCE

525. In this chapter, it is submitted that:

(i) The right to self-determination has become a legal right in international law, but in a carefully limited manner;

(ii) The right to self-determination does not authorise non-consensual secession from an independent State;

(iii) Kosovo does not constitute a valid self-determination unit under international law;

(iv) Kosovo Albanians do not constitute a "people" for the purposes of self-determination under international law.

(v) The "remedial secession" interpretation of the "safeguard clause" contained in General Assembly resolution 2625 (XXV) is wrong and, in any case, irrelevant.

A. Self-Determination: The General Principle in International Law

526. The right of peoples to self-determination has become established as a principle of international law of considerable importance. It powered the drive to decolonisation and independence of European empires and it has evolved into a principle of human rights operative within the domestic legal systems of sovereign States. However, it does not constitute a principle of international law legitimizing secession from recognised independent States, nor does it confer a right of secession upon groups or communities or peoples within such States, any more than it legitimizes irredentist claims by neighbouring States upon ethnic, national or self-determination claims.

527. The right of peoples to self-determination is indubitably an important norm within the international community.[495] Article 1(2) of the United Nations Charter states that the development of friendly relations among nations based upon respect for the principle of equal rights and self-determination constituted one of the purposes of the United Nations and this phraseology is repeated in Article 55. Although not expressed as such as a legal right, the inclusion of a reference to self-determination in the Charter, particularly within the context of the statement of purposes of the United Nations, provided the opportunity for the subsequent interpretation of the principle. It is also to be noted that Chapters XI and XII of the Charter deal with non-self-governing and trust territories and may be seen as relevant within the context of the development and definition of the right to self-determination, although in slightly different terms.

528. Practice since 1945 within the United Nations, both generally and particularly with regard to specific cases, can be seen as having ultimately established the legal standing of the right in international law. Instruments that may be noted in this context include resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted in 1960, which noted in paragraph 2 that: "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development", while also emphasizing in paragraph 6 that attempts aimed at the partial or total disruption of the national unity and territorial integrity of a country were deemed incompatible with the UN Charter.

529. The Declaration on the Granting of Independence to Colonial Countries and Peoples set the terms for the self-determination debate in its emphasis upon the colonial context and its opposition to secession, and has been regarded by some as constituting a binding interpretation of the Charter.[496] The International Court has specifically referred to the Declaration as an "important stage" in the development

[495] See in general e.g. A. Cassese, *Self-Determination of Peoples* (1995) and C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993).

[496] See e.g. O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966), pp. 177–185.

of international law regarding non-self-governing territories and as the "basis for the process of decolonization".[497]

530. The 1970 Declaration on Principles of International Law Concerning Friendly Relations, also noted that:

> "by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

531. In addition to this general approach, the United Nations organs have dealt extensively with self-determination both generally and in a series of specific resolutions with regard to particular situations.[498] Further, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 1966 contain an identical first article, declaring *inter alia* that:

> "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

532. Judicial discussion of the principle of self-determination has not been extensive and it has taken place in the context of either decolonisation or foreign occupation. In the *Namibia* advisory opinion[499] the International Court emphasised that: "the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations

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[497] *Western Sahara*, p. 31, para. 57.

[498] See General Assembly resolutions 1755 (XVII), 2138 (XXI), 2151 (XXI), 2379 (XXIII), 2383 (XXIII) and Security Council resolutions 183 (1963), 301(1971), 377 (1975) and 384 (1975).

[499] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971*, p.31, para. 52 (hereinafter: "*Namibia*").

made the principle of self-determination applicable to all of them".[500] The Court affirmed that the right of self-determination possessed an *erga omnes* character, within the colonial context, in the *East Timor (Portugal v. Australia)* case.[501]

533. Since it is undeniable that the principle of self-determination has become a legal norm,[502] the question arises as to its scope and application. Although the usual formulation contained in international instruments[503] from the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples to the 1970 Declaration on Principles of International Law and the 1966 International Covenants on Human Rights refers to the right of "all peoples" to determine "freely their political status", international practice is clear that not all "peoples" as defined in a political–sociological sense[504] are accepted in international law as able to freely determine their political status up to and including secession from a recognised independent State. In fact, practice shows that the right has been recognised for "peoples" in strictly defined circumstances. In particular, a critical difference has been established between peoples and minorities.

B. The Right to Self-Determination is Carefully Limited in Law

534. International practice and doctrine has identified clearly the operative areas of the legal norm of self-determination and has equally clearly identified the areas of non-applicability. In short, the norm of self-determination as conferring rights under international law applies with regard to mandate and trusteeship territories, colonial territories of the European empires and, arguably, foreign occupations. It also applies as a principle of human rights within independent States. It manifestly does not apply as a general rule legitimising secession from independent States

[500] See *Western Sahara*, p. 31, para. 54.

[501] *East Timor (Portugal v. Australia), Judgment of 30 June 1995, I.C.J. Reports 1995*, p. 102, para. 29; see also *Wall*, p. 172, para. 88, and p. 199, para. 156.

[502] See also the *Reference re Secession of Quebec* case, [1998] 2 S.C.R. 217, para. 115.

[503] See also Article 20 of the African Charter of Human and Peoples' Rights (1981), which provides that, "all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have chosen".

[504] See, e.g., *the Greco-Bulgarian Communities case, Advisory Opinion of 31 July 1930, P.C.I.J., Series B, No. 17*, p. 4.

nor conferring rights of secession upon groups, entities or peoples within such independent States.

I Mandate and trust territories, and non-self-governing territories

535. The first recognised application internationally of a right to self-determination was with regard to mandate and trust territories. The Covenant of the League of Nations established that such territories were to be governed by "advanced nations who by reason of their resources, their experience or their geographical position" could undertake the responsibility and according to the principle that "the well-being and development of such peoples form a sacred trust of civilisation".[505] Upon the conclusion of the Second World War and the demise of the League, the mandate system was transmuted into the United Nations trusteeship system under Chapters XII and XIII of the UN Charter.[506]

536. The right of self-determination was subsequently recognised as applicable to non-self-governing territories as enshrined in the UN Charter. An important step in this process was the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted in 1960, which called for the right of self-determination with regard to all colonial countries and peoples that had not attained independence and this was confirmed by the International Court of Justice in two advisory opinions.[507] The United Nations based its policy on the proposition that "the territory of a colony or other non-self-governing territory has under the Charter a status separate and distinct from the territory of the State administering it" and that such status was to exist until the people of that territory

[505] See Article 22 of the Covenant of the League of Nations; see also the *International Status of South West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p. 132; *Nambia*, pp. 28–29, paras. 45-46; *Certain Phosphate Lands in Nauru, Judgment of 26 June 1992, I.C.J. Reports 1992*, p. 256, para. 41, and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 409.

[506] See *Certain Phosphate Lands in Nauru (Nauru v. Australia), Judgment of 26 June 1992, I.C.J. Reports 1992*, p. 257, para. 44, and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 409, para. 212.

[507] See *Namibia*, p. 31, para. 52, and *Western Sahara*, pp. 31-33, paras. 54-59; see also *Wall*, p. 172, para. 88.

had exercised the right to self-determination.[508] The Canadian Supreme Court concluded in the *Quebec Secession* case that, "[t]he right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed".[509]

537. The question of the definition of "people" was addressed in the *Western Sahara* case. The Court declared that:

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances".[510]

538. This important statement by the Court affirms that a definition of a "people" for the purposes of recognition of the right to self-determination has emerged and in seeking to identify whether or not a particular claimed group constitutes a "people" for the purposes of self-determination in international law, recognition by a relevant international organisation is required. Accordingly, the United Nations has developed a methodology for identifying "non-self governing territories" and laying down specific ways to put an end to the colonial situation including the applicability of the principle of self-determination."[511]

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[508] 1970 Declaration on Principles of International Law. Note also that General Assembly resolution 1541 (XV) declared that there is an obligation to transmit information regarding a territory 'which is geographically separate and is distinct ethnically and/or culturally from the country administering it'.

[509] *Reference re Secession of Quebec* case [1998] 2 S.C.R. 217, para. 132.

[510] See *Western Sahara*, p. 33, para. 59.

[511] See, e.g., General Assembly resolutions 9(I), 66(I), 1541(XVI) and 1654 (XVI).

539. The principle of self-determination itself provided that the people of the colonially defined territorial unit in question may freely determine their own political status. Such determination may result in independence, integration with a neighbouring State, free association with an independent State or any other political status freely decided upon by the people concerned.[512]

II Occupation

540. The Declaration on Principles of International Law 1970 noted that the

> "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of self-determination], as well as a denial of fundamental human rights, and is contrary to the Charter",

541. Article 1 (4) of Additional Protocol I to the Geneva Conventions 1949, adopted in 1977, referred to

> "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

542. The Canadian Supreme Court also referred to the right of self-determination in the context of foreign military occupations.[513] In order to determine where a foreign occupation exists, the evidence of relevant international organisations is required or at least highly desirable.

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[512] See *Western Sahara*, pp. 32-33, paras. 57-58, and p. 68, paras. 161-162. See also Judge Dillard, *ibid.*, p. 122; see also General Assembly resolution 1541 (XV) and the 1970 Declaration on Principles of International Law.

[513] *Reference re Secession of Quebec* case [1998] 2 S.C.R. 217, para. 138.

543. The Palestinian people, under Israeli occupation since the 1967 war, has, in particular, been recognised as having the right to self-determination. This was noted in a number of United Nations resolutions[514] and by the International Court in the *Wall* case.[515]

III Self-Determination as a Human Rights Principle

(1) General

544. Beyond the mandate/trusteeship, colonial and foreign occupation situations, the right to self-determination has been recognised internationally as applying as a principle of human rights but only within the territorial framework of independent States. This manifestation of self-determination (sometimes termed 'internal self-determination') refers essentially to the continuing right of a people within a sovereign State to freely participate in the governance of such State.[516] This, however, requires recognition of the particular population in question as a "people" as distinct from a minority or other group or collection of persons.

545. The UN Human Rights Committee has examined this aspect of self-determination in relation to Article 1 of the Civil and Political Rights Covenant.[517] In its General Comment on Self-Determination adopted in 1984, the Committee emphasised that the realisation of the right was "an essential condition for the effective guarantee and observance of individual human rights".[518] In discussing the right, the Human Rights Committee has encouraged States parties to provide in their reports details

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[514] See General Assembly resolutions 3236 (XXIX), 55/85, 58/163, See also General Assembly resolutions 38/16 and 41/100, and Cassese, *Self-Determination*, *op. cit.*, p. 92 and following.

[515] See *Wall,* p. 183, para. 118, p. 197, para. 149, and p. 199, para. 155. See also e.g. A. Cassese, *Self-Determination*, *op. cit.*, pp. 90–99 and following.

[516] A. Cassese, *Self-Determination*, *op. cit.*, p. 101.

[517] See in particular D. McGoldrick, *The Human Rights Committee*, (1994), chapter 5; Cassese, *Self-Determination*, *op. cit.*, p. 59 and following and M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd ed. 2005), part 1.

[518] General Comment 12: see HRI/GEN/1/Rev.1, p. 12, 1994. However, the principle is seen as a collective one and not one that individuals could seek to enforce through the individual petition procedures provided in the First Optional Protocol to the Covenant, see, e.g., the *Kitok* case, Report of the Human Rights Committee, Un Doc. A/43/40 (1988), pp. 221, 228; the *Lubicon Lake Band* case, UN Doc. A/45/40 (1990), vol. II, pp. 1, 27; and *RL v. Canada*, UN Doc. A/47/40 (1992), pp. 358. 365; see also R. Higgins, "Postmodern Tribalism and the Right to Secession" in C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (1993), p. 31.

about participation in social and political structures,[519] and in engaging in dialogue with representatives of States parties, questions are regularly posed as to how political institutions operate and how the people of the State concerned participate in the governance of their State.[520] This necessarily links in with consideration of other articles of the Covenant concerning, for example, freedom of expression (Article 19), freedom of assembly (Article 21), freedom of association (Article 22) and the right to take part in the conduct of public affairs and to vote (Article 25). The right of self-determination, therefore, provides the overall framework for the consideration of the principles relating to democratic governance.

546. The Committee on the Elimination of Racial Discrimination adopted General Recommendation 21 in 1996 in which it similarly divided self-determination into an external and an internal aspect. The former:

> "implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation",

while the latter referred to the:

> "right of every citizen to take part in the conduct of public affairs at any level. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level..".[521]

547. The Canadian Supreme Court addressed this issue in the *Quebec Secession* case and concluded that self-determination "is normally fulfilled through *internal* self-

[519] See e.g. the report of Colombia, CCPR/C/64/Add.3, pp. 9 ff., (1991). See also the Third periodic report of Peru, CCPR/C/83/Add.1, 1995, p. 4.
[520] See e.g. with regard to Canada, UN Doc. A/46/40 (10 October 1991), p. 12. See also UN Doc. A/45/40 (4 October 1991), pp. 120–121, with regard to Zaire.
[521] UN Doc. A/51/18 (1 January 1996).

determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state".[522]

548. This understanding of the meaning of self-determination in independent States, that is the principle relates essentially to a bundle of human rights within the territory of the State and not at all to rights to secede from that State and either create another one or join a third State, is confirmed upon a consideration of the approach of international law to the question of minorities and indigenous peoples.

(2) Minority Rights

549. Insofar as minorities are concerned, international law has accepted that they possess a distinct status and may benefit directly from carefully circumscribed international rights. Various attempts after World War I to institutionalise the international protection of certain minorities in Central and Eastern Europe were not crowned with success,[523] and after World War II, the focus shifted to the international protection of universal individual human rights, although several instruments dealing with specific situations did incorporate provisions concerning the protection of minorities.[524]

550. However, Article 27 of the International Covenant on Civil and Political Rights 1966 provides that,

> "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

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[522] *Reference re Secession of Quebec* case [1998] 2 S.C.R. 217, para. 126.

[523] See generally Thornberry, *International Law and Minorities* (1991), pp. 38 ff.

[524] See, e.g., Annex IV of the Treaty of Peace with Italy (1947); the Indian–Pakistan Treaty (1950) and Article 7 of the Austrian State Treaty (1955). See also the provisions in the documents concerning the independence of Cyprus, Cmnd 1093, 1960.

It is to be noted that this provision establishes that such minority rights belonged to the individual members of such groups and not to the groups themselves, while the framework for the operation of the provision was that of the State itself.

551. The Human Rights Committee adopted a General Comment on Article 27 in 1994, which pointed to the distinction between the rights of persons belonging to minorities on the one hand, and the right to self-determination and the right to equality and non-discrimination on the other. The Committee noted in particular that:

> "2. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant …
>
> 3.1. The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.
>
> 3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party".[525]

552. This approach, whereby the rights of minorities under international law were strictly confined to the internal jurisdiction of States and had no application beyond such borders was reaffirmed in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic

[525] General Comment No. 23: The rights of minorities (Art. 27) CCPR/C/21/Rev.1/Add.5 (1994).

Minorities 1992.[526] Article 1 provides that States, "shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities *within their respective territories*" (emphasis added) and shall adopt appropriate legislative and other measures to achieve these ends and the Declaration concludes by explicitly stating in Article 8, paragraph 4, that:

> "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States".[527]

553. In similar vein, the Framework Convention for the Protection of National Minorities, adopted by the Council of Europe in 1995, establishes as its aim, as expressed in the preamble:

> "the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of States",

while specifically providing that:

> "Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States".[528]

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[526] General Assembly resolution 47/135.
[527] *Ibid.*
[528] Article 21 of the Framework Convention for the Protection of National Minorities (opened for signature 1 February 1995, entered into force 1 February 1998), CETS No. 157.

(3) Rights of Indigenous Peoples

554. The international legal situation with regard to indigenous peoples mirrors that concerning minorities generally.[529] While recognizing the special position of such peoples with regard to the territory with which they have long been associated, relevant international instruments have consistently constrained the rights accepted or accorded with reference to the need to respect the territorial integrity of the State in which such peoples live.

555. Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, adopted by the International Labour Organisation in 1989, for example, underlined in its preamble the aspirations of indigenous peoples

> "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, *within the framework of the states in which they live*" (emphasis added).

556. A Declaration on the Rights of Indigenous Peoples was adopted by the United Nations in 2007.[530] The Declaration, noting that indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, specifically recognised their right to self-determination.[531] In exercising their right to self-determination, it was noted that indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[532] While thus essentially defining the meaning of self-determination for indigenous peoples, the point was underlined in Article 46 (1) that:

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[529] See, e.g., P. Thornberry, *Indigenous Peoples and Human Rights* (2002); S. Marquardt, "International Law and Indigenous Peoples", 3 *International Journal on Group Rights* (1995), p. 47; and J. Anaya, *Indigenous Peoples in International Law* (2004).

[530] General Assembly resolution 61/295.

[531] *Ibid.*, Articles 1 and 3.

[532] *Ibid.*, Article 4.

"Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States"

557. Accordingly, the following summary may be made at this stage:

(i) International law recognises the right of self-determination in the case of mandated and trust territories as meaning the right of the people of such territories to decide their own political status, whether or not this leads to independence or association with another State or any other status;

(ii) International law recognises that those colonial territories designated as non-self-governing territories by the appropriate United Nations organ (General Assembly and Decolonisation Committee) may constitute candidates for the exercise of self-determination. In such cases, the General Assembly would determine whether the inhabitants of such territories would constitute or not a "people" entitled to self-determination;

(iii) In such cases, self-determination has been interpreted as meaning the right of the people of such territories to decide their own political status, whether or not this leads to independence or association with another State or any other status;

(iv) International law recognises that the right of self-determination will apply in cases of foreign occupation as determined by relevant international organisations and the meaning of self-determination in such cases would presumptively be the conclusion of that foreign occupation;

(v) International law recognises the right of self-determination with regard to peoples within independent States as meaning the right of such peoples to participate in the governance of such States and generally to benefit from the collective expression of relevant human rights but strictly and solely within the territorial framework of the State in question;

(vi) International law recognises that persons belonging to minorities within independent States have certain rights, but that these are to be exercised strictly and solely within the territorial framework of such States;

(vii) International law recognises the right of self-determination with regard to indigenous peoples as collective rights and rights related to self-government and autonomy, but strictly and solely within the territorial framework of the State in question;

(viii) The principle of self-determination beyond the mandate/trust territories, colonial and foreign occupation contexts reinforces the concept of the territorial integrity of States. In the case of the human rights, minorities and indigenous manifestations of the principle, this has been explicitly affirmed.

C. Self-Determination Does Not Authorise Secession

558. International law is unambiguous in not providing for a right of secession from independent States. The practice surveyed above in Chapter 6 on the fundamental norm of territorial integrity demonstrates this clearly. Indeed, such a norm would be of little value were a right to secession under international law be recognised as applying to independent States.

559. The United Nations has always strenuously opposed any attempt at the partial or total disruption of the national unity and territorial integrity of a State. Point 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, for example, emphasised that:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

while the preamble to the Declaration on Principles of International Law 1970 included the following paragraphs:

> "Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,
>
> Considering it essential that all States 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.
>
> Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."[533]

560. In addition, it was specifically noted that:

> "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[534]

561. This approach has also been underlined in regional instruments. For example, Article III (3) of the OAU Charter emphasises the principle of "Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence", as does Article 3 (b) of the Constitutive Act of the African Union 2001, while Principle VIII of the Helsinki Final Act, in a statement of considerable importance and relevance for present purposes, noted that:

> "The participating States will respect the equal rights of peoples and their rights to self-determination, acting all times in conformity with the purposes and principles of the Charter of the United

[533] 1970 Declaration on Principles of International Law, Preamble.
[534] *Ibid.*

Nations and with the relevant norms of international law, including those relating to the territorial integrity of States".[535]

562. In addition, the Charter of Paris 1990 underlined this approach and declared that the participating States:

> "reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States".[536]

563. International practice demonstrates that self-determination has not been interpreted to mean that any group defining itself as such can decide for itself its own political status up to and including secession from an already independent State.[537] The United Nations Secretary-General has emphasised that:

> "as an international organisation, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of a member State".[538]

564. The Arbitration Commission of the Conference on Yugoslavia underlined in Opinion No. 2 that:

> "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of

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[535] Principle IV on the Territorial Integrity of States underlined respect for this principle, noting that the participating states "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".

[536] The Charter of Paris, available at: http://www.osce.org/documents/mcs/1990/11/4045_en.pdf.

[537] See e.g. H. Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), p. 469 and Cassese, *Self-Determination*, *op. cit.*, p. 122.

[538] *UN Monthly Chronicle* (February 1970), p. 36. See also the comment by the UK Foreign Minister that, "it is widely accepted at the United Nations that the right of self-determination does not give every distinct group or territorial sub-division within a state the right to secede from it and thereby dismember the territorial integrity or political unity of sovereign independents", 54 *British Yearbook of International Law* (1983), p. 409. See also *infra* para. 612 and following.

> independence (*uti possidetis juris*) except where the States concerned agree otherwise",[539]

while the Canadian Supreme Court concluded in the *Quebec Secession* case that:

> "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign States and consistently with the maintenance of the territorial integrity of those States... The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing States. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states".[540]

565. Learned writers have come to the same general conclusion. Cassese has written that:

> "Ever since the emergence of the political principle of self-determination on the international scene, states have been adamant in rejecting even the possibility that nations, groups and minorities be granted a right to secede from the territory in which they live. Territorial integrity and sovereign rights have consistently been regarded as of paramount importance; indeed they have been considered as concluding debate on the subject".[541]

566. That author concluded with the observation that:

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[539] Opinion No. 2 of the Arbitration Commission on former Yugoslavia, 31 ILM 1497 (1992), Annex 39 in Documentary Annexes accompanying this Written Statement.
[540] *Reference re Secession of Quebec* case [1998] 2 S.C.R. 217, paras. 122 and 127.
[541] Cassese, *Self-Determination*, *op. cit.*, p. 122.

"the international body of legal norms on self-determination does not encompass any rule granting ethnic groups and minorities the right to secede with a view to becoming a separate and distinct international entity".[542]

567. Crawford has written that:

"Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent states if the secession is opposed by the government of that state. In such cases the principle of territorial integrity has been a significant limitation. Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the predecessor state".[543]

568. Crawford concluded as follows:

"To summarise, outside of the colonial context, the principle of self-determination is not recognised as giving rise to unilateral rights of secession by parts of independent states … State practice since 1945 shows the extreme reluctance of states to recognise unilateral secession outside of the colonial context. That practice has not changed since 1989, despite the emergence during that period of twenty-three new states. On the contrary, the practice has been powerfully reinforced".[544]

569. It may, therefore, be concluded that international law assuredly does not recognise a right of secession from independent States and no formulation of the principle of self-determination can be interpreted so to do.[545] The emphasis placed by international law and international practice upon the norm of territorial integrity

[542] *Ibid.*, p. 339.
[543] Crawford, *The Creation of States, op. cit.*, p. 390.
[544] *Ibid.*, p. 415.
[545] See as to the "safeguard clause" argument, *supra* Section E. para. 589 ff.

must also be understood to render non-consensual secession as illegitimate as such.

D. Kosovo Does Not Constitute a Self-Determination Unit under International Law Nor Do the Kosovo Albanians Constitute a "People" Entitled to Self-Determination

570. It follows from the above discussion of the right to self-determination as it has evolved and been recognised in international law that the territory of Kosovo is not entitled as such to benefit from the right to self-determination insofar as this may be interpreted as the right to secession.

571. Kosovo was neither a mandated/trust territory nor an overseas European colonial territory in the UN sense[546] nor was it registered or recognised or ever even submitted for acceptance as a non-self-governing territory with the United Nations nor did any international or regional body ever recognise it as such, nor was it subject to foreign occupation as determined or evidenced by relevant international organisations. Kosovo formed an integral part of the FRY (State Union of Serbia and Montenegro). It remains an integral part of Serbia[547] and as such the population of that territory were, and remain, part of the "people" of Serbia. Those persons forming part of a minority within the territory of Serbia, including Kosovo are entitled to the protection of minority rights as laid down in Articles 14 and 75 – 81 of the Constitution of the Republic of Serbia 2006.[548]

572. Kosovo, as a part of an internationally recognised independent State is not a self-determination unit as that term has been understood in international law and practice. Consistent international recognition of the territorial integrity of the FRY (and thus of its continuator, the Republic of Serbia) by definition precludes acceptance of the right of self-determination as inhering in the inhabitants of the province of Kosovo.

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[546] See above, para.11.
[547] On the continuity between the FRY and the Republic of Serbia, see *supra* Chapter 1, Section E.
[548] Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006.

573. The process of dissolution of the SFRY was conducted in a way, which, despite controversy, affirmed the rule that the constituent republics of that State came to independence within the territorial definition that they had previously held. As is well-known, Kosovo was not a constituent republic of the SFRY but part of the Republic of Serbia.[549]

574. The Arbitration Commission established by the European Communities' Conference on Yugoslavia in its Opinion No. 1 pointed out that the constituent republics of the SFRY (the former Yugoslavia) had expressed their desire for independence through a variety of referenda or parliamentary resolutions and that the composition and workings of the essential federal organs of the former Yugoslavia no longer met the criteria of participation or representativeness inherent in a federal State. The Arbitration Commission thus concluded that the former Yugoslavia was "in process of dissolution".[550]

575. In its Opinion No. 2, the Arbitration Commission was asked the question: "Does the Serbian population in Croatia and Bosnia-Hercegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?". The Commission responded as follows:

> "1. The Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination.
>
> However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.

[549] See *supra* Chapter 5, Section A (III)(5), especially paras. 178-180.
[550] Opinion No. 1 of the Arbitration Commission on former Yugoslavia, 31 ILM 1494, 1497 (1992), Annex 38 in Documentary Annexes accompanying this Written Statement.

> 2. Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.
>
> As the Commission emphasized in its *Opinion No. 1* of 29 November 1991, published on 7 December, the - now peremptory - norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics *vis-à-vis* the minorities on their territory.
>
> The Serbian population in Bosnia-Hercegovina and Croatia must therefore be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the Draft Convention of 4 November 1991, which has been accepted by these Republics".[551]

576. However one characterises the termination of the former Yugoslavia, what was clearly apparent from international practice was that the successor States achieved independence within the territorial bounds of the former republics and with their right to territorial integrity affirmed. Opinion No. 2 also made it clear that territories within the constituent republics were not entitled to secede and that the populations of such territories were entitled to any and all relevant human rights and, in particular, minority rights. This principle clearly applies to Kosovo, which is part of the Republic of Serbia.

577. The Commission was also clear that whatever the right to self-determination might mean, it could not override the territorial integrity of the recognised State. Further, the Commission emphasised in Opinion No. 3 that:

> "Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows

[551] Opinion No. 2 of the Arbitration Commission on former Yugoslavia, 31 ILM 1497, 1498 (1992).

> from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between *Burkina Faso and Mali (Frontier Dispute*, (1986) *ICJ Reports* 554 at 565):
>
> 'Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles ...'"[552]

578. It is worthy of note that Dr. Rugova, the leader of the Kosovo Albanians at the time, wrote to Lord Carrington, Chairman of the European Communities' Conference on Yugoslavia, on 22 December 1991 seeking recognition of the "Republic of Kosovo" as an independent State consequent upon the adoption of the EC Guidelines.[553] This request was not granted. The Arbitration Commission considered applications by the former constituent Yugoslav republics of Slovenia, Croatia, Bosnia and Herzegovina and Macedonia, but not the one made by the Kosovo Albanian leader. It is, further, noticeable that the International Conference on Yugoslavia established by the European Community in 1991 refused to permit the representatives of the Kosovo Albanians to participate on an equal footing with the Yugoslav Republics.[554]

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[552] Opinion No. 3 of the Arbitration Commission on former Yugoslavia, 31 ILM 1499, 1500 (1992), Annex 40 in Documentary Annexes accompanying this Written Statement.

[553] See Letter from Dr. Rugova to Lord Carrington, Peace Conference on Yugoslavia, 22 December 1991, Annex 76 in Documentary Annexes accompanying this Written Statement.

[554] In a letter to Dr. Rugova dated 17 August 1992, Lord Carrington, the Chair of the Conference, wrote with regard to the participation of a Kosovo delegation to the Conference as follows: "If you are planning to be in London at the time of the Conference (from 26-28 August) then I am pleased to inform you that it will be possible for you and your delegation to have access to the Queen Elizabeth II Conference Centre for meetings, for example with me, Secretary Vance, and other participants. As it will not, for practical and other reasons, be possible to grant your delegation access to the Conference chamber itself, the organisers will set up a 'Salle d'écoute' to which the formal Conference proceedings will be relayed live", Annex 77 in Documentary Annexes accompanying this Written Statement.

579. For present purposes, it should be emphasised that the process seeking to manage the dissolution of the former Yugoslavia in the light of international law specified that a key element was "respect for the inviolability of all frontiers" with the proviso that issues concerning self-determination, minority protection and human rights were vital but were to be achieved within the territorial boundaries of the former Yugoslav republics. In other words, the dissolution of the former Yugoslavia was accomplished with the recognition and reaffirmation of the territorial integrity of the constituent republics now recast as new States.

580. The international instruments marking a conclusion to the conflict over the former Yugoslavia are also characterised by explicit and unambiguous affirmation of the territorial integrity of all the successor States, including the Republic of Serbia. Such instruments include Security Council resolution 1031 (1995) reaffirming "its commitment to a negotiated political settlement of the conflicts in the former Yugoslavia, preserving the territorial integrity of all States there within their internationally recognized borders" and Article 1 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Paris-Dayton Agreement), which provided for mutual recognition of the sovereign equality and territorial integrity of Croatia, Bosnia-Herzegovina and the FRY. The express commitment by the Security Council to a settlement of the Yugoslav conflicts "preserving the territorial integrity of all States there within their internationally recognized borders" was reaffirmed in resolutions 1088 (1996), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005), 1722 (2006), 1785 (2007) and 1845 (2008).[555]

581. Such affirmation of the territorial integrity of the successor States to the former Yugoslavia was repeated specifically with regard to the FRY (today's Republic of Serbia) in the Kosovo crisis. The Security Council in a whole series of resolutions and Presidential Statements specifically affirmed the "commitment of all Member

[555] See Annex 15 and Annexes 21 to 28 in Documentary Annexes accompanying this Written Statement. For more, see *supra* Chapter 6, Section E, paras. 498-524.

States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[556]

582. This culminated in Security Council resolution 1244 (1999), which in addition to reaffirming this commitment to the sovereignty and territorial integrity of the FRY in the light of preceding Security Council resolutions, also referred to the Helsinki Final Act, which called for respect for the territorial integrity of each of the participating States in the Helsinki process, and to the set of principles for the resolution of the Kosovo crises, contained in annexes 1 and 2, which explicitly and specifically emphasised the sovereignty and territorial integrity of the FRY.[557]

583. This continual reaffirmation of the sovereignty and territorial integrity of Serbia throughout the settlement process of the conflicts in the former Yugoslavia and with regard to the Kosovo crisis is consistent with an understanding of the right to self-determination of people within Serbia in the sense discussed earlier in this section. It is simply not consistent with any understanding of the right to self-determination which extends beyond domestic human rights to include any purported right to secession.

584. Not only has Kosovo not been recognised in any international instrument as constituting a unit for the purposes of the exercise of self-determination, it is also the case that the Kosovo Albanians have not as such been recognised by any international organisations as a "people" entitled to the exercise of the right to self-determination outside of the internationally recognised and affirmed territorial integrity of the Republic of Serbia.

585. Such international recognition in the context of self-determination was critical in the acceptance of the application of the right to particular categories of "people".

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[556] See Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999), reproduced in Annexes 15 to 19 in Documentary Annexes accompanying this Written Statement; and UN Doc. S/PRST/1998/25 (24 August 1998), UN Doc. S/PRST/199/2 (19 January 1999) and UN Doc. S/PRST/199/5 (29 January 1999), reproduced in Annexes 29 to 31 in Documentary Annexes accompanying this Written Statement. See further *supra* Chapter 6, Section E, paras. 498-524.

[557] See further Chapter 6, Section E, paras. 506-515.

586. As noted above, the right to self-determination in its fullest sense, that is permitting the people concerned to decide for itself its future political status including independence, pertains only to mandate/trust territories (of which there are no more) and non-self-governing (or colonial) territories, as defined carefully in United Nations practice noted above.[558]

587. No information was ever transmitted to the United Nations claiming that Kosovo was such a non-self-governing territory. No member State ever argued that Kosovo should be so designated. No challenge was ever made to the territorial integrity of the FRY (currently the Republic of Serbia) on the basis that Kosovo was a non-self-governing territory or at all. No United Nations resolution ever stated that Kosovo was or should be designated a non-self-governing territory to which the right of self-determination in its widest sense might apply. No other international or regional organisation has ever made such a claim.

588. In such circumstances, it is clear that there is no evidence to support the proposition that Kosovo ever constituted a self-determination unit as a recognised non-self-governing territory or that the Kosovo Albanians, being a part (albeit the majority) of the population of Kosovo, constituted a people entitled to exercise the right of self-determination in the sense of a totally free choice as to its political status up to and including secession.

E. The "Remedial Secession" Reading of the "Safeguard Clause" Contained in General Assembly Resolution 2625 (XXV) Is Wrong and At Any Rate Does Not Apply to Kosovo

589. In an attempt to legally justify the purported secession of the Serbian province of Kosovo, one of the arguments advanced by those promoting this secession has been a particular reading of the "safeguard clause" contained in paragraph 7 of the principle of equal rights and self-determination of peoples embodied in General Assembly resolution 2625 (XXV) (Declaration on Principles of International Law) adopted in 1970. This section addresses this particular reading of the

[558] See *supra* paras. 535-557.

"safeguard clause" in order to demonstrate the flawed character of the purported justification of so-called "remedial secession". This section is divided into 3 parts. *First*, it will be shown that the "safeguard clause" is part of a firm practice of guaranteeing the preservation of the political unity and territorial integrity of independent States (1). *Second*, it will be demonstrated that an *a contrario* reading of the "safeguard clause" in order to admit a right to "remedial secession" is not supported by the terms of the paragraph, its context, its object and purpose, the *travaux préparatoires* and subsequent practice (2). *Third*, it will be established that resolution 2625 (XXV) does not transform a minority suffering from human rights violations into a people having a right to self-determination (3). *Fourth*, even if there is a so-called right to "remedial secession" (*quod non*), it does not apply to the case of Kosovo (4).

I Paragraph 7 of the principle of equal rights and self-determination of peoples forms part of a well-established practice of guaranteeing the preservation of the political unity and the territorial integrity of independent States

590. As stated above, the United Nations has always attributed great importance to the respect of the territorial integrity of its member States.[559] Even when dealing with decolonisation – which is not a case of secession – and after having affirmed the rights of peoples to self-determination, the Organisation was careful to state that territorial integrity should be preserved. Thus, General Assembly resolution 1514 (XV), which was recognised by the Court as an important milestone in the evolution of customary law in that field,[560] affirms in its paragraph 6 that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[561]

591. It is worth recalling that during the debates preceding the adoption of resolution 1514 (XV), Guatemala introduced an amendment to the Afro-Asian draft, in

[559] See Chapter 6 of this Written Statement.
[560] *Namibia*, p. 31, paras. 52-53, *Western Sahara*, p. 31, para. 55.
[561] General Assembly resolution 1514 (XV).

which it proposed to include a new paragraph that provided that the principle of self-determination could not affect the territorial integrity of States. In considering the Guatemalan amendment unnecessary, the authors of the draft made it clear that this point was already covered by paragraph 6.[562]

592. Another important instrument for the determination of the scope of the right to self-determination is General Assembly resolution 2625 (XXV). Again, in this resolution the General Assembly considered it necessary to expressly state that the territorial integrity of States must be respected when it addressed the right to self-determination. Paragraph 7 of the principle of equal rights and self-determination of peoples, referred to as the "safeguard clause", reads as follows:

> "Nothing in the foregoing paragraphs [those related to self-determination] shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".[563]

593. The inclusion of the "safeguard clause" reflected the desire of many States during the drafting of resolution 2625 (XXV) to make express reference to respect for the territorial integrity of States in relation to the principle of equal rights and self-determination of peoples. A number of proposed texts may be cited in this respect.

594. Both paragraph 2(c), part VI, of the United Kingdom text,[564] and paragraph 2(c) of the proposal by Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the United Arab Republic and

[562] UN Doc. A/PV.947 (14 December 1960), pp. 1271-1272, See also *Yearbook of the United Nations 1960*, p. 48.
[563] General Assembly resolution 2625 (XXV).
[564] UN Doc. A/AC.125/L.44 (19 July 1967) part VI, reprinted in: Official Records of the General Assembly, Twenty-second Session, annexes, agenda item 87, UN Doc. A/6799 (26 September 1967), para. 176.

Yugoslavia,[565] included the following statement: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State." Paragraph 2(a) of the proposal submitted by Czechoslovakia, Poland, Romania and the Union of Soviet Socialist Republics provided a broader statement. It simply read "The integrity of the national territory shall be respected."[566]

595. Both paragraph 7 of the section concerning the principle of equal rights and self-determination of peoples contained in General Assembly resolution 2625 (XXV), and paragraph 6 of its resolution 1514 (XV) are examples of a longstanding practice of the international community of underlining the territorial integrity of member States. The substantial involvement of the United Nations in the Republic of Congo at the beginning of the 1960s in order to preserve this State's territorial integrity against Katangese separatism, and the rejection by the Organization of African Unity of the secessionist attempt by Biafra from Nigeria in 1967, are significant examples of this long-standing practice of the international community around the time resolution 2625 (XXV) was adopted.

596. In relation to Katangese separatism, in 1960 the Congolese President and Prime Minister sent a telegram to the Secretary-General requesting the "urgent dispatch of military assistance" in response to the purported secession of Katanga.[567] The Secretary-General responded by requesting United Nations action in his Report to the Security Council.[568] On 14 July 1960, the Security Council adopted resolution 143 (1960), which provides in its operative paragraph 2 that the Security Council

> "*Decides* to authorize the Secretary-General to take the necessary steps… to provide the Government [of the Republic of Congo] with such military assistance as may be necessary until... the national security forces may be able... to meet fully their tasks".

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[565] UN Doc. A/AC.125/L.48 (27 July 1967), reprinted in Official Records of the General Assembly, Twenty-second Session, annexes, agenda item 87, UN Doc. A/6799 (26 September 1967), para. 177.
[566] UN Doc. A/AC.125/L.74.
[567] *Official Records of the Security Council*, Fifteenth Year, Supplement for July, August and September 1960, UN Doc. S/4382.
[568] *Official Records of the Security Council*, Fifteenth Year, 873rd meeting, paras. 18-29.

This was followed by Security Council resolution 145 (160) of 22 July 1960 that, in operative paragraph 2, requested all States "to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of Congo" and Security Council resolution 146 (1960) of 9 August 1960.

597. The Security Council action in response to the Katanga separatist movement in the Congo was supported by the General Assembly in resolution 1474 (ES-IV) of 20 September 1960, in operative paragraph 5(a), which requested all States "...to refrain from any action that might undermine the unity, territorial integrity and the political independence of the Republic of the Congo."

598. In relation to the secessionist attempt by Biafra from Nigeria, the Organization of African Unity firmly condemned this secessionist attempt in a resolution in which the heads of member States reaffirmed their adherence to the principle of territorial integrity of States.[569]

599. The year that the Declaration on Principles of International Law was adopted was also the same year that Secretary-General U Thant made the following famous statement in January 1970:

> "As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocable. As an International Organization, the United Nations has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its member States".[570]

600. The international legal environment in which resolution 2625 (XXV) was adopted was thus one in which the practice of emphasising the territorial integrity and

[569] OAU Resolution on Situation in Nigeria, OAU Doc. AHG/Res.51 (IV) adopted at the Fourth Ordinary Session of the Assembly of the Heads of State and Government of the OAU, Kinshasa, 11-14 September 1967, paras. 1-2, *reprinted in* 6 ILM (1967), p. 1243. See D.A. Ijalaye, "Was Biafra at Any Time a State in International Law?" 65 *AJIL* (1971), pp. 551-568.

[570] 7 *UN Monthly Chronicle* (1970), p. 36.

political unity of independent States was well established and continually affirmed.[571]

II An *a contrario* reading of the "safeguard clause" in order to admit a right to "remedial secession" is not supported by legal means of interpretation

(1) A good faith interpretation of the "safeguard clause" does not admit a right to "remedial secession"

601. A good faith interpretation of the "safeguard clause" in General Assembly resolution 2625 (XXV),[572] in accordance with the ordinary meaning to be given to the terms in their context and in the light of the object and purpose, leads to the conclusion that the principle of self-determination cannot be understood as either authorising or promoting in any way actions that are contrary to the territorial integrity and the political unity of States.

602. The "safeguard clause" is the seventh paragraph of the section dealing with the fifth principle entitled 'the principle of equal rights and self-determination of peoples' in General Assembly resolution 2625 (XXV) and must be interpreted in this context. *First*, the first six paragraphs under this heading address the principle of self-determination, the content of that right, the possible outcomes of its exercise, the obligation to put an end to any situation contrary to that right and to promote its respect, and finally the different legal nature of the colonial territories with regard to the territory of the administering States. *Second*, in paragraph 7, the text provides that nothing in those six foregoing paragraphs must be understood as authorising or encouraging *any action* which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. *Any* action is an all-encompassing formula. It necessarily includes actions not only taken by States but also taken by *any* entity, organ, organization or group of *any* kind. Consequently, no secessionist attempt made by any entity, organ,

[571] See *supra* Chapter 6, paras. 429-433

[572] As Judge Lauterpacht has noted, UN member States are bound to give due consideration to General Assembly resolutions in good faith, see *South-West Africa-Voting Procedure, Advisory Opinion of June 7th, 1955, I.C. J. Reports 1955, Separate Opinion Judge Lauterpacht*, p. 119.

organization or group can be legally justified under the plea of the exercise of the right to self-determination.[573]

603. The end of paragraph 7 recalls that States, which the safeguard clause aims at protecting, must conduct themselves in compliance with the principle of self-determination of peoples and consequently their governments must represent the whole people belonging to the territory without distinction as to race, creed or colour. However, this wording cannot be read in good faith as meaning that if a government does not represent a whole people belonging to the territory without distinction as to race, creed or colour, that the secession of part of that State's territory is either authorized or encouraged by General Assembly resolution 2625 (XXV), as advocates for so–called "remedial secession" claim. The right of self-determination cannot comprise a right to secession if the language of paragraph 7 safeguarding each State's political unity and territorial integrity is to have any effect. Indeed, paragraph 7 makes clear that *any action* that dismembers or impairs totally or in part the territorial integrity or political unity of a State is not in accordance with the principle of equal rights and self-determination of peoples, as set out in the preceding six paragraphs.

604. Those who read the safeguard clause as recognizing "remedial secession" adopt an erroneous interpretation of General Assembly resolution 2625 (XXV) by reading the paragraph backwards and implying a meaning that is not present in the text. The Declaration on Principles of International Law contains a positive statement: that there must be respect for the political unity and the territorial integrity of "States *conducting themselves* in compliance with the principle of equal rights and self-determination of peoples". It does not say that "States that *do not conduct themselves* in compliance with the principle of equal rights and self-determination of peoples could be the object of an action that would dismember or impair, totally or in part, their territorial integrity or political unity".

605. The only ground advanced for the so-called "remedial secession" reading of this paragraph is an interpretation on the basis of *a contrario* reasoning. However, to

[573] See *supra* paras. 558-569.

reason *a contrario* does not necessarily lead to a correct outcome. As a matter of course, an *a contrario* reasoning is not in and of itself self-explanatory. The express statement contained in the safeguard clause contains an assertion and a consequence. The "remedial secession" reading imagines the opposite assertion (States which do not conduct themselves in compliance with the principle of self-determination) and purports to apply to it the opposite consequence (no safeguard to their territorial integrity and political unity). However there are many alternative consequences to the opposite assertion, and the consequence advanced (secession) is just one among many others, and, as will be demonstrated below, neither the most reasonable nor the most logical one.

606. The purpose of paragraph 7 is largely acknowledged to be the establishment of a "safeguard clause". Indeed, this is the term that is generally employed to refer to this paragraph.[574] This clearly follows from the *travaux préparatoires*: the text of the different drafts submitted by States that proposed incorporating this paragraph into resolution 2625 (XXV) were referred to as the "safeguard clause".[575] By definition, a safeguard clause does not add any particular element to the scope of the right. Its purpose is to expressly state or reaffirm something clearly, in order to avoid confusion or an incorrect interpretation of the right at issue. This is clearly evinced by the words with which paragraph 7 begins: "Nothing in the foregoing paragraphs shall be construed as…". One could say that even if the safeguard clause had not been included in resolution 2625 (XXV), a good faith interpretation of the preceding six paragraphs should not be any different.

(2) The travaux preparatoires do not support an a contrario *reading of the "safeguard clause" that admits a right to "remedial secession"*

607. In addition to a good faith interpretation of the "safeguard clause", the *travaux préparatoires* of General Assembly resolution 2625 (XXV) also confirm that the

[574] Crawford, *The Creation of States*, *op. cit.*, p. 118. Other similar terms are also used to refer to this paragraph, such as "saving clause", see Steven Wheatley, *Democracy, Minorities and International Law* (2005), p. 93.

[575] See *Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.*, GA OR, Twenty-fifth Sess., Supp. No. 18, UN Doc. A/8018 (1 May 1970), p. 51, para. 78, and p. 99, para. 177.

scope of the "safeguard clause" is limited to safeguarding the territorial integrity and political unity of States. Rather than providing for a so-called "right to remedial secession" if the wording of the second part of the safeguard clause is not complied with by a State, the *travaux préparatoires* make clear that the clause is designed to perform the opposite task, namely that of protecting the territorial integrity and political unity of States.

608. The "safeguard clause" was the result of a proposal by Italy to expressly include a statement "safeguarding" the territorial integrity of States in relation to the principle of equal rights and self-determination of peoples. In response to a broadly-worded paragraph proposed by the United Kingdom,[576] Italy advocated a text that would

> "ensure that the principle [of equal rights and self-determination of peoples] would not be interpreted in such a way as to undermine the territorial integrity of independent States, which was safeguarded as fundamental by the Charter."[577]

609. Some States even thought the inclusion of such a "safeguard" would be unnecessary,[578] but Italy was resolute, and one could say now that it showed enormous foresight. The representative of Italy, Professor Gaetano Arangio-Ruiz, explained the logic behind the Italian proposal in the following terms:

> "Once it was clear that it was peoples that were the beneficiaries of the principle of self-determination, it followed logically that

[576] The text proposed by the United Kingdom provided as follows: "States enjoying full sovereignty and independence, and possessed of a representative government, effectively functioning as such to all distinct peoples within their territory, shall be considered to be conducting themselves in conformity with this principle as regards those peoples": UN Doc. A/AC.125/L.44, part VI, reprinted in Official Records of the General Assembly, Twenty-second Session, annexes, agenda item 87, UN Doc. A/6799 (19 July 1967), para. 176

[577] Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 19, UN Doc. A/7619, p. 67, para. 187.

[578] Statement by Mr. Allaf on behalf of Syria, Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States: Summary Records of the One Hundred and Tenth to One Hundred and Fourteenth Meeting held at Palais des Nations, Geneva, from 31 March to 1 May 1970, UN Doc. A/AC.125/SR.110-114, p. 18.

provision must be made to safeguard the territorial integrity and political unity of States. And it was a problem that had to be dealt with at the international level. Provisions of constitutional law could not protect the territorial integrity or political unity of a State at that level, which was precisely the level at which the declaration would be made. In the absence of such a safeguard in international law, it would be possible to invoke the principle of self-determination in order to destroy the territorial integrity or undermine the political unity of a State.

The claim that the territorial integrity of States was safeguarded under the principles concerning the non-use of force and intervention was not enough. Since the principle of equal rights and self-determination conferred rights on peoples and not on States, it would be very easy to disrupt the political integrity of a State on the basis of that principle. The term 'people' was not defined and it would be possible to invoke the principle of self-determination on behalf of any group, that possibly rendered an *ad hoc* safeguard, such as the one included in the Italian proposal, absolutely necessary."[579]

610. The Indian Government also held a similar understanding of the limitations to the principle of equal rights and self-determination of peoples. It expressed its view as follows:

"…the right of self-determination d[oes] not apply to sovereign and independent States or to integral parts of their territory or to a section of a people or nation. Without such an understanding, the principle of self-determination would lead to fragmentation, disintegration and dismemberment of sovereign States and

[579] Statement by Mr. Arangio-Ruiz on behalf of Italy, United Nations General Assembly, 1970 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States: Summary Records of the One Hundred and Tenth to One Hundred and Fourteenth Meeting held at Palais des Nations, Geneva, from 31 March to 1 May 1970, UN Doc. A/AC.125/SR.110-114, p. 22.

> Members of the United Nations. The dangers in that context would be particularly acute in the case of States having multi-racial and multi-lingual populations."[580]

611. Therefore, rather than providing for a right to so-called "remedial secession", the "safeguard clause" was included in resolution 2625(XXV) to protect the territorial integrity and political unity of States in relation the principle of the equal rights and self-determination of peoples. Indeed, as an author has pointed out, the origin of the last part of the "safeguard clause" was the struggle between the different groups of States with regard to the reinforcement of the idea of the *internal* element of self-determination during the time of the Cold War.[581] This wording does not refer to the *external* element of self-determination, even less to a purported right to secession.

(3) Subsequent practice does not support an a contrario *reading of the "safeguard clause" that admits a right to "remedial secession"*

612. Nothing that has happened following the adoption of General Assembly resolution 2625 (XXV) has changed the constant UN policy of seeking to preserve the territorial integrity and political unity of States. Rather, subsequent practice confirms that the "safeguard clause" does not admit a right to "remedial secession".

613. To date there has not been a single instance where a State has been successfully created by the secession of territory from an existing State in circumstances where the secession was officially justified on the basis of the exercise of the right to self-determination by "remedial secession". Examples of remedial secession that are sometimes invoked are the cases of Bangladesh and Eritrea. However, in both

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[580] *Ibid*, p. 110, para. 221.

[581] See Cassese, *Self-Determination*, *op. cit.*, pp. 109-110. The same author concluded that "the possibility of racial groups to *secede* under the extreme circumstances set out above has *not* become customary law". *Ibid*, p. 121.

these instances the parent States, Pakistan and Ethiopia respectively, accepted the secession of these parts of their territories, as will be discussed below.[582]

614. The 1975 Helsinki Final Act confirmed both the principle of self-determination and that of territorial integrity. Not only was no reference made to any purported right to "remedial secession", but rather, on the contrary, stress is strongly laid on the respect of the territorial integrity of States.[583] The principle of the territorial integrity of States also features prominently in the formulation of the principle of "Equal rights and self-determination of peoples", which *inter alia* provides that

> "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."[584]

615. States recognised this legal situation in the past. The British Minister of State of the Foreign and Commonwealth Office wrote in reply to a question in 1983, for example, that:

> "...it has been widely accepted at the United Nations that the right of self-determination does not give every distinct group or territorial subdivision within a State the right to secede from it and thereby dismember the territorial integrity or political unity of sovereign independent States".[585]

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[582] See *infra* Chapter 10, para. 947.

[583] See Helsinki Final Act, Declaration on Principles Guiding Relations between Participating States, Principle IV; see also, Principles I and VIII; for other international instruments confirming the principle of territorial integrity of States see Chapter 6, Sections B & C.

[584] *Ibid*, Principle VIII.

[585] H.L. Debs., vol. 446, cols 93-4: 12 December 1983, *reprinted in* British Year Book of International Law, 1983, p. 409.

616. Similarly, in 1996 the Government spokesman in the House of Lords, Lord Chesham, stated that "[t]he right to self-determination does not equate automatically with a right to secession."[586]

617. Specific mention was made of the principles set out in the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe by Lord Whitty, when presenting the British Government's response to the situation in Nagorno-Karabakh with regard to Azerbaijan and Armenia in 1997. In response to a question by Baroness Cox who asked Her Majesty's Government to provide details about "their position with regard to the relationship between the principles of self-determination and territorial integrity",[587] his Lordship replied:

> "The eighth OSCE principle relates to self-determination. It is worth mentioning that for the purposes and principles of the UN Charter that is operative with reference to the relevant norms of international law. They include not just references to human rights but those relating to territorial integrity of states. Our position on the issue does not apply just to Nagorno-Karabakh. It applies throughout the world, but in particular in that part of the world it applies to Abkhazia where we have made clear our support for the territorial integrity of Georgia."[588]

618. Specifically in relation to the Serbian province of Kosovo, the French Minister for Foreign Affairs stated in 1998 following a meeting with his Albanian counterpart, that while the province of Kosovo should enjoy a large degree of autonomy, and that human rights need be respected, the territorial integrity of the FRY must be respected.[589] This need to respect internationally recognised borders with respect

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[586] H.L. Debs., vol. 569, col. 971: 20 February 1996, *reprinted in* British Year Book of International Law, 1996, p. 720.

[587] Lord Hansard text for 1 July 1997, col. 154, available at: http://www.publications.parliament.uk/pa/pahansard.htm.

[588] *Ibid.*, col. 169, available at. http://www.publications.parliament.uk/pa/pahansard.htm

[589] "J'ai rappelé à cette occasion la position de la France qui est très claire, qui s'appuie sur quelques principes et qui sont les suivants : il faut respecter l'intégrité territoriale de la République fédérale de Yougoslavie. En même temps, la démocratisation et le respect des droits de l'homme sont nécessaires dans ce pays, ce qui favorisera sa réintégration dans la communauté internationale. Nous demandons que l'on revienne à où que l'on obtienne un statut de large autonomie pour le Kosovo", Statement by the French

to Kosovo was reiterated by the President of France on 12 March 1998.[590] Similarly, Kosovo independence would, again according to the French Minister for Foreign Affairs in 1998, destabilise the region.[591]

619. Germany was of a similar opinion when it penned a joint letter with France to the FRY in which the two States noted that only a negotiated solution among the FRY, the Republic of Serbia, and the Albanian community of Kosovo could create the basis for lasting peace in the region.[592]

620. The Committee on the Elimination of All Forms of Racial Discrimination (CERD) also interpreted self-determination as denoting a right that does not lead to secession from a State:

> "6. The Committee emphasizes that, in accordance with the Declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or colour. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paras. 17 and following), namely, that a

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Minister for Foreign Affairs, 5 March 1998, reprinted in Jean-François Dobelle, "Pratique française du droit international – 1998 " 44 *Annuaire français de droit international* (1998), p.735.

[590] "En revanche, il faut que Belgrade sache que cette attitude de très grande fermeté doit le conduire à une solution aimable, c'est-à-dire une grande autonomie du Kosovo comme ce fut le cas dans le passé, mais dans le respect des frontières internationalement reconnues", Statement by the President of France at a London press conference, 12 March 1998, reprinted *ibid.*.

[591] Statement by the French Minister for Foreign Affairs during an interview on Radio France, 13 March 1998, reprinted in *ibid.*.

[592] Letter from the Ministers for Foreign Affairs of France and Germany to the President of the Federal Republic of Yugoslavia, 19 November 1997, reprinted in Jean-François Dobelle, "Pratique française du droit international – 1998 " 43 *Annuaire français de droit international* (1997), p. 930.

> fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned."[593]

621. Significantly, following its analysis of the scope of the right to self-determination, the CERD quoted paragraph 7 of the Declaration on Principles of International Law and immediately concluded that "[i]n the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State". Not a single phrase in the CERD's extended analysis of self-determination in general and of paragraph 7 in particular refers to the possibility of existence of a right to "remedial secession".

622. General Comment 12 by the Human Rights Committee concerning Article 1 of the International Covenant on Civil and Political Rights (ICCPR) equally does not contain any comment in relation to the "safeguard clause", or any mention of secession.[594] Referring to the first paragraph of Article 1 of the Covenant, the Committee considers that "States parties should describe the constitutional and political processes which in practice allow the exercise of this right".[595] All States Parties must do this, irrespective of the composition of their respective population, i.e. whether the State is made up of national, linguistic, religious or other minorities. Of particular interest is the following analysis of Article 1, paragraph 3, of the Covenant:

> "Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of

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[593] CERD, General Recommendation XXI, Right to Self-determination (23 August 1996), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?Opendocument.

[594] Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 13 March 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994), available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument.

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

this paragraph is confirmed by its drafting history. It stipulates that 'The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'. The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end."[596]

623. Clearly, the view is taken that paragraph 3 focused on Non-Self-Governing and Trust Territories and it is underlined that positive action by States Parties must not be such as to constitute interference in the internal affairs of other States. Supporting secessionist attempts constitutes the most evident case of any such interference.

624. Other international instruments adopted subsequent to the 1970 Declaration on Principles of International Law during the course of the last two decades have reproduced the safeguard clause. Examples include the Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993,[597] and General Assembly Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.[598]

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

[597] "All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the

625. In sum, paragraph 7 of the principle of equal rights and self-determination of peoples embodied in the Declaration on Principles of International Law contains a safeguard clause the purpose of which is to make clear that the right of self-determination does not authorise or encourage any action against the territorial integrity or political unity of States.

III Resolution 2625 (XXV) does not transform a minority suffering from human rights violations into a people having a right to self-determination

626. Despite the clear object of the "safeguard clause", described above, paragraph 7 of the principle of equal rights and self-determination of peoples has been read by some authors and by some States as encouraging or authorising the UDI of 17 February 2008, on the basis of what they call a right to "remedial secession".[599]

World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right. In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind", UN Doc. A/CONF.157/23 (12 July 1993), para. 2.

[598] "[T]he United Nations... [c]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self- determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind". General Assembly resolution 50/6 of 24 October 1995, para. 1.

[599] For an account of this doctrinal position, see C. Tomuschat, "Secession and Self-Determination" in M. G. Kohen (ed.), *Secession. International Law Perspectives* (2006), p. 48; J. Dugard and D. Raič, "The Role of Recognition in the Law and Practice of Secession" in *ibid.*, p. 28; A. Cassese, *Self-Determination*, *op. cit.*, p. 118.
Recognition by Switzerland of the so-called "Republic of Kosovo" has been explained by its Foreign Affairs Minister in this way: "Un Etat qui se comporte en conformité avec le droit des peoples à disposer d'eux-mêmes et qui dispose d'un gouvernement qui représente et respecte toutes les personnes faisant partie de son pays, se voit garantir son intégrité territoriale et sa souveraineté par le droit international. En revanche, cette garantie échoit si l'Etat en question ne protège plus ses citoyens, viole le droit des peuples à l'autodétermination de façon systématique et flagrante, comme l'a fait la Serbie à l'égard de la très grande majorité des habitants du Kosovo". "Les priorités de la politique étrangère de la Suisse", Discours de Madame Micheline Calmy-Rey, 10e anniversaire du "Forum Suisse de politique internationale", Geneva, 7 March 2008. Available at:
http://www.eda.admin.ch/etc/medialib/downloads/edazen/dfa/head/speech0.Par.0013.File.tmp/080307_Discours%20MCR_fr.pdf.

The existence of such a right is highly controversial and such interpretation has not received any support from the United Nations.

627. Indeed, secession is not a legal effect of a failure of a State to respect human rights or to conduct itself in accordance with the principle of self-determination. The first legal consequence that emerges from a case in which a State is not conducting itself in accordance with the principle of self-determination and with international human rights standards is that it must put an end to the situation and act in conformity with these principle and standards. This is the normal way to deal with wrongful acts having a continuing character, including human rights violations.

628. The second legal consequence arises in the field of reparation. However, "remedial secession" goes much further than requiring reparation. It is tantamount to imposing a type of sanction that is wholly outside the field of State responsibility for wrongful acts. "Remedial secession" means that, as a consequence of human rights violations, the wrongdoer will be sanctioned with the loss of its territory. This kind of sanction, even in response to grave violations of peremptory norms, is unknown in international law.[600]

629. Viewed from another perspective, "remedial secession" would imply that if a national, religious or linguistic minority is seriously discriminated against by the State, then this minority would become a "people" entitled to exercise self-determination by seceding territory from the State. However this purported new "category" of peoples has never been referred to in any international instrument or in practice. Here, the well-established distinction between peoples' rights and minorities' rights is critical. Only "peoples" are entitled to exercise self-determination. To apply self-determination to minorities is tantamount to not only blurring but rendering meaningless this distinction. Indeed, this approach leads to the negation of the distinction clearly made in international law between peoples – entitled to the right of self-determination – and minorities – holders of other

[600] See Article 41of the ILC articles on Responsibility of States for Internationally Wrongful Acts, YILC, 2001, Vol. II, Part Two.

rights, but not of the right of self-determination. Conventional or customary rules dealing with minority rights, both at the individual and the collective level, do not recognize minorities as holders of the right to self-determination.[601]

630. Indeed, the more appropriate way to address the issue of serious violations of human rights, either collective or individual, is through the restoration of the respect of such rights and the reparation of the injury caused. These kinds of violations are often due to the existence of a particular government following discriminatory policies. By definition, this is a temporary situation, spanning the political life of the government concerned. By contrast, a radical "solution" such as secession is permanent. The creation of States is not intended to be a temporary measure. They are created with the intention of permanency. There is no reason to respond to a temporary situation with a permanent disruption. Moreover, there exists many different ways other than the creation of an independent State to allow a population of a given territory to pursue its political, economic, social and cultural development. Different forms and degrees of self-government and autonomy are examples all over the world.

631. Nothing in international law gives support to the "remedial secession" reading of the "safeguard clause". Not surprisingly, no author to date who defends the *a contrario* reading of this clause has provided any legal justification of it based on positive applicable rules.[602]

632. Moreover, paragraph 7 does not refer to grave violations of human rights or international humanitarian law. It speaks of "States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction". Even assuming the

[601] See Article 27 of the ICCPR; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135; Framework Convention for the Protection of National Minorities (opened for signature 1 February 1995, entered into force 1 February 1998), CETS No. 157.

[602] See, e.g., Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, (2004), pp. 357-359; Lee Buchheit, *Secession: The Legitimacy of Self-Determination* (1978), p. 223; T. M. Franck, "Postmodern Tribalism and the Right to Secede" in Brölmann, Lefeber, Ziek, *Peoples and Minorities* (1993), pp. 13-14; T. D. Musgrave, *Self-Determination and National Minorities* (1997), pp. 188-192.

correctness of the *a contrario* reading (*quod non*), the only application of "remedial secession" would be in the case of the State that does not conduct itself "in compliance with the principle of equal rights and self-determination of peoples and thus [not possessing] of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". Hence, not all grave violations of human rights and international humanitarian law would create conditions for a purported "remedial secession".

633. For the abovementioned reasons, neither the safeguard clause nor any existing legal rule provides legal support for the "remedial secession" doctrine.

IV There is no support for the "remedial secession" doctrine in national case law or the findings of human rights commissions and courts

634. The highest courts in some federal States have dealt with the matter of secession and have analysed their concrete situations both at the constitutional and international law levels. In this vein both the Russian Supreme Court, with regard to Tatarstan, and the Canadian Supreme Court, with regard to Quebec, have dealt with the question of secession.

635. The Canadian Supreme Court in its opinion on Quebec analysed the position of some commentators on a right to unilateral secession in the circumstance "when a people is blocked from the meaningful exercise of its right to self-determination internally [and whether] it is entitled, as a last resort, to exercise it by secession". The Canadian Supreme Court's position was that "it remains unclear whether this third proposition actually reflects an established international law standard".[603]

636. The Russian Supreme Court analysed the relationship between self-determination and territorial integrity with respect to the Constitution of the Russian Federation and expressly referred to paragraph 7 of the principle of self-determination contained in resolution 2625 (XXV). Without denying the right of self-determination as the expression of the will of the people, according to the Russian

[603] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 134-135.

Constitutional Court any unilateral action aiming at breaking up the national unity and the territorial integrity of the Russian Federation would not be in conformity with international law rules governing human rights and the rights of peoples.[604]

637. In its 2007 Advisory Opinion on the United Nations Declaration of Indigenous Peoples, the African Commission of Human and Peoples' Rights summarised its position with regard to secession and the relationship between self-determination and territorial integrity in general as follows:

> "In its jurisprudence on the rights of peoples to self-determination, the ACHPR, seized of Communications/Complaints claiming for the enjoyment of this right within State Parties, has constantly emphasized that these populations could exercise their right to self-determination in accordance with all the forms and variations which are compatible with the territorial integrity of State Parties [See Communication 75/92 of 1995 –the Katangese People Congress vs. Zaire, reported in the 8th Annual Activity Report of the ACHPR].
> In this respect, the report of the ACHPR's WGIP states that, 'the collective rights known as the peoples' rights should be applicable to certain categories of the populations within Nation States, including the indigenous populations but that ...the right to self-determination as it is outlined in the provisions of the OAU Charter and in the African Charter should not be understood as a sanctioning of secessionist sentiments. The self-determination of the populations should therefore be exercised within the national inviolable borders of a State, by taking due account of the

[604] No. 3-P of 13 March 1992 In Re the Constitutionality of the Declaration of State Sovereignty of the Tatar Soviet Socialist Republic of August 30, 1990, Law of the Tatar Soviet Socialist Republic of April 18, 1991 "On Amendments and Additions to the Constitution (Basic Law) of the Tatar Soviet Socialist Republic", of Law of the Tatar Soviet Socialist Republic of November 29, 1991 "On the Referendum of the Tatar Soviet Socialist Republic", Decree of the Supreme Soviet of the Republic of Tatarstan of February 21, 1992 "On the Holding of a Referendum of the Republic of Tatarstan on the Question of the State Status of the Republic of Tatarstan", available in Russian at: http://ks.rfnet.ru.

sovereignty of the Nation State (Experts' Report of the ACHPR p. 83/88)."[605]

638. This distinction between the rights enjoyed by a people, and those enjoyed by a minority was made by the Inter-American Commission on Human Rights in the *Miskito Case* concerning the indigenous Miskito population of Nicaragua. In acknowledging the principle of self-determination of peoples, the Commission nevertheless stated that "[t]his does not mean, however, that it recognizes the right to self-determination of any ethnic group as such."[606] The Commission found that although the Miskito population was an ethnic minority in Nicaragua, and enjoyed special legal protection by virtue of this status, this legal protection did not extend to "a right to political autonomy and self-determination".[607]

V Even if read as providing a right to "remedial secession" (*quod non*), the "safeguard clause" requirements would not be met in the present case

639. The insurmountable problem facing those attempting to legally justify the UDI through "remedial secession" is that even if this doctrine has became an established rule of international law (*quod non*), the purported conditions required through the *a contrario* reading of the Declaration on Principles of International Law would not at any rate be met in the case at issue.

640. The purported conditions for "remedial secession" would be that the State is not conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus not possessing a government representing the whole people belonging to the territory without distinction.

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[605] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at Its 41st Ordinary Session Held in May 2007 in Accra, Ghana, paras. 23-24.

[606] The *Miskito* Case, Case 7964 (Nicaragua), Inter-American Commission on Human Rights, Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L./V.II.62, doc. 10 rev. 3, 29 November 1983, Part Two(B) § 9.

[607] *Ibid*, § 15.

641. As far as Kosovo is concerned, its status as an autonomous province granted by the 1974 Constitution of the SFRY and the 1974 Constitution of Serbia, was modified in 1989. This was done through amendments to the Constitution of Serbia, in the constitutionally prescribed procedure and with the consent of Kosovo and another Serbian autonomous province, Vojvodina.[608] Their status of autonomous provinces remained under both the federal and Serbian constitutions, but they enjoyed less autonomous powers, particularly in the legislative realm.[609] At no time was the Albanian minority, either in Kosovo or elsewhere in Serbia, excluded or discriminated from the participation in the public affairs of the State.[610]

642. Since then, however, the Kosovo Albanians have organized themselves into parallel institutions, holding elections in which they elected their own "president" and "parliament", and establishing their own education, health, tax systems.[611] The majority of the Kosovo Albanian population systematically boycotted any participation in any state structure in the FRY (Serbia and Montenegro) and in Serbia, and in particular elections. The goal of the majority of Kosovo Albanians was independence, and they accordingly not only refused to cooperate with the Serbian government in office at that time, but also with the Serbian democratic opposition.[612] Should the Kosovo Albanians have acted otherwise, their presence in the national Parliament would have permitted a different majority from that formed by Mr. Milosevic and his allies, and sparing not only Kosovo but the entire Serbia the policies of his regime.

643. It emerges that the Kosovo Albanians did not participate in the State apparatus of Serbia and Yugoslavia during the 1990s out of choice not to do so, and in the pursuit of independence as evinced in the establishment of their own parallel institutions. Consequently, the FRY and the Republic of Serbia cannot be held accountable for the lack of Kosovo Albanian participation in the national State

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[608] See *supra* para. 189.
[609] *See supra* paras. 189-198.
[610] See *supra* Chapter 5, Section D (II).
[611] See *supra* Chapter 5, Section D (I).
[612] See *supra* Chapter 5, para. 277.

institutions. This is not a case of non-compliance with the principle of self-determination of a State, but the decision of part of the population not to participate in the functioning of the State.

644. At no time during that period, until today, has a single United Nations or regional organisation resolution recognised that the Kosovo Albanians had a right to "remedial secession", or that this part of the population of Serbia had a right of external self-determination to create an independent State.

645. Indeed, the Peace Conference on Yugoslavia did not recognise at any time a right to Kosovo to constitute its own sovereign State, in opposition to what it did for the constituent republics of the former SFRY. This was so, despite the demands by the leaders of the Kosovo Albanians to be recognised as an independent republic.[613] Indeed, the Conference did not even allow the representatives of the Kosovo Albanians to participate in it on an equal footing with the Yugoslav republics.[614]

646. Furthermore, there remain two important reasons categorically to reject the purported justification under international law of the UDI on the basis of "remedial secession". *First*, at the moment that this secessionist attempt was carried out by the Provisional Institutions of Self-Government, the region of Kosovo enjoyed – and continues to enjoy – substantial autonomy within Serbia under the administration of the United Nations. It is difficult to imagine a more remote situation from that which a case for "remedial secession" would have to be substantiated. *Second*, Kosovo's substantial autonomy is also guaranteed by the Constitution of the Republic of Serbia,[615] which since 2000 has been an entirely democratic State in which human rights are widely respected and in which all the inhabitants, regardless of their national origin, language or religion, can participate in public life. National minorities freely develop their fundamental rights and the principle of self-determination is fully respected within Serbian territory with regard to all members

[613] Letter from Dr Rugova to Lord Carrington, Peace Conference on Yugoslavia, 22 December 1991, Annex 76 in Documentary Annexes accompanying this Written Statement.

[614] Letter from Lord Carrington, Chairman, Conference on Yugoslavia, to Dr Rugova, 17 August 1992, Annex 77 in Documentary Annexes accompanying this Written Statement.

[615] Constitution of the Republic of Serbia, Preamble and Article 182, para. 2, Annex 59 in Documentary Annexes accompanying this Written Statement.

of its people. Serbia is a party to all relevant universal and regional instruments guaranteeing human rights and minority rights.[616]

647. As Crawford has stated,

> "the inhibitions on international recognition of unilateral secession movements go further, and are even stronger than the 'safeguard clause' in the 1970 and 1993 Declarations imply. If the 1970/1993 proviso is taken to mean that unilateral secession is permissible where the government is constituted on discriminatory basis, it is doubtful whether the proviso reflects international practice. But whoever this may be, a state which *is* governed democratically and respects the human rights of all its people is entitled to respect for its territorial integrity".[617]

648. Finally, it must be noted that, notwithstanding the international civil and security presence in the territory, Serbian and other national groups of Kosovo have been victims of serious violations of human rights infringed by members of the Kosovo Albanian minority over the last nine years. Over 200,000 non-Albanians from Kosovo had to seek refuge in other parts of Serbia or in other countries, and the conditions for their return home have not been met.[618] It would be indeed a strange right of "remedial secession" that grants a victimised minority the right to create a new State while, at the same time, the leadership of this same minority bears responsibility for similar violations infringed on other national groups within the same territory.

649. In sum, the decision of the Kosovo Albanians not to participate in any Yugoslav or Serbian State institution, in order to proclaim their "sovereignty" and "independence" in 1990 and to effectively create their own parallel institutions

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[616] On guarantees of human rights and minority rights in Serbia, see Chapter 5, Section B (III).

[617] James Crawford, "State Practice and International Law in Relation to Unilateral Secession", Report, Experts opinion accompanying the Attorney General of Canada's Factum, in: Anne Bayefsky (ed.), *Self-Determination in International Law. Quebec and Lessons Learned. Legal opinions Selected and Introduced by Anne Bayefsky* (2000), p. 61, para. 71.

[618] For more on persecution of non-Albanians in Kosovo, see Chapter 5, Section F(I).

during the whole decade preceding the adoption of Security Council resolution 1244 (1999), renders the "remedial secession" doctrine completely inapplicable to the case at hand, even assuming that this doctrine constitutes a rule of international law (*quod non*). Furthermore, following the adoption of Security Council resolution 1244 (1999) and to date, Kosovo enjoys a regime of substantial autonomy under United Nations administration, such autonomy also being guaranteed by the Constitution of the Republic of Serbia, which means that the UDI can in no way be justified by the purported doctrine of "remedial secession".

VI No international body has ever acknowledged the applicability of the purported "remedial secession" of Kosovo

650. A further element demonstrating the futility of the claim of "remedial secession" as legal ground for the unilateral declaration of independence of 17 February 2008 is that not a single resolution by a United Nations organ, regional organisation, or any relevant international body has endorsed this claim. This was the case even during the worst period of the conflict between the Yugoslav Army and Serbian security forces on the one side, and the Kosovo Albanian terrorist organisation, the so-called KLA, on the other. As mentioned above, both Serbian forces and the KLA forces committed serious breaches of fundamental human rights and the rules of international humanitarian law.[619] Nevertheless all Security Council resolutions adopted in 1998-1999 concerning the situation in Kosovo stressed the need to respect the territorial integrity of the FRY, which is tantamount to denying any possibility of secession.[620]

651. In an attempt to blur this unquestionable fact, the UDI claims that Kosovo's secession "brings to an end the process of Yugoslavia's violent dissolution".[621] This is in clear contradiction with the findings of the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission). In its Opinion No. 8 of 4

[619] See Chapter 5, Section E.

[620] See Security Council resolutions 1199 (1998), 1203 (1998) and 1244 (1999), reproduced in Annexes 17, 18 and 20 in Documentary Annexes accompanying this Written Statement. For more see *supra* Chapter 6, Section E.

[621] See Annex 2 in Documentary Annexes accompanying this Written Statement.

July 1992, the Arbitration Commission considered that the process of dissolution of the SFRY had come to an end.[622] At no time did the Arbitration Commission mention the possibility of the independence of Kosovo, as a result of the application of the "remedial secession" doctrine or otherwise. If the abrogation of the autonomous status of Kosovo by the Milosevic regime in 1989 had created a situation on the ground triggering the applicability of the doctrine of "remedial secession", the Arbitration Commission could have not failed to omit this important fact. Indeed, the Commission was not even asked by the Conference to address the possible independence of Kosovo. Remarkably, in its first opinion, the Commission enumerated the declarations of independence issued by the Yugoslav Republics, but did not even mention that of "Kosovo", despite the fact that the Kosovo Albanian leaders had requested the Conference to consider it.[623]

652. Further, the European Union and the Organization for Security and Co-operation in Europe (OSCE) did not invoke the applicability of the external element of self-determination to the Kosovo population, and much less acknowledge a purported right of "remedial secession".[624]

653. It would be extraordinary to admit the application of the principle of self-determination to the population of Kosovo on the ground of "remedial secession" while, contrary to the whole history of the application of the right of peoples to self-determination within the United Nations, not a single acknowledgment as to the applicability of the principle to the situation of Kosovo has been made.

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[622] Opinion No. 8 of the Arbitration Commission on former Yugoslavia, 31 ILM 1521, 1523 (1992), Annex 41 in Documentary Annexes accompanying this Written Statement.

[623] See Opinion No. 1, 31 ILM 1494, 1496 (1992), Annex 38 in Documentary Annexes accompanying this Written Statement and the letter from Dr Rugova to Lord Carrington, Peace Conference on Yugoslavia, 22 December 1991, Annex 76 in Documentary Annexes accompanying this Written Statement.

[624] In relation to the Council of the European Union, see Presidency Conclusions (19/20 June 2008), Brussels, 20 June 2008, 11018/08. In relation to the OSCE Mission in Kosovo, see OSCE, Decision No. 263, 193rd Plenary Meeting, PC.DEC/263 (25 October 1998); OSCE, Preliminary Assessment of the Situation of Ethnic Minorities in Kosovo (10 July 1999), available at: http://www.osce.org/documents/html/pdftohtml/1119_en.pdf.html; OSCE, Second Assessment of the Situation of Ethnic Minorities in Kosovo, 26 July 1999, available at http://www.osce.org/documents/html/pdftohtml/1118_en.pdf.html; OSCE, Overview of the situation of ethnic minorities in Kosovo, 3 November 1999, available at http://www.osce.org/documents/html/pdftohtml/1117_en.pdf.html. See also Human Rights Watch, 'Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo', Vol. 10, No. 9 (D), October 1998, available at:http://www.hrw.org/legacy/reports/reports98/kosovo/.

F. Conclusions

654. In conclusion, it is submitted that

(i) The right to self-determination has become a legal right in international law, but in a carefully limited manner;

(ii) International law has evolved a particular definition of a "people" entitled to self-determination for which recognition by a relevant regional or international organisation is required. In particular the United Nations has developed a methodology for identifying "non-self-governing territories" and laying down specific ways to put an end to colonial situations, including the applicability of the principle of self-determination;

(iii) The right to self-determination does not authorise non-consensual secession from an independent State;

(iv) Kosovo does not constitute a valid self-determination unit under international law;

(v) Kosovo Albanians do not constitute a "people" for the purposes of self-determination under international law.

(vi) Paragraph 7 of the principle of equal rights and self-determination of peoples embodied in the Declaration on Principles of International Law is a guarantee of the preservation of the political unity and the territorial integrity of independent States.

(vii) The *a contrario* reading of that paragraph in order to admit a right to "remedial secession" is not supported by the terms of the paragraph, its context, its object and purpose, the *travaux préparatoires* and subsequent practice.

(viii) National minorities cannot become "peoples" entitled to self-determination because of human rights violations.

(ix) Even assuming the legal existence of the doctrine of "remedial secession" (*quod non*), the conditions for its application would not be met in the case of Kosovo.

(x) Kosovo Albanians decided themselves not to participate in the State apparatus of Yugoslavia and Serbia, but rather to create their own parallel institutions.

(xi) Consequently, Yugoslavia and Serbia cannot be considered as not having respected the principle of equal rights and self-determination and thus as not possessing a government representing the whole people belonging to the territory of Serbia "without distinction as to race, creed or colour"

(xii) Neither the Arbitral Commission on Yugoslavia nor any United Nations or regional organisation resolution endorsed the claim of independence by the Kosovo Albanians or acknowledged any their purported right to external self-determination, either through "remedial secession" or otherwise.

Kosovo continues to enjoy a regime of substantial autonomy under United Nations administration, such autonomy also being constitutionally recognized by the Republic of Serbia.

Part IV
THE IMPACT OF SECURITY COUNCIL RESOLUTION 1244 (1999) ON THE QUESTION PUT TO THE COURT

Chapter 8
SECURITY COUNCIL RESOLUTION 1244 (1999) HAS ESTABLISHED AN INTERNATIONAL LEGAL REGIME FOR KOSOVO

655. The previous chapters have established that the UDI violated general principles of international law. The focus of this chapter is on the non-conformity of the UDI with the special legal regime that applies to Kosovo, as established by the United Nations Security Council in a binding resolution. This chapter will demonstrate that

(i) The Security Council of the United Nations, by adopting Security Council resolution 1244 (1999) under Chapter VII of the Charter, established an international legal regime for Kosovo, binding upon the parties as well as upon all Member States of the United Nations;

(ii) The international legal regime for Kosovo guarantees the territorial integrity of Serbia[625] pending a final settlement to be agreed between the parties under the auspices of the Security Council;

(iii) The notions of "self-government" and "autonomy" in Security Council resolution 1244 (1999) exclude independence for Kosovo, in particular a unilateral declaration of independence;

(iv) Security Council resolution 1244 (1999) requires that Kosovo's future status be determined through a political process, peacefully and by negotiations;

(v) Only the Security Council may terminate the international legal regime for Kosovo.

[625] On the continuity between the FRY and the Republic of Serbia, see *supra* Chapter 1, Section E.

A. Practice of the Security Council, in particular Resolution 1244 (1999), Recognizes and Guarantees the Territorial Integrity of the FRY/Serbia

I. Practice prior to the adoption of Security Council resolution 1244 (1999)

656. Already well before the adoption of Security Council resolution 1244 (1999), both the Security Council and individual Members of the United Nations had confirmed the territorial integrity of the FRY and rejected the idea of any unilateral right of Kosovo to secede. In addition, the Security Council stressed the need for any settlement to be based on an agreement reached between the parties on an autonomous status of Kosovo *within* the FRY.

657. As a matter of fact, it was already in 1995, 1996 and 1997 respectively, that the Security Council in resolutions 1031 (1995), 1088 (1995) and 1144 (1997) – after having reaffirmed its commitment to a *negotiated settlement* of all conflicts in the former Yugoslavia – referred to the preservation of the territorial integrity and the preservation of the sovereignty and territorial integrity of all States concerned within their internationally recognized borders[626]

658. Similarly, the Contact Group, comprising France, Germany, Italy, Russia, the United Kingdom and the United States, also supported "an enhanced status for Kosovo *within the Federal Republic of Yugoslavia*",[627] including "meaningful self-administration".[628]

659. In early 1999, the President of the Security Council, speaking on behalf of the Security Council, in two presidential statements stated that the Council "reaffirms

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[626] See Security Council resolution 1031 (1995), preambular para. 2, as well as Security Council resolution 1088 (1996), preambular para. 2, reprinted in Annexes 14 & 15 in Documentary Annexes accompanying this Written Statement. See, also, Security Council resolution 1144 (1997), preambular para. 2. For more, see Chapter 6, Section E.

[627] See Contact Group Statement on Kosovo of 24 September 1997 (emphasis added), reprinted in Weller, *op.cit.*, p. 234. This formula was repeated in subsequent Contact Group statements on Kosovo, see the statements of 25 February 1998 (Moscow) and 9 March 1998 (London), reprinted in *ibid.*, p. 235.

[628] See Contact Group statements on Kosovo of 25 February 1998 (Moscow) and 9 March 1998 (London), *ibid.*, pp. 235-236.

its commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."[629]

660. In Security Council resolution 1239 (1999), adopted only weeks before Security Council resolution 1244 (1999) was adopted, the Council not only again reaffirmed "the territorial integrity and sovereignty of all States in the region",[630] but in operative paragraphs 2 and 3 also specifically referred to Kosovo as one of the "parts of the Federal Republic of Yugoslavia".[631]

661. On 8 May 1999, during a meeting of the Security Council devoted to discussing the bombardment of the Chinese embassy in Belgrade, the French representative referred to the process which was then taking place within the framework of the G-8 and which laid the groundwork for what was to become Security Council resolution 1244 (1999). He stressed that the goal of any Security Council decision would be

> "a political process leading to the establishment of an interim political agreement, involving substantial autonomy for Kosovo, that fully takes into account the Rambouillet accords, *the principles of the 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".[632]

662. That same view was endorsed by representatives of a significant number of States during debates of the Security Council. Thus the representative of Cuba stated that the task of the Security Council was

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[629] See UN Doc. S/PRST/1999/5 (29 January 1999), para. 4, and UN Doc. S/PRST/1999/2 (19 January 1999), para. 10, reprinted in Annexes 31 & 30 respectively.

[630] Security Council resolution 1239 (1999), preambular para. 7, Annex 19 in Documentary Annexes accompanying this Written Statement.

[631] *Ibid.*, operative paras. 2 & 3 and preambular paras. 4 & 6.

[632] Statement of Mr. Dejammet (France), UN Doc. S/PV.4000 (8 May 1999), p. 5 (emphasis added).

> "to find the path towards a just and dignified political solution *that respects the sovereignty and territorial integrity of the Federal Republic of Yugoslavia* and all the States of the region".[633]

663. Argentina in turn referred to the

> "need to create conditions conducive to a lasting peace, within a framework based on respect for human rights and for the *principles of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia*...".[634]

664. In the same vein, China took the position that any settlement of the Kosovo issue ought to take place "on the basis of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia",[635] a view that was shared by the representatives of Ukraine[636] and Belarus.[637]

665. Similarly, India reiterated that "the sovereignty and territorial integrity of the international border of the Federal Republic of Yugoslavia is inviolable".[638]

666. Germany's ambassador also assumed that any future political solution would be based on the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[639]

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[633] Statement by Mr. Rodriguez Parrilla (Cuba), UN Doc. S/PV.4000 (8 May 1999), p. 11 (emphasis added).
[634] Mr. Petrella (Argentina), UN Doc. S/PV.3988, (24 March 1999), p.11 (emphasis added).
[635] See statements by the representative of China Mr. Qin Huasun (China), UN Doc. S/PV.3989 (26 March 1999), p. 9.
[636] Mr. Yelchenki (Ukraine):
"It is necessary to return as soon as possible to a peaceful political settlement on the basis of the preservation of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (...)", *ibid.*, p. 10.
[637] Mr. Sychon (Belarus):
"The Republic of Belarus reaffirms its position on the settlement of the Kosovo conflict: it should be based on unconditional respect for the sovereignty and territorial integrity of Yugoslavia (...)", *ibid.*, p. 12.
[638] Mr. Sharma (India), UN Doc. S/PV.3988 (24 March 1999), p. 15.
[639] Mr. Kastrup (Germany), *ibid.*, p. 17.

II. The practice leading to the adoption of Security Council resolution 1244 (1999)

(1) The Statement by the chairman on the conclusion of the meeting of the G-8 foreign ministers at the Petersberg on 6 May 1999

667. One of the first steps towards the adoption of Security Council resolution 1244 (1999) was a statement of the G-8 of 6 May 1999, which also reflected the views of those G-8 members that were members of the Security Council at the relevant time on the Kosovo situation and its settlement. One of the core principles of that statement was the establishment of a political process towards the establishment of

> "an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords *and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region...*"[640]

(2) The Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the FRY and /the Republic of Serbia of 9 June 1999

668. The Military Technical Agreement of 9 June 1999 between the International Security Force ("KFOR") and the Governments of the FRY and its constituent entity, the Republic of Serbia of which Kosovo formed part, also confirms the fact that the legal status of Kosovo as a province falling under the sovereignty of the FRY remained unaltered, and, given the contractual character of the undertaking, could not be subsequently altered unilaterally.

669. In that regard, it should first be noted that the agreement, on frequent occasions, refers to "Kosovo" on the one side, and "locations in Serbia outside Kosovo" on the other, which clearly implies that the parties to the agreement considered

[640] UN Doc. S/1999/516 (6 May 1999) (emphasis added), also reprinted as Annex 1 to Security resolution 1244 (1999), see Annex 20 in Documentary Annexes accompanying this Written Statement.

Kosovo to form part of Serbia (as a constituent entity of the FRY) and thus also of the FRY. Accordingly, Article II, paragraph 2 of the Military Technical Agreement states that "[t]he FRY agrees to a phased withdrawal of all FRY forces from Kosovo to locations *in Serbia outside Kosovo*."[641]

670. Had the parties instead taken the position that Kosovo no longer formed part of the FRY, they would have simply formulated that any such withdrawal should take place "from Kosovo *to locations in Serbia*."

671. Besides, while limiting the right of the FRY to station troops in Kosovo, Article I, paragraph 4(a) of the agreement provided that any such provisions were "...without prejudice to the agreed return of FRY and Serbian personnel [to Kosovo]..."

672. The fact that the agreement left untouched the sovereignty of the FRY with regard to Kosovo is finally also confirmed by Article II, paragraph 2 (h) of the agreement. It provides:

> "The international security force ("KFOR") will provide appropriate control *of the borders of FRY in Kosovo* with Albania and FYROM until the arrival of the civilian mission of the UN." (emphasis added, footnote omitted)

673. The formula "*the borders of FRY in Kosovo*" clearly shows that the boundaries of Kosovo with Albania and the Former Yugoslav Republic of Macedonia at the same time also constitute the external borders of the FRY.

674. The Military Technical Agreement remains in force, notwithstanding the UDI.[642]

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[641] Art. II, para. 2 of the Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia of 9 June 1999, UN Doc. S/1999/682 (15 June 1999) (emphasis added), Annex 10 in Documentary Annexes accompanying this Written Statement.

[642] See *infra* paras. 861-864.

III. Security Council resolution 1244 (1999) guarantees the territorial integrity of the FRY and contradicts any right of the so-called "Republic of Kosovo" to unilaterally declare independence

675. It is against this background that Security Council resolution 1244 (1999) similarly confirms the territorial sovereignty of the FRY. Furthermore it also sets out the parameters for any future political settlement. These parameters clearly contradict any possibility of a unilateral change to the legal status of the territory, and provide for a negotiated settlement to be agreed upon by the two parties concerned.

676. Security Council resolution 1244 (1999) first and foremost reaffirms the sovereignty and the territorial integrity of the FRY.

677. Preambular paragraph 2 recalls Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999), all of which had in turn previously confirmed the territorial integrity of the FRY.[643]

678. Further, preambular paragraph 4 of Security Council resolution 1244 (1999) refers to the area concerned as "Kosovo, Federal Republic of Yugoslavia" thereby clearly indicating the conviction of the Security Council that Kosovo forms part of the FRY.

679. This is particularly significant bearing in mind that earlier drafts of Security Council resolution 1244 (1999) and in particular drafts adopted by the G-8 on 7 and 8 June 1999 had, in their preambular paragraph C., merely referred to the situation in "Kosovo".[644]

680. Accordingly, this indicates that the formula "Kosovo, Federal Republic of Yugoslavia" was deliberately introduced and was meant to be more than just a description of the geographical setting of "Kosovo".

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[643] As to the content of those resolutions see *supra* para 503 ff. As to the legal identity the FRY and the Republic of Serbia see *supra* Chapter 1, Section E.

[644] See Annex 35 in Documentary Annexes accompanying this Written Statement.

681. The Security Council then, once again, and in line with its own prior practice,[645] reaffirmed in preambular paragraph 10 of Security Council resolution 1244 (1999) the commitment of the Security Council and of its members to the sovereignty of the FRY "as set out in the Helsinki Final Act".

682. The Security Council thereby incorporated the content of the Helsinki Final Act in the resolution. According to Principle III of the Helsinki Final Act, "[t]he participating States regard as inviolable all one another's frontiers as well as *the frontiers of all States in Europe...*"[646]

683. Further, according to Principle I, any change in boundaries may only take place "*... in accordance with international law*, by peaceful means *and by agreement.*" (emphasis added)

684. Preambular paragraph 10 of Security Council resolution 1244 (1999) at the same time refers to annex 2 thereof,[647] which contains "principles to move towards a resolution of the Kosovo crisis". These principles were contained in a peace proposal submitted to the government of the FRY by former Finnish President Ahtisaari and former Russian Prime Minister Chernomyrdin and which proposal was formally accepted by the FRY.[648]

685. Annex 2 of Security Council resolution 1244 (1999) not only makes reference to the territorial integrity of the FRY, as one of the principles to be taken into full account when establishing interim political agreement for Kosovo (paragraph 8), but also provides for the establishment of an interim administration under which

[645] See *supra* Section A. (I) above.
[646] Helsinki Final Act (emphasis added).
[647] Annex 2 to Security Council resolution 1244 (1999), Annex 20 in Documentary Annexes accompanying this Written Statement.
[648] Annex 2 to Security Council resolution 1244 (1999), *ibid.*

> "the people of Kosovo ["la population du Kosovo" in the French text] can enjoy substantial autonomy *within the Federal Republic of Yugoslavia*".[649]

686. The territorial integrity of the FRY is also confirmed in Annex 1 to resolution 1244 which reproduces the conclusion of the G-8 meeting of foreign ministers of 6 May 1998 on "the general principles on the political solution to the Kosovo crisis".[650]

687. One of the general principles agreed at the meeting was that a political process towards the establishment of an interim political agreement should take full account of

> "the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region".[651]

688. This idea of Kosovo enjoying substantial autonomy *within the FRY* is then, once again, reiterated in operative paragraph 10 of Security Council resolution 1244 (1999), which authorises the Secretary-General to establish an international civil presence in Kosovo to provide an interim administration.

689. The principle of respect for the territorial integrity of the FRY is reaffirmed in operative paragraph 1 of Security Council resolution 1244 (1999) which expressly refers to annexes 1 and 2. The Security Council, acting under Chapter VII of the Charter, *decided* that a political solution to the crisis in Kosovo

> "shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2".

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[649] *Ibid.*, para 5 (emphasis added).
[650] Annex 1 to Security Council resolution 1244 (1999), Annex 20 in Documentary Annexes accompanying this Written Statement.
[651] *Ibid.*

690. As discussed above, the general principles in annex 1 and annex 2 include the principles of sovereignty and territorial integrity of the FRY.

691. The understanding that Security Council resolution 1244 (1999) requires any future solution to take into account the territorial integrity of the FRY is also confirmed by statements of members of the Security Council made immediately prior or after the adoption of Security Council resolution 1244 (1999) including statements of permanent members of the Security Council, whose agreement was necessary for the resolution to be adopted.

692. Thus, the representative of the Russian Federation underlined the reaffirmation of the commitment of all States to the sovereignty and territorial integrity of the FRY by stating:

> "In addition to clearly reaffirming the commitment of all States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the draft resolution authorizes the deployment in Kosovo, under United Nations auspices, of international civil and security presences with a clearly formulated, concrete mandate." [652]

693. The representative of China also underlined that any solution of the question of Kosovo must respect the sovereignty and territorial integrity of the FRY. He stated:

> "We stand for peaceful settlement of the question of Kosovo *on the basis of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia* and guarantees of the legitimate rights and interests of all ethnic groups in the Kosovo region."[653]

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[652] Mr. Lavrov (Russian Federation), UN Doc. S/PV.4011 (10 June 1999), p. 7, Annex 34 in Documentary Annexes accompanying this Written Statement

[653] Mr. Shen Guofang (China), *ibid.*, p. 8 (emphasis added).

694. He also underlined that the views of the government of the FRY are of particular relevance:

> "We are of the view that any proposed solution should take full account of the views of the Federal Republic of Yugoslavia."[654]

695. As a matter of fact, the preservation of the sovereignty and territorial integrity of the FRY was a *conditio sine qua non* for China in order not to block with a veto vote the adoption of Security Council resolution 1244 (1999). It was only subject to this condition that China was willing to abstain and thus allow the draft resolution to be adopted. As stated by the representative of China:

> "The draft resolution before us has failed to fully reflect China's principled stand and justified concerns. In particular, it makes no mention of the disaster caused by NATO bombing in the Federal Republic of Yugoslavia and it has failed to impose necessary restrictions on the invoking of Chapter VII of the United Nations Charter. *Therefore, we have great difficulty with the draft resolution.* However, *in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan*, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft resolution has reaffirmed the purposes and principles of the United Nations Charter, the primary responsibility of the Security Council for the maintenance of international peace and security *and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this draft resolution.*"[655]

696. The representative of Argentina specifically addressed a possible final status of Kosovo. He stated:

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[654] *Ibid.*
[655] *Ibid.*, p. 9 (emphasis added).

"Secondly, it [Security Council resolution 1244 (1999)] lays the foundation for a definitive political solution to the Kosovo crisis that will respect the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."[656]

IV Subsequent practice of United Nations organs confirms the territorial integrity of Serbia

697. Subsequent practice by United Nations organs also confirms the view that Security Council resolution 1244 (1999) is based on the guarantee of the territorial integrity of the FRY.

698. Thus, *inter alia*, reports of the Secretary-General to the Security Council on the United Nations Interim Administration Mission in Kosovo from 1999 onwards referred to Kosovo as forming part of Serbia by using the following formulae: "Kosovo, Federal Republic of Yugoslavia", "Kosovo, Serbia and Montenegro", and finally "Kosovo (Serbia)".[657]

699. Furthermore, UNMIK Regulation No. 1999/3 of 31 August 1999 "On the Establishment of the Customs and Other Related Services in Kosovo" distinguished between the external borders of Kosovo on the one hand and the administrative line dividing Kosovo from the rest of the FRY by providing that customs would be established "... at the inland customs houses and international borders of Kosovo".[658]

700. Besides, both the Security Council and the Special Representative of the Secretary-General in Kosovo have upheld the right of the FRY to demarcate its border, including those parts relating to Kosovo.

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[656] Mr. Petrella (Argentina), *ibid.*, p. 19.

[657] See *e.g.* UN Doc. S/1999/1250 (23 December 1999), p. 1, as well as UN Doc. S/2002/1126 (9 October 2002), p. 1 ("Kosovo, Federal Republic of Yugoslavia"), see also UN Doc. S/2003/996 (15 October 2003), p. 1, UN Doc. S/2004/907 (17 November 2004), p. 1 and UN Doc. S/2005/335 (23 May 2005), p. 1 ("Kosovo, Serbia and Montenegro"), and finally UN Doc. S/2007/768 (3 January 2008), p. 1 ("Kosovo (Serbia)").

[658] Preamble of UNMIK Regulation 1999/3 (31 August 1999); see also Section 5 thereof. UNMIK regulations are available at http://www.unmikonline.org/regulations/unmikgazette/index.htm .

701. It was for this reason that the Special Representative of the Secretary-General in 2002 declared null and void the "Resolution on the protection of the territorial integrity of Kosovo" adopted by the Assembly of Kosovo on 23 May 2002.[659] This resolution had attempted to challenge the legality of the border agreement between Macedonia and the FRY concluded on 23 February 2001.[660] This Yugoslav-Macedonian agreement had, *inter alia*, demarcated the Kosovo part of the Yugoslav-Macedonian border.

702. The Security Council, by way of a Presidential Statement,[661] in turn confirmed this decision of the Special Representative and reiterated that any such resolution by the Assembly of Kosovo did not fall within the field of competences of the Assembly of Kosovo. With regard to the same matter, the Security Council had previously also emphasized that the said border, *as determined by the agreement concluded between Macedonia and the FRY* "must be respected by all".[662]

703. These statements when read together confirm conclusively the view of the Security Council that under the regime established by Security Council in resolution 1244 (1999), Kosovo continues to form part of the FRY/Serbia and that it is Serbia, and Serbia alone, that can dispose of any territory forming part of "Kosovo".

704. This view was also shared by the Secretary-General. Thus, in the exchange of letters between the Under-Secretary-General for Peace-Keeping Operations and the Permanent Representative of Serbia and Montenegro to the United Nations dated 23/ 24 December 2003 on the United Nations Office in Belgrade, the Under-Secretary-General referred to the content of Security Council resolution 1244 (1999)

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[659] See UNMIK/PR/740 (23 May 2002), Annex 80 in Documentary Annexes accompanying this Written Statement.

[660] Agreement for the delineation of the borderline between the Republic of Macedonia and the Federal Republic of Yugoslavia (signed 23 February 2001, entered into force 16 June 2001) 2174 UNTS 4.

[661] UN Doc. S/PRST/2002/16 (24 May 2002).

[662] UN Doc. S/PRST/2001/7 (12 March 2001).

"... by which the United Nations Security Council, acting under Chapter VII of the United Nations, decided on the *deployment in Kosovo in the Federal Republic of Yugoslavia, (now with the new name of Serbia and Montenegro)*... of... the United Nations Interim Administration in Kosovo (UNMIK)."[663]

B. The Establishment of an International Civil Administration (UNMIK)

705. Acting under Chapter VII of the Charter, the Security Council in resolution 1244 (1999) authorized the Secretary-General to establish an international civil presence (hereinafter referred to as the "United Nations Mission in Kosovo" (UNMIK)), the task of which was

> "... to provide an interim administration for Kosovo under which the people of Kosovo *can enjoy substantial autonomy within the Federal Republic of Yugoslavia,* and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;".[664]

706. Further, in paragraph 10 of resolution 1244 (1999), the Security Council *decided* that UNMIK would, *inter alia*,

- perform civilian administrative functions where and as long as required;
- organize and oversee the development of provisional institutions for democratic and autonomous self-government;
- transfer its administrative responsibilities to these institutions while continuing to oversee and support the consolidation of Kosovo's local provisional institutions;

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[663] Annex 11 in Documentary Annexes accompanying this Written Statement (emphasis added).

[664] Security Council resolution 1244 (1999), para. 10 (emphasis added), Annex 20 in Documentary Annexes accompanying this Written Statement

- support the reconstruction of infrastructure and economic reconstruction;
- support humanitarian aid;
- maintain civil law and order,
- protect human rights, and
- assure the return of refugees and displaced persons.

707. Accordingly, as explained in the Secretary-General's Report on UNMIK that was submitted to the Security Council on 12 July 1999, shortly after resolution 1244 (1999) was adopted:

> "The Security Council, in its resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK."[665]

708. This was reaffirmed in UNMIK Regulation 1999/1 "On the Authority of the Interim Administration in Kosovo" adopted on 25 July 1999, which is still in force and which provides that

> "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General."[666]

709. The paramount administrative and legislative authority of UNMIK in Kosovo was subsequently confirmed, *inter alia*, by promulgation of the Constitutional Framework for Provisional Self-Government in Kosovo by the Special

[665] UN Doc. S/1999/779 (12 July 1999), para. 35.
[666] UNMIK/REG/1999/1 (25 July 1999). Subsequent amendments to this regulation retained the quoted provision, see UNMIK/REG/2000/54 (27 September 2000).

Representative of the Secretary-General, expressly acting pursuant to the authority given to him under Security Council resolution 1244 (1999).[667]

710. By means of the Constitutional Framework, the Special Representative established the Provisional Institutions of Self-Government, and determined their competences and principles of work. However, the Special Representative reserved a number of powers and responsibilities for himself including

- "[d]issolving the assembly and calling for new elections in circumstances where the Provisional Institutions of Self-Government are deemed to act in a manner which is not in conformity with UNSCR 1244 (1999), or in the exercise of the SRSG's responsibilities under that Resolution";[668]
- "[m]onetary policy";[669]
- "[e]xercising powers and responsibilities of an international nature in the legal field";[670]
- "[c]oncluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);"[671]
- "[e]xternal relations, including with states and international organisations, as may be necessary for the implementation of his mandate".[672]

711. In addition to reserving certain powers for himself, the Special Representative reaffirmed his supreme legislative and administrative authority in Kosovo by ensuring that his conferral of powers on the Provisional Institutions of Self-Government in no way affected or diminished his authority to ensure full implementation of resolution 1244 (1999):

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[667] See Constitutional Framework, Preamble, para. 2, reprinted in Annex 3 in Documentary Annexes accompanying this Written Statement.
[668] *Ibid.*, Art. 8.1 (b).
[669] *Ibid.*, Art. 8.1 (d).
[670] *Ibid.*, Art. 8.1 (i).
[671] *Ibid.*, Art. 8.1 (m).
[672] *Ibid.*, Art. 8.1 (o).

> "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.*"[673]

712. One way in which the Special Representative exercises his authority in the implementation of Security Council resolution 1244 (1999) is by adopting regulations. These regulations not only provide an interpretation of the resolution, but also build upon it, thus forming a body of law which, together with resolution 1244 (1999), constitutes the international legal regime applicable to Kosovo.

713. In this regard as well, the supreme authority of the Special Representative is confirmed by the fact that his regulations take precedence over all other acts in Kosovo. Already in UNMIK Regulation 1999/1, it was provided that regulations issued by UNMIK

> "[…] will remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions *established under a political settlement, as provided for in United Nations Security Council resolution 1244 (1999)*".[674]

714. Further, the Constitutional Framework, which was issued in the form of a regulation of the Special Representative and can only be changed by adoption of a new regulation by the Special Representative, has supremacy over the laws enacted by the Kosovo Assembly. It specifically provides:

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[673] *Ibid.*, Chapter 12 (emphasis added). The Constitutional Framework also provides that nothing in it shall affect the authority of KFOR under Security Council resolution 1244 (1999) and the Military Technical Agreement, *ibid.*, Chapter 13.

[674] UNMIK/REG/1999/1 (25 July 1999), Section 4 (emphasis added).

> "In case of conflict between this Constitutional Framework and any law of the Assembly, this Constitutional Framework shall prevail."[675]

715. A recent confirmation of the supreme administrative and legislative authority of UNMIK in Kosovo may be found in the judgment of the European Court of Human Rights in the *Behrami v. France* and *Saramati v. France, Germany and Norway* cases where the Court stated that UNMIK has to provide

> "... an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC *comprised all legislative and executive power* as well as the authority to administer the judiciary ..."[676]

716. This finding by the European Court of Human Rights was informed by a statement of the United Nations made in the context of these proceedings. The United Nations position is that UNMIK is

> "... a subsidiary organ of the UN *endowed with all-inclusive legislative and administrative powers in Kosovo* including the administration of justice".[677]

This statement is in turn in line with Section 1 of UNMIK Regulation 1999/1.

717. Consequently, as prescribed by the Security Council in operative paragraph 11 of Security Council resolution 1244 (1999), and until such time that a final settlement has been agreed upon by the parties under the supervision of the Security Council, it is therefore UNMIK which exercises overall legislative and administrative functions in and with regard to Kosovo, while the provisional

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[675] UNMIK/REG/2001/9 (15 May 2001), Article 14.1.

[676] European Court of Human Rights, *Behrami v. France and Saramati v. France, Germany and Norway*, Decision on admissibility of 2 May 2007, para. 70 (emphasis added).

[677] *Ibid.*, para. 118 (emphasis added), referring to a statement made by the United Nations in the proceedings before the Court.

institutions of Kosovo may solely exercise autonomous self-government functions and may not, in this exercise, act contrary to Security Council resolution 1244 (1999), the Constitutional Framework, and other regulations and decisions issued by the Special Representative of the Secretary-General.

C. The Establishment of a Security Presence (KFOR)

718. Acting under Chapter VII, the Security Council also authorized Member States and relevant international organizations to establish a security presence in Kosovo, *i.e.* KFOR. It is KFOR, in exercising its mandate under Security Council resolution 1244 (1999), that is empowered to deter hostilities, establish a secure environment, ensure public safety, supervise demining, support UNMIK, and conduct border monitoring duties.[678]

719. Thus, as aptly described again by the European Court of Human Rights, KFOR is mandated "(…) to exercise complete military control in Kosovo".[679]

720. In other words, KFOR was established as, and indeed remains, the ultimate military and security authority in Kosovo. This is so even after the UDI, as KFOR "continues to stand ready to deal with unrest or violence, regardless of where it comes from".[680]

D. The Role of Serbia in Kosovo

721. That Security Council resolution 1244 (1999) is based on the principle that Kosovo continues to form part of Serbia is also confirmed by the fact that Serbia

[678] Security Council resolution 1244 (1999), para. 9, Annex 20 in Documentary Annexes accompanying this Written Statement.

[679] European Court of Human Rights, *Behrami v. France and Saramati v. France, Germany and Norway*, Decision on admissibility of 2 May 2007, para. 70.

[680] Monthly Report to the United Nations on the Operations of the Kosovo Force, UN Doc S/2008/638 *of 8 October 2008* [i.e. after the adoption of the UDI], Annex, para. 28.

was recognised as having certain administrative rights with respect to its territory of Kosovo as well as sovereignty.

722. Operative paragraph 4 of Security Council resolution 1244 (1999) confirms that the FRY is permitted to station an agreed number of military and police personnel in Kosovo in order to liaise with UNMIK and KFOR, to mark and clear minefields, but also in order to maintain a presence at Serb patrimonial sites and at key border crossings. This is even more relevant since an earlier draft of what was to become Security Council resolution 1244 (1999) of 7 June 1999 prepared by the G-8 did not contain such a provision.[681]

723. In particular, the two latter functions, *i.e.* the stationing of troops at certain sites as well as at border crossings, are clear examples not only of the possibility of exercising official authority by Serbia within the territory of Kosovo, but also the right to do so in law. Their inclusion demonstrates that the Security Council, while significantly limiting the right of the FRY to exercise effective control over Kosovo, still perceived Kosovo as continuing to form an integral part of the FRY pending a final agreement to be agreed upon by the parties under the supervision of the Security Council.

724. This approach is further confirmed by the fact that the Security Council did not regulate the issue of the nationality of persons living in Kosovo.

725. Thus, even after the adoption of Security Council resolution 1244 (1999), the inhabitants of Kosovo retained their prior nationality, *i.e.* continued to be nationals of the FRY.

726. Accordingly, UNMIK Regulation 2000/18 of 29 March 2000 "On travel Documents" expressly provided in Section 1.2. that a travel document issued by UNMIK "does not confer nationality upon its holder, nor does it affect in any way the holder's nationality".

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[681] See Annex 35 in Documentary Annexes accompanying this Written Statement.

727. In line with this legal situation, since the adoption of Security Council resolution 1244 (1999) more than 244,843 persons from Kosovo from all ethnic communities have been granted passports of the FRY/State Union of Serbia and Montenegro/Serbia respectively, or have since then requested to be released from their Yugoslav/Serbian nationality in accordance with the domestic law of the FRY/Serbia. This includes approximately 2,228 persons who have done so *after* the adoption of the UDI.

E. The Notions of Substantial Autonomy and Self-Government in Security Council Resolution 1244 (1999)

728. Security Council resolution 1244 (1999) provides in operative paragraph 10 that the international civil presence will provide an interim administration for Kosovo under which the people of Kosovo ["la population" in the French text] can enjoy substantial autonomy within the FRY and will later establish and oversee the development of provisional democratic self-governing institutions. Yet, both terms, *i.e.* "autonomy within the Federal Republic of Yugoslavia" and "self-government" exclude any form of independence, and even more so exclude a unilateral declaration of independence.

I The meaning of "autonomy"

729. With regard to the notion of "autonomy", it has to be noted that it was the Permanent Court of International Justice which emphasized that a grant of autonomy does not set aside the sovereignty of the territorial State concerned. Thus the Court stated, when dealing with the Statute of Memel:

> "When... Lithuania undertook to secure to that Territory autonomy... it certainly was *not the intention of the Parties to the Convention that the sovereignty should be divided between two bodies which were to exist side by side in the same territory*. Their intention was simply to ensure to the transferred territory a wide

measure of *legislative, judicial, administrative and financial decentralization, which should not disturb the unity of the Lithuanian State and should operate within the framework of Lithuanian sovereignty.*

Whilst Lithuania was to enjoy full sovereignty over the ceded territory, subject to the limitations imposed on its exercise, the autonomy of Memel was only to operate within the limits so fixed and expressly specified."[682]

730. It further defined the purpose of autonomy as "the purpose of managing its *local affairs* as it pleases".[683]

731. In relation to Kosovo in particular, this limitation of the notion of "autonomy" is further supported by the fact that under Security Council resolution 1244 (1999) such autonomy is to be granted "within the Federal Republic of Yugoslavia", which confirms that the Security Council did not mean to question, by providing for such autonomy, the territorial integrity and overall sovereignty of the FRY.[684]

II The meaning of "self-government"

732. Article 76 (b) of the Charter of the United Nations, as was observed by one distinguished commentator,[685] neatly sets the two concepts of "self-government" and independence in contrast with one another. It is therefore obvious that the concepts of self-government on the one hand, and independence on the other, are mutually exclusive.

733. Self-government has to be understood as the ability of a given community to administer itself internally, as confirmed by the French text of Article 76 of the

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[682] *Interpretation of the Statute of the Memel Territory (Great Britain, France, Italy, Japan/Lithuania), Judgment of 11 August 1932*, PCIJ Series A/B, No. 49, p. 313 (emphasis added).
[683] *Ibid.*, p. 314 (emphasis added).
[684] See *supra* paras. 667-696.
[685] See C. Tomuschat, "Yugoslavia's Damaged Sovereignty over the Province of Kosovo", in G. Kreijen *et al.* (eds.), *State, Sovereignty and International Governance* (2002), p. 323 *et seq.*, at 328.

Charter which refers to self-government as "... la capacité à s'administrer eux-mêmes".

734. More specifically with regard to Security Council resolution 1244 (1999), it is again the French text which clarifies that self-government is tantamount to autonomy and involves no more than the right of the population of Kosovo to administer itself. Accordingly, the French text of Security Council resolution 1244 (1999) refers in paragraph 10 and annex 2, paragraph 5, to "institutions d'auto-administration", and in paragraph 11 (c) it speaks of "auto-administration substantielle" or simply refers to "une autonomie substantielle".[686] All these variations denote nothing more than the regulation of internal affairs.

735. Accordingly, self-government describes a legal status under which a human community enjoys full powers to govern its internal matters while still being debarred from, for example, conducting its own foreign affairs, which has constitutionally been allocated elsewhere.[687]

736. Thus self-government as such may only be concerned with the administration of a territory. It does not entail the power to determine, and even less to change, the international legal status of the territory concerned.

737. This is confirmed by paragraph 11 (a) of resolution 1244 (1999) where the Security Council decided that the international civil presence will have the responsibility to promote substantial autonomy and self-government, "taking full account of annex 2 and of the Rambouillet accords..."

738. In turn, annex 2 to the resolution states that an interim political agreement providing for substantial self-government for Kosovo should, *inter alia*, take into full account the Rambouillet accords and the principles of sovereignty and territorial integrity of the FRY. This again shows that (substantial) self-

[686] See Annex 1 and Annex 2, para. 8, of Security Council resolution 1244 (1999), Annex 20 in Documentary Annexes accompanying this Written Statement.
[687] Tomuschat, *op.cit.*, at p. 328.

government was not to be understood as in any way affecting the sovereignty and territorial integrity of the FRY.

739. Further, the official name of the so-called Rambouillet Accords was "Interim Agreement for Peace and Self-Government in Kosovo", which also indicates that the content of this document reflects what the parties involved in the negotiation of its text understood as comprising "self-government".

740. In particular, the Rambouillet Accords recognized the reservation of certain competences for the FRY as not falling within the notion of "self-government" including territorial integrity and defence, as well as foreign policy except in matters that fell within Kosovo's self-governing competences under the agreement..[688]

741. The self-government in Kosovo is also limited by the fact that it is subject to oversight by the international civil presence, whose responsibilities, according to paragraph 11(c) of Security Council resolution 1244 (1999) include

> "[o]rganizing and *overseeing* the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections". (emphasis added)

742. The practice of the Special Representative of the Secretary General in the implementation of Security Council resolution 1244 (1999), has also been in line with this limited understanding of the term "self-government".

743. In particular, the Special Representative of the Secretary-General adopted the Constitutional Framework for Kosovo "... with a view to the further development of *self-government* in Kosovo",[689] and decided that "... within the limits defined

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[688] See Rambouillet Accords, UN Doc. S/1999/648 (7 June 1999), Chapter I, Article I, paras. 3 & 6(c).

[689] Constitutional Framework, preamble, para. 6, Annex 3 in Documentary Annexes accompanying this Written Statement (emphasis added).

by UNSCR 1244 (1999), responsibilities will be transferred to Provisional Institutions of Self-Government...".[690]

744. Thus, the competences of the Provisional Institutions of Self-Government were delegated to them by the Special Representative and, furthermore, this was done "within the limits defined" by Security Council resolution 1244 (1999).

745. The Constitutional Framework further affirmed that

> "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)",[691]

and that accordingly

> "[t]he Provisional Institutions of Self-Government and their officials shall:
> Exercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework..."[692]

746. Accordingly, *any* exercise of the responsibilities of the Provisional Institutions of Self-Government under the Constitutional Framework may

> "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."[693]

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[690] *Ibid.*, preamble, para. 7.
[691] *Ibid.*, preamble, para. 10.
[692] *Ibid.*, Chapter 2.
[693] *Ibid.*, Chapter 12.

747. Moreover, whenever the Provisional Institutions of Self-Government do not act in accordance with Security Council resolution 1244 (1999) and the Constitutional Framework, the Special Representative of the Secretary General may take appropriate action.[694] In particular, the Special Representative may, and indeed is required to, uphold the integrity of the legal regime established by the Security Council by virtue of Security Council resolution 1244 (1999) and make sure that the Provisional Institutions of Self-Government do not overstep their limits.[695]

748. These provisions confirm that the powers of the Provisional Institutions of Self-Government are subject to supervision by the head of UNMIK, which clearly confirms that the notion of self-government, as used in Security Council resolution 1244 (1999), in no way permits those institutions to unilaterally proclaim the independence of Kosovo.

749. It follows that the "self-government" granted to the Provisional Institutions of Self-Government by virtue of Security Council resolution 1244 (1999) does not and cannot relate to the international legal status of Kosovo. Instead, it amounts to the right of the inhabitants of Kosovo to govern themselves internally pending a final agreement on the permanent status of Kosovo to be reached by the parties under the supervision of the Security Council. This is confirmed in the preamble of the Constitutional Framework itself which recalls that Security Council resolution 1244 (1999)

> "envisages the setting-up and development of meaningful self-government in Kosovo *pending a final settlement*" (emphasis added).

F. The Political Process Designed to Determine the Future Status of Kosovo

750. Security Council resolution 1244 (1999) provides essential parameters concerning

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[694] *Ibid.*
[695] See *supra* para. 709 ff.

- the procedure for reaching a final settlement by the parties; and
- the guiding substantive criteria for any such final settlement.

I Procedural parameters laid down by Security Council resolution 1244 (1999)

(1) Political process and negotiations

751. Security Council resolution 1244 (1999) presupposes that any final settlement between the parties as to the legal status of Kosovo shall be reached peacefully and through negotiation.

752. It is for this reason that the Security Council in operative paragraph 11 of Security Council resolution 1244 (1999) decided that one of the main responsibilities of the international civil presence would be

> "(e) Facilitating *a political process* designed to determine Kosovo's future status". (emphasis added)

753. The very term "political process" implies that all parties concerned shall be involved and that they have to find a mutually agreeable solution through negotiation.

754. The requirement laid down by the Security Council that a solution as to the final status of Kosovo must be reached by agreement between the parties is further confirmed by the fact that the interim situation created by Security Council resolution 1244 (1999) will only end when authority is transferred from Kosovo's provisional institutions to institutions "established under a political settlement",[696] whereby the parties will agree on the outstanding issues as to the final status of Kosovo. It is obvious that "settlement" cannot but mean agreement, not a unilateral measure taken by one of the parties.

[696] See Security Council resolution 1244 (1999), op. para. 11 (f), Annex 20 in Documentary Annexes accompanying this Written Statement.

755. Most notably, Annex 2, paragraph 8, 2nd sentence of Security Council resolution 1244 (1999) provides that

> "[*n*]*egotiations* between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions." (emphasis added)

756. Accordingly, the Security Council assumed that negotiations between the parties would take place in order to bring about a definitive settlement. It also took it for granted that these negotiations would take time. It is only pending the successful conclusion of the negotiations that the self-governing institutions were to continue to exercise their rights within the framework and limits of Security Council resolution 1244 (1999).

(2) Unilateral action is not permitted

757. That the Security Council was well aware that the interim status, pending a mutually agreed solution, could continue to exist for quite a significant period of time is obvious from the fact that it did not, unlike in many other cases, limit the mandate of the international civil and security presences. Rather it provided that

> "... the international civil and security presences are established for an initial period of 12 months, *to continue thereafter unless the Security Council decides otherwise*". (emphasis added)

758. It is therefore clear that the Security Council took the position that, pending a successful conclusion to the negotiations leading to a *mutually acceptable political settlement*, the mandate of both the civilian and military presences would continue and that neither of the parties to the conflict could unilaterally impose a solution on the other.

759. This view was expressly confirmed in a "FRY-UNMIK Common Document", dated 5 November 2001 and signed on behalf of the United Nations by the Special Representative of the Secretary-General of the United Nations, which *inter alia*

> "[r]eaffirms that the position on Kosovo's future status remains as stated in UNSCR 1244, *and that this cannot be changed by any action taken by the Provisional Institutions of Self-government.*"[697] (emphasis added)

760. The Security Council, by way of a Presidential Statement, took note of this agreement and underlined the need for Security Council resolution 1244 (1999) to be respected by all parties in its entirety. It stated:

> "*The Security Council welcomes the signing on 5 November 2001 of the UNMIK-FRY Common Document* by the Special Representative of the Secretary-General and the Special Representative of the President of the Federal Republic of Yugoslavia and the Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia. *This document is consistent with resolution 1244 (1999) and the Constitutional Framework for Provisional Self-Government in Kosovo.*"
>
> "The Security Council reaffirms the statement of its President of 5 October 2001 (S/PRST/2001/27). It encourages the further development of a constructive dialogue between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the authorities of the Federal Republic of Yugoslavia. It emphasizes the responsibility of the provisional institutions of self-government and all concerned *to respect fully the final status provisions of resolution 1244 (1999). It underlines its continued commitment to*

[697] Paragraph 5, reprinted in Annex 12 in Documentary Annexes accompanying this Written Statement.

the full implementation of resolution 1244 (1999), which remains the basis for building Kosovo's future."[698]

761. In sum, the FRY-UNMIK Common Document reiterates and confirms the obligation of the parties contained in Security Council resolution 1244 (1999) to continue to negotiate and not to attempt to change the *status quo* unilaterally.

762. The FRY-UNMIK Common Document was also welcomed and endorsed by the United States[699] and the Member States of the European Union.[700]

763. This view was also shared by the members of the Contact Group when they adopted the "Guiding principles of the Contact Group for a settlement of the status of Kosovo",[701] subsequent to Ambassador Eide's report on the comprehensive review of the situation in Kosovo submitted to the Security Council on 7 October 2005. This document provided *inter alia* in its introductory part that

> "The Security Council will remain actively seized of the matter. *The final decision on the status of Kosovo should be endorsed by the Security Council.*"[702]

764. In addition, principle 6 specifically refers to the issue of a possible unilateral solution, *i.e.* a solution not based on the consensus of the parties. It stipulated:

> "6. The settlement of Kosovo's status should strengthen regional security and stability. Thus, it will ensure that Kosovo does not return to the pre-March 1999 situation. *Any solution that is*

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[698] UN Doc. S/PRST/2001/34 (9 November 2001) (emphasis added), Annex 32 in Documentary Annexes accompanying this Written Statement.

[699] See http://pristina.usembassy.gov/press20011106a.html, Annex 67 in Documentary Annexes accompanying this Written Statement.

[700] See European Union Presidency Statement of 30 July 2002, Annex 69 in Documentary Annexes accompanying this Written Statement.

[701] UN Doc. S/2005/709, Annex (10 November 2005).

[702] *Ibid.*, p. 2 (emphasis added).

> *unilateral or results from the use of force would be unacceptable*."[703]

765. All these statements demonstrate a common understanding that unilateral steps taken to resolve the status of Kosovo are not allowed under Security Council resolution 1244 (1999), which presupposes that any solution should be agreed by the parties and endorsed by the Security Council. Moreover, in the case of the UNMIK-FRY Common Document, this understanding was not only expressly accepted by the Special Representative of the Secretary-General who is directly responsible for implementation of said resolution, but also endorsed by the Security Council itself.

(3) Obligations of the negotiating parties

766. It should be noted that the requirement to enter into negotiations between the parties as well as the "political process" envisaged by the Security Council entail certain obligations for the parties concerned.

767. According to the jurisprudence of the Court, the obligation to negotiate in international law presupposes that "the negotiations have to be conducted in good faith".[704]

768. Further, the Court has in its jurisprudence formulated certain other requirements that the parties to a negotiating process are bound to respect. Thus in the *North Sea Continental Shelf* cases, the Court held that negotiating parties

> "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either

[703] *Ibid.*, p. 3 (emphasis added).
[704] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 424, para. 244.

of them insists upon its own position without contemplating any modification of it".[705]

769. The Court reiterated this position in the *Gabčíkovo-Nagymaros* case where it further underlined, before repeating the above statement, that

> "[i]t is for the *Parties* themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses."[706]

770. Applied to the situation of Kosovo, this means that the two parties to the conflict must take into account all relevant norms of international law, as set out in Security Council resolution 1244 (1999), and may not simply disregard the basic legal arguments brought forward by the other side. It is even less the case that one of the parties, in the absence of an agreed upon solution, may unilaterally attempt to impose its own views and enforce its own position by attempting to create a *fait accompli* on the ground.

771. This view seems to be reflected in a statement made by the representative of China, who, after the adoption of Security Council resolution 1244 (1999), stated that

> "... any proposed solution should take full account of the views of the Federal Republic of Yugoslavia." [707]

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[705] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 47, para. 85.

[706] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 78, para. 141 (emphasis added).

[707] UN Doc. S/PV.4011 (10 June 1999), p. 8, Annex 34 in Documentary Annexes accompanying this Written Statement .

772. It is only by taking into account *bona fide* the views of the other side, and by not trying to unilaterally impose its own views and create a *fait accompli*, that a party to ongoing negotiations is fulfilling its obligation to negotiate in good faith.

773. On the other hand, the Court's jurisprudence also confirms that any such obligation to negotiate in good faith does not require that negotiations should be successful[708] nor that they must lead to a certain result. It has to be noted, however, that pending a mutually agreed upon solution under the supervision of the Security Council, the legal *status quo* remains as beforehand, *i.e.* Kosovo remains subject to the sovereignty of Serbia while being administered by the international civil and security presences provided for in Security Council resolution 1244 (1999).

774. It should be noted that even subsequent to the report of President Ahtisaari, and until December 2007, the parties continued to undertake negotiations on the future status of Kosovo. Those negotiations were then unilaterally interrupted by the UDI, only one month after the Security Council had last considered the issue during its 5821st Meeting. Nevertheless, Serbia stands ready, in fulfilment of its obligations under both general international law and Security Council resolution 1244 (1999) to resume negotiations on a final settlement of the status of Kosovo at any given moment.

775. In conclusion, under general international law and Security Council resolution 1244 (1999), *both* parties to the negotiations on the future status of Kosovo are under an ongoing obligation to negotiate in good faith and to take into account international law in order to reach a mutually agreeable solution on the final status of Kosovo under the supervision of the Security Council. Neither party may, pending a mutually agreed solution, unilaterally attempt to impose its own views by trying to create a *fait accompli*. Pending an agreed solution, the legal status created by Security Council resolution 1244 (1999) remains unchanged.

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[708] See *mutatis mutandis North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 47, para. 85.

II The substantive parameters laid down by the Security Council in resolution 1244 (1999)

776. Apart from laying down procedural parameters to settle the situation, Security Council resolution 1244 (1999) also contains substantive benchmarks that the parties have to abide by, when fulfilling their underlying duty to negotiate in good faith in order to reach an agreement on the final status of Kosovo.

777. These benchmarks are referred to in operative paragraph 1 of Security Council resolution 1244 (1999) where the Council

> "1. Decides 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".

(1) Principles of sovereignty and territorial integrity of Serbia

778. As already discussed, Annexes 1 and 2 of Security Council resolution 1244 (1999) in turn refer to a political process which shall, *inter alia*, also take *full* account of

> "... the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[709]

779. It is thus the principles of sovereignty and territorial integrity of Serbia that are of fundamental relevance for the determination of any future final status of Kosovo. The meaning and content of these two basic principles of international law, which are incorporated in Security Council resolution 1244 (1999), has been outlined earlier in this Written Statement.[710]

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[709] See *supra* Section A(III).
[710] See *supra* Chapter 6.

780. The call for respect of the sovereignty and territorial integrity of Serbia contained in Security Council resolution 1244 (1999) makes clear that, pending a final settlement to be agreed between the parties under the auspices of the Security Council, Serbia is "entitled to maintain the unity of its territory as well as to exercise governmental powers in that territory and over its citizens"[711] subject only to the limits of Security Council resolution 1244 (1999) and general international law.

(2) Rambouillet Accords

781. Apart from the explicit references to the protection of sovereignty and territorial integrity of the FRY, Security Council resolution 1244 (1999) also refers to the Rambouillet Accords

782. It is particularly important to note, however, that the Rambouillet Accords themselves were

> "[r]ecalling the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[712]

783. Furthermore, the Rambouillet Accords, to which Security Council resolution 1244 (1999) refers, also incorporated the Helsinki Final Act as a legal parameter for determining the final status of Kosovo. Therefore, by including this reference to the Helsinki Final Act, the Security Council again considered (as did the drafters of the Rambouillet Accords) that any such solution shall not lead to an infringement of the territorial integrity of the FRY, given that the Helsinki Final Act provides that the frontiers of all States in Europe shall be inviolable,[713] and

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[711] V. Santori, "The United Nations Interim Administration Mission in Kosovo and the Sovereignty and Territorial Integrity of the Federal Republic of Yugoslavia", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Vol. 3 (2003), pp. 1689, 1702.

[712] Rambouillet Accords, UN Doc. S/1999/648 (7 June 1999), Preamble, para. 4.

[713] Helsinki Final Act, Principle III.

that accordingly any change in boundaries presupposes the agreement of the territorial state concerned.[714]

784. In conclusion, the Rambouillet Accords, as the document which should be taken into account in the political process that would determine Kosovo's future status, clearly adopts the principle of the continued territorial integrity and sovereignty of the FRY over Kosovo.

(3) The practice of the Security Council in other cases confirms this interpretation of Security Council resolution 1244 (1999)

785. The conclusion that Security Council resolution 1244 (1999) prescribes that any solution should not only be reached by way of negotiations between the parties, but also that the territorial integrity and sovereignty of the FRY should be safeguarded, is also confirmed by the continuous practice of the Security Council with regard to other situations. Thus, the Security Council has either,

- like in the case of Namibia and East Timor, and in contrast to the case of Kosovo, *explicitly acknowledged* a right to strive for independence;

  or

- like in the case of Eastern Slavonia, explicitly confirmed the territorial integrity and sovereignty of the territorial State and provided for a temporary United Nations administration pending the implementation of a *negotiated settlement* between the parties to the conflict.

786. In the case of Namibia, the Security Council in both Security Council resolutions 435 (1978) and 632 (1989) reiterated that its objective was the withdrawal of the illegal South African administration and to ensure "the early independence of Namibia" and "the early independence of the territory",[715] respectively, to be achieved with the assistance of the United Nations Transition Assistance Group.

[714] *Ibid.*, Principle I.

[715] Security Council resolution 435 (1978), op. para. 3; and resolution 632 (1989), operative para. 2.

787. Even more telling is a comparison with the case of East Timor. In this case, and in sharp contrast to Security Council resolution 1244 (1999) on Kosovo, Security Council resolution 384 (1975) of 22 December 1975 not only expressly refers to the "*people* of East Timor", but also recognized "the inalienable right of the people of East Timor to self-determination and independence"[716] and to this end called upon all States to

> "respect the territorial integrity *of East Timor* as well as the inalienable right of its *people* to *self-determination*".[717]

788. Most striking is Security Council resolution 1246 (1999), adopted by the Security Council on *11 June 1999, i.e. only one single day after Security Council Resolution 1244 (1999) on Kosovo had been adopted.* In this resolution, the Security Council decided to establish the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation

> "in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia *or reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia...*".[718]

789. It is obvious that the Security Council, *had it considered that the population of Kosovo was similarly entitled to unilaterally separate from the FRY*, would have used in Security Council resolution 1244 (1999) similar, if not identical, language to the wording that it used only one day later with regard to East Timor. Yet it did not.

790. It is therefore not surprising that Security Council resolution 1272 (1999), again in sharp contrast to Security Council resolution 1244 (1999), took note of the will of the East Timorese people

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[716] Security Council resolution 384 (1975), preambular para. 4.
[717] *Ibid.*, operative para. 1 (emphasis added).
[718] Security Council resolution 1246 (1999), operative para. 1 (emphasis added).

"to begin a process of transition under the authority of the United Nations *towards independence*".[719]

791. Accordingly the task of the United Nations Transitory Authority in East Timor (UNTAET) was, *unlike that of UNMIK* "to support fully the transition [of East Timor] *to independence*" (emphasis added).[720]

792. The examples of Namibia and East Timor stand in sharp contrast to the practice of the Security Council with regard to Eastern Slavonia, where the Security Council, just like in the case of Kosovo, underlined the integrity of the territorial State concerned, *i.e.* Croatia, and provided for a temporary United Nations Transitory Authority in Eastern Slavonia (UNTAES). The only difference from the present case is that in the case of Eastern Slavonia the parties had already reached an agreement as to the final status of the area concerned *before* UNTAES was established.

793. Just like Security Council resolution 1244 (1999), Security Council resolution 1037 (1996) of 15 January 1996 relating to Eastern Slavonia reaffirmed the

"... commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia",

and then referred to the "Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium between the Government of the Republic of Croatia and the local Serbian community"[721] agreed upon by the parties as providing the mechanism to bring about a political settlement of the dispute.

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[719] Security Council resolution 1272 (1999), preambular para. 3 (emphasis added).

[720] See *e.g.* Security Council resolution1338 (2001), op. paras. 3 and 4:

"3. *Requests* the Special Representative of the Secretary-General to continue to take steps to delegate progressively further authority within the East Timor Transitional Administration (ETTA) to the East Timorese people until authority is fully transferred to the government of an independent State of East Timor, as set out in the report of the Secretary-General;

4. *Encourages* UNTAET, bearing in mind the need to support capacity-building for self-government, to continue to support fully the transition to independence (...)".

[721] UN Doc. S/1995/951, Annex (15 November 1995).

G. Only the Security Council May Terminate the International Legal Regime Established by Security Council Resolution 1244 (1999)

794. Given the content and wording of Security Council resolution 1244 (1999) and the competences of the Security Council under the Charter, it is only the Security Council itself that may terminate the international legal regime created by Security Council resolution 1244 (1999).

I Competence of the Security Council to establish an interim territorial administration under Chapter VII of the UN Charter

795. When adopting Security Council resolution 1244 (1999), the Security Council was acting under Chapter VII of the Charter of the United Nations, and in exercising those powers, decided on the deployment of both international civil and military presences in Kosovo, the responsibilities of which are outlined in paragraphs 9, 10 and 11 of the said resolution respectively, pending a final status agreement between the parties to be reached under the supervision of the Security Council.

796. While initially there might have been some doubt concerning the powers of the Security Council to provide for an administration on a given territory by the United Nations under Chapter VII of the Charter,[722] there now seems to be consensus that the Security Council can, when acting under Chapter VII, do so.[723]

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[722] See H. Kelsen, *The Law of the United Nations* (1951), p. 651 ("... the Organisation is not authorised by the Charter to exercise sovereignty over a territory which has not the legal status of a trust territory."). Moreover, in 1947, Australia contended that Article 24 of the Charter would not support the assumption by the Security Council of governmental functions with respect to Trieste, see *Repertoire of the Practice of the Security Council*, 1946-1951, at 482.

[723] See e.g. M. J. Matheson, "United Nations Governance of Postconflict Societies", 95 *AJIL* (2001), pp. 76, 83-84; M. Bothe/T. Marauhn, "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration" in C. Tomuschat (ed.), *Kosovo and the International Community. A Legal Assessment* (2002), pp. 217, 231-232; C. Stahn, "International Territorial Administration in the former Yugoslavia: Origins, developments and challenges ahead", 61 *ZaöRV* (2001), pp. 107, 129-131; M. Ruffert, "The Administration of Kosovo and East Timor by the International Community", 50 *ICLQ* (2001), pp. 613, 620-622; J. Frowein/N. Krisch, in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed. 2002), Vol. I, Art. 41, paras. 20-22.

797. This view was confirmed by the European Court of Human Rights, which specifically held that Security Council resolution 1244 (1999) was not only validly adopted, but that the Security Council could also delegate its powers to UNMIK and KFOR. The Court considered

> "... that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK."[724]

798. This view was later reconfirmed when the same Court stated with regard to the international administration of Bosnia and Herzegovina that

> "[g]iven that the UNSC had, as required, established a "threat to international peace and security" within the meaning of Article 39 of the UN Charter, it had the power to authorise an international civil administration in Bosnia and Herzegovina".[725]

II Continued validity of Security Council resolution 1244 (1999)

799. The section that follows will demonstrate that the continued validity of Security Council resolution 1244 (1999), until the Security Council decides otherwise, is clearly mandated by the text of the resolution, and confirmed in international practice both, before and after, the adoption of the UDI.

(1) Text of the resolution 1244 (1999) and subsequent practice

800. Pending an agreement on Kosovo, upon which the Security Council would eventually terminate the mandate of the civil and military presences, the international legal regime of Kosovo, as established by Security Council resolution 1244 (1999), remains and indeed must remain unaltered.

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[724] European Court of Human Rights, *Behrami v. France and Saramati v. France, Germany and Norway*, Decision on admissibility of 2 May 2007, para. 130.

[725] European Court of Human Rights, *Berić et al. v. Bosnia Herzegovina*, Decision on admissibility of 16 October 2007, para. 27.

801. It is only the Security Council that may alter this interim *status quo*. Thus, pending a Security Council resolution deciding otherwise, Kosovo remains subject to United Nations administration, enjoying a right of self-government, while at the same time Serbia continues to have sovereignty over the area.

802. The unlimited duration of Security Council resolution 1244 (1999) is first and foremost confirmed by the fact that the mandate of both the civil and the military presences is, according to the clear wording of operative paragraph 19 of Security Council resolution 1244 (1999), not limited in time.

803. This stands in sharp contrast to the practice of the Security Council with regard to other situations where it had from the very beginning limited the respective mandates to periods of six or twelve months, which accordingly had to be renewed in order to remain in force.

804. In addition, in paragraph 21 of the Security Council resolution 1244 (1999), the Security Council decided to continue to remain actively seized of the matter.

805. Accordingly, as the representative of the United States in the Security Council expressly stated with regard to Security Council resolution 1244 (1999)

> "[i]t is important to note that this resolution [*i.e.* Security Council resolution 1244 (1999)] provides for the civil and military missions *to remain in place until the Security Council affirmatively decides that conditions exist for their completion.*"[726]

806. As a matter of fact, the responsibilities of UNMIK under paragraph 11 (a) of Security Council resolution 1244 (1999) include promoting the establishment of substantial autonomy and self-government in Kosovo "pending a final settlement" ("en attendant un règlement définitif"). This wording once again demonstrates and reaffirms that the legal regime set up by Security Council resolution 1244 (1999) may only come to an end by a final settlement to be reached by the parties which

[726] Mr. Burleigh (United States of America), UN Doc. S/PV.4011 (10 June 1999), p. 14 (emphasis added), Annex 34 in Documentary Annexes accompanying this Written Statement.

would then eventually propose to the Security Council to terminate the said resolution.

807. Similarly, the Security Council has also charged the UNMIK under paragraph 11 (c) of Security Council resolution 1244 (1999) with establishing and overseeing the development of provisional democratic institutions for self-government "pending a political settlement".

808. It has also to be noted, that under Security Council resolution 1244 (1999), operative paragraph 11 (f), UNMIK will oversee the transfer of authority from Kosovo's provisional institutions to institutions established "under a political settlement" ("d'un règlement politique").

809. Thus, any transfer of authority from Kosovo's provisional institutions (which may only act within the limits laid down by Security Council resolution 1244 (1999) in any event) to institutions not so limited is dependant on a *political settlement*, which necessarily presupposes an agreement between the two parties concerned, one of which is the territorial State, *i.e.* the Republic of Serbia.

810. Until such time, *i.e.* until a political settlement has been reached between the parties and until the Security Council endorses such settlement, Security Council resolution 1244 (1999) and the international legal regime it created remains in force *in its entirety*.

811. This view is also confirmed by the practice of the Special Representative of the Secretary-General, given that UNMIK Regulation 1999/1 provides that regulations issued by UNMIK

> "... will remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions *established*

under a political settlement, as provided for in United Nations Security Council resolution 1244 (1999)."[727]

812. Similarly, the Special Representative of the Secretary-General during a visit of a mission of the Security Council to Kosovo, stated that

> "[t]he *Security Council* would determine the future status [of Kosovo] and no party had a right to prejudge it."[728]

813. This view was reconfirmed on behalf of the Security Council by the Head of the Mission of the Security Council when stating that

> "[n]o unilateral steps will determine Kosovo's final status. The United Nations Security Council will, in consultation with all concerned, ultimately determine Kosovo's final status."[729]

814. Further, this position that any final status may not be unilaterally imposed and that it consequently presupposes a negotiated settlement between the parties to be reached within the overall framework of the Security Council, was also confirmed by the "Agreed Minutes of the Bilateral Meeting in the Context of CEFTA Enlargement Negotiations agreed upon by Serbia and UNMIK of 20 October 2006". This document provides that:

> "5. The conclusion of the Agreement will be without prejudice to the current status of Kosovo under the United Nations Security Council Resolution 1244 of 10 June 1999 *or the determination of its final status under the auspices of the United Nations Security Council.*" [730]

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[727] UNMIK/REG/1999/1 (25 July 1999), Section 4 (emphasis added).
[728] Report of the Security Council Mission to Kosovo and Belgrade, Federal Republic of Yugoslavia, 14 to 17 December 2002, UN Doc. S/2002/1376 (19 December 2002), p. 4 (emphasis added).
[729] *Ibid.*, Annex I, p. 17.
[730] Annex 13 in Documentary Annexes accompanying this Written Statement.

815. This again confirms the shared conviction of both Serbia and the United Nations, represented by UNMIK, that any final status determination is contingent on the Security Council taking action, and that pending any such action no party can change the international legal status of Kosovo, as defined in Security Council resolution 1244 (1999).

(2) Views expressed in the context of the "Ahtisaari Plan"

816. The continued validity of Security Council resolution 1244 (1999) and the international legal regime of Kosovo it has created, pending an *actus contrarius* by the Security Council itself, is also confirmed by the fact that the Special Envoy of the Secretary-General on Kosovo's future status, former Finnish President Ahtisaari, "urge[d] the Security Council to endorse [his] Settlement proposal"[731] when submitting it to the Council, thereby implying that such an endorsement was indeed needed to implement the proposal.

817. Indeed, Special Envoy Ahtisaari had already taken this position after his very first visit to Kosovo in 2005. In a press briefing following the visit, he stated:

> "In the final analysis it is not me, I have also made it perfectly clear, it is not me, neither us, who will decide the timing, the Secretary General has an important role, and finally *it is up to the Security Council to decide how the future status will look like*."[732]

818. Even more telling is the fact that a certain number of States had in July 2007 formally introduced a draft Security Council resolution which would have replaced Security Council resolution 1244 (1999)[733] and which would have terminated the current legal status of Kosovo after a given period. However, the

[731] UN Doc. S/2007/168 (26 March 2007), para. 16.

[732] Press Briefing by UN Special Envoy Martti Ahtisaari and his Deputy Albert Rohan after their first visit to Kosovo, 23 November 2005, p. 2 (emphasis added), available at www.unmikonline.org .

[733] S/2007/437 (17 July 2007) (Provisional), see Annex 36 in Documentary Annexes accompanying this Written Statement.

draft resolution was withdrawn after it became obvious that it would not receive sufficient support within the Security Council.

819. This draft resolution, *if adopted,* would have provided that the mandate of the international civil presence (UNMIK) and the international security presence (KFOR) would have ended 120 days after its adoption.[734] It would have also taken note of "the declaration of the Kosovo Assembly of 5 April 2007 concerning the Special Envoy's proposals"[735] by which the Assembly of Kosovo had accepted the proposal of the Special Envoy.

820. The very fact that this draft resolution was considered necessary, confirms that the interim legal status of Kosovo, as laid down in Security Council resolution 1244 (1999), including the powers of both UNMIK and KFOR with regard to the territory, could only be altered by a new Security Council resolution.

821. This was expressly confirmed by the sponsors of said draft resolution, *i.e.* Belgium, France, Germany, Italy, the United Kingdom and the United States, which recognized that an additional Security Council resolution would be necessary as a legal basis for implementation of the Ahtisaari plan providing for Kosovo's independence. In a "Statement issued on 20 July 2007 by the co-sponsors of the draft resolution on Kosovo presented to the UNSC on 17 July", they stated:

> "UN Special Envoy Martti Ahtisaari presented his Comprehensive Proposal for the Kosovo Status Settlement to the UN Secretary General on March 26... Since that date we have worked intensively to achieve a *resolution that would allow for this proposal to be taken forward*.... We regret, however, that it has been impossible to secure such a resolution in the UNSC."[736]

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[734] *Ibid.*, operative paras. 5 and 8 respectively.
[735] *Ibid.*, operative para. 2.
[736] Annex 37 in Documentary Annexes accompanying this Written Statement (emphasis added).

822. *A fortiori*, a decision by a party to the conflict cannot unilaterally undo the prescriptions contained in Security Council resolution 1244 (1999). Finding otherwise would endanger the very system of collective security which was set up by the Charter of the United Nations and would by the same token also put into question the pivotal role of the Security Council with regard to the maintenance of international peace and security.

823. Indeed, to accept that the Provisional Institutions of Self-Government could alter the legal status of Kosovo would be tantamount to setting aside the prerogatives of the Security Council under the Charter since it was the Security Council which adopted resolution 1244 (1999) under Chapter VII of the Charter, and thereby established the international legal regime for Kosovo and provided that this regime and the mandate of the international presences in Kosovo would continue until the Council decides otherwise by a new resolution.

(3) Practice of United Nations organs subsequent to the Ahtisaari plan and the UDI

824. This view that the status of Kosovo, being part of the Republic of Serbia, continues to be governed by Security Council resolution 1244 (1999) and cannot unilaterally be changed, is also a view shared by organs of the United Nations and individual Member States including those States that have recognized the purported independence of the so-called "Republic of Kosovo".

825. The Security Council in its resolution 1785 (2007) adopted on 21 November 2007, *i.e.* weeks *before* the UDI was adopted, as well as most recently in its resolution 1845 (2008) adopted on 20 November 2008, *i.e. after* the adoption of the UDI, in *identical wording* reaffirmed

> "its commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial

integrity of all States there within their internationally recognized borders",[737]

which, given the aforementioned sequence of events, must necessarily be understood as a renewed recognition of the territorial integrity of the Republic of Serbia including Kosovo.

826. In the same vein, the "Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo" of 15 July 2008,[738] presented to the Security Council, covers the *period from 1 March to 25 June 2008*, and thus a period subsequent to 17 February 2008, the date on which the UDI was adopted. This report refers to the continued "implementation of the mandate" with regard to this period,[739] as does the Secretary-General's report dated 17 March 2009 with regard to the period from 1 November 2008 to 9 March 2009.[740]

827. The Secretary-General accordingly was and continues to be of the view that the mandate of UNMIK, based on Security Council resolution 1244 (1999), had not been set aside by the UDI.

828. Even more expressly, in his "Report on the United Nations Interim Administration Mission in Kosovo" of 28 March 2008 covering the period from 16 December 2007 *to 1 March 2008*,[741] the Secretary-General drew the attention of the Security Council to the UDI, and then

"reaffirmed that, *pending guidance from the Security Council*, the United Nations would continue to operate on the understanding that

[737] See Security Council resolution 1785 (2007), preambular para. 2; and resolution 1845 (2008), preambular para. 2; reprinted in Annexes 27-28 in Documentary Annexes accompanying this Written Statement.
[738] UN Doc. S/2008/458 (15 July 2008).
[739] *Ibid.*, para. 1.
[740] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2009/149 (17 March 2009), para. 1.
[741] UN Doc. S/2008/211 (28 March 2008).

> resolution 1244 (1999) *remains in force and constitutes the legal framework for the mandate of UNMIK...*"[742]

829. In his report dated 24 November 2008, as well as in his latest report dated 17 March 2009, the Secretary-General reiterated this same position and reaffirmed that Security Council resolution 1244 (1999) continues to govern the legal status of Kosovo. Accordingly, it follows that Kosovo continues to form part of Serbia, the UDI notwithstanding.

830. Thus, his reports begin by stating that they are submitted pursuant to Security Council resolution 1244 (1999).[743] Most recently, the Secretary-General has also pointed out that "despite ever-increasing challenges to [UNMIK's] ability to fulfil its mandate" which result *inter alia* from the position of Kosovo provisional authorities that resolution 1244 (1999) "is no longer relevant and that the institutions of Kosovo have no legal obligation to abide by it",[744] UNMIK

> ...will continue working towards the advancement of regional stability and prosperity, based on its continued mandate under resolution 1244 (1999), in close coordination with the Organization for Security and Cooperation in Europe (OSCE) and KFOR and in cooperation with authorities in Pristina and Belgrade."[745]

831. The Secretary-General's report dated 24 November 2008 describes the demarcation line between Kosovo and the other part of Serbia as "the Administrative Boundary Line"[746] which, to state the obvious, is clearly different from an international boundary between two independent States. This distinction is confirmed by the fact that the Secretary-General, when referring to the mandate of KFOR, mentions other "boundaries" in contrast to the aforementioned "administrative boundary line".

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[742] *Ibid.*, para. 4 (emphasis added).
[743] UN Doc. S/2008/692 (24 November 2008), para. 1, & UN Doc. S/2009/149 (17 March 2009), para. 1..
[744] UN Doc. S/2009/149 (17 March 2009), para. 4.
[745] *Ibid.*, para. 17.
[746] UN Doc. S/2008/692 (24 November 2008), para. 19.

832. With regard to UNMIK, the Secretary-General confirms that his Special Representative "is still formally vested with executive authority under resolution 1244 (1999)"[747] while the European Union mission EULEX will act

> "under the overall authority of the United Nations, under a United Nations umbrella headed by my Special representative, and in accordance with resolution 1244 (1999)",[748]

and thus exclusively deriving its authority from Security Council resolution 1244 (1999).

833. This view, that Kosovo is part of Serbia and is still subject to the international administration established by Security Council resolution 1244 (1999), the UDI notwithstanding, is also confirmed by the fact that UNMIK continued its work under the mandate of Security Council resolution 1244 *after* the UDI.

834. Despite the fact that the declaration constituted a significant challenge to the administrative authority of UNMIK,[749] it was *after* its adoption that UNMIK still approved the Kosovo Budget for 2008,[750] and passed another 25 regulations.[751]

835. Furthermore, more specifically with regard to Kosovo's external status, it was UNMIK, acting on behalf of Kosovo and exercising its mandate provided for in Security Council resolution 1244, which *inter alia*

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[747] *Ibid.*, para. 21.

[748] *Ibid.*, para. 23.

[749] See *e.g.*, Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/211 (28 March 2008), para. 30.

[750] UNMIK/REG/2008/13 (29 February 2008).

[751] See Regulation No. 2008/10 (19 February 2008); Regulation No. 2008/11 (22 February 2008); Regulation No. 2008/12 (27 February 2008); Regulation No. 2008/14 (17 March 2008); Regulation No. 2008/15 (17 March 2008); Regulation No. 2008/16 (20 March 2008); Regulation No. 2008/17 (26 March 2008); Regulation No. 2008/18 (26 March 2008); Regulation No. 2008/19 (31 March 2008); Regulation No. 2008/20 (21 April 2008); Regulation No. 2008/21 (6 May 2008); Regulation No. 2008/22 (6 May 2008); Regulation No. 2008/23 (15 May 2008); Regulation No. 2008/24 (16 May 2008); Regulation No. 2008/25 (16 May 2008); Regulation No. 2008/26 (27 May 2008); Regulation No. 2008/27 (27 May 2008); Regulation No. 2008/28 (29 May 2008); Regulation No. 2008/29 (31 May 2008); Regulation No. 2008/30 (5 June 2008); Regulation No. 2008/31 (5 June 2008); Regulation No. 2008/32 (14 June 2008); Regulation No. 2008/33 (14 June 2008); Regulation No. 2008/34 (14 June 2008), all available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/E2008regs.htm

- *on 21 July 2008* filed a progress report to the Council of Europe on the implementation of the Framework Convention for the Protection of National Minorities (FCNM) in Kosovo;[752]
- conducted High Level talks with Representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in Pristina *from 9 to 11 December 2008*;[753]

- represented Kosovo in answering to the Committee on Economic, Social and Cultural Rights on the Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Kosovo in its 41st session *on 10 November 2008*.[754]
- represented Kosovo in the first round of bilateral consultations on trade in agricultural products in January 2009 following an invitation by the Chair-In-Office of the Central European Free Trade Agreement (CEFTA).[755]

and

- in the Regional Cooperation Council, where Kosovo is represented by an UNMIK coordinator along with a Kosovo coordinator.[756]

836. Further, as the Secretary-General has noted in his latest report on UNMIK,

> "the attendance of Kosovo at Energy Community meetings and meetings of the Central European Free Trade Agreement (CEFTA) has been *irregular*, as Kosovo ministry representatives have attempted without success to attend some meetings *without UNMIK*."[757]

837. It should also be mentioned that the Committee for the Rights of the Child, when dealing with the State report of the Republic of Serbia *on 20 June 2008*, referred

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[752] Doc. ACFC (2008) 001 (10 December 2008), available at: http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp.
[753] See http://www.cpt.coe.int/documents/srb/2008-12-15-eng.htm.
[754] See http://www2.ohchr.org/english/bodies/cescr/cescrs41.htm.
[755] See UN Doc. S/2009/149 (17 March 2009), para. 28.
[756] *Ibid.*
[757] *Ibid.*, (emphasis added).

to the Committee's request *to UNMIK* to provide "... information on the implementation of the Convention [on the Rights of the Child] in Kosovo and Metohija."[758]

838. In the same vein, at its 41st session *in November 2008*, the Committee on Economic, Social and Cultural Rights recommended

> "... that *UNMIK* include the Covenant in the list of directly applicable human rights treaties in Chapter 3.1 of the Constitutional Framework for Provisional Self-Government in Kosovo...".[759]

839. The Committee thus took it for granted that it is the Constitutional Framework adopted by the Special Representative of the Secretary-General under its authority based on Security Council resolution 1244 (1999) that continues to govern the exercise of governmental authority in Kosovo.

840. The fact that it is UNMIK that continues to represent Kosovo in external matters falling within its powers of administration of the territory is also confirmed by the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY). Thus, where provisional release is granted to an accused from Kosovo, subject to certain conditions, it is UNMIK that is requested to guarantee that the said conditions are being met. Accordingly *on 9 February 2009*, *i.e.* almost one year after the UDI, the ICTY Appeals Chamber requested *UNMIK* to meet the accused Mr. Bajrush Morina at Pristina airport, to accompany him to his home, to instruct him about the conditions of provisional release he had to abide by, and to ensure that he would surrender his passport to UNMIK and regularly report to UNMIK police, and finally to eventually return him to Pristina airport in order to be returned to the Hague.[760]

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[758] UN Doc. CRC/C/SRB/CO/1 (20 June 2008), para. 6.
[759] UN Doc. E/C.12/UNK/CO/1 (19 November 2008), para. 9 (emphasis added).
[760] ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009, para. 12.

841. Finally and most recently, it was the Security Council itself, which, through its President *on 26 November 2008,* after having welcomed the report of the Secretary General of 24 November 2008, also welcomed "the cooperation between the UN and other international actors, *within the framework of Security Council resolution 1244 (1999)*",[761] which again presupposes the continued applicability of the said resolution in its entirety.

842. The United Nations organs have applied the same approach, *mutatis mutandis*, with regard to the security presence of KFOR.

843. Thus, in a letter dated 16 May 2008 from the Secretary-General to the President of the Security Council,[762] the Secretary-General "[p]ursuant to Security Council resolution 1244 (1999)"[763] conveyed a report on the international security presence in Kosovo covering the period from 1 to 29 February 2008. In this report KFOR described the fulfilment of its mandate under Security Council resolution 1244 (1999) *since the UDI* thereby once again confirming the continued validity of the said resolution, the UDI notwithstanding.

844. This was reiterated in a letter dated 8 July 2008 from the Secretary-General of the North Atlantic Treaty Organization (NATO) addressed to the United Nations Secretary-General to which the former attached a report on the operations of the Kosovo Force covering the period from 1 to 30 April 2008 "[i]n accordance with paragraph 20 of Security Council resolution 1244 (1999)".[764]

845. Since then several other letters were sent to the Security Council by the United Nations Secretary-General where he, expressly acting pursuant to Security Council resolution 1244 (1999), conveyed reports on the fulfilment of the Security

[761] UN Doc. S/PRST/2008/44 (26 November 2008), para. 2 (emphasis added), Annex 33 in Documentary Annexes accompanying this Written Statement.
[762] UN Doc. S/2008/331 (16 May 2008).
[763] *Ibid.*, p. 1.
[764] UN Doc. S/2008/477 (22 July 2008), p. 2.

Council mandate of KFOR,[765] which again confirms that Security Council resolution 1244 (1999) remains in force in all of its aspects.

846. The Secretary-General of the United Nations confirmed this position most recently in his report of 24 November 2008, in which he referred to the fact that KFOR will continue its security mandate throughout Kosovo, including with respect to the boundaries in accordance with Security Council resolution 1244 (1999).[766]

847. In his report of 17 March 2009, the Secretary-General also noted "the commitment of EULEX to fully respect resolution 1244 (1999)"[767] Indeed, EULEX reports about its activities to the Secretary-General of the United Nations.[768]

(4) Statements of members of the Security Council

848. Members of the Security Council have, on various occasions, expressed the view that Security Council resolution 1244 (1999) remains fully in force and valid, the UDI notwithstanding.

849. Thus, immediately after the UDI the representative of the Russian Federation stated that

> "... resolution 1244 (1999) remains fully in force and that in accordance with it the Secretary-General's Special Representative and Head of the United Nations Interim Administration Mission in Kosovo (UNMIK) must continue to carry out functions and

[765] See *e.g.* UN Doc. S/2008/549 (12 August 2008), p. 1; UN Doc. S/2008/600 (12 September 2008), p. 1; UN Doc. S/2008/638 (8 October 2008), p. 1.
[766] See UN Doc. S/2008/692 (24 November 2008), para. 44.
[767] UN Doc. S/2009/149 (17 March 2009), para. 37
[768] *Ibid.*, Annex I.

responsibilities of the provisional administration of Kosovo assigned to the Mission..."[769]

850. The representative of China took the same position and confirmed that

> "Security Council resolution 1244 (1999) remains the political and legal basis for the settlement of the Kosovo issue. Prior to the adoption of any new resolution by the Council, all efforts and actions for the settlement of this issue should conform to the relevant provisions of resolution 1244 (1999)."[770]

851. This view was also shared by the representative of Indonesia stating on the same occasion that "[t]he Security Council should ensure that the provisions of the United Nations Charter and Council resolution 1244 (1999) are fully respected."[771]

(5) Statements by other States

852. A similar approach confirming the continued applicability of Security Council resolution 1244 (1999) was taken by individual States, including States that have recognized the so-called "Republic of Kosovo". Thus, for example, the German government stated in May 2008 that "Security Council resolution 1244 (1999) will remain in force until the adoption of a subsequent resolution by the UN Security Council".[772]

853. Further, India, in a joint statement with the Russian Federation and China on May 15, 2008 unequivocally stated that

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[769] Mr. Churkin, (Russian Federation), UN Doc. S/PV.5839 (18 February 2008), p. 6.
[770] Mr. Wang Guangya (China), *ibid.*, p. 8.
[771] Mr. Natalegawa (Indonesia), *ibid.*, p. 12
[772] See Deutscher Bundestag Drucksache 16/9287 [German Parliament, Doc. 16/9287] (27 May 2008), p.2, Annex 74 in Documentary Annexes accompanying this Written Statement. Translation of the German original, which reads as follows:
"Bis zum Beschluss einer Folgeresolution durch den VN-Sicherheitsrat gilt die Sicherheitsratsresolution 1244 (1999) fort.".

> "[t]he unilateral declaration of independence of Kosovo is contrary to the UN Security Council Resolution 1244, which should remain the legal basis for the settlement of Kosovo issue till new decisions by the UN."[773]

854. The fact that Security Council resolution 1244 (1999) remains in force was also confirmed by the Bucharest Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008 representing the vast majority countries contributing troops for the security presence in Kosovo. The Heads of State and Government of NATO States stated:

> "We reiterate that *KFOR* will remain in Kosovo *on the basis of United Nations Security Council Resolution (UNSCR) 1244* to ensure a safe and secure environment, including freedom of movement, for all people in Kosovo *unless the Security Council decides otherwise.*"[774]

855. Similarly, the Council of the European Union, in a statement adopted on February 2008 declared that it "... welcomes the continued presence of the international community [in Kosovo] *based on UN Security Council resolution 1244*".[775]

856. Both texts confirm the conviction of a significant number of States, including several members of the Security Council, that Security Council resolution 1244 (1999) remains in force, the UDI notwithstanding, for otherwise Security Council resolution 1244 (1999) could no longer govern the deployment of troops in Kosovo.

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[773] Joint Communiqué on the outcome of the Meeting of the Foreign Ministers of the Russian Federation, the People's Republic of China and the Republic of India (15 May 2005), para. 17, Annex 73 in Documentary Annexes accompanying this Written Statement, available at http://www.meaindia.nic.in/.

[774] Bucharest Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008, Doc. NATO PR/CP(2008)049 (3 April 2008), para. 7 (emphasis added), Annex 72 in Documentary Annexes accompanying this Written Statement.

[775] Council of the European Union, 2851st External Relations Press Release 6496/08 (18 February 2008), p. 7 (emphasis added), Annex 71 in Documentary Annexes accompanying this Written Statement.

857. Further, this view is shared by the European Commission which also expressed the view that Security Council resolution 1244 (1999) remains fully in force, the UDI notwithstanding. In its Kosovo 2008 Progress Report *of 5 November 2008* (*i.e.* several months after the UDI), the European Commission accordingly states that

> "... United Nations Security Council Resolution 1244/99 (UNSCR 1244/99) provides the international legal framework for Kosovo. It provides for the deployment of international civil and military presences in Kosovo, under UN auspices. It authorises the Secretary General of the United Nations (UNSG) to establish an international civil presence to provide an interim administration for Kosovo."[776]

858. Yet any such continued applicability of the provisions of Security Council resolution 1244 (1999) relating to KFOR respectively to UNMIK in turn presupposes that all other parts of Security Council resolution 1244 (1999) also remain in force, including the interim self-governing status of Kosovo created by the Security Council in that resolution.

859. Otherwise individual States or groups of States could apply a "pick-and-choose" approach of freely determining what parts of a given Security Council resolution would remain in force while others would not, their obligations under the Charter to abide by binding Security Council resolutions notwithstanding.

860. The quintessential importance of complying with binding decisions of the Security Council was stressed by the Court in its *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).* After having determined that the Security Council resolution under consideration was legally binding under the Charter, the Court continued:

[776] Commission of the European Communities, Kosovo (under UNSCR 1244/99) 2008 Progress Report, Doc. SEC (2008) 2697, p. 4, available at http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/kosovo_progress_report_en.pdf .

> "Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. *To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.*"[777]

(6) Continued applicability of the Military-Technical Agreement of 9 June 1999

861. The understanding that Security Council resolution 1244 (1999) remains fully in force and legally binding is also confirmed by the further fact that neither party to the Military-Technical Agreement of 9 June 1999 concluded between the International Security Force KFOR on the one hand, and the FRY and the Republic of Serbia, on the other, has taken any step whatsoever to terminate the said agreement, despite the fact that the agreement takes as a basic starting point the fact that Kosovo forms part of the FRY.[778]

862. Thus, the fact that the parties continue to apply the agreement, which in turn is closely intertwined with the continued applicability of Security Council resolution 1244 (1999), again demonstrates and confirms that Kosovo continues to form part of Serbia and that its legal interim status is still governed by the parameters of said resolution, the UDI notwithstanding.

863. It is also telling that even States that have recognized the independence of Kosovo continue to recognise that the Military-Technical Agreement providing for the stationing of troops in Kosovo as part of the FRY/ the Republic of Serbia remains in force and serves as an additional legal basis for the deployment of troops in Kosovo.

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[777] *Nambia*, p. 54, para. 116 (emphasis added).
[778] On the continuity between the FRY and the Republic of Serbia, see *supra* Chapter 1, Section E.

864. This is exemplified by the request of the government of the Federal Republic of Germany addressed to the German Parliament for a continued participation of German troops in KFOR *dated May 27, 2008, i.e. subsequent to the UDI.*[779] This request referred to the continuation of the German participation in KFOR

> "... on the basis of Security Council resolution 1244 (1999) and the Military-Technical Agreement between the International Security Presence (KFOR) and the governments of the Federal Republic of Yugoslavia (now: Republic of Serbia) and that of the Republic of Serbia of 9 June 1999".[780]

H. Conclusions

865. From the above the following conclusions may be drawn:

(i) The Security Council, acting under Chapter VII of the Charter, adopted Security Council resolution 1244 (1999) and created an international legal regime for Kosovo pursuant to which this Serbian territory is administered by an international civil presence, while security is provided by an international security presence.

(ii) The territorial integrity and sovereignty of the FRY with respect to the territory of Kosovo was confirmed in Security Council resolution 1244 (1999), as well as in the practice of the United Nations and its Member States prior and subsequent to the adoption of the said resolution. The principle of the territorial integrity and sovereignty of the FRY[781] forms an inherent part of the international legal regime for Kosovo.

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[779] See Deutscher Bundestag Drucksache 16/9287 [German Parliament, Doc. 16/9287] (27 May 2008), Annex 74 in Documentary Annexes accompanying this Written Statement.

[780] *Ibid.*, p.1; emphasis added. The German original reads as follows:
„Antrag der Bundesregierung Fortsetzung der deutschen Beteiligung an der internationalen Sicherheitspräsenz im Kosovo auf der Grundlage der Resolution 1244 (1999) des Sicherheitsrates der Vereinten Nationen vom 10. Juni 1999 und des Militärisch-Technischen Abkommens zwischen der internationalen Sicherheitspräsenz (KFOR) und den Regierungen der Bundesrepublik Jugoslawien (jetzt: Republik Serbien) und der Republik Serbien vom 9. Juni 1999".

[781] On the continuity between the FRY and the Republic of Serbia, see *supra* Chapter 1, Section E.

(iii) The international legal regime for Kosovo comprises Security Council resolution 1244 (1999), and other acts of the Security Council pertaining to Kosovo, as well as legal acts adopted by the Special Representative of the Secretary-General, UNMIK and KFOR, including the Constitutional Framework.

(iv) Security Council resolution 1244 (1999) provides that the international civil presence will provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy, and which will establish and oversee the development of provisional democratic self-governing institutions.

(v) Both the term "substantial autonomy" and the term "self-government" exclude any form of independence for Kosovo, and even more so, exclude a unilateral declaration of independence.

(vi) Security Council resolution 1244 (1999) envisages a political process that will determine Kosovo's future status which presupposes that any final settlement between the parties shall be reached peacefully and through negotiations. In this regard, Security Council resolution 1244 (1999) lays down specific procedural and substantive parameters.

(vii) As far as the procedure is concerned, the parties to such negotiations are under the obligation, both under general international law and Security Council resolution 1244 (1999), to negotiate in good faith and to take into account international law, and may not, pending a mutually agreed solution, unilaterally attempt to impose their own views by attempting to create a *fait accompli*.

(viii) As for the substance of the final settlement, the Security Council provided that such settlement should be based *inter alia* on the principle of territorial integrity and sovereignty of the FRY.

(ix) Pending the settlement, the legal situation remains unaltered: Kosovo remains an integral part of Serbia. Only a final settlement to be agreed upon by the parties under the auspices of the Security Council can modify this situation.

(x) Security Council resolution 1244 (1999), and the international legal regime established on the basis of this resolution, continues to be binding and

applicable in its entirety until the Security Council decides otherwise. The continued validity of Security Council resolution 1244 (1999) is confirmed by the practice of the United Nations organs, including the Security Council, as well as by the practice of Member States, both before and after the adoption of the UDI.

CHAPTER 9
THE UDI IS CONTRARY TO THE INTERNATIONAL LEGAL REGIME ESTABLISHED BY SECURITY COUNCIL RESOLUTION 1244 (1999)

866. It has been shown in this Written Statement that the UDI is contrary to the principle of respect for the territorial integrity of States (Chapter 6), while the right to self-determination provides no basis whatsoever for the UDI (Chapter 7). It will now be shown that the UDI is also contrary to the international legal regime for Kosovo established by Security Council resolution 1244 (1999) which has been analyzed in the previous chapter. In particular, it will be demonstrated that the UDI

(i) constitutes an *ultra vires* act of the Provisional Institutions of Self-Government;

(ii) contravenes the paramount administrative authority of UNMIK in Kosovo;

(iii) challenges the competences and authority of the Security Council under Chapter VII of the United Nations Charter, and

(iv) constitutes an attempt to unilaterally determine the status of Kosovo contrary to the requirements of Security Council resolution 1244 (1999).

A. The Declaration is an *Ultra Vires* Act of the Provisional Institutions of Self-Government

I The UDI

867. The UDI was adopted on 17 February 2008 by the Assembly of Kosovo.[782] For the purposes of the present discussion some of its provisions will be briefly recalled.

[782] Annex 2 in Documentary Annexes accompanying this Written Statement.

868. The UDI declares Kosovo

> "to be an independent and sovereign state."[783]

869. The Assembly of Kosovo also assumed constitutional powers in the UDI, by stating its intention to

> "adopt as soon as possible a Constitution..."[784]

Indeed, a "constitution of Kosovo" was subsequently adopted on 9 April 2008.[785]

870. The Assembly also purported to act as a representative of a sovereign and independent State, *inter alia*, by inviting international missions and by purporting to establish international relations in the field of implementation of Security Council resolution 1244 (1999). It stated

> "We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities."[786]

871. Similarly, the Assembly purported to undertake international obligations in the name of Kosovo:

> "With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall

[783] *Ibid.*, para. 1.
[784] *Ibid.*, para. 4.
[785] See "Kosovo adopts constitution; U.N. handover June 15", *Reuters*, 9 April 2008, available at http://www.reuters.com/article/homepageCrisis/idUSL09435803._CH_.2400
[786] UDI, para. 5, Annex 2 in Documentary Annexes accompanying this Written Statement.

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 community that mark relations among states…"[787]

"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 intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability."[788]

872. The Assembly also purported to establish Kosovo's "international borders" by stating that

"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 neighbours."[789]

II The scope of powers of the Provisional Institutions of Self-Government, in particular the Assembly

873. As already discussed in Chapter 8, Section B, the scope of powers of Kosovo institutions has been determined by Security Council resolution 1244 (1999) and subsequent regulations issued by the Special Representative of the Secretary-General in implementing the resolution, most importantly by the Constitutional Framework.

[787] *Ibid.*, para. 8.
[788] *Ibid.*, para. 9.
[789] *Ibid.*, para. 8

874. According to Security Council resolution 1244 (1999), the scope of powers of Kosovo institutions is determined by the notions of "substantial autonomy" and "self-government". As has been demonstrated in Chapter 8, Section E, these notions exclude any form of independence. Likewise, they exclude any exercise, by Kosovo institutions, of competences related to the international legal status of Kosovo. Rather, they are limited to providing a system in which the inhabitants of Kosovo are able to govern themselves internally in a meaningful way.

875. The Special Representative of the Secretary General in Kosovo, pursuant to the authority given to him by Security Council resolution 1244,[790] adopted the Constitutional Framework which established the Provisional Institutions of Self-Government in Kosovo and transferred certain limited powers to them.[791] These powers must be exercised

> "consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in [the] Constitutional Framework"[792]

876. It follows that the Provisional Institutions of Self-Government were created as part of the international legal regime of Security Council resolution 1244 (1999), with all their powers deriving from this resolution and the Constitutional Framework adopted pursuant to it. Accordingly, the powers of the Provisional Institutions of Self-Government cannot be exercised in a manner that is inconsistent with this legal regime as interpreted by the Special Representative of the Secretary-General in Kosovo and, ultimately, the Security Council.

877. The competences of the Provisional Institutions of Self-Government are expressly set out in the Constitutional Framework, mostly in its Chapter 5. These competences relate to various fields of activity in internal affairs but do not include, *inter alia*, defence, law-enforcement and control of borders issues.

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[790] Constitutional Framework, Preamble, para. 2, Annex 3 in Documentary Annexes accompanying this Written Statement.
[791] See *supra* Chapter 8, Section B.
[792] *Ibid.*, Chapter 2, para. 1(a).

878. In the field of foreign affairs, the Provisional Institutions of Self-Government have limited competences, akin to those exercised by other autonomous or federated entities within many States:

> "The Provisional Institutions of Self-Government shall also have the following responsibilities in the field of external relations:
> - international and external cooperation, including the reaching and finalising of agreements. Such activities shall be coordinated with the SRSG [Special Representative of the Secretary-General]".[793]

In this regard, the Assembly of Kosovo has the competence to consider and endorse "proposed international agreements *within the scope of its responsibilities*."[794]

879. The Assembly of Kosovo also has the competence to adopt laws and resolutions in the areas of responsibility of the Provisional Institutions of Self-Government.[795]

880. As already mentioned,[796] the Special Representative of Secretary-General reserved certain competences for himself, as well as the general authority to ensure full implementation of Security Council resolution 1244 (1999), including overseeing the Provisional Institutions of Self-Government and taking "appropriate measures" when their actions are inconsistent with the resolution or the Constitutional Framework.[797]

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[793] *Ibid.*, Article 5.6.
[794] *Ibid.*, Article 9.1.26 (f) (emphasis added)
[795] *Ibid.*, Article 9.1.26 (a).
[796] See *supra* Chapter 8, Section B, at para. 710.
[797] Constitutional Framework, Chapter 12, Annex 3 in Documentary Annexes accompanying this Written Statement.

III The UDI is an *ultra vires* act in violation of international law

881. By adopting the UDI, the Provisional Institutions of Self-Government acted outside their competencies as set out in the Constitutional Framework, which itself derives its force from Security Council resolution 1244 (1999). Their *ultra vires* acts were therefore not in accordance with international law, of which resolution 1244 and UNMIK regulations form part.

882. In the UDI, the Assembly of Kosovo declared Kosovo "to be an independent and sovereign state" (paragraph 1), thereby purporting to determine the international legal status of Kosovo. By doing so, the Assembly violated Security Council resolution 1244 (1999) and the Constitutional Framework.

883. As a "provisional institution for democratic and autonomous self-government" as provided for in Security Council resolution 1244 (1999), paragraph 11 (c), the Assembly *by its very nature* does not have the power to take decisions related to the international legal status of Kosovo, including proclamations of independence. Therefore, the Assembly acted *ultra vires* under resolution 1244 (1999) by adopting the UDI.

884. By purporting to determine the international legal status of Kosovo, the Assembly directly encroached upon the competences of the Security Council which, by virtue of its powers under Chapter VII of the UN Charter, is the only authority competent to change the international legal regime established by its resolution 1244 (1999).[798]

885. As will be discussed below, by unilaterally attempting to determine Kosovo's status, the Assembly acted contrary to Security Council resolution 1244 (1999) which provides that this status will be determined by a "final settlement" between the parties that shall be reached by negotiations.[799]

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[798] See *infra* paras. 904-912.
[799] See *infra* paras. 913-927.

886. Further, the Assembly acted *ultra vires* under the Constitutional Framework when it declared that Kosovo is a sovereign and independent State. The Constitutional Framework does not provide the Assembly with any authority to deal with matters relating to the international legal status of Kosovo, let alone to declare its independence. Moreover, its declaration is contrary to an express provision of the Constitutional Framework which provides that

> "Kosovo is an entity under interim international administration."

887. In the UDI, the Assembly also attempted to assume constitutional powers by stating its intention to "adopt as soon as possible a Constitution... "[800]

888. However, the Assembly does not possess such powers in relation to Kosovo because, under the international legal regime established by Security Council resolution 1244 (1999), this is the sole competence of the Special Representative of the Secretary-General, which he exercised by adopting, *inter alia*, the Constitutional Framework. The Constitutional Framework itself provides that it may be amended only by the Special Representative of the Secretary-General, while the Assembly's role is confined to the right to *request amendments*.[801] Thus, the Assembly of Kosovo acted *ultra vires* when it tried to assume constitutional powers in the UDI, thereby purporting to abolish and *de facto* amend the Constitutional Framework.

889. The Assembly also invited international missions to exercise responsibilities in relation to Kosovo, including an invitation to NATO to continue to implement its responsibilities as the international military presence under Security Council resolution 1244 (1999). In this way, the Assembly purported to act as a representative of a sovereign and independent state, which is clearly beyond its competences under Security Council resolution 1244 (1999) and constitutes a clear defiance of the Security Council.[802]

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[800] UDI, para. 4, Annex 2 in Documentary Annexes accompanying this Written Statement.

[801] Constitutional Framework, Article 14.3, Annex 3 in Documentary Annexes accompanying this Written Statement

[802] See *infra* Section C.

890. This also constitutes a clear violation of the Constitutional Framework, which provides that the Provisional Institutions of Self-Government in Kosovo have limited competences in the field of foreign affairs, and which must always be exercised in coordination with the Special Representative of the Secretary-General.[803] Inviting international missions, and in particular inviting them to participate in the implementation of Security Council resolution 1244 (1999) does not fall within the scope of responsibilities of the Assembly and it does not have any powers in this regard. On the contrary, this is a reserved power of the Special Representative of the Secretary-General, who has a general authority to conduct external relations "as may be necessary for the implementation of his mandate"[804] and, in particular, the authority to ensure full implementation of resolution 1244 (1999). Indeed,

> "the exercise of the responsibilities of the Provisional Institutions of Self-Government... shall not affect or diminish the authority of the SRSG [Special Representative of the Secretary-General] to ensure full implementation of UNSCR 1244 (1999)..."[805]

891. Further, the Assembly purported to establish Kosovo's "international borders" (paragraph 8), which is also beyond its competences as an institution of "autonomous self-government" under Security Council resolution 1244 (1999) (paragraph 11(c)). The Constitutional Framework also does not provide the Provisional Institutions of Self-Government with any powers relating to the determination of international borders. Their only powers related to borders are

> "administrative and operational customs activities",[806]

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[803] See *supra* para. 878.
[804] Constitutional Framework, Article 8.1.(o), Annex 3 in Documentary Annexes accompanying this Written Statement
[805] *Ibid.*, Chapter 12.
[806] *Ibid.* Article 5.1.(c).

where the custom service belongs to UNMIK, with the Special Representative having "control and authority" over it, as well as "control over cross-border/boundary transit of goods."[807]

892. As discussed in Chapter 8,[808] the Special Representative had already prevented the Assembly of Kosovo from dealing with matters of international borders, when in 2002 he declared null and void an Assembly resolution attempting to challenge a border agreement concluded between Macedonia and the FRY which, *inter alia*, dealt with the Kosovo section of the border between two States. This action by the Special Representative was endorsed by the Security Council which agreed that the Assembly's decision was outside its competence and thus null and void.[809]

893. In paragraphs 8 and 9 of the UDI, the Assembly also purported to undertake international obligations in the name of Kosovo and declared its intention to seek membership of Kosovo in international organizations. Again, this is clearly beyond the Assembly's competences as an institution of "autonomous self-government" under Security Council resolution 1244 (1999), paragraph 11(c). The Constitutional Framework similarly does not provide the Assembly with the power to undertake international obligations or to seek membership in international organizations in the name of Kosovo as a State.

894. In conclusion, the UDI as a whole purports to establish Kosovo as an independent and sovereign State and to deal with various aspects of independence which is manifestly an *ultra vires* act of the Assembly under Security Council resolution 1244 (1999) and the Constitutional Framework. Further, as has been demonstrated above, individual provisions of the UDI dealing with, *inter alia*, constitutional powers, international borders, international relations and implementation of Security Council resolution 1244 (1999), by themselves constitute an *ultra vires* act of the Assembly, contrary to Security Council resolution 1244 (1999) and the Constitutional Framework.

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[807] *Ibid.*, Article 8.1.(f) & (p).
[808] See *supra* paras. 701-702.
[809] S/PRST/2002/16 (24 May 2002).

B. The Declaration Contravenes the Paramount Administrative Authority Set Up by Security Council Resolution 1244 (1999)

895. The Assembly of Kosovo not only acted *ultra vires* when it adopted the UDI, it also challenged and contravened the supreme administrative authority of UNMIK and thereby also violated Security Council resolution 1244 (1999), the Constitutional Framework and other UNMIK regulations.

896. By declaring Kosovo to be "an independent and sovereign state", the Assembly purported to exercise functions of a sovereign entity acting as if it were the supreme authority in Kosovo, vested with original legislative powers. This is contrary to the international legal regime established by Security Council resolution 1244 (1999) which provides that UNMIK, headed by the Special Representative of the Secretary-General, is the supreme authority in Kosovo, and that all legislative and administrative powers are vested in UNMIK alone. While the Special Representative transferred certain enumerated powers to the Provisional Institutions of Self-Government by the Constitutional Framework, he did not, and indeed could not, transfer the power to change the binding international regime established by Security Council resolution 1244 (1999) and UNMIK regulations.

897. The UDI also challenges the supreme legislative authority of UNMIK by setting aside the Constitutional Framework issued by the Special Representative of the Secretary-General acting pursuant to the authority given to him under Security Council resolution 1244 (1999). This is contrary to the international legal regime established by Security Council resolution 1244 (1999) and contrary to the primacy of the Constitutional Framework over decisions of the Kosovo Assembly.[810] In this regard, it should be recalled that the provisions of the Constitutional Framework shall prevail over the UDI according to the terms of the Constitutional Framework itself,[811] and the general principle that all legislative and administrative authority in Kosovo belongs to UNMIK and the Special

[810] See *supra* paras. 875-876.

[811] Constitutional Framework, Article 14.1, Annex 3 in Documentary Annexes accompanying this Written Statement.

Representative of the Secretary-General[812] who adopted the Constitutional Framework.

898. Further, the UDI encroaches upon the reserved powers of the Special Representative of the Secretary-General in two ways.

899. First, the UDI contravenes the authority of the Special Representative to oversee the Provisional Institutions of Self-Government. According to Security Council resolution 1244 (1999), one of the responsibilities of the international civil presence is

> "overseeing the development of provisional democratic self-governing institutions" (paragraph 10, see also paragraph 11 (c)).

900. Consequently, Chapter 12 of the Constitutional Framework expressly reserves the Special Representative's power of

> "overseeing [*inter alia*] the Provisional Institutions of Self-Government"

and

> "taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework."

901. The claim by the Assembly that it is the sovereign and supreme authority in Kosovo is *a limine* contrary to this power of oversight and contrary to the power of the Special Representative to take appropriate measures against recalcitrant authorities. Consequently, the UDI violates paragraphs 10 and 11(c) of Security Council resolution 1244 (1999), as well as Chapter 12 of the Constitutional Framework.

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[812] See UNMIK/REG/1991/1 (25 July 1999) and UNMIK/REG/2000/54 (27 Sept. 2000), para. 1.1.

902. Second, as already noted, the Special Representative's reserved powers under the Constitutional Framework include

> "exercising powers and responsibilities of an international nature in the legal field",[813]

as well as

> "concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999)",[814]

and conducting external relations as may be necessary for the implementation of his mandate.[815] Further, the Constitutional Framework expressly provides that the exercise of the responsibilities of the Provisional Institutions of Self-Government "shall not affect or diminish the authority of the SRSG [Special Representative of the Secretary-General] to ensure full implementation of UNSCR 1244 (1999)".[816]

903. By adopting the UDI the Assembly purported to act as a representative of a sovereign and independent State in international relations, including by attempting to fix Kosovo's "international borders", by "inviting and welcoming" international missions to Kosovo to implement Security Council resolution 1244 (1999), and by assuming international obligations and seeking membership in international organizations. This way the Assembly encroached upon the reserved powers of the Special Representative of the Secretary-General in the field of external relations, treaty-making, and implementation of Security Council resolution 1244 (1999), and thereby contravened his authority under Security Council resolution 1244 (1999) and the Constitutional Framework.

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[813] Constitutional Framework, , Article 8.1(i), Annex 3 in Documentary Annexes accompanying this Written Statement.
[814] *Ibid.*, Article 8.1(m).
[815] *Ibid.*, Article 8.1(o).
[816] *Ibid.*, Chapter 12.

C. The UDI Challenges the Competences of the Security Council

904. As demonstrated above, it was the Security Council which, acting under Chapter VII of the Charter and in order to address the threat to international peace and security in the region, adopted Security Council resolution 1244 (1999) and for that very purpose created an interim administration for Kosovo.[817]

905. Given that Security Council resolution 1244 (1999) is not limited in time,[818] this interim status continues until a final status agreement has been reached between the parties under the auspices of the Security Council, or until the Security Council terminates the international administration of Kosovo and the legal regime established by Security Council resolution 1244 (1999).

906. Despite continued attempts by the Republic of Serbia to bring about such an agreement, including far-reaching proposals for autonomy of Kosovo,[819] the parties have so far been unable to reach any final settlement, as envisaged by Security Council resolution 1244 (1999).

907. Given this situation, it is for the Security Council, and for the Security Council alone, to decide whether or not it wishes to terminate Security Council resolution 1244 (1999) and the international legal regime established by it, including the mandate of the international presences. Pending such termination, which has not yet occurred, any attempt by either side to alter the legal *status quo* of the territory is a flagrant attempt to circumvent the role of the Security Council by disregarding and contradicting its competences under Chapter VII of the Charter of the United Nations.

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[817] See Chapter 8, Section B.

[818] See Chapter 8, Section G(II).

[819] See Republic of Serbia Status Proposal, 26 April 2007, Annex 81 in Documentary Annexes accompanying this Written Statement. See, also, Amendments to Comprehensive Proposal For the Kosovo Status Settlement by the Negotiating Team of the Republic of Serbia, 2 March 2007, Annex I, Article 1.2., available at http://www.media.srbija.sr.gov.yu/medeng/documents/amendments_eng.pdf

908. As demonstrated above,[820] the practice of both the Security Council and the other organs of the United Nations in implementing Security Council resolution 1244 (1999), as well as the practice of individual Member States, confirms this understanding, *i.e.* that the interim legal status created by resolution 1244 (1999) has not changed, the UDI notwithstanding.

909. In contrast thereto, by declaring Kosovo to be a sovereign State, the UDI purports to unilaterally terminate Kosovo's interim status which has been created by the Security Council in an exercise of its prerogatives under Chapter VII of the Charter.

910. This illegal attempt is evident from paragraph 1 of the UDI by which the Assembly declares Kosovo to be "an independent and sovereign state." Similarly, in paragraph 5 of the UDI its authors

> "(…) *invite* and welcome an international civilian presence (…)"

and also

> "(…) *invite* and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo".

This wording indicates that, according to the Assembly, it is Kosovo's "invitation" which serves as a legal basis for the respective international presences, and not the Chapter VII mandate under Security Council resolution 1244 (1999).

911. This encroachment upon the powers of the Security Council is further highlighted by the fact that, according to paragraph 5 of the UDI, the international security presence is only supposed to exercise its functions

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[820] See Chapter 8, Section G.

"(...) until such time as Kosovo institutions are capable of assuming these responsibilities"

without even mentioning any role whatsoever *for the Security Council* in eventually terminating the mandate of KFOR.

912. Thus, the UDI flagrantly disregards the very foundations not only of Security Council resolution 1244 (1999), but also of the system of collective security set up by the Charter of the United Nations, since it purports to terminate a specific legal situation and a specific mandate that were created by a binding Security Council resolution.

D. The UDI is an Attempt to Unilaterally Decide the Outcome of a Political Process Provided for by Security Council Resolution 1244 (1999)

913. As demonstrated above,[821] Security Council resolution 1244 (1999) lays down specific procedural parameters concerning how a final settlement with regard to the situation in Kosovo shall be reached, as well as substantive parameters upon which the settlement shall be based. The UDI is contrary to both these sets of requirements.

I The UDI violates procedural parameters laid down in Security Council resolution 1244 (1999)

914. Security Council resolution 1244 (1999) presupposes and requires the parties to the conflict to enter into and sustain a political process to be pursued under the auspices of the Security Council in order to bring about a mutually acceptable solution.

[821] See Chapter 8, Section F.

915. More specifically, it requires the parties to negotiate *bona fide* so as to eventually reach an agreement on the final status of Kosovo within the realm of the substantive parameters also laid down in Security Council resolution 1244 (1999).[822]

916. By the same token and by providing for such a mechanism, Security Council resolution 1244 (1999) precludes any unilateral attempt to change the current interim legal status of Kosovo and thereby also precludes any attempt to create a *fait accompli*.

917. Serbia has actively and constructively participated in the political process envisaged in Security Council resolution 1244 (1999), including in the negotiations chaired by the Special Envoy of the Secretary-General on Kosovo's future status, former Finnish President Martti Ahtisaari,[823] and the negotiations under the auspices of the European Union/United States/Russian Federation-Troika on Kosovo.[824] Serbia has always negotiated in good faith with the representatives of Kosovo Albanians and international mediators in order to find a mutually acceptable solution.

918. More specifically, in line with the parameters contained in Security Council resolution 1244 (1999), it has offered to grant Kosovo a wide degree of autonomy. Serbia's proposals envisaged a substantial autonomy for Kosovo, in which the latter would have autonomous legislative, executive and judicial powers, except with respect to the following competences: foreign policy, border control, monetary policy, customs policy, final legal recourse in the protection of human rights, and the protection of Serbian religious and cultural heritage.[825]

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[822] See *supra* Chapter 8, Section F(II).

[823] See Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168 (26 March 2007).

[824] See Report of the European Union/United States/Russian Federation Troika on Kosovo of 4 December 2007, UN Doc. S/2007/723 (10 December 2007).

[825] See Republic of Serbia Status Proposal, 26 April 2007, Annex 81 in Documentary Annexes accompanying this Written Statement. See, also, Amendments to Comprehensive Proposal For the Kosovo Status Settlement by the Negotiating Team of the Republic of Serbia, 2 March 2007, Annex I, Article 1.2., available at http://www.media.srbija.sr.gov.yu/medeng/documents/amendments_eng.pdf

919. On the other hand, the representatives of Kosovo Albanians participating in the negotiation process have, from the very beginning, insisted that the only acceptable solution would be independence and the abolition of any form of sovereignty of Serbia over the territory. However, in sharp contrast to this approach, Security Council resolution 1244 (1999) is premised on the idea that the sovereignty and territorial integrity of Serbia should be safeguarded.

920. The approach taken by the representatives of the Kosovo Albanians during the negotiations, who did not provide any leeway for a compromise on the international legal status of Kosovo, is in line with a long-standing attempt of the Albanian independence movement to secede this territory from Serbia dating back to the late 1980s.

921. Notwithstanding this, Serbia, in line with the requirements of Security Council resolution 1244 (1999) and the general obligation to negotiate in good faith, was willing and continues to be willing to negotiate on the final status of Kosovo.

922. On the other hand, the authorities in Priština have by their declaration of independence not only attempted unilaterally and illegally to change the *status quo*, but also continue to be unwilling to resume the negotiations.[826]

923. The view that Security Council resolution 1244 (1999) did not allow such unilateral steps was *inter alia* shared by the representative of South Africa during a Security Council debate subsequent to the UDI, when he regretted that this step

> "... was *not taken in conformity with a legal and political process* envisaged by Security Council resolution 1244 (1999)..."[827]

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[826] See, e.g., the recent statements of the Kosovo prime minister and speaker of the Assembly that they are only willing to negotiate with Serbia once Serbia recognizes Kosovo's independence – "Furore over customs stamp overshadows Kosovo's independence anniversary", *Financial Times*, 17 February 2009, available at http://www.ft.com/cms/s/0/8a20145e-fc93-11dd-aed8-000077b07658.html; "Kosovo: No Talks Before Serbia Recognition", *Balkan Insight*, 11 February 2009, available at http://balkaninsight.com/en/main/news/16600/.

[827] UN Doc. S/PV. 5839 (18 February 2008), p. 16 Mr. Kumalo (South Africa); emphasis added.

924. Similarly, the representative of the Russian Federation took the position that

> "... resolution 1244 (1999) [...] clearly does not provide for the possibility of Kosovo unilaterally proclaiming its independence, since what happens in Kosovo is controlled by the United Nations and that situation still prevails there from the point of view of resolution 1244 (1999)..."[828]

925. Accordingly, any unilateral action, such as the UDI, runs counter to Security Council resolution 1244 (1999) and its basic premise that any final settlement must be reached by way of a political process involving both the parties to the conflict, and the Security Council.

926. As a matter of fact, any such unilateral action does not only challenge the authority of the Security Council, but has a bearing upon the very fabric of international law more generally as the representative of China in the Security Council noted after the adoption of the UDI:

> "... to terminate negotiations, give up pursuit of a solution acceptable to both parties and replace such efforts with unilateral actions will certainly constitute a serious challenge to the fundamental principles of international law."[829]

927. Apart from being an act contrary to the procedural requirements contained in Security Council resolution 1244 (1999), the UDI also contradicts the substantive parameters set out therein, and, in particular, violates the sovereignty and territorial integrity of Serbia.

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[828] Mr. Churkin (Russian Federation), UN Doc. S/PV.5969 (28 August 2008), p. 17.
[829] UN Doc. S/PV. 5839 (18 February 2008), p. 8, Mr. Wang Guangya (China).

II The UDI violates the sovereignty and territorial integrity of Serbia

928. As demonstrated above,[830] Security Council resolution 1244 (1999) not only contains procedural but also substantive parameters for a final agreement to be reached by the parties under the auspices of the Security Council. In particular, Security Council resolution 1244 (1999) specifically refers to the sovereignty and territorial integrity of Serbia.

929. Security Council resolution 1244 (1999) has as its very premise the assumption that Kosovo continues to form part of Serbia, notwithstanding that the territory is subject to the administration by the international civil and military presences, *i.e.* UNMIK and KFOR respectively.

930. It should be also reiterated that Security Council resolution 1244 (1999) does not contain any provision and not even a hint that it was the intention of the Security Council to abrogate the sovereignty of Serbia with regard to Kosovo. Rather, Security Council resolution 1244 (1999) takes as a starting point and repeatedly guarantees the sovereignty and territorial integrity of Serbia with regard to Kosovo.

931. As already discussed,[831] operative paragraph 1 of Security Council resolution 1244 (1999) provides that "a political solution to the Kosovo crisis" shall be based on the general principles set in Annexes 1 and 2 to the resolution, which include the principles of sovereignty and territorial integrity of Serbia.

932. Further, it is only within the framework of Security Council resolution 1244 (1991), and thus respecting the overall sovereignty and territorial integrity of Serbia, that the Provisional Institutions of Self-Government may exercise their limited powers derived from those of the United Nations.

933. In blatant contradiction to these limitations the UDI declared

> "Kosovo to be an independent and sovereign state"

[830] See Chapter 8, Section F (II).
[831] See *supra* paras. 776 ff.

934. The authors of the UDI thereby claimed that Kosovo would no longer form part of Serbia. This claim is reiterated in paragraph 11 of the same document where the authors refer to Serbia as one of the States neighbouring Kosovo, thereby implying that the territory of Kosovo would no longer form part of Serbian territory.

935. The UDI therefore purports to strip Serbia of approximately 15 percent of its territory, contrary to Security Council resolution 1244 (1999) and indeed without any form of Security Council authorization or involvement, and thus the UDI runs diametrically counter to the guarantee of Serbia's territorial integrity, as guaranteed in this same resolution adopted under Chapter VII of the Charter. In addition, as noted above in Chapter 6, this UDI also constitutes a violation of general international law.

936. This purported secession of Kosovo from Serbia has not been accepted either by Serbia, the lawful sovereign, or by the Security Council which established the international administration of Kosovo.

937. Accordingly, the legal situation, as provided for in Security Council resolution 1244 (1999), must be considered to have remained unchanged. If it were otherwise, one of the parties concerned, contrary to the procedural arrangements foreseen in this same resolution, could have not only *unilaterally* altered the *status quo*, but would have also challenged the primary competence of the Security Council for the maintenance of international peace and security under Article 24 of the Charter of the United Nations generally and its prerogatives under Chapter VII thereof more specifically.

938. Therefore, the legal situation remains as provided for in Security Council resolution 1244 (1999), *i.e.* Kosovo remains part of Serbia and thus subject to Serbian sovereignty whilst being administered by an international civil and military presence.

939. This legal situation created by Security Council resolution 1244 (1999) will only come to an end once a mutually agreed upon final settlement is reached by the parties under the auspices of the Security Council, or once the Security Council otherwise decides to terminate this interim administration.

940. It follows that the UDI violates the territorial integrity and sovereignty of Serbia, as guaranteed by Security Council resolution 1244 (1999).

E. Conclusion

941. It has been demonstrated that the UDI is contrary to the legal regime established under Security Council resolution 1244 (1999).

(i) The UDI constitutes an *ultra vires* act of the Assembly of Kosovo. In particular,

- by declaring Kosovo "to be an independent and sovereign state", the Assembly acted *ultra vires* and violated Security Council resolution 1244 (1999) and the Constitutional Framework which provide that the Assembly is a provisional institution of self-government which does not have the power to determine the international legal status of the territory;
- by assuming constitutional powers, the Assembly acted *ultra vires* under the Constitutional Framework;
- by inviting international missions to Kosovo, purporting to fix Kosovo's "international borders", purporting to conduct international relations, purporting to undertake international obligations and to seek membership in international organizations, the Assembly acted *ultra vires* under Security Council resolution 1244 (1999) and the Constitutional Framework.

(ii) The UDI contravenes the paramount administrative authority in Kosovo established by Security Council resolution 1244 (1999) by declaring Kosovo to be "an independent and sovereign state", as well as by encroaching upon the reserved powers of the Special Representative of the Secretary-General under the Constitutional Framework.

(iii) The UDI challenges the competences of the Security Council with respect to the situation in Kosovo by unilaterally terminating Kosovo's interim status and the mandate of international presences, both of which were established by Security Council resolution 1244 (1999).

(iv) The UDI violates procedural requirements for the conduct of negotiations set forth in Security Council resolution 1244 (1999), by unilaterally and illegally attempting to change the current interim legal status of Kosovo.

(v) The UDI also violates substantive requirements for the conduct of negotiations and a final settlement set forth in Security Council resolution 1244 (1999), specifically the territorial integrity and sovereignty of Serbia which are guaranteed by the said resolution.

Part V

NO OTHER JUSTIFICATION FOR THE UNILATERAL DECLARATION OF INDEPENDENCE UNDER INTERNATIONAL LAW

Chapter 10

NEITHER A "RIGHT TO SECESSION" NOR "LEGAL NEUTRALITY" AFFORDS SUPPORT TO THE LEGALITY OF THE UNILATERAL DECLARATION OF INDEPENDENCE

942. The previous chapters have demonstrated that the UDI is not in conformity either with fundamental principles of international law, such as the principle of respect for the territorial integrity of States and the right of peoples to self-determination, or with the international legal regime established by Security Council resolution 1244 (1999). It has also been shown that so-called remedial secession cannot validly be invoked to legally justify the conformity of the UDI with international law. This chapter will demonstrate why the UDI purporting to constitute a secession of Kosovo from Serbia cannot be justified under international law by the application of any other rule relevant to the issue of secession:

(i) The situation in Kosovo will be distinguished from those situations where international law recognises secession, namely where

- domestic law grants that right to a constituent part of the State concerned;
- the territories seeking secession had previously been unlawfully annexed;
- the parent State agrees to the secession of part of its territory and population, either before or after the secession attempt.

(ii) The relevance of effectiveness will be examined in order to demonstrate that the purported presence of the so-called constituent elements of

statehood is not the only decisive factor in determining the existence of a new State.

(iii) In any case, the so-called constituent elements of statehood are not present in the case of Kosovo.

(iv) Recognition by some States of a so-called "Republic of Kosovo" neither grants retroactive legality to the UDI, nor purges it of its *ab initio* illegality.

(v) The contemporary international legal system does not remain neutral on the question of non-consensual secession, so that new States cannot be illegally created today.

A. None of the Exceptional Situations in Which a Right to Secession Might Exist Are Present in the Case of Kosovo

943. There have been a number of secessionist attempts from independent States in different parts of the world. Most of these attempts have failed, and just a few have resulted in the creation of new States. In some cases this failure was a pure matter of fact: some or all of the constituent elements allowing the possibility of the existence of a State simply were not present. In other cases, some or even all of the material elements were present and even a semblance of a State apparatus emerged. Nevertheless the creation of a new State met the insurmountable obstacle of its non-conformity with international law, and no new State was created. Only in exceptional cases was a new State created and practice shows that this was the result of its conformity with international law. This conformity can be manifested in a number of different ways: 1) by the granting of the right to secession in domestic law, 2) by the particular situation of territories that were previously illegally annexed to the State from which they later secede, or 3) by the acceptance by the parent State of the secession of part of its territory and population, either preceding or within a short time following the secession.

944. As will be seen below, none of these situations apply to the case of Kosovo.

I Domestic law did not and does not grant Kosovo a right to secession

945. The first situation where international law acknowledges the right of secession of part of a State's territory is where the constitution of the parent State itself envisages that possibility. Indeed, very few constitutions of independent States recognise the right to secession of its peoples or of the component units that make up the State. At present, this is the case with regard to Ethiopia,[832] Uzbekistan,[833] and St. Kitts-and-Nevis.[834] This was also the case in the former Soviet Union.[835] Similarly, the federal constitution of the former SFRY envisaged the right of the nations of Yugoslavia to secede.[836] The separation of Montenegro from the Union State of Serbia and Montenegro in 2006 was also foreseen in the Constitution of that Union.[837]

946. A case of secession that has its origin in the granting of such a right by the domestic law of the parent State does not raise any difficulty in the realm of international law. It will be in conformity with it because none of the fundamental principles which are at issue in a case of the creation of new States in contemporary international law would be infringed. If the constitution itself recognises that the State is constituted of a plurality of peoples each of which has the competence to exercise external self-determination, then international law cannot but take notice of this. Equally, respect

[832] Article 47 of the Constitution of Ethiopia, available in English on the website of the Parliament of the Federal Democratic Republic of Ethiopia at http://www.ethiopar.net . Article 47(2) provides "Nations, Nationalities and Peoples within the States enumerated in sub-Article 1 of this article have the right to establish, at any time, their own States." This right is exercisable according to the procedures set out in Article 47(3).

[833] Article 74 of the Constitution of Uzbekistan, which provides "The Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nationwide referendum held by the people of Karakalpakstan." Available at http://www.umid.uz/Main/Uzbekistan/Constitution/constitution.html .

[834] Article 113 of the Federation of Saint Kitts and Nevis Constitutional Order of 1983, 1983 No.881, available on the website of the Office of the Prime Minister of St. Kitts and Nevis at http://www.cuopm.com. This article provides that "The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis." This must be done in accordance with the other provisions of Article 113.

[835] Article 72 of the 1977 Constitution of the U.S.S.R. provides that "To every Union Republic is reserved the right freely to secede from the U.S.S.R."

[836] The Basic Principle I of the Constitution of the SFRY, 1974, provided that "[t]he nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession..." See Annex 52 in Documentary Annexes accompanying this Written Statement.

[837] Article 60 of the Constitutional Charter of the State Union State of Serbia and Montenegro, Annex 58 in Documentary Annexes accompanying this Written Statement.

for the territorial integrity of States is not at issue either, since the State itself considers that part of its territory can be legally separated from the whole to constitute a new State. In other words, the State itself has provided for its consent to secession of part of its territory in its constitution.

947. Neither during the existence of the SFRY, nor afterwards, were the Kosovo Albanians or the province of Kosovo granted the right of secession. During the period of the SFRY, only the constituent nations of Yugoslavia were recognized as holders of the right of self-determination, including the right to secession.[838] The Kosovo Albanians were a national minority ("narodnost", "nationality") and not one of the nations of Yugoslavia, and as such they did not have the right to self-determination under the 1974 federal Constitution. This was confirmed by the Constitutional Court of Yugoslavia in 1991.[839]

948. Further, whereas Serbia, a Socialist Republic, was defined as a "state" in Article 3 of the 1974 SFRY Constitution, the Socialist Autonomous Province of Kosovo was defined as an "autonomous socialist self-managing democratic socio-political communit[y]" under Article 4. The difference between the two was also confirmed by the Constitution Court of Yugoslavia when in 1991 it declared unconstitutional a declaration made by individual members of the Kosovo Assembly seeking the status of the federal unit for Kosovo. The Court held that Serbia was a federal unit of the Yugoslav federation (as were Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, and Slovenia), unlike Kosovo which was an autonomous province within Serbia. The Court further held that any change of the legal status of Kosovo required the consent of the Republic of Serbia and changes to the Yugoslav and Serbian constitutions.[840]

949. Further, the Conference on Yugoslavia, created by the European Communities and afterwards co-chaired by the United Nations at the beginning of the process of

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[838] See, e.g., *supra* para. 195.

[839] See Constitutional Court of Yugoslavia, Decision of 19 February 1991, II-U-broj 87/90, *Službeni list SFRJ* [Official Gazette of the SFRY], No. 37/1991, p. 618, Annex 56 in Documentary Annexes accompanying this Written Statement.

[840] *Ibid.* For more, see Chapter 5, Section A, paras. 194-195.

dismemberment of the SFRY, did not recognise that Kosovo was entitled to create its own sovereign State.[841] This was so, despite the request by the leaders of the Kosovo Albanians to be recognised as a republic, having the same rights as Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.[842] Indeed, the Conference did not even allow the representatives of the Kosovo Albanians to participate on an equal footing with the Yugoslav Republics.[843] Discussions in which a Kosovo Albanian delegation participated only dealt with issues relating to economic, social and cultural rights.[844]

950. The constitutions that have been enacted subsequently to the dissolution of the SFRY have also not granted any right of secession to Kosovo, namely the 1990 Constitution of Serbia, the Constitution of the FRY of 1992; the Constitutional Charter of the Union of Serbia and Montenegro of 2003; and the Constitution of the Republic of Serbia of 2006, currently in force.

951. Consequently, Kosovo cannot invoke any internal legal right to secede, either at the time of the collapse of the SFRY, or at any moment up until the present.

II Kosovo was not illegally integrated into Serbia

952. There have been cases where secession occurred after a period of illegal incorporation of some entities into another State. This has been the dominant perception of the situation of the Baltic States when they declared their

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[841] In its Opinion No. 1, the Arbitration Commission only referred to the independence of the existing Republics within the SFRY, not that of the provinces. Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia, 31 ILM 1494 (1992), Annex 38 in Documentary Annexes accompanying this Written Statement.

[842] Letter from Dr. Rugova to Lord Carrington, Chair of the Peace Conference on Yugoslavia, Peace Conference on Yugoslavia, 22 December 1991, Annex 76 in Documentary Annexes accompanying this Written Statement.

[843] In a letter to Dr. Rugova, Lord Carrington specified the participation of a Kosovo delegation in the conference as follows: "If you are planning to be in London at the time of the Conference (from 26-28 August) then I am pleased to inform you that it will be possible for you and your delegation to have access to the Queen Elizabeth II Conference Centre for meetings, for example with me, Secretary Vance, and other participants. As it will not, for practical and other reasons, be possible to grant your delegation access to the Conference chamber itself, the organizers will set up a 'Salle d'ecoute' to which the formal Conference proceedings will be relayed live", Letter from Lord Carrington, Chairman, Conference on Yugoslavia, to Dr. I. Rugova, 17 August 1992, Annex 77 in Documentary Annexes accompanying this Written Statement.

[844] Statement by the Republic of Kosovo to Conference on Yugoslavia, Geneva, 16 September 1992, reprinted in Weller, *op. cit.*, p. 89. See, also, *supra* Chapter 5, Section D.

independence in 1990. As a result, they became Members of the United Nations and were widely recognised as independent States before the collapse of the Soviet Union and hence before the other republics.

953. In the case of Eritrea, it was a decision of a United Nations organ, which had the capacity to decide the fate of the territory, to integrate Eritrea within Ethiopia on condition of its autonomy and in the framework of a federated State.[845] After a prolonged period of many decades in which the conditions set out in General Assembly resolution 390 (V) were not met, the United Nations participated in the final process that led to the holding of a referendum in which the Eritreans opted for independence.

954. What is striking is that in the two situations just depicted, the parent States in both cases (the Soviet Union and Ethiopia respectively) recognised the independence of the new States. In the case of Ethiopia, its government agreed to the holding of a referendum, i.e. to the possibility of secession even before this situation actually occurred.[846]

955. These cases are not analogous to the situation of Kosovo. As explained above,[847] most of the territory of what is known as Kosovo today was integrated into Serbia, with the remaining part being integrated into Montenegro, during the Balkan Wars of 1912-13, *i.e.*, 34 years after Serbia (and Montenegro) were recognized as independent States. This was a valid decision recognized by valid international treaties and without any particular condition. This integration was also internationally mandated and internationally recognized. Since then, and notwithstanding all the changes that have occurred in the region, Kosovo has been an integral part of Serbia, both when Serbia was a constituent part of a sovereign State (Kingdom of the Serbs, Croats and Slovenes, Kingdom of Yugoslavia, Popular or Socialist Federal Republic of Yugoslavia, FRY, Serbia and

[845] General Assembly resolution 390 (V), Article 1 of which provides "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown."

[846] Eritrea/Ethiopia Claims Commission, *Partial Award (Civilian Claims) (Eritrea's Claims)*, 17 December 2004, available on the website of the Permanent Court of Arbitration at http://www.pca-cpa.org/showpage.asp?pag_id=1151, para. 7.

[847] See *supra* para. 132.

Montenegro), and a sovereign State itself. The only exception was the legally void annexation of most of the territory of Kosovo to "Greater Albania" under the Nazi-Fascist occupation during World War II.

956. In sum, the situation of Kosovo is by no means comparable to that of an illegally annexed territory seeking to recover its independence, or becoming independent as a result of the denial of the international conditions imposed to the previous incorporation of a territory to an existing State.

III The parent State has never accepted secession

957. Secession will be in conformity with international law if there is consent from the parent State. Although there is doctrinal debate on a point of nomenclature, namely whether such consent given before the accession of the independence should be called "secession" or "devolution",[848] it is not contested that the creation of a new State in such circumstance is in accordance with international law.

958. The same can be said when that consent is granted after a unilateral declaration of independence by an entity possessing all the constituent elements of a State. However, there is no such consent when the parent State considers the secession attempt to be an act against the territorial integrity of the State or not in conformity with the principle of equal rights and self-determination of peoples.

959. Consent of the parent State renders secession in conformity with international law. This is a point upon which no discrepancy arises. Examples constitute virtually all cases of secessionist phenomena having culminated in the actual creation of new States.[849] These examples include the case of Bangladesh, whose independence was recognised by Pakistan on 22 February 1974.[850]

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[848] Crawford, *The Creation of States*, *op.cit.*, p. 330.

[849] See the list elaborated in *ibid.*, p. 391, as well in J. Crawford, *State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada concerning unilateral secession by Quebec*, 19 February 1997, paras. 30-48.

[850] Bangladesh was admitted to the United Nations on 17 September 1974, see General Assembly resolution 3203 (XXIX).

960. As a matter of course, we are not referring here to the cases of decolonisation. Newly independent States created by decolonisation are not cases of secession, since, as recalled by the Declaration on Principles of International Law

> "[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purpose and principles".

961. In the case of Kosovo, no consent of the parent State has ever been granted, either before the UDI, or subsequently. The contrary is rather the case. Before the unilateral action taken by the provisional institutions, Serbia made it clear that Kosovo constituted part of its territory. Following the UDI, Serbia has in turn declared it null and void.[851] It could not be clearer that Serbia does not consent to the secession of Kosovo.

962. As seen above, neither Serbia (the FRY/Serbia and Montenegro) nor the former SFRY have ever agreed or consented to recognising the inhabitants of Kosovo as falling within the category of a "people" entitled to external self-determination, a path that would have permitted those inhabitants to secede territory from the parent State.[852]

963. In sum, the UDI cannot be justified under international law on the basis that there was consent of the State holder of territorial sovereignty, either before or after the UDI was made, either expressly or by inference.

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[851] The unilateral declaration of independence was declared null and void by the Government of Serbia and the National Assembly of the Republic of Serbia. See Annex 4 in Documentary Annexes accompanying this Written Statement; see also Letter dated 17 February 2008 from Mr. Boris Tadic, President of the Republic of Serbia, to the Secretary-General, U.N. doc. A/62/703-S/2008/111, reproduced in Annex 5 in Documentary Annexes accompanying this Written Statement.

[852] See *supra* Chapter 5, especially paras. 194-203.

B. Effectiveness Alone Is Not a Ground for Statehood

964. The present advisory proceedings concern the legal question whether the UDI is "in accordance with international law" and not the factual issue of whether Kosovo has an effective government. However, the issue of effectiveness will also be addressed in this Written Statement as this has been invoked as a justification for the UDI.

965. While it is difficult to conceive of the creation of a State if the material constituent elements are not present (a government exercising sovereign authority over a given territory and its population), it is a completely different idea to affirm that the mere existence of these elements automatically leads to the existence of a State. In relation to this latter statement, it will be demonstrated below that effectiveness *per se* is not sufficient to justify the creation of a State today. In any event, it will be shown that there is no effective independent government in Kosovo. Consequently, effectiveness is not a ground to justify the legality of the UDI, either before or after the declaration was made.

I The effective presence of the so-called constituent elements of the State does not suffice in contemporary international law for the creation of a new State

966. It is common to quote Article 1 of the 1933 Montevideo Convention on Rights and Duties of States adopted by the 7th International American Conference in order to determine the constituent elements of an independent State:

> "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."

967. Shortly before the Montevideo Convention, an arbitral tribunal advanced a similar idea:

> "un Etat n'existe qu'à la condition de posséder un territoire, une collectivité d'hommes habitant ce territoire, une puissance publique s'exerçant sur cette collectivité et ce territoire. Ces conditions sont reconnues indispensables et l'on ne peut concevoir un Etat sans elles."[853]

968. Some decades after, the Arbitration Commission of the Conference on Yugoslavia also defined these elements, considering:

> "that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority, that such a state is characterized by sovereignty".[854]

969. As mentioned above, these so-called "constituent elements" must necessarily be present to invoke the existence of a new State. However, they do not represent *per se* a sufficient ground for admitting *ipso facto* the existence of a new State.[855] They are necessary, but not sufficient, conditions of statehood.

970. International practice reveals a number of examples of entities claiming to be independent States that are able to demonstrate an actual effectiveness of their constituent elements, but which nevertheless are not considered to be sovereign States. The reason for this is that their creation and existence is vitiated by an infringement of the law. "Manchukuo" was a classic example in the inter-war period. "Southern Rhodesia" another, during the Cold War era. Contemporary examples are those of the "Turkish Republic of Northern Cyprus" and "Somaliland", among others.

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[853] *Deutsche Continental Gas Gesellschaft c. Etat polonais*, cause n° 1877, 2 (1/2) *ZaöRV* (1930), part 2: Documents, p. 22.

[854] Opinion No. 1, 31 ILM 1494 (1992), Annex 38 in Documentary Annexes accompanying this Written Statement.

[855] On this point, see Theodore Christakis, "L'Etat en tant que 'fait primaire': réflexions sur la portée du principe d'effectivité" in M. G. Kohen (ed), *Secession. International Law Perspectives* (2006), pp. 138-170.

971. The reason why these entities do not exist as States despite their effectiveness is that their creation or their very existence infringes international law. Such entities cannot therefore acquire the status of a State, the principal subject of international law. This is even more so the case today because contemporary international law contains fundamental principles which are relevant to the creation of States. These principles are the prohibition of the use of force in international relations, the right of peoples to self-determination, respect for the territorial integrity of States, non-intervention in the domestic affairs of States, and respect for fundamental human rights.

972. The assertion that "the creation of States is a matter of pure fact and not of law" is not accurate. Constant practice clearly goes in the opposite direction, demonstrating that the creation and extinction of States is not a mere factual situation: international law acts either to allow one or another situation to occur, or to prevent it. An example of where international law has allowed the creation of new States – indeed, where international law has actively favoured it – was the creation of an impressive number of States through decolonisation. Examples of where international law has prevented entities from becoming new States are the non-existence as independent States of "Katanga", "Southern Rhodesia", "Turkish Republic of Northern Cyprus", "Bougainville", "Republic of Anjuan", "Somaliland", "Kosova", "Nagorno-Karabakh", among others. Further support for the assertion that the creation of States is a matter of *law* and not of fact are situations in which international law has prevented the extinction of an existing State despite its lack of effectiveness. Examples include the illegal annexation of Kuwait in 1990, as well as the collapse of Somalia's government around this same period and in the years that have followed.

973. Therefore, contemporary international law does not content itself with ascertaining the existence of a *de facto* situation of an entity effectively controlling a territory and its population, in order to automatically consider it as a State. The creation of a new State is also contingent on the respect of applicable rules of international law.

II In any event, there is no effective independent government in Kosovo

974. In addition to its non-conformity with international law, the so-called "Republic of Kosovo" does not fulfil the constituent requirements of a State, as there is no effective independent government in Kosovo.

975. This fact is demonstrated by the following:

- UNMIK continues to act within the territory, together with EULEX.
- KFOR continues to be the ultimate military and security authority in the territory.
- Serbia continues to retain its sovereign rights over Kosovo insofar as they are compatible with Security Council resolution 1244 (1999).
- The provisional institutions of self-government, purporting to have become the organs of an independent State, in fact substantially exercise the same authority that they have performed previously, on the basis of Security Council resolution 1244 (1999).

976. In accordance with what is foreseen in Security Council resolution 1244 (1999), the United Nations Secretary-General has stated that UNMIK continues to be deployed in Kosovo.[856] The same is applicable to KFOR.[857] Contrary to the wishes of the so-called "independent" authorities,[858] EULEX was deployed within the framework of Security Council resolution 1244 (1999) and with the support of Serbia.[859]

977. In order to measure the degree of independence of the authorities of a secessionist entity, the starting point must be the existing situation at the time of the UDI. Such a declaration is supposed to initiate a major change in the factual and legal

[856] See reports of the Security-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008) and UN Doc. S/2009/149 (and 17 March 2009).

[857] *Ibid*, pp. 2 and 12.

[858] "Kosovo again opposes EULEX plan; Albania airs doubts", *Thomson Reuters Foundation*, 25 November 2008. Available at: http://www.alertnet.org/thenews/newsdesk/LP686174.htm. See Annex 32 in Documentary Annexes accompanying this Written Statement.

[859] See letter by President of the Republic of Serbia sent to Mr. Havier Solana, Secretary-General of the Council of the European Union and High Representative for the Common and Foreign Policy, dated 28 November 2008, reproduced in Annex 83 in Documentary Annexes accompanying this Written Statement.

situation. In the case of Kosovo, the Provisional Institutions of Self-Government enjoyed substantial authority, although not of a sovereign character, on the basis of Security Council resolution 1244 (1999). There have not been any significant changes to this status since then. The mere reinforcement of the existing substantial administering powers conferred by the United Nations does not transform these institutions into institutions of an independent State. It should be noted that the international administration is entitled to annul acts of the Kosovo authorities.

978. Equally, the authors of the UDI cannot claim that they have the power to exclude the exercise of Serbia's sovereignty over the territory. If Serbia does not administer the territory, this is so due to a Security Council resolution adopted under Chapter VII of the United Nations Charter and the Serbian acceptance of the establishment of an international administration over the territory,[860] and has nothing to do with the UDI or the subsequent action of its authors. On the contrary, Serbia continues to act on the international level as the holder of sovereignty over the territory of Kosovo and is recognised as such by a majority of the components of the international community. Even those States that support independence have had to negotiate with Serbia for the deployment of EULEX, which finally has been done in conformity with Security Council resolution 1244 (1999), contrary to the wishes of the so-called "government of the Republic of Kosovo".[861]

979. As it is also evident, the authorities of the so-called "Republic of Kosovo" have not been able to put an end to the international regime established by Security Council resolution 1244 (1999), although they purported to do so by the UDI. In fact, UNMIK/EULEX possess substantial authority over the territory, which overrides that of the so-called "Government of Kosovo".

980. All the above mentioned elements are sufficient to reject any claim that the UDI reflects a factual "reality" or has lead to the creation of a State.

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[860] See Annex 2 of Security Council resolution 1244 (1999), Annex 20 in Documentary Annexes accompanying this Written Statement.

[861] See *supra* para. 976.

981. However, there are additional elements that show a lack of "Republic of Kosovo" effectiveness. Following the UDI, parts of the population of Kosovo have refused to recognise the Provisional Institutions of Self-Government as legitimate, since they have acted *ultra vires* and have invoked a capacity that they do not possess. As a consequence, some areas remain completely outside any purported authority exercised by the so-called "Government of Kosovo", and in other areas attempts to exercise any such authority are seriously hampered by the boycotting of the "independent" institutions by some parts of the population.

982. The "independent government" does not have political control over the whole territory of Kosovo, nor is it recognised by the entire population of Kosovo as having the authority to exercise such control. While the Assembly of Kosovo purports to pass legislation without reference to the powers of the Secretary-General's Special Representative under Security Council resolution 1244 (1999),[862] the "majority of Kosovo Serbs continue to recognize UNMIK as their sole and legitimate civilian international interlocutor... This has had significant implications, including in the police, customs and judicial sectors, where UNMIK continues to play a prominent role."[863] Some areas in the northern region of Kosovo function completely outside of any political control exercised by the provisional interim institutions. As the Secretary-General noted in his Report of 24 November 2008:

> "In the north [of Kosovo], four municipal structures function on the basis of the law on local self-government of Serbia. The local Kosovo Serbian community resists any real or perceived efforts by Kosovo authorities to exercise control north of the Ibar River. For example, it opposed efforts by Mitovicë/Mitrovica municipality, which is based in the south, to initiate projects in the north, especially as neither UNMIK nor the community itself had been consulted."[864]

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[862] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008), p. 1, para. 2.
[863] *Ibid.* p. 2, para. 4.
[864] *Ibid.*

983. Further, the provisional interim institutions do not exercise judicial control over the whole territory of Kosovo. In Mitrovica, the court was not operational for a six-month period, and was only re-opened, with international judges and prosecutors temporarily appointed to handle the most urgent criminal cases, after consultations between the United Nations Special Representative, Mr. Zannier, and the Government of Serbia.[865] Courts that deal with municipal and minor offences in the municipality of Leposavic function as part of the Serbian judicial system,[866] and courts in Zubin Potok that deal with municipal and minor offences are not operational following the resignation of all Kosovo Serb support staff.[867]

984. Even in the areas supposed to be under control of the "independent government", there are serious difficulties in implementing a real, efficiently functioning judiciary and police force, two basic elements for the existence of any State.[868] Corruption and crime, including trafficking of all kinds, are widespread[869] due to the lack of any true State authority.

985. Indeed, given the strong international civil and security presence in the territory on the basis of Security Council resolution 1244 (1999); the fact that even those States who encouraged the UDI of the so-called "Republic of Kosovo" have had to negotiate with Serbia on matters regarding Kosovo (such as EULEX); the strong resistance by part of the population to the attempt by the institutions to exercise *ultra vires* power; and the failure of these institutions to exercise basic public functions, it is difficult to imagine how the so-called "Government of Kosovo" can be equated with an effective government of an independent State.

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[865] *Ibid.* p. 3, para. 8.

[866] *Ibid.* See also report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/458 (15 July 2008), p. 4, para. 9, and UN Doc. S/2009/149 (17 March 2009), para. 14.

[867] *Ibid.*

[868] Commission of the European Communities, 'Kosovo (Under UNSCR 1224/99) 2008 Progress Report. Commission Staff Working Document', Brussels, 5 November 2008, SEC(2008) 2697, pp. 13, 15, and 53.

[869] *Ibid*, pp. 15 and 54.

C. Recognition by Third States Alone Is Not Decisive

I Recognition by third States as such does not grant retroactive legality or purge illegality

986. It has been shown in this Written Statement that the UDI was contrary to international law and to the domestic law of the Republic of Serbia. It is now argued that recognition by a number of States cannot overturn that legal situation or rectify the UDI. In particular and as part of this proposition, Security Council resolution 1244 (1999) with its unambiguous affirmation of the sovereignty and territorial integrity of the FRY in the context of the Kosovo situation cannot be overturned or bypassed by a number of recognitions by individual States. Further, what is clearly illegal in international law cannot be unilaterally rendered valid by one or more States.

(1) Recognition is not constitutive of statehood

987. Recognition of new States plays an important part in the process of acceptance or confirmation of the statehood of a particular aspirant within the international community, but it should not be confused with the creation of statehood itself, which is a distinct and a discrete process.

988. That the constitutive theory of recognition of statehood is not accepted as part of the international legal order is attested by the fact that States overwhelmingly regard the grant of recognition as being a political act (albeit within a legal framework) and thus subject to the discretion of the State considering recognition. Provided that there is no illegality involved, States have a wide discretion as to whether or not to recognise an entity as a new State.[870] Dugard and Raič concluded that:

[870] See, e.g., M. Whiteman, *Digest of International Law* (1968), vol. II, p. 10 and *Digest of US Practice in International Law* (1976), pp. 19-20.

> "it is essential to appreciate that political considerations do influence the decision [to recognise] and may prompt a State to recognise an entity prematurely or to refuse to grant it recognition".[871]

989. The Arbitration Commission of the Conference on Yugoslavia emphasised in its Opinion No. 1 that "the effects of recognition by other States are purely declaratory".[872]

990. In other words, the pre-existing legal status cannot be changed as a matter of law by an act of recognition. There are two separate questions here: first, whether a new entity has established itself in a manner consistent with international law, and, secondly, whether third States have taken a decision to accept the legal consequences of this situation insofar as they are concerned by the political act of recognition. We are here concerned with the first question only, noting only that an act of recognition by a third State cannot as a matter of law and as such constitute or create a new State.

991. In other words, international practice is consistent in not accepting the doctrine whereby a new State is created only by and upon the recognition of existing States. Crawford makes the essential argument as follows:

> "If individual States were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communications, a system for registering the assent or dissent of individual States without any prospect of resolution".[873]

992. He continues:

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[871] "The Role of Recognition in the Law and Practice of Secession" in *Secession: International Law Perspectives* (ed. M.G. Kohen, 2006), pp. 94, 98.
[872] 31 ILM 1494 (1992), Annex 38 in Documentary Annexes accompanying this Written Statement.
[873] Crawford, *The Creation of States*, *op.cit.*, p. 20.

> "...if State recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void. Yet the nullity of certain acts of recognition has been accepted in practice, and rightly so; otherwise recognition would constitute an alternative form of intervention, potentially always available and apparently unchallengeable".[874]

993. Such political calculation will doubtless take account of a number of pertinent features of the particular situation, but it cannot ignore or neglect the overall context of international law. Recognition may be made or refused for political reasons by States but it cannot so be done in contravention of international law. More to the point in the matter at hand, recognition cannot validate an illegal act. Recognition is not a law-creating mechanism in the arena of international law.

994. It is clear that recognition by a number of States is not as such constitutive of statehood in international law, except, of course, within the domestic legal system of the particular recognising State. Oppenheim summarises the situation as follows:

> "The grant of recognition by a State is a unilateral act affecting essential bilateral relations and neither constitutes nor declares the recognised State to be a member of the international community as a whole….. The overwhelming practice of States does not accept that the mere claim of a community to be an independent State automatically gives it a right to be so regarded … While the grant of recognition is within the discretion of States, it is not a matter of arbitrary will or political concession, but is given or refused in accordance with legal principle. That principle … is that when certain conditions of fact (*not in themselves contrary to*

[874] *Ibid.*, p. 21. Footnote omitted.

international law) are shown to exist, recognition is permissible and is consistent with international law".[875]

(2) Recognition and unlawful assertions of statehood

995. It follows that where the situation or claim to statehood is contrary to international law, recognition becomes problematic. However, the question before the Court is not concerned with the question of the legality or otherwise of such recognitions of the so-called "Republic of Kosovo" as have occurred, but rather with the assertion of independence and the consequential argument that may be made to the effect that recognition has either demonstrated the legality of the UDI or cured the illegality of such declaration. Recognition, however, cannot mitigate or legitimate in international law what is an unlawful act.

996. It is well established that an illegal unilateral act cannot produce legal consequences, *ex injuria jus non oritur*.[876] Consequently, the attempt made by some States to support the creation of a new State on the territory of Serbia through recognition is devoid of any legal relevance for the present advisory proceedings.

(3) Inability of recognition to legitimise illegality

997. The principle of *ex injuria jus non oritur* may be seen as having three possible consequences. In the first case, an obligation would be seen to arise requiring the non-recognition of the new situation brought about by the wrongful act. For example, Article 41, paragraph 2, of the International Law Commission's Articles on State Responsibility[877] provides that no State "shall recognise as lawful a situation created by a serious breach within the meaning of Article 40 [*ie.* of an obligation arising under a peremptory norm of general international law] nor

[875] *Oppenheim's International Law* (ed. R.Y. Jennings and A.D. Watts), (9th ed., 1992), p. 130. Emphasis added and footnotes omitted.

[876] See, e.g., *Gabçikovo-Nagymaros Project Case (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 76, para. 133, and Judge Elaraby's Separate Opinion in *Wall*, p. 254, para. 3.1.

[877] See General Assembly resolution 56/10; see also resolution 56/83.

render aid or assistance in maintaining that situation".[878] A general duty of non-recognition may, for example, arise in situations arising out of the illegal use of force. A second consequence of the principle is that, whether or not a duty of non-recognition arises, an obligation will exist not to accept as valid that original unlawful act. Thirdly, and related to the second point, the principle of *ex injuria jus non oritur* must mean, in order to maintain any credibility, that recognition of an unlawful situation cannot as such render legal what is illegal.

998. This is particularly important with regard to the present case, where Serbia is arguing that those recognitions that have occurred cannot have the effect of validating in law the initial unlawful act (that is, the non-consensual secession of Kosovo from the Republic of Serbia). This is the critical point from the perspective of the question asked of the Court.

999. It is important to recognise the distinction for present purposes between the initial act and the question of subsequent events and the question asked of the Court focuses clearly upon the initial act itself. What is actually before the Court is the question whether "the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law?" and not the legality or otherwise of subsequent acts by third parties. Recognition, therefore, is only meaningful in terms of the question asked of the Court to the extent that it sheds light on the initial act of declaring independence. In this context, the relevant part of the principle of *ex injuria jus non oritur* is the third point which establishes, it is argued, that the illegality of the wrongful act cannot be validated or made legal by third party recognition. As such, the political or other consequences of the series of recognitions is not relevant.

1000. The Canadian Supreme Court in the *Quebec Secession* case addressed in detail and with great care the relevant issues for present purposes. It declared that:

[878] See also, e.g., *Wall*, p. 200, para. 159.

"Although recognition by other States is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be State in the international community depends, as a practical matter, upon recognition by other States. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a 'legal' right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession".[879]

1001. The Supreme Court continued:

"It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right".[880]

1002. The Supreme Court developed the argument as follows:

"Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.

[879] *Reference re Secession of Quebec* case, [1998] 2 S.C.R. 217, , para. 142.
[880] *Ibid.*, para. 144. Emphasis added.

> Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law".[881]

1003. Three essential points were made by the Canadian Supreme Court. First, that the domestic process is important and will have an influence upon international perceptions and conduct, at the least. In other words, the fact that a secession has been accomplished according to valid internal norms and is thus legitimate in constitutional terms is likely to constitute an important consideration in the recognition process and thus encourage recognition by third States as both politically and legally acceptable. Conversely and equally significantly, a secession achieved contrary to the relevant applicable law will face increased difficulties in the political recognition process as well as raising the issue of illegality. Adherence or not to constitutional processes must be therefore an important consideration in the methodology of recognition by third States, although this is essentially a different question from that of illegality before the Court.

1004. Secondly, the *Quebec Secession* case underlines that recognition by third States constitutes a process that affects viability and effectiveness on the international stage, but it cannot as such alter the legality or otherwise of the initial act of independence or secession. Recognition in international law concerns the conduct of international relations and not the modification of existing legal rules and juridical situations.

1005. Thirdly, the case emphasises that recognition cannot retroactively legitimate in law what is already an established illegality. Recognition does not, and cannot, reach back into the domestic legal system of an individual States in order to alter its legal norms and their application, nor can it retroactively re-classify the status of an illegal act either in domestic or in international law.

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[881] *Ibid.*, para. 155. Emphasis added.

II Kosovo: a varied mix of recognition and refusal to recognise

1006. As of 1 April 2009, there are 56 States that have recognised the independence of Kosovo. Or to put this another way, 136 Member-States of the United Nations have not recognised Kosovo. These States include Russia, China, India, Pakistan, Brazil, Argentina, South Africa, the vast majority of African and Asian States and most of the Latin American States. Not only is there no consistency of recognition, but those recognitions that have occurred have been concentrated in Europe. The recognition of Kosovo by minority of States can prove little on the international scene and most certainly cannot be used to demonstrate the acceptance of statehood for Kosovo as an international practice. It certainly cannot be argued that such a geographically unbalanced pattern of recognitions constitutes conduct capable of rectifying the unlawful declaration of independence as a matter of international law.

1007. Critically, such recognition of Kosovo has not included membership of the United Nations, which would constitute powerful evidence of existence of statehood. As Dugard has noted, the United Nations:

> "has for practical purposes become the collective arbiter of statehood through the process of admission and non-recognition".[882]

III Conclusion

1008. It can therefore be concluded that:

(i) Recognition as such is, as a matter of general international legal principle, not constitutive of statehood;

(ii) Recognition is essentially a political and discretionary act of a State with determinative effects only within its own domestic legal system and with regard to bilateral relations with the recognised State;

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[882] J. Dugard, *Recognition and the United Nations* (1987), p. 102.

(iii) Accordingly, recognition cannot determine the legal nature of the asserted independence of a purported State in any binding way in international law;

(iv) An illegal act cannot as a matter of general principle be creative of legal rights;

(v) Recognition as such cannot legitimate an illegal act nor may it re-characterise that unlawful act as legal;

(vi) As a matter of fact, the long list of States not recognising Kosovo and their global distribution undermines any thesis as to the legitimation of the legally flawed declaration of independence by the Provisional Institutions of Self-Government of Kosovo;

(vii) The fact that the United Nations has not accepted Kosovo as a Member adds to the range of international conduct demonstrating the unacceptability of the proposition that a new State has been validly created.

D. Contemporary International Law Does Not Remain "Neutral" with Regard to Illegal Secessionist Attempts

1009. Some writers have claimed that international law simply does not regulate secession, and consequently secession is neither permitted nor prohibited by international law.[883] This purported neutrality of international law may lead some to argue that the question asked by the General Assembly to the Court would not be able to be answered, or at least would be devoid of any practical consequence. Some may consider that the matter under discussion is a purely political one. This is not the case, as is demonstrated in this Written Statement.

1010. Indeed, the claim of international law's "neutrality" *vis-à-vis* secession is just the final attempt to find a legal justification for what is an illegal attempt to secede from a recognised State and United Nations Member. Such a claim is tantamount

[883] For example, Thomas Franck holds the view that "[post-colonial international law] appears not to take sides; rather, modestly it tries only to regulate and mitigate in a humanitarian fashion the more deleterious effects of rampant postmodern tribal secessionism", T. Franck, *Fairness in International Law* (1995), p. 159. For a critical analysis of this view, see Olivier Corten, "Le droit international est-il lacunaire sur la question de la sécession?" in M. G. Kohen (ed), *Secession. International Law Perspectives* (2006), pp. 231-254.

to asserting that international law does not apply to secessionist attempts; that the act under scrutiny is neither illegal nor legal.

1011. For the sake of completeness, the present section will deal with the doctrine of "neutrality", particularly taking into account the positions held by some States. Indeed, those States that support an "independent" Kosovo and that have recognised an "independent" Kosovo with unprecedented speed, have tried to avoid making a legal analysis of the UDI for the obvious reason of its non-accordance with international law. Consequently, the arguments of such States rest solely on political considerations.

1012. In this respect, the position of the United Kingdom may be cited when it considered the request for an Advisory Opinion from the Court to be "primarily for political rather than legal reasons."[884] Similarly, Ms. DiCarlo on behalf of the United States of America, stated that "[w]e do not think it appropriate or fair to the Court to ask it to opine on what is essentially a matter that is reserved to the judgment of Member States."[885] In a similar vein, Mr. McNee, on behalf of Canada, stated that "[i]t is our view, however, that the case raises highly political matters that are unsuitable for judicial review."[886]

1013. Even if "neutrality" is clearly not the position of the United Kingdom as evinced in a letter of 1 October 2008 distributed to the General Assembly in which the British Government affirmed that it does not have any doubt about the legality of the UDI,[887] the United Kingdom's government nevertheless seems to leave open the possibility of such an argument. It stated that "[m]any States emerged to independence in what at the time were controversial circumstances".[888] It is not clear to which cases the British Government is referring to. The fact is that since

[884] Statement by Sir John Sawers on behalf of the United Kingdom, UN Doc. A/63/PV.22 (8 October 2008), p. 2.
[885] Statement by Ms. DiCarlo on behalf of the United States of America, *ibid.*, p. 5.
[886] Statement by Mr. McNee on behalf of Canada, *ibid.*, p. 11.
[887] Letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly, UN Doc. A/63/461 (2 October 2008).
[888] Annex to the letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly, *ibid*, para. 8.

the existence of the United Nations, all new States have emerged under legal circumstances, either through decolonisation, a General Assembly resolution, the dissolution of the parent State, or with the consent of the parent State. Not a single case can be mentioned in which the creation of a State had another legal ground.

1014. Moreover, the British Government in the aforesaid letter refers to "the pragmatic reality of the circumstances" that would "warrant wider recognition" of Kosovo's independence.[889] This assertion seems to support the claim that the issue of Kosovo's independence must be dealt with "pragmatism", taking into account "reality". Law seems to be completely neglected.

1015. The previous chapters have demonstrated that international law is far from being "neutral". On the contrary, the international legal system clearly sets out rigorous requirements for secession, regarding it as illegal in most circumstances and recognising its legality in a few limited cases only. Those chapters have also demonstrated that the UDI is not in conformity with those requirements, and thus not in conformity with international law.

1016. The following sub-sections will first explain why the so-called "*Lotus* principle" (or "principe de liberté" in French), according to which "everything that is not prohibited is permitted" is not applicable to the case of the UDI. The second sub-section will then show that, on the contrary, the maxim *ex injuria jus non oritur* is plainly applicable to the issue at hand, and it follows from an application of this maxim that the creation of a new State cannot occur if this creation is not in accordance with international law.

I The "*Lotus* principle" ("principe de liberté") has no room in the case of Kosovo

1017. The maxim "anything that is not prohibited by law is deemed to be permitted" is often referred to as the "*Lotus* principle" since it was applied by the Permanent

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

Court of International Justice in the *Lotus* case between France and Turkey.[890] Those attempting to transplant this notion to the realm of secession contend that, since secession is not prohibited by international law, it should therefore be permitted. This thesis leads to two equally implausible conclusions: (a) either there is a right to secession, or (b) the matter is not covered by international law and consequently there would be, if not a right, at least a "privilege" to secede, i.e. a kind of authorisation to do so.[891] Quite apart from the controversial scope, and questions concerning the validity and the application of this principle in international law, it will be demonstrated here that there is no room to apply the *Lotus* principle to the case of Kosovo.

1018. At the outset, it can be stated that the *Lotus* judgment noted that "[r]estrictions upon the independence of States cannot be presumed".[892] As pointed out by Crawford, "[t]he Court was not at all concerned with the position of non-state entities, such as secessionist groups".[893] Thus, even if the *Lotus* principle applies within the scope depicted above, secession would not be covered by it.

1019. The previous chapters have abundantly demonstrated that rules of international law clearly apply to cases of secession, and that secession is consequently not exclusively determined by the "normative Kraft des Faktischen". On the contrary, international law plays an increasing role in prohibiting the creation of a State even where there appears to be an effective "State" in existence, when the creation and existence of this entity is contrary to applicable principles and rules.

1020. It is uncontroversial that some matters are not governed by international law. In these cases, States and other subjects of international law are at liberty to regulate their conduct as they think fit. However, this is just part of the overall picture. If the matter is not governed by international law, the international legal system may

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[890] *S.S. Lotus, Judgment of 7 September 1927, P.C.I.J., Series A, No.10.*

[891] See Thomas Franck, "Opinion Directed at Question 2 of the Reference" in Anne F. Bayefsky (ed), *Self-Determination in International Law. Quebec and Lessons Learned. Legal Opinions Selected and Introduced by Anne F. Bayefsky* (2000), pp. 77-79.

[892] *S.S. Lotus, Judgment of 7 September 1927, P.C.I.J., Series A No.10*, p.18.

[893] "Response to Experts Reports of the *Amicus Curiae*", in Anne F. Bayefsky (ed), *Self-Determination in International Law. Quebec and Lessons Learned. Legal Opinions Selected and Introduced by Anne F. Bayefsky* (2000), p. 162.

recognise that the matter is governed by domestic law. Examples are abundant. The determination of nationality and the internal mechanisms and competencies for the conclusion of treaties are just two examples.

1021. The fact that a matter is governed by domestic law does not mean that international law remains completely alien to the same matter. International law plays a role at two levels: *first*, by establishing a framework for domestic law (i.e. domestic regulations must respect international law) and *second*, by recognising that a matter can become international at a certain stage – and that is usually determined by international law. The case of secession also meets this categorisation. With the exceptions already mentioned,[894] international law considers secession to fall within the internal sphere of States. This is the reason why it is widely recognised, even by supporters of secession, that the central authorities have the right to use all means – whilst respecting applicable international rules, such as those related to human rights and humanitarian law applicable in internal conflicts – to avoid an attempt to secede. A number of examples may be cited.

1022. For instance, the United Kingdom recognised and supported the sovereignty and territorial integrity of the Russian Federation when the armed secessionist movement led by Mr. Dzhokhar Dudayev in the Russian province of Chechnya purported to unilaterally declare independence. The United Kingdom commented that "the exercise of the right [of self-determination] must also take into account... respect for the principle [of] territorial integrity of the unitary state. In the case of Chechnya…we have repeatedly called on the Russians to work for a political solution which would allow the Chechen people to express their identity within the framework of the Russian Federation,"[895]

1023. For its part, the European Council stated that

[894] See *supra* paras. 952 ff.

[895] 563 *HL Deb* Col. 476, 18 April 1995, reprinted in 66 *British Year Book of International Law* (1995), p. 621.

> "[t]he European Council does not question the right of Russia to preserve its territorial integrity nor its right to fight against terrorism. However the fight against terrorism cannot, under any circumstances, warrant the destruction of cities, nor that they be emptied of neither their inhabitants, nor that a whole population be considered as terrorist"[896]

1024. Similarly, the United States of America stated:

> "We support the sovereignty and territorial integrity of the Russian Federation…We oppose attempts to alter international boundaries by force, whether in the form of aggression by one state against another or in the form of armed secessionist movements such as the one led by Dzhokhar Dudayev. That is why we have said that we regard Chechnya as a matter which the Russian Government and the people of Chechnya will have to resolve together peacefully by political means"[897]

1025. Generally, the case of the independence of Kosovo is a matter governed by domestic law. At the same time, however, it is also governed by international law, due to the existence of an international regime established by Security Council resolution 1244 (1999). The Provisional Institutions of Self-Government are an international creation and are bound to respect the international legal framework upon which they were created and exercise their functions. This includes, as seen above, respect for the territorial integrity of Serbia.[898]

1026. The situation in the case of Kosovo may be distinguished from those matters that have been determined by the Court as not regulated by international law. The latter include, for instance – in the case of lack of any particular treaty-based obligation for the States concerned – the determination of the particular regime of

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[896] Helsinki European Council, 10 and 11 December 1999, Conclusions of the Presidency, Annex II, Declaration on Chechnya, para. 2. Available at: http://www.ena.lu/

[897] Deputy Secretary of State Talbott (1995) 6 *US Department of State Dispatch* 119, p. 120.

[898] See *supra* para. 728 ff.

a free zone, the way to terminate a diplomatic asylum not granted in conformity with international law, the question over who has preference to exercise functional or diplomatic protection in the case of an international civil servant having the nationality of a given State, and the level of armaments of a State.

1027. The Court held in the *Nicaragua* case, for example, that the extent to which the level of armaments of a State may be limited was not a matter regulated by international law, unless States accepted rules limiting their actions in the form of a treaty or otherwise. This is in contrast to the situation in Kosovo which is specifically governed by binding Security Council resolution 1244 (1999).

1028. In the *Case of the Free Zones of Upper Savoy and the District of Gex*, the Court declined to determine the regime governing the zones because according to its interpretation of the Special Agreement, the parties intended to reach an agreement between themselves on this point.[899]

1029. In the "new situation" faced by the Court in the *Reparations for Injury* case, the Court found that the United Nations had the capacity to bring international claims against both Member and non-Member States of the United Nations.[900] The question remained, however, whether the national State of the victim or the Organisation employing the victim had priority with regard to the exercise of either diplomatic or functional protection. The Court stated:

> "In such a case there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to

[899] *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), Judgment of 7 June 1932 P.C.I.J., Series A/B No. 46*, p. 152.

[900] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 185.

render 'every assistance' provided by Article 2, paragraph 5, of the Charter".[901]

1030. In the *Haya de la Torre* case, the Court found that the asylum must cease, even though the Government of Colombia was not under an obligation to surrender the individual to the Peruvian authorities. The Court left open the manner in which the situation should practically be resolved, stating that

> "[i]t is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum since, by doing do, it would depart from its judicial function. But it can be assumed that the Parties now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics."[902]

The Court thus left it to the two parties to reach an agreement on how to practically find a solution to the dispute.

1031. None of the situations the Court faced in the abovementioned four cases is present in the current advisory proceedings. In the case under the consideration of the Court, there are both principles of general international law and specific Security Council resolutions adopted under Chapter VII of the UN Charter that are applicable.

1032. The question set out by the General Assembly raises the matter of the legality or the illegality of a certain act. Here, the Court is plainly in a position to determine whether the UDI is or is not in accordance with Security Council resolution 1244(1999), with regard to the principle of respect for the territorial integrity of

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[901] *Ibid*, pp. 185-186.
[902] *Haya de la Torre Case (Colombia v. Peru), Judgment of June 13th 1951, I.C.J. Reports 1951*, p. 83.

States, equal rights and self-determination of peoples and any other rule deemed applicable.

II *Ex injuria jus non oritur*: a State cannot be created illegally

1033. Thus, not only does international law not remain "neutral" in the case of secession, it governs the issue and imposes as a condition for the existence of a new State the legality of its creation. In this regard, the maxim *ex injuria jus non oritur* is plainly applicable.

1034. The Court applied the principle *ex injuria jus non oritur* in the *Case concerning the Gabcikovo-Nagymaros Project*, when the Court affirmed the applicability of the 1977 treaty despite the fact that it had been violated by both parties. The Court stated in relation to the acts and omissions by the parties that

> "[t]his does not mean that facts - in this case facts which flow from wrongful conduct - determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct."[903]

1035. As Judge Elaraby affirmed in his Separate Opinion to the Court's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,

> "[t]he general principle that an illegal act cannot produce legal rights - *ex injuria jus non oritur* - is well recognized in international law."[904]

1036. The Canadian Supreme Court also applied this maxim, with regard to secession:

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[903] *Case concerning the Gabcikovo-Nagymaros Projec(Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 76, para. 133.

[904] *Wall*, Separate Opinion of Judge Elaraby, p. 254, para. 3.1.

> "It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state. Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected."[905]

1037. Further, an illegal act that purports to create a State in violation of international law cannot be made good by the assertion that a *de facto* situation has been created that alters the status of the territory in law. "State" refers to a subject of international law; it is not merely a term that is applied to facts on the ground. As discussed above, effectiveness must be accompanied by legality before a claim for statehood can be accepted as in accordance with international law.

1038. In sum, the application of international law leads to the finding that the UDI was not in accordance with international law, and it does not produce the effect attributed to it by its authors.

E. Conclusions

1039. The present chapter has shown that there is no additional legal argument that may be used to justify the validity of the UDI. In particular:

(i) Domestic law has not granted to the territory of Kosovo a right to secede.

(ii) Kosovo is not a territory that was placed under Serbian sovereignty subject to certain conditions or on the basis of an unlawful act, such as annexation.

(iii) The parent State and recognised legal sovereign has never consented to the secession of Kosovo, either before or after the UDI.

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[905] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 20 August 1998, paras. 107-108.

(iv) Effectiveness is not a ground for justifying the UDI, either at the time of the declaration or afterwards.

(v) In any case, the so-called "Republic of Kosovo" does not fulfil the material requirements of an independent State.

(vi) The illegality of the secession cannot be cured by recognition, which is, as a matter of general international legal principle, not constitutive of statehood.

(vii) Accordingly, recognition cannot determine the legal nature of the asserted independence of a purported State in any binding way in international law nor may recognition as such legitimate an illegal act or characterise that unlawful act as legal.

(viii) As a matter of fact, the long list of States not recognising Kosovo and their global distribution undermines any thesis as to the legitimation of the legally flawed declaration of independence by the Provisional Institutions of Self-Government of Kosovo.

(ix) International law does not remain "neutral" with respect of secession, but rather specifies that it is illegal unless certain particular conditions have been satisfied – such conditions clearly not being satisfied in the case of Kosovo.

(x) Accordingly, Kosovo is a clear case in which secession has no legal basis.

Chapter 11
CONCLUSIONS AND SUBMISSIONS

A. Conclusions

1040. For the reasons set out in this Written Statement, the Republic of Serbia respectfully concludes as follows:

(i) In accordance with Article 65 of the Statute, the Court is competent to give the advisory opinion requested by the General Assembly in the present case, because the request came from an organ duly authorized under Article 96, paragraph 1, of the United Nations Charter, and concerns a legal question.

(ii) There are no compelling reasons that would prevent the Court from giving its opinion.

(iii) Kosovo remains under the international legal regime established by the United Nations Security Council under Chapter VII of the United Nations Charter; only the Security Council can modify or terminate this international legal regime.

(iv) Security Council resolution 1244 (1999) forms the cornerstone of the international legal regime for Kosovo, which also includes decisions and regulations adopted by the Special Representative of the Secretary-General in Kosovo, in particular the Constitutional Framework which created the Provisional Institutions of Self-Government in Kosovo and regulated their competences.

(v) The principle of territorial integrity of States is one of the key elements of international law:

- Security Council practice shows that the obligation to respect territorial integrity extends beyond States and binds non-state actors in situations of non-consensual attempts to violate the territorial integrity of independent States;

- In addition, the Security Council resolutions that deal generally with the situation in the former Yugoslavia, and more specifically with Kosovo, demonstrate clearly the intention of the Security Council that the Kosovo Albanian leadership and community be bound by the principle of the territorial integrity of Serbia.
- In particular, the territorial integrity of the FRY/Serbia was reaffirmed in Security Council resolution 1244 (1999).

(vi) The UDI, by purporting to create an independent State on the territory of Serbia, violates the internationally confirmed territorial integrity of Serbia guaranteed by norms of international law.

(vii) The right to self-determination does not authorise non-consensual secession from an independent State.

(viii) In any case, Kosovo does not constitute a valid self-determination unit under international law, and the population of Kosovo do not constitute a "people" for the purposes of self-determination under international law.

(ix) The UDI constitutes an *ultra vires* act of the Assembly of Kosovo contrary to the international legal regime for Kosovo. In particular,

- by declaring Kosovo "to be an independent and sovereign state", the Assembly of Kosovo acted *ultra vires* and violated Security Council resolution 1244 (1999) and the Constitutional Framework which provide that the Assembly is a provisional institution of self-government which does not have the power to decide on the international legal status of the territory;
- by assuming constitutional powers, the Assembly acted *ultra vires* under the Constitutional Framework;
- by "inviting" international missions to Kosovo, by purporting to set Kosovo's "international borders", and by purporting to conduct international relations, undertake international obligations and seek membership in international organizations, the Assembly acted *ultra vires* under Security Council resolution 1244 (1999) and the Constitutional Framework.

(x) The UDI challenges the competences of the Security Council under the Charter of the United Nations generally, and in particular its powers under

Chapter VII thereof, by purporting to *unilaterally* terminate Kosovo's interim status created under Chapter VII and the mandate of the international presences under Security Council resolution 1244 (1999), thereby violating the said resolution and the Constitutional Framework which defines Kosovo as "an entity under interim international administration".

(xi) The UDI contravenes the paramount administrative authority in Kosovo set up by Security Council resolution 1244 (1999) and also encroaches upon the reserved powers of the Special Representative of the Secretary-General under the Constitutional Framework.

(xii) By unilaterally and illegally attempting to change the current interim legal status of Kosovo, the UDI violates procedural requirements for the conduct of negotiations set forth by Security Council resolution 1244 (1999); the UDI also violates substantive requirements for the conduct of negotiations and a final settlement stipulated in the resolution, specifically the territorial integrity and sovereignty of Serbia which are guaranteed by said resolution.

(xiii) None of the exceptional situations in which a "right to secession" might exist under general international law is applicable to Kosovo, since

- Kosovo has never had a right to secession either under domestic law of Serbia (which is the continuation of the FRY and the State Union of Serbia and Montenegro) or of the SFRY;
- Kosovo was not unlawfully annexed by Serbia, rather, on the contrary, its integration into Serbia has been internationally guaranteed since 1913;
- Serbia, as the parent State and the recognized legal sovereign, does not accept the secession of Kosovo which continues to form an integral part of its territory.

(xiv) The purported existence of an effective "government" in Kosovo (which is denied) is not sufficient for statehood. Further, the requirement of respecting the applicable rules of international law has not been met in the present case.

(xv) Contemporary international law is not "neutral" in cases of secession and requires, as a necessary condition for the existence of a new State, the legality of its creation.

(xvi) In any event, however, there is no effective independent government in Kosovo, which is still a territory under international administration: KFOR continues to provide security, while UNMIK continues to act in Kosovo jointly with the EU mission EULEX, which operates under the overall authority of the United Nations and in accordance with Security Council resolution 1244 (1999).

(xvii) The fact that Kosovo has been recognized by a number of States cannot overturn, rectify or legitimize in any way the illegality of the UDI under international law by virtue of the inherent characteristics of the principle of recognition in international law and in view of the maxim *ex injuria jus non oritur*. In any event, the fact that the international community as a whole cannot be said to have recognised Kosovo as an independent State, is demonstrated by the long list of States from all parts of the world that do not recognise Kosovo. This further undermines and contradicts any assertion of the alleged "legitimatisation" of the illegal UDI.

B. Submissions

1041. For the reasons set out in this Written Statement, it is therefore respectfully submitted that:

(i) The Court is competent to give the advisory opinion requested by the General Assembly in its resolution 63/3 of 8 October 2008, and that there are no compelling reasons that should lead the Court to decline to give its opinion;

(ii) The unilateral declaration of independence adopted by the Assembly of Kosovo on 17 February 2008 is not in accordance with international law.

Saša Obradović

Belgrade, 15 April 2009 — Head of the Legal Team of the Republic of Serbia

APPENDICES

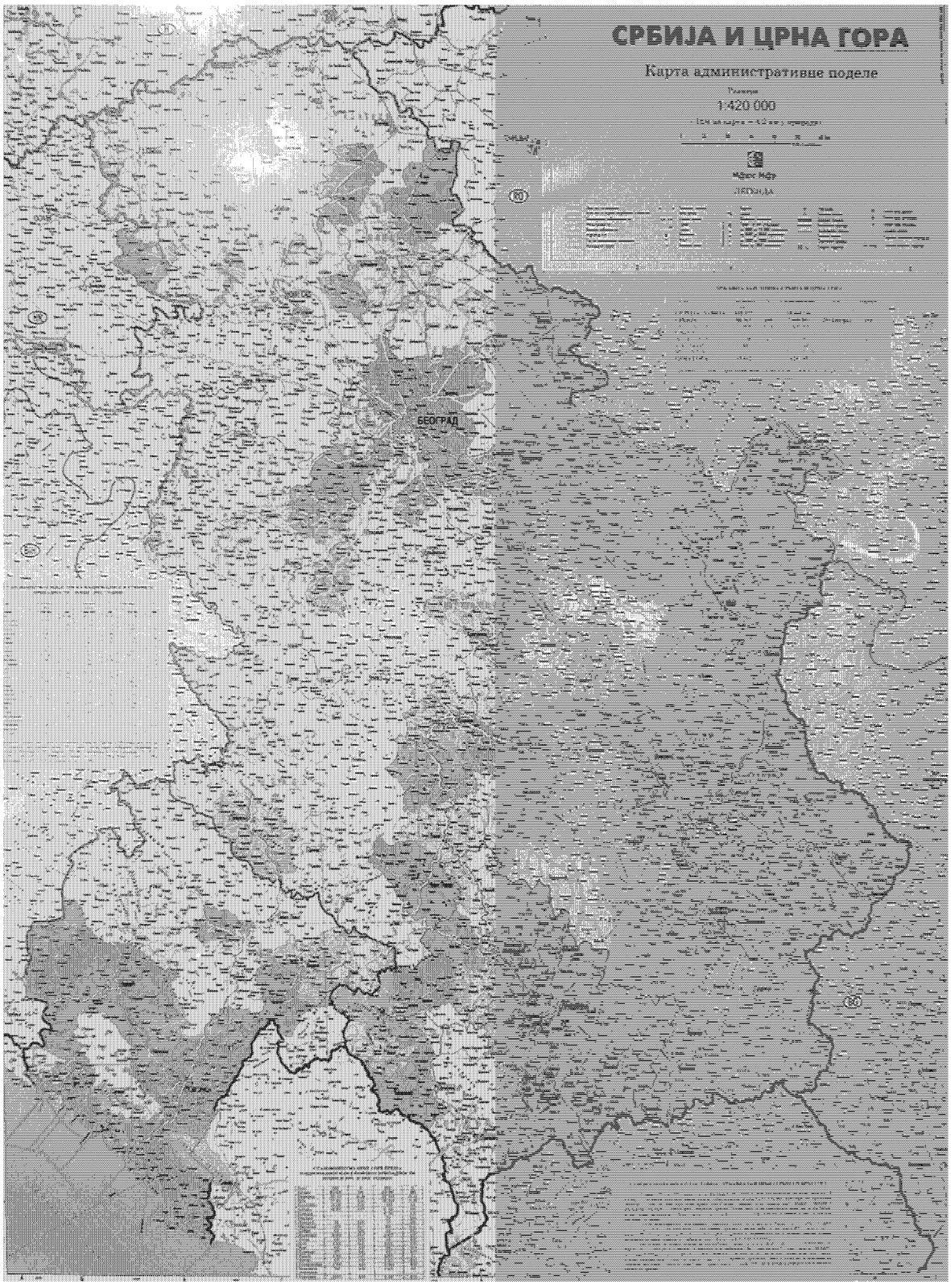
APPENDIX 1

SERBIA, *United Nations Department of Peacekeeping Operation, Cartographic Sector*

Map No. 4268 Rev. I UNITED NATIONS
April 2007

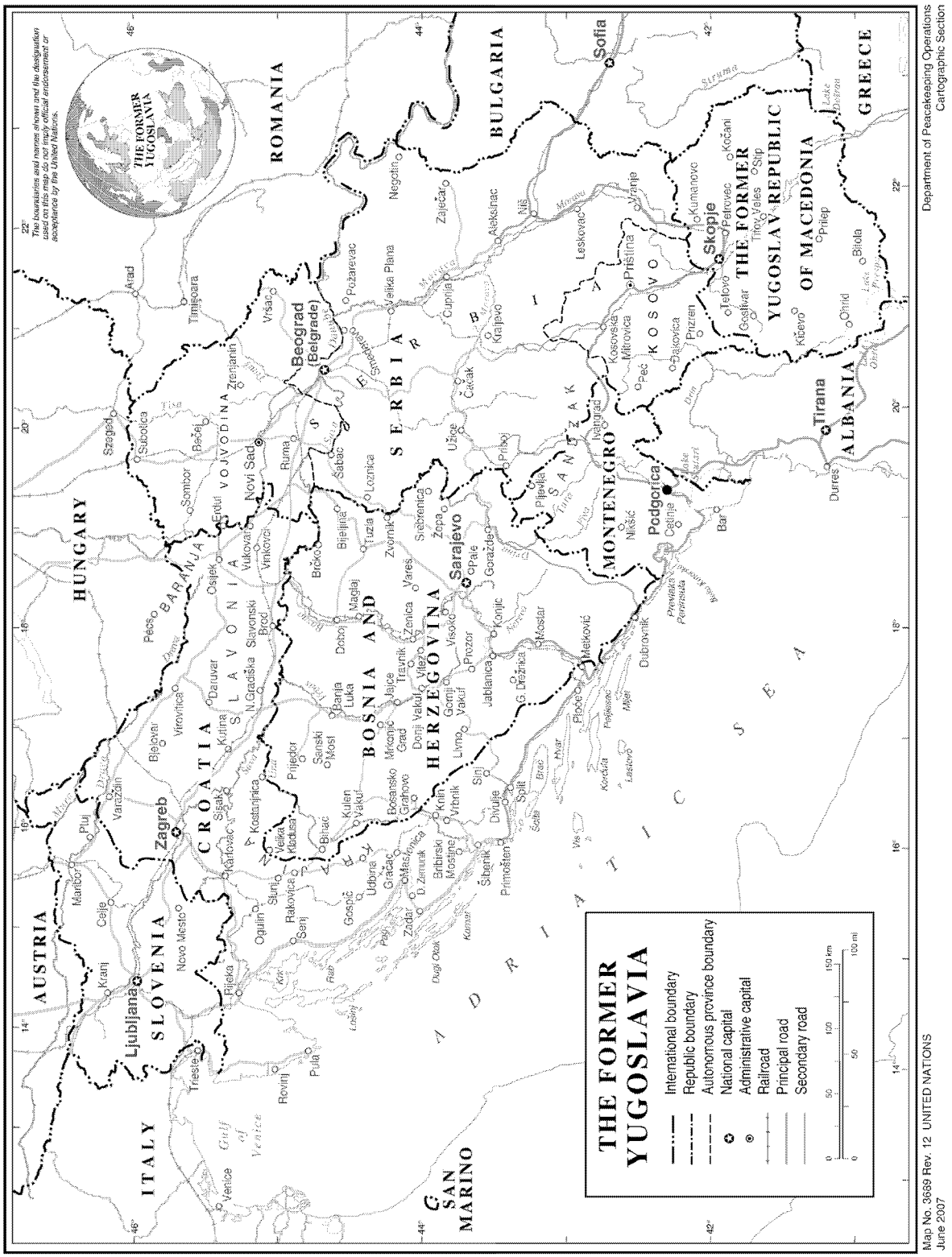
Department of Peacekeeping Operation
Cartographic Section

APPENDIX 2
SERBIA AND MONTENEGRO, MAP OF ADMINISTRATIVE DIVISION,
Magic Map, Smederevska Palanka



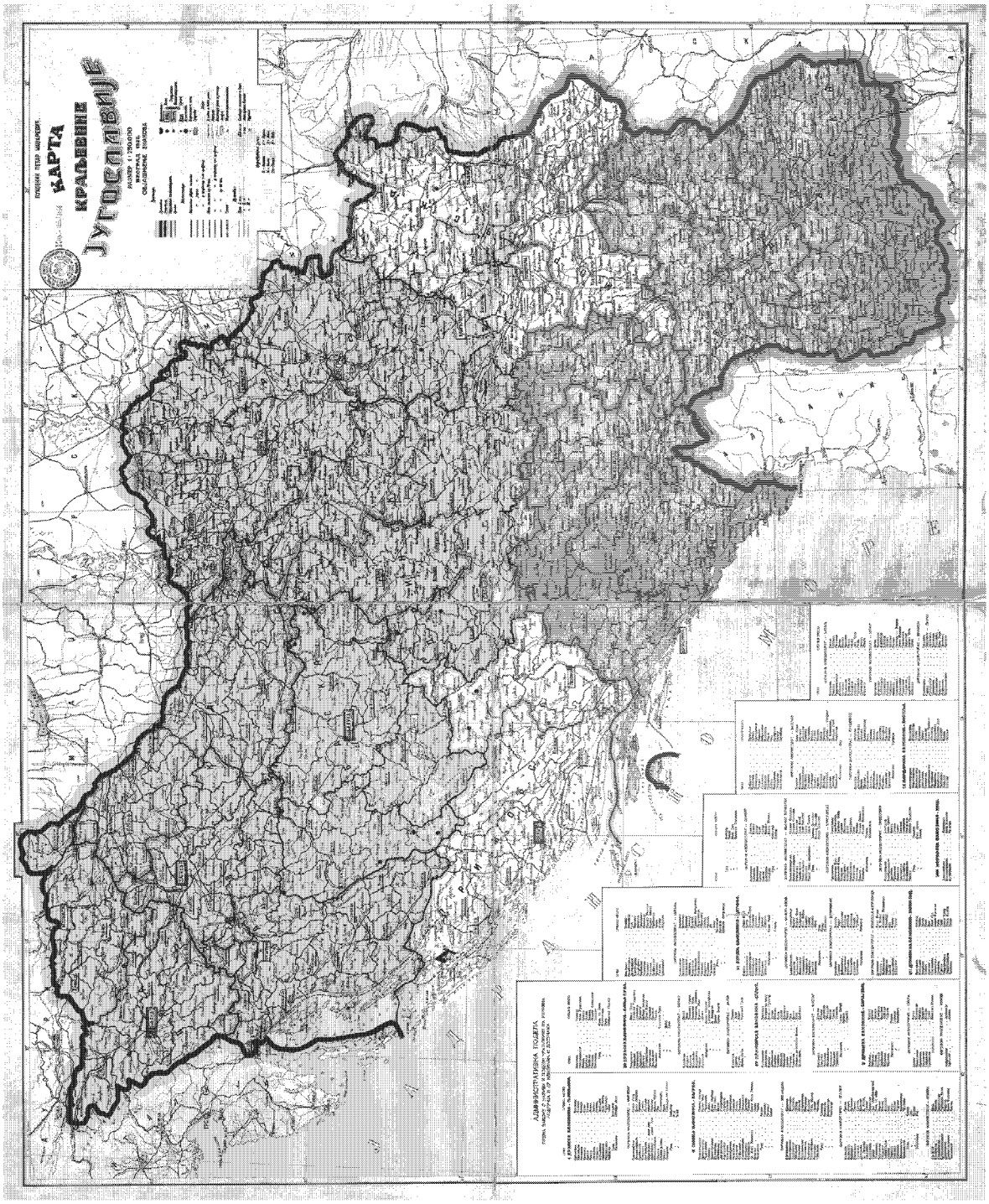
APPENDIX 3

THE FORMER YUGOSLAVIA, *United Nations Department of Peacekeeping Operation, Cartographic Sector*

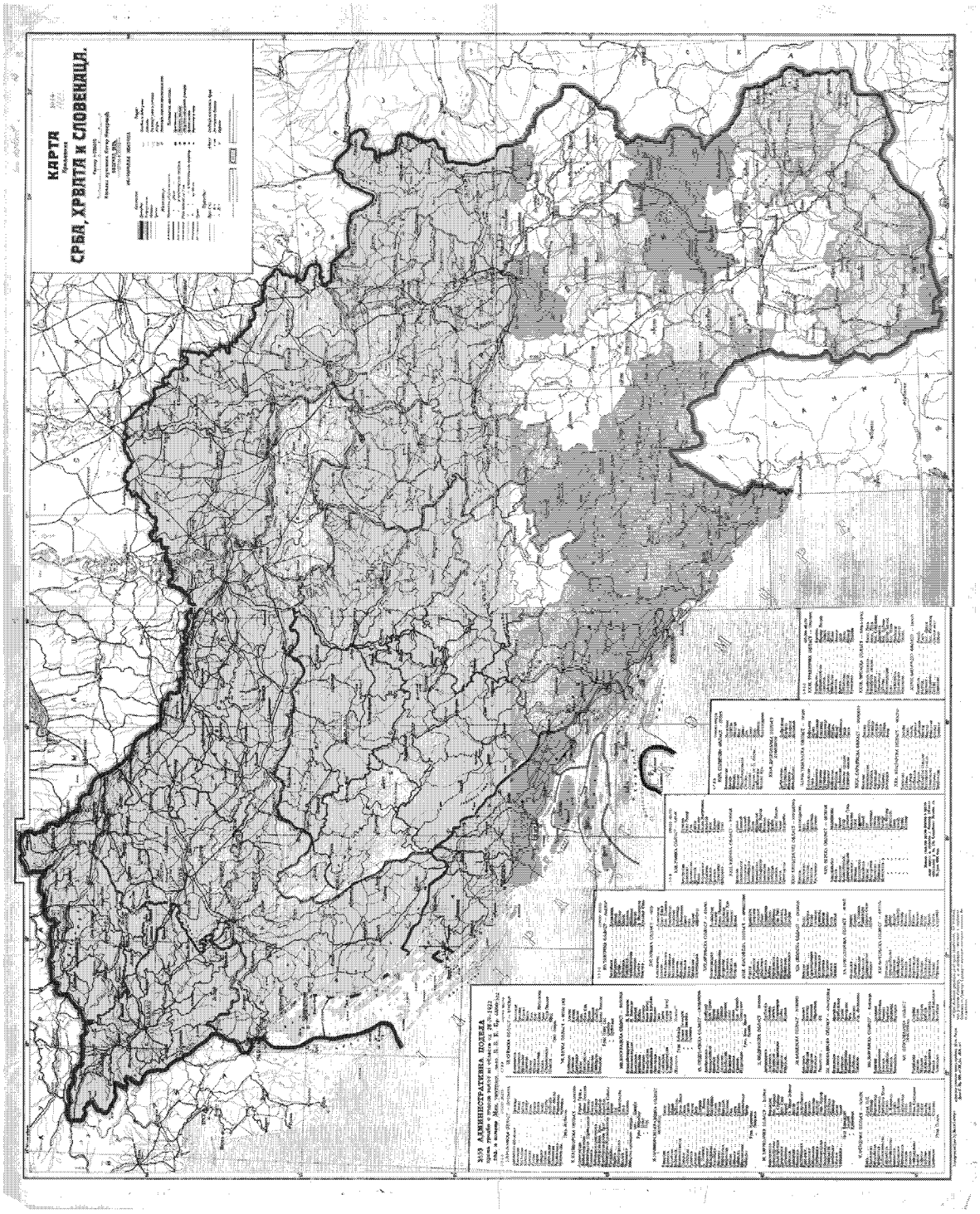


APPENDIX 4

THE KINGDOM OF YUGOSLAVIA - 1930, *Military Geographical Institute, Belgrade*



APPENDIX 5
THE KINGDOM OF THE SERBS, CROATS AND SLOVENES - 1924,
Military Geographical Institute, Belgrade



APPENDIX 6

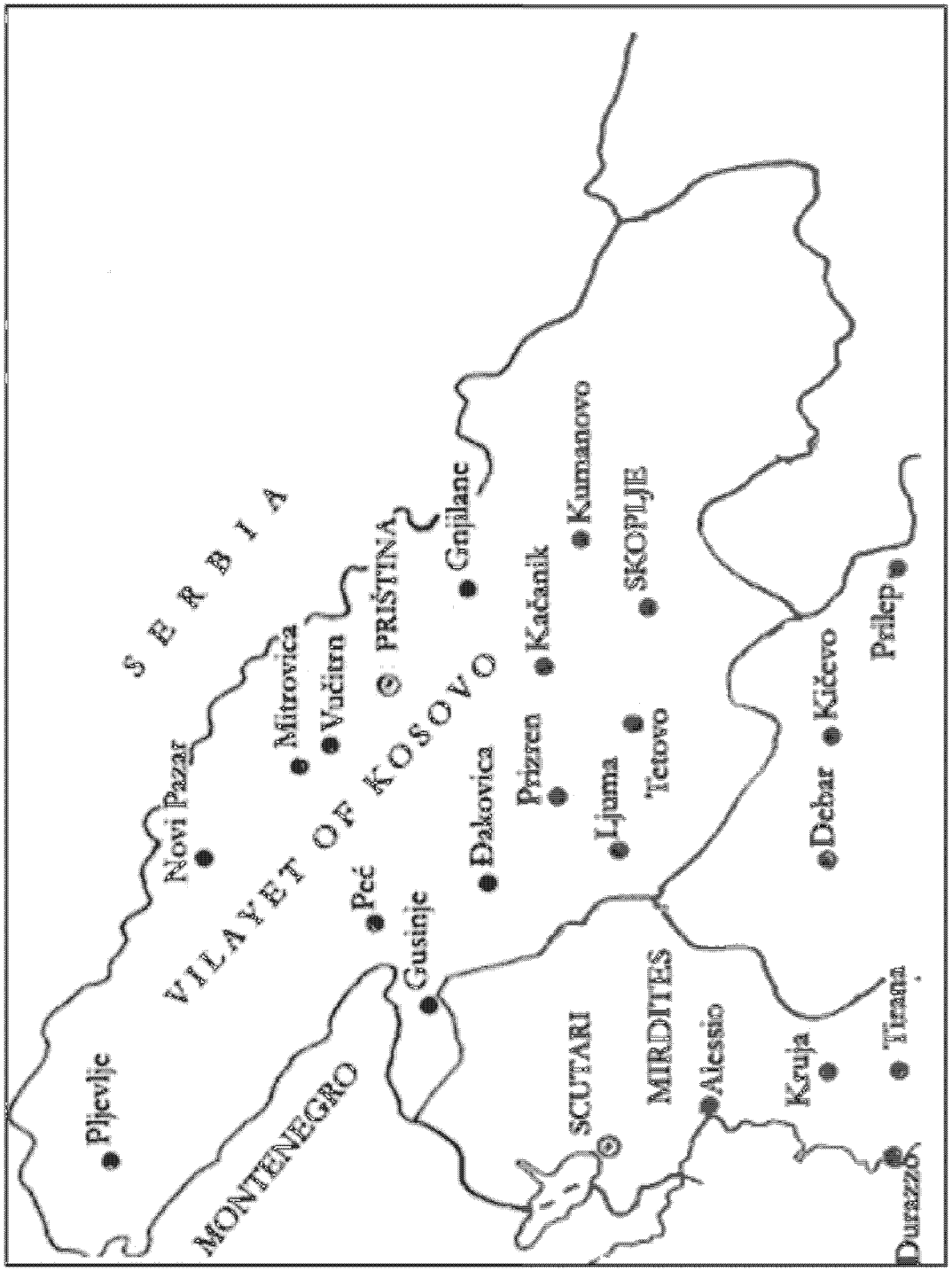
THE BALKANS IN 1914, *Charles Jelavich & Barbara Jelavich, "The Balkans", Englewood Cliffs, Prentice-Hall, Inc 1965*

FORMATION OF MODERN BALKAN STATES

THE BALKANS IN 1914

APPENDIX 7

THE VILAYET OF KOSOVO, 1877-1912, *Dušan T. Bataković, ''Kosovo and Metohija, Living in the Enclave'', Institute for Balkan Studies, Belgrade 2008*



The Vilayet of Kosovo, 1877–1912