

Madrid, 14 April 2009

**His Excellency  
Mr. Philippe Couvreur  
Registrar  
International Court of Justice  
Peace Palace  
2517 KJ The Hague  
The Netherlands**

Your Excellency,

In response to your letter of 20 October 2008, it is my honour to inform you that, following the Court's Order of 17 October 2008, the Government of Spain has decided to submit a written statement regarding the request from the United Nations General Assembly for an Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*.

In this respect, I am pleased to inform you that the Kingdom of Spain will be represented in these advisory proceedings by Professor Concepción Escobar Hernández, Legal Adviser of the Ministry of Foreign Affairs and Cooperation.

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



Miguel Ángel Moratinos Cuyaubé  
Minister of Foreign Affairs and Cooperation

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 ADVISORY OPINION)

WRITTEN STATEMENT OF THE KINGDOM OF SPAIN

April, 2009



GOBIERNO  
DE ESPAÑA

MINISTERIO  
DE ASUNTOS EXTERIORES  
Y DE COOPERACIÓN

## CONTENTS

	Page
I.— REQUEST FOR AN ADVISORY OPINION: GENERAL ISSUES.....	5
1.— Introduction.....	5
2.— The scope of the question.....	6
3.— The competence of the Court.....	7
II.— ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE: GENERAL APPROACH .....	9
III.— THE PRINCIPLE OF SOVEREIGNTY AND TERRITORIAL INTEGRITY OF STATES .....	14
1.— Sovereignty and territorial integrity of States under contemporary international law.....	14
1.1.— Legal recognition and scope of the principle.....	14
1.2.— The practice of the Security Council.....	19
2.— Sovereignty and territorial integrity in the case of Kosovo.....	24
2.1.— Sovereignty and territorial integrity in Security Council Resolution 1244 (1999) .....	24
2.2.— Sovereignty and territorial integrity in the «international presence under Resolution 1244(1999)» in Kosovo.....	27
2.2.1.— UNMIK.....	27
2.2.2.— NATO.....	31
2.2.3.— OSCE.....	32
2.2.4.— European Union.....	33
2.3.— Sovereignty and territorial integrity as regards the case of Kosovo in other international Organizations and bodies.....	36
IV.— THE PROVISIONAL SELF-GOVERNMENT REGIME OF KOSOVO.....	38
1.— Resolution 1244 (1999) as the framework and legal basis of interim international administration regime, including the provisional self- government regime of Kosovo.....	38
2.— Kosovo’s provisional self-government regime «within» Serbia.....	40
2.1.— The Provisional Institutions of Self-Government of Kosovo (PISG)..	40
2.1.1.— Nature.....	40
2.1.2.— Competences.....	42
2.2.— The international civil presence as a limit to the PISG’s competences.....	43

2.3.— The process of determining the future status of Kosovo as a limit to the interim international administration regime and to the PISG's competences.....	46
V.— THE PROCESS TO DETERMINE KOSOVO'S FUTURE STATUS: AN OPEN PROCESS.....	47
1.— Resolution 1244(1999) as the framework and legal basis for the process to determine Kosovo's future status.....	47
2.— Characteristics and conditions of the political process.....	49
3.— The role of the Security Council.....	52
4.— Validity of Resolution 1244(1999) and continuity of the process.....	53
VI.—CONCLUSIONS.....	55

## I. REQUEST FOR AN ADVISORY OPINION: GENERAL ISSUES

### 1. INTRODUCTION

1. On 8 October 2008, the General Assembly of the United Nations adopted Resolution 63/3, under which, pursuant to the stipulations of Article 96 of the UN Charter and in implementation of Article 65 of the Statute of the International Court of Justice (ICJ), it decided to ask the ICJ to issue an advisory opinion regarding the following question:

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

Resolution 63/3 was approved by 77 votes in favour, 6 against, and 74 abstentions. Spain voted in favour of the aforesaid Resolution, and submitted the following statement explaining its vote: *«[a]s is well known, the Spanish Government believes that the respect for international law is the fundamental principle governing the actions of States and international organizations, and in particular the United Nations, in the context of their international relations. Spain has therefore placed that fundamental principle at the core of all its actions in the international arena, while at the same time giving the United Nations an unparalleled leading role in that regard»*. Spain also highlighted the importance it attributes *«to the correct functioning of the principal organs of the Organization, including the General Assembly and the International Court of Justice, and to the interaction amongst those organs to promote the achievement of the purposes and principles of the United Nations, in accordance with the Charter»*, and concluded that *«in the general interest of the Organization and the international community as a whole, it would be advisable to provide the [General] Assembly with an authorized opinion of the main judicial body of the United Nations on the legal aspects of issues that, such as the present one regarding Kosovo, have been the object of diverse interpretations by Member States.»*<sup>1</sup>

2. On 17 October 2008, the ICJ issued the Order by which it decided that the United Nations and its Member States could furnish information to the Court regarding this advisory procedure. In this Order, it fixed 17 April 2009 as the time-limit within which written statements on the question may be submitted by those States that so desire.

On 20 October 2008, the Secretary of the Court, pursuant to Article 66.2 of the Statute of the ICJ, officially informed the Government of Spain of the aforesaid Order.

In response to this communiqué, the Government of Spain, moved by its deep commitment to international law and guided by its full confidence in the ICJ as the UN's

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<sup>1</sup> See A/63/PV.22, pp. 7-8. Statement by Ambassador Yañez-Barnuevo.

main judicial body, submits this written statement expressing its views on the legal issues contained in the request for an advisory opinion formulated by the General Assembly.

3. In its Order of 17 October 2008, the ICJ «*[d]ecides further that, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question; and decides therefore to invite them to make written contributions<sup>2</sup> to the Court within the above time-limits.*»

The Government of Spain does not consider it necessary to formulate any observation at this time regarding such an invitation or its accordance with the norms involved in an advisory procedure. However, it does want to point out that the aforesaid invitation does not introduce, nor may it introduce, any modification regarding the legal status of the Provisional Institutions of Self-Government of Kosovo, nor may it be interpreted in any way as a modification of Kosovo's legal status.

## 2. THE SCOPE OF THE QUESTION

4. The General Assembly has submitted a question to the ICJ written in simple, clear, and precise terms, and which sets forth the three relevant elements, to wit:

- i) The unilateral declaration of independence (UDI) of Kosovo;
- ii) The Provisional Institutions of Self-Government (PISG) of Kosovo which issued this declaration; and
- iii) The international law in light of which the UDI should be evaluated.

5. These three elements, which must be taken into consideration conjointly, define the scope of the consultation, which, in Spain's view, should be circumscribed to two basic aspects:

- i) The identification and interpretation of the applicable norms and principles of international law; and
- ii) The assessment of the UDI in light of the impact that it aims to produce and of the nature and scope of Kosovo's PISG, approaching both of these elements within the framework of the process of determining the future status of Kosovo that is being carried out pursuant to Security Council Resolution 1244 (1999).

6. A response to these two aspects of the question indicated above requires taking into account three basic criteria, to wit:

- i) The reference to *international law* must be understood in its widest sense, including both general rules and principles of international law and treaty provisions, resolutions, and other acts and regulations issued by international Organizations. Amongst these, Spain considers that pride of place should be given to those instruments embodying the principle of sovereignty and territorial integrity of the

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<sup>2</sup> Emphasis added.

State, in particular the Charter of the United Nations, Resolution 2625 (XXV) of the General Assembly, of 24 October 1970, and the Helsinki Final Act of 1 August 1975. Likewise, the advisory opinion should especially take into consideration Security Council Resolution 1244 (1999) of 10 June, which constitutes the basis of the international community's actions regarding Kosovo.

- ii) The applicable norms of international law should be analyzed in direct relation to the UDI made by the PISG of Kosovo. In consequence, the response to the General Assembly consultation should carefully consider the relevant practice concerning the situation in Kosovo, and in particular the practice regarding the establishment of an international presence and an interim international administration in this territory, the definition of a system of self-government for Kosovo, and the definition of a political process to determine the future status of Kosovo. Nevertheless, this examination cannot turn into an examination of the question of Kosovo as a very special case with regard to which there may be any *a priori*, and automatic, exclusion of the application of the norms and principles of general international law.
- iii) The question posed by the General Assembly refers solely to the compatibility of the UDI with international law, and makes no reference to any other act deriving, directly or indirectly, from such a declaration. This seems to have been the understanding of the Court itself in its Order of 17 October 2008, in which it was stated that «the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court». The central role attributed by the General Assembly in its question to the UDI made by Kosovo's Provisional Institutions determines the «critical date» that should be taken into consideration by the Court in responding to the question. This «critical date» must necessarily be 17 February 2008, which is when the PISG of Kosovo adopted the aforesaid declaration. Consequently, following the principles established by the ICJ itself in the Advisory Opinion on Western Sahara to define the time frame for the consultation<sup>3</sup>, Spain considers that acts and events, taking place on the basis of, or as a development of, the UDI itself, are not relevant for the purposes of this consultation.

### 3. THE COMPETENCE OF THE COURT

7. In accordance with the provisions of Article 96.1 of the UN Charter and of Article 65.1 of its Statute, «[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.» On this basis, the ICJ has continually reiterated that «the Court may give an advisory opinion on any legal question, abstract or otherwise.»<sup>4</sup>

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<sup>3</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports, 1975*, p. 38, para 76, 77, and 78.

<sup>4</sup> *Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, I.C.J. Reports, 2004*, p.154, para. 40. This Advisory Opinion merely reiterates its previous jurisprudence, which it cites literally: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 236, para. 15; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 54; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40).

The Court has defined the expression «legal question» on a case-by-case basis, but always in the sense of identifying as such a question that has «been framed in terms of law and raises problems of international law»<sup>5</sup>; that «is directed to the legal consequences arising from a given factual situation considering the *rules and principles of international law*»<sup>6</sup>; or, in more general terms, concerns a question that «is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law»<sup>7</sup>.

In view of this reiterated jurisprudence, and taking into account the scope of the question posed by the General Assembly in the aforesaid terms, there can be no doubt whatsoever that the Court is facing a legal question, with regard to which it is required to exercise an activity that fully corresponds to the nature of its advisory competence, and which the ICJ itself defined in the Advisory Opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*: «the Court only has to do what it has often done in the past, namely 'to identify the existing principles and rules, interpret them and apply them...', thus offering a reply to the question posed based on law' (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13)»<sup>8</sup>.

8. It could be alleged, nonetheless, that the issue in question incorporates elements of a clearly political nature. Although this is obvious, it is, however, not sufficient to invalidate the Court's competence. In this respect, Spain wishes to recall the unchanging case law of the Court, according to which the existence of political components within a legal question<sup>9</sup> does not affect the legal nature of the question, nor does it prevent the ICJ from exercising its advisory competence<sup>10</sup>.

In the case at hand, the question itself refers to the interpretation of relevant rules and principles under general international law, and also to the no less important rules governing the process to determine the future status of Kosovo, adopted by the UN Security Council or under its authority. The legal dimension of these two elements must not be underestimated, and warrants a statement by the main judicial body within the United Nations—all the more so when, within the Organization itself, the Member States, for different reasons and at different levels and degrees of intensity, have been maintaining positions that are clearly dissimilar concerning the aforesaid legal elements. In this sense, the following statement made by the Court itself is of some relevance: «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»<sup>11</sup>.

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<sup>5</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

<sup>6</sup> *Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, I.C.J. Reports, 2004*, 153, para. 37.

<sup>7</sup> *Ibidem*.

<sup>8</sup> *Ibidem*, p. 154, para. 38.

<sup>9</sup> Which, as the Court has observed, «as, in the nature of things, is the case with so many questions which arise in International life». *Application for Review of Judgement N° 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14.

<sup>10</sup> See, for all: *Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, I.C.J. Reports, 2004*, 155, para. 41.

<sup>11</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33.



9. Spain consequently considers that the ICJ is fully competent to issue an advisory opinion on the question posed by the General Assembly, and that there are no «compelling reasons» bearing on the case which should be taken into account by the Court for it to renounce the exercise of its competence on the basis of the discretionary power it is granted under Article 65.1 of its Statute, based on policy considerations or on the possible inutility of the opinion that might be given by the Court.

On the contrary, the arguments cited above may not be taken into consideration, in view of the Court's reiterated jurisprudence, in which the following principles have been established:

- i) «The Court (...) is mindful of the fact that its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused'»<sup>12</sup>;
- ii) The «advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action»<sup>13</sup>; and
- iii) «[T]he Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. 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»<sup>14</sup>.

In this respect, and reserving the right of the ICJ to decide whether or not to exercise its advisory competence, it should be recalled that the assessment of the necessity and usefulness of the Court giving an advisory opinion on the question contained in Resolution 63/3 has already been made by the General Assembly. Furthermore, and as Spain has observed in the explanation of its vote, «it will ultimately fall to [the] Assembly and the other bodies of the United Nations to draw the conclusions they deem appropriate concerning the advisory opinion that the International Court of Justice will pronounce at the proper moment»<sup>15</sup>

## **II. ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE: GENERAL APPROACH**

10. The question formulated by the General Assembly revolves around the «unilateral declaration of independence of Kosovo's Provisional Institutions of Self-Government». However, the reference that in Resolution 63/3 is made to this act cannot be understood adequately unless it is linked to the impact that the UDI aims to produce, to wit: the constitution of a new State out of a pre-existing sovereign State, without the latter's consent and via a unilateral act emanating from institutions that lack international legal status.

In sum, the UDI and the effect that its authors intend to derive from it have to be taken into consideration jointly, and constitute the mirror in which the International Court of Justice has to look in order to answer the question formulated by the General Assembly.

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<sup>12</sup> *Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, I.C.J. Reports, 2004*, 156, para. 44. See also the comprehensive references to other advisory opinions, in the same paragraph.

<sup>13</sup> *Ibidem*, p. 162, para. 60, and also the jurisprudence cited in this paragraph.

<sup>14</sup> *Ibidem*, p. 163, para. 62. See also para. 61.

<sup>15</sup> See A/63/PV.22, pp. 8.

The answer is neither simple nor clear, but regarding the same it is the view of Spain that the negative conclusion, i.e. the Kosovo UDI's non-accordance with international law, admits no doubt whatsoever.

11. In abstract terms, the response to the question that is the subject of the present advisory procedure must address, at least, three different, although complementary, levels, to wit:

- i) the constitutional level;
- ii) that of general international law, including, especially, its basic principles; and
- iii) that of the eventual concurrence of a special legal regime applicable to the case in question.

Only if it is possible to find a legal basis for a UDI on one of these levels, can we conclude that it is indeed in accordance with the international law in force. To do so, we should answer the following questions:

- i) Does the Constitution of the State affected by the UDI permit one or more of its territories to split away or secede?
- ii) Are there rules or principles of international law upon which may be validly based a UDI that may be opposable *per se* to the State affected by it?
- iii) Is it possible that the UDI may be based on some *ad hoc* legal system that would make it possible, in a specific case, to exclude the application of the rules and principles of international law that are generally applicable?

12. The first of the questions formulated could seem unnecessary, since the General Assembly, needless to say, only refers to international law as a standard of reference to the UDI. However, examining the constitutional hypothesis, although only in this section, is not without interest, since if the Constitution of Serbia (or formerly, of the Federal Republic of Yugoslavia or of Serbia and Montenegro) recognized a right of secession of the provinces of Serbia that could be claimed by Kosovo, it is evident that international law would have nothing to object to such a manifestation of sovereignty, reflected in the Constitution itself, which would permit the exercise of a kind of «constitutional right of secession». Therefore, in this event, a UDI of Kosovo would be compatible, although indirectly, with international law, because it would not conflict with the sovereignty and territorial integrity of Serbia.

Such an approach to the question is not, moreover, too far from the real situation, especially if the Montenegro independence process is taken into account; it was justified precisely by this constitutional formula, without formal opposition from Serbia, and with the general acceptance of the international community<sup>16</sup>.

However, this formula does not give an answer to the case of Kosovo, since neither the Constitution of the Federal Republic of Yugoslavia of 1990<sup>17</sup>, nor its reform in 2003

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<sup>16</sup> The Constitutional Charter approved on 4 February 2003, restructured the Federal Republic of Yugoslavia, adopting the name of *Serbia and Montenegro*, and recognized the right of Montenegro to secede, from three years after the reform's entry into force. The independence of Montenegro was proclaimed by its Parliament on 3 June 2006, after the referendum of 21 May 2006, in accordance with the constitutional reform of 2003. The independence of Montenegro became official on 5 June, and the new State was recognized by Serbia on 15 June of the same year.

<sup>17</sup> See, especially, Article 6 of the Constitution of the Federal Republic of Yugoslavia, which only refers to the «Autonomous Province of Kosovo and Metohija» as a «form of territorial autonomy».

constituting the State of Serbia and Montenegro<sup>18</sup>, nor the Constitution of Serbia of 2006<sup>19</sup>, adopted after the independence of Montenegro, considers Kosovo as more than a Serbian province that has its own autonomous government, which is recognized by the Constitution itself.

13. Since it is not possible to find an answer on the constitutional level, the search for an answer should focus, first, on the rules and principles of international law relevant to this case.

Taking into account the nature of the UDI, and its intended effects, it seems obvious that the legal standards of reference should be found in the rules that regulate the sovereignty and territorial integrity of the State, especially in the form of the *principle of the sovereign equality of States*, solemnly proclaimed in the Charter of the United Nations, in Resolution 2625 (XXV) of the General Assembly and reaffirmed in a large number of international instruments with a general scope, especially the Helsinki Final Act. Undoubtedly, this is a basic principle of contemporary international law, which constitutes one of the basic tenets of the existing politico-legal system and which contributes decisively to guaranteeing peace and security in international relations.

Logically, the central role of this principle has been projected on the case of Kosovo, in such a way that, as we shall have the opportunity to see below, its safeguard constitutes a constant feature in the different actions carried out by the international community in its response to the crisis which, since the 1990s, has been unfolding in this Serbian province. Especially, it cannot be forgotten that the Security Council itself has reiterated the references to respect for the sovereignty and territorial integrity of Serbia and of the other States in the region in the statements that it has issued all along the prolonged and reiterated treatment that it has been giving to the situation in Kosovo.

14. It is no less true that the application of this principle to Serbia (formerly the Federal Republic of Yugoslavia and Serbia and Montenegro) has been altered by the actions of the Security Council itself which, within the framework of Chapter VII of the Charter, decided to establish an International Administration in Kosovo stemming from Resolution 1244(1999) and based on the same.

In fact, the suspension by President Milosevic of the statute of autonomy of the Kosovo province in 1989 threw this territory into a severe situation of instability as a result of the parallel measures that had a special impact on the Albano-Kosovar population. The events that occurred thereafter, including the serious attacks against the Albano-Kosovar minority

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<sup>18</sup> As indicated *supra*, said constitution does recognize a system of *constitutional secession*, but only with regard to Montenegro.

<sup>19</sup> See, especially, article 181 and 182 of the Constitution of 2006, which have to be read together. According to Article 182, Kosovo is nothing but an autonomous province, which «[t]he substantial autonomy [of the Autonomous province of Kosovo and Metohija] shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution». To which should be added, due to its significance, the following declaration contained in the Preamble of the Constitution: «(...) the Province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interest of Serbia in Kosovo and Metohija in all internal and foreign political relations.»

led by the authorities and the army of the Federal Republic of Yugoslavia, as well as those referring to the declaration of independence of 1991 and the creation of the Kosovo Liberation Army (UÇK), generated a spiral of confrontation and violence that ended in an internal armed conflict which could be considered a threat to international peace and security. The reaction of the international community, including the use of force on the part of a group of States, requires no further reminder or pronouncement here. However, it is necessary to pay attention to the fact that the response of the Security Council to this serious violation of international law, including the serious violations of human rights, international humanitarian law, and the rights of minorities, was none other than the establishment of an international administration in Kosovo, with a multi-faceted mandate and objectives.

This international administration system noticeably limited the sovereign competence that the authorities of the former Federal Republic of Yugoslavia (now Serbia) can exercise over Kosovan territory; even replacing those authorities with a complex institutional system, at the top of which is the *international civilian and security presence* constituted for that purpose. Meanwhile the creation is being promoted of a provisional system of self-government, at the centre of which we find the *Provisional Institutions of Self-Government of Kosovo*, which carry out their functions of self-government under the supervision and control of the international community, through what is known as the *international civilian presence*, led by the United Nations Mission in Kosovo (UNMIK).

In any case, this is a interim international administration, including a provisional self-government regime established by mandate and under the supervision of the Security Council of the United Nations, in response to the severe disruption of international peace and security that had been occurring in Kosovo, and therefore, within the framework of Chapter VII of the Charter. This puts the Security Council in a central position, and one of its consequences is that the basic decisions which the Council has adopted to this end (*cf.* especially Resolution 1244 and thereafter) become the relevant legal instruments to assess the extent to which the Kosovo UDI is in accordance with international law from the standpoint of the third perspective indicated above, to wit: the possible existence of an *ad hoc* legal system applicable to the Kosovo situation which would eventually make it possible to exclude the application of the rules and principles of international law generally applicable.

15. Nevertheless, even from this standpoint, the obligation to respect Serbia's sovereignty and integrity, as regards the situation of Kosovo, admits no exception. On the contrary, although the exercise of Serbia's sovereign powers is indeed extremely limited, it remains true that its sovereignty and territorial integrity must be maintained; as observed below, this constitutes a precondition for establishing a regime of international administration and for the PISG. This requirement, explicitly contained in Resolution 1244 (1999), has been maintained constantly in the international community's action in Kosovo, being present not only in formal established procedures but also, and more importantly, in the activities carried out by UNMIK and the other elements constituting the international presence in Kosovo, endorsed by the Security Council.

Consequently, even from this perspective the initial view must be that the UDI declared by the PISG is contrary to international law, since the effect intended thereby (namely, the establishment of an independent State in Kosovo) clearly contradicts the recognition of Serbia's sovereignty and territorial integrity, to which the Security Council and other international bodies make repeated reference.

16. Nevertheless, it is true that the Security Council itself, within the framework of Chapter VII of the UN Charter, has granted or has endorsed the granting of a wide spectrum of competences to the PISG. It has done so with two clearly defined purposes: firstly, to allow the self-governing institutions to enable the peaceful co-existence in Kosovo of all the communities that have traditionally lived there. And, secondly, to favour the process of institutionalisation of the self-government of this Serbian province, so that negotiation may begin between the interested parties in order to determine the future status of Kosovo and thus put an end to the present conflict in this territory, which undoubtedly presents the potential to destabilise the region and endanger international peace and security in the Western Balkans.

Let us now consider the final dimension, namely the objective sought; this must be analysed in order to answer the question posed by the General Assembly. Spain recalls that in this respect, too, the paradigm of the legality or otherwise of UDI, under international law, consists of the rules and principles referred to above and, most especially, UN Security Council Resolution 1244 (1999) and its subsequent development.

17. In this sense, it is unarguable that the Kosovo PISG constitute «institutions» or «authorities» that operate in a Serbian province, endorsed by the international community and the Security Council, in order to enable the broadest possible system of self-government for Kosovo. The competences bestowed upon them under Resolution 1244 (1999) are reflected, essentially, in a wide spectrum of regulations approved by UNMIK, together with the «Constitutional Framework» for Kosovo. This set of regulations makes it clear that these competences are to be deployed exclusively within the internal sphere; note that, while extremely broad, they correspond, in general terms, to those granted to self-governing authorities, institutions or bodies at a non-national level in States having a complex structure. Moreover, such competences are to be exercised under UNMIK's control, supervision and ultimate decision-taking role.

In contrast, it must be noted that the PISG lack competences in the international sphere reflecting a presumptive legal capacity under international law or that possess any, albeit incipient, international status. This absence of competences to carry out the activities pertaining to a sovereign State (i.e., maintaining international relations) has been highlighted on many occasions by UNMIK and other international agencies.

Consequently, not even from the bestowal of competences upon the PISG can it be concluded that the international community and, particularly, the Security Council, sought to exclude the principle of respect for Serbia's sovereignty and territorial integrity in relation to Kosovo. This is based upon two fundamental reasons:

- i) The competences granted to the PISG are internal powers, with no international projection whatsoever; and
- ii) These competences are exercised by the PISG within the framework of the regime of international administration and of self-government defined under Resolution 1244 (1999). This means that such powers are exercised *within* Serbia and *in* Serbia, the only legal person under international law that is defined as the framework of reference in the aforesaid Resolution and in the entire system derived from it.

18. Nevertheless, and despite their being set up clearly and exclusively as internal (domestic) institutions or authorities, the Security Council has recognized that the PISG are

undeniably entitled to participate in the process through which the future status of Kosovo is to be finally decided. Thus, the question remains as to whether this confers upon them any power or specific attribution that should be borne in mind when the compliance or otherwise of the UDI with international law is determined.

The answer to this question must be that it does not, in view of the nature and structure of the process regulated under Resolution 1244 (1999), which is based on negotiation between the interested parties and the need to reach a mutually acceptable settlement; this requires an agreement to be reached, regardless of its shape or form, and excludes any unilateral solution, regardless of which party adopts it. Consequently, the entitlement of the PISG to participate in the process cannot extend to their being recognized the power to conclude it unilaterally and, thus, is also insufficient to exclude the application, in the case of Kosovo, of the principle that Serbia's sovereignty and territorial integrity must be respected.

19. Thus, not even given the existence of an *ad hoc* legal regime applicable to Kosovo can it be concluded that such a regime allows this specific case to be exempt from general rules and principles and, therefore, that the UDI complies with international law. On the contrary, the aforesaid special regime, in this context, merely establishes a process whereby, via negotiations between the interested parties, a mutually acceptable settlement on Kosovo's future status may be reached. Until such a solution is achieved, the *ad hoc* political regime established under Resolution 1244 (1999) for Kosovo only provides legal cover to the maintenance of a interim regime of international administration and a provisional system of self-government for Kosovo within Serbia. Thus, the sovereignty and territorial integrity of the latter State remain untouched.

Finally, it must be added to the previous considerations that the process described, initiated under the mandate and supervision of the Security Council, cannot be modified or altered unilaterally by any of the parties without the prior acceptance of the Security Council. Thus, from this standpoint, too, compliance of UDI with international law is questionable, insofar that a unilateral conclusion of the process by which the future status of Kosovo is defined contradicts the decisions adopted by the Security Council and, in this context, challenges the Council's role as the body to which the international community entrusts «primary responsibility for the maintenance of international peace and security»<sup>20</sup>.

### **III. THE PRINCIPLE OF SOVEREIGNTY AND THE TERRITORIAL INTEGRITY OF STATES**

#### **1. SOVEREIGNTY AND TERRITORIAL INTEGRITY OF STATES UNDER CONTEMPORARY INTERNATIONAL LAW**

##### *1.1. Legal recognition and scope of the principle*

20. As observed above, respect for the sovereignty and territorial integrity of Serbia and of the other States in the region is a fundamental aspect of Resolution 1244 (1999), which constitutes the basis for the actions of the Security Council with regard to the situation in Kosovo.

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<sup>20</sup> See Art. 24.1 of the UN Charter.

However, the UDI issued by the Kosovo PISG seeks to produce an effect that has negative consequences for the sovereignty and territorial integrity of Serbia and of the other States in the region. Therefore, it is appropriate to analyze, firstly, how these two elements are addressed under general international law and to identify within this framework, the legal status of the principle or principles<sup>21</sup> on which they are based.

There is no doubt that this exercise is of considerable importance and utility, as it involves no less than the UN Charter 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*, approved under Resolution 2625(XXV) of the General Assembly, of 24 October 1970, which in Section 3 of its general provisions formally proclaims that «[t]he principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles».

21. Although the UN Charter does not explicitly mention a «principle of sovereignty and territorial integrity of the State», it does proclaim in Art. 2.1 that «[t]he Organization is based on the principle of the sovereign equality of all its Members», the content of which necessarily includes respect for sovereignty and territorial integrity of States. Moreover, the principle generally termed «sovereign equality of States» can usually be expressed, in essence, as the principle defending sovereignty and territorial integrity of States.

22. The *Declaration* annexed to Resolution 2625 (XXV) provides further evidence of the importance attached under contemporary international law to respect for the sovereignty and territorial integrity of the State. In this respect, suffice it to note that this Resolution makes explicit mention of these two elements on the four occasions described below:

- i) In the Preamble to the Declaration, in which the General Assembly reaffirms «in accordance with the Charter, the basic importance of sovereign equality», it recalls «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» and states its conviction 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».
- ii) On setting out the *principle of the sovereign equality of States*, the substantive content of which is developed in the following terms:

«All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

  - a) States are juridically equal;
  - b) Each State enjoys the rights inherent in full sovereignty;

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<sup>21</sup> The principles are, according to the Court, «the rules of international law by which the application of principles may be justified by their more general and more fundamental nature»: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, ICJ, Rec. 1984, para. 79.

- c) Each State has the duty to respect the personality of other States;
  - d) The territorial integrity and political independence of the State are inviolable; (...).»
- iii) On setting out the *principle prohibiting resort to the threat or the use of force*, which is expressly stated as: «Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State.»
  - iv) On setting out the *principle of equal rights and self-determination of peoples*, in relation to which Resolution 2625(XXV) expressly warns: «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.» This is accompanied by a safeguard clause, according to which, «[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.»

Finally, in addition to these explicit references, there is the implicit one concerning sovereignty and territorial integrity that is contained in Resolution 2625 (XXV) in the enunciation of the *principle of non-intervention*, as follows: «No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.»

23. The importance of these reiterated references in the Declaration to the sovereignty and territorial integrity of States is highlighted by the fact that the principles set out in Resolution 2625 (XXV) express legal principles and essential organizational rules which, because of their references to customary law, play a central role in the international legal order, constituting not only the general regulatory structure for contemporary international law but, indeed, their main identifying feature.

Furthermore, the essential value ascribed to sovereignty and territorial integrity in the Declaration is underscored by the fact that these elements are transmitted in a cross-cutting manner within the basic principles contained in this document. And, as set out in Resolution 2625 (XXV), all the principles set out in the Declaration «are interrelated and each principle should be construed in the context of the other principles»<sup>22</sup>.

24. In this sense, the explicit recognition of sovereignty and territorial integrity acquires particular significance when it is related to equal rights and the right of self-determination of peoples; this is a profoundly innovative principle, one that has been the object of major progressive development by Resolution 2625 (XXV); nevertheless, this Resolution expressly declares and guarantees both elements. The importance and essential content of this

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<sup>22</sup> It should be borne in mind, moreover, that the ICJ itself has concluded that the principles of sovereign equality, the prohibition of the threat or the use of force, and that of non-intervention all overlap, to some degree, and should be interpreted concurrently. In this sense, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, judgement of 27 June 1986: ICJ, *Rec. 1986*, para. 202 et seq.; 212 et seq., and 242.



expression are in no way diminished by the mere fact that respect for sovereignty and territorial integrity are accompanied, in this paragraph in the Declaration, by a reference to «(...) 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.»

In fact, upon analysis of the above clause, in view of the «*travaux préparatoires*» carried out regarding Resolution 2625 (XXV) and of the contextual interpretation to be made of the latter in relation to the other provisions within the *Declaration*, including those concerning the specific principle referred to, it cannot be concluded that respect for sovereignty and territorial integrity of States is subservient to the exercise of an alleged right to self-determination exercised via a unilateral act, and which is of great significance as regards the existence of personality under international law.

The above considerations are further bolstered by the doctrine on the scope of the right of peoples to self-determination, which has been established by various Committees entrusted with the protection of human rights within the United Nations system, and in particular, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. This doctrine can be summarised as follows:

- i) «The right [to self-determination] and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law»<sup>23</sup> and should be viewed in relation to the other international instruments concerning the self-determination of peoples, and especially the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*<sup>24</sup>.
- ii) The right to self-determination presents a twofold dimension: external and internal<sup>25</sup>.

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<sup>23</sup> Human Rights Committee: *General Comment No. 12: Article 1 (Right to self-determination)*, para. 2, *in fine*, 1984. See also para. 6, *in fine*.

<sup>24</sup> *Ibidem*, para. 2. See in the same sense *General Recommendation XXI on the right to self-determination*, approved in 1996 by the Committee on the Elimination of Racial Discrimination, which continually refers to the UN Charter and to Resolution 2625 (XXV): see para. 2, 3 and 6.

<sup>25</sup> See, particularly, *General Recommendation XXI of the Committee on the Elimination of Racial Discrimination*, para. 4, which states: «In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right to every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by prohibition to subject peoples to alien subjugation, domination and exploitation». It is in a sense related to the internal aspect of the concept of self-determination that one should view the reference made by the Human Rights Committee in para. 4 of its General Comment No. 12, according to which States, when they inform the Committee of the application of Art. 1.2 of the Pact «should describe the constitutional and political processes which in practice allow the exercise of this right». See also para. 6 of the *General Comment*.

iii) «[I]nternational law has not recognized a general right of peoples unilaterally to declare secession from a State»<sup>26</sup>.

Finally, one should also consider, in view of its relevance to the issue in question, the opinion given by the *Badinter Committee*, which, in relation to the right to self-determination of Serbian minorities of the several Republics federated within the former Yugoslavia, declared, «[t]he Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of the independence, except where the states concerned agree otherwise»<sup>27</sup>.

25. To sum up, there can be no doubt that respect for the sovereignty and territorial integrity of States is inscribed in the essential, non-derogable core of the basic principles of international law as set out in the United Nations Charter and in Resolution 2625 (XXV).

Moreover, Resolution 2625 (XXV) is not the sole standard of reference; on the contrary, it forms part of the consolidated practice of the United Nations, and one that is very coherent with its content. For example, suffice it to recall the General Assembly Resolutions cited in its Preamble and previous ones such as Resolution 2131 (XX)<sup>28</sup>, of 21 December 1965, and Resolution 2160 (XXI)<sup>29</sup>, of 30 November 1966. Recall, too, later Resolutions, which state Principles, and very specially Resolution 50/6 of 9 November 1995, which contains the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, which naturally restates, 25 years later, the principles set out in 1970.

26. In addition, the recognition of sovereignty and territorial integrity as basic elements of the international system has also been made outside the United Nations Organization, within diverse instruments, among which the first that should be cited, in order of importance, are those emerging from the Conference on Security and Cooperation in Europe.

In this respect, suffice it to recall that the Helsinki Final Act, of 1 August 1975, confirmed the *opinion juris* concerning recognition of sovereignty and territorial integrity of States as a principle currently ruling mutual relations among the States participating in the above-cited Conference (all of which were European, except for Canada and the USA), stating, «[t]he 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»<sup>30</sup>.

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<sup>26</sup> CERD: *General Recommendation XXI*, para. 6. This is a particularly significant conclusion, as the CERD issues this General Recommendation after stating «that ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession» (par. 1). It should also be taken into account that General Comment No. 12 of the Human Rights Committee warns, in the same way, that «in particular, States must refrain from interfering in the internal affairs of the other States and thereby adversely affecting the exercise of the right to self-determination» (para. 6).

<sup>27</sup> Arbitrary Commission on Former Yugoslavia, Opinion 2, January 11, 1992 (Annex 4), pp. 81-82.

<sup>28</sup> «Declaration on the inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty».

<sup>29</sup> «Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination».

<sup>30</sup> See Section A), sub-section I, sub-sections II («Refraining from the threat or use of force»), III («Inviolability of frontiers») and IV («Territorial integrity of States»), of the Helsinki Final Act. The importance of the Helsinki Final Act needs no further emphasis, suffice it to say that the ICJ itself has referred to this document as proof

This standpoint was reiterated in the Charter of Paris for a New Europe, in which the States participating in the OSCE declared themselves «determined to co-operate in defending democratic institutions against activities which violate the independence, sovereign equality or territorial integrity of the participating States.»<sup>31</sup>.

Finally, neither should it be overlooked that the Treaty of the European Union itself, albeit only implicitly, also corroborates the above principles, in defining the aims of the Common Foreign and Security Policy, among which it includes to «preserve peace, and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Charter of Paris, including those on to external borders»<sup>32</sup>.

27. In view of the above considerations, it must be concluded that sovereignty and its inherent rights, those of territorial integrity, political independence and formal equality, accurately represent the legal status of States within the contemporary international order. This legal status is long-lasting and substantial<sup>33</sup>, and may not be renounced in international relations. Accordingly, it must be fully taken into account in the present consultative procedure.

## 1.2. *The practice of the Security Council*

28. On the basis of the aforementioned, it is of special importance to measure these conclusions against the reality of international practice. Particularly, it is useful and appropriate to analyze the practice adopted by the Security Council regarding other cases, in which situations similar to that of Kosovo arose during the 1990s and which prompted the Security Council to deal with the Kosovo issue in order to fulfil its «primary responsibility for the maintenance of international peace and security» assigned it by the UN Charter (Art. 24.1). This analysis, moreover, is of special interest as concerns defining the role assigned under the international system to the sovereignty and territorial integrity of States, because, according to Art. 24.2 of the Charter, «[i]n discharging these

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of the existence of the principles of the prohibition of resorting to the threat or the use of force, and of non-intervention, in the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, judgement of 27 June 1986: ICJ, *Rec. 1986*, para. 204 and 292, Section 5), 189 and 264. No less important is the fact that the Security Council itself, in its Resolution 1244 (1999) referred to this instrument to highlight the obligation of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (Preamble para. 10).

<sup>31</sup> P. 8. [http://www.osce.org/documents/mcs/1990/11/4045\\_en.pdf](http://www.osce.org/documents/mcs/1990/11/4045_en.pdf).

<sup>32</sup> Treaty of the European Union, Art. 11.

<sup>33</sup> Because these elements have long been the object of definition, as corroborated by international jurisprudence. See, e.g. *Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, *R.S.A.*, vol. II, p. 838: «Sovereignty in the relations between States signifies independence. Independence in regard 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.» See also the *Corfu Channel case (United Kingdom vs. Albania)*, judgement of 9 April 1949, ICJ, *Rec. 1949*, p. 35: «Between independent States, respect for territorial sovereignty is an essential foundation of international relations».

duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations».

29. In general, it must be recognized that when the Security Council has had to deal with situations that put international peace and security at risk, it has respected the principle of sovereignty and territorial integrity of States. This has been so in cases of flagrant acts of force by other States, such as the well known precedents of Cyprus, the occupied Arab territories, Nicaragua and Kuwait. The Security Council has acted consistently in applying the above principle to all these cases<sup>34</sup>.

30. From the standpoint of the problem of Kosovo, given that it is a conflict of a non-international character, situations of internal armed conflict are of particular interest, because such situations, in the opinion of the Security Council, have put international peace and security at risk, compelling this UN body to intervene and become involved in the search for a solution. The practice in this respect is very rich and has evolved in certain cases towards «failed State» situations, where the principle of sovereignty and territorial integrity of the State is severely challenged.

In this respect, the Security Council has regularly dealt with a number of armed conflicts, of a non-international nature, which have coincided over the last two decades with the different stages of the conflict in the former Yugoslavia. Such have been the cases of Afghanistan, the Democratic Republic of Congo, Somalia and Sudan. In all these conflicts, the Security Council has reported and condemned the serious breaches of human rights and of humanitarian international law that have been committed by the warring parties, groups and factions, including all kinds of abuses and crimes against the civilian population, especially those who are most vulnerable, and even indiscriminate terrorist attacks<sup>35</sup>. It has

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<sup>34</sup> Among others, see the following references: A) For the occupied Arab territories, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*: ICJ, *Rec. 2004*, para. 71-78, 120-122 and 162. B) For the case of Nicaragua, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America), judgement of 27 June 1986*: CIJ, *Rec. 1986*, para. 204 and 292, Section 5), 189 and 264. C) For the case of Kuwait, see Resolutions 660 (1990), 661 (1990), 665 (1990) and 678 (1990) of the UN Security Council. D) For the case of Cyprus, the position of the Security Council has remained unchanged since 1964: to preserve its sovereignty, independence and territorial integrity; to reject all attempts to divide the island or to unify it with any other country; not to recognize the status quo created by the Turkish invasion of the island; and to work for a Cypriot State that enjoys sovereignty and has a single international personality and a single citizenship, whose independence and territorial integrity are guaranteed because the total or partial union with any other State is excluded, as is any form of partition or secession (Resolution 186 (1964)). In relation to this case, see also Resolutions 939 (1994), 1217 (1998), 1251 (1999), 1818 (2008) and 1847 (2008).

<sup>35</sup> Among others, see the following Resolutions and Statements by the President of the Security Council: A) For Afghanistan: Resolutions 1193 (1998), 1214 (1998), 1267 (1999), 1333 (2000) and 1806 (2008); Statements of 6 April 1998 (S/PRST/1998/9), 14 July 1998 (S/PRST/1998/22) and 23 August 2005 (S/PRST/2005/40). B) For the Democratic Republic of Congo: Resolutions 1355 (2001), 1417 (2002), 1445 (2002), 1493 (2003) and 1565 (2004); Statements of 13 July 1998 (S/PRST/1998/20), 31 August 1998 (S/PRST/1998/26), 11 December 1998 (S/PRST/1998/36), 18 October 2002 (S/PRST/2002/27), and 13 July 2005 (S/PRST/2005/31). C) For Somalia: Resolutions 794 (1992), 897 (1994), 923 (1994), 1814 (2008), and 1863 (2009); Statements of 29 June 2000 (S/PRST/2000/22), 30 April 2007 (S/PRST/2007/13), 14 June 2007 (S/PRST/2007/19), and 30 October 2008 (S/PRST/2008/41). D) For Sudan: Resolutions 1556 (2004), 1564 (2004), 1590 (2005), 1591 (2005), 1593 (2005), 1663 (2006), 1713 (2006), 1714 (2006) and 1828 (2008); Statements of 25 May 2004 (S/PRST/2004/18), 13 October 2005 (S/PRST/2005/48), 25 April 2006 (S/PRST/2006/17), 2 October 2007 (S/PRST/2007/35), 16 June 2008 (S/PRST/2007/21), and 16 July 2008 (S/PRST/2008/27).

also reported and condemned the humanitarian crises and catastrophes, reflected above all else in enormous loss of life and widespread material damage, caused by the indefinite extension of these conflicts, the obstacles placed by the warring parties to humanitarian aid and access to the civilian population and numerous grave violations of international humanitarian law<sup>36</sup>.

On many occasions, too, the Security Council has observed that the authorities of these States are incapable of exercising effective control within their territory and of guaranteeing law and order there<sup>37</sup>. It has continually urged the Member States of the Organization, as well as to relevant regional organizations, to cooperate with the Security Council in maintaining international peace and security in these zones, to assist with financial, technical and human resources to create and reinforce the capacity of local authorities and to assist with other contributions<sup>38</sup>.

31. Vis-à-vis these situations, the Security Council has adamantly defended, as an indisputable precondition, the sovereignty, territorial integrity, political independence and unity of States immersed in these conflicts, and also of neighbouring States when it has been necessary<sup>39</sup>. It is almost a stylistic clause in the Council's practice, included in the Preamble to its Resolutions, but it is fully consistent with the provisions thereof. In defending the sovereignty and territorial integrity of States undergoing these conflicts, the Security Council has disregarded any other consideration about their causes or origin,

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<sup>36</sup> Among others, see the following Resolutions and Statements by the President of the Security Council: A) For Afghanistan: Resolutions 1193 (1998) and 1214 (1998); Statements of 23 March 1994 (S/PRST/1994/12), 16 April 1997 (S/PRST/1997/55), 6 April 1998 (S/PRST/1998/9), 6 August 1998 (S/PRST/1998/24), 25 October 1999 (S/PRST/1999/29), and 7 April 2000 (S/PRST/2000/12). B) For the Democratic Republic of Congo: Resolutions 1468 (2003) and 1856 (2008). C) For Somalia: Resolutions 733 (1992), 746 (1992), 1801 (2008), 1814 (2008) and 1863 (2009); Statements of 15 March 2006 (S/PRST/2006/11), and 19 December 2007 (S/PRST/2007/49). D) For Sudan: Resolution 1556 (2004); Statements by the Presidency of 25 May 2004 (S/PRST/2004/18), 21 December 2005 (S/PRST/2005/67) and 11 January 2008 (S/PRST/2008/1).

<sup>37</sup> Among others, see the following Resolutions and Statements by the President of the Security Council: A) For Afghanistan: Resolutions 1536 (2004), 1563 (2004), 1623 (2005), 1806 (2008) and 1817 (2008); Statements of 18 June 2003 (S/PRST/2003/7) and 6 April 2004 (S/PRST/2004/9). B) For the Democratic Republic of Congo: Resolutions 1399 (2002) and 1756 (2007); Statements of 7 June 2004 (S/PRST/2004/19) and 25 January 2006 (S/PRST/2006/4). C) For Sudan: Resolution 1556 (2004); Statements of 25 May 2004 (S/PRST/2004/18) and 13 October 2005 (S/PRST/2005/48).

<sup>38</sup> Among others, see the following Resolutions and Statements by the President of the Security Council: A) For Afghanistan: Resolutions 1076 (1996), 1378 (2001), 1401 (2002), 1471 (2003) and 1746 (2007). B) For the Democratic Republic of Congo: Resolution 1671 (2006). C) For Somalia: Resolutions 733 (1992), 746 (1992), 794 (1992), 794 (1992), 1772 (2007) and 1863 (2009); Statement of 28 March 2002 (S/PRST/2002/8).

<sup>39</sup> Among others, the following Resolutions and Statements by the President of the Security Council can be mentioned: A) For Afghanistan: See the Resolutions regarding this conflict, ranging from 1076 (1996) to 1833 (2008); Statements of 11 August 1994 (S/PRST/1994/43), 30 November 1994 (S/PRST/1994/77), 15 February 1996 (S/PRST/1996/6), 30 September 1996 (S/PRST/1996/40), 6 April 1998 (S/PRST/1998/9), 14 July 1998 (S/PRST/1998/22), and 11 July 2008 (S/PRST/2008/26). B) For the Democratic Republic of the Congo: See the Resolutions regarding this conflict, ranging from 1234 (1999) to 1857 (2008); Statements of 19 November 2003 (S/PRST/2003/21), 14 May 2004 (S/PRST/2004/15), and 21 October 2008 (S/PRST/2008/38). C) For Somalia: See Resolution 897 (1994) and Resolutions 1744 (2007) to 1863 (2009) which address this conflict; Statements of 15 March 2006 (S/PRST/2006/11), and 19 December 2007 (S/PRST/2007/49). D) For Sudan: Resolutions from 1547 (2004) to 1841 (2008); Statements of 2 August 2005 (S/PRST/2005/38), 11 April 2006 (S/PRST/2006/16), 25 April 2006 (S/PRST/2006/19), and 13 May 2008 (S/PRST/2008/15). Also see the Security Council Mission Report of 15 July 2008 (S/2008/460). Clearly present in this documentation are the historical secessionist tensions in Sudan and the insistence of the Security Council on achieving a united and peaceful Sudan.

their endemic nature, the weakness and incapacity of affected States to exercise the powers pertaining to sovereignty, or about the risks created thereby for international peacekeeping and security.

In such situations, the Security Council has always defended the preservation of the principle of the State's sovereignty and territorial integrity, reminding neighbouring States, in addition, of the obligation not to intervene in the internal affairs of affected States<sup>40</sup>. It has fostered all kinds of peaceful political transition processes and inclusive peace agreements, based on dialogue, on the harmonization of the interests of all sides present, and on the establishment of democratic institutions, in order to stabilize and reconstruct those States<sup>41</sup>. And it has authorized a considerable number of its own and third-party peace operations for which the interested regional organizations are responsible, especially in order to protect such peace processes, increase security on the ground, provide all possible assistance, and prevent humanitarian disasters.

32. The same course of action has been followed by the Security Council in addressing all the internal conflicts that have taken place in Europe since the decade of the 1990s, regarding which it has declared the principle of sovereignty and territorial integrity through a high number of Resolutions.

It did so, in general terms, in the conflict of the former Yugoslavia, in which Resolution 855 (1993) stressed the Council's commitment «to the territorial integrity and political independence of all States in the region»<sup>42</sup> and Resolution 1022 (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,»<sup>43</sup>. In line with this approach, the Council has highlighted in particular the validity and application of the principle in question regarding the different

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<sup>40</sup> Among others, the following Resolutions and Statements by the President of the Security Council can be mentioned: A) For Afghanistan: Resolutions 1076 (1996), 1193 (1998), 1214 (1998), 1453 (2002) and 1662 (2006); Statements of 15 February 1996 (S/PRST/1996/6), 30 September 1996 (S/PRST/1996/40), 9 July 1997 (S/PRST/1997/35), and 14 July 1998 (S/PRST/1998/22). B) For the Democratic Republic of the Congo: Resolutions 1468 (2003), 1484 (2003) and 1493 (2003); Statement of 22 June 2004 (S/PRST/2004/21). C) For Somalia: Resolutions 1425 (2002), 1474 (2003), 1519 (2003) and 1863 (2009). D) For Sudan: Resolutions 1556 (2004), 1574 (2004), 1590 (2005) and 1651 (2005).

<sup>41</sup> Among others, the following Resolutions and Statements by the President of the Security Council can be mentioned: A) For Afghanistan: Resolutions 1076 (1996), 1193 (1998), 1214 (1998), 1378 (2001), 1662 (2006), 1659 (2006) and 1746 (2007); Statements of 16 April 1997 (S/PRST/1997/20), 15 July 2004 (S/PRST/2004/25), 12 October 2004 ((S/PRST/2004/35), 23 August 2005 (S/PRST/2005/40), and 17 July 2007 (S/PRST/2007/27). B) For the Democratic Republic of the Congo: Resolutions 1417 (2002), 1445 (2002), 1635 (2005), 1693 (2006) and 1711 (2006). C) For Somalia: Resolutions 746 (1992), 751 (1992), 767 (1992), 1725 (2006), 1744 (2007), 1772 (2007), 1801 (2008), 1814 (2008), and 1863 (2009); Statements of 11 November 2003 (S/PRST/2003/19), 7 March 2005 (S/PRST/2005/11), 13 July 2006 (S/PRST/2006/31), and 22 December 2006 (S/PRST/2006/59). D) For Sudan: Resolutions 1564 (2004), 1574 (2004), 1590 (2005) and 1812 (2008).

<sup>42</sup> See also, Resolutions 871 (1993) and 970 (1995).

<sup>43</sup> Similar terms are used in Resolutions 983 (1995), 994 (1995), 1009 (1995), 1003 (1995), 1015 (1995), 1074 (1996) and 1088 (1996).

specific expressions of the conflict, especially with regard to Bosnia-Herzegovina<sup>44</sup>, Croatia<sup>45</sup> and Macedonia<sup>46</sup>.

33. The same position has been adopted by the Council regarding the internal conflicts that have arisen in some of the States resulting from the disintegration of the Soviet Union. Indeed, in the case of Nagorno-Karabakh, Resolutions 822 (1993), 874 (1993) and 884 (1993) reaffirm «the sovereignty and territorial integrity of the azerbaijani Republic and of all other states in the region», and add the reaffirmation of «the inviolability of international borders»<sup>47</sup>. In the Tajikistan conflict, Resolution 999 (1995) refers to the Council's «commitment to the sovereignty and territorial integrity of the Republic of Tajikistan and to the inviolability of its borders», reiterating this same principle in a great number of Resolutions<sup>48</sup>.

The case of Georgia stands out due to the great number of Council Resolutions in which the Council defends the State's sovereignty and territorial integrity. In Resolution 896 (1994) it «calls upon all concerned to respect the sovereignty and territorial integrity of the Republic of Georgia, and stresses the importance it attaches to such respect». In addition, the Council has repeatedly supported the creation of a political status for Abkhazia, albeit «respecting fully the sovereignty and territorial integrity of the Republic of Georgia»<sup>49</sup>. In Resolution 1096

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<sup>44</sup> Indeed, in the case of Bosnia-Herzegovina, following Resolution 787 (1992) it expressed itself as «deeply concerned at the threats to the territorial integrity of the Republic of Bosnia and Herzegovina, which, as a State Member of the United Nations, enjoys the rights provided for in the Charter of the United Nations» and it called on «all parties and others concerned to respect strictly the territorial integrity» of that State (see Resolution 770 (1992), 752 (1992) and 838 (1993)), about which it stated «the inviolability of its borders» (Resolution 757 (1992). Resolution 859 (1993) reaffirmed, once again, «the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina and the responsibility of the Security Council in this regard» (emphasis added). And the Security Council continued to express itself in similar terms in many subsequent Resolutions: 819 (1993), 820 (1993), 836 (1993), 900 (1994), 913 (1994), 959 (1994), 982 (1995), 1004 (1995) and 1010 (1995).

<sup>45</sup> In relation to Croatia, Resolution 815 (1993) reaffirmed the «commitment to ensure respect for the sovereignty and territorial integrity of Croatia and of the other Republics where UNPROFOR is deployed» (see Resolution 847 (1993)) and «its commitment to ensure respect for the sovereignty and territorial integrity of the Republic of Croatia» (Resolutions 958 (1994), 1009 (1995), 1037 (1996), 1038 (1996), 1066 (1996), 1079 (1996)), expressing «its commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia within its internationally recognized borders» (Resolution 981 (1995)).

<sup>46</sup> In the case of Macedonia, in Resolution 1082 (1996) the Security Council states «its commitment to the independence, sovereignty and territorial integrity» of that State, and in Resolution 1371 (2001) it reaffirms «its commitment to the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia and other States of the region». Furthermore, on the occasion of the «Agreement for delineation of the borderline between the Republic of Macedonia and the Federal Republic of Yugoslavia» (20

01), «[t]he Security Council recalls the need to respect the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia. In this context it emphasizes that the border demarcation agreement, signed in Skopje on 23 February 2001, and ratified by the Parliament of the former Yugoslav Republic of Macedonia on 1 March 2001, must be respected by all.» (S/PRST/2001/7).

<sup>47</sup> See also Resolution 853 (1993).

<sup>48</sup> In this respect, see Resolutions 1030 (1995), 1089 (1996), 1061 (1996), 1099 (1997), 1113 (1997), 1128 (1997), 1138 (1997), 1167 (1998), 1206 (1998), 1240 (1999) and 1274 (1999).

<sup>49</sup> Resolution 896 (1994). In subsequent Resolutions, it has insisted on respect for that principle and defends «a comprehensive political settlement of the conflict, including on the political status of Abkhazia, *respecting fully the sovereignty and territorial integrity of the Republic of Georgia, based on the principles set out in its previous resolutions*» (Resolution 937 (1994), emphasis added), which it will reiterate in other Resolutions (Resolution 906 (1994), 993 (1995), 971 (1995), 1077 (1996) and 1036 (1996)), as it does in Resolution 1065 (1996), reaffirming «its commitment to the sovereignty and territorial integrity of Georgia, *within its internationally recognized borders*, and to the necessity of defining the status of Abkhazia in strict accordance with these principles». In similar terms, see Resolutions 1666 (2006), 1716 (2006), 1752 (2007), 1781 (2007) and 1808 (2008).

(1997), this is materialized in «the political status of Abkhazia *within* the State of Georgia», a wording which it will repeat in many subsequent texts<sup>50</sup>.

34. In light of this practice, it must be concluded that the Security Council has repeatedly and constantly maintained a position of unequivocal support and respect for the sovereignty and integrity of the State; even in the framework of serious armed conflicts of a non-international nature in which there have been serious violations of International Law and which have resulted in serious threats to international peace and security.

In this respect, it must be underlined that secessionist tensions, the ethnic and religious dimension of some of the serious violations of human rights against the civilian population committed during the mentioned conflicts, or even the intervention of the International Criminal Court and other international criminal tribunals in these internal armed conflicts, all these have not altered the firm practice of the Security Council aimed at preserving the sovereignty and territorial integrity of the States concerned.

## 2. SOVEREIGNTY AND TERRITORIAL INTEGRITY IN THE CASE OF KOSOVO

### 2.1. *Sovereignty and territorial integrity in Security Council Resolution 1244 (1999)*

35. Bearing in mind the practice examined above, it is no surprise that respect for the sovereignty and territorial integrity of Serbia has also been an essential element of the Security Council's action regarding Kosovo since the first resolutions in which it addressed the issue within the framework of Chapter VII of the Charter.

Thus, suffice it to recall here the statement included in the Preamble of Resolution 1160 (1998) which expresses «the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia». This statement was reiterated in identical terms in Resolutions 1190 (1998) and 1203 (1998); and in Resolution 1239 (1999) it became the reaffirmation of «the territorial integrity and sovereignty of all States in the region».

36. Nevertheless, the key text to assess the role that the Security Council has assigned to sovereignty and territorial integrity in the case of Kosovo is necessarily Resolution 1244 (1999), of 10 June.

This Resolution was adopted in a complex historical context which is worth recalling: following the Rambouillet negotiations, immediately after the military action undertaken in Serbia by NATO Member States, and on the basis of two important documents which were annexed to the Resolution itself, namely the proposals for the solution to the conflict agreed upon at the G-8 Foreign Ministers Meeting held on 6 May 1999 (Annex 1) and the principles contained in the document presented in Belgrade on 2 June 2009 and accepted by the Federal Republic of Yugoslavia (Annex 2).

The Resolution thus agreed upon constitutes the basis of all the subsequent action of the Security Council regarding Kosovo, both from the standpoint of setting up an Interim

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<sup>50</sup> Resolutions 1124 (1997), 1150 (1998), 1255 (1999), 1287 (2000), 1462 (2003), 1494 (2003), 1524 (2004), 1554 (2004), 1582 (2005) and 1615 (2005).



International Regime for territorial Administration, and from the standpoint of setting up and promoting a political process enabling the definition of the future status of Kosovo.

37. In this respect, it should be noted, firstly, that Resolution 1244 (1999) explicitly *reaffirms* in the tenth paragraph of its preamble «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». This mention is equally repeated in the two Annexes to the Resolution – which are an integral part thereof – in which, likewise, the need is recalled for «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». These references contained in both Annexes are particularly significant, as it must be borne in mind that the mention of the sovereignty and territorial integrity of the Federal Republic of Serbia is made in connection with the setting up of «a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo».

Nevertheless, and although these explicit references are important, they are not the only occasions on which the sovereignty and territorial integrity of the Federal Republic of Yugoslavia are present in Resolution 1244 (1999). Quite the opposite, it must be highlighted that throughout the Resolution there are statements, even in its operative paragraphs, which can only be understood as recognizing both elements, namely:

- i) The name of the territory, «Kosovo, Federal Republic of Yugoslavia», in paragraph four of the Preamble;
- ii) The decision 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» (o.p. 1) which, as mentioned above, include respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia;
- iii) The decision to establish an «interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy *within* the Federal Republic of Yugoslavia» (o.p. 10)<sup>51</sup>.
- iv) The express reference to the acceptance by the Federal Republic of Yugoslavia of the principles on a political solution to the Kosovo crisis set forth in Annexe 2 to the Resolution (paragraphs 1 to 9), as well as to the deployment of the international civil presence in Kosovo (o.p. 5); and
- v) The provision that, after the withdrawal of the Federal Republic of Yugoslavia's troops from Kosovo, a small number of Yugoslav and Serb military and police personnel would return to Kosovo to perform functions that are clearly linked to sovereignty, especially «liaison with the international civil mission and the international security presence» and «maintaining a presence at key border crossings»<sup>52</sup>.

In addition, no less important is the fact that, when the elements that constitute the principal mandate of the «international civil presence» are defined, among which are «promoting the establishment, pending a final settlement, of a substantial autonomy and self-government in Kosovo», and «facilitating a political process designed to determine Kosovo's future status», reference is made, in both cases, to the need for «taking full account of/taking into account (...)

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<sup>51</sup> Emphasis added. An identical statement is contained in paragraph 5 of Annexe 2 to the Resolution.

<sup>52</sup> O.p. 4 and o.p. 9, a). On the other hand, the conditions for return, as well as their functions, are regulated in Annex 2 of the Resolution, especially in paragraphs 6 and 10.

the Rambouillet accords (S/1999/648)»<sup>53</sup>. And this is due to the very content of the Rambouillet Accords, in which respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia constitutes the basis for the system of self-government of Kosovo and inspires the Draft Constitution for Kosovo; it is present when defining the regime for implementing the accords, including the deployment of NATO; and it is expressed in many spheres which, such as border control or customs control, are part of the core content of State sovereignty<sup>54</sup>.

38. This position of full respect for the sovereignty and territorial integrity of Serbia in the framework of Resolution 1244 (1999) has been strengthened by the reiterated statements made by the Member States during the Security Council debates, both when the mentioned resolution was adopted<sup>55</sup> and afterwards<sup>56</sup>. And it has been endorsed by the Security Council

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<sup>53</sup> O.p. 11, a) and e).

<sup>54</sup> In this respect, the Preamble to the *Interim Agreement for Peace and Self-Government in Kosovo* not only reaffirms «their commitment to the Purposes and Principles of the United Nations, as well as to OSCE principles, including the Helsinki Final Act and the Charter of Paris for a new Europe» but also recalls «the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia». The Preamble to the Draft Constitution for the PISG in Kosovo also states that the latter will be «grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia». As for the Articles, Article I.2 of the Framework, regarding the *Principles*, sets forth that the national communities «shall not use their additional rights to endanger... the sovereignty and territorial integrity of the Federal Republic of Yugoslavia». For its part, Article I.3 of the Constitution, regarding the *Principles of Democratic Self-Government in Kosovo*, states that the Federal Republic of Yugoslavia is responsible in Kosovo for «territorial integrity». Also, in Chapter 7, regarding *Implementation*, when referring to the deployment of NATO forces, Article I.a) points out that the Parties «(...) also reaffirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY)». Respect for the sovereignty and territorial integrity of Yugoslavia is specifically expressed in the Rambouillet Accords in relation with respect for and control over the borders of the Federal Republic of Yugoslavia. Indeed, in Chapter 2, on *Police and Civil Public Security*, Article VI.1 states that the Government of that State «will maintain official border crossings on its international borders (Albania and FYROM)». In Chapter 4, on *Economic Issues*, Article I. 4 sets forth that the Federal Republic of Yugoslavia «shall be responsible for the collection of all customs duties at international borders in Kosovo». Finally, in Chapter 7, Article V.1 states that «all Other Forces in Kosovo other than KFOR must «respect the international borders of the FRY».

<sup>55</sup> Indeed, on the occasion of the adoption of Resolution 1244 (1999), it was underlined that the text «clearly reaffirms the commitment of all States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia» (Russian Federation, 4011th Meeting (10 June 1999), (S/PV.4011, p. 7). Similar terms were used by China (*ibid.*, p. 10). For its part, Argentina highlighted the importance of Resolution 1244 (1999), among other reasons because «it 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» (*ibid.*, p. 19).

<sup>56</sup> In different, subsequent sessions, the Members of the Security Council have insisted on respect for the principle of the sovereignty and territorial integrity of Yugoslavia. Among other statements, it is worth mentioning, as examples, the following: «The Security Council offered a specific way to deal with the crisis on the basis of the fundamental principles of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia» (Russian Federation, 4153rd Meeting (9 June 2000), S/PV.4153, p. 13); «our only understanding of the relevant provisions of Resolution 1244 (1999) and its annexes is that the people of Kosovo can enjoy a substantial autonomy within the Federal Republic of Yugoslavia, whose sovereignty and territorial integrity should be fully respected» (Ukraine, *ibid.*, p. 25); «my delegation would like to see the full implementation of Security Council resolution 1244 (1999), and that the sovereignty and territorial integrity of the Federal Republic of Yugoslavia must be respected by all» (Namibia, 4200<sup>th</sup> Meeting (27 September 2000), S/PV.4200, p. 20); «the ultimate resolution of the Kosovo question should be premised on respect for, and safeguarding of, the sovereignty and territorial integrity of the Federal Republic of Yugoslavia» (China, 4296<sup>th</sup> Meeting (16 March 2001), S/PV.4296, p. 12); «The European Union reiterates its strong attachment to the principle of the inviolability of all borders in the region» (*ibid.*); «our goal should be 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 the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region» (Singapore, 4309<sup>th</sup> Meeting (9 April 2001), S/PV.4309, p. 14); «A sustainable resolution of the question of Kosovo must be achieved with full application of the principle of territorial integrity» (Argentina, 5373<sup>rd</sup> Meeting (14 February 2006), S/PV.5373, p. 13).

itself, which, in Resolutions approved subsequently<sup>57</sup> and in the numerous Statements by the President regarding the question of Kosovo, «reaffirms its commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia»<sup>58</sup> and continually refers to the territory as «Kosovo, Federal Republic of Yugoslavia»<sup>59</sup> or as «Kosovo (Serbia and Montenegro)»<sup>60</sup>.

## 2.2. *Sovereignty and territorial integrity in the «international presence under Resolution 1244(1999)» in Kosovo*

39. It is useful to analyze the Security Council's standpoint vis-à-vis Serbia's territorial integrity and sovereignty over Kosovo, but no less so is it to analyze the practice of the different components and organizations that have participated—and continue to do so—in the complex structure of the international civil and security presence, implemented by virtue of and under the umbrella of Resolution 1244 (1999). This is especially true in view of the fact that these components, in their daily activity, carry out the mandate of Resolution 1244 (1999), implementing the principles which, in line with the mentioned Resolution, must inspire the international presence in Kosovo.

Given that this practice is very wide-ranging, it is not possible to analyze it exhaustively at this moment. But it is useful to draw attention, at least, to the most significant expressions of the practice carried out by the main components of the international presence in Kosovo, as well as by other bodies from the United Nations and other international organizations.

### 2.2.1. UNMIK

40. Let us analyze the position adopted by UNMIK, corresponding to the primary role it is called upon to play in the regime of the international administration of Kosovo as established by the Security Council. Within a broad range of positions, the following are particularly significant situations, in which UNMIK has reaffirmed, explicitly or implicitly, Serbia's sovereignty and territorial integrity.

41. Firstly, UNMIK has reaffirmed the principle of Serbia's sovereignty and territorial integrity in the *UNMIK-FRY Common Document*, signed the 5 November 2001<sup>61</sup>, in which the parties express their intention to:

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<sup>57</sup> See, in this respect, Resolution 1345 (2001).

<sup>58</sup> See Statements by the President of 24 August 1998 (S/PRST/1998/25), 19 January 1999 (S/PRST/1999/2) and 29 January 1999 (S/PRST/1999/5).

<sup>59</sup> See Statements by the President of 29 January 1999 (S/PRST/1999/5), 5 October 2001 (S/PRST/2001/27), 9 November 2001 (S/PRST/2001/34), 13 February 2002 (S/PRST/2002/4), 24 April 2002 (S/PRST/2002/11), 24 May 2002 (S/PRST/2002/16) and 24 October 2002 (S/PRST/2002/29).

<sup>60</sup> See Statements of 12 December 2003 (S/PRST/2003/26), 18 March 2004 (S/PRST/2004/5), 30 April 2004 (S/PRST/2004/13) and 24 October 2005 (S/PRST/2005/51).

<sup>61</sup> «UNMIK – FRY Common Document», adopted 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. Nebojsa Covic, who is also the President of the Coordinating Centre for Kosovo and Metohija, (Text at: <http://www.mfa.gov.yu/Foreinframe.htm>). The Security Council in the Statement by its President of 9 November 2001 declares that this «UNMIK-FRY Common Document» is in accordance with the Resolution 1244 (1999) and the Constitutional Framework (S/PRST/2001/34).

4. «Promote 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.»

42. Secondly, UNMIK further reaffirmed Serbia's sovereignty and territorial integrity when the Special Representative of the Secretary-General (SRSG) exercised his exclusive right to enact the legislation adopted by the Kosovo Assembly, under the provisions contained in the *Constitutional Framework* approved by UNMIK<sup>62</sup>.

In this respect, analysis of the practice of legislative promulgations reveals that the SRSG has prevented, in a reiterated, decided and express manner, the Kosovo PISG from acting beyond the limits explicitly set out in Resolution 1244 (1999) and in the *Constitutional Framework*, taking special care that the PISG should not modify the principle of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia with respect to the territory of Kosovo.

Proof of this is the scrupulous care taken in the terminology employed, whereby any term that might suggest that Kosovo is a sovereign State is avoided. In this respect, it is to be noted that in the legislative projects approved by the Assembly, the SRSG:

- i) has repeatedly modified any description of Kosovo as a «State» or «country»<sup>63</sup>;
- ii) has removed the term «nation» or «national» in describing any Kosovan institution<sup>64</sup>, (including the parks, which may not be «national parks» but «public parks»<sup>65</sup> or the radio and television, which are not «national» but «public»<sup>66</sup>, and the «National Centre for Blood Transfusion in Kosovo» which must be termed «Kosovo Centre for Blood Transfusion»<sup>67</sup>.);
- iii) has always distinguished between the «borders» and the «boundaries» of Kosovo in relation to the external frontiers of the territory and the internal administrative bounds between Serbia and Kosovo<sup>68</sup>;

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<sup>62</sup> Section 9.1.45 of the Constitutional Framework states: «Laws shall become effective on the day of their promulgation by the SRSG, unless otherwise specified.» Previously, Section 9.1.44 states that, «[t]he President [of the Assembly] shall sign each law adopted by the Assembly and forward it to the SRSG for promulgation.»

<sup>63</sup> See, among others, the following UNMIK Regulations: UNMIK/REG/2003/24, UNMIK/REG/2004/25, UNMIK/REG/2004/30, UNMIK/REG/2006/16, UNMIK/REG/2006/31, UNMIK/REG/2006/38, UNMIK/REG/2006/42, UNMIK/REG/2007/13, UNMIK/REG/2007/33, UNMIK/REG/2008/10, UNMIK/REG/2008/15, UNMIK/REG/2008/23 and UNMIK/REG/2008/30.

<sup>64</sup> See, among others, the following UNMIK Regulations: UNMIK/REG/2003/33, 6 November 2003; UNMIK/REG/2003/39, 17 December 2003; UNMIK/REG/2004/25, 28 July 2004; UNMIK/REG/2004/26, 28 July 2004; UNMIK/REG/2006/14, 11 April 2006; UNMIK/REG/2006/24, 25 April 2006; and UNMIK/REG/2008/8, 8 February 2008.

<sup>65</sup> UNMIK/REG/2003/30; and UNMIK/REG/2006/22.

<sup>66</sup> UNMIK/REG/2006/14.

<sup>67</sup> UNMIK/REG/2008/7.

<sup>68</sup> In general, the SRSG makes the following distinctions: «(a) «Boundary» means the line of division between Kosovo and Serbia, and between Kosovo and Montenegro; (b) «Border» means the Kosovo section of the internationally recognized border between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia (FYROM), and between the Federal Republic of Yugoslavia and the Republic of Albania [...]» (UNMIK/REG/2001/10, 24 May 2001, Sec. 1). See similarly UNMIK/REG/2003/25, 6 July 2003; or UNMIK/REG/2007/35, 19 December 2007.

iv) has always replaced any reference to the «citizens of Kosovo» with «residents in Kosovo»<sup>69</sup>.

This practice was maintained even following the UDI, so that in the promulgation of the Assembly's rules, the terms «country», «citizens» and «State» were changed to «Kosovo», «residents» and «competent authority», respectively<sup>70</sup>.

43. Thirdly, the assertion of the principle by UNMIK is reflected in the sphere of external relations, on the one hand, through its refusal to accept any suggestion of an individual international legal personality for Kosovo, distinct from that of Serbia, and on the other, through the explicit recognition of Serbia's sovereignty and territorial integrity.

Thus, in order to avoid any kind of confusion that might give rise to the idea of a distinct legal personality for Kosovo, the SRSG:

- i) Has eliminated the term «foreign», replacing it by «external», on successive occasions<sup>71</sup>;
- ii) Has not accepted expressions that might imply the international legal personality of Kosovo<sup>72</sup>;
- iii) Has avoided any affirmation of the legal personality of Kosovo in the international agreements signed by UNMIK, such as the two technical agreements signed by UNMIK and the Council of Europe concerning technical arrangements for the application within Kosovo of the Council of Europe Conventions on the protection of national minorities and on the prevention of torture and inhuman or degrading treatment or punishment<sup>73</sup>; this is also the case of the Energy Community Treaty, signed in Athens on 25 October,

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<sup>69</sup> See, among others, the following UNMIK Regulations: UNMIK/REG/20; UNMIK/REG/2003/24; UNMIK/REG/2003/30; UNMIK/REG/2004/20; UNMIK/REG/2004/25; UNMIK/REG/2004/26; UNMIK/REG/2006/7; UNMIK/REG/2006/13; UNMIK/REG/2007/33; UNMIK/REG/2008/23; UNMIK/REG/2008/25; and UNMIK/REG/2008/25.

<sup>70</sup> UNMIK/REG/2008/10, of 19 February; UNMIK/REG/2008/14, of 17 March; UNMIK/REG/2008/15, of 17 March; UNMIK/REG/2008/23, of 15 May; UNMIK/REG/2008/25, of 16 May; and UNMIK/REG/2008/33, of 14 June.

<sup>71</sup> Thus, in the enactment of the Law on «External Trade Activity» (Law No. 2006/6), the definitions used in the Law include the following: «*External area*» shall mean any area outside the territory of Kosovo. «*External trade activity*» shall include trade, commerce, contracts, transactions and other activities involving the movement of goods, other tangible property, intangible assets, intangible property rights, and services between an external area and the territory of Kosovo. «*Foreign state*» shall mean (i) any State or separate foreign customs territory, and (ii) any territorial or political subdivision of such a State or separate foreign customs territory» (Sec. 2). Furthermore, it states, «If there is in effect a bilateral or multilateral international agreement that international law requires Kosovo to observe, and such agreement obligates Kosovo to accord most-favoured-nation treatment to the export of goods destined for a specified external area or areas, then, except as specifically otherwise provided in the present law or a normative act authorized by the present law, Kosovo shall accord most-favoured-nation treatment to such exportations» (Sec. 27.1) (See: UNMIK/REG/2003/15, 12 May 2003). See also the references to «import» and «export» in UNMIK/REG/2004/1, 20 January 2004; and those to «foreign persons» in UNMIK/REG/2006/28, 28 April 2006.

<sup>72</sup> See, *ad.ex.*, UNMIK/REG/2004/20, 30 June 2004, in which the SRSG deletes the words: «International agreements to which Kosovo is a party or an associated member» in Article 4.1 of the Law adopted by the Assembly of Kosovo on the Energy Regulator. See, similarly: UNMIK/REG/2004/21 and UNMIK/REG/2004/22.

<sup>73</sup> *Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities*, 23 August 2004 (text in Council of Europe Document CM/Del/Dec (2004)890, 2 July 2004). See also *Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 23 August 2004 (text in Council of Europe Document CM/Del/Dec (2004)890, 2 July 2004). In relation to these two Agreements, see *infra*, Section III.2.3

2005, in which UNMIK itself stated that its participation in this act should be viewed without prejudice to the future status of Kosovo<sup>74</sup>;

- iv) In those cases in which the Kosovo Assembly appeared to claim powers for the PISG to conclude international agreements for Kosovo, or to represent Kosovo within international organizations or bodies, again the SRSG has corrected such deviations. Thus, the SRSG corrected the Kosovo Assembly when it proposed that the *Kosovo Standardization Agency* (KSA) could, among other roles, «[r]epresent Kosovo at International, European and regional organizations» or «[c]onclude cooperative agreements with homologous organizations of other countries [...]»<sup>75</sup>. The SRSG reacted in a similar way in 1999, when the *Post and Telecommunications Enterprise in the territory of Kosovo* (PTK) was established<sup>76</sup>;
- v) Finally, it should be recalled that the SRSG has not recognized any right of the PISG to exercise a *jus legationis*. Thus, when the «Liaison Offices in Kosovo» were established, they were done so as «liaison offices of foreign governments in Kosovo which contribute to the fulfilment of the mandate given to the civil and security presences under the resolution.»<sup>77</sup> And whenever the Assembly sought to exercise a *jus legationis*, the SRSG amended that decision; thus, when the *Law on the Administrative Procedure* (Law No. 02-L/28), was passed, which established powers for so-called «diplomatic or consular offices» or «diplomatic mail», the SRSG replaced these terms with «designated offices outside Kosovo» and «official mail», respectively.<sup>78</sup>

44. Finally, a particularly significant aspect is the recognition of Serbia's territorial integrity and sovereignty over the province of Kosovo (by UNMIK in particular and by the United Nations in general) on the occasion of the signature of the «Agreement for the delineation of the borderline between the Republic of Macedonia and the Federal Republic of Yugoslavia», during the Balkans Summit meeting held in Skopje on 23 February, 2001<sup>79</sup>.

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<sup>74</sup> The Parties to the cited Treaty are, on the one hand, the European Community and, on the other, Albania, Bulgaria, Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Romania, Serbia and UNMIK, in accordance with Resolution 1244 (1999) of the Security Council. On signing the Treaty, UNMIK stated that «*the conclusion of the Treaty by UNMIK is without prejudice to Kosovo's future status.*». Serbia, moreover, made the following statement: «*the Government of the Republic of Serbia states that the signing of the Energy Community Treaty by the Special Representative of the UN Secretary-General, Head of the UN Interim Administration Mission in Kosovo, in no way prejudges the final status of Kosovo-Metohija. The Government of the Republic of Serbia recalls Security Council Resolution 1244 (1999), which reaffirms the commitment of all Member States to the sovereignty and territorial integrity of Serbia and Montenegro.*». Both declarations were accepted by the other Parties, including the European Commission, as an integral part of the Treaty (see Doc. 175 of the Dossier presented by the SG to the Court).

<sup>75</sup> Article 17(f),(g) and (h) of the Law on Standardization (Law No. 2004/12) adopted by the Assembly of Kosovo, 29 April 2004. On enacting this Law, the SRSG decided that: «*In article 17(f), the wording «Represent Kosovo at» shall be replaced by «Participate in», and, in articles 17(g) and (h), the word «Conclude» shall be replaced by «Enter into» and the wording «of other countries» shall be replaced by «outside Kosovo»;*[...]

(See UNMIK/REG/2004/15, 28 May 2004).

<sup>76</sup> On this occasion, the SRSG warned that: «*PTK shall not take any action with respect to international postal and telecommunications services without the specific written consent of the Special Representative of the Secretary-General.*» (UNMIK/REG/1999/12, 14 October 1999). See also the enactment of the Law on Postal Services, adopted by the Assembly of Kosovo (UNMIK/REG/2003/37), and section (c) of the enactment of the Law on Transport of Dangerous Goods (UNMIK/REG/2004/17, 4 June 2004).

<sup>77</sup> UNMIK/REG/2000/42, 10 July 2000, Sec. 1.1.

<sup>78</sup> UNMIK/REG/2006/33, 13 May 2006.

<sup>79</sup> UNDOC: A/56/60-S/2001/234 of 16 March 2001: Letter dated 15 March 2001 from the Permanent Representative of the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General attaching the «Agreement for the delineation of the borderline between the Republic of Macedonia and the Federal Republic of Yugoslavia».

Protesting at the signing of this Agreement, on 23 May, 2002, the Kosovo Assembly adopted a «resolution on the protection of the territorial integrity of Kosovo», declaring, among other matters, that Serbia was not competent to sign the Agreement in question<sup>80</sup>. Reactions to this resolution approved by the Assembly of Kosovo were immediate and firm, with both the SRSG and the Secretary-General of the United Nations declaring it «null and void»<sup>81</sup>.

## 2.2.2. NATO

45. For its part, NATO, the pillar of the international security presence in Kosovo (KFOR), has also, since the beginning of its activities, affirmed its respect for the sovereignty and territorial integrity of Serbia.

Thus, in the Kumanovo Agreement between NATO and Serbia—which provides for the end of armed NATO action on Serbian territory, the withdrawal of military and police forces of Serbia from Kosovo's territory, and the deployment of KFOR—NATO recognizes both the sovereignty of Serbia in Kosovo and the territorial integrity of Serbia, including the territory of Kosovo. Especially, through the following actions:

- i) on the one hand, the fact that NATO requested Serbia to accept immunity, both for KFOR and its personnel, «for any damages to public or private property that they may cause in the course of duties related to the implementation of this agreement»<sup>82</sup>, thus recognising Serbia's sovereignty over Kosovo; and

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<sup>80</sup> Doc. 178 of the dossier presented by the SG to the Court: Resolution of the Kosovo Assembly, Commission for Judicial, Legislative and Constitutional Framework Affairs, Commission for International Cooperation of 23 May 2002.

<sup>81</sup> The SRSG, on the very day of its adoption and in an especially firm manner, declared the following: «By virtue of the powers conferred upon me by Security Council resolution Resolution 1244 (1999) and the constitutional framework, I declare null and void the «Resolution on the protection of the territorial integrity of Kosovo» adopted this day by the Kosovo Assembly» (Doc. 179 of the dossier of the SG: «Determination» by the Special Representative of the Secretary-General on the «Resolution on the protection of the territorial integrity of Kosovo» of 23 May 2002). For his part, the UN Secretary-General, in a letter to the Foreign Minister of Macedonia, was also firm: « I have the honour to refer to your letter of 23 May 2002, regarding the adoption by the Kosovo Assembly of a resolution concerning the Border Agreement between the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia. The UN position on this question is clear. The action of the Kosovo Assembly is ultra vires and thus null and void. My Special Representative for Kosovo, Michael Steiner, has taken a formal decision to this effect and has received the unreserved support of the Security Council. (Doc. 181 of the dossier of the SG: Letter dated 3 June 2002 from the Secretary-General to the Foreign Minister of the former Yugoslav Republic of Macedonia [on file with the UN Office of Legal Affairs]). Likewise, the declaration by the Assembly of Kosovo provoked a rejection on the part of Macedonia (*The Assembly underscores that the Border Agreement between the Republic of Macedonia and the Federal Republic of Yugoslavia has been ratified by Parliaments of the two States, supported by all relevant international structures and recognized by the United Nations, the Kosovo Protectorate being under its jurisdiction ...*). See S/2002/609, of 31 May 2002) which was ratified with a declaration by the Security Council on the duty to respect the sovereignty and territorial integrity of the Republic of Macedonia («*The Security Council recalls the need to respect the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia. In this context it emphasizes that the border demarcation agreement, signed in Skopje on 23 February 2001, and ratified by the Parliament of the former Yugoslav Republic of Macedonia on 1 March 2001, must be respected by all*». See S/PRST/2001/7). For its part, the Presidency of the European Union expressed its concern, and called for the member of the Assembly of Kosovo to respect Resolution 1244 (1999). Lastly, and especially noteworthy is the protest by the Federal Republic of Yugoslavia, which declared that «*the Agreement for the delineation of the borderline between the Republic of Macedonia and the Federal Republic of Yugoslavia was signed by two sovereign States and its validity therefore cannot be questioned in any way. The Agreement was supported in the presidential statement of 7 March 2001 (S/PRST/2001/7). The same is true of the Federal Republic of Yugoslavia-UNMIK Common Document, which provides the basis for cooperation of its parties in the implementation of resolution 1244 (1999) (see S/PRST/2001/34) » (S/2002/585 of 28 May 2002).*

- ii) on the other hand, in the affirmation, contained in the agreement, that «[t]he international security force (KFOR) will provide appropriate control of the borders of the Federal Republic of Yugoslavia in Kosovo with Albania and the Former Yugoslav Republic of Macedonia until the arrival of the civilian mission of the United Nations»<sup>83</sup>, thus recognizing the territorial integrity of the Federal Republic of Yugoslavia.

Moreover, it should be taken into account that, since 1999, NATO has constantly reaffirmed its commitment and adherence to the «full implementation of United Nations Security Council Resolution 1244», including «the territorial integrity and sovereignty of all countries in the Balkans»<sup>84</sup>.

### 2.2.3. OSCE

46. As for the OSCE, its practices regarding the matter at hand have not had the same development as those analyzed above. In spite of this, it is noteworthy that, generally speaking, the OSCE has affirmed its adherence to the principles contained in Resolution 1244 (1999), including Serbia's sovereignty and territorial integrity, both through the Parliamentary Assembly<sup>85</sup> and the Ministerial Council<sup>86</sup>.

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<sup>82</sup> Military-technical agreement concluded by NATO military authorities with the Federal Republic of Yugoslavia (Serbia and Montenegro) on the procedures and modalities for the withdrawal from Kosovo of security forces of the Federal Republic of Yugoslavia (S/1999/682), appendix B section 3.

Therefore, the immunity of NATO forces is based on the Kumanovo Agreement, as well as on UNMIK Regulation 2000/46 regarding the status, privileges, and immunities of KFOR and UNMIK and their staff, just as NATO itself recognises them.

<sup>83</sup> *Ibidem*, art. II.2.h).

<sup>84</sup> Statement on the Balkans, Issued at the Meeting of the North Atlantic Council in Defence Ministers Session held in Brussels on 6 June 2002. Cf.: Final Communiqué. Meeting of the North Atlantic Council in Defence Ministers Session held in Brussels on 2 December 1999; Final Communiqué. Ministerial Meeting of the North Atlantic Council held in Florence on 24 May 2000; Statement on the Situation in the Balkans Issued at the Meeting of the North Atlantic Council in Defence Ministers Session held in Brussels on 8 June 2000; Statement on the situation in the Balkans, Issued at the Meeting of the North Atlantic Council in Defence Ministers Session held in Brussels on 7 June 2001; Final Communiqué. Ministerial Meeting of the North Atlantic Council Held at NATO Headquarters, Brussels, on 6 December 2001; Statement on the Situation in the Balkans. Issued at the Meeting of the North Atlantic Council in Defence Ministers Session held in Brussels on 18 December 2001; Final Communiqué - Ministerial Meeting of the North Atlantic Council Held in Reykjavik on 14 May 2002; Final communiqué - Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, On 4 December 2003; Istanbul Summit Communiqué - Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council; Final Communiqué - Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 9 December 2004; Statement issued by the Heads of State and Government participating in a meeting of the North Atlantic Council in Brussels; Final Communiqué - Meeting of the North Atlantic Council In Defence Ministers Session Held in Brussels on Thursday, 9 June 2005; Meeting of the North Atlantic Council In Defence Ministers session held in Brussels on Thursday, 8 June 2006; Final Communiqué - Meeting of the North Atlantic Council in Defence Ministers Session; Final communiqué - Ministerial meeting of the North Atlantic Council held at NATO headquarters, Brussels; 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.

<sup>85</sup> See, for example, the Brussels Declaration by the OSCE Parliamentary Assembly (Fifteenth Annual Session, Brussels, 3-7 July 2006), in which the Assembly: «[Reaffirm] the necessity to respect the sovereignty, territorial integrity and internationally recognized borders of states, as one of the pillars of maintenance of international security.» (par. 7) and «[Call upon] all parties concerned to engage constructively in dialogue to resolve the future status of Kosovo, and to seek a solution through negotiations on the basis of the principles mentioned above» (par. 8).

<sup>86</sup> See, for example, the Declaration by the Ministerial Council adopted at the Meeting on 6-7 December 2002, in which the Council: «2. Reiterating our adherence to the Helsinki Final Act, the Charter of Paris and the 1999 Istanbul Charter for European Security, we fully support the territorial integrity and the inviolability of borders



#### 2.2.4. European Union

47. The European Union has continually taken part in the efforts made by the international community to respond to the Kosovo crisis, both from the specific perspective of its participation in the international civil presence under Resolution 1244 (1999), especially in the Pillar IV, and from a general political perspective. Therefore, it is also of interest to analyze the practice of its institutions.

48. In this respect, attention should be drawn first to the repeated practice of the EU institutions to refer to Kosovo as being part of Serbia, through expressions such as Serbia «including Kosovo» or «Kosovo within the former Federal Republic of Yugoslavia». Such references no doubt imply recognition of the sovereignty and territorial integrity of Serbia.

The use of such expressions is particularly significant in the case of acts of secondary law explicitly referring to the relation between the EU and Serbia or between the EU and the province of Kosovo, among which the following can be underlined:

- i) *Council Decision 2004/520/EC, of 14 June 2004, on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999<sup>87</sup>. Regarding this Council Decision, it is to be stressed that when it was last modified, one day after the unilateral declaration of independence of Kosovo, reference was still made to «Serbia including Kosovo under UNSCR 1244», and annex I of the decision refers to a country, in the singular<sup>88</sup>.*
- ii) *Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA)<sup>89</sup>.*
- iii) *Council Decision 2006/880/EC of 30 November 2006 providing exceptional Community financial assistance to Kosovo<sup>90</sup>.*

49. On the other hand, recognition that Kosovo is still a part of Serbia, although under an Interim Regime of International Administration, is equally reflected in the use of expressions such as «Kosovo under United Nations Security Council Resolution 1244 (1999)» and «Kosovo as defined by United Nations Security Council Resolution 1244

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of the States in South-Eastern Europe. We welcome the efforts displayed by the governments, together with the OSCE and other international organizations to maintain peace and enhance security and stability in former crisis areas. We expect full compliance with all international obligations and reaffirm our commitment to the full implementation of United Nations Security Council resolution 1244. We stand ready to continue to play an active role in the United Nations Interim Administration Mission in Kosovo and to assist the Provisional Institutions of Self-Government in Kosovo, Federal Republic of Yugoslavia.»

<sup>87</sup> OJ L 227, 26.06.2004, p. 21–34. See also Council Decision 2006/56/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 (1999) of 10 June 1999 and repealing Decision 2004/520/EC (OJ L 35, 7.2.2006, p. 32); and Council Decision 2008/213/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 (1999) of 10 June 1999 and repealing Decision 2006/56/EC (OJ L 80, 19.3. 2008, p. 48).

<sup>88</sup> OJ L 80, 19 March 2008, p. 48.

<sup>89</sup> OJ L 210 31.7.2006, p. 82, art. 2 and annex III.

<sup>90</sup> OJ L 339, 6.12.2006, p. 36. See also *Council Decision 2000/140/EC of 14 February 2000 providing exceptional Community financial assistance to Kosovo* (OJ L 47, 19.2.2000, p. 48) and *Council Decision of 27 June 2001 on further exceptional financial assistance to Kosovo* (OJ L 183, 6.7.2001, p. 42).

(1999)». Bearing in mind that, as indicated *supra*, Resolution 1244 (1999) proclaims respect for the sovereignty and territorial integrity of Serbia, the use of such expressions is particularly significant.

In this respect, one could cite *Commission Regulation (EC) No 2008/2006 of 22 December 2006 laying down detailed rules for the application in 2007 of the tariff quotas for baby beef products originating in Croatia, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia and Serbia, Montenegro and Kosovo*<sup>91</sup>. And even *Council Joint Action 2008/124/CFSP, of 4 February 2008, on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO*, which on defining «Kosovo organs, institutions and authorities referred to in this Joint Action», declares that «[they] are the institutions (hereinafter the Kosovo institutions) created on the basis of Resolution 1244»<sup>92</sup>.

This same practice has been followed, now through acts not having a normative character, by the Commission which, in different documents specifically related Kosovo, or to the Western Balkans in general, refers to the Serbian province as «Kosovo under UNSCR 1244». It does so, for instance, in a series of reports entitled «Commission Staff Working Document, *Kosovo (under UNSCR 1244) 2006 Progress Report*<sup>93</sup>, of 8 November 2006; *2007 Progress Report*<sup>94</sup>, of 6 November 2007; and *2008 Progress Report*<sup>95</sup>, of 5 November 2008. Of even greater interest is the use of this expression in the following Communications by the Commission: *A Europe Future for Kosovo*<sup>96</sup>, of 20 April 2005; *The Western Balkans on the road to the EU: consolidating stability and raising prosperity*<sup>97</sup>, of 27 January 2006; *Enlargement Strategy and Main Challenges (2007-2008)*<sup>98</sup>; and *Western Balkans: enhancing the European perspective*, of 5 March 2008<sup>99</sup>.

50. Recognition of the sovereignty and territorial integrity of Serbia, along with recognition of the United Nations competence in relation to Kosovo, can also be deduced, *a sensu contrario*, from the process of conclusion of international agreements involving different States of the Western Balkans region, aimed at promoting stability and economic development in the region. Although intended to apply directly in Kosovo, it must be stressed that such agreements have not been concluded directly with the PISG, but have been concluded with UNMIK as the institution in charge of the administration of Kosovo by virtue of Resolution 1244 (1999). This has been the case of *Energy Community Treaty*, *Central European Free Trade Agreement*, *Agreement Amendment of an Accession to the Central European Free Trade Agreement*, and of *Agreement on the European Common Aviation*

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<sup>91</sup> OJ L 379, 28.12.2006, p. 105. The same model has been adopted in *Commission Regulation (EC) N° 1577/2007 of 27 December 2007* (OJ L 344, 28.12.2007, p. 2) and in the *Commission Regulation (EC) N° 1189/2008 of 25 November 2008* (OJ L 322 of 2 December 2008).

<sup>92</sup> OJ L 42, 16.2.2008, p. 92, p.p. 2.

<sup>93</sup> COM (2006) 649 final.

<sup>94</sup> SEC (2007) 1433.

<sup>95</sup> SEC (2008) 2697.

<sup>96</sup> COM (2005) 156 final.

<sup>97</sup> COM (2006) 27 final.

<sup>98</sup> COM (2006) 649 final. In identical sense, see the Communication referred to the 2008-2009 period (COM (2008) 674 final, of 5 November 2008). Reference to «Kosovo under Resolution 1244» appears even in the website *European Commission. Enlargement* ([http://ec.europa.eu/enlargement/press\\_corner/key\\_documents/reports\\_nov\\_2008\\_en.htm](http://ec.europa.eu/enlargement/press_corner/key_documents/reports_nov_2008_en.htm)).

<sup>99</sup> Doc. COM (2008) 127 final.

Area (ECAA). Likewise, as reported by the Commission in its *Kosovo (under UNSCR 1244) 2008 Progress Report*, «UNMIK/Kosovo» takes part in the negotiation of the *Western Balkans Transport Community Treaty*.

51. Finally, from a general political perspective, it must also be recalled that respect for the sovereignty and territorial integrity of Serbia and the other States of the region, along with respect for pre-established borders, inspired the EU position on the final settlement of the Kosovo conflict. Thus, it can now be underlined, by way of example, that the Berlin European Council, of 24-25 March 1999, expressly stated that «[t]he international community's only objective is to find a political future for Kosovo, on the basis of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia[...]»<sup>100</sup>. And the Cologne European Council, whose Conclusions «emphasize the urgent need for the adoption of a UN Security Council Resolution authorizing the creation of the international security force and the setting up of the provisional international civil administration», refers *expressis verbis* to the «province» of Kosovo<sup>101</sup>. The Lisbon European Council of 2000, for its part, also referring to the Kosovo crisis, declared that «[l]asting stability in the region can only be ensured taking into account the legitimate interests of the neighbouring countries of the FRY with full respect for territorial integrity and for existing borders»<sup>102</sup>. This same reference to the need to respect the pre-existing borders in the region recurs in the Stockholm European Council of 2001, expressly affirming in its Conclusions that, «[i]t recalls its firm attachment to the principles of inviolability of borders, territorial integrity and sovereignty of the countries of the region»<sup>103</sup>. This general recognition of the importance of the principle of sovereignty and territorial integrity has not ceased even after the European Union reinforced its commitment to the solution of the Kosovo, or even after an European perspective for the Balkans was defined, an event that resulted, in political terms, in a series of declarations of support for the Ahtisaari proposal.

The European Parliament, for its part, has also made reference in several resolutions to the need to respect the existing borders, to the exercise of the self-government of Kosovo within the FRY or with respect for the sovereignty and territorial integrity of Serbia<sup>104</sup>; it has also called for a strict compliance with Resolution 1244 (1999)<sup>105</sup>, which obviously includes

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<sup>100</sup> Presidency Conclusions, Berlin European Council, 24 and 25 March, 1999, Part III, Statements on Kosovo. In the same Conclusions, referring to the Rambouillet Agreements, the European Council affirmed the following: «The draft agreement, which was signed by the Kosovo Albanians in Paris, meets these requirements: on the basis of the sovereignty and territorial integrity of Yugoslavia it assures Kosovo a high degree of self-government, guarantees the individual human rights of all citizens in Kosovo according to the highest European standards, envisages extensive rights for all national communities living in Kosovo and creates the basis for the necessary reconstruction of the war-torn region.»

<sup>101</sup> Presidency Conclusions, European Council, 3-6 June 1999, para. 65 and Annex V: European Council Declaration on Kosovo.

<sup>102</sup> Presidency Conclusions, Lisbon Extraordinary European Council, 23 and 24 March 2000, para. 53.

<sup>103</sup> Presidency Conclusions, Stockholm European Council, 23 and 24 March 2001, para. 65 and annex III. Respect for the territorial integrity of the neighbouring countries has also been proclaimed by the European Council of Brussels, of 16 and 17 June 2005: Presidency Conclusions, Declaration on Kosovo, Annex III.

<sup>104</sup> See, for instance, Resolutions of 18 June 1998 (OJ C 210, 6 July 1998, p. 225), 10 July 1998 (OJ C 292, 21 September 1998, p. 134), and 15 April 1999 (OJ C 219, of 20 July 1999).

<sup>105</sup> Resolution of 15 February 2000 (OJ C 276, 1.10.2000, p. 277). Likewise, in Resolution of 15 March 2001 the European Parliament «13. Calls for respect of the existing borders of the states in south-east Europe; therefore demands the strict application of the UN resolution 1244 in all parts.» (OJ C 343, 5.12.2001, p. 265). See also Resolutions of 18 June 1998 (OJ C 210, 6 July 1998, p. 225), 10 July 1998 (OJ C 292, 2 September 1998, p. 134), and 15 April 1999 (OJ C 219, 20 July 1999).

the aforementioned principle. And only after the unilateral declaration of independence has the European Parliament adopted resolutions that are incompatible with full respect for Serbia's sovereignty and territorial integrity.

However, attention must be drawn to the fact that, even after the unilateral declaration of independence of Kosovo, the European Union has continued to recognize the importance it attaches to the principle of sovereignty and territorial integrity. Thus in the Conclusions of the Council of the European Union of 18 February 2008, adopted one day after the unilateral declaration of independence of Kosovo, «[t]he Council reiterates the EU's adherence to the principles of the UN Charter and the Helsinki Final Act, *inter alia* the principles of sovereignty and territorial integrity and all UN Security Council resolutions»; and then states that «Kosovo constitutes a *sui generis* case which does not call into question those principles and resolutions»<sup>106</sup>.

At any rate, such a statement cannot be interpreted as being *per se* an impugnation of Serbia's sovereignty and territorial integrity, all the more so if it is related to the fact that the Council of the European Union itself starts by recognizing the different positions held on the issue by Member States, affirming in the referred Conclusions that «[t]he Council notes that Member States will decide, in accordance with national practice and International law, on their relations with Kosovo».

### 2.3. *Sovereignty and territorial integrity as regards the case of Kosovo in other international Organizations and bodies*

52. Lastly, there are international organizations, bodies, and institutions that, although they do not form part of the international civilian presence or have a direct relationship with it, are especially significant to mention here. Thus, certain activities of the Council of Europe and the UN Human Rights Committee regarding Kosovo have expressly recognized the sovereignty and territorial integrity of Serbia. In both cases, it is especially noteworthy that recognition of Serbia's sovereignty and integrity occurred within the context of international protection of human rights and minority rights in Kosovo. This is an issue known to be one of the reasons justifying the adoption of Resolution 1244 (1999), and the establishment of an international administration for this territory.

53. Regarding the Council of Europe, the following is especially worthy of note:

- i) The Secretariat of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) drew up a document in 2003 on the possible extension of the CPT's activities to Kosovo. In this document, after affirming that « [p]ursuant to United Nations Security Council Resolution 1244 (1999), Kosovo still forms part of the territory of Serbia and Montenegro », it declares itself favourable to the possibility that the Council of Europe could reach an agreement with UNMIK enabling the CPT to exercise its functions in this territory. However, this does not affect its prior recognition of Serbia's territorial integrity, since it expressly declares that such an agreement is no more than a «means of enabling

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<sup>106</sup> Doc. 6496/08 (Presse 41).

the CPT to effectively fulfil its obligations under the Convention throughout *the whole territory of Serbia and Montenegro*<sup>107</sup>.

- i) Closely related to the aforesaid situation are two technical agreements signed by UNMIK and the Council of Europe regarding the technical arrangements for implementing the Council's Convention for the Protection of National Minorities<sup>108</sup> and for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>109</sup>. During the negotiations for both, including the discussions with Serbia-Montenegro, an amendment was included in para. 3 of each Preamble, recognizing the sovereignty and territorial integrity of Serbia-Montenegro in accordance with Security Council Resolution 1244<sup>110</sup>.

54. Lastly, it should be noted that the UN Human Rights Committee, regarding the study on the report presented by Serbia in 2004 in accordance with Art. 40 of the International Covenant on Civil and Political Rights, affirms the following:

« The Committee notes that, in accordance with Security Council resolution 1244 (1999), Kosovo currently remains a part of Serbia and Montenegro as successor State to the Federal Republic of Yugoslavia, albeit under interim international administration, and the protection and promotion of human rights is one of the main responsibilities of the international civil presence (para. 11 (j) of the resolution) »<sup>111</sup>.

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55. To sum up, having analyzed the legal framework and the relevant practice, both general and as regards Kosovo, it must be concluded that respect for sovereignty and territorial integrity of States is a fundamental pillar of contemporary international law. Moreover, in the case of Kosovo, respect for Serbia's sovereignty and territorial integrity is a precondition of the action undertaken by the Security Council and the international community in this territory. The applicability and binding force of the principle of sovereignty and territorial integrity cannot be discarded because the Security Council has decided to establish an interim international administration regime in Kosovo as a result of, and as a sanction in response to, the grave events that took place in this Serbian province during the nineties.

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<sup>107</sup> Doc. CPT (2003) 57 of 24 June 2003: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). Possible extension of the CPT's activities to Kosovo. Document prepared by the Secretariat. Emphasis added.

<sup>108</sup> *Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities*, 23 August 2004 (text in Council of Europe Document CM/Del/Dec (2004)890, 2 July 2004).

<sup>109</sup> *Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 23 August 2004 (text in Council of Europe Document CM/Del/Dec (2004)890, 2 July 2004).

<sup>110</sup> Re these issues, see: Council of Europe Document GR-EDS(2004)18, 3 June 2004. Regarding both technical agreements, it should be underlined that neither of the two makes UNMIK party to the Conventions whose applications it is ensuring, in which the only State party continues to be Serbia.

<sup>111</sup> CCPR/CO/81/SEMO, of 12 August 2004. It should be taken into account here that the Human Rights Committee issued this because «The State party [Serbia and Montenegro] explained its inability to report on the discharge of its own responsibilities with regard to the human rights situation in Kosovo, and suggested that, owing to the fact that civil authority is exercised in Kosovo by the United Nations Interim Administration Mission in Kosovo (UNMIK), the Committee may invite UNMIK to submit to it a supplementary report on the human rights situation in Kosovo.»

## IV. THE PROVISIONAL SELF-GOVERNMENT REGIME OF KOSOVO

### 1. RESOLUTION 1244 (1999) AS THE FRAMEWORK AND LEGAL BASIS OF THE INTERIM INTERNATIONAL ADMINISTRATION REGIME, INCLUDING THE PROVISIONAL SELF-GOVERNMENT REGIME OF KOSOVO

56. As observed above, Resolution 1244 (1999) constituted the immediate response by the Security Council to the grave events that occurred in Kosovo in the 1990s. In this Resolution, the Council stated it was «*determined* to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes» (p.p. 4th) and reaffirmed its call for «substantial autonomy and meaningful self-administration for Kosovo» (p.p. 11th); its *decided* that the «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» of the same Resolution (o.p. 1).

Under this Resolution, the Security Council created a special regime for Kosovo, based upon two complementary pillars: i) the interim international administration of Kosovo; and ii) the political process to determine Kosovo's future status. These two pillars are manifestations of the Security Council's application of its primary responsibility in maintaining international peace and security in the case of Kosovo. And both pillars are viewed, in teleological terms, as instruments that are necessary to achieve the goal defined by the Security Council, to wit: the definitive political solution to the Kosovo crisis.

Both pillars are influenced by the unilateral declaration of independence issued by the PISG of Kosovo. Accordingly, each one in turn must be analyzed to determine whether this UDI may possess any grounds for justification in the special regime established under Resolution 1244 (1999); either from the viewpoint of defining the competences of the PISG, or from that of the elements that define the process to determine Kosovo's future status.

57. As regards the first of the pillars, the Security Council «*decides* on the deployment in Kosovo, under United Nations auspices, of international civil and security presences» (o.p. 5); and «*authorizes* the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order 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» (o.p. 10).

This international presence, and in particular the civil presence headed by UNMIK, constitutes the instrument applied by the Security Council to establish the international administration regime for Kosovo, which has the following main responsibilities (o.p. 11):

- i) *Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);*
- ii) *Performing basic civilian administration functions where and as long as required;*
- iii) *Organizing and overseeing the development of provisional institutions for*

- democratic and autonomous self-government pending a political settlement, including the holding of elections;*
- iv) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;*
  - v) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);*
  - vi) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;*
  - vii) Supporting the reconstruction of key infrastructure and other economic reconstruction;*
  - viii) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;*
  - ix) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;*
  - x) Protecting and promoting human rights;*
  - xi) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.*

58. As may be concluded from the aforesaid, the interim international administration regime for Kosovo is characterized by the following elements:

- i) It is a special regime by virtue of which certain international institutions (those making up the international civil presence, and in particular, UNMIK) are attributed wide-ranging powers of civil administration, including the financial and infrastructure reconstruction of the territory. They are also attributed powers to ensure that the Kosovar population coexists peacefully, that human rights are protected and promoted and that humanitarian initiatives are guaranteed access.
- ii) It is a special regime, an essential part of which is the establishment of a system of self-government that is to be exercised «*within the Federal Republic of Yugoslavia*»<sup>112</sup> (present-day Serbia). This system of self-government must be promoted by the same international civil presence, including the promotion of a process of institutionalization leading to the constitution of «Kosovo's local provisional institutions» (the PISG), which will be responsible for the exercise of self-government, under the direction, supervision and control of the international civil presence.
- iii) It is a special regime that does not alter the situation of Serbia's territorial integrity and sovereignty over Kosovo, as the self-government is to be implemented within the Federal Republic of Yugoslavia (present-day Serbia).
- iv) It is a special regime that does not predetermine the future status of Kosovo, as the status of this territory is to be determined in an autonomous way in accordance with a process established for this purpose under Resolution 1244 (1999). In consequence, the international administration regime, and the provisional regime of self-government derived from the latter, must be implemented in such a way that the specific form of Kosovo's future status is not predetermined.

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<sup>112</sup> Res. 1244 (1999), o.p. 10. Emphasis added.

- v) It is a special regime, intended to remain valid until the definitive determination of Kosovo's future status. Hence – and by definition – it is a provisional regime.

## 2. KOSOVO'S PROVISIONAL SELF-GOVERNMENT WITHIN SERBIA

### 2.1. *The Provisional Institutions of Self-Government of Kosovo (PISG)*

59. Inevitably, in view of Security Council Resolution 1244 (1999), the establishment of a *provisional regime for the self-government of Kosovo* and, as an instrument of the latter, the creation and establishment of *Provisional Institutions of Self-Government* (the PISG), are fundamental aspects of the international administration regime set up by the Security Council.

In consequence, this interim international administration regime constitutes the framework within which the regime for provisional self-governance and the PISG's activity should be developed. Therefore, it is this regulatory framework that must determine the PISG's nature and powers, and which must be the standard of reference for assessing the legal validity of any action taken by the aforesaid provisional institutions. This conclusion is fully applicable to the UDI issued by the Kosovo Assembly, and therefore the latter Declaration will only be lawful if it is found to be compatible with the special regime defined by the Security Council in Resolution 1244 (1999) and developed by UNMIK. This compatibility, in turn, can only be assessed in the light of the nature and powers of the aforesaid PISG.

#### 2.1.1. Nature

60. In fact, Resolution 1244 (1999) makes continual reference to what are termed *provisional democratic self-governing institutions, provisional institutions for democratic and autonomous self-government, Kosovo's local provisional institutions, and Kosovo's provisional institutions*.

In accordance with the aforesaid resolution, UNMIK has promoted the constitution of the *Provisional Institutions of Self-Government* (PISG) of Kosovo, which were created by virtue of the *Constitutional Framework for Provisional Self-Government*<sup>113</sup>. These *Provisional Institutions* are basically the Assembly, the Government and the Judiciary, together with a number of Independent Bodies and Offices<sup>114</sup> and the Ombudsperson<sup>115</sup>. Therefore, the Kosovo Assembly which approved the UDI of 17 February 2008 forms part of the PISG and is subject to the general legal regime applicable to those institutions.

61. The PISG are obliged to develop their mandate within the framework of Resolution 1244 (1999) and within the *Constitutional Framework*, which is the legal standard of

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<sup>113</sup> UNMIK/REG/2001/9, 15 May 2001.

<sup>114</sup> These bodies and offices are the Central Election Commission; the Kosovo Judicial and Prosecutorial Council; the Office of the Auditor-General; the Banking and Payments Authority of Kosovo; the Independent Media Commission; the Board of the Public Broadcaster; and the Housing and Property Directorate and the Housing and Property Claims Commission. UNMIK/REG/2001/9, ch. 11.

<sup>115</sup> The Ombudsperson, in accordance with UNMIK legislation in force, shall have jurisdiction to receive and investigate complaints, monitor, take preventive steps, make recommendations and advise on human rights violations or actions constituting abuse of authority by any public authority in Kosovo. *Ibid.*, ch. 10.



reference for defining the validity or otherwise of the acts taken by the aforesaid institutions.

In this respect, it is particularly noteworthy that in the discussions held in the Security Council, reiterated mention has been made of the fact that the PISG are subject to Resolution 1244 (1999) and to the *Constitutional Framework*, even as regards the elected bodies of the PISG. Thus, for example, let us note the statement that «[t]he elected leaders (...) must play their part in the Self-Government (...). They have that responsibility to their electorate, but also to Kosovo as a whole, which must be fully developed within the framework of resolution 1244 (1999) and the Constitutional Framework (...)»<sup>116</sup>. Moreover, it has been stated that «the Kosovo Assembly and self-government institutions must act at all times within the terms of Security Council resolution 1244 (1999) and the Constitutional Framework»<sup>117</sup>. Both statements, without doubt, are of particular importance with regard to the present consultative procedure.

62. Finally, it should be noted that the PISG are of a provisional nature, and must never be confused with the «*institutions established under a political settlement*», the status of which is not defined under Resolution 1244 (1999), but must be derived from the process by which Kosovo's future status is to be determined.

This provisional nature of the PISG is expressly stated in Resolution 1244 (1999), which employs the term «provisional» on at least four occasions, as well as in Annexes 1 and 2 to the Resolution, which refer, respectively, to «an *interim* political framework agreement providing for a substantial self-government for Kosovo» and to the «*provisional* democratic self-governing institutions». Furthermore, the difference made between the latter and the «*institutions established under a political settlement*» is also apparent in Resolution 1244 (1999), which sets out that one of the elements of the mandate of the international civil presence (UNMIK) will be that of «*overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement*».

In consequence, it must be concluded that the nature of the PISG is, and was at the moment when the Kosovo Assembly adopted its UDI, that of a provisional institution, one subject to the international administration regime, and that they should in no case be confounded with the «*institutions established under a political settlement*» in accordance with the process set up under the auspices of the Security Council. The same conclusion is supported by various Statements made by the President of the Security Council, in which it is expressly declared that «[t]he Security Council (...) emphasizes the responsibility of Kosovo's elected leaders to respect fully the final status provisions of resolution 1244 (1999)»<sup>118</sup>. This responsibility, beyond a doubt, would not exist in the case of the aforesaid «*institutions established under a political settlement*».

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<sup>116</sup> France, 4498th Meeting (27 March 2002), (S/PV.4498, p. 20). At the same session, Norway stated that «[e]lected representatives in the Kosovo Assembly, as well as provisional Government authorities, must strictly abide by the Security Council resolution 1244 (1999) and the Constitutional Framework» (*ibid.*, p. 23).

<sup>117</sup> United Kingdom, 4559th Meeting (26 June 2002), (S/PV.4559, p. 17). For Mexico, «the process of transferring additional responsibilities to the Provisional Institutions of Self-Government of Kosovo (...) it is essential that the process be carried out in accordance with resolution 1244 (1999) and the Constitutional Framework» ( 4782nd Meeting (3 July 2003), S/PV.4782, p. 10).

<sup>118</sup> S/PRST/2001/27 and S/PRST/2001/34.

## 2.1.2. Competences

63. The competences attributed to the PISG are those corresponding to a regime of autonomy and self-government; both expressions are repeatedly referred to in Resolution 1244 (1999) and its Annexes, for example in mentions of the «democratic self-governing institutions» (o.p. 10), the «substantial autonomy and self-government» for Kosovo (o.p. 11.a), the «democratic and autonomous self-government» of Kosovo (o.p. 11.c), the «substantial self-government» (Annex 1), the «democratic self-governing institutions»<sup>119</sup> and the «substantial self-government» of Kosovo (Annex 2).

Moreover, in order to identify the scope of this regime of self-government, paragraph 11 a) of Resolution 1244 (1999) states that «full account of annex 2 and of the Rambouillet accords» should be taken. In this respect, it should also be recalled that Principle 8 of those set out in Annex 2 establishes a clear-cut limit in referring to the «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». As regards the Rambouillet accords, their affirmation of the aforesaid principles has been noted above.

64. On the basis of the aforesaid, the substantive competences of the PISG are defined in the *Constitutional Framework* in very broad terms, which can be summarised as follows:

- i) The PISG are responsible for the following areas: economic and financial policy, fiscal and budgetary issues, administrative and operational customs activities, domestic and foreign trade, industry and investments, education, science and technology, youth and sport, culture, health, environmental protection, labour and social welfare, family, gender and minors, transport, post, telecommunications and information technologies, public administration services, agriculture, forestry and rural development, statistics, spatial planning, tourism, good governance, human rights and equal opportunity, and non-resident affairs.<sup>120</sup>
- ii) In the field of local administration, the PISG have responsibilities in supporting inter-municipal cooperation, promoting the development of a professional municipal civil service, assisting the municipalities in the development of their own budgets and financial management systems, monitoring the quality of municipal services, identifying ways and means for training activities for the municipalities, assisting the municipalities in making their activities transparent to the public, providing legal guidance and advice to the municipalities, coordinating the activities of international agencies and non-governmental organizations pertaining to municipalities, and overseeing compliance with responsibilities and powers delegated to municipalities based on the organizational structures that emerged from the municipal elections, as well as responsibilities and powers transferred in the meantime.<sup>121</sup>
- iii) In the field of judicial affairs, the PISG also have responsibilities in making decisions regarding the appointment of judges and prosecutors; exercising responsibilities regarding the organization and proper functioning of the courts, within existing court

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<sup>119</sup> Principles 5 and 8 of Annex 2.

<sup>120</sup> See UNMIK/REG/2001/9, ch. 5.1.

<sup>121</sup> *Ibid.*, ch. 5.2.

structures; the provision, development and maintenance of court and prosecutorial services; the provision of technical and financial requirements, support personnel and material resources to ensure the effective functioning of the judicial and prosecutorial systems; the training, including professional and vocational training, of judicial personnel in cooperation with the Organisation for Security and Cooperation in Europe (OSCE); the organization of examinations for qualification of judges, prosecutors, lawyers and other legal professionals through an independent professional body; the appointment, training, disciplining and dismissing of members of judicial support staff; ensuring coordination on matters pertaining to the judicial system and the correctional service; cooperating with appropriate organizations in respect of independent monitoring of the judicial system and the correctional service, providing information and statistics on the judicial system and the correctional service, as appropriate; protecting personal data relating to the judicial system and correctional service; ensuring cooperation in judicial and correctional matters with appropriate entities inside Kosovo; and assisting in the recruitment, training and evaluation of personnel for the correctional service.<sup>122</sup>

65. However, under the Constitutional Framework, the powers and responsibilities of the PISG do not include certain reserved powers and responsibilities, which remain exclusively in the hands of the SRSG. These reserved powers include, amongst others: the faculty to dissolve the Assembly and calling for new elections in circumstances where the PISG 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; the final authority on monetary policy and to approve the Kosovo Consolidated Budget; to exercise control and authority over the UNMIK Customs Service; the final authority regarding the appointment, removal from office and disciplining of judges and prosecutors; to exercise the powers and responsibilities of an international nature in the legal field; the external relations as may be necessary for the implementation of his mandate, including the conclusion of agreements with States and international organizations in all matters within the scope of UNSCR 1244 (1999) and to oversee the fulfilment of commitments in international agreements entered into on behalf of UNMIK; to preserve the existing boundaries of municipalities; or to ensure that the system of local municipal administration functions effectively based on internationally recognized and accepted principles.<sup>123</sup>

## 2.2. The international civil presence as a limit to the PISG's competences

66. In any case, it should be borne in mind that, as established in the *Constitutional Framework*, «[t]he 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.»<sup>13</sup> The PISG and the exercise of its competences, therefore,

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<sup>122</sup> *Ibid.*, ch. 5.3.

<sup>123</sup> *Ibid.*, ch. 8.

remain subject to the authority of the Special Representative of the Secretary-General and the corresponding legislation. In other words, they remain subject to, and are to be addressed within, the international administration regime established by the UN Security Council in Resolution 1244 (1999).

67. Within the aforesaid framework, it should be noted that certain *ultra vires* actions by the PISG have obliged the SRSG to intervene repeatedly, and to issue warnings concerning the limits of the PISG's competences, and even to repeal some of their decisions. The above effects are reflected in a considerable, significant body of practice, a large part of which is analyzed in Section III of the present document concerning the acts by the PISG that prejudice Serbia's sovereignty and territorial integrity<sup>125</sup>.

Nevertheless, apart from the particular areas in which the SRSG has taken steps<sup>126</sup>, it is useful to draw attention at this stage to the fact that the control practice referred to above highlights the limited nature of the PISG's competences. Moreover, this is reinforced by the fact that both the Secretary-General and the Security Council have always supported these interventions by the SRSG, this being reflected both in the Secretary-General's reports concerning UNMIK and in the Security Council's published *procès verbaux*, as well as in the Statements made by its President.

68. It should be recalled, firstly, that the Secretary-General's reports concerning UNMIK have on many occasions taken note of diverse decisions taken by the Special Representative annulling *ultra vires* actions by the PISG, and of the fact that the Secretary General has always approved these decisions. For example, the following statements are worthy of mention:

- i) «There were continued instances of the Assembly overstepping its competences. On 8 November the Assembly adopted a resolution rejecting the inclusion of Kosovo in the preamble of the Constitutional Charter of the State Union of Serbia and Montenegro (...). In December, my Special Representative sent back to the Assembly the Law on External Trade Activity, which was in violation of the Constitutional Framework. Also in December, UNMIK headed off a draft resolution on independence prepared by AAK»<sup>127</sup>.
- ii) «[T]he Kosovo Assembly continues, on occasion, to show a tendency to go beyond its prescribed institutional role as a legislative body and to adopt positions on symbolic matters, which are clearly beyond the scope of its competences under

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<sup>124</sup> UNMIK/REG/2001/9, ch. 12.

<sup>125</sup> See *supra*, Section III.2.2.1.

<sup>126</sup> In addition to the examples provided above, many others can be found in the Secretary-General's reports on UNMIK. Significant among these, for all, are the most recent: S/2006/45, Annex 1, para. 3 and 6; S/2006/707, para. 18 and Annex 1, para. 14; S/2006/906, para. 5 and 63; S/2007/134, Annex 1, para. 28 and 33; S/2007/582, para. 4 and 23; Annex 1, para. 68; S/2007/768, Annex 1, para. 19. In the same respect, mention should be made of the reaction provoked by the Kosovo Assembly's adoption of the *Declaration on Kosovo – A sovereign and independent State* of 3 February 2003. In response to this, the Principal Deputy Special Representative of the Secretary-General said in a letter of 7 February 2003 to the President of the Assembly: «[i]n this respect I would like to advise you in writing that consideration of this matter by the Assembly would be contrary to United Nations Security Council resolution 1244 (1999), the Constitutional Framework for Provisional Self-Government in Kosovo and to the Provisional Rules of Procedure of the Assembly» (Letter dated 7 February 2003 from the Principal Deputy Special Representative of the Secretary-General to the President of the Assembly of Kosovo (on file with the UN Office of Legal Affairs) [Dossier No. 189]).

<sup>127</sup> S/2003/113, p. 4, para. 12.

the Constitutional Framework. The Assembly's endorsement of a resolution on «war values», which was highly divisive in nature, hinders efforts at cooperation among political representatives of Kosovo's communities in the Provisional Institutions»<sup>128</sup>.

- iii) «I am also concerned that the Kosovo Assembly is once again refusing to take into account legitimate minority concerns in the legislative process and overstepping its competences. That is a direct challenge to resolution 1244 (1999), the Constitutional Framework and the law applicable in Kosovo. I fully support the firm line that my Special Representative has taken in that regard»<sup>129</sup>.
- iv) «While a greater degree of openness and transparency shown by the Kosovo Assembly in its work is to be welcomed, the Assembly's adoption of a comprehensive package of proposed amendments to the Constitutional Framework was clearly outside its competences as set out in resolution 1244 (1999) and the Constitutional Framework and is unacceptable»<sup>130</sup>.

69. The Security Council, too, has reacted promptly to unilateral actions by the Kosovo PISG, as has been highlighted in various interventions by Member States at the Council Sessions in which such actions have been discussed. Accordingly, it has been stated that «initiatives such as the resolution on the protection of territorial integrity of Kosovo, which exceed the competence of the self-government institutions, are null and void»<sup>131</sup>, and that «[t]he Special Representative has been quite right to declare null and void any Assembly regulations falling outside their remit»<sup>132</sup>.

Furthermore, the Council's position in opposition to unilateral actions by the PISG has been made absolutely clear in Statements made by its President, as shown in the following examples:

- i) «The Security Council deplores the adoption by the Assembly of Kosovo, in its session of 23 May 2002, of a «resolution on the protection of the territorial integrity of Kosovo». It concurs with the Special Representative of the Secretary-General that such resolutions and decisions by the Assembly on matters which do not fall within its field of competence are null and void»<sup>133</sup>.
- ii) «The Security Council (...) condemns all attempts to establish and maintain structures and institutions as well as initiatives that are inconsistent with resolution 1244 (1999) and the Constitutional Framework». It is subsequently stressed that «[t]he Council strongly rejects unilateral initiatives which may jeopardize stability and the normalization process not only in Kosovo but also in the entire region. It urges all political leaders in Kosovo and in the region to shoulder responsibility for democratization, peace and stability in the region by rejecting all initiatives contravening resolution 1244 (1999)»<sup>134</sup>.

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<sup>128</sup> S/2003/675, p. 16, para. 62.

<sup>129</sup> S/2004/71, p. 17, para. 55.

<sup>130</sup> S/2004/613, p. 16, para. 62.

<sup>131</sup> France, 4559th Meeting (26 June 2002), (S/PV.4559, p. 15). At the same meeting, Norway stated: «We reiterate our support for the Special Representative's annulment of the Kosovo Assembly's attempts to deal with issues beyond its authority» (*ibid.*, p. 16).

<sup>132</sup> United Kingdom, 4592nd Meeting (30 July 2002), (S/PV.4592, p. 22).

<sup>133</sup> S/PRST/2002/16, Statement on 24 May 2002.

<sup>134</sup> S/PRST/2003/1, Statement on 6 February 2003.

70. Therefore, it must be concluded that the competences attributed to the PISG, though related to wide sectors of social reality, are limited by the interim regime of international administration and by the very powers of the SRSG, for whom the powers more directly connected with the exercise of sovereign competence have been reserved, and to whom the power to condition, limit or prevent the exercise of competences by the PISG has been given, all under the authority of the Secretary General and the Security Council.

The fact that the system of distribution of competences and the mandate of the SRSG itself have not always been respected by the PISG is a mere element of fact that cannot have any effect whatsoever on the binding force of the legal regime established under Resolution 1244 (1999).

### 2.3. *The process of determining the future status of Kosovo as a limit to the provisional self-government regime and to the PISG's competences*

71. Finally, let us draw attention to an element that constitutes an incontrovertible limit to the exercise of self-government in Kosovo by the PISG, to wit: the international administration regime for Kosovo established by the Security Council is a provisional institution, and does not predetermine the definitive solution to the question of Kosovo's final status, which must be determined in accordance with the political process established for this purpose. In consequence, this International Administration Regime must act in such a way so as not to condition or prevent the development of the process, or to condition the definitive solution that may be achieved regarding the future status of Kosovo.

This relation between the interim international administration regime and the process by which the future status of Kosovo is to be determined has played a crucial role regarding the *international presence, both civil and of security forces*, deployed in Kosovo. In application of its mandate, such an international presence has been subject to the principle of a *status-neutral* as regards the definitive political solution<sup>135</sup>.

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<sup>135</sup> The status-neutral principle has constantly been reiterated by the Secretary-General in his reports to the Security Council, especially after the Council authorized, in 2005, the launching of the political process to determine Kosovo's future status. Thus, he has stated that all preparatory work to define a future international presence in Kosovo or to modify the structure or scope of UNMIK is carried out «without prejudice to the outcome of the future status process» (see, in this respect, the following reports: S/2006/45, para. 14; S/2007/134, para. 21; S/2007/395, para. 28; S/2007/582; S/2007/768, para. 28; S/2008/211, para. 28). Even more emphatically, the Secretary-General stated in his report S/2008/458 that «[t]he United Nations has maintained a position of strict neutrality on the question of Kosovo's status» (para. 29). The principle of neutrality has also been expressly recognized by other components of the international presence in Kosovo. Thus, on 29 October 2007, in his capacity as OSCE Chairman-in-office, Miguel Ángel Moratinos, the Spanish Foreign Minister, stated in his speech to the Helsinki Committee: «over the years, we have managed to maintain a position of neutrality and impartiality in relation to the status of Kosovo». Therefore, it is logical that the same status-neutral principle should also underpin the deployment in Kosovo of EULEX-KOSOVO under the overall authority of the United Nations. See, in this respect: S/2008/354, para. 12; S/2008/692, para. 26; and S/2009/149. See also the *Declaration by the Presidency, on behalf of the European Union, on the deployment of EULEX*, of 2 December 2008; and *Council Joint Action 2006/304/CFSP, of 10 April 2006, on the establishment of an EU Planning Team (EUPT Kosovo) regarding a possible EU crisis management operation in the field of rule of law and possible other areas in Kosovo* (OJ L 112, 24.6.2006, p. 19).

72. However, while the latter is important regarding the international presence and the international administration regime itself, it is all the more so when the obligation to respect the process whereby the future status of Kosovo is to be determined, in accordance with Resolution 1244 (1999), is linked to the PISG and its activities and competences. In this case, the obligation not to prejudge the final outcome of the above process and not to adopt unilateral measures that might imperil it constitute an absolutely clear-cut limit to the provisional self-governance regime and to the competences attributed to the PISG.

This standpoint has been expressly recognized by the United Nations, via UNMIK, by the inclusion in the *UNMIK – FRY Common Document*<sup>136</sup> of a paragraph in which the parties reaffirm «*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*».

## **V. THE PROCESS TO DETERMINE KOSOVO'S FUTURE STATUS: AN OPEN PROCESS**

### **1. RES. 1244 (1999) AS THE FRAMEWORK AND LEGAL BASIS FOR THE PROCESS TO DETERMINE KOSOVO'S FUTURE STATUS**

73. Resolution 1244 (1999) constitutes, without a doubt, the fundamental reference basis for the solution to the conflict and for determining Kosovo's future status. Indeed, suffice it to recall that after welcoming «the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this Resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this Resolution), and the Federal Republic of Yugoslavia's agreement to that paper», operative paragraph 1 of the aforesaid Resolution is conclusive when it states that the Security Council «*[d]ecides 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*».

The fundamental nature of Resolution 1244 (1999) has been affirmed by different Members of the Security Council in various sessions<sup>137</sup>, and as examples, noteworthy are the following: the statement that «resolution 1244 (1999) remains the basis for the final

<sup>136</sup> «UNMIK – FRY Common Document», adopted by the Special Representative of the Secretary-General of the United Nations for Kosovo, 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, Nebojsa Covic, who is also the President of the Coordinating Centre for Kosovo and Metohija. Text in <http://www.mfa.gov.yu/Foreinframe.htm>

<sup>137</sup> Meetings: 4153rd (9 June 2000), 4225th (16 November 2000), 4249th (19 December 2000), 4258th (18 January 2001), 4277th (13 February 2001), 4296th (16 March 2001), 4335th (22 June 2001), 4430th (27 November 2001), 4454th (21 January 2002), 4518th (24 April 2002), 4702nd (6 February 2003), 4742nd (23 April 2003), 4770th (10 June 2003), 478th (3 July 2003), 4853rd (30 October 2003), 4886th (17 December 2003), 4910th (6 February 2004), 4928th (18 March 2004), 4942nd (13 April 2004), 4967th (11 May 2004), 5089 th (29 November 2004), 5130th (24 February 2005), 6025th (26 November 2008).

status of Kosovo»<sup>138</sup>; the reference to «resolution 1244 (1999) as the basic framework for taking forward the political process in Kosovo»<sup>139</sup>; the reference to «a process (...) to determine the final status in accordance with resolution 1244 (1999)»<sup>140</sup>; or the drawing of attention to the need to ensure that «the outcome of Kosovo's future status can be determined only in the overall context of resolution 1244 (1999)»<sup>141</sup>. In addition to these, there have been numerous expressions of «support for resolution 1244 (1999)»<sup>142</sup>.

These statements have, furthermore, been endorsed by the Security Council itself, which, in various subsequent resolutions regarding the situation in Kosovo, «[r]eiterates its strong support for the full implementation of resolution 1244 (1999)»<sup>143</sup>, sets forth Resolution 1244 (1999) as a reference for subsequent action by the Security Council<sup>144</sup> and makes numerous references to its nature as a fundamental basis for the situation of Kosovo. This position has been reiterated in the Statements by the President, in which the Security Council «reaffirms its commitment to the full implementation of resolution 1244 (1999), which remains the basis for building Kosovo's future»<sup>145</sup>; «reaffirms its continued commitment to the full and effective implementation of Council resolution 1244 (1999) in Kosovo, Federal Republic of Yugoslavia»<sup>146</sup>, or «reaffirms that resolution 1244 (1999) remains fully valid in all its aspects. Resolution 1244 (1999) continues to be the basis of the international community's policy on Kosovo»<sup>147</sup>.

In addition to this, regarding the most significant decisions adopted to promote the definitive solution to the Kosovo crisis, the Security Council and the Secretary-General have always pointed out that the framework for the settlement and its legal basis are contained in Resolution 1244 (1999).

74. In relation to this latter fact, especially significant is the appointment in 2005 of M. Ahtisaari as the Special Envoy of the Secretary-General for the future status process for Kosovo. To this purpose, suffice it to recall that the letter of appointment signed by

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<sup>138</sup> China, 4702nd (6 February 2003), (S/PV.4702, p. 11). Canada expressed itself in identical terms at the 4153rd Meeting (9 June 2000) (S/PV.4153, p. 28). For Ireland, «we continue to believe that full implementation of Security Council resolution 1244 (1999) must remain the aim of the international community in Kosovo» (4277th Meeting (13 February 2001) (S/PV.4277, p. 14). According to Mali, «Security Council resolution 1244 (1999) should continue to be the main thread of all policies on Kosovo» (4430th Meeting (27 November 2001) (S/PV.4430, p. 4). For Mauritius, «resolution 1244 (1999) remains the basis for building Kosovo's future» (4518th Meeting (24 April 2002), S/PV.4518, p. 21). In Chile's opinion, «we regard resolution 1244 (1999) as a valid basis and instrument for achieving the three-fold objective of its mandate: to administer Kosovo, to create institutions and, lastly, to facilitate a political process for determining the final status of Kosovo» (4702nd Meeting (6 February 2003), S/PV.4702, p. 9).

<sup>139</sup> United Kingdom, 5089th Meeting (29 November 2004), (S/PV.5089, p. 11). For Spain, «Resolution 1244 (1999) and the Constitutional Framework are the cornerstone of the action of the international community and that of the Security Council on the question of Kosovo» (4702nd Meeting (6 February 2003), S/PV.4702, p. 18). For Greece, «the road ahead for Kosovo has been clearly defined, within the parameters of Security Council resolution 1244 (1999)» (5130th Meeting (24 February 2005), S/PV.5130, p. 18).

<sup>140</sup> United Kingdom, 4910th Meeting (6 February 2004), (S/PV.4910, p. 8).

<sup>141</sup> United States, 4886th Meeting (17 December 2003), (S/PV.4886, p. 9).

<sup>142</sup> United States, 4853rd Meeting (30 October 2003), (S/PV.4853, p. 19). In line with this, Algeria highlighted that «we must forcefully underscore the need to fully implement Security Council resolution 1244 (1999)» (4967th Meeting (11 May 2004), S/PV.4967, p. 10).

<sup>143</sup> Resolution 1345 (2001), o.p. 3.

<sup>144</sup> Resolutions 1345 (2001), 1367 (2001), 1371 (2001).

<sup>145</sup> Statements by the President on 5 October (S/PRST/2001/34) and 9 November 2001. Likewise, the Statement by the President on 24 April 2002.

<sup>146</sup> Statement by the President on 24 October 2002.

<sup>147</sup> Statement by the President on 6 February 2003 (S/PRST/2003/1).



the Secretary-General expressly informed him that in his capacity as Special Envoy, he would lead the political process aimed at determining the future status of Kosovo in accordance with Security Council Resolution 1244 (1999) and the declarations by its President on the question. And that the Mandate annexed to the mentioned letter also states that the objective thereof consists in « [d]etermining the future status of Kosovo is in furtherance of the responsibility of the United Nations in Kosovo in accordance with Security Council resolution 1244 (1999), which includes facilitating a political process designed to determine the future status of Kosovo, as well as relevant Presidential Statements of the Security Council »<sup>148</sup>.

75. Finally, it must also be highlighted that Resolution 1244 (1999) has been recognized as the basis to reach a definitive solution regarding Kosovo's future status by other Organizations, which provide components included in the international presence, and by Organizations and States that have played an outstanding role in the development of the political process itself.

Indeed, suffice it to recall at this point, as an example, that the European Union has expressed before the Security Council, on various occasions, that Resolution 1244 (1999) is the basis for the solution of the Kosovo question<sup>149</sup>, and that, for its part, the Report of the *European Union/United States/Russian Federation Troika on Kosovo*, of December 2007, regarding the negotiations between Belgrade and Pristina on Kosovo's future status promoted by the mentioned Troika, states that «we reaffirmed that Security Council resolution 1244 (1999) and the November 2005 guiding principles of the Contact Group would continue to be our operating framework»<sup>150</sup>.

## 2. CHARACTERISTICS AND CONDITIONS OF THE POLITICAL PROCESS

76. Although Resolution 1244 (1999) does not define in its operative part the characteristics of and the conditions that must be met by the «political process designed to determine Kosovo's future status», such elements may be identified indirectly by virtue of the provisions of the Resolution itself and its two Annexes, and by the reference made by both the Resolution and the Annexes to the Rambouillet Accords.

From the comprehensive reading of all these instruments it must be concluded, without a doubt, that the «political process» endorsed by the Security Council and the development of which should be facilitated by the international civil presence<sup>151</sup>, is characterized by the presence of the following elements:

- i) Its aim is to put an end to the Kosovo crisis as a whole<sup>152</sup>.

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<sup>148</sup> Letter of Appointment dated 14 November 2005 from the Secretary-General to Martti Ahtisaari with attached Terms of Reference (on file with the UN Office of Legal Affairs) [Dossier No. 198].

<sup>149</sup> Thus, France, speaking on behalf of the EU, affirmed that «for the European Union, the full implementation of resolution 1244 (1999) must be the be all and end all of international community action» (S/PV.4249, p. 7). And Greece, in the same capacity, affirmed that the «full implementation of that resolution remains the cornerstone of the European Union's policy on Kosovo» (S/PV. 4770, p. 20).

<sup>150</sup> S/2007/723, p. 2-3.

<sup>151</sup> See Resolution 1244 (1999), o.p. 11.e).

<sup>152</sup> See Resolution 1244 (1999), o.p. 1.

- ii) This must be carried out through «[n]egotiation between the parties for a settlement»<sup>153</sup>.
- iii) The definitive settlement is not predetermined or subject to any limits, but what is predetermined is the condition that such a settlement must be reached by agreement<sup>154</sup> between the interested parties, accompanied, if appropriate, by the international community. This latter element underlies Resolution 1244 (1999) and the whole system constructed on its basis.

77. These characteristics have been present throughout the process that has been taking place since the adoption of Resolution 1244 (1999), with the support and guidance of the Security Council, and with the encouragement and involvement of the international community, through diverse formulas that need not be examined now.

In any case, our analysis of the relevant body of practice highlights the special importance granted in this process to «agreement» between the parties as the basis for any definitive solution that may be considered in accordance with Resolution 1244 (1999). This leads to the consideration as contrary to the mentioned Resolution and, therefore, not in accordance with the Law, of any unilateral act adopted by any of the parties with the intention of deciding on Kosovo's future status without regard to the agreement and, therefore, without regard to the political process supported by the Security Council.

78. The relevant body of practice is rich in examples that support this conclusion.

Thus, it must be pointed out, first and foremost, that the Security Council debates highlight the fact that its Members consider it necessary to reach a negotiated solution that will allow an agreement that is mutually acceptable to the parties. In this sense, it has been said that «[i]t will, in the end, be up to Belgrade and elected representatives of Kosovo's communities to reach final agreement between themselves on status»<sup>155</sup>; that «the terms of any eventual settlement must be mutually acceptable to both sides»<sup>156</sup>; that it is necessary «to find an effective and mutually acceptable negotiated outcome»<sup>157</sup>; or that the definitive settlement must be «a mutually acceptable plan, reached after sincere negotiations by both parties concerned»<sup>158</sup>. This, obviously, excludes unilateral decisions, as it has been stated in this respect that «[n]o unilateral move or arrangement intended to predetermine Kosovo's status

<sup>153</sup> See Resolution. 1244 (1999), Annex 2, principle 8.

<sup>154</sup> In this respect, bear in mind that although Resolution 1244 (1999) does not expressly mention the need for agreement, it does use, on various occasions, the expression «pending a final settlement» (o.p. 11, sections a) and c)) or mentions «a political settlement» (o.p. 11, f)). For its part, Annex 2 expressly mentions «[n]egotiations between the parties for a settlement» (principle 8).

<sup>155</sup> United Kingdom, 4225th Meeting, 16 November 2000 (S/PV.4225, p. 13). In that same session, Canada said that «Canada supports the full implementation of resolution 1244 (1999). We continue to believe that the question of future status is one that must be resolved through negotiations, as established in that resolution» (*ibid.*, p. 14).

<sup>156</sup> United States, 4258th Meeting, 18 January 2001 (S/PV.4258, p. 9).

<sup>157</sup> Russian Federation, 5588th Meeting, 13 December 2006 (S/PV.5588, p. 12). At the 5522nd Meeting (13 September 2006) Peru expressed «its support for the political process aimed at finding a negotiated solution to Kosovo's future status» (S/PV.5522, p. 13).

<sup>158</sup> China, 6025th Meeting, 26 November 2008 (S/PV.6025, p. 17).

—either for the whole or for parts of Kosovo— can be accepted»<sup>159</sup>; and that «the Security Council can support only a negotiated decision, not a one-sided one»<sup>160</sup>.

In addition to this, the Special Representative of the Secretary-General (SRSG), in the exercise of his duties, has also drawn attention towards the non-compliance with Resolution 1244 (1999) of any unilateral action intended to affect or condition Kosovo's future status. In this respect, for the sake of example, the following statements may be quoted:

- i) «Although there will be a clear functional and organizational separation between UNMIK and the provisional institutions of self-government, procedures will be in place to ensure that the Assembly and the Government fully respect Security Council resolution 1244 (1999) and the Constitutional Framework for Provisional Self-Government. *The issue of an eventual declaration of independence would hence be obsolete, since this is by no means within the authority of the self-government*»<sup>161</sup>.
- ii) «Kosovo is under the authority of UN Security Council Resolution 1244 (1999). Neither Belgrade nor Pristina can prejudge the future status of Kosovo. Its future status is open and will be decided by the UN Security Council. Any unilateral statement in whatever form which is not endorsed by the Security Council has no legal effect on the future status of Kosovo»<sup>162</sup>.

Moreover, the importance of an agreement being reached through negotiation is made equally apparent in the Secretary-General's reports, who on several occasions following the beginning of the political process has drawn attention to the need for participation in the process by the interested parties and to the need for them to do so via an approach that will enable positions to be brought closer, because «without such an approach, progress will be difficult and neither side will benefit»<sup>163</sup>. At the same time, he reminded them that «[i]t is the responsibility of the parties to find common ground and a sustainable solution, acceptable to both sides»<sup>164</sup> and he «call[ed] upon all sides to refrain from any unilateral actions and statements»<sup>165</sup>. To conclude, he stated that «[g]iven the substantial gap between the parties on the question of status of Kosovo, consideration should be given to how to deal with the situation if the sides are unable to reach agreement»<sup>166</sup>.

79. Furthermore, this same conviction that only agreement can constitute the basis for the definitive solution regarding Kosovo's future status has also been expressed by other international actors that have played an important role in the political process itself.

Indeed, in the *Guiding principles of the Contact Group for a settlement of the status of Kosovo*, agreed upon by the Contact Group in 2005 and sent by the President of the Security Council to the Secretary-General on the occasion of M. Ahtisaari's appointment as a Special

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<sup>159</sup> Germany, 4770th Meeting, 10 June 2003 (S/PV.4770, pages 13- 14).

<sup>160</sup> Russian Federation, 5373th Meeting, 14 February 2006 (S/PV.5373, p. 6).

<sup>161</sup> The statement was formulated before the Security Council at its 4387th Meeting, (S/PV.4387, p. 6).

<sup>162</sup> «Pronouncement» by the Special Representative of the Secretary-General of 7 November 2002, (on file with the UN Office of Legal Affairs) [Dossier No. 187] (Emphasis added).

<sup>163</sup> See S/2006/361, para. 22.

<sup>164</sup> See S/2006/707, para. 29. See also S/2006/361, para. 22 *in fine*.

<sup>165</sup> S/2006/906, para. 22.

<sup>166</sup> See S/ 2007/582, para. 29.

Envoy for the Future Status Process for Kosovo, the Contact Group did «call on the parties (...) to refrain from unilateral steps», and in Principle 6 it declares that «[a]ny solution that is unilateral (...) would be unacceptable». Regarding these statements, it is important to highlight that the *Guiding principles* were sent to the Secretary-General in relation to the appointment of the Special Envoy «for your reference»<sup>167</sup>.

### 3. THE ROLE OF THE SECURITY COUNCIL

80. Through Resolution 1244 (1999), the Security Council has exercised its «primary responsibility for the maintenance of international peace and security» in relation to the Kosovo crisis. Therefore, and bearing in mind that it acts under Chapter VII of the United Nations Charter, it is no surprise that the Council itself has declared in the mentioned Resolution its ultimate competence over the matter. Thus, suffice it to recall that in the mentioned resolution it «[d]ecides to remain actively seized of the matter» (o.p. 21), and that, with respect to the international civil and security presences, it declares that they will continue after the expiry of the initial mandate of 12 months, «unless the Security Council declares otherwise» (o.p. 19).

On this basis, the Security Council has continued to actively address the situation of Kosovo and the implementation of Resolution 1244 (1999), as is proved by the fact that, since March 1998, it has held more than seventy sessions devoted to the matter, and that its President has made some twenty Statements. And, even more importantly, the Member States have reaffirmed, repeatedly, the ultimate power of the Security Council to assess the implementation of Resolution 1244 (1999), the political process to determine Kosovo's future status, and the status itself.

For the sake of example, suffice it to note that various States have affirmed that «it is now up to the Security Council to take up its responsibility to guarantee the success of a process that it itself began»<sup>168</sup>; that «[o]nly the Security Council has the power to declare a position regarding the implementation of resolution 1244 (1999), and it has the final word in settling the status issue»<sup>169</sup>, and that «it is important that this process be implemented with the United Nations taking a leading role and under the close political leadership of the Security Council»<sup>170</sup>.

Furthermore, it should not be forgotten that it was the Security Council itself that decided in 2005 to endorse the Secretary-General's proposal to launch the political process to determine the future status of Kosovo<sup>171</sup> and it also endorsed the proposal to appoint M. Ahtisaari as Special Envoy of the Secretary-General for the Future Status Process for Kosovo<sup>172</sup>, and that, in this framework, the Security Council itself, through a Statement by

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<sup>167</sup> Letter dated 10 November 2005, S/2005/709.

<sup>168</sup> France, 5673rd Meeting, 2 May 2007 (S/PV.5673, p. 6).

<sup>169</sup> Germany, 4770th Meeting, 10 June 2003 (S/PV.4770, pages 13-14). At the same session, Bulgaria affirmed that «the final word on the status of Kosovo should be given to the United Nations, in compliance with resolution 1244 (1999)» (*ibid.*, p. 8).

<sup>170</sup> Russian Federation, 4910th Meeting, 6 February 2004, p. 10.

<sup>171</sup> See S/2005/635.

<sup>172</sup> See Statement by the President dated 24 October 2005 (S/PRST/2005/51).

its President, has affirmed that this «political process (...) will be led by the United Nations»<sup>173</sup>.

81. This central role of the Security Council has likewise been affirmed by the SRSG in various statements, as shown by the following examples:

- i) «The future status of Kosovo remains to be determined and this shall be done only by the Security Council. And this question shall not be prejudged by any third party»<sup>174</sup>.
- ii) «Neither Belgrade nor Pristina can prejudge the future status of Kosovo. Its future status is open and will be decided by the UN Security Council»<sup>175</sup>.

The SRSG has thus expressed a conviction that has been reiterated by the Secretary-General. As an example, mention can be made of his Report of 28 September 2007, in which he states that «[t]he United Nations (...) expects that the parties and the Troika will do their utmost to reach an agreement that could be endorsed by the Security Council»<sup>176</sup>. The latter can be corroborated by a long list of references to the involvement and responsibility of the Security Council with regard to the solution to the Kosovo crisis, in the Secretary-General's reports on UNMIK, even after the unilateral declaration of independence by the provisional institutions of self-government of Kosovo<sup>177</sup>.

82. In this respect, neither should the example offered by the Contact Group itself be ignored; in its *Guiding principles for a settlement of the status of Kosovo*, addressed to the Secretary-General in October 2005, it states that «[t]he final decision on the status process should be endorsed by the Security Council»<sup>178</sup>.

#### 4. VALIDITY OF RESOLUTION 1244 (1999) AND CONTINUITY OF THE PROCESS

83. In coherence with the above-mentioned, it can only be concluded that Resolution 1244 (1999) is fully valid. This validity was indisputable when the UDI was adopted by the Kosovo Assembly and persisted subsequently, even after the operative and organizational changes that took place in the second half of 2008 regarding the international civil presence, in order to enable the deployment of EULEX-KOSOVO within UNMIK.

This is confirmed, for example, by the *Declaration by the Presidency, on behalf of the European Union, on the deployment of EULEX*, of 2 December 2008, in which it is stated

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<sup>173</sup> S/PRST/2005/51, p. 2.

<sup>174</sup> Letter dated 6 November 2002 from the Special Representative of the Secretary-General to the President of the Assembly of Kosovo (on file with the UN Office of Legal Affairs) [Dossier No. 185]. In the same document, the SRSG added the following: «Yesterday, in Brussels, I took the floor before the EU's Political and Security Committee and I met with the EU Commissioner, Chris Patten, the NATO Secretary-General, Lord Robertson, and the EU High Representative, Javier Solana. At these meetings, I clearly set out my position regarding the question and my three interlocutors expressed their agreement».

<sup>175</sup> «Pronouncement» by the Special Representative of the Secretary-General of 7 November 2002, (on file with the UN Office of Legal Affairs) [Dossier No. 187].

<sup>176</sup> S/2007/582, Report of the Secretary-General of 28 September 2007, para.26, p. 7.

<sup>177</sup> See for all: S/2006/707; S/2006/906, para. 23; S/2007/134, para. 24; S/2007/395, para. 34; S/2007/768, para. 33; S/2008/211, para. 29, *contrario sensu*; and S/2008/354, para. 14, 19 y 32.

<sup>178</sup> S/2005/709, Annex, p. 2.

that «[i]n the implementation of its mandate, the EULEX Kosovo mission will fully respect UNSC Resolution 1244 (1999) and will operate under the general authority and within the status-neutral framework of the UN.»<sup>179</sup>. Thus, the European Union reiterates its recognition of the validity of Resolution 1244 (1999), which it had already formulated in the Council Conclusions of 18 February 2008 adopted after the formulation of the UDI<sup>180</sup>. This has also been the understanding of the United Nations Secretary-General, who declared that «EULEX will fully respect Security Council resolution 1244 (1999) and operate under the overall authority and within the status neutral framework of the United Nations»<sup>181</sup>, and, in this respect, it has «instructed UNMIK, to cooperate with European Union, (...) under the overall authority of the United Nations, in accordance with resolution 1244 (1999), and under a «United Nations umbrella» headed by my Special Representative»<sup>182</sup>. As for the Security Council, in the Presidential Statement of 26 November 2008, it «welcomes the cooperation between the UN and other international actors, within the framework of Security Council Resolution 1244 (1999)»<sup>183</sup>.

84. The mentioned validity of Resolution 1244 (1999) must be understood, moreover, as referring to the entire Resolution. This is so because, as an act of the Security Council, it can only be amended or annulled, totally or partially, by this body. Therefore, and given that the Security Council has not adopted any decision in this respect, it must be concluded that Resolution 1244 (1999) continues to govern both the international administration regime for Kosovo and the political process to determine Kosovo's future status. In this regard, the Secretary-General has explicitly declared that «pending guidance from the Security Council, the United Nations would continue to operate on the understanding that the resolutions 1244 (1999) remains in force»<sup>184</sup>, and that «unless the Security Council decides otherwise, resolution 1244 (1999) will remain the legal framework for the United Nations mandate»<sup>185</sup>.

85. This conclusion is of particular importance for this consultative process, especially if it is linked to the conclusion formulated above regarding the ultimate competence of the Security Council to declare a position vis-à-vis the political process and, even, vis-à-vis an eventual solution regarding Kosovo's future status.

Indeed, and in accordance with these conclusions, the political process may only be modified by a Security Council decision and the solution regarding Kosovo's future status must be endorsed by the Council. To date, this has not taken place, not even in reference to the activity carried out by the Secretary-General's Special Envoy, M. Ahtisaari, which concluded with the proposal generally known as the «Ahtisaari Plan»<sup>186</sup>, to which the PISG

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<sup>179</sup> See Doc. 16482/1/08 REV 1 (Presse 348).

<sup>180</sup> In these Conclusions it is affirmed that «[t]he Council welcomes the continued presence of the international community [in Kosovo] based on UN Security Council resolution 1244.»

<sup>181</sup> S/2008/692, para. 50. See also S/2008/354, para. 14.

<sup>182</sup> S/2008/458, para. 30.

<sup>183</sup> S/PRST/2008/44.

<sup>184</sup> S/2008/211, para. 4. See also para. 29: «Since Kosovo's declaration of independence, UNMIK continues to operate in the understanding that resolution 1244 (1999) remains in force, unless the Security Council decides otherwise».

<sup>185</sup> S/2008/354, para. 14.

<sup>186</sup> See S/2007/168 and Add. 1 and 2.

continually refer in their unilateral declaration of independence. Nevertheless, even in relation to this «Plan», it must be recalled that the document is a mere proposal, a preliminary act, which has never been endorsed by the Security Council<sup>187</sup>, and which, as a result, does not have any legal effectiveness to put an end to the political process to determine Kosovo's future status.

This is also made clear by the fact that the Security Council, after having examined the Secretary-General's report including the Ahtisaari Plan without adopting any decision with respect to it, decided to continue to address the political process of Kosovo's future status by sending a *Security Council Mission on the Kosovo issue*<sup>188</sup> and by monitoring the work of the *European Union/United States/Russian Federation Troika on Kosovo*, which in its final report recorded the absolute disagreement among the parties with regard to the above-mentioned Ahtisaari Plan<sup>189</sup>.

86. In short, the body of practice has proved that the Security Council had not adopted any of the above-mentioned decisions on 17 February 2008, the date on which the Kosovo Assembly adopted the UDI, nor has it adopted them subsequently. Therefore, it must be concluded that the political process to determine Kosovo's future status was open on the above-mentioned date, and is still open today, in the same terms as, and in accordance with, the above-said conditions, including both the inappropriateness of a unilateral declaration to put an end to the mentioned process and determine by itself the final and definitive solution regarding Kosovo's future status and, secondly, the leadership of the Security Council in regard to the process.

## VI. CONCLUSIONS

By virtue of all the factual and legal arguments included in this document, Spain invites the Court, when responding to the request made by the UN General Assembly, to:

1.- Declare and exercise its competence to give an advisory opinion regarding the question posed to it by the UN General Assembly, through Resolution 63/3, of 8 October 2008.

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<sup>187</sup> In this respect, the Secretary-General stated that «(...) the Council did not, however, endorse the proposal» (S/2008/354, para. 3).

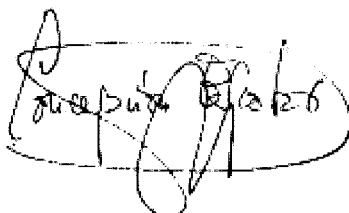
<sup>188</sup> See S/2007/220, Letter dated 19 April 2007 from the President of the Security Council to the Secretary-General. See also S/2007/256, of 4 May 2007, Report of the Security mission on the Kosovo issue. The central role granted to the Security Council in the political process is highlighted in the declarations made by some of the persons with whom the Mission had occasion to meet. Thus, in the framework of the EU, «Commissioner Rehn underlined the need for a Security Council resolution that would provide legal and political clarity (...)» (para. 9). For their part, the representatives of the Albano-Kosovar population and of other non-Serbian communities «looked to the Security Council to move rapidly towards a solution, without any further need for negotiations between the sides» (para. 59).

<sup>189</sup> See S/2007/ 723: «As a result, there was no discussion of the Ahtisaari proposal nor any discussion that it should be modified» (para. 8). In relation to this statement, it should be observed that the Troika, on describing its mandate to the parties that took part in the negotiations, «noted that while the Ahtisaari settlement was still on the table, we would be prepared to endorse any agreement the parties might be able to reach» (para. 5).

2.- Conclude that the unilateral declaration of independence by the Provisional Institutions of Kosovo is not in accordance with international law, for the following reasons:

- i) It ignores Serbia's right to sovereignty and territorial integrity derived from the applicable rules and principles of international law which is expressly recognized in the specific instruments that constitute the basis for the interim international administration regime and for the provisional self-government regime for Kosovo set up pursuant to Security Council Resolution 1244 (1999), and no special circumstance or *ad hoc* legal regime concurs that would allow the application of such rules and principles to be excluded in the present case.
- ii) It is not in accordance with the interim international administration regime or with the provisional self-government regime for Kosovo, both set up under a Security Council mandate given under Chapter VII of the UN Charter; nor is it consistent with either the nature of the Provisional Institutions of Self-Government of Kosovo (PISG) or with the competences attributed to them, which are, in any case, to be viewed as limited, provisional and exercised *within* Serbia and under international supervision.
- iii) It comes into conflict with the rules and principles governing the process to determine Kosovo's future status launched by the Security Council, and which may not be legitimately altered without its express consent. As this process is based on negotiation among the interested parties and on the principle that any final settlement must be acceptable to all of them, a unilateral declaration of independence contravenes the rules and principles governing the process to definitively determine Kosovo's future status and, therefore, cannot be considered to be in accordance with international law.

Madrid, 14 April 2009

A handwritten signature in black ink, enclosed in a hand-drawn oval. The signature is cursive and appears to read 'Concepción Escobar Hernández'.

CONCEPCIÓN ESCOBAR HERNÁNDEZ  
*Representative of the Kingdom of Spain*