Välisministeerium
Ministry of Foreign Affairs
Republic of Estonia

Mr Philippe Couvreur
The Registrar of the
International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Tallinn, 13 April 2009 no 08.1-1/5723

Request for an advisory opinion pursuant to United Nations General Assembly Resolution no 63/3

Dear Sir,

In response to the invitation, contained in the order dated 17 October 2008 of the International Court of Justice, regarding the request for an advisory opinion on the question of accordance with international law of the Unilateral Declaration of Independence by the provisional institutions of Self-Government of Kosovo, I have the honour to submit the written Statement of the Republic of Estonia.

Yours sincerely,

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International Court of Justice

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for an Advisory Opinion by the United Nations General Assembly)

Written Statement of the Republic of Estonia

APRIL 2009

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I. Introduction

In its Order of 17 October 2008 the Court invited States to submit written statements regarding the request for an advisory opinion on the question of *accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.*

The terms of the request made by the General Assembly of the United Nations in resolution 63/3 (A/63/L.2), adopted at its Sixty-third Session on 8 October 2008, are as follows:

> *"The General Assembly,*
> ...
> *Decides,* in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court to render an advisory opinion on the following question:
>
> > 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'"

The General Assembly adopted the resolution, on the proposal of the Republic of Serbia (A/63/195), by a recorded vote of 77 in favour to 6 against, with 74 abstentions (GA/10764). A considerable number of States did not participate in the vote. Estonia abstained in the vote on resolution 63/3.

The question asked by the General Assembly is specific and narrow and deals only with the issue of the accordance of Kosovo's Declaration of Independence with international law and does not relate to Kosovo's present or future status or the issue of recognition.

The following observations are submitted by the Republic of Estonia in response to the Order of the Court of 17 October 2008 fixing the time-limit within which written statements relating to the question may be submitted to the Court by the United Nations and its Member States.

II. Factual background

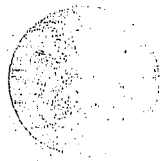
Since 1946 Kosovo was an autonomous territory of Serbia, within the larger federation of Yugoslavia.

In 1963 Kosovo became an autonomous province of Serbia - the Autonomous Province of Kosovo and Metohija - which since 1974 enjoyed a status similar to the six republics.

In 1989 Kosovo's special status within Serbia was abolished; Kosovo became a part of Serbia without any special rights. Discrimination of Kosovo Albanians began.

In 1990 Kosovo's parliament and government were dissolved. Massive oppression of the ethnic Albanian population in Kosovo started.

In September 1991 an unofficial referendum was held in Kosovo which voted for independence. A provisional government was formed in October.



In May 1992 an unofficial election for the Assembly was held and the president was elected.

From 1992 until June 1999 severe and systematic violation of human rights took place in Kosovo. Numerous international documents condemned the repressions and ethnic cleansing in Kosovo and called upon the Government of the Federal Republic of Yugoslavia and the Serbian authorities to stop the severe human rights violations and other illegal practices.

In August 1993 the authorities of the Federal Republic of Yugoslavia refused to give their consent to the continuation of the CSCE mission to Kosovo. The UN call to reconsider the refusal was not followed.

In February 1998, the conflict between forces of the Federal Republic of Yugoslavia and Serbia on one side and a faction of Kosovo Albanians organised in the "Kosovo Liberation Army" on the other side intensified, and the Security Council of the United Nations demanded in its resolution 1199 that the leadership of both sides take steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe.

On 10 June 1999, the UN Security Council adopted resolution 1244 on the situation of Kosovo. The UN Security Council authorised the Secretary-General, with the assistance of the relevant international organisations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo could enjoy substantial autonomy. Under resolution 1244 (1999), and up to the present day, Kosovo and Serbia have been governed in complete separation. Serbia has not exercised any authority over Kosovo since June 1999.

In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari as his Special Envoy for the future status process for Kosovo with the purpose of finding a negotiated solution for Kosovo.

By the end of 2007 it was widely accepted that no negotiated solution could be found between Kosovo and Serbia. In March 2007 UN Secretary-General's Special Envoy Mr. Ahtisaari concluded that the parties were not able to reach an agreement on Kosovo's future status and recommended for Kosovo an internationally supervised independence. Additionally, in December 2007 the Troika on Kosovo (European Union, United States and Russian Federation) concluded that the parties were unable to reach a negotiated agreement on the Status of Kosovo.

On 17 February 2008, Kosovo declared its independence. On 15 June 2008 a new constitution entered into force, which is devoted to respect for human rights and freedoms, to the principles of rule of law, non-discrimination, democracy and equality.

III. Legal aspects of the question

1. Issuance of a declaration of independence

The Declaration of Independence of Kosovo was voted upon and signed by the representatives of the people of Kosovo and expressed the will of the people. It was not an act of the Provisional Institutions of Self-Government (PISG) but an act of the Assembly of Kosovo. The Declaration of Independence of Kosovo paragraph 1 reads as follows:

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

To answer the General Assembly's question on the accordance of the declaration with international law, the Court will have to consider whether there exists in international law any prohibition on the issuance of a declaration of independence.

Estonia is of the opinion that international law is silent about the issuance of a declaration of independence. There is no rule in international law expressly prohibiting the issuance of a declaration of independence and there is no rule of international law which expressly allows the issuance of a declaration of independence.

However, the issuance of a declaration of independence is a factual event, which can take place and may lead to the creation of a State.

Still, there are certain preconditions recognised by international law that should be fulfilled to be entitled to make a declaration of independence which, in consequence, accomplishes a secession. Therefore, the declaration of independence could in international practice be considered unlawful where certain principles of international law have been disregarded.

2. Kosovo's secession is a case *sui generis*

2.1. Principle of self-determination and secession

Taking into account the very special situation of Kosovo, one aspect in combination with others justifying the Declaration of Independence and secession of Kosovo is the principle of self-determination.

Indeed, the principles of sovereignty and territorial integrity are very important in international law, but international law also recognises the principle of self-determination. The application of the principle of self-determination can under certain circumstances lead to declaration of independence and to secession.

Of course international law strongly supports the principle of territorial integrity that is mentioned both in Article 2 (4) of the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ("Friendly Relations Declaration" of 1970), resolution 2625 (XXV) of 24 October 1970 of the General Assembly. But international law also recognises the peoples' right to self-determination. The right to self-determination is mentioned in Articles 1 and 55 of the Charter of the United Nations. It has been further developed by the UN human rights covenants of 1966 (International Covenant on Civil and Political Rights, UNTS, Vol. 999, p. 171, Article 1; International Covenant on Economic, Social and Cultural Rights, UNTS, Vol. 993, p. 3, Article 1) and by the "Friendly Relations Declaration" of 1970.

It emerges from the "Friendly Relations Declaration" of 1970 that the principle of self-determination is recognised as being on the same level as the principle of the sovereignty and the territorial integrity of States. It is said there that:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

Self-determination may be exercised internally and externally. In Part VIII of the Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act of 1975) this is formulated as follows:

> "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."

Although the right of self-determination enshrined in the Charter of the United Nations was predominantly meant for use in the decolonisation process, the bearers of the right of self-determination are also minorities living inside of a State territory and the population of a sovereign State if the entire State should come under foreign domination. (K. Doering, Self-determination, in B. Simma (ed), The Charter of the United Nations. A Commentary, Vol I, 2nd edition, 2002, p. 55)

The UN General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 9 November 1995 emphasises:

> "1. . . . Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. "

Certainly the right to self-determination does not contain an automatic right to secession.

While there exists no written rule in international law concerning secession and international law contains neither an explicit right of unilateral secession nor the explicit denial of such a right, it can be assumed that an implicit declination to the denial can be deduced from the fact that exceptional circumstances are required for secession to be permitted under the principle of self-determination. The state practice provides a framework within which, depending on the facts, certain secessions are allowed.

Indeed, for the sake of the stability of the international system of states, secession should normally not be considered and self-determination should be enjoyed inside the existing State. In some cases, however, self-determination may exceptionally legitimise the secession. This would be the case if the secession is the only remedy against a prolonged and rigorous refusal

of internal self-determination (K. Doering, Art. 1 Self-determination, in B. Simma (ed), The Charter of the United Nations. A Commentary, Vol I, 2nd edition, 2002, p. 58), whereby there exists no other possibility to solve a situation and the secession would be the only possibility to maintain or restore international peace, security and stability.

Albeit international law places great importance on the territorial integrity of states, as it was already provided in "Friendly Relations Declaration" of 1970,

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

international law and state practice would accept the secession in the case of oppressed minorities under two obligatory conditions.

2.1.1 Severe and long-lasting refusal of internal self-determination

The first condition to be fulfilled for the utilisation of the principle of external self-determination is suffering from a severe and long-lasting refusal of internal self-determination by the State in which a group is living. The severe and long-lasting refusal is often accompanied by brutal violations of human rights, genocide or ethnic cleansing. As the Supreme Court of Canada has put it in a case concerning certain questions relating to the secession of Quebec from Canada,

> "the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 134).

It is known that the people of Kosovo suffered under grave discrimination and their human rights were systematically and extensively violated in the period up to and including 1999. Whereby, the actions of the Government of the Federal Republic of Yugoslavia and Serbian authorities can not be assessed as a legal suppression of unlawful secession activities of the Kosovars.

The massive violations of the Government of the Federal Republic of Yugoslavia and Serbian authorities against the minorities in Kosovo are documented in numerous international documents.

In July 1992, at its Helsinki summit, the Conference on Security and Co-operation in Europe adopted a Declaration on the Yugoslav crisis, in which it specifically addressed the situation in Kosovo (para. 3):

> "The situation in Kosovo remains extremely dangerous and requires immediate preventive action. We strongly urge the authorities in Belgrade to refrain from further repression and to engage in serious dialogue with representatives of Kosovo, in the presence of a third party". (CSCE/HS/Dec. 1, 10 July 1992)

In resolution 47/147 of 18 December 1992, the General Assembly (op. para. 14):

"Expresses its grave concern at the report of the Special Rapporteur on the dangerous situation in Kosovo, Sandjak and Vojvodina ... and calls upon the Serbian authorities to refrain from the use of force, to stop immediately the practice of 'ethnic cleansing' and to respect fully the rights of persons belonging to ethnic communities or minorities ..."

In resolution 48/153 of 20 December 1993, the General Assembly:

"17. Expresses its grave concern at the deteriorating human rights situation in the Federal Republic of Yugoslavia (Serbia and Montenegro), particularly in Kosovo, as described in the reports of the Special Rapporteur, and strongly condemns the violations of human rights occurring there;

18. Strongly condemns in particular the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including:

(a) Police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, which leads to a climate of lawlessness in which criminal acts, particularly against ethnic Albanians, take place with impunity;

(b) The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities;

(c) Arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations;

(d) Repression by the Serbian police and military;

19. Urges the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro):

(a) to take all necessary measures to bring to an immediate end the human rights violations inflicted on the ethnic-Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary detention and the use of torture and other cruel, inhuman or degrading treatment and the occurrence of summary executions;

(b) to revoke all discriminatory legislation, in particular that which has entered into force since 1989;

(c) to re-establish the democratic institutions of Kosovo, including the parliament and the judiciary;

(d) to resume dialogue with the ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia."

In resolution 49/196 of 23 December 1994, the General Assembly:

"19. Strongly condemns the increase of police violence against the non-Serb populations in Kosovo, the Sandjak, Vojvodina and other areas of the Federal Republic of Yugoslavia (Serbia and Montenegro), and of violations of the right to fair trial, as described in the most recent report of the Special Rapporteur".

In resolution 50/193 of 22 December 1995, the General Assembly:

"16. Condemns police violence against the non-Serb populations in Kosovo, ... particularly the systematic acts of harassment, beatings, torture, warrantless searches,

arbitrary detention and unfair trials, including those directed mainly against members of the Muslim population;

17. Strongly urges the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to take appropriate measures to respect fully all human rights and fundamental freedoms and to take urgent action to ensure the rule of law in order to prevent arbitrary evictions and dismissals and discrimination against any ethnic or national, religious and linguistic group, including in the fields of education and information;

18. Cautions against any attempts to use Serb refugees to alter the population balance in Kosovo ... thus further suppressing the enjoyment of human rights in those areas".

In resolution 51/116 of 12 December 1996 the General Assembly:

"10. Urgently demands that the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) take immediate action to put an end to the repression of, and to prevent violence against, non-Serb populations in Kosovo, including acts of harassment, beatings, torture, warrantless searches, arbitrary detention and unfair trials, ...;

11. Calls upon the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to act immediately to allow all residents in Kosovo to participate freely and fully in the political, economic, social and cultural life of the region, particularly in the areas of education and health care, and to ensure that all the residents of the region are guaranteed equal treatment and protection regardless of ethnic affiliation.

In resolution 52/147 of 12 December 1997, the General Assembly:

15. Urgently demands that the authorities of the Federal Republic of Yugoslavia take immediate action to put an end to the repression of, and prevent violence against, non-Serb populations in Kosovo, including acts of harassment, beatings, torture, warrantless searches, arbitrary detention and unfair trials, ...;

16. Calls upon the Government of the Federal Republic of Yugoslavia to respect the democratic process and to act immediately to allow freedom of expression and assembly and full and free participation by all residents in Kosovo in the political, economic, social and cultural life of the region, particularly in the areas of education and health care, and to ensure that all the residents of the region are guaranteed equal treatment and protection regardless of ethnic affiliation;

17. Strongly urges the Government of the Federal Republic of Yugoslavia to revoke all discriminatory legislation and to apply all other legislation without discrimination and to take urgent action to prevent arbitrary evictions and dismissals and discrimination against any ethnic or national, religious or linguistic group;

In the report of the United Nations Secretary-General of 3 October 1998 (S/1998/912) submitted to the Security Council he expressed serious concern over the deteriorating conditions in the province:

"7. The desperate situation of the civilian population remains the most disturbing aspect of the hostilities in Kosovo. I am particularly concerned that civilians increasingly have become the main target in the conflict. Fighting in Kosovo has resulted in a mass displacement of civilian populations, the extensive destruction of villages and means of livelihood and the deep trauma and despair of displaced populations. Many villages have been destroyed by shelling and burning following operations conducted by federal and Serbian government forces. There are concerns that the disproportionate use of force and actions of the security forces are designed to

terrorize and subjugate the population, a collective punishment to teach them that the price of supporting the Kosovo Albanian paramilitary units is too high and will be even higher in future. The Serbian security forces have demanded the surrender of weapons and have been reported to use terror and violence against civilians to force people to flee their homes or the places where they had sought refuge, under the guise of separating them from fighters of the Kosovo Albanian paramilitary units. ...;
8. The level of destruction points clearly to an indiscriminate and disproportionate use of force against civilian population ...;
9. I am outraged by reports of mass killings of civilians in Kosovo, which recall the atrocities committed in Bosnia and Herzegovina ...".

Also, for example, on 26 February 2009, the International Criminal Tribunal for the former Yugoslavia convicted former FRY Vice-President Sainovic, former Chief of the General Staff of the Yugoslav Army, General Ojdanic, and some other high-ranking Serbian officials for crimes against humanity committed in Kosovo in 1999 (Case No. IT-05-87-T).

The factual events preceding the Declaration of Independence have revealed a clear case of prolonged and severe repression and denial of all internal self-determination. It follows that the first precondition for external self-determination i.e. secession is fulfilled.

2.1.2 Secession as an *ultima ratio* means

Another condition for the application of the external self-determination, in addition to suffering under repressive authorities, is the lack of other options, i.e. secession is an *ultima ratio* means. This signifies that other possible ways to resolve the situation must be exhausted. In the case of Kosovo this condition, too, is met. There have been comprehensive negotiations in several formats over a considerable period of time.

On 23 September 1998, the Security Council adopted the resolution 1199 (1998), in which it demanded that the Federal Republic of Yugoslavia:

> "... (d) make rapid progress to a clear timetable, in the dialogue referred to in paragraph 3 with the Kosovo Albanian community called for in resolution 1160 (1998), with the aim of agreeing confidence-building measures and finding a political solution to the problems of Kosovo." (op. para. 4)

On 10 June 1999, the Security Council authorised in resolution 1244 (1999)

> "... 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 ..." (op. para. 10) and decided
> "... that the main responsibilities of the international civil presence will include: ... 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 ..." (op. para. 11).

In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari as his Special Envoy for the future status process for Kosovo. According to his terms of reference, this process should have culminated in a political settlement that determines the future status of Kosovo. But after more than one year of direct talks, bilateral negotiations and expert consultations, the Special Envoy concluded in his report (S/2007/168):

"..., it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status" (para. 1);
"... It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse" (para. 3);
"... The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community." (para. 5)

To the aforementioned report Special Envoy Ahtisaari has added a "Comprehensive Proposal for the Kosovo Status Settlement" (S/2007/168 Add.1). The Security Council, however, failed to adopt a resolution to endorse the proposal.

After a period of discussions in the Security Council, the Contact Group (France, Germany, Italy, Russia, the United Kingdom and the United States) proposed that a Troika of officials from the European Union, the United States and the Russian Federation undertake yet another period of negotiations with the goal of achieving a negotiated agreement. As it is explained in the report of the European Union, the United States and the Russian Federation (Troika on Kosovo) of 4 December 2007, the Troika undertook during four months an intense schedule of meetings with the parties and discussed a wide range of options. Nonetheless, the parties were unable to reach an agreement. (S/2007/723 Enclosure, Summary paras 1, 2)

In a letter dated 5 December 2007 and addressed to EU High Representative Solana, the European Union representative within the Troika, Ambassador Ischinger, gave his summary of the Troika process:

"The Troika has, as promised, left no stone unturned in trying to achieve a negotiated settlement of the Kosovo status question. The positions of both parties on status have, however, remained diametrically opposed. The potential to reach a negotiated settlement is now exhausted. It is my view that the parties would not be capable of reaching agreement on the issue if negotiations were to be continued, whether in the Troika format, or in some other form."

On 3 January 2008 the Secretary General stated in his report to the Security Council on the United Nations Interim Administration Mission in Kosovo:

"Expectations in Kosovo remain high that a solution to Kosovo's future status must be found rapidly. As such the status quo is not likely to be sustainable. ... Moving forward with a process to determine Kosovo's future status should remain a high priority for the Security Council and for the international community. Uncertainty and a loss of forward dynamic in the future status process could create a risk of instability, both in Kosovo and in the wider region ..." (S/2007/768, paras 33, 34)

Kosovo was on the agenda of the Security Council on 19 December 2007, 16 January 2008 and 14 February 2008 with no outcome.

From the foregoing it can be concluded that all possible means including international mediation, were exhausted to find a negotiated solution for the status of Kosovo and the declaration of independence was for Kosovo a means *ultima ratio.*

2.1.3 Possibility to use the principle of external self-determination in Kosovo

In general, the possibility to use external self-determination ceases to exist when the preconditions (severe and long-lasting refusal of internal self-determination and secession as an *ultima ratio* means) are not fulfilled anymore. It can be argued that since for several years in Kosovo there was no violence from the side of the Serbian government, in 2008 the time had lapsed to make use of the right to secession.

Still, it has to be taken into account that in the very special case of Kosovo the violence and ethnic cleansing came to an end due to the international administration which was established in Kosovo. International administration, established by the resolution S/RES/1244 (1999), brought Kosovo out from being under Serbian control. Accordingly, the possibility to use external self-determination was not on the agenda due to the negotiations with Serbia through the mediation of UN.

It can be assumed that in order to avoid the destabilisation of the region and the international system of states, the territorial integrity of Serbia was favoured until all attempts had been made to find a negotiated solution for the situation in Kosovo. But even through long-lasting international negotiation and mediation, the parties of the conflict could not find an acceptable solution for both sides.

Moreover, it should be taken into account what was said by the Special Envoy of the Secretary-General on Kosovo's future status, Martti Ahtisaari:

> "A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition ..." (S/2007/168, para 7)

Deduced from what was said above, the aspect of self-determination is not the only deciding factor in the case of the secession of Kosovo. Kosovo is a case *sui generis*. The secession of Kosovo can be assessed only when taking into account all relevant circumstances.

2.2 Circumstances making Kosovo a case *sui generis*

A combination of specific circumstances makes Kosovo a unique case.

The latter point was also expressed in 2007 by UN Special Envoy Martti Ahtisaari in his Report on Kosovo's future status:

> "Kosovo is a unique case that demands a unique solution. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary." (S/2007/168, para. 15).

The same was confirmed by the EU Foreign Ministers on 18 February 2008:

> "[The Council] underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case ..." (Council Conclusions on Kosovo, 18. February 2008, final para.)

Based on what was stated above, it can be said that Kosovo is a unique case resulting from:

1. Yugoslavia's non-consensual and violent break-up;
2. Massive violence and repression that took place in Kosovo in the period up to and including 1999, which would have justified the secession on the basis of self-determination and which made it impossible to find a solution for the status of Kosovo as part of the Republic of Serbia;
3. Extended period of international administration under the Security Council resolution 1244 (1999) which was established with a purpose to put an end to the violence. The administration, while remaining committed to the principle of the territorial integrity of the Federal Republic of Yugoslavia, also had to guarantee the autonomy of Kosovo until a negotiated agreement could be found. As a result of the international administration, the Republic of Serbia did not govern Kosovo for several years;
4. Extensive UN-led process to find a negotiated solution on the future status of Kosovo with the outcome that the UN Special Envoy Martti Ahtisaari confirmed in 2007 in his Report on Kosovo's future status that "the only viable option for Kosovo is independence, to be supervised for an initial period by the international community" (S/2007/168, para. 5). One must note that the situation in Kosovo and in the region was so serious that the UN Security Council, who has according Article 24(1) of the Charter of UN the primary responsibility for the maintenance of international peace and security, had to engage actively into the solution-finding of the crises.

All these aspects combined make Kosovo a case *sui generis*. Taking into account all the legal and factual circumstances of the case, Kosovo was, according to international law, entitled to use the right to external self-determination and justified to make a Declaration of Independence.

3. Accordance of the Declaration of Independence with the Security Council resolution 1244 (1999)

The Security Council resolution 1244 (1999) suspended the governmental authority of the Federal Republic of Yugoslavia over Kosovo and authorised the Secretary-General to establish an international civil presence in Kosovo in order to provide interim international administration under United Nations auspices. Paragraph 10 of the resolution 1244 (1999) foresaw the establishment of an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia.

While the earlier Security Council resolutions (resolution 1160 (1998), 1199 (1998) and 1203 (1998)) expressed support for a peaceful resolution of the Kosovo problem which would include an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration, resolution 1244 (1999) went further than before, changing substantially the context of autonomy of Kosovo as foreseen in earlier resolutions.

Resolution 1244 (1999) did not determine the autonomy of Kosovo within the Federal Republic of Yugoslavia as a final outcome of the process. It only established an interim international administration which should, *pending a political settlement,* assure Kosovo's autonomy within the Federal Republic of Yugoslavia. The goal of the administration was,

while remaining committed to the principle of the territorial integrity of the Federal Republic of Yugoslavia to guarantee the autonomy of Kosovo until a negotiated agreement.

The latter is confirmed in resolution 1244 (1999) as follows:

> "10. [Security Council] 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 ...;
>
> 11. Decides that the main responsibilities of the international civil presence will include:
>
> (a) Promoting the establishment, *pending a final settlement*, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
>
> ...
>
> (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government *pending a political settlement*, including the holding of elections ..." (emphasis added)

This means that the resolution 1244 (1999) deals with the substantial autonomy of Kosovo within the Federal Republic of Yugoslavia in the context of a transitional period.

It must be emphasised that although resolution 1244 (1999) foresaw a political process to determine Kosovo's future status; it did not prescribe any specific final settlement but remained silent on the final outcome. Nevertheless, it can be deduced that by providing with resolution 1244 (1999) a substantial autonomy for the interim period, the Security Council also determined that the political process on the status of Kosovo should lead to nothing less than substantial autonomy. Therefore the substantial autonomy as referred to in resolution 1244 (1999) can be considered the starting point of the political process determining the status of Kosovo.

The political process to determine Kosovo's future status envisaged by resolution 1244 (1999) began in autumn 2005 (S/PRST/2005/51) with the UN-mediated negotiations in order to find a mutually agreeable solution regarding the final status of Kosovo. International negotiators who mediated the process under the mandate of the UN and within the framework of resolution 1244 (1999) foresaw several possible solutions for the final status of Kosovo. That supports the previous argumentation that resolution 1244 (1999) did not determine the final outcome of the political process.

In the Comprehensive Proposal for the Kosovo Status Settlement prepared by the Secretary-General's Special Envoy for the future status process for Kosovo Martti Ahtisaari, it was stated:

> "I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community". (S/2007/168, para.5)

The report of the Troika of officials from the European Union, the United States and the Russian Federation indicates that wide range of options regarding the future status of Kosovo was considered:

> "10. Under our guidance, the parties reviewed outcomes ranging from independence to autonomy, as well as alternate models such as confederal arrangements, and even a model based on an "agreement to disagree" in which neither party would be expected to renounce its position but would nonetheless pursue practical arrangements designed to facilitate cooperation and consultation between them. Other international models, such as Hong Kong, the Åland Islands and the Commonwealth of Independent States, were discussed". (S/2007/723, enclosure)

Furthermore, resolution 1244 (1999) envisaged in paragraph 11(e) "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords". Rambouillet accords were interim agreements providing in Article I paragraph 3 of Chapter 8 that the final status of Kosovo will be determined *inter alia* on the basis of the will of the people. Thus resolution 1244 (1999) does not exclude the independence of Kosovo as the outcome of the political process if such should be the will of the people.

Kosovo's Declaration of Independence was followed by a Serbian request that the Secretary-General should issue a clear and unequivocal instruction to his Special Representative for Kosovo to declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void. (Record of the 5839th meeting of the UN Security Council, UN Doc., S/PV.5839, 18 February 2008)

The legality of the unilateral acts of Kosovo's Assembly was on the agenda of the Special Representative of the Secretary-General for Kosovo already in 2002. The Special Representative of the Secretary-General and Head of the United Nations Interim Administration Mission in Kosovo Michael Steiner had declared in his statement of 23 May 2002 null and void the "resolution on the protection of the territorial integrity of Kosovo" adopted by the Assembly of Kosovo. The Security Council, in a Presidential Statement of 24 May 2002, concurred with the Special Representative of the Secretary-General (S/PRST/2002/16). Thus the Special Representative ruled out the unilateral actions of the Assembly of Kosovo directed towards independence at the time when talks on final status had not begun and there was a possibility to reach a mutually acceptable outcome.

However, after 15 months of intensive negotiations involving both Serbian and Kosovo authorities conducted through the Secretary-General's Special Envoy Martti Ahtisaari, the Special Envoy stated

> "... that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse." (S/2007/168, para. 3)

A final attempt to determine whether there was any ground for agreement between Kosovo and Serbia was made by the Troika which, after "high-level, intense and substantive discussions between Belgrade and Pristina", also had to state that "the parties were unable to reach an agreement on the final status of Kosovo". (S/2007/723, para. 2)

Only after the negotiations could not produce any mutually agreeable outcome on Kosovo's status, Kosovo declared independence according to the will of Kosovo's people, thus respecting the political process envisaged in resolution 1244 (1999). The Special Representative of the Secretary-General and Head of the United Nations Interim Administration Mission in Kosovo did not declare thereafter, despite Serbia's call, the Declaration of Independence of 17 February 2008 null and void.

Thus the Declaration of Independence of Kosovo did not contravene the resolution 1244 (1999) as:

1) Resolution 1244 (1999) provided for securing the autonomy of Kosovo for the period of interim administration;

2) Resolution 1244 (1999) did not exclude several outcomes on the final status of Kosovo, among them independence, if this was the will of the people of Kosovo;

3) Kosovo respected the political process envisaged by resolution 1244 (1999). This conclusion is supported by the fact that the Special Representative of the Secretary-General did not declare the Declaration of Independence null and void despite the demands of Serbia.

IV. Conclusion

For the reasons set out in this Statement, we respectfully request the Court to find that the Declaration of Independence of Kosovo of 17 February 2008 was in accordance with international law.