Република Србија
МИНИСТАРСТВО СПОЉНИХ ПОСЛОВА
Кнеза Милоша 24-26
БЕОГРАД

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

15 July 2009

Sir,

With reference to the request for an advisory opinion submitted to the International Court of Justice by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo and to the Order of the Court dated 17 October 2008, I have the honour to present to the Court the written comments of the Government of the Republic of Serbia on the written statements of other States.

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

Mr. Philippe Couvreur
Registrar
International Court of Justice
The Hague

In accordance with Article 50, paragraph 1, and Article 51, paragraph 3, of the Rules of Court, I now certify that four documents annexed to the written comments of the Republic of Serbia are the genuine copies of the original documents, as well as that the translation of the relevant part of the document no. 3 from Serbian into English is accurate.

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

Saša Obradović,
Head of the Legal Team

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF THE GOVERNMENT OF THE REPUBLIC OF SERBIA

14 JULY 2009

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Chapter 1

INTRODUCTION

1. Pursuant to the Court's Order of 17 October 2008, and in accordance with Article 66, paragraph 4, of the Statute, Serbia respectfully files these Written Comments on the written submissions submitted in the present proceedings.

A. Importance of the Present Proceedings

2. In response to the Court's Order of 17 October 2008, a total of 36 member States of the United Nations have submitted written statements in the present advisory proceedings, and a dossier of documents has also been submitted on behalf of the United Nations Secretary-General.[1]

3. The authors of the unilateral declaration of independence (hereinafter "UDI") also made a written contribution (hereinafter "WC Authors"), having been invited to do so by the Court. However, this written contribution was deliberately marked as a contribution of the so-called "Republic of Kosovo", in clear breach of the Court's Order of 17 October 2008. As noted in Serbia's letter to the Court dated 7 May 2009, protesting against this behaviour and requesting the Court to ensure respect for the Order by all participants, the authors of the UDI have "sought to create an environment constituting unacceptable pressure upon the Court essentially to prejudge the matter in dispute." Serbia reiterates that the participation of the authors of the UDI in the present proceedings shall in no way constitute recognition of the so-called "Republic of Kosovo" by Serbia.

4. The number of written submissions in the present proceedings attests to the importance of the question submitted to the Court for an advisory opinion. As the UDI raises questions concerning the principles of sovereignty and territorial

[1] Hereinafter referred to as "**Dossier**" together with the number of the relevant document contained therein.

integrity, principles that are at the cornerstone of the international legal order, this case is not only about Kosovo, but about "Kosovos" – situations where violent and armed secessionist movements attempt to separate by force parts of the territory from a pre-existing State. This was emphasized by the President of Serbia, Boris Tadic, in his address to the General Assembly plenary session in 2008:

> "We all know that there are dozens of Kosovos throughout the world, just waiting for secession to be legitimized, to be turned into an acceptable norm. Many existing conflicts could escalate, frozen conflicts could reignite, and new ones could be instigated."[2]

5. The response of the international community and the United Nations to Kosovo's attempt at independence and unilateral termination of the United Nations administration of the territory is not only going to have direct political repercussions on the crisis in Kosovo itself, but on other existing and potential crises throughout the world. This response is likely to determine the outlook of the international order in the years to come. Both prior to 1945, and since this time, the attitude of the international community towards unilateral secession has been negative and the principles of sovereignty and territorial integrity have clearly been upheld as pillars of the international order. As noted by James Crawford, "[s]tate practice since 1945 shows the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context."[3] This is not without reason. The principle of territorial integrity of States both reflects and manifests the sovereign equality of States as a foundation of the international order and, as such, is inextricably linked to State sovereignty.[4] The principles of territorial integrity and stability of international borders serve as guarantors of the stability of the international order as a whole and, as such, directly uphold international peace and security. If the international community were now to accept secession from sovereign States in violation of the principle of territorial integrity, this would have dramatic consequences.

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[2] UN Doc. A/63/PV.5 (23 September 2008), p. 29.
[3] J. Crawford, *The Creation of States in International Law* (2nd ed. 2006), p. 415.
[4] For more see WS Serbia, paras. 414-428.

6. Moreover, if the UDI were tolerated in the case of Kosovo, this would have a negative impact on the hard-won achievements of the United Nations and regional organizations in the field of human rights and rights of minorities. Those holding the views that aspirations for minority rights and autonomy are merely a pretext for secession would feel vindicated. This could have negative consequences on further acceptance and implementation of minority rights by States.

7. What is also at stake in the present proceedings is the authority of the United Nations generally, and the Security Council in particular, in a situation where the Organization is engaged in the fulfilment of one of its pre-eminent purposes – the maintenance of international peace and security, as provided in Article 1 of the Charter of the United Nations. According to the Secretary-General, the UDI has presented a significant challenge to the authority of the United Nations and its mission in Kosovo, UNMIK.[5] Moreover, the authorities in Kosovo consider that Security Council resolution 1244 (1999) is no longer relevant and that the institutions of Kosovo "have no legal obligation to abide by it."[6]

8. All this shows how important is the response of the international community and the United Nations to the UDI and the attempt of its authors to terminate the United Nations administration of the territory and to achieve independence from Serbia. Needless to say, this response will be significantly influenced by the Court's answer to the request for an advisory opinion in the present case.

9. The opinion of the Court will provide valuable guidance to all concerned in the Kosovo situation. In particular, it will provide legal guidance to the United Nations and its political organs. It is striking that, in a situation in which Kosovo is administered by the United Nations, neither its main political organs nor its mission in Kosovo seem to have had the benefit of impartial legal advice from within the United Nations structures, as is demonstrated by the fact that the Secretary-General has refrained from making a written statement but has submitted a dossier containing documentary evidence in which there is no legal analysis of the UDI.

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[5] See UN Doc. S/2008/211 (28 March 2008), para. 30, **Dossier No. 86**.

[6] See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2009/149 (17 March 2009), para. 4, as well as most recently Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2009/300 (10 June 2009), para. 2.

10. The Court's opinion will also provide legal guidance to individual States in their actions within and outside the United Nations. A question has been raised of the Court's acting as a "legal adviser" to member States.[7] However, in Serbia's submission such an argument is entirely misplaced. The function of the advisory opinion is to provide legal guidance to the General Assembly, which is concerned with the powers and functions of other organs of the United Nations, in accordance with Article 10 of the Charter. The General Assembly is composed of member States and can only function by their concerted action which will be guided by the Court's opinion. In that sense and to that extent, the advice of the Court will also be useful to member States, as were previous advisory opinions rendered by the Court.

11. Indeed, the fact that both the United Nations and individual member States will benefit from the Court's opinion will contribute to strengthening the international rule of law. Conversely, without the benefit of the Court's legal guidance, not only would the approaches taken towards the situation in Kosovo vary, leading to great uncertainty in international relations, but there would be a significant risk that a policy of *fait accompli* would prevail over applicable legal rules. This is exactly the situation that the world organization has been designed to prevent by providing a forum and a mechanism for the resolution of conflicts on the basis of international law and equality of States.

B. Summary of Issues before the Court

I Introduction

12. Unsurprisingly, participants' submissions in the present proceedings can be clearly divided into two groups, depending on their attitude towards the UDI and its legality and the international legal status of the so-called "Republic of Kosovo". In one group are the written statements by those States that consider the UDI as not being in accordance with international law, and which have not recognized the so-called "Republic of Kosovo". In the other group are the written

[7] See WS United States, p. 44.

statements by those States that recognised this so-called "State", as well as the written contribution made by the authors of the UDI.

13. Before summarizing the main points made by the participants, it should be noted that, despite their differences, all member States participating in the proceedings agree that Security Council resolution 1244 (1999) is still in force. Even the written contribution of the authors of the UDI analyses the latter's compatibility with resolution 1244 (1999), thereby acknowledging its relevance,[8] in contrast with the position they take elsewhere that this resolution is no longer relevant and binding on them.[9]

II Arguments presented by Serbia

14. The essence of arguments presented by Serbia is that the UDI is in violation of the principle of territorial integrity of States which is one of the fundamental principles of international law, as well as in violation of the international legal regime established by Security Council resolution 1244 (1999). In that sense, the UDI can be viewed both as an attempt to illegally secede territory from Serbia, the parent State, and an attempt to terminate the United Nations administration of Kosovo established by the Security Council pursuant to Chapter VII of the Charter.

15. As has been demonstrated in Serbia's Written Statement, the principle of territorial integrity, which is an essential element of the international order, extends beyond States and binds non-State entities in situations of non-consensual attempts to violate the territorial integrity of independent States. This is confirmed by Security Council practice in general and in relation to the situation in the former Yugoslavia in particular. Moreover, the Security Council resolutions dealing with Kosovo specifically confirm the territorial integrity of Serbia with regard to this territory and reaffirm the binding force of this principle on all

[8] See WC Authors, para. 9.01. *et seq.*
[9] See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2009/149 (17 March 2009), para. 4.

relevant actors, including the Kosovo Albanians. Thus, by adopting the UDI, which constitutes a violation of Serbia's territorial integrity, the authors of the UDI have clearly acted in blatant violation of binding norms of international law.

16. Additionally, the UDI constitutes a clear violation of the international legal regime established by Security Council resolution 1244 (1999), which it openly seeks to terminate. The UDI is not only an *ultra vires* act of its authors, the Assembly of Kosovo that adopted it, and the President and Prime Minister of Kosovo that endorsed it. It is also a serious challenge to the authority of the United Nations in Kosovo, again in violation of Security Council resolution 1244 (1999) and the Constitutional Framework for Provisional Self-Government in Kosovo.[10] Finally, the UDI is a unilateral act which, if only temporarily, prevents the continuation of the political process to determine the status of Kosovo, in violation of resolution 1244 (1999) and the elementary rules governing negotiations and the peaceful settlement of disputes.

17. Serbia's Written Statement has also demonstrated that none of the justifications that could possibly be of any relevance to the UDI under international law apply in the present case. In particular, it has been shown that the principle of self-determination does not provide legal support in the present case; that effectiveness alone is not a ground for statehood; and that the creation of a new State in contemporary international law is also contingent on respect for the applicable rules of international law, which clearly have not been respected in the case of the UDI. In any case, as demonstrated by Serbia, there is no effective independent government in Kosovo and the so-called "Republic of Kosovo" does not fulfil the constituent requirements of a State.

18. The arguments made in Serbia's Written Statement are shared, in whole or in part, by those member States that have also adopted the position that the UDI is contrary to international law.

[10] UNMIK Regulation No. 2001/9 (15 May 2001) (hereinafter: "Constitutional Framework"), Annex 3 in Documentary Annexes accompanying WS Serbia, **Dossier No. 156**.

III Arguments presented in the written statements of those States that have recognised the so-called "Republic of Kosovo" and in the written contribution of the authors of the UDI

19. The written statements of those States that have recognized the so-called "Republic of Kosovo" and the written contribution made by the authors of the UDI make a number of different claims in order to support the legality of the UDI, but the main points (not all of which are necessarily shared in all submissions) may be summarized as follows:

(i) International law does not regulate declarations of independence, i.e., it neither authorizes nor prohibits such declarations, and therefore the UDI is not contrary to international law.

(ii) Security Council resolution 1244 (1999) does not preclude the independence of Kosovo as the outcome of the political process to determine Kosovo's future status, and therefore the UDI does not contravene this resolution.

(iii) The UDI is an exercise of external self-determination which is justified by Serbia's repression over Kosovo Albanians.

(iv) In any event, developments after the UDI have cured any deficiency that may have existed.

20. The first obvious problem with these arguments is that they fail to take into account the fact that Kosovo is subject to the United Nations administration established by a binding resolution of the Security Council, and that the UDI is an attempt to terminate this international legal regime. In other words, even if all the above mentioned claims in favour of the UDI's legality were accurate, *quod non*, they still would not be able to justify the UDI as an attempt to terminate unilaterally the United Nations administration of Kosovo.

21. Generally speaking, those arguing in favour of the legality of the UDI try to confine their discussion of Security Council resolution 1244 (1999) to the questions of whether it prohibits independence and in what manner it guarantees the territorial integrity of Serbia. At the same time, they fail to address the impact

of the international legal regime for Kosovo, the binding rules of which include Security Council resolution 1244 (1999) and regulations adopted by the UNMIK. However, their awareness of this binding international legal regime transpires from their claim that the UDI was adopted by "democratically-elected representatives of the people of Kosovo" and not by the Provisional Institutions of Self-Government, as if this could cure the UDI's illegality. But, as will be demonstrated in Chapters 2 and 9, not only is this claim inaccurate but it is also irrelevant, since Security Council resolution 1244 (1999) and its legal regime apply to all relevant actors in Kosovo, not only to the Provisional Institutions of Self-Government.

22. Moreover, this embarrassing lacuna in the submissions of those States that recognized the so-called "Republic of Kosovo" and of the authors of the UDI cannot be overcome by their claim that the Secretary-General and his Special Representative did not declare the UDI null and void. As will be shown in Chapter 9, this claim is inaccurate because these officials have not acquiesced to the UDI, but rather have expressly taken a status neutral position while waiting for guidance from the Security Council, the ultimate authority in implementation of Security Council resolution 1244 (1999). In addition, the Security Council has never acquiesced to the UDI.

23. As far as the argument that international law neither authorizes nor prohibits the UDI is concerned, its essence has already been dealt with in Serbia's Written Statement, in particular its Chapter 6 (B) and (E), as well as Chapter 10 (D). The simple answer to it is that Kosovo is under an international legal regime established by the Security Council and that, pursuant to resolution 1244 (1999), any decision about its "future status" must be the result of a political process involving both parties. No one party can unilaterally terminate or modify the situation established by a resolution adopted by the Security Council under Chapter VII of the United Nations Charter. In addition, the principle of respect for the territorial integrity of States is applicable to non-State actors in secessionist situations in general and with respect to the situation in Kosovo in particular. As such, it clearly prohibits the UDI.

24. The claim that the UDI is justified as an exercise of "remedial" self-determination was fully refuted in Chapter 7 of Serbia's Written Statement. The same goes for the claim that developments that have taken place following the UDI have cured any deficiencies that may have existed, which was refuted in Chapter 10 of Serbia's Written Statement. Apart from the questionable legal validity of these claims, it should also be noted that they require particular factual matrices, which do not obtain in the case of Kosovo. Thus, attempts to factually substantiate these claims have resulted in one-sided and, at times, inaccurate presentations of facts, as will be demonstrated in the present Written Comments.

C. Outline of the Present Written Comments

25. These Written Comments consist of 11 chapters. The present introductory Chapter 1 is followed by a discussion of the terms and scope of the question before the Court in Chapter 2. Chapter 3 deals with jurisdiction and admissibility of the present request for an advisory opinion.

26. Chapter 4 discusses the legal and factual background of the case. It provides certain general comments regarding presentations of facts in other written statements and in the written contribution of the authors of the UDI, as well as comments on specific questions concerning the status of Kosovo within Serbia and Yugoslavia and the negotiations on the final status of Kosovo.

27. Chapter 5 deals with the claim that Kosovo is a so-called "*sui generis*" case, while Chapter 6 addresses the argument that international law is "neutral" with regard to the UDI.

28. This is followed by chapters that deal with various legal grounds relevant for the assessment of the UDI's legality and refute claims made by those States promoting the independence of the so-called "Republic of Kosovo" and the authors of the UDI. Chapter 7 demonstrates that the UDI is in contradiction with the principle of respect for the territorial integrity of States. Chapter 8 shows that neither the principle of

self-determination, nor the purported doctrine of "remedial secession" provide any support for the UDI. Chapter 9 deals with the international legal regime applicable to Kosovo established by Security Council resolution 1244 (1999) and the UDI's illegality under this regime. Chapter 10 shows that recognition as such does not grant retroactive legality or purge illegality of the UDI.

29. This is followed by Chapter 11, which summarizes the conclusions of these Written Comments and reiterates the submissions made by the Written Statement of the Republic of Serbia. Finally, these Written Comments also contain four documentary annexes.

Chapter 2

THE TERMS AND SCOPE OF THE QUESTION BEFORE THE COURT

A. Introduction

30. Several written statements, as well as the written contribution of the authors of the UDI, characterize the question posed by the General Assembly as prejudicial and argumentative.[11] They contest certain factual determinations made by the General Assembly in the text of the question, most notably that the UDI was adopted by the Provisional Institutions of Self-Government. In addition, some of them also seem to understand the question before the Court in the narrowest possible terms – as a question of legality of a purely verbal, declaratory act.[12] These two issues will each be dealt with in turn.

B. The "Authors" of the UDI Are the Provisional Institutions of Self-Government of Kosovo

31. The written contribution by the authors of the UDI uses more than twelve pages to argue that the UDI was not in fact an act of the Assembly of Kosovo and the Provisional Institutions of Self-Government in Kosovo, but "an act of the democratically-elected representatives of the people of Kosovo meeting as a constituent body to establish a new State".[13] This same argument is also put forward by some States that have recognized the so-called "Republic of Kosovo" as an independent State.[14]

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[11] See, e.g., WC Authors, para. 7.04. *et seq*; WS Germany, pp. 7-8; WS Luxembourg, para. 9 *et seq.*; WS United Kingdom, para. 1.10 *et seq*.

[12] See, e.g., WS United States, p. 45 ("...the question…focused on the legality of the act of declaring independence"); WS United Kingdom, para. 1.16 ("whether Kosovo's Declaration of Independence, a declaration on a given day, is compatible with international law.").

[13] WC Authors, para. 6.01. *et seq.*

[14] See WS Albania, para. 40 and paras. 103-105; WS Austria, para. 16; WS Estonia, p. 3; WS Finland, paras. 17-18; WS Germany, p. 25; WS Netherlands, paras. 3.3-3.4; WS Norway, paras. 13-17; WS Poland, paras. 3.40-3.41; WS United Kingdom, paras. 1.12-1.13; WS United States, pp. 32-33.

32. This argument clearly reveals the awareness of its proponents that the Provisional Institutions of Self-Government acted *ultra vires* when adopting the UDI. It has no merit for two reasons: first, it is incorrect, and second, it is irrelevant. It is incorrect because evidence clearly shows that the UDI was adopted by the Assembly of Kosovo and endorsed by the President and Prime Minister of Kosovo, all of which are Provisional Institutions of Self-Government. It is irrelevant because the international legal regime established by Security Council resolution 1244 (1999) applies to everyone in Kosovo, and not only to the Provisional Institutions of Self-Government, and precludes acts such as the UDI.[15]

33. The claim that the UDI was not adopted by the Provisional Institutions of Self-Government does not correspond with what actually occurred. Firstly, this can be seen from the evidence emanating from the Kosovo authorities themselves. The transcript of the Assembly session held on 17 February 2008 shows that it was indeed the Assembly of Kosovo, a Provisional Institution of Self-Government in Kosovo, sitting *as the Assembly of Kosovo*, and not as some constituent body, that adopted the UDI:

- the President and the Prime Minister of Kosovo were greeted as guests of the Assembly, along with others, by the President of the Assembly;[16]
- it was the Assembly that, by a vote of *its* members, adopted *its* agenda containing two items: 1) the declaration of independence; and 2) the approval of state symbols;[17]
- before the vote on the UDI took place, the President of the Assembly determined the quorum;[18]
- it was *the Assembly* that adopted, by a vote of *its members*, the UDI;[19]

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[15] See *infra* paras. 372-389.

[16] "It is with great pleasure *that on behalf of the Assembly of Kosovo* and on my personal behalf, I welcome and thank you all..." WC Authors, Annex 2, p. 227 (emphasis added).

[17] In that regard, Mr. Krasniqi, President of the Assembly, used the following words: "[t]he first item *on our agenda...* [t]he second item *on our agenda...*" WC Authors, Annex 2, p. 227 (emphasis added).

[18] The transcript of the session (*ibid.*, at p. 238), records the following
"PRESIDENT OF THE ASSEMBLY, JAKUP KRASNIQI:
Thank you, Mr. Prime Minister!
Honorable Assembly Members,
I inform you that the vote will be cast electronically, thus I propose that we proceed.
I declare that 109 assembly members are present.
Are there any members who do not have their cards with you?
If any of you have no cards, you may vote by raising your hand.
I ask you, shall we vote electronically, or by raising our hand (...)"

[19] *Ibid.*

- at the time that the UDI was adopted and for months afterwards, the official website of the Assembly featured the text of the UDI starting with the words "The Assembly of Kosovo...." which was, at some point after the commencement of the present proceedings, replaced with the one that does no longer contain the words in question.[20]

34. According to the transcript of the Assembly session of 17 February 2008, the President and Prime Minister of Kosovo were guests at the Assembly session and did not vote on the UDI. What they did was to "solemnly" sign the UDI after it had already been adopted. They put their signatures on the UDI as an apparent mark of endorsement, and did so in their official capacity – as the President and Prime Minister of Kosovo, being the Provisional Institutions of Self-Government in Kosovo.[21] In this way the UDI, an act of the Assembly of Kosovo, also became an act shared and supported by other Provisional Institutions of Self-Government, so they can also be considered as the "authors" of the UDI.

35. Nevertheless, they continued to treat the UDI as an act of the Assembly of Kosovo. This is evidenced by a letter of the President of Kosovo to the President of Germany sent on the very day the UDI was adopted and informing that "... *the Assembly of Kosovo* declared Kosovo's independence..."[22] This clearly shows the understanding of the President of Kosovo that the UDI was an act of the Assembly of Kosovo and not of a so-called "constituent body" as the authors of the UDI contend in the present proceedings.

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[20] However, the original version of the text of the UDI is still available at the website of the Kosovo Assembly – not at the "documents" page (http://www.assembly-kosova.org/?cid=2,100) which features the "corrected" version but as a news item posted on the day of the UDI's adoption, 17 February 2008, see http://www.assembly-kosova.org/?cid=2,128,1635 (visited on 24 June 2009) and Annex 1 to the present Written Comments.

[21] See the photographic reproduction of the UDI on which the President and Prime Minister of Kosovo put their signatures under the designations "Kryetari i Kosovës" (President of Kosovo) and "Kryeministri i Kosovës" (Prime Minister of Kosovo), see WC Authors, Annex 1, p. 207. The term "Kryetari i Kosovës" is used by the Constitutional Framework for Provisional Self-Government in Kosovo to refer to the President of Kosovo, as an institution of self-government (see, e.g., Article 9.2.1). In contrast to that, the "constitution" of the so-called "Republic of Kosovo" uses the term "Presidenti i Republikës së Kosovës" when referring to the "president" (see, e.g., Article 84, available at http://www.assembly-kosova.org/common/docs/Kushtetuta_sh.pdf).

[22] WS Germany, Annex 2 (emphasis added).

36. Further, the written contribution of the authors of the UDI claims that the adoption of the UDI was accompanied by procedural irregularities and conclude that this shows the UDI was not an act of the Assembly but "a particular act voted upon and signed by the participants gathered together in a very special meeting."[23] In this regard, it should first be noted that these procedural irregularities reveal additional elements of the UDI's illegality, rather than curing it. Secondly, the evidence presented above clearly shows that the UDI was not adopted by "participants" or a "constituent body", but by the Assembly of Kosovo, while the Prime Minister and President of Kosovo did not sign and endorse it as individuals or "participants" but in their official capacity. By acting in their official capacity, a capacity that had been conferred on them by the Constitutional Framework and by elections organized under the Constitutional Framework and Security Council resolution 1244 (1999), they acted as the Provisional Institutions of Self-Government of Kosovo.

37. That the Assembly of Kosovo is the author of the UDI is also confirmed by the United Nations Secretary-General.[24] His view is also shared by the European Union, which, like the United Nations, has a field mission in Kosovo.[25]

38. This is also confirmed by the views of various States that have recognized the so-called "Republic of Kosovo", for example, Albania,[26] Denmark,[27]

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[23] WC Authors, para. 6.11.

[24] See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/211 (28 March 2008), para. 3 ("On 17 February, the Assembly of Kosovo held a session during which it adopted a "declaration of independence', declaring Kosovo an independent and sovereign State"), **Dossier No. 86**; see, also, UN Doc. S.PV.5839, p. 2, **Dossier No. 119**.

[25] Council of the European Union, Council Conclusions on Kosovo, 2851st External Relations Council meeting, Brussels, 18 February 2008: "On 17 February 2008 the Kosovo Assembly adopted a resolution which declares Kosovo to be independent..." Available at: http://www.auswaertiges-amt.de/diplo/de/Aussenpolitik/RegionaleSchwerpunkte/Suedosteuropa/Downloads-und-Dokumente/080218-Ratsschlussfolgerungen-Kosovo.pdf and http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf, p. 7.

[26] Albania, Recognition, Statement of Prime Minister: "Based on Declaration of Assembly of Albania, on October 21, 1991, in compliance with decision of Assembly of Kosovo, on February 17, 2008 for Declaration of Independence...", available at: http://www.keshilliministrave.al/index.php?fq=brendaandm=newsandlid=7323andgj=gj2; available also via: http://www.kosovothanksyou.com/.

[27] Denmark, Recognition, Press Release: "On 17 February 2008, the Assembly of Kosovo declared Kosovo's independence." Available at: http://www.um.dk/en/servicemenu/News/NewsArchives2008/DenmarkRecognizesKosovoAsAnIndependentState.htm.

Estonia,[28] Germany,[29] Ireland,[30] Latvia,[31] Lithuania,[32] Norway,[33] Poland,[34] Switzerland,[35] and Sweden.[36]

39. It follows that contemporaneous statements made by the authors of the UDI themselves, by international organizations as independent observers, and by States which accepted the UDI and recognized Kosovo, clearly confirm that the UDI was adopted by the Assembly of Kosovo.

40. In addition, it should be noted in the present context that the Assembly of Kosovo which adopted the UDI had been elected at parliamentary elections in November 2007 on which the overall voter turnout was a mere 42.8 %,[37] and where Kosovo status issues were deliberately removed from the electoral campaign by agreement of the election participants.[38] This brings into question even the political legitimacy of the Kosovo Assembly to deal with the status issues. It also shows

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[28] Estonia, Recognition, Press Release: "The Kosovo Assembly declared the province independent from Serbia on 17 February." Available at: http://www.vm.ee/eng/kat_138/9350.html.

[29] Pressemitteilung der Bundesregierung Nr. 51, Zustimmung des Kabinetts zur völkerrechtlichen Anerkennung des Kosovo vom 20.02.2008: "Am 17. Februar 2008 hat die Parlamentarische Versammlung in Pristina eine Unabhängigkeitserklärung verabschiedet." Available at: http://www.bundesregierung.de/nn_1264/Content/DE/Pressemitteilungen/BPA/2008/02/2008-02-20-anerkennung-des-kosovo.html.

[30] Ireland, Recognition, Press Release: "The recognition of Kosovo by Government decision follows a resolution by the Kosovo Assembly on 17th February to declare Kosovo independent." Available at: http://foreignaffairs.gov.ie/home/index.aspx?id=42938.

[31] Latvia, Recognition, Press Release: „Respecting the declaration adopted by the Assembly of the Republic of Kosovo on 17 February, the Republic of Latvia recognises the independence of the Republic of Kosovo." Available at: http://www.mfa.gov.lv/en/news/press-releases/2008/february/20-4/.

[32] Lithuania, Recognition, Resolution: "the declaration of independence of Kosovo adopted by the Assembly of Kosovo on 17 February 2008 and declaring Kosovo an independent and sovereign state..." Available at: http://www3.lrs.lt/docs2/JISENYRJ.DOC.

[33] Norway, Recognition, Original Letter: "I have the pleasure to refer to your letter of 17 February 2008 in which you informed the Government of Norway of the decision taken by the Assembly of Kosovo to declare Kosovo's independence." WS Norway, Annex 3.

[34] Poland, Recognition, Press Release: "On 17 February 2008, the National Assembly of Kosovo adopted a declaration of independence..." Available at: http://www.premier.gov.pl/english/s.php?id=1793.

[35] Switzerland, Recognition, Media Release, "The Federal Council took note of the Declaration of Independence adopted by the Assembly of Kosovo on 17 February 2008..." Available at: http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=17497.

[36] Sweden, Recognition, Press Release: "On 17 February the Kosovo Assembly adopted a resolution which declares Kosovo to be independent." Available at: http://www.sweden.gov.se/sb/d/10358/a/99714.

[37] See UN Doc. S/2007/768 (3 January 2008), p. 1, **Dossier No. 84**.

[38] See, e.g., Draft Report on Kosovo Municipal and Assembly Elections (Serbia) observed on 17 November and 8 December 2007, CoE Doc. CG/BUR(14)55 REV (14 January 2008), para. 10, available at www.amai.ie/CLRAE/KOSOVO.doc ; see, also, U. Caruso, "Kosovo declaration of Independence and the International Community - an assessment by the Kosovo Monitoring Task Force", *Journal on Ethnopolitics and Minority Issues in Europe*, vol. 7, no. 2 (2008), p. 14, available at http://www.ecmi.de/jemie/download/2-2008-Caruso.pdf .

that the Kosovo Assembly was far from being a "constituent body" with the task to establish a new State.

41. In conclusion, the claim that the "authors" were not acting as Provisional Institutions of Self-Government when adopting (Assembly) and endorsing (President and Prime Minister) the UDI is nothing more than a self-serving construction designed to place the Kosovo authorities and the UDI outside the mandatory international legal regime established by Security Council resolution 1244 (1999). According to this argument, a "constituent body" that purports to establish a new State by the UDI would not be bound by general international law, binding Security Council resolutions, and the regulations adopted by the Special Representative of the Secretary-General.[39] Consequently, according to this argument, the authors of the UDI would be free (as in reality they are trying to be) to terminate the international legal regime for Kosovo unilaterally, and then, again unilaterally, to "invite" international civil and military presences to Kosovo and define their mission.[40]

42. In any case, however, this attempt is futile, since the mandatory effect of the international legal regime established by Security Council resolution 1244 (1999) is not confined in the scope of its application to the Provisional Institutions of Self-Government, but applies to all actors in Kosovo, as will be discussed in more detail in Chapter 9. Therefore, even if one were to accept, if only for the sake of argument and contrary to the facts, the idea that the Provisional Institutions of Self-Government were not the authors of the UDI, *quod non*, this could not change anything in the final analysis as the authors of the UDI are in any case bound by the international legal regime for Kosovo which the UDI violates.

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[39] According to WC Authors, "... given that the declaration was not even an act of the PSIG but, rather, a constituent act of the people of Kosovo expressed through their democratically elected representatives, the Declaration was not even capable of violating resolution 1244." (para. 9.28).

[40] See UDI, para. 5, which states as follows:
"… We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability."

C. The Meaning of the Question

43. As has already been noted, some written statements take the position that the question before the Court is a question of the legality of a purely verbal, declaratory act.[41] However, the UDI is not merely a declaratory act; it is also an attempt to create a new State. Indeed, in the view of its authors it was an act by which an independent State, the so-called "Republic of Kosovo", was created. This is illustrated by the words of Mr. Krasniqi, the president of the Assembly of Kosovo, immediately after the Assembly adopted the UDI:

> "And from this point on, the political position of Kosovo has changed. Kosovo is:
>
> A REPUBLIC, AN INDEPENDENT, DEMOCRATIC AND SOVEREIGN STATE
>
> (applause)
>
> Congratulations to you and all of those who are watching us!
>
> (applause)".[42]

44. All these different aspects of the UDI are relevant for the examination of its legality. The UDI purports to be a legal act and, as such, needs to be analyzed in the light of the applicable international legal regime and international obligations of its authors. This involves an analysis of the UDI as an act aimed, *inter alia*, at creating a new State and purporting to terminate Serbia's sovereignty and the United Nations administration of Kosovo, as well as the future status process. This immediately raises the question of whether a State was indeed created – as claimed by the authors of the UDI and the States that have recognized the so-called "Republic of Kosovo" – which leads to an examination that entails both factual and legal elements: whether the so-called constituent elements of statehood

[41] See, e.g., WS United States, p. 45 ("...the question... focused on the legality of the act of declaring independence"); WS United Kingdom, para. 1.16 ("whether Kosovo's Declaration of Independence, a declaration on a given day, is compatible with international law.").

[42] Annex 2 to WC Authors, p. 14. See, also, e.g., WS Albania, para. 47 ("... a DoI as the birth of a new sovereign State...") and WS Slovenia, p. 1 ("[w]ith the Declaration of Independence, the new state of Kosovo was founded").

are present in the case of the so-called "Republic of Kosovo", and whether this attempt at creating a new State was in accordance with applicable rules of international law.

45. The question before the Court is narrow in as much as it deals only with the UDI and does not address related issues, such as recognition. Nonetheless, the question requires the Court to address various aspects of the UDI and the legality of these aspects under international law. These, indeed, are the true legal questions that are before the Court. Therefore, in Serbia's view, in order to fully consider the question submitted by the General Assembly, the Court should deal with the UDI in a comprehensive manner. Serbia's Written Statement has analyzed all dimensions of the UDI and concluded that it not only breached the applicable rules of international law, but also does not have as an effect the creation of a new State.

D. Conclusion

46. In conclusion,

(i) The Provisional Institutions of Self-Government in Kosovo are the authors of the UDI, as is clear from the evidence showing that the UDI was adopted by the Assembly of Kosovo and endorsed by the President and Prime Minister of Kosovo;

(ii) In any case, all actors in Kosovo, and not only the Provisional Institutions of Self-Government, are bound by the international legal regime established by Security Council resolution 1244 (1999), which has been violated by the UDI;

(iii) The UDI should be viewed as a purported legal act, which, *inter alia*, attempts to create a new State by terminating Serbia's sovereignty and the United Nations administration in Kosovo, as well as the future status process;

(iv) The question asked by the General Assembly in the present proceedings requires the Court to deal with various aspects of the UDI and their legality under international law;

(v) Serbia's Written Statement has shown that the UDI breached the applicable rules of international law, and that the factual elements of Statehood are not present in the case of Kosovo, and consequently the UDI is not in accordance with international law, and does not have as an effect the creation of a new State.

Chapter 3

JURISDICTION AND ADMISSIBILITY

47. A great majority of States participating in the present proceedings accept that the Court has jurisdiction to deal with the request made by the General Assembly and that there are no compelling reasons that prevent it from rendering an advisory opinion.[43]

48. However, there are still some States that question the jurisdiction of the Court or the propriety of it giving an advisory opinion in the present proceedings. This Chapter will first demonstrate that the claims objecting to the Court's jurisdiction are not well founded. Second, it will be shown that the reasons adduced by the States questioning the admissibility of the present request do not stand, and that there are no compelling reasons that prevent the Court from exercising its jurisdiction.

A. Jurisdiction

49. The Written Statement of France contends that since international law does not govern the conditions for the creation of a new State, but only takes notice of its existence, this means that the question before the Court is not a legal one, as it cannot be answered "sur un terrain véritablement juridique."[44]

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[43] The following states expressly discuss the issue of the Court's jurisdiction and the propriety of its exercise, and consider that the Court can and should render an advisory opinion: WS Argentina, pp. 10-18; WS Azerbaijan, paras. 6-9; WS Cyprus, paras. 5-17; WS Egypt, paras. 13-25; WS Iran, paras. 1.1-1.5; WS Russian Federation, paras. 6-17; WS Serbia, paras. 41-104; WS Spain, paras. 7-9; WS Switzerland, paras. 13-24.

Additionally, the following States do not in any way contest that the Court has jurisdiction, nor the propriety of the Court exercising it, but only discuss the merits of the request: Austria, Bolivia, Brazil, China, Denmark, Estonia, Finland, Germany, Japan, Latvia, Luxembourg, Libya, the Maldives, the Netherlands, Norway, Poland, Romania, Sierra Leone, Slovakia, Slovenia, United Kingdom and Venezuela.

[44] WS France, para. 1.5.

50. This is an incorrect proposition that confuses the nature of the question before the Court with a possible answer to that question. Even if international law were "neutral" with regard to secession, *quod non*, this would not mean that the question before the Court is not a legal one, but would only suggest one particular (legal) answer to this legal question. Further, even if international law did not govern questions of secession, *quod non*, any factual requirements of statehood would nevertheless still be determined by international law.

51. This notwithstanding, the proposition that international law is "neutral" towards secession is controversial, to say the least.[45] Moreover, there are cases – Kosovo being one of them – where international law is clearly not neutral towards secession. In any case, this is *a question of international law* that the Court is able to address in the advisory opinion in the present case.

52. Even more importantly, the UDI is not merely an isolated act attempting to create a new State, but constitutes an act purporting to establish a new State *by terminating the United Nations administration of the territory*.[46] As such, the UDI exists in the legal setting regulated by the international legal regime established by the Security Council. With this in mind, the question of the possible "neutral" stance of international law *vis-à-vis* the UDI does not even arise, which leaves the jurisdictional claim made by France without any basis.

53. A similar argument has been made by Albania which contends that international law does not regulate the UDI, which, according to Albania, is a matter essentially within the domestic jurisdiction of the State in the sense of Article 2, paragraph 7, of the Charter. For that reason, Albania claims, the General Assembly's request "does not concern a legal question within the purview of its competences under the UN Charter."[47] However, this claim not only prejudices the question before the Court as it starts from the proposition that Kosovo is a State, but is also, as a matter of principle, unfounded. The situation in Kosovo has for a long time been a

[45] See WS Serbia, para. 1009 *et seq*.
[46] See *supra* paras. 43-45.
[47] WS Albania, para. 47.

matter of international concern, and the Security Council, acting under Chapter VII of the Charter, has specifically regulated, *inter alia*, the interim administration of the territory, a political solution to the Kosovo crisis and the political process designed to determine Kosovo's future status.[48] Further, as emphasized in the *Interpretation of Peace Treaties* advisory opinion, questions of international law cannot be considered as being essentially within the domestic jurisdiction of a State and lie within the competence of the Court.[49] Therefore, it is quite astonishing to claim, as Albania does, that the UDI is a matter essentially within the domestic jurisdiction and that the request of the General Assembly is not within its competences under the Charter.

54. Albania contends that the General Assembly does not have jurisdiction due to the effect of Article 12, paragraph 1, of the Charter. It seems to contend that the Court's scrutiny of relevant Security Council resolutions would interfere with Security Council jurisdiction under Chapter VII and that the proper interpretation of Article 12, paragraph 1, should prevent such a possibility.[50] However, this is clearly contrary to the Court's well-established position that the said provision does not prevent the General Assembly from requesting advisory opinions.[51] In addition, the interpretation proposed by Albania would unduly extend the application of Article 12, paragraph 1, to prevent the General Assembly from requesting advisory opinions in cases in which the Court could, if only hypothetically, touch upon matters that are dealt with by the Security Council under Chapter VII of the Charter. This would lead to an unwarranted limitation of the General Assembly's competences and the Court's judicial function. Indeed, not only is the Court not precluded from interpreting Security Council resolutions, including those adopted under Chapter VII, but as the principal judicial organ of the United Nations it has a responsibility to do so when exercising its judicial function.

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[48] See resolution 1244 (1999), *passim*, especially paras. 1 and 10, **Dossier No. 34**.

[49] See *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, pp. 70-71. See, also, C. Tomuschat, "Article 36", *in* A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice. A Commentary* (2006), p. 637.

[50] WS Albania, para. 52.

[51] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, para. 28 (hereinafter: "*Wall"*).

55. Finally, since Albania also uses this claim as an objection to the propriety of the Court's opinion in the present case, it should be noted that a hypothetical possibility of a conflict between the opinion of the Court and eventual Security Council action has never been regarded as a compelling reason for the Court to decline issuing an advisory opinion.[52] Other objections as to the propriety of the Court exercising its jurisdiction in the present case are dealt with in the section that follows.

B. There Are No Compelling Reasons to Decline Jurisdiction in the Present Case

56. In a minority of written statements, it has been claimed that there are compelling reasons for the Court to decline to give an advisory opinion in the present case, which may be summarized as follows:

(i) that the General Assembly has no interest in the opinion;

(ii) that the opinion would serve no useful purpose;

(iii) that the opinion would concern a bilateral dispute;

(iv) that the opinion would have adverse political effects.

Each of these claims will be discussed in turn and it will be demonstrated that none of them have any legal bearing and that the Court should not decline to give its opinion in the present case.

I Interest of the General Assembly and the United Nations in the advisory opinion

57. Some States claim that the General Assembly has no interest in the advisory opinion,[53] which is in fact sought "solely for the benefit of individual States."[54] This claim amounts to questioning the *bona fide* nature of the General Assembly

[52] See *ibid*, para. 53.
[53] See WS United States, pp. 41-45; WS France, paras. 1.23-1.42 *passim*; WS Ireland, para. 12.
[54] WS United States, p. 44.

resolution 63/3, and for that reason it does not seem to be a proper matter for the Court's consideration. As the Court stated in its first advisory opinion,

> "[i]t is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body."[55]

58. In the present case, the interest of the General Assembly in the question before the Court is evinced by the very fact that the General Assembly decided to request the advisory opinion, which is indeed not a routine matter. It is not relevant that, unlike most previous requests for advisory opinions, the present one did not expound in detail on the need for the Court's advice or identify a specific problem or cite relevant General Assembly resolutions.[56] In that regard, General Assembly resolution 63/3 is quite similar, for example, to the General Assembly resolution adopted on 16 November 1950 which requested the Court's advisory opinion in the *Reservations to the Convention on Genocide* case.[57]

59. Much of the argument behind the claim that the General Assembly has no interest in the advisory opinion is based on the fact that the draft resolution was proposed by Serbia individually and that Serbia, along with some other States, emphasized the right of any State to seek an advisory opinion during the General Assembly debate. However, all this meant was that any State might seek to persuade the General Assembly to request an advisory opinion from the Court,[58] and not that the advisory opinion is requested solely for the benefit of one or more individual

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[55] *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 61. See, also, *Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, pp. 6-7; *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 155; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* para. 33; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996* (hereinafter: "*Legality of the Threat or Use of Nuclear Weapons*"), pp. 233-234, para. 13.

[56] See WS United States, p. 43.

[57] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 16-17.

[58] See, also, WS United States, p. 44.

States. To contend otherwise is to reduce the General Assembly to a postal service transmitting to the Court requests from States seeking advisory opinions. Indeed, this argument minimizes the fundamental importance of the fact that it is the General Assembly that adopted a decision to request an advisory opinion from the Court and that the opinion is given to the Assembly, not to Serbia.

60. This argument is not diminished in the least by the fact that the General Assembly currently does not have on its agenda a separate item specifically dealing with the situation in Kosovo. There is nothing to preclude the Assembly from including such an item at an appropriate time of its choice, in accordance with the Charter. The long-standing interest of the General Assembly in the situation in Kosovo was already noted in the Written Statement of Serbia.[59]

61. Furthermore, the General Assembly's 63rd session does have the financing of UNMIK on its agenda, which clearly relates to the question before the Court.[60] Those States that claim that the General Assembly has no interest in the present advisory procedure try to diminish the importance of this fact.[61] However, as already discussed,[62] the UDI is an act purporting to terminate UNMIK and the legality of the UDI must be of great relevance for the organ deciding on whether and to what extent this mission should be financed.

62. In any case, the present proceedings are not a proper place to speculate whether or not, and if so in what form, the General Assembly should or will discuss the situation in Kosovo or its various aspects. This is a prerogative of the Assembly itself. What is clear and indeed sufficient for the purpose of the present discussion is that the General Assembly has expressed its interest in the question before the Court by requesting the advisory opinion. As the Court stated in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion:

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[59] See WS Serbia, para. 54.
[60] See UN Doc. A/63/251 (19 September 2008), p. 13, agenda item 142.
[61] "A matter related to the financing of UNMIK is listed on the agenda, but there is no indication that the Assembly needs the Court's legal advice in order to address this agenda item, nor was it suggested during the debate that it does." WS United States, p. 42, note 173; see, also, WS France, para. 1.37(ii).
[62] See *supra* para. 44.

> "Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs."[63]

63. For the sake of completeness it should be recalled that the General Assembly has responsibilities under the United Nations Charter that are closely related to the question before the Court, including considering any matters relating to the maintenance of international peace and security (Article 11, paragraph 2); matters relating to the powers and functions of any organs of the United Nations (Article 10); as well as the admission of new members (Article 4, paragraph 2).[64] Its interest in an advisory opinion is apparent from the very fact that the opinion will provide legal guidance necessary for the discharge of these responsibilities. In particular, the General Assembly has a direct interest in all situations involving challenges to the United Nations and violations of the Charter of the United Nations and general international law.[65]

II The purpose and effect of the advisory opinion

64. Another claim that is made is that the advisory opinion in the present case will serve no useful purpose or will have no effect.[66] At this point it is useful to recall what the Court said with regard to this question:

> "It follows that the 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.

[63] *Legality of the Threat or Use of Nuclear Weapons,* p. 237, para. 16.
[64] WS Serbia, paras. 47-57.
[65] See *ibid.*, para. 55.
[66] See WS France, paras. 1.7. *et seq.*; WS Albania, paras. 69-70; WS Czech Republic, p. 5; WS Ireland, para. 12; WS United States, p. 42.

> Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly – and the Security Council – may then draw conclusions from the Court's findings."[67]

65. As this pronouncement clearly shows, the Court cannot decline the advisory opinion on the basis that it would serve no useful purpose, as it would otherwise second-guess the requesting organ which is entitled to draw its own conclusions from the Court's findings.

66. This is fully applicable to the present case and should dispose of the present objection conclusively. Nevertheless, France claims that Article 12 of the Charter "priverait un avis de la Cour de toute portée concrète"[68] and that General Assembly cannot take any action in this situation without violating the Charter.[69] This claim is one of pure conjecture. In order to deal with it the Court would be forced to speculate what actions the Assembly could take pursuant to the advisory opinion and then to rule on hypothetical questions concerning compliance of these hypothetical actions with the Charter. This would be clearly incompatible with the Court's judicial function.

67. Further, and with reference to the Court's pronouncements in the *Northern Cameroons* and *Nuclear Tests* cases, France contends that the Court in the present case, as well, should avoid "un prononcé judiciaire dépourvu d'effet utile"[70] for the following reasons:

> "1.13. Or, dans le cas présent, la question posée à la Cour est dépourvue de tout effet pratique : quelle que puisse être la réponse, rien, concrètement, ne pourra en résulter.

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[67] *Wall*, p. 163, para. 62; see, also, *Legality of the Threat or Use of Nuclear Weapons,* p. 237, para. 16.
[68] WS France, paras. 1.28-1.42.
[69] *Ibid.*, para. 1.42.
[70] WS France, para. 1.12.

> 1.14. La conformité – ou non – de la déclaration d'indépendance du Kosovo au droit international ne peut avoir aucun effet sur l'existence de cette entité en tant qu'Etat qui est une pure question de fait..."[71]

68. Here, one should first note that the assumption behind this contention is that the purported existence of the so-called "Republic of Kosovo" as a State is merely a question of fact, an assumption which, as demonstrated in the written statements of Serbia and other States, is not accurate.[72] Moreover, as already noted, the UDI purports to be a legal act which, *inter alia*, purports to create a new State and is an attempt to terminate the United Nations administration of Kosovo.

69. Secondly, the context of the *Northern Cameroons* case reveals that the Court refused to act in a situation where no actual legal rights were involved because the dispute concerned a Trusteeship Agreement which had been terminated by the General Assembly and was no longer in force.[73] This is wholly inapplicable to the present case in which the question concerns the legal regime established by Security Council resolution 1244 (1999) which is still in force and is legally binding on all relevant actors. Indeed, to accept the claim espoused by France is to accept that this legal regime is no longer in force.

70. Moreover, advisory opinions are given in a completely different setting than the one invoked by France. As the Court stated in the *Western Sahara* advisory opinion:

> "Thus, to assert that an advisory opinion deals with a legal question within the meaning of the Statute only when it pronounces directly upon the rights and obligations of the States or parties concerned, or upon the conditions which, if fulfilled, would result in the coming into existence, modification or termination of such a right or obligation, would be to take too

[71] *Ibid.*, paras. 1.13-1.14.
[72] For more, see *infra* paras. 215-216 .
[73] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 37.

restrictive a view of the scope of the Court's advisory jurisdiction."[74]

71. Since the present advisory opinion is given to the General Assembly it should be recalled that its responsibilities under the United Nations Charter are such that the advisory opinion will have an important effect in their discharge.[75]

72. Finally, one should also not forget the usefulness of the advisory opinion for other organs of the United Nations. The Dossier submitted by the United Nations in the present proceedings reveals that the Organization has had no benefit of impartial legal advice on the matter, despite the fact that it is administering the territory and that the UDI has presented a significant challenge to the authority of the United Nations and its administration in Kosovo.[76] In particular, the authoritative legal guidance from the Court will benefit the Security Council, as well as the Secretary-General and his Special Representative who have taken a position of strict neutrality towards the UDI pending further political guidance from the Council.[77]

III Other reasons adduced should also not lead the Court to decline jurisdiction

73. Paradoxically, the same States that claim that an advisory opinion in the present case will have no effect, also claim that it will actually have an effect, but an adverse one.[78] In essence, this is a claim that the Court should decline its advisory opinion for political reasons and due to the potential adverse political effects of the opinion. However, this simply cannot be the reason for the Court to abdicate its judicial function, particularly since the United Nations' plenary political organ,

[74] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 20, para. 19.
[75] For more, see WS Serbia, paras. 47-57 and 91-92.
[76] See Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/211 (28 March 2008), para. 30, **Dossier No. 86**.
[77] See, e.g., Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/2008/354 (12 June 2008), para. 12 and Annexes 1-2, **Dossier No. 88**, as well as, more recently, UN Doc. S/2009/149 (17 March 2009), para. 5.
[78] See WS France, para. 1.18; WS Czech Republic, p. 5.

which is much better placed to assess the political aspects of the situation, did not consider that the advisory procedure in the present case would have any such adverse political effects. Finally, it should be recalled what the Court said on an earlier occasion:

> "The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (...) Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law."[79]

74. Another claim, made by Albania, is that since neither the General Assembly nor the Security Council have requested that States should not recognize the so-called "Republic of Kosovo" as a new State, "[a]n advisory opinion could not come to the conclusion that the recognition by these 57 States was in violation of international law."[80] While it should be noted that the claim made by Albania unduly limits the Court in the exercise of its judicial function, it is clear that in any case the present advisory opinion does not concern the question of recognition as such. The question before the Court concerns various aspects of the UDI and their legality under international law.

75. Finally, a claim has been made that the advisory opinion concerns "a bilateral dispute between Kosovo and Serbia."[81] As already discussed in the Written Statement of Serbia,[82] its consent, as the interested State, is not required in the present case, which raises issues of direct and acute concern to the United Nations

[79] *Legality of the Threat or Use of Nuclear Weapons,* p. 234, para. 13.
[80] WS Albania, para. 58.
[81] WS Albania, Part IV, E).
[82] WS Serbia, paras. 76-80.

and the international system as a whole.[83] In any case, Serbia has given its consent to the present proceedings. At the same time, the consent of Kosovo is not required, since it is not a State. Nevertheless, it should be noted that the authors of the UDI are participating in the present proceedings and have submitted a written contribution.[84]

C. Conclusion

76. In conclusion, the Court is competent to exercise its advisory jurisdiction in the present proceedings and there are no compelling reasons that should lead the Court to decline to give an advisory opinion in response to the question submitted by the General Assembly. As has been demonstrated, the claims made by a minority of participants in the present proceedings, challenging either the competence of the Court or the propriety of its exercise of advisory jurisdiction, are unfounded and should be rejected in their entirety.

[83] See *Wall*, p. 159, para. 50.
[84] It has however been marked as a contribution of the so-called "Republic of Kosovo" in clear breach of the Court's Order of 17 October 2008, see *supra* para. 3.

Chapter 4

THE LEGAL AND FACTUAL BACKGROUND

A. General Remarks

77. The Written Statement of Serbia has provided a comprehensive summary of the legal and factual background relevant for the question submitted to the Court. Despite the conflicts of recent years still fresh in minds, the hardships currently endured by a substantial number of inhabitants of Kosovo, and the continuing flagrant violations of Serbia's sovereignty and territorial integrity initiated by the UDI, this summary was intended to be as objective, fair and comprehensive as possible. This was so regardless of the light such a presentation of facts would cast on the governmental authorities of the Federal Republic of Yugoslavia (hereinafter: "FRY") and Serbia at the relevant times.

78. However, not all written submissions in the present proceedings have adopted this approach. Instead, some of them have provided simplified and/or incomplete presentations of facts designed purely to support their case for the independence of the so-called "Republic of Kosovo."[85] These inaccurate and sometimes incorrect presentations of facts will be addressed as follows: first, a number of general comments will be made; second, inaccuracies or misrepresentations of facts which concern the status of Kosovo within Serbia and Yugoslavia, and the negotiations on the final status, will be addressed.

79. In any event, Serbia expressly denies all claims that are contrary to the presentation of the factual and legal background in its Written Statement and the present Written Comments.

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[85] See, in particular, WC Authors, *passim*; WS Albania, para. 4 *et seq*; WS United Kingdom, para. 2.1 *et seq*; WS United States, p. 4 *et seq*; WS Germany, p. 8 *et seq*; WS Denmark, p. 6 *et seq*; WS Austria, para. 5 *et seq*; WS Finland, para. 9 *et seq*; WS Estonia, p. 2 *et seq*; WS Switzerland, para. 81 *et seq*; WS Poland, para. 3.1 *et seq*; WS Norway, para. 30; WS Japan, p. 5 *et seq*; WS Ireland, para. 33.

80. With regard to factual statements made in the written submissions of the States that have recognized the so-called "Republic of Kosovo," as well as in the written contribution by the authors of the UDI, Serbia would respectfully like to make the following general comments.

81. *First*, almost no information is given on the situation in Kosovo before 1989, in particular with regard to the position of the ethnic Serb population in the province in the period between 1974 (when a new constitutional structure was introduced in the Socialist Federal Republic of Yugoslavia[86]) and 1989. The evolution of the crisis in Kosovo and the various positions of actors cannot be understood without this information.[87]

82. *Second*, descriptions of the position of the Kosovo Albanians in the period between 1991 and 1997 are incomplete and fail to note two important facts. On the one hand, human rights abuses were not confined to Kosovo, but were committed against citizens in all parts of the FRY.[88] On the other hand, due to their radical secessionist political agenda and policy of disengagement – which is also hardly mentioned – the Kosovo Albanian leadership missed a number of opportunities to improve the position of their community and the human rights situation in Kosovo as a whole.[89] Finally, in their description of this period, some Written Statements contain gross factual inaccuracies such as that "public activities in the Albanian language were banned, starting from education, culture, science, and media..."[90] However, the fact is that Albanian language media operated in Kosovo throughout the period,[91] and school education in the Albanian language took place, albeit in "parallel" schools due to the Kosovo Albanian boycott of the State educational system.[92] While it is true that the media in Kosovo were exposed to repression, this was also the case with regard to independent media elsewhere in the country.

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[86] Hereinafter: "SFRY"
[87] This is discussed in WS Serbia, paras. 221-231.
[88] See, e.g., WS Serbia, para. 270.
[89] See *ibid.*, paras. 268 and 271-272.
[90] WS Albania, para. 9.
[91] See, e.g., International Crisis Group, *Kosovo Spring* (1998), pp. 26-28
[92] For more see WS Serbia, paras. 267-268.

83. *Third*, there is almost no mention of the role played by the so-called "Kosovo Liberation Army" (hereinafter: "KLA") in the period between 1997 and 1999, or references to it are couched in neutral or positive terms.[93] However, this period cannot be understood without taking into account the crucial role of the KLA in the aggravation of the crisis through the introduction of terrorism as a *modus operandi* of the Kosovo Albanian independence movement.[94] Indeed, the United States of America initially considered the KLA to be a terrorist organization,[95] in stark contrast to its current description of events:

> "Having failed in supporting the secession of Serb-majority areas from the territory of Croatia and Bosnia, Belgrade turned to establishing full control over Kosovo, including through use of force. In this context, some ethnic Albanians concluded that the nonviolent policies of the Republic of Kosova would fail and that only armed resistance could protect Kosovo from Belgrade. The Kosovo Liberation Army ("KLA") began to undertake significant armed operations in 1997."[96]

84. This statement attempts to cast the KLA in a positive light by using the expression "armed resistance" (a term also employed by Mr. Ahtisaari, the Special Envoy of the Secretary-General[97]) to apply to what was a terrorist organization. It also inaccurately implies that it was Belgrade that had to "establish full control over Kosovo" which in turn had to be "protect[ed]... from Belgrade", as if Kosovo was not already for decades part of Serbia. In this context, it should also be noted that some written submissions, while extensively quoting from the ICTY first instance judgment in *Milutinovic et al.* in relation to the atrocities committed by individuals then being part of FRY authorities, fail to mention those parts of the

[93] For example, the written contribution of the authors of the UDI mentions "the armed struggle of 1998-1999," see WC Authors, para. 3.41; The United States uses the expression "armed resistance", see WS United States, p. 13.
[94] See WS Serbia, para. 290 *et seq.*
[95] See WS Serbia, para. 297.
[96] WS United States, p. 13 (footnotes omitted).
[97] See UN Doc. S/2007/168 (26 March 2007), para. 6, **Dossier No. 203**.

same judgment dealing with the KLA[98] and, indeed, the ICTY judgments specifically dealing with crimes committed by members of the KLA.[99]

85. *Fourth*, not only are the crimes against the ethnic Serb population in Kosovo before June 1999 not mentioned, but there is also almost no mention of the human rights situation in Kosovo after June 1999 or at present.[100] The grave situation of the non-Albanian population, in particular Serbs and Roma, is hardly discussed, including the fact that there are almost no returns to Kosovo of displaced persons of non-Albanian origin.[101] Similarly, there is hardly any mention of the well-documented organised pogrom against the Serbs in Kosovo that took place on 16-18 March 2004.[102] These facts must be mentioned, not only for the sake of fairness, but because they are relevant and important, in particular when discussing the fulfilment of the United Nations' task in Kosovo.

86. *Fifth*, no real evidence has been presented that would confirm that there is an independent government in Kosovo exercising effective control over the territory. While some of the written submissions, in particular the written contribution made by the authors of the UDI, dedicate considerable space to describing the functioning of the so-called "Republic of Kosovo",[103] it should be noted that this is mainly confined to quoting its "constitution" and "laws", as well as to presenting the well-known statistics of its recognition. This is simply not sufficient to prove the effective control of the so-called "Republic of Kosovo", in

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[98] For example, see ICTY, *Prosecutor v Milutinovic*, IT-05-87-T, Judgment, 26 February 2009, paras. 797-804 and 821-840. Similarly, extensive references to the OSCE report *Human Rights in Kosovo: As Seen, As Told,* Volume I (1999), fail to mention those parts dealing with the KLA and its crimes, see, e.g., *ibid.*, pp. 25-26 and 136-138.

[99] ICTY, *Prosecutor v. Fatmir Limaj et al.*, IT-03-66, Judgment, 30 November 2005; ICTY, *Prosecutor v. Ramush Haradinaj et al.*, IT-04-84, Judgment, 3 April 2008.

[100] For more, see WS Serbia, paras. 365-387. See, also *Human Rights in Kosovo: As Seen As Told*, Volume II (1999), which is completely neglected by those extensively quoting the first volume of the report.

[101] According to a recent report of the Secretary-General "[a]ccording to UNHCR estimates, 137 displaced community members, including 24 Kosovo Albanians, 30 Kosovo Serbs and 54 Roma, Ashkali and Egyptians, voluntarily returned to Kosovo between January and April [2009]", UN Doc. S/2009/300 (10 June 2009), para. 30. There are currently more than 200.000 internally displaced persons from Kosovo in Serbia. See UNHCR Global Report 2008, p. 250, which also states that "[a]s a result of the unilateral declaration of independence by the Kosovo Assembly in February 2008, returns of minority groups from other parts of Serbia to Kosovo have come to a near halt." *Ibid.*, p. 249, available at:
http://www.unhcr.org/cgi-bin/texis/vtx/search?page=searchanddocid=4a2e14ee2andquery=kosovo%202009

[102] But see WS United States, p. 25.

[103] See WC Authors, paras. 2.01-2.74. See, also, WS United Kingdom, paras. 4.12-4.27; WS United States, pp. 34-40.

the light of the extensive powers exercised by international civil and security presences in Kosovo, as well as the lack of control by the so-called "independent" authorities in parts of Kosovo.[104]

B. Kosovo as Part of Serbia and Yugoslavia

I Integration of Kosovo into Serbia and Kosovo as part of Serbia and Yugoslavia after World War II

87. A number of misrepresentations have been made with respect to various aspects of the status of Kosovo as part of Serbia and Yugoslavia, which will be refuted in the present section. For a comprehensive and detailed assessment of this topic the Court is respectfully directed to the Written Statement of Serbia.[105]

88. The first misrepresentation regards the integration of Kosovo into Serbia in 1912-1913, which is termed as an "occupation" by the authors of the UDI.[106] Indeed, according to the written contribution of the authors of the UDI,

> "The territory of Kosovo was fought over and changed hands a number of times during the Second Balkan War (1913) and World War I (1914-1918). It was absorbed into the Kingdom of Serbs, Croats and Slovenes (later known as the Kingdom of Yugoslavia) in December 1918; but, prior to that the territory of Kosovo had never been lawfully incorporated into the Kingdom of Serbia, having merely been occupied territory. It should therefore be noted that when Kosovo first entered a modern Yugoslav State, it did not do so as an integral part of any Serbian State. Serbia itself ceased to exist as a political entity, though the policies of successive governments of the new Kingdom were dominated by Serb interests."[107]

[104] For more, see WS Serbia, especially paras. 974-985.
[105] WS Serbia, paras. 132-203.
[106] WC Authors, paras. 3.02. and 3.05-3.06.
[107] WC Authors, para. 3.06.

89. This is a drastic misrepresentation of facts. As is well-known, the integration of the territory of present-day Kosovo into Serbia was internationally recognised and guaranteed by international treaties determining borders in the Balkans in 1913.[108] Therefore, there is no question of Kosovo being a Serbian occupied territory and it is factually incorrect to say, as the authors of the UDI do, that "prior to [1918] the territory of Kosovo had never been lawfully incorporated into the Kingdom of Serbia." Further, since the territory of present-day Kosovo was from 1913 legally a part of Serbia, the legal personality of which was continued by the Kingdom of the Serbs, Croats and Slovenes after World War I, it is inaccurate to state that "when Kosovo first entered a modern Yugoslav State, it did not do so as an integral part of any Serbian State."

90. A claim is also made that "as recently as 1943, it was by no means clear that Kosovo would be part of Yugoslavia, for its history was one of connections with various empires and States."[109] However, the reason for this particular uncertainty about the future of Kosovo in Yugoslavia by no means lies in any possible specificity of Kosovo: the real reason is that Yugoslavia was occupied and partitioned by Nazi Germany and other Axis powers. Once World War II was over and the occupation had ended, Yugoslavia's international boundaries were re-established. The country was constituted as a federation, on the basis of the 1943 decisions of the Anti-fascist Council of National Liberation of Yugoslavia,[110] with Serbia as one of its federal units and the Serbs as one of its nations. In 1945, the Presidency of the National Assembly of Serbia constituted Kosovo as an autonomous region within Serbia.[111] In 1946, the Yugoslav federal constitution confirmed that Serbia included Kosovo and Vojvodina and their autonomous status.[112] In any case, the status of Kosovo in Serbia and Yugoslavia was purely a matter of the domestic constitutional structure.

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[108] See Traité de Paix conclu à Londres le dix-sept (trente) mai mil neuf cent treize entre la Turquie et les Alliés balkaniques; Traité de Paix conclu et signé à Bucarest le 28 juillet 1913 entre la Serbie, la Grèce, le Monténégro et la Roumanie d'une part et la Bulgarie d'autre part; Accord intervenu entre le Royaume de Serbie et le Royaume de Grèce concernant la frontière serbo-grecque [3/16 August 1913]; Accord intervenu entre le Royaume de Serbie et le Royaume de Monténégro concernant la frontière serbo- monténégrine [30 October 1913 (Julian calendar)]; all reprinted in Annexes 6-9 in Documentary Annexes accompanying WS Serbia.
[109] WC Authors, para. 3.10.
[110] See Annex 42 in Documentary Annexes accompanying WS Serbia.
[111] See WS Serbia, para. 147.
[112] See *ibid.*, paras. 148-150.

91. It seems that these misrepresentations have apparently been made in order to support a further misrepresentation that Kosovo has never been part of Serbia, but only of Yugoslavia, and that the secession of Kosovo is just another step in the dissolution of the former Yugoslavia.[113] This, however, is incorrect both in law and in fact. First, the Arbitration Commission on former Yugoslavia determined that the process of dissolution of the former Yugoslavia was completed more than 15 years before the UDI, i.e. by 4 July 1992 at the latest.[114] Secondly, and even more importantly, the fact that Kosovo forms part of Serbia (and of Yugoslavia when Serbia was in Yugoslavia) has been continuously reaffirmed ever since Kosovo was integrated into Serbia:

- in 1913, by the international treaties determining the borders in the Balkans;
- after World War I, by the recognition of the borders of the Kingdom of the Serbs, Slovenes and Croats (the Kingdom of Yugoslavia) in a series of international treaties and decisions;[115]
- after World War II, by the recognition of the borders of Yugoslavia;
- in 1992, by the acceptance of the borders of the republics of the former Yugoslavia as the basis for new State borders, as confirmed in Opinion No. 2 of the Arbitration Commission on former Yugoslavia and subsequently accepted by the international community;
- from 1998 until present, in Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1999), 1239 (1999), 1244 (1999), and 1345 (2001).

II Constitutional amendments of 1989

92. Another series of misrepresentations is made with regard to the status of Kosovo within the Yugoslav Federation after 1974 and, in particular, concerning the 1989 amendments to the Serbian Constitution. For a comprehensive description of the

[113] See, e.g., WC Authors, para. 3.31.
[114] Opinion No. 8, 31 ILM 1523 (1992), Annex 41 in Documentary Annexes accompanying WS Serbia, **Dossier No. 235**.
[115] See Treaty of St. Germain-en-Laye (1919), Treaty of Trianon (1920), Treaty of Neuilly-sur-Seine (1919), as well as the decision of the Conference of Ambassadors, see *Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion of 4 September 1924, P.C.I.J., Series B, No. 9*, especially pp. 9-15.

status of Kosovo in the 1974 constitutional system, the Court is respectfully directed to the Written Statement of Serbia.[116] At this point it is sufficient to note that the autonomous provinces, while being an important part of the SFRY constitutional structure, were *not* federal units. As stated by the (federal) Constitutional Court of Yugoslavia:

> "under the SFRY Constitution, the SAP [Socialist Autonomous Province] of Vojvodina and the SAP [Socialist Autonomous Province] of Kosovo are not federal units like the republics, but… they are autonomous socio-political communities within the SR [Socialist Republic] of Serbia."[117]

93. As far as the 1989 amendments to the Serbian constitution are concerned, it is claimed that this was an "illegal removal of autonomy" through coercion,[118] or that the Kosovo Assembly accepted them without the required two-thirds majority.[119] For example, the authors of the UDI dedicate two full pages to this issue and quote extensively from the ICTY Trial Chamber's first instance judgment in *Prosecutor v. Milutinovic et al*.[120] On this basis, the authors of the UDI conclude that

> "through a process of violence and intimidation, Serbia unconstitutionally and illegally removed Kosovo's autonomy, both within Serbia and within the SFRY."[121]

94. However, the assessment arrived at by the ICTY Trial Chamber clearly does not support such sweeping conclusion:

> "The Chamber is in no doubt that the Kosovo Albanians perceived the amendments as removing the substantial autonomy previously enjoyed by Kosovo and Vojvodina, and that, in fact, this was their effect."[122]

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[116] WS Serbia, paras. 173-187.
[117] Constitutional Court of Yugoslavia, Decision of 19 February 1991, II-U-broj 87/90, *Sluzbeni list SFRJ* [Official Gazette of the SFRY], no. 37/1991, p. 618, for the Serbian original and English translation see Annex 56 in Documentary Annexes accompanying WS Serbia.
[118] WC Authors, paras. 3.23. *et seq.*; WS United Kingdom, para. 2.5.
[119] WS United Kingdom, para. 2.5.
[120] See WC Authors, paras. 3.26-3.28.
[121] See WS, para. 3.28.
[122] ICTY, *Prosecutor v Milutinovic*, IT-05-87-T, Judgment, 26 February 2009, para. 221.

95. While Serbia does not agree with the Chamber's broad assessment that the effect of the amendments was to remove "the substantial autonomy previously enjoyed by Kosovo and Vojvodina", which is in any case a matter for legal assessment, it is significant that the Chamber did not conclude that the amendments were adopted either "unconstitutionally", "illegally" or "through a process of violence and intimidation" as the authors of the UDI erroneously claim.

96. This comes as no surprise, since the witnesses testifying in *Milutinovic et al.* about the adoption of the 1989 amendments were either not present in Kosovo at that time, or only had second-hand information about the circumstances in which the amendments were adopted.[123] In such circumstances, the Chamber rightfully confined itself to concluding that the amendments were perceived by the Kosovo Albanians as removing the autonomy and that "in fact, that was their effect" without establishing that this was done illegally or by coercion or unconstitutionally.

97. In this regard, Serbia would respectfully like to draw attention to the following additional facts which show that the decision of the Assembly of Kosovo, which consisted predominantly of ethnic Albanians, to accept the 1989 amendments to the Serbian constitution was neither unconstitutional nor coerced:

- Discussion and voting were free; indeed some members criticised the amendments and their statements were reported in the press.[124] No procedural irregularities in the work of the Kosovo Assembly were raised or reported at the time. It should be noted that indeed a large number of journalists was present at the session,[125] as well as the highest-ranking Yugoslav federal officials, including those of ethnic Albanian origin.[126]

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[123] See *ibid.*, para. 219. These statements can be contrasted by the witness statement of Mr. Vukasin Jokanovic, who was the chairman of the Kosovo Assembly at the time, and who denied that any coercion or illegality took place. See ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Transcript, 1 December 2004, e.g., p. 34044, Annex 2 to these Written Comments.

[124] See, e.g., BBC Summary of World Broadcasts, 28 March 1989, ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, exhibit P796.3, available at: http://icr.icty.org/.

[125] See ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Transcript, 1 December 2004, pp. 34052 and 34054-34055, Annex 2 to these Written Comments.

[126] *Ibid.*, pp. 34055-34056.

- The amendments to the Serbian constitution were reviewed by the (federal) Constitutional Court of Yugoslavia, which found that some of them were not in accordance with the federal constitution but upheld the constitutionality of the amendments relating to the status and competences of autonomous provinces. Only one judge raised the question of the constitutionality of the procedure through which the amendments were adopted by the Kosovo Assembly but his motion was rejected by the Constitutional Court of Yugoslavia by a vote of 11 against 2, its judges coming from all parts of the former Yugoslavia.[127]

98. Therefore, the 1989 amendments to the Serbian constitution were not adopted either illegally or by coercion. This was also the view of the competent authority, the Constitutional Court of Yugoslavia, which considered that it was not necessary to examine the constitutionality of their adoption.

99. Moreover, the effect of the 1989 amendments to the Serbian constitution was to modify the autonomy of Vojvodina and Kosovo, not to abolish it. After the amendments entered into force, the Autonomous Province of Kosovo continued to exercise its autonomous competences. For example, the Assembly elected Kosovo's delegation to the Chamber of Republics and Provinces of the Yugoslav federal Assembly,[128] and adopted amendments to the provincial constitution.[129] The same was the case with other institutions of Kosovo's autonomy which continued their work until they were eventually suspended at a later stage in response to their attempt to unconstitutionally assume powers that they did not possess. As far as Vojvodina is concerned, it has continued to exercise its autonomous powers until the present day, powers which are currently regulated by the 2006 Constitution of Serbia.

[127] See Minutes U-No. 105/1-89 of 18 January 1990, reproduced in Annex 3 to these Written Comments; see, also, Constitutional Court of Yugoslavia, Opinion of 18 January 1990, IU-broj 105/1-89, *Sluzbeni list Socijalisticke Federativne Republike Jugoslavije* [Official Gazette of the SFRY], No. 10/1990.
[128] See *Sluzbeni list SAP Kosova* [Official Gazette of the SAP Kosovo], No. 36/1989.
[129] *Ibid.*, No. 24/1989.

C. Negotiations on the Future Status

I Introduction

100. Most written submissions presented to the Court discuss the negotiations on the future status of Kosovo. In this regard, the proponents of Kosovo's independence claim that all possibilities for further negotiations were exhausted so, accordingly, the unilateral action taken by the Provisional Institutions of Self-Government in Kosovo was inevitable. Thus, the United Kingdom refers to the "multiple (unsuccessful) searches for a solution" which are in its Written Statement divided into five phases.[130] The United States' view is that "[t]he political process…was pursued with creativity and persistence, and was strongly supported by the international community" but eventually the differences between the parties were "simply too great to achieve a result that was acceptable to both Belgrade and Pristina."[131] Germany also refers to "the earnest and intense, but ultimately unsuccessful search for a negotiated solution…"[132] Mr. Ahtisaari, the Special Envoy of the Secretary-General, took the 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."[133]

101. However, these views are not accurate. The negotiations were from the very beginning fatally affected by the attitude of certain Powers, members of the Contact Group, as well as the mediator himself, which was clearly in favour of independence of Kosovo. In such circumstances, the Kosovo Albanian leadership did not have any reason to consider, let alone accept, any compromise on the issue of status. This will be demonstrated in the following sections which, in turn, will deal with the circumstances in which the negotiations were conducted, and the approaches of the parties.

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[130] WS United Kingdom, para. 3.33 *et seq.* These five phases of the "searches for negotiated solution" even include the "standards before status" policy as one phase. However, this policy preceded the negotiations and was not an attempt to reach a final solution.
[131] WS United States, p. 32.
[132] WS Germany, p. 27.
[133] UN Doc. S/2007/168 (26 March 2007), para. 3, **Dossier No. 203**.

102. Serbia is aware that its submissions on this matter raise very serious concerns. For that reason it has decided to rely solely on public documents that speak for themselves and not on its diplomatic archive. Serbia is confident that the Court will give due consideration to these facts and will draw its conclusions accordingly.

II The circumstances in which the negotiations were conducted and the attitude of Mr. Ahtisaari

103. The Contact Group consisting of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States adopted in November 2005 the guiding principles for the future status process for Kosovo.[134] This document was subsequently forwarded by the President of the Security Council to the Secretary-General,[135] and served as a basis for the final status negotiations.

104. With respect to the final status of Kosovo, the Contact Group adopted the following position:

> "The settlement of Kosovo's status should strengthen regional security and stability. Thus, it will ensure that Kosovo does not return to the pre-March 1999 situation. Any solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected."[136]

105. It is clear from the foregoing that the Contact Group did not pre-determine independence as the final status of Kosovo, but only set certain criteria for whatever final status the parties might agree upon (such as: no return to the pre-March 1999

[134] "Guiding principles of the Contact Group for a settlement of the status of Kosovo," UN Doc. S/2005/709 (10 November 2005), Annex, **Dossier No. 197**.
[135] UN Doc. S/2005/709 (10 November 2005), **Dossier No. 197**.
[136] "Guiding principles of the Contact Group for a settlement of the status of Kosovo," UN Doc. S/2005/709 (10 November 2005), Annex, para. 6, **Dossier No. 197**.

situation; no unilateral solution; no solution by the use of force; no partition of Kosovo; no union of Kosovo with other countries; respect for territorial integrity). A subsequent statement of the Contact Group issued in January 2006 also did no pre-determine the final status of Kosovo to be independence.[137]

106. At the same time, however, Mr. Ahtisaari, who was the Special Envoy for the future status process for Kosovo, from the very beginning of his mandate took the view that independence was the only option for the final status of Kosovo and conveyed this view to both parties. According to Mr. Ahtisaari himself:

> "L'une des conditions formulées au départ était de ne surtout pas revenir à la situation d'avant 1999. Lorsque j'ai rencontré [le premier ministre] Kostunica en 2005, je lui ai dit que j'interprétais cela comme la perte du Kosovo."[138]

107. This is confirmed by Mr. Kostunica, who writes that Mr. Ahtisaari told him that Kosovo shall be independent already on his first visit to Belgrade on 24 November 2005:

> "On the occasion of his first visit to Belgrade already on 24 November 2005, Ahtisaari conveyed that he came to Belgrade to see in what way he can help Serbia, i.e., to reduce the damage that Serbia will suffer. When asked what damage he was talking about, Ahtisaari responded that something goes without saying: Kosovo shall be independent."[139]

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[137] Kosovo Contact Group Statement, London, 31 January 2006, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf.

[138] *Le Temps*, "Martti Ahtisaari: 'Le Kosovo est un cas à part'", 5 March 2008, Annex 4 to these Written Comments, available at: http://www.letemps.ch/Facet/print/Uuid/79cb56ac-aa06-11dd-bf59-ad3d6140ad87/Martti_Ahtisaari_Le_Kosovo_est_un_cas_à_part.

[139] V. Kostunica, *Odbrana Kosova* [Defence of Kosovo] (2nd rev. ed, 2009), p. 15. The Serbian original reads as follows:

> "Prilikom svoje prve posete Beogradu još 24. novembra 2005. Ahtisari je saopštio da je došao u Beograd da vidi na koji način može da pomogne Srbiji, odnosno da umanji štetu koju će Srbija pretrpeti. Na pitanje o kakvoj je šteti reč, Ahtisari je odgovorio da se nešto podrazumeva: Kosovo će biti nezavisno".

108. Moreover, Mr. Ahtisaari not only from the very beginning embraced independence as his solution for the final status of Kosovo, but also took the following view of the negotiations and his role in them:

> ”[Ahtisaari:] Let me give you an example how... how... how I look at the Kosovo negotiations, because people have a totally wrong impression that we simply sit there, I as a mediator, and there’s Serbia, and there’s Kosovo delegation. But... and, and... then we have to, people expect that the negotiations mean that we have to find somehow a compromise between these two. But situation very often in a negotiations is, that, let’s take an example, that Serbia is like a thief who has stolen the wallet from Kosovo. And if I am a mediator, I am not advising them that could the Serbian thief actually decide himself how much money he wants to give to the fellow whose wallet he’d stolen ... he has to give the whole damn wallet to you and then, most probably, go to jail for what he did. So, this is what the negotiations very often are. You have to do what is right. Things went so much overboard, that the only solution was left, and everyone, Belgrade, Pristina, Kosovo Serbs, knew from the first quarter of 2006 when the five members of the Contact Group - all the western members - told these two and the Kosovo Serbs, the following (the private messages, there were eight of them, I am not going to bother you and the audience for reading them all, but I’ll read the first one) ‘The unconstitutional abolition of Kosovo’s autonomy in 1989 and the ensuing tragic events resulting in the international administration of Kosovo have led to a situation in which a return of Kosovo to Belgrade’s rule is not a viable option.’ Everyone knew that independence was coming. But Prime Minister Kostunica and company behaved like they wouldn’t have heard what was told to them.

> [Question:] Well, you know, the Serbs think that Kosovo is their wallet and you took it away from them and they, they... and I won't bore people with this, I've got the UN resolution here, the Supreme... the Security Council promising that Yugoslavia would never be broken up. So, there are, I think, two sides to this story…
>
> [Ahtisaari:] No, it's, it's... there's not - there's only one side to story. Because, in 2005, the General Assembly accepted the principle: responsibility to protect. If a dictatorial leadership in any country behaves the way as Milosevic and company did vis-à-vis the Albanians in Kosovo, they lose the right to control them any more.
>
> [Question:] And that was it?
>
> [Ahtisaari:] That was it."[140]

109. These statements patently show that Mr. Ahtisaari did not approach the final status negotiations in a fair and unbiased manner, as was his duty. Instead, he clearly favoured one party in the process, the Kosovo Albanians, and from the very beginning considered that independence was the only option for the status of Kosovo.

110. In addition, from the beginning of 2006 onwards, certain members of the Contact Group started to convey to both parties, Serbia and the Kosovo Albanians, a message that the independence of Kosovo would be the only solution for the final status.

111. In a press statement made on 10 March 2006, Mr. Jack Straw, the United Kingdom Foreign Secretary, "called on Serbia to accept that independence for Kosovo was almost inevitable."[141] Previously, at the beginning of February 2006,

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[140] Interview with Mr. Ahtisaari, CNN, 10 December 2008, available at: http://www.youtube.com/watch?v=rHvpgj-ns-Mandfeature=related (visited on 17 June 2009).

[141] See http://news.bbc.co.uk/2/hi/europe/4792372.stm. In response to this statement, Serbia protested to the United Kingdom Ambassador in Belgrade on 11 March 2006.

a high-level British diplomat visited Kosovo and, according to the reports of the Kosovo media, conveyed a message indicating that independence was the favoured option.[142]

112. Therefore, the final status negotiations were led by a mediator who was clearly biased against one party and who came to the negotiating table with a ready solution – independence for Kosovo. Moreover, during the first half of 2006, when the status negotiations were in their early phase, high level representatives of certain members of the Contact Group conveyed the message to the parties that the only solution for Kosovo was independence. All this created a setting in which the negotiations could not be conducted in an open and fair manner. One party, the Kosovo Albanians, simply did not have any incentive to consider any compromise solution to the future status but stuck to its position that independence was the only option, and was indeed encouraged to do so by the mediator himself and certain Powers.

113. This situation continued once Mr. Ahtisaari presented his final status proposal in early 2007, which indeed envisaged independence for Kosovo. Once it became obvious that the proposal would not be endorsed by the Security Council, there were new efforts to achieve a negotiated solution acceptable to both parties. However, support for independence was at this point in time no longer merely voiced in diplomatic meetings and in oblique language, but came from the highest places and was expressed in unequivocal terms. As the United States President George W. Bush said on 10 June 2007 in Tirana:

> "We also talked about Kosovo. I'm a strong supporter of the Ahtisaari plan. I said yesterday in Rome, the time is now. A fellow asked me a question, 'Well, when does this end? When does the process end?' I said, 'The time is now.' In other words, I put a sense of -- I made it clear that -- two things: One, that we

[142] See UNMIK media survey: http://www.unmikonline.org/dpi/localmed.nsf/0/7F842356DE8A83B1C125710E0033CAEE/$FILE/lmm070206.pdf.

need to get moving; and two, *that the end result is independence*."[143]

114. Consequently, any further efforts to negotiate an agreed solution for the final status of Kosovo were doomed from the very beginning. The Kosovo Albanian side simply had no reason even to consider any proposal that fell short of independence, it only had to wait.

III The approaches taken by the parties

115. In the circumstances in which the negotiation process was from the very beginning led in a biased manner and towards independence as the only solution, the Kosovo Albanian leadership clearly had no incentive to consider any other status options. Yet, some written submissions, including the written contribution by the authors of the UDI, claim that Serbia was unwilling to compromise in contrast to the Kosovo Albanian leadership.[144]

116. A simple comparison of the positions of the two parties taken at the beginning and at the end of negotiations, shows that the position of the Kosovo Albanian leadership from the beginning to the end was only independence. According to the Kosovo Assembly resolution adopted before the negotiations started, on 17 November 2005, "... will of Kosova people for Independence is Nonnegotiable".[145] The Kosovo Albanian leadership stuck to the same position after almost two years of negotiations and said to the Security Council mission on the Kosovo issue that "Kosovo's independence as outlined in the Kosovo settlement proposal now before the Security Council was the only acceptable

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[143] The President's News Conference With Prime Minister Sali Berisha of Albania in Tirana, Albania, June 10, 2007 (emphasis added), available at: http://www.presidency.ucsb.edu/ws/index.php?pid=75342

[144] See WC Authors, paras. 5.15 and 5.18 (their approach "forward-looking and positive" while Belgrade's approach "unconstructive"); see, also, e.g., WS United Kingdom, para. 3.52, and WS Germany, p. 22.

[145] **Dossier No. 200**, para. 9. See, also, *UNMIK Media Monitoring*, 16 October 2005, which transmits the following press report from Kosovo daily *Bota Sot*: "Following the statement made by US Under Secretary Nicholas Burns that solution to Kosovo status should be a result of compromise, Kosovo political parties stated that independence of Kosovo is the only possible compromise...", available at: http://www.unmikonline.org/dpi/localmed.nsf/0/9AB2D62F157EB1D5C125709D002F5FAC/$FILE/161005.pdf

option. Other solutions could not be contemplated."[146] This remained the position of the Kosovo Albanian leadership during the 2007 Troika negotiations.[147]

117. In contrast, Serbia's position changed towards ever wider autonomy and self-government for Kosovo, as the negotiations progressed. From a general and open-minded starting position, which did not exclude any solution that would respect its territorial integrity and sovereignty,[148] Serbia moved to propose broad substantial autonomy under international supervision.[149] Subsequently, it presented various ideas for Kosovo's substantial autonomy,[150] none of which were accepted by the Kosovo Albanian leadership, including the following model proposed by the President of Serbia:

> "Serbia offers to Kosovo most competencies and symbols that are normally reserved only for sovereign countries.
> Serbia maintains the right to associate herself with province's foreign policy, defence, border control and the protection of Serbian heritage. As such, Serbia also reserves the right to exclusive representation in the United Nations, the OSCE and the Council of Europe. Serbia also requires that there be no army but accepts a gendarmerie to ensure domestic law and order in Kosovo.

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[146] Report of the Security Council mission on the Kosovo issue, U.N. Doc. S/2007/256 (4 May 2007), para. 26, **Dossier No. 207**.

[147] See Report of the European Union /United States/Russian Federation Troika on Kosovo, UN Doc. S/2007/723 (10 December 2007), Enclosure, para. 8, **Dossier No. 209**.

[148] According to a resolution adopted on 21 November 2005 by the National Assembly of the Republic of Serbia, the Government was authorized "to advocate modalities of a sustainable political, institutional and legal solution for the future status of Kosovo and Metohija." Further, the National Assembly emphasised that it "is aware of the fact that there can be different modalities of the future status of Kosovo and Metohija that do not question the sovereignty and territorial integrity of the state." *Sluzbeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 100/2005.

[149] According to the 2007 Report of the Security Council mission on the Kosovo issue,

> "The Coordinator of the Negotiating Team, Mr. Leon Kojen, outlined the Serbian proposal for broad substantial autonomy under international supervision. This arrangement envisaged that Kosovo would be vested with executive, legislative and judicial powers while Serbia would retain control over foreign policy, defence, border control, monetary and customs policy, and the protection of Serbian religious and cultural heritage and human rights. Such autonomy would be renegotiable after a certain period. Serbia was willing to discuss Kosovo's access to international financial institutions. Kosovo would have a choice: either special representation in Serbia's institutions, or full participation in the political institutions at the central level."

U.N. Doc. S/2007/256 (4 May 2007), para. 14, **Dossier No. 207**; see, also, Annex 81 in Documentary Annexes accompanying WS Serbia.

[150] See Letter of Ambassador Ischinger to European Union High Representative Solana, 5 December 2007, Annex 4 to the WS Germany, p. 2.

Agreements would exist between Belgrade and Pristina to ensure the protection of the rights of ethnic communities and, in the case of the Serbs, their relationship with the institutions in Belgrade.

Within each of these competencies, the International Community Representative would have his or her own jurisdiction. And methods of joint cooperation between Belgrade and Pristina would have to be elaborated.

In this model, there would be mutual concessions. The implementation would be supervised and guaranteed by the international community.

The benefits for Kosovo would be immediate and considerable:

1. Kosovo would be officially self-governing, with full consent of Belgrade

2. Relations with Kosovo Serbs would improve, reversing the current and potential reality of physical separation between the communities,

3. Kosovo would have access to international financial institutions and other international and regional organizations except the UN, OSCE and Council of Europe. This would provide Kosovo with legitimacy in international and other lending institutions,

4. Kosovo would have trade and cultural representative offices abroad,

5. Kosovo would have its own flag, anthem and national teams as they are accepted by international sporting federations,

6. Relations with Serbia would be normalized thus enhancing the prospects for stability and development of Kosovo,

> 7. Kosovo's integration into the network of official regional relations and with Serbia would accelerate European integration. Serbia is prepared to ask for benefits of its relationship with the EU to be enjoyed by Kosovo."[151]

118. As an illustration of Serbia's alleged inflexibility, some written submissions mention the adoption of a new Serbian Constitution in 2006. However, while the Constitution does not accept independence of Kosovo, it provides that the "substantial autonomy" of Kosovo will be regulated by a constitutional law.[152] This means that the Constitution leaves the door completely open for any form of "substantial autonomy" to be agreed by the parties and endorsed by the Security Council. Since this agreed autonomy will be implemented by a constitutional law – adopted in accordance with the procedure to be followed for the change of the Constitution – every detail of Kosovo's status will be constitutionally entrenched and, depending on what is the negotiated solution, will vary from the constitutional regime applicable to other autonomous provinces. In that regard, the concerns voiced by the Venice Commission that the Constitution does not guarantee substantial autonomy for Kosovo[153] must be, with respect, considered as unfounded.

119. Further, the adoption of a new Constitution did not change much with respect to the implementation of any negotiated solution endorsed by the Security Council, because Serbia would in any event have to implement *any* such solution by a constitutional amendment, both under the old and the new Constitution.

120. Finally, the process in which the new Constitution was adopted in 2006 did not exclude the Kosovo Albanians as such.[154] Rather, the voting requirements at the referendum with regard to the voters in Kosovo were identical to those adopted at

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[151] See address of Mr. Boris Tadic, President of the Republic of Serbia, on 27 November 2007 in Baden, Austria, available at: http://www.predsednik.rs/mwc/default.asp?c=303500andg=20071127103315andlng=engandhs1=0.

[152] Constitution of Serbia, Article 182, para. 2, see Annex 59 in Documentary Annexes accompanying WS Serbia.

[153] See, e.g., WS Germany, p. 22; WS United States, p. 28; WS United Kingdom, para. 3.51.

[154] See WS United States, pp. 27-28.

all previous elections since the first elections after the fall of Milosevic in 2000. Simply, the referendum was held at those ballot stations in Kosovo where this was possible, i.e. those that satisfied all legal requirements for voting, in particular the providing full security to all participants and ballots.[155] This solution has never been criticized by international election observers and was introduced in 2000 to prevent the manipulation of votes from Kosovo, which had been frequent before 2000.[156] The voters registered at the ballot stations where security and other legal requirements were ensured could vote regardless of their ethnicity. However, the Kosovo Albanians wilfully excluded themselves from participation in the political process and from all elections in Serbia and the FRY ever since the early 1990s.

IV Conclusion

121. It has been shown above that the final status negotiations were predetermined by the attitude of the mediator, Mr. Ahtisaari, and some members of the Contact Group, according to whom independence was the only option for the final status of Kosovo. For them, it seems that the main purpose of the negotiations was to achieve the independence of Kosovo from Serbia and obtain, including by pressure, Serbia's consent to such a solution. Mr. Ahtisaari clearly failed to act as an impartial mediator, who would approach the negotiations in a fair and unbiased manner, as was his duty.

122. Thus, from the very beginning of the negotiations, the Kosovo Albanian leadership was given to understand that the independence of Kosovo was the only solution on the table. In such circumstances, they had no reason whatsoever to consider, let alone accept, any compromise on this issue. After the publication of Mr. Ahtisaari's "Comprehensive Proposal for the Kosovo Status Settlement"

[155] See *Uputstvo za obavljanje pojedinih radnji u postupuku sprovodjenja republickog referenduma radi potvrdjivanja novog Ustava Republike Srbije na podrucju Autonomne pokrajine Kosovo i Metohija* [Instruction for conducting certain activities in the procedure of implementation of the republican referendum to confirm the new Constitution of the Republic of Serbia on the territory of the Autonomous Province of Kosovo and Metohija], *Sluzbeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 84/2006.

[156] See OSCE ODIHR, *Republic of Serbia / Federal Republic of Yugoslavia / Parliamentary Election / 23 December 2000 /Final Report* (20 February 2001), p. 7.

which proposed independence for Kosovo, and after the independence was unequivocally supported in public statements of those States that hitherto had only done so in diplomatic conversations, the negotiations appeared to lose any prospect of success, despite the efforts of subsequent negotiators and their pledge to "leave no stone unturned."

123. Therefore, it is inaccurate, if not cynical, to claim that all possibilities of negotiations have been exhausted and that the UDI was the only option left. As the above survey demonstrates, the negotiations that preceded the UDI were conducted in a setting that was designed to pre-determine their outcome and to push through only one solution, the independence of Kosovo. Today it is clear that this "solution" was unacceptable not only for Serbia, but also for the Security Council and the majority of the international community. What is now required is the continuation of negotiations, on the basis of a *bona fide* approach to be taken by all actors.[157]

[157] See, also, *infra* para. 464. *et seq*.

Chapter 5

THE CLAIM THAT KOSOVO IS A SO-CALLED "*SUI GENERIS* CASE" IS AN ACKNOWLEDGEMENT OF THE LACK OF ANY LEGAL BASIS FOR THE UDI

A. Introduction

124. A number of States that submitted written statements have argued that the purported secession of Kosovo can be justified on the basis of the *sui generis* nature of the Kosovo case.[158] This argument amounts to conceding that although the secession of Kosovo would not be in accordance with international law, an exception should be allowed owing to the "exceptional" circumstances preceding and surrounding the UDI. Or, viewed, from another perspective, that the secession of Kosovo would be considered in accordance with international law just because it is "exceptional". In short, this argument urges the Court to adopt reasoning that is particular, rather than universal, and political, rather than legal. Such an approach is simply not compatible with the function of law in general, nor with the role of the Court as the principal judicial organ of the United Nations in particular. The social function of law is to provide abstract patterns of conduct that are applicable to all on an equal footing. Exceptions are provided by the law itself and, again, they are not adopted on an *ad hoc* or individual basis. Equally, the function of the Court is "to decide *in accordance with international law* such disputes as are submitted to it",[159] and in the exercise of its advisory jurisdiction, to answer any legal question *in the same manner*.[160]

125. As Cyprus has rightly pointed out about this argument made by those States promoting Kosovo's secession: "'Special cases' do not merely dilute the quality of legality of a system: they replace it with a political element, in which the

[158] See WS Albania, para. 95; WS Denmark, para. 2.4; WS Estonia, pp. 11-12; WS France, para. 2.17; WS Germany, pp. 26-27; WS Ireland, para. 33; WS Japan, pp. 5-8; WS Latvia, p. 2; WS Luxembourg, para. 6; WS Maldives, p. 1; WS Poland, para. 5.2; WS Slovenia, p. 2; WS United Kingdom, para. 0.22.

[159] Article 38 of the Statute of the International Court of Justice (emphasis added).

[160] Articles 65 and 68 of the Statute of the International Court of Justice.

power and commitment of individual actors becomes more significant than the legal rights that they enjoy. Claims that situations are *sui generis* reduce the universally recognised rights of States, and put them outside the ordinary processes of the making and application of international law."[161]

126. Although the alleged "*sui generis* case" of Kosovo, and the question of whether Kosovo would constitute a precedent for other separatist phenomena, are not matters that bear any legal weight for the task of the Court, this chapter will address both points, taking into account the considerable emphasis laid on them by States favouring Kosovo's secession. After having determined the scope of this argument in section B, it will be demonstrated that:

(i) Each of the circumstances mentioned to qualify Kosovo's situation as *sui generis* does not lead to the recognition of a right to independence for the Serbian province.

(ii) The sum of various non-legal grounds does not amount to the creation of a right.

(iii) The effort exerted by some States in trying to bring about the secession of Kosovo from Serbia is a bad political precedent that, if allowed to be encased in a legal veneer, would also create "bad law".

B. The Scope of the "*Sui Generis*" Argument

127. The use of the *sui generis* argument by those States promoting Kosovo's secession could be interpreted in two ways: *first*, that the purported "unique" character of the Kosovo case would render the situation in accordance with international law; *second*, that even if it is not in accordance with international law, Kosovo's purported independence should be permitted because it would not constitute a "precedent" for other separatist cases in which the same international legal rules are also at issue. Neither of these two alternatives can be accepted.

[161] WS Cyprus, para. 77.

128. It must be stressed from the outset that any situation that comes before the Court is "unique". At the same time, some cases share similarities with others. The task of the Court, and indeed of any person analysing a concrete situation from the legal standpoint, is to apply the relevant legal rules having by definition a general character to a concrete – "unique" – situation. As the Court explained in a different context, but which nevertheless remains applicable to other realms of international law,

> "each specific case is, in the final analysis, different from all the others, […] it is monotypic and […] more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics."[162]

129. Some States rely heavily on the *sui generis* argument in the absence of substantial legal reasons to justify the purported secession of Kosovo. Other States have attempted to bolster their inherently weak legal arguments in favour of the secession of Kosovo based on a purported exercise of (external) self-determination, by also arguing that Kosovo is a so-called "*sui generis* case" and that secession of the territory must accordingly be allowed under international law.[163] However, any argument in favour of Kosovo's self-determination simply concerns those rules governing self-determination, and such arguments cannot be strengthened by taking so-called *sui generis* elements into consideration. The Written Statement of Serbia,[164] among others, has demonstrated that this is not possible.

130. Those States that have invoked the *sui generis* character of Kosovo have failed to explain what its *genus* would be. As it is known, in the field of the creation of

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[162] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 290, para. 81. In the French authoritative text: "chaque cas concret est finalement différent des autres, […] il est un *unicum*, et […] les critères les plus appropriés et la méthode ou la combinaison de méthodes la plus apte à assurer un résultat conforme aux indications données par le droit, ne peuvent le plus souvent être déterminés que par rapport au cas d'espèce et aux caractéristiques spécifiques qu'il présente" (*ibid.*).

[163] See WS Estonia, p. 11, and WS Ireland, para. 34.

[164] WS Serbia, Chapter 7.

States, there are different *genera*: decolonisation, separation from an existing State, dissolution of a State, unification. Each *genus* is made up of different cases, i.e. the establishment of two States from a single colony, the establishment of a single State from two different colonies, cases of devolution, dissolution by agreement or with no agreement, among others. If Kosovo is really a *sui generis* case, then it may be suggested that its *genus* would simply be defined as "Kosovo". This seems to be the approach taken by those advancing that this case cannot constitute a precedent. There would be just one case of "Kosovo" and no other "Kosovos" able to achieve independence in the future. It would be a *genus* containing only this one case. If this is indeed the case, then the *genus* of Kosovo is not a legal category but rather an arbitrary political denomination established for purely political reasons. To put it simply, Kosovo is considered a *genus* by some Powers because they have chosen not to apply international law to the case of Kosovo, and thus not to establish it as a precedent.

131. If, on the contrary, the *genus* of Kosovo is defined as "a case in which secession is permitted if the following circumstances exist: previous human rights violations, prolonged international administration, unsuccessful negotiations, lack of agreement within the Security Council, etc", then this would look like a legal category, although a convoluted one. However, if this is the case, then this *genus* would not be confined to Kosovo and may also apply to other cases that arise in the future.

132. The next section will demonstrate that none of the various "unique" features invoked in order to justify the *sui generis* character of Kosovo provides a legal ground for the UDI.

C. None of the Alleged Features that Purport to Make Kosovo a "*Sui Generis* Case" in Any Way Justify the Legality of the UDI

133. Further evidence that the *sui generis* argument lacks any legal spine is the fact that States favouring this assertion are unable to agree on the features of the

Kosovo case that make it unique and thus worthy of being allowed to violate international law. They cannot even agree upon criteria that would assist in identifying such unique features. France refers to the *sui generis* character of the political process,[165] and lists in purported support of such a proposition France's interpretation of a short history of Kosovo, including its constitutional status within Serbia, the human rights violations during the Milosevic era, its being placed under international administration, the possible outcome of independence – one of many outcomes – foreseen by the Security Council, the (unilaterally interrupted) negotiation process, the fact that the declaration of independence purports to self-impose obligations to uphold human rights in the territory of Kosovo, and the support that is claimed to be provided to the so-called "Republic of Kosovo" by the United Nations and the European Union.[166]

134. Other States have similarly constructed their short histories of Kosovo, and laid them out in a numerated list as though they amount to some clear set of criteria. Each such history varies, with each State laying stress on different issues it finds of a particularly "*sui generis* character". In this respect, reference may be made to the written statements of Germany (which considers that events of 1912 contribute to making the case of Kosovo *sui generis*),[167] Ireland,[168] Japan,[169] Luxembourg,[170] Poland,[171] and the United Kingdom.[172] Other States, perhaps overwhelmed by such a task, have simply declared the Kosovo case to be *sui generis*, as though such a declaration on its own carries some legal weight. These States are Latvia,[173] the Maldives,[174] and Slovenia.[175]

[165] WS France, para. 2.17.
[166] WS France, para. 2.18.
[167] WS Germany, p. 27.
[168] WS Ireland, paras. 33-34.
[169] WS Japan, p. 5 *et seq.*
[170] WS Luxembourg, para. 6 *et seq.*
[171] WS Poland, para. 5.2.
[172] WS United Kingdom, paras. 0.22-0.23.
[173] WS Latvia, p. 2
[174] WS Maldives, p. 1.
[175] WS Slovenia, p. 2.

135. The present Written Comments will summarily address each of the different features mentioned by the States purporting to demonstrate the *sui generis* character. Serbia will show that none of them is really "unique" nor provides a legal justification for the UDI.

I The status of Kosovo in the SFRY 1974 Constitution[176]

136. *First*, the fact that Kosovo was an autonomous province within the Republic of Serbia is rather an argument playing against any claim that the secession of Kosovo is in accordance with international law. According to the 1974 Constitution, only the nations of the former SFRY were recognised as having a right to secede.[177] To this end, when the SFRY was in the process of breaking down, neither the Peace Conference nor its Arbitration (*Badinter*) Commission envisaged the independence of Kosovo.[178]

137. *Second*, it is common knowledge that there exist within many States in the world today autonomous units that occupy a clearly defined territorial area. However, there exists no rule of international law applicable to such units that would exclude them from the application of the principles of territorial integrity, self-determination, non-intervention, and their corollaries, which apply to these territorial parts of a State as well as to any other part.

II The non-consensual and violent break-up of the SFRY[179]

138. It is curious that an event that occurred nearly two decades ago, superseded since then by the existence of different States, and considered definitely ended by the international Peace Conference and its Arbitration Commission with the

[176] WS Ireland, para. 33; WS Japan, p. 6; WS Poland, para. 5.2.1
[177] WS Serbia, para. 174.
[178] *Ibid.*, paras. 279-283 and 263.
[179] WS Estonia, p. 12; WS Luxembourg, para. 6; WS United Kingdom, para. 0.22 (b) and (c).

establishment of the FRY (which included Kosovo as part of Serbia),[180] has been invoked to justify Kosovo's purported secession.

139. At any rate, if this argument were valid, it would apply equally to the entities composing other successor States of the SFRY. The destabilising factor of this argument is immediately evident, and no argument claiming that the Kosovo case is not a precedent can cure this.[181]

III Human rights violations occurring between 1989 and 1999[182]

140. There is no doubt that serious human rights violations occurred in the period between 1989 and 1999. However, this is but one aspect of a larger, more complex situation, and unfortunately it is not unique to Kosovo. It must be remembered that from 1991 onwards the Kosovo Albanians had rejected participating in the Yugoslav and Serbian State structures and had built their own parallel institutions.[183] States promoting Kosovo's secession disregard the fact that for years this open defiance of State authority was tolerated; moreover, negotiations leading to solve concrete issues, such as education, were undertaken and agreements were reached.[184]

141. Serious and persistent human rights violations related to minorities and violent repressions of separatist attempts have sadly taken place in different regions of the world other than in the territory of the former SFRY. This undisputable fact has not lead the States favouring Kosovo's secession in their written statements to adopt the same policy in relation to these other parts of the world. The Court is aware of recent events confirming this.

142. Certainly, human rights and humanitarian law violations must be addressed at the State and individual levels. Nevertheless, international law does not grant a right

[180] WS Serbia, para. 279-283, and para. 263.
[181] WS Denmark, pp. 5-6; WS Maldives, p. 1; WS Slovenia, p. 2.
[182] WS Estonia, p. 12; WS France, paras. 2.20-2.27; WS Germany, p. 27; WS Ireland, para. 33; WS Luxembourg, para. 6; WS Poland, para. 5.2.2; WS United Kingdom para. 6.21.
[183] WS Serbia, para. 264-266.
[184] WS Serbia, para. 267-268.

to secession in these circumstances, as discussed elsewhere.[185] Human rights violations are not "unique" to the Kosovo situation either.

IV The international administration of the territory since 1999[186]

143. Some States that have recognised the so-called "Republic of Kosovo" have argued that the fact that the territory has been and continues to be under international administration since June 1999 is a distinct feature adding to the *sui generis* character of the situation and justifying secession. This argument neglects that Security Council resolution 1244 (1999) both established the international administration and *preserved the territorial integrity* of the State that continued to have sovereignty over the territory.

144. Moreover, Kosovo was not the first territory constituting part of a sovereign State to be placed under international administration, and it will probably not be the last. Other cases include territories from other successor States of the SFRY, such as the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES).

VThe fact that Serbia has not administered the territory since 1999[187]

145. This argument is the corollary of the immediately preceding argument, and it equally flies in the face of Security Council resolution 1244 (1999). France argues that the absence of Serbian administration on the territory has created an "irreversible fact".[188] Of course, this is only France's perception of things. If this was indeed the case, then there would have been no need to negotiate the future status of the territory. Moreover, the "irreversible fact" would not be

[185] WS Serbia, paras. 589-638. These Written Comments, paras. 339-349.
[186] WS Estonia, p. 12; WS France, paras. 2.20-2.27; WS Ireland, para. 33; WS Luxembourg, para. 6; WS Poland, para. 5.2.4.
[187] WS Ireland, para. 33; WS Japan, p. 7; WS Luxembourg, para. 6; WS Poland, para. 5.2.4.
[188] WS France, paras. 2.20-2.27.

independence. France fails to distinguish secession, which amounts to a change of sovereignty, from the simple administration of a territory.

146. Moreover, there have been other cases around the world where the sovereign State has not administered part of its territory, including territory where secessionist attempts have been made. This lack of administration has not in and of itself provided a legal basis for secession.

VI "Independence" has been envisaged as an option[189]

147. Leaving aside the exact accuracy of this assertion, the fact that independence is one of a number of options cannot justify *per se* any actual independence. This is not a peculiar case; there are other cases in the world where independence may be an option to put an end to a conflict, but other options are equally plausible outcomes. Independence has no primacy.

VII "Negotiations were exhausted and there was no other option but independence"[190]

148. Some States have argued that the purported secession of Kosovo is in accordance with international law because it was an *ultima ratio* way to resolve the situation. These States argue that all other possible ways to resolve the situation had been exhausted through negotiation. Again, this is *petitio principii*, which Serbia strongly rejects. In any case, it is not up to one side of the negotiations to unilaterally decide their outcome, and to impose it on the other.[191]

149. The fact is that there are disputes over territory in the world which have not yet been successfully resolved, despite decades of attempts to do so. Examples of

[189] WS Estonia, p. 12; WS France, paras. 2.28-2.39.
[190] WS Estonia, pp. 9-10; WS France, paras. 2.40-2.62; WS Germany, p. 27; WS United Kingdom, paras. 6.35-6.38.
[191] WS Serbia, paras. 757-765; see also WS China, para. I (b); WS Romania, para. 98.

negotiations lasting much more than the less than two-years long negotiations led by Mr. Ahtisaari, can be cited from all around the world. The same logic applies to failure in the negotiation process. Such a failure cannot simply open the way for one side to impose its unilateral solution on the other.

150. Kosovo is not alone in being a situation where the proposal put forward by the Secretary-General of the United Nations was not accepted by either side to a dispute. Cyprus is just another example. To accept such an argument would be tantamount to accepting that if a mediator's proposal is not accepted by one side, the other can simply impose it on the other. This is an unacceptable transformation of the role and scope of this peaceful settlement of dispute means, and consequently an undermining of the whole system of the peaceful settlement of disputes.

VIII The will of the majority of the population of Kosovo[192]

151. The fact that the majority of the population of the territory is favourable to independence does not *per se* constitute a ground for independence, unless this population constitutes a people entitled to external self-determination. As addressed elsewhere, this is not the case of the population of Kosovo, nor the Kosovo Albanians.[193]

152. As it is well known, Kosovo is not the unique region of a State inhabited by an ethnic, religious or linguistic minority which in turn constitutes the majority of the population of that region. That a minority population within a State constitutes an ethnic, religious or linguistic majority in a clearly defined territory does not mean that the same population amounts to a 'people' who have a right to exercise self-determination. As Serbia has previously noted, minority rights should not be confused with the right of peoples to self-determination.[194]

[192] WS Japan, p. 7; WS Ireland, para. 33.
[193] WS Serbia, paras. 570-588; see, also, WS Cyprus, para. 136. Cf. WS Netherlands, para. 3.3; WS Switzerland, paras. 75 and 77; WS Albania, paras. 75 and 79.
[194] WS Serbia, para. 533.

IX The purported absence of any other solution[195]

153. The claim that there is no other "solution" than independence is a hollow claim. As demonstrated above,[196] Serbian proposals to make the province of Kosovo a very substantially autonomously governed area were completely disregarded by both the Special Envoy, Mr. Ahtisaari, and the Kosovo Albanian leadership. This blinkered view of the latter two does not, however, mean that other solutions were not available and, as mentioned, even explicitly proposed.

154. In any event, the fact that some States consider that independence is the best solution for the province of Kosovo does not transform this political opinion into a legal ground, no matter how powerful and rich these States are.

XThe invented and inexistent "support" to the "independent" Kosovo by the United Nations and the European Union[197]

155. It is well known that the United Nations Secretary-General, who has direct responsibility for the administration of the territory, has adopted a neutral stance on the matter. For its part, the European Union was unable to adopt a unified policy with regard to the UDI, as written statements coming to opposite conclusions filed by some of its member States in these proceedings eloquently show. Moreover, EULEX has been deployed under the umbrella of Security Council resolution 1244 (1999) and not on the basis of any agreement with the purported authorities of the so-called "Republic of Kosovo".

156. Inexistent support by the United Nations cannot make Kosovo a "*sui generis*" case. For its part, even if the European Union support were true, which is not the case, this would not constitute a legal basis whatsoever. Regional organisations cannot dispose the territory of their member States, all the more of non-member States.

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[195] WS France, paras. 2.40-2.62; WS United Kingdom, paras. 6.39-6.41.
[196] See *supra* paras. 103-114 and 117.
[197] WS France, para. 2.18.

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157. The fact is that none of these alleged features that would characterise the Kosovo case lead to a qualification of the UDI as being in conformity with international law.

158. Indeed, there are other features that form integral parts of the Kosovo situation. It is regrettable that States encouraging Kosovo's secession have failed to take them into consideration. They are:

(i) The fact that the majority of the Kosovo Albanians boycotted any participation in the State apparatus of Yugoslavia and Serbia since the 1990s;

(ii) The fact that Kosovo Albanian leaders also bear responsibility for the events that lead to the humanitarian crisis of 1999;

(iii) The fact that the standards set by the United Nations to be implemented in Kosovo have not been achieved;

(iv) The fact that the situation of Kosovo Serbs and other groups has degenerated since 1999 and that the UDI has had an even further negative impact on these parts of the population: displaced persons are not able to return to their homes; the fate of missing persons is still not being addressed; ethnic Serbs live in enclaves in the province of Kosovo, and they cannot freely circulate in this territory;

(v) And certainly another feature that they cannot ignore: the fact that the secessionist attempt was enthusiastically encouraged and is vigorously supported by some Powers.

D. The Sum of All the Non-Legal Grounds Does Not Amount to the Creation of a Legal Basis for a *Sui Generis* Case for Kosovo

159. If, as seen above, none of the alleged "unique" features that purport to make Kosovo a *sui generis* case gives rise to a legal basis for its independence, the addition of nil cannot result in the creation of a right or a legal justification for Kosovo's independence.

160. Poland contends that

> "[i]f in a particular case only one or a few (but not all) of above mentioned *sui generis* conditions were fulfilled, it could not be legally assessed *per analogiam* to Kosovo's Declaration of Independence."[198]

Poland has not explained the rationale for its assertion. Indeed, precedents are always constructed from cases that are all "unique". Analogy precisely means to apply a solution envisaged for a situation, to situations that have some points in common with the former, but are not identical to it. If the situation at issue would fall within the pattern described by the rule, it would not be analogy but simple application of the rule. More important, however, is the fact that Poland fails to elicit an explanation why *all* the factors it has invoked would permit the Court to conclude that the UDI is in conformity with international law.

161. The fact remains that Kosovo is, like every set of facts before the Court, a particular case. This "particularity", however, *per se* entails no legal consequences, as does not any other set of "unique" facts before the Court. "Uniqueness" is not a legal argument.

E. The Attempt to Make from a Bad Political Precedent "Bad Law"

162. The same States that have invoked the *sui generis* character of Kosovo have also advanced the idea that the secession of this territory from Serbia would not constitute a "precedent". The UDI also contends "that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation".[199]

[198] WS Poland, para. 5.2.5.
[199] Annex 2 in Documentary Annexes accompanying WS Serbia.

163. The purpose of this assertion is also clear. Conscious of the evident illegality of the UDI, States in favour of Kosovo's secessionist attempt that have recognised this so-called "State", claim that Kosovo is a "unique" case that cannot be used to support separatist attempts elsewhere. In other words, their practice of recognition of an illegal secessionist attempt would not be coupled with the *opinio iuris* necessary for the case to constitute a precedent.

164. Cyprus has rightly observed that

> "Where the Kosovo-recognising States see only difference, other States might see other situations as identical and act accordingly. The weakening of the protection of the principles of territorial integrity and non-intervention could hardly be avoided."[200]

165. As Argentina stated,

> "the mere invocation of the purported independence of Kosovo as being a 'special case' and 'not a precedent', no matter whether this is the case or not, cannot *per se* provide a legal justification. It has not been advanced which particular rules of international law would provide for a special outcome if Kosovo would be a 'special case'. As to the nature of the case as a 'precedent', certainly if the declaration is in conformity with international law, it would constitute a 'precedent'. If, on the contrary, it is not in accordance with international law, it cannot constitute either a 'precedent' or a 'special case' according to the principle *ex iniuria ius non oritur.*"[201]

166. There is a great risk of creating bad precedent and thus bad law by allowing the "no precedent" argument to float. As Bolivia has noted,

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[200] WS Cyprus, para. 79.
[201] WS Argentina, para. 60.

> "if there is an acceptance of a unilateral declaration of Kosovo's independence without having a clear foundation of international law to analyze and judge in every case, we would be establishing a bad precedent."[202]

167. The mere assertion by its authors that a fact they produced is not a "precedent" does not prevent it to be one. The bad precedent that would be created in this instance would entail serious consequences. It would be a precedent of secession without the consent of the parent State. It would be a precedent of enlarging the definition of self-determination to extend its application to minorities. It would be a precedent of open disregard for a Security Council resolution adopted under Chapter VII of the United Nations Charter. It would be a precedent that United Nations guarantees accorded to a member State are not respected. It would be a precedent that one side of a dispute can impose its views to the other if negotiations fail.

168. Further, the value of the judicial precedent of the Court should also be reflected upon in the context of the claim under analysis. The Court's advisory opinions are not binding, and its judgments and orders in contentious cases are binding only on those States parties to the proceedings. However, its reasoning in both contentious cases and advisory opinions assists in the ascertainment of international law by creating clarity where there may be confusion, and by precisely articulating the law where it may otherwise appear vague. This is the power of its precedent. Moreover, as the Court has held in the *Cameroon v. Nigeria* case with regard to a request by the Respondent not to follow its previous jurisprudence,

> "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is

[202] WS Bolivia, p. 1.

whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[203]

169. If the Court were to give any credence to the *sui generis* argument made in the context of these advisory proceedings, it would amount to allowing the particularities of any case to undermine the letter of the law, and ultimately to undermine the whole international legal system.

F. Conclusions

170. The considerations above lead to the following conclusions:

(i) The claim that Kosovo is a "*sui generis* case" and that it creates no precedent applicable to other situations is an implicit recognition of the lack of any legal ground to justify the attempted secession.

(ii) Every case is unique, and this does not prevent the application of international law to the particular facts: the purported *sui generis* character of the Kosovo situation does not *per se* constitute a legal basis for secession.

(iii) None of the alleged "unique" features of the Kosovo case amounts to the existence of a case for secession recognised under international law.

(iv) The addition of nil only amounts to nil: there is no legal case for Kosovo's unilateral independence.

(v) States invoking this plea have neglected important features that form an integral part of the Kosovo case.

(vi) The UDI, openly encouraged and recognised by some States, is a bad political precedent that, if accepted, would constitute a serious bad legal precedent.

[203] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, para. 28.

Chapter 6

THE CREATION OF STATES IS NOT A MERE FACT AND INTERNATIONAL LAW DOES NOT REMAIN "NEUTRAL" WITH REGARD TO THE UDI

A. Introduction

171. In an attempt to avoid the straightforward answer to the question raised by the General Assembly, a number of States supporting Kosovo's secession, as well as the authors of the UDI, have advanced two interrelated ideas in their respective texts: 1) that international law remains "neutral" with regard to the creation of States, including the case of secession, and 2) that the creation of a new State is only a matter of fact.[204] However, the States asserting these arguments do not come to the same conclusions as to the consequences to be attached to these two propositions in the present proceedings. For some, like Albania and France, these contentions should lead the Court to conclude that it lacks jurisdiction to render an advisory opinion, since the UDI would not be a matter governed by international law, and consequently the Court would not be able to answer the question raised by the General Assembly. For other participants, like the United Kingdom and the United States of America, these propositions would allow the Court to answer that the UDI is in accordance with international law or did not contravene any applicable rule of international law.[205] None of these conclusions, nor the premises on which they are based, is accurate.

172. In the Written Statement of Serbia, it has been demonstrated that many issues of international law arise concerning the UDI by the Provisional Institutions of Self-Government of Kosovo. Indeed, there is perhaps no other case of a secessionist attempt that is so specifically regulated by international law. For not only must the

[204] WS Albania, paras. 43-44; WS Austria, para. 24; WS Czech Republic, p. 7; WS Estonia, p. 4; WS Denmark, pp. 3-4; WS France, para. 2.8; WS Germany, pp. 29-30; WS Ireland, paras. 18-19; WS Japan, pp. 2-3; WS Luxembourg, para. 16; WS Norway, para. 10; WS Poland, para. 2.2; WS United Kingdom, para. 5.13; WS United States, p. 50; WC Authors, paras. 8.08-8.10.

[205] WS United Kingdom, para. 6.65; WS United States, p. 52.

UDI of 17 February 2008 be considered in light of fundamental principles of international law generally applicable with regard to the creation of States, but also with respect to a specific resolution adopted by the Security Council under Chapter VII of the UN Charter. Thus, the decision taken by the Provisional Institutions of Self-Government of Kosovo on 17 February 2008 violates the territorial integrity of Serbia *and* is contrary to the entire regime set out in Security Council resolution 1244 (1999), including the mechanism leading to the determination of the future status of the territory.

173. Serbia,[206] as well as other States[207], has also demonstrated that the principle of self-determination – which played a major role in the process of the creation of numerous States during the UN era[208] – does not provide a legal ground justifying the accordance with international law of the UDI of 17 February 2008.

174. Consequently, the Written Statement of Serbia has demonstrated that contemporary international law does not remain neutral with regard to the creation of new States. In some cases, international law recognises the existence of a right to create a new State, and in other cases international law prevents the creation of a new State, even where the material constitutive elements seem to be present. This approach is supported by concrete international practice, particularly over the last 60 years, in which the international community has witnessed the creation of a considerable number of States, and prevented the emergence of other States where such a creation would not have been in accordance with international law. There is no place for asserting the "*Lotus* principle" in this domain in contemporary international law, arguing that international law does not prohibit the creation of States, and it is therefore permitted.[209]

175. Together with the argument of "neutrality", some States supporting the secessionist attempt made by the Provisional Institutions of Self-Government

[206] WS Serbia, paras. 570-588.
[207] WS Argentina, paras. 92-100; WS Cyprus, para. 123; WS Romania, para. 141; WS Russian Federation, para. 91.
[208] *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*, para. 52.
[209] WS Serbia, paras. 1017-1032.

have tried to minimise the importance of the UDI, in a further attempt to avoid its legal analysis. They have presented the UDI as being a mere declaration of intention not governed by international law; a pure political statement which in any case would not *per se* create a State. Section B of this chapter will analyse the exact nature of the UDI under international law. It will be shown, firstly, that the UDI is a unilateral act emanating from the Provisional Institutions of Self-Government of Kosovo that purports to create a sovereign State. Secondly, it will be demonstrated that the authors of the UDI considered that the legal effect of the UDI was the creation of an independent State under international law. Third, and lastly, it will be shown that States that have recognised the so-called "Republic of Kosovo" have treated the UDI of 17 February 2008 as an act producing legal effects.

176. Section C will then analyse and rebut in turn each of the arguments raised in the written statements of some States and in the written contribution of the authors, that attempt to provide reasons why the UDI cannot be examined under international law or is not prohibited by it.

177. Section D will then demonstrate that in advancing the arguments outlined above, some States have in their written statements acknowledged different ways in which international law does in fact apply to unilateral declarations of independence. This part will show that when these ways by which international law applies to unilateral declarations of independence, proposed in the written statements of different States, are viewed together as a whole, they are very similar to the applicable international legal framework outlined in the Written Statement of Serbia. Thus, despite arguments from some States that claim that international law is "neutral" insofar as it does not apply to the UDI, there is clear consensus evidenced in the written statements, that international law does apply, and that there are many ways in which this occurs.

178. Clearly, contemporary international law plays a role in the process of creation of States and consequently does not remain neutral or outside this problem.

B. The Question of the Legal Nature of the UDI under International Law

179. States supporting Kosovo's secession, as well as the authors of the UDI, have invested a great deal of effort in their respective texts in attempting to play down the effect of the UDI by the Provisional Institutions of Self-Government of Kosovo. They refer to unilateral declarations of independence as being nothing more than expressions of wishful thoughts made public having no legal effect, and they have consequently tried to distinguish the UDI from the creation of the "State" itself. At most, according to some States and the authors of the UDI, the UDI is but one part of a larger process leading to the creation of a State.[210] As already discussed in these Written Comments,[211] they have even tried to convince the Court that the authors of the UDI are not the Provisional Institutions of Self-Government, in what is an evident last effort to escape the determination of the non-conformity of the UDI with international law.

180. The Czech Republic, for example, argues that "[a]ny declaration of independence is an expression of will of a people or merely of a group, and, as such, of a political nature."[212] This position of denying that the UDI in the present case entails any legal effect can be rebutted not only through an analysis of its true nature and scope, but also because what the authors of the UDI and those States affirm in these proceedings is clearly contradicted by the position they have adopted at the time of the issuance of the UDI and at the time that they recognised Kosovo as a State.

I The UDI is a unilateral act emanating from the Provisional Institutions of Self-Government aiming at the creation of a sovereign State

181. The UDI is an act adopted with the intention to produce legal effects, among others the existence of a new State.

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[210] WC Authors, para. 8.11.
[211] See *supra* para. 31 *et seq*.
[212] WS Czech Republic, p. 6.

182. The creation of a new State entails a change in the sovereignty and the responsibility for the international relations of a territory. As the Russian Federation rightly argues, because the UDI "aim[s] at producing legal effects in the form of creation of a new State through secession from an existing State (Serbia)",[213]

> "[i]t thus relates to issues of State sovereignty and territorial integrity, as well as to the right of peoples to self-determination and the questions of secession. These matters are within the realm of international law."[214]

183. The fact that the UDI is an act that purports to produce legal effects is corroborated by the alleged obligations assumed by the so-called "Republic of Kosovo" in this UDI. Paragraph 12 of the UDI in particular, may be quoted:

> "We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship."[215]

184. Thus, in the view of the authors, the UDI is a unilateral act that has a binding effect (*quod non*, because of its lack of conformity with international law). Given this intention of the authors, the analysis of its compatibility with applicable rules of international law cannot be denied.

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[213] WS Russian Federation, para. 10.
[214] *Ibid.*
[215] Annex 2 in Documentary Annexes accompanying WS Serbia.

185. As quoted above,[216] immediately following the adoption of the UDI by the Assembly of Kosovo, the President of the Assembly declared that since its adoption, Kosovo was "an independent and sovereign state", as provided in the wording of the UDI itself.

186. The President and the Prime Minister of the Provisional Institutions of Self-Government, also immediately after the adoption of the UDI by the Assembly, addressed letters to the governments of the States of the world communicating that decision and requesting recognition as a sovereign State.[217] They signed these letters as President and Prime Minister of the alleged "Republic of Kosovo", in what was the first change of their previous attitude of acting as organs of the Provisional Institutions of Self-Government.

187. Clearly, for the authors of the UDI, this act had the effect of marking the creation of a new State (*quod non*).

II States having recognised the "Republic of Kosovo" have treated the UDI of 17 February 2008 as an act producing legal effects

188. Most of the States that are advancing the idea of the lack of any legal effect of the UDI in these proceedings, responded the day after to this request by the President and Prime Minister of the alleged new "State", either recognising it or announcing the intention to do so in a near future, and *explicitly referring to the UDI and attributing to it legal consequences*. Some eloquent examples follow.

189. In his letter of recognition, American President George W. Bush indicated without any ambiguity that he considered the UDI as producing binding effects:

> "I also note that, in its declaration of independence, Kosovo has willingly assumed the responsibilities assigned to it under the Ahtisaari Plan. The United States welcomes this unconditional

[216] See *supra* para. 43.
[217] As mentioned in the letters sent by heads of State or government quoted below, para. 189 *et seq.*

> commitment to carry out these responsibilities and Kosovo's willingness to cooperate fully with the international community during the period of international supervision to which you have agreed. The United States relies upon Kosovo's assurances that it considers itself legally bound to comply with the provisions in Kosovo's Declaration of Independence."[218]

190. Similarly, the French President Nicolas Sarkozy, in his letter of recognition of 18 February 2008, stated that France,

> "*tirant les conséquences de la résolution adoptée par l'Assemblée du Kosovo le 17 février 2008*, reconnaît dès à présent le Kosovo comme un État souverain et indépendant."[219]

191. Clearly, the French Written Statement denying any legal consequence to the UDI is at odds with the opposite stance adopted by President Sarkozy on 18 February 2008.

192. Other States that deny in these advisory proceedings that the UDI of 17 February 2009 had any legal effect, nevertheless previously recognised that it had such an effect in their instruments of recognition or in official information concerning their recognition. This was the case *inter alia* of Albania,[220] Denmark,[221] Estonia,[222] Norway,[223] Switzerland,[224] and the United Kingdom.[225] In contrast,

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[218] Letter of President George W. Bush to Mr. Fatmir Sejdiu of 18 February 2008, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html.

[219] Letter of President Nicolas Sarkozy to Mr. Fatmir Sejdiu of 18 February 2008 (emphasis added), available at: http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/balkans_1056/kosovo_650/france-kosovo_4601/proclamation-independance-du-kosovo-18.02.08_59650.html#sommaire_2. Translation by Serbia: "[France,] accepting the consequences of the resolution adopted by the Kosovo Assembly on 17 February 2008, now recognises Kosovo as a sovereign independent State."

[220] Statement of Prime Minister of Albania Mr. Sali Berisha on Recognition of Independence of Kosova. Emphasis added, available at: http://www.keshilliministrave.al/index.php?fq=brendaandm=newsandlid=7323andgj=gj2.

[221] Denmark recognizes Kosovo as an independent State, available at: http://www.um.dk/en/servicemenu/News/NewsArchives2008/DenmarkRecognizesKosovoAsAnIndependentState.htm.

[222] Estonia recognises Republic of Kosovo (emphasis added), 21 February 2008, available at: http://www.vm.ee/eng/kat_138/9350.html.

[223] WS Norway, Annex 1.

[224] Statement by the President of the Swiss Confederation, Pascal Couchepin, 27 February 2008, available at: http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=17497.

Slovenia does not have any problem in advancing in its Written Statement that, "[w]ith the Declaration of Independence, the new state of Kosovo was founded.".[226]

III Conclusion

193. The fact is that the UDI is a unilateral act expressing the intention of its authors to purportedly create a new State and hence to purportedly terminate both Serbia's sovereignty and the United Nations administration over the territory, to undertake certain obligations for this new "State", and to provide an alleged new basis for the international presence in Kosovo, i.e. on the basis of the "permission" of the new "State". The UDI was an unlawful act by institutions created by the United Nations whose functions and powers must be exercised in accordance with the law of the United Nations.

194. Indeed, whether the UDI is or is not in accordance with international law can be determined upon examination of the following:

(i) Whether the organs that issued the UDI had or did not have the right to do so (i.e. under Security Council resolution 1244 (1999) and the Constitutional Framework, or with respect to the principle of self-determination and other applicable rules).

(ii) Whether the procedure by which the UDI was issued followed or did not follow any applicable rules (i.e. under Security Council resolution 1244 (1999) and the Constitutional Framework and other applicable rules).

(iii) The legality of the purported effects of the UDI, i.e. the creation of a new State, and the termination of Serbia's sovereignty and the United Nations administration over the territory (i.e. taking into account the principle of respect for the territorial integrity of States, the international legal regime set out by Security Council resolution 1244 (1999) and other applicable rules).

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[225] Letter by Prime Minister Gordon Brown to Mr. Sejdiu of 19 February 2008, available at: http://www.president-ksgov.net/documents/presidenti_fSejdiu_viti_pavaresise_Eng.pdf ("The President of Kosovo on the year of Independence », p. 11)

[226] WS Slovenia, p. 1.

195. To sum up, it can be said that there can probably be no other UDI in the world that is more susceptible to international legal analysis than the UDI by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008. As Serbia and other States have demonstrated, this legal analysis inexorably leads to the finding that the UDI by the Provisional Institutions of Self-Government was not in conformity with international law.

C. The UDI Can Be Examined under International Law in Many Ways

196. Some States, as well as the authors of the UDI, advance the idea that for the UDI not to be in accordance with international law there should be a rule prohibiting its issuance.[227] This is a peculiar way to understand the application of international law to acts, facts and situations. It is a matter of common understanding that there is not, nor can there be, a *specific* rule governing every type of conduct under international law. The lack of a particular rule concerning a particular matter does not mean that the matter cannot be treated from a legal perspective. The authors of the UDI read the so-called *Lotus* principle ("everything which is not prohibited is permitted") as meaning "everything which is not *explicitly* prohibited is permitted".[228] As a matter of course, rules having a broader or general character can be used to determine the way international law (or any legal system) deals with a particular matter. This is the traditional way the Court solves disputes, or addresses legal matters in the exercise of its advisory jurisdiction. The Court looks for the existence of a *lex specialis*, and if there is none, applies general international law.

197. Thus, after hearing arguments from States based on the *Lotus* principle, the Court, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, simply noted that

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[227] WS Albania, para. 43; WS Estonia, p. 4; WS France, paras. 2.3-2.10; WS Germany, pp. 27-32; WS Ireland, paras. 18-26; WS Poland, para. 2.2; WS Luxembourg, paras. 16-17; WS United Kingdom, paras. 5.12-5.13; WS United States, pp. 50-52; WC Authors, para. 8.03.

[228] WC Authors, para. 8.07.

> "[i]n seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law."[229]

198. It is quite obvious that there does not exist a specific rule prohibiting the issuance of unilateral declarations of independence: if it were so, no new State could declare its existence in such a way. What the Court is requested by the General Assembly to do is to examine the UDI by the Provisional Institutions of Self-Government of Kosovo in the light of the applicable rules of international law. These are both of a general and a particular character: they are the fundamental principles of international law, the UN Charter and the specific Security Council resolution 1244 (1999), which govern the situation of the territory both at the critical date, as well as thereafter.

199. It is not surprising that the authors of the UDI and some States supporting their secessionist attempt explicitly request the Court not to analyse a general rule that would be able to provide a legal foundation to the creation of a State: the principle of self-determination.[230] Since this principle cannot be validly invoked by the authors of the UDI, the Kosovo secessionist movement and its supporters prefer to avoid addressing this issue.

I Rebuttal of the argument that the UDI is governed by domestic law, but not by international law

200. It has been argued that secession can fall within the realm of domestic law, but not within the realm of international law. Germany seems to have attempted to say this, by stating in this regard that "the issue of the legality of a declaration of independence may very well arise under *domestic* (not *international*) law".[231] However, it then goes on to say that "[i]n international practice, declarations of

[229] *Legality of the Threat or Use of Nuclear Weapons,* para. 23; see, also, *Wall,* para. 86.
[230] WC Authors, paras. 8.38-8.41.
[231] WS Germany, p. 29 (emphasis in the original).

independence have only been held to violate *international* law if conjoined with some other violation."[232] It appears that, according to Germany, it is possible to assess the legality of a unilateral declaration of independence both by domestic *and* by international law.

201. With regard to domestic law, some constitutions provide for a right to secession, as it was the case of the SFRY, only with regard to the six constituent nations of Yugoslavia and hence not with regard to the Kosovo Albanians or the Autonomous Province of Kosovo. Others remain silent or contain dispositions that make secession impossible without a constitutional change. International law does not simply remain "neutral" when confronted with acts that respect or are in violation of domestic law.

202. An example demonstrating that international law is concerned with the role of domestic law is provided by the attempt by the province of Katanga in the Congo to secede. Security Council resolution 169 (1961) specifically

> "*[d]eclares* that all secessionist activities against the Republic of Congo are contrary to the *Loi fondamentale* and Security Council decisions and specifically *demands* that such activities which are now taking place in Katanga shall cease forthwith".[233]

203. If international law were neutral vis-à-vis domestic law, there would not be any need to refer to it and even less to demand that activities contrary to it should cease.

II The argument that international law does not prohibit the proclamation of independence of a new State begs the real question

204. According to France, "Le droit international n'interdit pas par principe la proclamation de l'indépendance d'un Etat nouveau". France continues that, taking into account the question raised by the General Assembly, the Court

[232] *Ibid.*
[233] Security Council resolution 169 (1961), para. 8.

> "ne devrait, en particulier, pas décider si, d'une façon générale, le peuple kosovar bénéficiait d'un droit à l'indépendance, ni rechercher si le Kosovo remplit les conditions pour être considéré comme un Etat mais elle devrait seulement déterminer si la déclaration d'indépendance du 17 février 2008 est conforme au droit international."[234]

205. With the ultimate purpose of avoiding any legal analysis of the UDI, France has attempted to narrow the question raised by the General Assembly, which is not one exclusively related to an analysis of illegality. Non-conformity would mean illegality, as is the case here. It can also mean that such a proclamation has no international legal ground. Serbia has demonstrated why the UDI of 17 February 2008 is illegal. But the question put before the Court is not only limited to determining the legality or illegality of the UDI, but more broadly its *conformity* with international law. The Court, contrary to what France suggests, can examine if the UDI by the Provisional Institutions of Self-Government has its legal ground on the basis of a purported right to independence of a so-called "Kosovar people", or whether the existence of the constitutive elements of the State allowed the authors of the UDI to proclaim their existence as an independent State. Of course, as already seen, both questions must be answered in the negative, which is precisely the analysis France tries to avoid.

206. By way of example, when Guinea-Bissau and Cape Verde unilaterally declared independence from Portugal on 24 September 1973, this was done in conformity with international law, as noted by the General Assembly. After the issuance of that declaration of independence, the General Assembly,

> "[r]ecognizing the inalienable right of all peoples to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples"

[234] WS France, para. 2.3.

(...)

"[w]elcome[d] the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau".[235]

207. If a province or region of a sovereign State proclaims its independence, it is always possible to determine whether international law offers a ground for it or not. It is curious to see the same States arguing that international law is "neutral" regarding secession, and at the same invoking a purported right of "remedial secession" to justify the secession of Kosovo.

208. Moreover, this will not be the first time in which a unilateral declaration of independence will have been declared illegal. This occurred with respect to Katanga,[236] Rhodesia, and the Turkish Republic of Northern Cyprus, among others.

209. The Security Council in its resolution 216 (1965) "[*d[ecide[d] to condemn* the unilateral declaration of independence made by a racist minority in Southern Rhodesia". In resolution 541 (1983), the Security Council "[d]eplore[d] the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus" and "[c]onsidere[d] the declaration […] as legally invalid".

210. Other Security Council resolutions even anticipated that any unilateral declarations of entities in contradiction with the territorial integrity of States affected by internal conflicts would not be recognised. Thus, resolution 787 (1992) states in its operative paragraph 3 that the Security Council

"[s]trongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted".

[235] General Assembly resolution 3061 (XXVIII) of 2 November 1973.
[236] Security Council resolution 169 (1961), already quoted above.

211. For its part, the General Assembly in resolution 31/6A "[r]eject[ed] the declaration of 'independence' of the Transkei and declare[d] it invalid", in resolution 32/105N, "[d]enounce[d] the declaration of the so-called 'independence' of the Transkei and that of Bophuthatswana […] and declare[d] them totally invalid", and in resolution 34/93G, "[d]enounce[d] the declaration of the so-called 'independence' of the Transkei, Bophuthatswana and Venda […] and declare[d] them totally invalid".

III The argument that the UDI is not governed by international law since it cannot be attributed to a subject of international law neglects both contemporary practice and Security Council resolutions on Kosovo

212. Austria contends that unilateral declarations of independence are not addressed by international law because they cannot be attributed to a subject of international law.[237] It will be demonstrated below,[238] that international law does address injunctions to different non-state actors. In particular, international law addresses the need to respect the territorial integrity of States involved in secessionist or other domestic conflicts. Moreover, it is beyond any doubt that all relevant actors in Kosovo, and in particular the Provisional Institutions of Self-Government, being an international creation within the United Nations framework, are bound by the international legal regime established under Security Council resolution 1244 (1999).

IV The argument that international law does not prohibit persons or entities from seeking independence is completely irrelevant

213. According to the authors of the UDI, international law "does not contain any rule prohibiting persons or entities from seeking independence, nor from issuing a declaration of independence."[239] These are two different questions. First, not only does international law not prohibit persons or entities from seeking independence

[237] WS Austria, para. 24.
[238] See *infra*, para. 256 *et seq*.
[239] WC Authors, para. 8.08.

from a sovereign State, but – if they pursue their political goals in a way that conforms to the legal requirements – it can be said that international law even provides protective rules related to the respect of relevant civil and political rights that would be at issue. A second, and completely different matter is the issuance of a unilateral declaration of independence purporting to create a new State.

214. The Court is not requested to answer the question whether Kosovo Albanians can seek to obtain an independent State and openly declare their intention to do so. As mentioned above, the UDI was not a mere declaration of intention, it was an act adopted with the purpose of creating a new independent State on the territory that falls under the sovereignty of a pre-existing State and which also falls under the international administration of the United Nations. Immediately, the authors of it, the Provisional Institutions of Self-Government of Kosovo, began to act as though they were the institutions not of the international administration of the territory, but as though they were the institutions of a new sovereign State. It is against this background that the UDI of 17 February 2008 can and must be analysed.

V The argument that the creation of States is a matter of fact ignores more than half a century of evolution of international law

215. Some States supporting Kosovo's secession argue that the creation of States is a matter of fact and consequently, that the UDI is not governed by international law or at least not prohibited by it. France thus argues that since the creation of States is a matter of fact, whether the UDI is legal or illegal is completely irrelevant.[240] This is a blatant rejection of the principle *ex injuria jus non oritur* and a seriously wrong and disturbing message to give to other potential situations where illegal attempts are or may be made purporting to create new States. France's message is tantamount to saying that no matter whether a State was created in violation of international law, the important point or rather the only point of concern, is whether this entity succeeds in effectively establishing itself. This is in blatant contradiction with the practice of the United Nations (although it is true that

[240] WS France, para. 2.4.

France was the only member of the Security Council that abstained from voting when this organ condemned the proclamation of the racist "State" of Rhodesia, all the other members having voted in favour of the resolution).[241]

216. Serbia agrees that the creation of States is in part a matter of fact. There can be no State if the material elements are not present. The law cannot create a State, even if a people or an entity is entitled to create a new State on the basis of international law. The example of Namibia is illustrative. In spite of the efforts deployed by the UN for decades, the independent State of Namibia could only come into being when the factual situation allowed this to happen. This does not mean, despite what some claim, that the creation of States is a *pure* matter of fact. There can be no State without the existence of some factual elements, but an entity created in breach of international law, even if it has all the factual attributes of a State, is not a State. Examples are well known and have been abundantly mentioned. The creation of States in the contemporary world is both a matter of fact and law. The Written Statement of Serbia has already analysed this and the Court is respectfully invited to refer to it.[242]

D. The Acknowledgement by States Promoting the Secession of Kosovo That International Law Does Indeed Deal With Secession

217. States that have invoked the "neutrality" of international law, or the creation of States as a pure matter of fact not governed by international law, are at pains to remain coherent with this proposition. Many have ended up by recognising that international law does deal with the question at issue. As mentioned below, this is the case of Switzerland, Germany, Estonia and Finland. Other States, such as Ireland and France, together with Germany and Finland, provide examples of situations of secession that would be considered illegal from the international law viewpoint.

[241] Security Council resolution 216 (1965).
[242] WS Serbia, paras. 964-973.

218. Switzerland, whose open policy of promoting Kosovo's secession was *inter alia* explained by the presence of a large Kosovo Albanian community on its territory,[243] acknowledges that

> "[c]e serait toutefois aller trop loin que de prétendre que le droit international reste entièrement muet sur les déclarations d'indépendance, et que ces dernières tombent par conséquent dans un vide juridique total."[244]

219. Germany also acknowledges that "[i]n international practice, declarations of independence have only been held to violate *international law* if conjoined with some other violation."[245] The "other violation" would be joined to that of the domestic law of the State concerned.

220. Equally, Estonia considered that

> "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."[246]

221. After having invoked "the absence in international law of specified criteria on how statehood may be conferred to an entity",[247] Finland states that

> "[t]his does not, however, mean that international law would have nothing to say about such statements of declarations. They

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[243] Answer by the Federal Council (Government) to a question raised by Mr. Daniel Vischer MP, 14 May 2008, para. 7 , available at: http://www.parlament.ch/e/suche/pages/geschaefte.aspx?gesch_id=20083032; Micheline Calmy-Rey (Swiss Minister of Foreign Affairs), "Pourquoi la Suisse est engagée dans les Balkans", *Le Monde*, 24 January 2006.

[244] WS Switzerland, para. 28. Translation by Serbia: "It would be going too far to suggest that international law remains completely deaf to declarations of independence, and that these consequently fall into a total legal void."

[245] WS Germany, p. 29 (emphasis added).

[246] WS Estonia, p. 4.

[247] WS Finland, para. 2.

must be examined on a case by case basis and by reference to the general law concerning statehood."[248]

222. Significantly, if one takes the "exceptions" mentioned by some States invoking international law's "neutrality", i.e. situations in which the creation of States would be contrary to international law, the result of an accumulation of all these "exceptions" is impressive:

(i) If a unilateral declaration of independence or a secessionist attempt involves the use of force (position held by Germany,[249] France,[250] and Ireland[251]).

(ii) If a unilateral declaration of independence violates an international agreement (Germany[252]).

(iii) If a secessionist attempt is carried out with external aid (Germany[253]).

(iv) If a unilateral declaration of independence is coupled with racial discrimination (Germany[254]).

(v) If a secessionist attempt violates peremptory norms of international law (Ireland[255]).

(vi) If a secessionist attempt is in violation of self-determination (Ireland[256]).

223. As demonstrated in Serbia's Written Statement, and further analysed in the present Written Comments, the UDI by the Provisional Institutions of Self-Government violates the territorial integrity of Serbia, the international regime set out by Security Council resolution 1244 (1999) and the mechanism designed to determine the future status of the territory, and finds no justification in the principle of self-determination or in any other rule of international law.

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[248] WS Finland, para. 3.
[249] WS Germany, p. 29.
[250] WS France, paras. 1.5 and 1.15
[251] WS Ireland, para. 22.
[252] WS Germany, p. 29.
[253] WS Germany, p. 30.
[254] WS Germany, p. 30.
[255] WS Ireland, para. 22.
[256] WS Ireland, para. 23.

E. Conclusions

224. On the basis of the arguments set out above, it can be concluded that:

(i) Under contemporary international law, the creation of States is not only a matter of fact, but also a question of law, i.e. the presence of all the constitutive elements of the State must be coupled with the conformity of that creation with international law.

(ii) International law does not remain neutral with regard to the case of Kosovo, which is probably the secessionist attempt most regulated by international law. Not only are the fundamental principles of international law that normally apply to the creation of States at stake, but a Security Council resolution adopted under Chapter VII of the UN Charter, establishing an entire regime for the territory and a mechanism for the determination of its future status, is also applicable.

(iii) The UDI of 17 February 2008 is an act adopted by an organ created by the United Nations, its purpose is the creation of a sovereign State, putting an end to Serbia's sovereignty and the United Nations administration of the territory and the assumption of certain obligations at the international level. As such, it is subject to legal analysis as regards its conformity with international law.

(iv) The authors of the UDI have acknowledged that the purpose of its adoption was to assert that since that adoption there exists a new sovereign State.

(v) States denying any legal effect to the UDI during these proceedings have nevertheless attributed a legal nature to the UDI, endorsing the purposes of its authors, at the time they recognised the so-called "Republic of Kosovo".

(vi) The question at issue is not whether there exists a specific rule prohibiting the issuance of unilateral declarations of independence, but whether the UDI in the present case is or is not in conformity with relevant international law rules, found in general international law,

the United Nations Charter, as well as Security Council resolution 1244 (1999).

(vii) It is not necessary to determine whether the authors of the UDI are subjects of international law, but whether they are bound by resolution 1244 (1999) and general international law applicable to the purpose of the UDI to secede territory from a pre-existing State.

(viii) International law does not remain indifferent towards domestic law where there is an attempt to create a new State through the separation of parts of a pre-existing State. Conformity or not with domestic law also plays a role at the international level.

(ix) The question at issue is not whether individuals or entities can seek independence, but how this independence can be achieved in a particular case. In the case of Kosovo, the UDI did not respect either the political process set out in Security Council resolution 1244 (1999), nor was consent obtained from the parent State, Serbia.

(x) The attempts made by States supporting Kosovo's secession and by the authors of the UDI, that aim at avoiding any legal analysis of the UDI, are groundless and must be rejected. Consequently, the Court can and must examine the conformity of the UDI by the Provisional Institutions of Self-Government of Kosovo with international law and can and must answer that this UDI is not in conformity with international law.

Chapter 7

THE UDI IS IN CONTRADICTION WITH THE PRINCIPLE OF RESPECT FOR THE TERRITORIAL INTEGRITY OF STATES

A. Introduction

225. The principle of respect for the territorial integrity of States has been and remains a critical component of contemporary international law. Its significance has not been diminished with the growth of international law, rather enhanced as States seek to construct a globalised world in keeping with national traditions and interests. In these Written Comments, Serbia concludes that the principle of territorial integrity, which has been accepted by all as a valid principle, continues to apply and that the reaffirmation of its sovereignty and territorial integrity over Kosovo in Security Council resolution 1244 (1999) has not been changed or amended or contradicted in law. It further concludes that the principle of territorial integrity, as a key principle in international law, applies to internal situations and applies not only to all States but also to non-State entities. International practice, and Security Council resolutions in particular, demonstrate that this principle applies not only generally, but also with regard to the conflicts in the former Yugoslavia and specifically with regard to the Kosovo problem.

226. Nothing contained in any of the written statements produced by States in this case marks any doubt or hesitation concerning the relevance of territorial integrity. On the contrary, many of the statements have emphasized the key nature of the principle of territorial integrity, where doubts have been expressed these have focused on particular issues and not on the importance of the principle itself. This section will reply to those arguments that have been made that suggest that the principle of respect for the territorial integrity of States has no application in the current advisory proceedings. It will be shown that such arguments do not stand up to analysis and that the essential point made by the Republic of Serbia that the UDI contradicted a key norm of international law is correct in law.

B. The Views Expressed in the Written Statement of the Republic of Serbia

227. In its Written Statement, the Republic of Serbia submitted that:

(i) The principle of territorial integrity of States is one of the key elements of international law;

(ii) It guarantees the spatial definition of States in a way that is binding on all members of the international community;

(iii) The principle is reflected in extensive international and regional practice;

(iv) All States are bound to respect the territorial integrity of other States;

(v) The obligation to respect territorial integrity extends beyond States and binds non-State actors in situations of non-consensual attempts at breaching the territorial integrity of independent States;

(vi) The fact that non-State actors may be bound by the principle of territorial integrity is illustrated by reference to a number of Security Council resolutions;

(vii) In addition, the range of Security Council resolutions dealing generally with the former Yugoslavia and specifically with the Kosovo problem demonstrates clearly the intention that the Kosovo Albanian leadership and community be bound by the principle of the territorial integrity of Serbia.[257]

228. The following points in particular were made. First, territory is the essential framework for the exercise of State sovereignty and constitutes the spatial context for the very existence of the State and thus plays a determinative role at the very heart of international law.[258] Second, the foundational norm of respect for the territorial integrity of States is crucial with regard to the evolution of the principles associated with the maintenance of international peace and security, thus linking the very essence of international law as a State-focused system with

[257] WS Serbia, para. 413.
[258] *Ibid.*, paras. 416-417.

the notion of binding international regulation of the most serious issues as mandated by the Security Council of the United Nations.[259]

229. These points have been reaffirmed by international jurisprudence on many occasions. In the *Island of Palmas* case, for example, it was emphasized that:

> "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",[260]

while the Court declared in the *Asylum* case that, "derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."[261]

230. This obligation of a high order to respect the territorial integrity of other States constitutes a paramount norm and it is one that goes beyond merely refraining from, for example, intervening by force in the territory of another State. It positively requires the international community to uphold as a key value judgment the *integrity* of the territorial framework of independent States. There is, therefore, a strong presumption against dismemberment of sovereign States and a powerful emphasis upon the stability of agreed frontiers.[262] This has an obvious application to non-consensual secession attempts from recognized independent and sovereign States, *a fortiori* where the international community has on many occasions reaffirmed the territorial integrity of the State in question.

231. Thirdly, the Written Statement of the Republic of Serbia laid out in some detail the reaffirmation of the principle of territorial integrity by the United Nations as a

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[259] *Ibid*., para. 418.
[260] *Island of Palmas case (Netherlands v. USA),* 2 RIAA 829, 838 (1928).
[261] *Colombian-Peruvian Asylum case, Judgment of November 20th, 1950, I.C.J. Reports, 1950*, p. 275.
[262] See, e.g., J. Crawford, *The Creation of States in International Law* (2nd ed., 2006), p. 415. See, also, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* paras. 45 and 72.

general norm.[263] It was noted in particular that point 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples emphasized that:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations",

while article 46 of the United Nations Declaration on the Rights of Indigenous Peoples 2007 provides that:

> "Nothing in this Declaration may be interpreted as implying *for any State, people, group or person* any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." (emphasis added)

232. This principle, it is submitted, is an authoritative formulation of the accepted principle in international law to the effect that international law prohibits non-consensual secession from sovereign and independent States. And further, it is maintained, such principle is not one that pertains exclusively to States, but constitutes an obligation upon non-State actors as well.

233. Fourthly, the Republic of Serbia has demonstrated that the principle of territorial integrity has been upheld continuously and consistently by regional treaties.[264]

234. Fifthly, the Republic of Serbia emphasised the consistent and repeated reaffirmation of its territorial integrity by relevant international bodies.[265] This is an important point. Not only is there a general international law principle

[263] See WS Serbia, para. 429 *et seq*.
[264] *Ibid*., at para. 477 *et seq*.
[265] *Ibid*., para. 498 *et seq*.

prohibiting non-consensual secession from independent States, there is also binding international confirmation of the territorial integrity of Serbia in particular. Further, this is phrased in such a way as to preclude any possible legitimation of secession from Serbia. For example, Security Council resolution 1031 (1995) reaffirmed "its commitment to a negotiated political settlement of the conflicts in the former Yugoslavia, preserving the territorial integrity of all States there within their internationally recognized borders."[266]

235. Sixthly, the Republic of Serbia has noted that this consistent practice of the UN Security Council, acting under Chapter VII of the Charter and thus binding on all member States of the United Nations, with regard to the territorial integrity of Serbia has been repeated in resolutions dealing specifically with the Kosovo problem. While Security Council resolutions 1160 (1998), 1199 (1998) and 1203 (1998), for instance, reaffirmed the commitment of all member States to the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia",[267] resolution 1203 (1998) specifically demanded that "the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)". This established clearly, therefore, that the territorial integrity obligation fell upon the Kosovo Albanian community.

236. This process culminated in Security Council resolution 1244 (1999), as described fully in Serbia's Written Statement[268] and below,[269] which reaffirmed the sovereignty and territorial title of the FRY with regard to Kosovo. At no point in these resolutions was the territorial integrity of the FRY, now the Republic of Serbia, made conditional upon any event or circumstance and at no point was such affirmation made contingent upon any non-consensual arrangement.

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[266] See, also, Security Council resolutions 1088 (1996), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005), 1722 (2006), 1785 (2007), and 1845 (2008), Annexes 15 and 21-28 in Documentary Annexes accompanying WS Serbia.

[267] See also the Presidential Statements of 24 August 1998, **Dossier No. 14**, 19 January 1999, **Dossier No. 24**, and 29 January 1999, **Dossier No. 25**, see WS Serbia, para. 504 and footnotes 478-480.

[268] *Ibid*., Chapter 8.

[269] See *infra* para. 411 *et seq*.

237. Further, at no point has the Security Council overturned, reversed, challenged or modified its constant reaffirmations of the territorial integrity of Serbia, whether made generally or with regard specifically to Kosovo.

C. Support for Serbia's Position on Territorial Integrity

238. Serbia's position on territorial integrity has been supported by a wide range of States in their written statements in this request for an advisory opinion from the Court. The following constitutes a representative sample.

239. The Argentine Republic noted that:

> "[r]espect for the territorial integrity of States is a well established principle of international law, without which the very existence of international law, as a corpus of rules governing primarily the relationship between sovereign entities, could not be envisaged (...) As a corollary of the sovereign equality of States, the principle of the respect of territorial integrity is a fundamental principle of international law."[270]

240. Argentina further emphasised that,

> "[i]t is a legitimate common aspiration to see this fundamental principle universally respected, as one of the main foundations of the entire international legal system and as a concrete manifestation of the sovereign equality of States."[271]

241. Spain noted that,

> "there can be no doubt that respect for the sovereignty and territorial integrity of States is inscribed in the essential, non-

[270] WS Argentina, paras. 69-70.
[271] *Ibid.*, para. 73.

> derogable core of the basic principles of international law as set out in the United Nations Charter and in Resolution 2625 (XXV)"

and 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, and may not be renounced in international relations. Accordingly, it must be fully taken into account in the present consultative procedure."[272]

242. Slovakia declared that:

> "[f]ew principles in present-day international law are so firmly established as that of the territorial integrity of States. Though it is an ancient principle, linked to the notion of the State itself, it has been solemnly and particularly forcefully reaffirmed in the last more than sixty years. The principle of territorial integrity of States is widely proclaimed and accepted in practice and forms a part of the *corpus* of international law."[273]

243. Romania concluded that,

> "[t]he principles of territorial integrity and of the inviolability of frontiers have an absolute character. This means that no changes to a State's territory or to its frontiers can occur except in those cases when the State concerned consents to that end."[274]

[272] WS Spain, paras. 25 and 27 (footnote omitted).
[273] WS Slovakia, para. 3.
[274] WS Romania, para. 97.

244. The Islamic Republic of Iran wrote that the principle of territorial integrity was the "cornerstone of the United Nations Charter" and that it constituted a peremptory norm (*jus cogens*) in international law, noting that "[t]he highly respected nature and status of this principle in international law indicates that no derogation from this principle is acceptable."[275]

245. Cyprus declared that "the quality of the generality of the rules of international law and the prominence of the rule of territorial sovereignty are at the heart of the question which the Court has been asked to address", while "[t]he starting point for the Court is the fundamental principle of Serbia's sovereignty and territorial integrity."[276] In addition, it was noted that, "[t]he stability of title to territory has always been a feature of international law and it has been bolstered as modern international law has developed."[277]

246. Azerbaijan emphasized that

> "[t]erritorial integrity and State sovereignty are inextricably linked concepts in international law. They are foundational principles. Unlike many other norms of international law, they can only be amended as a result of a conceptual shift in the classical and contemporary understanding of international law."[278]

D. Uncontested Issues

247. Before proceeding to discuss the points made in opposition to the thesis maintained by the Republic of Serbia, it is important to note what is unchallenged and thus not in issue in the current matter.

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[275] WS Iran, para. 2.1.
[276] WS Cyprus, paras. 81 and 82.
[277] *Ibid*., para. 86.
[278] WS Azerbaijan, para. 19. See, also, WS China, pp. 2-3; WS Russian Federation, paras. 76-78; WS Egypt, paras. 26-9; and WS Bolivia, p. 1.

248. First, no State has denied the existence of the principle of territorial integrity. The United Kingdom, for example, declared that the principle of territorial integrity of States was a principle in international law and indeed protected under international law, while also admitting that, "international law favours the territorial integrity of States in the interests of stability and the peaceful settlement of disputes, including disputes arising within a State."[279] Other States have made comments about the particular application of territorial integrity with regard to Kosovo, but none has sought to argue that the principle is not a key norm of international law.

249. Secondly, no State has argued that the FRY did not have sovereignty over Kosovo in 1999. No attempt has been made to question or challenge the territorial title of Serbia over Kosovo prior to the unilateral declaration of independence, nor has it been suggested that Serbia's title was ambiguous or conditional or contingent. Serbia's full sovereignty over Kosovo has only been questioned since February 2008.

250. Thirdly, no State has argued that Security Council resolution 1244 (1999) transferred sovereignty from Serbia to any other possible candidate. There has been no claim that this resolution removed Serbia's title to Kosovo. What the resolution did in fact was to establish a framework for the exercise of international administration upon the foundation of the reaffirmation of Yugoslavia's sovereignty and territorial integrity and therefore its continuing territorial title over Kosovo.

251. Fourthly, no State has denied that Security Council resolution 1244 (1999) indeed reaffirmed the sovereignty and territorial integrity of the FRY (now Serbia). While the argument has been made that such affirmation was only within the context of a political process ("the interim status") and not for the purposes of any final settlement (an argument that is dealt with below), none of the written statements placed before the Court have argued that such reaffirmation did not take place nor that it was totally without effect.

[279] WS United Kingdom, paras. 5.8-5.11.

E. Arguments Made Contrary to Serbia's Thesis on Territorial Integrity

252. Several arguments have been made that challenge Serbia's approach to the meaning and relevance of the principle of territorial integrity in this case. Such claims are essentially that the principle of territorial integrity does not apply internally; that the reaffirmation of territorial integrity in Security Council resolution 1244 (1999) relates only to the process of reaching a settlement and not to the final settlement itself; and that in any event the formulation of territorial integrity in this resolution referred not to Serbia but to the composition of the FRY.

I The non-application of the principle of territorial integrity to internal situations

253. The United Kingdom put the issue as follows,

> "The protection of the territorial integrity of States is a protection in 'international relations'. It is not a guarantee of the permanence of a State as it exists at any given time. Nor does it apply to secessionist movements within the territory of a State."[280]

254. Each of these sentences requires comment. First, the view that territorial integrity is a matter for 'international relations' is essentially correct (leaving aside the obvious fact that domestic law of course also governs attempts to secede[281]). However, that begs the question as to what is covered within the rubric of "international relations" and United Nations practice is very clear in recent decades that such issues as civil wars,[282] violations of international humanitarian law,[283] terrorism,[284] and internal

[280] WS United Kingdom, para. 5.9.
[281] See, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 112.
[282] See, e.g., Security Council resolutions 713 (1991) with regard to the former Yugoslavia; 733 (1992) with regard to Somalia and 788 (1992) with regard to Liberia.
[283] See, e.g., Security Council resolutions 808 (1993) with regard to the former Yugoslavia and 955 (1994) with regard to Rwanda.
[284] See, e.g., Security Council resolutions 731 (1992) with regard to Libya and 1070 (1996) with regard to Sudan.

military seizure of power[285] may well fall within the purview of international threats to peace and security and thus, of necessity, within the category of "international relations" and no longer form part of "domestic jurisdiction" within the meaning of Article 2, paragraph 7, of the United Nations Charter either. Secondly, the doctrine of territorial integrity is not of itself a "guarantee of the permanence of a State as it exists at any given time" since consensual change is always possible. However, it does constitute a guarantee of the international permanence of the territorial delineation of a State until it consents to change. If that were not so, the whole purpose of the fundamental concepts of State sovereignty and territorial integrity in international law would essentially dissipate. The fact that the United Kingdom has commented that this principle "has not been extended to the point of providing a guarantee of the integrity of a State's territory against internal developments which may lead over time to the dissolution or reconfiguration of the State"[286] is correct insofar as consensual re-arrangements may always take place, but it is not correct beyond this point.

255. Thirdly, the view that the principle of territorial integrity does not apply to secessionist movements within the territory of a State is not correct in contemporary international law. The answer to this point, made also by some other States,[287] needs to be taken in stages since it is linked to the argument that international law does not essentially deal with non-State actors.[288]

(1) International law does in principle directly address non-State entities

256. As the Authors of the UDI have written, "the question put to the Court is focused on the international legality of a non-State entity declaring independence".[289] They then argue that insofar as independence is concerned, "treaties generally do not seek to regulate non-State entities in such fashion".[290] Further, it is noted that

[285] See, e.g., Security Council resolution 841 (1993) with regard to Haiti.
[286] WS United Kingdom, para. 5.10.
[287] See, e.g., WS Switzerland, paras. 55-56.
[288] See, e.g., WC Authors, paras. 8.06, 8.19 and 9.02.
[289] *Ibid.*, para. 8.10.
[290] *Ibid.*, para. 8.19.

rules concerning territorial integrity are imposed upon States and not upon non-State actors.[291]

257. The implicit suggestion that international law does not address non-State entities is incorrect and needs to be restated briefly by way of introduction. This may be accomplished by reference to two sets of Security Council resolutions. First, those resolutions that deal with terrorism clearly and overtly address non-State entities and in a way that demonstrates that they are subject to the rules of international law.[292] Security Council resolution 1822 (2008), for example, reaffirms that:

> "that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *reiterating* its unequivocal condemnation of Al-Qaida, Usama bin Laden, the Taliban, and other individuals, groups, undertakings, and entities associated with them",

and urges that:

> "all Member States, international bodies, and regional organizations to allocate sufficient resources to meet the ongoing and direct threat posed by Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them, including by participating actively in identifying which individuals, groups, undertakings and entities should be subject to the measures referred to in paragraph 1 of this resolution".[293]

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[291] *Ibid.* and 8.20.

[292] See, e.g., Security Council resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006) and 1735 (2006).

[293] Security Council resolution 1822 (2008), Preamble, paras. 2 and 10.

258. There then follow a range of actions to be taken, none of which make sense except in the context of the direct application of international law to the groups in question. It is true, as the authors of the UDI have pointed out, that these resolutions impose obligations upon member States with regard to the treatment of such groups, but to infer that this means that international law does not address such groups directly is to confuse applicability of the law with its implementation.[294]

259. A second series of resolutions to the same effect concern non-proliferation of nuclear, chemical and biological weapons and their means of delivery. Security Council resolution 1540 (2004) provides *inter alia* the following:

> "1. *Decides that* all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;
>
> 2. *Decides also* that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them".

260. This resolution, and the others that followed it,[295] are only comprehensible on the basis that the activities engaged in are contrary to international law and that the non-State entities are directly addressed by international law. The fact that the weight of implementation lies upon member States of the United Nations and the relevant Security Council Committee established under resolution 1540 (2004) is simply the pertinent implementation methodology and cannot detract from the fact

[294] See, e.g., WC Authors, para. 9.02.
[295] See, e.g., resolutions 1673 (2006); 1718 (2006); 1737 (2006); 1803 (2008) and 1810 (2008).

that non-State entities are directly addressed by both the rules and the enforcement mechanisms of international law.

261. This subsection may be concluded with a reference to Security Council resolutions, for example, resolution 1845 (2008), which, invoking Chapter VII of the Charter, impose an obligation upon "entities" to cooperate with the International Criminal Tribunal for the former Yugoslavia.

(2) Relevant international legal practice shows that the rule against non-consensual secession binds non-State entities

262. In a number of situations, the Security Council has adopted binding resolutions which are only comprehensible in terms of recognising a rule prohibiting non-State entities from asserting secessionist claims. Cumulatively, they demonstrate that international law now accepts that non-consensual secessions from recognised, sovereign and independent States are unlawful.

Conflicts in the former Yugoslavia generally

263. The international community took the position early in the conflicts over the former Yugoslavia that the independence of the former republics, achieved as a result of the dissolution of the SFRY,[296] had to be resolved in the framework of the *uti possidetis* borders of the new States. In particular, the Serb populations in Bosnia and Herzegovina and in Croatia, while entitled to minority rights, were not entitled to the exercise of self-determination in the sense of secession from those two new States.[297] Opinion No. 3 of the Arbitration Commission emphasised that, "[e]xcept where otherwise agreed, the former boundaries become frontiers protected by international law."[298]

[296] Opinion No. 1 of the Arbitration Commission on former Yugoslavia, 31 ILM 1497 (1992), Annex 38 in Documentary Annexes accompanying WS Serbia, **Dossier No. 233**.
[297] Opinion No. 2 of the Arbitration Commission on former Yugoslavia, 31 ILM 1498 (1992), Annex 39 in Documentary Annexes accompanying WS Serbia, **Dossier No. 234**.
[298] Opinion No. 3 of the Arbitration Commission on former Yugoslavia, 31 ILM 1500 (1992), Annex 40 in Documentary Annexes accompanying WS Serbia.

264. The Security Council also very clearly opposed any attempt at secession from the new States emerging out of the dissolution of the former Yugoslavia. In a long series of resolutions, the Council repeated the explicit and unambiguous affirmation of the territorial integrity of all the successor States, including the FRY (now the Republic of Serbia), and called in particular in resolution 1031 (1995) for a "negotiated political settlement of the conflicts in the former Yugoslavia, preserving the territorial integrity of all States there within their internationally recognized borders".[299] Security Council resolution 1845 (2008), for example, specifically reaffirmed the Council's "commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders" and reaffirmed, in its operative clauses,

> "once again its support for the Peace Agreement, as well as for the Dayton Paris Agreement on implementing the Federation of Bosnia and Herzegovina of 10 November 1995 (S/1995/1021, annex) and *call[ed] upon* the parties to comply strictly with their obligations under those Agreements".

265. The nature of these resolutions and their content, taken in the well-known context of claims for secession from some of the new States, can only be interpreted as imposing an obligation, not only on neighbouring States to respect the territorial integrity of all the successor States, but also upon the relevant non-State entities not to violate the territorial integrity of all the successor States. In the circumstances and bearing in mind that the threats to territorial integrity were coming essentially from particular groups within States, the international community, operating through the Badinter Commission and the Security Council, underlined that secession from these States would violate international law. It is also to be noted that the phrase used in these resolutions, "political settlement of the conflicts in the former Yugoslavia", clearly includes the Kosovo situation.

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[299] See, e.g., resolutions 1088 (1996), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005), 1722 (2006), 1785 (2007) and 1845 (2008), Annexes 15 and 21 - 28 in Documentary Annexes accompanying WS Serbia.

266. This approach was also manifest in the Security Council's treatment of the Eastern Slavonia issue. In resolution 1023 (1995), for example, the Council reaffirmed

> "its commitment to the search for an overall negotiated settlement of the conflicts in the former Yugoslavia, ensuring the sovereignty and territorial integrity of all the States there within their internationally recognized borders, and stressing the importance it attaches to the mutual recognition thereof"

and further reaffirmed

> "its commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia and emphasizing in this regard that the territories of Eastern Slavonia, Baranja and Western Sirmium, known as Sector East, are integral parts of the Republic of Croatia".[300]

267. In resolution 1120 (1997), the Security Council referred to these principles and specifically called upon the

> "Government of the Republic of Croatia and the local Serb community to cooperate fully with UNTAES and other international bodies and to fulfil all obligations and commitments specified in the Basic Agreement and all relevant Security Council resolutions, as well as in the letter of the Government of the Republic of Croatia of 13 January 1997". [301]

268. Again, the reaffirmation of territorial integrity took place in circumstances where the essential challenge to it was by local entities, so that the Council effectively underlined the prohibition of secession.

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[300] Security Council resolution 1023 (1995), Preamble, paras. 2-3. See, also, resolutions 1037 (1996) and 1079 (1996).

[301] Security Council resolution 1120 (1997), para. 1.

Southern Sudan

269. The Security Council has reaffirmed on a number of occasions "its strong commitment to the sovereignty, unity, independence and territorial integrity of Sudan" faced with a range of secessionist claims.[302] These resolutions have included reference to the conflicts in southern Sudan and in Darfur, often in the same instrument, thus reinforcing the same prohibition on secession.

270. In resolution 1841 (2008), for example, the Security Council in reaffirming the territorial integrity of Sudan, stressed its firm commitment to the cause of peace throughout Sudan; full implementation of the Comprehensive Peace Agreement of 9 January 2005 (CPA), by which the government of Sudan reached an agreement with the Sudan People' Liberation Movement and the Sudan People's Liberation Army concerning the secessionist struggles in southern Sudan; full implementation of the framework agreed between the parties for a resolution of the conflict in Darfur (the Darfur Peace Agreement), and an end to the violence and atrocities in Darfur. In resolution 1870 (2009), adopted on 30 April 2009, in operative paragraph 4, the Council stressed

> "the importance of full, and expeditious implementation of all elements of the CPA, implementation of the Abyei Roadmap, agreements on Darfur, and the October 2006 Eastern Sudan Peace Agreement, and call[ed] upon all parties to respect and abide by their commitments to these agreements without delay".[303]

271. Accordingly, with regard to Sudan, the Security Council has adopted a strong stance in favour of the territorial integrity and national unity of the State and supporting peace agreements between the government and rebel and secessionist movements, even to the extent of sending troops. The relevant resolutions cannot be read without understanding that the Council was positively opposing secessionist attempts, thus reinforcing the view that international practice has prohibited such attempts.

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[302] See, e.g., Security Council resolution 1769 (2007). See WS Serbia, para. 464 *et seq*.

[303] See, also, resolutions 1828 (2008), 1779 (2007), 1769 (2007), 1713 (2006), 1672 (2006), 1665 (2006), 1651 (2005), 1591 (2005),1556 (2004) and 1812 (2008).

272. This practice of reaffirming the territorial integrity of States faced with internal and secessionist conflicts[304] constitutes undeniable evidence that the international community does not adopt a position of neutrality with regard to non-consensual secessionist claims concerning independent States. On the contrary, it adopts a position of positive disapproval and the range of practice further demonstrates that the principle of territorial integrity binds not only States but also non-State entities.

273. The Written Statement of Spain puts it as follows:

> "Vis-à-vis these situations [armed conflicts of a non-international character], 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."[305]

274. This general approach, whereby the international community does not stand neutral with regard to secessionist attempts, but faced with them has repeatedly endorsed the territorial integrity of the State concerned and thus strenuously opposed such attempts,[306] has been specifically applied by the Security Council in relation to Serbia and the Kosovo problem. In other words, it is not necessary to rely solely upon general practice. Particular relevant practice exists.

(3) The territorial integrity of Serbia has been internationally affirmed in the specific context of the Kosovo problem

275. Faced with the increasing problems arising out of the Kosovo situation, the Security Council has repeatedly reaffirmed the territorial integrity of the FRY /Serbia. To put this another way, in the very precise context of secessionist pressures from the Kosovo Albanian population, the Security Council underlined

[304] See for further examples WS Serbia, paras. 453-463 and 473-476.
[305] WS Spain, para. 31 (footnote omitted).
[306] See, also, e.g., Security Council resolutions 145 (1960), 169 (1961), 404 (1977) and 496 (1981).

the principle of the territorial integrity of Serbia. Such a reaffirmation was clearly not directed only against other States, none of whom were actually challenging the territorial integrity of the country at the relevant stage, but also with regard to those internal forces seeking the secession of Kosovo from Serbia.

276. Resolution 1160 (1998), for example, which dealt specifically with the use of force by the Serbian police forces and acts of terrorism by the Kosovo Liberation Army, affirmed the commitment of all member States to the sovereignty and territorial integrity of the FRY and declared in operative paragraph 5 that the Security Council agrees that "the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and ... that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo .... which would include a substantially greater degree of autonomy and meaningful self-administration".[307]

277. Resolution 1203 (1998) reaffirmed the territorial integrity of the FRY and demanded that, "the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)".

278. Resolution 1244 (1999) reaffirmed the sovereignty and territorial integrity of the FRY and established an international presence to administer the territory. This resolution also recalled and thus reaffirmed resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999). In so doing, the Council was clearly doubly underlining the twin principles of the territorial integrity of the FRY and autonomy for Kosovo.

279. Serbia has analysed Security Council resolution 1244 (1999) in its Written Statement[308] and in these Written Comments.[309] Suffice it for present purposes to

[307] Annex 16 in Documentary Annexes accompanying WS Serbia. See, also, resolutions 1199 (1998), 1203 (1998) and 1239 (1999), Annexes 17 to 19 in Documentary Annexes accompanying WS Serbia, **Dossier Nos. 17, 20 and 28**.
[308] WS Serbia, Part IV and para. 508 *et seq*.
[309] See *supra* Chapter 9.

make the following points. First, the territorial integrity and sovereignty of the FRY was clearly reaffirmed.[310] Secondly, at no point during the Security Council debate on 10 June 1999 concerning the adoption of resolution 1244 (1999) was the sovereignty and territorial integrity of the FRY challenged or questioned. No State queried or denied the views expressed by, for example, the Russian Federation, China and Argentina, that the resolution would reaffirm the commitment to the sovereignty and territorial integrity of the FRY.[311]

280. Thus, a whole series of binding Security Council resolutions established and repeated that any solution for the Kosovo problem would be contingent upon respect for the sovereignty and territorial integrity of the FRY. There is no condition to be found attached to this, nor any opposition to it manifested, nor any hint of an amendment to this or questioning of it. The conclusion must be, therefore, that the United Nations as a whole and member States and interested parties (necessarily including the Kosovo Albanians) were and remain bound by these resolutions.

281. This approach was indeed subsequently confirmed in the UNMIK-FRY Common Document signed on 5 November 2001.[312] This instrument specifically reaffirmed resolution 1244 (1999) and Point 4 provided for:

> "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".

282. This instrument was further welcomed by the Security Council in a Presidential Statement and indeed by the United States of America.[313] Security Council resolution 1345 (2001) also reaffirmed in operative paragraph 2 the commitment

[310] WS Serbia, Part IV and para. 508 *et seq*.
[311] See UN Doc. S/PV.4011 (10 June 1999), Annex 34 in Documentary Annexes accompanying WS Serbia, **Dossier No. 33**.
[312] WS Serbia, para. 517 *et seq.* and Annex 12 in Documentary Annexes accompanying WS Serbia, **Dossier No. 171**.
[313] UN Doc. S/PRST/2001/34 (9 November 2001), Annex 32 in Documentary Annexes accompanying WS Serbia, **Dossier No. 172**, and Annex 67 in Documentary Annexes accompanying WS Serbia.

of the Council to the sovereignty and territorial integrity of the FRY and tellingly referred in operative paragraph 10 to "Kosovo, Federal Republic of Yugoslavia".

283. Indeed, as the Written Statement of Cyprus, for example, makes clear, until the UDI the fact that Kosovo was part of Serbia "was uncontested by other States".[314]

284. Powerful evidence would indeed be needed for the territorial integrity of a State to be queried in international law, never mind compromised. No such evidence is available with regard to Serbia in respect of Kosovo. On the contrary, the heavy weight of evidence, both general and particular, is all in support of respect for the territorial integrity of Serbia.

II The argument that the reference to territorial integrity in Security Council resolution 1244 (1999) is "temporary"

285. The argument has been made that the principle of territorial integrity has somehow been modified in Security Council resolution 1244 (1999) and reinterpreted as a temporary or partial norm.

286. The written contribution of the authors has in a number of places sought to minimise references to territorial integrity in resolution 1244 (1999). They have attempted to do this by isolating each reference to territorial integrity and reinterpreting it exceptionally narrowly in the context. For example, it is argued that the explicit reference to the territorial integrity of the FRY in the preamble of resolution 1244 (1999), was of little effect since the preamble was a "non-binding clause".[315] Further, it is argued that the references to sovereignty and territorial integrity in annexes 1 and 2 "were solely in the context of an interim political settlement".[316] These issues will be analysed in detail later in these Written Comments.[317]

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[314] WS Cyprus, para. 40.
[315] WC Authors, para. 9.05.
[316] *Ibid.*, para. 4.07. See, also, WS United Kingdom, paras. 3.7 and 6.12; WS United States, p. 68 *et seq.*; and WS France, para. 2.21.
[317] See *infra* paras. 414-0.

287. Suffice it to say in this section that the claim that the political process and interim political framework must be governed by the principle of territorial integrity while the end product of this process may simply jettison this principle without the consent of the State concerned is simply not logical. It is also curious in law.

288. Further, the implications of such an approach are deeply disturbing at a more general level. It suggests that the principle of territorial integrity may be re-interpreted by way of a Security Council resolution in a phrase that is at best controversial or indeed by unilateral non-State action. The respect for State sovereignty, of which territorial integrity is a key component, is a rule of *jus cogens*. Accordingly, it may be altered to the detriment of the State concerned only by a similar rule, that is in such circumstances by the clear and explicit consent of the State. Anything less than this has alarming implications for States generally. The argument of the authors of the UDI that, "the preambular reference in resolution 1244 (1999) marked a clear shift in the position of the Security Council, one that now contemplated the possibility that a final status for Kosovo would not entail maintenance of FRY territorial borders"[318] is clearly wrong in its understanding of the text of the preamble. It must also be clearly wrong in law in its suggestion that a statement in a preamble of a Security Council resolution has the capacity to render the foundational principle of the territorial integrity of a State inapplicable in a given situation.

289. There is no practice to suggest that the principle of territorial integrity may be emasculated by way of a Security Council resolution in the absence of the consent of the State concerned.[319] There is most certainly no practice that suggests that the principle of territorial integrity, explicitly acknowledged for a relevant political process, may be violated by the actions of secessionist entities, who unilaterally claim to put an end to that Security Council mandated process, act contrary to the application of the principle of territorial integrity and declare independence in opposition to the stated position of the State concerned and a significant number of other States.

[318] WC Authors, para. 9.30.
[319] See, e.g., WS Cyprus, para. 100.

290. It was accepted by all relevant parties that the political process phase would be governed by the principle of territorial integrity and that the principle of territorial integrity (as a preambular reference) at the least informed the interpretation of the pertinent resolution. No State and no other entity denied the applicability of the principle of the territorial integrity of the FRY. To accept a major re-interpretation of one of the key principles of international law whether by a controversial reading of a Security Council resolution or by unilateral action by a non-State entity would be contrary to the whole tenor of the international community and gravely disturbing to the stability of international relations.

III The argument that the principle of territorial integrity reaffirmed in resolution 1244 (1999) applied to the FRY and not to Serbia

291. The authors of the UDI have claimed that since Security Council resolution 1244 (1999)

> "was focused upon the status of the FRY as a whole and Kosovo's position as a federal unit within the FRY [and] [g]iven that the FRY radically changed in nature, it cannot be assumed that commitments existing in 1999 stayed the same..."

and further that,

> "[t]here is simply no basis for assuming that any position taken in 1999 with respect to the FRY remained the same in 2008 with respect to Serbia, given the fundamentally changed circumstances that arose from the FRY's fragmentation..."[320]

292. There are two essential legal arguments put forward here. First, that Serbia today cannot be regarded as the continuation or continuator of the FRY as that existed in 1999, and, secondly, that "fundamentally changed circumstances" have altered the commitments made in 1999 in resolution 1244 (1999).

[320] WC Authors, para. 9.33. See also, e.g., WS United States, p. 74 *et seq.*

293. Both arguments are extraordinarily weak. To accept that the reaffirmation of the territorial integrity of the FRY made in Security Council resolutions, including resolution 1244 (1999), does not apply today to Serbia is to challenge that Serbia is the legitimate continuation of the FRY. No State has made that claim. Moreover, if one were to follow this line of reasoning it would also mean *vice versa* that the *obligations* of the FRY contained in Security Council resolution 1244 (1999), such as those in paragraph 2, should no longer be interpreted as applying to Serbia either.

294. The FRY, proclaimed on 27 April 1992, was renamed the State Union of Serbia and Montenegro on 4 February 2003. Neither during the FRY nor during the State Union was Kosovo "a federal unit", as the authors of the UDI erroneously contend.[321]

295. Article 60 of the Constitutional Charter of Serbia and Montenegro specifically stated that in the case of the separation of Montenegro from the State Union, "the international instruments pertaining to the Federal Republic of Yugoslavia, particularly resolution 1244 of the United Nations Security Council, would concern and apply in their entirety to Serbia."[322] The Preamble of the Constitutional Charter also confirmed that Serbia included Kosovo.[323] This is a fact that was well-known to the Security Council when it took note of the constitutional transformation of the FRY.[324]

296. Furthermore, when Montenegro did in fact separate in 2006, President Tadic informed the United Nations that Serbia would continue to exercise all rights of the State Union arising under the Constitutional Charter. His letter stated:

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[321] See WC Authors, para. 9.33.

[322] *Ustavna povelja Državne zajednice Srbija i Crna Gora* ["Constitutional Charter of Serbia and Montenegro"], *Službeni list Srbije i Crne Gore* [Official Gazette of Serbia and Montenegro"], No. 1/2003, text to be found in Annex 58 in Documentary Annexes accompanying WS Serbia.

[323] *Ibid.*

[324] See Statement of the President of the Security Council, UN Doc. S/PRST/2003/1 (6 February 2003), **Dossier No. 61**. This is acknowledged by the Written Statement of the United States, see WS United States, p. 78.

> "[The] Republic of Serbia remains responsible in full for all the *rights* and obligations of the state union of Serbia and Montenegro under the UN Charter."[325]

297. This notion of "rights and obligations (…) under the Charter" clearly includes rights contained in, and referred to, in binding Security Council resolutions, including the reaffirmation of the territorial integrity of the FRY contained in Security Council resolution 1244 (1999).[326]

298. Shortly thereafter, the representative of Serbia, in a meeting of the Security Council, specifically referred to the guarantee of the "sovereignty and territorial integrity of our country" [i.e. the one of Serbia] as contained in preambular paragraph 10 of Security Council resolution 1244 (1999)[327] – an assumption that was not contradicted by any of the Security Council members.[328]

299. On 3 June 2006, Montenegro declared its independence. The State Union of Serbia and Montenegro was renamed the Republic of Serbia, which declared its continuity with the State Union and its responsibility for all the rights and obligations of the former State Union. On 28 June 2006, the General Assembly of the UN in resolution 60/264 admitted the Republic of Montenegro as a new Member of the United Nations. Serbia continued the membership of the United Nations and other international institutions of the former State Union.

300. No State challenged this. No State argued that Serbia was not the continuation of the legal personality of the former State Union. The United Nations admitted

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[325] See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment of 26 February 2007*, para. 67; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment of 18 November 2008*, para. 23 (emphasis added).

[326] See *mutatis mutandis* Security Council resolution 670 (1990), as well as *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, para. 42.

[327] Mrs. Raskovic-Ivic (Serbia), UN Doc. S/PV.5470 (20 June 2006), p. 5: "We come before the Security Council with full confidence, with the expectation that it will make its crucial contribution in the spirit of the documents it has previously adopted, primarily resolution 1244 (1999), of 10 June 1999, which unambiguously *reaffirms the sovereignty and territorial integrity of our country*." (emphasis added)

[328] Those speakers included, *inter alia,* representatives of France, the United Kingdom, the United States, Japan, Denmark, as well as Austria speaking on behalf of the European Union.

Montenegro as a new member and accepted Serbia as the continuation of the former State Union of Serbia and Montenegro. The Court, in its judgment of 26 February 2007 in the *Bosnia and Herzegovina v Serbia and Montenegro* case, noted that Serbia had accepted such continuity and thus remained the respondent in that case.[329]

301. Further, in the context of this request for an advisory opinion from the Court, the Written Statement of Germany declared that,

> "Security Council resolution 1244 (1999) does mention 'the sovereignty and territorial integrity of the Federal Republic of Yugoslavia' several times. *As the FRY no longer exists, this reference must now indeed be taken as a reference to Serbia*".[330]

302. Accordingly, there is no room for any challenge to the continuity of the Republic of Serbia to the FRY (renamed the State Union of Serbia and Montenegro in 2003). It follows from this that the international legal principle of territorial integrity, which was reaffirmed in Security Council resolution 1244 (1999) (and other resolutions) with regard to the FRY, simply continued to apply to the State Union of Serbia and Montenegro and thus to the Republic of Serbia (minus the territory of Montenegro which had legitimately separated from the State Union, with full consent, in 2006). Any other approach would, for example, constitute a challenge to the territorial integrity of States in similar circumstances, such as the Federal Republic of Germany, the Russian Federation, Yemen, Eritrea and Ethiopia.

303. The fundamental change of circumstances argument put by the authors of the UDI (but by none of the States producing written statements in this case) is similarly flawed both in fact and in law. First, there has in reality been no "fundamental

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[329] *Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26 February 2007*, para. 75. This was reaffirmed in the *Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Croatia v Serbia), Judgment of 18 November 2008*, para. 32.

[330] WS Germany, p. 37 (emphasis added). See also, e.g., WS Romania, para. 18 *et seq*.

change of circumstances" since 1999. The FRY/Serbia continued to be the acknowledged holder of the sovereign territorial title over Kosovo, while the UN continued to administer that territory. Nothing fundamentally changed until the UDI of 2008. The reference by the authors of the UDI to "the FRY's fragmentation"[331] is simply tendentious. The FRY did not "fragment". Montenegro left the State Union with the full consent of the State Union and Serbia. The reference to the "extensive UN-sponsored creation of institutions of self-governance in Kosovo"[332] does not constitute a fundamentally changed circumstance since 1999 and resolution 1244 (1999), since it was provided for in that resolution.

304. Similarly, in terms of the relevant law the argument of the authors of the UDI is incorrect. Article 62, paragraph 1, of the Vienna Convention on the Law of Treaties provides that:

> "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> > (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> >
> > (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty".

305. The doctrine of fundamental change of circumstances (*rebus sic stantibus*) was examined by the Court in *Fisheries Jurisdiction* cases. The key to the application of the doctrine, was that the change that has taken place was critical and that the

[331] WC Authors, para. 9.33.
[332] *Ibid.*

consequences of the change have been to destroy or significantly modify the basis of the obligation in question and make impossible the actual or future realisation of the objectives and goals of that obligation. The Court noted in the *Fisheries Jurisdiction* case, there has to be a "radical transformation of the extent of the obligations imposed" by it.[333] The Court also specified what it meant by "radical transformation" and accordingly explained that :

> "The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken."[334]

306. The Court returned to the doctrine in the *Gabčíkovo-Nagymaros Project* case. The Court, which regarded Article 62 of the Vienna Convention as codifying existing customary law,[335] noted that:

> "The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional working of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".[336]

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[333] *Fisheries Jurisdiction* case *(Federal Republic of Germany v. Iceland)*, *Judgment of 2 February 1973, I.C.J. Reports 1973*, para. 36.
[334] *Ibid*., para. 43.
[335] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* para. 46.
[336] *Ibid.,* para. 104. See also D. F. Vagts, "*Rebus* Revisited: Changed Circumstances in Treaty Law", 43 *Colum. J. Transnat'l L.* (2004-5), p. 459; A. Vamboukos, *Termination of treaties in international law: the*

307. Accordingly, the indispensable requirements of a successful application of the doctrine are very high. The circumstances to which the change relates must have been an essential basis of the consent of the parties to the obligation undertaken, the change in question has to be unforeseen and fundamental, the consequences of which would be to dramatically transform the extent of the obligations to be performed. And in addition, the application of the doctrine must be exceptional.

308. No evidence has been put forward which is relevant to such conditions concerning the Kosovo situation between the adoption of Security Council resolution 1244 (1999) and the UDI of 17 February 2008, still less that any fundamental change of circumstances has indeed taken place within the definition provided by Article 62 and the Court.

309. There has clearly and simply been no "radical transformation of the extent of obligations".

F. Conclusion

310. The following conclusions have, therefore, been reached in addition to those laid out in Serbia's Written Statement:[337]

(i) The principle of territorial integrity of States has been acknowledged by those participating in the present advisory proceedings as one of the key and applicable elements of international law.

(ii) There has been no denial that the FRY/Serbia held sovereignty and territorial title to Kosovo at the date of Security Council resolution 1244 (1999).

(iii) There has been no claim that resolution 1244 (1999) deprived FRY/Serbia of sovereignty and territorial title to Kosovo.

(iv) There has been no denial that the preamble to resolution 1244 (1999) reaffirmed the sovereignty and territorial title of FRY/Serbia over Kosovo.

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doctrines of rebus sic stantibus and desuetude (1985) and M.N. Shaw and C. Fournet, "Article 62" in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne de 1969 et de 1986 sur le droit des traités: Commentaire article par article* (2006), p. 2229.

[337] WS Serbia, para. 413.

(v) There has been no denial that resolution 1244 (1999) affirmed that the political process to resolve the Kosovo problem had to take account of the fundamental principle of the territorial integrity of FRY/Serbia.

(vi) The obligation to respect territorial integrity applies beyond the inter-State context and applies as a general proposition to non-State entities and that the effect of this is to render non-consensual secessions from independent States unlawful.

(vii) The principle of territorial integrity has been reaffirmed by Security Council resolutions as applying to the conflicts in the former Yugoslavia.

(viii) The principle of territorial integrity has been specifically reaffirmed by Security Council resolutions as applying to the Kosovo problem and binding upon all States and upon the Kosovo Albanians.

(ix) The references to territorial integrity in resolution 1244 (1999) are binding and not to be seen as limited in time or substance.

(x) The references to the territorial integrity of the FRY in resolution 1244 (1999) apply to the territorial integrity of the Republic of Serbia as its continuation.

(xi) There have been no fundamental changes of circumstances to justify any modification in the application of the principle of territorial integrity of Serbia with regard to Kosovo.

Chapter 8

NEITHER THE PRINCIPLE OF SELF-DETERMINATION NOR THE SO-CALLED DOCTRINE OF ”REMEDIAL SECESSION” PROVIDE ANY SUPPORT FOR THE UDI

A. Introduction

311. In its Written Statement, Serbia has demonstrated that the principle of self-determination provides no legal justification for the UDI. In particular, it was shown that the principle applies in its external aspect in the context of decolonisation and occupation, and requires the existence of a ”people” who are recognised as the sole holder of this right. In this regard, Serbia recalled that minorities are not entitled to exercise the external right to self-determination, meaning that they cannot secede territory from a pre-existing State. Rather, they exercise the internal aspect of this right, together with the rest of the people of the State concerned.[338] This view was shared not only by other States that came to the same conclusion as Serbia with regard to the question submitted by the General Assembly,[339] but also by States that took the opposite position as well.[340] Japan, for instance, stated that

> “[t]he case of Kosovo can be regarded [as] a case outside the colonial context, and as indicated above, we cannot arrive at an appropriate legal interpretation simply by looking into the relevance of the right of self-determination.”[341]

312. The Written Statement of Serbia has also demonstrated that the so-called doctrine of ”remedial secession” is untenable under international law. Serbia carefully

[338] WS Serbia, para. 544.
[339] WS Argentina, para. 94; WS Iran, para. 5.3; WS Romania, para. 142; WS Cyprus, para. 139.
[340] WS Switzerland, para. 67.
[341] WS Japan, p. 4.

analysed the purported conditions required by those advancing its existence in international law and has shown that in any event, these conditions would not be met in the case of Kosovo.[342] Other States likewise shared this view. Those States advancing the "remedial secession" doctrine have been unable to justify their position in legal terms, and have simply taken the doctrine for granted and have failed to explain how this doctrine forms part of positive international law.[343] The simple reason for this is that it does not. Furthermore, they base the application of this doctrine to the case of Kosovo upon repeated generalisations of only those facts that purportedly support their argument, and that are not consequently representative of all the relevant facts.

313. This chapter will rebut the positions adopted by those encouraging Kosovo's secession with regard to both the principle of self-determination and the doctrine of "remedial secession". In particular, the following points will be addressed:

(i) The relationship between the right of peoples to self-determination and the principle of territorial integrity.

(ii) The notion of "people" and the fact that this notion is not applicable to the Kosovo Albanians nor to the entire population of Kosovo.

(iii) The scope of the internal exercise of the right to self-determination.

(iv) The impossibility to justify the UDI on the basis of the external exercise of self-determination.

(v) The lack of relevance of the doctrine of "remedial secession".

(vi) The fact that the alleged conditions invoked to justify "remedial secession" are not met in the case of Kosovo.

(vii) The date for the examination of the applicability of the principle of self-determination and the doctrine of remedial secession is that of the UDI, namely 17 February 2008.

[342] WS Serbia, paras. 639-649.

[343] WS Albania, para. 81; WS Estonia, p. 4; WS Finland, para. 7; WS Germany, p. 35; WS Ireland, para. 30; WS Netherlands, paras. 3.6-3.7; WS Poland, para. 6.5; WS Slovenia, p. 2; WS Switzerland, para. 62; WC Authors, para. 8.40.

B. Relationship between the Right of Peoples to Exercise Self-Determination and Respect for the Territorial Integrity of States

314. As mentioned above,[344] most of the written statements have generally acknowledged the importance of the principle of respect for the territorial integrity of States, no matter what their positions are with regard to the question raised by the General Assembly. Even States advancing the doctrine of "remedial secession" have accepted the general prevalence of territorial integrity over self-determination, the "remedial secession" doctrine being – according to them – an exception, a kind of *ultima ratio*.[345]

315. Just one isolated written statement contended that self-determination takes precedence over territorial integrity. This was the case of Slovenia, based on what it perceived to be the "democratic nature" of the principle of self-determination, which it considered absent in the principle of respect of territorial integrity.[346]

316. In the view of Serbia, the issue in the present case is not a conflict of norms, where one principle takes precedence over the other under international law, but rather the correct application of both principles. If, in a given situation, as is the case with Kosovo, there is no unit of self-determination or a holder of this right in its external aspect,[347] then the discussion about the prevalence of respect of territorial integrity over the right of self-determination becomes entirely *obiter*. The fact remains that there is no legal justification for failing to respect the territorial integrity of Serbia and the UDI is an open violation of this principle.

317. It will also be stressed below that the "exceptional" or "abnormal" situation or the "*ultima ratio*" exception to respect for territorial integrity of Serbia invoked by those supporting Kosovo's secession, on the basis of an alleged but undemonstrated doctrine of "remedial secession", lacks any substance.

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[344] See *supra* para. 248.
[345] WS Estonia, pp. 9-10; WS Finland, para. 7; WS Germany, p. 34; WS Ireland, para. 30; WS Netherlands, para. 3.7; WS Poland, para. 6.9; WS Switzerland, para. 67.
[346] WS Slovenia, p. 2.
[347] See WS Serbia, paras. 570-588, and *infra* paras. 318-329.

C. Meaning of ”People” and Non-Existence of a Distinct ”People” in Kosovo

318. It is uncontroversial that the right to self-determination may only be exercised by a ”people”, in the sense this term of art possesses in international law. According to Serbia, and to many other States, there is no ”Kosovar people”. Furthermore, Kosovo Albanians do not constitute a separate people entitled to self-determination either.[348]

319. Some written statements, as well as the text submitted by the authors of the UDI, nevertheless argue in favour of the existence in Kosovo of a ”people” entitled to external self-determination. The criteria to apply in order to determine who constitutes the ”Kosovar people”, however, greatly vary among these texts. Some of those States recognising Kosovo have supposed the existence of a people who are the holder of the right of self-determination in Kosovo, simply because the word ”people” has been used in some texts, notably in the Rambouillet Accords. Switzerland even goes so far as to consider Kosovo to be a ”non-self-governing territory”. Other States, as well as the authors of the UDI, embarked upon ethnical considerations. Yet other written statements pleaded the transformation of a minority into a ”people” because of the sufferings the minority had endured. Finally, some States have simply invoked or implied the existence of a ”people” without providing any justification for their assertion.

I Neither the Rambouillet Accords nor any United Nations instrument has recognised the applicability of self-determination to a ”Kosovar People”

320. The Netherlands argues on the basis of wording in the Rambouillet Accords draft, that there is a “people” on whose behalf the Declaration was made on 17 February 2008.[349] France also relies upon the reference to “the will of the people” contained

[348] WS Serbia, para. 584; WS Argentina, para. 85; WS Cyprus, para. 136; WS Romania, para. 131; WS Russian Federation, paras. 91 and 97; WS Slovakia, paras. 15-16.
[349] WS Netherlands, para. 3.3.

in the Rambouillet Accords draft to assert "la nécessité impérieuse, réaffirmée à de nombreuses reprises, de respecter la volonté du peuple du Kosovo".[350]

321. This reading of the Rambouillet Accords is not accurate. France misinterprets the wording of the Rambouillet Accords, which do not refer whatsoever to "the need to respect" the will of the people. As demonstrated in the Written Statement of Serbia,[351] among others,[352] there was no agreement that the use of the word "people" in this document refers only to the population of Kosovo, and no recognition of the existence of a people entitled to exercise self-determination. Furthermore, the text of the Rambouillet Accords only once uses the term "people" while otherwise it refers to the "Kosovo population". The *only* passage in the Rambouillet Accords where the word "people" is used reads as follows:

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act …".

322. Whereas France argues "the need to respect the will of the people", the text only mentions that "the will of the people" will be just *one of a number of elements* to be taken into consideration to convene an international meeting to determine a mechanism for the final settlement. The other elements include the opinion of the relevant authorities (i.e. the Serbian government) and the Helsinki Final Act, which in turn includes territorial integrity and inviolability of boundaries as two core principles.[353]

323. Albania in its Written Statement goes even further. It contends that, from the wording of the preamble of the Constitutional Framework for Kosovo promulgated by the Special Representative of the Secretary-General,

[350] WS France, para. 2.18.
[351] WS Serbia, paras. 341-342.
[352] WS Argentina, para. 99.
[353] See, also, *infra* paras. 425-432.

> "the United Nations system has clearly recognised that Kosovo is a specific entity with a specific people. This has been accepted for a long time since the identity of the majority population is clearly different from the population of Serbia."[354]

324. Three comments can be made in relation to this extraordinary assertion. *First*, it is true that the Special Representative employed the phrase "the people of Kosovo" to refer to the inhabitants of Kosovo. However, the use of this term is misleading. When discussing the future status of Kosovo that should be determined by a future process, he mentioned that this would be "in accordance with UNSCR 1244 (1999)" and stated that this process "shall take full account of relevant factors including the will of the people". Clearly, the "will of the people" is not paramount but simply one factor among others – as it was in the text of the Rambouillet Accords. This is not so when self-determination is applicable. In this case, and contrary to what is mentioned both in the Rambouillet Accords and in the Preamble of the Constitutional Framework, the "will of the people" is *the only* factor that alone determines the fate of a territory. *Second*, irrespective of the interpretation to be given to the Preamble, this text cannot override resolution 1244 (1999), as this is the source of the powers of the Special Representative and of the Secretary-General with regard to Kosovo. *Third*, whatever the interpretation of the wording of the Preamble might be, by no means can this Preamble prove that "the UN system" has recognised anything with regard to Kosovo and its inhabitants. The Court is an organ of the United Nations system, and of course it has not yet decided anything in this respect.

325. The authors of the UDI were indeed more cautious when dealing with this issue. They have merely argued that after 2004, "[a]s at Rambouillet, all options for final status were open, though it was generally acknowledged that the will of the Kosovo people was a fundamental premise of the status negotiations."[355] However, their written contribution fails to explain how this alleged "fundamental

[354] WS Albania, para. 84.
[355] WC Authors, para. 4.03.

premise" was ever "generally acknowledged". In addition, the authors mention the use of the wording "people of Kosovo" in Security Council resolution 1244 (1999) to support their views.[356] Serbia's Written Statement, as well as others, have demonstrated that this is not equivalent to the recognition of the existence of a people entitled to exercise self-determination: Annex II of the said resolution uses interchangeably the expressions "people of Kosovo" and "all people in Kosovo", and later on "all inhabitants of Kosovo".[357]

326. The truth is simple and well known: neither the Security Council nor the Contact Group have ever accepted to apply external self-determination to the inhabitants of Kosovo, in spite of the insistence of the Kosovo Albanian leadership for such recognition.

II It is common knowledge that Kosovo is not a "Non-Self-Governing Territory"

327. Switzerland relies on the writings of James Crawford to assert that the "people" of Kosovo have a right to exercise self-determination, separate from the population of the Serbian State, because they constitute a "non-self-governing territory".[358] As explained in Serbia's Written Statement, Kosovo does not constitute a non-self-governing territory and the United Nations has never inscribed Kosovo in the list of non-self-governing territories.[359] Chapter XI of the UN Charter, as well as the developments in the field of customary law related to its application during decolonisation, are clearly not applicable to Kosovo.

III Dangerous constructions of the definition of a "people" based on ethnic considerations can lead to discrimination

328. The approach taken by Albania and by the authors of the UDI in identifying the alleged "people" is a cause for serious concern. Albania seems to suggest that the

[356] *Ibid.*, para. 4.17.
[357] Security Council resolution 1244 (1999), Annex 2, paras. 4 and 5, **Dossier No. 34**.
[358] WS Switzerland, paras. 75 and 77.
[359] WS Serbia, paras. 535-539.

"people" in Kosovo do not include all the inhabitants of Kosovo, but only ethnic Kosovo Albanians.[360] Confusingly, however, Albania argues that there is a "Kosovar people" based on a comment made by the Special Representative of the Secretary-General of the United Nations on 15 May 2001, which is not limited to Kosovo Albanians.[361]

329. A similarly problematic definition of a "people" based on ethnicity stems from the self-definition of the authors of the UDI, who claim to represent the so-called "people of Kosovo", namely "a group of which 90 percent are Kosovo Albanians, who speak the Albanian language, and who mostly share a Muslim religious identity."[362] It appears that for the authors of the UDI, the "people of Kosovo" are essentially defined by the Albanian features. This is not the way the practice of the United Nations has qualified peoples to be entitled to self-determination but rather an attempt to transform an ethnic/linguistic/religious minority within a State into a majority within its own new State, and by the same token to transform other parts of the population of the province of Kosovo into minorities within the "new State of Kosovo". This way of defining the "people" is further evidence of the discriminatory stance taken by the Kosovo Albanian leadership. The unacceptable situation of Serbs and other non-Albanian inhabitants of Kosovo today seems to reflect the way that this leadership understands "self-determination".

D. Exercise by the Inhabitants of Kosovo of an "Internal Right to Self-Determination"

330. Even assuming the existence of an identifiable "people" in Kosovo, *quod non*, this would not automatically entail the affirmation of the existence of a right of external self-determination. Many States recognise that a "people" have a right to exercise "internal" self-determination, meaning that the exercise of the right of self-determination does not necessarily imply secession from the territorial State.

[360] WS Albania, paras. 75 and 79.
[361] WS Albania, para. 84.
[362] WC Authors, para. 8.40.

For example, Egypt states that "the right to internal self-determination, in accordance with national legislation, might be established in certain circumstances in line with human rights norms."[363] Even States in favour of the secession of Kosovo have recognised an "internal right to self-determination" that could be applicable to a so-called "people of Kosovo": Albania,[364] Denmark,[365] Estonia,[366] Germany,[367] Ireland,[368] and the Netherlands.[369] An exercise of internal self-determination logically bars an exercise of external self-determination, as the former is, as a matter of fact, only applicable within the territory of the State concerned.

331. States that argue in favour of a right to "internal self-determination" describe the content of such a right as an internal exercise of political self-determination. Germany argues that it "means enjoying a degree of autonomy inside a larger entity, not leaving it altogether but, as a rule, deciding issues of local relevance on a local level."[370] According to Cyprus, it is a right of the population of the territory as a whole that "[…] giv[es] people the right to choose the form of government and have access to constitutional rights."[371]

332. The authors of the UDI, as well as some of the written statements of those States supporting the secession of Kosovo, contend that internal self-determination is no longer a possibility because of its alleged denial in 1989 and the human rights violations occurring between 1989 and 1999.[372] However, it is an unquestionable fact that Kosovo enjoys internal self-determination through the Provisional Institutions of Self-Government, established in conformity with Security Council resolution 1244 (1999) and the Serbian Constitution.

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[363] WS Egypt, para. 73.
[364] WS Albania, para. 75.
[365] WS Denmark, p. 12.
[366] WS Estonia, p. 4 *et seq.*
[367] WS Germany, p. 33.
[368] WS Ireland, para. 30.
[369] WS Netherlands, para. 3.6.
[370] WS Germany, p. 33.
[371] WS Cyprus, para. 135.
[372] WC Authors, para. 8.40.

333. Indeed, without denying the human rights violations that occurred in Kosovo during the Milosevic regime, it must be mentioned for the sake of having a complete picture, that parallel institutions organised by the Kosovo Albanian leadership functioned in the territory at all times during the 1990s with the tolerance of the Yugoslavian/Serbian authorities. Self-organised elections were able to be held during those years. Agreements to solve practical issues were even concluded between the central authorities and the Kosovo Albanian leadership.[373] The crucial point is that Kosovo Albanians excluded themselves from the political process of Yugoslavia/Serbia. Significantly, at the critical date, 17 February 2008, there were no human rights violations perpetrated against the population in Kosovo as a group, and if a "people" in Kosovo exists, it was able at this time, as it continues to be able, to exercise internal self-determination.

E. An "External Right to Self-Determination" Is Not Applicable to Kosovo

334. This section will address the positions taken in the first stage of these proceedings with regard to the application of the external aspect of self-determination to Kosovo.

335. For some States, outside the colonial context, there is no right to self-determination that results in the lawful secession of territory from a pre-existing State. It is for this reason that Japan considers that self-determination cannot provide an appropriate legal interpretation of the case of Kosovo.[374] China asserts that self-determination has only ever applied to situations of colonial rule or foreign occupation,[375] and that "[e]ven after colonial rule ended in the world, the scope of application of the principle of self-determination has not changed."[376] Romania,[377] and Slovakia[378] are of the understanding that outside the colonial context, self-determination should only be exercised in its internal form.

[373] For example, the St. Egidi [St Egidio] Education Agreement of 1 September 1996, reproduced in Annex 79 in Documentary Annexes accompanying WS Serbia.
[374] WS Japan, p. 4.
[375] WS China, para. III (a).
[376] *Ibid*., para. III (b).
[377] WS Romania, para. 123.

336. Other States appear to argue that international law is "neutral" when it comes to the legality of the secession of territory from a pre-existing State, outside the colonial context, on the basis of an exercise of self-determination. Latvia thus argues that "no rule of International Law prohibits the issuing of declaration of independence as an outcome of the fulfilment of the right of self-determination."[379] This argument lacks coherence. Indeed, if independence is "the outcome of the fulfilment of the right to self-determination" then it is in conformity with international law. However, Latvia fails to demonstrate that this is the case of Kosovo. As seen,[380] it is not. Evidently, either the principle of self-determination provides for a legal justification for the independence of Kosovo, or it does not. The principle as such cannot remain "neutral": it is either applicable or it is not.

337. Other States have accepted the possibility of a people exercising their right to self-determination in circumstances other than colonial rule or foreign occupation. The Russian Federation considers that this may occur when a "people" is identified, and recognised in the national law of a State as having a right to exercise external self-determination. In respect to Kosovo, the Russian Federation notes that there is no "people" of Kosovo for the purposes of external self-determination, nor any recognition in the national Constitution that this autonomous province could be lawfully seceded.[381]

338. For their part, neither the States that promote Kosovo's secession nor the authors of the UDI were able to provide the slightest piece of evidence demonstrating that Kosovo would fall within the scope of what can be considered the "normal" application of the principle of external self-determination (i.e. not so-called "remedial secession"). This unsurprising conclusion of the state of the law has led them to make two different and contradictory arguments: 1) to argue that the principle of self-determination is not relevant, and 2) to invoke what they consider to be an exceptional case of

[378] WS Slovakia, para. 6.
[379] WS Latvia, p. 1.
[380] WS Serbia, paras. 5.70-5.88.
[381] WS Russian Federation, para. 91.

external self-determination applicable to part of an existing sovereign State, namely the doctrine of "remedial secession".[382] The authors of the UDI do not appear to be concerned about self-contradiction as they invoked both these arguments at the same time.[383] They finish by arguing that the Court has no need to address the issue of the applicability of the principle of self-determination,[384] thereby demonstrating their clear lack of confidence in the soundness of their legal reasoning about the purported right to self-determination of the so-called "people of Kosovo".

F. States Promoting Kosovo's Secession and the Authors of the UDI Have Not Demonstrated the Existence of a "Right to Remedial Secession"

339. None of the arguments put forward in the Written Statement of Serbia that demonstrate the absence of a purported "right to remedial secession"[385] in international law have been rebutted in the statements of those States that support the secession of Kosovo, nor in the written contribution of the authors of the UDI. Similarly, no written statement has adequately addressed the factual analysis of the situation in Kosovo set out in the Written Statement of Serbia, which shows that even assuming the existence of such a right, the conditions advanced by this doctrine would not be met.[386] Indeed, no serious legal analysis is really put forward that would rebut Serbia's arguments on any of these points. Instead, there is a series of flawed generalisations of certain facts, and a taking for granted that the doctrine of "remedial secession" exists in international law and that Kosovo would be a concrete case for its application.

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[382] WS Albania, para. 81; WS Estonia, p. 4 *et seq*; WS Finland, para. 7; WS Germany, p. 35; WS Ireland, para. 30; WS Netherlands, paras. 3.6-3.7; WS Poland, para. 6.5; WS Slovenia, p. 2; WS Switzerland, paras. 62-63; WC Authors, para. 8.40.

[383] WC Authors, paras. 8.38-8.41.

[384] "The Court is not obliged to reach the issue of whether the Declaration of Independence by the representatives of the people of Kosovo reflected an exercise of the internationally-protected right of self-determination for there is no need to determine whether international law authorized Kosovo to seek independence", WC Authors, para. 8.38.

[385] WS Serbia, paras. 589-638.

[386] WS Serbia, paras. 639-653.

340. Only a small number of States that submitted written statements asserted that such a "right of remedial secession" exists: Albania,[387] Estonia,[388] Finland,[389] Germany,[390] Ireland,[391] the Netherlands,[392] Poland,[393] and Switzerland.[394] They all present the application of this "right" as being "exceptional", "abnormal" or as an "*ultima ratio*".[395] These States reason that the secession of part of a territory of a State is purportedly justified under international law because of gross human rights violations carried out on that territory against a "people" by the government of the territorial State.

341. Those States in favour of a right to "remedial secession" ground this "right" on different legal bases in their written statements. These alleged legal bases have already been addressed in the Written Statement of Serbia, in which Serbia demonstrates their lack of legal substance.

342. The first such argument is based on an *a contrario* reading of the "safeguard clause" in the Friendly Relations Declaration. This is an argument put forward by Albania, which considers secession to be lawful where a government discriminates on the basis of "race, creed or colour".[396] Switzerland is also attracted to this *a contrario* reading of the "safeguard clause".[397] The safeguard clause is also quoted, but not explained by the United Kingdom.[398]

343. Other States agree with Serbia that this *a contrario* reading of the "safeguard clause" is erroneous. Cyprus[399] and Iran[400] challenge the outcome of the *a contrario* reasoning, asserting that in the case of large-scale human rights abuses,

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[387] WS Albania, para. 81.
[388] WS Estonia, p. 4 *et seq*.
[389] WS Finland, para. 7.
[390] WS Germany, p. 34.
[391] WS Ireland, para. 30.
[392] WS Netherlands, para. 3.7.
[393] WS Poland, para. 6.12.
[394] WS Switzerland, para. 67.
[395] WS Estonia, p. 4 *et seq*; WS Finland, paras. 7 and 9; WS Germany, p. 35; WS Ireland, para. 30; WS Switzerland, para. 67.
[396] WS Albania, para. 81.
[397] WS Switzerland, para. 63.
[398] WS United Kingdom, para. 5.30.
[399] WS Cyprus, para. 142.
[400] WS Iran, para. 4.1.

the territorial integrity of a State must nevertheless be respected. The Russian Federation considers the *a contrario* reasoning flawed because it notes that the primary purpose of the "safeguard clause" is to guarantee the territorial integrity of States.[401] Similarly, Spain disagrees with the *a contrario* reading based on the *travaux préparatoires* to the Friendly Relations Declaration and a contextual interpretation of the safeguard clause.[402]

344. Some States have not relied solely on an *a contrario* reading of the safeguard clause to support their argument in favour of the secession of Kosovo, but have used other arguments in an attempt to bolster their position. Thus, whilst the Netherlands relies on the *a contrario* reading of the safeguard clause,[403] it also adds a "procedural condition" to the exercise of external self-determination, to the effect that "all avenues must have been explored" before secession can be resorted to.[404] The very fact of these advisory proceedings following the General Assembly request shows that this "procedural condition" is not met.

345. Apart from the *a contrario* reading of the safeguard clause, other States have argued in favour of the lawfulness of the secession of Kosovo on the basis of two conditions being met. The international law and state practice that purportedly support the existence of these two conditions are gravely lacking. According to Estonia[405] and Germany,[406] these two conditions are (1) a severe and long-lasting refusal of internal self-determination, and (2) secession being the *ultima ratio*. The Netherlands advances a similar thesis.[407] Ireland argues for the existence of these same two conditions to justify secession, based on partial quotations of the decision of the Supreme Court of Canada,[408] ignoring the doubts cast by this same Court as to the existence of "remedial secession" in international law. As is well-known, the Court concluded that "it remains unclear whether this… proposition

[401] WS Russian Federation, para. 88.
[402] WS Spain, para. 24.
[403] WS Netherlands, para. 3.10.
[404] WS Netherlands, para. 3.11.
[405] WS Estonia, pp. 6-10.
[406] WS Germany, p. 35.
[407] WS Netherlands, para. 3.12.
[408] WS Ireland, para. 30.

actually reflects an established international law standard."[409] These States fail to establish any firm legal basis for the requirement of these two conditions as a justification in law for secession.

346. The lack of State practice and *opinio juris* with respect to a so-called "right of remedial secession" cannot be overcome by these arguments. As Cyprus notes,

> "[w]hile the claim that there is a 'right of secession of last resort' has been supported by some writers and by *a contrario* reasoning such as that above, it is without support in State practice. It has not emerged as a rule of customary law. It is not found in any treaty. And it has no support from the practice of the UN."[410]

347. Another State, Finland, has argued in favour of external self-determination on the basis of what it calls the "abnormal" situation in Serbia. It cites three references to support its argument of "abnormality" as justifying secession: (1) comments made by the Commission of Jurists on the Aaland Islands question in 1920, in which the Commission held that self-determination may emerge as a criterion for future territorial settlement,[411] (2) the "safeguard clause" of the Friendly Relations Declaration,[412] and (3) a statement made by the Supreme Court of Canada in the *Reference re Secession of Quebec* case.[413] Finland then argues that the situation in Serbia was "abnormal" owing to five aspects of its reading of the history of Kosovo.[414] Consequently, Finland does not argue that the existence of gross human rights violations are sufficient to justify the secession of Kosovo, but that other factors must also be present. In this respect, Finland's argument is a mixture of an assertion of a right to "remedial secession", and an argument in favour of secession based on the *sui generis* character of the situation. This latter *sui generis* argument is addressed in these Written Comments above in Chapter 5.[415]

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[409] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 135.
[410] WS Cyprus, para. 143 (footnote omitted).
[411] WS Finland, para. 7.
[412] WS Finland, para. 8.
[413] WS Finland, para. 8.
[414] WS Finland, para. 10.
[415] See *supra* paras. **140-142**.

348. States other than Serbia have made clear that a violation of human rights enjoyed by a minority on its territory, does not entail a remedy under international law of secession of territory. Cyprus stresses that whilst a State would entail responsibility for breaches of human and minority rights, "the remedy for any such breach is not the splitting up of the State."[416] Slovakia similarly notes that a State cannot be "punished" for past violations of human rights by the secession of part of its territory, unlike individuals who have been "punished" after being held individually criminally responsible by the International Criminal Tribunal for the Former Yugoslavia.[417]

349. In sum, States invoking the existence of a "right to remedial secession" have presented different conditions for its exercise. None of them has demonstrated how this doctrine has ever been incorporated into positive international law. None of them explains where the conditions for the exercise of this so-called "right" are depicted under international law. All of them have failed to establish its existence in international law.

G. The Account of the Situation in Kosovo Used to Justify Kosovo's "Remedial Secession" Is Not Accurate

350. Serbia's Written Statement has already discussed each of these alleged conditions supposedly leading to remedial secession.[418] This has also been addressed in the present Written Comments. While not denying the existence of human rights violations, Serbia explained that the picture drawn by the States supporting Kosovo's secession and by the authors of the UDI is not accurate and does not even correspond with the requirements constructed by the doctrine of "remedial secession".[419]

[416] WS Cyprus, para. 139.
[417] WS Slovakia, para. 28.
[418] WS Serbia, paras. 589-638.
[419] See *supra* paras. 82-85.

H. It Is Undisputed that at the Critical Date the Alleged Conditions for "Remedial Secession" Were Not Present

351. The date of the UDI, namely, 17 February 2008, is the critical date to ascertain the existence of the alleged "remedial secession" requirements that some States have put forward, outlined above in Section E, such as an inability to exercise internal self-determination, or the occurrence of large-scale human rights abuses.

352. Other States share Serbia's views in this regard. Cyprus argues that the population of Kosovo cannot exercise a so-called right to "remedial secession", even if such a right did exist, because the human rights violations ended in 1999, and "[a]llegations of ill-treatment several years ago cannot be a justification for allowing the dismemberment of a State now."[420]

353. The Russian Federation similarly notes that in response to the human rights violations that occurred in Kosovo during the 1999 crisis, the response of the international community was to confirm the territorial integrity of the FRY,[421] and there was no suggestion at that time that Serbia had somehow "forfeited its right to govern Kosovo" or that "the return of Kosovo under Serbian rule [was] not a viable option".[422]

354. Similarly, Romania argues that the analysis must be made at the moment of the UDI. Romania concludes that

> "the general situation of Serbia, in particular regarding human rights and people's participation to the government, meets presently the generally recognized universal and European standards, and so it did at the moment of the DOI. Consequently, there is no reason to believe that Kosovo, *at the moment of the DOI*, have been under Serbia's control and its population would have been victim of oppression, brutal violation of human rights

[420] WS Cyprus, para. 146.
[421] WS Russian Federation, para. 102.
[422] WS Russian Federation, para. 92.

> or unjust exclusion from the exercise of its right of internal self-determination together with the rest of people of Serbia – which would have justified a case of 'remedial secession'."[423]

355. However, some States have asserted that evidence of gross human rights violations preceding this date, and which were no longer present at the critical date, are nevertheless relevant for consideration. Germany argues that the "reality" of the situation prevents Kosovo from continuing to be part of Serbia due to past human right abuses. Although it acknowledges that, "the Serbia of today is not the Serbia of the past",[424] it nevertheless argues that

> "the reality is that the very legacy of the conflict, in particular the atrocities of the late 1990s, make a return of Serb rule in Kosovo unthinkable. Certainly, in the eyes of the Kosovars, if not in the eyes of the international community, the viability of a solution that would maintain Serb sovereignty over Kosovo could not be established."[425]

356. If this were true, it can be asked why the international community did not move in the direction suggested by Germany at the very moment that these events occurred, and particularly when the Security Council established the international regime set out by Security Council resolution 1244 (1999). Moreover, it is not enough to assert that the passage of time is unable to erase the external right to self-determination; it must also be shown that previously such right existed.

357. In fact, what Germany advances is a kind of perennial argument of "remedial secession". Even if the "remedy" is no longer necessary, the right to secede will remain. The contradiction of the outcome with the aim of the purported rule is self-evident.

358. The argument has also been advanced by the authors of the UDI, as well as by States, that the referendum leading to the adoption of the Serbian Constitution of

[423] WS Romania, para. 156 (original emphasis).
[424] WS Germany, p. 36.
[425] WS Germany, p. 36.

2006 demonstrates the failure of Serbia to take into account the internal self-determination of the Kosovo Albanians.[426] First, this is in the circumstances an astonishing argument which is difficult to reconcile with their systematic boycott of all Yugoslav/Serbian elections for decades.[427] Second, as explained above, at ballot stations in Kosovo where security and other legal requirements for voting were met, all registered voters could vote at the referendum, regardless of their ethnicity.[428]

359. Consequently, none of the alleged conditions for the application of the external aspect of self-determination, either in the form of the doctrine of "remedial secession" or otherwise, exists in the case of Kosovo.

I. Conclusions

360. The present chapter has shown the flawed character of the arguments advanced by the authors of the UDI and the States supporting them based on the principle of self-determination. It has been demonstrated that in this particular case the principle of self-determination provides no justification not to respect the territorial integrity of Serbia. The following conclusions can be drawn:

(i) The right to self-determination may only be exercised by a "people" as this word is understood as a term of art in international law.

(ii) Neither the Rambouillet Accords nor any United Nations instrument recognises the applicability of the principle of self-determination to the inhabitants of Kosovo.

(iii) There is no "Kosovar people" and Kosovo Albanians do not constitute a separate "people".

(iv) Kosovo does not constitute a self-determination unit.

(v) The inhabitants of Kosovo, like all inhabitants in Serbia, are entitled to exercise internal self-determination and are exercising it.

[426] WC Authors, paras. 5.16-5.17.
[427] See WS Serbia, paras. 273-278.
[428] See *supra* para. 120.

(vi) Consequently, the inhabitants of Kosovo enjoy individual and collective human rights, but not the right to exercise external self-determination.

(vii) States promoting secession and the authors of the UDI, being aware of this, have invoked a purported exceptional ”right to remedial secession” as a way to try to find legal justification for the purported independence of the territory.

(viii) The participants in these proceedings invoking “remedial secession” have failed to prove the existence of this doctrine in international law, and moreover, are not even able to present a unified view of the alleged conditions to be met in order to invoke “remedial secession”.

(ix) They have drawn a picture of the situation of Kosovo either before or after 1999 which does not correspond with reality.

(x) Even assuming that the right of “remedial secession” exists, the different conditions advanced would not be met in the case of Kosovo.

(xi) The applicability of the principle of self-determination must be analysed in light of the situation existing at the critical date, 17 February 2008.

(xii) Even assuming the existence of the doctrine of ”remedial secession” (*quod non*), at the critical date, the conditions of this so-called “right” are not met and it is not possible to find any legal justification for Kosovo’s secession under international law and hence providing a legal justification for the UDI; The new doctrine of “perennial remedial secession”, advanced for the first time in these proceedings, has no legal foundation and is contrary to the very purpose of the “remedial secession” doctrine.

Chapter 9

THE UDI IS CONTRARY TO THE INTERNATIONAL LEGAL REGIME ESTABLISHED BY SECURITY COUNCIL RESOLUTION 1244 (1999)

A. Introduction

361. In its Written Statement, Serbia has already demonstrated that Security Council resolution 1244 (1999) affirms its territorial integrity and excludes any unilateral attempt to change the international legal status of Kosovo, by mandating that any final status of Kosovo must be reached by way of negotiations, the result of which must be endorsed by the Security Council.[429]

362. It has been further demonstrated that the UDI constitutes an *ultra vires* act of the Assembly of Kosovo; contravenes the paramount administrative authority in Kosovo established by Security Council resolution 1244 (1999) and encroaches upon the reserved powers of the Special Representative of the Secretary-General; challenges the competences of the Security Council by unilaterally terminating Kosovo's interim status and the mandate of international presences established by said resolution; and, finally, violates procedural and substantive requirements for the conduct of negotiations and a final settlement set forth in Security Council resolution 1244 (1999).[430]

363. Serbia will now address the arguments submitted by a certain number of States, as well as by the authors of the UDI, concerning Security Council resolution 1244 (1999) and the legal regime it has established. In particular, it will be demonstrated, contrary to the written statements of some States, that:

(i) Security Council resolution 1244 (1999) imposes obligations upon all relevant actors.

[429] See, generally, WS Serbia, Chapter 8.
[430] See, generally, *ibid.*, Chapter 9.

(ii) Security Council resolution 1244 (1999) guarantees the territorial integrity of Serbia.[431]

(iii) Any final settlement has to be agreed upon by the parties under the auspices of the Security Council by way of negotiations excluding any form of non-consensual independence for Kosovo.

(iv) The process leading to a final settlement has not yet come to an end.

(v) Only the Security Council may make binding determinations as to the conclusion of the final status process.

(vi) The illegality of the UDI has not been remedied by any alleged form of acquiescence of United Nations organs.

B. Security Council Resolution 1244 (1999) Is Still in Force

364. It should be first noted, however, that is has been generally accepted that Security Council resolution 1244 (1999) continues to remain fully in force, the UDI notwithstanding. The only exception to this international consensus are the Kosovo local authorities, which have taken the position that they are under no obligation to abide by this resolution adopted by the Security Council under Chapter VII of the Charter,[432] thus challenging the authority of the Security Council for the maintenance of international peace and security.

C. Security Council Resolution 1244 (1999) Imposes Obligations upon All Relevant Actors

I Introduction

365. It has already been noted that the authors of the UDI and some States recognising the so-called "Republic of Kosovo" have strenuously argued that the UDI was not

[431] On the continuity between the FRY and the Republic of Serbia, see WS Serbia, Chapter 1, Section E, and *supra* paras. 293-309.

[432] As the Secretary-General put it in his latest report on the implementation of Security Council resolution 1244 (1999) dated 17 March 2009: "The Kosovo authorities (…) have repeatedly stated during the past months that resolution 1244 (1999) is no longer relevant and *that the institutions of Kosovo have no legal obligation to abide by it*." Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2009/149 (17 March 2009), para. 4 (emphasis added).

adopted by the Assembly of Kosovo and Provisional Institutions of Self-Government, but rather that the UDI was an act emanating from a so-called "constituent body" which met "to establish a new State".[433] The claim that the UDI did not emanate from the Provisional Institutions of Self-Government has apparently been made in an attempt to place the UDI and its creators outside the international legal regime established by Security Council resolution 1244 (1999), thereby purportedly enabling the authors of the UDI to unilaterally modify the international legal status of Kosovo.

366. As has been discussed in Chapter 1,[434] first, this claim is erroneous as evidence clearly shows that it was the Assembly of Kosovo that *as the Assembly of Kosovo* adopted the UDI on 17 February 2008, while the UDI was subsequently endorsed by the President and Prime Minister of Kosovo. This shows that the UDI is clearly an act of the Provisional Institutions of Self-Government in Kosovo.

367. Secondly, the mandatory international legal regime established by Security Council resolution 1244 (1999) applies to all in Kosovo, contrary to what is implied in the written contribution submitted by the authors of UDI.[435] Therefore, as will be demonstrated below, the question whether the UDI was adopted by the Provisional Institutions of Self-Government or by some other entity does not change the fact that the authors of the UDI were bound by the international legal regime for Kosovo and that the UDI should be examined for its accordance with this regime.

II The Provisional Institutions of Self-Government in Kosovo are bound by the international legal regime established by Security Council resolution 1244 (1999)

368. As already discussed in the Written Statement of Serbia,[436] the Provisional Institutions of Self-Government are bound by Security Council resolution 1244 (1999) and UNMIK regulations governing their work, in particular the

[433] See, e.g., WC Authors, para. 6.01.
[434] See *supra* paras. 31-41.
[435] See WC Authors, para. 9.02.
[436] See, e.g., WS Serbia, paras. 873-880.

Constitutional Framework. Indeed, these institutions were created as part of the international legal regime established by Security Council resolution 1244 (1999), and derive all their powers from this resolution and the Constitutional Framework.

369. This is not a controversial point, so it will suffice to mention briefly that the Constitutional Framework, which was adopted by the Special Representative of the Secretary-General "pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999",[437] provides that:

> "Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions in accordance with this Constitutional Framework and UNSCR 1244 (1999)."[438]

It further specifies that

> "[t]he Provisional Institutions of Self-Government and their officials shall:
> (a) Exercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework; […]"[439]

370. The Security Council confirmed the obligation of the Provisional Institutions of Self-Government to fully comply with Security Council resolution 1244 (1999) and the Constitutional Framework, not only by endorsing the Constitutional Framework,[440] but also by directly addressing Kosovo institutions. For example, in April 2002, the Security Council

> "encourage[d] the Provisional Institutions of Self-Government, in full cooperation with the Special Representative and *in strict*

[437] Constitutional Framework, preambular para. 2.
[438] Constitutional Framework, Article 1.1 (emphasis added).
[439] *Ibid.*, Article 2 (a).
[440] See, e.g., UN Doc. S/PRST/2001/27 (5 October 2001), **Dossier No. 52**.

compliance with resolution 1244 (1999), to take on the tasks assigned to them by the constitutional framework."[441]

371. It is clear therefore that the Provisional Institutions of Self-Government, which were created under the international legal regime established for Kosovo, are legally bound by Security Council resolution 1244 (1999) and the Constitutional Framework.

III All other relevant actors in Kosovo are bound by the international legal regime established by Security Council resolution 1244 (1999)

372. The international legal regime for Kosovo created by Security Council resolution 1244 (1999) does not bind only the United Nations, its member States and the Provisional Institutions of Self-Government in Kosovo. It also binds all other relevant actors, as will be demonstrated in the following section.

(1) Security Council resolutions on Kosovo preceding resolution 1244 (1999) were addressed to all relevant actors

373. The Security Council addressed the Kosovo Albanians from the very beginning of its involvement in the Kosovo crisis, as is clear from its resolutions 1160 (1998), 1199 (1998), and 1203 (1998). Thus, in resolution 1160 (1998), the Security Council emphasized that "all elements in the Kosovar Albanian community should pursue their goals by peaceful means only" and "call[ed] upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues".[442] This was repeated in the subsequent resolution 1199 (1998),[443] where, in addition, the Security Council strongly "demand[ed] that all parties, groups and individuals immediately cease hostilities and

[441] UN Doc. S/PRST/2002/11 (24 April 2002), p. 1. (emphasis added), **Dossier No. 55**.
[442] Security Council resolution 1160 (1998), paras. 2 and 4, **Dossier No. 9**.
[443] *Ibid.*, paras. 3 and 6.

maintain a ceasefire."[444] Finally, the obligation of the Kosovo Albanians to comply with Security Council resolutions on Kosovo could not be made clearer in resolution 1203 (1998) in which the Council

> "4. Demands also that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo".[445]

374. In its resolution 1244 (1999), the Security Council recalled its previous resolutions on Kosovo[446] and thereby expressly incorporated them, and the obligations they impose on all relevant actors, into the international legal regime applicable to Kosovo. Even more importantly, resolution 1244 (1999) itself created obligations for all relevant actors in Kosovo.

(2) Security Council resolution 1244 (1999) created obligations for all relevant actors in Kosovo

375. One of the main purposes of Security Council resolution 1244 (1999) is to create conditions in which a political solution to the Kosovo crisis would be possible. This by definition requires the involvement not only of Serbia, as the sovereign territorial State, as well as the Security Council and other parts of the international community, but also all other relevant actors in the crisis, *viz.* Kosovo Albanians. The Security Council has both regulated the interim administration of Kosovo pending a political settlement and determined the basic principles of a political solution to the Kosovo crisis. In this regard, the Security Council created legal obligations binding on all relevant actors by virtue of Chapter VII of the United Nations Charter.

376. This is clear from the debate at the Security Council's 4011th meeting on 10 June 1999, when resolution 1244 (1999) was adopted. The obligations of the KLA

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[444] *Ibid.*, para. 1.
[445] Security Council resolution 1203 (1998), para. 4, **Dossier No. 20**.
[446] Security Council resolution 1244 (1999), preambular para. 2, **Dossier No. 34**.

under the resolution were mentioned by the Russian Federation, the United States, Japan and Belarus,[447] while the representative of the United Kingdom said that

> "*[t]his resolution applies also in full to the Kosovo Albanians*, requiring them to play their full part in the restoration of normal life to Kosovo and in the creation of democratic, self-governing institutions. The Kosovo Albanian people and its leadership must rise to the challenge of peace by accepting the obligations of the resolution, in particular to demilitarize the Kosovo Liberation Army (KLA) and other armed groups."[448]

377. The ambassador of Germany, speaking on behalf of the European Union, as well as on behalf of Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Cyprus, Iceland and Liechtenstein, made the following statement:

> "The European Union affirms its full support for the solution to the Kosovo crisis outlined in the resolution and calls upon the authorities of the Federal Republic of Yugoslavia and all Kosovo Albanians fully and unconditionally to cooperate with the international security presence and the international civil presence to that end."[449]

378. Some of the obligations under Security Council resolution 1244 (1999) are couched in very specific terms, while some are more general, depending on the subject-matter of the obligation in question. Thus, when it needed to ensure swift disarmament of the KLA, the Security Council was very precise in demanding that "the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization ..."[450] Similarly, due

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[447] Mr. Lavrov (Russian Federation), UN Doc. S/PV.4011 (10 June 1999), p. 8, **Dossier No. 33**; Mr. Burleigh (United States), *ibid.*, pp. 14-15; Mr. Satoh (Japan), UN Doc. S/PV.4011 (Resumption 1) (10 June 1999), p. 3, **Dossier No. 33**; Mr. Sychov (Belarus), *ibid.*, p. 6.
[448] Mr. Greenstock (United Kingdom), UN Doc. S/PV.4011 (10 June 1999), p. 18 (emphasis added), **Dossier No. 33**.
[449] Mr. Kastrup (Germany), UN Doc. S/PV.4011 (Resumption 1) (10 June 1999), p. 2, **Dossier No. 33**.
[450] Security Council resolution 1244 (1999), para. 15, **Dossier No. 34**.

to the need for the rapid early deployment of international civil and security presences, the Security Council "demand[ed] that the parties cooperate fully in their deployment."[451] In contrast, by deciding that a political solution to the Kosovo crisis shall be based on the general principles outlined in annexes 1 and 2 to the resolution, the Security Council imposed general – but not less binding – obligations on the parties. For example, these include the obligation to participate in "a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo".[452] The facilitation of this political process is one of the tasks of the international civil presence.[453]

379. The obligations set forth by the Security Council have been further developed and specified in the practice of implementing resolution 1244 (1999). In this context, it should also be noted that in addition to obligations directly imposed by resolution 1244 (1999), all relevant actors also have obligations that flow from decisions and regulations adopted by UNMIK. As already discussed in the Written Statement of Serbia,[454] resolution 1244 (1999) provided UNMIK, headed by the Special Representative of the Secretary-General, with the supreme administrative authority over Kosovo. This means that the binding force of UNMIK decisions and regulations upon all persons in Kosovo has its source in Security Council resolution 1244 (1999).

380. The binding character of the international legal regime created by Security Council resolution 1244 (1999) and its applicability to all relevant actors, including the Kosovo Albanian community, was repeatedly confirmed by the Security Council and the Secretary-General.

(3) Subsequent practice of the Security Council

381. When in April 2000 a mission of the Security Council visited Kosovo, its terms of reference clearly showed an understanding that all relevant parties are bound by

[451] *Ibid.*, para. 8.
[452] *Ibid.*, Annex 1, para. 6.
[453] *Ibid.*, para. 11 (e).
[454] WS Serbia, para. 705 *et seq.*

Security Council resolution 1244 (1999). The objectives of the mission were defined as follows:

> "2. The Council has therefore decided to send a mission there headed by Ambassador A. Chowdhury on 28 and 29 April 2000, with the following objectives:
>
> (a) To look for ways to enhance support for the implementation of resolution 1244 (1999);
>
> (b) To observe the operations of the United Nations Interim Administration Mission in Kosovo (UNMIK) and its activities and to gain a greater understanding of the situation on the ground in order to comprehend better the difficult challenges faced by UNMIK;
>
> (c) *To convey a strong message to all concerned on the need to reject all violence; ensure public safety and order; promote stability, safety and security; support the full and effective implementation of resolution 1244 (1999); and fully cooperate with UNMIK to this end*;
>
> (d) To review ongoing implementation of the prohibitions imposed by Security Council resolution 1160 (1998) of 31 March 1998."[455]

382. The Security Council conducted a further mission to Kosovo in June 2001, the terms of reference of which were worded almost identically as those of the previous mission.[456]

383. In October 2001 the Security Council adopted a presidential statement, which in the relevant part stated:

> "The Security Council welcomes the elections to be held on 17 November as a basis for the establishment of democratic self-

[455] UN Doc. S/2000/320 (17 April 2000) (emphasis added), **Dossier No. 42**.
[456] UN Doc. S/2001/600 (19 June 2001), **Dossier No. 50**.

> governing institutions as specified in the Constitutional Framework for Provisional Self-Government, under which the people of Kosovo, Federal Republic of Yugoslavia, will enjoy substantial autonomy in accordance with resolution 1244 (1999). *It emphasizes the responsibility of Kosovo's elected leaders to respect fully the final status provisions of resolution 1244 (1999).* It reaffirms its commitment to the full implementation of resolution 1244 (1999), which remains the basis for building Kosovo's future."[457]

384. This was reaffirmed in the Security Council presidential statement issued in November 2001, with the following words:

> "The Security Council reaffirms the statement of its President of 5 October 2001 (S/PRST/2001/27). It encourages the further development of a constructive dialogue between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the authorities of the Federal Republic of Yugoslavia. It emphasizes the responsibility of the provisional institutions of self-government and all concerned to respect fully the final status provisions of resolution 1244 (1999). It underlines its continued commitment to the full implementation of resolution 1244 (1999), which remains the basis for building Kosovo's future."[458]

385. Subsequently, in response to the adoption by the Kosovo Assembly of a resolution affirming Kosovo's "territorial integrity" and the nullification of that resolution by the Special Representative of the Secretary-General,[459] in May 2002, the Security Council adopted a presidential statement which *inter alia* stated that

> "*The Security Council calls on Kosovo's elected leaders to focus their attention on the urgent matters for which they have*

[457] UN Doc. S/PRST/2001/27 (5 October 2001) (emphasis added), **Dossier No. 52**.
[458] UN Doc. S/PRST/2001/34 (9 November 2001) (emphasis added).
[459] WS Serbia, paras. 701-702.

> *responsibility, in accordance with resolution 1244 (1999) of 10 June 1999 and the Constitutional Framework.* Concrete progress in those areas is of paramount importance to improve the life of the people."[460]

386. In February 2003, the Security Council called upon all communities to work towards the goal of a multiethnic and democratic Kosovo, and "actively participate in public institutions as well as decision-making process, and integrate into society" and condemned "all attempts to establish and maintain structures and institutions as well as initiatives that are inconsistent with resolution 1244 (1999) and the Constitutional Framework." The Council also called for the authority of UNMIK "to be respected throughout Kosovo".[461]

(4) Subsequent practice of the Secretary-General

387. The binding character of the obligations under Security Council resolution 1244 (1999) and UNMIK regulations upon all relevant actors and their duty to cooperate in the implementation of this international legal regime has been repeatedly emphasized by the United Nations Secretary-General. For example, his first report on implementation of Security Council resolution 1244 (1999) *inter alia* states the following:

> "I strongly encourage all ethnic communities and parties in Kosovo to demonstrate restraint and tolerance and fully cooperate with the international community in the implementation of tasks defined by the Security Council in its resolution 1244 (1999). I wish to remind them that the only legitimate path to any future political settlement for Kosovo is through the mechanisms envisioned in Council resolution 1244 (1999). I also urge the Government of the Federal Republic of Yugoslavia to cooperate fully with the provisions of that resolution."[462]

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[460] UN Doc. S/PRST/2002/16 (24 May 2002) (emphasis added), **Dossier No. 56**.
[461] UN Doc. S/PRST/2003/1 (6 February 2003), **Dossier No. 61**.
[462] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779 (12 July 1999), para. 119, **Dossier No. 37**.

388. Even more explicit is his April 2003 report which contains the following statement:

> "The tendency of local Kosovo Albanian leaders and the Provisional Institutions to focus on symbols and image and to publicly promote positions contrary to resolution 1244 (1999) is a cause for concern, as well as the action taken by the Kosovo Assembly on higher education and its refusal to take into account vital interests of minority communities. This amounts to a direct challenge to resolution 1244 (1999) and the Constitutional Framework, as well as to UNMIK's authority under those documents.
>
> *All local leaders should adhere strictly to resolution 1244 (1999) and the Constitutional Framework.* They should also keep their political differences separate from the activities of the Provisional Institutions, and work together to consolidate these institutions by focusing on substance and practical results, instead of holding institutional development hostage to political or ethnic differences. The Provisional Institutions and municipalities need to focus on their areas of responsibility and on what matters directly to all the people of Kosovo, including those waiting to return."[463]

IV Conclusion

389. In conclusion, Security Council resolution 1244 (1999) created an international legal regime for Kosovo that binds all relevant actors. The binding international obligations for all relevant actors are contained in the resolution itself but also in documents implementing it, most notably regulations adopted by the Special

[463] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2003/421 (14 April 2003), paras. 53-55 (emphasis added), **Dossier No. 62**.

Representative of the Secretary-General in Kosovo. This international legal regime is applicable not only to the Provisional Institutions of Self-Government (which are specifically bound by it by the Constitutional Framework) but also to all other actors of relevance for the solution of the Kosovo crisis. In particular, as is clear from the practice of the Security Council and the Secretary-General, this international regime applies, without exception, to the political leaders of all communities in Kosovo.

D. The Interpretation of Security Council Resolution 1244 (1999)

390. At this point it is pertinent to deal, as a preliminary matter, with some general issues of interpretation of Security Council resolution 1244 (1999). More specifically, it will be demonstrated that limitations on the sovereignty of States concerned cannot be presumed; that Security Council resolution 1244 (1999) has to be interpreted in light of the then ongoing military action; that its primary goal is to secure human rights for the inhabitants of Kosovo; and, finally, that the drafting history of Security Council resolution 1244 (1999) excludes the possibility of a unilateral secession of Kosovo.

I General rule of interpretation

391. Under Chapter VII of the Charter, the Security Council has broad powers to provide for enforcement measures which may significantly encroach upon the sovereign rights of member States, including limiting the right of a member State to exercise the full range of sovereign rights over its own territory for a certain period, such as in the case of Serbia's right to govern Kosovo.

392. In such cases, Security Council resolutions must be narrowly construed since there is a presumption against limitations of the rights of States, in particular where a given resolution is ambiguous. As put by two learned commentators on the Charter:

> "… *Chapter VII resolutions should, in general, be interpreted narrowly.* If their wording is ambiguous, this most often reflects

> a compromise and therefore indicates that no agreement has been reached on a certain measure. Such agreement of nine members and the absence of objection by the permanent members, however, constitute the sole authority upon which this measure rests. In their absence, the basis of such a far-reaching encroachment upon the rights of a member State as caused by enforcement action is doubtful. For SC resolutions under Chapter VII, it seems therefore warranted to have recourse to the old rule of interpretation according to which *limitations of sovereignty may not be lightly assumed*."[464]

393. Applied to the case at hand, this means that the temporary restrictions on the administration of Serbia over Kosovo imposed by Security Council resolution 1244 (1999) must be interpreted narrowly. It would be astonishing to use them as the basis for an interpretation that would result in a right of Kosovo to secede. Moreover, Security Council resolution 1244 (1999), unlike other Security Council resolutions,[465] including resolutions adopted during the very same period of time,[466] does *not* contain any reference whatsoever to the right of self-determination,[467] and even less a reference to a right of secession.[468] To the contrary, it instead explicitly refers to and reaffirms the territorial integrity of Serbia, and this is the context in which the temporary restrictions on the administration of Serbia over Kosovo must be interpreted.[469]

II The background of Security Council resolution 1244 (1999): the military intervention against the FRY

394. Security Council resolution 1244 (1999) was drafted while the military intervention against the FRY was ongoing, which intervention blatantly violated the prohibition of the use of force, as contained in Article 2, paragraph 4 of the

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[464] J. Frowein & N. Krisch, "Introduction to Chapter VII", in B. Simma (ed.), *The Charter of the United Nations: A Commentary,* Vol. I (2nd ed., 2002), p. 713, MN. 35 (footnote omitted).
[465] See WS Serbia, para. 785 *et seq*.
[466] WS Serbia, para. 788.
[467] See, also, WS Slovakia, para. 24.
[468] See generally WS Serbia, Chapters 8 and 9.
[469] See, also, *infra* para. 411 *et seq*.

Charter of the United Nations. Even more important in the current context, this unilateral use of force also seriously challenged the primary responsibility of the Security Council for the maintenance of international peace and security, since it was undertaken without any form of Security Council approval or endorsement.

395. Given this background, the very first preambular paragraph of Security Council resolution 1244 (1999) not only referred to the purposes and principles of the Charter of the United Nations, but also firmly recalled "the primary responsibility of the Security Council for the maintenance of international peace and security". The Security Council also determined that the situation in the region continued to constitute a threat to international peace and security.[470]

396. These two paragraphs of Security Council resolution 1244 (1999), when read together, confirm that the Security Council decided to take all necessary steps to deal with the situation and keep it fully under control and subject to its authority. This shows that Security Council resolution 1244 (1999) excludes any form of unilateral action without the Security Council's endorsement or approval.

397. Erroneously interpreting Security Council resolution 1244 (1999) as containing or endorsing a unilateral right of secession contrary to general international law would establish a causal link between the illegal use of military force that preceded this resolution and a non-consensual territorial change attempted by the UDI.

398. The interpretation that Security Council resolution 1244 (1999) excludes any right of secession is further supported by the position taken by States having participated in the aerial bombing of the FRY. Prior to their military campaign, they themselves had merely advocated an enhanced autonomy status of Kosovo *within* the FRY. Besides, the self-proclaimed goal of the operation was not to bring about a secession of Kosovo, but rather to solely avoid an alleged "humanitarian catastrophe".[471] For example, the Berlin European Council of 24/25 March 1999 *expressis verbis* had stated:

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[470] See preambular para. 12.
[471] NATO Press release 1999 (040), 23 March 1999.

"The international community's only objective is to find a political future for the Kosovo, on the basis of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia …".[472]

III The object and purpose of Security Council resolution 1244 (1999): securing human rights for all inhabitants of Kosovo

399. The understanding that Security Council resolution 1244 (1999) aims at protecting the human rights of all ethnic groups in Kosovo underlies the whole text of the resolution. This is also evidenced by the preamble of the resolution, which assists in its interpretation by giving guidance as to its object and purpose.[473] Security Council resolution 1244 (1999) specifically provides that it was adopted "to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia".[474]

400. As already discussed, as a general rule of interpretation, it cannot be presumed that the Security Council wanted to further encroach upon the sovereignty of the FRY than that which was considered necessary to prevent future human rights violations in Kosovo. Accordingly, only measures which are necessary and required to resolve this situation fall within the ambit of the resolution.

401. Moreover, by recalling the mandate of the International Tribunal for the Former Yugoslavia,[475] the Security Council further underlined that it wanted to focus on the individual responsibility for crimes committed in Kosovo during the conflict. This again underlines the aim of Security Council resolution 1244 (1999), namely to prevent the repetition of any form of serious human rights violations, and, in the long term, to provide for a final status where such acts were to be excluded.

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[472] Berlin European Council, 24 and 25 March 1999, Presidency Conclusions, Part III - Statements on Kosovo, available at: http://www.europarl.europa.eu/summits/ber2_en.htm#partIII. This is also confirmed by statements made during these very proceedings. Thus, for example, France states: "les Etats membres de l'Otan ont alors jugé devoir recourir á la force contre Belgrade, afin de mettre un terme à une escalade continue de la violence menacant gravement la sécurité de l'ensemble de la population civile au Kosovo (…)",WS France, para. 16.

[473] M. C. Wood, "The Interpretation of Security Council Resolutions", *2 Max Planck Yearbook of the United Nations* (1998), p. 86.

[474] Preambular para. 4.

[475] See preambular para. 8.

402. In this regard, a final status guaranteeing substantial autonomy and self-government of Kosovo within the FRY was considered a sufficient guarantee for the protection of human rights of the population of Kosovo.

403. It is in line with this, that the Security Council not only excluded any form of unilateral secession by:

> "Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia …"

but also reaffirmed its call:

> "for substantial autonomy and meaningful self-administration for Kosovo"

which again *a contrario* excludes any possibility of a unilateral secession against the will of the territorial State, i.e. Serbia.[476]

IV Drafting history of Security Council resolution 1244 (1999)

404. Serbia has already demonstrated that the drafting history of Security Council 1244 (1999) does not provide support for the proposition that the resolution provides for a unilateral right of secession for a minority of the population of the FRY.[477] At the time, *none* of the members of the Security Council mentioned or even alluded to the possibility of independence for Kosovo and even less to the possibility of a unilateral secession.

405. Still, attempts have been made to interpret the statement of the then representative of the FRY as an acknowledgment that this resolution contains a right of secession,[478] which is a deliberate misreading of his statement.

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[476] As to the temporal scope of application of this guarantee of Serbia's territorial integrity see *infra* para. 414 *et seq.*
[477] See WS Serbia, Chapters 8 and 9, and, in particular, para. 757 *et seq.* and para. 913 *et seq.*
[478] WS United States, p. 78-79; WC Authors, para. 4.22.

406. At the time, Mr. Jovanovic stated:

> "Furthermore, in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and *opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia*."[479]

407. As becomes clear from the first part of the quotation, Mr. Jovanovic was merely describing the *de facto* situation provided for by Security Council resolution 1244 (1999) as a "protectorate". This was a political statement. It merely served to describe, in non-technical terms, the exercise of governmental authority in Kosovo by the United Nations, as already outlined in Serbia's Written Statement.[480]

408. Similarly, the reference to the "possibility" of secession by Kosovo could only be understood also as a political statement and a warning that the formula used in paragraph 11 might be misused for a future attempt to secession. Even more importantly, nothing in Mr. Jovanovic's statement can be understood as a renunciation of Serbia's sovereignty over Kosovo.

VSecurity Council resolution 1244 (1999) and its predecessors[481]

409. It must also be pointed out that Security Council resolution 1244 (1999) recalled previous resolutions of the Security Council dealing with the situation in Kosovo. All of them provided for an autonomous status of Kosovo as part of the FRY, and also provided for a *negotiated* solution, as was *inter alia* admitted by the United Kingdom.[482]

410. It is true that Security Council resolution 1244 (1999) was different in nature, as compared to resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999),

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[479] UN Doc. S/PV.4011 (10 June 1999), p. 6, **Dossier No. 33**.
[480] WS Serbia, Chapter 8.
[481] For a further analysis see WS Romania, paras. 26-40.
[482] WS United Kingdom, para. 6.24.

in that it provided for international civilian and military presences in Kosovo. However, there is absolutely no hint of a suggestion in this resolution that it constituted a departure from the long-standing goal and requirement of the Security Council to bring about a negotiated settlement to the situation in Kosovo, which would respect the territorial integrity of the FRY, and be endorsed by the Security Council.

E. The Reaffirmation of the Territorial Integrity of the FRY/ Serbia

411. It has been further argued that the references to the territorial integrity of the FRY contained in Security Council resolution 1244 (1999) are, on the one hand, not legally binding as such,[483] and on the other hand, only applicable to the "interim phase" until a final settlement has been reached.[484] Finally, it has also been argued that the protection of Serbia's territorial integrity is of limited duration, given the situation prevailing during the current interim phase.[485] All of these propositions are unfounded.

I The legal character of the reaffirmation of Serbia's territorial integrity

412. As already shown, the notion of territorial integrity fundamentally underpins the entire system of international law.[486] It is thus not a right that is granted by the Security Council but is inherent in sovereignty and, as such, is protected by the United Nations Charter. Accordingly, there was no need for the Security Council to *decide* that Serbia's territorial integrity must be safeguarded, given that its territorial integrity is already protected under general international law.[487] This is

[483] WS Austria, para. 31; WS Czech Republic, p. 9; WS Denmark, pp. 10-11; WS France, para. 2.28; WS Poland, para. 7.2; WS Switzerland, para. 43; WS United Kingdom, para. 6.12; WC Authors, para. 9.29 *et seq.*

[484] WS Albania, paras. 101-102; WS Austria, para. 32; WS Czech Republic, p. 10; WS Denmark, p. 11; WS France, para. 2.31; WS Poland, para. 7.2; WS Switzerland, para. 45; WS United Kingdom, para. 6.12; WC Authors, para. 9.30.

[485] WS Germany, pp. 38 and 40; WS Ireland, para. 24; WS Luxembourg, para. 26; WS United States, pp. 68-74.

[486] WS Serbia, Chapters 6 and 8. See, also, *supra* para. 228 *et seq.*

[487] WS Serbia, Chapters 6 and 8.

the reason why the Security Council simply *reaffirmed* Serbia's territorial integrity – a fact acknowledged by various written statements.[488]

413. This is also confirmed in Security Council practice with regard to other situations where the Council has similarly *reaffirmed* the territorial integrity of a given member State.[489]

II The reaffirmation of Serbia's territorial integrity is not limited to the interim period

414. It has also been argued that the effect of the reaffirmation of Serbia's territorial integrity is limited in time and that it does not extend to the issue of the final status of Kosovo.[490]

415. In that regard it has to be noted that the UDI does not and cannot amount to a final settlement within the meaning of Security Council resolution 1244 (1999) – a question that has already been addressed,[491] and that will also be further dealt with below.[492] Accordingly, the interim status has not yet come to an end and could not have been brought to an end unilaterally. Thus, the reaffirmation of Serbia's

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[488] WS United States, p. 69; see also WS Argentina, paras. 81-82; WS Cyprus, para. 97; WS Russian Federation, para. 58; WS Spain, para. 31 *et seq*; WC Authors, para. 9.29.

[489] As one commentator put it with regard to the Council's practice concerning Iraq:

> "Many resolutions concerning Iraq also *reaffirm* the commitment of all member States to the sovereignty and territorial integrity of Iraq. That *must mean that it is impossible to unilaterally disregard the territorial integrity* of Iraq by military action. *One may read the formal confirmation of the territorial integrity of Iraq to show that the Security Council had no intention to question the existing territory of the State of Iraq.* However, *territorial integrity is a term of art in international law.* (…) Therefore, *a state particularly concerned by resolutions of the Security Council adopted under Chapter VII must be able to rely on the clear wording of that guarantee of territorial integrity*. Iraq would be able to argue that the Security Council has confirmed the territorial integrity against any use of force and *only the Council itself, by a specific decision taken under Chapter VII, may authorize the disregard of territorial integrity* through the use of force."

See J.A. Frowein, "Unilateral Interpretation of Security Council Resolutions - a Threat to Collective Security?" in V. Götz et al. (ed.), *Liber amicorum Günther Jaenicke* (1998), pp. 97, 108 (emphasis added; footnote omitted).

[490] WS Albania, paras. 101-102; WS Austria, para. 32; WS Czech Republic, p. 10; WS Denmark, p. 11; WS France, para. 2.31; WS Germany, pp. 38, 40; WS Ireland, para. 24; WS Luxemburg, para. 26; WS Poland, para. 7.2; WS Switzerland, para. 45; WS United Kingdom, para. 6.12; WS United States, pp. 68-74; WC Authors, para. 9.30.

[491] WS Serbia, para. 913 *et seq*.

[492] See *infra* para. 436 *et seq*.

territorial integrity would continue to be fully applicable, even if one were to consider that it does not cover the future status of Kosovo, which it does.

416. Besides, the guarantee of Serbia's territorial integrity also refers to and encompasses the determination of Kosovo's future status. In Security Council resolution 1244 (1999), Serbia's territorial integrity is reaffirmed "as set out in the Helsinki Final Act and annex 2". Yet, there is no hint whatsoever in the Helsinki Final Act that its principles are, in one way or the other, limited in time or not applicable to specific types of situations.

417. The authors of the UDI, in a clear acknowledgment of its incompatibility with the Helsinki Final Act, try to deprive the latter of any binding effect.[493] However, the Helsinki Final Act has been widely recognised as an instrument of fundamental importance, as it declares and interprets the major principles of international law.[494]

418. It is also a truism that the Helsinki Final Act does not contain a general prohibition to change boundaries[495] – yet any such change, in order to be in line with the Helsinki Final Act, must necessarily take place "in accordance with international law, by peaceful means and *by agreement*".[496] This, in particular, presupposes the agreement of the State which has title over the territory in question, i.e. Serbia.

419. With regard to the reference to Annex 2 in Security Council resolution 1244 (1999), it must be noted that it is contained in the paragraph of the resolution's preamble that reaffirms Serbia's territorial integrity and which does *not* contain any temporal limitation. Moreover, the reference to Annex 2 cannot incorporate a temporal limitation because such a limitation would contradict the concomitant reference to the Helsinki Final Act in the same provision; the plainly absurd result of applying a temporal limitation is that the territorial integrity of Serbia would be reaffirmed on a permanent basis by the reference to the Helsinki Final Act, and at

[493] WC Authors, para. 9.30.
[494] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 23.
[495] WC Authors, para. 9.30.
[496] Emphasis added.

the same time, for a limited duration, by the reference to Annex 2. This cannot be the case.

420. Furthermore, the relevant provision in Security Council resolution 1244 (1999) reaffirms the sovereignty and territorial integrity "of the Federal Republic of Yugoslavia *and the other States in the region*".[497] If this guarantee were limited in time, it would be limited not only with respect to Serbia, but also with respect to "the other States in the region" which certainly could not have been the intention of the Security Council.

421. Therefore, the guarantee of the sovereignty and territorial integrity of Serbia in Security Council resolution 1244 (1999) incorporates the substantive content of Annex 2, and in particular its para. 8, without at the same time also incorporating its temporal limitations. This is confirmed by the fact that paragraph 1 of resolution 1244 (1999) also makes a reference to Annexes 1 and 2 when it provides that a political solution to the Kosovo crisis shall be based on the general principles contained therein. This reference would make no sense if it were read as including the same temporal limitations that apply to the content of the annexes, because it cannot be that the Security Council intended the political solution to the Kosovo crisis to be provisional.

422. The fact that the reaffirmation of Serbia's territorial integrity is not limited to the interim status is also confirmed by yet another consideration. Limitations of Serbia's sovereignty with regard to Kosovo are *expressly* mentioned in Security Council resolution 1244 (1999), such as e.g. the obligation to withdraw military forces from Kosovo. It would be surprising, to say the least, to consider a fundamental limitation of Serbia's territorial integrity, namely the obligation to surrender permanently a substantial part of its national territory, to be provided only in a mere cross-reference to an Annex.[498]

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[497] Emphasis added.

[498] See, also, with regard to the more general dangers of accepting limitations to territorial integrity *supra* para. 391-393.

III Security Council resolution 1244 (1999) did not touch upon Serbia's title to territory

423. It has also been argued that the reaffirmation of Serbia's territorial integrity and sovereignty contained in Security Council resolution 1244 (1999) must be interpreted in light of the fact that by virtue of Security Council resolution 1244 (1999) the FRY had been denied *de facto* control over Kosovo in recent years.[499] This is plainly wrong, considering the fact that Security Council resolution 1244 (1999) deliberately decided *not* to detach Kosovo from the FRY, but only to provide for its *administration* by the United Nations. Accordingly, Serbia has retained full title with regard to Kosovo – a fact the Security Council specifically reaffirmed by referring to and reiterating the notions of sovereignty and territorial integrity of the FRY.

424. This was acknowledged, *inter alia,* by the Government of the United Kingdom in the *Behrami* case before the European Court of Human Rights:

> "*The legal status of Kosovo was not, however, changed by resolution 1244.* It remained part of what was then the Federal Republic of Yugoslavia."[500]

IV The reference to the Rambouillet Accords in Security Council resolution 1244 (1999)

425. Much has been made in various written statements of the reference in Security Council resolution 1244 (1999) to the Rambouillet Accords,[501] and in particular, the reference to the "will of the people" contained therein, a matter that Serbia has already addressed.[502] Further to that, Serbia wishes to now add the following comments.

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[499] WC Authors, para. 9.31.

[500] European Court of Human Rights, *Behrami and Behrami v. France*, (Application No. 71412/01), Observations of the Government of the United Kingdom, 22 September 2006, para. 8 (emphasis added).

[501] WS Albania, para. 98; WS Denmark, p. 10; WS Estonia, p. 14; WS France, paras. 2.31 *et seq.*; WS Germany, pp. 39 *et seq.*; WS Luxembourg, para. 21; WS Switzerland, para. 47; WS United Kingdom, para. 3.7; WS United States, pp. 64 *et seq.*; WC Authors, paras. 9.12 *et seq.*

[502] WS Serbia, paras. 340 *et seq.*

426. The relevant part of the Rambouillet Accords, i.e. Chapter 8, Article 1, paragraph 3 thereof, contains several important features which have not been dealt with by those States which merely refer to the "will of the people" mentioned therein. The provision reads:

> "Three years after the entry into force of this Agreement, an *international meeting* shall be convened to determine a *mechanism* for a final settlement for Kosovo, on the basis of the will of the *people*, *opinions of relevant authorities*, *each Party's efforts regarding the implementation of this Agreement*, and the *Helsinki Final Act*, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."[503]

427. *First*, said provision does not provide for a final settlement as such, but rather only for a *mechanism* for a final settlement, i.e. it only provides *how* an eventual final settlement should be reached, but not what its content would be.

428. *Second*, the very term "international meeting" presupposes the involvement of international actors, as well as the participation of the State most directly concerned, namely Serbia, thus *per se* excluding any form of unilateral action by any of the parties to the conflict.

429. *Third*, Chapter 8, Article 1, paragraph 3 of the Rambouillet Accords is the only place where the text uses the notion of "people", while otherwise always referring to the "population of Kosovo". Thus, it may be inferred that the "people" referred to in Chapter 8, Art. 1, paragraph 3 is *not* identical to the population of Kosovo.[504]

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[503] Chapter 8, Art. I, para. 3 (emphasis added).

[504] It is therefore misleading to state that the Rambouillet Accords "prévoient explicitement que le réglement défintif de la question du statut devra respecter la volonté de *la population du Kosovo*", but see WS Switzerland, para. 46 (emphasis added). The same consideration applies, *mutatis mutandis*, with regard to the blunt assumption, made by Albania, that under the agreement the final status of Kosovo "would be determined on the basis of the will of the people of Kosovo" (*sic*!), which assumption, besides, disregards the other factors to be also taken into account. It is telling that, *inter alia*, Denmark in its Written Statement on the one hand uses the term "will of the *people*" as used in the Rambouillet Accords, while on the other refers to the "*population* of Kosovo", see WS Denmark, p. 10 (emphasis added).

430. *Fourth*, the text provides that any such determination of a possible mechanism shall by based on all these factors taken together, namely the *will of the people*, *opinions of relevant authorities*, *each Party's efforts regarding the implementation of this Agreement*, and finally the *Helsinki Final Act*. It does so without setting up any form of hierarchy among these four factors, which therefore have *all* to be taken into consideration *on an equal footing*. Given the inclusion of these four relevant factors (including the reference to the guarantee of territorial integrity as contained in the Helsinki Final Act), it must be concluded that neither the Rambouillet Accords nor Security Council resolution 1244 (1999) allow a unilateral decision to be taken by one of the parties on the outcome of this process.

431. *Fifth*, the Kosovo Albanian side formally proposed during the Rambouillet negotiations an explicit reference to the principle of self-determination and further a proviso providing that the final status would be unilaterally determined or confirmed by way of a referendum, which would have paved the way for a unilateral declaration of independence after the three-year interim period provided for in the Rambouillet Accords.[505] These Kosovo Albanian proposals were rejected and were, on purpose, *not* included in the text.[506]

432. Given this drafting history, the reference to the Rambouillet Accords in Security Council resolution 1244 (1999) cannot now be interpreted as providing for the possibility of unilateral action without endorsement by the Security Council.

VThe notion of self-government

433. It has also been claimed that the reference to "self-government", as contained in Security Council resolution 1244 (1999),[507] encompasses both "self-government"

[505] See "Statement on Fundamental principles for a Settlement of the Kosovo Question Issued by the Government of the Republic of Kosovo, 3 November 1998", para. 10, reprinted in H. Krieger, *The Kosovo conflict and international law: an analytical documentation 1974-1999* (2001), pp. 165-166.

[506] This fact was acknowledged in the Written Statement of the United States, see WS United States, p. 67.

[507] See op. paras. 11 (a), (c), as well as Annex 1, principle 6 and Annex 2, para. 8 of Security Council resolution 1244 (1999), **Dossier No. 34**.

of Kosovo within Serbia, and the creation of an independent State.[508] Yet, as has already been demonstrated in detail in Serbia's Written Statement, the very term "self-government"/"auto-administration" in the English and French versions of Security Council resolution 1244 (1999), as well as the context within which it is used, preclude any possibility of a unilateral declaration of independence by the Provisional Institutions of Self-Government.[509]

F. Security Council Resolution 1244 (1999) Excludes Any Unilateral Determination of the Future Status of Kosovo by the Provisional Institutions of Self-Government

434. Serbia's Written Statement has already demonstrated that Security Council resolution 1244 (1999) excludes any unilateral determination of the future status of Kosovo and that, in particular, the notion of "political settlement" *per se* excludes any attempt to unilaterally create a *fait accompli*. Some written statements have clearly neglected this important point, as will be demonstrated below.

I The requirement of negotiations

435. Paragraph 8 of Annex 2 clearly establishes that negotiations are to take place between the parties.[510] In accordance with Annex 2, it is these negotiations, and only these negotiations, that will lead to a final settlement and thereby also provide for the final status of Kosovo to be agreed upon by the parties. It follows that the references to the Helsinki Final Act and Annex 2 of Security Council resolution 1244 (1999) in the preambular clause of Security Council resolution 1244 (1999) reaffirming Serbia's territorial integrity, must be understood as precluding unilateral secession.

[508] WS United Kingdom, para. 6.15.
[509] WS Serbia, para. 732 *et seq*.
[510] WS Serbia para. 755 *et seq*.

II The notion of "political settlement"

436. Under paragraph 11 (a) of Security Council resolution 1244 (1999), UNMIK shall exercise its competences "pending a final settlement". It has been argued that the UDI constitutes such a "political settlement".[511]

437. Yet, as was already demonstrated in various written statements,[512] the ordinary meaning of "settlement" precludes a unilateral act such as the UDI as constituting a "settlement". Furthermore, it must also be noted that the term "settlement"/"règlement", as used in paragraph 11 (a) of Security Council resolution 1244 (1999), is identical to the term "settlement", as used in Article 2, paragraph 3, as well as Article 33, of the Charter of the United Nations, which both preclude methods leading to any kind of unilateral *fait accompli*.

438. This requirement for both sides to participate in order for a "settlement" to be reached was also confirmed as early as 1999 in a statement by the Contact Group.[513] The Chairman's Conclusions underlined the mandatory interlinkage between negotiations and a political settlement by calling upon both parties to commit themselves "to a process of *negotiation leading to a political settlement*".[514]

439. As a matter of fact, such a link had previously been established in a more general context in the Manila Declaration on the Peaceful Settlement of International Disputes.[515] It has also to be noted that international practice commonly uses the notion of "settlement" or "political settlement" in the context of *agreed* solutions which have been reached, or are envisaged as being reached, by way of

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[511] WC Authors, para. 9.10; WS Austria, para. 29 *et seq.*; WS Albania, para. 98; see, based on the respective conclusions, also WS France, para. 2.28 *et seq.* and para. 2.40 *et seq.*; WS Estonia, p. 14; WS Czech Republic, p. 11; WS Latvia, para. 4; WS United Kingdom, para. 6.39 *et seq.*

[512] WS Russian Federation, para. 59 *et seq.*; WS Cyprus, para. 98; WS Romania, paras. 38 and 53 *et seq.*; WS Spain, para. 76 *et seq.*; WS Argentina, para. 118; see also WS Germany, p. 40.

[513] For further relevant practice see also WS Serbia, para. 336 *et seq.* and para. 757 *et seq.*

[514] Contact Group, Chairman's Conclusions, London, 29 January 1999, reprinted in H. Krieger, *The Kosovo conflict and international law: an analytical documentation 1974-1999* (2001), p. 254 (emphasis added).

[515] UN Doc. A/RES/37/10 (15 November 1982) (emphasis added): "10. States should, without prejudice to the right of free choice of means, bear in mind that direct *negotiations are a flexible and effective means of peaceful settlement* of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement of their disputes by the other means mentioned in the present Declaration."

negotiations. In this regard, one could mention the "Agreement on a Comprehensive Political Settlement of the Cambodia Conflict",[516] the "Declaration on Measures for a Political Settlement of the Georgian/Abkhaz Conflict",[517] or the "Treaty on the Final Settlement with Respect to Germany of September 12, 1990".[518]

440. Accordingly, had the Security Council wanted to provide for the possibility of a *unilateral* solution, thereby deviating from common practice, it would have used different wording or indicated in some other manner that a non-consensual solution, neither agreed upon with the territorial State nor endorsed by the Security Council, had also been contemplated.

III The notion of "political settlement" and the overall system of collective security set up by the Charter of the United Nations

441. Further, any interpretation of a "political settlement" that would allow unilateral steps, such as the UDI, would be incompatible with the overall system of collective security set up by the Charter of the United Nations. Under the Charter, it is for the Security Council to deal with threats to international peace and security by taking measures under Chapter VII.

442. Specifically with regard to Security Council resolution 1244 (1999), its preambular paragraph 1 underlined the primary responsibility of the Security Council for the maintenance of international peace and security. When this paragraph is read together with the determination in preambular paragraph 12 that the situation in the region did constitute a threat to international peace and security and the fact that the Security Council acted under Chapter VII of the Charter, this means that it is the Security Council's sole prerogative to definitely settle the situation.

443. It would be surprising, to say the least, to assume that the Security Council had granted the parties the right to unilaterally provide for any form of alleged "final

[516] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (23 October 1991), reprinted in 31 ILM 183 (1992).
[517] Declaration on Measures for a Political Settlement of the Georgian/Abkhaz Conflict (4 April 1994), UN Doc. S/1994/397 (5 April 1994), Annex 1.
[518] Treaty on the Final Settlement with Respect to Germany of September 12, 1990, reprinted in 29 ILM 1186 (1990).

settlement", even more so since the Council had decided to remain "actively" seized of the matter.[519] As a matter of fact, any such alleged *carte blanche* that would have allowed a unilateral change of the international legal status of a territory subject to Security Council administration, either for the territorial State or the population concerned, would carry the inherent risk of again destabilizing the region and thereby necessitating renewed Security Council action under Chapter VII.

444. Moreover, acknowledging a unilateral right of secession that could be exercised with regard to a territory currently under the United Nations administration would also run the risk that in the future the Security Council and its permanent members would be less able to agree on measures that would involve the United Nations' administration of a territory. Even more problematic would be the risk that the respective territorial States concerned would, unlike the FRY in case of Security Council resolution 1244 (1999),[520] no longer accept any such administration for fear of it leading to a secession of a part of their territory.

445. Even the authors of draft Security Council resolution of 17 July 2007 – Belgium, France, Germany, Italy, the United Kingdom, and the United States – considered that "the unresolved situation in Kosovo continues to constitute a threat to international peace and security."[521]

446. It is for this reason that they themselves, contrary to their current position before the Court in these proceedings,[522] had still considered in July 2007, i.e. only seven months before the issuance of the UDI, that a further Security Council resolution was necessary in order to move the situation forward.[523] This necessarily implies that from their viewpoint, too, a unilateral secession was not in line with Security

[519] See Security Council resolution 1244 (1999), para. 21, **Dossier No. 34**.
[520] The agreement of the FRY to the international regime for Kosovo was acknowledged in preambular paragraph 8, as well as in operative paragraphs 2 and 5 of Security Council resolution 1244 (1999).
[521] S/2007/437 (17 July 2007) (Provisional), preambular paragraph 14; text to be found in Annex 36 in Documentary Annexes accompanying WS Serbia.
[522] See WS United States, p. 83; WS France, para. 2.70 *et seq*; see, also, WS Germany, p. 40, simply stating that "the Security Council took up the matter but was itself unable to make a decision", thus deliberately keeping silent on the legal requirement of another Security Council resolution. The Written Statement of the United Kingdom, para. 6.16 *et seq*., refers to the non-action of the Security Council after the UDI rather than underscoring the need for a new resolution to provide for a final settlement.
[523] See WS Serbia, paras. 818-821.

Council resolution 1244 (1999). It is also noteworthy that the said draft resolution, if adopted, would have itself referred back to Security Council resolution 1244 (1999), thereby providing for an interlinkage with the current interim status created by Security Council resolution 1244 (1999). It was accordingly the view of the drafters that only such a new resolution, if adopted, could have changed the current *status quo* created by Security Council resolution 1244 (1999).

IV Subsequent interpretation of the notion of "political settlement"

447. Serbia has already demonstrated that, contrary to the position adopted by some States, Security Council resolution 1244 (1999) generally, and with regard to the necessity of a "political settlement" more specifically, excludes – and was continuously perceived to exclude – any unilateral solution to the Kosovo crisis. It is indeed quite telling that this view was also shared by States which now take a different position, as well as by the United Nations Special Representative for Kosovo. Apart from the practice already referred to in Serbia's Written Statement, this is also confirmed by the practice of both States and organs of the United Nations.

(1) Further subsequent State practice

448. For example, the United States, the United Kingdom, Canada and Germany, have in the past consistently taken the *unqualified* position during Security Council debates that any "final settlement" would necessarily require the consent of both sides.[524]

449. Already in 2001, US Ambassador Holbrooke made the following remark about the final status process:

> "I think we should be clear about two points before this process begins. First, the *terms of any eventual settlement must be mutually acceptable to both sides and backed by the international community.* No other approach will result in a

[524] For further details, see WS Spain, para. 78.

> stable, long-term solution. No other approach will permit a significant drawdown in external forces."[525]

450. The Ambassador of the United Kingdom stated in 2003:

> "The United Kingdom condemns unilateral statements on Kosovo's final status from either side. We will not recognize any move to establish political arrangements for the whole or part of Kosovo, either unilaterally or in any arrangement that does not have the backing of the international community."[526]

451. The Ambassador of Greece, speaking on behalf of the European Union, as well as on behalf of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, Romania, Turkey, Iceland and Liechtenstein, stated the following:

> "Building effective, transparent and accountable institutions for the benefit of all the communities, while at the same time adhering to the obligations stemming from Security Council resolution 1244 (1999) and the Constitutional Framework *and not prejudging the final status*, should be the goal of our actions."[527]

452. This view was also shared by other States. Thus, at the 4430th meeting of the Security Council, e.g. the Ambassador of Mauritius remarked:

> "Any attempt to change the status of Kosovo *would go against the commitments made under the relevant Security Council resolutions* and other agreements, the most recent one signed in Belgrade earlier this month."[528]

453. It is quite telling that Germany now attempts to modify its own previous position by submitting in its Written Statement that Security Council resolution 1244

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[525] Mr. Holbrooke (United States), UN Doc. S/PV.4258 (18 January 2001), p. 9 (emphasis added), **Dossier No. 96**.
[526] Mr. Harrison (United Kingdom), UN Doc. S/PV.4742 (23 April 2003), p. 16, **Dossier No. 107**.
[527] Mr. Vassilakis (Greece), *ibid*., p. 21, (emphasis added).
[528] Mr. Gokool (Mauritius), UN Doc. S/PV.4430 (27 November 2001), p. 11, (emphasis added), **Dossier No. 101**.

(1999) "prohibited unilateral steps of either side regarding the status of Kosovo before the beginning of the political process and while the political process was ongoing and had still some prospect of success".[529]

454. There is no hint of a suggestion, however, in the text of Security Council resolution 1244 (1999) that would confirm this conclusion. Furthermore, as will be demonstrated below, the possibility of negotiations had not been exhausted.[530] Moreover, any such determination of an alleged "lack of any prospect of success" of future negotiations had to be made, if at all, by the Security Council, since it established the regime laid down in the resolution 1244 (1999). Such a determination cannot be made by other organs as they are not empowered to do so,[531] and even less so by one party to the conflict - *nemo judex in sua causa*. Given the overriding powers of the Security Council, there was no danger that the parties would lock themselves in a frozen conflict, as has already been submitted.[532]

(2) Subsequent practice of organs of the United Nations

455. Relevant organs of the United Nations took the same position. In addition to the practice already referred to in Serbia's Written Statement,[533] it should be noted that already in 2001, the then Special Representative of the Secretary-General Haekkerup stated:

> "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*."[534]

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[529] WS Germany, p. 40.
[530] See *infra* para. 467 *et seq*.
[531] See *infra* para. 477 *et seq*.
[532] WS Germany, p. 40.
[533] WS Serbia, para. 816 *et seq*.
[534] Mr. Haekkerup, UN Doc. S/PV.4387 (5 October 2001), p. 6, (emphasis added), **Dossier No. 100**.

456. He later continued:

> "Finally, I would like to underline that, as the Yugoslav Ambassador clearly said, provisional self-government does not prejudice the final status. It is very clear, in how we have defined the powers of the provisional self-government, that *questions about the final status or the sovereignty are not part of the mandate*. That is a reserved power and will be dealt with when we come to the final political settlement. I want to underline that point so that there is no doubt about what is the position in that regard."[535]

457. On 6 November 2002, the Special Representative of the Secretary-General addressed a letter to the President of the Kosovo Assembly, the relevant part of which stated the following:

> "The future status of Kosovo is open and it will be decided solely by the Security Council. No third party or parties can prejudge it."[536]

458. On 7 November 2002, i.e. only one day later, he reiterated his view by stating:

> "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.[537]

459. It is also relevant to note that in relation to the appointment of the Special Envoy of the Secretary-General, Mr. Ahtisaari, the President of the Security Council had communicated to the Secretary-General the "Guiding principles of the Contact Group" which provided that "any solution that is unilateral … would be unacceptable".[538]

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[535] *Ibid.*, p. 27 (emphasis added).
[536] Letter dated 6 November 2002 from the Special Representative of the Secretary-General to the President of the Assembly of Kosovo, **Dossier No. 185**.
[537] "Pronouncement" by the Special Representative of the Secretary-General of 7 November 2002, (emphasis added), **Dossier No. 187**.
[538] UN Doc. S/2005/709 (10 November 2005), Annex, **Dossier No. 197**.

460. And as late as 2006, the then Secretary-General's Special Representative for Kosovo. Mr**.** Jessen-Petersen stated:

> "UNMIK is not a player in the status process. Our job is to fulfil our mandate as set forth in resolution 1244 (1999). But having said that, from the start it has been important to me that the activities of UNMIK in Kosovo should be consistent with and supportive of the status process being conducted out of Vienna. With that process gaining momentum, it is clear that we are moving towards the end of the UNMIK mandate. Much work has already been done on what will follow it. *Of course, this work cannot prejudge what this Council might decide*."[539]

461. Similarly, a 2006 opinion of the European Commission for Democracy through Law has also excluded the possibility of unilateral action determining Kosovo's future status.[540]

462. Besides, it is also worth noting that the vast majority of those members of the Security Council approving, in principle, the proposal submitted by the Special Envoy of the Secretary-General Mr. Ahtisaari, similarly took it for granted that his proposal must be endorsed by the Security Council in order to be able to provide for a final settlement.[541]

VThe irrelevance of the "political" character of the process/solution

463. Some written statements have implied that the political character of the process of negotiations for a final status of Kosovo is indicative of the fact that it could be

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[539] Mr. Jessen-Petersen, UN Doc. S/PV.5470 (20 June 2006), p. 4.

[540] The Venice Commission stated: "As regards the future status of Kosovo, it is not up to the Venice Commission to interfere with the political process designed to determine Kosovo's future status under Resolution 1244 (1999) of the Security Council. As a member of the United Nations, Serbia will have to respect the respective decisions by the Security Council", Venice Commission, *Comments on the Constitution of Serbia,* Opinion No. 405/2006, CDL-AD (2007) 004, 19 March 2007, para. 105, available at: http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.asp.

[541] See UN Doc. S/PV.5673 (10 May 2007), p. 3 (Belgium), p. 5 (Peru), p. 6 (France), p. 8 (Ghana), p. 9 (Panama), p. 11 (Italy), as well as p. 12 (United Kingdom), **Dossier No. 114**.

considered at one point "to have run its course".[542] Yet, as the Court has reiterated time and again, the political nature of any given question does not deprive it of its legal nature, which must still be answered in accordance with international law.[543] Indeed, in particular where political considerations are prominent, it may be particularly necessary to scrupulously apply the relevant legal principles applicable with regard to the matter.[544]

G. The "Political Process" Envisaged in Security Council resolution 1244 (1999) Was Not *Bona Fide* Exhausted

464. It has frequently been argued in various written statements,[545] as well as in the written contribution by the authors of the UDI,[546] that the "political process" provided for in Security Council resolution 1244 (1999) had been exhausted and that accordingly any further negotiations would thus have been in vain.[547] This assumption is erroneous, both on substantive and on procedural grounds. Further, and in any event, the authors of the UDI cannot rely on any such alleged exhaustion because they themselves are the reason for the alleged deadlock.

I The negotiation process on the final status of Kosovo was not conducted in an open and unbiased manner

465. As demonstrated above,[548] Security Council resolution 1244 (1999) required a *bona fide* negotiation process between the parties aiming at a mutually acceptable

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[542] WS United States, pp. 79-83; see, also, WS Czech Republic, p. 10; WS Denmark, p.9.
[543] *Legality of the Threat or Use of Nuclear Weapons,* para. 13; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* para. 14; *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 1948,* pp. *61-62; Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950,* pp. 6-7*; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962,* p. 155.
[544] See *mutatis mutandis Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, para. 33.
[545] WS Netherlands, para. 2.9; WS United Kingdom, para. 6.36 *et seq.*; WS United States, p. 81; WS Germany, p. 40; WS Albania, para. 99; WS Austria, para. 34.
[546] WC Authors, para. 9.17.
[547] WS Germany, p. 35, 40; WS United States, p. 83; WS United Kingdom, para. 6.38; WS Czech Republic, p. 10.
[548] See *supra* para. 434 *et seq.*

solution. This process was supposed to be facilitated by interested third States, sitting as the Contact Group, and, since 2006, by the Special Envoy of the Secretary-General Ahtisaari. However, as outlined above in detail,[549] from the very beginning of the status process, Mr. Ahtisaari and certain members of the Contact Group opted for independence of Kosovo as the only possible solution. Consequently, the final status negotiations were not conducted in an open and unbiased manner. In such circumstances, the Kosovo Albanian leadership did not have any incentive to consider any compromise solution for the future status, and throughout the whole status process continuously rejected any form of solution that fell short of independence.[550]

466. In these circumstances, it is not surprising that the final status process conducted before the UDI did not yield any result. At the same time, however, it cannot be argued, given the circumstances prevailing throughout the process, that the process has been exhausted. Furthermore, as will now be demonstrated, future negotiations are not excluded.

II Future negotiations were and are not excluded

467. It should be first noted that Serbia, in contrast to the authors of the UDI, has never excluded future negotiations on the international legal status of Kosovo. To the contrary, Serbia has time and again reiterated its continued willingness to enter into negotiations on the final status of Kosovo, offering a wide range of possible models of autonomy and self-government based on internationally accepted models and examples.[551]

468. It is also of particular relevance that the Special Envoy had *already in 2007* predicted that "the potential [for negotiations] to produce any mutually agreeable outcome on Kosovo's status [was exhausted]". His view was however not shared by the international community. Rather, the negotiations between the parties

[549] See *supra* para. **103** *et seq*.
[550] See *supra* paras. **116-117**.
[551] See *supra* para. **117**.

continued, his evaluation notwithstanding, under the auspices of the so-called "Troika", representing the European Union, the United States, as well as the Russian Federation.

469. Even more importantly, before the negotiations under the auspices of the Troika had even started, some members of the Troika had already publicly declared that the only possible outcome would be independence for Kosovo anyhow, thus from the outset seriously jeopardizing any possible compromise.[552]

470. It is obvious that such statements necessarily did not move the negotiation process forward, but rather fostered the long-standing view of the Kosovo Albanians that third parties would eventually support unilateral action, even if this was in violation of Security Council resolution 1244 (1999) and general international law.

471. It is worth noting that even after the conclusion of the Troika's mandate, the Parliamentary Assembly of the Council of Europe on 22 January 2008, i.e. less than four weeks prior to the UDI, adopted the position that talks between the parties should continue on the basis of Security Council resolution 1244 (1999) and stressed the role of the Security Council in this regard. The relevant resolution provided:

> "...the Assembly concludes that, as the most recent stage in the negotiations has not resulted in compromise, *alternative ways should be envisaged to secure the continuation of the talks on the basis of the UNSC Resolution 1244 and the attainment of a compromise solution in the near future,* with a view to preventing Kosovo from becoming a powder-keg and ultimately a frozen conflict in the Balkans. In this context, *the Assembly calls on UNSC members to do everything in their power to overcome the differences and to find the way to reach a timely compromise as the only guaranteed basis for peace and stability in the region.*"[553]

[552] See *supra* paras. 110-114.

[553] Council of Europe, Parliamentary Assembly, resolution 1595 (2008) on developments as regards the future status of Kosovo, 22 January 2008, available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1595.htm#1.

472. Furthermore, international practice and experience demonstrates that even conflicts concerning the status of territories which may have seemed unsolvable for significant periods of time, sooner or later become ripe for a negotiated solution. Such was the case with the question of Northern Ireland, where a final settlement was reached in 1998 after decades of conflict.

473. Frequent examples also confirm that the international community is not willing to accept unilateral attempts to alter a given *status quo,* and, in particular, has been determined in pushing for negotiated and mutually acceptable solutions by the parties even after the lapse of significant periods of time, in the cases of Cyprus,[554] Western Sahara[555] and Palestine[556] among others.

474. It should also be noted in passing that certain States that recognize the so-called "Republic of Kosovo" have, be it only inadvertently, accepted the very possibility of future negotiations. Thus, Denmark for example, has argued that the Court is not competent to deal with the parameters of *future negotiations* to take place between Kosovo and Serbia.[557] By doing so, Denmark has implicitly accepted that such negotiations are indeed possible, not in vain and, in particular, not excluded either *de jure* or *de facto*.

475. Similarly, the Netherlands accepted that the UDI was made "without the agreement of all stakeholders", but contemplated that a solution could still be found be way of negotiation when stating:

> "A political solution on the status of Kosovo that has the agreement of all stakeholders has, therefore, yet to be achieved."[558]

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[554] See Report of the Secretary-General on the United Nations operation in Cyprus of 28 November 2008, UN Doc. S/2008/744 (28 November 2008), para. 3 where the Secretary-General referred to the *agreement* of 21 March 2008, aimed at "a comprehensive *settlement* of the Cyprus problem" (emphasis added).

[555] See most recently Report of the Secretary-General on the situation concerning Western Sahara of 13 April 2009, UN Doc. S/2009/200 (13 April 2009), in particular para. 7 *et seq*. as to the current status of negotiations between Morocco and the Frente Polisario.

[556] It is particularly worth noting that the Court itself, in its Advisory opinion in the *Wall* case, at para. 162, has stressed the necessity to "achiev[e] as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems" related to the status of Palestine, the longstanding character of the conflict notwithstanding.

[557] WS Denmark, p. 2.

[558] WS Netherlands, para. 2.9.

476. As a matter of fact, the Court's opinion will shed new light on the question whether the UDI was in accordance with international law. It will accordingly give the parties, as well as the Security Council and the United Nations at large and its membership, guidance on how to further proceed. Indeed, it may be presumed that all actors involved will act in accordance with the Court's authoritative legal determination, which may provide new impetus for a renewal of the negotiation process.

III Only the Security Council itself may make a determination on a possible conclusion of the political process foreseen in Security Council resolution 1244 (1999)

477. It has been argued that several actors, including the Special Envoy of the Secretary-General, the Special Representative of the Secretary-General, the so-called Troika, as well as the Secretary-General made, in one way or another, determinations that the negotiations had allegedly been exhausted, which allegedly lead to the conclusion of the political process foreseen in Security Council resolution 1244 (1999).

478. It has to be noted, however, that it is only the Security Council which has the power to determine whether all possibilities for negotiations have been exhausted and whether a final settlement has been reached. This is confirmed by the Written Statement of the United Kingdom which itself referred to paragraph 19 of Security Council resolution 1244 (1999) as "underscoring the authority *of the Security Council* to discontinue the situation".[559]

479. Security Council resolution 1244 (1999) leaves no doubt that the Security Council did *not* want to entrust the Secretary-General or his Special Representative, and even less so the Secretary-General's Special Envoy, with any form of authority to make determinations as to the outcome of the negotiations between the parties. Rather, under paragraph 6 of Security Council resolution 1244 (1999), the Security Council merely requested the Secretary-General to appoint, in consultation with the Security Council, a Special Representative "to control the

[559] WS United Kingdom, para. 6.30 (emphasis added).

implementation of the international civil presence" but not to make any determinations as to a final settlement. Instead, paragraph 11, lit. (e) of Security Council resolution 1244 (1999) only entrusted the international civil presence with the task of *facilitating* a political process designed to determine Kosovo's future status. Given the ordinary meaning of "facilitating", it is clear that the Special Representative of the Secretary-General was not to make determinations pertaining to the status or outcome of this political process.

480. This result is also confirmed by paragraph 19 of Security Council resolution 1244 (1999). It provides that:

> "the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise".

481. This implies that the Security Council would have to adopt, once the goals of Security Council resolution 1244 (1999) have been reached and a final settlement has been agreed upon, a new resolution bringing to an end the international civilian and military presences in Kosovo. The very fact that the Security Council has not yet adopted such a resolution proves that the Security Council does not yet consider that a final settlement has been reached, and more specifically, that the UDI does not amount to this envisaged final settlement.

482. Moreover, and specifically with regard to statements made by Special Envoy Mr. Ahtisaari, it is important to note that he himself took the position, as already noted,[560] that it would be up to the Security Council to make determinations and reach decisions as to a possible final settlement. Moreover, under his terms of reference and in accordance with Security Council resolution 1244 (1999), the purpose of his engagement was simply to *facilitate* the political process designed to determine the future status of Kosovo, subject to control by the Security Council. It is for this reason that the Council, by way of a presidential statement, requested that the Secretary-General was to "provide regular updates on progress in determining Kosovo's Future

[560] WS Serbia, para. 523.

Status, as defined by Security Council resolution 1244 (1999)",[561] thus leaving no doubt that any final determination and decision arising under Security Council resolution 1244 (1999) would be exclusively made by the Security Council itself. Accordingly, the proposal by the Special Envoy was nothing more than a proposal submitted to the Security Council that was in turn free to either adopt it or not to adopt it. As is well known, this proposal was not accepted by the Security Council.

483. It is also particularly relevant that the Secretary-General himself formally acknowledged the prerogatives of the Security Council with regard to the proposal submitted by his Special Envoy Mr. Ahtisaari by stating:

> "On 3 April 2007, I submitted to the Security Council the Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1), prepared by my Special Envoy for the Future Status Process for Kosovo, Martti Ahtisaari. *The Council did not, however, endorse the proposal*."[562]

IV In any event, any such alleged exhaustion of negotiations may not be relied upon either by the authors of the UDI or by third parties given that it was caused by the authors of the UDI themselves

484. In any case, it has to be noted that it was the authors of the UDI who unilaterally decided to no longer participate in future negotiations on the final international legal status of Kosovo. It is thus due to *their* behaviour that such negotiations are currently not taking place.

485. In other words, the authors of the UDI and the States supporting them have themselves created a situation which, in their view, proves the futility of further negotiations in which they did not wish to participate. They have thus been acting in bad faith. More specifically with regard to the post-1999 situation, it must be

[561] Statement by the President of the Security Council, UN Doc. S/PRST/2005/51 (24 October 2005), p. 2, **Dossier No. 195**.
[562] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354 (12 June 2008), para. 3, **Dossier No. 88**.

also reiterated that the Kosovo Albanian side has – right from the very beginning and until the end of the Troika process – continuously rejected any form of solution short of independence, including proposed solutions where Serbia would not have had effective *de facto* control over the territory.[563]

H. The Non-Action by the Special Representative of the Secretary-General, the Secretary-General, and the Security Council, Does Not and Cannot Amount to a Tacit Recognition of the Legality of the UDI

486. Attempts have also been made to argue that the UDI should be considered lawful due to the simple fact that it was not nullified by the Special Representative of the Secretary-General, nor considered illegal by the Secretary-General,[564] nor addressed by the Security Council.[565] This argument warrants several remarks.

I Alleged tacit recognition of the UDI by the Secretary-General and his Special Representative

487. *First*, *following the UDI,* the Special Representative has amended draft laws adopted by the Assembly of Kosovo so as to counter any perception of independence contained in such draft laws.[566]

488. *Second*, and as outlined above, in implementing Security Council resolution 1244 (1999), the Secretary-General and his Special Representative act under the overall authority of the Security Council. Yet, it is common knowledge that the positions within the Security Council (including among its permanent members) vary as to

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[563] This was confirmed by the Special Envoy of the Secretary-General M. Ahtisaari, see WS Serbia, para. 400.

[564] WS United States, pp. 84 *et seq.*; WS Estonia, p. 14; WS Germany, p. 42; WS Albania, para. 100; WS Austria, para. 41 *et seq.*; WS France, para. 2.72 *et seq.*; WS Luxembourg, para. 25; WS Netherlands, para. 2.10; WS United Kingdom, para. 6.45; see also WC Authors, para. 9.23 *et seq.*

[565] WS United Kingdom, paras. 6.1.6-6.17, 6.70; WS Albania, para. 100; WS Czech Republic, p. 11; WS France, para. 2.72 *et seq.*; WS Netherlands, para. 2.10; WS United States, p. 88 *et seq.*; see, also, WC Authors, para. 9.27.

[566] See in particular UNMIK/REG/2008/10 (19 February 2008); UNMIK/REG/2008/14 (17 March 2008); UNMIK/REG/2008/15 (17 March 2008), UNMIK/REG/2008/23 (15 May 2008); UNMIK/REG/2008/25 (16 May 2008), **Dossier No. 167**, as well as UNMIK/REG/2008/33 (14 June 2008); see, also, WS Spain, para. 42.

the question whether the UDI was legal or illegal. Accordingly, for political reasons the Security Council has not provided guidance to the Secretary-General or his Special Representative. It is for this reason that both the Secretary-General and his Special Representative have taken a status neutral approach. Indeed, such an approach does not amount to acquiescence because it clearly does not accept the UDI. As the Secretary-General himself put it unequivocally in a letter to President Tadic dated June 12, 2008:

> "The position of the United Nations on the question of the status of Kosovo has been one of strict status neutrality."[567]

It would clearly run counter to this position to now interpret the behaviour of either the Secretary-General or his Special Representative as a tacit acceptance of the UDI.

489. *Third*, Kosovo authorities have seriously challenged the *de facto* exercise of the mandate of the Special Representative of the Secretary-General. As the Secretary-General put it in his November 2008 report:

> "As a consequence of the deeply diverging paths taken by Belgrade and the Kosovo authorities following Kosovo's declaration of independence, the space in which UNMIK can operate has changed. As is evident from the developments on the ground, *my Special Representative is facing increasing difficulties in exercising his mandate owing to the conflict between resolution 1244 (1999) and the Kosovo Constitution, which does not take UNMIK into account.* The Kosovo authorities frequently question the authority of UNMIK in a Kosovo now being governed under the new Constitution. While my Special Representative is still *formally* vested with executive authority under resolution 1244 (1999), *he is unable to enforce this authority. In reality, such authority can be exercised only if*

[567] Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr. Boris Tadić, UN Doc. S/2008/354 (12 June 2008), Annex I, **Dossier No. 88**.

and when it is accepted as the basis for decisions by my Special Representative. Therefore, very few executive decisions have been issued by my Special Representative since 15 June."[568]

490. *Fourth*, as can be deduced from the list of relevant documents contained in the dossier prepared by the Secretariat of the United Nations pursuant to the Court's Order of 17 October 2008, the Secretary-General does not appear to have yet received legal guidance from the Undersecretary-General for Legal Affairs of the United Nations, the Legal Counsel, concerning the legality of the UDI. This is yet another reason why no action has yet been taken by either the Secretary-General or his Special Representative.

491. Similar considerations apply, *mutatis mutandis*, with regard to the fact that the Special Representative had, in 2005, taken note of the negotiation mandate adopted by the Assembly of Kosovo which provided for the goal of independence.[569] On the one hand, the Special Representative had only taken note of the *platform for the then starting status talks*, and not of any kind of purported *decision* on independence. On the other hand, and even more importantly, Serbia as the State possessing title to territory with regard to Kosovo may at any point renounce its rights concerning the territory. Accordingly, there was nothing that hindered the Kosovo Albanian side to strive for a *consensual* separation from Serbia as part of the overall negotiation process and even less was there any reason why the Special Representative of the Secretary-General should hinder them from pursuing this political goal as part of their negotiation strategy.

II Alleged tacit recognition of the UDI by the Security Council

492. As mentioned, and as is public knowledge, the Security Council was not and is not in a position to either welcome or condemn the UDI, due to the divergent views within the membership of the Council, including its permanent members. Yet, it is

[568] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008), para. 21 (emphasis added), **Dossier No. 90**.
[569] See UNMIK/PR/1445 (17 November 2005), **Dossier No. 199**.

misleading to draw the conclusion from the ensuing Security Council's inaction that it might have thereby indicated that the UDI was not in breach of international law. As the Court has rightly noted:

> "The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed."[570]

493. The argument that the non-action of the Security Council supports the UDI's lawfulness also runs counter to the fact that Security Council resolution 1244 (1999) does not *oblige* the Security Council to positively decide on the existence of a breach of its resolution (1244). Otherwise, the very powers of the Security Council at large would be circumvented by enabling any one of its permanent members to *de facto* allow parties to a conflict to violate binding Security Council resolutions by simply vetoing any further resolution determining the breach of the relevant prior resolution.[571]

494. In conclusion, inaction of the Security Council, the Secretary-General and his Special Representative cannot be perceived or interpreted as a tacit recognition of the alleged legality of the UDI. As a matter of fact, "to give legal significance to an omission of an organ to condemn is problematical".[572]

I. The Alleged "Unsustainability" of the Interim Status Created by Security Council Resolution 1244 (1999)

495. Several written statements[573] have also attempted to persuade the Court that the status created by Security Council resolution 1244 (1999) is allegedly

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[570] *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,* para. 69.

[571] To bring the acquiescence argument to its logical conclusion, accepting that the Council has acquiesced in Kosovo's independence would be tantamount to saying that the Council has acquiesced in any use of force that it fails to condemn.

[572] I. Brownlie, *Principles of Public International Law* (6th ed., 2003), p. 664 (footnote omitted).

[573] WS United Kingdom, para. 6.28; WS Denmark, p. 9; WS Estonia, p. 11 ("*ultima ratio*"); WS France, para. 2.56 *et seq.*; WS Czech Republic, p. 12; WS Germany, p. 36; WS Ireland, p. 11; WS Luxemburg, para. 23; WS Poland, para. 7.7 ("loss of control over the situation in Kosovo"); see also WC Authors, para. 9.18.

"unsustainable". It should be first noted that in any event an acceptance of broad autonomy, as proposed by Serbia, would bring to an end this alleged uncertainty. It should be also noted that the vast majority of member States of the United Nations have not recognized "Kosovo" as an independent State despite the recent and on-going pressure to do so emanating from some States that support Kosovo independence. Accordingly, the UDI has, contrary to the above-mentioned assumption, not brought to an end the uncertainty with regard to the international legal status of Kosovo, but has rather lead to an extension thereof *sine die*.

496. Furthermore, the Security Council, when adopting Security Council resolution 1244 (1999), was well aware that reaching an agreement on a final status may take time. It is notably for this reason that it *deliberately* decided not to limit in time the mandates of the civilian and the military presences. Moreover, it is up to the relevant organs of the United Nations, and notably the General Assembly, in exercising its rights concerning the budget of the organisation, to reach conclusions and make decisions on the size and format of the international civilian presence in line with any future decisions the Security Council might make, and in light of the guidance provided by the Court's advisory opinion on the matter. Pending such decisions, any such allegations of "unsustainability" cannot serve as a pretext for unilateral action.

J. Conclusion

497. Accordingly, the UDI runs counter to the legal regime established by the Security Council in Security Council resolution 1244 (1999), given that no mutually acceptable solution has yet been reached nor endorsed by the Security Council. Pending a final status agreement, Kosovo remains subject to the regime established by Security Council resolution 1244 (1999) and continues to form part of the territory of Serbia, the territorial integrity of which has been reaffirmed by this very resolution.

498. In conclusion of this part, it should be stressed once again that Security Council resolution 1244 (1999) brought to an end a unilateral military action in violation of international law and reinstated the role and primacy of the Security Council with regard to the maintenance of international peace and security, as provided in the United Nations Charter. This would be reversed by accepting the legality of the UDI adopted by one side without Security Council endorsement.

499. Doing so would also amount to awarding actors who are unwilling to further *bona fide* continue with a negotiation process, be it only because they knew they were supported by a certain number of States (including those that had unilaterally used military force in 1999) that were willing to disregard both the principle of territorial sovereignty, as reaffirmed in Security Council resolution 1244 (1999), and the Council's pivotal role under the Charter.

500. Moreover, doing so would also amount to approving unilateral acts which has in the past, on several occasions, given rise to serious abuses and cannot, regardless of the present defects in international organization, find a place in international law.[574]

[574] See *mutatis mutandis Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 35.

Chapter 10

RECOGNITION AS SUCH DOES NOT GRANT RETROACTIVE LEGALITY OR PURGE ILLEGALITY

A. Introduction

501. The issue before the Court relates to and is limited to the UDI adopted by the Provisional Institutions of Self-Government in Kosovo on 17 February 2008. The request for the advisory opinion does not ask the Court to characterise those recognitions that have occurred as being either lawful or unlawful or at all. However, the question of recognition is important to the extent that any such recognition or recognitions cannot as such affect the unlawful nature of the UDI. In its Written Statement, the Republic of Serbia submitted that:

(i) Recognition as such is, as a matter of general international legal principle, not constitutive of statehood.

(ii) Recognition is essentially a political and discretionary act of a State with determinative effects only within its own domestic legal system and with regard to bilateral relations with the recognised State.

(iii) Accordingly, recognition cannot determine the legal nature of the asserted independence of a purported State in any binding way in international law.

(iv) An illegal act, such as the UDI, cannot as a matter of general principle be creative of legal rights.

(v) Recognition as such cannot legitimate an illegal act nor may it re-characterise that unlawful act as legal.

(vi) As a matter of fact, the long list of States not recognising Kosovo and their global distribution undermines any thesis as to the legitimation of the legally flawed declaration of independence by the Provisional Institutions of Self-Government of Kosovo.

(vii) The fact that the United Nations has not accepted Kosovo as a member adds to the range of international conduct demonstrating the unacceptability of the proposition that a new State has been validly created.[575]

502. It was particularly emphasised that an illegal unilateral act cannot produce legal consequences, *ex injuria jus non oritur*, so that the attempt made by some States to support the creation of a new State on the territory of Serbia through recognition is devoid of any legal relevance for the present advisory proceedings.[576] In order for the *ex injuria* principle to have any real meaning, it must be understood as preventing the validation of unlawful situations.

503. The Canadian Supreme Court in the *Quebec Secession* case emphasised that:

> "... international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a 'legal' right to secede in the first place (...)
> It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but *this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.* (...)
> *Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.*"[577]

504. The Canadian Supreme Court particularly stressed that whatever role recognition by third States may play within international relations, it cannot as such alter the legality or otherwise of the initial act of independence or secession. Recognition in

[575] WS Serbia, para. 1008.
[576] *Ibid.*, paras. 996 and 1033 *et seq*. See, also, the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* para. 133 and Judge Elaraby's Separate Opinion in *Wall*, para. 3.1.
[577] *Reference re Secession of Quebec* case, [1998] 2 S.C.R. 217, paras. 142, 144 and 155 (emphasis added).

international law concerns the conduct of international relations and not the modification of existing legal rules and juridical situations. The Supreme Court also made the point that recognition cannot retroactively legitimate in law what is already an established illegality. Recognition does not, and cannot, reach back into the domestic legal system of an individual State in order to alter its legal norms and their application, nor can it retroactively re-classify the status of an illegal act either in domestic or in international law.[578]

505. Accordingly, whatever the political impact of the recognitions, it is submitted that they cannot have the effect of altering such a foundational principle of international law such as the principle of territorial integrity and thus render lawful an unlawful unilateral and non-consensual secession.

506. Further, for the purposes of this request for an advisory opinion, recognition is relevant only from the negative point of view, that is its inability to validate an unlawful act.

507. It is to be noted that no State has argued that the effect of those recognitions that have taken place is to have created a new State of Kosovo. It is also to be noted that no State has argued that the question of lawfulness or not of these recognitions as such is one that is before the Court.

508. In any event, it is clear that the "Republic of Kosovo" has not complied with the factual requirements laid down in international law for Statehood, something which constitutes a logical precursor to recognition.

B. Statehood Requirements

509. In its Written Statement, Serbia has pointed out that even if the so-called "Republic of Kosovo" were to have had a legal basis for its claim of Statehood (which is denied), it would not conform with the requirements laid down in

[578] See WS Serbia, para. 1000 *et seq*.

international law for such status, particularly in view of the fact that there is no effective independent government in Kosovo. In brief, it was noted that:

(i) UNMIK continues to act within the territory, together with EULEX.

(ii) KFOR continues to be the ultimate military and security authority in the territory.

(iii) Serbia continues to retain its sovereign rights over Kosovo insofar as they are compatible with Security Council resolution 1244 (1999).

(iv) The Provisional Institutions of Self-Government, purporting to have become the organs of an independent State, in fact substantially exercise the same authority that they have performed previously, on the basis of Security Council resolution 1244 (1999).[579]

510. The United Nations Secretary-General has emphasised that UNMIK continues to be deployed in Kosovo within the framework of Security Council resolution 1244 (1999).[580] The same situation applies with regard to KFOR.[581] Further and contrary to the wishes of the so-called "independent" authorities,[582] EULEX was deployed within the framework of Security Council resolution 1244 (1999) and with the support of Serbia.[583] In addition, it is very clear that the purported "independent government" does not have political control over the whole territory of Kosovo, nor is it recognised by the entire population of Kosovo as having the authority to exercise such control. While the Assembly of Kosovo claims to adopt legislation without reference to the powers of the Secretary-General's Special Representative under Security Council resolution 1244 (1999), it has been pointed out that the:

> "majority of Kosovo Serbs continue to recognize UNMIK as their sole and legitimate civilian international interlocutor... This

[579] WS Serbia, para. 966 *et seq.*, particularly para. 974 *et seq.*

[580] See reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008), **Dossier No. 90**, and UN Doc. S/2009/149 (17 March 2009).

[581] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008), pp. 2 and 12, **Dossier No. 90**.

[582] "Kosovo again opposes EULEX plan; Albania airs doubts", *Thomson Reuters Foundation*, 25 November 2008. Available at: http://www.alertnet.org/thenews/newsdesk/LP686174.htm. See Annex 82 in Documentary Annexes accompanying WS Serbia.

[583] See letter by President of the Republic of Serbia sent to Mr. Javier Solana, Secretary-General of the Council of the European Union and High Representative for the Common and Foreign Policy, dated 28 November 2008, reproduced in Annex 83 in Documentary Annexes accompanying WS Serbia.

> has had significant implications, including in the police, customs and judicial sectors, where UNMIK continues to play a prominent role." [584]

511. It is also to be noted that many of the normal functions of government cannot be carried out by the "independent government". It is well known that corruption and crime of all kinds are rampant in the areas supposed to be under the control of this government.[585] These are all issues that have not been addressed by those making written statements in favour of the UDI, nor indeed in the written contribution of the authors of the UDI, who tellingly confine themselves to discussing legal and constitutional issues.[586]

512. In this context, one may also mention the serious state of human rights observance in the territory today and in the very recent past. The Written Statement of Serbia has addressed these issues.[587] Interestingly, the written contribution of the authors of the UDI makes no reference to such critical issues as the pogrom against the Serb inhabitants of Kosovo in March 2004,[588] the situation of the non-Albanian displaced persons and the situation of the disappeared.

513. Ominous indications of what may occur in the future were seen in March 2004. According to a report by the Organization of Security and Cooperation in Europe,

> "The campaign of ethnic violence lasted for three days and left 19 dead, 954 injured, 4100 displaced, 550 houses and 27 Orthodox churches and monasteries burnt and an additional 182 houses and two churches/monasteries damaged."[589]

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[584] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692 (24 November 2008), para. 4, **Dossier No. 90**.

[585] Commission of the European Communities, Commission Staff Working Document, "Kosovo (Under UNSCR 1224/99) 2008 Progress Report", Brussels, 5 November 2008, SEC(2008) 2697, pp. 13, 15, and 53-54.

[586] See, e.g., WC Authors, paras. 2.01-2.74. See, also, WS United Kingdom, paras. 4.12-4.27 and WS United States, pp. 34-40.

[587] WS Serbia, para. 365 *et seq*.

[588] But see, e.g., WS United States, p. 25.

[589] OSCE, *Human Rights Challenges – following the March riots*, 25 May 2004, p. 4, available at: http://www.osce.org/documents/html/pdftohtml/2939_en.pdf.html.

514. In its report on the events, the International Crisis Group concluded that:

> "The Kosovo Provisional Institutions of Self-Government (PISG) cannot bring themselves to give direction to the society they purport to represent …Kosovo's provisional institutions of self-government (PISG), media and civil society afforded the rioters licence for mayhem…. The violent explosion revealed Kosovo Albanian society to be deeply troubled, lacking institutions, leadership and the culture to absorb shocks and contain its violent, criminal minority... 33 major riots, 51,000 rioters, some using military weapons [were involved]."[590]

515. This traumatic period demonstrated that the Kosovo Albanian leadership was not able to exercise the necessary degree of effective control over its own population. This view has been reinforced since the UDI. With regard to this, the Minority Rights Group has recently concluded that:

> "in the period since Kosovo unilaterally declared independence on 17 February 2008, the actions of the new Kosovo authorities and the international community have instead created uncertainty, confusion and increasingly complex, multi-layered executive governance structures in Kosovo."[591]

Further:

> "A lack of political will among majority Albanians and poor investment in protection mechanisms have resulted in minority rights being eroded or compromised in the post-independence period."[592]

516. This pattern of human rights abuses, whether deliberate or resulting from lack of effective control from the purported government, is important not only in itself, but

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[590] International Crisis Group, *Collapse in Kosovo*, *ICG Europe Report No. 155*, 22 April 2004, pp. 1, *i* and 19.
[591] Minority Rights Group International, *Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo*(2009), p. 6, available at www.minorityrights.org/download.php?id=635.
[592] *Ibid.* at p. 3. See, also, OSCE ODIHR, *Human Rights in Kosovo: As Seen As Told*, Volume II (14 June – 31 October 1999), available at http://www.osce.org/odihr/item_11_17756.html

also within the framework of claimed Statehood. It is relevant in two ways. First, it goes to the heart of the requirement of effective governmental control. Second, it is relevant in that it has been argued that respect for human rights, or perhaps the absence of serious abuse of human rights, is an additional criterion of Statehood.[593]

517. With regard to the first point, the concept of effective government is meaningless if that government will not or cannot ensure at least minimum levels of human rights protection. The situation in Kosovo today falls below that minimum level and thus reinforces the already existing perception that the purported government is either simply not in control in any real sense or that it is actively pursuing a policy of human rights violations against its minority population.

C. Critical Date

518. Although the request before the Court is very specific in both space and time, so that the legality and effect of those recognitions that have taken place are not relevant for the purposes of the case, the United Kingdom has sought to finesse this principle so as to bring in the purported impact of the recognitions in a way that contradicts the question posed by the General Assembly. The UK's Written Statement declares that:

> "If, contrary to this view [of the United Kingdom], the Court concludes that the Declaration of Independence was in some manner inconsistent with international law at the point that it was made, the United Kingdom considers that developments since 17 February 2008 have crystallised Kosovo independence and cured any deficiency that might initially have existed."[594]

519. As well as contradicting the *ex injuria* principle and opening the door to a reckless attitude to international illegality by positing the curing of illegality by recognition

[593] See, also, The European Community's Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, 31 ILM 1485 (1992), pp. 1486-7.
[594] WS United Kingdom, para. 0.15. See, also, *ibid.*, paras. 5.54 and 6.73.

by a minority of States, this approach also runs counter to the international law principle of the critical date. This doctrine establishes that an act must be analysed for its legal application and lawfulness in the light of the legal situation as at the date it was carried out. The doctrine is founded upon the need for stability of legal relations and is intended to prevent the retroactive overthrow of hitherto lawful situations and, conversely, the retroactive validation of illegal acts.

520. Since the request before the Court for an advisory opinion is so specific and relates to the need for a characterisation in law of a particular event, the date of the unilateral declaration of independence must constitute the critical date, as that term in understood in international law.[595] The importance of this concept is that where a determining moment can be identified, as in this case, the rights of the parties must be taken to have crystallised at that moment, so that no act subsequent to that date can alter the legal position. While the doctrine has been used primarily with regard to territorial disputes, it is clearly relevant analogically here since the question of valid sovereign territorial title is at issue. The Court has emphasised that:

> "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them."[596]

521. The task before the Court currently, therefore, is to assess the legality of the UDI of 17 February 2008 in the light of the law applicable on that date and having established and confirmed the legal position to sustain that position by declaration. It cannot thereafter undermine its own determination of the legalities by accepting that subsequent events (specifically and deliberately excluded from the question

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[595] See, e.g., *Island of Palmas case (Netherlands v. USA),* 2 RIAA 829, 845 (1928); the *Eastern Greenland* case, *P.C.I.J., Series A/B, No. 53,* p. 45; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002,* para. 135; *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), Judgment of 8 October 2007*, para. 117 and the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008,* paras. 32-36. See also e.g. L.F.E. Goldie, "The Critical Date", *International and Comparative Law Quarterly,* vol. 12 (1963), p. 1251; M.G. Kohen, *Possession contestée et souveraineté territoriale* (1997), pp. 169-183 and M.N. Shaw, *International Law* (6th ed., 2008), p. 509 *et seq.*

[596] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), I.C.J. Reports 2002,* para. 135.

posed in the request) have remedied in law established illegality. Information subsequent to the critical date can only be taken into account insofar as it reflects the situation at the date and cannot be used for the purposes of rectification or altering that legal situation.[597]

522. As the Court noted in the *Western Sahara* advisory opinion:

> "Although the Court has thus been asked to render an opinion solely upon the legal status and legal ties of Western Sahara as these existed at the period beginning in 1884, this does not mean that any information regarding its legal status or legal ties at other times is wholly without relevance for the purposes of this Opinion. It does, however, mean that such information has present relevance *only in so far as it may throw light on the questions as to what were the legal status and the legal ties of Western Sahara at that period.*"[598]

D. Conclusion

523. Accordingly, the Republic of Serbia reaffirms the submissions made in its Written Statement, and concludes:

i) The critical date for the purposes of the request for the advisory opinion is 17 February 2008, the date of the unilateral declaration of independence by the PISG.

ii) The legality or illegality of the unilateral declaration must be determined in the light of the law applicable at that moment.

iii) Subsequent events, such as the recognitions made by the minority of States that have occurred, cannot retroactively purge the illegality of the UDI.

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[597] See e.g. WS Argentina, para. 43 *et seq.* and WS Spain, para. 6 (iii).
[598] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* para. 78 (emphasis added).

iv) Subsequent acts may only be considered insofar as they reflect the legal position at the critical date.

v) The view that, as expressed by the Written Statement of the United Kingdom, that, "developments since 17 February 2008 have crystallised Kosovo independence and cured any deficiency that might initially have existed" is both legally incorrect and politically dangerous.

vi) In any event, the "Republic of Kosovo" has failed to satisfy the criteria of Statehood. It does not possess an effective independent government as a matter of fact, and the abuses of human rights in the territory it claims demonstrates both that and the failure to adhere to the criterion of Statehood requiring respect for human rights.

Chapter 11

CONCLUSIONS

523. The present Written Comments have rebutted the claims made in the written statements of the States that promote the independence of the so-called "Republic of Kosovo" and in the written contribution of the authors of the UDI. In particular, it has been demonstrated that the UDI is not only regulated by international law but is contrary to international law.

524. The UDI is a purported legal act which, *inter alia*, attempts to create a new State by terminating Serbia's sovereignty and the United Nations administration in Kosovo, as well as – at least for the time being – the process of negotiations to determine the future status of Kosovo. In all these respects, the UDI is contrary to applicable rules of international law. Moreover, as has been demonstrated by Serbia, the UDI did not have as an effect the creation of a new State, since the necessary legal and factual requirements of Statehood are not fulfilled in the case of Kosovo.

525. As already discussed,[599] there is probably no other unilateral declaration of independence in the world that is more susceptible to international legal analysis than the UDI of 17 February 2008. Its authors – the Provisional Institutions of Self-Government in Kosovo – are organs that were created under international law, with competences that are fully regulated by international law. In that regard, it has been demonstrated that they did not have the authority to issue the UDI which was *ultra vires* their competences under Security Council resolution 1244 (1999) and the Constitutional Framework for Kosovo. Moreover, by issuing the UDI, they violated, *inter alia*, the following rules of international law:

(i) the general international law principle of respect for the territorial integrity of States which precludes non-consensual secessions from independent States;

[599] See *supra* Chapter 6.

(ii) the international legal regime established by Security Council resolution 1244 (1999), guaranteeing the territorial integrity of Serbia, as well as providing for the United Nations administration as the supreme administrative authority in Kosovo which can be modified or terminated solely by the Security Council;

(iii) the international legal regime established by Security Council resolution 1244 (1999), which provides for a negotiation process to determine the future status of Kosovo that must not be terminated unilaterally or undermined by any of the parties concerned.

526. Since the foregoing rules of international law are not only applicable to the Provisional Institutions of Self-Government, but to all relevant actors in Kosovo, they would be violated even if the UDI was not an act of the Provisional Institutions of Self-Government in Kosovo (*quod non*), as claimed by some States and the authors of the UDI.

527. It has also been demonstrated that the principle of self-determination does not provide support for the UDI, since neither the Kosovo Albanians nor the "Kosovar people" constitute a separate "people" entitled to exercise the right to self-determination, and Kosovo does not constitute a self-determination unit. Furthermore, the so-called "right to remedial secession" does not provide support for the proposition that the UDI is in accordance with international law. First, its proponents have failed to prove the existence of this doctrine in international law. Second, even assuming that such a right exist (*quod non*), its various requirements advanced by its proponents have not been met in the case of Kosovo.

528. Contrary to what has been claimed in some written statements, the recognitions of the so-called "Republic of Kosovo" by a minority of States cannot retroactively purge the illegality of the UDI which must be determined in light of the law applicable at the moment the UDI was issued, namely 17 February 2008. Further, the so-called "Republic of Kosovo" does not possess an effective independent government as a matter of fact.

529. Finally, the flagship argument advanced by those States promoting the independence of Kosovo is that Kosovo is a *sui generis* case. This is not a legal

argument but rather only a policy consideration. The very idea that Kosovo is a *sui generis* case evinces that there are no sufficient legal grounds that can otherwise be relied upon to justify its attempted secession from Serbia. Obviously, every case is unique, but this does not prevent the application of international law. When rules of international law are applied to the case of the UDI, it clearly follows that the UDI is not in accordance with international law. In any case, the various "unique" features of the Kosovo case, taken individually or together, do not provide a legal justification for the UDI and the purported secession of Kosovo from Serbia.

530. On the basis of the reasons set out in its Written Statement and in the present Written Comments, the Republic of Serbia respectfully reiterates the submissions it has made in its Written Statement, namely

(i) that the Court is competent to give the advisory opinion in the present case and that there are no compelling reasons that should lead it to decline to give its opinion; and

(ii) that the UDI of 17 February 2008 is not in accordance with international law.

Saša Obradović
Head of the Legal Team of the Republic of Serbia

Belgrade, 14 July 2009

ANNEX 1

“News: Kosovo Declaration of Independence”,
Sunday, 17. 02. 2008 17:20
http://www.assembly-kosova.org/?cid=2,128,1635

News

Kosovo Declaration of Independence

Sunday, 17.02.2008 17:20

Assembly of Kosovo,

Convened **in an extraordinary meeting on February 17, 2008, in Pristine, the capital of Kosovo,**

Answering **the call of the people to build a society that honors human dignity and affirms the pride and purpose of its citizens,**

Committed **to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness,**

Dedicated **to protecting, promoting and honoring the diversity of our people,**

Reaffirming **our wish to become fully integrated into the Euro-Atlantic family of democracies,**

Observing **that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,**

Recalling **the years of strife and violence in Kosovo, that disturbed the conscience of all civilised people,**

Grateful **that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration,**

Proud **that Kosovo has since developed functional, multi-ethnic institutions of democracy that express freely the will of our citizens,**

Recalling **the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status,**

Regretting **that no mutually-acceptable status outcome was possible, in spite of the good-faith engagement of our leaders,**

Confirming **that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance,**

Determined **to see our status resolved in order to give our people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of our society,**

Honoring **all the men and women who made great sacrifices to build a better future for Kosovo,**

Approves

KOSOVA DECLARATION OF INDIPENDENCE

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

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

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

4. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

5. We welcome the international community's continued support of our democratic development

February 2008

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Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability.

6. For reasons of culture, geography and history, we believe our future lies with the European family. We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

7. We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy. We are committed to working constructively with the United Nations as it continues its work in the period ahead.

8. With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

10. Kosovo declares its commitment to peace and stability in our region of southeast Europe. Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation. We shall therefore work together with our neighbours to advance a common European future.

11. We express, in particular, our desire to establish good relations with all our neighbours, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future. We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people.

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

D- 001
Pristina, 17 February 2008
President of the Assembly of Kosova
Jakup KRASNIQI

Lajmet e fundit

Deklarata e Pavarësisë së Kosovës

E Diel, 17.02.2008 17:20

Kuvendi i Kosovës,

I mbledhur në seancë të jashtëzakonshme më 17 shkurt 2008, në kryeqytetin e Kosovës, në Prishtinë,

Duke iu përgjigjur thirrjes së popullit për të ndërtuar një shoqëri që respekton dinjitetin njerëzor dhe afirmon krenarinë dhe synimet e qytetarëve të saj,

Të zotuar për t'u përballur më trashëgiminë e dhembshme të së kaluarës së afërt në frymë të pajtimit dhe faljes,

Të përkushtuar ndaj mbrojtjes, promovimit dhe respektimit të diversitetit të popullit tonë,

Duke riafirmuar dëshirën tonë për t'u integruar plotësisht në familjen euroatlantike të demokracive,

Duke vërejtur se Kosova është një rast special që del nga shpërbërja jokonsensuale e Jugosllavisë dhe nuk është presedan për cilëndo situatë tjetër,

Duke rikujtuar vitet e konfliktit dhe dhunës në Kosovë që shqetësuan ndërgjegjen e të gjithë popujve të civilizuar,

Mirënjohës që bota intervenoi më 1999 duke hequr në këtë mënyrë qeverisjen e Beogradit mbi Kosovën, dhe vendosur Kosovën nën administrimin e përkohshëm të Kombeve të Bashkuara,

Krenarë që Kosova që atëherë ka zhvilluar institucione funksionale, multietnike të demokracisë që shprehin lirisht vullnetin e qytetarëve tanë,

Duke rikujtuar vitet e negociatave të sponsorizuara ndërkombëtarisht ndërmjet Beogradit dhe Prishtinës mbi çështjen e statusit tonë të ardhshëm politik,

Duke shprehur keqardhje që nuk u arrit asnjë rezultat i pranueshëm për të dyja palët përkundër angazhimit të mirëfilltë të udhëheqësve tanë,

Duke konfirmuar se rekomandimet e të Dërguarit Special të Kombeve të Bashkuara, Martti Ahtisaari, i ofrojnë Kosovës një kornizë gjithëpërfshirëse për zhvillimin e saj të ardhshëm, dhe janë në vijë me standardet më të larta europiane për të drejtat të njeriut dhe qeverisjen e mirë,

Të vendosur që ta shohim statusin tonë të zgjidhur në mënyrë që t'i japë popullit tonë qartësi mbi të ardhmen e vet, të shkohet përtej konflikteve të së kaluarës dhe të realizohet potenciali i plotë demokratik i shoqërisë sonë,

Duke nderuar të gjithë burrat dhe gratë që bënë sakrifica të mëdha për të ndërtuar një të ardhme më të mirë për Kosovën,

Miratoi

DEKLARATËN E PAVARËSISË SË KOSOVËS

1. Ne, udhëheqësit e popullit tonë, të zgjedhur në mënyrë demokratike, nëpërmjet kësaj Deklarate shpallim Kosovën shtet të pavarur dhe sovran. Kjo shpallje pasqyron vullnetin e popullit tonë dhe është në pajtueshmëri të plotë me rekomandimet e të Dërguarit Special të Kombeve të Bashkuara, Martti Ahtisaari, dhe Propozimin e tij Gjithëpërfshirës për Zgjidhjen e Statusit të Kosovës.

2. Ne shpallim Kosovën republikë demokratike, laike dhe multietnike, të udhëhequr nga parimet e jodiskriminimit dhe mbrojtes së barabartë sipas ligjit. Ne do të mbrojmë dhe promovojmë të drejtat e të gjitha komuniteteve në Kosovë dhe krijojmë kushtet e nevojshme për pjesëmarrjen e tyre efektive në proceset politike dhe vendimmarrëse.

3. Ne pranojmë plotësisht obligimet për Kosovën të përmbajtura në Planin e Ahtisarit, dhe mirëpresim kornizën që ai propozon për të udhëhequr Kosovën në vitet në vijim. Ne do të zbatojmë plotësisht ato obligime, përfshirë miratimin prioritar të legjislacionit të përfshirë në Aneksin XII të tij, veçanërisht atë që mbron dhe promovon të drejtat e komuniteteve dhe pjesëtarëve të tyre.

4. Ne do të miratojmë sa më shpejt që të jetë e mundshme një kushtetutë që mishëron zotimin

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liritë themelore të të gjithë qytetarëve tanë, posaçërisht ashtu siç definohen me Konventën Europiane për të Drejtat e Njeriut. Kushtetuta do të inkorporojë të gjitha parimet relevante të Planit të Ahtisaarit dhe do të miratohet nëpërmjet një procesi demokratik dhe të kujdesshëm.

5. Ne mirëpresim mbështetjen e vazhdueshme të bashkësisë ndërkombëtare për zhvillimin tonë demokratik nëpërmjet të pranive ndërkombëtare të themeluara në Kosovë në bazë të Rezolutës 1244 të Këshillit të Sigurimit të Kombeve të Bashkuara (1999). Ne ftojmë dhe mirëpresim një prani ndërkombëtare civile për të mbikëqyrur zbatimin e Planit të Ahtisaarit dhe një mision të sundimit të ligjit të udhëhequr nga Bashkimi Europian. Ne, po ashtu, ftojmë dhe mirëpresim NATO-n që të mbajë rolin udhëheqës në pranin ë ndërkombëtare ushtarake dhe të zbatojë përgjegjësitë që i janë dhënë sipas Rezolutës 1244 të Këshillit të Sigurimit të Kombeve të Bashkuara (1999) dhe Planit të Ahtisaarit, deri në atë kohë kur institucionet e Kosovës do të jenë në gjendje të marrin këto përgjegjësi. Ne do të bashkëpunojmë plotësisht më këto prani në Kosovë për të siguruar paqen, prosperitetin dhe stabilitetin në të ardhmen në Kosovë.

6. Për arsye të kulturës, gjeografisë dhe historisë, ne besojmë se e ardhmja jonë është në familjen europiane. Për këtë arsye, ne shpallim synimin tonë për të marrë të gjitha hapat e nevojshëm për të siguruar anëtarësim të plotë në Bashkimin Europian sapo që të jetë e mundshme dhe për të zbatuar reformat e kërkuara për integrim europian dhe euroatlantik.

7. Ne i shprehim mirënjohje Organizatës së Kombeve të Bashkuara për punën që ka bërë për të na ndihmuar në rimëkëmbjen dhe rindërtimin pas luftë dhe ndërtimin e institucioneve të demokracisë. Ne jemi të përkushtuar të punojmë në mënyrë konstruktive me Organizatën e Kombeve të Bashkuara gjersa ajo vazhdon punën e saj në periudhën në vijim.

8. Me pavarësinë vie detyra e anëtarësisë së përgjegjshme në bashkësinë ndërkombëtare. Ne e pranojmë plotësisht këtë detyrë dhe do t'i përmbahemi parimeve të Kartës së Kombeve të Bashkuara, Aktin Final të Helsinkit, akteve tjera të Organizatës për Siguri dhe Bashkëpunim në Europë, obligimeve ligjore ndërkombëtare dhe parimeve të marrëdhënieve të mira ndërkombëtare që shënojnë marrëdhëniet ndërmjet shteteve. Kosova do të ketë kufijtë e saj ndërkombëtarë ashtu siç janë paraparë në Aneksin VIII të Planit të Ahtisaarit, dhe do të respektojë plotësisht sovranitetin dhe integritetin territorial të të gjithë fqinjve tanë. Kosova, po ashtu, do të përmbahet nga kërcënimi apo përdorimi i forcës në cilëndo mënyrë që është jokonsistente me qëllimet e Kombeve të Bashkuara.

9. Ne, nëpërmjet kësaj Deklarate, marrim obligimet ndërkombëtare të Kosovës, përfshirë ato të arritura në emrin tonë nga Misioni i Administratës së Përkohshme të Kombeve të Bashkuara në Kosovë (UNMIK), si dhe obligimet e traktateve dhe obligimet tjera të ish-Republikës Socialiste Federative të Jugosllavisë ndaj të cilave obligohemi si ish-pjesë konstituive, përfshirë konventat e Vjenës për marrëdhëniet diplomatike dhe konsullore. Ne do të bashkëpunojmë plotësisht me Tribunalin Penal Ndërkombëtar për ish-Jugosllavinë. Ne synojmë të kërkojmë anëtarësim në organizatat ndërkombëtare, në të cilat Kosova do të synojë të kontribuojë për qëllime të paqes dhe stabilitetit ndërkombëtar.

10. Kosova zotohet për paqë dhe stabilitetit në rajonin tonë të Europës Juglindore. Pavarësia jonë e sjell në fund procesin e shpërbërjes së dhunshme të Jugosllavisë. Gjersa ky proces ka qenë i dhembshëm, ne do të punojmë pa pushim për t'i kontribuar një pajtimi që do të lejonte Europën Juglindore të shkojë përtej konflikteve të së kaluarës dhe të farkojë lidhje të reja rajonale të bashkëpunimit. Për këtë arsye, do të punojmë së bashku me fqinjtë tanë për të avansuar të ardhmen tonë të përbashkët europiane.

11. Ne shprehim, në veçanti, dëshirën tonë për të vendosur marrëdhënie të mira me të gjithë fqinjtë tanë, përfshirë Republikën e Serbisë, me të cilën kemi marrëdhënie historike, tregtare dhe shoqërore, të cilat synojmë t'i zhvillojmë më tej në të ardhmen e afërt. Ne do të vazhdojmë përpjekjet tona për t'i kontribuar marrëdhënieve të fqinjësisë dhe bashkëpunimit me Republikën e Serbisë duke promovuar pajtimin ndërmjet popujve tanë.

12. Ne, nëpërmjet kësaj, afirmojmë në mënyrë të qartë, specifike dhe të parevokueshme se Kosova do të jetë ligjërisht e obliguar të plotësojë dispozitatat e përmbajtura në këtë Deklaratë, përshirë këtu veçanërisht obligimet e saj nga Plani I Ahtisaarit. Në të gjitha këto çështje, ne do të veprojmë në pajtueshmëri në parimet e së drejtës ndërkombëtare dhe rezolutat e Këshillit të

Sigurimit të Kombeve të Bashkuara, përfshirë Rezolutën 1244 (1999). Ne shpallim publikisht se të gjitha shtetet kanë të drejtën të mbështeten në këtë Deklaratë, dhe i bëjmë apel të na ofrojnë përkrahjen dhe mbështetjen e tyre.

D-001
Prishtinë, më 17 shkurt 2008
Kryetari i Kuvendit të Kosovës
Jakup KRASNIQI

ANNEX 2

ICTY, *Prosecutor v. Milosevic*, IT-02-54-T, Transcript,
1 December 2004, pp. 33983 & 34043-34056
http://www.icty.org/x/cases/slobodan_milosevic/trans/en/041201IT.htm

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going to ask you to admit that book into evidence as well, this book of Mr. Primakov that he mentioned yesterday.

If you wish, if you accept this, I will prepare it and submit it to the Chamber.

JUDGE ROBINSON: Submit it to us, and we'll consider it.

THE ACCUSED: [Interpretation] Thank you. I call witness Vukasin Jokanovic.

JUDGE ROBINSON: Mr. Milosevic, I'm reminded that of course it's only the parts of the book that are relevant that were adverted to that we would consider admitting, so that you should identify those parts.

THE ACCUSED: [Interpretation] Very well.

MR. NICE: And of course the obvious point is that I wasn't alerted to it and may have had several questions to ask arising out of it, but perhaps I could see the book when it is admitted.

JUDGE ROBINSON: Very well, yes.

[The witness entered court]

JUDGE ROBINSON: Let the witness make the declaration.

THE WITNESS: [Interpretation] I solemnly declare that I will speak the truth, the whole truth, and nothing but the truth.

JUDGE ROBINSON: Please be seated.

WITNESS: VUKASIN JOKANOVIC

[Witness answered through interpreter]

JUDGE ROBINSON: You may begin, Mr. Milosevic.

Examined by Mr. Milosevic:

Q. [Interpretation] Good morning, Mr. Jokanovic.

(...)
(pages 33984-34042 omitted)

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Mr. Jokanovic, for the Assembly of Serbia to be able to pass these amendments, it was necessary to receive the approval of both provinces; is that so?

A. Yes.

Q. Was it necessary to have the approval of the Republic of Serbia for provincial assemblies to pass amendments?

A. No. Serbia's approval was not necessary. Provinces could change their constitutions independently.

Q. Mr. Jokanovic, we will now move on to very specific issues, questions, because as you just confirmed, you were at the time president of the Assembly of Kosovo.

A. Correct.

Q. When did the Assembly of Kosovo and, if you know, the Assembly of Vojvodina meet to give this approval?

A. For Vojvodina it was the 10th of March, and for Kosovo it was the 23rd of March.

Q. I thought Vojvodina's Assembly met on the 21st of March, but what you say is true. The session of the Assembly of Kosovo over which you presided took place on the 23rd of March.

Tell me, was it a public session?

A. The session of the Kosovo parliament was a public one. It was attended by a great number of journalists. Never in my life, although I occupied various posts, had I spoken before a greater number of the press. There were 180 journalists accredited from all over Yugoslavia and even from abroad. The interest was huge in the course and the work of

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that particular session of the Assembly of Kosovo.
Q. Tell me, Mr. Jokanovic, was this parliament session held in a regular way?
A. This parliament session was held quite regularly, in keeping with the constitution of Kosovo and in keeping with the Rules of Procedure of that parliament.
Q. You were the speaker of that parliament. What was the ethnicity of other high officials in the parliament?
A. I was president, the vice-president was Albanian, general secretary was also Albanian. Since the parliament had three Chambers, in two Chambers there were Albanians, and in the third one there was a Montenegrin at the top. And my in my previous posts I also had a lot of Albanian colleagues. I think I explained that already.
Q. Please tell us, was any pressure exerted on the delegates?
A. To vote or not to vote?
Q. Were they pressured into accepting the proposal to consent to these constitutional amendments?
A. We functioned in the system of delegates. Delegates voted in accordance with their constituency. Their constituency were the municipal assemblies, and the delegates of social political Chambers and various political organisations. Pressures in the sense of threats or any other kinds of pressure did not exist. It was the duty of the delegates to vote in accordance with the position of those organs who sent them to the Assembly of Kosovo.
Q. Actually to vote in accordance with the position of their

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constituency?

A. Yes, that's right.
Q. Please tell me, on the 3rd of May, 2002, Ibrahim Rugova stated here, I'm quoting his words, I took this off the transcript: "The Kosovo Assembly had to decide on the suspension of the status of Kosovo from the federation and the Assembly delegates were pressured into voting on this. The public was against this. They used violence to pressure them. There were tanks in the streets, and there were secret agents inside the Assembly building so that the members voted under pressure. I remember that ten members voted against, and these members were punished, convicted. Some were sent to prison, and some were fired."
All right. So you were the president of the Assembly. Let us clear up some things. Were there any tanks around the Assembly building?
A. No, there were no tanks around the Assembly building.
Q. Did you see any tanks? How did you come to the Assembly building from your house? Did you walk there or did you come with an escort or something like that?
A. Well, the distance is relatively short. I lived in what was then called Beogradska Street. I went there on foot. I saw no tanks on the streets, no tanks around the Assembly building.
Q. Mr. Jokanovic, please have in mind the warning of the interpreters. As both of us speak Serbian, we have to make a pause in order to allow the interpreters to interpret what both of us say.
So there was no pressure, and there were no tanks. But the fact that ten members of the Assembly voted against is an accurate one that can

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be confirmed by the minutes?
A. Yes, that's right.

Q. How many members of the Kosovo Assembly attended that session where amendments were passed?
A. Hundred and 87.
Q. What was the total number?
A. Hundred and ninety.
Q. So only three members of the then-Kosovo Assembly did not attend the session?
A. Yes, that's right.
Q. And out of those 187, Rugova himself stated that ten voted against, and how many refrained from voting?
A. Ten voted against, and two delegates abstained from voting.
Q. So everybody else voted for?
A. Yes. Everybody else voted for. This was a vast majority, and the decision was followed by an applause. Everybody stood up, because in addition to working nature, this was also a formal, solemn Assembly session.
Q. Please tell me, did anybody from Serbia have an influence over the election of the members of the Kosovo Assembly?
A. The Republic of Serbia and its organs had no influence over the personnel policy in Kosovo. The personnel policy in Kosovo was something that was dealt with by Kosovo organs and other institutions in Kosovo.
Q. Well, there are documents to confirm all of these facts that you are testifying about. There were 187 delegates attending out of a total

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number of 190, ten voted against, 2 abstained from voting.
How would you characterise the claim contained in paragraph 86 of this so-called indictment which reads as follows, I'm quoting --

JUDGE ROBINSON: I'm stopping you. The indictment is proper as to form and to substance. Challenges were made at a preliminary stage, and they were dealt with. The indictment is a reality. It is entirely proper and should not be referred to in that way. Continue.
THE ACCUSED: [Interpretation] Mr. Robinson, the indictment is an act of insolence, because everything in it is turned upside down. Not a single count --
JUDGE ROBINSON: I have cut you off. If you are going to proceed in that manner concerning issues that have already been dealt with, I will not allow you to do so. I want to hear nothing more about the indictment. That issue has been dealt with, was dealt with from over two years ago. Proceed with your questions.
THE ACCUSED: [Interpretation] All right. Well, here is an example of how it has been dealt with, Mr. Robinson. You don't need a greater example from this testimony of this witness. So paragraph 86 reads as follows: "The Kosovo Assembly met in March in Kosovo, and they voted on the proposed amendments," which is correct again. And I will quote on: "And most of the Kosovo Albanian delegates abstained from voting," which is a blatant lie, because only two of them abstained from voting. And then I continue quoting: "Although lacking the required two-thirds majority in the Assembly --" which again is a blatant lie, because only ten delegates voted against --

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JUDGE ROBINSON: Mr. Milosevic, there will come a time when you will be allowed to make a speech. That time is not now. The evidence is to be elicited through the witness.
THE ACCUSED: [Interpretation] Very well. Very well, Mr. Robinson.

JUDGE KWON: Check the paragraph number again. I couldn't follow.
You said 86.
THE ACCUSED: [Interpretation] Yes. I said 86. 86, yes.
Then it goes on to say: "Although the majority of Kosovo Albanian delegates abstained from voting. Although lacking the required two-thirds majority in the Assembly, the president of the Assembly nonetheless declared that the amendments --"
THE INTERPRETER: Interpreters note that Mr. Milosevic is reading out of paragraph 81.
THE ACCUSED: [Interpretation] Thank you, Ms. Anoya.
Perhaps I had an old version, but the text is identical, and the new number is paragraph 81. I have it in English, and what I quoted is accurate, even in this new paragraph number. And it says here: "On 23rd March, [In English] Assembly of Kosovo met in Pristina and with the majority of Kosovo Albanian delegates abstaining, voted to accept the proposed amendments to the constitution. Although lacking the required two-thirds majority in the Assembly, the president of the Assembly nonetheless declared that amendments had passed."
[Interpretation] And then in the end there's another sentence. It is not important for this witness: "[In English] Assembly of Serbia voted to approve the constitutional change, effectively revoking the autonomy

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granted in the 1974 constitution."
[Interpretation] This is precisely what I read out verbatim.
MR. MILOSEVIC: [Interpretation]
Q. Therefore, out of 187 delegates, two voted against -- two abstained, ten voted against, and 174 voted for; is that right?

A. Yes, that's right.
Q. All of these delegates who had some reservations and who voted against, were they given an opportunity to speak publicly in the Assembly?
A. The session was held in a democratic atmosphere. All of those who wanted the floor were granted the right to speak, and you can see that in the tape recording. All of those who wanted were able to discuss publicly. I think that a lot of those who voted for also spoke up publicly. I think that there were a total of 34 people taking the floor.
Q. How many?
A. I think 34. I have it here in a press excerpt, because the press, on the following day, wrote about all of these facts that I'm describing here. It wrote about the debate, about those who attended, and so on. And there is also a videotape which is not complete because our technical facilities were not very modern at the time.
JUDGE ROBINSON: What was the ethnic distribution of the membership of the Assembly?
THE WITNESS: [Interpretation] The ethnic composition was in accordance with the ethnic composition of the population. Therefore, there were over 70 per cent of Albanian delegates in the Assembly, and at the time there were 77 per cent of Albanians living in Kosovo and

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Metohija, and in the Assembly over 70 per cent of the delegates were Albanian. If I remember well, there were 140 and something -- 142 or 143 Albanian delegates in the Assembly.
And then we had Serbs, Montenegrins, Turks, Muslims, and so on, again in numbers corresponding the ethnic composition of the population, because we had to satisfy the requirement for representation both as far

as the ethnic composition was concerned and the social composition. That was very important in our then-system.

MR. MILOSEVIC: [Interpretation]

Q. All right, Mr. Jokanovic. I have here the English translation and the Serbian text, so there are no problems with translations here. I also have the tape recording from the session of the Assembly held on the 23rd of March, 1989. I marked certain portions. You received this text in English. This is Exhibit 963. And I ask that this be admitted into evidence.

You will be surprised to hear that even those who voted against did not have very firm views, were not firmly opposed to the constitutional amendments. However, it is their democratic right to vote, so there is no problem there.

JUDGE KWON: I don't follow the number you said 963 is coming from.

THE ACCUSED: [Interpretation] This is the number indicated on the list. It says here "DPK 963, tape recording," and so on.

JUDGE KWON: 65 ter number, yes.

JUDGE ROBINSON: Proceed, Mr. Milosevic.

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MR. MILOSEVIC: [Interpretation]

Q. Therefore, my question was, Mr. Jokanovic -- in view of the significance, I have to repeat this question. In view of these facts that you are testifying about, and in view of these documents, how can you qualify the claims in paragraph 81 - and I thank Mr. Kwon for helping me with this - this claim that on the 23rd of March, 1989 the Assembly of Kosovo met in Pristina and, with the majority of Kosovo Albanian delegates

abstaining, voted to accept the proposed amendments even though the required two-thirds majority was lacking, and the president of the Assembly - meaning you - declared that the amendments had passed, full stop.

On the 28th of March, 1989 the Assembly of Serbia voted to approve the constitutional changes effectively revoking the autonomy granted in the 1974 constitution. So this is paragraph 81 of the English version. So please tell me, in view of these facts that you told us here, how do you assess this paragraph?

A. This is not correct. This is fabricated. This fabrication is an attempt to justify what was going on in Kosovo.

I think that the Office of the Prosecution received this information which they deemed to be reliable. They received this -- these facts from those who use such fabrications to strengthen their separatist objectives of breaking Kosovo away from Serbia and transforming it into an independent state.

I don't think that something like this, a claim like this, is even logical. I don't think that it would even be possible, realistic, because

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as a speaker of the parliament, I'm not a magician, so I could not, in the presence of 187 delegates, and in the presence of 180 journalists, in a situation where all leaders, the most prominent leaders from Kosovo and from the federation were present, how could I, under those circumstances, say the amendments have been passed when, in fact, they have not? The press reporting both in Serbian and Albanian will clearly show that the situation was, as will the tape.

Q. Mr. Jokanovic --

THE ACCUSED: [Interpretation] Could we play the tape, Mr. Robinson? And this will allow you to gain an impression. We have a videotape, a very brief one.

JUDGE ROBINSON: Yes. Yes.

THE ACCUSED: [Interpretation] Could you please play the tape.

[Videotape played]

JUDGE ROBINSON: Stop the tape. Mr. Milosevic, was it your intention to have the tape played without there being any translation? Because we're not getting any translation, so it's -- it's of no use to us.

THE ACCUSED: [Interpretation] It was not my intention to play it without interpretation, because I assumed that it could be translated because it's very brief when you play the tape. So I thought that what is being spoken and what is being seen about all the organs supporting the Assembly session, that there was major interest in that, I thought that several of these key things could be interpreted. But we can continue. You can see what the atmosphere at the Assembly session itself was like.

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JUDGE ROBINSON: Well, before we continue, let me find out whether the interpreters are in a position to translate, to interpret.

THE INTERPRETER: Your Honours, it's very fast.

JUDGE ROBINSON: Mr. Milosevic, I just heard that. The interpreters say the speech is very, very fast. It's very difficult for them.

THE INTERPRETER: Without a transcript, Your Honour.

THE ACCUSED: [Interpretation] The following clip is not very fast, and it's pretty indicative, and I think it will show the actual place

where the Assembly was held and the declaration of the adoption of the amendments. We do not have to interpret this very fast clip, but let's look at the next one.

JUDGE ROBINSON: Very well, yes.

JUDGE KWON: And if you could also indicate the relevant page number of this transcript. It's not interpreted?

THE ACCUSED: [Interpretation] This next clip, you will see now and then I will try with the help of the witness to identify when it was taken and so on.

[Videotape played]

THE INTERPRETER: [Voiceover] "There is the Socialist Republic of Serbia became a state throughout its territory after the decision of the republican -- after the parliament on Kosovo the constitution of the Socialist Republic of Serbia will be announced on the 28th of March. It is well known that the provincial parliament of Kosovo gave its approval to the wording of the amendments."

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MR. MILOSEVIC: [Interpretation]

Q. Very well. Mr. Jokanovic --

JUDGE ROBINSON: Before you proceed, let me ask the witness, just to clarify this. There's a reference to paragraph 81 of the indictment to which Mr. Milosevic referred. You say it is -- it does not reflect the factual situation because the reference to the required two-thirds majority not being present is wrong because there was a two-thirds majority. Please answer that.

THE WITNESS: [Interpretation] There was a two-thirds majority and agreement was reached by an overwhelming majority, much greater than a

two-thirds majority. A two-thirds majority was required, however, under the constitution.

JUDGE ROBINSON: So that in declaring the amendments as having passed, you acted entirely properly.

THE WITNESS: [Interpretation] I acted completely properly, in accordance with my agenda and in the way I conducted the meeting, asked who was for, who was against, how many abstained, and I declared that agreement was reached on the amendments to the constitution of Serbia, and this was followed, as you could see, by applause. All the deputies who were present got to their feet.

This happened before 180 journalists and TV crews who happened to be accredited for that event that day. I have the original newspapers with me where what I'm saying now was published at the time. These are both newspapers in Serbian. I also have a newspaper in the Albanian language, Jedinstvo Politika in Albanian. It's the newspaper Rilindja

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Komunist. There are pictures and so on.

JUDGE ROBINSON: You've answered the question.

MR. MILOSEVIC: [Interpretation]

Q. Mr. Jokanovic, at the moment when you declared the amendments adopted and when the Assembly session got to its feet and the applause began, we could see on this brief clip many figures who were sitting there. Can you please remember and tell us who we can see. Who was sitting in the front row? Who were those who were present as special guests and who also applauded and got to their feet and so on?

A. The session was attended by leaders and officials from the federation who were representing Kosovo in the federation. The member of

the Presidency of Yugoslavia was there. The member of the Presidency of the Central Committee of Yugoslavia.

Q. I apologise for interrupting you, Mr. Jokanovic, but it would be useful, if you remember, if you could also tell us their names and not only just their posts.

A. Member of the Presidency of Yugoslavia who was before the vice-president and the president of the Presidency, his name is Sinan Hasani.

Q. And what is his ethnicity?

A. He's an Albanian from the village of Pozharanje from my own municipality Kosovska Vitina. He's also a writer, an author, who published the first novel in the Albanian language. He's a very prominent, respected figure. He's a novelist called "Rrushi ka filluar me u pjek." That's in Albanian. In Serbian the title is The Grapes are

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Beginning to Ripen.

Next to him was Ali Shukrija, who was a member of the Presidency of the Central Committee of Yugoslavia. Remzi Koleci, the president of the Presidency of Kosovo.

Q. Remzi Shukrija [sic] Was also an Albanian?

A. Yes, an Albanian from Kosovska Mitrovica. He participated in World War II and was decorated for that, and he was in the political life of Kosovo and the federation for many years.

Q. Continue. Remzi Koleci, what about him?

A. Remzi Koleci was the president of the Presidency of the Autonomous Province of Kosovo. This is the top function in Kosovo.

Rrahman Morina, the president of the Presidency of the Provincial

13 Committee of Kosovo.

14 Q. All Albanians?

15 A. Albanian. Daut Jasanica, the president of the Presidency of the

16 Socialist Alliance of the Albanians. The president of the Executive

17 Council, also an Albanian, Nazmi.

18 Q. Was that Jusuf Zejnullahu who was the person at the time?

19 A. Jusuf Zejnullahu at the time actually -- actually, at the time it

20 was either Nazmi Mustafa or Jusuf Zejnullahu. There are many years that

21 have gone by since then and there were people always changing in those

22 functions. I think it was Jusuf Zejnullahu.

23 Q. Well, I'm not sure either. I'm trying to remember.

24 JUDGE KWON: Excuse me, Mr. Milosevic.

25 Mr. Jokanovic, at the last page of this transcript I notice you

(...)

ANNEX 3

The Constitutional Court of Yugoslavia, Minutes U-No. 105/1-89 of 18 January 1990 [original and translation]

CONSTITUTIONAL COURT OF YUGOSLAVIA
Ref: U-No. 105/1-89
18 January 1990
Belgrade
LLJ

MINUTES

of the sittings deciding and voting in the procedure to render an opinion of the Constitutional Court of Yugoslavia on the incompatibility of Amendments IX to XLIX to the Constitution of the SR of Serbia with the Constitution of the SFRY

(...)

Judge Dr. Ivan Kristan made a proposal to additionally examine the question of the adoption of the amendments to the Constitution of the SR of Serbia while emergency measures were still in place in the SAP of Kosovo.

Two judges voted in favour of Judge Dr. Ivan Kristan's proposal and 11 (eleven) judges were against it.

Judge Kristan proposed to study the matter, especially with regard to law by the scientists concerning restricting the transfer of immovable property, although he agreed with the arguments advanced by Judge Rapporteur Milovan Buzadzic.

Further, Judge Kristan made an oral proposal, at the sitting on deciding and voting of 5 January 1990, to additionally study the status of autonomous provinces and submitted his proposal in writing. In this written proposal, Judge Kristan challenged, that is brought into doubt, three amendments to the Constitution of the SR of Serbia, namely: Amendment XXIX, point 1; Amendment XLIV, point 5; Amendment XLVII.

The Judge Rapporteur reported on these issues and stated the reasons why he deemed that Amendment XXIX, point 1; Amendment XLIV, point 5; and Amendment XLVII to the Constitution of the SR of Serbia were not incompatible with the SFRY Constitution. The Constitutional Court accepted the reasoning of Judge Buzadzic and determined that the said Amendments to the Constitution of the SR of Serbia were not in contravention of the SFRY Constitution.

(...)

УСТАВНИ СУД ЈУГОСЛАВИЈЕ
USTAVNI SUD JUGOSLAVIJE
USTAVNO SODIŠČE JUGOSLAVIJE
УСТАВЕН СУД НА ЈУГОСЛАВИЈА
Бр. Br. Št. U-broj 1o5/1-89
18. januara 19 9o год./god./let.
БЕОГРАД—BEOGRAD—БЕЛГРАД
LLJ

Z A P I S N I K

sa sednica o većanju i glasanju u postupku utvrdjivanja mišljenja Ustavnog suda Jugoslavije o suprotnosti Amandmana IX - XLIX na Ustav SR Srbije sa Ustavom SFRJ

Ustavni sud Jugoslavije održao je sednice o većanju i glasanju u postupku utvrdjivanja mišljenja o suprotnosti Amandmana IX - XLIX na Ustav SR Srbije sa Ustavom SFRJ 9, 12. i 18. januara 199o. godine.

Svim sednicama o većanju i glasanju prisustvovalo je dvanaest sudija, i to: predsednik Ustavnog suda Jugoslavije Dušan Štrbac i sudije Hrvoje Bačić, Božidar Bulatović, Milovan Buzadžić, mr Krste Čalovski, dr Aleksandar Fira, dr Omer Ibrahimagić, dr Branislav Ivanović, Dimče Kozarov, Veljko Marković, Radko Močivnik i Milosav Stijović.

Sudija dr Ivan Kristan prisustvovao je samo na sednici o većanju i glasanju održanoj 9. januara 199o. godine. Sud je prihvatio predlog Radka Močivnika da može da glasa i u ime sudije dr Ivana Kristana.

Sednicama o većanju i glasanju prisustvovali su i sekretar Ustavnog suda Jugoslavije Krcun Dragović i stručni saradnici Suda.

Sednice o većanju i glasanju vodio je predsednik Ustavnog suda Jugoslavije Dušan Štrbac.

Sudija izvestilac Milovan Buzadžić predložio je da Ustavni sud Jugoslavije utvrdi da su sledeće odredbe Am-

andmana IX - XLIX na Ustav SR Srbije u suprotnosti sa Ustavom SFRJ:

1. Odredba tačke 5. stav 1. Amandmana XIV na Ustav SR Srbije, u delu kojim je utvrdjeno da se zakonom, odnosno na zakonu zasnovanom odlukom skupštine društveno-političke zajednice utvrdjuje oblik samoupravnog organizovanja u kome se zadovoljavaju potrebe i interesi u odgovarajućoj oblasti.

Za predlog sudije izvestioca glasalo je četiri sudije, a protiv predloga glasalo je devet sudija, što znači da predlog sudije izvestioca nije prihvaćen.

2. Odredba tačke 3. Amandmana XX na Ustav SR Srbije, u delu kojim je utvrdjeno da se zakonom može ograničiti promet nepokretnosti.

Za predlog sudije izvestioca glasalo je svih 13 (trinaest) sudija Ustavnog suda.

3. Odredbe stava 3. Amandmana XXVII na Ustav SR Srbije.

Za predlog sudije izvestioca glasalo je 8 (osam) sudija, a protiv je glasalo 5 (pet) sudija. Sudija dr Aleksandar Fira, Veljko Marković i Milosav Stijović izdvojili su mišljenje.

4. Odredba tačke 4. stav 2. Amandmana XXXIX na Ustav SR Srbije, u delu kojim je utvrdjeno da delegatsku izbornu jedinicu za delegate u Veću opština Skupštine SR Srbije čine radni ljudi i gradjani u društveno-političkim organizacijama.

Za predlog sudije izvestioca glasalo je svih 13 (trinaest) sudija Ustavnog suda.

Sudija dr Ivan Kristan dao je predlog da se dodatno prouči pitanje donošenja Amandmana na Ustav SR Srbije u vreme trajanja vanrednih mera u SAP Kosovo.

Za predlog sudije dr Ivana Kristana glasala su dvojica sudija, a protiv je glasalo 11 (jedanaest) sudija.

Sudija Kristan je predložio izučavanje stvari, a naročito u vezi zakona od strane nauke u pogledu ograničavanja prometa nepokretnosti iako se složio sa iznetom argumentacijom sudije izvestioca Milovana Buzadžića.

Takodje je sudija Kristan predložio usmeno na sednici o većanju i glasanju 5. I 199o. godine da se dodatno prouči položaj autonomnih pokrajina i dao pismeni predlog. U pismenom predlogu sudija Kristan je osporio - odnosno doveo u sumnju tri Amandmana na Ustav SR Srbije, i to: Amandman XXIX tačka 1, Amandman XLIV tačka 5, Amandman XLVII.

Sudija izvestilac je referisao po ovim pitanjima i izneo razloge zbog kojih smatra da nema suprotnosti amandmana XXIX tač. 1, XLIV tač. 5. i XLVII na Ustav SR Srbije sa Ustavom SFRJ. Ustavni sud je prihvatio argumentaciju sudije Buzadžića i utvrdio da Amandmani na Ustav SR Srbije nisu u suprotnosti sa Ustavom SFRJ.

Ceo tok sednice o većanju i glasanju stenografski je beležen i magnetofonski sniman.

Magnetofonske beleške prilažu se ovom zapisniku i čine njegov sastavni deo.

SUDIJA IZVESTILAC
Milovan Buzadžić

SAMOSTALNI SAVETNIK
Ljubica Pavlović-Trgovčević

PREDSEDNIK
USTAVNOG SUDA JUGOSLAVIJE

Dušan Štrbac

ANNEX 4

***Le Temps*, "Martti Ahtisaari: 'Le Kosovo est un cas à part'", 5 March 2008**
http://www.letemps.ch/Facet/print/Uuid/79cb56ac-aa06-11dd-bf59-ad3d6140ad87/Martti_Ahtisaari_Le_Kosovo_est_un_cas_à_part

LE TEMPS

BALKANS Mercredi5 mars 2008

Martti Ahtisaari: «Le Kosovo est un cas à part»

Par Caroline Stevan, envoyée spéciale à Helsinki

Artisan du plan d'indépendance de l'ex-province serbe, l'ancien président finlandais revient sur la naissance du nouvel Etat.

Nommé fin 2005 émissaire des Nations unies pour le Kosovo, l'ancien président finlandais Martti Ahtisaari (1994-2000) a supervisé les négociations concernant le statut de la province serbe pendant des mois. En mars 2007, il rend un rapport qui prône l'indépendance et fournit une ossature au futur Etat kosovar. Sans surprise, Pristina s'est officiellement affranchi de Belgrade le 17 février dernier. Interview.

Le Temps: Le Kosovo vient de déclarer son indépendance selon votre plan. Comment vous sentez-vous?

Martti Ahtisaari: En réalité, je suis déçu que le Conseil de sécurité des Nations unies n'ait pu réaliser ce plan. Le Kosovo a autoproclamé son indépendance, mais il n'y avait pas d'autres options. Pristina l'a fait sur la base du rapport que j'ai rendu en 2007 et c'était une condition pour une reconnaissance par les autres Etats.

- Etes-vous surpris par la réaction de Belgrade?

- Ce qui m'étonne dans cette affaire, c'est que la Serbie savait depuis le début ce que j'allais proposer. Il a tout de suite été question d'indépendance lors des réunions avec les négociateurs français, britanniques, italiens, allemands, américains et russes. L'une des conditions formulées au départ était de ne surtout pas revenir à la situation d'avant 1999. Lorsque j'ai rencontré [le premier ministre] Kostunica en 2005, je lui ai dit que j'interprétais cela comme la perte du Kosovo. C'était très clair et à cette époque, la population serbe partageait ce sentiment. J'aurais normalement dû rendre mon rapport fin 2006, mais cela a été reporté à cause des élections. Ma position était donc connue depuis longtemps. Les autorités serbes ont sciemment préparé leur population à un autre scénario et je trouve cela extrêmement grave. La Russie a aussi sa part de responsabilité dans l'attitude affichée par Belgrade mais je suppose que leur irresponsabilité n'ira pas plus loin que des déclarations.

- Craignez-vous, comme certains l'avancent, que l'indépendance du Kosovo ne déclenche des revendications en chaîne?

- Le Kosovo est un cas à part et nulle autre région n'a une histoire comparable. L'OTAN y est intervenue en 1999 pour mettre un terme à la guerre lancée par Slobodan Milosevic. Le territoire est ensuite passé sous administration des Nations unies. Depuis 1999, le Kosovo était de facto un protectorat onusien et non plus une province serbe.

- Que pensez-vous de la situation en Republika Srpska, où les Serbes ont des velléités

d'indépendance vis-à-vis de la Bosnie?

- Je n'en pense rien.

- Belgrade veut saisir la Cour internationale de justice au motif que l'indépendance du Kosovo violerait la résolution 1244 des Nations unies affirmant le principe de l'intégrité du territoire serbe. Est-ce légitime?

- Les choses ont tellement mal tourné dans les années 1990, entraînant la fuite de milliers de réfugiés et l'intervention armée de l'OTAN... Toute autre option que l'indépendance est de la littérature. En outre, la Serbie n'a jamais rien fait pour intégrer les Kosovars. Ceux-ci ont été empêchés de participer à la vie politique, de développer leur région au niveau économique... La province, dès lors, n'était pas considérée comme partie prenante de la Serbie.

- Le Kosovo a-t-il les moyens de son indépendance?

- Dans un monde idéal, l'indépendance aurait dû intervenir en 1999. Le Kosovo a donc eu le temps de s'y préparer. C'est un pays qui a des ressources, comme le lignite ou les minéraux, mais le chômage y atteint des proportions gigantesques - entre 40 et 60% de la population. Il est, dès lors, très important de l'intégrer au plus vite au concert des nations. La Banque mondiale et le Fonds monétaire international doivent apporter leur aide, notamment pour la construction d'une centrale thermique qui pourrait, à terme, permettre au Kosovo d'exporter de l'énergie. L'Union européenne a évidemment un rôle primordial à jouer.

- Allez-vous vous investir encore pour la construction du Kosovo?

- Non, mon mandat s'est achevé fin février, j'ai fait mon travail. Le Kosovo est maintenant un problème européen.

- La Finlande devrait reconnaître l'indépendance du Kosovo vendredi. Etes-vous déçu que votre pays n'ait pas figuré parmi les premiers Etats à soutenir Pristina?

- La présidente était en vacances! Le plus important était d'annoncer cette reconnaissance.