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E REPUBLIKËS SË SHQIPËRISË
Hagë

EMBASSY
OF THE REPUBLIC OF ALBANIA
The Hague

No 45/09

The Embassy of the Republic of Albania presents its compliments to the Registrar of the International Court of Justice and has the honour to transmit to the Court this reply in the advisory proceedings in the case *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.*

The Embassy of Albania avails itself of this opportunity to renew to the Registrar of the International Court of Justice the assurances of its highest consideration.

The Hague, July 17, 2009

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

INTERNATIONAL COURT OF JUSTICE

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo

(Request for Advisory Opinion)

Order of 17 October 2008

REPLY OF THE GOVERNMENT
OF THE REPUBLIC OF ALBANIA

July 2009

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LIST OF ABBREVIATIONS

DoI	Declaration of Independence
EULEX	European Union Rule of Law Mission in Kosovo
FRY	Federal Republic of Yugoslavia
GA	General Assembly of the United Nations
ICFY	International Conference on the former Yugoslavia
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
KFOR	NATO-led Kosovo Force
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Co-operation in Europe
PISG	Provisional Institutions of Self-Government of Kosovo
UNMIK	United Nations Interim Administration Mission in Kosovo
SC	Security Council of the United Nations
SFRY	Socialist Federal Republic of Yugoslavia
SR-SG	Special Representative of the Secretary-General of the United Nations for Kosovo

Part I INTRODUCTION

1. On the basis of the Order of the Court of 17 October 2008 the Republic of Albania submits its written observations on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

2. Albania has a number of observations with regard to certain factual and legal issues presented in the first round of written submissions which closed on 17 April 2009. They mainly respond to the written Statement of Serbia, since other similar statements do not really add new arguments. These observations should be considered as additional to or supporting the views expressed in Albania's previous written statement submitted on 16 April 2009.

3. The Republic of Albania reserves its position on all issues and matters not dealt with explicitly in its written statements. Further, Albania reserves the right to provide further comments or observations should the Court determine to deal with any such issues.

4. In replying to differing positions the Republic of Albania has chosen to maintain the structure of its previous statement. Thus, at the beginning are provided some general initial observations with regard to some factual and legal elements of the case. In turn, jurisdictional and propriety issues are dealt with briefly. Subsequently, several legal issues concerned with the question put before the Court are discussed in detail. A number of conclusions are drawn at the end, before presenting Albania's submissions to the Court.

Part II BACKGROUND TO THE CASE

5. Albania deems it necessary at this juncture to make a number of general remarks on some key developments relating to the violent break-up of Yugoslavia, which involve Kosovo. They are aimed at clarifying certain misleading factual and legal interpretations present in the written statement of Serbia and a small number of other countries. At the outset Albania would like to clarify for the purposes of these proceedings that it does not share a border with Serbia, but with the Republic of Kosovo, the latter State laying between them.

A) Constitutional Issues

6. The 1968 constitutional amendments started the emergence of the autonomous province of Kosovo as a constituent part of the SFRY. At the same time these amendments granted Kosovo the right to establish its own judiciary headed by a supreme court. Further amendments adopted in 1971 granted Kosovo the right to have representatives in the federal organs in addition to the Federal Assembly, namely the Presidency, the Federal Government, and the Federal Constitutional Court. In 1972 the Assembly of Kosovo created the National Bank of Kosovo and the Constitutional Court of Kosovo. According to the 1974 SFRY Constitution 2/3 of the members of the Assembly of Kosovo had to give their consent for changes to the SFRY and the Serbian Constitution to be adopted. In the 1974 Constitution of the SFRY, Kosovo was a constituent part of Yugoslavia, with an equal status to the republics for all purposes, save for the name.

7. While in theory the March 1989 constitutional amendments of the Serbian Constitution could be reversed at the SFRY level, Serbia by and large controlled the federal authorities, including the Federal Constitutional Court of Yugoslavia. In practice that meant that those changes would drastically affect the self-governing powers and the autonomy enjoyed until that time by Kosovo and its

citizens.[1] It should be emphasized that the voting in the Serbian parliament by Kosovo's representatives is not important, since their vote would not have been able to stop the proposed amendments from being adopted.[2] What matters is the complete rejection of these amendments by the population of Kosovo, expressed through the hunger strike of the miners in Trepça (Mitrovica) and the widespread public demonstrations.[3]

8. In commenting upon the political manoeuvres preceding the amendments to the Serb Constitution in 1988-1989 Weller notes:

> "To ensure the eventual adoption of reform proposals, the leadership of Vojvodina was removed first. Measures were taken to ensure that Montenegro, too, would not oppose Serb action at the Federal level. While Slovenia remained opposed and was locked in an increasingly bitter struggle with Serbia and the federal organs increasingly dominated by it, Milosevic also initially managed to persuade leaders in Croatia and Bosnia and Herzegovina to remain silent, on the understanding that Serbia would not subsequently seek to take action in relation to the Serbs inhabiting those two republics. Macedonia, with its very sizeable ethnic Albanian minority of between 20 and 30 per cent, was also persuaded not to oppose the removal of the Kosovo Albanians from political power."[4]

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[1] See *inter alia* Written Question E-0432/98 by Leonie van Bladel (UPE) to the Commission (24 February 1998) and the reply by the Commission (European Parliament) Official Journal C 223, 17/07/1998 P. 0172. Part of the reply reads: "The concept of autonomy under the 1990 constitution of the Republic of Serbia is very limited, in particular as all economic decisions are centralised. Kosovo Albanians have lost all of the legislative and executive authority which they had gained under the 1974 federal construction."

[2] See written statement of Serbia, par. 235 and M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 47 (hereinafter Weller).

[3] See *inter alia* written statement of Albania, p. 7, par. 8; Weller, p. 47; and *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, p. 43.

[4] Weller, *supra* note 2, p. 47.

9. It should be noted beforehand that the discussion by Serbia of a number of cases decided by the Constitutional Court of the SFRY is not relevant for the current legal proceedings. What these cases demonstrate is that in dealing with the issue of impending secession of the Yugoslav Republics, the Yugoslav Constitutional Court in the *Slovenian Constitutional Amendment Case* clarified that this was a matter for the Federal Constitution of Yugoslavia and not the constitution of a single republic, where the approval of all of Yugoslavia's republics and autonomous provinces was necessary.[5] Similarly, the decision by the Yugoslav Constitutional Court in the case of Kosovo upheld the process which was to be followed in such a case.[6] A *sine qua non* legal requirement for that process was that any changes to the SFRY Constitution necessitated the approval of all republics and autonomous provinces. These cases, if anything, demonstrate the wide discrepancy between the constitutional legal framework existing at that time and the changing political realities and demands within the SFRY.

10. Furthermore, it is telling for the functioning of federal institutions at the time and their legitimacy that the decision of Yugoslav Federal Constitutional Court of 19 February 1991 on Kosovo's declaration of itself as a republic within the SFRY, was rendered by a reduced court composed of nine out of the total number of 14 members. That is by a court where more than one third of the judges did not participate in the legal proceedings. Taking note of these developments, in its Opinion No. 1 issued on 29 November 1991 the Badinter Commission concluded that the SFRY had ceased to be a State since federal institutions, including the Federal Constitutional Court, had ceased 'to meet the criteria of participation and representativeness inherent in a federation'.[7]

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[5] See *inter alia* P. Radan, '*Secession: Can it be a Legal Act?*', in *Identity, Self-Determination and Secession*, I. Primoratz and A. Pavković (eds.), Ashgate, 2006, pp. 158-160.

[6] Federal Constitutional Court of Yugoslavia, Decision of 19 February 1991, Official Gazette of the SFRY, No. 37/1991.

[7] See *inter alia* P. Radan, *The Break-Up of Yugoslavia and International Law*, Routledge Publishers: London and New York, 2002, p. 205; T.D. Musgrave, *Self Determination and National Minorities*, Clarendon Press: Oxfiord, 1997, p. 201. The relevant paragraph from Opinion No. 2 (b) reads: "The

11. The cases discussed in the Serbian written statement bear no semblance, nor do they provide any useful guidance for deciding in the present case. Kosovo cannot be compared, as Serbia tries to, with the situation of the Serb population in Bosnia Herzegovina or Croatia. Badinter Commission Opinion No. 2 dealt with the issue of the right to self-determination of the Serb population of Bosnia and Herzegovina and that of Croatia. This Opinion is not applicable to Kosovo, since Kosovo was a constituent part of the former Yugoslavia. Further, the situation is not at all comparable with that in Eastern Slavonia, a region which was not a constituent part of Yugoslavia (SFRY) like the Autonomous Province of Kosovo, but merely an administrative unit of Croatia. Furthermore, the parties there, namely the Republic of Croatia and the local Croatian Serb authorities in Eastern Slavonia, had already reached an agreement. The SC established an interim administration to govern the region during the transitional period of 12 months, and authorized an international force to maintain peace and security during that period. Thus, the UN assisted in the implementation of a prior agreement between the parties concerned.[8] Kosovo was not a party to the Dayton agreement, nor was it discussed there, so any references contained there regarding the territorial integrity of the FRY cannot be seen as binding on Kosovo.

B) Armed Conflict in Yugoslavia and Kosovo

12. It has to be kept in mind that between 1992 and 1995 Serbia was waging war against Croatia and Bosnia and Herzegovina, in spite of a number of Security

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composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, *the Constitutional Court* or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal state" (emphasis added).

[8] For more details on the mission and duration of the United Nations Transitional Authority in Eastern Slavonia (UNTAES) *http://www.un.org/Depts/dpko/dpko/co_mission/untaes.htm* (last accessed on 14 July 2009).

Council resolutions calling for an end to the hostilities. As the North Atlantic Council Ministerial meeting in December 1992 observed:

> "Primary responsibility for the conflict in Bosnia- Herzegovina lies with the present leadership of Serbia and of the Bosnian Serbs. They have sought territorial gains by force and engaged in systematic gross violations of human rights and international humanitarian law, including the barbarous practice of "ethnic cleansing"."[9]

A similar strategy would be employed by the Serbian authorities in Kosovo only a few years later.

13. Expressing concern about a potential escalation of the conflict and its spillover in Kosovo that Ministerial meeting statement noted:

> "We are deeply concerned about possible spillover of the conflict, and about the situation in Kosovo. We call urgently on all parties to act with restraint and moderation. Serious negotiations on the restoration of autonomy to Kosovo within Serbia and the guarantee of full human rights should begin immediately under the ICFY. We are in favour of a UN preventive presence in Kosovo. An explosion of violence in Kosovo could, by spreading the conflict, constitute a serious threat to international peace and security and would require an appropriate response by the international community."[10]

14. Since a lot of its resources were drawn into conflicts in Bosnia-Herzegovina and Croatia, the peaceful resistance by Kosovar Albanians fitted neatly Serbia's interests at the time. That temporary 'tolerance' by the Serb authorities faded quickly when in 1998-1999 the Serbian army, police and paramilitary forces engaged in a wholesale campaign of ethnic cleansing, pillaging and destruction of

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[9] Statement on Former Yugoslavia, Issued by the North Atlantic Council in Ministerial Meeting at NATO Headquarters, Brussels on 17th December 1992, available at: *http://www.nato.int/docu/comm/49-95/c921217b.htm* (last accessed on 14 July 2009).

[10] *Ibidem*.

civilian property and cultural and religious objects. It should be noted that a number of Serbian political and military leaders of the highest rank have been convicted for these crimes by the International Criminal Tribunal for the former Yugoslavia.

15. Contrary to what is contended by Serbia,[11] the period from October 1998 to January 1999 was characterized by a military build-up, against the recommendations of the Security Council, and the Contact Group for a withdrawal of Serb military and special police forces from Kosovo.[12] The Kosovo Liberation Army (KLA) was a liberation movement stemming from the people of Kosovo, strongly opposed to the violent oppression exercised upon them by the Milosevic regime. While a small number of low-ranking or rogue elements of the KLA have committed violations of the laws of armed conflict, the highest ranking political and military leaders of Serbia of that time have been found guilty of war crimes and crimes against humanity committed against Kosovar Albanian civilians in furtherance of clear State policy to ethnically cleanse Kosovo.[13]

C) Demographic Issues

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[11] See written statement of Serbia, par. 333.

[12] See *inter alia* the transcript of testimony given by General Wesley Clark in the Milosevic trial on 15 December 2003, p. 30467:13-20 noting that by 20th or so of December [1998] additional Serb military forces were being deployed and used against the population contrary to the October 1998 Holbrooke agreement, p. 30468:18-25 noting *inter alia* 'We saw increased numbers of forces moved in, we saw more tactical activities', available at: *http://www.icty.org/x/cases/slobodan_milosevic/trans/en/031215ED.htm* (last accessed on 14 July 2009); *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, p. 80; see also Weller, *supra* note 2, pp. 272-286.

[13] ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić* (hereinafter *Prosecutor v. Milutinović et al.*), Case No. IT-05-87-T, Judgment of 26 February 2009, Volumes I-IV, available on the ICTY website: *http://www.icty.org/case/milutinovic/4#tjug* (last accessed on 14 July 2009).

16. Slow economic growth in Kosovo compared with other parts of Yugoslavia, including Serbia, and better opportunities elsewhere were the main factors driving a number of Serbs out of Kosovo throughout the 70s, 80s, and 90s. The per capita income [in Kosovo] had declined from 48 per cent of the Yugoslav average in 1954 to 33 per cent by 1975, and 27 per cent in 1980.[14] While the political crisis went hand in hand with the economic difficulties facing all inhabitants of Kosovo, these hit ethnic Albanians the hardest. Thus, the numbers of Kosovar Albanians leaving Kosovo throughout the 70s, 80s, and 90s is estimated at around 500 000 persons, with about 300 000 of them leaving in the period from 1991 to 1995 when the level of economic hardship and human rights abuses increased exponentially.

17. It is submitted that the number of over 200 000 Serbs fleeing Kosovo after June 1999 is considerably inflated.[15] According to the Serb census of 1991 the total number of Serbs living in Kosovo at that time was about 194 190.[16] It should be noted that the Serb population at that time was estimated at about 9% and at present at about 6-7%.[17] That means that the number of Serbs leaving Kosovo after June 1999 most probably ranges from 30 to about 50 thousand persons at the most. While still considerable, the number is far below what the Serbian authorities contend. It should be mentioned that a lot of efforts have been made by the Kosovar authorities in cooperation with UNMIK and other international organisations to ensure the return to Kosovo of this part of the population. A number of them have already returned.

18. Besides passing a number of decrees aimed at changing the ethnic composition of Kosovo, part of the efforts aimed at the Serbianisation of Kosovo was the

[14] See A.J. Bellamy, *Human Wrongs in Kosovo: 1974–99*, International Journal of Human Rights, Special Issue: The Kosovo Tragedy: The Human Rights Dimensions, 2000, p. 111, quoting D. Rusinow, Yugoslavia: A Fractured Federalism, Washington DC: Wilson Centre Press, 1988, p. 70.

[15] See written statement of Serbia, pars. 357 and 365-387.

[16] See written statement of Serbia, par. 122.

[17] See written statement of Serbia, pars. 110 and 122 and the CIA World Factbook on Kosovo, available at: *https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html* (last accessed on 14 July 2009).

resettlement of Serbs in Kosovo and depriving the Kosovar Albanians of their demographic advantage.[18] Thus, Serbia kept transferring to Kosovo Serbian refugees fleeing from other parts of Yugoslavia where war was ongoing.[19] It is highly likely that with the withdrawal of the Serbian forces in June 1999 large numbers of these persons departed with them.

D) Parallel Institutions

19. The factual description in the statement of Serbia regarding the so-called parallel institutions in Kosovo in the period 1991-1998 is misleading.[20] An uninformed reader could get the impression that it was a policy of boycott of the existing public institutions by the Kosovar Albanians which led to the parallel institutions. In fact it was the exclusion of Kosovar Albanians from all forms of public life which left them no other alternative. Cultural, economic and political apartheid acted as the driving force for the creation of parallel state institutions by Ibrahim Rugova and his party, the Democratic party of Kosovo (LDK).[21] It was the firing *en masse* of Kosovar Albanians from their jobs and the discriminatory State policies against them which forced them to establish parallel institutions to cater for basic needs in the fields of education and elementary healthcare.[22]

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[18] See A.J. Bellamy, *Human Wrongs in Kosovo: 1974–99*, International Journal of Human Rights, Special Issue: The Kosovo Tragedy: The Human Rights Dimensions, 2000, p. 115. Reference is made there to the 'Decree for Colonisation of Kosovo of the Federal Republic of Yugoslavia' adopted by the Serbian Parliament on 11 January 1995. See also International Crisis Group Report, *Kosovo Spring*, 20 March 1998, p. 5 and *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, pp. 41-42.

[19] See written statement of Serbia, par. 293.

[20] See written statement of Serbia, p. 103.

[21] See A.J. Bellamy, *Human Wrongs in Kosovo: 1974–99*, International Journal of Human Rights, Special Issue: The Kosovo Tragedy: The Human Rights Dimensions, 2000, p. 122.

[22] For more details see *inter alia* International Crisis Group Report, *Kosovo Spring*, 20 March 1998; *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, pp. 45-46.

20. The establishment of these institutions provided work and some source of income to a large number of Kosovar Albanians who had been fired from their jobs, while at the same time providing them education in their own language and enjoyment of some minimum services. The Serbian authorities kept financing a number of the healthcare and educational institutions, since the majority of persons employed there were Serbs. Serbia violated the most fundamental elements of Kosovo's right to internal self-determination when it forced all Albanian pupils to undergo education in the Serbian language. Justifying that procedure on the adoption of "uniform curricula for primary and secondary education throughout Serbia in August 1990", as the Serbian statement does, is no excuse for that flagrant violation of the rights of the ethnic Albanian population of Kosovo[23].

21. A number of speculative assertions have been made by Serbia, claiming that participation in the elections organized by Serbia of Kosovar Albanians would have saved both Serbia and Kosovo from the policies of the Milosevic regime.[24] At a time when nationalism and nationalist policies were having their heyday in the Balkans, including Serbia, to claim that Kosovar Albanians could have tipped the balance in such elections is speculative. Moreover, no mainstream Serbian political party has then, nor does now take into account or even less so accommodate the legitimate interests and choices of Kosovar Albanians. Unfortunately, their position on Kosovo remains largely unaltered to this date.

E) Human Rights Violations in Kosovo

22. While correctly stating that the human rights' situation in Kosovo was very serious,[25] the written statement of Serbia fails to explain why that was so. Instead, by saying that the human rights' situation was not much better in the rest of Serbia at the relevant time Serbia tries to avoid accepting that the violation of human rights of the Kosovar Albanians was part and parcel of State policy at that time.

[23] See written statement of Serbia, par. 267.

[24] See written statement of Serbia, par. 642.

[25] See written statement of Serbia, p. 105, par. 270.

Comparing the difficult human rights situation of about 1 800 000 Kosovar Albanians resulting from sanctioned discriminatory State policy with the repression of a small number of Serb political dissidents opposed to the policies of Milosevic is a clear effort to gloss over the gross and systematic human rights abuses perpetrated upon ethnic Albanians in Kosovo. It bears mentioning here that at least one member of every Kosovar Albanian family was called by the police in what were termed 'informative talks', had spent some time in jail, or was waiting for a trial.[26] Such 'talks' were simply instances during which individuals were subjected to psychological intimidation and in many cases to acts of torture at the hands of the Serbian police.

23. The human rights abuses perpetrated on ethnic Albanians in Kosovo throughout the 90's are well-known and well-documented.[27] It is a complete misrepresentation of the factual situation pertaining at the time to list the formal legal protection theoretically available under the laws of the country, while gross and systematic violations of human rights of ethnic Albanians took place with virtual impunity. As the General Assembly, as well as the Security Council note in many resolutions, the suppression of the ethnic Albanian population in Kosovo was evident, well-documented and thus it became subject to international condemnation.[28] Unfortunately, even nowadays the Serbian judicial authorities are reluctant to award reparations for violations of humanitarian law in Kosovo by

[26] See *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, p. 42.

[27] *See inter alia* Human Rights Watch Report, *Humanitarian Law Violations in Kosovo*, October 1998; Human Rights Watch Report, *Kosovo: Rape as a Weapon of Ethnic Cleansing*, March 2000, available at: *http://www.hrw.org/legacy/reports/2000/fry/index.htm#TopOfPage* (last accessed on 14 July 2009); Human Rights Watch Report, *Under Orders: War Crimes in Kosovo*, 2001, available at: *http://www.hrw.org/legacy/reports/2001/kosovo/part_two.pdf* (last accessed on 14 July 2009); Reports of the UN Commission on Human Rights, the UN High Commissioner on Human Rights and the Special Rapporteur for the Former Yugoslavia in Weller, pp. 158-185; *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, pp. 364-366.

[28] See written statement of Albania, Part II, section B, pp. 7-16.

Serbian forces of the Ministry of the Interior.[29] Thus, a lawsuit for reparations brought by the Humanitarian Law Center on behalf of 14 women and children of the Bogujevci and Duriqi families in Halim Gashi's yard in Podujevo on 28 March 1999 in an action aiming at the expulsion of the Albanian population, was dismissed by the judge on the basis of the expiry of the statute of limitation.

24. At this point Albania would like to rectify the position expressed in the Introductory Note to the Dossier prepared by the Secretariat of the United Nations, namely that March 1998 marks the beginning of the UN's engagement in Kosovo.[30] The UN has been engaged in following the situation in Kosovo long before March 1998 through the numerous resolutions adopted by the General Assembly and the Security Council addressing the very serious human rights situation and the need for a political solution.[31] The dire humanitarian situation in Kosovo especially in early 1999 has not been extraneous even to this Court since in an Order of 1999 it stated that it 'is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute'.[32]

F) Political Solution of the Kosovo Status

25. Even when the Kosovar Albanian leadership engaged with the Serb authorities through international mediation like the example of the Saint Egidio agreement

[29] See Press Release of 21 May 2009 by the Humanitarian Law Centre, Belgrade, Serbia, *Compensation Lawsuit for Victims from Podujevo Dismissed*, available at: *http://www.hlc-rdc.org/Saopstenja/1712.en.html* (last accessed on 14 July 2009).

[30] UN Dossier, Introductory Note, p. 2.

[31] See General Assembly Resolutions 47/147 (1992), 48/153 (1993), 49/196 (1994), 49/204 (1994), 50/190 (1995), 50/193 (1995), 51/111 (1996), 51/116 (1996), 52/147 (1997), 52/139 (1997), 53/163 (1998), 53/164 (1998) in H. Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999: An Analytical Documentation 1974-1999* (Cambridge International Documents Series), Cambridge University Press, 2001, pp. 15-25, Weller, pp. 125-132.

[32] ICJ, *Case Concerning Legality of Use of Force* (Yugoslavia v. Belgium), Request for the Indication of Interim Measures, ICJ Rep. 1999, p. 131, par. 16. The same concern was expressed by the Court in the other nine Legality of Use of Force cases.

regarding education, such agreements were a smokescreen for the eyes of the international community and were in fact never implemented by the Serb authorities.[33] The boycott of the elections organized by Serbia in Kosovo from 1991 to 1998 was the reply by Kosovar Albanians to the wholesale takeover and disregard by the then Serbian administration of the status previously enjoyed by them under the 1974 Constitution. Kosovar Albanians had their own institutions and leaders which were viewed by the population as the legitimate representatives of Kosovo. Further, even if they wanted to participate in the political life of Serbia, there were simply no political forces which would represent their legitimate requests, including respect for the right of Kosovo to self-determination. Unfortunately, mainstream political parties in present day Serbia have not changed their attitude much towards Kosovo's status as compared with the time of Milosevic.[34]

26. One of the stepping stones towards the solution of the Kosovo crisis was the statement by the Chairman of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999. In adopting a number of general principles on the political solution to the Kosovo crisis the G-8 Foreign Ministers called *inter alia* for:

> "A *political process* towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, *taking full account of the Rambouillet accords* and the principles of sovereignty and

[33] See *inter alia* EUROPEAN PARLIAMENT MINUTES OF THE SITTING OF THURSDAY 12 MARCH 1998 PART II - Texts adopted by the European Parliament, 5. Situation in Kosovo Official Journal No. C 104, 1998, Item 4 (1998/C 104/04-6). Part of this document reads: "aware that the suppression of the cultural and political autonomy of Kosovo by the Serbian authorities in 1989 is at the root of the crisis in the region and regretting that even the rather weak agreement on education of 1996 has not been implemented by the Serbian authorities".

[34] The only notable exception to such a position being Čedomir Jovanović, leader of the Liberal Democratic Party, which has won about 5-6% of the votes in the 2007 elections and has 12 seats in the Serbian parliament.

territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region."[35]

27. Reference is made to the FRY-UNMIK Common Document of 5 November 2001 with regard to clarifying the issue of a mutually accepted political settlement for the status of Kosovo. It is beyond doubt that while a mutually acceptable political settlement was the desired outcome, such a settlement had to be acceptable first and foremost to the people of Kosovo.[36] As the Special Representative Hans Haekkerup clarified, the point of the FRY-UNMIK Common Document was "to get the support of Belgrade for Serb participation in Kosovo institutions."[37] In answering a question on whether the document meant a reassurance that Kosovo will not get independence Mr. Haekkerup stated: 'As you know, this document and 1244 are neutral to what the final status is going to be and it does not rule out any possibility.'[38]

G) Kosovo's Status within the Project of Greater Serbia

28. The events which took place in or with regard to Kosovo within the FRY previous to the 1989 revocation of autonomy and afterwards up to spring 1999 were anything but random. Noting the developments preceding the dissolution of the former Yugoslavia the *Tadic* Trial Chamber stated:

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[35] Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999.

[36] Kosovo Contact Group Statement, London, 31 January 2006, par. 7 (emphasis added).

[37] Press Conference by SR-SG Hans Haekkerup to announce the signing of the UNMIK FRY Common Document, November 5, 2001, available at: *http://www.unmikonline.org/press/2001/trans/tr0511pm.html* (last accessed on 14 July 2009).

[38] *Ibidem*.

"In the mid to late 1980s, the Republic of Serbia had already begun measures to deprive Yugoslavia's two autonomous provinces, Vojvodina and Kosovo, of their separate identity and effectively to incorporate them into the Republic."[39]

29. In the *Celebici* judgment, the Trial Chamber noted:

"By 1988, the Serbian government was seeking to achieve the full integration of the two autonomous provinces into Serbia. In October of that year, the authorities governing Vojvodina were removed and in March 1989 a new Constitution was adopted in Serbia which removed the autonomy of the province of Kosovo."[40]

30. Indeed, these efforts were part of the larger project of a Greater Serbia. As noted in the *Tadic* judgment:

"The concept of a Greater Serbia has a long history. It emerged at the forefront of political consciousness in close to its modern-day form as early as 150 years ago and gained momentum between the two World Wars. Kept in check during the years of Marshal Tito's rule, it became very active after his death. Greater Serbia involved two distinct aspects: first, the incorporation of the two autonomous provinces of Vojvodina and Kosovo into Serbia, already referred to; and secondly, the extension of the enlarged Serbia, together with Montenegro, into those portions of Croatia and Bosnia and Herzegovina containing substantial Serb populations.

Associated with the first of these aspects was the Serbian opposition to the equal representation federally of each of the Republics, regardless of population size. This, together with the existence of the two autonomous provinces, was the subject of much agitation and received strong support in the second half of the 1980s from the Serbian Academy of Arts and Sciences in its widely distributed

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[39] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 May 1997, par. 69, available at: *http://www.un.org/icty/tadic/trialc2/judgement/index.htm* (last accessed on 14 July 2009).

[40] ICTY, *Prosecutor v. Delalic et a*l, Case No. IT-96-21-T, 16 November 1998, par. 97, available online at: *http://www.un.org/icty/celebici/trialc2/judgement/index.htm* (last accessed on 14 July 2009).

but not officially published memorandum urging major constitutional change. As mentioned above, the two provinces were effectively incorporated into Serbia in 1990 but the move to achieve federal representation by population rather than by Republics, with a resulting increased power for Serbia, was not achieved before the breakup of the federation."[41]

31. The last chapter of those efforts was the campaign of ethnic cleansing carried out by Serbian armed forces in 1998-1999, which lead to the military intervention by the international community and the establishment of UNMIK under Security Council Resolution 1244 (1999).

H) Concluding Remarks

32. The Kosovo conflict is a significant component of the dramatic events surrounding the violent break-up of Yugoslavia. Among others, the project of a Greater Serbia provided a significant drive for the armed conflicts which wreaked havoc in the territory of Yugoslavia, resulting in extreme misery and untold human suffering. It is well-documented that the rights of Kosovar Albanians were being violated with impunity by the Serbian State authorities from early 1989 up until June 1999. The cultural, economic and political apartheid which Kosovar Albanians were subjected to was the driving force for the creation of their own parallel state institutions. It is unfortunate that from the beginning of the Yugoslav crisis up to 1998, however, Kosovo was regarded as secondary to the overall situation in terms of urgency and status.

33. Until 1998 when the situation precipitated into an armed conflict, the international community failed to take sufficient preventive action.[42] In the face of a broad

[41] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 May 1997, pars. 85, 86, 88 available at: *http://www.un.org/icty/tadic/trialc2/judgement/index.htm* (last accessed on 14 July 2009).

[42] On this issue see generally *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, pp. 55-61. On pp. 55-56 this report notes 'Kosovo was not a priority for the international community before 1998. The province's

campaign of ethnic cleansing, the international community finally intervened in late March 1999 and by early June 1999 it forced the Serbian armed forces to withdraw from Kosovo. Kosovo was placed under the interim administration of UNMIK, which would establish and oversee the development of provisional, democratic self-governing institutions, until a final solution for the status of Kosovo was found. A political process under the lead of the United Nations was to bring about such a solution. That long negotiation process launched in November 2005 and led by the Special Envoy of the Secretary-General, Mr. Ahtisaari, resulted in the March 2007 Comprehensive Proposal for the Kosovo Status Settlement, which was endorsed in the Declaration of the Independence adopted by the democratically elected representatives of the people of Kosovo. More details on this last issue are provided below in Part IV.

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troubles almost appear to have been an inconvenience, adding further complications to negotiations about the wars in Slovenia, Croatia and Bosnia. Kosovo seems to have been regarded as secondary to these conflicts in terms of both urgency and status.'

Part III JURISDICTION AND PROPRIETY ISSUES

34. As already pointed out by Albania, there are a number of reasons why the Court does not have jurisdiction in this case, or in the alternative should use its discretion and not render an advisory opinion. Notably, in its written statement France has also raised a number of objections to the jurisdiction of the Court in this case.[43] Other countries have also expressed their reserves with regard to the rendering by the Court of an advisory opinion in this case.[44]

A) Issues Concerning the Jurisdiction of the Court

35. The Court should be mindful of the fact that the declaration of independence is an internal, domestic matter, not regulated by international law. The mere insertion of the phrase 'accordance with international law' in the question put before the Court does not elevate the issue to one of international law. As an author has noted:

> "Secession is a domestic matter, and therefore a legally neutral act in international law…Although secession produces consequences in international law when a new state is formed, the act of secession itself is essentially political rather than legal in nature."[45]

The DoI is not prohibited by international law, unless there were a violation of a peremptory norm. No such violation has been put forward by either the Security Council or by the General Assembly and therefore the question of its legality is essentially a matter of national law, which the Court has no jurisdiction to pronounce upon.

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[43] Written statement of France, pp. 15-35, pars. 1.1-1.42.

[44] See written statement of the Czech Republic, pp. 3-5 expressing reserves based on the issue of judicial propriety; written statement of the United States of America, pp. 41-45; written statement of Ireland, pp. 2-4, par. 8-12.

[45] T.D. Musgrave, *Self Determination and National Minorities*, Clarendon Press: Oxfiord, 1997, p. 210.

36. The whole discussion in Serbia's written statement simply confirms Albania's position that the legal issue at hand is of a domestic nature and the Court would be assuming the role of a domestic constitutional court, which is not this Court's function. Clearly, from this perspective the dispute has little to do with international law.

37. Another important consideration is Article 12, paragraph 1 of the UN Charter which, in principle, prevents the General Assembly from asking a question for an advisory to the Court while the Security Council remains actively seized of that matter.[46] Albania submits that the General Assembly cannot ask for an advisory opinion regardless of the limitations provided for under Article 12 and 10 of the UN Charter.[47] Instead, the Court should consider each case separately based on the broader context of the case while keeping in mind the principle of functional cooperation in the attainment of the common goals of the Organization.[48] Although the General Assembly has broad powers indeed, and Albania certainly sympathizes with the idea of greater use being made of the Court, the Court's legal procedures and judicial integrity should be safeguarded from possible misuse.

38. The purpose of bringing this question before the Court by Serbia, as the sole sponsor of the General Assembly Resolution 63/3, appears to be part of a strategy to influence States in their decision whether to recognize the Republic of Kosovo. This should be taken into consideration since the Court is the ultimate guardian of its judicial integrity. As the Court itself noted long ago: "There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its

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[46] See for more details the written statement of Albania, pp. 28-29, pars. 50-53.

[47] See written statement of Albania, pp. 27-29, pars. 48-53.

[48] See for more details Vera Gowlland-Debbas in A. Zimmerman *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford Commentaries on International Law), Oxford University Press, 2006, pp. 89-91.

judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." [49]

B) Issues Concerning Propriety

39. Albania would like to underline that Serbia described itself as the "interested state".[50] Further, the Court decided to invite the Kosovar authorities to make written contributions in these legal proceedings. It is obvious that in reality the dispute is a bilateral one between the predecessor State, namely Serbia, and the newly independent State of Kosovo. Kosovo has clearly not given its consent to the jurisdiction of the Court. Therefore, the Court should use its discretion and not render an advisory opinion in this bilateral dispute since that would amount to allowing a dispute being submitted to judicial settlement without a State's consent, in this case Kosovo's.[51]

40. The matter is not "of particularly acute concern to the United Nations" as contended in the Serbian written statement.[52] Indeed, had it been so the General Assembly would have requested the Court to proceed with a degree of urgency. That is clearly not the case in the present legal proceedings. Moreover, had the Security Council deemed it useful for the exercise of its functions, it could have asked for an advisory opinion from the Court. While the Security Council has asked the Court for an advisory opinion on two occasions, it clearly chose not to do so this time. Further, the Court is one of the main organs of the UN that can advise other main organs and specialized agencies. At a time when the independence of Kosovo has been recognised by all neighbouring States, save for Serbia, it is rather clear that Kosovo's declaration of independence is seen as furthering peace and stability in the whole region of South-Eastern Europe.

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[49] ICJ, *Northern Cameroons Case*, ICJ Reports 1963, pp. 29-30.

[50] See written statement of Serbia, p. 41.

[51] See written statement of Albania, pp. 35-36, pars. 65-67.

[52] See written statement of Serbia, par. 72.

Therefore, the claim by Serbia that Kosovo's DoI is a cause for concern is without any ground.[53]

41. Serbia's position is somewhat inconsistent when for purposes of justifying the jurisdiction of the Court it states that the DoI is a significant challenge to the authority of the UN and its administration in Kosovo,[54] but when dealing with the issue of propriety of the exercise of such advisory jurisdiction it asserts that the Republic of Kosovo is far from exercising independent governmental authority, since Kosovo remains a territory governed by an international administration which retains ultimate power in the province.[55] Either one or the other is true. The position of Albania is that the DoI poses no challenge to the presence and the activity of the UN in Kosovo. Indeed, as the Secretary-General has noted:

> "The Kosovo authorities have, however, welcomed the continued presence of the United Nations in Kosovo. They have committed themselves to implementing in full the Comprehensive Proposal for the Kosovo Status Settlement prepared by my then Special Envoy for the Kosovo Future Status Process, Martti Ahtisaari, and conveyed to the Security Council on 26 March 2007 (S/2007/168/Add.1)."[56]

42. At the same time it is true that, since the DoI, the Kosovar authorities exercise the sovereign prerogatives of a State, while inviting and accepting on their own accord international support for so long as deemed necessary. With regard to some contentions by Serbia regarding exercise of State authority it bears mentioning that KFOR, EULEX, and UNMIK are in Kosovo on the invitation of the Kosovar authorities and SC Resolution 1244. That invitation was clearly extended to them in the DoI adopted by the democratically elected representatives of Kosovo on 17 February 2008.

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[53] See written statement of Serbia, par. 74.

[54] See written statement of Serbia, pars. 53, 87, and 92.

[55] See written statement of Serbia, par. 99.

[56] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 15 July 2008, UN Doc. S/2008/458, par. 4.

43. As outlined in the statement of Albania there are additional reasons not to exercise advisory jurisdiction in this case.[57] In particular the advisory opinion cannot help either the United Nations or member States in their subsequent actions. The request does not indicate in what way the advisory opinion would guide future actions by the General Assembly. It should be kept in mind that it is for the member States to decide on Kosovo's recognition. In that regard it is worth reemphasizing that 60 States have already recognised Kosovo, among them three permanent members of the Security Council and a great number of member States of the European Union.

C) Concluding Remarks

44. Albania submits that either the Court does not have jurisdiction for the reasons listed in its written statements, or that in the alternative it should use its discretion and not render an advisory opinion in this case.

[57] For more details see the written statement of Albania, pp. 25-37, pars. 41-70.

Part IV ISSUES RELATING TO THE ACCORDANCE WITH INTERNATIONAL LAW OF THE DECLARATION OF INDEPENDENCE BY KOSOVO

A) The Issue of Independence of Kosovo Is Not Before the Court, It Being Completely Distinct from the Issue of Accordance with International Law of the Declaration of Independence

45. It is to be noted at first that the caption of part III in Serbia's written statement is completely misleading. It is stated there that "general international law provides no ground for the independence of Kosovo".[58] The question before the Court, however, is not whether international law provides any ground for Kosovo's independence. The question is rather whether there is any rule of public international law which could have been violated by the declaration of independence of Kosovo. In its written statement Serbia noted that the present request is confined to legal issues and concerns the legality of the unilateral declaration of independence under applicable rules of international law, being 'no more and no less than this'.[59] It has already been shown in Albania's written statement both that the declaration of independence is in accordance with international law and that the people of Kosovo are entitled to independence. This will be explained further below.

B) The Principle of Territorial Integrity Is Not Applicable in This Case

46. Albania is fully agreed that the principle of territorial integrity is a cardinal principle of international law. Indeed, it deems it both commendable and important that, after having waged war either directly or through proxy against other republics of the former Yugoslavia, Serbia has come to accept the importance of

[58] See written statement of Serbia, p. 147.

[59] See written statement of Serbia, p. 26, par. 19.

the principle of territorial integrity. Article 2(4) of the UN Charter prohibits member States from using or threatening force against the territorial integrity of any State. This injunction applies only as between States. As pointed out by a noted author:

> "Secession, by contrast, usually occurs within the confines of a single state, and therefore does not fall within the jurisdiction of Article 2(4)."[60]

47. The issue at hand is not concerned with the principle of territorial integrity. The sixth Guiding Principle for a settlement of the status of Kosovo reads:

> "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."[61]

48. There is nothing in this guiding principle for the solution of the final status of Kosovo which calls for the preservation of the territorial integrity of the FRY *vis-à-vis* the people of Kosovo. On the contrary, the territorial integrity of Kosovo is ensured. Further, the principle clearly states that there would be no return to the pre-March 1999 situation when NATO intervened militarily. The obligation to respect the territorial integrity of the FRY was directed solely at States member of the UN. Having clearly demonstrated that the principle of territorial integrity is not applicable in this case, it is not necessary to deal with the question whether the

[60] Thomas. D. Musgrave, *Self Determination and National Minorities*, Oxford Monographs in International Law, Clarendon Press: Oxford, 1997, p. 181.

[61] Contact Group, Guiding principles of the Contact Group for a settlement of the status of Kosovo, November 2005, available at: *http://www.unosek.org/unosek/en/docref.html* (last accessed on 14 July 2009).

principle of territorial integrity does extend beyond States to bind also non-State actors.

C) The Principle of Territorial Integrity in No Way Limits the Internal Constitutional Process of a State

49. The caption of Chapter VI of the Serbian written statement and the following discussion is misleading and irrelevant for the case at hand. It is, as already stated, fully correct that the principle of territorial integrity is one of the most important principles of public international law. Territorial integrity plays an important role as far as the exercise of sovereignty by States is concerned. However, the principle of territorial integrity in no way limits the internal constitutional process of a State.

50. The principle of territorial integrity does not guarantee the existence of a State or its territory against developments which have their origin in processes taking place within a State. As a distinguished author has put it:

> "Again, however, the law of *uti possidetis* merely refutes Krajina's and Nagorno-Karabakh's claim to a legal right to secession: It does not prohibit an effective act of secession by the people of such a region. It is neutral about that."[62]

51. The principle of territorial integrity cannot be understood as a guarantee of the State as against its own people or parts of that people. Therefore, the lengthy observations relating to the principle of territorial integrity in the statement of Serbia are without any relevance in the present context.[63] In particular the discussion of the principle with regard to internal conflicts does not at all address the issue which is of relevance to these proceedings.[64] It is correctly underlined that many Security Council resolutions have confirmed the principle of territorial

[62] Thomas M. Franck, *Fairness in the international legal and institutional system*, Recueil des Cours, 240 (1993-III), p. 148.

[63] See *inter alia* written statement of Switzerland, p. 27, par. 98(c); pars. 46-48 of this written statement.

[64] See written statement of Serbia, pp. 158-170.

integrity of a specific State. However, these resolutions should be seen within the context to which they relate. Each of them have a particular legal background and they each relate to situations whereby the threat existed that third States, by intervention, might wish to disintegrate a State and create a puppet State on part of its territory. This is the background for the Security Council presidential statement on the situation in Georgia.[65] The same is true for the situation concerning the Democratic Republic of the Congo[66] and it is also true for the situation in Sudan[67].

52. It is of course correct that the Security Council can act under Chapter VII as soon as a threat to the peace exists because of interventions by third States with the aim to destabilise a particular State.[68] But the Security Council, in the present case, did not see such a threat and did not take action on the basis of Chapter VII concerning the DoI. This is of crucial importance since the Council was actively seized of the matter since the adoption of Resolution 1244 (1999).

53. As already explained in the statement of Albania, there is consensus in the literature on international law that secession is a matter for the internal political sphere of a State and is neither regulated nor limited by international law.[69] As very clearly analysed in the most important French treatise on public international law, secession is a political fact not regulated by international law.[70] As already noted, in his seminal work on the creation of States Crawford states that, 'The

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[65] See written statement of Serbia, pp. 163-164, pars. 457-458.

[66] See written statement of Serbia, par. 459 ff.

[67] See written statement of Serbia, par. 464 ff.

[68] For more details see *inter alia* J. Frowein and N. Krisch, '*Chapter VII. Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*' and '*Article 39*', in B. Simma *et al*. (eds.), The Charter of the United Nations: A Commentary, Oxford University Press, 2002, pp. 701-739.

[69] See *inter alia* written statement of Albania, pp. 38-39, pars. 73-74 and footnotes 101 and 102; A. Tancredi, "*A normative 'due process' in the creation of States through secession*", in M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 172 and footnote 3, listing a number of sources.

[70] See P. Daillier, A. Pellet, *Droit International Public*, 7ème éd., Paris, LGDJ, 2002, p. 526 f.

position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.' Only where there is third State intervention, it is clear that international law is violated and international organisations take measures to uphold the territorial integrity of the State against which such an intervention takes place. This is shown by the abstention of international organisations in relation to prolonged disputes of secession, while in a case like Cyprus the United Nations clearly defended the territorial integrity of the Republic of Cyprus against the intervention by Turkey. It is quite telling that the statement by Serbia does not even deal with that issue.

54. During the lengthy process of secession concerning the former Soviet Union nobody ever argued that the principle of territorial integrity could be a limitation for the secession of the Baltic States, of Armenia, of Georgia, of Azerbaijan as well as others. This process of secession from the Soviet Union illustrates that there is no principle of international law which outlaws in any way secession by a part of a State. Therefore, it is clearly incorrect to state that the declaration of independence of Kosovo could in any way be seen as a violation of the principle of territorial integrity of Serbia.

D) The Treatment of Self-Determination in Chapter VII of the Statement of Serbia Is Entirely Incorrect

55. The caption of Chapter VII of the Serbian statement is also misleading. The question is not whether self-determination gives a basis for the declaration of independence of Kosovo, but rather whether the principle of self-determination could be seen as a limitation for the declaration of independence or whether this declaration was in line with the principle of self-determination as recognised in international law. The construction by Serbia of the right to self-determination defies both reality and State practice. It is true that the right to self-determination does not amount to a general rule legitimising secession from an independent State. However, under exceptional circumstances, the right to self-determination

gives rise to secession.[71] It is abundantly clear that these circumstances have been cumulatively met in the case of Kosovo.[72]

56. The general discussion of the principle of self-determination concerning colonial situations is without relevance in the present context. If it is stated that self-determination does not authorize secession,[73] the rule is correctly stated as underlined also in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States (Friendly Relations Declaration) where the last paragraph, in principle, rejects the idea that secession could be authorized by the principle of self-determination. This paragraph reads:

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[71] See *inter alia* written statement of Albania, pp. 42-43, par. 81; Thomas. D. Musgrave, *Self Determination and National Minorities*, Oxford Monographs in International Law, Clarendon Press: Oxford, 1997, pp. 76, 182-183 and 188-199; A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford University Press, 2007, pp. 357-359; L. Buchheit, *Secession: The Legitimacy of Self-Determination,* Yale University Press, 1978, pp. 92-97, Thomas M. Franck, '*Postmodern Tribalism and the Right to Secede*', in *Peoples and Minorities*, C.M. Brömann et al. (eds.), 1993, pp. 13-14. On the issue of 'remedial secession' see *inter alia* C. Tomuschat, '*Secession and Self-Determination*', in M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, pp. 38-42; J. Dugard and D. Raič, '*The role of recognition in the law and practice*' in M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 176 and footnote 13 listing a vast number of authors supporting this view.

[72] J. Dugard and D. Raič, '*The role of recognition in the law and practice*' in M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 109 and footnote 42. As Dugard and Raič note, within the framework of the qualified secession doctrine there is general agreement on the constitutive parameters for a right of secession, namely, (a) there must be a people, which, though forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within a part of the territory of that State; (b) the State from which the people in question wishes to secede must have exposed that people to serious grievances (carence de souveraineté), consisting of either i) a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination), and/or ii) serious and widespread violations of fundamental human rights of the members of that people; (c) there must not be (further) realistic and effective remedies for the peaceful settlement of the conflict.

[73] See written statement of Serbia, p. 203.

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

However, this is not the end of the discussion. The question is rather whether international law contains a rule which prohibits secession under the circumstances of Kosovo. It is submitted that this is not the case.

57. As the 1970 Friendly Relations Declaration in its explanation of the principle of self-determination of peoples declares, there are several ways in which the principle can be exercised. The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

58. The penultimate paragraph of the principle then contains the disclaimer that the foregoing paragraphs could not be construed as authorizing or encouraging action against the territorial integrity of a sovereign State. This formula cannot be read as containing an unconditional prohibition of secession by a people, which make up part of the population of a State. The paragraph is not a guarantee for the territorial integrity of any State against movements of secession by a specific constituent people, which form part of the overall population.

59. Moreover, it is of the utmost importance that the last part of this clause recognizes the possibility of remedial secession in situations where a government practices systematic discrimination and is not representative of its entire population. There is strong support in legal literature that such a right, though applicable under

exceptional circumstances, exists.[74] The argument that secession under those circumstances could be seen as contrary to the principle of self-determination is excluded by this part of the principle concerning remedial secession. By this construction, the disclaimer paragraph excludes the possibility to be used against secession in a situation as the one concerning Kosovo.

60. It is incorrect that a reading of the safeguard clause can in any way be used as an argument against secession in a situation as Kosovo. This is exactly what the paragraph wanted to avoid by limiting its applicability to situations where States conduct themselves in compliance with the principle of equal rights and self-determination of peoples and are possessed of a government representing the whole people without distinction as to race, creed and colour. In a situation such as the one in Kosovo, where a system of officially sanctioned discrimination and unequal treatment was put into place and maintained through force and suppression of fundamental human rights there is no unconditional claim to maintenance of the *status quo*, territorial or otherwise, and the safeguard clause makes this abundantly clear.

E) The People of Kosovo Clearly Constitutes a People and a Self-Determination Unit

61. It has already been pointed out that the United Nations have correctly recognised that the people of Kosovo is a people in the sense of the rules of self-determination. But it is submitted that the ICJ need not determine the quality of the people of Kosovo as a people in the sense of the rule of self-determination. This is not what the General Assembly has requested. Rather, the General Assembly has

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[74] See *inter alia* J. Dugard and D. Raič, '*The role of recognition in the law and practice*' in M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 106 and footnote 36 listing a number of sources; F.R. Tesón, '*Ethnicity, Human Rights, and Self-Determination*', in D. Wippman (ed.), *International Law and Ethnic Conflict*, Cornell University Press, 1998, pp. 86-111. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 138; also in International Legal Materials, 1998, 1340, 1373.

requested an advisory opinion on the accordance with international law of the declaration of independence of 17 February 2008. The principle of self-determination in no way outlaws a declaration of independence under the present circumstances.

62. Albania submits additionally that the population of Kosovo has been recognised and referred to as a people in several important instruments. References to this fact are contained in the Rambouillet Accords. Chapter 8, entitled 'Amendment, Comprehensive Assessment, and Final Clauses' in its relevant part 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."[75]

63. Clearly the reference to the will of the people was a reference to the will of the people of Kosovo. Another clear reference to that is the Statement of 31 January 2006 by the Ministers of the Contact Group. That Statement reads:

> "Ministers look to Belgrade to bear in mind that *the settlement needs, inter alia, to be acceptable to the people of Kosovo*. The disastrous policies of the past lie at the heart of the current problems. Today, Belgrade's leaders bear important responsibilities in shaping what happens now and in the future. The Contact Group, the EU and NATO stand ready to support Serbian democratic forces in taking this opportunity to move Serbia forward."[76]

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[75] Rambouillet Accords of 23 February 1999, available online at: *http://www.commondreams.org/kosovo/rambouillet.htm* (last accessed on 14 July 2009).

[76] Kosovo Contact Group Statement, London, 31 January 2006, par. 7 (emphasis added).

64. The Constitutional Framework of Kosovo adopted by UNMIK on 15 May 2001 reads:

> "Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes."[77]

65. These references clearly indicate that the people of Kosovo has been recognised as such on several instances, among others by the UN itself, through the SR-SG. There can be no doubt that the population of Kosovo as a people is a unit entitled to the right to self-determination.

F) Resolution 1244 (1999) Is No Guarantee for the Territorial Integrity of Serbia and It Left Open the Issue of the Final Status of Kosovo and the Manner of Its Expression

66. It has already been explained that Resolution 1244 (1999) is no guarantee for the territorial integrity of Serbia as against a declaration of independence by Kosovo. This resolution was formulated in a manner not to prejudge the final outcome of the development after the establishment of the international administration of the territory. It envisaged a political process that would lead to a final status "taking into account the Rambouillet accords" and thus acknowledging the possibility of independence for Kosovo if that were the will of the people. This is clearly confirmed by the use of different expressions such as: "final settlement", "political settlement", and "future status of Kosovo".[78]

67. Since the lengthy procedure of internationally supervised negotiations did not come to a mutually acceptable solution, the declaration of independence was the only way to determine with finality the status of Kosovo. This declaration of

[77] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9 - 15 May 2001, Article 1.1, available at: *http://www.unmikonline.org/constframework.htm#1* (last accessed on 14 July 2009).

[78] Written statement of Albania, p. 44. par. 85.

independence was the exercise of the '*pouvoir constituant*' of the people of Kosovo, which is an internal matter of the newly founded State. A declaration of independence does not violate any international law rule concerning the sovereignty and the territorial integrity of the parent State. It may, however, be in violation of the constitutional law of the parent State. This is, on the other hand, without any relevance for the question put before the ICJ by the General Assembly. Where a federated State or other territory declares its independence this is not a violation of any principle of international law concerning sovereignty and territorial integrity.

68. The well-known international jurist, George Abi-Saab, has pointed out that, save for cases when a State is created in violation of a basic principle of contemporary international law:

> "[t]he State is considered a 'primary fact' to be acknowledged by international law, once that fact has materialised, regardless of the process by which it came into being. However, if that process results from a clear expression of will of the people in question, the democratic character of that process may be a positive factor later on, conferring greater political legitimacy on the new State, and thus reinforcing its legal existence and facilitating its rapid recognition by other States."[79]

G) Under Contemporary International Law Serbia's Consent Is Not a Legal Requirement for the Validity of the Act of Declaring Independence

69. Part V of the written statement of Serbia tries to set the clock of international law back to the eighteenth century when it argues the necessity of consent of the parent State to secession. This problem was argued at length after the US had declared their independence and by the early nineteenth century it was clear that third States were free to recognise an effectively independent State. The idea that sovereignty

[79] George Abi-Saab in M.G. Cohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 473.

should be transferred from the former parent State to the newly independent State, which had been a view held by many authors until about 1800, was then clearly overruled by State practice and *opinio juris*.[80] The clock cannot be set back to the phase before the development of contemporary international law. As the practice of 62 States clearly shows, the recognition of Kosovo as an independent State is seen by a growing number of States as clearly indicated by international law.

70. The Serbian statement tries to dispute the independence of Kosovo. However, clearly this is legally incorrect. Independence is fully compatible with a certain form of transitional or interim international legal guardianship established through an international agreement or by the Security Council of the United Nations. Prominent examples in this regard are Cambodia, East Timor and Bosnia-Herzegovina. Moreover, international assistance aimed at the establishment and further consolidation of democratic institutions and the rule of law does not call into question the independence of a State. Kosovo's representatives have clearly solicited and welcomed such assistance, including in the Declaration of Independence.

71. It is not necessary that the former parent State should give its consent to secession. On the contrary, secession refers to the situation where a new State is established and recognised without the consent of the 'parent' State.[81] It is true that State practice shows that in most cases a parent State has at a later stage come to accept and recognise the existence of the new State. Absence or refusal of consent by the parent State does no preclude statehood. As Crawford notes:

> "Where the territory in question is a self-determination unit it might be presumed that any secessionary government possesses the general support of the people:

[80] Comp. J. A. Frowein, *Transfer or recognition of sovereignty – some early problems in connection with dependent territories*, American Journal of International Law, Vol. 65, 1971, p. 568-571.

[81] S. Wheatley, *Democracy, Minorities and International Law*, Cambridge University Press, 2005, pp. 85-86 quoting Crawford, State practice and international law in relation to secession, British Yearbook of International Law, 1998, 85-86.

> secession in such a case, where self-determination is forcibly denied, will be presumed to be in furtherance of, or at least not inconsistent with, the application of self-determination to the territory in question."[82]

72. It is correct that recognition by third States as such does not grant retroactively legality or purge illegality. However, this is not the issue here. Where intervention of third States has taken place recognition does not purge illegality. This is shown by State practice in cases as Northern Cyprus, Abkhazia or South Ossetia. In those cases the recognition was limited to the intervening State. Practically no other State recognised these specific purported States as independent States.

73. In such cases it has been argued that there is a collective duty of non-recognition. That duty is incumbent upon every State when the coming into being of a new State contravenes peremptory norms of international law.[83] Since its Declaration of Independence Kosovo has been recognised as a State by 62 members of the United Nations. That is a clear indication that a considerable number of States see the DoI of Kosovo as being in accordance with international law. It is also clearly indicative of the fact that no collective non-recognition is being practised in relation to Kosovo.

H) The Kosovar Authorities Exert the Sovereign Prerogatives of a State Entity

74. In noting developments subsequent to the Declaration of Independence of Kosovo the Secretary-General has noted:

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[82] J. Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press: New York, 2007, p. 384.

[83] See *inter alia* written statement of Albania, pp. 31, par. 57; J. Dugard, *Recognition and the United Nations*, Cambridge: Grotius Publications Limited, 1987, p. 135; Vera Gowlland-Debbas, *Collective responses to illegal acts in international law: United Nations action in the question of Southern Rhodesia*, Nijhoff Publishers: Dordrecht, 1990; J. Dugard and D. Raič, '*The role of recognition in the law and practice*' in M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, pp. 100-101.

> "In addition to the adoption of the constitution and connected legislation, on 10 June the Kosovo Assembly adopted a national anthem and on 17 June the Kosovo Government authorized the establishment of nine "embassies" in Member States that have recognized the declaration of independence."[84]

75. No regulations have been published in the UNMIK Legal Gazette after 14 June 2008, that is, since the Constitution of Kosovo entered into force on 15 June 2008. From 15 June 2008 on Kosovar institutions function on the basis of their democratic Constitution adopted by the Assembly of Kosovo after a broad campaign of public consultations. This latter fact has been acknowledged by the Secretary-General in his reports to the Security Council.

76. Additionally, Albania would like to draw attention to new developments which have occurred since the closure of the first phase in these legal proceedings. Thus, there have been new recognitions, and new bilateral and international agreements have been entered into by the Kosovar Government. It should also be noted that on 8 May 2009 the International Monetary Fund offered membership to the Republic of Kosovo.[85] Kosovo participates in this international institution with a share which is even bigger than the two neighbouring States, namely Albania and Montenegro. Further, on 29 June 2009 the Republic of Kosovo became the newest member of the five World Bank Institutions.[86] Each of these events on their own and in their entirety show that the Kosovar authorities are exercising prerogatives of a sovereign State and that Kosovo is a separate State entity, entirely independent from the Republic of Serbia.

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[84] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 15 July 2008, UN Doc. S/2008/458, par. 4.

[85] Press Release No. 09/158, *IMF Offers Membership to Republic of Kosovo*, available at: *http://www.imf.org/external/np/sec/pr/2009/pr09158.htm* (last accessed on 14 July 2009).

[86] See inter alia Press Release No: 2009/448/ECA, available at: *http://go.worldbank.org/K2KVNDA7Z0* (last accessed on 14 July 2009).

77. Kosovo has been recognized by 62 States this far.[87] Fourteen States have recognised Kosovo's independence after the case was referred to the Court, while 5 of these States recognised Kosovo after 17 April 17 2009, the deadline for the submission of the first written submissions by States in the present case.

I) Kosovo's Declaration of Independence Is In Conformity with International Law

78. Kosovo's declaration of independence is in full conformity with the purposes and principles of the UN Charter. In the course of their activities the Kosovar authorities have shown utmost respect for the organs of the United Nations, despite Kosovo not being a State member of this organization at this point. Further, the Kosovar authorities have acted in accordance with international law norms and the principles of friendly relations among nations. On their own accord they have accepted a considerable number of international legal obligations, especially in the field of international human rights law.

79. It should be emphasized that the SR-SG did not act upon either prior to, during or after the adoption of the Declaration of Independence of Kosovo. Thus, neither did he declare the Declaration null and void, nor did he move to dissolve the Kosovo Assembly. It bears mentioning that not only was he entitled to do so under the Constitutional Framework, but he was explicitly asked by the Serbian government to do so. It can reasonably be inferred that he deemed that the DoI was not inconsistent with SC Resolution 1244 (1999) and that it was not issued by a Provisional Institution of Self-Government as the Kosovo Assembly acting under powers conferred to it under the Constitutional Framework, but it was issued by the democratically elected representatives of the people of Kosovo in a special meeting, as part of the legitimate exercise of their '*pouvoir constituant*'.

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[87] The full list is available online at: *http://www.ks-gov.net/MPJ/Njohjet/tabid/93/Default.aspx* (last accessed on 14 July 2009).

80. Considering the overall context of the non-consensual break-up of the former Yugoslavia (including the dissolution of the FRY itself in 2006),[88] the notorious record of institutionalised discrimination and suppression of ethnic Albanians in Kosovo in the period 1989-1999, the temporary administration of the territory by the United Nations for over 8 years, the deadlocked internationally supervised final status negotiations and last but not least the will of the people of Kosovo, the Declaration of Independence, while being a lawful exercise of the right of the people of Kosovo to self-determination was in fact a means of last resort. As a distinguished author has noted:

> "There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party and if the consequence of it not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts."[89]

J) Minority Guarantees and the Treatment of Ethnic Albanians in the Republic of Serbia

81. Although the Republic of Albania does not consider this point put forward in the written submission of Serbia as being relevant to the current legal proceedings before this Court, it nevertheless deems it important to clarify its position on the issue of minority rights of ethnic Albanians in the Republic of Serbia. Improving the situation of the Albanian minority in Preševo (Preshevë), Bujanovac

[88] For a chronology of the conflict in Yugoslavia see *inter alia* D. Bethlehem and M. Weller (*eds*.), *The 'Yugoslav' Crisis in International Law: General Issues Part I*, Cambridge International Documents Series Volume 5, Cambridge University Press, 1997, pp. xix-lvii; a general chronology is given by Weller, *supra* note 2, pp. 15-23.

[89] J. Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press: New York, 2007, pp. 447-448.

(Bujanovc) and Medvedja (Medvegjë) is part and parcel of the international legal obligations incumbent upon the government of Serbia. Unfortunately, up to the present time the rights of the Albanian minority within Serbia are far from being fully respected and implemented.

82. According to the census held by Serb authorities in 2002 there were 61 647 ethnic Albanians living in Serbia. A different figure is given however in the 2002 report of the Humanitarian Law Center, where it is claimed that the total number in these three municipalities is estimated at over 100 000.[90] The South Serbia municipalities of Preševo, Bujanovac and Medvedja are inhabited by 90% of the ethnic Albanians living in Serbia.[91] Serbia has failed to ensure respect for basic human rights of ethnic Albanians living in these municipalities. Moreover, the rhetoric adopted by the Serb government has aggravated relations between Serbs and Albanians.

83. In its 2004 report the Helsinki Committee for Human Rights in Serbia noted:

> "Taking into account the nature of Milosevic's regime, minorities can be classified in the context of repression against them. Namely, the then regime has not treated all minority communities in the same way – some were used as instruments of its legitimacy (such as Slovaks), while repression against others (Croats, Albanians or Bosniaks) has been either encouraged or tolerated. War, violence, ethnically motivated persecution, massive poverty and meager prospects forced a number of citizens – from majority and minority communities alike – to leave Serbia. This brain drain particularly affected minority

[90] Humanitarian Law Center, Albanians in Serbia Preševo, Bujanovac and Medveđa, Report of 2002, p.2, available at: *http://www.hlc-rdc.org/uploads/editor/Albanians%20in%20Serbia.pdf* (last accessed on 14 July 2009)

[91] See Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to Serbia (13-17 October 2008), CommDH(2009)8, 11 March 2009, p. 31, par. 165.

> communities, as it deprived them of their "organic intellectuals" whose role in the safeguard and development of a minority culture is extremely important."[92]

84. In highlighting the double standards Serbia uses in the treatment of minorities the Helsinki Committee for Human Rights in Serbia noted:

> "There is yet another institution the members of minority communities perceive as a major legal instrument of advancement and protection of their rights. This is about autonomy, i.e. various forms of autonomy – cultural, personal and territorial – or an adequate special status. Relevant proposals have already been put forth by representatives of some minority communities such as Croat, Hungarian or Bosniak. However, the state bodies have ignored them, to put it mildly. Serbian authorities, though on their guard when it comes to a territorial autonomy based on ethnicity, have proposed this model as the most appropriate one for the protection of the Serbian minority in Kosovo. True, the situation in Kosovo can hardly be compared with the one in Vojvodina. However, one cannot get rid of the impression that this is about double standards."[93]

85. In his March 2009 Report on the human rights situation in Serbia, the Council of Europe Commissioner for Human Rights, Mr. Thomas Hammarberg, pointed out that in practice, respect for and protection of minority rights appears to be inadequate.[94] While the Law on the Protection of Rights and Freedoms of National Minorities provides for the establishment of national councils for minorities, the Albanian minority was the only minority community who had not formed such a council at the time of his visit.[95] This report notes that, 'The law regulating the

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[92] Helsinki Committee for Human Rights in Serbia, *National Minorities in Serbia: In Conflict with a State Ethnic Identity*, Annual Report 2004, pp. 2-3.

[93] Helsinki Committee for Human Rights in Serbia, *National Minorities in Serbia: In Conflict with a State Ethnic Identity*, Annual Report 2004, pp. 5-6.

[94] See Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to Serbia (13-17 October 2008), CommDH(2009)8, 11 March 2009, p. 29, par. 157. For the activities of the Commissioner see *inter alia*: *http://www.coe.int/t/commissioner/default_en.asp* (last accessed 14 July 2009).

[95] *Ibid.*, p. 29, par. 158.

election of these councils, their competences and financing has not yet been passed, and is now approximately 6 years overdue'.[96]

86. The 2007 Report by the European Commission against Racism and Intolerance (ECRI) noted with concern that the Albanian minority in Preševo (Preshevë), Bujanovac (Bujanovc) and Medvedja (Medvegjë) suffers from discrimination in areas such as access to education and the civil service, particularly the police and the judiciary.[97] The Serb government has failed to protect the Albanian minority living in Serbia from violence after the declaration of independence from Kosovo.

87. The Human Rights Watch Report of November 2008 noted that four years after a wave of anti-minority violence, Serbia's response to violence against minorities in February 2008 was again inadequate and it was hard to avoid the conclusion that the authorities still do not take attacks on minorities and their property sufficiently seriously.[98] As this report noted:

> "The attacks on embassies and rioting in Belgrade were widely covered by national and international media. What largely escaped attention, however, were acts of harassment and intimidation against ethnic Albanians that took place across Serbia, but particularly in the province of Vojvodina, in the days that followed. In February and March 2008, the police registered 221 incidents relating to the protests over Kosovo, including those with no ethnic motivation, of which 190 took place in Vojvodina. Predominantly affecting Albanian-owned businesses and homes, many involved criminal damage—the smashing of windows and attempted arson, the spraying of hate graffiti, intimidating protests in front of homes and businesses, and in one case an organized boycott of an Albanian-owned business and the distribution of inflammatory leaflets. Some

[96] *Ibid.*, p. 29, par. 159.

[97] European Commission against Racism and Intolerance (ECRI), Report on Serbia CRI(2008)25, 2007, p. 18, par. 43. There were 4 Albanian judges in total in Serbia, from whom 1 in Bujanovac (Bujanovc) and 3 in Preševo (Preshevë) – see Chart on pp. 47-48.

[98] Human Rights Watch, *Hostages of Tension: Intimidation and Harassment of Ethnic Albanians in Serbia after Kosovo's Declaration of Independence*, Report of November 2008, p. 4.

incidents took place during or immediately after public protests, and others occurred over subsequent days, sometimes repeatedly, the vast majority after dark."

This kind of violence against minorities is not new in Serbia. Ethnic Albanians have been particularly vulnerable, particularly when developments in Kosovo inflame tension. They were targeted, for example, in 1999 during the NATO bombing campaign. A wave of violence which included attacks on minority-owned businesses and on mosques took place between late 2003 and 2005, reaching a peak in March 2004 as nationalist sentiment reacted to anti-Serbian and anti-Roma riots in Kosovo.'[99]

88. Systemic problems with ensuring respect for the rights of the minorities and the protection of their life and property were also noted in an earlier report by the Human Rights Watch.[100] Amnesty International appealed to the highest officials of the Serbian government to take measures to protect the Albanian minority and

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[99] The Report reads: 'The government must demonstrate a stronger commitment to investigate and prosecute ethnically motivated crimes, condemn violence, and act to protect minorities and their property from attack. The authorities must also assist victims obtain the protections and remedies to which the law entitles them, including for civil claims against perpetrators. Until the authorities cooperate adequately to prevent, investigate, and, where appropriate, prosecute the attacks on minorities such as those described in this report, minorities in Serbia will remain hostages of societal tensions, feeling threatened, intimidated and unwelcome.'

[100] Human Rights Watch, *Dangerous Indifference*, October 2005, available online at: *http://www.hrw.org/en/reports/2005/10/09/dangerous-indifference* (last accessed on 14 July 2009). The Report notes that 'Analysis of the government's response to anti-minority violence in Serbia since 2003 indicates that the authorities have failed to take the phenomenon seriously. Rather than tackle the problem head-on, the authorities have sought to minimize it. While some incidents with alleged ethnic motivation were later established to have taken place for reasons unrelated to ethnicity, authorities have been quick to deny ethnic motivation even before any meaningful investigation into the incidents was completed. The failure of the government to take these incidents seriously alienates minority communities and heightens fears in those communities that the government will not provide protection should there be a future outbreak of violence.'

human rights activists from attacks after the declaration of independence of Kosovo.[101]

K) Concluding Remarks

89. In light of the above it can be concluded that, contrary to what is contended in the written submissions by Serbia, the Serb government still does not ensure the rights of the Albanian minority in Serbia. To that aim concrete measures need to be taken to ensure that the rights of the Albanian minority in Serbia are respected. It is Albania's firm belief that the respective minorities in Kosovo and Serbia cannot and should not be used for political gain or quarrel, but should be nurtured and serve as bridges for building friendly relations among the two nations. While no National Council has been created for ethnic Albanians according to Article 75 of the Serbian Constitution of 2006,[102] Serbia should enter into a bilateral agreement with both the Republic of Kosovo and Albania on minority protection for ethnic Albanians living in Serbia.

[101] See Press Release by Amnesty International entitled 'Serbia: Stop attacks on human rights activists and on minorities', available at: *http://www.amnestyusa.org/document.php?id=ENGUSA20080220003&lang=e* (last accessed on 14 July 2009).

[102] See written statement of Serbia, par. 217.

Part V CONCLUSIONS AND SUBMISSIONS

A) Conclusions

90. In declaring the independence of Kosovo the Kosovar authorities acted in accordance with the principles guiding the negotiating process towards the final status. These authorities were acting not as Provisional Institutions of Self-Government, but as a constituent assembly of the democratically elected representatives of the people of Kosovo expressing the will of the people of Kosovo, that is exercising their '*pouvoir constituant*' to be independent from Serbia.[103]

91. Kosovo's Declaration of Independence should be seen in its context, since the circumstances of its issuance, the character of the Kosovo problem, shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999, and the extended period of international administration under Security Council Resolution 1244 (1999) constitute a clearly exceptional case.

92. Kosovo's independence is a factor of peace and stability in the Balkans. In its Declaration of Independence Kosovo formally recognised a number of important international obligations regarding human rights and fundamental freedoms for all its citizens. Kosovo affirmed that it will abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the OSCE, and the international legal obligations and principles of international comity that mark the relations among States.

93. Instead of accepting responsibility for the gross and systematic human rights violations against Kosovar Albanians, Serbia has tried to minimize them and portray them as normal, while in fact they amount to serious violations of

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[103] See written statement of Albania, p. 38, par. 71, written statement of the Kingdom of Norway, pp. 5-6, pars. 13-15.

international human rights and humanitarian law. Moreover, Serbia's recalcitrant and obstructionist attitude *vis-à-vis* the Kosovar authorities and institutions still represents a serious impediment for stability in the Balkans. Moreover, Serbia has failed to heed calls from the international community to cease its obstruction of Kosovar Serbs' participation in Kosovo's institutions, despite having signed agreements to this aim with UNMIK and the Kosovar Provisional Institutions of Self-Government.[104] Albania would like to draw the Court's attention to these facts. At a time when Serbia has openly discouraged participation by the Serb minority in the conduct of public affairs in Kosovo, to complain before this Court that such participation is at a low level amounts to abusing this legal process.

94. It is telling that the former American Ambassador to the former Yugoslavia, Mr. Zimmermann, in his book quoted in the Serbian written statement notes that Serbian abuses against Albanians were never conceded by Serb officials.[105] That attitude is expressed throughout the written statement prepared by the present Serbian government too. Glossing over the humanitarian catastrophe and untold human suffering which befell the Kosovar Albanians at the hand of the Milosevic regime since 1989 demonstrates that Serbia still views as normal the long period of systematic abuse of their rights. Albania would like to emphasize that such an inconsiderate attitude is not conducive to friendly relations among nations.

95. The people of the Republic of Kosovo are determined to build a better future for generations to come and to establish good relations with their neighbours, including Serbia. The Kosovar authorities have expressed their firm commitment to a society which respects the human rights and fundamental freedoms of all Kosovo's citizens. Kosovo's independence is, and will remain, a reality. Serbia needs to decide for itself on how it wishes to come to terms with that.

[104] See *inter alia* Contact Group Ministerial Statement, New York, 20 September 2006, par. 4, available at: *http://www.unosek.org/unosek/en/docref.html* (last accessed on 14 July 2009); FRY-UNMIK Common Document of 5 November 2001.

[105] See Serbian written statement, par. 226.

96. The Declaration of Independence of Kosovo in no way violates international law, whose overarching aims are the maintenance and the furthering of peace and stability in the conduct of international relations among States. Rather, it is in conformity with the principle of self-determination as set out among others in the authoritative General Assembly Resolution 2625 (XXV) of 24 October 1970. The Kosovar authorities are exercising the prerogatives and functions of a lawfully constituted government, representative of the Kosovo population in full conformity with the UN Charter and international law.

B) Submissions

97. Albania is of the view that the statements submitted by Serbia and a few other States taking a similar position do not in any way change the position supported by many other States that the declaration of independence of Kosovo was fully in accordance with international law.

98. As indicated above, the Republic of Albania maintains that the Court does not have jurisdiction, or in the alternative it should use its discretionary power and decline to render an advisory opinion in this case. As argued above, the declaration of independence is not a matter regulated by international law. Moreover, such an opinion would not assist the General Assembly in exercising its functions, and would not be conducive to furthering friendly relations among States.

99. Should the Court, nevertheless, find it proper and necessary to render an advisory opinion, Albania respectfully requests the Court to indicate that Kosovo's declaration of independence is in full accordance with international law, it being an expression of the right of self-determination of the people of Kosovo, or in the alternative that Kosovo's declaration of independence does not contradict any applicable rule of international law.

100. Finally, it bears mentioning that trying to undermine the development and progress of the people of Kosovo by impinging upon their rightful choices, as

Serbia has been doing thus far, is not conducive to peace and security in the Balkans. For that reason, Albania respectfully requests the Court to indicate that Serbia should respect Kosovo's right to self-determination and conduct itself in conformity with the generally accepted principles of friendly relations and cooperation among States for the benefit of the two peoples and in the common interest of maintaining and consolidating peace and security in the Balkan region.