VELEPOSLANIŠTVO REPUBLIKE SLOVENIJE
EMBASSY OF THE REPUBLIC OF SLOVENIA
THE HAGUE, THE NETHERLANDS

No.VHG/280/09

The Hague, 17 July 2009

Sir,

I have the honour to submit herewith the written comments of the Republic of Slovenia on the written statements of other states in the matter of an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.

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

Sincerely,

Leon Marc
Ambassador

REPUBLIKA SLOVENIJA * VELEPOSLANIŠTVO 1 DEN HAAG *

Enclosure:
- written comments of the Republic of Slovenia (30 copies)
- CD ROM containing the written comments of the Republic of Slovenia

**Mr. Philippe Couvreur**
**Registrar**
**International Court of Justice**

Anna Paulownastraat 11 - 2518 BA The Hague - Tel. 0031 70 310 86 90 - Fax 0031 70 362 66 08

REPUBLIC OF SLOVENIA

**MINISTRY OF FOREIGN AFFAIRS**

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR AN ADVISORY OPINION)

## WRITTEN COMMENTS OF THE REPUBLIC OF SLOVENIA ON OTHER WRITTEN STATEMENTS

17 JULY 2009

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## INTRODUCTION

1. Pursuant to the Court's order of 17 October 2008, the Republic of Slovenia respectfully offers its written comments on the written statements submitted to the Court concerning the request for an advisory opinion on the question of "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo". After examining the written contributions submitted to the Court, the Republic of Slovenia noticed that some of the written contributions elaborated on the issue of the dissolution of the former Socialist Federal Republic of Yugoslavia (hereinafter: the SFRY) and the creation of new states on its territory as well as on different interpretations of the constitutional system of the former SFRY and Socialist Republic of Serbia (hereinafter: SR Serbia), in particular on the 1974 Constitutions, as well as the 1989 amendments to federal and republic Constitutions. The Republic of Slovenia, as one of the five successor states to the former SFRY, wishes to offer some clarifications regarding the mentioned aspects, which might contribute to a better understanding of the latter.

2. The first part of the written comments of the Republic of Slovenia thus focuses on special features of the dissolution of the former SFRY, and the creation of new states on its territory. The second part examines in greater depth the constitutional status of autonomous provinces under the 1974 SFRY Constitution, constitutional amendments of 1989 and the adoption of the relevant laws on these legal bases.

## I. DISSOLUTION OF THE FORMER SFRY AND THE CREATION OF NEW STATES ON ITS TERRITORY

### 1. Dissolution of the former SFRY

3. The dissolution of the former SFRY is a unique example of the creation of new states, of which the examination of new claims to statehood was entrusted by the European Community to an Arbitration Commission of the Peace Conference on the

former Yugoslavia headed by Robert Badinter.[1] Alongside the Badinter opinions, there were several UN Security Council resolutions adopted with regard to this issue. In Badinter Opinion No. 8 of 4 July 1992, the Arbitration Commission concluded that the process of dissolution of the SFRY was complete and that the SFRY no longer existed. The same conclusion was reached by the UN General Assembly resolution 47/1 of 22 September 1992, as well as by the UN Security Council resolution 777 (1992).

4. Despite the fact that some written statements refer to the Badinter Arbitration Opinion No. 2 regarding the right to self-determination and changes to existing frontiers,[2] it is important to explicitly emphasise that the Badinter Opinion No. 3 refers also to Paragraphs 2 and 4 of Article 5 of the SFRY Constitution (1974). Paragraph 2 of Article 5 stated: *"A republic's territory cannot be altered without the consent of that republic, and the territory of an autonomous province without the consent of that autonomous province"*; while Paragraph 4 provided that *"A border between republics can only be altered on the basis of their agreement, and in the case of a border of an autonomous province on the basis of its concurrence."* Therefore Badinter Opinion No. 3 of 20 November 1991 is of utmost importance regarding territorial integrity and border issues. The Arbitration Commission stated that the former internal boundaries had become frontiers protected by international law.[3] The Badinter Commission based its opinion upon the *uti possidetis* principle (i.e. Third Principle). It concluded that the *uti possidetis* principle, although initially applied in settling decolonisation issues in America and Africa, is today recognised as a general principle, as stated by the International Court of Justice in the Frontier Dispute.[4] It is necessary to explain,[5] however, that internal borders, i.e. administrative borders in the SFRY were defined by municipalities rather than by republic borders or by the borders between republics and provinces, while at sea no formal border existed.

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[1] On the dissolution of the former SFRY see, *inter alia*, Türk, D.: Recognition of States: A Comment, in: 4 EJIL (1993), pp. 66-71 and Pellet, A.: The Opinions of the Badinter Arbitration Committee – A Second Breath for the Self-determination of Peoples, in: 3 EJIL (1992), pp. 178-185.

[2] See e.g.: Written statement of Serbia, p. 205, para. 564; Written statement of the Netherlands, p. 8, para. 3.8; Written statement of Finland, p. 3, para. 5; Written statement of Spain, p. 18, para. 24; Written Statement of Iran, p. 6, para. 3.6.

[3] Conference on Yugoslavia Arbitration Commission, Opinion No. 2 (11 January 1992).

[4] *Frontier Dispute*, ICJ 1986 Reports 554 at p. 565, Opinion 3 Third Principle.

[5] E.g.: Written statement by Cyprus, pp. 30-31, para. 119; Written statement by Romania, p. 23, para. 69.

5. However, the Badinter opinions are silent on the question of state succession. As indicated in the initial statement of the Republic of Slovenia, the succession of the former SFRY was defined in 2001 by the Agreement on Succession Issues[6] concluded in Vienna between five successor states to the former SFRY: Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and the Federal Republic of Yugoslavia (hereinafter: FRY). In case of Kosovo, the creation of the new state is related to the right to secession from the Republic of Serbia, which is one of the forms of the creation of states in international law. Therefore, in case of Kosovo it is not the matter of direct exercise of the right to self-determination in the context of the dissolution of the former SFRY. However, it could not be overlooked that prior to its independence Kosovo formed part of the Republic of Serbia, which is as a state successor of the state of Serbia and Montenegro and FRY one of five equal state successor of the former SFRY.[7]

6. In case of Kosovo it must be taken into account that Kosovo is a *sui generis* case due to unique circumstances which led to the Declaration of Independence of Kosovo.[8] These circumstances are the status of Autonomous Province of Kosovo in the former SFRY, the dissolution of the SFRY, the later gross and systematic human rights violations, humanitarian catastrophe, the rejection of the Rambouillet Accord, the UN Security Council Chapter VII resolutions, the 9 year presence of the international administration, the lack of agreement of key actors to assure a certain level of autonomy and of the status of the province, and the responsibility of the international community for peace and stability in the region.

## 2. General principles of international law on the creation of new states

7. By examining the written statements, delivered to the Court by other states, the Republic of Slovenia found that some states emphasised the issue of the hierarchy of

[6] Agreement on Succession Issues, Ur. l. RS No. 71/2002, 8 August 2002, MP No. 20/2002, entered into force: 2 June 2004.

[7] The issue of the unilateral declaration of independence of Kosovo could therefore not be entirely separated from the dissolution of the former SFRY, as is stated in written statements of some states. See e.g.: Written statement of Russian federation, pp. 15-16, paras. 43-45; Written statement of Cyprus, pp. 29-31, paras. 115-122.

[8] EU Council Conclusions on Kosovo, 18 February 2008 (2851st External Relations Council meeting): *"… Kosovo constitutes a sui generis case…".*

the relevant principles of international law.[9] The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations (1970)[10] provides for seven principles among which there are also *"the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations"* and *"the principle of equal rights and self-determination of peoples"*. Similarly, the Helsinki Final Act of the Conference on Security and Co-operation in Europe of 1 August 1975 includes the Declaration on Principles Guiding Relations between Participating States (so-called Helsinki Decalogue). Among those principles, which all are of primary significance, guiding their mutual relations, there are also *"Sovereign equality, respect for the rights inherent in sovereignty"*, *"Inviolability of frontiers"*, *"Territorial integrity of States"*, *"Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief*", as well as *"Equal rights and self-determination of peoples"*.[11] All these principles are of equal valid, albeit they might in practice well be in conflict. Consequently, every concrete situation must be comprehensively evaluated. In addition, the Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, adopted by the European Community on 16 December 1991, provided that a state might be recognised if it fulfils the criteria set down therein.[12]

8. It must be emphasized that the principle of territorial integrity, even if it could be interpreted to exclude declarations of independence in principle (which is not the case), cannot be absolute, but must be understood in balance with other relevant principles, including the right to self-determination.[13] Moreover, even a state, in particular ethnically complex state, must "earn" the protection of its territorial

[9] Written statement of Iran, p. 3, paras. 21-22. See also written statements of Egypt, Libya, Brazil, Azerbaijan, China, Slovakia, Romania, Spain and Russian Federation.
[10] General Assembly Resolution 2625 (XXV) of 24 October 1970.
[11] While it was clearly recognised that the 1970 Declaration on Principles forms part of customary international law (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.), Slovenia maintains that also the Helsinki Final Act presents part of regional customary international law.
[12] See: Written statement by the Republic of Slovenia on Accordance with International Law of the Universal Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion) of 17 April 2009.

integrity. If a state does not respect the right to self-determination and its government does not enjoy representativity or if the later is lost, it cannot count on having its territorial integrity assured.[14] In such circumstances, demand for independent statehood to the disadvantage of territorial integrity of a common state might be the only way to realise the right to free determination of political status of people forming part of the population of the common state, recognised in Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights of 1966[15].[16] For these reasons, the particular circumstances of each case are even more important.

## II. LEGAL REGULATION OF THE STATUS OF AUTONOMOUS PROVINCES IN THE FORMER SFRY[17]

### 1. Constitutional status of autonomous provinces under the 1974 SFRY Constitution

9. The principle of the autonomy of autonomous provinces was adopted at the second conference of the Anti-Fascist Council of National Liberation of Yugoslavia (hereinafter: AVNOJ) in November 1943, forming an integral part of the decision to create Yugoslavia as a federal state (the former Kingdom of Yugoslavia was a unitary state), granting complete rights to national minorities[18].

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[13] Türk, D.: Temelji mednarodnega prava, GV Založba, Ljubljana 2007, p. 157.
[14] Ibidem, p. 158. See also: Kirgis, F.: The Degrees of Self-Determination in the United Nations Era, 88 AJIL (1994), p. 304-311.
[15] UN General Assembly Resolution 2200 A (XXI), 16 December 1966.
[16] Türk, D.: Temelji mednarodnega prava, GV Založba, Ljubljana 2007, p. 158.
[17] In addition to the Written statement of Serbia, pp. 63-81, paras. 144-200, and Written statement of Kosovo, pp. 41-53, paras. 3.01-3.28, regarding the legal status of Kosovo in the former SFRY as well as written statements of some other states in this regard (e.g. Albania, Cyprus, Finland, Great Britain, USA, Norway) the Republic of Slovenia wishes to explain in greater depth the status of the Autonomous Province of Kosovo under the 1974 SFRY Constitution, the circumstances of the adoption of 1989 constitutional amendments and the proclamation of the state of emergency, which influenced the content of the 1990 Republic of Serbia Constitution as well as the constitutional changes after 1991.
[18] Decision on creating Yugoslavia according to the federal principle, *Uradni list Demokratične federativne Jugoslavije*, No. 1/1945:
Item 2: "*In order to implement the principle of sovereignty of the nations of Yugoslavia, that Yugoslavia would truly be the homeland to all its nations and that it would never again become the site of any hegemonic clique, Yugoslavia is built and will be built according to the federal principle which will ensure full equality of Serbs, Croats, Slovenians, Macedonians and Montenegrins, or the nations of Serbia, Croatia, Slovenia, Macedonia, Montenegro, and Bosnia and Herzegovina.*"

10. The autonomous units of Vojvodina and Kosovo-Metohija were then set up in 1945 and integrated into the Republic of Serbia (this decision was upheld by the third AVNOJ Conference in August 1945). In September 1945, the People's Republic of Serbia (hereinafter: PR Serbia) adopted the Law on the Autonomous Authority of Kosovo-Metohija and the Law on the Autonomous Province of Vojvodina. Formally, the autonomous province enjoyed a higher status than the autonomous authority.

11. The status of Vojvodina and Kosovo-Metohija as introduced in 1945 was later endorsed by the 1946 Constitution of the Federal People's Republic of Yugoslavia (hereinafter: FPRY) and the 1947 Constitution of the PR Serbia. It must be stressed that the Republic of Serbia was the only republic of the FPRY to have autonomous constitutive units.

12. The status of both autonomous units was made equal in 1968 (both became autonomous provinces) through the adoption of amendments to the 1963 SFRY Constitution; "Kosovo and Metohija" was renamed "Kosovo".

13. The status of both provinces as constitutive elements of the Federation was finally regulated by the 1974 SFRY Constitution. This means that the autonomous provinces in the former SFRY were formally created by the 1974 federal constitution. The status of the autonomous provinces was unusual in that it had a dual character. On the one hand, the autonomous provinces were federal units within the SFRY and, on the other hand, they were autonomous units within the Republic of Serbia.

14. The 1974 SFRY Constitution (Article 2) stipulated that the Federation was comprised of the Republics of Bosnia and Herzegovina, Macedonia, Montenegro, Croatia, Slovenia, and Serbia and the autonomous provinces of Kosovo and Vojvodina.

15. The difference between a republic and an autonomous province was explained in the Constitution. The republic was defined as *"a state and a socialist self-managing*

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Item 4: *"National minorities in Yugoslavia shall be granted all ethnic rights."*

*democratic community"*[19], while the autonomous province was *"an autonomous, socialist, self-managing, democratic, socio-political community"*[20].

16. Notwithstanding the formal difference between republics and autonomous provinces, the autonomous provinces were *de facto* constitutive elements of the Federation. Therefore, on the basis of the SFRY Constitution, the Yugoslav Federation consisted of eight federal units: six republics and two autonomous provinces.

17. The autonomous provinces had an organisational structure which was virtually equivalent to that of a republic, since both possessed the same bodies. Most importantly, both autonomous provinces and republics had a presidency acting in the capacity of head of state. In deciding on the main issues in the Federation, the competences of the autonomous provinces were practically equal to those of the republics. The differences between republics and autonomous provinces were apparent; however, in the structure of the bodies of the Federation and the forms of decision-making by federal bodies.

18. The highest level of formal equality between an autonomous province and a republic was apparent from the composition of the collective head of state, i.e. the Presidency of the SFRY. The composition of the latter was based on the principle of parity, according to which all federal units were represented by one member respectively. Such a composition enabled equal status among members of the Presidency of the SFRY from the autonomous provinces and those from the republics. Based on the pre-selected order of the presidency, a representative of the autonomous province could also become President of the Presidency (collective head) of state.

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[19] Article 3 of the SFRY Constitution: *"The Socialist Republic is a state based on sovereignty of nations, the authority and self-management of working people and all workers, and it is a socialist self-managing democratic community of working people, citizens and equal nations and nationalities."*

[20] Article 4 of the SFRY Constitution: *"The socialist autonomous province is an autonomous, socialist, self-managing, democratic, socio-political community based on authority and self-management of the working class and all working people, in which working people together with citizens, nations and nationalities exercise their sovereign rights, when specifically provided for by the Constitution of the Socialist Republic of Serbia in the interest of all working people, citizens, nations and nationalities of the republic, this also applies to the Republic."*

19. At the federal level, autonomous provinces were equal to republics also with regard to decision making powers on the following main issues:

- Republics and autonomous provinces took decisions on amendments to the SFRY Constitution on an equal footing (Articles 398–402 of the SFRY Constitution), meaning the consent of autonomous provinces was required for the adoption of an amendment to the SFRY Constitution;
- Federal bodies decided on laws and other issues stipulated by the Constitution (Articles 398–402 of the SFRY Constitution and amendment No. 40) on the basis of the agreement of republic and provincial assemblies;
- The Federation concluded certain treaties in agreement with the competent republic or provincial bodies (Article 271 of the SFRY Constitution);
- Republics and autonomous provinces cooperated with foreign bodies, organisations and international organisations (amendment No. 36 to the SFRY Constitution);
- Republics and autonomous provinces could request a special decision-making procedure in the Federal Chamber of the SFRY Assembly (Article 294 of the SFRY Constitution).

20. Even more, at the federal level, common interests were implemented:

a) Through federal bodies in which the equality of republics and autonomous provinces was guaranteed, and

b) Through federal bodies on the basis of decisions or agreement by the bodies of republics and autonomous provinces (Article 244, paragraph 2, of the SFRY Constitution).

21. In federal bodies, autonomous provinces were represented either according to the principle of equality with republics (principle of parity), or according to the principle of appropriate (smaller) representation.

22. The principle of parity was implemented within the collective head of state, i.e. the SFRY Presidency (Article 321 of the SFRY Constitution and amendments Nos. 4 and 41). Therefore, each republic and autonomous province had one member elected by the republic or provincial assembly.

23. The principle of appropriate (smaller) representation was implemented in other federal bodies. In the SFRY Assembly, the Federal Chamber (lower house) had thirty members from each republic and twenty members from each autonomous province (Article 291 of the Constitution and amendment No. 40), while the Chamber of Republics and Provinces (upper house) had twelve members from each republic and eight from each autonomous province (Article 292 of the Constitution and amendment No. 40). The Constitutional Court of Yugoslavia consisted of two members from each republic and one from each autonomous province (Article 381 of the SFRY Constitution). The Constitution did not stipulate the number of the Federal Executive Council members (federal government); however, the principle of equal representation of republics and respective representation of autonomous provinces had to be taken into account (Article 348 of the Constitution and amendment No. 43).

24. The status of the autonomous provinces under the 1974 SFRY Constitution was in several ways equal to the status of the republics. The autonomy possessed by the autonomous provinces was therefore significant, and consequently the autonomous provinces formed *de facto* constitutive elements of the SFRY. However, in 1989 the process of abolishing autonomy was conducted through two parallel procedures/levels[21]:

- At the constitutional level by amending the Constitution in 1989, and adopting a new constitution in 1990, which related to both provinces – Kosovo and Vojvodina; and
- At the legislative level, where the process of the abolition of autonomy was aimed only at Kosovo. Additionally, Kosovo's autonomy was abolished through the adoption of special laws and measures.

25. The process of the abolition of Kosovo autonomy began on 27 March 1989 with the SFRY Presidency's declaration of a state of emergency in Kosovo due to a miners' strike in Stari trg in Kosovo.

[21] For the purpose of this contribution, the abolition of Kosovo autonomy is discussed from the aspect of the constitutional and legal status achieved under the 1974 SFRY Constitution, whereby other dimensions such as the historical dimensions of the Kosovo issue are not dealt with.

## 2. Amendments to the Constitution of the SR Serbia of March 1989

26. The SR Serbia took advantage of the declaration of the state of emergency in order to amend its 1974 Constitution, and adopted constitutional amendments the following day after declaring the state of emergency, i.e. on 28 March 1989. These amendments were presented to the public as having great importance for strengthening the status of Serbia in the Federation, particularly due to amendments to constitutional provisions relating to the autonomous provinces.

27. By way of these amendments, the status of the autonomous provinces deteriorated considerably compared to the status enjoyed under the Constitution of the SR Serbia and the 1974 SFRY Constitution. This particularly derived from amendments No. 29, item 1, No. 31, No. 33, No. 44 and No. 47.

28. Amendment No. 29, item 1, stipulated that on the basis of the opinion of the Constitutional Court of Serbia, certain provisions of the constitutions of autonomous provinces were not applicable (meaning they ceased to apply), if the assembly of the autonomous province did not harmonise such provisions with the aforementioned opinion within one year.

29. Amendment No. 31 abolished Article 296 of the Constitution of the SR Serbia[22], according to which the republic administrative bodies of Serbia conducted business with municipal authorities through the relevant provincial administrative bodies. By doing so, the Republic of Serbia deprived the autonomous provinces of the status which derived from Article 4 of the SFRY Constitution and which was essential, taking into account Article 278 of the SFRY Constitution. The latter stipulated that federal administrative bodies conducted business with municipal authorities through the relevant republic and provincial administrative bodies.

30. In contrast to Article 300 of the Constitution of the SR Serbia, amendment No. 33 considerably weakened the status of the autonomous provinces in the area of

[22] Article 296, paragraph 1, of the 1974 Constitution of the SR Serbia: *"Republic administrative bodies conduct business with municipal authorities in autonomous provinces through relevant provincial administrative bodies."*

legislation which uniformly regulated relations throughout the entire territory of the republic. The status of autonomous provinces as derived from Article 4 of the SFRY Constitution and Article 291 of the Constitution of the SR Serbia were not taken into account.

31. Amendment No. 44 provided that the Constitutional Court of Serbia could continue (i.e. “begin”) to decide on certain matters, although the constitutional court of the autonomous province had not yet concluded the proceedings. The SFRY Constitution did not include such a provision, since the Constitutional Court of Yugoslavia decided on a certain matter only after the republic or provincial constitutional court had concluded its proceedings.

32. Amendment No. 47 abolished Article 427 of the Constitution of the SR Serbia, which stated that the Assembly of the SR Serbia decided on amendments to the Constitution of the SR Serbia on the basis of the agreement of the assemblies of the autonomous provinces. Amendment No. 47 stipulated that provincial assemblies gave only opinions on amendments to the republic Constitution of Serbia, and not their consent. It has to be taken into consideration that the autonomous provinces retained the right to give their consent to amendments to the SFRY Constitution.

33. The Constitutional Court of Yugoslavia expressed its opinion (Decision IU No. 105/1-1-89 as of 18 January 1990) on the amendments made to the Constitution of the SR Serbia (based on Article 378 of the SFRY Constitution). It established that the provisions of the following three amendments were contrary to the SFRY Constitution: amendment No. 20, item 3 (transactions in immovable property), amendment No. 27, paragraph 3 (equality of languages and scripts), and amendment No. 39, paragraph 2 (candidates for delegates). The Constitutional Court of Yugoslavia did not consider any of the five above quoted amendments as unconstitutional; however, (in the opinion of the then Slovenian Constitutional Court Judge, Prof. Ivan Kristan) the status of the autonomous provinces was affected by the aforementioned amendments.

34. Prof. Ivan Kristan, in his capacity as the Slovenian judge of the Constitutional Court, gave a separate opinion on the decision by the Constitutional Court of

Yugoslavia. In addition to the violation of constitutional status of the autonomous provinces, he also established the violation of formal constitutionality, since the amendments to the Constitution of the SR Serbia were made during the state of emergency in Kosovo. The Assembly of Kosovo had to give its consent to the amendments to the Constitution of the SR Serbia, where human rights and freedoms were violated during the state of emergency. It is especially incomprehensible that the Kosovo provincial assembly freely consented to deleting Article 427 of the Serbian Constitution, whereby Kosovo lost the right to give consent to future amendments to the Serbian Constitution. Judge Kristan assessed that the procedure was illegal. Consequently, the Republic of Slovenia does not share the view presented in some written submissions concluding that Kosovo freely consented to the mentioned amendments. In addition, Judge Kristan pointed to the international aspect of the issue, and proposed that the Constitutional Court of Yugoslavia examine the UN study on respect for human rights in states of emergency[23]. However, the Constitutional Court of Yugoslavia did not accept the proposal to examine this study and did not postpone the formulation of its final opinion.

### 3. Adoption of the 1990 Constitution of the Republic of Serbia

35. Two characteristics are evident in the 1990 Constitution of the Republic of Serbia[24]: the first is the abolition of the then status of the autonomous province, and the second is a redefinition of the formal relationship between the Republic of Serbia and the Federation (SFRY).

36. This Constitution abolished the constitutional status of both autonomous provinces as defined in the 1974 SFRY Constitution and the 1974 Constitution of the SR Serbia; the following major elements of the autonomy of provinces were abolished:

- Political and territorial autonomy;

[23] United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-Fifth Session, 23 September 1982, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, Special Rapporteur Mrs Nicole Questiaux.
[24] Constitution of the Republic of Serbia, *Službeni glasnik Republike Srbije*, No. 1/1990, 28 September 1990.

- Constitution;
- Legislative powers;
- Presidency;
- Constitutional court;
- Supreme court;
- Consent to amendments to the Constitution of the Republic of Serbia;
- Alterations to the territory of the autonomous provinces no longer required the consent of the provincial assembly.

37. Before the 1990 Constitution of the Republic of Serbia, the autonomous provinces had "political and territorial autonomy", from which the structure of authorities and their competences derived. The dimensions of the political and territorial autonomy of autonomous provinces were envisaged in Article 4 of the SFRY Constitution (1974) and in Article 291 of the Constitution of the SR Serbia (1974)[25].

38. Conversely, Article 6 of the 1990 Constitution of the Republic of Serbia defined the autonomous province as "territorial autonomy". At the same time, it renamed the autonomous province of "Kosovo" the autonomous province of "Kosovo and Metohija", the name it originally had.[26] Consequently, the 1990 Constitution of the Republic of Serbia deprived the autonomous province of the element of "political" autonomy, reducing it to the level of "territorial" autonomy, resulting in the loss of its previous powers and status.

39. Prior to the adoption of the new Constitution of the Republic of Serbia in 1990, the autonomous province had its own constitution, the provisions of which, however, should not have been contrary to the SFRY Constitution. The 1990 Constitution of the

[25] Article 291 of the 1974 Constitution of the SR Serbia is identical to Article 4 of the SFRY Constitution which reads:
*"The socialist autonomous province is a socialist, autonomous, self-managing, democratic, socio-political community based on authority and self-management of the working class and all working people, in which working people together with citizens, nations and nationalities exercise their sovereign rights; this also applies to the Republic when it is specifically provided for by the Constitution of the Socialist Republic of Serbia in the interest of all working people, citizens, nations and nationalities of the republic."*
[26] Article 6 of the 1990 Constitution of the Republic of Serbia: *"In the Republic of Serbia, there is the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija, representing the forms of territorial autonomy."*

Republic of Serbia conversely stipulated that the Statute was the supreme legal act of the autonomous province.

40. An additional degradation of the status of the autonomous province lies in the fact that, prior to the 1990 Constitution of the Republic of Serbia, the autonomous province adopted its constitution independently, whereas according to the 1990 Constitution of the Republic of Serbia, the Statute was adopted on the basis of the previous consent of the Assembly of the Republic of Serbia (Article 110 of the Constitution of the Republic of Serbia[27]).

41. Furthermore, the Constitutional Act Implementing the Constitution of the Republic of Serbia stated that the Assembly of the Republic of Serbia would adopt a provisional statutory decision of the Autonomous Province of Kosovo and Metohija and call elections for the provincial assembly, which would then pass the statute of the province.[28] In essence, there was nothing left of the provincial self-government.

42. In addition to the abovementioned changes in the status of the autonomous provinces, the latter also lost legislative power. Laws were no longer stated among the acts which provincial bodies could adopt on the basis of Article 109 of the Constitution of the Republic of Serbia. The constitution granted the autonomous provinces only the function of implementing laws. Moreover, the autonomous provinces had the power to implement only those laws which clearly provided for such a power.[29]

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[27] Article 110, paragraphs 1 and 2 of the 1990 Constitution of the Republic of Serbia:
*"The Statute is the highest legal act of the autonomous province laying down, on the basis of the Constitution, the responsibility of the autonomous province, elections, organisation and operation of its bodies and other issues of interest to the autonomous province.*
*The Statute of the Autonomous Province shall be adopted by its Assembly, subject to prior approval of the National Assembly."*

[28] Constitutional Act Implementing the Constitution of the Republic of Serbia, *Službeni glasnik Republike Srbije*, No. 1/1990, Article 13:
*"The Assembly of the Republic of Serbia shall adopt a provisional statutory decision of the Autonomous Province of Kosovo and Metohija and call direct and secret elections to the Assembly of the Province according to the provisions of the Constitution and the provisional statutory decision.*
*The newly elected Assembly of the Autonomous Province of Kosovo and Metohija shall adopt the Statute of the Province."*

[29] Article 109, paragraph 1, Item 4, of the Constitution of the Republic of Serbia: *"The autonomous province, through its bodies … shall implement laws, other regulations and general acts of the Republic of Serbia and the bodies of the autonomous province shall implement these and adopt regulations for their implementation when this is provided for by law."*

43. As mentioned above, the 1974 SFRY Constitution (Article 147)[30] provided that the autonomous provinces had a Presidency. Conversely, the 1990 Constitution of the Republic of Serbia does not list the Presidency[31] among the bodies of the autonomous province (Article 111). The 1974 Constitution of the SR Serbia did not list the bodies of the autonomous province in the chapter on the autonomous province, since this was the subject matter of the provincial constitution. Consequently, the Republic of Serbia *de iure* abolished the Presidency of the autonomous province. However, the presidencies of both autonomous provinces continued to operate, although this was not specifically provided for in the Constitutional Act Implementing the Constitution. The justification of the continued work of the Presidencies of the autonomous provinces could be indirectly inferred from Article 12, paragraphs 1 and 2 of the Constitutional Act Implementing the Constitution, which linked the functioning of the provincial bodies to the adoption of the statute of the autonomous province, the formation of the National Assembly, as well as the assumption of duties of the President of the Republic.[32]

44. The above mentioned *de facto* continuity of the Presidency of the autonomous province may also be inferred from the fact that the Presidency of the Autonomous Province of Kosovo and Metohija was (again) abolished on 18 March 1991.

45. The 1990 Constitution of the Republic of Serbia further abolished the Constitutional Court of the autonomous province which formed part of the constitutional and judicial control exercised by the SFRY at three levels (autonomous province, republics and the Federation). The 1990 Constitution also abolished the Supreme Court of the autonomous province.

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[30] Article 147 of the SFRY Constitution: *"The Presidency of the Republic or the Presidency of the Autonomous Province, which represents the Republic or the Autonomous Province, and exercises other rights and duties determined by the Constitution, is formed in the Republics and Autonomous Provinces."*

[31] Article 111, paragraph 1 of the Constitution of the Republic of Serbia: *"The bodies of the autonomous province are the assembly, executive council and administrative bodies."*

[32] Constitutional Act Implementing the Constitution of the Republic of Serbia, *Službeni glasnik Republike Srbije*, No. 1/1990, Article 12, paragraphs 1 and 2:
*"Provincial bodies and other authorities in the autonomous province shall continue to work in accordance with the relevant provisions of the constitutions of the socialist autonomous provinces until the date of entry into force of the Statute of the autonomous province.*
*On the date when the National Assembly is constituted and when the President of the Republic takes on his/her duties, the bodies of the autonomous province continue to work in accordance with the Constitution."*

46. The previous procedure for the adoption of the republic constitution was abolished by 1990 Constitution of the Republic of Serbia. In accordance with Article 427 of the 1974 Constitution of the SR Serbia, the approval of the Assembly of the autonomous province was required for amendments to the Constitution of the SR Serbia if they concerned relations in the Republic as a whole. Following the adoption of the 47th amendment to the Constitution of the SR Serbia in 1989, the Assembly of the autonomous province only maintained the right to present its opinion. According to the 1990 Constitution, the Assembly no longer had the right to an opinion on amendments to the Constitution of the Republic.

47. The constitutional guarantee of consent to the changes to the territory of the autonomous province was also abolished in 1990. Both the Constitution of the SFRY (Article 5)[33] and the Constitution of the SR Serbia (Article 292) stipulated that the territory of an autonomous province could not be altered without its approval. On the other hand, Article 108 of the 1990 Constitution of the Republic of Serbia provided that the territory of an autonomous province was determined by law. The autonomous provinces, however, were not involved in the adoption of such a law.

48. The 1990 Constitution of the Republic of Serbia also changed the formal relationship between the Republic of Serbia, as well as the Federation on the one hand and the Constitution of the SFRY on the other.

49. All previous constitutions of the Republic of Serbia, including the 1974 Constitution of the SR Serbia (Article 1)[34], contained the provision which defined the Republic of Serbia as a member of the Federation (FPRY, SFRY). This provision was not included in Article 1 of the 1990 Constitution of the Republic of Serbia. Rather, the membership of the Republic of Serbia in the Federation was referred to in Article 135[35] of the 1990 Constitution, which was an important change from the legal and systemic aspects.

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[33] See Paragraph 4 of Chapter I on the dissolution of the former SFRY.

[34] Article 1 of the 1974 Constitution of the SR Serbia stipulated that the Socialist Republic of Serbia formed part of the Socialist Federal Republic of Yugoslavia.

[35] Article 135 of the Constitution of the Republic of Serbia:
*"The rights and duties vested under the present Constitution in the Republic of Serbia, which is a constituent part of the Socialist Federal Republic Yugoslavia, and exercised in the Federation in accordance with the federal constitution shall be exercised in accordance with the federal constitution.*

50. Neither the Constitution nor the Constitutional Act Implementing the Constitution of the Republic of Serbia defined the rights and duties of the Republic of Serbia under the Constitution, which should have been exercised in accordance with the federal constitution, as stipulated in Article 135, paragraph 1, of the 1990 Constitution of the Republic of Serbia. Although the title of Chapter VIII concerned the relationship of the Republic of Serbia with the SFRY, Chapter VIII did not explain on what grounds Serbia had abolished the key features of the status of the autonomous provinces as provided for in the Constitution of the SFRY.

### 4. Law on the Actions of Republic Authorities under a State of Emergency of 26 June 1990 - Proclamation of the State of Emergency in Kosovo

51. The process of abolishing the autonomy of Kosovo was facilitated by the declaration of the state of emergency in Kosovo, which preceded the adoption of the 1990 Constitution of the Republic of Serbia. However, a state of emergency was not declared in Vojvodina. The Assembly of the SR Serbia passed a special law followed by the declaration of the occurrence of the state of emergency in Kosovo through a specific decision and the introduction of coercive measures in about 250 companies and organisations in Kosovo.

52. With the Law on the Actions of Republic Authorities under a State of Emergency of 26 June 1990,[36] the Republic of Serbia gained powers which it did not have under the Constitution of the SFRY. The Law established "state of emergency", defined in Article 2 of the Law,[37] the proclamation of which granted the authorities of the

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*If acts of the agencies of the Federation or acts of the agencies of another republic, in contravention of the rights and duties it has under the Constitution of the Socialist Federal Republic of Yugoslavia, violate the equality of the Republic of Serbia or in any other way threaten its interests, without providing for compensation, the republic agencies shall issue acts to protect the interests of the Republic of Serbia."*

[36] Law on the Actions of Republic Authorities under a State of Emergency, *Službeni list SR Srbije*, No. 30/1990, 26 June 1990.

[37] Article 2, paragraph 1, of the Law on the Actions of Republic Authorities under a State of Emergency:

*"The state of emergency under Article 1 hereof is deemed to occur in the part of the territory of the Socialist Republic of Serbia (hereinafter referred to as: part of the republic territory) where, in an organised manner:*

*(1) Activities have been undertaken, directed against the constitutional order and territorial integrity;*

*(2) Laws and regulations have not been implemented;*

Republic of Serbia the power to use coercive measures in order to suspend the self-management rights of workers in companies and institutions, the rights of socio-political communities (their assemblies and administrative bodies) and even the jurisdiction of courts. Although the law applied to the Republic of Serbia as a whole, the Assembly of the Republic of Serbia established in a decision[38] adopted on the same day as the law that state of the emergency had occurred only in the Autonomous Province of Kosovo.

53. In a public debate before the Constitutional Court of Yugoslavia[39], its initiators argued that, with this law, the Republic of Serbia, contrary to the Constitution of the SFRY and federal legislation, paved the way for the introduction of coercive measures in about 250 companies and institutions, in which management and self-management bodies were relieved of duty, and about 55,000-60,000 workers dismissed. These measures were aimed mainly at the majority Kosovo Albanian population.

54. The consideration of formal and substantive aspects of the adoption of the law leads to the conclusion that it was unconstitutional. In addition to the Constitution of the SFRY, federal laws were also violated (e.g. Law on the Foundations of State Administration and Federal Executive Council, Law on General Administrative Procedure, Law on Administrative Disputes).

55. Under the 1974 Constitution of the SFRY (Article 203)[40], the freedoms and rights it guaranteed could not have been rescinded or limited; however, instances and conditions under which freedoms and rights exercised contrary to the Constitution

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*(3) Actions have been undertaken that may pose risks to the life and health of people;*
(4) *Constitutional and statutory rights and obligations are exercised in a way that causes serious damage to social interests and where they are aimed at attaining objectives contrary to the Constitution."*

[38] Decision of the Assembly of the Socialist Republic of Serbia establishing the occurrence of state of emergency in the territory of the SAP Kosovo (*Službeni glasnik SR Srbije*, No. 31/1990, 26 June 1990).

[39] Public debate was held before the Constitutional Court of Yugoslavia on 30 May 1991. It was chaired by the President of the Constitutional Court of Yugoslavia, Milovan Buzadjić, the judge rapporteur was Pjeter Kolja. The public debate was attended by: Musa Janiku and Avni Kpuska on behalf of the Assembly of the Djakovica Municipality which initiated the procedure; Njegovan Kljajić and Dr Vladan Kutlešić on behalf of the Assembly of Serbia; initiators of the procedure: Sabit Hodža, Dr Esad Stavileci, Šaban Kajtazi, Nik Ljumezi; senior research fellows: Prof. Dr Ibrahim Festić from Sarajevo, Prof. Dr Dragan Medvedović from Zagreb, Prof. Dr Budimir Košutić from Belgrade, Prof. Dr Boštjan Markić from Ljubljana and Prof. Bardulj Čauši from Pristina.

[40] Article 203, paragraph 1, of the SFRY Constitution: *"Freedoms and rights guaranteed by the Constitution may not be rescinded or limited."*

might be limited or rescinded were envisaged in the law. The judicial protection of rights and freedoms was guaranteed. The right to self-management was defined in the Constitution (Article 155)[41] as an inviolable and inalienable right of working people and citizens in companies, institutions and socio-political communities.

56. The protection of freedoms and rights applied in time of peace, state of emergency and under the threat of imminent war. Derogations were possible only in a state of war, when the Presidency of the SFRY could suspend, by a decree with the force of law, individual freedoms and rights for the purposes of national defence (Article 317 and Amendment No. 41).

57. The Republic of Serbia lacked legitimate powers to introduce a state of emergency, limit self-management rights or dismiss workers. By adopting this law, the Republic of Serbia interfered in areas falling within the powers of the federation (Article 281 of the SFRY Constitution[42]).

58. The Law on the Actions of Republic Authorities under a State of Emergency was adopted contrary to the Constitution, as it withdrew powers from the bodies of other socio-political communities (municipalities and autonomous provinces), delegated these powers to the republic bodies of Serbia and, above all, concentrated powers in the republic Assembly of Serbia (Articles 13-16). By subjecting municipal and provincial bodies to republic bodies, the law directly violated Articles 132[43] and 149[44] of the Constitution of the SFRY. According to the Constitution of the SFRY, assemblies of socio-political communities were not vertically subordinated, whereas

[41] Article 155 of the SFRY Constitution: *"The right of working people and citizens to self-management shall be inviolable and inalienable, by which every person is provided with a possibility to decide on his/her personal and common interests in the organisations of associated labour, local communities, organisation of self-managing communities, as well as in any other self-managing organisations and communities and socio-political communities, and also in all other forms of its self-managing association and establishment of mutual links."*

[42] Article 281 of the SFRY Constitution provided for 17 sets of matters that the Federation regulated through federal bodies.

[43] Article 132, paragraph 1, of the Constitution of the SFRY: *"Assembly is a body of social self-management and the highest organ of government within the rights and duties of socio-political communities."*

[44] Article 149, paragraph 3, of the Constitution of the SFRY: *"Administrative bodies are independent within the framework of their authorisations, and are accountable for their work to the Assembly and the Executive Council."*

managing bodies were horizontally responsible to the assembly of the relevant socio-political community.

59. Furthermore, the provision of Article 6 of the law was also contrary to the Constitution, since it granted the Supreme Court of Serbia the power to designate another competent court to decide administrative disputes, while under the Law on Regular Courts of the SAP Kosovo, the Supreme Court of Kosovo had exclusive jurisdiction in settling administrative disputes in the SAP Kosovo.

60. The unconstitutionality of the law on a state of emergency was further intensified by two instruments adopted by the Assembly of the SR Serbia on the very same day as the law, i.e. 26 June 1990: a decision establishing the occurrence of a state of emergency in the territory of the SAP Kosovo[45] and a decision introducing provisional social protection measures in the *"Elektrokosovo"* company[46].

### *4.1. Violation of the principles of the rule of law*

61. The extent of violations of the principles of the rule of law, which posed a threat to human rights and freedoms in Kosovo, becomes even more evident if all three acts adopted by the Serbian Assembly on 26 June 1990 are considered together.

62. As mentioned above, at the session on that same day (26 June 1990), the Assembly of the SR Serbia passed three acts of different legal rank:

(1) General legal norm: Law on the Actions of Republic Authorities under a State of Emergency,

(2) Establishing the factual situation for the application of a law: Decision establishing the occurrence of a state of emergency in the territory of the SAP Kosovo,

[45] Decision of the Assembly of the Socialist Republic of Serbia establishing the occurrence of the state of emergency in the territory of the SAP Kosovo (*Službeni glasnik SR Srbije*, No. 31/1990, 26 June 1990).

[46] Decision of the Assembly of the Socialist Republic of Serbia on taking interim social protection measures in the public electricity distribution company *Elektrokosovo* Pristina (*Službeni glasnik SR Srbije*, No. 31/1990, 26 June 1990).

(3) Sanctioning of a specific case: Decision of the Assembly of the SR Serbia on the introduction of interim social protection measures of self-management rights and socially owned property in the *"Elektrokosovo"* company in Pristina.

63. All three acts were adopted, published in the Official Journal, and entered into force on 26 June 1990, thereby violating the principle of *vacatio legis*, which requires that a certain time limit must elapse from the date of the promulgation of the law until its entry into force. The time limit ensures that those concerned are acquainted with the cogent legal norm imposing or prohibiting certain conduct in order to adapt their future actions to these cogent norms. This was not done in this case. Those concerned were not acquainted with the coercive norms and were not given the opportunity to adapt their actions to these norms.

64. Contrary to the *vacatio legis* requirement, the law did not provide for any time limit within which the people of Kosovo could become acquainted with the provisions of the Law, particularly with Article 2 stipulating actions due to which the Assembly may declare a state of emergency (undermining the constitutional order and territorial integrity, failure to implement laws, threats to life and health of people, damaging the public interest). Furthermore, the decision establishing the occurrence of a state of emergency in the territory of the SAP Kosovo would have required a sufficient time frame within which the relevant authorities of the Republic of Serbia could have established where in Serbia such circumstances existed. The Executive Council could then have proposed that the Assembly establishes the occurrence of a state of emergency in a certain part of the Republic.

65. Conversely, immediately upon passing the law, the Assembly of the SR Serbia established in a decision at the same session, with no analysis, that a state of emergency existed in the SAP Kosovo. The taking into account of the *vacatio legis* principle would have been crucial for the relevant bodies to analyse the situation on the ground in order for the social attorney of self-management to propose to the Assembly of the SR Serbia which companies required coercive measures.

66. Since those concerned were not acquainted with the norms defining unlawful actions due to which the Assembly of Serbia introduced sanctions (coercive measures)

in companies and organisations, and could therefore not adapt their actions to these norms, the sanctions were in fact imposed retroactively. The retroactive application of regulations was unconstitutional (Article 211 of the Constitution of the SFRY[47]).

67. Interestingly, the Law on the Actions of Republic Authorities under a State of Emergency and the Decision of the Assembly of the SR Serbia on establishing the occurrence of the state of emergency were adopted at the same session and were published on the same day in special editions of the Official Journal (*Službeni glasnik*), whereby both editions were issued on the same day, i.e. 26 June 1990: the Law was published in *Službeni glasnik* No. 30/1990 of 26 June 1990, and the Decision in *Službeni glasnik* No. 31/1990 of the same date, i.e. 26 June 1990.

68. The necessary time frame between the second level of decision-making (establishing the occurrence of a state of emergency) and the third level (imposition of sanctions in a concrete case), which was required to introduce actual sanctions against certain organisations upon establishing the occurrence of a state of emergency in the SAP Kosovo, was also lacking.

69. The republic social attorney of self-management, who was authorised, under Article 11 of the Law on the Actions of Republic Authorities under a State of Emergency to propose to the Assembly of the Republic of Serbia the adoption of coercive measures, proposed to the Assembly the introduction of coercive measures against the *"Elektrokosovo"* public company. The decision of the Assembly on the introduction of such measures bears the same date (26 June 1990) and was published in the same issue of the Official Journal (No. 31/1990).

70. Further, the republic social attorney of self-management proposed to the Assembly of the SR Serbia the introduction of *"interim measures for the protection of self-management rights and socially owned property"* against all companies or organisations.

[47] Article 211, paragraphs 1 and 2, of the Constitution of the SFRY:
*"No law, other regulations or other enactments passed by bodies of socio-political communities may be applied retroactively.*
*Retroactive application of particular provisions of a law may only be provided by this particular law if general interest so requires."*

71. In all instances, the following reasons for the introduction of interim measures were given:

- Seriously deteriorated self-management relations,
- Serious damage to social interests, and
- Non-implementation of statutory obligations.

72. It must be stressed that no evidence was presented in support of the alleged violations. The procedure described in the case of *"Elektrokosovo"* was carried out in all companies and institutions. Upon the proposal of the social attorney of self-management, the Assembly of the SR Serbia adopted a decision to introduce interim measures for the social protection of self-management rights and socially-owned property.

73. The following measures were imposed on *"Elektrokosovo"* by the Assembly of the SR Serbia:

- Self-management bodies shall be dissolved: Workers' Council; Disciplinary Commission; Self-management Workers' Control Committee;
- A provisional (three-member) management of the company shall be appointed which shall take up the duties of all three self-management bodies forthwith;
- The following self-management rights of working people shall be provisionally suspended: the right to decide on status changes; the right to decide on entering into employment relations and on termination of employment; the right to decide on the distribution of personal income; the right to decide on the distribution of apartments;
- All the aforementioned self-management rights shall be exercised by the provisional management of the company;
- The interim measures shall be introduced for a period of 12 months;
- The costs of the implementation of the interim measures shall be borne by the *"Elektrokosovo"* company.

74. The gravity of the measures is particularly evident from the measure on the costs of unlawful abolition of the previous management and self-management status, the costs of which had to be borne by the company or organisation itself.

75. The Assembly imposed additional measures on 5 July 1990 on *"Radio-televizija Pristina"*, on the Rilindija newspaper company, on the *"Rilindija"* and *"Zeri e Rinis"* newspaper houses and others. Such coercive measures were introduced, with shorter interruptions, into about 250 companies and organisations, both in economic and non-economic sectors.

76. That there was a violation of the rule of law may also be inferred from an examination of the General Comments adopted by the Human Rights Committee regarding Article 4 of the International Covenant on Civil and Political Rights concerning derogations during a state of emergency (General Comment No. 5 (1981)[48] as well as General Comment No. 29 (2001) replacing the former[49]), since the conditions stipulated therein were not met by the SR Serbia.

77. Paragraph 2 of the General Comment No. 29 stipulates that measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke Article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. Article 4, paragraph 3, states that States parties, when resorting to the power of derogation under Article 4, commit themselves to a regime of international notification. Moreover, a fundamental requirement for any measures derogating from the Covenant, as set forth in Article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. Paragraph 8 of the General Comment No. 29 further states that according to Article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

78. It should be emphasised that General Comment No. 5 of 1981 had already emphasised that when a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to

[48] General Comment No. 5. Thirteenth Session of the Human Rights Committee, 31 July 1981.
[49] General Comment No. 29. Seventy-Second Session of the Human Rights Committee, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

the extent strictly required by the situation. Furthermore, the General Comment No. 5 stated that the State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds. The obligation of the State party to inform the other States parties immediately, through the Secretary-General, of the derogations it has made including the reasons therefore and the date on which the derogations are to be terminated was also mentioned, as well as an exceptional and temporary nature of the measures introduced under Article 4.

## 5. Law on Labour Relations under State of Emergency of 26 July 1990

79. The Law on Labour Relations under State of Emergency of 26 July 1990[50] supplemented unconstitutional interim measures depriving employees in many companies in the SAP Kosovo of all self-management rights.

80. The law suspended applicable labour law regulations in respect of all bodies and organisations in the SAP Kosovo in which a state of emergency had been declared, and it introduced interim measures for the social protection of self-management rights and socially-owned property.

81. The adoption of the Law on Labour Relations under State of Emergency provided SR Serbia with a formal basis for the unlawful dismissal of 55,000-60,000 workers - mainly Kosovo Albanians (data from the public debate of 30 May 1991 before the Constitutional Court of Yugoslavia on the Law on the Actions of Republic Authorities under State of Emergency).

82. The law laid down (Article 1)[51] that in companies and organisations on which interim measures for social protection of self-management rights and socially-owned

[50] Law on Labour Relations under State of emergency (*Službeni list SR Srbije*, No. 40/1990, 26 July 1990).

[51] Article 1 of the Law on Labour Relations under State of Emergency: *"In part of the territory of the SR Serbia, in which state of emergency occurred, as provided for under the law, the provisions of the law and other regulations shall be applied regulating labour relations in work collectives of the administration, administrative organisations, technical services and other state bodies to which regulations on state administration apply (hereinafter: the body) as well as in companies, social activity and other organisations and associations against which interim measures for the social protection of self-management rights and socially-owned property have been taken (hereinafter: the organisation), unless certain issues and relations are otherwise regulated by this law."*

property were imposed, the provisions of laws and other regulations introducing such circumstances were to be applied unless otherwise stipulated by law. Consequently, Article 1 posed an unconstitutional encroachment upon the right to self-management (Article 155 of the SFRY Constitution) and the right to work (Article 159 of the SFRY Constitution).

83. The Law on Labour Relations in State of Emergency was also passed without *vacatio legis:* it was promulgated on the date of its passage, i.e. 26 July 1990, and entered into force on that same day.

## 6. Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo - Abolition of the supreme bodies of the SAP Kosovo

84. The introduction of the state of emergency in Kosovo was followed by the encroachment on the structure of political authority in Kosovo, more explicitly, its supreme bodies. On 5 July 1990 the SAP Kosovo Assembly and its Executive Council were abolished,[52] and on 18 March 1991, the Kosovo member of the SFRY Presidency was dismissed[53] and the Presidency of the SAP Kosovo was abolished[54].

85. The Assembly of the Republic of Serbia lacked the power to pass the Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo. Under the SFRY Constitution all socio-political communities (from the municipality to the federation) had an assembly, *"a body of social self-management and the highest authority within the scope of rights and duties*

[52] The Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo, *Službeni glasnik SR Srbije*, No. 33/1990, 5 July1990. The Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo uses the expression *"the termination of work"* instead.
[53] Decision on Dismissal of the Member of the Presidency of the SFRY from the Autonomous Province of Kosovo and Metohija, *Službeni glasnik Republike Srbije*, No. 15/1991, 18 March 1991.
[54] Law on the Termination of Work of the Presidency of the SAP Kosovo, *Službeni glasnik Republike Srbije*, No. 15/1991, 18 March 1991.

*of a socio-political community"*, whose organisation was governed by their own legal acts.[55]

86. The SAP Kosovo Assembly[56] and the Executive Council of the SAP Kosovo[57] were provided for by the Constitution of the SAP Kosovo. Therefore, the Assembly of the SR Serbia had no power to establish or abolish the Assembly of the SAP Kosovo or its Executive Council.

87. The Assembly of the Republic of Serbia adopted the Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo without stating the legal basis for its adoption. Instead, the justification for its adoption was based on the assertion that the Assembly of the SAP Kosovo and its Executive Council had not been operating in accordance with the Constitution. Moreover, it was argued that the majority of the Executive Council members *"posed a threat to sovereignty, territorial integrity and constitutional order of the SR Serbia"*. The allegation of unconstitutional actions could not have justified the actions taken against the Assembly and the Executive Council of the SAP Kosovo. The alleged criminal offences of undermining the constitutional order and threatening the territorial integrity of Serbia should have resulted in criminal proceedings against the suspected individuals, rather than serve as grounds for the abolition of the constitutional body of the SAP Kosovo.

88. Therefore, the Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo was contrary to the Constitution in its entirety, in particular Articles 2 and 5, although it must be noted that the Constitutional Court of Yugoslavia never took such a decision.

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[55] Article 132, paragraph 2, of the SFRY Constitution: *"Forming, organisation and competence of the Assemblies of socio-political communities and bodies responsible thereto are regulated by the Constitution, statute and law, on the basis of uniform principles determined by this Constitution."*

[56] Article 300, paragraph 1, of the 1974 Constitution of the SAP Kosovo: *"The Assembly of the Socialist Autonomous Province of Kosovo is a body of social self-management and the highest authority within the rights and duties of the Province."*

[57] Article 349 of the Constitution of the SAP Kosovo: *"The Executive Council is a body of the Assembly of the SAP Kosovo. The Executive Council carries out its rights and duties on the basis and within the framework of this Constitution and laws."*

89. Article 2 of the law provided for the take-over of the functions of the SAP Kosovo Assembly and Executive Council: The Assembly of the SR Serbia took over the responsibilities of the SAP Kosovo Assembly, and the Executive Council of the SR Serbia the responsibilities of the SAP Kosovo Executive Council.

90. With the date of entry into force of the law, Article 5 provided for the dismissal of all officials of the Assembly of the SAP Kosovo, all members of the Executive Council, and all officials of the administrative bodies of the Province.

91. It must be stressed that there was no vertical superiority or subordination between the assemblies of the SR Serbia and SAP Kosovo or their executive councils; therefore the Assembly of the SR Serbia could not have taken over the functions of the Assembly of the SAP Kosovo. The same applies to the relationship between the two executive councils, since the executive council was only horizontally accountable to the assembly by which it was elected. Since the officials of the Assembly and members of the Executive Council of the SAP Kosovo were elected or appointed by the Assembly of the SAP Kosovo, the latter was the only body possessing the competence to dismiss them.

92. The law had two direct negative effects:

a) The people of Kosovo were deprived of their constitutional rights to exercise authority in the SAP Kosovo, and their sovereign rights in the Federation through provincial bodies.

b) The abolition of the Assembly of the SAP Kosovo hindered and in certain cases even prevented the exercise of federal functions.

93. By the abolition of the Assembly of the SAP Kosovo, the Chamber of Republics and Provinces of the SFRY Assembly was no longer a legitimate body since it was not composed in accordance with the Constitution[58], as one of its eight delegations, that of the Assembly of the SAP Kosovo, was no longer represented. The quorum requirement in the Chamber of Republics and Provinces entailed the presence of all

[58] Article 284, paragraph 3, of the SFRY Constitution: *"The Chamber of Republics and Provinces shall consist of delegations of the assemblies of the republics and assemblies of autonomous provinces."*

eight delegations.[59] Consequently, decision-making on matters which required the consensus of the assemblies of the republics and provinces (as stipulated by Article 286 of the SFRY Constitution) was made impossible.

94. In the adoption of this law, the rule of law was not respected, and *vacatio legis* was not defined, since the act was adopted and entered into force on the same day.

### *6.1. Decisions adopted on the basis of the new laws - dismissal of a member of the Presidency of the SFRY and abolition of the Presidency of the SAP Kosovo*

95. In 1991, the reduction of the powers of institutions of the Autonomous Province of Kosovo continued with the dismissal of a member of the Presidency of the SFRY and the abolition of the Presidency of the SAP Kosovo.[60]

96. At an extraordinary session on 18 March 1991, the Assembly of the Republic of Serbia, in a fast track procedure, dismissed the member of the Presidency of the SFRY from Kosovo and abolished the Presidency of the SAP Kosovo, directly interfering with the work of the Presidency of the SFRY.

97. Here, too, the SR Serbia lacked the legal basis for these two acts. The legal basis for the introduction and work of the presidencies of the republics and the presidencies of the autonomous provinces was provided for by the SFRY Constitution[61]. The work of a presidency of any republic was regulated by that republic's constitution and that of the presidency of an autonomous province by the constitution of the province.

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[59] Article 295, paragraph 1, of the SFRY Constitution: *"The Chamber of Republics and Provinces shall decide at a meeting, at which all delegations of the assemblies of republics and assemblies of autonomous provinces shall be represented, and which the majority of delegates in the Chamber shall attend."*

[60] These decisions coincided with the crisis within the Presidency of the SFRY following the resignation of President Dr Jović, as well as with Milošević's statement that Serbia would not recognise any decisions of the Presidency of the SFRY. See: *"Serbia will not recognize any decisions by the Presidency of Yugoslavia"*, Borba newspaper, Belgrade, 17 March 1991.

[61] Articles 147, 322 and 324 of the SFRY Constitution and Amendment No. 41.

98. According to the SFRY Constitution (Article 321) and the Constitution of the SAP Kosovo[62], members of the Presidency of the SFRY from autonomous provinces were elected and dismissed by the Assembly of the SAP Kosovo. If the term of office of a member of the SFRY Presidency from an autonomous province was terminated and a new member elected, his/her duties in the Presidency of the SFRY were performed by the President of the Presidency of the autonomous province until the election of a new member (SFRY Constitution, Article 324 and Amendment No. 41).

99. Therefore, the dismissal of Riza Sapunxhiu, a member of the Presidency of the SFRY, from the SAP Kosovo, lacked the necessary legal basis. Conversely, the Assembly of the Republic of Serbia based its decision upon Article 324 of the SFRY Constitution and Amendment No. 41, as well as Article 2 of the Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo. However, Article 324 (with Amendment No. 41) stipulated the very opposite, i.e. that the Assembly of the SR Serbia elected and dismissed only a member of the Presidency of the SFRY from Serbia, and not a member from the SAP Kosovo. Article 2 of the Law on the Termination of Work of the Assembly of the SAP Kosovo and the Executive Council of the Assembly of the SAP Kosovo, in fact, could not have provided a legal basis for these decisions either, since the Law itself was unconstitutional.

100. The agenda of the session of the Assembly of Serbia on 18 March 1991 initially included only the dismissal of Mr Riza Sapunxhiu as a member of the Presidency of the SFRY from the SAP Kosovo. However, during the intermission, a proposal was made to add the adoption of the Law on the Termination of Work of the Presidency of the SAP Kosovo to the agenda. The government drafted the Law during the intermission, without stating any legal basis for its adoption.[63]

101. Upon the abolition of the Presidency of the SAP Kosovo, there was a proposal in the Assembly to abolish also the Presidency of the SAP Vojvodina; however, the proposal was not accepted at the time.

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[62] Article 301, paragraph 1, item 20, of the Constitution of the SAP Kosovo: *"The Assembly shall …elect and dismiss the member of the Presidency of the SFRY from the SAP Kosovo."*

[63] "All in two hours", Borba newspaper, Belgrade, 19 March 1991.

102. Both unconstitutional acts (the dismissal of Mr Riza Sapunxhiu as a member of the Presidency of the SFRY from the SAP Kosovo and the abolition of the Presidency of the SAP Kosovo) were endorsed by the Assembly of the Republic of Serbia at an extraordinary session on 18 March 1991.

103. In addition, regarding the replacement of a member of the Presidency of the SFRY from the autonomous province, it is necessary to note the provision of the 1990 Constitutional Act Implementing the Constitution of the Republic of Serbia. The latter stipulated that a member of the Presidency of the SFRY from the Autonomous Province should be replaced by the President of the Assembly of the Autonomous Province,[64] which was contrary to Article 324 of the SFRY Constitution.

## 7. Constitutional changes after 1991

104. The adoption of the 1992 Constitution of the FRY[65] concluded the process of abolishing the autonomy of provinces launched by the Republic of Serbia in 1989 with constitutional amendments and resumed with the adoption of the 1990 Constitution. The Constitution of the FRY, in contrast to the 1974 Constitution of the SFRY, contained no provisions on autonomous provinces. Article 2 of the Constitution of the FRY stated that the FRY was comprised of the Republic of Serbia and the Republic of Montenegro. In contrast to Article 2 of the Constitution of the SFRY, it did not stipulate that the Republic of Serbia had autonomous provinces. Within three years, the autonomy provided for by the 1974 Constitution of the SFRY had been abolished.

105. The legitimacy and legality of the adoption of the 1992 Constitution of the FRY might also be questionable for two reasons:

a) The Federal Chamber of the SFRY Assembly, which adopted the Constitution of the FRY, did not have legal grounds for such an action, and had

[64] Constitutional Act Implementing the Constitution of the Republic of Serbia, *Službeni glasnik Republike Srbije*, No. 1/1990, 28 September 1990, Article 12, paragraph 3: *"As of the date of the termination of work of the Presidency of the Socialist Autonomous Province, the member of the Presidency of the SFRY from the Autonomous Province shall be replaced by the President of the Assembly of the Autonomous Province in cases provided for by the SFRY Constitution."*

no authority to adopt a constitution. The term of office of the Federal Chamber elected in 1986 expired in 1990 and was not extended, although this would have been possible in a state of emergency or time of war (Article 308 of the Constitution of the SFRY).

b) The procedure for the adoption of the Constitution of the FRY was inappropriate. It may be inferred from the procedure itself that the adopted act was null and void.[66]

106. Decisions on the amendments to the Constitution of the SFRY were adopted by the Federal Chamber by a two-thirds majority of all delegates. The amendments also had to be approved by the assemblies of all republics and autonomous provinces (Articles 401 and 402). It must be emphasised that at the time of the adoption of the Constitution of the FRY (27 April 1992), the Federal Chamber no longer functioned, since the SFRY no longer functioned either. The Badinter Commission observed that the SFRY was in a process of formal dissolution. Only three months after the adoption of the Constitution of the FRY, the Badinter Commission established that the SFRY no longer existed[67]. It can therefore be argued that, rather than adopting the Constitution of the FRY on the basis of the revision of the Constitution of the SFRY (Articles 398–403), the actors of the new state should have convened a constitutional assembly.

107. Following the declaration of independence on 25 June 1991 and the expiry of the three-month moratorium on activities relating to independence (provided for in the Brioni Declaration[68]), the Republic of Slovenia and the Republic of Croatia as well as

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[65] Constitution of the Federal Republic of Yugoslavia, *Službeni list SR Jugoslavije* No. 1/1992, 27 April 1992.

[66] Such an assessment was given by Professor Pavle Nikolić, Faculty of Law in Belgrade, who stated that from the legal aspect due to the mistakes made during the adoption of the Constitution of the FRY, the Constitution was null and void. Pavle Nikolić: Mistakes and Legal Voidness of the Constitution of the Federal Republic of Yugoslavia of 27 April 1992, *Pravni život*, Belgrade, No. 7–8/1992.

[67] In its Opinion No. 1 of 29 November 1991, the Badinter Commission established *"that the SFRY was in the process of dissolution"*; in its Opinion No. 8 of 4 July 1992, it established *"that the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists"*.

[68] At its session on 2 October, the Assembly of the Republic of Slovenia established that the moratorium under the Brioni Joint Declaration would expire on 7 October 1991 and that there were no reasons for its extension. The Assembly concluded that further involvement of the representatives of the Republic of Slovenia in the work of the federal bodies of the SFRY was no longer necessary. See: Positions and conclusions of the Assembly of the Republic of Slovenia upon the expiry of the three-month moratorium on the further implementation of independence acts of the Assembly of the

the Republic of Bosnia and Herzegovina and the Republic of Macedonia were no longer involved in the work of the Federal Chamber, while the autonomous provinces of Kosovo and Vojvodina were abolished with the adoption of the 1990 Constitution of the Republic of Serbia.

108. It must be emphasised that the SFRY procedure for constitutional revision was inappropriate for the adoption of the constitution of a new state (FRY), since instead of eight members (all of whom were required to endorse constitutional amendments[69]) only two members, Serbia and Montenegro, were involved in the procedure. Consequently, the act promulgating the Constitution of the FRY did not state the constitutional basis for the adoption (on the basis of Article 403, the Federal Chamber was responsible for promulgating amendments to the Constitution of the SFRY). Furthermore, the act cited no articles in the Constitution of the SFRY which could justify the signatures of the President of the Federal Chamber[70] or the President of the Assembly of the SFRY[71].

109. It is important to emphasise that the FRY did not follow the procedure that was followed by other newly established states of the former SFRY (Slovenia, Croatia, Bosnia and Herzegovina and Macedonia) in order to obtain the European Community's recognition in accordance with the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union[72]. Instead, it claimed sole succession of the SFRY, which was never recognized by the international community (on succession of the former SFRY see Chapter I on the dissolution of the former Yugoslavia).

110. Also the State Union of Serbia and Montenegro established on 4 February 2003 with the declaration of the Constitutional Charter of the State Union of Serbia and Montenegro did not affect the constitutional status of the autonomous provinces.

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Republic of Slovenia of 25 June 1991, provided for in the Brioni Declaration of 7 July 1991, Ur. l. RS No. 16/1991.

[69] Article 402, paragraph 1, of the Constitution of the SFRY: *"An amendment to the SFRY Constitution shall be adopted when the Assemblies of all Republics and Autonomous Provinces, i.e. Assemblies of all Republics, agree with the text adopted by the Federal Chamber of the SFRY Assembly."*

[70] Bogdana Glumac – Levakov.

[71] Dr Slobodan Gligorijević.

[72] Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991).

Serbia introduced a regime that had been initiated with the 1990 Constitution and which remained unchanged after the adoption of the Constitution of the Federal Republic of Yugoslavia in 1992. The concept of "territorial autonomy" was preserved, whereby the 2006 Constitution of the Republic of Serbia[73] refers only to citizens who exercise their right to the autonomy of provinces,[74] and not to "citizens (residents), nations and nationalities", as provided for by the SFRY Constitution and also by the Constitution of the SR Serbia of 1974.

**CONCLUSION**

111. The analysis of the legal history and other events shows that the Constitutional amendments of 1989 and the laws adopted on these bases regarding the action against the autonomy of Kosovo were a violation of 1974 SFRY Constitution and of the rule of law principle. In this process gross violations of human rights and freedoms were also committed. This resulted in lawlessness, which deprived numerous members of Kosovo Albanians of their rights, employment, education, etc. For all these reasons, the belief prevailed that the majority of the Kosovo population was no longer willing to return to Serbian power, as the Republic of Serbia had not only abolished Kosovo's status as an autonomous province, but had also committed unlawful violent acts against the majority of the Kosovo population.

Simona Drenik
Minister Plenipotentiary
Head of International Law Division

[73] Constitution of the Republic of Serbia, *Službeni glasnik Republike Srbije*, No. 98/2006.
[74] Article 182, paragraph 2, of the 2006 Constitution of the Republic of Serbia.