

## I. Judge Koroma's Question

1. Judge Koroma asked the following question:

"It has been contended that international law does not prohibit the secession of a territory from a sovereign State. Could participants in these proceedings address the Court on the principles and rules of international law, if any, which, outside the colonial context, permit the secession of a territory from a sovereign State without the latter's consent?"

2. At the outset, we wish to recall that the question submitted by the General Assembly in resolution 63/3<sup>1</sup> does not address the issue of the conformity with international law of the secession of Kosovo from Serbia, or of the recognitions of the Republic of Kosovo, which currently number 64<sup>2</sup>, or questions of statehood. The question addressed to Court is whether the Declaration of Independence of 17 February 2008 was in conformity with international law. As we made clear in our oral contribution, "*[v]ous-êtes (...) appelés à répondre à la seule et unique question, très précise et restreinte, de la conformité de la déclaration d'indépendance du 17 février 2008 avec le droit international*"<sup>3</sup> and "*[l]a question ne porte sur rien d'autre et il n'y a aucune façon, ni aucune nécessité, de lui accorder un sens plus «complet»*"<sup>4</sup>.

3. The narrowness of the question has been confirmed by the overwhelming majority of States participating in the proceedings.<sup>5</sup> Even Serbia, the sponsor of

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<sup>1</sup> UN Dossier No. 7.

<sup>2</sup> Malawi was the most recent State to recognize Kosovo, on 16 December 2009. For the latest information on recognitions, see <http://www.ks-gov.net/mpj/?page=2,33>.

<sup>3</sup> CR 2009/25, 1 December 2009, p. 32, para. 7 (Müller).

<sup>4</sup> *Ibid.*, p. 33, para. 8.

<sup>5</sup> CR 2009/26, 2 December 2009, p. 26, para. 5-6 (Wasum-Rainer), CR 2009/27, 3 December 2009, p. 6, para. 3 (Tichy), CR 2009/28, 4 December 2009, p. 23, para. 18-21 (Dimitroff), CR 2009/29,

resolution 63/3 of the General Assembly, has taken the same view.<sup>6</sup> It is neither necessary nor appropriate for the Court to widen the question submitted by Serbia through the General Assembly and to respond to the - different - issue of secession in international law and its legality.

4. Nevertheless, in response to Judge Koroma's question, we recall that general international law does not prohibit secession of a territory from a State, whether or not that State consents. This was explained by many States during the written and oral proceedings.<sup>7</sup>

5. International law neither prohibits nor authorizes secession.<sup>8</sup> Many States have taken the same view during the written and oral presentations in these proceedings.<sup>9</sup> Secession is, as Professor Crawford has written, "neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."<sup>10</sup> As Daillier, Forteau and Pellet say: "*Quelle que soit sa légalité au plan interne, la sécession est un fait politique au regard du*

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7 December 2009, p. 52, para. 10 (Metelko-Zgombić), *ibid.*, p. 67 (Winkler); CR 2009/30, 8 December 2009, p. 36, para. 35 (Koh), CR 2009/31, 9 December 2009, p. 9, para. 4 (Belliard), *ibid.*, pp. 27-28, para. 3-6 (Prince Al Hussein), *ibid.*, p. 44, para. 10.

<sup>6</sup> CR 2009/24, 1 December 2009, p. 41, para. 17 (Djerić).

<sup>7</sup> See, for example, CR 2009/25, 1 December 2009, pp. 39-45, para. 19-31 (Müller), CR 2009/26, 2 December 2009, pp. 26-27, para. 9 (Wasum-Rainer), CR 2009/27, 3 December 2009, pp. 11-12, para. 19-21 (Tichy), CR 2009/30, 8 December 2009, pp. 29-30, para. 18-19 (Koh), CR 2009/31, 9 December 2009, p. 12, para. 12 (Belliard), CR 2009/32, 10 December 2009, pp. 49-52, para. 11-22 (Crawford).

<sup>8</sup> CR 2009/25, 1 December 2009, p. 44, para. 30 (Müller).

<sup>9</sup> See, for example, CR 2009/26, 2 December 2009, p. 12, para. 13 (Frowein), *ibid.*, p. 20, para. 7 (Gill), CR 2009/28, 4 December 2009, p. 32 (d'Aspremont), CR 2009/31, 9 December 2009, p. 15, para. 18 (Belliard), *ibid.*, p. 38, para. 43 (Prince Al Hussein).

<sup>10</sup> J. Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> edn., Oxford University Press, 2006, p. 390.

*droit international, qui se contente d'en tirer les conséquences lorsqu'elle aboutit à la mise en place d'autorités étatiques effectives et stables".*<sup>11</sup>

6. International law does recognize a right for a people who have been denied the effective exercise of the right to self-determination to choose freely their political status, which may lead to the creation of a State through secession. As the Supreme Court of Canada recognized in its opinion *Re Secession of Quebec from Canada*: "[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."<sup>12</sup>

7. Thus, in exceptional circumstances of persistent serious violations of human rights and the prolonged, rigorous and oppressive denial of the right to self-determination, a people can, at last resort, exercise their external right of self-determination.<sup>13</sup> The people of Kosovo, as has been stated, were clearly entitled under the specific circumstances to exercise their right to external self-

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<sup>11</sup> P. Daillier, M. Forteau, A. Pellet, *Droit international public (Ngyuen Quoc Dinh)*, 8th edn., L.G.D.J., Paris, 2009, p. 585.

<sup>12</sup> Reference *re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 138.

<sup>13</sup> CR 2009/26, 2 December 2009, p. 21, para. 10 (Gill), *ibid.*, p. 30, para. 32 (Wasum-Rainer), CR 2009/30, 8 December 2009, pp. 56-57, para. 12 (Kaukoranta), *ibid.*, p. 26, para. 23 (Koskenniemi), CR 2009/32, 10 December 2009, pp. 8-10, para. 4-11 (Lijnzaad).

determination and have done so by choosing to establish a sovereign and independent State.<sup>14</sup>

## II. Judge Bennouna's Question

8. Judge Bennouna asked the following question:

*"Est-ce que les auteurs de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo ont fait auparavant campagne, lors de l'élection de novembre 2007 de l'assemblée des institutions provisoires d'administration autonome du Kosovo, sur la base de leur volonté de déclarer unilatéralement, une fois élus, l'indépendance du Kosovo, ou bien ont-ils, au moins, présenté à leurs électeurs la déclaration unilatérale d'indépendance du Kosovo comme l'une des alternatives de leur action future ?"*

9. Elections for the Assembly of Kosovo, as well as for municipal assemblies and mayors, took place on 17 November 2007 following a three-week election campaign that began on 26 October 2007. It should be noted that the campaign took place at a time when the Troika talks were ongoing; in conducting the campaign the leaders of the main political parties were careful not to do anything that might disrupt that process.

10. In its Written Comments of 14 July 2009, Serbia asserted that

"Kosovo status issues were deliberately removed from the electoral campaign by agreement of the election participants"<sup>15</sup>.

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<sup>14</sup> CR 2009/25, 1 December 2009, pp. 45-46, para. 33-34 (Müller). See also *Kosovo's Further Written Contribution*, pp. 76-86, para. 4.32-4.52; CR 2009/26, 2 December 2009, pp. 21-23, para. 11-16 (Gill), *ibid.*, p. 30, para. 33 (Wasum-Rainer), CR 2009/30, 8 December 2009, p. 38, para. 39 (Koh), CR 2009/31, 9 December 2009, p. 37, para. 38 (Prince Al Hussein).

<sup>15</sup> Serbia Written Comments, para. 40.

Serbia goes on to claim, wrongly, that those declaring independence could not have been acting as a "constituent body" because they were selected in an election from which independence was excluded as an issue. Serbia cites in support an article that refers to a "Gentlemen's Agreement" between the main political parties dated 5 October 2007. In fact, that agreement simply aimed to ensure an electoral process characterized by a spirit of tolerance and understanding<sup>16</sup>, in an environment in which it was amply evident that support for independence among the people of Kosovo was overwhelming. Neither that agreement, nor any other agreement, contained any reference to removing Kosovo status issues from the campaign.

11. There can be no doubt that the overwhelming majority of the people of Kosovo favoured independence. That support had been articulated by the people themselves when they voted overwhelmingly for independence in a referendum in 1991; it was maintained by Kosovo's representatives in the negotiations held during the Hill and Rambouillet negotiations; and it was adhered to by Kosovo's representatives throughout the final status negotiations of 2005-2007. It will be recalled in particular that, as reported by the Secretary-General, on 17 November 2005 the Kosovo Assembly unanimously adopted a resolution confirming the will of the people of Kosovo for an independent and sovereign State of Kosovo; the resolution provided a mandate to the delegation of Kosovo for the future status process<sup>17</sup>.

12. The Council of Europe Election Observation Mission reported that "the political campaign was largely focused on employment, economy, education,

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<sup>16</sup> A copy of the Gentlemen's Agreement is attached, in Albanian with an English translation.

<sup>17</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 25 January 2006 (S/2006/45, para. 4 [UN Dossier No. 75]).

health and local issues, rather than on the issue of the future status of Kosovo"<sup>18</sup>. Nevertheless, in the elections of November 2007, those running for office understood that the overwhelming preference of the people remained in favour of independence. Overwhelming popular support existed for seeking independence at the earliest opportunity, which was reflected in the political programmes of all the main parties, and is confirmed by contemporaneous media reports. A BBC Albanian report of 25 October 2007, for example, stated that "the majority of political forces that competed in these elections has as a priority in their programs independence and economic development"<sup>19</sup>.

13. In his report covering the elections, the UN Secretary-General recorded that:

"Throughout the election campaign, the members of the Kosovo Unity Team remained engaged in the Troika-led negotiations on Kosovo's future status. While the Unity Team continued to attend the Troika-led talks, its representatives repeatedly stated that any further extension of talks would be unacceptable, stressing that a date for a declaration of independence for Kosovo, in coordination with the international community, should be quickly set after 10 December. This has raised further expectations in the Kosovo Albanian community that Kosovo will be independent in the near future. Public pressure on the new Government and Assembly to act swiftly

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<sup>18</sup> Final Report, Council of Europe Election Observation Mission V in Kosovo (CEEOM V), Strasbourg, 28 March 2008, para. 106.

<sup>19</sup> [http://www.bbc.co.uk/albanian/regionalnews/2007/10/071025\\_hyseni\\_elections.shtml](http://www.bbc.co.uk/albanian/regionalnews/2007/10/071025_hyseni_elections.shtml). The German station *Deutsche Welle* noted in its report of 16 November 2007: "The election campaign in Kosovo has been dominated by the subject of province's future status. With a trio of diplomatic envoys from the European Union, the United States and Russia facing a Dec. 10 deadline to come up with a plan for the province, the Kosovar Albanian parties have become increasingly vocal in their calls for independence." A *Voice of America* report of 17 November 2007 said: "The people of Kosovo are voting Saturday for a new local government. All the main political parties in the Albanian-majority province have pledged to gain independence from Serbia ...."

to declare independence following the end of the period of engagement is high.”<sup>20</sup>

14. The support of the people for independence as declared by those who were elected in 2007, was clear, among other things, from the popular celebrations on the day the Declaration was issued; far from being unexpected, the event was fully accepted and endorsed by the people. As the United Nations Secretary-General informed the Security Council the next day, on 18 February 2008:

“In much of Kosovo, there have been peaceful celebrations by tens of thousands welcoming the declaration.”<sup>21</sup>

### III. Judge Cançado Trindade’s Question

15. Judge Cançado Trindade asked the following question:

“United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11 (a), to “substantial autonomy and self-government in Kosovo”, taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this renvoi to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people’s eligibility into statehood, in the framework of the legal régime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configurations of a ‘people’, and of its eligibility into statehood, under general international law?”

16. Paragraph 11 of Security Council resolution 1244 (1999) contains two references to the Rambouillet accords. The reference in paragraph 11 (a) concerns the

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<sup>20</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/2007/768 of 3 January 2008, para. 8 [UN Dossier No. 84].

<sup>21</sup> Security Council, provisional verbatim record, sixty-third year, 5839<sup>th</sup> meeting, 18 February 2008 (S/PV.5839), p. 2 [Dossier No. 119].

international civil presence's responsibility to help establish self-governing institutions in Kosovo during the interim period, pending a final settlement, whereas the reference in paragraph 11 (e) concerns that presence's responsibility to facilitate a political process to determine Kosovo's final status.

17. In paragraph 11 (a) of resolution 1244 (1999), the Security Council decided that the main responsibilities of the international civilian presence in Kosovo (authorized by paragraph 10) included:

"(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648)".

The issuance of the Declaration of Independence on 17 February 2008 by the democratically-elected representatives of the people of Kosovo did not contravene the international civilian presence's responsibilities, including the responsibility in paragraph 11 (a). As such, the issuance of the Declaration was in accordance with resolution 1244, including paragraph 11 (a).

18. In paragraph 11 (a), the Council sought to promote the establishment of substantial autonomy and self-government in Kosovo, prior to a final settlement, "taking full account of ... the Rambouillet accords". Many of the provisions of the Rambouillet Interim Agreement concerned the creation of self-governing institutions in Kosovo, protected from the arbitrary political will of the authorities in Belgrade, for an interim period. Thus, the final version of the Rambouillet Interim Agreement contained extensive provisions on police and civil public security in Kosovo (Chapter 2), the conduct and supervision of Kosovo elections (Chapter 3), Kosovo's economic reconstruction and development (Chapter 4), and so on<sup>22</sup>. In the course of the UN Mission in

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<sup>22</sup> Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999, reproduced in S/1999/648 [Dossier No. 30].



Kosovo (UNMIK)'s activities during the period immediately following resolution 1244's adoption, the Rambouillet accords provided guidance to UNMIK and the Secretary-General for creating Kosovo's interim governing institutions and progressively transferring authority to them. For example, the Secretary-General advised in June 2000 that UNMIK's relationship with the people of Kosovo in this period should be built upon the principles of the Rambouillet accords, especially in establishing protections for existing and displaced Kosovo residents.<sup>23</sup>

19. This *renvoi* to the Rambouillet accords expressed the Council's desire in resolution 1244 for an extensive form of self-governance in Kosovo, prior to settlement of the final status, notwithstanding Belgrade's rejection of the Rambouillet accords. By doing so, the Council allowed for the conditions to emerge in Kosovo during 1999-2008 in which the people of Kosovo could choose independence, having developed the capacity for legislative, executive, and judicial self-governance that had been denied to them for so long.

20. Paragraph 11 (e) of resolution 1244 also refers to the Rambouillet accords in the course of placing responsibility upon the international civilian presence to facilitate "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords".<sup>24</sup> Here the reference to the Rambouillet accords should be understood as directed in particular at Chapter 8, Article I, paragraph 3 of the Rambouillet Interim Agreement, which stated that "a final settlement for Kosovo" would be based upon various factors, the first of which was "the will of the people", and omitted any language calling for a

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<sup>23</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 6 June 2000, S/2000/538, p. 22, para. 132 [Dossier No. 44].

<sup>24</sup> Unlike paragraph 11(a), this provision contains no reference to Annex 2, which concerned the interim period, including the clause relating to "principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia ...".

Belgrade-Pristina agreement (as had been sought by Belgrade) or for a further Security Council resolution<sup>25</sup>.

21. This *renvoi* to the Rambouillet expressed the Council's desire for a final status process that would not be grounded upon Serbia's consent to secession, and that could consist of independence if that proved to be the will of the people of Kosovo.

22. As explained in our written and oral pleadings, the Court may answer the question by finding that the Declaration of Independence did not violate either resolution 1244 or general international law, without reaching the issue of whether the people of Kosovo exercised their right to self-determination in February 2008. If the Court reaches the latter issue, however, the references to the "Rambouillet accords" contained within paragraph 11 of resolution 1244 reinforce the facts that the people of Kosovo are a "people" within the meaning of the right of self-determination, and that they were exposed to conditions that merit an ability, if the people so chose, to exercise that right through independence, even without Belgrade's consent<sup>26</sup>. The provisions of resolution 1244 reflect the circumstances that had arisen by June 1999. As recognized by the Security Council, those conditions included "a grave humanitarian situation in Kosovo", one that involved "acts of violence against the Kosovo population" and that had resulted in a "threat to international peace and security".<sup>27</sup> Further, the Council determined that there was a need to "provide for the safe and free return of all refugees and displaced persons to their homes", and that such individuals had a right to return to their homes in safety<sup>28</sup>. In order to address

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<sup>25</sup> CR 2009/25, pp.52-56, paras. 27-41 (Murphy); Kosovo Further Written Contribution, paras. 5.05-5.18.

<sup>26</sup> See Kosovo Further Written Contribution, paras. 4.45-4.48.

<sup>27</sup> Security Council resolution 1244 (1999), 10 June 1999, pmbi. [UN Dossier No. 34].

<sup>28</sup> *Ibid.*

those conditions, and to ensure an enduring and peaceful resolution of the crisis, the Council - invoking Chapter VII of the United Nations Charter - ordered the withdrawal of Federal Republic of Yugoslavia (FRY) and Serbian military and police forces from Kosovo, provided for the deployment of international civilian and military presences, and mandated them to help foster self-governance in Kosovo. As Professor Tomuschat concluded, "Security Council Resolution 1244 can be deemed to constitute the first formalized decision of the international community recognizing that a human community within a sovereign State may under specific circumstances enjoy a right of self-determination"<sup>29</sup>.

23. Further, resolution 1244 envisaged that a political process designed to determine Kosovo's final status would occur, in which the will of the people was a central element. The Security Council launched that process in 2005 with the appointment of President Ahtisaari, who conducted extensive negotiations, and then concluded that further efforts were futile and that independence was the only viable option for addressing an unstable situation. Once that political process was exhausted, as occurred by the end of 2007 at the latest, the conditions arose in which the people of Kosovo could express their will, in accordance with resolution 1244. The Declaration of Independence was the expression of that will.

24. Finally, for a discussion of the meaning of "people" in the context of the right of self-determination under general international law, and its application to the people of Kosovo, the Court may wish to refer to Kosovo's Written Contribution, paragraph 8.40, and Kosovo's Further Written Contribution, paragraphs 4.42 to 4.46, as well as its oral presentation, CR2009/25, pages 45-46,

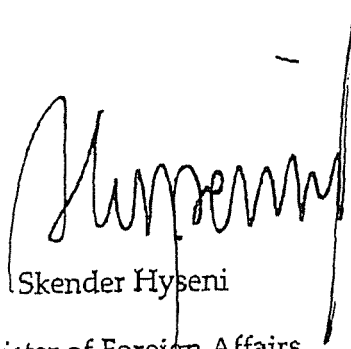
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<sup>29</sup> Ch. Tomuschat, "Secession and self-determination", in M. G. Kohen, *Secession: International Law Perspectives* (2006), p. 34.

and to the written and oral presentations of the many UN Member States that addressed the issue of self-determination.

I hereby certify that the document annexed to this letter is a true copy and conforms to the original document and that the English translation provided is accurate.

Accept, Sir, the assurances of my highest consideration.



Skender Hyseni

Minister of Foreign Affairs  
Representative of the Republic of Kosovo before  
the International Court of Justice

## ANNEX

### GENTLEMEN'S AGREEMENT

#### Albanian Original

- Duke qenë të vendosur thellë për të marrë pjesë në zgjedhjet parlamentare dhe lokale në Kosovë të 17 nëntorit 2007;
- Duke shprehur gatishmërinë tonë që të kontribuojmë që ky proces të zhvillohet në pajtueshmëri me standardet më të larta demokratike ndërkombëtare;
- Duke respektuar në tërësi dispozitat në fuqi të Kosovës lidhur me mbajtjen dhe organizimin e zgjedhjeve;

Ne, përfaqësuesit e partive politike, koalicioneve dhe iniciativave qytetare, të certifikuar nga KQZ i Kosovës për të marrë pjesë në këto zgjedhje, duke iu përgjigjur thirrjes së Presidentit të Kosovës, në ujdi të plotë nënshkruajmë solemnisht këtë:

### DEKLARATË

me të cilën zotohemi se:

- Gjatë periudhës përgatitore parazgjedhore, do të bëjmë çmos për të ndihmuar në përgatitjen sa më të mirë të procesit të zgjedhjeve;

- Do të organizojmë fushatën tonë zgjedhore veç e veç për të prezentuar projektet tona politike para elektoratit në mënyrë të dinjitetshme në përputhje me dispozitat në fuqi;
- Do të angazhohemi që procesi zgjedhor të rrjedhë në frymën e tolerancës e të mirëkuptimit. Nuk do të përdorim gjuhë dhe veprime që thyejne dhe janë në kundërshtim me etikën e kodit zgjedhor dhe të dispozitave ligjore në fuqi;
- Përfaqësuesit tanë në komisionet zgjedhore, ekipet vëzhguese dhe mekanizmat tjerë që i parasheh ligji, pokështu do të respektojnë në tërësi të gjitha dispozitat ligjore që kanë të bëjnë me këtë proces zgjedhor.

Me këtë rast u bëjmë thirrje të gjithë qytetarëve të Kosovës me të drejtë vote që të marrin pjesë aktive në procesin zgjedhor, ditën e votimit dhe të votojnë të preferuarit e tyre.

Thërrasim pokështu të gjitha mjetet e komunikimit publik, të shkruara dhe elektronike, që të angazhohen për prezentim gjithëpërfshirës dhe të paanshëm të gjithë këtij procesi, duke iu përmbajtur kritereve profesionale, etikës gazetareske dhe dispozitave ligjore në fuqi.

Prishtinë, 5.10.2007

### English Translation

- Strongly determined to participate in the Kosovo Parliamentary and Local Elections of 17 November 2007;
- Expressing our readiness to contribute to the conduct of the process in accordance with the highest democratic international standards;
- Respecting fully the applicable provisions in Kosovo on the conduct and organization of elections;

We, the representatives of political parties, coalitions and citizens' initiatives certified by the CEC of Kosovo to participate in these elections, responding to the call of the President of Kosovo, in full agreement solemnly sign the following:

### DECLARATION

whereby we pledge that:

- During the preparatory pre-electoral period, we will do our utmost to help the best preparation of the electoral process;
- We will organize our electoral campaigns separately to present our political projects to the electorate in a dignifying manner in accordance with the applicable provisions;

- We will be committed that the electoral process flows in the spirit of tolerance and understanding. We will not use language and actions in violation, or contrary to the ethics of the Elections Code and applicable legal provisions;
- Our representatives to the electoral committees, observation teams and other mechanisms foreseen by the law will also completely respect all legal provisions related to this electoral process.

On this occasion, we call upon all citizens of Kosovo eligible to vote, to participate actively in the electoral process in Election Day and vote for their preferred candidates.

We also call upon all means of public communication, print or electronic, to engage in a comprehensive and impartial presentation of the process, complying with professional criteria, ethics of journalism and applicable legal provisions.

Prishtinë/Pristina, 5.10.2007