Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria -Vlada - Government

Ministria e Punëve të Jashtme - Ministarstvo Inostranih Poslova
Ministry of Foreign Affairs

Pristina, 17 July 2009

Sir,

With reference to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, I have the honour to submit herewith, in accordance with Article 66 of the Statute of the Court and the Court's Order of 17 October 2008, a Further Written Contribution.

The Government of the Republic of Kosovo transmits thirty copies of the Contribution and its annexes, as well as an electronic copy.

Accept, Sir, the assurances of my highest consideration.

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

Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
Netherlands

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

FURTHER WRITTEN CONTRIBUTION OF THE REPUBLIC OF KOSOVO

17 JULY 2009

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

FURTHER WRITTEN CONTRIBUTION OF THE REPUBLIC OF KOSOVO

17 JULY 2009

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ANNEXES

ABBREVIATIONS

Ahtisaari Plan	Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1) (also referred to as "Ahtisaari Settlement" or "CSP")
Contact Group	France, Germany, Italy, Russian Federation, United Kingdom, United States of America
Dossier	Dossier submitted on behalf of the Secretary-General pursuant to Article 65, paragraph 2, of the Statute of the International Court of Justice
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EUSR	European Union Special Representative
FRY	Federal Republic of Yugoslavia
G-8 (Group of Eight)	Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom, United States of America
ICO	International Civilian Office
ICR	International Civilian Representative
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISG	International Steering Group
KFOR	Kosovo Force (international military presence in Kosovo)
KLA	Kosovo Liberation Army
PISG	Provisional Institutions of Self-Government of Kosovo
SFRY	Socialist Federal Republic of Yugoslavia
SRSG	Special Representative of the Secretary-General
Troika	European Union/United States of America/Russian Federation Troika on Kosovo
UNMIK	United Nations Interim Administration Mission in Kosovo

PART I

INTRODUCTION

CHAPTER I

INTRODUCTION

I. Introductory Remarks

1.01. The Republic of Kosovo submits this Further Written Contribution in accordance with paragraph 4 of the Order of the Court dated 17 October 2008.

1.02. The purpose of the present Contribution is to comment on the Written Statements of other States, which were transmitted under cover of the Registrar's letters dated 21 April and 15 May 2009. The present Contribution does not repeat matters covered in the first Written Contribution of the Republic of Kosovo (hereafter "first Written Contribution"). Kosovo maintains and relies upon what was said in its first Written Contribution, which remains the basic statement of its position and which is complemented as necessary by the present Contribution.

1.03. The present Contribution does not seek to address each point made in the Written Statements. In particular, it does not address each of the questionable factual and legal assertions, and citations and references often made out of context, that appear in the Statements of those seeking to demonstrate that the Declaration of Independence was not in accordance with international law. Rather, it is limited to the main lines of argument made in those Statements. The absence of comment does not indicate agreement.

1.04. Nor does this Further Written Contribution address in detail the Written Statements which argue that the Court should find that the Declaration of Independence did not contravene any applicable rule of international law. Kosovo is in broad agreement with the lines of argument in those Written Statements.

II. Summary of Kosovo's Further Written Contribution

1.05. This Further Written Contribution is organised as follows. **Section III** of the present Chapter addresses the question put by the General Assembly to the Court, in light

of the approach adopted in some of the Written Statements. **Chapter II** then updates developments both within and external to the Republic of Kosovo since early April 2009 (when Kosovo's first Written Contribution was finalized).

1.06. **Part II** (which consists of a single chapter, **Chapter III**) comments on what Serbia in particular says about the history and context relevant to the question before the Court, especially as regards the period 1974 to 1999.

1.07. **Part III** then deals with the central legal arguments advanced in the Written Statements which assert that the Declaration of Independence of 17 February 2008 was not in accordance with international law. It does so in two chapters, demonstrating respectively why the Declaration of Independence (i) did not contravene general international law (**Chapter IV**); and (ii) did not contravene Security Council resolution 1244 (1999) (**Chapter V**).

1.08. Finally, **Part IV** (comprising **Chapter VI**) draws together certain key elements and summarises Kosovo's legal arguments.

III. The Request for an Advisory Opinion, the Question Put to the Court, and the Authors of the Declaration of Independence

1.09. The majority of the Written Statements address the propriety of the request for an advisory opinion contained in General Assembly resolution 63/3. Kosovo wishes to comment again, very briefly, on this issue (**A**).

1.10. As regards the question contained in General Assembly resolution 63/3, almost all the Written Statements, including that of Serbia[1], underline that it is strictly limited and should be answered by the Court as it stands. Kosovo fully subscribes to this conclusion, but deems it nevertheless necessary to comment on the more expansive approach adopted by some States (**B**).

[1] *Serbia*, paras. 19-23. (In this Contribution, references to Written Statements are given in this form.)

1.11. Kosovo will once again[2] explain that the authors of the Declaration of Independence were not the Provisional Institutions of Self-Government (PISG), as seems to be suggested by the question put to the Court and as has been asserted by some States, but were the democratically elected representatives of the people of Kosovo (**C**).

A. THE PROPRIETY OF THE REQUEST FOR AN ADVISORY OPINION

1.12. The States that have submitted Written Statements accept that the Court has the discretion whether to respond to the question. The Court's jurisprudence establishes that

> "Article 65, paragraph 1, of its Statute, which provides that 'The Court *may* give an advisory opinion …' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met *(Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996 (I)*, pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused' *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *First Phase*, *Advisory Opinion*, *I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *Advisory Opinion*, *I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the 'principal judicial organ of the United Nations' (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only 'compelling reasons' should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *Advisory Opinion*, *I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)"[3]

Consequently, as the Court pointed out, by the same token it must

> "satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of 'compelling reasons' …".[4]

1.13. Kosovo notes the opinion of several States[5] that there may indeed be such "compelling reasons" that would justify the Court declining to exercise its discretionary

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[2] See *Kosovo*, para. 6.01 and paras. 6.03-6.20.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, p. 156, para. 44.

[4] *Ibid.*, p. 157, para. 45.

power under Article 65, paragraph 1, of the Statute. The present request does not appear to have been designed to enable the Court to participate in the activities of the Organization, but rather to render a legal opinion for the benefit of the sole sponsor of General Assembly resolution 63/3, the Republic of Serbia (in its words, the "interested State"[6]) and other States. The representative of Serbia explained during the short debate on the draft resolution in the Assembly:

> "*We* have chosen to seek an advisory opinion from the International Court of Justice (ICJ) on the legality of the unilateral declaration of independence. Today *we* are turning to the General Assembly to convey that request to the Court, in fulfilment of its powers and functions under the United Nations Charter."[7]

And he stressed that:

> "We also believe that the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law."[8]

1.14. The role of the Court in its advisory jurisdiction, however, is not to furnish "judicially authoritative guidance" to a State or even to States generally, but rather "to guide the *United Nations* in respect of *its own action*"[9]. It is not appropriate for a State to request an advisory opinion of the Court, and to ask the Assembly to "transmit" the request in order to meet the jurisdictional conditions set by the Statute, nor appropriate for the Court, under its Statute, to act as legal counsel for a State or States[10]. As the Court has pointed out, its "Opinion is given not to the States, but to the organ which is entitled to

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[5] For example, *Czech Republic*, p. 5; *France*, paras. 1.6-1.26; *Ireland*, para. 12; *United States of America*, pp. 43-45.

[6] *Serbia*, para. 80.

[7] United Nations, *Official Records of the General Assembly*, *Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 1 (emphasis added) [Dossier No. 6].

[8] *Ibid.* See also A/63/195 [Dossier No. 1] ("Many Member States would benefit from the legal guidance an advisory opinion of the International Court of Justice would confer. It would enable them to make a more thorough judgement on the issue.")

[9] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*, *I.C.J. Reports 1951*, p. 19 (emphasis added). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 24, para. 32 ("The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions."); *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, p. 27, para. 41.

[10] See *Kosovo*, para. 7.20-7.21.

request it"[11]. The present request and the circumstances of its adoption within the General Assembly disregarded the inter-organ nature of the advisory function of the Court.

1.15. Serbia cannot now "readjust" the picture in its Written Statement[12] by arguing that the "case raises issues of direct and acute concern to the United Nations and the international system as a whole"[13] and that, somehow incidentally, United Nations organs, including the Special Representative of the Secretary-General (SRSG), might find some benefit in the opinion[14], in addition to the implications it would have for States[15]. There has been no statement from the SRSG, from the Secretary-General, from the Security Council, or from the General Assembly indicating that an opinion from the Court on this matter is necessary or even helpful for the work of the United Nations, including the SRSG's role and the functioning of UNMIK. Rather, every available source of information confirms that the opinion has been sought in order to guide States, as was made plain in Serbia's explanatory memorandum[16], the debate[17], and General Assembly resolution 63/3[18]. That the opinion of the Court might have some unspecified effects for the United Nations as an institution, or, as some States seem to wish, create a precedent on alleged "fundamental rules and principles of international law which apply throughout the international legal order"[19], is irrelevant.

1.16. The Court, "being a Court of Justice"[20], is not called upon to pronounce on issues of international law in the abstract, even in its advisory role. Its function under Article 65 of the Statute is to give legal guidance to the organ that requests the Court's

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[11] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *Advisory Opinion*, *I.C.J. Reports 1950*, p. 71.

[12] See e.g. *Serbia*, para. 8.

[13] See *Serbia*, paras. 75 and 79.

[14] *Serbia*, paras. 92-94. See also *Cyprus*, para. 9-12.

[15] *Serbia*, paras. 95-96.

[16] A/ 63/195 [Dossier No. 1].

[17] See para. 1.13 above.

[18] Dossier No. 7 ("*Aware* that this act has been received with varied reactions by the Membcrs of the United Nations as to its compatibility with the existing international legal order".)

[19] *Cyprus*, para. 16. See also *Serbia*, para. 97.

[20] *Status of Eastern Carelia*, *Advisory Opinion*, 1923, *P.C.I.J.*, *Series B*, No. 5, p. 29.

opinion for its own actions. In this regard, several United Nations Member States[21] have expressed strong doubts about whether the General Assembly can ultimately benefit for its own work from an opinion of the Court on this matter. In their view, the General Assembly was only a vehicle for the Republic of Serbia to achieve its own goal for its own purposes: a judicial pronouncement on the legality of the Declaration of Independence of Kosovo.

1.17. For all these reasons, several United Nations Member States have suggested that there are "compelling reasons" for the Court not to entertain the request for an advisory opinion contained in General Assembly resolution 63/3. The opinion requested from the Court would not represent the Court's "participation in the activities of the Organization", and the Court could, for this "compelling reason", decline to answer the question.

B. The Meaning and Scope of the Question Contained in General Assembly Resolution 63/3

1.18. Most States that have addressed the matter, including Serbia[22], the sole sponsor of General Assembly resolution 63/3, have recognized the strictly limited scope of the question contained in that resolution, i.e. the legality of the Declaration of Independence that was issued on 17 February 2008[23]. Serbia did so during the debate in the General Assembly. It stated that, as formulated, the question "represents the lowest common denominator of the positions of the Member States on this question, and hence there is no need for any changes or additions"[24].

1.19. Consequently, the Court, assuming that it considers it to be appropriate to respond to the question, should limit itself to the single issue contained in the question: Was the Declaration of Independence of 17 February 2008 in accordance with international law? The question is narrow. It need not be broadened, interpreted or reformulated. The

[21] See note 5 above.

[22] *Serbia*, para. 19.

[23] See also, in principle, *Spain*, para. 6 (iii).

[24] United Nations, *Official Records of the General Assembly*, *Sixty-third Session*, 22nd plenary meeting, 8 October 2008 (A/63/PV.22), p. 2 [Dossier No. 6].

Court need only identify the relevant legal rules, if any, and apply them to the Declaration of Independence. Other questions, such as Kosovo's statehood today, or the legality of the many recognitions of the Republic of Kosovo as a sovereign and independent State, are not before the Court[25], contrary to assertions of one or two States[26].

1.20. The question can also not be broadened by arguing that the rules that allegedly apply in the Kosovo situation are fundamental rules applying throughout the international legal order[27] or are potentially applicable to other situations[28]. The question only concerns, and the Court is only called to consider, the legality of the Declaration of Independence of Kosovo of 17 February 2008, in its particular context. The Court is not requested to pronounce in general or in the abstract on the legality of declarations of independence.

1.21. As previously submitted by Kosovo[29] and as underlined by others[30], the prejudicial and argumentative elements contained in the formulation of the question, i.e. the characterisation of the Declaration as "unilateral", the mischaracterization of those who issued the Declaration, and the assumption that there are indeed rules of international law governing the issuance of declarations of independence, should not affect the Court's approach in the present proceedings.

C. THE PERSONS WHO ISSUED THE DECLARATION OF INDEPENDENCE

1.22. It is necessary to comment again[31], very briefly, on the issue of the authorship of the Declaration of Independence that was read out, voted upon and signed on 17 February 2008.

1.23. As was shown by Kosovo in its first Written Contribution, and contrary to what may be thought from the terms of the question put to the Court, the Declaration of

[25] *Poland*, para. 2.1; *United Kingdom*, para. 1.16. See also *Spain*, para. 6 (iii).

[26] *Cyprus*, para. 10 ; *Russian Federation*, para. 52. See also *Argentina*, para. 112, and *Venezuela*, para. 5.

[27] *Cyprus*, para.18; *Serbia*, paras. 75 and 79; *Argentina*, para. 3. See also *Egypt*, para. 23.

[28] *Russian Federation*, paras. 13-14.

[29] *Kosovo*, paras. 7.04-7.10.

[30] *Luxembourg*, paras. 13-14.

[31] See *Kosovo*, para. 6.01 and paras. 6.03-6.20.

Independence of 17 February 2008 was issued in the name of the people of Kosovo, by their democratically elected representatives meeting in an extraordinary session, as a constituent body in Pristina[32]. Issuance of the Declaration was not an act of the "Provisional Institutions of Self-Government of Kosovo" (PISG), or of the Assembly of Kosovo acting as one of the PISG. As was explained in Kosovo's first Written Contribution, the special circumstances of the adoption of the Declaration, its form and its text confirm that it was not an act of the PISG[33]. As the Minister of Foreign Affairs of the Republic of Kosovo, Mr. Hyseni, put it in the Security Council:

> "the independence of the Republic of Kosovo was declared by elected representatives of the people of Kosovo, including by all elected representatives of non-Albanian communities except the members of the Serb community"[34].

1.24. Serbia refers in its Written Statement to those who issued the Declaration as "members of the Assembly of Kosovo"[35]. In fact, on 17 February 2008, the Declaration was read out by the Prime Minister, voted upon and signed by the democratically elected representatives of the people, including members of the Assembly, the President of Kosovo and the Prime Minister. However, "members of the Assembly" are not "the Assembly", and these members and the other representatives of the people of Kosovo did not purport to act on that day as the PISG.

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[32] A number of States have rightly identified those who issued the Declaration as the democratically elected representatives of the people of Kosovo expressing the will of the people. See, e.g., *Austria*, para. 8; *Germany*, pp. 6-7; *Luxembourg*, par. 13; *Switzerland*, para. 79; *United Kingdom*, para. 1.12; *United States of America*, pp. 32-33.

[33] The text of the Declaration of Independence included by the United Nations Secretariat in its Dossier (Dossier N° 192), and the text included by the Republic of Serbia in its Written Statement (*Serbia*, Annex 2), do not reflect the actual wording of the Declaration of Independence as read out (in Albanian), voted upon, written down in solemn form, and signed on 17 February 2008. A scanned copy of the original of the Declaration, as well as a translation into English and French, can be found in Kosovo's first Written Contribution, Annex 1.

[34] Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 23.

[35] *Serbia*, para. 17.

CHAPTER II

KOSOVO TODAY

2.01. The aim of this chapter is two-fold: to respond, as necessary, to assertions about the situation in Kosovo today made in some Written Statements; and to update the developments described in Chapter II of Kosovo's first Written Contribution.

2.02. The chapter is divided into five sections: international relations (**Section I**); constitutional and other internal developments (**Section II**); presence of the international community (**Section III**); criteria for statehood (**Section IV**); and Serbia's attitude towards Kosovo (**Section V**).

2.03. As stated in Kosovo's first Written Contribution, developments in Kosovo since 17 February 2008 are not directly relevant to the question before the Court[36]. That question concerns solely the Declaration of Independence issued on 17 February 2008, and its "accordance with international law"[37]. It does not concern other matters, such the status of the Republic of Kosovo today as a sovereign and independent State or its recognition by other States. Nevertheless, it may be helpful to mention some important developments since the finalization of Kosovo's first Written Contribution in early April 2009.

2.04. Major developments since early April 2009 include the celebration on 15 June 2009 of the first anniversary of the entry into force of the Constitution of the Republic of Kosovo; additional recognitions of the Republic of Kosovo as a sovereign and independent State; its admission to the International Monetary Fund and the World Bank, both specialized agencies of the United Nations, and to other organizations of the World Bank Group; the appointment of the nine judges of the Constitutional Court, and that Court's entry into full functioning; the election by the Assembly of the Ombudsman provided for in the Constitution; and increasing efforts at internal reconciliation, with

[36] *Kosovo*, para. 2.01.

[37] *Ibid.*, paras. 7.11-7.15, and paras. 1.18-1.21 above.

"more and more Serb representatives willing to come forward and engage with the central institutions"[38].

2.05. Addressing the Assembly of Kosovo on 15 June 2009, former Finnish President and United Nations Special Envoy Martti Ahtisaari said:

> "Kosovo's independence is irreversible and this is evident from the recognitions that continue to arrive from around the world. Acceptance of this reality by all would go a long way toward ensuring stability not only for Kosovo, but for the entire Western Balkans region and indeed for Europe as well."[39]

I. International Relations

Recognitions

2.06. Since early April 2009, four more States have recognized the Republic of Kosovo as a sovereign and independent State: Bahrain, Comoros, Gambia and Saudi Arabia. In addition, many other States deal with the Republic of Kosovo as a sovereign and independent State, without a formal act of recognition[40]. A large number of States that had not yet recognized the Republic of Kosovo voted for Kosovo's membership in the International Monetary Fund or the organizations of the World Bank Group[41].

2.07. Thus, as of the date when this further Written Contribution was completed, 60 States had formally recognized the Republic of Kosovo as a sovereign and independent State, while many others treated it as a State in practice. It is particularly noteworthy that the great majority of States in Kosovo's broader region, that is Europe, have recognized Kosovo. Of the 47 member States of the Council of Europe, 33 had recognized by early July 2009 including all of Kosovo's immediate neighbours (except Serbia). Such recognition happened notwithstanding heavy-handed campaigns, led by the

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[38] ICO, "Consolidating Kosovo's European Future: Tracing Next Steps", Presentation at the London School of Economics, 13 May 2009, p. 7 (available on the ICO website: http://www.ico-kos.org/d/LSE_final.pdf).

[39] President Ahtisaari's address, **Annex 1**.

[40] As the Court is aware, the practice of some States is not to issue formal statements of recognition but, rather, simply to begin treating a new country as a State in their international relations, such as through the conclusion of bilateral treaties, or the exchange of diplomatic or consular representatives. On such implied recognition, see *Kosovo*, para. 2.32.

[41] Paras. 2.08-2.11 below.

President and Foreign Minister of the Republic of Serbia, to coerce States into not recognizing the Republic of Kosovo, and to put obstacles in the way of Kosovo's participation in international organizations and international cooperation. Such efforts illustrate Serbia's backward-looking and negative policies towards Kosovo[42].

Relationship with International Organizations

2.08. The Republic of Kosovo became a member of the International Monetary Fund on 29 June 2009, and a member of the International Bank for Reconstruction and Development and other organizations of the World Bank system on the same day. It is thus a member of two of the specialized agencies of the United Nations[43].

2.09. On 8 May 2009, the Executive Board of the **International Monetary Fund** (IMF) certified a vote by the IMF's Board of Governors to offer IMF membership to the Republic of Kosovo. 138 member countries of the IMF, out of 185, participated in the vote. 96 countries voted for the Republic of Kosovo's membership in the IMF; only 10 voted against. Kosovo became a member of the IMF when its authorized representative signed the IMF's Articles of Agreement on 29 June 2009[44].

2.10. By letter dated 22 April 2009, the Boards of Governors of the **International Bank for Reconstruction and Development** (IBRD, also known as the World Bank), the **International Development Agency** (IDA) and the **International Finance Corporation** (IFC) were asked to vote on draft Resolutions entitled "Membership of the Republic of Kosovo". The period within which votes could be received expired on 3 June 2009. By that date, the required number of votes had been cast, and the Resolutions inviting the Republic of Kosovo to join the three organisations were adopted. 96 countries voted for the Republic of Kosovo's membership in the World Bank, with only 7 voting against. In the case of the IDA the corresponding figures were 89 and 5; and in the case of the IFC they were 95 and 6.

[42] See paras. 2.56-2.58 below.

[43] See also *Kosovo*, paras. 2.41-2.42.

[44] Only "countries" (i.e., States) may become members of the IMF. See Articles of Agreement of the International Monetary Fund, 22 July 1944, United Nations, *Treaties Series (UNTS)*, vol. 2, p. 39, Article II (2) ("Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors.")

2.11. By letter dated 22 April 2009, the Council of Governors of the **Multilateral Investment Guarantee Agency** (MIGA) was asked to vote on a draft Resolution entitled "Membership of the Republic of Kosovo". The period within which votes could be received expired on 3 June 2009. By that date, the required number of votes had been cast, and the Resolution inviting the Republic of Kosovo to join the organisation was thus adopted. 91 countries voted for the Republic of Kosovo's membership in MIGA, with 7 voting against.

2.12. A law to enable Kosovo to implement **United Nations sanctions** imposed by the Security Council is in preparation. This is an example of Kosovo's commitment to the World Organization even prior to its admission as a Member State.

European Union

2.13. The 16th plenary meeting of the Kosovo Stabilisation and Association Process Tracking Mechanism (STM) was held on 12 June 2009 in Pristina. The meeting focused on the progress delivered in the implementation of Kosovo's European agenda as well as the priorities for the immediate future. The European Commission has welcomed a number of recent laws which Kosovo had adopted, and presented an update on the preparations of the Feasibility Study that will be published in October.

2.14. During May and June 2009, as part of the continuous dialogue between the European Commission and Kosovo, regular technical discussions were held covering six main sectors. These meetings assess Kosovo's progress in implementing the European Partnership recommendations and advancing towards EU standards, including legislation and institutional arrangements.

Diplomatic Relations and the Establishment of Embassies[45]

2.15. The *Law on the Ministry for Foreign Affairs and Diplomatic Service of Republic of Kosovo* specifies criteria for the diplomatic representatives of Kosovo[46], and

[45] See also *Kosovo*, paras. 2.33-2.35.

[46] Law No. 03/L-044, 15 March 2008, art. 6, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 50-53.

procedures for their selection and appointment, which include a role for the Assembly in scrutinizing appointments[47]. The selection of Kosovo's first Ambassadors has been conducted by open competition. In addition, a *Law on the State Protocol of the Republic of Kosovo* was adopted by the Assembly in April[48].

2.16. High officials of the Republic of Kosovo have continued to have numerous bilateral and international meetings with their opposite numbers from other countries, with both inward and outward official visits[49]. By way of example, towards the end of June 2009 the President of the Republic of Kosovo attended a meeting at Vlora, Albania, with the Presidents of Albania, Macedonia and Montenegro.

Treaties and International Law[50]

2.17. The general position as regards treaties was set out in Kosovo's first Written Contribution[50]. In addition, Kosovo has concluded a number of bilateral treaties[51], including:

– Agreement between the Government of the Republic of Kosovo and the Kingdom of Denmark on "Development Cooperation", entered into force on 3 April 2008;

– Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey on "Mutual Abolition of Visas", concluded on 13 January 2009, entered into force on 6 June 2009;

– Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Slovenia on "Development Cooperation", concluded on 21 April 2009;

[47] Law No. 03/L-044, 15 March 2008, art. 7, *Official Gazette of the Republic of Kosova*, No. 26, 2 June 2008, pp. 50-53.

[48] Law No. 03/L-132, 14 April 2009.

[49] *Kosovo*, para. 2.28.

[50] See also *ibid.*, paras. 2.36-2.40.

[51] Published or to be published on the website of the *Official Gazette of the Assembly of the Republic of Kosovo* (http://www.gazetazyrtare.com/).

– Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey on "Economic Cooperation", concluded 28 May 2009;

– Loan Assumption Agreement between the Republic of Kosovo and the International Bank for Reconstruction and Development, signed on 29 June 2009;

– Investment Incentive Agreement between the Government of the Republic of Kosovo and the Government of the United States of America, signed on 30 June 2009.

2.18. Other bilateral treaties are at an advanced stage of negotiation (including with Albania and Turkey).

2.19. Kosovo has recently signed its first two Memoranda of Understanding, with Montenegro and Italy respectively, to facilitate the exchange of operational and judicial information on matters relating to organized crime.

II. Constitutional and Internal Developments

2.20. On 15 June 2009, the first anniversary of the entry into force of the Constitution of the Republic of Kosovo, Ambassador Pieter Feith, the International Civilian Representative (ICR), while acknowledging that there was a "long journey ahead", said that

> "there is progress of which to be proud. This is evident in the development of central institutions, the rule of law and devolution of governing authority to municipalities. The Kosovo government and its international partners have also pressed ahead on community rights and representation and preservation of religious and cultural heritage."[52]

2.21. By early July, all the principal institutions provided for in the Constitution of the Republic of Kosovo (and foreseen in the Ahtisaari Plan) had been established and were operational. Contrary to the impression given in Serbia's Written Statement, Kosovo Serbs are increasingly taking part in institution-building.

[52] *Koha Ditore* interview, 15 June 2009.

2.22. During the period of international supervision following independence, the **Constitutional Court** of the Republic of Kosovo is composed of six judges appointed by the President of the Republic upon the proposal of the Assembly of Kosovo, and three international judges appointed by the International Civilian Representative (ICR) after consultation with the President of the European Court of Human Rights[53]. These appointments have all been made[54], and on 26 June 2009, the nine judges were sworn in by the President of the Republic. Mr. Enver Hasani was elected as President of the Constitutional Court, which is now fully operational.

2.23. On 4 June 2009, in accordance with article 134 of the Constitution, the **Ombudsperson** was elected by the Assembly of Kosovo for a non-renewable five-year term[55].

2.24. A number of new **laws** have been adopted by the Assembly of Kosovo[56]. These include the *Law on the Membership of the Republic of Kosovo in the International Monetary Fund and World Bank Group of Organizations*.

2.25. In June 2009, the Government of Kosovo announced that a **census** would be held in the spring of 2011, in parallel with those in other European States.

2.26. On 16 June 2009, the President of the Republic fixed 15 November 2009 as the date for **local elections** throughout Kosovo. These elections will be the first held in Kosovo since independence, and will involve elections in 38 municipalities, including 10 with a Serb majority and one with a Turk majority. Five of the Serb-majority municipalities are new, formed as part of the decentralization process foreseen in the Ahtisaari Plan.

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[53] Constitution, art. 152.

[54] Of the six judges appointed by the President of the Republic, four are Kosovo Albanians, one a Kosovo Serb, and one from the Turkish community; the three judges appointed by the ICR are from Bulgaria, Portugal and the United States of America.

[55] For the functions of the Ombudsman, see Constitution, art. 132.

[56] Law No. 03/L-132 of 16 April 2009 *On the State Protocol of the Republic of Kosovo*; Law No. 03/L-129 of 30 April 2009 *On Economic Zones*; Law No. 03/L-119 of 27 May 2009 *On Biocide products*; Law No. 03/L-152 of 29 May 2009 *On Membership of the Republic of Kosovo in the International Monetary Fund and World Bank Group Organizations.*

2.27. Efforts continue to ensure the return of **refugees and internally displaced persons**, and progress is being made – though for a number of reasons, not least economic, the numbers involved, while once again on the increase, continue to be disappointingly low[57]. Such efforts are necessarily long-term[58].

2.28. Progress has also been made with the reconstruction of **cultural and religious heritage sites**, with tenders for significant projects being issued in May 2009[59].

2.29. As regards the **Kosovo Security Force**, the Foreign Minister of Kosovo informed the Security Council on 17 June 2009 that

> "[t]he build-up of our security force is progressing. As I said in my March statement to the Council, the NATO-trained Kosovo Security Force is a democratic and civilian-controlled security force. This multi-ethnic and apolitical force will be focused primarily on emergency response and generally on activities to promote development and regional peace, security and stability."[60]

III. Presence of the International Community

2.30. Contrary to the presentation by certain States, notably Cyprus and Serbia, the international presence in Kosovo in no way undermines the sovereignty of the State. On the contrary, the principal role of the presence, which is in Kosovo at the invitation of the State, is to monitor and to assist in developing the institutions in accordance with the Ahtisaari Plan and the Constitution of the Republic of Kosovo.

2.31. Important elements of the international presence, in particular UNMIK and KFOR, have already been reconfigured and downsized very significantly. Others, in particular the ICR/ICO and EULEX, are due to have their mandates reviewed in 2010.

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[57] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, paras. 30-33.

[58] Remarks by the ICR at the Institute for Historical Justice and Reconciliation, The Hague, 26 May 2009, pp. 4-5 (available on the ICO website: http://www.ico-kos.org/d/090526 Remarks IHJR(1).pdf).

[59] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, paras. 34-36.

[60] Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 9.

These reductions reflect the development of the institutions of Kosovo, and the importance attached to local ownership.

2.32. The **International Steering Group** of 25 States[61] continues to support Kosovo's development. Its Eighth Meeting was held in Pristina on 15 June 2009, the anniversary of the entry into force of the Constitution of the Republic of Kosovo. In its statement issued on that occasion[62] the ISG noted that

> "in the past year the people of Kosovo have made significant progress in building a democratic, multi-ethnic State based on the principles of democracy and human rights in accordance with its European perspective".

2.33. The **ICR**[63] recently said

> "[t]he Ahtisaari Plan vests in me executive authority to supervise Kosovo's development as an independent state, and this fact is also acknowledged in the Constitution of Kosovo. However, I have to date not felt the need to exercise these powers – mainly out of respect for the principle of local ownership and responsibility …"[64].

2.34. The ICR/ICO monitors progress in the broad fields covered by the Ahtisaari Plan. Considerable progress has been made in the various fields covered by European Standards (internal market; public procurement; transport; telecoms; social affairs; agriculture and rural development; energy; environment; justice, freedom and security; and integrated border management).

2.35. As provided for in the Ahtisaari Plan, when the ICR's powers are reviewed in 2010, the ISG will decide whether there is a continuing need for their retention.

2.36. **EULEX**'s mandate is a technical one, aimed at assisting local institutions in the rule of law field. It does not have political functions. The mandate is set out in the Joint

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[61] *Kosovo*, paras. 2.62-2.63.

[62] **Annex 2**.

[63] *Kosovo*, para. 2.64.

[64] "Consolidating Kosovo's European Future: Tracing Next Steps", Presentation at the London School of Economics, 13 May 2009, p. 4 (available on the ICO website: http://www.ico-kos.org/d/LSE_final.pdf).

Action of the Council of the European Union of 4 February 2009[65], and it reports to Brussels. Like other European Security and Defence Policy (ESDP) missions, the principle of local ownership is at the heart of the mission. As the Head of Mission, Yves de Kermabon, has put it, locals are "in the driver's seat".

2.37. EULEX's Mission Statement is as follows:

> "The ESDP mission will assist the Kosovo authorities, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability. It will further develop and strengthen an independent and multi-ethnic justice system and a multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices. The mission, in full co-operation with the European Commission Assistance Programmes, will implement its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities."

2.38. EULEX is described as follows on its website:

> "The European Union Rule of Law Mission in Kosovo (EULEX) is the largest civilian mission ever launched under the European Security and Defence Policy (ESDP). The *central aim is to assist and support* the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas. *The mission is not in Kosovo to govern or rule.* It is a technical mission which will monitor, mentor and advise whilst retaining a number of limited executive powers."[66]

2.39. As the Foreign Minister of Kosovo explained during the Security Council meeting on 23 March 2009,

> "[d]eployment of EULEX throughout Kosovo is in accordance with the mandate that derives from the Kosovo independence declaration, the Ahtisaari package, the constitution of the Republic of Kosovo, the laws of the Republic of Kosovo, the European Union joint action plan of 4 February 2008 and the invitations of the President of 17 February and 8 August"[67].

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[65] *Kosovo*, para. 2.66.

[66] http://www.eulex-kosovo.eu/?id=2 (emphasis added).

[67] Security Council, provisional verbatim record, sixty-fourth year, 6079th meeting, S/PV.6079, p. 8.

2.40. A second report on EULEX's activities, covering the period February to May 2009, is annexed to the United Nations Secretary-General's latest report[68]. As this report states, "[t]hrough monitoring, mentoring and advising the rule of law institutions in Kosovo, EULEX built up a picture of the competence of those authorities, and identified areas for further targeting of reform efforts".

2.41. EULEX judges and prosecutors act within the Kosovo judicial system, in accordance with the Constitution and laws of the Republic of Kosovo. In particular, they act on the basis of two Laws adopted by the Kosovo Assembly as part of the Ahtisaari package, the *Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo*, and the *Law on Special Prosecution Office of the Republic of Kosovo*[69]. Article 1 of the first of these Laws provides as follows:

> "This law regulates the integration and jurisdiction of the Eulex judges and prosecutors in the judicial system of the Republic of Kosovo."

2.42. Two recent reports of the Secretary-General describe the current situation as regards **UNMIK**: his report to the Fifth (Budgetary) Committee of April 2009[70]; and his report to the Security Council on UNMIK of June 2009[71].

2.43. As anticipated[72], the April 2009 report proposed to the General Assembly that the personnel of UNMIK be reduced, in 2009-2010, by almost 90% as compared with the approved numbers for 2008-2009 (507 persons instead of 4,911)[73]. In the case of law enforcement matters, UNMIK has now handed over to EULEX virtually all remaining

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[68] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, annex I.

[69] *Kosovo*, para. 2.67.

[70] Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009.

[71] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009.

[72] *Kosovo*, paras. 2.69-2.74.

[73] Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009. On the basis of this report, the General Assembly has adopted a greatly reduced budget for UNMIK for 2009/2010 (resolution 63/295, 30 June 2009).

active case files[74]. As of 19 March 2009 the Kosovo authorities assumed responsibility for transnational mutual legal assistance with those States that have recognised Kosovo[75].

2.44. The mandate of UNMIK is described as now being "to help the Security Council achieve an overall objective, namely, to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance regional stability and prosperity in the western Balkans"[76].

2.45. The main remaining functions of UNMIK are described in the April 2009 report as being "monitoring and reporting on political, security and community developments that affect inter-ethnic relations and stability in Kosovo and the sub-region; facilitating, where necessary and possible, arrangements for Kosovo's engagement in international agreements; and facilitating dialogue between Pristina and Belgrade on issues of practical concern"[77]. The Secretary-General also made clear that UNMIK "will not undertake activities in the areas of the international administration of Kosovo or the rule of law, areas in which the Mission has already ceased operations in the wake of Kosovo's declaration of independence in February 2008 and the deployment of EULEX in December 2008"[78]. There is no mention in the report of any remaining functions of the SRSG/UNMIK with regard to "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[79].

2.46. The latest report of the Secretary-General is incorrect, when it says, without attribution, that "Kosovo authorities … made a series of public statements ... asserting that Security Council resolution 1244 (1999) is no longer relevant and that they had no legal

[74] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, para. 21.

[75] *Ibid*., para. 22.

[76] Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009, para. 2; see also Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, paras. 18-20.

[77] Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009, para. 34 (last sentence).

[78] *Ibid*., para. 12. The last remaining UNMIK rule of law function is liaison with INTERPOL. This too is expected to cease, when, as anticipated, EULEX concludes a Memorandum of Understanding with the International Criminal Police Organisation (INTERPOL) at its General Assembly in October 2009.

[79] Security Council resolution 1244 (1999), para. 10 (e) [Dossier No. 34].

obligation to abide by it"[80]. This statement, which in context appears to relate to the period covered by the latest report (10 March-31 May 2009), simply repeats what was said in the previous report[81].

2.47. In the Security Council debate on 17 June 2009, the Foreign Minister of Kosovo clearly and unequivocally stated

> "As I said in my remarks in this forum in March, for practical and pragmatic reasons we have requested the conclusion of the mission and mandate of UNMIK. In light of the continued positive developments in Kosovo and the widespread deployment of EULEX, I reiterate that request today. I also reiterate the commitment expressed in our Declaration of Independence and in our Constitution of respect for and adherence to international law, including binding resolutions of this body. That commitment has never wavered."[82]

2.48. Until the Security Council terminates its mandate, UNMIK remains in Kosovo in accordance with Security Council resolution 1244 (1999), which is the United Nations basis for its presence, as Kosovo accepted in its Declaration of Independence. It will be recalled that in paragraph 12 of the Declaration of Independence, the representatives of the people of Kosovo stated that they would "act consistent with the principles of international law and resolutions of the Security Council, including resolution 1244 (1999)"[83]. This remains the position.

IV. Criteria for Statehood

2.49. It is suggested in one or two of the Written Statements[84] that the Republic of Kosovo does not meet the "Montevideo" criteria for statehood. In particular, in its Written

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[80] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 5 May 2009, para. 4.

[81] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/149, 17 March 2009, para. 4.

[82] Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 8 (corrected).

[83] *Kosovo*, Annex 1, p. 217.

[84] *Cyprus*, paras. 159-192. The Russian Federation raises the question whether Kosovo "met the necessary criteria for statehood", without giving an answer. Its point seems to be that "throughout that period [June 1999 to February 2008], and well into the year 2008, Kosovo remained largely dependent on the functioning of the international presences" (it cites only figures for security forces), and it concludes that "[b]y and large, the situation remains the same today" (*Russian Federation*, paras. 52-53). This is simply not the case.

Statement, the Republic of Cyprus argues at length that Kosovo was not, in April 2009, a State because it did not meet at least one of the criteria[85]. Specifically, Cyprus suggests that the role of the international community in Kosovo is such as to preclude Kosovo from meeting the requirement of independence in the exercise of its international relations. While this issue is not before the Court[86], Kosovo wishes to place on record that it does in fact clearly meet the criteria for statehood.

2.50. Article 1 of the Montevideo Convention provides:

> "The state as a person of international law should possess the following qualifications: (a) a permanent population: (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."

2.51. The reality is that Kosovo has a defined territory[87], has a permanent population[88], has a fully functioning and effective government[89], and is engaging actively on its own behalf in international relations with States worldwide (as well as within international organizations)[90].

2.52. Despite some equivocal language about the criteria of population and territory[91], Cyprus seems only to question Kosovo's fulfilment of the criteria for statehood on the ground that it lacks an effective government and the capacity to enter into relations with other States[92]. Cyprus asserts, rather vaguely, that "the Kosovo authorities appear to be some way from being able to function independently as an effective government"[93], and

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[85] *Cyprus*, paras. 159-192. Cyprus further argues that Kosovo does not meet a requirement of "legality", which it suggests is missing *inter alia* when "the entity has been established in a manner that violates the legal obligations, or the legal limitations upon the powers, of those who purported to establish the State"[85]. This argument will not be addressed here; it adds nothing to Cyprus's assertion that the authors of the Declaration of Independence acted *ultra vires* their powers under Security Council resolution 1244 (1999) (as to which see paras. 5.61-5.66 below).

[86] See *Kosovo*, paras. 7.11-7.15, and paras. 1.18-1.21 above.

[87] *Kosovo*, paras. 2.10-2.14.

[88] *Ibid.*, paras. 2.15-2.16.

[89] *Ibid.*, paras. 2.48-2.56.

[90] *Kosovo*, paras. 2.27-2.47 and paras. 2.06-2.19 above.

[91] *Cyprus*, para. 172. Past population changes, hardly unique to Kosovo, are irrelevant. What matters for statehood is current population.

[92] *Cyprus*, paras. 3 (k), 172-183, and 193 (g).

[93] *Ibid.*, para. 173.

that "much of the responsibility for governance still falls on the 'international presences'"[94]. It seems to base these assertions largely on the tasks of EULEX, as set out in paragraph 3 of the EU Council Joint Action[95], and on what it claims is the continuing role of UNMIK in respect of Kosovo's international relations[96].

2.53. Regarding the presence of EULEX in Kosovo, as Cyprus itself notes, the mandate of EULEX is to "monitor, mentor and advise", and to "contribute to" certain other narrowly-defined tasks[97]. As explained in Kosovo's first Written Contribution[98] and above[99], EULEX's role is a technical one, strictly focused on assisting Kosovo institutions in certain discrete rule of law activities. It operates in accordance with the law applicable in Kosovo and supports the principle of local ownership.

2.54. Cyprus asserts that "it is UNMIK which conducts much, if not all, of Kosovo's international relations"[100]. This is not correct and Cyprus provides no factual foundation for the assertion. As noted above[101], and as the Secretary-General has made clear, the role of UNMIK in this field is strictly limited; it is confined to "*facilitating*, where *necessary and possible*, arrangements for *Kosovo*'s engagement in international agreements"[102]. As agreed between the SRSG and the Government of Kosovo, UNMIK stands ready to facilitate Kosovo's participation in regional and more widely in international initiatives upon the Government's request. Such facilitation may, occasionally, be of assistance in dealing on practical matters with certain States that have not yet recognized Kosovo. In

[94] *Cyprus*, para. 175

[95] *Ibid.*, para. 174.

[96] *Ibid*., para. 178.

[97] Paras. 2.36-2.41 above.

[98] *Kosovo*, paras. 2.65-2.67.

[99] Paras. 2.36-2.41 above.

[100] *Cyprus*, para. 178.

[101] Paras. 2.42-2.48 above.

[102] Budget of the United Nations Interim Administration Mission in Kosovo for the period 1 July 2009 to 30 June 2010, Report of the Secretary-General, A/63/803, 2 April 2009, para. 34 (emphasis added).

other respects, as already described[103], Kosovo conducts its international relations directly and independently.

2.55. As explained in Kosovo's first Written Contribution[104], the international community's presence and role in Kosovo is similar to that in certain other States that are fully accepted as having acquired statehood. Indeed, if one compares the position of Kosovo with other States that have been admitted to the United Nations, such as Bosnia and Herzegovina or Timor Leste, or States that in the past had significant international presences as they entered upon statehood (including former colonies and trusteeships), it is clear that the international community's present role in Kosovo can in no way be viewed as an exceptional circumstance, let alone a diminution of Kosovo's position as a sovereign and independent State. Rather, the international presence in Kosovo has been welcomed and accepted by Kosovo, and as such is an affirmation of Kosovo's independence and sovereignty.

V. Serbia's Attitude towards Kosovo

2.56. The hostile and backward-looking attitude of the Republic of Serbia's high officials towards Kosovo continues[105] as does their interference in Kosovo's internal affairs. This is to the grave detriment of Kosovo Serbs, especially those living in northern Kosovo, who have been largely prevented by direct and indirect Serbian pressure from benefiting from integration into the structures of the Republic of Kosovo. As the Foreign Minister of Kosovo informed the Security Council on 17 June 2009:

> "Our Government has continued to seek ways to improve the conditions in the minority community areas, especially in the Serb-majority areas. Unfortunately the Republic of Serbia has continued to prevent the Serb citizens of Kosovo from cooperating with the institutions of Kosovo. Belgrade has also continued to impede

[103] *Kosovo*, paras. 2.27-2.47.

[104] *Ibid.*, paras. 2.58-2.74.

[105] See, as one example among many, the intemperate speech of the Foreign Minister of Serbia in the Security Council on 17 June 2009: "we are gathered [he said] to discuss the dangerous consequences of the 17 February 2008 unilateral declaration of independence by the ethnic Albanian authorities of Serbia's southern province of Kosovo and Metohija" (Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 5).

> our cooperation with neighbors and the international community by blocking our participation in regional and wider international bodies."[106]

2.57. Serbian officials, in particular its Foreign Minister, Mr. Jeremić, assert that Serbia will "never" recognize Kosovo[107], apparently regardless of the outcome of the present proceedings before this Court and regardless of the attitude of the people of Kosovo (including the Kosovo Serbs) towards independence[108]. They engage in provocations, such as the recent announcement that "local elections" will be held in Peja and Pristina municipalities on August 2009. In adopting such positions, Serbia's leaders are seeking to bind the people of Serbia, and all the peoples of the Balkans, to an indefinite future of discord and instability. The ICR recently said,

> "Kosovo's stability continues to be negatively influenced from the outside. While actively courting Brussels in its European aspirations, Serbia exercises a certain influence over the Serb community living in Kosovo, particularly in the North. Progress towards a multi-ethnic society in part rests on Belgrade's willingness to let communities decide their future for themselves."[109]

2.58. Serbia's negative attitude contrasts starkly with the positive vision of the people and leaders of Kosovo:

> "The desire of Kosovo's people and of their leaders for progress and for Euro-Atlantic integration is palpable, and the spirit of local ownership for Kosovo's affairs grows."[110]

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[106] Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 9.

[107] See, among many such statements, Mr. Jeremić's statement to the Security Council on 17 June 2009: "Serbia will never, under any circumstances, implicitly or explicitly recognize the unilateral declaration of independence by the ethnic Albanian authorities of our southern province" (*ibid.*, p. 5).

[108] As the Secretary-General says in his latest report, "increasing numbers of [Kosovo Serbs] continue to apply for Kosovo identity cards, driver's licenses and other Kosovo documentation, and sign contracts with the Kosovo Energy Corporation (KEK) in order to facilitate their daily lives (S/2009/300, para. 7). He further said that "[a] growing number of Kosovo Serb police officers appear to have started returning to work …; there also seems to be considerable interest amongst members of the Kosovo Serb community to apply for posts which might become vacant after 30 June" (*ibid*., para. 25). In fact, the overwhelming majority of Kosovo Serb police officers in the North did return to work with the Kosovo Police by the 30 June 2009.

[109] "Consolidating Kosovo's European Future: Tracing Next Steps", Presentation at the London School of Economics, 13 May 2009, pp. 6-7 (available on the ICO website: http://www.ico-kos.org/d/LSE_final.pdf).

[110] Remarks by the ICR at the Institute for Historical Justice and Reconciliation, The Hague, 26 May 2009, p. 6 (available on the ICO website: http://www.ico-kos.org/d/090526 Remarks IHJR(1).pdf).

PART II

HISTORY AND CONTEXT

CHAPTER III

HISTORY AND CONTEXT

3.01. This chapter responds to some specific points made by Serbia in its Written Statement[111] concerning the historical background and context against which the Declaration of Independence of Kosovo is to be seen. Serbia's presentation of history is selective and inaccurate on many points, large and small. The present chapter only covers some of these inaccuracies, focusing on the constitutional position of Kosovo as a federal unit in the period 1974 to 1989, and the forcible removal of that status in 1989, as well as Serbia's distorted view of the atrocities and acts of oppression committed against Kosovo Albanians in the period 1989-1999[112].

3.02. The general historical background is important for an understanding of the special circumstances of Kosovo. Further, certain aspects of the history could be relevant in the event that the Court were to find it necessary to consider whether the people of Kosovo had a right to self-determination under international law[113]. However, the detailed history is not directly relevant to the question before the Court, which is limited to whether the Declaration of Independence of 17 February 2008 contravened any rule of international law[114].

3.03. This chapter is divided into five sections. The first responds to some assertions by Serbia concerning the period up to 1945 (**Section I**). Then Serbia's arguments that Kosovo was not a federal unit of the SFRY are dealt with (**Section II**), as are Serbia's assertions about the removal of that status in 1989 (**Section III**). Response is made next to Serbia's account of the period of persecution in the 1980s and 1990s, culminating in the

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[111] Of those States that have submitted Written Statements to the Court arguing against the legality of the Declaration of Independence of 17 February 2008, it is principally Serbia which has made detailed arguments on historical matters. See also *Cyprus*, paras. 28-40.

[112] Kosovo's account of the relevant history is contained in Chapters III, IV, and V of its first Written Contribution. For a detailed account of the history of Kosovo, see N. Malcolm, *Kosovo: A Short History* (1998).

[113] See paras. 4.31-4.52 below.

[114] See paras. 1.18-1.21 above.

atrocities of 1998-1999 (**Section IV**). A final section deals with the position of Kosovo Serbs during the period June 1999 to February 2008 (**Section V**).

I. The Period before 1945

3.04. *Serbia has suggested that Serbs historically were the predominant inhabitants of Kosovo since the fourteenth and fifteenth centuries*[115]. This is incorrect.

3.05. Serbia gives a misleading and inaccurate account of the demographic history of Kosovo[116]. The claim that the first evidence of a "noticeable Albanian population" appeared "around the seventeenth century" is false: there are many references to an Albanian population in this territory in medieval records. A highly inaccurate and speculative estimate by an Austrian soldier in 1871 is quoted by Serbia because it claimed that there was a majority of Serbs in Kosovo; but no mention is made of the much more detailed Austrian study published in 1899 which carefully analysed the Ottoman census statistics and found that the ratio of Muslims (who were mostly Albanian) to non-Muslims (who were mostly Serb) in Kosovo was 72:28[117].

3.06. Over the course of history, the territory that now forms the Republic of Kosovo has at times been part of other units, most notably the Ottoman Empire. Over time, Kosovo has been occupied, annexed and exchanged between various powers, including by Serbia. In short, Serbia has no special historical claim to the territory that now forms the Republic of Kosovo.

3.07. In any case, these questions of historical demography are of limited relevance to the question of Kosovo's Declaration of Independence on 17 February 2008. At most, two facts (neither of which has been seriously contested by Serbia) might be considered to be of some relevance: that a majority of the population at the time of the Serbian conquest of Kosovo in 1912 consisted of Albanians, who had no wish to come under Serbian rule;

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[115] *Serbia*, para. 112.

[116] *Ibid.*, paras. 112-118.

[117] On all the demographic issues here, see N. Malcolm, *Kosovo: A Short History* (1998), *passim*.

and that Kosovo was subsequently treated by the government in Belgrade as a colonial territory, with what was officially described as a "colonisation" programme.

3.08. *Serbia refers to Kosovo's "integration into Serbia" in 1913 and adds that: "the constitutional provisions and laws of Serbia were gradually introduced to the territory and the guarantees of local self-government were not applied until after World War I, i.e. 1919"*[118]. This misrepresents both the factual situation and the legal position. In fact, Kosovo was forcibly occupied by Serbia in 1912/1913 prior to the creation of the Kingdom of Serbs, Croats and Slovenes in 1918[119].

3.09. The suggestion that the inhabitants of Kosovo gradually came to enjoy the normal protection of the law in the period between the Serbian conquest in 1912 and the Serbian loss of control of the territory during World War I (in 1915) is false. The territory was governed primarily on the basis of Serbian royal "decree-laws"[120]. Throughout this period, the Albanian population of Kosovo suffered gross abuses of human rights at the hands of the Serbian authorities. A detailed report by the Austrian Consul in January 1914 recorded that not one of the Serbians' promises of equal treatment for the Albanians had been kept[121].

3.10. The territory of Kosovo was not legally "integrated" into Serbia in 1913[122]. Kosovo was administered as an occupied territory. It only began to be integrated into a constitutional and legal system some time after the formation of the Kingdom of Serbs, Croats and Slovenes (later called the Kingdom of Yugoslavia) in 1918. Whatever "guarantees of local self-government" were eventually "applied", they were Yugoslav and not Serbian ones[123].

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[118] *Serbia*, para. 138.

[119] *Kosovo*, paras. 3.05-3.06.

[120] N. Malcolm, *Kosovo: A Short History* (1998), p. 257.

[121] *Ibid*., p. 258.

[122] Under Article 4 of the 1903 Serbian Constitution, the consent of a "Grand National Assembly" (a constitutional assembly, specially convened) was required for this; yet no such Assembly was convened. See N. Malcolm, *Kosovo: A Short History* (1998), pp. 264-266.

[123] In fact, power in the local administration was then held almost exclusively by Slavs, not by members of the local Albanian majority population.

3.11. Thus, contrary to the impression given by Serbia[124], Kosovo was not part of Serbia at the time of the formation of the Yugoslav State. Legally, it was a component of a Yugoslav entity before it became a component of a Serbian one.

3.12. *Serbia refers to a 1943 declaration in support of certain legal propositions about the status of Kosovo*[125]. That declaration, however, was not a constitutional document, but merely a statement of policy by the Communist leadership at a particular moment in late November 1943. One month later, a conference of Kosovo representatives (Bujan, 31 December 1943 – 2 January 1944) issued another declaration, which stated:

> "the only way freedom can be achieved is if all peoples, including the Albanians, have the possibility of deciding on their own destiny, with the right to self-determination up to and including secession"[126].

3.13. *Serbia's account of the establishment of the present-day territorial unit of Kosovo by the Presidency of the National Assembly of Serbia in 1945*[127] omits the essential information that Serbia was given the power to determine these matters on the basis of a decision (an ostensibly voluntary and democratic decision[128]) by the "Regional People's Council of Kosovo" to join a "federal Serbia". That decision was, officially, the constitutional basis of Kosovo's participation in the Serbian Republic.

II. Kosovo was a Federal Unit of the SFRY

3.14. The constitutional position of Kosovo within the SFRY may be relevant to the legal arguments in at least two respects: (1) whether the declarations of independence by the republics of the SFRY (Slovenia, Croatia, Bosnia and Herzegovina, Macedonia) in the 1990s are to be regarded as similar in nature to Kosovo's Declaration of Independence of 17 February 2008 (so that the failure to regard the former as violations of international law would be relevant to whether Kosovo's Declaration of Independence was in

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[124] *Serbia*, para. 138.

[125] *Ibid.*, paras. 144-146.

[126] N. Malcolm, *Kosovo: A Short History* (1998), p. 308.

[127] *Serbia*, para. 147.

[128] See however *Kosovo*, paras. 3.09-3.10.

conformity with international law)[129]; and (2) whether the people of Kosovo were entitled to the right of self-determination[130].

3.15. *Serbia repeatedly asserts that Kosovo was not a federal unit of Yugoslavia*. Kosovo addressed this issue in its first Written Contribution[131]. The following specific points are made in reply to Serbia's distorted picture of Kosovo's position within the Federation.

3.16. *Serbia states that upon the formation of a federal Yugoslavia in 1945, Kosovo was not regarded as a constituent component of the federation*[132]. This is not correct. In fact, at the meeting of the Anti-Fascist Council of National Liberation of Yugoslavia (AVNOJ) held in August 1945 – the constituent body of the federal Yugoslavia – Kosovo was represented by its own delegates independently of Serbia[133].

3.17. *Serbia asserts that Kosovo was not a federal unit under the 1974 SFRY Constitution* – the constitution in force before the dissolution of the SFRY. This too is incorrect. Kosovo had numerous powers, duties and rights, independent of Serbia, and directly guaranteed by the 1974 SFRY Constitution. In fact, Serbia itself admits that Kosovo was "ruled almost exclusively by [its] own institutions" and that if the Kosovo Constitution was contrary to the Serbian Constitution, "there was no legal mechanism in place that would ensure the latter's primacy"[134].

3.18. As set out in Kosovo's first Written Contribution[135], with supporting extracts from the ICTY judgment in the *Milutinović* case, the position of Kosovo under the 1974 SFRY Constitution was equivalent to that of the republics. Kosovo as a unit was represented directly (not by Serbia) in the federal legislature, executive, and judiciary.

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[129] See *Kosovo*, paras. 8.22-8.37.

[130] See *ibid.*, paras. 8.38-8.41, and paras. 4.31-4.52 below.

[131] *Kosovo*, paras. 3.17-3.22.

[132] *Serbia*, para. 146.

[133] *Kosovo,* para. 3.11.

[134] *Serbia*, para. 190.

[135] *Kosovo*, paras. 3.17-3.22.

Under powers granted to it by the Federal Constitution, it issued its own Constitution directly, not receiving it from the Republic of Serbia, and had its own Constitutional Court. Kosovo had its own legislature, executive, and judiciary, with competences equivalent in almost every way to those of the republics. It had the right, which it exercised, to negotiate and enter into agreements with foreign States. As such, Kosovo is properly regarded as having been a federal unit of the SFRY.

3.19. To deny that it was a federal unit is to go against the simple and universally accepted meaning of that term, as it would be applied in any federal system. A federal system is one in which the constitution distinguishes two levels of government: at the higher level, authority is exercised by a federal government over the entire State; at the lower level, authority is exercised by the governments of unit territories; and those unit territories are themselves represented at the higher, federal level. Kosovo was indeed such a unit territory, both exercising governmental power over its own territory and being represented directly at the federal level.

3.20. Serbia indicated in its Written Statement that Kosovo was defined as part of Serbia under the 1974 SFRY Constitution. Yet a proper understanding of the words used indicates that rather than Kosovo being a mere geographical area within Serbian territory, the Constitution was actually defining the structural and constitutional relationship between Kosovo and Serbia[136]. In any case, as set out in detail in Kosovo's first Written Contribution[137], Kosovo had a dual status under the SFRY Constitution – it was both a federal unit of the SFRY and a part of Serbia.

3.21. However, to say that it was both of these things does not and should not imply anything like a parity of importance between them, for two fundamental reasons. First, Kosovo was only part of Serbia on the condition that Serbia remained a part of the federal

[136] The phrase "*u njenom sastavu*" is translated by Serbia as "[which are] its parts". Yet in paragraph 159 of Serbia's Written Statement, the phrase "*u sastavu republike*" is translated as "within a republic". This illustrates the difficulty of translating the abstract noun "*sastav*", which means "composition", "structure", or "makeup". Better translations would be: "[which are] in its composition" or "… in its structure", and "in the composition of a republic" or "in the structure of a republic". The implication of these phrases is that the relation of Serbia to the autonomous provinces was a *structural* relationship; insofar as those provinces were "parts" of Serbia they were so by virtue of their constitutional relationship to it, and not as mere geographical areas of Serbian territory.

[137] *Kosovo*, paras. 3.17-3.21.

(SFRY) framework. Kosovo's relationship with Serbia was defined by, and existed by virtue of, the federal Constitution. Second, in the 1974 Constitution the status of Kosovo as a component of Serbia was an almost notional matter, being stated there only in a few articles of a general and theoretical nature; whereas the status of Kosovo as a unit of the federal system was established by the many substantive articles which set out its rights, powers and duties, both in its own territory and at the federal level.

3.22. Serbia suggests that what the Yugoslav constitutions called "nationalities" ("*narodnosti*") can be reasonably translated as "national minorities"[138]. Serbia's translation is seriously misleading, as the term "nationalities" ("*narodnosti*") was in fact used in a very different way in Yugoslav legal discourse – a way that had no relation to whether the population in question was a minority or a majority in any particular territory. The particular Yugoslav theory (which was directly modeled on Soviet theory and terminology) was that a population within Yugoslavia was called a "nationality", not a "nation", if there was a larger body of people with that ethnic or linguistic character in another State. Thus the Kosovo Albanians were called a "nationality" because of the existence of the Albanian population in Albania itself, regardless of their numerical position in Kosovo, and regardless of the relative sizes, within the Yugoslav State, of the Albanian population and the populations of the so-called "nations". In fact, within the SFRY, the Kosovo Albanians were the third most populous national group, comparable in numbers to the Bosnian Muslims and the Slovenes, and larger than the Macedonians and the Montenegrins.

3.23. In short, the term "nationality" ("*narodnost*") cannot properly be translated as "national minority". The status of a "nationality" was assigned to the Kosovo Albanians on extraneous grounds, without the application of any reasonable or consistent criteria as to what might constitute a "minority" in any numerical sense. Insofar as this status was intended to be associated with a lower level of constitutional or political rights, its assignment to the Kosovo Albanians was discriminatory.

[138] *Serbia*, para. 157.

3.24. Serbia argues that "[d]espite their participation in the federal bodies and their role in the Yugoslav federation, the autonomous provinces were not federal units"[139]. This statement vividly illustrates the untenability of Serbia's position, since it must be obvious that, as a unit that enjoyed direct participation in the federal bodies and played a role equivalent to that of the other units in the Yugoslav federation, Kosovo was a federal unit. The only reason given by Serbia to sustain its assertion that Kosovo was not a federal unit is the fact that there were some differences of terminology between the two general articles that defined the republics and the autonomous provinces[140]. Emphasis is placed on the fact that a republic was defined as "based on the sovereignty of the people". The phrase translated here as "the sovereignty of the people" is "*suverenosti naroda*"; in fact, "*narod*" here means not "people" but "nation", in the special sense in which Yugoslav theory distinguished a "nation" from a "nationality". However, while this definition grounds a republic on the "sovereignty" of a "nation", the definition of an autonomous province also attributes "sovereign rights" ("*suverena prava*") to both "nations" and "nationalities", and says that they realize or implement those sovereign rights in the autonomous province.

3.25. Such tensions or contradictions in these general statements show that these very general statements had a character and purpose that were, to a significant extent, rhetorical. A full understanding of Kosovo's constitutional position under the 1974 Constitution requires a study of all the specific rights and competences attributed therein to Kosovo, rather than from the study of these general phrases.

3.26. Serbia relies on an SFRY Constitutional Court decision of 19 February 1991 to argue that Kosovo was not a federal unit. As explained in Kosovo's first Written Contribution, this is factually and legally incorrect. When considering that decision by the Constitutional Court, it is necessary to understand that, by 1991, the Court was (and understood itself to be) a political organ of the State. In December 1990, the Socialist Party of Serbia had won a sweeping victory in the elections, under its leader Slobodan Milošević. For more than two years he had campaigned on the issue of Kosovo, stirring up a ferment of hostility in Serbian political and intellectual circles towards the rights enjoyed

[139] *Serbia*, para. 178.

[140] Articles 3 and 4 of the 1974 Constitution, first presented as Amendment XX, paras. 3 and 4 in 1971 (see *Serbia*, para. 167).

by Kosovo under the 1974 Constitution. Thus, when the SFRY Constitutional Court was asked to consider the proclamation made by former members of the Kosovo Assembly in September 1990 which declared that Kosovo was a "Republic", it is not surprising that the judges adopted an essentially political approach, believing that their role was to support the objectives of State policy. It should also be noted that even more blatant political pressures were exerted on the members of the SFRY Presidency during 1990-1991. As such, Serbia's references to statements of the SFRY Presidency should likewise be regarded with due caution[141].

3.27. Serbia asserts, on the basis of the SFRY Constitutional Court decision, that under the SFRY Constitution the right of self-determination belonged exclusively to the nations of Yugoslavia and not to the nationalities[142]. This issue was addressed briefly in Kosovo's first Written Contribution, where it was noted that the SFRY Constitution does not expressly accord a right of secession to either the republics or the provinces[143]. If there was no right of secession under the SFRY Constitution, then none of the republics (such as Slovenia, Croatia, Macedonia, or Bosnia-Herzegovina) had a right under national law to declare independence prior to the dissolution of the SFRY, and yet the international community did not regard such declarations as internationally wrongful. Similarly, even if Kosovo's declaration of independence was inconsistent with FRY or Serbia law, that does not make it internationally wrongful. Alternatively, if there was a right of secession in the SFRY Constitution, it was shared by the equally sovereign nations and nationalities of the SFRY, including Kosovo. It cannot therefore be said that Kosovo's exercise of that right through a declaration of independence is wrongful either nationally or internationally. Moreover, that existence of such a right in the SFRY Constitution is of relevance in considering whether the people of Kosovo have an internationally-protected right of self-determination. Nothing in the 1974 SFRY Constitution says otherwise.

3.28. In summary, Kosovo was a federal unit of the SFRY and as such, like the republics, was entitled to determine its own future upon the dissolution of the SFRY.

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[141] A clear account of the Serbian control over the SFRY, in particular the Presidency, and the extreme pressure placed on its non-Serb members is found in L. Silber and A. Little, *The Death of Yugoslavia* (1995).

[142] *Serbia*, para. 195.

[143] *Kosovo*, para. 3.19, in particular fn. 141.

III. The Illegal Removal of Kosovo's Autonomy in 1989

3.29. The federal protections guaranteed to Kosovo as an autonomous province under the SFRY Constitution were illegally removed by Serbia in 1989[144]. This forcible removal of Kosovo's autonomy was effectively a denial by Serbia of Kosovo's right to participate in the SFRY institutions. *Serbia's remarkable assertion that the amendments removing Kosovo's federal rights and autonomy were "duly adopted with the consent of the assemblies of the autonomous provinces of Kosovo and Vojvodina*"[145] is yet another example of Serbia's inability, even today, to accept that gross illegalities were committed by the Milošević regime.

3.30. The 1989 amendments were forced through unconstitutionally, as described by the ICTY in its *Milutinović* judgment[146]. Far from being duly adopted with the consent of the Kosovo Assembly, the measures were forced through in a procedurally invalid way in circumstances of intense intimidation and with tanks being outside the Assembly building. The BBC editor Dr. Paulin Kola has summarized the objections as follows:

> "first … there was a state of emergency in place and, therefore, the conditions were not conducive to the free exercise of the functions of members of the Assembly; secondly, many members had been threatened with serious consequences unless they voted in favour of the changes; thirdly, there was no quorum in the Assembly, let alone the two-thirds majority required to pass constitutional laws; fourthly, the votes were never counted; and, fifthly, Belgrade delegates and even secret service agents had also participated in the vote"[147].

The amendments "adopted" on that occasion, and the subsequent measures carried out on the basis of those amendments, cannot be described as legally valid.

3.31. *Serbia relies on an SFRY Constitutional Court decision of 18 January 1990 to argue that the main amendments were legitimate.* However, that decision is simply not relevant. The Constitutional Court did not examine the circumstances in which the

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[144] *Kosovo*, paras. 3.23-3.28.

[145] *Serbia*, para. 189.

[146] *Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), *Judgement*, 26 February 2009, paras. 217-221 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), cited in *Kosovo*, para. 3.27.

[147] P. Kola, *In Search of Greater Albania* (2003), pp. 180-181.

amendments were forced through the Kosovo Assembly, merely assuming that they had been correctly adopted.

3.32. In fact, in 1990 the Constitutional Court of Kosovo took up the issue of the constitutionality of the 1989 amendments, finding that there were indeed procedural improprieties in respect of the vote in the Kosovo Assembly on 27 March 1989. Before the Kosovo Constitutional Court could reach a final judgment, Serbia dissolved the Court, in yet another act of anti-Kosovo repression.

3.33. In summary, in 1989, Kosovo, a federal unit of the SFRY with all the associated powers and rights, had these rights forcibly and illegally removed by Serbia in violation of the SFRY Constitution. It was these events that triggered the collapse and ultimate dissolution of the SFRY[148].

IV. The Period from the 1989 to 1999

3.34. Throughout its Written Statement, Serbia downplays the atrocities and acts of oppression that were committed against the people of Kosovo.

Systematic violations of constitutional rights

3.35. *Serbia points to the rights that the people of Kosovo purportedly had under the 1990 Serbian Constitution*[149]. In fact, the guarantees appearing on paper in that Constitution were in practice systematically violated during subsequent years:

– The "freedom to use his or her language and alphabet" was systematically violated. As the United Nations Rapporteur Tadeusz Mazowiecki stated in his report of 17 November 1993:

> "In 1984 identity cards, birth and marriage certificates, and other documents were issued in three languages, Albanian, Serbo-Croat and Turkish; in 1990, in Albanian and Serbo-Croat, and in 1993 only in Serbo-Croat. In the Prizren district court, proceedings take place exclusively in Serbo-Croat, even though 95% of the people

[148] For an account of this, see L. Silber and A. Little, *The Death of Yugoslavia* (1995).

[149] *Serbia*, para. 207.

being tried are Albanian. The alteration of street names in Kosovo is intended to give a Serbian character to places with majority-Albanian populations. In Prizren, since 1991, 90% of the place names have been changed."[150]

Kosovo Albanian medical workers were also dismissed for communicating with other Kosovo Albanians in the Albanian language.

– The right "to preserve, foster and express their cultural, linguistic and other peculiarities" was also systematically violated. The most important Albanian cultural bodies in Kosovo, such as the Academy of Sciences and Arts and the Institute of Albanology in Pristina, were forcibly suppressed, and in Prizren the Museum of the League of Prizren, one of the most important cultural sites for Albanian history in the region, was closed down[151].

– The right "to have information media in their own language" was also systematically violated. In July 1990, the Kosovo Albanian staff of the State-run radio and television service in Kosovo were dismissed (1,300 journalists and technicians lost their jobs) and their Albanian-language programmes were closed down. In August 1990, the only Albanian-language daily newspaper, *Rilindja*, was also suppressed[152].

3.36. Serbia lists in a footnote[153] "various measures" which were adopted between 1989 and 1990 to prevent the exodus of Serbs from Kosovo and for the return of those who had left. But no information is given about the contents of those measures, nor of their effects in practice. Similarly, only the title of the "Program for realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo" is given at paragraph 231. In fact, these measures were blatantly discriminatory, being designed to benefit Serbs in Kosovo and future Serb migrants to Kosovo, by diverting resources to them.

3.37. Thus, for example, the "Yugoslav Program" of January 1990 retrospectively annulled legally valid sales of real estate by Serbs to Albanians; decreed that the development funds for Kosovo should be concentrated on projects in Serb-majority areas;

[150] Cited in J. Hubrecht, *Kosovo: établir les faits* (2001), pp. 27-28.

[151] N. Malcolm, *Kosovo: A Short History* (1998), pp. 346 and 352.

[152] J. Hubrecht, *Kosovo: établir les faits* (2001), p. 27.

[153] *Serbia*, para. 230.

enjoined that all large-scale investment projects in Kosovo should include an obligation to construct apartments for Serb and Montenegrin workers; called for measures to encourage Kosovo Albanians to move to other parts of Yugoslavia; offered special credits to non-Albanians to settle in Kosovo; and announced that in urban centres in Kosovo, Serbs and Montenegrins would be given priority in the allocation of permits to build houses, and would also be given priority when buying or renting shops, or seeking work permits or bank credits[154].

3.38. The "Program for realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo" was similarly concerned mostly with discriminatory measures in favour of Serb inhabitants and settlers, announcing, for example, that new factories would be built in 30 Serb-majority villages. It also contained the provision that "[a]ll those who have taken part in protest demonstrations will be dismissed from all managerial posts in enterprises and institutions"[155].

3.39. Altogether, 32 laws and more than 470 special decrees of this discriminatory kind were issued in the period 1990-1992[156].

3.40. During the period of Serbian oppression in the 1990s, Kosovo Albanians sought to develop many of the institutions (e.g. schools) that they were denied under the law. The reference to Serbia "tolerating" various aspects of the situation should not be taken to imply that Serbian policy was motivated or characterized by a spirit of "tolerance". Rather, the Serbian authorities made a calculation about the level of "political friction" that would suit them. This "friction" included repressive actions against many thousands of Albanians. In 1999, the Council for the Defense of Human Rights and Freedoms calculated that between March 1989 and December 1997 more than 10,000 Albanians in Kosovo had been victims of physical violence by the authorities, including heavy beatings and torture[157].

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[154] A. Gashi, ed., *The Denial of Human and National Rights of Albanians in Kosova* (1992), pp. 130-134.

[155] J. Hubrecht, *Kosovo: établir les faits* (2001), pp. 19-20.

[156] H. Clark, *Civil Resistance in Kosovo* (2000), pp. 71-72.

[157] J. Hubrecht, *Kosovo: établir les faits* (2001), p. 26.

Education

3.41. *Serbia's assertion that the Serbian authorities "tolerated most of the parallel structures"*[158] must be heavily qualified. Amnesty International reported in 1998 that "[t]he Serbian authorities have systematically harassed those involved in the educational process, including members of the teachers' trade union, teachers, university lecturers, private citizens who have made their homes available for teaching and even pupils themselves. Schools have been broken into and raided, teachers arrested and/or beaten and lessons repeatedly interrupted."[159]

3.42. *Serbia's account of the issue of education begins with the "boycott" following the introduction of new curricula in August 1990*[160]. This approach gives a false impression of the situation, as it fails to mention the events of the previous year. In August 1990, the Serbian Assembly repealed the entire body of educational legislation previously passed by the Assembly of Kosovo, in order to impose a uniform curriculum on the whole of Serbia, with only token concessions to the Albanians, this action was a central part of the Serbian political programme relating to Kosovo (a programme which also involved the closure of the Ministry of Education in Kosovo and of the Pedagogical Institute in July 1990). Any "boycott" of this new program was simply a reaction to the wholesale evisceration of an educational system that had been in place for years to educate students in Kosovo. The suggestion that proposals submitted by the Kosovo Albanian teachers would have been accepted by Belgrade is simply not realistic.

3.43. *The statement that "Kosovo Albanian educators chose to resign from their posts and to establish a parallel educational system"*[161] *also fails to characterize correctly the nature of these developments.* Kosovo Albanian teachers would have preferred to remain in their posts and, where possible, physically in their schools, teaching what had previously been the officially approved curriculum. Yet, during the 1990-1991 school year, schools in many Kosovo towns were closed down, sometimes forcibly, by the authorities: in Podujevë/Podujevo, for example, police used tear gas to close down two

[158] *Serbia*, para. 265.

[159] Amnesty International, *Kosovo: The Evidence* (1998), p. 66.

[160] *Serbia*, para. 267.

[161] *Serbia*, para. 267.

high schools where 4,300 Albanian children were taught by 264 teachers[162]. Then, in the period between January and May 1991, the Serbian authorities ceased to pay the Kosovo Albanian teachers.

3.44. *The claim made by Serbia that "primary and much of secondary education of Kosovo Albanian pupils was substantially funded by the State authorities"*[163] *is very misleading.* In May 1991, the Serbian authorities announced a plan to abolish half of the secondary schools in Kosovo (specifically, in areas where the Albanians formed a large majority). Only 29% of Albanian children leaving primary school would be permitted to go to secondary school, but the plan also specified that the number of places reserved for Serb children would be greater than the total number of Serb children leaving primary school. It was also announced that for the next year, the University of Pristina would admit 1,500 Albanian students and 1,500 Serb students, even though the ratio between these ethnic groups in the population of school-leavers was roughly 9:1, and the previous enrolment of Albanian students had been more than 7,000 per year[164]. Generally, schools were kept "open and running" in cases where there were Serb children being taught in them. In many cases, secondary schools that served Albanian communities were closed down by the authorities. At the start of the 1991-1992 school year, the Serbian authorities barred all Kosovo Albanian children from State schools, both primary and secondary. In the second term of that year, because the Yugoslav Constitution made elementary schooling compulsory, roughly 90% of the primary schools were re-opened to Kosovo Albanians. However, ethnic segregation was strictly maintained, and the Kosovo Albanian classes did not benefit from any public expenditure on teaching, books, equipment, or even heating. Where the Kosovo Albanian children used separate classrooms (as opposed to the same ones in different shifts), all equipment – including, in one recorded case, the window-glass – was removed from those classrooms[165].

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[162] Amnesty International, *Kosovo: The Evidence* (1998), p. 164.

[163] *Serbia*, para. 268.

[164] Amnesty International, *Kosovo: The Evidence* (1998), pp. 124-125 and p. 172; H. Clark, *Civil Resistance in Kosovo* (2000), p. 96.

[165] *H. Clark, Civil Resistance in Kosovo* (2000), p. 97; N Malcolm, *Kosovo: A Short History* (1998), p. 349.

Public health

3.45. *Serbia refers to a "stable" situation in the public health system, in which "the Kosovo Albanian community continued to use the State public health system throughout the period", claiming that there were no "en masse resignations of Kosovo Albanian health care providers"*[166]. In support of this statement, it gives a reference to pp. 25-26 of a report issued by the International Crisis Group in 1998. Serbia's statement seriously misrepresents the contents of that report, which in fact states (at p. 25) that "[i]n July and August 1990, health care in Kosovo came under Serbian 'emergency management' which rapidly led to large-scale sackings. In total, 1,855 Kosovar medical workers were dismissed, of whom 403 were physicians." It continues: "The boycott of the Serbian health care system is almost as comprehensive as that of the educational system," and it notes that "[b]etween 1990 and 1993 Kosovars went to great lengths not to visit Serb doctors, and Kosovar doctors by and large refused to work within the Serbian system which required them to write prescriptions in Cyrillic". The only exception it notes is that Kosovo Albanians were willing to use the Serbian system for consultations with specialists[167].

3.46. The statement that there were no "*en masse* resignations of Kosovo Albanian health care providers" is to be explained by the fact that there were *en masse* dismissals of them instead. As another analysis of this issue puts it:

> "From August 1990 onwards, more than half of the medical staff of Kosovo were dismissed – beginning at the Gynaecological Clinic in the Medical Faculty. As elsewhere, any sign of disloyalty could be a reason for dismissal, including treating demonstrators, offering humanitarian aid to strikers or dismissed workers, or writing in Albanian … In the Medical Faculty, police dragged senior doctors from their offices. Clinics were shut down – 38 in Prishtina alone and many more in towns and villages."[168]

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[166] *Serbia*, para. 269.

[167] International Crisis Group, *Kosovo Spring* (1998), p.25 (available at http://www.crisisgroup.org/library/documents/report_archive).

[168] H. Clark, *Civil Resistance in Kosovo* (2000), p. 106.

Employment

3.47. *Serbia's reference to "publicly-owned companies where Kosovo Albanians continued to work throughout the whole period discussed in this section"*[169] *is misleading*. Those who continued to work were minorities of the former workforces, in some cases very small ones. To give the example of three major industrial sectors, where the industries were all publicly owned: 94% of all Albanian miners were dismissed; 90% of chemical workers; and nearly 60% of metal workers[170].

Departure of Serbs from Kosovo

3.48. *Serbia makes much of the departure of thousands of Serbs from Kosovo since the 1960s, stating that the movement was due to mistreatment by Kosovo Albanians.* In fact, this movement was largely for economic reasons. For example, Serbia refers to a departure of 50,000 Serbs from Kosovo in the 1970s. But in reality during this period there were large flows of people moving from all under-developed parts of Yugoslavia to developed or developing ones. Thanks to the expansion of Belgrade and the industrial development of Serbia, Serbia attracted a higher net immigration, from all parts of Yugoslavia, than any other area. In 1981, there were 112,000 people living in Serbia who had moved from Bosnia-Herzegovina, 111,000 from Croatia, and 50,000 from Macedonia[171]. Overall, the flow of Serbs from Kosovo was a normal part of this trend. An investigation into the entire issue of the Serb "exodus" from Kosovo by the Yugoslav Democratic Initiative in 1990 concluded: "demographic shifts [in Kosovo] were not the result of an unusually large emigration of Serbs but of a surprisingly small emigration of Albanians"[172].

3.49. There was indeed "continued Serbian and Montenegrin emigration … throughout the 1980s"[173], again primarily for economic reasons. Official reports on the reasons for emigration of the 14,921 Serbs who left Kosovo in the period 1983-7 found

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[169] *Serbia*, para. 266.

[170] H. Clark, *Civil Resistance in Kosovo* (2000), p. 76.

[171] N. Malcolm, *Kosovo: A Short History* (1998), p.330.

[172] S. Popović, "A Pattern of Domination", *Balkan War Report*, 1993, pp. 6-7.

[173] *Serbia*, para. 224.

that in 95% of cases the emigrants cited economic or family reasons. In only eleven cases (0.1%) were pressures from Albanians given as the main cause of emigration[174].

3.50. When charging that Kosovo Albanians were responsible for atrocities against Serbs, it is noteworthy that Serbia relies entirely on very general statements[175]. No specific evidence of maltreatment, and no detailed analyses of bodies of evidence (of the sort carried out by the Yugoslav Democratic Initiative) have been put forward.

Serbian atrocities in 1998/1999

3.51. *Serbia's statement that the hostilities between March and September 1998 "led to more than 600 civilian deaths on both sides"* contrives to give an impression of symmetry. However, it is adapted from the text of the Secretary-General's report of 4 September 1998, which said: "An estimated 600 to 700 civilians have been killed in the fighting in Kosovo since March."[176] The great majority of these were Kosovo Albanians.

3.52. *Serbia states that the KLA actions in July 1998 "provoked a fierce reaction from Government forces"*[177]. The "fierce reaction" of Serbia in fact involved killings of Kosovo Albanian civilians, the destruction of Kosovo Albanian civilian homes on a large scale, mostly by arson, and the driving out of Kosovo Albanian civilians *en masse* from the areas where they lived[178].

3.53. Again, *the statement that the increase in refugees and internally displaced persons "affected both sides of the conflict", and that the total number was "280,000, of which 200,000 were internally displaced persons within Kosovo, and 80,000 were located in central Serbia or neighbouring countries*"[179], is potentially misleading. By emphasizing that "both sides" were affected, and singling out "central Serbia" (the destination preferred by Serb refugees and some Roma), it obscures the fact that the great majority of the IDPs

[174] N. Malcolm, *Kosovo: A Short History* (1998), p. 331.

[175] *Serbia*, paras. 221-226.

[176] Dossier No 18.

[177] *Serbia*, para. 319.

[178] See *Kosovo*, paras. 3.47-3.60.

[179] *Serbia*, para. 322.

and refugees were Albanians. These figures are cited from the Secretary-General's report of 3 October 1998, which itself merely summarized a report by the UNHCR[180]. The report by the UNHCR, of 8 September 1998, estimated that 20,000 refugees were in Serbia, 39,628 in Montenegro, 14,000 in Albania, 5,200 in Bosnia, 2,000 in Turkey and 1,000 in Macedonia. Since the majority of those who went to Montenegro were Albanians seeking refuge with the ethnic Albanian population there (including 17,000 who went to the ethnic Albanian town of Ulcinj), it is clear that the majority of the refugees who left Kosovo were Albanian[181].

3.54. *Serbia's description of the violence in Kosovo between Spring 1998 and March 1999 is seriously misleading.* Serbia cites the Secretary-General's report of 30 January 1999 about the growth of violence in Kosovo[182], but fails to mention the most serious example discussed at length in that report, the massacre at Reçak/Račak, where 45 Kosovo Albanian civilians were murdered. The report noted that "[m]any of the dead appeared to have been summarily executed, shot at close range in the head and neck", and that "investigative and forensic efforts in the wake of this massacre have been willfully obstructed by the lack of cooperation by the authorities of the Federal Republic of Yugoslavia"[183].

3.55. Further, *the phrase "unrestrained armed conflict broke out"*[184] gives the impression almost of a natural occurrence taking place after the removal of a "restraint". Yet the atrocities that unfolded were the result of a deliberate policy by armed forces, paramilitaries and police acting under and on behalf of the Serbian and FRY authorities. The statement that "[t]he beginning of the NATO bombing, and intensified clashes between Government forces and the KLA led to massive displacement of Kosovo's population, including more than 800,000 refugees …" is simply wrong. The refugees were not fleeing from the NATO bombing (which was targeted at military and other installations, not at homes), nor were "clashes" between Government forces and the KLA

[180] M. Weller, *The Crisis in Kosovo, 1989-1999* (1999), p. 215.

[181] *Ibid.*, p. 269. The report gives a detailed breakdown of destinations in Montenegro, from which broad deductions can reasonably be made about the ethnic character of the refugees.

[182] *Serbia*, para. 345.

[183] S/1999/99, 30 January 1999, paras. 11-12 [Dossier No. 26].

[184] *Serbia*, para. 351.

the prime reason for the mass exodus from Kosovo. The Serbian authorities went to great lengths to force people from their homes in areas where there was no fighting (e.g. the capital Pristina, where Kosovo Albanian inhabitants were rounded up and expelled in large numbers), and to force them *en masse* to leave Kosovo. While doing this, they confiscated passports and identity cards, and removed number-plates from cars before they were allowed to cross the border. This was clearly designed to make it possible, thereafter, to refuse them re-entry to Kosovo, on the basis that they could not prove that they were Kosovo citizens. In other words, the Serbian authorities drove most of the Kosovo Albanian population from their homes, and drove nearly half of them (the officially recorded figure is 848,100) out of Kosovo, in a deliberate attempt to cause a permanent change in the nature of the population there.

Serbia's current attitude to the past atrocities

3.56. The attitude displayed by Serbia, in its Written Statement, towards the horrific events in Kosovo from 1989 to 1999, culminating in the crimes against humanity, war crimes and human rights violations committed on a massive scale by the Belgrade authorities and security forces[185], is revealing. It confirms what is also clear from the statements of the highest representatives of Serbia, that underlying attitudes among those in power in Belgrade towards Kosovo seem not to be unduly troubled by the treatment of the people of Kosovo during the Milošević era. Such an attitude vividly confirms why the people of Kosovo were not willing to entertain a final status under which Kosovo would remain a part of Serbia.

3.57. Throughout the Written Statement, descriptions are given which reproduce and appear to defend the Milošević regime's own version of events. Thus the constitutional amendments of 1989, coercively and illegally imposed, are described as 'duly adopted'; the facts about the political persecution of Kosovo Albanians are denied; human rights guarantees are cited with no acknowledgement of the fact that they were systematically violated; the situation in education, public health and employment is misrepresented, with an attempt both to minimise the number of dismissals and to suggest that the Kosovo Albanians were themselves responsible for the loss of their jobs; the departures of Serbs

[185] *Kosovo*, paras. 3.23-3.60.

are misrepresented, in ways that echo the propaganda of the Milošević regime at the time; the armed conflict of 1998-1999, and the suffering it caused, are characterized with false suggestions of symmetry; the worst atrocities of the Milošević regime are passed over in silence; and an attempt is made to blame the mass expulsion in 1999 on the NATO bombing, as was done by the Milošević regime at the time.

3.58. There is in Serbia's Written Statement, no real comprehension of the past. On the contrary, the underlying theme is that, since the autumn of 2000, there has been a "new" Serbia; that this new Serbia has nothing to do with the past; and that Serbia's sovereignty over its province of 'Kosovo and Metohija' cannot be put in doubt as a result of past events. Yet from their approach it seems clear that, like their predecessors, the present authorities in Belgrade view Kosovo essentially as territory, not as people that have overwhelmingly rejected rule from Belgrade because of the constant denial of their right of self-determination and massive human rights violations.

V. The Position of Kosovo Serbs from June 1999 to February 2008

3.59. *Serbia wrongly claims that "more than 200,000 Serbs and other non-Albanians fled Kosovo" after 10 June 1999*[186]. This appears to reflect the figure of 229,600 (for refugees from Kosovo in Serbia and Montenegro) put forward by the government of the FRY at the time, but no evidence is supplied to justify this figure. Taken as such, this figure would imply the flight of virtually the entire Serb population of Kosovo. Since it is well known that many thousands of Serbs remained in Kosovo after 1999 (and remain today), Serbia's claim is clearly wrong.

3.60. In a study published in January 2000, six months after the end of the war, the Unites States Committee for Refugees and Immigrants noted:

> "The Yugoslav government says that 229,600 people have been displaced from Kosovo into Serbia-proper (199,600, as of November 26, 1999) and Montenegro (30,000, as of January 28, 2000). This number is, however, open to dispute. The Kosovo Serb National Council claims that there are still about 100,000 Serbs living in Kosovo. Added together, this would be a larger number than the estimated 200,000 Serbs living in Kosovo before the war, casting obvious doubt on the

[186] *Serbia*, paras. 357 and 365.

> accuracy of the count, or of the pre-war estimate. Further confusing the numbers picture is the estimate that up to 50,000 Roma have fled Kosovo as well, and, by some accounts, that up to 25,000 are still living in Kosovo."[187]

Other estimates have placed the number of Serbs who remained in Kosovo a little higher, at approximately 110,000.

3.61. *Serbia, against this evidence, continues to assert that 200,000 Kosovo Serbs left Kosovo in 1999*[188]. The Foreign Minister of Kosovo explained to the Security Council on 17 June 2009:

> "the kind of game that is being played with figures is not helpful. Two hundred thousand Kosovo Serbs, said Minister Jeremic, are still displaced. I have to repeat yet again that according to the last census – which was conducted by the Serbian-imposed authority in Kosovo – the largest number of Serbs ever living in Kosovo was 195,000. Presently in Kosovo, 135,000 Serbs live. I do not know where that 200,000 figure is found."[189]

3.62. While Serbia invokes the authority of the UNHCR for its inflated figures, it must surely be aware that the UNHCR merely reproduced figures given to it by the Serbian authorities. The most detailed study of this issue is the analysis carried out by the European Stability Initiative, an international NGO, in 2004, which presented evidence indicating that roughly 130,000 Serbs were living in Kosovo (as compared with the 195,000 living there in the early 1990s), and commented:

> "The claim that there are 200,000 IDPs from Kosovo in Serbia, representing almost the entire Kosovo Serb population, has become an orthodoxy, even repeated by international officials … The only official figure on displacement of Serbs from Kosovo comes from a registration exercise carried out by the Serbian government in early 2000. The results, published in April 2000, state that there were 187,129 IDPs from Kosovo, of whom 141,396 were Serbs … However, the limited hard information available from within Kosovo paints a very different picture. As we have already pointed out, if one compares the data on the number of Serbs who remain in Kosovo with Yugoslav statistical data from before 1999, the extent of displacement of Serbs from Kosovo is more likely to be in the vicinity of 65,000 …

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[187] US Committee for Refugees and Immigrants, *Reversal of Fortune: Serbia's Refugee Crisis*, 1 January 2000, Refugee Reports, Vol. 21, No. 1 (available at: http://www.unhcr.org/refworld/docid/3c58099b4.html).

[188] See most recently the comments of the Foreign Minister of Serbia in the Security Council debate on 17 June 2009 (provisional verbatim record, sixty-fourth year, 6144th meeting, S/PV.6144, pp. 6 and 24).

[189] *Ibid*, p. 23.

> UNHCR's own documents repeat the results of the Serbian government registration exercise. UNHCR, which operates on the territory of Serbia by invitation of the government, has not carried out an independent investigation. In the fine print of some of its documents, however, it expresses serious doubts about the official figures."[190]

It also cited a UNHCR document of February 2004 which said: "The sum of the estimated number of minorities living in Kosovo, and the number of currently registered IDPs in Serbia and Montenegro, results in a figure that is significantly higher than the minority population that has ever lived in Kosovo."[191]

3.63. *The comparison made by Serbia*[192] *between the human and minority rights situation in Serbia and that in Kosovo since June 1999 is artificial*, as it takes no account of relevant features of the background to these two very different situations. Some Kosovo Serbs have undoubtedly experienced hostility from Kosovo Albanians. This is partly because of the long previous history of Kosovo Albanian suffering at the hands of the Serbian authorities; partly because of the brutal actions of Serbian forces and paramilitaries in 1998-1999, in which some Kosovo Serbs participated; and partly because of the policy pursued by successive Belgrade governments since 1999, which has involved manipulating the Serb minority in Kosovo in order to block, so far as possible, any integration of those Serbs into a functioning Kosovo State.

3.64. *Serbia asserts that the "situation drastically deteriorated for Kosovo Serbs", pointing to the violence that occurred in March 2004*[193]. However, by extracting only a few elements from various reports, and omitting essential details that explain how this situation arose, Serbia gives an inadequate and potentially misleading account of these events. On 16 March 2004 three Albanian children drowned in the river Ibar; a fourth, who survived, claimed that they had been chased into the river by a group of local Serbs. This claim (which later turned out to be false) was reported as fact in news broadcasts,

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[190] European Stability Initiative, "The Lausanne Principle: Multiethnicity, Territory, and the Future of Kosovo's Serbs", 7 June 2004, pp. 18-19 (available at http://www.esiweb.org/pdf/esi_document_id_53.pdf)

[191] UNHCR, *Critical Appraisal of Response Mechanisms Operating in Kosovo for Minority Returns*, Pristina, February 2004, p. 14.

[192] *Serbia*, para. 220.

[193] *Ibid.*, para. 375.

leading to widespread anger in the Kosovo Albanian population. When Kosovo Albanians gathered to demonstrate at the end of the bridge in the nearby city of Mitrovica on 17 March 2004, Serbs gathered to oppose them on the other side of the bridge; shooting broke out, in which six Kosovo Albanians and two Kosovo Serbs were killed. After this, a series of demonstrations and violent actions against Kosovo Serbs took place in other parts of Kosovo. Of the 19 who died, 11 were Kosovo Albanians.

3.65. Serbia presents quotations from Nexhat Daci, the then Speaker of the Kosovo Assembly, and Hashim Thaçi, the present Prime Minister of Kosovo, describing them as having "publicly supported" the violence against the Serbs in March 2004. This is grossly misleading. On 18 March 2004 Nexhat Daci was a signatory (with President Ibrahim Rugova, Prime Minister Bajram Rexhepi, and others) to a joint public statement that said:

> "There is no excuse for violence and it must stop immediately. Those who are engaging in violence are betraying all the people of Kosovo. The progress of the last few years is in jeopardy and with it prospects for a better future for everyone. We, the leaders of Kosovo, unite in denouncing those who practice violence."[194]

Similarly, it is highly misleading to present Hashim Thaçi's comments as an example of "Kosovo Albanian politicians [who] publicly supported the violence". On 20 March Mr. Thaçi issued a strong public statement, including the following: "those who set fire to Serb houses and to Orthodox churches are nothing more than criminals, who cannot be tolerated. Kosovo does not just belong to the Albanians"[195].

3.66. To summarize the position of Serbs and other non-Albanians in Kosovo since 1999[196]:

(a) Even though, since June 1999, crimes have been committed against members of the Serb community, these have for the most part been individual and isolated, with the exception of the violence in March 2004. Two important points should be noted. First, the number of inter-ethnic crimes in Kosovo has drastically dropped over the ten years

[194] Human Rights Watch, *Failure to Protect: Anti-minority Violence in Kosovo, March 2004*, (report issued 25 July 2004), fn. 171.

[195] *Ibid.*, fn. 174.

[196] *Serbia*, paras. 365-387.

since 1999. In particular, the crimes that happened during the past two years (even between different communities) were ordinary crimes that mostly related to personal problems between individuals, not crimes of an inter-ethnic nature. Second, the Government of Kosovo has consistently condemned enter-ethnic crime[197], and has put in place measures to ensure that all persons in Kosovo can live in freedom and without fear. These measures are supported by the strong protections set out in the Constitution of the Republic of Kosovo, which came into force in June 2008.

(b) The acts of violence committed against Serbs during these years have been the acts of individuals; they have not been organized by the Kosovo authorities, and have not formed part of a State policy. This strongly contrasts with the maltreatment of the Kosovo Albanians in the previous decade, 1989-1999, when the State policy of Serbia and the FRY was discriminatory, and violence and other forms of maltreatment were systematically applied by the organs of the State.

(c) While the Government of Serbia complains that the Serbs in Kosovo are not enabled to lead normal lives, Serbia is systematically working to prevent their integration into the legal structures, political structures, public services, etc., of Kosovo, by instituting boycotts, creating and funding parallel structures, and putting pressure (including threats of the withdrawal of pension payments) on those who might otherwise be willing to integrate with the structures of the Kosovo. This policy not only has a negative effect on the integration of the Serbs; it also contributes to distrust or even hostility on the part of ordinary Kosovo Albanians, who are thereby led to regard their Serb neighbours as instruments of a hostile Serbian policy. Despite direct and indirect pressure from Serbia, more and more Kosovo Serbs continue to cooperate and participate with the Kosovo institutions.

[197] As recently as 23 March 2009, the Foreign Minister of Kosovo said in the Security Council "I will start by once again condemning, on behalf of the Republic of Kosovo, the events of 17 March 2004. I invite the Council's attention to the statement made by the Government of the Republic of Kosovo on 17 March this year." (Security Council, provisional verbatim record, sixty-fourth year, 6079th meeting, S/PV.6079, p. 24).

PART III

THE LAW

CHAPTER IV

THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE ANY APPLICABLE RULE OF GENERAL INTERNATIONAL LAW

4.01. In its Written Statement, Serbia argues that recognizing the newly created situation on the ground would constitute a violation of general international law by recognizing States[198]. It asserts that "were the international community to accept as proposed the UDI by the provisional institutions of self-government of Kosovo a radical re-orientation of international law would in effect be proposed which would significantly undermine the principle of the stability of boundaries"[199] and that "the obligation upon all States is not simply to avoid trespassing across international borders, but to acknowledge and positively protect the territorial composition of other States"[200].

4.02. This, however, is not the issue in the present proceedings. As underlined in Chapter I above[201], and as Serbia itself has recognized[202], the only question before the Court is the conformity with international law of the Declaration of Independence of 17 February 2008. The Court is not called upon to pronounce on the legality or the consequences of recognitions of the Republic of Kosovo as a State. The Court is only called upon to pronounce on the question of whether the Declaration of Independence was contrary to any rule of international law.

4.03. The fundamental point is that international law does not address the legality of declarations of independence[203]. While such declarations may well violate the internal law of a State, as a matter of international law the issuance of a declaration of independence is merely an element in the factual process of the creation of a State. International law only

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[198] See also *Argentina*, para. 112; *Romania*, para. 109; *Venezuela*, para. 5.

[199] *Serbia*, para. 427.

[200] *Ibid.*, para. 424.

[201] See paras. 1.18-1.21 above.

[202] *Serbia*, para. 19.

[203] *Kosovo*, para. 8.07-8.37; *Austria*, paras. 22 and 24; *Germany*, p. 27; *United Kingdom*, paras. 5.2-5.7.

takes account of the existence of States as subjects of the international legal order[204]. The creation of a State is a matter of fact, not of law[205]. As Professor Malcolm Shaw rightly underlined, "[t]he process of secession is probably best dealt with in international law within the framework of a process of claim, effective control and international recognition"[206].

4.04. The absence of rules of international law concerning declarations of independence has been stressed by most of the States that have submitted written statements. Nevertheless, other States have advocated that, for various reasons, general international law precludes Kosovo's declaration of independence. In particular, two reasons have been addressed in depth by several States, which require further response in this Chapter. First, the principle of sovereignty and territorial integrity does not preclude the issuance of a declaration of independence, as argued by some States[207], whether considered generally or in the context of the preambular reference in Resolution 1244 **(Section I)**. Second, though the right of self-determination need not be addressed when answering the question now before the Court, that right certainly is available to the people of Kosovo given the circumstances that preceded the issuance of Kosovo's Declaration of Independence **(Section II)**.

I. The Principle of "Sovereignty and Territorial Integrity" under General International Law did not Preclude the Issuance of the Declaration of Independence

4.05. The principle of sovereignty and territorial integrity is widely recognized in numerous international instruments, especially Article 2, paragraph 4, of the United Nations Charter, and in the jurisprudence of the Court[208]. Kosovo does not dispute the

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[204] A. Pellet, "Le droit international à l'aube du XXI[ème] siècle", 1 *Bancaja Euromediterranean Courses of International Law* 55 (1997). See also P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)* (7th ed., 2002), p. 407.

[205] G. Abi-Saab, "Conclusion", in M. G. Kohen, *Secession: International Law Perspectives* (2006), p. 470.

[206] *International Law* (6th ed., 2008), p. 523.

[207] *Argentina*, paras. 121-122; *Azerbaijan*, para. 27; *Brazil*, p. 2; *Cyprus*, paras. 88-89; *Romania*, para. 109; *Russian Federation*, para. 76; *Serbia*, paras. 498-524; *Spain*, para. 55; *Venezuela*, para. 4.

[208] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, *Merits*, *Judgment*, *I.CJ. Reports 1949*, p. 35; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *Judgment*, *I.C.J. Reports 1986*, p. 111, para. 213. Se also *ibid.*, p. 128, paras. 251 and 252

importance of the principle; indeed, the principle was accepted as part of Kosovo's international obligations in the Declaration of Independence itself:

> "With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations."[209]

A. The Principle of Sovereignty and Territorial Integrity is Addressed Exclusively to States and is not Concerned with the Issuance of Declarations of Independence

4.06. The authors of the Declaration of Independence in no way violated the principle of sovereignty and territorial integrity, as recognized in contemporary international law. That principle is designed and shaped as a protection of the territory of a State against other States, in particular against outside interference by the threat or use of force. The principle simply does not apply to situations that occur only within States and does not, in particular, prevent the authors of a declaration of independence from issuing such a declaration. By definition, at the time when they issue the declaration such authors do not act on behalf of a State but of a people. Nor does the issuance of a declaration of independence *per se* involve a threat or use of force in international relations prohibited by Article 2, paragraph 4, of the Charter. Hence the principle of sovereignty and territorial integrity cannot operate to preclude declarations of independence being issued on behalf of peoples.

4.07. Article 2, paragraph 4, of the United Nations Charter embodies this State-to-State character of the principle of sovereignty and territorial integrity:

[209] *Kosovo*, Annex 1.

> "All *Members* 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."[210]

It is clear from its wording that the principle in Article 2, paragraph 4, of the Charter prohibits only the threat or use of force by a State in its international relations, i.e. towards the territory or political independence of another State. Article 2, paragraph 4, which reflects the customary international law principle of the prohibition of the use of force and the territorial integrity of States[211], consequently has no application to the actions of the authors of the Declaration of Independence on 17 February 2008.

4.08. The list of regional instruments identified by Serbia[212] adds nothing to the argument. Serbia points out in its Written Statement that this "summary of some of the regional treaties embedding the principle of territorial integrity is sufficient to demonstrate the extent to which this principle forms the bedrock of international relations across the international community, covering all major regions, cultures and civilizations"[213]. However, it does not establish that these instruments prohibit the issuance of declarations of independence. As is clear from their text, all of these instruments only concern State-to-State relations, and are confined to reaffirming the principle as set forth in the United Nations Charter and customary international law. For example, Principle IV of the Declaration on Principles Guiding Relations between Participating States contained in the 1975 Helsinki Final Act makes clear that

> "*The participating States* will respect the territorial integrity of each of the participating States."[214]

4.09. Some States attempt, in their Written Statements, to apply the principle of sovereignty and territorial integrity to the authors of the Declaration of Independence by arguing that the principle "imposes an *erga omnes* obligation with regard to its

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[210] Emphasis added.

[211] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *Judgment*, *I.C.J. Reports 1986*, pp. 99-101, paras. 188-190.

[212] *Serbia*, paras. 477-491.

[213] *Ibid.*, para. 491.

[214] Dossier No. 217 (emphasis added).

observance"[215]. However, this reliance on *erga omnes* does not establish that the principle binds non-States. As the Court explained in its *Barcelona Traction* judgment:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[216]

The Court was clearly only referring to obligations owed by States to States. Moreover, the qualification of an obligation as *erga omnes* does not broaden the circle of those bound by the obligation, but only those to whom the obligation is owed.

4.10. Even Serbia initially seems to accept that the principle of sovereignty and territorial integrity is limited to State-to-State relations[217]; but it tries by a long enumeration of international instruments, especially General Assembly and Security Council[218] resolutions, to demonstrate that it "is not so limited"[217]. However, this "demonstration" is unpersuasive, in part because most of these instruments are not themselves legally binding upon States (let alone upon non-States) and in part because, even if they reflect customary international law, by their terms they do not support Serbia's conclusions. For example, the paragraph of General Assembly resolution 1514 (XV) of 14 December 1960, cited by Serbia[219], is simply not relevant to the present question; it concerns the particular situation of decolonization and is speaking to the right of a people to the integrity of their national territory as against external influences. Moreover, while resolution 1514 (XV) may perhaps be read as broadening the beneficiaries of the principle of territorial integrity so as to include not just the State but the people of the State, it says nothing about a duty of such people – even of peoples subject to alien subjugation – to respect the principle.

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[215] *Romania*, para. 80.

[216] *Barcelona Traction, Light and Power Company, Limited*, *Judgment*, *I.C.J. Reports 1970*, p. 32, para. 33.

[217] *Serbia*, para. 431.

[218] See paras. 4.21-4.29 below.

[219] *Serbia*, para. 431-432.

4.11. All other examples listed by Serbia[220] are equally unpersuasive in establishing that the authors of the Declaration of Independence were bound by the principle of sovereignty and territorial integrity under international law.

– General Assembly resolution 2625 (XXV) of 24 October 1970 embodies, like Article 2, paragraph 4, of the Charter, only a State-to-State obligation to respect the territorial integrity of a State. The particular provision cited by Serbia reads: "Every *State* shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country" (emphasis added).

– General Assembly resolution 41/128 of 4 December 1986 (Declaration on the Right to Development) contains a State-to-State obligation concerning sovereignty and territorial integrity. It provides, in its Article 5, that "*States* shall take resolute steps to eliminate (…) aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity …" (emphasis added).

– The Guiding Principles on Humanitarian Assistance annexed to General Assembly resolution 48/192 of 19 December 1991 do not address the issue of declarations of independence, but instead the very different question of "strengthening of the coordination of emergency humanitarian assistance of the United Nations system". The citation by Serbia concerns the need for consent of the affected country to the provision of humanitarian assistance from outside the State.

– General Assembly resolution 52/112 "on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination"[221] recalls Article 2, paragraph 4, of the Charter, without purporting to modify or broaden it in any way.

– The Millennium Declaration and the World Summit Outcome simply reaffirm the principle enshrined under Article 2, paragraph 4, of the United Nations Charter, and do not purport to modify or broaden it in any way.

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[220] *Serbia*, para. 433-436. It should be noted that many of the General Assembly resolutions cited by Serbia were adopted over negative votes.

[221] Adopted by 113 votes to 18, with 41 abstentions (General Assembly, Official Records, fifty-second session, 70th plenary meeting, 12 December 1997, A/52/PV.70, pp. 10-11).

– Article 46 (1) of the United Nations Declaration on the Rights of Indigenous Peoples of 7 September 2007 also does not help Serbia[222]. It states that

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

By its terms, this Declaration is simply stating that nothing within it implies a right under international law for peoples or persons to take action to dismember or impair the territorial integrity or political unity of a State. The Declaration – which of course itself is not legally binding, and which was adopted by vote in the General Assembly[223] – expresses no view on whether such a right already exists in international law and certainly does not articulate a prohibition on the conduct of peoples or persons. Indeed, it leaves international law in the same position as it was prior to the issuance of the Declaration.

Consequently, the instruments relied upon by Serbia do not demonstrate that the principle of sovereignty and territorial integrity extends beyond inter-State relations. Indeed, for the most part they confirm that it does not.

4.12. The correlative principle of stability of international borders, like the basic principle of sovereignty and territorial integrity, only applies as against forcible modification by other States. It does not protect a State against dissolution, but constitutes a useful means, under international law, to limit the breakup of a State to its own territory, without modifications of borders of neighbouring States. As the Badinter Arbitration Commission underlined in its Opinion No. 3:

> "All external frontiers must be respected in line with the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki

[222] General Assembly resolution 61/295, 13 September 2007. See *Serbia*, para. 437.

[223] General Assembly, Official Records, sixty-first session, 107th plenary meeting, 13 September 2007, A/61/PV.107, p. 19.

> Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties."[224]

This does not imply that the external frontiers of the SFRY had to remain the external frontiers of the FRY. Rather the principle of stability of borders is directed at maintaining intact the border between, for example, Kosovo and Albania, as it existed before the independence of Kosovo. Furthermore, whereas a State can complain to another State about the violation of its external frontiers, it cannot do so, under international law, against its own citizens. As long as no other State is injured, international law does not preclude the redistribution of the external borders between the preexisting State and the newly created State. Even if the principle of stability of international boarders were binding upon the authors of the Declaration of Independence, which is not the case, it is clear that this principle has not been infringed in any way. Kosovo respects faithfully the international frontiers with its neighbours as recognized in the Declaration of Independence itself[225].

4.13. In summary, the principle of sovereignty and territorial integrity as enshrined in general international law does not address a declaration of independence like that issued on 17 February 2008. Rather, the principle protects States against the coercive action and interference of other States. It does not preclude the issuance of a declaration of independence. This has been made clear by States in their Written Statements[226].

B. THE PREAMBULAR REFERENCE IN RESOLUTION 1244 (1999) TO "SOVEREIGNTY AND TERRITORIAL INTEGRITY" DID NOT PROHIBIT THE DECLARATION OF INDEPENDENCE

4.14. The preambular reference in Security Council resolution 1244 (1999) to the principle of sovereignty and territorial integrity of Serbia did not change the State-to-State character of the principle, nor did it prevent the democratically elected

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[224] *European Journal of International Law*, vol. 3, 1992, p. 185.

[225] See para. 4.05 above.

[226] *Austria*, para. 37; *Estonia*, p. 4; *France*, paras. 2.6-2.8; *Ireland*, para. 18; *Switzerland*, para. 55; *United Kingdom*, paras. 5.8-5.11; *United States of America*, p. 69.

representatives of the people of Kosovo from issuing the Declaration of Independence on 17 February 2008[227].

1. The Text of the Clause

4.15. In order to sustain the proposition that resolution 1244 (1999) prohibited the Declaration of Independence of 17 February 2008, Serbia and some other States rely heavily upon a single clause in the preamble of the resolution[228], where the Security Council says it is:

> "*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2 …"[229]

This preambular paragraph, obviously, is not part of the operative part of the resolution[230]. As such, it is rather extraordinary for Serbia and others to regard this clause, standing alone, as a critical factor for whether the people of Kosovo could pursue independence, especially in light of the events and negotiations that unfolded in the period preceding the adoption of resolution 1244 (1999)[231].

4.16. Leaving aside its presence in the preamble, the language of the clause says nothing about a declaration of independence, nor is it formulated in terms of a prohibition of any kind[232]. Indeed, by its terms the clause does not purport to establish a new legal obligation; it is "reaffirming" a pre-existing commitment of United Nations Member States[233]. That commitment relates not to the "sovereignty and territorial integrity" of the FRY as a general matter; rather, the commitment is "as set out in the Helsinki Final Act

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[227] For the discussion of the operative text of resolution 1244 (1999) as it relates to the question before the Court, see Chapter V below.

[228] *Serbia*, paras. 776-780 and paras. 928-940; *Cyprus*, para. 92; *Spain*, pp. 24-25; *Russian Federation*, para. 42 and paras. 54-58.

[229] Dossier No. 34.

[230] *France*, para. 2.21; *United Kingdom*, para. 6.12(1) ("It was a *considerandum*, not a guarantee.")

[231] See paras. 5.05-5.18 below.

[232] See *Kosovo*, paras. 9.29-9.36.

[233] See *Czech Republic*, p. 9 ("the preambular part of UNSCR 1244 does not create any new obligations under international law for the Member States or the" PISG); *Denmark*, pp. 10-11 ("the reference was concerned with the commitment of UN Member States, as opposed to the people of Kosovo …").

and annex 2" of the resolution. That annex relates solely to the interim period[234], and hence this clause is only reaffirming a commitment of Member States for the interim period prior to resolution of Kosovo's final status (as some States concede[235]). As for the Helsinki Final Act, the relevant principles in that instrument in part reveal a concern with the prevention of forcible action by one State against another[236], but also with the promotion of human rights and democracy in Europe. As such, this commitment is best understood as focused on the interim period (and therefore not of relevance to decisions on the final status of Kosovo) and as cognizant of the importance of balancing during that period values of territorial integrity and human rights.

4.17. Moreover, even if – contrary to its terms – this preambular clause were viewed as an open-ended commitment in 1999 to FRY "sovereignty and territorial integrity", that commitment must be understood as simply reflecting the view of Member States that coercive force by States to alter FRY territory was not acceptable, since that is the meaning ascribed to the principle of sovereignty and territorial integrity[237]. Had the Security Council intended to link the aspirations of the Kosovo people in some fashion to the concept of territorial integrity, one would expect language to that effect in the preamble, and yet none exists[238]. As such, the commitment expressed in the preamble of resolution 1244 (1999) has no application to a peaceable declaration of independence by the representatives of the people of Kosovo.

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[234] See *Kosovo*, para. 9.30; *Austria*, para. 23 ("If there were an obligation to respect the territorial integrity of the FRY it would, first, apply only for a limited period of time, namely the interim period, and second, apply only to member states of the UN."); *France*, paras. 2.28 and 2.32 ("Les mêmes annexes ne disaient absolument rien en revanche du statut définitif du territoire."); *Germany*, p. 38 ("all references to Yugoslavia's territorial integrity occur in the context of the interim framework, and not in that of any final settlement"); Poland Submission, para. 7.2 ("that reference concerns solely the provisional phase of the UN administration in Kosovo"); *Ireland*, para. 24 (the "annexes confirm only that, pending a final settlement, an 'interim political framework' shall afford substantial self-governance for Kosovo and taken into account the territorial integrity of the Federal Republic of Yugoslavia"); *Norway*, para. 16 ("the wording of inter alia Annex 2 of resolution 1244 concerns only the interim period of international administration and not the final status, which was left open.")

[235] See, e.g., *Romania*, para. 46 ("the objective of UNSC Resolution 1244 is not to find a long-term solution to the Kosovo situation but to provide for [a] short-term and medium-term solution to the crisis following the principles contained in annexes 1 and 2 to the Resolution.").

[236] See para. 4.08 above.

[237] See paras. 4.06-4.13 above.

[238] For example, in the context of the interim period envisaged by the Rambouillet Interim Agreement, Article 1(2) expressly stated that "national communities … shall not use their additional rights to endanger … the sovereignty and territorial integrity of the Federal Republic of Yugoslavia …" No such language was used in the preamble of resolution 1244 (1999).

4.18. Finally, even if, by some extraordinary alchemy, this preambular clause were interpreted as a broad political commitment in 1999 to unchanging FRY territorial boundaries, that commitment cannot be regarded as still viable in 2008. Any such commitment in 1999 to the territory and borders comprising the FRY at that time was a commitment that saw Kosovo as part of a tripartite federal relationship within the FRY, in which political power could be balanced among the Federal authorities[239]. When the Parliament of Montenegro declared independence on 3 June 2006 and Montenegro left the State Union, it altered more than the geographic territory of the federal State and its international borders; it removed the last vestiges of Federal structure, thereby radically altering the premises of any such commitment. Serbia itself acknowledged that this was an issue when, in 2002, it included in the Constitutional Charter of the State Union of Serbia and Montenegro a provision stating that "[s]hould Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as a successor"[240]. Serbia and Montenegro properly concluded that any preambular "commitment to unchanging FRY boundaries" could not possibly continue automatically after Montenegro broke away. Yet Serbia and Montenegro could not unilaterally decide that any such commitment would now "concern and apply" to a radically different State, for those two states had no ability to alter the commitment of UN Member States (or of the Security Council)[241]. In short, even if this clause is given the extraordinary interpretation of committing Member States to unchanging FRY territorial borders as of 1999, it simply cannot be assumed that the same commitment continued after 2006[242].

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[239] *Kosovo*, paras. 9.32-9.33. Concern with this balancing may be seen even in the interim agreement developed at Rambouillet, where the proposed Interim Constitution envisaged certain powers being accorded to the FRY, certain powers being accorded to Serbia, and certain powers being accorded to Kosovo. Such carefully negotiated divisions of authority would have no place in a state in which FRY authority no longer exists. See Rambouillet Accords, Chapter 1, Article 1.

[240] Constitutional Charter of the State Union of Serbia and Montenegro, Article 60.

[241] That the Republic of Serbia continues the legal personality of the FRY does not change this conclusion. While Serbia may be viewed as having retained the international rights and obligations of the Serbia and Montenegro, which in turn retained the rights and obligations of the FRY, this does not mean that any commitment of other States expressed in 1999 with respect to the FRY automatically remained the same after the fragmentation of what had been the FRY.

[242] *United States*, pp. 74-78.

2. Statements Made when the Clause was Adopted

4.19. Serbia and some other States attempt to look past the actual language of the preamble to find support for their position in the statements made at the Security Council meeting when the resolution was adopted[243]. Yet none of the statements made by members of the Security Council at the meeting indicated that the representatives of Kosovo were precluded from declaring independence. Further, none of the statements made at the meeting indicated that Kosovo could not ultimately emerge as an independent State. On the contrary, certain members strongly signaled that the aspirations of the people of Kosovo were central to a final status settlement. The representative of Malaysia noted:

> "With regard to the responsibility of the international civil presence, my delegation underscores the paramount importance of the proposed interim administration for Kosovo, which should pave the way for an early settlement of the future status of Kosovo, taking fully into account the political framework proposed in the Rambouillet accords. The root cause of the crisis is clear. The Secretary-General himself stated, in his address to the High-Level Meeting on the crisis in the Balkans, held in Geneva on 14 May 1999:
>
> > 'Before there was a humanitarian catastrophe in Kosovo, there was a human rights catastrophe. Before there was a human rights catastrophe, there was a political catastrophe: the deliberate, systematic and violent disenfranchisement of the Kosovar Albanian people.'
>
> This clearly demonstrates the need to ensure one very fundamental element in the peace settlement: the fulfilment of the legitimate aspirations and expectations of the Kosovar Albanian people, the majority inhabitants of Kosovo. Any departure from this fundamental point will risk unravelling the entire exercise which is being painstakingly put together."[244]

4.20. Certainly some members of the Council highlighted in their statements concern for FRY sovereignty and territorial integrity. At the same time, other members acknowledged that the Council needed to balance concerns for sovereignty and territorial integrity with concern for human rights and threats to the peace. For example, the representative of Slovenia stated:

> "Success in this specific case would give an example of the balance between the considerations of State sovereignty on the one hand and humanity and international

[243] See, e.g., *Serbia*, paras. 691-66; *Spain*, pp. 26-27.

[244] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 16 [Dossier No. 33].

> order on the other. It is true that international organizations must be careful in all their efforts and that they must respect international law, including the principle of the sovereignty of States. However, it is at least equally clear that State sovereignty is not absolute and that it cannot be used as a tool of denial of humanity resulting in threats to peace. While the situation in Kosovo last year and early this year escalated to a serious threat to peace, there is now a genuine opportunity to reverse the situation and to create the balance necessary for political stability and durable peace for the future."[245]

Finally, Serbia itself did not regard the preambular language to resolution 1244 as precluding the independence of Kosovo. In fact, Serbia stated the exact opposite, by asking Security Council members before they voted to *oppose* the resolution (including its preamble) so as to "stand up in defence … of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia …"[246]. Serbia entirely understood that this particular preambular reference was no guarantee against the possibility of the issuance of a declaration of independence, no more than the general international law principle of sovereignty and territorial integrity.

3. Comparison with Clauses in other Resolutions

4.21. Serbia[247], along with Iran[248] and Argentina[249], point to other Security Council resolutions concerning internal conflicts that reaffirm the territorial integrity of the State concerned. Even if the Security Council could legally impose an obligation on non-States, which is far from established[250], these examples do not indicate that the principle of sovereignty and territorial integrity applies to the issuing of declarations of independence.

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[245] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 11 [Dossier No. 33]; see also remarks by Netherlands, *ibid.*, p. 12 ("The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens."); remarks by Canada, *ibid.*, pp. 13-14 ("We wholeheartedly agree with the Ambassador of the Netherlands that the tensions in the United Nations Charter between state sovereignty on the one hand and the promotion of international peace and security on the other must be more readily reconciled when internal conflicts become internationalized, as in the case of Kosovo.")

[246] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 6 [Dossier No. 33].

[247] *Serbia*, paras. 440-475.

[248] *Iran*, para. 3.2.

[249] *Argentina*, paras. 77-80.

[250] See paras. 5.67-5.74 below.

All the references made by Serbia relate to internal *armed* conflicts: Bosnia and Herzegovina, Croatia, Democratic Republic of Congo, Georgia, Somalia, and Sudan. The situation of the peaceful accession to independence by the people of Kosovo can hardly be compared to those examples.

4.22. Furthermore, Serbia fails to note that in most of those cases, the sovereignty and territorial integrity of the State was endangered primarily by external assistance. To comment only on one case that Serbia brings up: the crisis in Bosnia and Herzegovina was not primarily internal in character, as Serbia is well aware. The calls made by the Security Council relating to the territorial integrity of the new State were essentially directed to the Federal Republic of Yugoslavia. As the Court recalled in 2007:

> "It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993))."[251]

4.23. Moreover, if the clauses on "sovereignty and territorial integrity" in Security Council resolutions relating to Bosnia and Herzegovina are relevant to the permissibility of Kosovo's Declaration of Independence, it must be noted that the same clause has been included in resolutions on Bosnia and Herzegovina *even after* Kosovo's Declaration of Independence with the support of several States that have recognized Kosovo. For example, in resolution 1845 (2008), nine members of the Security Council that had recognized Kosovo – Belgium, Burkina Faso, Costa Rica, Croatia, France, Italy, Panama, United Kingdom, and United States – had no difficulty supporting language reaffirming the Security Council's commitment "to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders". In other words, those States clearly do not regard the commitment expressed in those resolutions as precluding a Declaration of Independence by the representatives of the people of Kosovo.

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[251] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Merits*, *Judgment*, para. 386.

4.24. Finally, if comparisons are to be made with Security Council resolutions unrelated to Kosovo, then the most relevant comparison is between the preamble of resolution 1244 (1999) and the preamble or operative part of Security Council resolutions that expressly address whether particular entities should remain a part of an existing State, especially those relating to the Balkans. In 1992, the Security Council adopted a resolution in the context of Bosnia and Herzegovina in which it directly and expressly addressed the possibility of the issuance of a declaration of independence that would promote an independent State of Republika Srpska. Security Council resolution 787 (1992) stated in the operative part:

> "*Strongly reaffirms* its call on all parties and others concerned to respect strictly the territorial integrity of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted …"[252].

By contrast, in resolution 1244 (1999), the Council made no statement regarding a unilateral declaration by Kosovo Albanian authorities or entities.

4.25. Similarly, the Security Council included in the preamble of its resolution 1037 (1996) on Croatia a clause that directly and expressly addressed the status of certain territories in that country:

> "*Reaffirming* once again its commitment to the independence, sovereignty and territorial integrity of the Republic of Croatia and emphasizing in this regard that the territories of Eastern Slavonia, Baranja and Western Sirmium are integral parts of the Republic of Croatia …"[253].

By contrast, in resolution 1244 (1999), the Council made no statement indicating that Kosovo is an integral part of the FRY or of Serbia.

4.26. Moreover, the Security Council included in Security Council resolutions contemporaneous with resolution 1244 (1999) language that clearly indicated a position on secession. In the same month of June 1999, the Council adopted a resolution on Cyprus in which it stated in the operative part:

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[252] Security Council resolution 787 (1992), para. 3.

[253] Security Council resolution 1037 (1996), preamble. In its Written Statement, Serbia quotes the first half of this provision on "territorial integrity" but redacts the second half on "integral part" (*Serbia*, para. 793).

> "*Reaffirms* its position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession"[254].

Yet in resolution 1244 (1999), no statements of any kind were present indicating that a political settlement on Kosovo must be based on a FRY with a single sovereignty and international personality or that the political settlement must exclude secession.

4.27. In two resolutions concerning the situation unfolding in Georgia in the first half of 1999, the Council called for "settlement on the political status of Abkhazia *within the State of Georgia*"[255]. Through its President, the Council had also previously issued statements relating to Georgia reflecting its view on a declaration of independence:

> "The Security Council has received with deep concern a report from the Secretariat concerning a statement of 26 November 1994 attributed to the Supreme Soviet of Abkhazia, Republic of Georgia. It believes that *any unilateral act purported to establish a sovereign Abkhaz entity would violate the commitments assumed by the Abkhaz side* to seek a comprehensive political settlement of the Georgian-Abkhaz conflict."[256]

4.28. Such resolutions and statements, of course, were well known to the Council at the time of the adoption of resolution 1244 (1999) in June 1999, as was the aspiration of the people of Kosovo for independence. Yet in neither the preamble nor the operative part of resolution 1244 (1999) did the Security Council repeat, *mutatis mutandis*, such language so as to reject prospectively a declaration of independence by Kosovo's leaders or to declare that Kosovo was and must remain an integral part of the FRY. Nor did the Council's President issue any statement to that effect. As stressed by the United Kingdom, "when the Security Council intends to create an explicit guarantee or prohibition, or an

[254] Security Council resolution 1251 (1991), 29 June 1999, para. 11.

[255] Security Council resolution 1225 (1999), 28 January 1999, para. 3; Security Council resolution 1255 (1999), 30 July 1999, para. 5 (emphasis added).

[256] S/PRST/1994/78 (emphasis added).

obligation of non-recognition consequent on such a guarantee, it knows how to do so and it does so explicitly, not in a preamble"[257].

4.29. Moreover, even in the context of these other resolutions and statements, the Security Council did not proclaim a declaration of independence unlawful under international law; rather, it simply indicated that the Council would not accept such an act or that the act would violate political commitments undertaken by the relevant entity[258]. Had the Council intended to declare unacceptable a Kosovo declaration of independence, or the issuance of such a declaration without FRY, Serbian, or Security Council consent, the Council was fully capable of saying as much, rather than masking its position in a preamble through reliance on a general reference to "sovereignty and territorial integrity". Yet it did not, leading inescapably to a conclusion that the Council had no such intention.

4.30. In conclusion, the international law principle of sovereignty and territorial integrity speaks to the obligation of States to refrain from the use of coercion against other States. As such, the authors of the Declaration of Independence, who were not a State, and who did not use force when issuing their Declaration, cannot be regarded as having violated the principle of sovereignty and territorial integrity under international law. The reference to the "sovereignty and territorial integrity" contained in the preamble of Security Council resolution 1244 (1999) did not change the legal position and did not prevent the issuance of a declaration of independence.

II. The People of Kosovo were Entitled to Exercise their Right of Self-Determination by Declaring Independence through their Elected Representatives

4.31. Kosovo explained in its first Written Contribution[259] that, given the specific question put to the Court by the General Assembly, it is not necessary to show that the authors of the Declaration of Independence of 17 February 2008 were entitled, under some rule of international law, to issue the Declaration. In order to assess the conformity of the Declaration with international law, it is sufficient to find that there is no rule of

[257] *United Kingdom*, para. 6.12 (4).

[258] *Kosovo*, para. 8.18. See also paras. 5.67-5.70 below.

[259] *Ibid.*, paras. 8.38-8.41.

international law prohibiting or preventing the authors from adopting the Declaration. It is not necessary to demonstrate that there are rules of international law entitling the authors of the Declaration of Independence to issue the Declaration.

4.32. Many States, nevertheless, commented, sometimes at length, on the question of whether the people of Kosovo had a right of self-determination. Kosovo therefore considers it necessary to deal briefly with this issue, while still maintaining that this point need not be reached by the Court in order to respond to the question contained in General Assembly resolution 63/3.

4.33. The present section, after discussing some general aspects concerning the right of self-determination under international law (A), demonstrates that the people of Kosovo constitute a self-determination unit and were entitled to declare independence through their democratically elected representatives given the massive human rights' violations perpetrated and the systematical denial of the right of self-determination by the FRY/ Serbia (B). As stated in Kosovo's first Written Contribution, there can be no doubt that in the circumstances, the people of Kosovo were entitled to the right of self-determination[260].

A. THE RIGHT OF SELF-DETERMINATION UNDER INTERNATIONAL LAW

4.34. The existence of the right of self-determination as such is not disputed by those States that have submitted written statements. Indeed, the right is firmly established in contemporary international law as expressed, inter alia, in the United Nations Charter, in relevant General Assembly resolutions, and in the Court's case law:

> "The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara*, *Advisory Opinion*, *I.C.J.*

[260] *Kosovo*, para. 8.40.

Reports 1975, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law."[261]

4.35. In addition, it is also expressly recognized by Article 1 of the 1966 Covenants that "*all* peoples have the right of self-determination"[262]. Consequently, this right does not apply exclusively in the context of decolonization[263]. While Serbia seems to be in broad agreement with this proposition[264], it nevertheless discusses extensively the right to self-determination of dependent or colonial peoples[265], as those terms are understood in the practice of the General Assembly. Since the right is not limited to situations of decolonization, it is entirely irrelevant that Kosovo did not constitute a mandate or trusteeship territory or was not listed as dependent territory by the United Nations General Assembly[266].

4.36. In the most authoritative expression of the right of self-determination, a people are entitled "[b]y virtue of that right [to] freely determine their political status and [to] freely pursue their economic, social and cultural development"[267]. The right to "freely determine their political status" is sufficiently broad to include a multitude of choices, including but not limited to independence, depending on the particular circumstances of each case[268]. In this regard, Kosovo is well aware of the fact that, within a sovereign State,

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[261] *East Timor*, *Judgment*, *I.C.J. Reports 1995*, p. 102, para. 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, pp. 182-183, para. 118.

[262] International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 1 (1), United Nations, *Treaty Series*, vol. 999, p. 171 (emphasis added); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Article 1 (1), United Nations, *Treaty Series*, vol. 993, p. 3. See also World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993 (A/CONF.157/23), Article I.2.

[263] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Separate Opinion of Judge Higgins*, *I.C.J. Reports 2004*, p. 214, para. 29 (referring to the "substantial body of doctrine and practice on 'self-determination beyond colonialism'.")

[264] *Serbia*, para. 534.

[265] *Ibid.*, paras. 535-539. Serbia also acknowledged the existence of a right of self determination in the case of foreign occupation, especially with regard to the case of Palestine (*ibid.*, paras. 540-543). See also *China*, *passim*.

[266] See *Serbia*, para. 571.

[267] International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 1 (1), United Nations, *Treaty Series*, vol. 999, p. 171; International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Article 1 (1), United Nations, *Treaty Series*, vol. 993, p. 3.

[268] *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, p. 33, para. 58. See also General Assembly resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970.

the exercise of the right to self-determination by a self-determination unit usually does not include the creation of a new State. Serbia and others have sought at length to demonstrate that, in such a case, the principle of sovereignty and territorial integrity necessarily has precedence over the will of the people and that, consequently, the choice of the people concerned is limited in the sense that they are precluded from opting for independence. This ignores the fact that the principle of sovereignty and territorial integrity speaks to coercion in inter-State relations, not to the conduct of persons within a State[269].

4.37. Moreover, even if one were to reconceptualize the principle of territorial integrity as calling for maintaining the integrity of boundaries or frontiers (which international law normally addresses by reference to the principle of *uti possidetis*), there is no basis in law or practice for concluding that such a principle always supersedes the exercise of a right of self-determination. Serbia and other States cite no authority to the effect that this new form of "territorial integrity" would operate in a manner that entirely neglects the people living in the territory and their expressed desires. Moreover, Serbia fails to recognize that under contemporary international law there is no hierarchy between any such revised principle of territorial integrity and the right of self-determination; neither excludes the other. As this Court noted in the *Frontier Dispute* case, when considering the relationship between the *uti possidetis* principle and the right of self-determination in situations of State formation and the policy choice adopted by African States, neither concept preempts the other:

> "At first sight this principle [of *uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." [270]

4.38. Thus, even if the principle of territorial integrity were reconceptualized so as to be a principle that generally disfavors changes in international boundaries (which is it not),

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[269] See paras. 4.06-4.13 above.

[270] *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, p. 567, para. 25.

in any given situation, that principle would need to be weighed against the right of self-determination, without there being any predetermined outcome as to which prevails.

4.39. Despite Serbia's efforts to demonstrate otherwise, this is also the clear meaning of the " safeguard clause" contained in General Assembly resolution 2625 (XXV), stating:

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

This formula, which is essentially repeated in later instruments[271], may not expressly authorize or encourage secession as a means of self-determination, but it certainly does not exclude it. Indeed, the clause recognizes that independence may be an appropriate choice in the case where a State does not conduct itself in compliance with the principle of equal rights and self-determination of peoples as described. In those particular circumstances, the State concerned not only forfeits the benefit of the safeguard clause of General Assembly resolution 2625 (XXV), but also the right to invoke its sovereignty against the will of a people deprived of its right of self-determination. As Professor Tomuschat put it:

> "Within a context where the individual citizen is more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for secession as a measure of last resort after all other methods employed to bring about change have failed."[272]

4.40. If, as the Canadian Supreme Court stated in its well-known *Quebec* Opinion, the right of self-determination "generates, at best, a right to external self-determination [i.e. independence] in situations (…) where a definable group is denied meaningful access to

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[271] See World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993 (A/CONF.157/23), Article I.2; United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295, 13 September 2007, Article 46 (1). See also para. 4.11 above.

[272] Ch. Tomuschat, "Secession and self-determination", in M. G. Kohen, *Secession: International Law Perspectives* (2006), at p. 41; see also M. Shaw, *International Law* (6th ed., 2008), p. 523 (stating that there is an "arguable exception to this rule that the right to external self-determination applies only to colonial situations … where the group is question is subject to 'extreme and unremitting persecution' coupled with the 'lack of any reasonable prospect for reasonable challenge'"). See also *Finland*, paras. 8–9.

government to pursue their political, economic, social and cultural development"[273], then, the people of Kosovo were entitled to issue a declaration of independence in accordance with this right. As shown in Section B below, given the decade of deliberate exclusion from governing institutions and violation of basic human rights, culminating, in 1998-1999, in massive crimes against humanity and war crimes[274], the people of Kosovo had the right to chose independence[275]. The people of Kosovo chose to exercise this right through their democratically elected representatives, by adopting the Declaration of Independence.

4.41. Serbia repeatedly[276] argues that recognizing such a right effectively "punishes" the State concerned and that the law of international responsibility does not allow such a sanction. Yet it cannot be in the interest of the international community to offer only compensation or repeated exhortations to an existing government that it should "do better" when there have been massive violations of human rights and denial to a people of any ability to participate in the determination of their destiny. International law offers meaningful protective measures for such a people, and not only corrective instruments once the evil is done. Modern international law is also the law of people – a *droit des gens* – protecting the people, human beings, especially in the case where the State fails to do so. In those circumstances, the malfeasant State has to bear the consequences of its actions, not as a punishment, but as a necessary concomitant to the protection of core human rights.

B. THE PEOPLE OF KOSOVO WERE ENTITLED TO EXERCISE THEIR RIGHT OF SELF-DETERMINATION BY DECLARING INDEPENDENCE

4.42. The people of Kosovo are a people enjoying the right of self-determination, contrary to assertions denying them such a right. For its part, Serbia denies the right of self-determination to the "territory of Kosovo"[277]. However, the right of self-determination is not a right held by territory, but a right held by human beings living in a

[273] *Secession of Quebec*, [1998] 2 *S.C.R.* 217 (Can.), para. 138, reprinted in *I.L.M.*, vol. 37, 1998, p. 1340

[274] See paras. 3.29-3.58 above.

[275] See paras. 4.42-4.52 below.

[276] See e.g. *Serbia*, paras. 627-628. See also *Slovakia*, para. 28.

[277] *Serbia* , para. 570.

given territory, an important factor that Serbia ignored throughout the 1990s and still ignores today. For decades, Serbia's policy towards Kosovo has been to regard it simply as land (its territory) without regard to the rights and interests of the inhabitants.

4.43. The Canadian Supreme Court stated:

> "It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right of self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose."[278]

4.44. The existence of a people of Kosovo has been largely recognized by the international community, despite the fact that Kosovo formed part of the FRY/Serbia. And rightly so: as Professor Crawford points out, "a further possible category of self-determination units" is constituted by

> "entities part of a metropolitan State but that have been governed in such a way as to make them in effect non-self-governing territories – in other terms, territories subject to *carence de souveraineté*. Possible examples are Bangladesh, Kosovo and perhaps Eritrea"[279].

4.45. The people of Kosovo are much more than just a minority within the FRY/Serbia, but a self-determination unit as a "non-self-governing territory" in the sense referred to by Professor Crawford[280]. Furthermore, the people of Kosovo are distinct and homogeneous, being a group of which 90 percent are Kosovo Albanians, who speak the Albanian language, and who mostly share a Muslim religious identity. The 2001 Constitutional Framework promulgated by the SRSG recognized that "Kosovo is an entity under interim international administration which, with its people, *has unique historical,*

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[278] *Secession of Quebec*, [1998] 2 *S.C.R.* 217 (Can.), para. 124, reprinted in *I.L.M.*, vol. 37, 1998, p. 1340.

[279] J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford, 2006), p. 126. See also *Ireland*, para. 29.

[280] Prof. Crawford also explained that "[a]t the root, the question of defining 'people' concerns identifying the categories of territory to which the principle of self-determination applies as a matter of right" (*ibid*, p. 126).

legal, cultural and linguistic attributes"[281]. Security Council resolution 1244 (1999)[282], like earlier Presidential statements[283], the Rambouillet Interim Agreement and other pre-resolution 1244 documents[284], refers to the "people of Kosovo" or the "will of the people". Indeed, Security Council resolution 1244 (1999) itself may be read as confirming the existence of the right of self-determination for the people of Kosovo: the international administration of the territory was designed not only to exclude the FRY/Serbia from governing in Kosovo during the interim period, but also, and foremost, to establish favorable conditions for the people of Kosovo to exercise their right of self-determination, without prejudging whether the final status settlement would take the form of internal or external self-determination. As Professor Tomuschat explained:

> "It should be noted that resolution 1244 carefully avoids mentioning this word [i.e. self-determination]. Nowhere does it appear in the text. Implicitly, however, it permeates the entire texture of the resolution. Autonomy for a given human community cannot be invented by the Security Council without any backing in general international law. In conclusion, 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."[285]

4.46. If a right to secession exists in the case of a people being denied the exercise and enjoyment of the right to self-determination and subject of deliberate discrimination and human rights' violations, then the people of Kosovo were certainly entitled to exercise that right. Being entitled to a right to self-determination, the people of Kosovo, given the particular circumstances surrounding their recent history, could declare independence in 2008.

4.47. In its Written Statement, Serbia plays down the dramatic events of 1989-1990, and the systematic denial of self-determination, as well the large scale violations of basic

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[281] UNMIK Regulation No. 2001/9, 15 May 2001, Article 1.1 [Dossier No. 156] (emphasis added). See also *Albania*, para. 84.

[282] Dossier No. 34.

[283] See e.g. Statement by the President of the Security Council, S/PRST/1998/25, 24 August 1998 [Dossier No. 14].

[284] See paras. 5.05-5.18 below.

[285] Ch. Tomuschat, "Secession and self-determination", in M. G. Kohen, *Secession: International Law Perspectives* (2006), p. 34.

human rights to which the people of Kosovo were subjected, in the period 1989-1999[286]. It states:

> "As far as Kosovo is concerned, its status as an autonomous province granted by the 1974 Constitution of the SFRY and the 1974 Constitution of Serbia, was modified in 1989. This was done through amendments to the Constitution of Serbia, in the constitutionally prescribed procedure and with the consent of Kosovo and another Serbian autonomous province, Vojvodina. Their status of autonomous provinces remained under both the federal and Serbian constitutions, but they enjoyed less autonomous powers, particularly in the legislative realm. At no time was the Albanian minority, either in Kosovo or elsewhere in Serbia, excluded or discriminated from the participation in the public affairs of the State."[287]

4.48. As discussed in Chapter III this bland account of the terrible actions by Serbia from 1989-1999 is entirely contradicted by the findings of international bodies[288]. Kosovo has already quoted extensively from the findings of the International Criminal Tribunal for the former Yugoslavia in the *Milutinović et al.* judgment of 26 February 2009[289], which clearly contradict Serbia's assessment of the facts[290]. Furthermore, numerous General Assembly resolutions took account of the flagrant and systematic denial of basic human rights and discrimination against the people of Kosovo[291]. There is no doubt that the people of Kosovo were, at least since the events of 1989-1990, entirely deprived of any form of self-determination and excluded from any participation in the political processes within the SFRY/FRY institutions. These events culminated in systematic and deliberate large-scale violations of human rights, crimes against humanity, ethnic cleansing, and a massive refugee and internally displaced persons crisis. All these events, which were identified by the Security Council as a threat to the peace and resulted ultimately in the intervention of the international community, entitled the people of Kosovo to determine independently their political status and to declare independence from the State responsible for the grave humanitarian situation.

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[286] *Kosovo*, paras. 3.23-3.60, and paras. 3.29-3.58 above.

[287] *Serbia*, para. 641.

[288] See paras. 3.29-3.58 above, and *Kosovo*, paras. 3.23-3.37 and 3.47-3.60. See also *Albania*, paras. 86-92.

[289] *Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), *Judgement*, 26 February 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug).

[290] *Kosovo*, paras. 3.27 and 3.33.

[291] *Estonia*, pp. 6-9; *Ireland*, para. 33 (iii); *Switzerland*, paras. 82-84.

4.49. The adoption of Security Council resolution 1244 (1999) and the implementation of the United Nations administration in Kosovo put an end to these traumatic events and the situation on the ground changed. Circumstances also changed within the FRY, with the fall from power of the Milošević régime and, later, the departure of Montenegro from the State Union. However, these circumstances did not change the entitlement of the people of Kosovo to self-determination, contrary to the argument put forward by Cyprus[292].

4.50. Indeed, the positive developments in Kosovo in the period between June 1999 and February 2008 (a period of less than 9 years, during which the Serbian authorities had no presence in Kosovo) cannot be invoked to deny the people of Kosovo the right to self-determination. As discussed in Chapter V below, resolution 1244 (1999) did not preclude independence, but established an interim administration in order to enable the people of Kosovo to re-establish a secure environment and to effectively implement its right of self-governance pending a final status settlement, of which independence was one possibility. Rather than having the effect of ending a right of external self-determination, the interim period was aimed at giving the people of Kosovo the possibility to effectively exercise their internationally recognized rights through the establishment of democratic institutions, which ultimately might lead to independence if that was the will of the people of Kosovo.

4.51. Contrary to assertions made by various States, the new situation created in Kosovo between 1999 and 2008 was not accompanied by a markedly improved situation in the FRY/Serbia, at least in terms of Belgrade's attitude toward Kosovo. Serbia misleadingly claims that significant progress has been made with regard to the recognition of human rights for Kosovo within the new Serbian Constitution of 2006[293]. The fact is that even after 1999, the FRY and Serbian authorities continued in their statements and positions to treat Kosovo merely as a piece of territory belonging to Serbia, ignoring entirely the aspirations and fears of the people actually living there. The 2006 Constitution, which in its preamble openly declares that "the Province of Kosovo and Metohija is an integral part of the territory of Serbia"[294], was not even submitted for the

[292] *Cyprus*, para. 146.

[293] See e.g. the very selective quotes made by Romania of the opinion of the Venice Commission on the Serbian Constitution (*Romania*, para. 154).

[294] *Serbia*, Annex 59.

approval of the people of Kosovo[295]. Notwithstanding its positive assessment of the 2006 Constitution with regard to human rights, the Venice Commission sharply criticized the absence of any constitutional guarantee for an autonomy status of Kosovo:

> "With respect to substantial autonomy, an examination of the Constitution, and more specifically of Part VII, makes it clear that this substantial autonomy of Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the [Serbian] legislature. In Part I on Constitutional Principles, Article 12 deals with provincial autonomy and local self-government. It does so in a rather ambiguous way: on the one hand, in the first paragraph it provides that state power is limited by the right of citizens to provincial autonomy and local self-government, yet on the other hand it states that the right of citizens to provincial autonomy and local self-government shall be subject to supervision of constitutionality and legality. Hence it is clear that ordinary law can restrict the autonomy of the Provinces.
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> This possibility of restricting the autonomy of the Provinces by law is confirmed by almost every article of Part 7 of the Constitution, and more specifically by:
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> - Article 182, par. 2: 'The substantial autonomy of the Autonomous Province of Kosovo and Methohija shall be regulated **by the special law** which shall be adopted in accordance with the process envisaged for amending the Constitution.'
>
> - Article 183, par. 4: 'The territory of autonomous provinces and the terms under which borders between autonomous provinces may be altered shall be regulated **by the law** …'
>
> - Article 183, par. 2: 'Autonomous provinces shall, **in accordance with the law**, regulate matters of provincial interest in the following fields …'
>
> - Article 183, par. 3: 'Autonomous provinces shall see to it that human and minority rights are respected, **in accordance with the Law**.'
>
> - Article 183, par. 5: 'Autonomous provinces shall manage the provincial assets **in the manner stipulated by the Law.**'
>
> - Article 183, par. 6: 'Autonomous provinces shall, **in accordance with the Constitution and the Law,** have direct revenues, …'
>
> - Article 184, par. 1 to 3: 'An autonomous province shall have direct revenues for financing its competences. The kind and amount of direct revenues shall be **stipulated by the Law**. **The Law** shall specify the share of autonomous provinces in the revenues of the Republic of Serbia.'
>
> Hence, in contrast with what the preamble announces, the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the

[295] International Crisis Group, *Serbia's New Constitution, Democracy going backward*, Policy Briefing No. 44, 8 November 2006, available on http://www.crisisgroup.org/home/index.cfm?id=4494.

willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not."[296]

4.52. Against this background, it is apparent that the effective exercise of the right to self-determination of the people of Kosovo was not secured within the Republic of Serbia under the 2006 Constitution. At the end of the long but ultimately fruitless process in order to find a negotiated solution to this problem[297], the people of Kosovo had no other choice then to declare independence, as a last recourse to effectively exercise their right. In these circumstances, the issuance of the Declaration of Independence can properly be seen as the exercise by the people of Kosovo of their right to self-determination. As the Foreign Minister of the Republic of Kosovo put it in the Security Council debate on 17 June 2009:

"After having endured decades of unspeakable occupation, terror and slavery, the people of Kosovo deserve to be free and to join the community of the free and democratic nations of the world."[298]

4.53. In conclusion, however, Kosovo reiterates that in order to assess the conformity of the Declaration with international law, the Court need not address the issue of whether international law authorized or entitled Kosovo to exercise a right of self-determination. As discussed in depth in Kosovo's first Written Contribution[299], it is sufficient to find that there is no rule of international law prohibiting or preventing the authors from adopting the Declaration.

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[296] European Commission for Democracy through Law, Opinion on the Constitution of Serbia, Venice, 17-18 March 2007, paras. 7-8, available on http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf.

[297] See Kosovo, paras. 5.08-5.5.34.

[298] Security Council, provisional verbatim record, sixty-fourth year, 6144th meeting, 17 June 2009, S/PV.6144, p. 9.

[299] *Kosovo*, paras. 8.03-8.06.

CHAPTER V

THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE SECURITY COUNCIL RESOLUTION 1244 (1999)

5.01. Several written statements address the issue of whether the Declaration of Independence contravened Security Council resolution 1244 (1999). In its first Written Contribution, Kosovo addressed in some depth the meaning of resolution 1244 (1999) and the reasons why the Declaration cannot be seen as contravening it[300]. In this chapter, Kosovo will not repeat the arguments in its first Written Contribution, but will provide greater depth to certain specific issues raised by the statements of others.

5.02. First, the negotiating texts that preceded resolution 1244 (1999) did not prohibit Kosovo's representatives from declaring independence. Rather, those negotiations reveal a movement toward resolving the Kosovo crisis through a framework that would consist of two stages: an interim period during which Kosovo would be accorded extensive autonomy within the FRY, to be followed by a final settlement that would not require Belgrade-Pristina mutual agreement (**Section I**). Resolution 1244 (1999) adopted this two-stage approach through a framework that is status neutral in nature, meaning that it established an interim period of autonomy to be followed by a final status settlement based principally on the will of the Kosovo people, whatever that may be. As such, the resolution did not predetermine Kosovo's final status, nor prohibit Kosovo's representatives from ultimately declaring independence (**Section II**).

5.03. In the immediate aftermath of resolution 1244 (1999)'s adoption, certain documents and statements were issued that Serbia and some other States regard as relevant to Kosovo's ability to declare independence. Yet such statements and documents were reflecting attitudes as to what was appropriate at that time, prior to the commencement and completion of the final status process. After the relevant United Nations officials found in 2007 that independence was the only viable option, and that maintaining the *status quo* would be destabilizing, a declaration of independence was envisaged as the appropriate

[300] *Kosovo*, Chapter IX.

means for reaching a final settlement based upon the will of the people, as contemplated by resolution 1244 (1999) (**Section III**).

5.04. For several reasons, the Declaration of Independence cannot be regarded as an *ultra vires* act of the PISG or as a contravention of the Constitutional Framework. This is especially so since the Declaration was never set aside or declared null by the Special Representative of the Secretary-General in Kosovo – the United Nations official who established the Constitutional Framework and the PISG, and who was charged with overseeing the PISG and correcting any measures they took that were inconsistent with the Constitutional Framework (**Section IV**). Finally, the fact that the Declaration did not contravene resolution 1244 (1999) is consistent with the Security Council's general practice of only imposing legal obligations upon States (**Section V**).

I. The Negotiating Texts that Preceded Resolution 1244 (1999) did not Prohibit Kosovo's Representatives from Declaring Independence

5.05. In its Written Statement, Serbia argues that the negotiations preceding resolution 1244 (1999) demonstrate that Kosovo had no unilateral right to secede. In this regard, Serbia makes reference to the negotiations that took place at Rambouillet[301], those within the G-8[302], the Ahtisaari-Chernomydrin negotiations[303], and the negotiations in the context of the Military Technical Agreement[304]. Some other States make similar arguments[305]. Serbia fails to note, however, that none of the texts emerging from these various negotiations prohibited Kosovo from declaring independence. In each of these instances, the relevant negotiators understood that the leaders of Kosovo sought independence and that any text that precluded such an outcome would not be acceptable.

5.06. As indicated in Kosovo's first Written Contribution[306], any analysis of these pre-resolution 1244 (1999) negotiations should begin with the drafts prepared by the U.S.

[301] *Serbia*, paras. 781-784.

[302] *Ibid.*, paras. 667 and 686-687.

[303] *Ibid.*, paras. 684-685.

[304] *Ibid.*, paras. 668-674.

[305] E.g., *Argentina*, para. 76.

[306] *Kosovo*, paras. 9.13-9.14.

Ambassador (to Macedonia) Christopher Hill, who in late 1998 was tasked by the Contact Group to engage in extensive "shuttle diplomacy" with leaders from both Belgrade and Kosovo. From October 1998 to January 1999, in what is sometimes referred to as the "Hill Process", Ambassador Hill sought to establish an agreement that would stabilize the crisis that had unfolded in Kosovo. The Hill Process was important in laying the groundwork for two key elements of the negotiations that would follow and that would culminate in resolution 1244 (1999). First, it became apparent to all involved that it would not be possible to resolve Kosovo's final status at the outset. Instead, the central focus of the negotiations (and ultimately of resolution 1244 itself) had to be on establishing an interim solution, one designed to create the immediate conditions for the return to a peaceful and normal life for the inhabitants of Kosovo[307]. Second, while the negotiations (and ultimately resolution 1244) briefly addressed the process for Kosovo's final status, they avoided prejudging what that final status would be and avoided giving Serbia any veto over the resolution of that status.

5.07. Analysis of the four draft proposals of the Hill Process readily demonstrates these elements. All of the drafts principally focused on an immediate interim solution providing rights and protections to the people of Kosovo, while only at the end of the drafts is there a brief, but important, reference to the process for resolving the final status after the passage of three years. In the first Hill draft proposal of 1 October 1998, this took the form of a final clause stating:

> "In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, *which will require mutual agreement for adoption*."[308]

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[307] See, e.g., I. Daalder and M. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo* (2000), pp. 39-40 ("The logical options for Kosovo's future were three: independence, partition or autonomy. … Hill was tasked by the Contact Group to meet with the Belgrade and Albanian leadership to gain agreement on what were termed 'principles to guide discussions and negotiations' presented by the United States to the Contact Group meeting in Bonn. The key concept of the principles focused on the means for implementing autonomy in Kosovo in the short term and left the issue of the area's political future to be decided years later. On September 2, 1998, Hill announced that Milosevic and Rugova had agreed to work toward an interim plan for Kosovo and to postpone a final decision on Kosovo's political status for three to five years.")

[308] First Hill Draft Agreement for a Settlement of the Crisis in Kosovo, 1 October 1998, Article VIII(3), reprinted in M. Weller, *The Crisis in Kosovo 1989-1999* (1999), p. 359 (emphasis added).

The second Hill draft proposal of 1 November 1998 repeated this final provision[309]. The third Hill draft proposal of 2 December 1998 repeated this provision but replaced "sides" with "Parties"[310].

5.08. Yet because the language of "mutual agreement" would have given Serbia a veto over future developments, it was not acceptable to the Kosovo delegation. Consequently, in the fourth and final Hill draft proposal of 27 January 1999, this final provision was altered and placed in brackets, so as to read as follows:

> "In three years, there shall be a comprehensive assessment of this Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps, *by a procedure to be determined taking into account the Parties' roles in and compliance with this Agreement*."[311]

5.09. Hence, in the last version of the Hill proposals, reference to the "mutual agreement" by "sides" or "Parties" is completely dropped. Instead, the proposed provision moved toward a final status approach that would involve a "comprehensive assessment" under "international auspices" by a "procedure" that would "take into account" the two sides' roles and compliance with the agreement. No aspect of this (or any other) provision precluded the possibility of Kosovo seeking independence.

5.10. Ultimately, neither Kosovo nor the FRY/Serbia accepted the final Hill proposal: Kosovo was not sufficiently satisfied that the proposal constituted an interim agreement, while Serbia insisted that language be added definitively establishing that Kosovo would remain a part of Yugoslavia.

5.11. After the Yugoslav offensive in Kosovo in December 1999, and the massacre of some forty-five Kosovo Albanians in the village of Reçak/Račak, new negotiations were initiated at Rambouillet[312]. Coming only days after the end of the Hill Process and mediated in part by Ambassador Hill himself, the Rambouillet negotiations built upon the

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[309] Revised Hill Proposal, 1 November 1998, Article XI (3), reprinted in *ibid.*, p. 369.

[310] Third Hill Draft Proposal for a Settlement of the Crisis in Kosovo, 2 December 1998, Article X (3), reprinted in *ibid.*, p. 381.

[311] Final Hill Proposal, 27 January 1999, Article X (3), reprinted in *ibid.*, p. 388 (emphasis added).

[312] *Kosovo*, paras. 3.42-3.46.

Hill Process. Like the proposals that emerged from the Hill Process, the Rambouillet Interim Agreement contains no language prohibiting Kosovo's representatives from declaring independence. Instead, like the Hill Process, the Rambouillet Interim Agreement envisaged an interim period of substantial Kosovo autonomy followed by a final settlement; indeed, the formal title of the Agreement is "Interim Agreement for Peace and Self-Government in Kosovo".

5.12. Like the final Hill Proposal, the Rambouillet Interim Agreement abandoned the idea of Kosovo's final status being determined by "mutual agreement" between Kosovo and Serbia. The first draft of the Rambouillet Interim Agreement of 6 February 1999 drew upon the relevant final clause from the final Hill Proposal, stating:

> "In three years, there shall be a comprehensive assessment of the Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps."[313]

During the course of the Rambouillet negotiations, however, it became apparent that some greater content had to be given to the means by which final status would be determined. In doing so, the negotiators did not return to the original "mutual agreement" language of the Hill Process, but instead emphasized the need to base the final status upon "the will of the people" of Kosovo, in conjunction with certain other factors. Specifically, Chapter 8, Article I, paragraph 3 of the final version of the Rambouillet Interim Agreement stated:

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."[314]

5.13. Kosovo accepted the Rambouillet Interim Agreement[315], whereas the FRY/Serbia did not. Instead, the FRY/Serbia sought to revise the Rambouillet Interim

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[313] Interim Agreement for Peace and Self-Government in Kosovo, Initial Draft, 6 February 1999, Article III (3), reprinted in M. Weller, *The Crisis in Kosovo 1989-1999* (1999), pp. 422-423.

[314] Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999, Chapter 8, Article I(3), reproduced in S/1999/648 [Dossier No. 30].

[315] Letter from Hashim Thaci, Chairman of the Presidency of the Kosova Delegation, 15 March 1999, reprinted in M. Weller, *The Crisis in Kosovo 1989-1999* (1999), p. 480.

Agreement to delete "interim" from its title and text, and to delete the concept of a final status based on the "will of the people" in favor of one that required Serbia's consent. Specifically, FRY/Serbia proposed to change the final clause so as to read:

> "After three years, the signatories shall comprehensively review this Agreement with a view to improving its implementation and shall consider the proposals of any signatory for additional measures, *whose adoption shall require the consent of all signatories*."[316]

The negotiators at Rambouillet, including Russian Ambassador Majorski, rejected the FRY/Serbian proposed revision, stating that it was "the unanimous view of the Contact Group that only technical adjustments can be considered which, of course, must be accepted as such and approved by the other delegation"[317]. The FRY/Serbia's failed efforts to alter the Rambouillet Interim Agreement from an "interim" to a permanent settlement, and to require that the final status be subject to "the consent of all signatories" (i.e. including FRY/Serbia) again confirms that the Rambouillet Interim Agreement in its final form contemplated an interim period of substantial autonomy for Kosovo within the FRY to be followed by a final status process driven principally by the "will of the people" and with no requirement of FRY/Serbian consent.

5.14. Some States apparently now regard the Rambouillet Interim Agreement as calling for a permanent integration of Kosovo in Serbia[318] or as establishing unchangeable borders because of its reference to the Helsinki Final Act[319]. Yet the text of the Agreement cannot sustain such interpretations. The various references to "territorial integrity" of the FRY or "autonomy" of Kosovo within the FRY must be seen in the context of an *interim* period. Indeed, the very title of the Interim Agreement makes clear that it is principally addressing an interim solution, not Kosovo's final status. So too does its text. For example, the preambular clause in the proposed Constitution (Chapter 1 of the Agreement) emphasizes the interim nature of the provision as follows:

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[316] FRY Revised Draft Agreement, 15 March 1999, Chapter 8, Article 1 (4), reprinted in *ibid.*, pp. 489-490 (emphasis added).

[317] Letter from the three Negotiators to Head of Republic of Serbia Delegation, 16 March 1999, reprinted in *ibid.*, p. 490.

[318] *Russian Federation*, para. 55; *Spain*, p. 26; *Romania*, paras. 47-52.

[319] *Cyprus*, para. 93.

> "*Desiring* through this interim Constitution to establish institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which the authorities of governance set forth herein originate."[320]

The one provision in the Rambouillet Interim Agreement that did address Kosovo's final status – Chapter 8, Article I, paragraph 3 – says nothing about either "territorial integrity" or "autonomy" of Kosovo within the FRY; instead, it refers to a political solution driven principally by the "will of the people" of Kosovo[321].

5.15. Perhaps the most striking interpretation of the meaning of the Rambouillet Interim Agreement is the one now advanced by Serbia itself for purposes of these proceedings[322]. Serbia now maintains that the Rambouillet Interim Agreement accepted that Kosovo would remain a part of the FRY unless Serbia otherwise consented. But in the immediate aftermath of the Rambouillet meeting, the FRY/Serbia had a very different view, seeing the Agreement as essentially endorsing secession by Kosovo. On 24 March 1999 – just one month after completion of the text of the Rambouillet Interim Agreement – Belgrade's representative declared to the Security Council its view as to its meaning. He complained that the "meetings in France were not negotiations about the autonomy of Kosovo and Metohija" but instead an "attempt to impose a solution clearly endorsing the separatists' objectives". Further, he maintained that the FRY "was and is ready to find a political solution. We give it absolute priority, but we cannot agree to the secession of Kosovo and Metohija, either immediately or after the interim period of three

[320] Rambouillet Accords, Chapter 1, preamble. The reference in the overall preamble of the Interim Agreement to "the commitment of the international community to the sovereignty and territorial integrity" of the FRY" and to the Helsinki Final Act, even if regarded as speaking beyond the interim period, cannot be viewed as calling for a permanent integration of Kosovo in Serbia, let alone a prohibition on a declaration of independence. As discussed in Chapter IV, paras. 4.06-4.13, general references of this sort to "territorial integrity" must be seen as a commitment by States not to use coercion to alter territorial boundaries. Further, as also discussed in Chapter IV, paras. 4.14-4.29, with respect to the similar commitment by Member States in the preamble to resolution 1244 (1999), a preambular clause of this type simply cannot sustain the weight of the interpretation Serbia and some other States wish to place upon it.

[321] As Romania concedes, Rambouillet "was meant to provide an interim solution for Kosovo. The Rambouillet Agreement itself provided in its final chapter … for the way forward in identifying the final solution for the status of Kosovo. It is to be noted that such a solution would have taken account of the 'will of the people' …" (*Romania*, para. 52).

[322] *Serbia*, paras. 781-784.

years"[323]. Similarly, on 26 March 1999, Belgrade reiterated this view of the Rambouillet Interim Agreement to the Security Council, stating:

> "Now Yugoslavia is faced with another ultimatum, this time from NATO – from so-called democratic countries. It has been offered two alternatives: either voluntarily to give up a part of its territory or to have it taken away by force. This is the essence of the 'solution' for Kosovo and Metohija that was offered by way of an ultimatum at the 'negotiations' in France."[324]

5.16. These assertions were exaggerated, in that the Rambouillet Interim Agreement did not expressly provide that Kosovo would be an independent State. Yet by Belgrade's own assertions, the Rambouillet Interim Agreement cannot be interpreted in the manner now advanced by Serbia and others. At the time they were drafted, the FRY/Serbia read the Agreement as *not* deciding that Kosovo would remain a part of Serbia, and read the references to "territorial integrity" and "the Helsinki Final Act" as *not* precluding the emergence of an independent State of Kosovo, because those references related only to the interim period. Rather, the provision calling for final status to be resolved after three years based on the "will of the people" was well-understood, even by the FRY/Serbia, as including the possibility, indeed the likelihood, of Kosovo's emergence as an independent State after the interim period.

5.17. After armed conflict broke out in which the North Atlantic Treaty Organisation (NATO) States sought to prevent Serbian crimes against humanity and other atrocities in Kosovo, the leaders of the G-8 meeting at the Petersberg Centre on 6 May 1999 issued a statement of principles[325]. This relatively short statement was focused on the immediate steps necessary for ending the armed conflict: withdrawal of FRY/Serbian forces from Kosovo and establishment of an interim administration of Kosovo by the international community. The sole reference to "territorial integrity" refers to the interim period only:

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

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[323] See Security Council, provisional verbatim record, fifty-forth year, 3988th meeting, 24 March 1999, S/PV.3988, p. 14.

[324] Security Council, provisional verbatim record, fifty-forth year, 3989th meeting, 26 March 1999, S/PV.3989, p. 11.

[325] Security Council resolution 1244 (1999), annex 1 [Dossier No. 34].

> the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA."

By its terms, this principle is focused on the establishment of an *interim* political framework agreement and in that context notes, among other things, "principles of sovereignty and territorial integrity". Nothing in this principle or in the G-8 statement of principles as a whole, sought to alter the basic scheme developed in the Rambouillet Interim Agreement. Indeed, by expressly referencing the Agreement in the principle quoted above, the statement acknowledged and adopted the basic approach of Rambouillet that FRY/Serbia had rejected. As noted above, that approach contemplated that the interim period would be followed by a final status process based on the will of the people of Kosovo and not on consent by authorities in Belgrade. This statement of principles would become Annex 1 to Security Council resolution 1244 (1999).

5.18. Former Finnish President Martti Ahtisaari, on behalf of the G-8 and the European Union, and former Russian Prime Minister Viktor Chernomyrdin, on behalf of the Russian Federation, then engaged in negotiations with FRY President Slobodan Milošević regarding the steps necessary to end the armed conflict. This negotiation resulted in the "Ahtisaari-Chernomyrdin Plan", a series of principles that the Serbian Parliament ratified on 3 June 1999, and that were later incorporated as Annex 2 to resolution 1244 (1999). Like the G-8 statement of principles, the Ahtisaari-Chernomyrdin Plan is relatively brief, and is focused on the immediate steps necessary for withdrawal of FRY and Serbian forces from Kosovo and an interim administration of Kosovo. Recognizing the need for a detailed framework for governance of Kosovo during the interim period, the Ahtisaari-Chernomyrdin Plan called for:

> "A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions."[326]

Again, the sole reference to "territorial integrity" arises in the context of the interim period and, further, by expressly referencing the Rambouillet Interim Agreement, both

[326] S/1999/649, Annex, p. 2, para. 8 [Dossier No. 31].

acknowledges and adopts the basic approach at Rambouillet that the FRY/Serbia had originally rejected, including the provision relating to the final status process.

II. Resolution 1244 (1999) Itself did not Prohibit Kosovo's Representatives from Declaring Independence

A. The Operative Part of Resolution 1244 (1999) did not Prohibit the Declaration of Independence nor Require Serbian Consent to It

5.19. Serbia's Written Statement and those of certain other States contain repeated and sweeping assertions that resolution 1244 (1999) requires that the final status for Kosovo be one of autonomy within Serbia or that the final status only be resolved with the consent of Belgrade[327]. As such, they argue that the Declaration of Independence was unlawful because it denied a status of Kosovo autonomy within Serbia and because the Declaration was undertaken without Serbia's consent.

5.20. Yet resolution 1244 (1999) contains no language either expressly or implicitly requiring autonomy within Serbia or requiring FRY/Serbia's consent to Kosovo's final status[328]. Indeed, had resolution 1244 (1999) intended to alter the basic premises of the prior negotiations from the Hill Process, Rambouillet, the G-8 principles, or the Ahtisaari-Chernomyrdin Plan – in other words, to return to the FRY/Serbia's preference for an immediate resolution of Kosovo's status as an integral part of the FRY with no future change unless consented to by the FRY/Serbia – it would be expected that resolution 1244 (1999) would say as much. Instead, the approach taken in resolution 1244 (1999) is one of continuity with the Rambouillet approach; one in which an interim period of autonomy of

[327] See, e.g., *Russian Federation*, para. 57 ("the Resolution was based on the idea of Kosovo remaining an integral part of the FRY and Serbia"); *Slovakia*, para. 24.

[328] See, e.g., *Japan*, p. 5 ("UNSC resolution 1244 contains no language indicating any conclusion on the future legal status of Kosovo. Nor is there any language under which it may be understood that Kosovo's independence is precluded."); *France*, para. 2.25 ("la résolution 1244 (1999) n'a pas exclu l'option de l'indépendance."); *Luxembourg*, para. 22 ("L'indépendance du Kosovo n'y est ni explicitement souhaitée, ni exclue. Selon les termes et l'esprit de la résolution 1244, cette indépendance reste donc entièrement possible."); *Norway*, para. 16 ("resolution 1244 does not take a position on the question of Kosovo's final status"); *United Kingdom*, para. 6.9 ("The resolution, while stressing the need for a final settlement, is silent on the content of this settlement, a silence that was acknowledged by representatives to the Security Council during the debates of the resolution and in subsequent UN documents.").

Kosovo within Serbia would be followed by a final status process based upon the will of the people of Kosovo[329].

5.21. The framework of resolution 1244 (1999) is neutral as to the final status of Kosovo, though it provides important guidance on how that status ultimately is to be determined. Most of resolution 1244 (1999) focuses on the interim period, in which FRY/Serbian forces would be removed from Kosovo, an international civilian and military presence in Kosovo would be established, and indigenous Kosovo institutions would be promoted and developed so as to allow for extensive self-governance[330]. To that end, paragraph 1 decided that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2". To give that political solution greater content, paragraphs 2 to 4 indicated various steps for the withdrawal of FRY/Serb forces, while paragraphs 5 to 10 elaborated upon the deployment of the international civil and military presence to Kosovo.

5.22. The several references in this part of resolution 1244 (1999) indicating that Kosovo would have "substantial autonomy within the FRY" (which are highlighted by Serbia and some other States[331]) are all in the context of the interim period. As was the case at Rambouillet, it was understood that during an interim period Kosovo would be accorded extensive autonomy within the FRY, but that understanding did not prejudge the final status once the interim period came to an end. Indeed, as Spain acknowledges, the special regime for the interim period "does not predetermine the future status of Kosovo, as the status of this territory is to be determined in an autonomous way in accordance with a process established for this purpose under resolution 1244 (1999)"[332].

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[329] Any interpretation of a Security Council resolution must begin with its terms, though other factors may be taken into account when construing those terms. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 53, para. 114 ("In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, al1 circumstances that might assist in determining the legal consequences of the resolution of the Security Council.")

[330] *Kosovo*, paras. 4.04-4.22 and paras. 9.06-9.14.

[331] See, e.g., *Serbia*, paras. 685, 705, and 729-741; *China*, para. I (a); *Cyprus*, para. 94; *Slovakia*, para. 26.

[332] *Spain*, p. 39, para. 58 (iv).

5.23. Resolution 1244 (1999)'s neutrality on what the final status for Kosovo should be was widely understood at the time the resolution was adopted and thereafter, even in the aftermath of issuance of the Declaration of Independence. For example, the Secretary-General recently noted that EULEX operates "under the overall authority of the United Nations and within the status-neutral framework of resolution 1244 (1999)", and that "UNMIK has moved forward with its configuration within the status-neutral framework of resolution 1244 (1999)"[333]. Such an understanding of the approach taken by resolution 1244 (1999) would make no sense if the resolution had predetermined Kosovo's final status or prohibited a declaration of independence.

5.24. Although it did not predetermine Kosovo's final status, resolution 1244 (1999) did address the process for reaching final status. Paragraph 11 decided that the main responsibilities of the international civilian presence would include:

> "(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);
>
> (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

5.25. Before this Court, Serbia seeks to portray resolution 1244 (1999) paragraphs 11 (e) and 11 (f) as dictating an outcome that required Kosovo to remain within the FRY in the absence of FRY consent[334], and that a "political settlement" means a legal requirement of Kosovo-Serbia mutual agreement[335]. Yet the actual text of paragraphs 11 (e) and 11 (f) says nothing about the political process or the political settlement occurring only with the acceptance of the FRY/Serbia or through agreement by Belgrade and Pristina authorities. The lack of any such language is important when considered in context, for elsewhere resolution 1244 (1999) expressly refers to securing the FRY's "agreement" or "acceptance" on other matters[336].

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[333] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 10 June 2009, paras. 6 and 40.

[334] See *Serbia*, paras. 751-756; see also *Russian Federation*, paras. 59-64.

[335] See *Serbia*, paras. 757-758; see also *Spain*, para. 18; *Cyprus*, para. 98.

[336] See resolution 1244 (1999), preamble ("welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of … annex 2 to this resolution … and the Federal Republic of Yugoslavia's agreement to that paper,"); resolution 1244 (1999), para. 4 (referring to "an

5.26. Rather, the actual text of paragraph 11 (e) makes clear that the international civilian presence would facilitate a process that takes account of the outcome reached at Rambouillet, an outcome that in its Chapter 8, Article I, paragraph 3, emphasized the importance of the will of the people of Kosovo and that rejected a requirement of consent from Serbia[337]. Thus, paragraph 11 (e)'s reference to Rambouillet – which also provides context for the interpretation of paragraph 11 (f) – demonstrates that Kosovo-FRY/Serbia mutual agreement was not a required component of either the political process or political settlement (although it certainly was not precluded). Indeed, the term "political settlement" in paragraph 11 (f) is reminiscent of the phrase "final settlement" used in the Rambouillet Interim Agreement.

5.27. Moreover, an interpretation that insists upon Kosovo-Serbia mutual agreement is inconsistent with the overall object and purpose of resolution 1244 (1999) – i.e. to create an enduring peace in Kosovo. At the time resolution 1244 (1999) was adopted, Council members knew that it would be extremely difficult to reach agreement between Belgrade and Pristina on a permanent status; the Hill and Rambouillet negotiations had demonstrated as much. While negotiations with both sides were certainly expected, interpreting resolution 1244 (1999) as requiring mutual consent before any final status could be reached means imputing to the Council a willingness to "permanently lock the parties in a frozen conflict"[338], to create a situation of persistent instability in the region, to impede over the long-term the foreign investment needed for Kosovo's growth, and to maintain in perpetuity a costly United Nations administration[339]. By contrast, reading the language as it is actually drafted – without a requirement of mutual consent – is consistent with the resolution's object and purpose since it avoids the possibility of an enduring deadlock.

5.28. Yet perhaps the most compelling confirmation that paragraph 11 did not envisage FRY/Serbian consent to Kosovo's final status comes from Belgrade itself, in the

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agreed number of Yugoslav and Serb military and police personnel" returning to Kosovo in the interim period); resolution 1244 (1999), para. 5 ("Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences … and welcomes the agreement of the Federal Republic of Yugoslavia to such presences").

[337] *Luxembourg*, para. 21; *United States of America*, pp. 64-68.

[338] *Germany*, p. 40.

[339] *United Kingdom*, para. 6.31 (referring to UNMIK annual budgets in recent years, which exceed $200 million).

position taken before the Security Council at the meeting during which resolution 1244 (1999) was adopted. There, Belgrade advanced an entirely different interpretation of the meaning of the resolution, one that squarely envisaged the possibility of Kosovo's emergence as an independent State without Belgrade's consent[340]. In its statement to the Security Council on 10 June 1999, Belgrade's representative stated as follows:

> "In sub-item (a) and (b) of operative paragraph 9, the draft resolution requests in all practical terms that the Federal Republic of Yugoslavia renounce a part of its sovereign territory and grant amnesty to terrorists. Furthermore, in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia.
>
> In adopting the present text of the draft resolution, … the Security Council would … be instrumental in a de facto dismemberment of a sovereign European State …
>
> By opposing these provisions, the Security Council shall stand up in defence … of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia …"[341]

Thus, at the time of its adoption, Belgrade interpreted resolution 1244 (1999) (which included the preambular clause relating to FRY territorial integrity as well as paragraph 11) as "open[ing] up the possibility of secession of Kosovo and Metohija from Serbia". It is not surprising that the FRY took this position; resolution 1244 (1999) embraced a final process based upon the approach taken at Rambouillet, an approach that the FRY rejected at Rambouillet because it allowed ultimately for an independent Kosovo without Belgrade's consent. As such, it is entirely unpersuasive to argue now that paragraphs 11 (e) and 11 (f) must be construed as requiring a meeting of the minds between the FRY/Serbia and Kosovo[342]. While it is correct that members of the United Nations Security Council would have welcomed a mutual agreement and encouraged both sides to reach one[343], resolution 1244 (1999) contains no legal requirement to that effect.

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[340] See *Kosovo*, para. 4.22 (a).

[341] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 6 [Dossier No. 33].

[342] See *Cyprus*, para. 98.

[343] See *Spain*, pp. 50-51.

In light of its text, context, object and purpose, and negotiating history, many States are candid in acknowledging that resolution 1244 (1999) did not prohibit secession[344].

5.29. Given all these factors, Serbia's argument that Kosovo must recommence negotiations[345] is seriously misplaced for two reasons. *First*, Kosovo did engage in extensive negotiations, which ended in failure. As discussed in Kosovo's first Written Contribution, Kosovo engaged in fifteen rounds of negotiations in the course of 2006 in Vienna, during which Serbia insisted that autonomy was the only possible status (and even argued – incomprehensively – that international law precluded any settlement involving independence)[346]. Pristina advanced a forward-looking position, maintaining that while independence was the only solution, it could occur along with appropriate treaties and agreements on friendship and cooperation between two neighboring states. Ultimately, the Secretary-General's Special Envoy for the negotiations, President Ahtisaari, concluded that

> "[i]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse"[347].

5.30. Though some further attempts at negotiation were made, in light of the repeated failures to reach agreement (the Hill Process, Rambouillet, Ahtisaari talks), these further efforts (by the "Troika") only served to confirm the deadlock[348]. Today, there can be no question of further negotiations on final status. Kosovo is now widely accepted as a State within the international community, while Serbia on repeated occasions, even after initiation of this request for an advisory opinion, insists that it will never accept an independent Kosovo[349]. This Court has long recognized that when an obligation to negotiate exists, it does not require continuing to negotiate until success is achieved; rather,

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[344] See *Slovakia*, para. 26 ("Resolution 1244 does not contain provisions that exclude the possibility of Kosovo's independence"); *ibid*., para. 27 (resolution 1244 "does not explicitly prohibit secession or prohibit states from recognizing secession," as was done in the case of Southern Rhodesia); *Azerbaijan*, para. 14 ("There are divergent interpretations of resolution 1244 (1999) and there is no unanimity within the Security Council and among Member States of the United Nations in general as to the issue under examination by the Court.")

[345] *Serbia*, paras. 766-775.

[346] *Kosovo*, paras. 5.08-5.22.

[347] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168/Add.1, 26 March 2007, para. 3 [Dossier No. 203].

[348] See *France*, para. 2.51.

[349] See para. 2.57 above.

reasonable efforts at negotiation satisfy the obligation[350]. In the *Mavrommatis* case, the Permanent Court stated that

> "[t]he question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way and there can be no doubt that *the dispute cannot be settled by diplomatic negotiation*."[351]

5.31. *Second*, resolution 1244 (1999) does not include an obligation to strive for bilateral agreement, nor does it require maintenance of the *status quo* if a bilateral agreement cannot be reached. Rather, paragraph 11 of resolution 1244 (1999) calls for a *process* to be facilitated by UNMIK, one that included as a possible outcome independence for Kosovo, even without Serbian consent, so long as it reflected the will of the people[352]. As aptly put by the United Kingdom, the "consequence of Resolution 1244 (1999) was that the future of the territory of Kosovo ceased to be a matter for Serbia alone to decide upon. It became a matter to be resolved having regard to the interests and wishes of the inhabitants of Kosovo."[353]

5.32. In their submissions, some States maintain that resolutions preceding resolution 1244 (1999), which were recalled in its preamble, established that the Security Council intended a bilaterally negotiated outcome consisting solely of Kosovo autonomy within the FRY[354]. Thus, resolution 1160 (1998) called upon the FRY to pursue a "dialogue" with the "leadership of the Kosovar Albanian community" concerning the rights of Kosovar Albanians, and expressed its "support for an enhanced status for Kosovo

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[350] See *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2003*, p. 210, para. 107; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports 2002*, p. 424, para. 244.

[351] 1924, *P.C.I.J.*, *Series A*, *No. 2*, p. 13 (emphasis in original)

[352] See *Austria*, para. 30 ("the final settlement envisaged in Resolution 1244 comprises also a settlement towards independence. If this were not so, independence would have also been excluded as a solution to a political settlement by negotiation.")

[353] *United Kingdom*, paras. 0.25 (1) and 6.10.

[354] See, e.g., *Romania*, pp. 11-15.

which would include a substantially greater degree of autonomy and meaningful self-administration"[355]. Similarly, resolution 1199 (1998) called upon

> "the authorities in the Federal Republic of Yugoslavia and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo …"[356]

Further, resolution 1199 (1998) repeated in its preamble "support for a peaceful resolution of the Kosovo problem which would include an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration"[357]. Similar language may be found in resolution 1203 (1998)[358].

5.33. Such language in favor of dialogue and negotiation cannot be viewed as supporting Serbia's interpretation of resolution 1244 (1999). Certainly none of these earlier provisions constituted a prohibition on a declaration of independence by the democratically elected representatives of the people of Kosovo, whether issued with FRY consent or otherwise. Moreover, sentiments in these earlier resolutions in favor of dialogue and negotiation in 1998 simply cannot be transplanted to resolution 1244 (1999), which was adopted in the radically changed circumstances of June 1999, almost nine months after resolution 1203 (1998). Given the dramatic events that unfolded in late 1998 and the first five months of 1999, involving widespread FRY/Serbian crimes against humanity and other atrocities against Kosovar Albanians, resulting in massive flows of refugee and internally displaced persons,[359] there is no reason to suppose that the Security Council viewed measures of reconciliation pursued in 1998 as still viable in mid-1999. Indeed, when voting for resolution 1244 (1999), the representative of France reviewed resolutions 1160 (1998), 1199 (1998), and 1203 (1998), and then noted that "[u]nfortunately, the Belgrade regime refused to comply with the obligations set out in those resolutions", thereby compelling a radical change in approach by the international

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[355] Resolution 1160 (1998), paras. 1 and 4 [Dossier No. 9].

[356] Resolution 1199 (1998), para. 3 [Dossier No. 17].

[357] *Ibid*., preamble.

[358] Resolution 1203 (1998), preamble, paras. 3 and 5 [Dossier No. 20].

[359] *Kosovo*, pp. 60-67.

community[360]. Likewise, the representative of Gabon stated that "[n]either the peaceful measures that were advocated nor the condemnation repeatedly expressed by the international community [in the prior resolutions] succeeded in curbing the violence in Kosovo", and therefore the "resolution that we have just adopted … offers fresh prospects for a resolution of the Kosovo conflict and for peace in the Balkan region …"[361]. The United Kingdom, another active participant in the meeting and the negotiations leading up to it, now notes to this Court:

> "As far as the Yugoslav effective presence [in Kosovo] was concerned, Resolution 1244 (1999) aimed for, and achieved a clean slate. Previous international mandates had been piecemeal and ultimately unsuccessful attempts to address an escalating series of abuses by Yugoslav forces in Kosovo. By contrast, Resolution 1244 (1999) established basic public order in Kosovo and created international and local transitional institutions as a framework for a final settlement of Kosovo's internal and external affairs."[362]

5.34. Finally, and most importantly, the failure to repeat provisions from those earlier resolutions actually confirms that resolution 1244 (1999) did not preclude a Kosovo declaration of independence. If the Security Council in resolution 1244 (1999) had intended that the "political process" in paragraph 11 (e) consist solely of a "dialogue" between the FRY and Kosovo's leaders that would result in a "negotiated political solution", the Council certainly knew how to say as much, for it had done so in those earlier resolutions. Likewise, if the Council in resolution 1244 (1999) had intended that the "political settlement" in paragraph 11 (f) consist solely of "an enhanced status for Kosovo" within the FRY, that too the Council could have stated, using language from its prior resolutions. Yet in drafting resolution 1244 (1999), no such language was included anywhere in the text of the resolution.

5.35. By contrast, in the same timeframe that resolution 1244 (1999) was adopted, the Security Council adopted resolutions relating to Georgia that were quite explicit about the need for a mutual agreement of the two parties to the conflict and about the essential outcome expected in that agreement. In resolutions 1225 (1999) and 1255 (1999), which

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[360] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 12 [Dossier No. 33].

[361] Security Council, provisional verbatim record, fifty-fourth year, 4011th meeting, 10 June 1999, S/PV.4011, p. 20 [Dossier No. 33].

[362] *United Kingdom*, para. 6.25 (footnotes omitted).

were adopted, respectively, five months before and one month after resolution 1244 (1999), the Council underlined in the operative part of the resolutions the "necessity for the parties to achieve an early and comprehensive political settlement, which includes a settlement on the political status of Abkhazia *within the State of Georgia* …"[363].

5.36. Rather than adopt such an approach, the Council in resolution 1244 (1999) discontinued the use of such language, replacing it instead with language calling for a political process that would take into account the Rambouillet accords – accords that did not call for a FRY-Kosovo agreement on final status and did not require that final status to consist of autonomy within the FRY. Given that the Rambouillet Interim Agreement was adopted after virtually all of the resolutions "recalled" in resolution 1244 (1999)[364], and given that it is the Rambouillet Interim Agreement that is identified in the operative text of resolution 1244 (1999) relating to Kosovo's final status, the resolutions that preceded resolution 1244 (1999) serve to confirm the interpretation of that resolution discussed above, not to rebut it.

5.37. Perhaps aware that resolution 1244 (1999) cannot be construed as prohibiting a declaration of independence by the democratically elected representatives of the people of Kosovo, some States shift ground by arguing that resolution 1244 (1999) did not *authorize* a declaration of independence[365]. To that end, Serbia and certain other States note that in some other resolutions the Security Council has acknowledged a right of independence, such as with respect to Namibia and East Timor[366].

5.38. Such resolutions are not relevant to the case now before this Court. First, in those other instances, the Council had already decided that a new State should be formed and the Council was simply acknowledging that fact. By contrast, in resolution 1244 (1999), the Council adopted a status-neutral framework in which there would be an interim

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[363] Security Council resolution 1225 (1999), 28 January 1999, para. 3; Security Council resolution 1255 (1999), 30 July 1999, para. 5 (emphasis added).

[364] The only resolution recalled in resolution 1244 (1999) that post-dated the Rambouillet Accords was resolution 1239 (1999), which "did not concern the negotiated solution for the Kosovo problem" (*Romania*, para. 40).

[365] *Cyprus*, pp. 23-26 (especially para. 97); *Argentina*, para. 64.

[366] *Serbia*, paras. 785-792.

period of autonomy, followed by a process that would resolve the final status. Consequently, the language of the resolution did not seek to prejudge, one way or the other, the outcome of the final status process, as was done in the Namibia and East Timor resolutions.

5.39. Second, in answering the question now before it, the Court need not determine that resolution 1244 (1999) *authorized* such action; the Court need only find that resolution 1244 contains no prohibition on a declaration of independence and hence that the declaration cannot be said to contravene the resolution[367].

B. THE PREAMBULAR REFERENCE IN RESOLUTION 1244 (1999) TO "SOVEREIGNTY AND TERRITORIAL INTEGRITY" DID NOT PROHIBIT THE DECLARATION OF INDEPENDENCE

5.40. With no support in the operative part of resolution 1244 (1999) for the proposition that it prohibited the Declaration of Independence of 17 February 2008, Serbia and some other States turn to and rely heavily upon the single clause in the preamble of the resolution, where the Security Council says it is:

> "*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2 . . . ."

5.41. Yet this preambular paragraph says nothing about a declaration of independence, nor is it formulated in terms of a prohibition of any kind. Indeed, by its terms, the clause does not even purport to impose any new legal obligation; it is "reaffirming" a pre-existing commitment of United Nations Member States. This commitment must be understood as simply confirming the commitment of Member States to the principle of "territorial integrity" embodied in general international law, which prohibits States from using coercion against other States so as to alter territorial boundaries, but does not prohibit declarations of independence.

[367] *Kosovo*, pp. 137-39; *Germany*, p. 38 ("As to how the final settlement at the end of the political process should look like, resolution 1244 (1999) is entirely silent. It does not ask for complete independence, but neither does it exclude it.").

5.42. As discussed in greater detail in Chapter IV above[368], there are several other reasons why Serbia's argument is not sustainable. Even if Serbia's view of the meaning of this commitment was correct as of 1999 (which it is not), such a commitment cannot be regarded as still viable by 2008, given the extensive changes that had occurred over almost a decade. Further, a comparison of this clause with other clauses in the resolution, and a review of the statements made by members of the Security Council when the resolution was adopted, confirm that the clause was not intended to preclude Kosovo's Declaration of Independence. Finally, had the Security Council intended to link the aspirations of the Kosovo people to the concept of territorial integrity, one would expect language to that effect in paragraph 11 of resolution (1999), yet no such language exists.

C. REFERENCES IN RESOLUTION 1244 (1999) TO KOSOVO AS PART OF THE FRY ARE FACTUAL STATEMENTS ADDRESSING THE INTERIM PERIOD

5.43. Serbia and some other States expend considerable effort attempting to deduce from the language of resolution 1244 (1999) that it is based on a "principle that Kosovo continues to form part of Serbia"[369]. For example, Serbia notes that paragraph 4 of resolution 1244 (1999) envisaged a limited number of FRY military and police personnel returning to Kosovo (which it fact never happened). From this, Serbia concludes that "the Security Council, while significantly limiting the right of the FRY to exercise effective control over Kosovo, still perceived Kosovo as continuing to form an integral part of the FRY pending a final agreement …"[370]. Similarly, Serbia points out that the Security Council in resolution 1244 (1999) did not seek to alter the nationality of persons living in Kosovo[371].

5.44. Kosovo does not dispute that at the time of resolution 1244 (1999)'s adoption, Kosovo was regarded by the international community as a part of the FRY. Consequently, any provisions within resolution 1244 (1999) or statements by members of the Security Council during that period of time naturally viewed Kosovo as being part of the FRY. Yet

[368] See paras. 4.14-4.29 above.

[369] *Serbia*, para. 721.

[370] *Ibid.*, paras. 722-723.

[371] *Ibid.*, paras. 724-725.

these were merely factual statements of what was considered to be the case at the time resolution 1244 (1999) was adopted. These statements cannot be read as having in any way prejudged Kosovo's final status following the interim period[372].

5.45. The same point applies with respect to Serbia's arguments concerning the Military Technical Agreement of 9 June 1999, concluded between KFOR, the FRY, and Serbia immediately prior to the adoption of resolution 1244 (1999)[373]. That Agreement certainly contains provisions indicating that Kosovo is within Serbia, but these are simply factual statements reflecting what was considered to be the case at the time and remained so until 17 February 2008. The Agreement did not purport to provide any guidance on the final status process and would have had no reason to do so; indeed, NATO had no authority in this matter. The same point applies with respect to Security Council resolutions predating resolution 1244 (1999)[374], and Security Council Presidential statements[375] or other United Nations documents from that time[376]. All of these simply recognized the existing factual situation prior to 17 February 2008.

D. THE RELATIONSHIP OF RESOLUTION 1244 (1999) TO GENERAL INTERNATIONAL LAW

5.46. Some States argue that resolution 1244 (1999) established a special legal regime as it relates to the final status of Kosovo. Thus, Spain asserts that resolution 1244 (1999) established "an *ad hoc* legal system applicable to the Kosovo situation which would eventually make it possible to exclude the application of the rules and principles of intentional law generally applicable"[377]. If resolution 1244 (1999) is regarded as establishing a special legal system applicable only to Kosovo then, for the reasons indicated above, that *ad hoc* legal system did not prohibit the Declaration of Independence of 17 February 2008. Rather, resolution 1244 (1999) set up a status-neutral framework for

[372] See, e.g., *Estonia*, p. 12 ("Resolution 1244 (1999) did not determine the autonomy of Kosovo within the Federal Republic of Yugoslavia as a final outcome of the process. It only established an interim international administration which should, pending a political settlement, assure Kosovo's autonomy within the Federal Republic of Yugoslavia.")

[373] *Serbia*, paras. 668-674 (referring to resolution 1239 (1999)); see also *Spain*, para. 45.

[374] *Serbia*, para. 660; *Spain*, para. 37 (i).

[375] *Spain*, para. 38, fn. 60.

[376] *Serbia*, paras. 698-699.

[377] *Spain*, p. 12, para. 14. Such a position would seem inconsistent with the view that a decision by the Court in favor of Kosovo's position would set an adverse precedent for situations worldwide.

addressing Kosovo's future, one that contained no prohibition on a declaration of independence and instead fully envisaged the possibility of a final status of independence, if that ultimately proved to be the will of the people of Kosovo. Hence, even if the Court were to take the view that resolution 1244 (1999) is the sole source of law applicable in these proceedings, the Declaration of Independence still did not contravene that source of law.

5.47. Other States, such as Russia, assert that resolution 1244 (1999) "should be considered as the special legal regime upon which the Court can base its consideration of the request", but that "[p]rinciples of international law serve as the background against which the Resolution is to be interpreted and applied"[378]. If this approach is correct, then general international law does not prohibit a declaration of independence, as explained in Kosovo's first Written Contribution[379] and in Chapter IV above. Had the Security Council intended to alter the "background" rules emanating from general international law so as to create a prohibition on Kosovo's Declaration of Independence, it would have expressly said so in resolution 1244 (1999). By not doing so, general international law remained "as the background" and, under that law, there existed no prohibition on the issuance of the Declaration.

III. The Legal Effects of and Political Attitudes towards Resolution 1244 (1999) Changed after Commencement of the Final Status Process

5.48. Serbia and some other States assert that in the immediate aftermath of the adoption of resolution 1244 (1999), certain documents and statements were issued that characterized Kosovo as a part of the FRY and that in some instances opposed Kosovo's ability to declare independence at that time. Yet, such statements and documents typically do not address whether a declaration of independence might be issued by the people of Kosovo, and in any event were reflecting attitudes as to what was politically and legally appropriate prior to the commencement and completion of the final status process.

[378] *Russian Federation*, paras. 28 and 30.

[379] *Kosovo*, Chapter VIII.

5.49. In assessing the period between the adoption of resolution 1244 (1999) in June 1999 and the issuance of the Declaration of Independence on 17 February 2008, it is useful to consider three distinct phases. In the first phase, from 1999 to 2005, the international community was focused on an interim period in Kosovo that would see the departure of FRY/Serbian forces from Kosovo, the return of refugees and displaced persons to their homes, and the transfer of extensive authority to Kosovo institutions of self-government.

5.50. In this period, the Contact Group, the Secretary-General's Special Representative, and others made various statements to the effect that Kosovo's leaders should not proceed with efforts to declare independence[380]. Further, Serbia points to a "FRY-UNMIK Common Document" of 5 November 2001, a political document which "[reaffirmed] that the position on Kosovo's future status remains as stated in UNSCR 1244, and that this cannot be changed by any action taken by the Provisional Institutions of Self-government"[381]. Serbia also observes that the 2001 FRY-Macedonia border agreement[382] sought to address the border between Kosovo and Macedonia, a step that demonstrates that Kosovo remained a part of Serbia. Finally, Serbia notes that the SRSG declared null and void a "Resolution on the protection of the territorial integrity of Kosovo" adopted by the Kosovo Assembly in 2002 in connection with the border agreement[383], again confirming that Kosovo was not an independent State.

5.51. Yet such political statements and other actions often do not actually say what Serbia now claims that they say. The "Common Document", for instance, simply says that the position on Kosovo's future status "remains as stated" in resolution 1244 (1999) (i.e. that such status will be facilitated by UNMIK taking into account Rambouillet) and that "the position" expressed in the resolution cannot be changed by the PISG. The "Common Document" did not say that Kosovo's final status had to be one of autonomy, nor did it say that the PISG or any other entity or people could not be a factor in determining Kosovo's final status. Rather, the clause at issue merely says that the PISG cannot change the

[380] *Serbia*, para. 658.

[381] *Ibid.*, para. 759-762; see also *Spain*, para. 41.

[382] *Spain*, para. 44.

[383] *Serbia*, paras. 701-704; see also *Cyprus*, para. 112; *Spain*, p. 51; *Kosovo*, paras. 9.24-9.26.

approach on final status that was set forth within the framework of resolution 1244 (1999), which in fact it did not.

5.52. Moreover, it is important to note that such political statements and actions arose in the context of the first period of interim administration, at a time when the final status process had not yet been launched. In this period, it is clear that the relevant decision-makers in the international community did not regard the political process envisaged by resolution 1244 (1999), paragraph 11 (e), as yet having commenced. As such, action to bring about a final status settlement was not yet envisaged.

5.53. This situation changed during the second phase, the period between 2005 and 2007[384]. In 2005, Ambassador Kai Eide reported that the situation in Kosovo was no longer sustainable, an assessment with which the Security Council agreed. The Council therefore supported "the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999)", and welcomed the appointment of a Special Envoy to that end[385]. Moreover, the Security Council welcomed and approved the appointment of President Martti Ahtisaari as the Special Envoy, whose Terms of Reference indicated that the "pace and duration" of this process "will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground"[386].

5.54. As is often referred to by Serbia and others[387], the Contact Group stated in its "Guiding Principles" of 10 November 2005, issued at the outset of this process, that "any solution that is unilateral would be unacceptable". Seen in context, this was a political assertion that both sides must engage in good faith negotiations on final status issues under the auspices of the United Nations; it was certainly not, by its terms, nor could it have been, an interpretation of the requirements of resolution 1244 (1999), nor a statement that negotiations must continue indefinitely. Similarly, the statement by the Contact Group, in

[384] See *Kosovo*, paras. 9.15-9.19.

[385] See *ibid.*, para. 9.15.

[386] See *ibid.*, para. 9.16.

[387] *Serbia*, para. 764; *Cyprus*, para. 99; *Spain*, para. 79.

those same "Guiding Principles", that the "final decision on the status of Kosovo should be endorsed by the Security Council"[388], as well as the statement by President Ahtisaari that "it is up to the Security Council to decide how the future status will look like"[389], were also political assertions, issued at the outset of the final status process, positing that it was politically desirable for the Security Council to endorse the outcome of the process. Such assertions were no doubt also motivated by an understanding that, at some point, in order to terminate the presence of UNMIK in Kosovo, there would need to be a further Security Council resolution. These statements cannot be read as an interpretation of resolution 1244 (1999) that Security Council endorsement was legally necessary for the final status settlement to take effect prior to the termination of UNMIK.

5.55. President Ahtisaari engaged in fifteen months of intense negotiations with Serbia, Kosovo, and other stakeholders culminating in 2007[390]. He then determined that it was not viable to continue the *status quo* and that further "negotiations' potential to produce an mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse."[391] Further, he crafted a detailed political settlement, the Ahtisaari Plan, based on his conclusion that independence for Kosovo was the only viable option[392]. The Secretary-General supported the plan. Kosovo accepted the plan. Serbia did not. It is true that President Ahtisaari's conclusions included a "recommendation" to the Security Council for action[393], and that many states saw Security Council action[394] as politically desirable. Yet none of these statements expressed the belief that Kosovo's could not declare independence in the absence of a further Security Council resolution. Indeed, the draft resolution that was considered at the time contained no provision that would have declared Kosovo to be an independent State or that would have authorized a declaration of independence; instead, it was focused on UNMIK's changed role in the post-independence period.

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[388] *Serbia*, para. 763.

[389] *Ibid.*, para. 817.

[390] These negotiations included 17 direct discussion sessions and 26 missions of experts dispatched to Belgrade and Pristina. See *France*, para. 2.48.

[391] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].

[392] *Kosovo*, para. 9.17.

[393] See *Argentina*, paras. 58-59.

[394] *Serbia*, para. 821.

5.56. As it happened, the Ahtisaari Plan was supported by many members of the Security Council, none of whom viewed it as inconsistent with resolution 1244 (1999) due to a lack of Serbian consent or because it would transgress FRY "territorial integrity"[395]. No longer were statements being made at this point in the process about the need for further negotiations or about a concern with "unilateral action", for events had now moved past that point. Unfortunately, efforts to secure Security Council endorsement of the Ahtisaari Plan were unsuccessful due to the likely veto of a permanent member. Further efforts to resolve the matter, in which Serbia itself informed a mission of the Security Council that the *status quo* was not sustainable[396], also failed.

5.57. In the third and final phase, it was apparent towards the end of 2007 at the latest that the political process launched by the Security Council and Secretary-General had run its course, that the person charged with determining the "pace and duration" of this process viewed his task as completed, and that the only viable option was for Kosovo to be independent[397]. Once that process had run its course, the SRSG – unlike in prior phases – chose not to proclaim the Declaration null and void, or without legal effect. Thus, the entity charged by resolution 1244 (1999) with "facilitating" the final status process and, in the final stage, with overseeing the transfer of authority to the final settlement institutions, took a very different path than was taken before the end of the final status negotiations. Serbia thereupon formally demanded that the Secretary-General take steps to have the Declaration set aside. The Secretary-General did not do so. Nor did the Security Council,

[395] See Security Council, provisional verbatim record, sixty-second year, 5673rd meeting, 10 May 2007, S/PV.5673 [Dossier No. 114] (indicating that the Plan was supported by Belgium (p. 3), Peru (p. 5), France (p. 6), Ghana (p. 8), Panama (p. 9), Italy (p. 11), United Kingdom (p. 12), and United States (p. 13)). For example, Ghana stated: "We recognize the need to resolve the issue of the future status of Kosovo as soon as practicable, and support in principle the adoption of a resolution following the submission by the Special Envoy of the comprehensive proposal on the Security Council mission. We hope that the Security Council will work assiduously towards the realization of that objective." (p. 8).

[396] *Ibid.*, p. 3 ("Despite the strongly opposed positions, both parties agree that the status quo is not sustainable.")

[397] *Kosovo*, paras. 9.20-9.28; see also *France*, paras. 2.55-2.56; *United Kingdom*, para. 0.15 (the Declaration "flowed from the failure of the two sides, and of the international community, after long and sustained effort, to secure any other framework for peaceful relations between the people of Serbia and the people of Kosovo".); *United States*, p. 83 ("At the point in February 2008 that Kosovo declared independence … there was no longer an ongoing future status process. The Special Envoy had declared that that the process was over, and that there was no prospect of its successful resumption.")

either by resolution or through a statement of its President, take any steps to instruct the Secretary-General or his representative to set aside the Declaration[398].

5.58. This unwillingness of the SRSG, the Secretary-General, or any other United Nations entity to act strongly supports the proposition that the issuance of the Declaration did not violate resolution 1244 (1999)[399]. Resolution 1244 (1999) charges the SRSG (as the head of UNMIK) with "overseeing the development of provisional democratic self-governing institutions in Kosovo" and then, "[i]n a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement"[400]. In discharging these functions, Serbia itself has characterized UNMIK as having "supreme administrative authority" in Kosovo[401], a view echoed by several States[402]. Actions in exercise of that authority, as noted by the Russian Federation, "constitute a means of interpretation of the Resolution as well as a part of the legal regime established by it". Moreover, UNMIK stated in its Constitutional Framework that it would take "appropriate measures whenever [PISG] actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework"[403].

5.59. Yet the SRSG did not take any action before or after the Declaration of Independence of 17 February 2008 to set aside the Declaration or to declare it null and void. By not doing so, the "supreme administrative authority" in Kosovo acted in a manner that does not fit Serbia's conclusion that the Declaration violated resolution 1244

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[398] *Kosovo*, para. 9.27.

[399] See also *Austria*, para. 19 ("By abstaining from a negative reaction, the Security Council has accepted the competence of the [PISG] Assembly to act in this field. Moreover, since this conduct consisting of non-objection is decisive for interpretation of Resolution 1244 as subsequent practice, the act of the issuing of the Declaration has to be recognized as in conformity with Resolution 1244."); *ibid.*, para. 42 ("Since the Secretary-General as well as the Security Council were immediately aware of the events in Kosovo and, nevertheless, none of the organs of the UN took action in this regard, the impression is created that the UN has agreed to the Declaration."); *Germany*, p. 42 ("This only confirms the proposition that the prohibition of unilateral steps towards independence, contained in resolution 1244 (1999) for the interim framework, ended when the political process foreseen by that resolution had finally collapsed."); *United States*, pp. 84-89.

[400] Security Council resolution 1244 (1999), paras. 11 (c) and (f) [Dossier No. 34].

[401] *Serbia*, para. 895; *ibid.*, para. 896 (referring to "the international legal regime established by Security Council resolution 1244 (1999) which provides that UNMIK, headed by the Special Representative, is the supreme authority in Kosovo …").

[402] *Argentina*, para. 62 ("The Special Representative of the Secretary-General was vested with the highest authority of the international administration.")

[403] Constitutional Framework, Chapter 12 [Dossier No. 156].

(1999). Rather, the SRSG's position was entirely consistent with the view that the events contemplated in resolution 1244 (1999) had unfolded to the point where a transfer of authority from interim institutions to permanent institutions was appropriate.

5.60. The concluding element of the final status process, the Declaration of Independence of 17 February 2008, was the product of the will of the people of Kosovo, as well as the other Rambouillet factors recognized in resolution 1244 (1999) as important for the facilitation of a final settlement. It occurred only after the conclusions reached by the relevant United Nations representatives responsible for overseeing the final status discussions that the *status quo* was not sustainable and independence was the only viable option. While the Declaration may have been "unilateral"(as it is qualified in the question put to the Court and by Serbia in its Written Submission[404]) in the sense of not being the product of a Kosovo-Serbia agreement, the Declaration was certainly not "unilateral" in the sense of an action taken by Kosovo without any involvement of the international community in launching, negotiating, and concluding a final status settlement.

IV. The Declaration did not Violate Resolution 1244 (1999) as an *Ultra Vires* Act of the PISG or as a Contravention of the 2001 Constitutional Framework

5.61. Serbia and some other States also maintain that the Declaration is "contrary to the international legal regime for Kosovo" established by resolution 1244 (1999) because it constituted an *ultra vires* act by the PISG[405] and violated the Constitutional Framework promulgated by the SRSG[406]. The crux of this argument is that resolution 1244 (1999) and the regulations issued by UNMIK thereafter established authorities within Kosovo that were limited in their power; the Declaration unlawfully transgressed that limited power, and in doing so violated the "legal regime" set up by the Security Council for Kosovo. For several reasons, these arguments fail.

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[404] *Serbia*, paras. 913-940.

[405] *Ibid.*, paras. 867-94; *Cyprus*, pp. 27-29; *Argentina*, para. 116; *Romania*, para. 60; *Russian Federation*, para. 72; *Slovakia*, para. 25.

[406] *Serbia*, paras. 895-912. Slovakia refers to this as an alleged diminishment of the authority of the SRSG (*Slovakia*, para. 25).

5.62. First, as explained in greater detail in Kosovo's first Written Contribution, the entities identified in the question submitted to the Court – the PISG – did not adopt the Declaration[407]. As a series of institutions that do not act as a collective even in their normal functioning, the PISG cannot be regarded as having issued the Declaration. Moreover, if one sets aside the PISG and focuses on just one of the PISG institutions – the Assembly – it is also readily apparent from the form and content of the Declaration, and the procedure for adopting it, that this Declaration differed from the legislative acts normally adopted by the PISG Assembly. This particular action was of a very special and extraordinary nature that simply cannot be judged as the act of a body created by the SRSG and charged with day-to-day governing responsibilities during the interim period.

5.63. Second, even if this action of the democratically elected leaders of Kosovo, meeting as a constituent body, were to be regarded as an action of the PISG (or of the PISG Assembly), the legality of that action cannot be judged as against standards set in either resolution 1244 (1999) or UNMIK regulations for governance during the interim period. As discussed in Section III above, by February 2008 the final status settlement process had concluded with a determination by the United Nations authorities charged with overseeing the process that the *status quo* in Kosovo was unsustainable, further negotiations with Serbia were pointless, and Kosovo's independence was the only viable option. At this point, having reached the end of the political process for determining Kosovo's future status, paragraph 11 (f) of resolution 1244 (1999) contemplated a stage in which a transfer of authority would occur from Kosovo's provisional institutions to institutions established under a political settlement. Seen in this light, issuance of the Declaration of Independence on 17 February 2008 was not an act of an interim institution transgressing its limited authority; rather, it was an act of a constituent body declaring in the name of the people its readiness to exercise governing authority on a permanent basis, as contemplated by resolution 1244 (1999).

5.64. In this regard, it must be noted that the issuance of the Declaration did not terminate or seek to terminate the role of UNMIK under resolution 1244 (1999)[408]. That

[407] *Kosovo*, Chapter VI and paras. 1.22-1.24 above; see also *Austria*, para. 16.

[408] See, e.g., *Argentina*, para. 118 (the Declaration "attempts to put an end to such presence established on the basis of the Resolution, something which can only be decided by the Security Council").

resolution contemplated a role for UNMIK in both the interim and post-interim periods[409], which UNMIK has continued to fulfil. Serbia itself accepts that the Declaration did not set aside the mandate of UNMIK and that UNMIK continued to perform certain functions after the adoption of the Declaration[410]. Kosovo accepts that it is the Security Council's prerogative to terminate the international civilian presence in Kosovo[411] and that resolution 1244 (1999) remains the UN basis for UNMIK's presence in Kosovo[412], which over time is being reconfigured so as to reduce UNMIK's functions and personnel. Acceptance of those points, however, does not alter the fact that a final status process under resolution 1244 (1999) has run its course and UNMIK's role in facilitating a final status settlement is completed. Indeed, as noted in Chapter II, according to the Secretary-General, UNMIK's functions no longer include "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[413].

5.65. Third, whether or not the PISG issued the Declaration, it fell to the SRSG to determine whether the Declaration was an *ultra vires* act or an act that violated the Constitutional Framework promulgated by the SRSG, if that was truly the case. Yet, as discussed in the prior section, the SRSG took no such action. In this regard, a point of United Nations law arises. The Security Council, after delegating authority to the Secretary-General and his Special Representative on the ground in situations involving civilian administration of territory, provides those officials with authority for implementing the civilian administration, which includes interpreting Security Council resolutions as the need arises in the theatre of operations[414]. Such an approach empowers the relevant United Nations representatives (or for that matter subsidiary organs or committees) with the

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[409] See *Kosovo*, para. 4.20; *Austria*, para. 33 ("The wording of the Resolution signals that the international civil presence is meant to exist beyond the end of the interim period, after a political settlement has been achieved.")

[410] *Serbia*, paras. 827 and 834.

[411] Hence, Serbia's arguments in this respect are misguided. See *ibid.*, paras. 795-798.

[412] Kosovo's Foreign Minister has recently (on 17 June 2009) reiterated to the Security Council Kosovo's adherence to international law, including binding Security Council resolutions, such as resolution 1244 (1999). "This commitment has never wavered." S/PV.6144 (2009), p. 8: see paras. 2.46-2.47 above. Hence, arguments by others on this point are also misplaced. *Serbia*, paras. 799-815; *Spain*, para. 84; *Russian Federation*, para. 26.

[413] See para. 2.45 above.

[414] The need for according such authority to local administrators has also been recognized in the context of other types of representatives. See, e.g., resolution 1869 (2009), para. 4 ("*Reaffirms also* the final authority of the High Representative in theatre regarding the interpretation of annex 10 on civilian implementation of the Peace Agreement").

authority they need for day-to-day implementation of the Council's resolutions. Obviously if the United Nations representative acts in a manner that transgresses the United Nations Charter or a Security Council resolution, the Council or this Court might take steps to correct that transgression. But where the issue concerns a possible transgression in theatre of the rules adopted by the United Nations representative to regulate local matters (such as the Constitutional Framework), considerable deference should be accorded to that representative to interpret whether a transgression has occurred and, if so, to correct it[415]. In this instance, the SRSG's decision not to declare null or set aside the Declaration as an *ultra vires* act of the PISG, or as a violation of the Constitutional Framework, was an authoritative (or at least highly persuasive) interpretation that merits deference[416].

5.66. Fourth, even if one hypothesizes that the Declaration constituted an *ultra vires* act by the PISG and that it violated UNMIK's Constitutional Framework, Serbia errs in regarding any such action as a violation of *international law*. Such action would only have been a violation of the domestic law applicable in Kosovo – that is local law established for the administration of Kosovo. Indeed, as Spain notes, UNMIK's "set of regulations makes clear that these competences are to be deployed exclusively within the internal sphere", "that the PISG lack competences in the international sphere", that "competences granted to the PISG are internal powers, with no international projection whatsoever" and that "such powers are exercised within Serbia"[417]. As such, any transgression of the powers of the PISG or of the Constitutional Framework would have been a violation of domestic, not international law, and thus fall outside the scope of the question asked of this Court. In this respect, the Declaration of Independence would have been *ultra vires* only in the same way that most declarations of independence are – as a contravention of the domestic law of the State concerned.

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[415] As the Permanent Court said, "it is an established principle that the right of giving an authoritative interpretation of a legal rule (le droit d'interpréter authentiquement) belongs solely to the person or body who has power to modify or suppress it." (*Jaworzina*, *Advisory Opinion*, 1923, *P.C.I.J.*, *Series B*, *No. 8*, p. 37).

[416] *Netherlands*, p. 4 ("the exercise of delegated power in this case … has been generally accepted in practice.") Indeed, it should be noted that the Constitutional Framework itself is simply a regulation of UNMIK, which can be altered, amended, and interpreted at any time by the SRSG.

[417] *Spain*, para. 17; see also *Argentina*, para. 62 ("The Provisional Institutions of Self-Government … were conceived as a local governing institution …").

V. The Fact that the Declaration did not Contravene Resolution 1244 (1999) is Consistent with the Security Council's General Practice of Only Imposing Legal Obligations upon States

5.67. The fact that resolution 1244 (1999) did not prohibit the issuance of the Declaration of Independence of 17 February 2008 is consistent with the Security Council's general practice of imposing obligations upon States, not upon other entities or persons.

5.68. As the Court is well aware, the United Nations Charter is a multilateral treaty establishing an international organization and focusing upon rights and obligations of its Member States. The binding nature of Security Council decisions flows from Article 25 of the Charter, which states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with this Charter"[418].

5.69. When acting under Chapter VII, the Security Council "may call upon the Members of the United Nations" when pursuing non-forcible measures to address a threat to the peace[419], whereas forcible measures may include "operations by air, sea or land forces of Members of the United Nations"[420]. Article 48 provides that the "action required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine", while under Article 49 "Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided by the Security Council"[421]. In light of Article 2 (6), the United Nations powers have sometimes been regarded as extended to States that are not Members of the United Nations, though this is controversial[422].

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[418] United Nations Charter, art. 25.

[419] *Ibid*., art. 41.

[420] *Ibid.*, art. 42.

[421] *Ibid*., arts. 48-49. China asserts that resolution 1244 (1999) was adopted in accordance with this Article 49. See *China*, p. 2.

[422] Article 2 (6) provides that the United Nations "shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".

5.70. Such provisions help explain why the dominant and natural focus of the Security Council when adopting resolutions is upon the rights and obligations of States. This is not to say that the Council has refrained from issuing resolutions that speak to the conduct of entities or persons other than States. The Council, for example, can recognize *existing* legal rules that bind insurgent groups or that bind individuals under the *jus in bello*, and can set up international institutions to prosecute individuals for violations of those rules. The Council can also issue political statements about its attitude toward the conduct of non-state entities, calling upon them to (or demanding[423] that they) pursue a certain course of action, or stating that the Council will not accept a different course of action. The Council can certainly impose upon States the obligation to sanction groups or individuals, such as freezing of asset or travel restrictions. Yet under international law[424], and specifically under Article 25 of United Nations Charter, it is States (not individuals or groups of individuals) that are obligated to accept and carry out the decisions of the Security Council. As such, the authors of the Declaration of Independence cannot be said to have violated any obligation that might have been imposed by resolution 1244 (1999)[425].

5.71. In these proceedings, however, this Court need not address the exact limits on the power of the Security Council in this regard. Instead, it is sufficient to find that when the Security Council seeks to address (and perhaps to bind) non-state entities, it does so expressly and clearly. Although some States assert that the decisions contained in resolution 1244 (1999) are "unambiguously addressed to the Kosovo Albanian leadership and hence are binding on them"[426], in fact there is no demand or even request within resolution 1244 (1999) directed at the "Kosovo Albanian leadership". Nor is there any prohibition on the Declaration of Independence or of other acts that might alter the political status of Kosovo.

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[423] See *Argentina*, para. 75.

[424] *Compare* Vienna Convention on the Law of Treaties, 23 May 1969, Arts. 34 and 35, United Nations, *Treaties Series*, vol. 1155, p. 331 (providing that a treaty "does not create either obligations or rights for a third State without its consent" and that an obligation from a treaty arises for a third State only if it "expressly accepts that obligation in writing").

[425] Indeed, if Cyprus is correct that the Security Council could not itself grant Kosovo independence (*Cyprus*, paras. 100-103), then there is no principled basis for finding that the Council has the power to forbid any modification of territorial title that is not prohibited under general international law.

[426] *Russian Federation*, para. 24.

5.72. In prior resolutions, the Council made certain political demands of the Kosovo Albanian leadership on certain issues. For example, in resolution 1160 (1998), the Council called "upon the Kosovar Albanian leadership to condemn all terrorist action, and emphasize[d] that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only"[427]. Similarly, in resolution 1199 (1998), the Council demanded "that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe", and further called upon "the authorities of the Federal Republic of Yugoslavia, the leaders of the Kosovo Albanian community and all others concerned to cooperate fully with the Prosecutor of the International Tribunal for the Former Yugoslavia in the investigation of possible violations within the jurisdiction of the Tribunal"[428]. Yet the Council made no such requests or demands upon the Kosovo Albanian leadership in resolution 1244 (1999) of any kind, let alone with respect to a declaration of independence.

5.73. Some States argue that resolution 1244 (1999) binds the PISG by virtue of Chapter 2 of the Constitutional Framework, which states that the PISG and their officials shall exercise their authorities consistent with resolution 1244 (1999)[429]. Yet such an argument is misguided; the SRSG had no power to transform a Security Council resolution that does not bind an entity into one that does[430]. At best, the SRSG incorporated into his Regulation (the Constitutional Framework) certain standards existing in resolution 1244 (1999), such that a transgression of those standards by the PISG would violate the Regulation. As was indicated in the prior section, however, there was no violation of the Regulation, since (1) the persons who adopted the Declaration were not the PISG, (2) the Declaration was adopted as part of the transition from interim to final status, and thus was not by an interim institution, and (3) the Declaration cannot be seen as violating the Constitutional Framework given the inaction of the SRSG in setting the Declaration aside. In any event a violation of the Constitutional Framework would not have been a violation of international law, only of the local law applicable in Kosovo.

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[427] Security Council resolution 1160 (1998), para. 2 [Dossier No. 9].

[428] Security Council resolution 1199 (1998), para. 2 [Dossier No. 17].

[429] *Romania*, para. 14.

[430] See *Russian Federation*, para. 27 (the Constitutional Framework is "secondary and subordinate to the legal regime created by Resolution 1244").

5.74. In short, given the orientation of the United Nations Charter in setting forth the powers of the Security Council and the overall practice of the Council in taking measures that bind only States, the lack of any mention of non-State entities in resolution 1244 (1999) confirms that the Council did not seek in resolution 1244 (1999) to prohibit, by imposing an obligation under international law, the conduct of a non-State entity in issuing a declaration of independence.

PART IV

SUMMARY AND CONCLUSION

CHAPTER VI

SUMMARY

6.01. In this concluding Chapter, the Republic of Kosovo reiterates some of the key elements that were identified in earlier Chapters and in its first Written Contribution (**Section I**). The Chapter then summarises Kosovo's the legal arguments as set out its first Written Contribution and in the present Contribution (**Section II**).

I. Key Elements

The situation of Kosovo entailed special characteristics that are unlikely to be replicated in other cases

6.02. The emergence into statehood of the Republic of Kosovo occurred under circumstances that are very unlikely to be replicated elsewhere. Kosovo is best seen not as an example of secession, but as the final step in the process of a disintegrating Federation (the former SFRY).

6.03. Kosovo's status within the Federation gave Kosovo important protections against unilateral actions by Serbia, which could not survive the dissolution of the SFRY, as was amply demonstrated throughout the 1990s, culminating in Serbia's devastating crimes against the Kosovo Albanian population in 1998 and 1999, 90 percent of whom were forced from or fled their homes. The crimes against humanity and massive human rights violations of the 1998-1999 were identified by the Security Council as a threat to the peace and resulted ultimately in the intervention of the international community.

6.04. Under Security Council resolution 1244 (1999), Serbia was excluded from any role in the governance of Kosovo, replaced instead by UNMIK and Kosovo institutions nurtured by UNMIK from 1999 onwards.

6.05. Further, resolution 1244 (1999) called for a political process on final status that would be predicated upon certain key factors, in particular the will of the people of

Kosovo, and not on the consent of the FRY or of Serbia. The political process on final status was led by the United Nations Secretary-General and his Special Envoy, involved extensive negotiations over a lengthy period, and concluded after the relevant United Nations officials determined that further negotiations were pointless, that the *status quo* was unsustainable, and that independence was the only viable option.

6.06. Such characteristics are quite special in nature, such that the emergence of Kosovo as an independent State is not a precedent for the emergence of other States where similar factors do not exist.

Final Status for Kosovo was the Last Stage of the Break-up of the SFRY

6.07. Kosovo's Declaration of Independence was the last stage of the non-consensual dissolution of the SFRY. Serbia's destruction of Kosovo's autonomy in 1989, in a concerted effort to dominate the SFRY, was an important element in the chain of events leading to Yugoslavia's collapse. The break-up of the Federation, which had consisted of eight federal units, fundamentally undermined the basis for Kosovo's autonomy within Serbia. Before the break-up, Kosovo had had a dual nature: it was a constituent unit of the Federation (on an equal footing with the six republics), and it was an autonomous province within Serbia. With the disintegration of the SFRY, the constitutional safeguards could not be re-established. The unacceptability of any solution other than independence was confirmed by the brutal way in which Serbia destroyed Kosovo's autonomy in 1989, by the events of the 1990s, and by the terms of the 2006 Constitution of the Republic of Serbia. Other former units of that Federation also have become independent States, and their independence is universally accepted.

The people of Kosovo have long made clear their overwhelming desire for independence

6.08. The desire of the people of Kosovo to determine freely their political status goes back many years. This desire was clear to all the participants in the 1999 Rambouillet Conference and was recognized through the "will of the people" clause in the Rambouillet Interim Agreement as the key element in resolving Kosovo's final status. It was clear immediately after the 1999 conflict when resolution 1244 (1999) expressly referred to the Rambouillet accords, it was clear throughout the period of UNMIK administration, and it

was fully discussed and considered throughout the final status negotiations. Key participants in those negotiations, such as the Contact Group, repeatedly said that the final status must be acceptable to the people of Kosovo.

The crimes against humanity and human right abuses suffered by the people of Kosovo in 1998/1999 reinforced their demands for independence, and their unwillingness to return to Serbia

6.09. The people of Kosovo suffered human rights abuses in 1912, in the 1920s and 1930s, between 1945 and 1966, and throughout the 1980s and 1990s, culminating in the 1998-1999 ethnic cleansing, crimes against humanity, and the massive refugee and IDP crisis. This suffering was the result of a deliberate policy of the authorities of Serbia[431].

Final status negotiations had reached an impasse by the end of 2007; prolongation would have been highly destabilising for Kosovo and the region

6.10. By December 2007, at the latest, final status negotiations had reached a dead-end, and it was clear that their continuation would serve no purpose, as has been recognized by those most closely involved in these negotiations, including Special Envoy Ahtisaari[432], the Troika[433], and the United Nations Secretary-General[434]. It was also the considered view of many in the international community that to prolong the uncertainty caused by the protracted negotiations would be destabilising within Kosovo, given the expectations of the people of Kosovo, and within the region[435]. There can be no obligation to continue to negotiate in such circumstances[436]. More than one year later, there can be no question of resuming final status negotiations, as repeatedly and publicly suggested by Serbian authorities and as appears to be a principal motive for Serbia having instigated the present proceedings. Doing so would be pointless, destabilizing, and doomed to failure. The Declaration of Independence of 17 February 2008, the adoption, entry into force and

[431] See the ICTY Trial Chamber in its 26 February 2009 judgment in *Milutinović et al*.

[432] *Kosovo*, para. 5.22.

[433] *Ibid.*, para. 5.33.

[434] *Ibid.*, para. 5.34.

[435] *Ibid.*, paras. 5.11-5.14.

[436] See paras. 5.28-5.30 above.

implementation of the Constitution of the Republic of Kosovo, the establishment of fully-functioning sovereign governing institutions, the widespread recognition of Kosovo and its admission to international organizations, and above all the will of the people of Kosovo make clear that Kosovo's independence is irreversible.

6.11. In any event, these proceedings are for the provision of advice to the General Assembly. It would not be appropriate for the Court to treat this matter as a contentious proceeding by calling upon the two States to resume final status negotiations. In fact, were the issue before the Court to be seen as essentially a bilateral dispute over which the Court does not have contentious jurisdiction, then the Court should decline to address the matter through these advisory proceedings.

6.12. The Republic of Kosovo hereby reaffirms its wish for good neighbourly relations with the Republic of Serbia. It repeats that it would welcome talks with the Republic of Serbia on practical issues of mutual concern, such as those foreseen in the Ahtisaari Plan. Such talks would be normal between neighbouring sovereign and independent States but must be held on an equal basis, between two sovereign States. On the other hand, the Republic of Kosovo is not willing to enter into negotiations that could bring into question its status as a sovereign and independent State.

Kosovo has been recognized as a sovereign and independent State by many States, including almost all States in the region, and admitted to international organizations

6.13. Since 17 February 2008, the day on which the representatives of the people of Kosovo voted upon and signed the Declaration of Independence, many States have recognized Kosovo as a sovereign and independent State, while others have taken steps that imply recognition. Indeed, most European States have recognized the Republic of Kosovo, including all of its immediate neighbours, with the exception of Serbia. Within Europe, it is widely agreed that Kosovo's status as a sovereign and independent State is an important factor for peace and security in the region.

6.14. Since the Declaration of Independence, many steps have been taken by Kosovo to implement the commitments made to the international community regarding protections

for communities, rule of law, respect for international agreements, and cooperation with international institutions.

6.15. The Republic of Kosovo is participating as a sovereign and independent State in international relations through the establishment of diplomatic relations, the conclusion of treaties and its participation in international organizations. In particular at the end of June 2009, Kosovo became a member in the IMF and the World Bank institutions following an overwhelming vote in its favour. Kosovo has received much help from the international community, including from many States that have not yet taken the step of according formal recognition.

The common future for the States of the Western Balkans lies in Europe

6.16. In its Presidential statement of 26 November 2008, the Security Council welcomed "the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans, thereby making a decisive contribution to regional peace and stability"[437].

6.17. The common future for Kosovo and Serbia lies in eventual membership in the European Union. In the meantime, the development of good-neighbourly relations, as is normal between neighbouring States, should proceed hand-in-hand with progress towards full integration within European institutions, including the EU and the Council of Europe. This is a positive prospect, one looking toward the future, not rooted in the past.

II. Summary of Kosovo's Legal Arguments

The question posed to the Court may not be proper

6.18. The process by which the question was formulated, considered, and then adopted provides no indication as to how the Court's opinion will assist the General Assembly in its work. Rather, the purpose of the question appears to be part of a strategy by Serbia to influence States in their political decision about whether to recognize the

[437] Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008 [Dossier No. 91].

Republic of Kosovo. Yet in the course of exercising its advisory jurisdiction, the Court is not charged with providing general legal advice on any question of international law to whomever might solicit it; the Court is charged with providing advice to the political organs of the United Nations and the specialized agencies on matters within their competence.

The question put to the Court is narrow in scope

6.19. The question that has been put to the Court is narrow in scope, with a focus on the issuance of a particular statement – a declaration of independence – by particular persons on a particular day. This has been recognized by Serbia, the author of the question and sole sponsor of General Assembly resolution 63/3.

In so far as the question asked to the Court is argumentative and prejudicial, these elements should be disregarded

6.20. The question was drafted by a single State that declined to entertain any modifications contains prejudicial and argumentative assumptions. The question characterizes the Declaration of Independence as "unilateral", a term that at best is superfluous and at worst intended as a synonym for "illegal". Further, the question incorrectly suggests that the Declaration was adopted by the "Provisional Institutions of Self-Government of Kosovo", when it was an act voted upon and signed by the democratically elected representatives of the people of Kosovo, acting in a manner wholly different from the PISG Assembly let alone the several institutions that collectively comprise the PISG. Finally, the question appears unjustifiably to assume that there are rules of international law governing the issuance of declarations of independence, when in fact general international law does not regulate such declarations.

There are no rules of international law prohibiting the issuance of a declaration of independence

6.21. International law contains no prohibition on the issuance of declarations of independence. Rather, the issuance of a declaration of independence is understood as a *factual* event that, in combination with other events and factors, may or may not result in

the emergence of a new State. If a State emerges, only at that point does the new State become exposed to rights and obligations under international law. Consequently, the Declaration of Independence of 17 February 2008, as a factual event, did not contravene any applicable rule of international law and in that sense was "in accordance" with international law.

The principle of sovereignty and territorial integrity did not prevent the issuance of the Declaration of Independence

6.22. The principle of sovereignty and territorial integrity is not a rule prohibiting the issuance of a declaration of independence. Rather, the principle is applicable only in State-to-State relations, as is amply clear in the relevant provisions of the United Nations Charter, the Court's jurisprudence and relevant international instruments. Moreover, the principle is aimed at prohibiting the use or the threat of force by a State against the territorial integrity or political independence of another, or, more specifically, against established international boundaries. It is not shaped to protect a State against internal developments, such as the issuance of a declaration of independence. Consequently, as a matter of international law, Serbia cannot invoke the principle of sovereignty and territorial integrity against the people of Kosovo and their democratically elected representatives.

Even if it were necessary to demonstrate that the people of Kosovo had a right to issue the Declaration of Independence, they had the right to do so.

6.23. The Court need not reach the issue of whether the Declaration of Independence of 17 February 2008 reflected an exercise of the right of self-determination, for there is no need to determine whether international law has authorized Kosovo to declare independence.

6.24. However, because of the constant denial of self-determination to the people of Kosovo by Serbian authorities since 1989 and continuing right up to the date of the Declaration of Independence (as demonstrated by the 2006 Constitution of the Republic of Serbia), in conjunction with widespread violations of elementary human rights and the perpetration of war crimes and crimes against humanity against the people of Kosovo, the people of Kosovo were clearly entitled, under the internationally recognized right of self-

determination, to declare independence. No international law rule precluded such an event.

The Declaration did not contravene Security Council resolution 1244 (1999), which envisaged a political process that included the possibility of Kosovo's independence if it was the "will of the people"

6.25. The Declaration of Independence of 17 February 2008 did not contravene Security Council resolution 1244 (1999). Rather than prohibit the issuance of a declaration of independence, resolution 1244 (1999) established a status-neutral framework that included the possibility of Kosovo's emergence as an independent State.

6.26. In the negotiations which took place at Rambouillet prior to the adoption of resolution 1244 (1999), the FRY and Serbia sought to include language that would ensure a final status solely of Kosovo autonomy within Serbia, with no further changes in the absence of FRY/Serbian consent. Those efforts failed; instead, the final text of the Rambouillet negotiations contained a clause that focused on final status that reflected the "will of the people". Although the Rambouillet accords were not agreed to by the FRY/Serbia, they became the touchstone for Kosovo's final status in the political process identified in resolution 1244 (1999).

6.27. Nothing in the text of resolution 1244 (1999) precluded independence as the final status for Kosovo. The operative part of resolution 1244 (1999) made provision primarily for an interim period, during which Kosovo was placed under international administration. The resolution did not prejudge any final status outcome and favoured neither autonomy nor independence; indeed, it has been characterized by the Secretary-General as establishing a "status-neutral framework". Further, while all solutions were left open, the resolution clearly did not require a final status settlement predicated upon FRY or Serbian consent. Rather, UNMIK was charged with facilitating a political process that would take into account the Rambouillet accords, meaning a process largely driven by the "will of the people".

6.28. References within Security Council resolution 1244 (1999) or as contained in previous resolutions of the Security Council to FRY/Serbia's territorial integrity, or to the fact that Kosovo was part of Serbia have to be interpreted in light of this clear understanding. Further, references to "territorial integrity" in resolution 1244 (1999) must be understood as references to inter-State relations, as previously discussed and, in any event, only related to the "interim political framework" envisaged by resolution 1244 (1999). As such, these references did not prejudge the outcome of the final status political process.

6.29. While a further Security Council decision was no doubt viewed as politically desirable, resolution 1244 (1999) did not require any such decision. Indeed, the process and substance identified in the resolution for guiding this process were consciously open-ended and identified as "political" in nature.

The political process envisaged by resolution 1244 (1999) ended in 2007 when the authorized representatives of the United Nations determined that independence was the only viable option

6.30. In 2005, the Secretary-General, after consulting the Security Council, launched the political process for the determination of Kosovo's final status. The outcome of that process was a determination by President Ahtisaari, the United Nations Special Envoy appointed by the Secretary-General, that the "potential to produce any mutually agreeable outcome on Kosovo's status is exhausted"[438] and that "the only viable option for Kosovo is independence"[439]. Given the acceptance by the Secretary-General that further negotiations would be fruitless and that independence was the only viable option, it cannot be said that a declaration of independence by the democratically elected representatives of Kosovo contravened resolution 1244 (1999). Rather, the declaration was an obvious and necessary step in the process of achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very persons (the Secretary-General and his Special Envoy) charged by the Security Council with leading the final status process.

[438] Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].

[439] *Ibid.*, para. 5.

The Declaration was not declared unlawful by the SRSG, the United Nations official authorized to monitor implementation of resolution 1244 (1999)

6.31. Under the mandate assigned to the Special Representative of the Secretary-General (SRSG) by resolution 1244 (1999), as well as the terms of the Constitutional Framework promulgated by the SRSG in 2001, it would be expected that the SRSG would declare null and void any acts of the Kosovo Assembly that were regarded as inconsistent with resolution 1244 (1999). Any United Nations mission deployed under the direction of the Secretary-General is expected faithfully to execute the tasks assigned to it, in close consultation with United Nations officials in New York if important issues of interpreting that mandate arise. As such, the SRSG would have been expected to annul a declaration of independence if he regarded necessary to do so in order to implement resolution 1244 (1999), just as he had taken steps at earlier stages against actions of that nature prior to the completion of the Ahtisaari process. The fact that the SRSG did not do so indicates that the Declaration did not contravene resolution 1244 (1999).

The Declaration did not violate resolution 1244 (1999) as an ultra vires *act of the PISG or as a contravention of the Constitutional Framework*

6.32. Contrary to allegations to this effect, the Declaration of Independence of 17 February 2008 did not violate resolution 1244 (1999) as an *ultra vires* act of the PISG. It was not the PISG which issued this Declaration, but the democratically elected representatives of the people of Kosovo. As shown by the text and the form of the Declaration, as well as the specific circumstances under which it was read out, voted upon and signed, the representatives of the people of Kosovo did not purport to act, on that day, as either the PISG or one of its parts.

6.33. Even if the Court were of the opinion that the Declaration was an act of the PISG, it was not *ultra vires*. The Declaration was not an act of an interim institution transgressing its limited authority; rather, it was the act of a constituent body declaring in the name of the people its readiness to receive the transfer of governing authority on a permanent basis, as contemplated by resolution 1244 (1999). Furthermore, the SRSG, the competent authority to set aside unlawful acts of the PISG, did not annul the Declaration of

Independence. His judgment constitutes an authoritative interpretation that no violation of the relevant UNMIK regulations occurred.

6.34. In any event, even if one of the PISG had acted not in accordance with the Constitutional Framework by overstepping its competence, that would not have constituted a violation of public international law. Any action beyond the powers of the PISG or of the Constitutional Framework would have been contravened domestic or local rules, not rules of public international law. The Constitutional Framework, as its name indicates and like the many other regulations issued by the SRSG, set up a legal framework on the internal sphere of Kosovo. Given their non-international nature, any transgression of these rules falls outside the scope of the question before the Court.

6.35. Regarding the Declaration as not in contravention of resolution 1244 (1999) is consistent with the general practice of the Security Council in only regulating the conduct of states. To the extent that the Council seeks to address the conduct of other entities, it does so clearly and expressly, not through vague or ambiguous language.

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6.36. In short, given the terms of resolution 1244 (1999), the process that unfolded based on those terms, and the reaction of the SRSG after the issuance of Kosovo's Declaration of Independence, there is no basis for concluding that the February 2008 Declaration contravened resolution 1244 (1999) or any other any applicable rule of international law.

CONCLUSION

For the reasons set out in its first Written Contribution and in this Further Written Contribution, the Republic of Kosovo respectfully requests the Court, in the event that it deems it appropriate to respond to the request for an advisory opinion contained in General Assembly resolution 63/3, to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

Skender Hyseni

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

Pristina, 17 July 2009

ANNEXES

CERTIFICATION

I hereby certify that the documents annexed to this Written Contribution are true copies of and conform to the original documents and that the translations provided by the Republic of Kosovo are accurate.

Skender Hyseni

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

Pristina, 17 July 2009

Annex 1

PRESENTATION BY PRESIDENT MARTTI AHTISAARI TO THE ASSEMBLY OF THE REPUBLIC OF KOSOVO, 15 JUNE 2009

Presentation by President Martti Ahtisaari

Chairman of Crisis Management Initiative, former UN SG Special Envoy

for the future status process for Kosovo

Pristina, 15 June 2009

Mr. Speaker, Mr. President, Mr. Prime Minister, distinguished members of the Kosovo Assembly, friends, colleagues, ladies and gentlemen.

I am deeply honored to be here on this momentous occasion, the first anniversary of the Kosovo Constitution. Please accept my warmest congratulations. My deep involvement with Kosovo began many years ago and it is particularly gratifying to see the journey Kosovo has taken this past year. I am also happy to see so many friends here today who worked closely with me for Kosovo and its future.

On this day, I am reminded of the Preamble in the Kosovo Constitution which so eloquently captures the aspirations of this nation as it stands "determined to build a future for Kosovo as a free, democratic and peace-loving country that will be a homeland to all of its citizens."

Kosovo's independence is irreversible and this is evident from the recognitions that continue to arrive from around the world. Acceptance of this reality by all would go a long way toward ensuring stability not only for Kosovo, but for the entire Western Balkans region and indeed for Europe as well.

There is much that Kosovo can be proud of in this past year. Domestically, with the passing of legislation and adoption of a Constitution, addressing concerns of all communities as well as establishing state institutions, remarkable progress has been made. I have been deeply impressed as well with efforts made on the international front to setting up of diplomatic representations in key capitals, the recent membership offer from the IMF, and I am sure, offers from the World Bank and other organizations to follow, as well as bilateral meetings that the Kosovo leadership has undertaken in several countries.

I am also particularly impressed by the setting up of the Constitutional Court, the ultimate interpreter and guardian of the Constitution. It represents the launch of the most important body in the institutional architecture of the Constitution.

To Kosovo's partners here, the European Union and the United States, as well a number of other international organizations and NGO's, I offer my deepest thanks as well as encouragement for your efforts and commitment to assisting and advising Kosovo's own efforts in important areas such as rule of law and reforms in key sectors of society. When you declared independence and built the Constitution you took it upon yourselves to implement the Comprehensive Settlement Plan (CSP), and welcomed Pieter Feith as the International Civilian Representative. I congratulate you for the progress made thus far in your pledge and warmly thank Pieter and his team.

With Yves De Kermabon leading EULEX efforts in critical rule of law areas, I am fully confident that top expertise is in place to assist Kosovo as it builds and strengthens the structures and processes of law and justice.

Ladies and gentlemen, no tangible progress is ever devoid of challenges. Let us be frank. Kosovo also faces challenges despite the rapid and remarkable progress that it has made thus far. Institutional structures are in deep need of further reforms, economic and social development must be furthered strengthened, the imperatives of accountability and transparency in institution-building cannot be stressed strongly enough. There also remains the task of obtaining full international recognition in the global arena. These challenges are daunting in many ways and therefore I appeal to all ministers, officials and political parties to recognize what is still an issue of common cause—that of building Kosovo into a truly multi-ethnic, democratic state with its European perspective in clear focus.

State and institution-building endeavors necessarily require the participation of all citizens. The Republic of Kosovo will sow the seeds of failure and discord if it does not reach out in an authentic way to those who feel excluded, isolated and disenfranchised. Women's empowerment is also critical and their full participation an imperative in the development of a society. I am keen to see members of the Kosovo Serb as well other ethnic communities, to be full participants in Kosovo's future growth. My Comprehensive Plan is dedicated to ensuring the legitimate place of the Serb community in the new Kosovo. Indeed, the Constitution enshrines the rights of all communities buttressed by a strong rule of law structure.

Let me now turn to my Kosovo Serb friends. It is most important that you take advantage of new opportunities that will present themselves as this nation grows and you must become important stakeholders in the future that your children will inherit from you. There needs to be fuller appreciation of the outreach by the Kosovo leadership toward you and other communities, particularly returnees, and a willingness to trust that responding to these initiatives is in the best interest of all citizens of Kosovo. Building these links is necessary in all places at the local, municipal and state level. I cannot emphasize enough the enjoyment that life can bestow when there is a will to coexist in harmony by people who ultimately share a common destiny and future.

Serbia is a neighbor of Kosovo's and to that end interaction between the two can never cease to exist. The question is what kind of interaction this will be—constructive or destructive? I would wish to remind Belgrade to accept the reality that is now Kosovo and to extend its cooperation to this young nation that has miles to go yet, but whose journey has begun and the horizon beckons toward a brighter tomorrow. Belgrade and Pristina could together find common ground on their place in the world and determine that they could actually move away from adversarial rhetoric and toward coexistence, reconciliation and ultimate friendship.

To the European Union, I would say it is important to remain fully engaged in Kosovo and to find a common position which could help the region, as well as prepare Kosovo for its European perspective. To all the other international agencies and organizations working in Kosovo, I urge you to continue with the important task of preserving and building upon the peace in the Western Balkans. This is a transatlantic task requiring the continued collaboration between the European Union and the United States. Following years of strife, the people of Kosovo and the other countries in this region richly deserve tranquil lives.

I have a special message today for the young people of Kosovo. Yours is the future for which we have collectively worked and now arrived at this day. It is up to you to ensure that you build upon our efforts and determine to take your nation from strength to strength. There is so much opportunity for you to engage with each other and through your daily lives as students, friends, colleagues and citizens—you can already set the agenda for your participation in a stable and cosmopolitan Kosovo. So, begin now to imagine a Kosovo that you would be proud to call home and which would be proud of you. Because soon you will be called on to build it.

I stand before you today with a vision in mind for Kosovo. I imagine a few years from now a democratic, modern, multi-cultural, tolerant and prosperous nation, at peace with its neighbors, part of an integrated Europe and widely respected in the world. At the same time, I am a realist and I know that the road will continue to be strewn with obstacles. It is bound to be a long journey and requires your collective wisdom and effort to bring this vision into reality. Working for peace as I have done all my life, I have remained mindful that in negotiating I am vested with the responsibility to influence the destinies of peoples. This is a responsibility I have never taken lightly and have fought hard to ensure that dignity, opportunity and a chance at peaceful living have been accorded to those on whose behalf I have intervened.

Today, I have the unique privilege of witnessing a nation that has indeed taken charge of its own journey into a future which will be of its own making. Kosovo will forever hold a special place in my heart and I am so happy to share this day with you. While other responsibilities may keep me from visiting as often as I might like, please be assured of my continued support and trust in your progress. You have rightly earned this day and with genuine efforts of all the men and women who comprise this very special place. I know that the dream of a new Kosovo is bound to be realized. I also know that the vision of Kosovo as a “homeland to all of its citizens” will be a reality. Again, congratulations on your charter document, now one year old. Be proud of its achievements, dedicated to its vision, and mindful of its obligations.

I thank you.

Annex 2

INTERNATIONAL STEERING GROUP FOR KOSOVO,
PRISTINA, 15 JUNE 2009

(available at http://www.ico-kos.org/d/090615 Eighth ISG meeting ENG.pdf)

Eighth meeting of the International Steering Group for Kosovo

15 June 2009, Pristina, Republic of Kosovo

1. The International Steering Group (ISG) congratulates the citizens of Kosovo on the first anniversary of the entry into force of their Constitution. In the past year the people of Kosovo have made significant progress in building a democratic, multi-ethnic State on the principles of democracy and human rights in accordance with its European perspective. It welcomes the additional recognitions of Kosovo by a number of States as well as its admission to the International Monetary Fund and the World Bank.

2. The Constitution builds on the Declaration of Independence of 17 February 2008 and on the Comprehensive Settlement Proposal (CSP). The ISG appreciates the commitment of the Republic of Kosovo, as enshrined in the Constitution, to implement all the provisions in the CSP. The CSP is the result of the untiring mediation efforts of President Ahtisaari and his team. The ISG feels honoured to have President Ahtisaari and Ambassadors Rohan and Wisner in its midst today. It thanks H.E. President Sejdiu and H.E. Prime Minister Thaci for addressing the ISG.

3. Integration of the Kosovo Serb community as part of a multi-ethnic society in Kosovo remains a key objective. This can be achieved through participation in the forthcoming municipal elections and through engagement in the Government's decentralization initiative which will bring important benefits to the Kosovo Serb community, as well as to the other non-majority communities. Reform of local self-government is highly important to further strengthen municipal governance to the benefit of every citizen, and to promote the inclusion of all in the democratic structures of Kosovo. The ISG urges the Government and all those in positions of responsibility to continue to reach out purposefully to every community in Kosovo in order to address their needs and to find practical and pragmatic solutions to everyday problems.

4. The ISG underlines the importance of Kosovo's regional integration as a prerequisite for economic development.

5. The ISG commends Kosovo for laying the groundwork for a successful election process by taking steps to strengthen the Central Election Commission. It furthermore congratulates Kosovo on the progress achieved in establishing the Constitutional Court and warmly welcomes the recent election of Kosovo's Ombudsperson.

6. The ISG expresses its support to the Government for its efforts to promote the rule of law. In particular, it encourages further efforts aimed at continuing the fight against corruption and organized crime in close cooperation with the EU Rule of Law mission EULEX.

7. Freedom of expression and independent media acting within the law are indispensable elements in a democracy. Accordingly the ISG urges the Government of Kosovo, the Independent Media Commission as well as other relevant actors to do their utmost to promote and strengthen freedom of expression in Kosovo.

8. The ISG reiterates its full support to the efforts undertaken by the International Civilian Representative (ICR) Mr Pieter Feith and the International Civilian Office (ICO). The ISG welcomes the publication on the ICO website (www.ico-kos.org) of an updated ICO Mission Implementation Matrix, demonstrating the progress achieved to date. The ISG looks forward to the review of the ICR's powers to be held at its meeting in February 2010.