ПОСОЛ
РОССИЙСКОЙ ФЕДЕРАЦИИ
В КОРОЛЕВСТВЕ НИДЕРЛАНДОВ

AMBASSADOR
OF THE RUSSIAN FEDERATION
IN THE KINGDOM OF THE NETHERLANDS

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№ 306
16.12.09

Your Excellency,

Pursuant to the Order of the Court № 141 of 17 October 2008 the Russian Federation submits herewith its written statement on the question submitted to the Court by the UN General Assembly in resolution 63/3 ("Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?").

Please accept, Your Excellency, the assurances of my highest consideration.

Enclosure: 30 copies 412 pages each, CD-ROM

K.GEVORGIAN

H.E. Mr. Philippe Couvreur
Registrar
International Court of Justice
The Hague

INTERNATIONAL COURT OF JUSTICE

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

(Request for advisory opinion)

WRITTEN STATEMENT BY THE RUSSIAN FEDERATION

16 April 2009

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Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?

I. Introduction

1. By Resolution 63/3, adopted on 8 October 2008, the United Nations General Assembly, acting in accordance with Article 96, paragraph 1 of the Charter of the United Nations, requested the International Court of Justice to render an advisory opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?".

2. The Russian Federation voted in favour of the Resolution, driven by its deep and sincere commitment to the principles of the rule of law in international relations and of peaceful resolution of international disputes.

3. The Russian Federation notes the increasing workload of the Court in the recent years. It demonstrates the growing trust of the world community in the international judicial procedures. Russia itself, since 1989, has been consistent in widening the scope of its acceptance of the Court's jurisdiction, and, in 2008, found itself brought before this principal judicial organ of the United Nations for the first time. Whatever position with regard to specific events and particular judicial proceedings one may take, the mere fact that acute international issues find their way into the courtroom is a tendency that will, no doubt, contribute to the achievement of the purposes of the United Nations Charter.

4. During his visit to the Court on 2 November 2005, the President of the Russian Federation said: "The International Court of Justice makes an enormous contribution to the prevention of international conflicts and to the settlement of disputes that happen to arise. ... The Court's judgments and advisory opinions play

a paramount role in strengthening and developing the principles and norms of international law, provide a clear understanding of right and duties of States, thus exercising a positive impact on the universal acceptance of norms of international law"[1]. It is in this spirit that the Russian Federation submits the present written statement to the Court, pursuant to its Order of 17 October 2008.

5. The present case concerns some of the key principles of contemporary international law: State sovereignty, territorial integrity, self-determination. The Russian Federation has always given them its full support. For Russia, these principles are of special importance, since, historically, it has developed as a country of broadest ethnical diversity. The preamble to the Constitution of the Russian Federation reads: "We, the multinational people of the Russian Federation, ... preserving the historically established state unity, proceeding from the universally recognized principles of equality and self-determination of peoples, ... recognizing ourselves as part of the world community, adopt the Constitution of the Russian Federation"[2]. The peoples of the Russian Federation have chosen to exercise their right to self-determination through constituent entities, such as republics and autonomous regions, as well as through local national/cultural autonomous entities. Russia is a vivid example of a country where diverse peoples and ethnic groups peacefully co-exist within a single united State. The Russian Federation believes that the same principles may and should be applied (and indeed are often applied) in other countries where various peoples or ethnic communities live together. Russia has always addressed the Kosovo issue from that perspective, firmly believing that its approach is well-founded in the applicable principles and rules of international law.

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[1] The full text is available at http://www.kremlin.ru/appears/2005/11/02/2202_type63376type63377type82634_96617.shtml.

[2] See http://www.constitution.ru/en/10003000-01.htm.

II. Jurisdiction of the Court: legal nature of the question

6. As provided in Article 96, paragraph 1 of the UN Charter, the General Assembly may request the Court "to give an advisory opinion on any legal question". Accordingly, in order to proceed with the request addressed to it in Resolution 63/3, the Court needs to satisfy itself that the question formulated by the General Assembly is a legal one.

7. The Russian Federation recalls the consistent case-law of the Court, according to which a question is legal if it is framed in terms of law, raises problems of international law and is susceptible of a reply based on law[3].

8. Evidently, the present request falls under these conditions.

9. First, the request is aimed specifically at establishing, whether the (ostensibly) legal act in question is in accordance with international law. The request is therefore framed in terms of law.

10. Second, the matter certainly raises issues of international law. On 17 February 2008, the Kosovo Assembly adopted a Declaration of independence, whereby it "declare[d] Kosovo to be an independent and sovereign state"[4]. It is therefore aimed at producing legal effects in the form of creation of a new State through secession from an existing State (Serbia). It thus relates to issues of State sovereignty and territorial integrity, as well as to the right of peoples to self-determination and the questions of secession. These matters are within the realm of international law. Moreover, they pertain to the very basis of the contemporary system of international law.

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[3] See, *inter alia*, *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.15, para.15; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.233, para.13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, I.C.J. Reports 2004*, p.153, para.37;

[4] Paragraph 1 of the Declaration. The English text of the Declaration is available at: http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf.

11. The Declaration had far-reaching repercussions within the international community: a number of States have recognized Kosovo's independence while others have expressed their opposition to it. Both supporters and opponents of independence assert that they are guided by international law[5].

12. The Declaration has brought about undeniable factual effects on the ground[6] and thus cannot be equated to some similar declarations that are often adopted by separatist movements without any factual or legal effects whatsoever (such as the one adopted by the Kosovo Provincial Assembly in 1991[7]).

13. The debate within the General Assembly showed that most delegations, those supporting the Resolution 63/3 as well as those who had reservations in its regard, believed that the question goes beyond the technical aspects and relates to wider legal issues. It was also repeatedly stated that one of the aims, or potential

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[5] By way of example, see statements made in the Security Council on 18 February 2008 (S/PV.5839) by Serbia: "The Provisional Institutions of Self-Government of the southern Serbian province of Kosovo and Metohija, under interim United Nations administration, unilaterally and illegally declared their independence on Sunday, 17 February. This illegal declaration of independence by the Kosovo Albanians constitutes a flagrant violation of Security Council resolution 1244 (1999), which reaffirms the sovereignty and territorial integrity of the Republic of Serbia, including Kosovo and Metohija" (p.4); Russian Federation: "The 17 February declaration by the local assembly of the Serbian province of Kosovo is a blatant breach of the norms and principles of international law — above all of the Charter of the United Nations — which undermines the foundations of the system of international relations. That illegal act is an open violation of the Republic of Serbia's sovereignty, the high-level Contact Group accords, Kosovo's Constitutional Framework, Security Council resolution 1244 (1999) — which is the basic document for the Kosovo settlement — and other relevant decisions of the Security Council" (p.6); Libya: "Libya has been, and always will be, supportive of complete commitment to the principles of justice and to international law, which stipulates complete respect for the sovereignty and territorial integrity of all States" (p.15); Costa Rica: "We are convinced that resolution 1244 (1999), the 1999 general principles on a political solution to the Kosovo crisis set out in annexes 1 and 2 of that resolution, and the Interim Agreement for Peace and Self-Government in Kosovo contain sufficient legal foundations to enable us to recognize the independence proclaimed yesterday" (p.17); United States: "Kosovo's declaration of independence is a logical, legitimate and legal response to the situation at hand. Kosovo's declaration is fully consistent with resolution 1244 (1999) and expressly recognizes that that resolution will remain in force" (p.18); France: "Le Kosovo a déclaré hier son indépendance. Conformément au droit international, il revient à chaque gouvernement de décider ou non de reconnaitre ce nouvel État. Dans une lettre adressée au Président du Kosovo, le Président de la République française, M. Nicolas Sarkozy, vient avec effet immédiat de reconnaître le Kosovo comme un État souverain et indépendant" (p.20 of the French version).

[6] See *e.g.* S/2008/211, 28 March 2008. Notably, in para.30: "It is evident that Kosovo's declaration of independence has had a profound impact on the situation in Kosovo".

[7] J.Ringelheim, "Considerations on the International Reaction to the 1999 Kosovo Crisis", Revue belge de droit international, 1999/2, p.476.

consequences, of the request is that the opinion of the Court would be applicable to other similar situations[8].

14. Therefore, the Russian Federation is of the view that the situation arising out of the Declaration of independence of 17 February 2008 is governed by international law and that, consequently, the Declaration may be ruled as consistent or inconsistent with international law. The question put by UN General Assembly Resolution 63/3 is thus susceptible of a reply based on law.

15. The question before the Court is therefore a legal one.

16. It has been argued that the question is too political to be answered from a legal point of view[9]. Abundant jurisprudence of the Court consistently rejects such arguments[10].

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[8] A/63/PV.22, 8 October 2008. See *e.g.* declarations by Serbia: "We ... believe that the Court's advisory opinion would provide ... guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law" (p.1); Albania: "The potential engagement of the International Court of Justice (ICJ) in this unique case, ... could lay the groundwork for interpretations that could have wider latitude and scale of application" (p.4); United States: "We are confident that recognition of Kosovo's independence by an ever-increasing number of States is consistent with international law. We do not think it appropriate or fair to the Court to ask it to opine on what is essentially a matter that is reserved to the judgement of Member States. We ask members to consider the potential consequences if other Members or separatist movements within their countries were to seize upon language, in any opinion the Court might render, to bolster their own claims for or against independence" (p.5); Romania: "We are absolutely sure that its opinion on the question raised in the draft resolution will assist us in making decisions in the future, in particular when fundamental issues such as the sovereignty and territorial integrity are at stake" (p.6); Egypt: "... strengthening the role of the United Nations and in particular that of the General Assembly when dealing with issues related to sovereignty and territorial integrity, ... entails recognition of the pivotal role of the International Court of Justice" (p.7); France: "...la demande d'avis consultative proposée par la Serbie ne nous paraît [pas] utile, car la situation du Kosovo indépendant, reconnu par 48 États souverains nous paraît dépourvue d'incertitudes juridiques" (p.9 of the French version); Comoros: "[A]ttachée aux principes fondamentaux du respect de l'unité et de l'intégrité territoriale des États, l'Union des Comores condamne toute forme de sécession remettant en cause ces principles fondamentaux de notre Organisation. Par conséquent, l'Union des Comores votera pour le projet de résolution" (p.10 of the French version); Costa Rica: "... we recognized [Kosovo's] independence and have adopted a position that we deem legally valid. However, precisely because there are divergences in legal interpretations of the situation, we are convinced that an advisory opinion of the International Court of Justice would be desirable" (p.10); Switzerland: "La Suisse a décidé de reconnaître l'indépendance du Kosovo après un soigneux examen des questions de droit international. Nous sommes donc convaincus que la Cour internationale de Justice, après examen de tous les aspects en question, confirmera la conformité de la déclaration de l'indépendance du Kosovo avec le droit international" (p.15 of the French version); El Salvador: "El Salvador ... trusts in the value of the contribution that the International Court of Justice will be able to make to resolve such sensitive issues within the framework of international law as it applies to matters regarding the sovereignty and territorial integrity of States" (p.15).

[9] "... [T]he Serbian request is primarily for political rather than legal reasons" (A/63/PV.22, p.2, United Kingdom); "The intentional reduction of the complex issue of Kosovo into a simple aspect, namely, the legal one, is an attempt to establish a situation outside of its context" (*Ibid.*, p.3, Albania).

17. The Court therefore has jurisdiction to render the advisory opinion requested.

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[10] *Application for Review of Judgment No.158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p.171, para.14; *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, I.C.J. Reports 1948*, p.61; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp.6-7; *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p.155; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1984*, p.407, para.32-34; *Legality of the Threat or Use of Nuclear Weapons*, p.233, para.13; *Construction of a Wall*, para.41.

III. Applicable law

18. It is well known that, in view of the Court, "[i]n seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law"[11].

III.1. General international law.

19. As it has been noted, the issue before the Court relates at least to such matters as State sovereignty, territorial integrity and self-determination.

20. These matters fall under the relevant principles and rules of general international law enshrined in the UN Charter (Article 1, para.2; Article 2, paras. 1, 4, 7) and other basic international instruments, including the 1966 Human Rights Covenants[12], the 1970 Declaration of Principles of International Law[13], the 1975 Helsinki Final Act[14], etc.

21. Most recently, the principles reflected in those instruments were reaffirmed by the 2005 World Summit Outcome document[15], whereby Heads of State and Government rededicated themselves "to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in ... international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which

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11 *Legality of the Threat or Use of Nuclear Weapons*, see note 10, para.23.

12 General Assembly Resolution 2200 (XXI), 16 December 1966.

13 General Assembly Resolution 2625 (XXV), 24 October 1970.

14 Conference on Security and Co-Operation in Europe, Final Act, 1 August 1975, available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

15 General Assembly Resolution 60/1, 16 September 2005.

remain under colonial domination and foreign occupation, non-interference in the internal affairs of States..."[16].

22. These principles form the basis of the current international system. It is of utmost importance that "in their interpretation and application the above principles are interrelated and each principle should be construed in the context of other principles"[17].

III.2. UN Security Council Resolution 1244 (1999).

23. Another source of law applicable to the situation in Kosovo, which is much more specific in comparison to general international law, is the Security Council Resolution 1244 (1999) (hereinafter, Resolution 1244). The Resolution was adopted on 10 June 1999, in the aftermath of the NATO military operation against Yugoslavia and the accords reached with the assistance of international mediators, in order to provide an interim framework for administration of Kosovo and for further efforts to find a lasting solution to the Kosovo problem. It placed Kosovo under the authority of the United Nations Interim Administration Mission in Kosovo (UNMIK), thus temporarily preventing the Federal Republic of Yugoslavia from exercising its sovereign powers in the province[18], while confirming the territorial integrity of the FRY.

24. The Resolution was adopted under Chapter VII of the UN Charter. The decisions contained in it are to be accepted and carried out by all Member States, pursuant to Article 25 of the Charter. They are also unambiguously addressed to the Kosovo Albanian leadership and hence are binding on them.

25. Having addressed the Kosovo issue in 1999 and having adopted the Resolution 1244, the Security Council established the special legal framework

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16 *Ibid.*, para.5.

17 General Assembly Resolution 2625 (XXV), Annex, operative paragraph 2.

18 "[T]he United Nations has ... assumed the classical powers of a state within [Kosovo]" (C.Stahn, "The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis", 5 Max Planck Yearbook of United Nations Law (2001), p.119).

within which the situation in Kosovo should evolve and against which relevant events should be assessed.

26. Notwithstanding serious changes in the situation in and around Kosovo, the Resolution has never been abolished, nor amended, and remains in force. Its continuing validity is recognized by all relevant parties, including the authors of the Declaration of independence[19].

27. The institutions established under the Resolution, in particular the UNMIK, led by the Special Representative of the Secretary-General (SRSG), have produced a corpus of implementing acts. These acts also constitute a means of interpretation of the Resolution as well as a part of the legal regime established by it. They include the Provisional Constitutional Framework promulgated by SRSG in 2001[20]. It is within that Framework that the Provisional Institutions of Self-Government (PISG) were established. They are thus secondary and subordinate to the legal regime created by Resolution 1244. Moreover, the acts issued by the PISG, and their legality, should also be assessed in the light of the Resolution.

28. The Russian Federation believes that the Security Council Resolution 1244 (1999) should be considered as the special legal regime upon which the Court can base its consideration of the request.

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[19] Declaration of independence, para.5: "We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability"; para.12: "We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999)".

[20] UNMIK Regulation No. 2001/9, 15 May 2001, available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2001regs/RE2001_09.pdf.

III.3. Correlation between general international law and Resolution 1244.

29. As provided in Article 24, paragraph 2 of the UN Charter, "the Security Council shall act in accordance with the Purposes and Principles of the United Nations". It is to be presumed that, when adopting Resolution 1244, the Council acted accordingly, *i.e.* with due account of the principles of international law enshrined in Chapter I of the Charter. This is in fact confirmed by the Resolution itself, whose very first sentence provides: "The Security Council, bearing in mind the purposes and the principles of the Charter of the United Nations...". Another reference to the principles of international law appears in the eleventh paragraph of the preamble: "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 Helsinki Final Act*..."[21].

30. Therefore, Resolution 1244 and principles of international law should be regarded as mutually supportive. Principles of international law serve as the background against which the Resolution is to be interpreted and applied. On the other hand, the principles should be interpreted and applied in the present case with due regard to Resolution 1244. As pointed out by the International Law Commission, "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations. [...] General law will ... continue to give direction for the interpretation and application of the relevant special law..."[22].

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21 Emphasis added.

22 *Official Records of the General Assembly, Sixty-first Session, Supplement No.10* (A/61/10), pp.408-409.

IV. Factual background

31. A detailed account of historical events that led to the current situation around Kosovo will undoubtedly be presented to the Court by the most interested parties. On its part, the Russian Federation would like to focus on some aspects of the factual background to the case which are of special importance.

IV.1. The SFRY and Serbia.

32. Since late 1980s, Belgrade had been pursuing a policy aimed at preservation of the territorial integrity of the Socialist Federal Republic of Yugoslavia (SFRY) so as to prevent lands inhabited by ethnic Serbs to be split between different States. The FRY claimed to be the legal continuator of the SFRY. That claim was not supported by the international community[23].

33. Since 2000, the new government of Yugoslavia did not claim continuity with the SFRY any more. It accepted the position of being legally a new State, one of the successors of the SFRY. Based on this premise, it applied for membership in the United Nations and was admitted to the Organization[24].

34. The 21-century Yugoslavia is thus a new State, both politically and legally. That being the case, its principled approach to the issue of Kosovo, namely that it must remain an integral part of Serbia, remained intact.

35. The new Belgrade authorities expressed "a solemn commitment to uphold the purposes and principles of the Charter of the United Nations and to fulfil all the obligations contained therein"[25]. In particular, they "fully subscribe[d] to Security Council Resolution 1244 (1999) and consider[ed] it the main and only basis for a

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[23] See, *e.g.*, Security Council Resolution 757 (1992), 30 May 1992, eleventh preambular paragraph; Security Council Resolution 777 (1992), 19 September 1992, third preambular paragraph and operative paragraph 1; General Assembly Resolution 47/1, 22 September 1992, operative paragraph 1.

[24] General Assembly Resolution 55/12, 1 November 2000.

[25] S/PV.4215, 31 October 2000, p.2.

just and lasting solution"[26]. Ever since, they have actively participated in all relevant negotiation processes, even if at many junctures they had reasons to claim that Resolution 1244 was not adequately implemented as far as it concerned the status of Kosovo as an integral part of the FRY and the protection of rights of the ethnic Serb population of Kosovo.

IV.2. The "final status process".

36. In early 2000s, with regard to the settlement of the Kosovo issue the international community proceeded from the principle that before negotiations on the final status of Kosovo could start, a number of "standards" had to be implemented. This approach changed after the United Nations Secretary-General, in his report on the activities of UNMIK of 23 May 2005[27], proposed to undertake a "comprehensive review" in order to "look at the actual political realities as well as the formal preconditions for launching the future status process"[28]. The discussion in the Security Council showed support for this idea[29].

37. The "comprehensive review" was undertaken by Mr Kai Eide who concluded: "There will not be any good moment for addressing Kosovo's future status. It will continue to be a highly sensitive political issue. Nevertheless, an overall assessment leads to the conclusion that the time has come to commence this process"[30].

38. When the Eide report was discussed in the Security Council, Serbian-Montenegrin Prime Minister Vojislav Koštunica said: "Let me [...] express, on

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26 S/PV.4225, 16 November 2000, p.23.

27 S/2005/335, 23 May 2005.

28 *Ibid.*, para. 22.

29 S/PV.5188, 27 May 2005. That meeting of the Council was probably the first where some delegations spoke of independence of Kosovo as a possible result of the final status process. Yet it was underlined that the solution should be negotiated between Pristina and Belgrade. At the same time, the delegation of Serbia and Montenegro expressed its reservations as to the advisability of starting the status process, and clearly reiterated its opposition to the option of independence. China and Argentina also mentioned that any final solution must respect the territorial integrity of Serbia and Montenegro.

30 S/2005/635, 7 October 2005, p.4.

behalf of my country, the firm belief that the Security Council will act upon the principle of the sovereignty and territorial integrity of democratic States, and so define the framework and mandate of future status talks as talks on the future status of Kosovo and Metohija as a province within the internationally recognized State of Serbia and Montenegro"[31]. The meeting resulted in a President's Statement, providing, *inter alia*: "The Council ... supports the United Nations Secretary-General's intention to start a political process to determine Kosovo's future status, as foreseen in Security Council resolution 1244 (1999). The Council reaffirms the framework of the resolution..."[32].

39. Shortly after, "Guiding Principles for a settlement of the status of Kosovo" were agreed by the Contact Group[33]. They provided, *inter alia*: "A negotiated solution should be an international priority. [...] The final decision on the status of Kosovo should be endorsed by the Security Council"[34].

40. Mr Martti Ahtisaari was appointed Special Envoy of the Secretary-General "for the future status process for Kosovo". His efforts resulted in the so-called Ahtisaari Plan[35] that followed the conclusions that Mr Ahtisaari drew from the negotiations: the parties could not come to an agreed solution; reintegration of Kosovo into Serbia was not a viable option; continued international administration was not sustainable; the only viable option was "independence with international supervision"[36]. Mr Ahtisaari "urge[d] the Security Council to endorse [his]

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31 S/PV.5289, 24 October 2005, p.9.

32 S/PV.5290, 24 October 2005, p.2.

33 The Contact Group, established in early 1990s, consisted of France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States.

34 S/2005/709, 10 November 2005, p.2.

35 S/2007/168 and Add.1, 26 March 2007.

36 *Ibid.*

Settlement proposal"[37]. However, the Security Council was unable to reach a decision on the Plan[38].

41. Despite evident discrepancies between the Ahtisaari Plan and the position that Serbia had stated from the outset of the "final status process", Belgrade accepted to continue discussions led by the "Troika" composed of representatives of the Russian Federation, the European Union and the United States. These discussions did not bring about a negotiated solution.

42. The FRY and, later, Serbia, ever since 2000, has been a *bona fide* partner of the international community on the Kosovo issue. More than once, it accepted proposals that ran counter to its own vision, despite repeated acts of violence committed against ethnic Serbs in Kosovo, despite Serbia's total exclusion from the political life in Kosovo (even though the UNMIK was supposed to ensure autonomy for Kosovo *within* the FRY), and despite the continued policy of some international actors that created an atmosphere where hopes were high among Kosovo Albanians that they would soon accede to independence[39] and where Serbia was portrayed as placing artificial obstacles on that path. Yet the process resulted in the Ahtisaari Plan that was in clear contradiction both with the principle of territorial integrity of Serbia and with the requirement of a negotiated solution.

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37 S/2007/168, para.16.

38 S/PV.5673, 10 May 2007. Some delegations were opposed to the Plan, while almost all those who supported it, believed that it should be endorsed by the Security Council. See *e.g.* statements by Belgium: "Kosovo Albanians... expressed strong support for Mr. Ahtisaari's ... proposal ... , and they look to the Security Council to move rapidly to a solution" (p.3); Peru: "My delegation will therefore be in a position to support a draft Security Council resolution endorsing the proposal of the Special Envoy" (p.5); France: "Il nous semble que le Conseil dispose désormais de propositions détaillées et realistes... Nous pensons qu'il appartient maintenant au Conseil de prendre ses responsabilités pour assurer le succès d'un processus qu'il a initié" (p.6); Ghana: "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 ..." (p.8); Panama: "I ask that we take into consideration the possibility that this Council adopt, now, President Ahtisaari's government programme for Kosovo" (p.9); Italy: "I look forward to working together with all other Security Council members with a view to reaching the necessary consensus for a manageable and long-lasting solution for Kosovo" (p.11); United Kingdom: "... we have heard from the Kosovo side its declaration to implement the Ahtisaari proposals. The Council's role is to take up its responsibilities and to back the only viable vision for the future of Kosovo" (p.12).

39 S/2007/768, 3 January 2008, para.8. See also B.Knoll, *The Legal Status of Territories Subject to Administration by International Organisations*, Cambridge, 2008, p.260: "The messages sent to Pristina in the course of the negotiations were ... not devised in good faith, and consequently gave rise to expectations which could not be fulfilled as the process came to a close".

This contradiction is corroborated, *inter alia*, by references to the Plan in the preamble and in six out of twelve operative paragraphs of the unilaterally adopted Declaration of independence of Kosovo[40]. Could anyone acting in good faith blame Serbia for not having agreed to the proposal that was manifestly against the very basis of its sovereignty, in particular taking into account that the position that Serbia was defending throughout the process was well known to all interested parties?

IV.3. Kosovo and the disintegration of the SFRY.

43. With the mentioned elements in mind, the Russian Federation does not share the idea advocated by some States and authors – to consider Kosovo's 2008 attempt at secession as the last step in the process of disintegration of the Socialist Federal Republic of Yugoslavia[41]. Russia is convinced that politically, historically and, indeed, legally, this position is not well founded.

44. The disintegration of the SFRY in early 1990s is important for the issue under consideration for a number of reasons, the main one being that the issue of

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[40] Declaration of independence, 12th preambular paragraph: "Confirming that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance..."; para.1: "This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement"; para.3: "We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead"; para.4: "The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process"; para.5: "We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan...We also invite and welcome the North Atlantic Treaty Organization...to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities"; para. 8: "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"; para. 12: "We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan".

[41] See *e.g.* the General Assembly debate when adopting Resolution 63/3, A/63/PV.22, the United Kingdom: "... the question will need to be addressed against the background of the full context of the dissolution of Yugoslavia in so far as it affects Kosovo, starting with Belgrade's unilateral decision in 1989 to remove Kosovo's autonomy through to events of the present day" (p.3); United States: "Kosovo must be viewed within the context of the violent dissolution of the former Yugoslavia in the 1990s" (p.5); France: "Cette déclaration d'indépendance a marqué l'achèvement d'une séquence historique particulière, qui est celle de l'éclatement violent de l'ex-Yougoslavie au cours des années 90" (p.9 of the French version). See also the "Ahtisaari Plan", S/2007/168, para.16: "Concluding this last episode in the dissolution of the former Yugoslavia will allow the region to begin a new chapter in its history".

Kosovo's independence did not seriously arise during the process. For instance, in the Badinter Commission opinions[42], widely recognized as the leading authority in relation to the legal issues arising out of Yugoslavia's break-up[43], the word "Kosovo" does not appear a single time. Similarly, authors that commented on legal issues arising out of the dissolution of Yugoslavia, either in 1991-1992 or later, never spoke of Kosovo as an entity the independence of which might be claimed[44]. On 4 July 1992, the Badinter Commission, without having ever turned to the Kosovo issue, declared "that the process of dissolution of the SFRY ... [was] now complete"[45].

45. Therefore, the issue of Kosovo's (non-) entitlement to independence must be assessed as unrelated to the SFRY break-up.

IV.4. Some preliminary conclusions.

46. The 1991 – 1992 events were a manifestation of a failure of Yugoslavia's federal institutions. The 1999 crisis was the result of policies of President Milošević and those of NATO Member States, both open to criticism, to say the

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[42] Peace Conference on Yugoslavia, Arbitration Commission, Opinions No.1-3, 3 European Journal of International Law (1992), pp.182-185; Opinions No.4-10, 4 European Journal of International Law (1993), pp.74-91.

[43] In early 1990s, they were described as "balanced and impartial", as an "example [to be] used as a building block in the search for mechanisms to resolve ethno-territorial conflicts" (A.Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples", 3 European Journal of International Law (1992), p.181), as "provid[ing] a comprehensive legal interpretation of the status of successor states to former Yugoslavia" (D.Türk, "Recognition of States: A Comment", 4 European Journal of International Law (1993), p.69), or else as "nearly all the judicial decisions we have on the subject of state dissolution" (P.Szasz, "The Fragmentation of Yugoslavia", in *The American Society of International Law, Proceedings of the 88th Annual Meeting*, Washington, D.C., 1994, p.34).

[44] "Self-determination was not deemed applicable to territorially defined enclaves within former federal entities where a minority formed a local majority. The most striking examples are Kosovo and Krajina" (M.Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 American Journal of International Law (1992), p.606); "[T]he Kosovars were not generally perceived as possessing a right to self-determination (at least in the form of a right to create an independent State)" (C.Greenwood, "Humanitarian Intervention: the Case of Kosovo", X Finnish Yearbook of International Law (1999), p.146); "There was no ... acceptance that any groups within the constituent republics had any right to secede. Nor was such a right recognized to any other territorial entities within the former Yugoslavia, including for example the autonomous area of Kosovo" (J.Crawford, *Creation of States in International Law*, Oxford, 2006, p.400). See also R.Iglar, "The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede", XV Boston College International and Comparative Law Review (1992), No.1, pp.213-239.

[45] Opinion No.8, see note 42, pp.87-88.

least. After 2000, a completely new situation emerged in the region, the Albanian population of Kosovo not being exposed to risks of discrimination any more, both due to the regime established under Resolution 1244 and owing to the political changes in the new Serbia.

47. For these reasons, the Russian Federation believes that, both in terms of politics and law, the question of whether Kosovo might, in February 2008, secede from Serbia, should be assessed on the basis of the realities that emerged after Resolution 1244 was adopted, and not on the basis of outdated theories going back to early 1990s.

IV.5. The factual situation in February 2008.

48. Those realities, as of February 2008, may be summarized as follows.

49. A vast majority of displaced ethnic Albanians had returned home. Significant progress had been achieved in building democratic institutions of self-government in Kosovo, as well as in implementing the "standards". The level of violence had been reduced.

50. The main problems concerned the situation of the ethnic Serb community. Out of 200,000 displaced Serbs, less than 20,000 had returned[46]. The PISG had failed to engage Serbs in public life in Kosovo and, moreover, had to a significant extent lost control over an important part of the Serb-populated territories adjacent to Serbia proper[47]. Regular incidents of violence against Serbs were recorded[48].

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[46] UNHCR, "Almost 100 Roma return to Kosovo city", News release of 18 October 2007, available at http://www.unhcr.org/news/NEWS/47176e492.html.

[47] By way of example, as reported by the UN Secretary-General in November 2007, three ethnic Serb regions fully boycotted elections for the Kosovo Assembly; their population relied on Serbia for the provision of basic services (S/2007/768, para.5 and 30). After the adoption of the Declaration of independence, "Kosovo Serbs, with the support of the Serbian authorities, ha[d] expanded their boycott of the institutions of Kosovo to include UNMIK Customs, the Kosovo Police Service (KPS), the Kosovo Corrections Service, the judicial system, municipal administration, and UNMIK railways" (S/2008/211, 28 March 2008, para.8).

[48] "Relative security was progressively established throughout Kosovo but at the cost of the consolidation of inter-ethnic divisions and segregation" (A.Yannis, *Kosovo under International Administration: An Unfinished Conflict*, Athens, 2001, p.37).

51. Serbia had been effectively denied any role in governing Kosovo. More than once, it complained about it, as it did about the situation of ethnic Serbs in Kosovo. However, Serbia had fully abided by the Resolution and, importantly, had undertaken clear commitments not to resort to force to resolve the Kosovo problem. It is beyond doubt that today, Serbia poses no threat of use of force or any other form of oppression against Kosovo.

52. It is also to be mentioned that, throughout that period, and well into the year 2008, Kosovo remained largely dependent on the functioning of the international presences. Suffice is to say that, of coercive institutions, KFOR and UNMIK police clearly outnumbered the locally recruited police and Kosovo Protection Force[49]; local tax revenues were lower than the budget of the international presences[50]. (This raises, *inter alia*, the question of whether Kosovo met the necessary criteria of statehood).

Incidents of violence against Serbs have been described in virtually every report of the UN Secretary-General on the activities of the UNMIK. A particularly intense wave of violence that took place in March 2004 was described as follows:

"The defining event during the reporting period was the widespread violence that occurred in Kosovo in March, the responses to and events surrounding that violence, and its implications. Those events represent a serious setback to the stabilization and normalization of Kosovo. The onslaught led by Kosovo Albanian extremists against the Serb, Roma and Ashkali communities of Kosovo was an organized, widespread, and targeted campaign. Attacks on Kosovo Serbs occurred throughout Kosovo and involved primarily established communities that had remained in Kosovo in 1999, as well as a small number of sites of recent returns. Properties were demolished, public facilities such as schools and health clinics were destroyed, communities were surrounded and threatened and residents were forced to leave their homes. The inhabitants of entire villages had to be evacuated and, following their departure, many homes were burned to the ground. In other cases, there were attempts to illegally occupy and, in some cases, allocate abandoned property" (S/2004/348, 30 April 2004, para.2).

In November 2007, the Secretary-General reported: "[T]here were some notable incidents of an inter-ethnic nature, including shots fired at Kosovo Serb households and Molotov cocktails thrown at the Serbian Orthodox Church in Gjilan/Gnjilane" (S/2007/768, para.9).

[49] The Kosovo Police Service counted for approx. 7,000 personnel, the Kosovo Protection Corps – 3,000 (now being replaced with Kosovo Security Force also no more than 2,500 active personnel), compared to the 14,000-strong KFOR and the 2,000-strong UNMIK Police. See *e.g.* S/2007/768, pp.20-22, and http://www.nato.int/issues/kosovo/index.htm.

[50] The Kosovo consolidated annual budget, operated by the PISG, stands at about 900 million Euros (UNMIK Regulation No.2008/13, 29 February 2008, Schedule 1, available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008_13_schedules.pdf).

The budget of UNMIK is approx. 200 million US Dollars (General Assembly Resolution 62/262, 22 July 2008, para.16).

53. By and large, the situation remains the same today.

The budget of the EU Rule of Law Mission (EULEX) is approx. 200 million Euros for 16 months (Council Joint Action 2008/114/CFSP of 4 February 2008, on the European Union Rule of Law Mission in Kosovo, Official Journal of the European Union, L.42, 16 February 2008, p.97, Article 16).

The overall budget of KFOR is not easily available, but the number of staff employed in it suggests that the expenditures are significantly higher than those of UNMIK and EULEX.

V. The Declaration of independence in the light of Resolution 1244

V.1. The principle of sovereignty and territorial integrity of Yugoslavia in Resolution 1244.

54. Resolution 1244 contains numerous references to the sovereignty and territorial integrity of, or else to self-government and autonomy within, the Federal Republic of Yugoslavia:

- the eleventh paragraph of the preamble: "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";

- operative paragraph 4: "Confirms that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2";

- operative paragraph 10: "Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia...";

- seventh paragraph of Annex 1: "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 the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA";

- paragraph 5 of Annex 2: "Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of

Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations";

- paragraph 6 of Annex 2: "After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions: ... Maintaining a presence at key border crossings";

- paragraph 8 of Annex 2: "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...".

55. It is worth noting that the aforementioned Rambouillet accords had aimed at "establish[ing] institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the [FRY]"[51]. They explicitly foresaw certain competences of the FRY and of the Republic of Serbia in Kosovo[52] and contained other provisions indicating that Kosovo was to remain an integral part not only of the FRY, but also of Serbia[53].

56. It is striking that, in sharp contrast to the notions of sovereignty, territorial integrity and autonomy, neither the concept of self-determination of the people of Kosovo, nor a possibility of secession is ever mentioned in the Resolution. References to autonomy and self-government indicate that the authors aimed at keeping with terminology used to describe a special status of a territory within a State. Even if one admits that the Security Council, or some of its members,

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51 S/1999/648, 7 June 1999, p.9.

52 *Ibid.*, pp.10-11.

53 *Ibid., e.g.* Chapter 1, Article I.7 (p.10), Article VII.4.a.v (p.23), Article IX (p.27). Moreover, "[e]in unabhängiges Kosovo wurde zu keinem Zeitpunkt der Verhandlungen von den internationalen Gemeinschaft ins Auge gefasst. Diese Haltung zieht sich wie eine rote Linie von den Holbrooke-Milošević-Abkommen bis zu den Verhandlungen in Rambouillet" ("An independent Kosovo was at no point of the negotiations envisaged by the international community. This position passes as a red line from the Holbrooke-Milošević Agreement to the Rambouillet negotiations"), K.Kaser, "Die Verhandlungen in Rambouillet und Paris: Die Fragen der Souveränität Jugoslawiens und der Unabhängigkeit für Kosovo", 49 Südosteuropa (2000), No.1-2, S.52.

implied that the right to self-determination was applicable to the population of Kosovo, it was the internal aspect of self-determination. And it is worth stressing that both the Council and its members avoided using the notion of self-determination as such.

57. This account shows that the Resolution was based on the idea of Kosovo remaining an integral part of the FRY and Serbia, whatever the powers of the international administration and however wide the autonomy of Kosovo could be.

58. The commitment to the sovereignty and territorial integrity of the FRY was clearly based on principles of international law. The Russian Federation therefore believes that, for the purposes of the interpretation of the Resolution, an extremely strong presumption exists in favour of territorial integrity of the FRY and, later, Serbia as its continuator State.

V.2. The "final settlement": a non-unilateral solution.

59. Paragraphs 11 (a) and (c) of Resolution 1244 mention that self-government and autonomy for Kosovo are to be ensured "pending a final/political settlement". At the final stage of the political process, the international civil presence was to oversee the transfer of authority from provisional institutions to institutions established "under a political settlement" (paragraph 11 (f)). This wording is cited in order to claim that the possibility of Kosovo independence was not excluded by the Resolution.

60. Yet a "settlement", both in its plain meaning and with specific reference to law and international relations, usually is something agreed upon by parties or decided by a competent authority. It is defined as "an agreement composing differences"[54] or else as "an agreement ending a dispute or lawsuit"[55]. This

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[54] *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/settlement.

[55] *Black's Law Dictionary*, 7th ed., St. Paul, Minnesota, 1999, p.1377. See also *Compact Oxford English Dictionary*, http://www.askoxford.com/concise_oed/settlement?view= uk: "an official agreement intended to settle a dispute or conflict".

understanding is particularly relevant in the context of the notion of "pacific settlement of disputes", where negotiation is considered as the first option to be pursued by the parties (Article 33 of the UN Charter). Moreover, in the case at hand, a clear reference to a negotiated settlement is contained in Resolution 1244 itself: "Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions" (Annex 2, paragraph 8).

61. Apart from negotiation, Article 33 of the Charter lists, among the means of settlement of disputes, "enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements". All these means are characterized by a common feature: they envisage the involvement of a third party, duly authorized either to facilitate the negotiations or to decide on the matter.

62. What this list excludes is a unilateral decision by one of the parties to the dispute[56].

63. Therefore, even if one admits that Resolution 1244 does not exclude independence of Kosovo as a form of the "final settlement", such settlement was to be negotiated between the parties or, at the very least, to be decided upon by a body competent under international law to do so. As indicated in the "Factual background" section above, all the stakeholders considered the UN Security Council to be such body[57]. This is supported by the provision of para.19 of the

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[56] J.Friedrich argued in 2005: "A future settlement must ... *at least* pay tribute to the right to self-determination by respecting the will of the people of Kosovo" ("UNMIK in Kosovo: Struggling with Uncertainty", 9 Max Planck Yearbook of United Nations Law (2005), p.252, emphasis added). This suggests, *a contrario*, that the will of the people of Kosovo could not, by far, become the only factor to be taken into account. This reasoning is all the more important as the author speaks in favour of independence as the result of the settlement.

[57] See also B.Knoll, *Op.cit*, p.252: "At the outset of diplomatic efforts that started in earnest in mid-2005 stood a larger design, according to which mediation efforts conducted by a third party would ideally result in an endorsement, by the SC, of a general plurilateral (or limited multilateral) treaty between the parties in a resolution based on Chapter VII of the UN Charter. Parties to the determination of the future permanent political boundaries of the territory of Kosovo had to include Serbia, the holder of a reversionary title to exercise sovereign powers, on the one, and Kosovo's local institutions, on the other hand, supported in some form or the other by UNMIK". Writing just before the Declaration of independence was adopted, the author, after stressing that "[t]he importance of a *negotiated* solution to the Kosovo situation has been abundantly emphasized", asks: "But could the SC have conveyed sovereign title in the absence of a negotiated solution?" The author then, not without difficulty, comes to

Resolution: "Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter *unless the Security Council decides otherwise*"[58]. Respectively, the Ahtisaari Plan was presented to the Security Council for approval.

64. To sum up, whatever the specific procedure, Resolution 1244 and its regime were based on the premise that the final settlement could not take the form of a unilateral decision by one of the parties.

V.3. The "final status process" and the Ahtisaari Plan.

65. Turning to the "final status process" launched in 2005, three important elements demonstrated in the "Factual background" should be noted.

66. First, the decision to launch the final status process was taken with full cognizance of the fact that Serbia and Montenegro was resolutely opposed to the independence of Kosovo. Yet the Ahtisaari Plan envisaged independence, even though it was to be internationally supervised.

67. Second, the final status was supposed to be negotiated between Belgrade and Pristina. Yet the Plan did not meet support from Serbia. The reasons for that were obvious, and, as mentioned in the "Factual background" section, Belgrade cannot be blamed for that. Rather, the Plan was doomed to failure, since its author chose to disregard the core of the position of one of the parties.

68. Third, the outcome of the negotiations was supposed to be endorsed by the UN Security Council. Yet the Council did not support the Ahtisaari Plan.

69. The Plan, therefore, fell short of all the requirements that were formulated when the process was launched, and cannot be regarded as a proper basis for a settlement.

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the conclusion that the Security Council could do that. A unilateral option is not discussed at all (*Op.cit.*, p.272 *et seq.*, emphasis in the original).

58 Emphasis added.

V.4. The status and competences of the PISG.

70. The Provisional Institutions of Self-Government were established pursuant to the Provisional Constitutional Framework (PCF) promulgated by the SRSG in 2001[59]. The purpose was to ensure the practical implementation of the provisions of the Resolution 1244 pertaining to self-government. The PCF specifically mentioned that "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)" (tenth paragraph of the preamble). Chapter 2 of the PCF provided: "The Provisional Institutions of Self-Government and their officials shall ... exercise their authorities consistent with the provisions of UNSCR 1244 (1999)". The PISG were granted a broad, yet strictly defined scope of competence. A number of powers were specifically reserved for the SRSG, while Chapter 12 unambiguously provided: "The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework". As part of these responsibilities, the SRSG could dissolve the Assembly of Kosovo (Article 8.1.b). The Special Representative also remained the ultimate legislative authority, promulgating laws adopted by the Assembly (Article 9.1.45) and having the right to amend the Constitutional Framework (Article 14.3).

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[59] According to para.6 of Resolution 1244, the Special Representative was appointed "to control the implementation of the international civil presence". In practice, he became the head of the UNMIK. Pursuant to his own Regulation No.1999/1 of 25 July 1999 (S/1999/987, 16 September 1999, p.14), "all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, [was] vested in UNMIK and exercised by the Special Representative of the Secretary-General". "The legislative power of the SRSG appears to be absolute, both with regard to the content and to the law-making process" (T.Irmscher, "The Legal Framework for the Activities of the United Nations Interim Administration in Kosovo: The Charter, Human Rights and the Law of Occupation", 44 German Yearbook of International Law (2001), p.357).

71. These basic provisions of the PCF demonstrate a limited character of responsibilities of the PISG, as well as their secondary legal nature. They were not conceived, for instance, as a manifestation of the sovereignty of the Kosovo people. They were created with a special purpose, and clearly on a temporary basis, to serve as long as Resolution 1244 remained in force, or else as long as the SRSG deemed it appropriate[60].

72. Against this background, the proclamation of independence was outside the PISG mandate. Moreover, as the PISG were to abide by the PCF and Resolution 1244, the Declaration of independence was adopted not only *ultra vires*, but also in a breach of the law that the PISG were to respect.

73. On the basis of the above considerations, the Russian Federation believes that the Declaration of independence of 17 February 2008 is not in accordance with the United Nations Security Council Resolution 1244 (1999).

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[60] See *e.g.* J.Ringelheim, *Op.cit.*, pp.537-538: "The international presence ... guarantees the suspension of the authority of the FRY, but also hinders its replacement by an alternative sovereignty for, until the Kosovo's final status is determined, the ultimate civilian authority will be exercised by UN appointed agents, and not by independent local representatives".

VI. The Declaration of independence in the light of general international law

74. As has been mentioned above, Resolution 1244 and general international law do not contradict each other. On the contrary, they are to be interpreted in harmony.

75. Yet the Russian Federation considers it important to demonstrate that, even if assessed in the light of general international law rather than Resolution 1244, the unilateral Declaration of independence is not in accordance with law.

VI.1. The principles of sovereignty and territorial integrity.

76. The Declaration of independence sought to establish a new State through separation of a part of the territory of the Republic of Serbia. It was therefore, *prima facie*, contrary to the requirement of preserving the territorial integrity of Serbia.

77. Territorial integrity is an unalienable attribute of a State's sovereignty[61]. Article 2, paragraph 4 of the UN Charter prohibits the threat or use of force against the territorial integrity of any State. This was developed in the 1970 Declaration of Principles, the preamble of which stated, *inter alia*: "... *any* attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country ... is incompatible with the purposes and principles of the Charter"[62]. The Helsinki Final Act also recognized territorial integrity as one of the principles of modern international relations, committing CSCE member States to refraining from *any* action against the territorial integrity or the unity of any State.

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[61] "For States, respect of their territorial integrity is paramount. This is a consequence of the recognition of their equal sovereign character. One of the essential elements of the principle of territorial integrity is to provide a guarantee against any dismemberment of the territory. It is not only the respect of the territorial sovereignty, but of its *integrity*" (M.Kohen, "Introduction", in *Secession: International Law Perspectives*, ed. by M.Kohen, Cambridge and New York, 2006, p.6, emphasis in the original).

[62] Emphasis added.

78. It has been noted that the "principle of territorial integrity of States, this great principle of peace, indispensable to international stability, ... has today acquired the character of a universal, and peremptory norm"[63] and that "[o]ne of the essential elements of the principle of territorial integrity is to provide a guarantee against any dismemberment of the [State's] territory"[64].

VI.2. The right to self-determination.

79. There is no need to reproduce here the classic description[65] of how the principle of self-determination appeared and evolved before and especially after the World War II, starting from the United Nations Charter and continuing through the 1966 Covenants, the 1970 Declaration of Principles, the 1975 Helsinki Final Act[66] or the 1990 Charter of Paris for a New Europe[67]. Suffice is to say that the Court has recognized self-determination as "one of the essential principles of contemporary international law"[68]. Initially conceived to benefit peoples under colonial or other foreign domination, the principle is now universally recognized as applicable to all peoples.

80. Besides this general idea, a consensus seems to exist among States and scholars at least on the following points:

- the right to self-determination is to be exercised through the free choice by the people concerned without outside interference;

- it may be exercised through the establishment of an independent State, or through achieving a particular political status within an existing State;

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63 A.Pellet, *Op. cit.*, p.180.

64 M.Kohen, *Op. cit.*, p.6.

65 See *e.g.* A.Cassese, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge and New York, 1995; J.Crawford, *Op.cit.*, pp.108-148; J.Summers, *Peoples and Internaional Law*, Leiden and Boston, 2007, pp.141-254; H.Hannum, *Autonomy, Sovereignty and Self-Determination*, Philadelphia, 1990, pp.27-49.

66 See notes 12 – 14.

67 Available at http://www.osce.org/documents/mcs/1990/11/4045_en.pdf.

68 *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p.102, para.29.

- the right includes the possibility to freely determine the economic, social and cultural development of the people[69].

81. It is widely accepted that a population of a trust or mandated territory, of a non-self-governing territory, or of an existing State, taken as a whole, undisputedly qualifies as a people entitled to self-determination. Whether, and under which conditions, an ethnic or other group within an existing State may qualify as a people, is subject to extensive debates.

VI.3. Self-determination and territorial integrity.

82. It is worth reiterating that the principles of international law are to be applied in the light of each other, in a way that would produce a most harmonious interpretation of the various principles in a given situation.

83. The basis of the correlation between self-determination and territorial integrity is the so-called "safeguard clause" that first appeared in the 1970 Declaration of Principles and was somewhat modified in the 1993 Vienna Declaration of the United Nations World Conference on Human Rights: the right to self-determination "shall not 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 and thus possessed with a Government representing the whole population belonging to the territory without distinction of any kind"[70].

84. This passage suggests that a State that respects the rights of peoples living in its territory, is protected by the principle of territorial integrity from the implementation of the right to self-determination in the form of secession

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[69] See, *e.g.*, S.Chernichenko, V.Kotlyar, "Ongoing global legal debate on self-determination and secession: main trends", in *Secession and international law*, ed. by J.Dahlitz, United Nations, New York and Geneva, 2003, p.77.

[70] 32 International Legal Materials (1993), p.1665.

("external self-determination")[71]. As stated by the Supreme Court of Canada in the *Quebec secession* case, "the international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states"[72]. Many authors discussing self-determination point out either that the post-colonial system does not recognize a right to secession at all, or that, at least, a presumption or a strong preference exists in favour of territorial integrity[73].

85. It is important to note that self-determination can be exercised within an existing State. This "internal self-determination" is in fact preferred in the post-colonial world[74]. Following the mentioned judgment of the Canadian Supreme Court, "the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination"; "there is no necessary incompatibility between the maintenance of the territorial integrity of existing states ... and the right of a 'people' to achieve a full measure of self-determination"[75].

86. What remains to be analysed is whether there exists a possibility of secession where the State concerned does not "conduct itself in compliance with the principle of equal rights and self-determination of peoples" and thus does not possess a "government representing the whole population". Unilateral secession

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71 J.Craword, *Op.cit.*, pp.118-119 and p.418; A.Cassese, *Op.cit.*, p.112.

72 115 International Law Reports (1998), p.536, para.127.

73 For instance, "outside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States" (J.Craword, *Op.cit.*, p.415); "[T]he concept of secession is irrelevant to the ongoing entitlement of peoples to self-determination in the post colonial era" (R.Higgins, "Self-determination and secession", in *Secession and international law*, see note 69, p.36.); "The principle of territorial integrity of sovereign States was, and still is, considered sacred ... [A]ny licence to secede must be interpreted very strictly" (A.Cassese, *Op.cit.*, p.112); "[I]n no case should existing governmental structures be put in jeopardy lightly" (C.Tomuschat, "Self-Determination in a Post-Colonial World", in *Modern Law of Self-Determination*, ed. by C.Tomuschat, Dordrecht and Boston, 1993, p.11).

74 A telling example is offered by the General Recommendation XXI (48) adopted by the Committee on the Elimination of Racial Discrimination on 8 March 1996, *General Assembly, Official Records, Fifty-first Session, Supplement No.18* (A/51/18), pp.135-136.

75 See note 72, p.537, para.130. See also *e.g.* C.Tomuschat, *Op.cit.*, pp.16-17: "International law cannot and should not promote secessionist moves ... Instead, the aim should be to accommodate the legitimate claims of peoples ... by creating adequate political structures ... A 'federal' right to self-determination could act as such a catalyzer".

pursuant to the quoted provisions of the 1970 Declaration has been titled "remedial secession".

87. Importantly, authors that advocate this right admit that it can be exercised only in extreme conditions, where violent acts of discrimination are continuously committed against the people in question and all the possibilities for a resolution of the problem within the existing State have been exhausted. Secession has been described as a measure of last resort, where the very existence of the people, or its characteristic features, are in danger[76]. As formulated in the *Quebec* case, "a right to external self-determination (which ... potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances"[77].

88. In this regard, the Russian Federation is of the view that the primary purpose of the "safeguard clause" is to serve as a guarantee of territorial integrity of States. It is also true that the clause may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme

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[76] C.Tomuschat defines those circumstances as "structural discrimination ... amounting to grave prejudice affecting ... lives" ("Secession and Self-Determination", in *Secession: International Law Perspectives*, see note 61, p.41) and as "permanent and gross misuse of [State] powers" ("Self-Determination in Post-Colonial World", see note 73, p.11).

A.Cassese proposes the following criteria giving rise to the right to secession: "when the central authorities ... persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure" (*Op.cit.*, p.119).

A similar scheme was proposed by O.Schachter: "1. The claimant community should have an identity distinct from the rest of the country and inhabit a region that largely supports separation ...; 2. The community has been subjected to a pattern of systematic political or economic discrimination; 3. The central regime has rejected reasonable proposals for autonomy and minority rights of the claimant community" ("Micronationalism and Secession", in *Recht zwischen Umbruch und Bewahrung*, Berlin etc., 1995, p.185).

D.Murswiek put it in a more general way: "There must, at least, be a right of secession if it does not seem possible to save the existence of a people, which is the holder of the right of self-determination in a certain territory, except by secession from the existing State". He emphasizes that "there cannot be a right of secession in every case of discrimination, especially if there are still chances that the State authorities may stop the discrimination when requested" (D.Murswiek, "The Issue of a Right of Secession – Reconsidered", in *Modern Law of Self-Determination*, see note 73, pp.26-27).

See also G.Seidel, "A New Dimension of the Right to Self-Determination in Kosovo?", in *Kosovo and the International Community: A Legal Assessment*, ed. By C.Tomuschat, The Hague etc., 2002, pp.203-215.

[77] See note 72, p.536, para.126. See also *E.C.H.R., Loizidou v. Turkey,* Judgment of 18 December 1996, Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal.

circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent State and the ethnic community concerned within the framework of the existing State.

VI.4. Applying those criteria to Kosovo.

89. Next point to address is whether Kosovo, or its population, are entitled to secession from Serbia as a matter of self-determination.

90. First of all, it should be recalled that no issue of self-determination for Kosovo arose in 1991-1992, when the SFRY was disintegrating. In fact, both the Badinter Commission's opinions and most authors indicate that the process was not a manifestation of the right of peoples to self-determination but one of a failure of federal authorities which brought the existence of the federation to an end[78]. Meanwhile, Kosovo was not a constituent republic of the SFRY, and the latter's paralysis did not affect the functioning of the Republic of Serbia. Therefore, the logic of the SFRY dissolution did not apply to Kosovo.

91. But even if one admits that the SFRY was dissolved pursuant to the right of peoples to self-determination[79], the analysis of its constitutional system suggests that the population of Kosovo had never been considered as a people entitled to self-determination amounting to the right to independence. According to the very first sentence of the "General Principles" of the 1974 SFRY Constitution, "The peoples of Yugoslavia, proceeding from the right of all peoples to self-determination, including the right to secession, ... have united into a federal republic of free and equal peoples (*naroda*) and ethnicities (*narodnosti*) ...". Its Article 1 provides: "The [SFRY] is a federal State as a State union of the

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[78] Opinion No.1, see note 42, pp.182-183, and Opinion No.8, see note 42, pp.87-88; J.Ringelheim, *Op.cit.*, p.495. See also J.Crawford, *Op.cit.*, pp.400-401; A.Cassese, *Op.cit.*, pp.269-270; C.Tomuschat, "Secession and Self-Determination", p.32.

[79] A.Pellet, *Op.cit.*; B.Bagwell, "Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics", 21 Georgia Journal of International and Comparative Law (1991), p.489.

voluntarily united peoples and their socialist republics, as well as of socialist autonomous provinces of Vojvodina and Kosovo that make part of the Socialist Republic of Serbia..."[80]. One can see that only constituent republics were seen as a manifestation of the right of peoples to self-determination, while Kosovo represented an autonomous province established in the interest of an ethnic group (*narodnost*) that did not qualify as a people for the purposes of the Constitution.

92. Turning to the 1999 crisis, one should address the idea advocated by some, that, as a result of those events, Serbia forfeited its right to govern Kosovo and that the return of Kosovo under Serbian rule is not a viable option[81]. It is striking that these arguments only started to be advanced several years after 1999[82]. Back then, none of the parties involved ever mentioned either the right of Kosovo Albanians to self-determination or the option of Kosovo independence as a possible solution.

93. This is true for all the official documents adopted during the conflict. Ever since the Contact Group Statement of 9 March 1998[83], and up to the adoption of Resolution 1244, what was consistently mentioned as the aim of the international community, was "substantial autonomy", "meaningful self-government", "upgraded status" for Kosovo, but always "within" or "respecting the sovereignty and territorial integrity of" the Federal Republic of Yugoslavia[84].

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[80] *Ustav Socijalističke Federativne Republike Jugoslavije,* in *Službeni list Socijalističke Federativne Republike Jugoslavije*, godina XXX, broj 9, Beograd, čtvrtak, 21. februar 1974. English-language quotations and analysis appears e.g. in B.Bagwell, *Op. cit.*

[81] The Ahtisaari Plan, S/2007/168.

[82] *E.g* J.Kokott, "Human Rights Situation in Kosovo 1989-1999", in *Kosovo and the International Community: A Legal Assessment*, see note 76, pp.1-35; G.Seidel, *Op.cit.*, pp.203-215. Both articles appeared in 2002, to be compared with N.Levrat, writing in 2000: "Il est loin d'être certain que la situation du Kossovo puisse relever du droit des peuples à disposer d'eux-mêmes..." ("D'une exigence de légalité dans les relations internationales contemporaines", in *La crise des Balkans de 1999: Les dimensions historiques, politiques et juridiques du conflit du Kosovo*, sous dir. de Ch.-A.Morand, Bruxelles et Paris, 2000, p.263).

[83] S/1998/223, 12 March 1998.

[84] See also J.Ringelheim, *Op.cit.*, p.481: "The legal arguments deployed by each side are clearly discernible: Albanian leaders were claiming the status of a *people* entitled to self-determination and, hence, independence. Yugoslav authorities responded that they were 'only' a *national minority* ... . As for third-party states, they ... conspicuously avoided reference to self-determination or to minority protection" (emphasis in the original). At pp.500-501, after demonstrating that the international community did not qualify Kosovo Albanians as a "people" entitled to self-determination, the author concludes: "There was a striking consensus among states with regard to the

94. The same is also true for the justifications of the 1999 NATO military operation. Political statements that defended the legitimacy of that operation, and most legal writings that discussed it, did not refer to the right of Kosovo Albanians to self-determination. Rather, it was the general notion of human rights, or minority rights, or else the idea of a humanitarian catastrophe that was invoked.

95. Thus, Javier Solana, Secretary General of NATO, in his Press Statement of 23 March 1999, said: "We are taking action following the Federal Republic of Yugoslavia Government's refusal of the International Community demands: acceptance of the interim political settlement which has been negotiated at Rambouillet; full observance of limits on the Serb Army and Special Police Forces agreed on 25 October; ending of excessive and disproportionate use of force in Kosovo. ... This military action ... will be directed towards disrupting the violent attacks ... and weakening [Yugoslavia's] ability to cause further humanitarian catastrophe"[85]. The reluctance of NATO and its members to invoke self-determination and secession has been widely commented[86].

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settlement that should be promoted for Kosovo. In line with their initial stance, they continued to reject Kosovar Albanians claims to statehood".

Similarly, E.Lagrange admits: "Le Conseil de sécurité ne put se ressaisir du dernier des conflits nés sur le territoire de l'ex-Yougoslaive qu'en refoulant, à la qualification, la notion de régime discriminatoire et, au dispositif, celle d'auto-détermination". The author mentions "la solution que les members du Conseil, à l'époque, étaient d'accord pour décourager: l'indépendance" ("La Mission intérimaire des Nations Unies au Kosovo, nouvel essai d'administration directe d'un territoire", XLV Annuaire français de droit international (1999), pp.338 et 343).

[85] See http://www.nato.int/ docu/pr/1999/p99-040e.htm.

A.Cassese ("*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community", 10 European Journal of International Law (1999), pp.23-30) mentions self-determination as a possible justification of the NATO operation, but stresses that "respect for human rights and self-determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy" (p.25). Similarly, N.Levrat (*Op.cit.*, pp.262-266) discusses the eventual legitimacy of the NATO operation in the light of self-determination exclusively as a theoretical option.

[86] "It is noticeable that neither the Security Council nor the NATO States have referred to a right of self-determination as such in Kosovo" (C.Greenwood, *Op.cit.*, p.154);

"Characteristically, the intervening countries did not conceive the conflict as a secession attempt ... It should be noted ... that NATO States made it clear that their campaign did not support secessionist goals" (G.Nolte, "Secession and External Intervention", in *Secession: International Law Perspectives*, see note 61, p.93);

"On pourrait se demander si le droit à l'autodétermination confère aux Kosovars un droit de secession. Toutefois, l'opération des Etats de l'OTAN ne visait pas au soutien de la création d'un Etat indépendent. La souveraineté et l'intégrité territoriale de la République fédérale de la Yougoslavie furent confirmées dans toutes les phases du

96. Possible justifications for the 1999 military intervention are analysed by S.Sur[87], L.Henkin, R.Wedgwood, J.Charney, C.Chinkin, R.Falk, T.Franck, M.Reisman[88], B.Simma[89], C.Gray[90], M.Kohen[91], O.Corten and B.Delcourt[92], J.-F.Flauss[93], H.Shinoda[94], A.Roberts[95], N.Krisch[96], F.Francioni[97], V.Lowe[98], C.Guicherd[99], M.E.O'Connell[100], A.Sofaer[101], Y.Nouvel[102], P.Weckel[103],

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conflit" (R.Uerpmann, "La primauté des droits de l'homme: licéité ou illicéité de l'intervention humanitaire", in *Kosovo and the International Community: A Legal Assessment*, see note 76, p.68);.

87 S.Sur, *The Use of Force in the Kosovo Affair and International Law*, Paris, 2001.

88 "Editorial Comments: NATO's Kosovo Intervention", 93 American Journal of International Law (1999), pp.824-862.

89 B.Simma, "NATO, the UN and the Use of Force: Legal Aspects", 10 European Journal of International Law (1999), pp.1-22.

90 C.Gray, "The Legality of NATO's military action in Kosovo: Is There a Right of Humanitarian Intervention?", in *International Law in the Post-Cold War World, Essays in Memory of Li Haopei*, ed. by Sienho Yee and Wang Tieya, London and New York, 2001, pp.240-253.

91 M.Kohen, "L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international", Revue belge de droit international 1999, pp.132-137.

92 O.Corten and B.Delcourt, "La guerre du Kosovo: le droit international renforcé?", L'Observateur des Nations Unies, No.8, 2000, pp.133-147

93 J.-F.Flauss, "La primarité des droits de la personne: licéité ou illicéité de l'intervention humanitaire?", in *Kosovo and the International Community: A Legal Assessment.*, see note 76, pp. 87-102.

94 H.Shinoda, "The Politics of Legitimacy in International Relations: A Critical Examination of NATO's Intervention in Kosovo", 25 Alternatives (2000), pp.515-536.

95 A.Roberts, "NATO's 'Humanitarian War' over Kosovo", 41 Survival (1999), No.3, pp.102-123.

96 N.Krisch, "Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council", 3 Max Planck Yearbook of United Nations Law (1999), pp.79-86.

97 F.Francioni, "Of War, Humanity and Justice: International Law After Kosovo", 4 Max Planck Yearbook of United Nations Law (2000), pp.107-126.

98 V.Lowe, "International Legal Issues Arising in the Kosovo Crisis", in *International Law in the Post-Cold War World, Essays in Memory of Li Haopei*, see note 90, pp.278-288.

99 C.Guicherd, "International Law and the War in Kosovo", 41 Survival (1999), No.2, pp.19-34.

100 M.E.O'Connell, "The UN, NATO and International Law after Kosovo", 22 Human Rights Quarterly (2000), pp.57-89.

101 A.Sofaer, "International Law and Kosovo", 36 Stanford Journal of International Law (2000), pp.1-21.

102 Y.Nouvel, "La position du Conseil de sécurité face à l'action militaire engagée par l'OTAN et ses États membres contre la République Fédérale de Yougoslavie", XLV Annuaire français de droit international (1999), pp.292-307.

103 P.Weckel, "L'emploi de la force contre la Yougoslavie ou la Charte fissurée", Revue générale de droit international public, 2000, No.1, pp.19-36.

N.Valticos[104], F.Dubuisson[105], N.Rodley and B.Çalı[106]. Tellingly, the right to self-determination is not mentioned by any of these authors.

97. One may thus conclude that, in 1999, just like in 1991, the international community did not proceed on the premise that Kosovo Albanians, or the whole population of Kosovo, were entitled to self-determination. Resolution 1244 established the United Nations administration in Kosovo in order to safeguard human rights and to put an end to a situation that had been qualified as a threat to international peace and security, rather than to allow the people of Kosovo to exercise its right to self-determination[107].

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[104] N.Valticos, "Les droits de l'homme, le droit international et l'intervention militaire en Yougoslavie", Revue générale de droit international public, 2000, No.1, pp.5-17.

[105] F.Dubuisson, "La problématique de la légalité de l'opération 'Force alliée' contre la Yougoslavie: enjeux et questionnements", in *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo*, éd. Par O.Corten et B.Delcourt, Bruxelles, 2000, pp.149-206.

[106] N.Rodley, B.Çalı, "Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law", 7 Human Rights Law Review (2007), pp.275-297.

[107] Some authors mention the right to self-determination as applicable to Kosovo, but only in its internal aspect. Thus, J.Currie argues: "[A]t no relevant time did NATO or its members endorse any form of external self-determination for Kosovo, preferring instead to focus on the need for a greater degree of internal self-determination" ("NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?", Canadian Yearbook of International Law 1998, p.327).

According to C.Tomuschat, "[a]utonomy for a given human community cannot be invented by the Security Council without any backing in general international law. In conclusion, the 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 to self-determination" ("Secession and Self-Determination", in *Secession: International Law Perspectives*, see note 61, p.36).

J.Charney puts it even more bluntly: "[i]n Kosovo, the international community essentially endorsed the Albanian Kosovar's claims to self-determination" ("Self-Determination: Chechnya, Kosovo, and East Timor", 34 Vanderbilt Journal of Transnational Law (2001), p.458).

These positions are not completely unfounded. Yet they seem not to take account of the fact that autonomy and self-government are not at all necessarily a manifestation of the right to self-determination. An example of autonomy unrelated to self-determination is offered by the constitutional system of Serbia itself: the Autonomous Province of Vojvodina, 65 per cent of whose population are ethnic Serbs, is autonomous largely for historical reasons.

Some authors argued in favour of Kosovo secession in pursuance of the right to self-determination, while acknowledging that the international community did not support the idea (T.Baggett, "Human Rights Abuses in Yugoslavia: to Bring an End to Polical Oppression, the International Community Should Assist in Establishing an Independent Kosovo", 27 Georgia Journal of International and Comparative Law (1999), pp.457-476; P.Szasz, "The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: a Cautionary Fairy Tale about Clashes in Kosovo and Elsewhere", 28 Georgia Journal of International and Comparative Law (1999), pp.1-8; J.Merriam, "Kosovo and the Law of Humanitarian Intervention", 33 Case Western Reserve Journal of International Law (2001), pp.111-154).

98. The question therefore is whether, by February 2008, the situation had changed to the extent that the people of Kosovo had acquired the right to self-determination leading to secession. In other words, could the circumstances, as they were in 2008, be qualified as extreme?

99. The answer is clearly negative. It cannot be disputed that the situation on the ground in 2008 was incomparably better than the one in 1999.

100. In fact, Resolution 1244 was adopted with this very aim in mind: to prevent further deterioration of the situation, to restore international peace and security and to enable the population of Kosovo to again enjoy their basic human rights. As mentioned above, since then, the political regime has changed in Belgrade. Serbia and Montenegro has ceased to claim its right to continuation of the legal personality of the SFRY and was admitted to the United Nations as a new State. This new State, now reduced to Serbia, shares the universal values of democracy and human rights. It has consistently expressed its readiness to offer Kosovo a "substantial"[108] or even an "unlimited" autonomy[109]. The Serbian side was acting *bona fide* in negotiations during which other parties were trying to impose unacceptable solutions on it. Further, Belgrade has taken clear commitments not to use force in Kosovo. This commitment has been reiterated even after the Declaration of independence was adopted.

101. There are no reasonable grounds whatsoever to consider that in 2008, or currently, a threat of extreme – and indeed of any – oppression by Serbia against Kosovo Albanians existed or exists.

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[108] The idea of "substantial autonomy" for Kosovo is considered so important in the constitutional system of Serbia that it is provided for by the second preambular paragraph of the Constitution of the Republic of Serbia of 8 November 2006 (http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav.php).

[109] "Kosovo's Independence Nothing Else but Violent Partition of Serbia", Press Release of 19 November 2007 by the Government of Serbia, available at http://www.srbija.gov.rs/vesti/vest.php?pf=1&id=40900. This demonstrates that the idea advanced by some, that the adoption of the new Constitution of Serbia tied the hands of Serb negotiators, is groundless. According to Article 182 of the Constitution, the substantial autonomy of Kosovo is to be regulated by a special law. That law, obviously, can be based on a negotiated settlement.

102. The stance taken by the international community in 1999 was unanimous in confirming the territorial integrity of the Federal Republic of Yugoslavia. Immediately after the events that had been stigmatized as genocide and ethnic cleansing, the international community considered that the presumption in favour of territorial integrity was not overridden. The Russian Federation is therefore convinced that in 2008, the situation on the ground being significantly better that in 1999, the presumption obviously could not be overridden either[110]. This is true for the current period as well.

103. To sum up, the situation does not even begin to come close to the "extreme circumstances" under which the right to secession may be invoked.

104. The unilateral Declaration of independence is therefore not in accordance with general international law.

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[110] For a similar logic, see R.Higgins, "Self-determination and secession", in *Secession and international law*, see note 69. In particular, at p.37: "Certainly there was for a period a widespread international public sympathy for the idea of the reasonable need of Kosovo to secede from Serbia. By contrast, governments continued to give a greater priority to territorial unity – and with the evolution of events and the passage of time, the possible pre-requirements for the true need to secede have faded". Almost identical passages can be found in J.Friedrich, "UNMIK in Kosovo: Struggling with Uncertainty", see note 56, pp.251-252, even if the author thereafter argues in favour of independence as a negotiated settlement.

See also a similar assessment from a political point of view: "The political momentum for independence that was running high even among some international circles during spring-summer 1999 appears to have considerably subsided. ... The continued violence against Serbs had constantly been adding grist to the mill that opposes the independence of Kosovo. The progressive consolidation of the international administration in Kosovo and the collapse of the Milosevic regime only strengthened the forces that oppose further disintegration in the area" (A.Yannis, *Op.cit.*, p.58).

VII. Conclusions

On the basis of the foregoing, the Russian Federation states the following:

1. The question asked by the General Assembly is a legal one; the Court therefore has the jurisdiction to render an advisory opinion on it.

2. The law applicable to the issue under consideration includes general international law and the UN Security Council Resolution 1244 (1999).

3. The unilateral declaration of independence of Kosovo is not in accordance with Resolution 1244 for the following reasons:

- multiple references to the territorial integrity of the Federal Republic of Yugoslavia in Resolution 1244, and the lack of references to a possibility of independence for Kosovo create, for the purposes of interpretation, a strong presumption in favour of territorial integrity;

- even if one admits that Resolution 1244 does not exclude the possibility of the independence of Kosovo as a form of a final settlement, the Resolution itself as well as the consistently expressed positions of States indicate that the settlement has to be a result of an agreement negotiated by the parties or of a Security Council decision. The Resolution excludes the possibility for a final settlement to result from a unilateral act;

- the Provisional Institutions of Self-Government were established within the framework of Resolution 1244 and are obliged to abide by it. Declaring independence was by far outside their competence.

4. The unilateral declaration of independence of Kosovo is not in accordance with general international law for the following reasons:

- outside the colonial context, international law allows for secession of a part of a State against the latter's will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned is continuously

subjected to most severe forms of oppression that endangers the very existence of the people;

- the population of Kosovo was not considered as entitled to self-determination, at least in the form of secession, either in 1991-1992 or in 1999;

- by 2008, no extreme circumstances existed and, in particular, the population of Kosovo faced no risk of oppression. Since no issue of self-determination in the form of secession arose in 1999, it could not, *a fortiori*, arise in 2008.

Therefore, the Russian Federation considers that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.