



REPUBLIC OF ALBANIA  
MINISTER OF FOREIGN AFFAIRS

Tirana, 14. 04. 2009

Your Excellency,

On behalf of the Republic of Albania, pursuant to the Order of the Court dated 17 October 2008, I have the honour to transmit to the Court this Written Statement for the advisory proceedings in the case *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*.

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

Respectfully submitted,

On Behalf of the Government of the Republic of Albania

LULZIM BASHA

Minister for Foreign Affairs

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**Judge Hisashi OWADA,**  
**President, International Court of Justice**  
Peace Palace, Carnegieplein 2, 2517 KJ The Hague  
THE NETHERLANDS

INTERNATIONAL COURT OF JUSTICE

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

(Request for Advisory Opinion)

Order of 17 October 2008

WRITTEN STATEMENT OF THE GOVERNMENT OF  
THE REPUBLIC OF ALBANIA

April 2009

## TABLE OF CONTENTS

PART I	INTRODUCTION .....	4
PART II	BACKGROUND .....	5
A)	Events Preceding the Violent Break-Up of the Socialist Federal Republic of Yugoslavia	5
B)	Post-1989 Developments in Kosovo .....	7
C)	The February-March 1999 Rambouillet Accords .....	16
D)	NATO's Military Intervention in Kosovo – Operation 'Allied Force' 24 March – 10 June 1999 .....	17
E)	Resolution 1244 (1999) and the Establishment of the United Nations Interim Mission in Kosovo .....	20
F)	The Internationally Supervised Final Status Negotiation Process .....	21
G)	The Declaration of Independence by Kosovo on 17 February 2008.....	23
PART III	OBJECTIONS TO JURISDICTION.....	25
A)	The Declaration of Independence is a Domestic Matter not Regulated by International Law .....	25
B)	The General Assembly Was Prevented by Article 12, Paragraph 1 of the UN Charter to Request the Advisory Opinion .....	27
PART IV	PROPRIETY AND THE EXERCISE OF DISCRETION .....	30
A)	The Court Should Exercise Its Discretion and Decline to Give the Advisory Opinion...	30
B)	There Must not Be a Contradiction between the Exercise of Jurisdiction of the General Assembly and the Security Council .....	30
C)	The Security Council and the General Assembly Have Left it Open to States to Recognise Kosovo.....	31
D)	The Secretary-General of the United Nations and the Security Council Have Recognised the New Situation in Kosovo .....	32
E)	The Advisory Opinion Concerns a Bilateral Dispute between Kosovo and Serbia.....	35
F)	The Advisory Opinion Cannot Contribute to the Exercise of Jurisdiction by the General Assembly.....	36
PART V	IS THE DECLARATION OF INDEPENDENCE BY KOSOVO IN ACCORDANCE WITH INTERNATIONAL LAW?.....	38
A)	The Right to Self-Determination Is Firmly Established in International Law and in the Case Law of the Court.....	40
B)	The Institutionalised Policy of Repression and Gross and Widespread Human Rights Violations against Kosovar Albanians .....	44
C)	Prolonged Internationally Supervised Negotiations Failed to Produce an Agreement....	48
D)	Resolution 1244 of the Security Council Left Open the Form of the Final Status Settlement and the Manner of Its Expression.....	50
E)	The Declaration of Independence Was Adopted by the Freely and Democratically Elected Representatives of Kosovo .....	52
F)	Respect and Protection of the Human Rights of the Minorities in Kosovo's Constitution and Legal Framework.....	53

G) Kosovo's Future and Friendly Relations Policies .....	54
PART VI CONCLUSIONS AND SUBMISSIONS .....	56

## PART I INTRODUCTION

1. The International Court of Justice (hereinafter ICJ or Court) has been seized by the General Assembly with a request for an advisory opinion concerning the accordance with international law of the Declaration of Independence (hereinafter DoI) adopted by the representatives of the people of Kosovo on 17 February 2008.<sup>1</sup> To answer this question the historical circumstances and the socio-political and legal developments which have taken place in this area of the Balkans must be taken into account. Of particular importance are the tumultuous developments that took place in the former Yugoslavia and especially in Kosovo and Serbia during the last two decades. This memorial will first provide the necessary background, before addressing the legal features of the case.
2. A declaration of independence typically lists the grievances occasioning the separation and the creation of a new and independent body politic.<sup>2</sup> As such it represents a domestic political statement of the highest form whose status and requirements are not regulated by international law.
3. The Republic of Albania submits that the Court lacks jurisdiction to entertain the question put by the General Assembly, or in the alternative, in the interest of safeguarding its judicial character and in view of other important considerations exposed in detail below, it should use its discretion and not render an advisory opinion. Should the Court deem it justified and proper to render an advisory opinion, notwithstanding the objections, Albania submits that the DoI issued by the Kosovar authorities is in full conformity with international law. The Republic of Albania reserves the right to provide further comments or observations should the Court determine to respond to the request.

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<sup>1</sup> The position of the Republic of Albania is that the labeling of Kosovo's Declaration of Independence as 'unilateral' is misleading, since Kosovo consulted a number of international actors involved in the negotiation process before taking this step. In his reports on the situation in Kosovo to the Security Council, the Secretary-General of the United Nations uses the term 'declaration of independence'. Furthermore, 'Unilateral Declaration of Independence' is not a term of art. In adopting the Declaration of Independence the Kosovar authorities were not acting as Provisional Institutions of Self-Government, but as the democratically elected representatives of the people of Kosovo.

<sup>2</sup> See *inter alia* the Declaration of Independence of the United States of 4 July 1776 and the Declaration of Independence of Kosova of 17 February 2008.

## PART II BACKGROUND

### A) Events Preceding the Violent Break-Up of the Socialist Federal Republic of Yugoslavia

4. The state entity known as Yugoslavia changed its name and its constitutional framework several times from the end of the Second World War to the start of its violent break-up in the early 1990s. According to the 1946 Constitution of the Federal People's Republic of Yugoslavia, Kosovo was part of the People's Republic of Serbia and was given the status of an autonomous region.<sup>3</sup> In 1963, the country's name was changed to Socialist Federal Republic of Yugoslavia (hereinafter SFRY). According to the 1963 Constitution, Kosovo's status was transformed from that of an autonomous region to that of an autonomous province.<sup>4</sup>
  
5. In 1974, the Constitution of the Socialist Federal Republic of Yugoslavia was enacted to replace the 1963 Constitution. The SFRY was defined by the 1974 Constitution as a state community of voluntarily united nations and their socialist republics, as well as the autonomous provinces of Kosovo and Vojvodina, which had representation in both federal level and in the level of the Socialist Republic of Serbia.<sup>5</sup> According to the 1974 Constitution, Kosovo had its own Constitution, the Constitutional and Supreme Courts, its own Parliament and Executive Committee.<sup>6</sup> It had its own representatives in both the SFRY Chamber of

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<sup>3</sup> Article 2 of the 1946 Constitution, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 52.

<sup>4</sup> See Articles 111 and 112 of the 1963 Constitution in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 53.

<sup>5</sup> Article 1 of Constitution of the Socialist Federal Republic of Yugoslavia, in H. Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999: An Analytical Documentation 1974-1999* (Cambridge International Documents Series), Cambridge University Press, 2001, p. 2 (hereinafter Krieger) and in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 54 (hereinafter Weller). This Article reads: "The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntary united nations and their Socialist Republics and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Republic of Serbia, based on the power of self-management by the working class and all working people; it is at the same time a socialist self-management democratic community of working people and citizens and of nations and nationalities having equal rights."

<sup>6</sup> Article 4 of the 1974 Constitution reads: "The Socialist Autonomous Province are autonomous socialist self-managing democratic socio-political communities based on the power of self-management by the working class and all working people, in which the working people, nations and nationalities realize their sovereign rights, and

Republics and Provinces and the Federal Chamber and was also represented in the Federal Presidency.

6. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted in its judgment of 26 February 2009 in the *Milutinović et al* case, “This Constitution gave the provinces a significant degree of autonomy, which included the power to draft their own constitutions, to have their own constitutional courts, to have a representative in the SFRY Presidency in Belgrade, and the right to initiate proceedings before the Constitutional Courts of Yugoslavia and Serbia. In addition, they were represented, along with the republics, in the SFRY Chamber of Republics and Provinces and the Federal Chamber, which was the legislative body with the power to amend the SFRY Constitution.”<sup>7</sup>
  
7. According to Article 245 of the 1974 Constitution the nations and nationalities of the SFRY had equal rights.<sup>8</sup> Further, it is noteworthy that under Article 5 of that Constitution, the territory of a Republic could not be altered without the consent of that Republic, and the territory of an Autonomous Province – without the consent of that Autonomous Province.<sup>9</sup> That was reinforced in the last paragraph of that Article which reads: “Boundaries between the Republics may only be altered on the basis of mutual agreement, and if the boundary of an Autonomous Province is involved – also on the basis of the latter’s agreement.”<sup>10</sup> That means that, among other rights, the Autonomous Provinces enjoyed jurisdiction over their territory at the same level as the Republics constituting the federal state.

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when so specified by the Constitution of the Socialist Republic of Serbia in the common interest of the working people, nations and nationalities of that Republic as a whole, they do so also within the Republic.”, in Krieger, *supra* note 5, p. 3.

<sup>7</sup> ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić* (hereinafter *Prosecutor v. Milutinović et al.*), Case No. IT-05-87-T, Judgment of 26 February 2009, Vol. I, pp. 83-84, par. 213, available on the ICTY website: <http://www.icty.org/case/milutinovic/4#tjug> (last accessed on 15 April 2009).

<sup>8</sup> See Krieger, *supra* note 5, p. 3.

<sup>9</sup> *Ibidem*.

<sup>10</sup> Article 5 of the Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of SFRY*, No. 9/1974.

## **B) Post-1989 Developments in Kosovo**

8. In 1989, the Serbian authorities revoked Kosovo's autonomy against the will and the consent of the people of Kosovo.<sup>11</sup> The March 1989 amendments to the Constitution of the Socialist Republic of Serbia violated the letter and the spirit of the 1974 Constitution of the SFRY, especially the principle of equality between nations and nationalities.<sup>12</sup> This was done notwithstanding Article 145 of the 1974 Constitution of the Socialist Republic of Serbia which provided that nations and nationalities within Serbia shall be equal. The actions undertaken by the Serbian authorities to forcibly assimilate Kosovo into Serbia marked the starting point of the break-up of the SFRY.<sup>13</sup> Besides triggering a strong public reaction in Kosovo, expressed in widely attended demonstrations, these actions aimed at limiting Kosovo's autonomous powers caused a feeling of uneasiness among the Yugoslav Republics concerning issues of political power-sharing.<sup>14</sup> That was reinforced by other actions such as Serbia's plan to impose custom duties on goods entering Serbia from other Yugoslav republics and to withhold Serbia's payment to the Federal Republic, and the demands of the Serbians living in South-Eastern Croatia for an 'autonomous state'.<sup>15</sup>
9. On 3 June 1990 Serbia approved the law on the action of Republic bodies in special circumstances in Kosovo.<sup>16</sup> On 5 July 1990 Serbia passed the law on invalidation of the activity of the Assembly of Kosovo and its government.<sup>17</sup> On

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<sup>11</sup> See *inter alia* Krieger, *supra* note 5, p. 1. See also ICTY, *Prosecutor v. Limaj et al*, Case No. IT-03-66, Judgment of 30 November 2005, pp. 16-17, pars. 38-40.

<sup>12</sup> The 1989 amendments and the laws passed afterwards with regard to Kosovo by the Serb authorities went against the basic principles of the 1974 Constitution of the SFRY, namely national freedom and independence, the brotherhood and unity of the nations and nationalities, a system of socio-economic relations and uniform foundations for a political system which will ensure the common interests of the working class and all working people and *the equality of the nations and nationalities* (emphasis added). Article 206 of the 1974 SFRY Constitution stated that republican constitutions and the provincial constitutions may not be contrary to the SFRY Constitution.

<sup>13</sup> Those actions were preceded by the 1986 Memorandum of the Serbian Academy of Arts and Sciences (SANU), which was a blueprint for the aggressive policies which brought about the division and disintegration of the SFRY. This memorandum contained highly inflammatory nationalistic rhetoric against ethnic Albanians.

<sup>14</sup> See R. Lukic and A. Lynch, *Europe from the Balkans to the Urals: The Disintegration of Yugoslavia and the Soviet Union*, SIPRI, Oxford University Press: New York, 1996, p. 151-162.

<sup>15</sup> A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, p. 268.

<sup>16</sup> *Law on the Actions of Republic Agencies under Special Circumstances*, 26 June 1990, Official Gazette of Socialist Republic of Serbia, 33/90, in Weller, *supra* note 5, pp. 60-61.

<sup>17</sup> *Law Terminating Work of the SAP of Kosovo Assembly and the Executive Council*, 5 July 1990, in Weller, *supra* note 5, pp. 61-62. See also *Serb Assembly Regulation on Implementing Law Terminating Work of SAP Kosovo Assembly and Executive Council*, 13 July 1990, *ibid.*, p. 62.



26 July 1990 Serbia passed the law on labour relations in special circumstances.<sup>18</sup> On the basis of that law, 135 000 Albanian workers were expelled from their jobs.<sup>19</sup> Taken together, these laws had the effect that public activities in the Albanian language were banned, starting from education, culture, science, and media, while Kosovar Albanian employees working in institutions such as schools, university, health institutions, media, police and other relevant sectors were fired *en masse*.

10. Reacting to the revocation of the autonomy by the Serbian authorities, 114 out of 118 members of the Assembly of Kosovo approved the Declaration of the Independence of Kosovo on 2 July 1990.<sup>20</sup> This declaration preceded the Constitution of the Republic of Kosovo, adopted on 7 September 1990. An independence referendum was also organized in Kosovo from 26 to 30 September 1991, following the abolition of Kosovo's autonomous status by Serbia in 1989. Of 87 per cent of the population that took part in the referendum, 99.87 per cent voted for the independence of Kosovo.<sup>21</sup> Though the Serbian police did everything it could to prevent this referendum, out of an estimated number of 1 051 357 citizens of Kosovo with a right to vote, 914 802 or 87.01 per cent voted, and of these 913 705 or 99.87 per cent voted in favour.<sup>22</sup>
  
11. Two laws adopted in 1992 made Serbian the language of instruction in Kosovo for both elementary and secondary schools.<sup>23</sup> Serbia stopped financing education in the Albanian language. By March 1991, 21 000 teachers had been sacked from

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<sup>18</sup> *Law on Labour Relations under Special Circumstances*, Official Gazette of the Republic of Serbia, No. 22/91, in Weller, *supra* note 5, pp. 62-63.

<sup>19</sup> ICTY, *Prosecutor v. Limaj et al*, Case No. IT-03-66, Judgment of 30 November 2005, p. 16, par. 39.

<sup>20</sup> See *inter alia* Weller, *supra* note 5, pp. 17 and 64-65.

<sup>21</sup> See *inter alia* D. Bethlehem and M. Weller (eds.), *The 'Yugoslav' Crisis in International Law: General Issues Part I*, Cambridge International Documents Series Volume 5, Cambridge University Press, 1997, p. xxx; N. Malcolm, *Kosovo: A Short History*, Macmillan Publishers Ltd.: London, 1998, p. 347 (hereinafter Malcolm). See also ICTY, *Prosecutor v. Limaj et al*, Case No. IT-03-66, Judgment of 30 November 2005, p. 17, par. 42.

<sup>22</sup> See Weller, *supra* note 5, p. 72. The Central Board of Kosova for the Conduct of the Referendum noted that on diverse grounds and for diverse reasons 136,555 citizens, i.e. 12.99% of the citizens of Kosova, with the right to vote, did not come out in the Referendum.

<sup>23</sup> See *Elementary School Law*, Official Gazette of the Republic of Serbia, No. 50/92 and *Secondary School Law*, Official Gazette of the Republic of Serbia, No. 50/92, in Weller, *supra* note 5, p. 63. It is important to note also the *High School Law*, *ibidem*.

their jobs.<sup>24</sup> Similarly, 1885 doctors and other medical staff also lost their jobs. Systematic repression and violation of basic human rights and fundamental freedoms was a daily occurrence in Kosovo. It is reported that between 1990 and 1995 over three hundred thousand Kosovar Albanians had left Kosovo for fear of persecution or lack of economic opportunities as a consequence of discriminatory state policies.<sup>25</sup>

12. From 1992 to 1998 the General Assembly and the Security Council passed numerous resolutions, acknowledging and condemning persistent human rights violations that were taking place in Kosovo.<sup>26</sup> In its Resolution 48/153 of 20 December 1993, while expressing grave concern regarding the human rights situation in Kosovo, the General Assembly strongly condemned: “[i]n particular the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including: (a) Police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, which leads to a climate of lawlessness in which criminal acts, particularly against ethnic Albanians, take place with impunity; (b) The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities; (c) Arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language

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<sup>24</sup> See *inter alia* D. Kostovicova, *Parallel Worlds: Response of Kosovo Albanians to Loss of Autonomy in Serbia, 1989-1996*, Keele University Press, pp. 33-35.

<sup>25</sup> See *inter alia* International Crisis Group, *Kosovo Spring Report*, 20 March 1998, p. 5, available at: [http://www.crisisgroup.org/library/documents/report\\_archive/A400178\\_20031998.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400178_20031998.pdf) (last accessed on 15 April 2009); Minorities At Risk Project (University of Maryland’s Center for International Development and Conflict Management) *Chronology for Kosovo Albanians in Yugoslavia*, available at: <http://www.cidcm.umd.edu/mar/chronology.asp?groupId=34501> (last accessed on 15 April 2009). The relevant paragraph reads: “Ethnic Albanians continued to be forced out of jobs controlled by State owned enterprises in the month of March. Serbian militia, led by Zeljko Raznjatovic, increased harassment of Kosovo Albanians in what was termed by Kosovar leaders to be ‘ethnic cleansing in the quiet’. The results were alleged Albanian emigration from Kosovo reported to be up to 500,000.”

<sup>26</sup> For the General Assembly Resolutions see *inter alia* Krieger, *supra* note 5, pp. 15-25, Weller, *supra* note 5, pp. 125-132. For the Security Council Resolutions see *inter alia* Weller, pp. 185-193; Security Council Resolutions Concerning the Situation Pursuant to Resolution 1160 (1998) available at: <http://www.un.org/Docs/sc/committees/res1160/1160ResEng.htm> (last accessed on 15 April 2009).

mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations; (d) Repression by the Serbian police and military.”

13. In that same resolution the General Assembly also urged the authorities in the Federal Republic of Yugoslavia” (a) To take all necessary measures to bring to an immediate end the human rights violations inflicted on the ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary detention and the use of torture and other cruel, inhuman or degrading treatment and the occurrence of summary executions; (b) To revoke all discriminatory legislation, in particular that which has entered into force since 1989; (c) To re-establish the democratic institutions of Kosovo, including the Parliament and the judiciary; (d) To resume dialogue with the ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia.”
  
14. In its Resolution 49/204 of 23 December 1994, the General Assembly noted the police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice; discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against Albanian pupils and teachers, the closing of Albanian-language secondary schools and university, as well as the closing of all Albanian cultural and scientific institutions; the harassment and persecution of political parties and associations of ethnic Albanians and their leaders and activities, maltreating and imprisoning them; the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language; the dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin; the elimination in practice of the Albanian language, particularly in public administration and services; the serious and massive occurrence of discriminatory and repressive practices aimed at Albanians in Kosovo, as a whole, resulting in widespread involuntary migration; and noting also that the Sub-Commission on Prevention of Discrimination and

Protection of Minorities, in its resolution 1993/9 of 20 August 1993, considered that these measures and practices constituted a form of ethnic cleansing.

15. On 22 December 1995 the General Assembly adopted Resolution 50/190, noting various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo and the continuing deterioration of the human rights situation in Kosovo, including: Police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice, including the recent trials of ethnic Albanian former policemen; discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against ethnic Albanian pupils and teachers, the closing of Albanian-language secondary schools and the university, as well as the closing of all Albanian cultural and scientific institutions; the harassment and persecution of political parties and associations of ethnic Albanians and their leaders and activities, their maltreatment and imprisonment; the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language; the dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin; the elimination in practice of the Albanian language, particularly in public administration and services; the serious and massive occurrence of discriminatory and repressive practices aimed at ethnic Albanians in Kosovo, as a whole, resulting in widespread involuntary migration.
16. On 12 December 1996 the General Assembly adopted Resolution 51/111 on the situation of human rights in Kosovo. In expressing its concern about the grave human rights situation in Kosovo, the General Assembly stated that it:

“1. Condemns all violations of human rights in Kosovo, in particular repression of the ethnic Albanian population and discrimination against them, as well as all acts of violence in Kosovo; 2. Demands that the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro): (a) Take all necessary measures to bring to an

immediate end all human rights violations against ethnic Albanians in Kosovo, in particular the discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989; (b) Release all political prisoners and cease the persecution of political leaders and members of local human rights organizations; (c) Allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and respect the will of its inhabitants as the best means of preventing the escalation of the conflict there; (d) Allow the reopening of educational, cultural and scientific institutions of the ethnic Albanians; (e) Pursue constructive dialogue with the representatives of ethnic Albanians of Kosovo [...]" .

17. In Resolution 52/139 of 12 December 1997 the General Assembly expressed its concern about all violations of human rights and fundamental freedoms in Kosovo, in particular the repression of the ethnic Albanian population and discrimination against it, as well as acts of violence in Kosovo. It called upon the FRY authorities: to take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989; to release all political prisoners and to cease the persecution of political leaders and members of local human rights organizations; to allow the return in safety and dignity of Albanian refugees from Kosovo to their homes; to allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and to respect the will of its inhabitants as the best means of preventing the escalation of the conflict there; to allow the reopening of the educational, cultural and scientific institutions of the ethnic Albanians.
18. In October 1997, the UN Special Rapporteur on Human Rights in the former Yugoslavia, Elizabeth Rehn, visited Kosovo to investigate charges that Albanians were being abused. At the end of her visit Rehn said she had found evidence that Serbian police were guilty of “[b]rutality, with frequent use of torture” while

treating the arrested Albanians.<sup>27</sup> On hearings held respectively on 6 May and 23 June 1998 the US President's special envoy for the former Yugoslavia, Robert Gelbard told the Subcommittee on European Affairs, Committee on International Relations, that what Serbian forces were doing in Kosovo would amount to ethnic cleansing.<sup>28</sup>

19. Between 1989 and 1997 the situation in Kosovo continued to deteriorate. Ongoing gross and widespread human rights violations and the dire economic conditions facing the Kosovar Albanians had the effect of hardening their resistance towards the Serb authorities. Against this background the liberation movement organised as the Kosovo Liberation Army (KLA) started to gain ground. As the Tribunal for the former Yugoslavia stated:

“Its activities aimed at preparing the citizens of Kosovo for a liberation war, at mobilizing the population throughout the entire territory, and at responding by armed action to the acts of violence of the Serbian authorities.”<sup>29</sup>

The KLA made its first public appearance in November 1997 and it continued its armed resistance until the withdrawal of the Serb forces from Kosovo in June 1999.<sup>30</sup>

20. On 27 February 1998 Serbian forces, including armoured units and air support, attacked several villages in the Drenica region. A Human Rights Watch report concluded that a large number of civilians, including dozens of women and children, died in the attack.<sup>31</sup> Many reports by UN organs and agencies provide

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<sup>27</sup> Report of the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, UN Doc. A/52/490, in Weller, *supra* note 5, pp. 177-180. Based on that report the Commission on Human Rights in its Resolution 1998/79 called upon the authorities of the FRY to put an end to torture and ill-treatment of persons in detention as described in the reports of the Special Rapporteur, and to bring those responsible to justice.

<sup>28</sup> For more details see DR 2086 U75 1998 U.S. Congress, Senate Committee on Foreign Relations: Subcommittee on European Affairs, *The Crisis in Kosovo*, Hearings, 105<sup>th</sup> Congress, 2<sup>nd</sup> Session. Washington: GPO, May 6 and June 24, 1998. See also *KOSOVO: CURRENT SITUATION AND FUTURE OPTIONS*, Hearing before the Committee on International Relations House of Representatives, 23 July 1998, Witnesses: Ambassador Robert S. Gelbard, Special Representative of the President and the Secretary of State, Department of State, The Honorable Walter B. Slocombe, Under Secretary of Defense for Policy, Department of Defense, available at: [http://commdocs.house.gov/committees/intlrel/hfa50674.000/hfa50674\\_0f.htm](http://commdocs.house.gov/committees/intlrel/hfa50674.000/hfa50674_0f.htm) (last accessed on 15 April 2009).

<sup>29</sup> ICTY, *Prosecutor v. Limaj et al*, Case No. IT-03-66, Judgment of 30 November 2005, p. 18, par. 45.

<sup>30</sup> *Ibid.*, p. 19, par. 48.

<sup>31</sup> See *Humanitarian Law Violations in Kosovo*, Human Rights Watch Report, October 1998.

information about the scale and effect of the police and military operations carried out by Serb police, military and paramilitary forces in Kosovo. They provide a detailed account of the serious human rights and humanitarian law violations against the civilian population.<sup>32</sup>

21. Condemnation of the excessive and indiscriminate use of force during Serb police actions in Kosovo, leading to the deaths of some 80 persons over the previous week the decision was adopted was expressed in a Decision 218 on the situation in Kosovo, adopted at the special session of the Permanent Council of the Organization for Security and Cooperation in Europe, on 11 March 1998.<sup>33</sup> The UN High Commissioner for Refugees (hereinafter UNHCR) reported in early June 1998 that the operation forced more than 40 000 ethnic Albanians to leave their homes and flee for their lives.<sup>34</sup>
22. The deterioration of the humanitarian situation in Kosovo triggered the Security Council involvement. In Resolution 1160(1998) the Security Council acting under Chapter VII expressed its concern over the situation in Kosovo and decided to impose an arms embargo, while at the same time calling for authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues.<sup>35</sup> In a warning

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<sup>32</sup> For Reports of the UN Commission on Human Rights, the UN High Commissioner on Human Rights and the Special Rapporteur for the Former Yugoslavia see *inter alia* Weller, *supra* note 5, pp. 158-185; Krieger, *supra* note 5, pp. 25-45 and 46-65; for NGO Reports see Krieger, *supra* note 5, pp. 90-118.

<sup>33</sup> Decision 218 on the situation in Kosovo, adopted at the special session of the Permanent Council of the Organization for Security and Cooperation in Europe, on 11 March 1998, available at: <http://www.un.org/peace/kosovo/s1998246.pdf> (last accessed on 15 April 2009). In this decision the OSCE called upon the authorities of the FRY Calls upon the authorities of the Federal Republic of Yugoslavia:

- To halt the excessive use of force in Kosovo, to vigorously investigate and to accept the international investigation of reported summary executions and to bring to justice those found responsible;
- To initiate a meaningful dialogue with Kosovar Albanian representatives which will lead to concrete steps towards the resolution of ongoing political problems in the region;
- To allow access to Kosovo for the International Committee of the Red Cross and other humanitarian organizations;
- To implement without delay the Education Agreement and seek agreements on further confidence-building measures;
- To accept without preconditions, an immediate return of the OSCE missions of long duration to Kosovo, Sandjak and Vojvodina, with the understanding that the return of these missions is essential for future participation in OSCE by the Federal Republic of Yugoslavia.

<sup>34</sup> UNHCR, *Kosovo Crisis Update, The Exodus*, 7 April 1999, available at: <http://www.unhcr.org/news/NEWS/3ae6b80eb.html> (last accessed on 15 April 2009).

<sup>35</sup> SC Res. 1160(1998) of 31 March 1998, pars. 4 and 8.

to the Belgrade authorities the Security Council emphasised that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo would lead to the consideration of additional measures.<sup>36</sup>

23. By the time of the adoption of its next resolution, namely Resolution 1199(1998), the situation in Kosovo had further deteriorated. The Security Council noted its grave concern over the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which had resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230 000 persons from their homes.<sup>37</sup> Deep concern was voiced also over the rapid deterioration in the humanitarian situation throughout Kosovo, the impending humanitarian catastrophe as described in the report of the Secretary-General and reports of increasing violations of human rights and of international humanitarian law there.<sup>38</sup> The Security Council demanded *inter alia* that the Federal Republic of Yugoslavia implement immediately the following concrete measures towards achieving a political solution to the situation in Kosovo:

- “(a) cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression;
- (b) enable effective and continuous international monitoring in Kosovo by the European Community Monitoring Mission and diplomatic missions accredited to the Federal Republic of Yugoslavia, including access and complete freedom of movement of such monitors to, from and within Kosovo unimpeded by government authorities, and expeditious issuance of appropriate travel documents to international personnel contributing to the monitoring;
- (c) facilitate, in agreement with the UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes and allow free and unimpeded access for humanitarian organizations and supplies to Kosovo;
- (d) make rapid progress to a clear timetable, in the dialogue referred to in paragraph 3 with the Kosovo Albanian community called for in resolution 1160

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<sup>36</sup> *Ibid.*, par. 19.

<sup>37</sup> SC Res. 1199(1998) of 23 September 1998.

<sup>38</sup> *Ibidem.*



(1998), with the aim of agreeing confidence-building measures and finding a political solution to the problems of Kosovo;<sup>39</sup>

24. In view of the escalation of the situation on the ground, in Resolution 1203 adopted only one month later, namely on 24 October 1998, the Security Council while noting its primary responsibility for the maintenance of international peace and security under the UN Charter, affirmed that the situation in Kosovo constituted a continuing threat to peace and security in the region.<sup>40</sup> The Security Council demanded that the Federal Republic of Yugoslavia comply fully and swiftly with Resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo and the NATO Air Verification Mission over Kosovo.<sup>41</sup> Additionally, the Security Council reaffirmed the right of all refugees and displaced persons to return to their homes in safety, and underlined the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allowed them to do so.<sup>42</sup>

### **C) The February-March 1999 Rambouillet Accords**

25. While the situation on the ground was critical and gross human rights violations were ongoing, an internationally-sponsored conference was convened in Rambouillet, France, in February 1999. The aim of the conference was to provide a political solution to the conflict, or as the document itself suggests an interim agreement for peace and self-government in Kosovo.<sup>43</sup> The mechanism for final settlement contained in this document provided that three years after the entry into force of the Accords, an international meeting would be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each party's efforts regarding the implementation of the Accords, and the Helsinki Final Act.<sup>44</sup> On 18 March 1999 the agreement was signed by the Albanian representatives, but not by their Serb counterparts. It

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<sup>39</sup> *Ibid.*, par. 4.

<sup>40</sup> SC Res. 1203(1998) of 24 October 1998.

<sup>41</sup> *Ibid.*, par. 3.

<sup>42</sup> *Ibid.*, par. 12.

<sup>43</sup> The full text of the Rambouillet Agreement is available online at: [http://www.state.gov/www/regions/eur/ksvo\\_rambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html) (last accessed on 15 April 2009).

<sup>44</sup> Article I: Amendment and Comprehensive Assessment, Rambouillet Agreement: Amendment, Comprehensive Assessment, and Final Clauses.

should be noted that this Agreement was concluded under the auspices of the members of the Contact Group and the European Union and included an undertaking with respect to these members and the European Union to abide by this Agreement.

26. The Rambouillet Accords provided for a 3-year interim agreement that would provide democratic self-government, peace, and security for everyone living in Kosovo. The agreement provides that the final settlement of the status of Kosovo would be determined on the basis of the will of the people of Kosovo. Despite the fact that this agreement was not signed by Serbia, Resolution 1244 of the Security Council refers to it. The relevant part of Annex 1 to the resolution, listing a number of general principles for the political solution of the Kosovo crisis adopted at the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, reads:

“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.”<sup>45</sup>

The logical correlation between these international documents and the declaration of independence by the democratically-elected representatives of the Kosovo people is dealt with in Part V of this document.

#### **D) NATO’s Military Intervention in Kosovo – Operation ‘Allied Force’ 24 March – 10 June 1999**

27. As a means of last resort and in view of the unfolding humanitarian catastrophe in Kosovo, an intervention by NATO started on 24 March 1999 after prolonged international diplomatic efforts, including the Rambouillet conference, had failed. Yugoslav forces had already driven more than 400 000 people away from their homes, many of which they destroyed by shelling and arson. The UN Security Council had passed Resolution 1199 (1998), invoking Chapter VII of its Charter,

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<sup>45</sup> Annex 1 to Resolution 1244 of the Security Council of 10 June 1999 (Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999).

demanding a withdrawal of the forces “used for civilian repression,” and deciding, “should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region.” In Resolution 1160 (1998), the Security Council already had emphasised that, “[f]ailure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures.”

28. The brutal campaign of persecution against Kosovar Albanians by the Serbian authorities continued throughout the period of the NATO military operations. Many instances of sexual assaults and rape by Serb police, military and paramilitary forces against women occurred during that campaign.<sup>46</sup> Over 800 000 people were forcibly expelled or left their homes out of fear from Serbian police, military and paramilitary forces. “Under Orders: War Crimes in Kosovo”, a Human Rights Watch Report states, “Deliberate and unlawful killings of civilians – extrajudicial executions – were a key part of the ‘cleansing’ campaign. Throughout the province, civilians who were clearly non-combatants, including women and some children, were murdered by Serbian police, Yugoslav army soldiers, and associated paramilitary forces in execution-style killings.”<sup>47</sup>
29. According to an International Commission of Experts, these methods constituted the policy known as “ethnic cleansing.”<sup>48</sup> Through a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be

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<sup>46</sup> See *inter alia* Human Rights Watch Report, *Kosovo: Rape as a Weapon of “Ethnic Cleansing*, March 2000, available at: <http://www.hrw.org/legacy/reports/2000/fry/index.htm#TopOfPage> (last accessed on 15 April 2009); ICTY, *Prosecutor v. Milutinović et al*, Case No. IT-05-87, Judgment of 26 February 2009, Vol. 2, pp. 228, 251, and 318; *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, pp. 308-309, also available online at: <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (last accessed on 15 April 2009).

<sup>47</sup> Human Rights Watch Report, *Under Orders: War Crimes in Kosovo*, 2001, p. 6, available at: [http://www.hrw.org/legacy/reports/2001/kosovo/part\\_two.pdf](http://www.hrw.org/legacy/reports/2001/kosovo/part_two.pdf) (last accessed on 15 April 2009).

<sup>48</sup> See *The Kosovo Report: Conflict, International Response, Lessons Learned*, The Independent International Commission on Kosovo, Oxford University Press, 2000, available online at: <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (last accessed on 15 April 2009). Part of the executive summary – main findings of the report reads: “The origins of the crisis have to be understood in terms of a new wave of nationalism that led to the rise of Milosevic and the official adoption of an extreme Serbian nationalist agenda. The revocation of Kosovo’s autonomy in 1989 was followed by a Belgrade policy aimed at changing the ethnic composition of Kosovo and creating an apartheid-like society.”

forcibly displaced both within and without Kosovo.<sup>49</sup> The common purpose was to displace a number of them sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission.<sup>50</sup> The intention to reduce the Albanian population in Kosovo to about 600 000 by killing members of the group or forcefully expelling them, were known to foreign officials, and reportedly have been publicly uttered by Serbian officials.<sup>51</sup>

30. The fact that some of the highest ranking Serb officials, namely Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić were found guilty by the International Criminal Tribunal for the Former Yugoslavia (ICTY) for crimes against humanity and war crimes committed in Kosovo between 1 January and 20 June 1999, shows that the widespread campaign of violence against Kosovar Albanians was part of State policy to use violence and terror to force a significant number of Kosovo Albanians from their homes and across the borders, in order for the Serb state authorities to maintain control over Kosovo.<sup>52</sup>
31. The Court itself in the *Legality of Use of Force* cases had expressed deep concern over the human tragedy unfolding at that time in Kosovo. As noted in its Order on Provisional Measures of 2 June 1999:

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<sup>49</sup> ICTY, *Prosecutor v. Milutinović et al*, Case No. IT-05-87, Judgment of 26 February 2009, Vol. 3, p. 41, par. 95.

<sup>50</sup> *Ibidem*.

<sup>51</sup> See *inter alia* Steven Erlanger, *Diplomat Says Serbs Want Some Albanians in Kosovo*, *New York Times*, 25 April 1999, p. 14.

<sup>52</sup> ICTY, *Prosecutor v. Milutinović et al*, Case No. IT-05-87, Judgment of 26 February 2009. During that time Nikola Šainović was a Deputy Prime Minister of the Federal Republic of Yugoslavia, or FRY; Dragoljub Ojdanić was the Chief of the General Staff of the Yugoslav Army, or VJ; Nebojša Pavković was the Commander of the VJ 3rd Army; Vladimir Lazarević was the Commander of the VJ Priština Corps; and Sreten Lukić was the Head of the Serbian Ministry of Interior Staff for Kosovo, referred to as the MUP Staff. For a summary of this judgment see <http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf> (last accessed 16 April 2009). See also the testimony of General Wesley Clark given in the *Milosević* trial on 15 and 16 December 2003, referred to in transcript page number and rows, respectively p. 30407:13-19, p. 30506:1-25, p. 30507:1-6 and 19-25, p. 30508:1-14, p. 30510:6-19, p. 30521:16-22, p. 30522:2-25, p.30524:1-20, p. 30525:24-25, p. 30526:1-5 and 21-25, p. 30527:1-14, p. 30528:12-20, p. 30530:12-25, and p. 30531:1-2. Such shocking events were reminiscent of the 1914 pogroms on the Kosovar Albanian population, when an international commission of inquiry established by the Carnegie Endowment in 1914 reported: “Houses and whole villages reduced to ashes, unarmed and innocent populations massacred...such were the means which were employed and are still being employed by the Serb-Montenegrin Soldiery, with a view to the entire transformation of the ethnic character or regions inhabited exclusively by Albanians.”, in *Carnegie Endowment for International Peace*, Report of the *International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, Washington DC 1914, as quoted in Malcolm, *supra* note 21, p. 254.

“[...] the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia.”<sup>53</sup>

That human tragedy, loss of life and enormous suffering represented the culmination of the Serb authorities’ repressive and discriminatory policies against ethnic Albanians in Kosovo and formed the basis for the military intervention by NATO.

**E) Resolution 1244 (1999) and the Establishment of the United Nations Interim Mission in Kosovo**

32. On 10 June 1999 the Serbian Government agreed to withdraw Serb forces from Kosovo, opening the way to the adoption of Security Council Resolution 1244 (1999). Resolution 1244 authorized the establishment of a United Nations interim administrative mission in Kosovo (UNMIK), and the deployment of a NATO-led security force (KFOR). Kosovo was thus placed under a transitional United Nations administration, pending a definite solution to its future political status.
33. Following the Security Council’s consideration of the Secretary-General’s report on the United Nations Interim Administration Mission in Kosovo (UNMIK), of 23 May 2005, the Secretary-General appointed Mr. Kai Eide (Norway) as his Special Envoy to undertake a comprehensive review of the situation in Kosovo.<sup>54</sup> In his report Mr. Eide concluded that, the time had come to move to the next phase of the political process.<sup>55</sup> Based on the assessment provided in the report and further consultations, the Secretary-General accepted Mr. Eide’s conclusion.<sup>56</sup> Furthermore, he expressed his intent to initiate preparations for the appointment of a special envoy to lead the future status process.
34. In a statement of 24 October 2005 made by the President of the Security Council on behalf of the Council, the Security Council agreed with Ambassador Eide’s

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<sup>53</sup> ICJ, *Case Concerning Legality of Use of Force (Yugoslavia v. Belgium)*, *Request for the Indication of Interim Measures*, ICJ Rep. 1999, p. 131, par. 16. The same concern was expressed by the Court in the other nine *Legality of Use of Force* cases.

<sup>54</sup> See UN Doc. S/2005/335 and Corr.1 of 23 May 2005.

<sup>55</sup> See UN Doc. S/2005/635 of 7 October 2005.

<sup>56</sup> *Ibidem*.

assessment and welcomed the Secretary-General's readiness to appoint a Special Envoy to lead the status process.<sup>57</sup>

## **F) The Internationally Supervised Final Status Negotiation Process**

35. The Secretary-General appointed Mr. Martti Ahtisaari as his Special Envoy in November 2005 to lead the future status negotiation process envisioned in the UN Security Council Resolution 1244 (1999). His mandate was to be carried out in accordance with the ten guiding principles adopted by the Contact Group.<sup>58</sup> In a statement by the Contact Group Ministers of 31 January 2006 it was stated that they looked to Belgrade to bear in mind that the settlement needs, inter alia, to be

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<sup>57</sup> Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005.

<sup>58</sup> See 'Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo' of November 2005. The three main points were no return of Kosovo to the pre-1999 situation, no partition of Kosovo, and no union of Kosovo with any or part of another country. The Contact Group was composed of France, Germany, Italy, Russia, the United Kingdom and the United States. The ten guiding principles were namely: "1. The settlement of the Kosovo issue should be fully compatible with international standards of human rights, democracy and international law and contribute to regional security; 2. The settlement of Kosovo's Status should conform with democratic values and European standards and contribute to realizing the European perspective of Kosovo, in particular, Kosovo's progress in the stabilization and association process, as well as the integration of the entire region in Euro-Atlantic institutions; 3. The settlement should ensure multi-ethnicity that is sustainable in Kosovo. It should provide effective constitutional guarantees and appropriate mechanisms to ensure the implementation of human rights for all citizens in Kosovo and of the rights of members of all Kosovo communities, including the right of refugees and displaced persons to return to their homes in safety; 4. The settlement should provide mechanisms to ensure the participation of all Kosovo communities in government, both on the central and on the local level. Effective structures of local self government established through the decentralization process should facilitate the coexistence of different communities and ensure equitable and improved access to public services; 5. The settlement of Kosovo's status should include specific safeguards for the protection of the cultural and religious heritage in Kosovo. This should include provisions specifying the status of the Serbian Orthodox Church's institutions and sites and other patrimony in Kosovo; 6. The settlement of Kosovo's status should strengthen regional security and stability. Thus, it will ensure that Kosovo does not return to the pre-March 1999 situation. Any solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected; 7. The Status settlement will ensure Kosovo's security. It will also ensure that Kosovo does not pose a military or security threat to its neighbours. Specific provisions on security arrangements will be included; 8. The settlement of Kosovo's status should promote effective mechanisms to strengthen Kosovo's ability to enforce the rule of law, to fight organized crime and terrorism and safeguard the multi-ethnic character of the police and the judiciary; 9. The settlement should ensure that Kosovo can develop in a sustainable way both economically and politically and that it can cooperate effectively with international organizations and international financial institutions; 10. For some time Kosovo will continue to need an international civilian and military presence to exercise appropriate supervision of compliance of the provisions of the Status settlement, to ensure security and, in particular, protection for minorities as well as to monitor and support the authorities in the continued implementation of standards."

acceptable to the people of Kosovo and that the disastrous policies of the past lay at the heart of the current problems.<sup>59</sup>

36. After fifteen-months of UN-sponsored negotiations, Mr. Ahtisaari prepared a Comprehensive Proposal for the Kosovo Status Settlement, in which he recommended that Kosovo's status should be 'supervised' independence. The Special Envoy reported to the Secretary-General in mid-March 2007 that, although he and his team had "held intensive negotiations with the leadership of Serbia and Kosovo over the course of the past year" to achieve "a political settlement that determines the future status of Kosovo," it had "become clear ... that the parties are not able to reach an agreement on Kosovo's future status."<sup>60</sup> The Special Envoy noted that, "[B]oth parties have reaffirmed their categorical, diametrically opposed positions," further stating that, "[I]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse."<sup>61</sup>
37. Noting further that, "Kosovo's state of limbo cannot continue," since "uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation," the Special Envoy stated that, "the time has come to resolve Kosovo's status."<sup>62</sup> Accordingly, he concluded: "Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence."<sup>63</sup>

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<sup>59</sup> Kosovo Contact Group Statement, London, 31 January 2006, available at: [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressdata/en/declarations/88236.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf) (last accessed on 15 April 2009).

<sup>60</sup> See UN Doc. S/2007/168, par. 1.

<sup>61</sup> *Ibid.*, par. 3.

<sup>62</sup> *Ibid.*, par. 5.

<sup>63</sup> *Ibidem.*

38. The UN Secretary-General, in transmitting his Special Envoy's report to the Security Council, stated that, "I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement."<sup>64</sup>
39. After discussions in the Security Council, the Contact Group (France, Germany, Italy, Russia, the United Kingdom and the United States) proposed that a "Troika" of representatives from the EU, the United States and Russia undertake yet another period of negotiations between Belgrade and Pristina on the future status of Kosovo, "the last major issue related to Yugoslavia's collapse." On 1 August 2007 the Secretary-General welcomed this initiative, restated his belief that the *status quo* was unsustainable and requested that a report be submitted by the Contact Group on these efforts by 10 December 2007. Although the parties engaged in "the most sustained and intense high-level direct dialogue since hostilities ended in Kosovo in 1999,"<sup>65</sup> the Troika representatives reported that, "[A]fter 120 days of intensive negotiations, however, the parties were unable to reach an agreement on Kosovo's status."<sup>66</sup>

#### **G) The Declaration of Independence by Kosovo on 17 February 2008**

40. In its ninth year under an UN-led transitional administration and after a series of unsuccessful internationally-mediated talks, an extraordinary meeting was convened on 17 February 2008 in which the democratically-elected representatives of the people of Kosovo declared Kosovo to be an independent and sovereign state. They noted that this act "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."<sup>67</sup> As to the time of the writing of this written statement, fifty-seven (57) independent and sovereign

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<sup>64</sup> See the letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168.

<sup>65</sup> Report of the European Union/United States/Russian Federation Troika on Kosovo of 4 December 2007, UN Doc. S/2007/723, p. 4, par. 12.

<sup>66</sup>*Ibid.* p. 4, par. 11.

<sup>67</sup> See Declaration of Independence of Kosovo, Annex 1, available online at: [http://www.assembly-kosova.org/common/docs/Dek\\_Pav\\_e.pdf](http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf) (last accessed on 15 April 2009). The full paragraph reads: "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. 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."



states have recognised the independence and sovereignty of the Republic of Kosovo. It is submitted that the legal framework of the independent state of Kosovo is compatible with the guiding principles of the status negotiation process in general and respect for human rights, the rights of the minorities, democratic participation and peace and security in the Balkans in particular.

### **PART III OBJECTIONS TO JURISDICTION**

#### **A) The Declaration of Independence is a Domestic Matter not Regulated by International Law**

41. It follows from Article 96 of the UN Charter and Article 65 of the ICJ Statute that the question submitted to the Court for an advisory opinion must satisfy a number of requirements. The ICJ has noted that the question put before it must have a practical and contemporary effect and, consequently, not be devoid of object or purpose.<sup>68</sup> In the present case, the request concerns an internal matter and ultimate prerogative, lying solely with the parties concerned, i.e. on one side the expression of the will of the people of Kosovo and on the other the recognition or not from other States. It is submitted that examining the validity of an *internal* act, expressing the sovereign will of the people of Kosovo, lies outside the scope of the Courts' jurisdiction. In the following paragraphs it will be explained why that is the case.
42. While the General Assembly, as one of the main organs of the UN has the right to request an Advisory Opinion, on any legal question, the issue of whether a question submitted fulfils the necessary criteria rests with the Court. One of those criteria is that the request does not have an abstract character and it will assist the General Assembly in the exercise of its functions. However, the evaluation of the DoI goes beyond the normal exercise of its functions.
43. The DoI adopted by the representatives of the people of Kosovo on 17 February 2008, was an official act based on the sovereign will of the people of Kosovo. The question put by the General Assembly concerning the DoI adopted on February 17, 2008 by the Kosovar authorities seems to presuppose that there are rules under international law circumscribing a DoI. It is submitted, however, that this is not the case. Although throughout the development of international law DoIs have had an important effect on the international legal order, international law does not contain

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<sup>68</sup> ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 37, par. 73.

specific rules regulating the form or content of a DoI. And it certainly does not contain any rules forbidding or banning the use of a DoI.

44. After the United States declared their independence from Britain a lengthy discussion arose to what extent this declaration was valid and could have the consequence of establishing a new State. The matter was not solved but when the Latin-American States declared their independence it was established that third States could recognise new States after a DoI if the new State had become effective.<sup>69</sup> The rules of international law concern the requirements for the recognition of new States as well as the conditions for the exercise of the right of self-determination. However, international law does not regulate a DoI.
45. In its Opinion No. 1 dealing with the question of whether the constituent republics of the SFRY were in a process of secession, whereby the SFRY would continue to exist, or in a process of dissolution, whereby the SFRY would cease to exist, the Arbitration Committee set up by the Peace Conference for Yugoslavia, also known as the Badinter Commission, stated as follows:
- “The Committee considers
- a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a State; that in this respect the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory;
- b) that the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty;”<sup>70</sup>
46. As the above-quoted opinion which has been accepted generally as authoritative in the context of the dissolution of Yugoslavia shows, it is mainly a question of fact whether a DoI will mark the birth of a new State or not. The growth of UN membership from its original 51 member States in 1945 to 159 in 1990 was

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<sup>69</sup> For details see *inter alia* J. A. Frowein, *Die Entwicklung der Anerkennung von Staaten und Regierungen im Völkerrecht*, Der Staat 11, 1972, pp. 145-159; J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press: New York, 2007, pp. 376-383, especially p. 379; *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, par. 4.01 (iv), available online at: <http://www.uni.ca/library/5experts.html> (last accessed on 15 April 2009).

<sup>70</sup> 31 ILM, 1495 (1992).

essentially due to the decolonisation process carried out under the aegis of the UN.<sup>71</sup> The increase in this figure from 159 States in 1990 to 192 States at present has been due mainly to secession, whether unilateral or not, by former parts of sovereign States.<sup>72</sup> This has been shown by the developments concerning Yugoslavia as well as the development concerning the Soviet Union.

47. While a DoI produces effects at the international level and has international consequences, it is not itself regulated by international law. Therefore, the question cannot normally be answered whether a DoI is in conformity with international law. In that respect a DoI as the birth of a new sovereign State is a matter which is essentially within the domestic jurisdiction of the State in the sense of Article 2, paragraph 7 of the UN Charter. An advisory opinion cannot be concerned with the validity of an internal constitutional act, expressed through the highest domestic organs of a State. In answering the question asked the Court would be assuming the functions of a domestic constitutional court. The DoI as a domestic constitutional act is not regulated by international law. Therefore, the request expressed by the General Assembly does not concern a legal question within the purview of its competences under the UN Charter.

**B) The General Assembly Was Prevented by Article 12, Paragraph 1 of the UN Charter to Request the Advisory Opinion**

48. Article 12, paragraph 1 of the Charter provides that, “While the Security Council is exercising in respect of any dispute or situation the function assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

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<sup>71</sup> For a detailed description of the growth of UN membership visit: <http://www.un.org/members/growth.shtml> (last accessed on 15 April 2009).

<sup>72</sup> For a detailed list of the creation of States and their UN admission from 1945 to 2005 see *inter alia* J. Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> edition, Oxford University Press: New York, 2007, p. 187. Since 2005 only one State has been admitted to the UN, bringing the overall number of States member to the UN to 192. That State was Montenegro, admitted as a UN member on 28 June 2006. A complete list is available online on the UN official website at: <http://www.un.org/members/list.shtml> (last accessed on 15 April 2009).

49. As the Court has confirmed a request for an advisory opinion is not in itself a recommendation by the General Assembly.<sup>73</sup> However, the Court found it appropriate to examine the significance of that article in the advisory opinion concerning the *Construction of a Wall*, having regard to the relevant text and practice of the United Nations. In that opinion the Court found that the interpretation of Article 12 had evolved in the practice of the organs of the United Nations in such a way that the General Assembly and the Security Council may deal in parallel with the same matter concerning the maintenance of international peace and security.<sup>74</sup> Therefore, the request by the General Assembly was not *ultra vires* in that case.
50. However, the circumstances concerning the present request are completely different. That request concerning the DoI expressed by the freely elected representatives of Kosovo on 17 February 2008 could only raise a question under international law concerning its compatibility with Security Council Resolution 1244 of 10 June 1999 as to the administration of Kosovo after the armed intervention by NATO. This resolution is based on Chapter VII of the UN Charter and the Council determined that the situation in the region continued to constitute a threat to international peace and security.<sup>75</sup> After having set out the framework for the administration of Kosovo and the mission of the international civilian and military presence there, the Security Council decided to remain actively seized of the matter.<sup>76</sup>
51. The competence of the Security Council under Chapter VII is an expression of the Security Council's primary responsibility for the maintenance of international peace and security. Article 12 of the UN Charter serves to safeguard this primacy. Due to the completely different structure in composition of the Security Council

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<sup>73</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 148, par. 25 (hereinafter *Construction of a Wall*).

<sup>74</sup> *Construction of a Wall*, ICJ Reports 2004, pp. 149-150, pars. 27-28.

<sup>75</sup> Security Council Resolution 1244 of 10 June 1999, UN Doc. S/RES/1244 (1999), p. 2. The full paragraph reads: "Determining that the situation in the region continues to constitute a threat to international peace and security". The full text of the resolution is available online at: <http://www.un.org/Docs/scres/1999/sc99.htm> (last accessed on 15 April 2009).

<sup>76</sup> Security Council Resolution 1244 of 10 June 1999, p. 5, par. 21.

and the General Assembly, they might well evaluate situations differently and draw conflicting conclusions.<sup>77</sup>

52. It is for this reason that Article 12 tries to avoid any contradictions between the actions of the Security Council and the General Assembly. While a request for an advisory opinion may not be seen directly as a possible contradiction it has to be evaluated what the consequences of an advisory opinion could be in this respect. Assuming that on the basis of such a request a Security Council resolution under Chapter VII would be scrutinized by the Court as to its compatibility with the Charter and its effect on a specific problem as the DoI, this could well create a contradiction with the action of the Security Council. Therefore, a proper interpretation of Article 12 must lead to the result that a request by the General Assembly concerning an advisory opinion may not interfere with the jurisdiction of the Security Council under Chapter VII.<sup>78</sup>
53. Even if one does not go as far as qualifying the request as *ultra vires*, the need to avoid contradictory results must clearly be taken into account by the Court when considering exercising its discretion under Article 65, paragraph 1 of the Statute. That issue will be further clarified in the section below, which addresses the need for the exercise of discretion by the Court in this case.

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<sup>77</sup> See Hailbronner/Klein, in: Simma and others (eds.), *The Charter of the United Nations, A Commentary*, 2<sup>nd</sup> ed., Oxford University Press, 2002, Vol. I, Art. 12, No. 1.

<sup>78</sup> See *inter alia* R. Higgins, *A Comment on the Current Health of Advisory Opinions*, in: A.V. Lowe (ed.), *Fifty years of the International Court of Justice: Essays in Honour of Robert Jennings*, Cambridge University Press, 1996, p. 577; M.S.M Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, Kluwer Law International: The Hague/London/New York, 2003, p. 73 and footnote 101; M.M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005*, Springer-Verlag: Berlin, Heidelberg, 2006, pp. 76-86; G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, School of Human Rights Research Series Vol. 26, Intersentia: Antwerpen – Oxford – Portland, 2008, pp. 34-41.

## **PART IV PROPRIETY AND THE EXERCISE OF DISCRETION**

### **A) The Court Should Exercise Its Discretion and Decline to Give the Advisory Opinion**

54. The Court has held continuously that it has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. The Court frequently underlined that it should in principle not decline to give an advisory opinion but only “compelling reasons” should lead the Court to refuse such an opinion.<sup>79</sup> Although the Court has not listed reasons which would amount to compelling reasons, it has been suggested that the Court should refuse giving an opinion if it were to find that (i) rendering an opinion might complicate the matter or create difficulties for the UN in discharging its duties; or (ii) that it would affect the Court’s judicial character as a court of law; or (iii) the Court finds that its opinion would be ineffective or without object.<sup>80</sup>

### **B) There Must not Be a Contradiction between the Exercise of Jurisdiction of the General Assembly and the Security Council**

55. In the present case there are indeed compelling reasons why the Court should decline to give an advisory opinion. The first important reason has already been discussed above under objections to jurisdiction. An advisory opinion by the Court would run the risk that a contradiction between the exercise of jurisdiction by the Security Council with Resolution 1244 and the advisory opinion could occur. Under those circumstances it must be left to the Security Council to request an advisory opinion if the Council so decides. The General Assembly should not interfere with the Council’s primary responsibility to maintain international peace and security.

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<sup>79</sup> The Court has emphasized several times that it considers itself under a duty to participate in the activities of the Organisation and in principle should not refuse to give an advisory opinion unless there are ‘compelling reasons’ for doing that. See respectively the *Peace Treaties* case, ICJ Reports 1950, p. 72; the *UNESCO* case, ICJ Reports 1956, pp. 86-87; the *Certain Expenses* case, ICJ Reports 1962, p. 155; the *Mazilu* case, ICJ Reports 1999 (I), pp. 78-79, par. 29; and the *Construction of a Wall* case, ICJ Reports 2004, p. 156, par. 44.

<sup>80</sup> M.S.M Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, Kluwer Law International: The Hague/London/New York, 2003, pp. 108-109 (footnotes omitted).

**C) The Security Council and the General Assembly Have Left it Open to States to Recognise Kosovo**

56. There is a second reason why the Court should not give an advisory opinion as requested. Neither the General Assembly nor the Security Council have, after the DoI by Kosovo, requested that States should not recognise the new State. They have, thereby, shown that the situation is completely different compared with the cases where puppet States have been created and the General Assembly or the Security Council have asked States not to recognise those States. A first case where that happened was Katanga, where the Security Council required all states to refrain from any action which might undermine the territorial sovereignty and the political independence of the Republic of Congo.<sup>81</sup> Another such instance was Southern Rhodesia's declaration of independence in 1965.<sup>82</sup> The same attitude was adopted after South Africa declared the independence of Transkei as a homeland.<sup>83</sup> When the Turkish Cypriot authorities proclaimed an independent State in Northern Cyprus in 1983, the Security Council called upon all States not to recognise any Cypriot State other than the Republic of Cyprus.<sup>84</sup>
57. No other State present in the Security Council emergency session of 18 February 2008, besides Serbia and Russia, argued that the declaration of independence by Kosovo constituted an internationally unlawful act that would need to be countered through a collective policy of non-recognition.<sup>85</sup> Furthermore, the request by the Serbian representative that the Secretary-General issue a clear and unequivocal instruction to his Special Representative to declare the unilateral and illegal act of the secession of Kosovo from Serbia null and void and to dissolve the Kosovo Assembly was not acted upon.

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<sup>81</sup> See Security Council Resolutions 145 of 22 July 1960 and 146 of 9 August 1960, available at: <http://www.un.org/documents/sc/res/1960/scres60.htm> (last accessed on 15 April 2009); and General Assembly Resolution 1474 (ES-IV) of 20 September 1960.

<sup>82</sup> See Security Council Resolutions 216 of 12 November 1965 and 217 of 20 November 1965, available at: <http://www.un.org/documents/sc/res/1965/scres65.htm> (last accessed on 15 April 2009).

<sup>83</sup> See Security Council Resolution 402 of 22 December 1976, available at <http://www.un.org/documents/sc/res/1976/scres76.htm> (last accessed on 15 April 2009).

<sup>84</sup> See Security Council Resolution 541 of 18 November 1983, available at: <http://www.un.org/Docs/scres/1983/scres83.htm> (last accessed on 15 April 2009).

<sup>85</sup> See *inter alia* Security Council, 5839th Meeting, 18 February 2008, UN Doc. SC/9252 available at: <http://www.un.org/News/Press/docs/2008/sc9252.doc.htm> (last accessed on 15 April 2009); Vera Gowlland-Debbas, *Collective responses to illegal acts in international law: United Nations action in the question of Southern Rhodesia*, Nijhoff Publishers: Dordrecht, 1990.



58. It is clear that neither the Security Council nor the General Assembly felt, after the DoI by Kosovo, that a similar situation to those mentioned above existed. They left it entirely to member States whether to recognise or not the new State. At present, 57 UN member States have recognised Kosovo as an independent State. An advisory opinion could not come to the conclusion that the recognition by these 57 States was in violation of international law. Such a finding would not be possible under the circumstances. Albania respectfully submits that the Court should be mindful of not interfering with the decision of sovereign States to recognise Kosovo as an independent State.

**D) The Secretary-General of the United Nations and the Security Council Have Recognised the New Situation in Kosovo**

59. Since Kosovo's declaration of independence on 17 February 2008 the Secretary-General of the United Nations has reported five times to the Security Council about the activities of UNMIK, and developments of the situation.<sup>86</sup> In the report of 28 March 2008 the Secretary General stated:

“It is evident that Kosovo's declaration of independence has had a profound impact on the situation in Kosovo. The declaration of independence and subsequent events in Kosovo have posed significant challenges to the ability of UNMIK to exercise its administrative authority in Kosovo. To address these challenges, UNMIK, guided by the imperative need to ensure peace and security in Kosovo, has acted, and will continue to act, in a realistic and practical manner and in the light of the evolving circumstances.”<sup>87</sup>

It was acknowledged by the Secretary General that the evolving reality in Kosovo was likely to have significant operational implications for UNMIK. He indicated

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<sup>86</sup> See respectively: Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 28 March 2008, UN Doc. S/2008/211; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 June 2008, UN Doc. S/2008/354; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 15 July 2008, UN Doc. S/2008/458; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24 November 2008, UN Doc. S/2008/692; and Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 17 March 2009, UN Doc. S/2009/149.

<sup>87</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 28 March 2008, UN Doc. S/2008/211, p. 7, par. 30.

that pending Security Council guidance, there might be a need for UNMIK to adjust its operational deployment to developments and changes on the ground in a manner consistent with the operational framework established under resolution 1244 (1999).<sup>88</sup>

60. In his second report after the declaration of the independence, on 12 June 2008, the Secretary-General noted an important development, namely the passing of a Constitution for Kosovo on 9 April by the Kosovar Assembly, scheduled to come into force on 15 June 2008. He informed the Security Council that the Constitution was designed in such a way that it would effectively remove from UNMIK its current powers as an interim civil administration. In this regard, he noted that the government of Kosovo had indicated that it would welcome a continued United Nations presence in Kosovo provided that it carried out only limited residual tasks.<sup>89</sup>
61. The Secretary-General admitted that events in Kosovo have had and will continue to have a significant operational impact on the functioning of UNMIK.<sup>90</sup> He noted that while UNMIK had made progress in fulfilling and completing tasks set forth in paragraph 11 of resolution 1244 (1999), since the inception of the Mission in 1999, the scope of activities that it had performed had been reduced significantly. In his view, following the entry into force of the Kosovo constitution, UNMIK would no longer be able to perform effectively the vast majority of its tasks as an interim administration.<sup>91</sup> A similar view was repeated in his third report submitted to the Security Council on 15 July 2008.<sup>92</sup>
62. In a letter dated 12 June 2008 addressed to His Excellency, Mr. Fatmir Sejdiu, the Secretary-General stated:

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<sup>88</sup> *Ibid.*, p. 7, par. 32.

<sup>89</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 June 2008, UN Doc. S/2008/354, p. 2, par. 7.

<sup>90</sup> *Ibid.*, p. 5, par. 17.

<sup>91</sup> *Ibidem.*

<sup>92</sup> In that report the Secretary-General stated: "it is my assessment that UNMIK can no longer perform as effectively as in the past the vast majority of its tasks as an interim administration throughout all of Kosovo." See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 15 July 2008, UN Doc. S/2008/458, p. 9, par. 29.

“In the absence of other guidance from the Security Council, and following extensive consultations, it is my intention to reconfigure the structure and profile of the international civil presence to one that corresponds to the evolving situation in Kosovo and that enables the European Union to assume an enhanced operational role in Kosovo, in accordance with resolution 1244 (1999).”<sup>93</sup>

All of the above-mentioned documents indicate clearly that after the declaration of independence the nature and scale of UNMIK’s activities was gradually scaled down.

63. The assertion of independence by the Kosovar authorities vis-à-vis UNMIK is clearly noted in the Secretary General’s report to the Security Council of 24 November 2008. In the words of the Secretary-General:

“With the entry into force of the “Constitution of the Republic of Kosovo” on 15 June, the Kosovo authorities have continued to take steps towards asserting Kosovo’s statehood. Following the establishment of a Ministry of Foreign Affairs, the Kosovo authorities announced the opening of diplomatic missions and the appointment of mission heads to 10 countries. As at 31 October, Kosovo had been recognized as an independent state by 52 countries. In its ongoing efforts to assume the prerogatives and responsibilities of a sovereign state, Kosovo applied for membership in the International Monetary Fund and the World Bank Group, decided to undertake a census of the population, established a Ministry for Security Forces and appointed a new, 11-member Central Election Commission. The Assembly of Kosovo continues to pass legislation, which is now adopted without reference to the powers of my Special Representative under resolution 1244 (1999) or the Constitutional Framework.”<sup>94</sup>

64. The last report of the Secretary-General to the Security Council, dated 17 March 2009, notes that the process of reconfiguration of UNMIK’s presence is expected to lead to a significantly restructured Mission, whose functions are being adapted to respond to profoundly changed circumstances on the ground.<sup>95</sup> In addressing the political situation the Secretary-General stated:

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<sup>93</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 June 2008, UN Doc. S/2008/354, Annex 2, p. 8.

<sup>94</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24 November 2008, UN Doc. S/2008/692, p. 1, par. 2.

<sup>95</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 17 March 2009, UN Doc. S/2009/149, pp. 9-10, par. 35.

“During the reporting period, the Kosovo authorities continued to act on the basis of the “Constitution of the Republic of Kosovo”. The Assembly of Kosovo, in plenary sessions held on 15 and 16 December, passed laws on the Constitutional Court, on the Foreign Service and on the Consular Service of Diplomatic and Consular Missions in Kosovo. These laws make no reference to the powers of my Special Representative under resolution 1244 (1999) or to the Constitutional Framework. Since my last report to the Security Council, of 24 November 2008 (S/2008/692), four additional States have recognized Kosovo, bringing the total to 56.”<sup>96</sup>

It is rather clear that since the entry into force of the Constitution of Kosovo, Kosovar authorities do exert the prerogatives and responsibilities of a sovereign state. Such a course of action has not been countered, condemned, or declared illegal either by the Security Council and the General Assembly, or by any other organ of the United Nations, including the Special Representative of the Secretary-General for Kosovo.

**E) The Advisory Opinion Concerns a Bilateral Dispute between Kosovo and Serbia**

65. There is an additional, yet very important reason, why the Court should use its discretion and decline to give an advisory opinion. The issue brought before the Court is, unlike all the other cases where advisory opinions were given, one which concerns two States, namely Serbia and Kosovo. As in all cases where parts of a State have declared their independence and have then been recognised by other States as independent States the dispute concerns the relationship between the former mother State and the newly independent State. This was so when the United States declared their independence, when the Latin-American States became independent States as well as in many of the modern cases. Such a dispute between the former mother State and the new State is of a bilateral nature. It may finally be solved by the general recognition of the international community that a new State has come into being.
  
66. In light of the above, it is submitted that, to give an advisory opinion in the present case would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its

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<sup>96</sup> *Ibid.*, p.1, par. 2.

consent. The Court has held in previous advisory opinions that the procedure to request an advisory opinion may not be used to circumvent this principle.<sup>97</sup> Kosovo has clearly not given its consent to submit that dispute with Serbia to the International Court of Justice. In that respect a similar situation exists as the one existing when the Permanent Court of International Justice declined to give an advisory opinion on the status of Eastern Karelia.

67. In that case the question directly concerned an already existing dispute, one of States' parties to which was neither a party to the Statute of the Permanent Court nor a member of the League of Nations. This State objected to the proceedings and refused to take part in any way.<sup>98</sup> In the same way in the present case Kosovo is neither a member of the United Nations nor a party to the Statute of the International Court of Justice. Kosovo having not clearly consented to such jurisdiction, Albania strongly objects to the Court exercising jurisdiction in a matter of essential importance for Kosovo.

68. In this respect it is quite telling that the vote concerning the request for an advisory opinion in the General Assembly was 77 in favour against 6 votes, with 74 abstentions. This means that a majority of the States voting did not deem it either necessary or appropriate to ask the International Court of Justice to give an advisory opinion on this issue. It is clear that the abstaining States did not find an advisory opinion necessary or helpful. The Court should consider this fact when deciding whether or not to render an advisory opinion in this case.

#### **F) The Advisory Opinion Cannot Contribute to the Exercise of Jurisdiction by the General Assembly**

69. It should also be noted in that context that unlike all other requests for an advisory opinion by the General Assembly it cannot be seen in the present case what use the General Assembly could make of any advisory opinion delivered by the Court. It is not the General Assembly which decides on recognition of Kosovo by other

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<sup>97</sup> See *Western Sahara*, ICJ Reports 1975, p. 25, pars. 32 and 33; *Construction of a Wall*, ICJ Reports 2004, pp. 157-158, par. 47; comp. J. A. Frowein/K. Oellers-Frahm, in: A. Zimmermann a. o. (eds.), *The Statute of the ICJ*, A Commentary, 2006, p. 1412 s.

<sup>98</sup> *Construction of a Wall*, ICJ Reports 2004, pp. 156-157, par. 44.

States. 57 States, among them several permanent members of the Security Council, have already exercised their right to recognise Kosovo as an independent State.

70. It may well be that one day the procedure of admission of Kosovo to the United Nations will be started. The admission requires a decision of the General Assembly upon the recommendation of the Security Council.<sup>99</sup> Even assuming that the Court could come to the conclusion that Kosovo's declaration of independence could raise issues under international law, this would be of no relevance in the admission procedure. In the admission procedure the decisive issue would be whether at the time of admission a State exists which fulfils the requirements of Article 4 of the UN Charter. Even where at the time of the DoI there could be legal problems, this would not have the effect that an admission procedure would not be lawful. Therefore, the advisory opinion could not have any importance for the practice of the General Assembly at present, nor for the possibility of application for admission to the UN at some indeterminate point in the future.

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<sup>99</sup> See *inter alia* Article 4 of the UN Charter and ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, ICJ Reports 1948, p. 64.

## **PART V IS THE DECLARATION OF INDEPENDENCE BY KOSOVO IN ACCORDANCE WITH INTERNATIONAL LAW?**

71. The labeling of Kosovo's Declaration of Independence as 'unilateral' is misleading, since Kosovo consulted a number of international actors involved in the status negotiation process before taking this step. Besides, in all his reports on the situation in Kosovo submitted to the Security Council after 17 February 2008, the Secretary-General of the United Nations uses the term 'declaration of independence'. Moreover, on a technical level, 'Unilateral Declaration of Independence' is not a term of art. It should also be noted that in adopting the Declaration of Independence the Kosovar authorities were not acting as Provisional Institutions of Self-Government, but as the democratically elected representatives of the people of Kosovo.
72. It is respectfully submitted that the DoI by Kosovo, as an act of secession, is to be considered in the overall context of the non-consensual break-up of the former Yugoslavia,<sup>100</sup> the notorious record of institutionalised discrimination and suppression of ethnic Albanians in Kosovo in the period 1989-1999, the temporary administration of the territory by the United Nations for over 8 years, the deadlocked internationally supervised final status negotiations and last but not least the will of the people of Kosovo. All of these factors taken together make Kosovo a clearly unique case; its declaration of independence does not violate any relevant principle of international law. In fact, independence was the necessary and logical outcome of an intense controversy that has been raging between Kosovo and Serbia for a long period of time.
73. It is not at all claimed that there is a general right of secession. However, under the special circumstances of Kosovo, after the long period of international administration of its territory, the DoI was not in any way in violation of

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<sup>100</sup> For a chronology of the conflict in Yugoslavia see *inter alia* D. Bethlehem and M. Weller (eds.), *The 'Yugoslav' Crisis in International Law: General Issues Part I*, Cambridge International Documents Series Volume 5, Cambridge University Press, 1997, pp. xix-lvii; for a chronology of events in Kosovo from 1990 to 1999 see Krieger, *supra* note 5, pp. xx-xxx; a general chronology is given by Weller, *supra* note 5, pp. 15-23.

international law. Albania would like to reaffirm that international law does not contain any rules concerning a DoI. As a recognised author has stated:

“The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.”<sup>101</sup>

74. As noted in an *amicus curiae* brief to the Canadian Supreme Court prepared by a group of distinguished writers:

“[i]n a non-colonial context, the attainment of sovereignty by a territory is merely a question of fact in the eyes of international law: the new State is considered as such if its existence is effective. The recognition by third-party States (and by the State from which the territory concerned was severed) is a test of this effectiveness.”<sup>102</sup>

The recognition by 57 States so far of the Republic of Kosovo attests to the fact that a new State exists. As a commentator has noted,

“international law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized or prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case (for instance, law may impose the withholding of recognition of the new entity if this entity has come about in gross breach of human rights; or may make its recognition contingent upon formal and actual respect for the rights of individuals and minorities).”<sup>103</sup>

Through the DoI the people of Kosovo exercised its right of self-determination.

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<sup>101</sup> J. Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> edition, Oxford University Press: New York, 2007, p. 390.

<sup>102</sup> See *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, par. 4.01 (iv), available online at: <http://www.uni.ca/library/5experts.html> (last accessed on 15 April 2009). The Group of Experts was composed of Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, and Christian Tomuschat. For the full (original) text of their report see: *L'Intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté*, Commission d'Etude des Questions Afférentes à l'Accession du Québec à la Souveraineté, Assemblée Nationale, Exposés et Etudes, Volume 1 (1992), pp. 377-461.

<sup>103</sup> A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, p. 340.



**A) The Right to Self-Determination Is Firmly Established in International Law and in the Case Law of the Court**

75. In terms of the number of population Kosovar Albanians were the third nation in the Socialist Federal Republic of Yugoslavia.<sup>104</sup> However, their right to internal self-determination was continuously denied by the Serb authorities after the unilateral revocation of autonomy in 1989. The peoples' right to self-determination is an inalienable group right which enjoys an *erga omnes* character under international law. Its importance is best illustrated by its place in the United Nations Charter, Article 1, paragraph 2 and its inclusion as a separate and the first Article in both International Covenants of 1966, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. This article reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Another two important international instruments which address the right to self-determination in a similar manner as above are the Final Act of the Conference on Security and Co-Operation in Europe of 1975 and the African Charter on Human and Peoples' Rights of 1981.<sup>105</sup> A number of international institutions have recognised and emphasised in their work the importance of the right to self-determination for peace, security and the maintenance of friendly relations among nations.
76. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, has on several occasions emphasised the *erga omnes* nature of this right, which means that all States have an interest in and an obligation to promote the realisation of the right to self-determination.<sup>106</sup> Thus, in its 1995 judgment in the

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<sup>104</sup> Although as of 31 March 1971 when the last census was taken, there were more than 1,300,000 Albanians in all of Yugoslavia, which made them the third nation in terms of populations within Yugoslavia, they were denied the right to statehood in the 1974 Yugoslav Constitution. Information is extracted from Slobodan Stankovic, Yugoslavia 1974, p. 23, available online at: <http://files.osa.ceu.hu/holdings/300/8/3/text/81-3-1.shtml> (last accessed on 15 April 2009).

<sup>105</sup> See respectively Principle VIII '*Equal Rights and self-determination of peoples*' of the Final Act of the Conference on Security and Co-Operation in Europe, available at: [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) (last accessed on 15 April 2009) and Article 20 of the African Charter on Human and Peoples' Rights, available at: [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) (last accessed on 15 April 2009).

<sup>106</sup> See *inter alia* G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, School of Human Rights Research Series Vol. 26, Intersentia: Antwerpen – Oxford – Portland, 2008, pp. 102-134.

*East Timor* case the Court described as “irreproachable” the assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character”.<sup>107</sup> It underlined that self-determination “is one of the essential principles of contemporary international law”.<sup>108</sup>

77. In the 2004 Advisory Opinion on the *Construction of the Wall* the Court noted: “the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV), pursuant to which ‘Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.’ Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter”.<sup>109</sup>
78. The Human Rights Committee, the treaty-monitoring body of the International Covenant on Civil and Political Rights (ICCPR) in its General Comment No. 12 entitled: “The right to self-determination of peoples (Art. 1)” of 13 March 1984 stated: “The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.” This Committee concluded that General Comment by stating that “history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.”<sup>110</sup>

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<sup>107</sup> ICJ, *East Timor* (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 1995, p. 102, par. 29.

<sup>108</sup> *Ibidem*.

<sup>109</sup> *Construction of a Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, pp. 171-172, par. 88.

<sup>110</sup> General Comment No. 12 of 13 March 1984, *The Right to Self-Determination of Peoples (Art. 1)*, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/f3c99406d528f37fc12563ed004960b4?Opendocument> (last accessed on 15 April 2009).

79. This General Comment by one of the most important human rights organs emphasizes the importance of respect for the right to self-determination as a condition for the full enjoyment of human rights. There can be no doubt that a pattern of deliberate and widespread human rights abuses or systematic policies of oppression as experienced by Kosovar Albanians over the period of 1989-1999 surely fall below an order necessary for a dignified human existence. Hence, the legitimacy of Kosovo's declaration of independence is further reinforced by the years of oppression and exclusion from political and social life of Kosovar Albanians culminating in the 1998-1999 campaign of ethnic cleansing.
80. As mentioned above, the duty of States to promote the realization of the peoples' right to self-determination and to respect it has been reiterated on several occasions by the International Court of Justice, the Security Council, the General Assembly of the United Nations, the Human Rights Committee and other international organs.
81. It has been frequently observed that the part of the Declaration of 1970 on Friendly Relations adopted by the General Assembly dealing with self-determination was formulated in a way which excludes the argument that in a case of suppression a people could not unilaterally secede from the oppressing State. Indeed, this paragraph clearly recognises secession where no government representing the whole people belonging to the territory without distinction as to race, creed or colour exists.<sup>111</sup> The last paragraph concerning equal rights and self-determination of peoples reads:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as*

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<sup>111</sup> See *inter alia* K. Doehring, *Self-Determination*, in: B. Simma (ed.), *The Charter of the United Nations, A Commentary*, 2nd ed., Vol. I, 2002, p. 57 s; J. Crawford, *loc.cit.* 118 ss; see also C. Tomuschat, *Self-Determination in a Post-Colonial World*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 1, 8-11 with references.

*described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*<sup>112</sup>

82. A similar position was adopted in the 1993 Vienna Declaration and Programme of Action, adopted by consensus by the representatives of 171 States participating at the second World Conference on Human Rights. The relevant part of this Declaration reads:

“2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this 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 of a Government representing the whole people belonging to the territory without distinction of any kind.*<sup>113</sup>

83. In the case concerning a possible secession of the province of Quebec, the Supreme Court of Canada clearly recognised the right of secession in the case of oppression. This court stated:

“In summary, the international law right to self-determination only generates, at best, a right to external self-determination of former colonies; where a people is oppressed as for example under foreign military occupation; or where a definable group is denied meaningful access to the government to pursue their political, economic, social and cultural development. In all three situations the people in question are entitled to right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”<sup>114</sup>

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<sup>112</sup> General Assembly Resolution 2625 (XXV) of 24 October 1970, 1883rd plenary meeting (emphasis added). In M.D. Evans, *International Law Documents*, 6<sup>th</sup> edition, Oxford University Press: New York, 2003, pp. 161-162.

<sup>113</sup> See Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in Vienna, Austria on 25 June 1993, UN Doc. A/CONF.157/23 (emphasis added).

<sup>114</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 138; also in *International Legal Materials*, 1998, 1340, 1373.

Thereby, the Supreme Court of Canada clearly recognised the right of a people to secede unilaterally when denied the right to exert internally their right to self-determination as in the case of Kosovo.

84. The constitutional framework for provisional self-government of Kosovo promulgated by the Special Representative of the Secretary-General of the United Nations on 15 May 2001 proclaims that “Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes”.<sup>115</sup> This shows that the United Nation system has clearly recognised that Kosovo is a specific entity with a specific people. This has been accepted for a long time since the identity of the majority population is clearly different from the population in Serbia.
85. Resolution 1244 uses different notions indicating that the final status of Kosovo has not been decided by the resolution. The resolution speaks of “final settlement”, “political settlement”, and “future status of Kosovo”. It is clear that for such a final settlement the will of the people of Kosovo had to be taken into account. Therefore, the declaration of independence by the democratically elected representatives of Kosovo on 17 February 2008 was in full accordance with international law.

## **B) The Institutionalised Policy of Repression and Gross and Widespread Human Rights Violations against Kosovar Albanians**

86. Throughout history DoIs have been justified by suppression by the State from which secession takes place.<sup>116</sup> The people of the Netherlands justified its actions in the Declaration of 1581 by referring to the tyranny exercised against them by the Spanish kings. Another example consists of a similar declaration about 40 years later when the catholic valley of the Valtelin in Northern Italy declared their

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<sup>115</sup> Article 1.1 of the Constitutional Framework for Provisional Self-Government, UNMIK/Reg/2001/9 - 15 May 2001, available online at: <http://www.unmikonline.org/constframework.htm> (last accessed on 15 April 2009).

<sup>116</sup> As the United States Declaration of Independence reads: “[W]henver any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” American Declaration of Independence of 4 July 1776, available online at: [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html) (last accessed on 15 April 2009).

independence from the protestant Grisons who, according to them, suppressed the people in a tyrannical way.<sup>117</sup> When the United States declared their independence from Britain a famous exchange of notes developed between Britain and France as to the lawfulness, under international law, of the decision to recognise the United States taken by France. The French arguments are an interesting mixture. They referred to the effectiveness of the independence established by the United States. However, they also referred to the unjust oppression exercised by the King of England in the American colonies.<sup>118</sup>

87. From 1981 to 1988 measures undertaken by the Serb authorities enabled the Serbian minority in Kosovo to take control of the most important economic resources in the province: the mining centres at Obilic and Titova Mitrovica (Mitrovica) and agri-businesses in Kosovo-Polje (Fushë-Kosovë).<sup>119</sup> The above-mentioned firing *en masse* and the disenfranchisement of the Kosovar Albanians, starting with those which took place during 1990-1991, created a *de facto* regime of apartheid. Since the summer of 1990 the Serbian minority in Kosovo with the support of the Serbian authorities seized total power in Kosovo. The official policy of the SFRY of 'unity and brotherhood' was abandoned in favour of divisive and extreme nationalist policies.
  
88. The legal acts adopted by the Serbian authorities during the period 1990-1992, totalling 36 laws and 470 decisions, are proof of the intense attempts to influence every aspect of the public life of ethnic Albanians, with devastating consequences for their integrity, human dignity and prosperity. These acts were preceded by the Program for Kosovo.<sup>120</sup> Despite the proper title, this Program envisaged a series of discriminatory measures aimed at forcing Albanians to leave Kosovo, and on the other hand, encouraged Serbs and Montenegrins to install themselves in Kosovo.

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<sup>117</sup> J. A. Frowein, *Self-determination as a limit to obligations under international law*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, pp. 211-223.

<sup>118</sup> J. A. Frowein, *loc.cit.*

<sup>119</sup> See *inter alia* R. Lukic and A. Lynch, *Europe from the Balkans to the Urals: The Disintegration of Yugoslavia and the Soviet Union*, SIPRI, Oxford University Press: New York, 1996, p. 148, Malcolm, *supra* note 21, pp. 345-346.

<sup>120</sup> *Program for Realization of Peace, Freedom, Equality, Democracy and Prosperity of SAP Kosovo*, Official Gazette of the Socialist Republic of Serbia, No.15/90, 30 March 1990.

In summary, these discriminatory legal measures and the consequences thereto were as follows:<sup>121</sup>

- The Law on Job Relations in Special Circumstance of 26 July 1990 resulted in the subsequent expulsion of 150 000 Kosovar Albanians from their jobs, representing 80 percent of the employed Albanians in Kosovo;
- Renewed colonisation attempts consisting in providing farming land free of charge or favourable long-term loans for Serbs or other non-Albanians, were designed in the Law on Conditions, Manner and Procedure of Distribution of Farming Land of 20 July 1991;
- The Law on Special Conditions for Real Estate Transfer of 18 April 1998 effectively prohibited the selling of real estate and possession of property by Albanians;
- The banking system of Kosovo, the financial funds of the National Bank of Kosovo and of all commercial banks were completely undermined, and all Kosovo and municipality budget funds were usurped, as a consequence of the approval of the Law on Transmission of Financial Funds of 29 March 1991;
- Notwithstanding the demographic make up of the Kosovo population (90 percent ethnic Albanians), the Albanian language was officially banned by the Law on the Official Use of Language and Scripts of 27 July 1991;
- Names of streets, squares, schools and cultural centres in Kosovo were changed to Serbian names, with the requirement that they be in Serbian and in the Cyrillic alphabet;<sup>122</sup>
- The Public Prosecutor of Kosovo was suspended, likewise the Supreme and municipal courts, Legal Office, and Provincial Secretariat of Internal Affairs. Subsequently, all ethnic Albanian judges, public prosecutors, lawyers, and police personnel were discharged and replaced by Serbs and Montenegrins;<sup>123</sup>
- Kosovo's mass media consisting of Prishtina Radio and Television, six local radio stations, newspapers and magazines, was destroyed after placing it under total Serbian control.

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<sup>121</sup> See *inter alia* D. Kumbaro, *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention*, 2001, pp. 45-46, available at: <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> (last accessed on 15 April 2009).

<sup>122</sup> The Decision stipulating these changes is published in 12 subsequent issues of the Official Gazette of the Republic of Serbia, 1992.

<sup>123</sup> See respectively Law on Abrogation of the Criminal Law, Law on Public Prosecutor, Law on Legal Office, and Law on Internal Affairs.

89. These measures, coupled with the abolition of autonomy, had as their overriding purpose the complete exclusion of the Kosovo Albanians from the public life of Kosovo. This resulted in systematic oppression and gross discrimination and in the clear denial of the Kosovo Albanians right to internal self-determination. The above-mentioned measures taken by the Serb authorities were in clear violation of international law. As the Court itself has acknowledged:

“To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on the ground of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.”<sup>124</sup>

90. During the period 1998-1999 over 700 000 thousand persons were forcibly displaced, or fled under direct threat of attack. The number of the persons killed or disappeared is estimated at about 15 000. Deep concern about the pattern of State violence against Kosovar Albanians was expressed in numerous reports by well-known human rights organisations.<sup>125</sup> Those gross and systematic human rights violations were ascertained on the ground by international observers from the OSCE Verification Mission<sup>126</sup> and the KDOM - the Kosovo Diplomatic Observer Mission. During those years the Secretary-General of the United Nations presented several reports to the Security Council on the grave humanitarian situation on the ground. The escalation of the conflict in Kosovo and its consideration as a threat to international peace and security was acknowledged and reiterated in several Security Council Resolutions.

91. Thus, in resolution 1203, of 24 October 1998, the Security Council expressed its deep alarm and concern at the continuing grave humanitarian situation throughout

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<sup>124</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 57, par. 131.

<sup>125</sup> Amnesty International Report 1998: FRY: For the Period January – December 1997; Human Rights Watch: FRY: Humanitarian Law Violations in Kosovo, October 1998; Medecins Sans Frontieres: Survey Data on Mass Expulsions from Kosovo, A Survey of the Kosovar Refugees at Rosaye, Montenegro, Vincent Brown, Rosaye, 27 April 1999, in *Krieger, supra* note 5, pp. 90-118. See also a number of reports by the International Crisis Group, available at: <http://www.crisisgroup.org/home/index.cfm?l=1&id=1243&sr=3> (last accessed on 15 April 2009).

<sup>126</sup> The OSCE Kosovo Verification Mission operated in Kosovo from October 1998 to June 1999, *Human Rights in Kosovo: As Seen, As Told*, Vol. I, October 1998 - June 1999, available at: <http://www.osce.org/item/17755.html> (last accessed on 15 April 2009).



Kosovo and the impending humanitarian catastrophe, and re-emphasised the need to prevent this from happening.<sup>127</sup> In Resolution 1239 (1999) the Security Council emphasised that the humanitarian situation will continue to deteriorate in the absence of a political solution to the crisis consistent with the principles adopted by the Foreign Ministers of Canada, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America on 6 May 1999 (S/1999/516), and urged all concerned to work towards this aim.<sup>128</sup> The Security Council called for the prompt and complete investigation, including international supervision and participation, of all atrocities committed against civilians and full cooperation with the International Tribunal for the former Yugoslavia (ICTY), including compliance with its orders, requests for information and investigations.<sup>129</sup> A number of cases for crimes committed in Kosovo have been brought before the ICTY. Suffice it to mention the cases against the highest leaders of Serbia, namely Milošević (IT-02-54) and Milutinović *et al.* (IT-99-37).<sup>130</sup>

92. That deplorable situation triggered the military intervention on humanitarian grounds by NATO in 1999. Due to this intervention the direct assault on the ethnic Albanian population was ended and the forcibly displaced population was able to return to their homes immediately thereafter.

### **C) Prolonged Internationally Supervised Negotiations Failed to Produce an Agreement**

93. As mentioned above the constitutional framework for provisional self-government of Kosovo recognises that “Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.” It is clear that this recognition was of considerable

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<sup>127</sup> SC Res. 1203 (1998) of 24 October 1998.

<sup>128</sup> SC Resolution 1239 (1999) of 14 May 1999, p. 2, par. 5.

<sup>129</sup> *Ibidem*.

<sup>130</sup> The so-called Kosovo cases are: *Prosecutor v. Milošević* (Case No. IT-02-54, Case Information Sheet available at: [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf), last accessed on 15 April 2009), *Prosecutor v. Milutinović et al.* (Case No. IT-05-87, Case Information Sheet available at: [http://www.icty.org/x/cases/milutinovic/cis/en/cis\\_milutinovic\\_al\\_en.pdf](http://www.icty.org/x/cases/milutinovic/cis/en/cis_milutinovic_al_en.pdf), last accessed on 15 April 2009), and *Prosecutor v. Đorđević* (Case No. IT-05-87/1, Case Information Sheet available at: [http://www.icty.org/x/cases/djordjevic/cis/en/cis\\_djordjevic\\_en.pdf](http://www.icty.org/x/cases/djordjevic/cis/en/cis_djordjevic_en.pdf), last accessed on 15 April 2009).

importance for any political settlement as envisaged in resolution 1244. A political settlement had to respect the right to self-determination of the people of Kosovo. This means that no final political settlement could be brought about without a participation of the people of Kosovo. Either by a referendum or by elections the people of Kosovo had to give its consent to any political settlement.<sup>131</sup> The United Nations organs tried to bring about a political settlement respecting the right to self-determination of the people of Kosovo. However, this proved to be impossible.

94. As mentioned above on 17 February 2008 the representatives of the people of Kosovo which were elected on 17 November 2007, declared the independence of the country under the name: “The Republic of Kosovo”. That step was taken by Kosovar leaders in close cooperation and consultation with a large number of international actors, after failure to reach an agreement with Serbia and the impossibility of reaching a solution inside the Security Council. The majority of the international community has reacted with if not voiced at least tacit general approval, towards the declaration of independence.
95. Sometimes the fear is expressed that the case of Kosovo can be used by separatist movements. That fear is based on misconceptions and a non-acknowledgement of the *sui generis* (specific) nature of the Kosovo case. Since the declaration of independence Kosovo has been recognised by 57 countries, with the recognition procedure underway in other countries. From these countries 22 are members of the European Union, and three are permanent members of the Security Council of the United Nations, namely the USA, the UK, and France.
96. All possible means were used before the Kosovar authorities declared the independence of the country. The Special Representative of the Secretary General for the final status talks on Kosovo, Mr. Martti Ahtisaari, stated in March 2007 that the parties had made it clear that they were not able to agree upon the status of Kosovo. After that a troika composed of representatives of the United States, the European Union, and Russia tried to mediate in shuttle diplomacy talks for 90 days. Again, no rapprochement of the positions taken by the parties was reached.

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<sup>131</sup> See J. A. Frowein, *The Protection of Human Rights in Europe and the Right to Self-Determination*, Studime 10, 2003, Academia Scientiarum et Artium Kosoviensis, 9, 16 s.

The Ahtisaari plan was presented to the Security Council, which took note of it, but did not approve it.

**D) Resolution 1244 of the Security Council Left Open the Form of the Final Status Settlement and the Manner of Its Expression**

97. It is sometimes claimed that under resolution 1244 Kosovo's declaration of independence is precluded. Resolution 1244 authorised the Secretary-General to establish an international civil presence under United Nations auspices, the functions of which included nurturing and promoting the development of democratic institutions of self-government of Kosovo, and prevented Belgrade from exercising governmental authority in Kosovo.
98. As mentioned above, resolution 1244, par. 11(e) envisaged a political process that would lead to a final status "taking into account the Rambouillet accords," and thus acknowledged the possibility of independence for Kosovo, if that was the will of the people. This is also confirmed by the use of different expressions such as: "final settlement", "political settlement", and "future status of Kosovo".
99. After extensive negotiations conducted through the UN Special Envoy involving both Serbian and Kosovar authorities, the Special Envoy reaffirmed that the *status quo* was not sustainable, that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status was exhausted, and that the only viable option was for Kosovo to be an independent state.<sup>132</sup> After the UN Secretary General indicated full support for the Special Envoy's position, and, after one final effort by the Troika to determine if there was any basis for agreement failed, Kosovo declared its independence, thus fully respecting and honouring the status process launched by resolution 1244.
100. At no point thereafter did the Secretary-General's Special Representative (SRSG) in Kosovo or any other organ of the UN declare the DoI invalid, or null and void. In fact, neither the Security Council nor the General Assembly took any action against the DoI. Further, no United Nations organ recommended that States should

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<sup>132</sup> *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, UN Doc. S/2007/168, 26 March 2007.

not recognise the newly independent Kosovo. This shows that the situation is completely different compared with cases where the Security Council or the General Assembly recommended or decided that States should not recognise a new entity as an independent state.

101. Resolution 1244's preambular reference to "sovereignty and territorial integrity of the FRY" as set out in the Helsinki Final Act and Annex 2 reaffirmed a commitment of Member States, and did not address the question whether the representatives of the people of Kosovo could declare independence. Indeed, the language includes the possibility of independence as an outcome; among others, Annex 2 is focused solely on the period of interim administration, and this preambular reference does not relate to the issue of final status. It is true that Resolution 1244 does not mention the right to self-determination. However, the reference to the Helsinki Final Act clearly covers the right of self-determination, which is set out in detail in Principle VIII of the Helsinki Final Act.
  
102. As one commentator has noted, "On balance, it appears that Resolution 1244 neither promotes nor prevents Kosovo's secession. Although operative paragraph 1 of Resolution 1244 states that a political solution shall be based on the principles of Annexes 1 and 2, those annexes are silent as to the governmental form of the final status. The annexes only state that an "interim political framework" shall afford substantial self-governance for Kosovo and take into account the territorial integrity of Federal Republic of Yugoslavia. Paragraph 11(a), states that the international civil presence will promote "the establishment, *pending a final settlement*, of substantial autonomy and self-government in Kosovo..." The substantial autonomy language is thus addressed to the interim status of Kosovo. Moreover, the references to the territorial integrity of Serbia are only in the preambular language and not in the operational language. The document is therefore silent as to what form the final status of Kosovo takes."<sup>133</sup>

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<sup>133</sup> C.J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, ASIL Insights, Volume 12, Issue 2, February 29, 2008, available at: <http://www.asil.org/insights080229.cfm> (last accessed on 15 April 2009).

**E) The Declaration of Independence Was Adopted by the Freely and Democratically Elected Representatives of Kosovo**

103. It is commonly accepted that sovereignty rests with the people and it can and should be expressed through their duly elected representatives. The DoI of 17 February 2008 was adopted with 109 votes in favour out of the 120 members of the Kosovo Assembly. This Assembly was democratically elected in November 2007, as confirmed by international observers.<sup>134</sup> Their vote represents an overwhelming majority of the representatives of the people of Kosovo.
104. While it was expected that the proposal put forward by the Special Envoy of the Secretary General of the UN, Mr. Martti Ahtisaari, would be endorsed by the Security Council that did not happen. In declaring the independence of the country the Assembly of Kosovo was exercising the powers vested in it as the duly elected body of representatives of the people of Kosovo. Kosovo's President and Kosovo's Prime Minister joined that special session of the Assembly and signed the Declaration. The fact that the DoI was signed by all of them shows that they were acting in concert in expressing the sovereign will of the people of Kosovo.
105. Already after 4 years of United Nations administration of the territory of Kosovo it was held that no final solution could be adopted against the will of the people of Kosovo.<sup>135</sup> It could also be stated that the United Nations organs have to bring about a political settlement respecting the right to self-determination. It would not be in line with the right of self-determination to have a period of international administration without any expectation for a proper solution. It was clearly the aim of Resolution 1244 to facilitate a political process designed to determine Kosovo future status.<sup>136</sup> After the attempts to negotiate a final settlement during more than 8 years a DOI was the only possibility to arrive at a solution.

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<sup>134</sup> See *inter alia* Preliminary Statement by the Council of Europe Election Observation Mission in Kosovo (CEEOM V) available on: [http://www.coe.int/t/dc/files/events/2007\\_kosovo/prelim\\_statement\\_en.asp](http://www.coe.int/t/dc/files/events/2007_kosovo/prelim_statement_en.asp) (last accessed on 15 April 2009); Statement of the European Union on elections in Kosovo (17 November 2007), available on: [http://www.osce.org/documents/pc/2007/11/28258\\_en.pdf](http://www.osce.org/documents/pc/2007/11/28258_en.pdf) (last accessed on 15 April 2009)

<sup>135</sup> J. A. Frowein, *loc.cit.* 16-18.

<sup>136</sup> Frowein, *loc.cit.* 17, compare also A. Zimmermann/C. Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo*, *Nordic Journal of International Law* 70, 423-460, 2001, 423, in particular 454-460.

**F) Respect and Protection of the Human Rights of the Minorities in Kosovo's Constitution and Legal Framework**

106. Kosovar leaders have adopted a policy of inclusion of the Serb population of Kosovo in the decision-making and the political processes of the country. On several occasions prime ministers and other Kosovar officials have addressed Kosovo's Parliament in both Albanian and Serbian. From the standpoint of the existing legal framework the recently adopted Constitution of Kosovo creates the necessary conditions for the representation of the ethnic minorities in Kosovo in the political life of the country and their full enjoyment of the highest human rights standards.
107. This Constitution has a separate chapter on "Rights of Communities and Their Members", namely Articles 57-62.<sup>137</sup> Through them additional rights have been acknowledged to ethnic minorities with the ensuing duty on the government of Kosovo to ensure appropriate conditions enabling communities, and their members to preserve, protect and develop their identities. Further, the Republic of Kosovo is bound to promote the preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo. Extra provisions are included to accommodate the participation of the ethnic minorities in the local government. Thus, in municipalities where at least ten per cent (10%) of the residents belong to communities not in the majority in those municipalities, a post of Vice President of the Municipal Assembly for Communities shall be reserved for a representative of these communities.<sup>138</sup>
108. Besides upholding the highest human rights standards, by creating the necessary protection for the rights of the minorities, Kosovo's DoI complies with the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union ("Guidelines on Recognition"). Those Guidelines laid down various preconditions for recognition of new States in Eastern Europe and the Soviet Union, including

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<sup>137</sup> For the full text of these articles, the basic provisions, and those on fundamental rights and freedoms visit: <http://www.kosovoconstitution.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (last accessed on 15 April 2009).

<sup>138</sup> Article 62 of the Constitution of Kosovo.

respect for minority rights and maintenance of existing boundaries.<sup>139</sup> Further, Kosovo has indicated that it considers itself bound by the international obligations arising under the main international human rights instruments. A large number of the most important international human rights instruments are directly applicable in Kosovo and have priority over provisions of laws and other acts of public institutions.<sup>140</sup>

## **G) Kosovo's Future and Friendly Relations Policies**

109. In its Constitution Kosovo has renounced any territorial claims against other States, which should placate any concerns by the authorities of FYROM, or even Serbia. Moreover, the Republic of Kosovo has also undertaken that it shall seek no union with, any State or part of any State. Those undertakings are in line with the November 2005 Guiding principles of the Contact Group for a settlement of the status of Kosovo.

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<sup>139</sup> Guidelines on Recognition of New States in Eastern Europe and the Soviet Union of 16 December 1991. [T]hey [i.e. European Council State Members] adopt a common position on the process of recognition of these new States, which requires: - *respect* for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, *especially with regard to* the rule of law, democracy and *human rights*; - *guarantees for the rights of ethnic and national groups and minorities* in accordance with the commitments subscribed to in the framework of the CSCE (emphasis added). It is noteworthy to mention Articles 1 and 3 of the Kosovo Constitution. Article 1 (Definition of State) of the Constitution of Kosovo reads:

“1. The Republic of Kosovo is an independent, sovereign, democratic, unique and indivisible state.  
2. The Republic of Kosovo is a state of its citizens. *The Republic of Kosovo exercises its authority based on the respect for human rights and freedoms of its citizens and all other individuals within its borders.*  
3. The Republic of Kosovo *shall have no territorial claims against, and shall seek no union with, any State or part of any State.* (emphasis added)” Article 3 (Equality before the Law) of the Kosovo Constitution reads:  
“1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.  
2. *The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.* (emphasis added)”

<sup>140</sup> See Article 22 of Kosovo's Constitution. This article reads: “Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination Against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.”

110. Kosovar authorities have often declared that Kosovo is firmly oriented towards NATO and European Union membership. They have expressed Kosovo's commitment to peace, security, respect for human rights, and economic development of the region and to developing friendly relations with its neighbours, including Serbia. As reiterated several times by Kosovar authorities the government of Kosovo embraces the values of the European Union: peace, economic development and freedom of movement for all. On their part, European Union representatives have on several occasions expressed their support of a European future for Kosovo.<sup>141</sup> Since the beginning of its existence the Republic of Kosovo has expressed its firm commitment towards developing friendly relations with all its neighbours, including Serbia.

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<sup>141</sup> See *inter alia* European Commission, *A European Future for Kosovo*, Doc. Reference IP/05/450, 20 April 2005; Mr Olli Rehn, EU Commissioner for Enlargement, *European Institutions' reactions on Kosovo independence*, Doc. Reference SPEECH/08/91, 20 February 2008; *Kosovo (Under UNSCR 1244/99) 2008 Progress Report*, Doc. Reference SEC(2008) 2697, 5 November 2008; Commission of the European Communities, *Enlargement Strategy and Main Challenges 2008-2009*, COM(2008) 674 final, 5 November 2008, p. 5.



## **PART VI CONCLUSIONS AND SUBMISSIONS**

111. In view of the foregoing the Republic of Albania respectfully requests the Court to decline to render an advisory opinion in this case. As argued above, the declaration of independence is not a matter regulated by international law. Moreover, such an opinion would not assist the General Assembly in exercising its functions, and would not be conducive to furthering friendly relations among States.
112. Should the Court, nevertheless, find it proper and necessary to render an advisory opinion, Albania respectfully requests the Court to reply to the question put by the General Assembly in the following manner: Kosovo's declaration of independence is in full accordance with international law, it being an expression of the right of self-determination of the people of Kosovo, or in the alternative Kosovo's declaration of independence does not contradict any applicable rule of international law.
113. The people of the Republic of Kosovo are determined to build a better future for generations to come and live in peace with their neighbours. The Kosovar authorities have expressed their firm commitment to a society which respects the human rights and fundamental freedoms of all Kosovo's citizens. Kosovo's independence is, and will remain, a reality. Serbia needs to decide on how it wishes to come to terms with that. The Republic of Albania would like to emphasise that trying to undermine the development and progress of the people of Kosovo by impinging upon their rightful choices, as Serbia has been doing thus far, is not conducive to peace and security in the Balkans. For that reason, Albania respectfully requests the Court to indicate that Serbia should respect Kosovo's right to self-determination and conduct itself in conformity with the generally accepted principles of friendly relations and cooperation among States for the benefit of the two peoples and in the interest of maintaining and consolidating peace and security in the Balkan region.