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17 July 2009

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Excellency

**Request for an Advisory Opinion of the International Court of Justice on the Question
“Is the unilateral declaration of independence by the Provisional Institutions of Self-
Government of Kosovo in accordance with international law?”**

I have the honour to refer to your letters dated 10 October 2008 (No. 133294), 20 October 2008 (No. 133310), 4 March 2009 (No.133849), 21 April 2009 (No.134141), 15 May 2009 (No. 134178) and 8 June 2009 (No. 134197), and to the Court’s Order of 17 October 2008, in respect of the above mentioned request for an advisory opinion of the International Court of Justice.

In accordance with the Court’s Order of 17 October 2008 and your letter of 20 October 2008, I have the honour to enclose a signed original, and 29 copies, of the United Kingdom’s written comments on the other written statements filed with the Court.

As requested in your letter of 20 October 2008, also enclosed is an electronic copy of the United Kingdom’s written comments dated 15 July 2009.

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

Akbar Khan
Akbar Khan
First Secretary (Legal)
British Embassy, The Hague

Co-Representative of the United Kingdom of Great Britain
And Northern Ireland

**REQUEST FOR AN ADVISORY OPINION OF THE
INTERNATIONAL COURT OF JUSTICE
ON THE QUESTION
“IS THE UNILATERAL DECLARATION OF
INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS
OF SELF-GOVERNMENT OF KOSOVO IN ACCORDANCE
WITH INTERNATIONAL LAW?”**

WRITTEN COMMENTS OF THE UNITED KINGDOM

15 JULY 2009

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INTRODUCTION

1. In accordance with the Court's Order of 17 October 2008, the United Kingdom provides these Written Comments responding to Written Statements filed by other States.

2. There are three critical issues to be distilled from the Written Statements before the Court:

- first, as to the precise content of the question raised in the General Assembly's Request of 8 October 2008 and the nature of the enquiry that a response to that question entails;
- second, as to whether Kosovo's Declaration of Independence contravenes Security Council resolution 1244 (1999) (Resolution 1244 (1999));
- third, as to whether declarations of independence are unlawful as a matter of international law.

3. In brief, the United Kingdom's position in respect of these issues is as follows:

- first, the question before the Court is directed solely at the issue of the compatibility of the Declaration of Independence with international law. It does not go to the legal consequences of the Declaration of Independence. See **Section One** below;
- second, the Declaration of Independence in no sense contravenes Resolution 1244 (1999). In particular, Resolution 1244 (1999) does not contain any guarantee of the territorial integrity of Serbia. See **Section Two** below;

- third, international law contains neither a right of unilateral secession nor the denial of such a right. In the absence of an applicable *lex specialis*, international law does not preclude the creation of States by operation of declarations of independence which properly reflect the will of a people and garner sufficient support to enable the territorial entity in question to function effectively as a State in the international community. See **Section Three** below.

4. Before developing these propositions, two introductory observations are warranted.

5. First, neither the present proceedings nor developments in Kosovo itself are to be seen as “punishment” of Serbia, as some Written Statements have suggested.¹ The United Kingdom emphasises the importance of cementing the positive achievements in the Balkans in recent years, including in Serbia. The United Kingdom supports a normalized relationship between Kosovo and Serbia, and between both States and the European Union. It reiterates its hope for closer interaction between Serbia and Kosovo, bilaterally as well as under the auspices of the European Union, and in both case with the support of its Member States.

6. Second, the United Kingdom notes that, both as a matter of international recognition and in terms of internal consolidation within Kosovo, the independence of Kosovo is a reality. As of 15 July 2009, 62 States have recognised Kosovo’s statehood through formal acts of recognition: Saudi Arabia (20 April), Comoros (14 May), Bahrain (19 May), Jordan (7 July) and the Dominican Republic (11 July) being the most recent to do so. Other States have acknowledged Kosovo’s independence through other conduct. Broader acknowledgement since 17 April 2009 includes the following:

¹ e.g. Slovak Republic Written Statement (WS), para. 28.

- On 29 June 2009, Kosovo became a member of the International Monetary Fund (IMF) and of the World Bank Group. The IMF Board of Governors approved Kosovo's membership on 6 May with 96 Member States voting in favour of Kosovo's admission. The three institutions of the World Bank—the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the International Finance Corporation (IFC)—each adopted a resolution on 3 June 2009 in favour of Kosovo's admission. 96 IBRD Member States voted in favour of Kosovo's admission, 89 IDA Member States voted in favour, and 95 IFC Member States voted in favour.

The Organization of the Islamic Conference (OIC), during the 36th Session of the Council of Foreign Ministers at Damascus (23-25 May 2009), “[w]elcome[d] the cooperation of Kosovo with the OIC Economic and Financial institutions, and call[ed] on the international community, to continue contributing to the fostering of... Kosovo's economy.”²

7. As to the internal constitutional consolidation of Kosovo, the United Kingdom notes by way of example:

- municipal elections will be held on 15 November 2009;³
- Kosovo Serbs are applying in increasing numbers for Kosovo identity cards, driver's licenses and other Kosovo documentation;⁴

² Resolution No. 14/36-POL on the situation in Kosovo, para. 3. See OIC/CFM-36/2009/POL/RES/FINAL at <http://www.oic-oci.org/36cfm/w/en/res/36CFM-POL-RES-FINAL.pdf>.

³ See <http://www.president-ksgov.net/?id=5,0,0,0,e,1567>.

⁴ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2009/300* of 10 June 2009, para. 7).

- Kosovo Serb police officers “appear to have started returning to work” since the Kosovo government announced that it would not continue paying those who do not report for duty;⁵
- a new Kosovo Security Force (KSF) is expected to reach “interim operational capability” in September 2009. Kosovo has taken steps in various areas of rule of law and law enforcement, including anti-money laundering legislation, anti-corruption mechanisms, organised crime prevention, counter-terrorism, narcotics, the development of the Kosovo Police, judicial reform, and senior public appointments;⁶
- all members of the Kosovan Constitutional Court have now been appointed, including the three international members, selected by the President of the European Court of Human Rights⁷.

8. Reflecting these and other developments, the United Nations Interim Administration in Kosovo (UNMIK) “has moved forward with its reconfiguration within the status-neutral framework of resolution 1244 (1999)”.⁸ As part of this reconfiguration, further reductions have been made to the UNMIK budget.⁹ The Rule of Law component of UNMIK has been reduced from 3291 personnel to a 14-strong Police and Justice Liaison Office from 1 July¹⁰.

⁵ Ibid., para. 25.

⁶ Report of the Secretary-General of the Council of the European Union/High Representative for the CFSP to the Secretary-General of the United Nations on the activities of EULEX in Kosovo (31 May 2009), S/2009/300*, Annex, pp 12-14.

⁷ See http://www.ico-kos.org/d/090612_CC_international_judges.pdf

⁸ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2009/300*, para. 40.).

⁹ The Fifth Committee has cut UNMIK’s budget appropriation for the period from 1 July 2009 to 30 June 2010 by 76.3 per cent: see Report of the Fifth Committee, Financing of the United Nations Interim Administration Mission in Kosovo, A/63/902, para. 6 and GA/10841.

¹⁰ See Report of the Secretary-General on the Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2009 to 30 June 2010, A/63/803, p.3 and paras. 46-50.

SECTION ONE: THE QUESTION BEFORE THE COURT

1. The scope of the question

9. The General Assembly's Request of 8 October 2008 asks a specific question—namely, whether the Declaration of Independence by the Provisional Institutions of Self Government is in accordance with international law.¹¹ The request does not seek an opinion on the situation or status of Kosovo *grosso modo*. Nor does it enquire about the legal consequences of specified acts or situations. This contrasts with advisory opinions requests in other cases in which the question was explicitly formulated so as to invite a wider consideration of issues under the rubric of “legal consequences”. This element was addressed fully in the United Kingdom's Written Statement and requires no further elaboration.

2. The issue of self-determination

10. The law concerning self-determination has been examined in considerable depth in some of the Written Statements. Several States develop the concept of “remedial self-determination”,¹² to which the United Kingdom has also referred.¹³ In the United Kingdom's view, however, it is not necessary to apply that concept in the present case – whatever grounds there may be in the recent history of Kosovo for

¹¹ A number of States, including States which would have the Court answer the question in the negative, acknowledge that the question is framed in specific terms. Egypt, for example, notes that “this request... is limited to legal issues relevant to the lawfulness of the unilateral declaration...”: Egypt WS, para. 7. The Russian Federation notes that the request “is aimed specifically at establishing, whether [the Declaration] is in accordance with international law”: Russian Federation WS, para 9. Spain refers to the question as having been “written in simple, clear, and precise terms...”; and says that “[t]he question posed by the General Assembly refers solely to the compatibility of the UDI with international law, and makes no reference to any other act deriving, directly or indirectly, from such a declaration”: Spain WS, paras. 5, 6. These statements correctly observe that the Request goes no further than the question of the consistency with international law of the Declaration of Independence. See also Czech Republic WS, p. 6; Denmark WS, pp. 2-3, 13; Estonia WS, pp. 3-4; Federal Republic of Germany WS, pp. 5-6; France WS, para. 2.3; Ireland WS, paras. 13-17; Japan WS, pp. 1-2; Kosovo Written Comment, paras. 7.22-7.26, 8.09-8.10; Luxembourg WS, paras. 9-12; Norway WS, para. 8; United States WS, pp. 34, 45-9.

¹² See Albania WS, paras. 75-85; Denmark WS, pp. 12-13; Estonia WS, pp. 4-12; FRG WS, pp. 32-37; Finland WS, paras. 5-18; Ireland WS, paras. 27-34; Latvia WS, pp. 1-2; Netherlands WS, paras. 3.1-3.21; Poland WS, paras. 6.1-6.16; Slovenia WS, pp. 1-2; Switzerland WS, paras. 57-97.

¹³ United Kingdom WS, paras. 5.30-5.32.

doing so. The Court can decide the question by reference to well-established rules of general international law and in the light of Resolution 1244 (1999).

3. Kosovo as a special case

11. As the United Kingdom observed in its Written Statement, Kosovo over the last twenty years has experienced a unique combination of historical, factual, institutional, and legal developments.¹⁴

12. A number of States have suggested that to treat events in Kosovo as *sui generis* is an attempt to suspend the operation of international law; a form of special pleading that would take the case outside the law.¹⁵ This misunderstands the reference to the situation of Kosovo as “*sui generis*”. The use of the phrase does not suggest that special legal rules apply to Kosovo; that Kosovo somehow stands outside the law. Rather, it describes the unique configuration of circumstances and attempts to address the challenges of the region that serve comprehensively to place Kosovo in a category of its own for purposes of legal analysis. It is an indication that Kosovo does not pose slippery slope risks for other States or regions of the world. It is, for the reasons set out in the United Kingdom’s Written Statement, quite demonstrably a special case.

13. As a matter of law, two simple points are critical. First, the Security Council, which intervened decisively following widespread human rights abuses directed against the people of Kosovo as a whole, neither prohibited independence in advance nor condemned it when it was eventually proclaimed. Second, international law does not prohibit declarations of independence as such.

14. A key aspect of the unique combination of facts referred to above is the history of extensive human rights abuses by the FRY and the displacement and

¹⁴ United Kingdom WS, paras. 2.1-3.66.

¹⁵ See, e.g., Cyprus WS, paras. 75-81, especially paras. 77, 81; Argentina WS, paras. 11, 60, 81; Azerbaijan WS, para. 17; Egypt WS, para. 45.

expulsion by the FRY of large parts of the Kosovo population.¹⁶ Cyprus has described these events as “[a]llegations of ill-treatment”.¹⁷ This is an inappropriate characterisation of the events, which does not concern mere “ill-treatment” still less mere “allegations” thereof. These were horrific, well-documented and proven abuses of human rights, abuses that have been described and condemned by the UN General Assembly, the Security Council, by various UN treaty organs, and by the International Committee of the Red Cross.¹⁸ The events are the subject of a Judgment by the ICTY in *Prosecutor v Milutinović and others*.¹⁹

¹⁶ United Kingdom WS, paras. 2.25-2.39.

¹⁷ Cyprus WS, para. 146.

¹⁸ See United Kingdom WS, paras. 2.25-2.38.

¹⁹ As to which see United Kingdom WS, para. 2.38. It is noted that, in its WS, Serbia “sincerely regrets all tragedies and pain that were inflicted by the persons acting in the name of the FRY during the conflict.” Serbia WS, para. 358.

SECTION TWO: SECURITY COUNCIL RESOLUTION 1244 (1999)

15. The background to the adoption of Resolution 1244 (1999) and the multiple unsuccessful attempts to resolve the Kosovo crisis were addressed in detail in the United Kingdom's Written Statement.²⁰

16. States that ask the Court to answer the question in the negative have raised two principal arguments concerning Resolution 1244 (1999):

- Resolution 1244 (1999) establishes obligations with respect to the territorial integrity of Serbia which were breached by the adoption of the Declaration of Independence. In support, it is said that the past practice of the Security Council shows that Resolution 1244 (1999) precluded independence as an option for final status in Kosovo.²¹
- Resolution 1244 (1999) established UNMIK; UNMIK in turn had supervisory if not constitutive power over the PISG; the PISG adopted the Declaration of Independence; but adopting such a declaration did not fall within the proper functions of the PISG, and was thus not in accordance with international law.²² To similar effect, it is said that the 2001 Constitutional Framework conferred no authority on the PISG that is not contained within Resolution 1244 (1999).²³ States adopting this view observe that the Secretary-General's Special Representative (SRSG) declared a Kosovo Assembly resolution "on the protection of the territorial integrity of Kosovo" in 2002 null and void.²⁴

²⁰ See UK WS, paras. 2.13, 2.24, 3.1, 3.8 and 3.33-3.66.

²¹ See Serbia WS, paras. 675-704, 776-780, 788 *ff*; Cyprus WS, paras. 91-105; Slovak Republic WS, paras. 20, 26-27; Romania WS, paras. 5, 16-17, 29-32; Russia WS, paras. 56-58; China WS, para. I(a); Spain WS, paras. 35-44; Iran WS, para. 5.4; Venezuela WS, paras. 3-4.

²² See Serbia WS, paras. 873-912; Cyprus WS, paras. 71, 106-113; Argentina WS, paras. 7, 62-64, 116; Spain WS, paras. 59-72; Brazil WS, p. 2; Libya WS, paras. 3-4; Slovak Republic WS, para. 25.

²³ See Russia WS, paras. 70-3; Cyprus WS, para. 45; Argentina WS, para. 199.

²⁴ Serbia WS, paras. 701-4; Spain WS, paras. 44, 67.

These arguments will be considered in turn.

1. Resolution 1244 (1999) did not guarantee the territorial integrity of Serbia

17. Various States have emphasised the use of the expression “territorial integrity” in the preamble to Resolution 1244 (1999). It is said that the resolution therefore bars the separation of Kosovo from Serbia.²⁵ It is likewise said that the Declaration of Independence breached Resolution 1244 (1999) by disrupting a situation the resolution guaranteed as inviolable.²⁶ However, as the United Kingdom has already noted, Resolution 1244 (1999) did not seek to pre-judge what the outcome of the political process would be and did not seek to entrench the principles of sovereignty and territorial integrity of the FRY beyond an interim period.²⁷ There is nothing in Resolution 1244 (1999) that is equivalent to, for example, resolutions concerned with the protection of the territorial integrity of Cyprus.²⁸ Rather, the aim of Resolution 1244 (1999) was to ensure that Kosovo would possess a full array of competences securing self-government, and that there would be a negotiating process with a view to achieving a final settlement. The contrary argument implies that at the very moment it intervened decisively in the affairs of Kosovo – in the aftermath of the extensive human rights abuses and the displacement and expulsion of large parts of the Kosovo population²⁹ – the Security Council gave Serbia an effective veto over the outcome of the negotiations it mandated. The suggestion gains no support in the language of the resolution and lacks credibility.

18. As has already been noted, in describing the process of reconfiguration that UNMIK is currently undergoing to reflect the developments in Kosovo, the Secretary-General’s most recent report states that “UNMIK has moved forward with its

²⁵ See e.g. Romania WS, para. 57.

²⁶ See, e.g., Serbia WS, paras. 873-912; Argentina WS, paras. 7, 62-4, 116; Spain WS, paras. 59-72; Brazil WS, p. 2; Libya WS, paras. 3-4; Slovak Republic WS, para. 25.

²⁷ United Kingdom WS, paras. 3.7, 6.11-6.15.

²⁸ Compare e.g. S/RES/541 (1983) on the situation in Cyprus in which the Security Council called upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus. A similar point is made by Norway WS, para. 11.

²⁹ United Kingdom WS, paras. 2.25-2.39.

reconfiguration within *the status-neutral framework of resolution 1244 (1999)*”³⁰ (emphasis added). This accurately describes Resolution 1244 (1999). It is indeed “status-neutral”; i.e. it does not contain any guarantee of the territorial integrity of Serbia.

19. Serbia seeks to contrast Resolution 1244 (1999) with other Security Council resolutions. It is said that because Security Council resolutions concerning Namibia and East Timor “explicitly acknowledged” a right “to strive for independence”, while Resolution 1244 (1999) did not, Kosovo did not have the right to adopt a declaration of independence.³¹ Serbia also compares Kosovo to the Eastern Slavonia region of Croatia and argues that the outcome in Eastern Slavonia—retention of the territory by Croatia under minority rights guarantees—is the correct precedent for Kosovo in light of alleged similarities between Resolution 1244 (1999) and the Security Council resolutions that addressed the situation of Eastern Slavonia.³²

20. It is accurate that in the cases of Namibia and East Timor the Security Council expressly called for the implementation of popular processes to establish the independence of those territories, if their people chose that result.³³ But, by virtue of the acknowledged principle of colonial self-determination, both territories already possessed a presumptive right to establish themselves as independent States. This stemmed from their continuing status, respectively, as a Mandated Territory³⁴ and a Non-Self-Governing Territory under Chapter XI of the Charter.³⁵ It was on the implementation of self-determination that the Security Council naturally focused in both resolutions. The peoples of a colonial territory have a right to elect their final

³⁰ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (10 June 2009 advance copy), S/2009/300, para. 40.

³¹ Serbia WS, paras. 785-91.

³² Serbia WS, paras. 792-3.

³³ Serbia WS, paras. 785-91, referring to S/RES/435 (1978), 29 Sept. 1978; and 632 (1989), 16 Feb. 1989 with respect to Namibia; and S/RES/1246 (1999), 11 June 1999 with respect to East Timor.

³⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971, p. 16, at p. 52, para. 52. See also *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections), Sep. Op. Judge Bustamante, ICJ Rep 1962, p. 319, at p. 353.

³⁵ *Portugal v Australia (Case concerning East Timor)*, ICJ Rep 1995, p. 90, at p. 102, para. 29.

status as part of the law of the Charter as developed through General Assembly resolutions on decolonisation. It should come as no surprise that the Security Council would adopt another set of terms with respect to Kosovo, a territory having a different relation to an impugned territorial sovereign.

21. The attempt forcibly to separate the Serbian ethnic inhabitants of Eastern Slavonia from Croatia led to a Security Council response and, ultimately, a United Nations Transitional Administration for the region (UNTAES). The Security Council resolutions relating to Eastern Slavonia took a markedly different approach to that adopted with respect to Kosovo. In particular, in its resolutions 1037 (1996) and 1079 (1996) the Security Council was explicit that “the territories of Eastern Slavonia, Baranja and Western Sirmium are integral parts of the Republic of Croatia”.³⁶ This is consistent with the fact that the Security Council was seeking to achieve “the peaceful return of the territories to the control of the Republic of Croatia”.³⁷ Resolution 1244 (1999) was in quite different terms and had quite different purposes—first, the removal of the governmental authority of the preceding State from the territory; secondly, a negotiation on future status in which that State had no veto.³⁸

22. Had the Security Council wished to prohibit a declaration of independence it would have done so in clear terms. In particular, when the Security Council seeks to regulate the conduct of non-State entities, its language is explicit as to the actor(s) addressed and explicit as to the substantive constraints it intends to impose.³⁹

³⁶ S/RES/1037 (1996), 15 Jan. 1996, preambular para. 2; S/RES/1079 (1996), 15 Nov. 1996, preambular para. 2.

³⁷ S/RES/1079 (1996), 15 Nov. 1996, preambular para. 3.

³⁸ The Basic Agreement on Eastern Slavonia, Baranja and Western Sirmium of 12 November 1995 (A/50/757—S/1995/951, Annex) did not provide for a separate government of the people of the region. This, too, is in sharp contrast to S/RES/1244 (1999), in which the Security Council, by express terms, set the groundwork for interim institutions of self-government to administer Kosovo as a whole—i.e., as a distinct territory to be removed from the effective administration of Serbia.

³⁹ The Security Council has been specific when addressing recommendations to non-State entities. In S/RES/1865 (2009), for example, the Security Council urged “the political parties [in Côte d’Ivoire] to comply fully with the Code of Good Conduct for elections which they signed under the auspices of the Secretary-General, and in particular [urged] the Ivorian authorities to allow equitable access to public media.” S/RES/1865 (2009), 27 Jan. 2009, para. 10.

23. Resolution (1999) contains language establishing obligations with respect to the functions of the international security presence (para.9) and with respect to the international civil presence (para.11). For example, the security presence is to “[e]nsur[e] public safety and order ...” (para.9(d)); the civil presence is to “[p]rotect[] and promot[e] human rights” (para.11(j)). Resolution 1244 (1999) subjects none of the institutions to which it refers to an obligation not to adopt a particular final disposition with respect to the status of Kosovo. Nor does Resolution 1244 (1999) contain any general prohibition concerning the formal statements such institutions might adopt or the claims they might espouse.⁴⁰

2. The contention that the Declaration of Independence was *ultra vires* Resolution 1244 (1999)

24. The key point (already made in paras.1.12 and 4.5 of the United Kingdom’s Written Statement) is that the Declaration of Independence was not an act of the PISG acting as such. It was a *representative* act, adopted by a gathering that reflected a unique constitutional moment in the history of Kosovo in which those elected by the people of Kosovo – including but not limited to the Members of the Assembly – expressed the will of those they represented.⁴¹

25. The Declaration of 17 February 2008 is clear in its terms that it is not an act of the PISG under the interim arrangements for Kosovo but, rather, an expression of “the will of [the] people...”⁴² In this respect, it may be recalled that the Rambouillet Accords, to which Resolution 1244 (1999) makes express reference at paragraph 11(e), invoked the “will of the people” as one of the bases of the final settlement for Kosovo.⁴³

⁴⁰ See to similar effect Austria WS, para. 23.

⁴¹ A number of States in their Written Statements concur in this observation. See, also, e.g., Albania WS, paras. 1, 103-105; Austria WS, para. 16; Estonia WS, pp. 3-4; Federal Republic of Germany WS, pp. 6-7; Kosovo Written Contribution, paras. 6.01 *ff*; Norway WS, paras. 13-15; Poland WS, para. 3.41.

⁴² Declaration of Independence, para. 1, Transcript of the Special Plenary Session of the Kosovo Assembly, 17 February 2008, quoted United Kingdom WS, para. 4.3.

⁴³ Chapter 8, Article I(3), provided in relevant part: “Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement

26. The Declaration of 17 February 2008 could not be more different in content, and also in its context, to the resolution of the Assembly of Kosovo adopted on 23 May 2002 “on the protection of the territorial integrity of Kosovo”. That 2002 resolution was declared null and void by the SRSG and also by the Security Council.⁴⁴ Those decisions can only be seen as a response to a particular PISG act reached at a very early stage in the development of Kosovo self-government. The Kosovo Assembly’s resolution of 23 May 2002 was adopted at a time when (1) the basic institutional infrastructure under the constitutional framework had only begin to be established (competence among key ministries had yet to be allocated; local organs of self-government were nascent or non-existent; municipalities were in only the early stages of delineation),⁴⁵ and (2) well before the final status negotiations had commenced in earnest.

27. To seek to apply the SRSG’s findings of May 2002 to the position more than six years later ignores a series of factors, including the consolidation and entrenchment of Kosovo’s own representative institutions and, most particularly, the supervening – and unsuccessful – negotiation process. By contrast with the Kosovo Assembly resolution of 23 May 2002, the SRSG did not act in any way to seek to invalidate the Declaration of Independence in 2008 – despite being called on by Serbia to do so. Nor was the Declaration of Independence condemned by the Security Council (as the Assembly resolution of 23 May 2002 had been). The Court is being called on to do what two United Nations organs – competent for Kosovo and fully aware of the facts – expressly declined to do.

for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act ...”

⁴⁴ See Report of the Secretary-General, 17 July 2002, S/2002/779, para. 8; also Statement by the President of the Security Council, 24 May 2002, S/PRST/2002/16. It was the view of the Security Council at that time that the main task of the PISG was to “focus their attention on... urgent matters” and achieve “[c]oncrete progress... to improve the life of the people.”

⁴⁵ In his report of 17 July 2002, the Secretary-General noted “the inevitable jostling for more responsibilities” by the PISG. S/2002/779, para. 9.

28. The short answer to the contention that “[t]he United Nations has no legal power to remove or curtail the sovereignty of any State over its territory...”⁴⁶ is likewise that the Declaration of Independence was an act of the representative authorities of Kosovo. It was not the act of a delegate of UNMIK exercising a subordinate form of international authority. Any issue as to the legal powers of the Security Council is thus irrelevant to the question before the Court.

29. Even if one were to accept, *arguendo*, that the Declaration was an act of the PISG, the faulty assumption underlying the *ultra vires* argument⁴⁷ is that Resolution 1244 (1999) exhaustively defined and limited the powers of the PISG. For example, Serbia asserts that the PISG had no “competences related to the international legal status of Kosovo”⁴⁸ but it does not identify any specific limiting clause in Resolution 1244 (1999) itself that withheld such competences from Kosovo.⁴⁹ The parameters of the powers envisaged for the PISG under Resolution 1244 (1999) were wide, and they were open to evolution and development. They did in fact evolve and develop.⁵⁰

30. Further, it is to States that the Security Council ordinarily addresses the obligations it establishes. When it addresses obligations to entities other than States, it does so explicitly. There is no indication in Resolution 1244 (1999) that the Security Council meant to establish an obligation binding on the internal organs of Kosovo prohibiting the adoption of a declaration of independence.

31. As Austria observes, Resolution 1244 (1999) envisaged that the PISG would assume more powers as time went on.⁵¹ Paragraph 10 of Resolution 1244 (1999) authorised the Secretary-General to establish an international civil presence which would provide “*transitional* administration” while “establishing and overseeing the development of provisional democratic self-governing institutions to ensure

⁴⁶ Cyprus WS, para. 100.

⁴⁷ See esp. Serbia WS, Chapter 8 (paras. 788 *ff*). See also Cyprus WS, paras. 91-105; Slovak Republic WS, paras. 20, 26-7; Romania WS, paras. 5, 16-7, 29-32, 58-61.

⁴⁸ Serbia WS, para. 874.

⁴⁹ See Serbia WS, paras. 732-49.

⁵⁰ United Kingdom WS, paras. 3.22-3.32.

⁵¹ Austria WS, paras. 17-19.

conditions for a peaceful and normal life for all inhabitants of Kosovo”. The implementation of the resolution in practice confirms that it established a framework for incrementally transferring powers from the international presences to Kosovo institutions.⁵²

32. The argument that the Declaration of Independence exceeded the competences of the PISG, and therefore violated international law, assumes that an act *ultra vires* the 2001 Constitutional Framework would be a violation of international law.⁵³ But the 2001 Constitutional Framework is a municipal instrument. Thus, for example, the question of whether any law adopted by the Assembly was incompatible with the 2001 Constitutional Framework would fall to be decided by a Special Chamber of the Supreme Court. In certain circumstances, the SRSG might determine that an act of the Assembly went outside the scope of the 2001 Constitutional Framework. However, in doing so, the SRSG might be applying the 2001 Constitutional Framework by reference to its terms or, separately, Resolution 1244 (1999). The 2001 Constitutional Framework would not, in such circumstances, be applied as an international instrument governed by international law, breach of which was cognisable as a breach of international law.

⁵² See United Kingdom WS, para. 6.27; United States WS, pp. 22-24. See also France WS, para. 2.24; Germany WS, p. 21; Poland WS, para. 5.2.3.2; Netherlands WS, para. 2.4; Japan WS, pp. 5, 7; Ireland WS, para. 33; Denmark WS, p. 8.

⁵³ See e.g. Cyprus WS, paras. 108-112.

SECTION THREE: DECLARATIONS OF INDEPENDENCE IN INTERNATIONAL LAW

1. International law does not prohibit declarations of independence

33. The Court is asked to determine whether the Declaration of Independence of 17 February 2008 is in accordance with international law. But international law (leaving aside special cases, such as aggression and apartheid, which are not relevant here) does not regulate declarations of independence as such.⁵⁴ As the United Kingdom said in its Written Statement, it would be a complete and sufficient answer to the question posed for the Court to state that international law does not address the legality of declarations of independence *per se* and that, accordingly, the Declaration of Independence by Kosovo is not incompatible with international law.⁵⁵ This is a position supported by considerable authority, including by experts furnishing statements on opposite sides of particular sovereignty questions.⁵⁶

34. States which would have the Court answer the General Assembly's question in the negative have presented the question as one concerning the *effects* of the Declaration of Independence. They thus refer, *inter alia*, to the criteria for establishing a new State⁵⁷ and the future configuration of the international presences in Kosovo.⁵⁸ But – as shown in Section One above – these matters do not come within the scope of the Request.

35. To the extent that they address the specific issue which the Court is asked to decide, these States have adopted conclusory positions as to the lawfulness of

⁵⁴ See, e.g., Albania WS, paras. 41-47; Austria WS, paras. 23-26; Czech Republic WS, pp. 6-7; Denmark WS, pp. 3-6; Estonia WS, p. 4; Federal Republic of Germany WS, pp. 8, 27-32; France WS, paras. 2.2-2.15; Ireland WS, paras. 17-21; Japan WS, pp. 2-3; Kosovo Written Contribution, paras. 8.02 *ff.*, 8.20; Luxembourg WS, paras. 15-17; Netherlands WS, para. 3.22; Norway WS, para. 10; Poland WS, paras. 2.2-2.3; Switzerland WS, paras. 25-30; USA WS, pp. 50-60.

⁵⁵ United Kingdom WS, para. 6.4.

⁵⁶ See, e.g., summary of expert views in *Reference re Secession of Quebec*, Federal Republic of Germany WS, pp. 27-29.

⁵⁷ See, e.g., Serbia WS, chapter 10; Argentina WS, paras. 47-53; Cyprus WS, paras. 173-83; Russia WS, para. 52; Spain WS, para. 17.

⁵⁸ See, e.g., Cyprus WS, paras 11, 16, 63; Argentina WS, paras 30, 33-5.

declarations of independence. But they have furnished no evidence of a general international law prohibition. As Denmark observes, “[i]t is for those maintaining that the declaration is unlawful to show the existence of such a prohibitive rule.”⁵⁹ This they have not done.⁶⁰

36. The following points should be made:

- State practice is long-standing and consistent in the matter of declarations of independence: States have long acted on the basis that a declaration of independence is a fact not governed by international law.⁶¹ To find a general international law prohibition against such declarations would cast doubt upon the processes by which many modern States established their independence. Predecessor States will no doubt take the view that such declarations breach their own law; but international law has never contained such a prohibition.

- Declarations of independence have been associated with the creation of a significant number of the current Member States of the United Nations. The break-up of several empires after the First World War entailed over a dozen declarations of independence, not all of which led to the consolidation of new States in the inter-war period. In the territory of the former Soviet Union in the early 1990s there were eleven declarations of independence (not counting declarations of sovereignty, autonomy, and independence by territorial units beneath the level of the former Union Republics). In the territory of the former SFRY since 1989 there have been at least eleven declarations of independence.⁶² They were not all effective, immediately or

⁵⁹ Denmark WS, para. 2.2. See also Estonia WS, p. 4; Federal Republic of Germany WS, p. 8.

⁶⁰ As to the variable, and potentially contested, effects of declarations of independence, see Switzerland WS, para. 27.

⁶¹ Albania notes the practice concerning the American declarations: Albania WS, para. 44. cf France WS, paras. 1.4-1.5 (arguing that the Request as adopted poses no legal question).

⁶² Counting the declarations, ‘suspensions,’ and subsequent confirmations of independence by Croatia and Slovenia, about which see Badinter Opinion No. 1, 20 November 1991, (1993) 92 ILR 162, 165; and the declarations by the Serb entities in Croatia and Bosnia.

at all: some were suspended or withdrawn; some went unrecognised. But none of these were treated by competent United Nations organs as *per se* unlawful under international law.⁶³

- There *are* certain cases where declarations of independence have been treated as internationally unlawful, i.e. where wider issues have been in play (e.g. Katanga, Southern Rhodesia⁶⁴).
- Whether declarations of independence achieve the desired result of independence is another matter. It is a matter not determined by the mere fact of the claim – the “simple expression of a wish”⁶⁵ – but by the response given by the international community through the medium, in particular, of recognition and the participation of the entity in interstate relations, including intergovernmental organisations.

37. A declaration of independence is a claim only, and as such (and leaving aside special cases not relevant here – e.g. external aggression, apartheid) it is not prohibited under general international law and is not unlawful *per se*. Switzerland observes that “[i]l serait théoriquement possible, par exemple, qu’une déclaration d’indépendance contienne une incitation au génocide, et enfreigne ainsi le droit international à caractère impérative (*jus cogens*).”⁶⁶ The Declaration of Independence of 17 February 2008 contains nothing of the sort: on the contrary it reiterates that Kosovo is committed, *inter alia*, to “the highest European standards on human rights and good governance,” “fundamental freedoms of all [its] citizens,” and “international

⁶³ Nor were they so treated by the Badinter Commission, which was asked specifically to examine them from a legal point of view: see UK WS, para. 2.9; (1993) 92 ILR 162-211; (1994) 96 ILR 719-737.

⁶⁴ See United Kingdom WS, paras. 5.27-5.28, 5.36-5.39.

⁶⁵ Report of the International Commission of Jurists (Larnaude, Huber, Struycken), League of Nations Official Journal Spec. Supp. No. 3 (October 1920), pp. 5-6.

⁶⁶ Switzerland WS, para. 29.

peace and stability”.⁶⁷ Declarations in such terms are not prohibited under general international law.

38. On the rare occasions where the Security Council has impugned a declaration of independence, the Security Council’s determination has been specific, and it reached the determination in respect of an attempted secession which entailed serious breaches of fundamental international law rules, e.g. the prohibition against racial discrimination and apartheid.⁶⁸ The developments leading to and including the Declaration of Independence on 17 February 2008 in Kosovo did not involve a threat or use of force; they were peaceful political measures.

2. The principle of territorial integrity does not exclude declarations of independence adopted by the inhabitants of the State

39. The principle of territorial integrity is specifically recognised in the United Nations Charter; but it is not expressed to preclude the internal fragmentation of States. Article 2, paragraph 4 of the United Nations Charter stipulates that Member States shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. Territorial integrity in modern international law relates directly to the prohibition against use or threat of force in international relations, and in particular between States.

40. A number of States in their Written Statements note the centrality of the principle of territorial integrity in modern international law.⁶⁹ In particular, a number of States have noted the general preference for the preservation of the territorial

⁶⁷ Declaration of Independence of 17 February 2008, reprinted in Kosovo Written Contribution, Annex 2, pp. 236-7.

⁶⁸ See in respect of Katanga, Southern Rhodesia, the South Africa Bantustans, and the “Turkish Republic of Northern Cyprus”, United Kingdom WS, paras. 5.35-5.50. Thus, for example, the Security Council in resolution 541 (1983) stated that it considered the declaration of independence to be “legally invalid” and called for its withdrawal. It likewise called upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus. See also resolution 550 (1984).

⁶⁹ Cyprus WS, paras. 82 *ff*; esp. para. 83; Argentina WS, paras. 69-82; Spain WS, paras. 20-7; Iran WS, paras. 2.1-2.2; Azerbaijan WS, para. 23; Egypt WS, paras. 26-51; Romania WS, paras. 63 *ff*.

integrity of States. China has referred to remarks of Secretary-General U Thant,⁷⁰ but these need to be seen in context. The Secretary-General was asked, “Isn’t there a deep contradiction between the people’s right to self-determination—a right recognized by the United Nations—and the attitude of the Federal Government of Nigeria towards Biafra?”⁷¹ He replied:

“when a Member State is admitted to the United Nations, there is the implied acceptance by the entire membership of the principle of territorial integrity, independence, and sovereignty of that particular State.”⁷²

41. The Secretary-General recalled the millions spent by the UN in the Congo “primarily to prevent the secession of Katanga from the Congo”⁷³ where external intervention was used against the territorial integrity of a Member State.⁷⁴ He stressed that the United Nations gave express assurances and materially supported the territorial integrity of the Congo. The aim of the United Nations engagement in Kosovo from 1999, by contrast, was to protect the Kosovo population *against* the FRY, and to assure the establishment and entrenchment of an autonomous government in Kosovo in the aftermath of large-scale abuses, criminal in character.⁷⁵

42. International law contains no rule (outside the colonial context) giving secession precedence over preservation of the existing boundaries of States. But territorial integrity is not a guarantee against internal division, and separation has continued to occur since 1945, as it did in earlier times. The involuntary break-up of the SFRY is a recent example: Slovenia seceded and it was not suggested that in doing so it committed an internationally unlawful act. Other components of the former SFRY declared their independence (including Kosovo). Whether those declarations were recognised or not, they were not treated as internationally unlawful.

⁷⁰ China WS, pp. 6-7, quoting UN Monthly Chronicle, UN Office of Public Information, Vol. VII, No. 2, Feb. 1970, p. 36 (Press Conference of the Secretary-General at Dakar, Senegal, 4 January 1970).

⁷¹ Ibid, p. 35.

⁷² Ibid, p. 36.

⁷³ Ibid, p.36.

⁷⁴ Ibid, p. 39 (Press Conference of the Secretary-General at Accra, Ghana, 9 January 1970).

⁷⁵ S/RES/1244 (1999), paras. 1, 3, 10.

43. There is no evidence of a change in international law in this respect as a result of the adoption of the United Nations Charter in 1945. The concern of the Charter with respect to territorial integrity was to protect States against threat or use of force in international relations. The principal treaties on the UN Charter have not identified in Article 2, paragraph 4, any regulation of the conduct of public organs internally.⁷⁶

44. Thus to observe that “[i]nternational law has always favoured the territorial integrity of states and, correspondingly, the government of a state was entitled to oppose the unilateral secession of part of a state by all lawful means”⁷⁷ is not the same as saying that international law contains a rule prohibiting secession, a rule enforceable against persons and institutions operating within the territory of the State concerned.⁷⁸ It is to say that international law recognizes the right of existing governments to take steps, within the law, to maintain territorial integrity. But separation – though it is an act not preferred by international law and one which will be subject to considerable scrutiny – is not prohibited or excluded by international law. Nor is this suggested by Professor Crawford, on whom Cyprus (among others) relies. As Professor Crawford has noted: “international law has extended its protection of the territorial integrity of States at least so far as external use of force and intervention are concerned – though not to the point of providing a guarantee”.⁷⁹

⁷⁶ See, e.g., Leland M. Goodrich & Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd revised edn, London: Stevens & Sons Ltd, 1949), pp. 102-107; Hans Kelsen, *The Law of the United Nations; a critical analysis of its fundamental problems* (New York: Praeger, 1950, reprinted Union, New Jersey: Lawbook Exchange, 2000), pp. 87 ff, 99 ff, 106 ff, 527 ff, 726 ff, 769 ff, 792; Bruno Simma *et al*, eds., *The Charter of the United Nations: a commentary* 2nd edn (Oxford: Oxford University Press, 2002), pp. 112-136; Jean-Pierre Cot, Alain Pellet & Mathias Forteau, eds., *La Charte des Nations Unies. Commentaire article par article* (3rd edn, Paris: Economica, 2005), pp. 437-64. See also Switzerland WS, para. 55.

⁷⁷ Romania WS, para. 64, quoting Crawford, Report in *Quebec Reference*, para. 8.

⁷⁸ Three States have posited that international law regulates non-State parties within a State, so as to prohibit them from seeking to disrupt the territorial integrity of the State: Serbia WS, paras. 440-76; Iran WS, paras. 3.1-3.6; Egypt WS, paras. 46-50. This is a minority position and no evidence has been adduced to support it.

⁷⁹ See J. Crawford, *The Creation of States in International Law* (2nd edn, Oxford, 2006), p. 384. Cf. Cyprus WS, paras. 150-152.

He concludes that “[s]ecession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.”⁸⁰

45. States that would have the Court answer the General Assembly’s Request in the negative have noted the reasons for taking a highly circumspect view about the emergence of new States,⁸¹ and have recalled that international law does not treat secession as a preferred remedy to internal constitutional crises.⁸² The emergence of a new State against the wishes of the predecessor is not lightly accepted. But no rule of general international law prohibiting secession has been identified. The United Nations itself, while never having adopted a “principle of secession”, does not reject entities that have established themselves as States (including by means of secession) and have been accepted and recognised as such. Any principle of prohibition would re-write the membership list of the United Nations.

⁸⁰ See J. Crawford, *The Creation of States in International Law* (2nd edn, Oxford, 2006), pp. 384, 390, citing H. Lauterpacht, *Recognition in International Law* (Cambridge, 1947) p. 8.

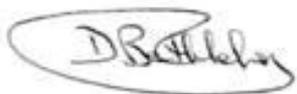
⁸¹ Russia WS, para. 13 n. 8; Cyprus WS, paras. 2, 79; Serbia WS, para. 526; Argentina WS, para. 60; Iran WS, para. 5.2; Bolivia WS, p 1.

⁸² Serbia WS, paras. 589-649; Cyprus WS, paras. 140-8; Romania WS, paras. 138-59.

CONCLUSION

46. For the reasons set out in its Written Statement of 17 April 2008, and further elaborated in these Written Comments, the United Kingdom submits as follows:

- (a) International law does not address the legality of declarations of independence *per se*. Accordingly, the Declaration of Independence by Kosovo is not incompatible with international law.
- (b) In any event, the Declaration of Independence by Kosovo was in accordance with international law.
- (c) In the event that the Court concludes that the Declaration of Independence was not – *quod non* – in accordance with international law at the time it was made, developments since that point have crystallized Kosovo's independence, resolving any doubts as to the position and curing any deficiency that may have existed.



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15 July 2009