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CR 2009/30

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Tuesday 8 December 2009, at 10 a.m., at the Peace Palace,

President Owada, presiding,

***on the* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le mardi 8 décembre 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***sur la* Conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Shi
		Koroma
		Al-Khasawneh
		Buergenthal
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Shi
Koroma
Al-Khasawneh
Buergenthal
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges

M. Couvreur, greffier

The Kingdom of Spain is represented by:

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as Head of Delegation and Advocate;

H.E. Mr. Juan Pratt y Coll, Ambassador of Spain to the Kingdom of the Netherlands;

Ms Araceli Mangas Martín, Professor of International Law, University of Salamanca,

Mr. Carlos Jiménez Piernas, Professor of International Law, University of Alcalá de Henares,

Ms Paz Andrés Saénz de Santa María, Professor of International Law, University of Oviedo,

Mr. Jorge Cardona Llorens, Professor of International Law, University of Valencia,

as Counsel.

The United States of America is represented by:

Mr. Harold Hongju Koh, Legal Adviser, U.S. Department of State,

as Head of Delegation and Advocate;

H.E. Madam Fay Hartog Levin, Ambassador of the United States of America to the Kingdom of the Netherlands;

Mr. Todd F. Buchwald, Assistant Legal Adviser for United Nations Affairs, U.S. Department of State,

Mr. Peter Olson, Assistant Legal Adviser for European Affairs, U.S. Department of State,

Mr. John D. Daley, Attorney-Adviser, U.S. Department of State,

Ms Kristen Eichensehr, Special Assistant to the Legal Adviser, U.S. Department of State,

Ms Karen K. Johnson, Deputy Legal Counsellor, U.S. Embassy in the Kingdom of the Netherlands,

Mr. John J. Kim, Legal Counsellor, U.S. Embassy in the Kingdom of the Netherlands,

Ms Emily Kimball, Attorney-Adviser, U.S. Department of State,

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For the complete list of delegations of all participants, please refer to CR 2009/29.

Le Royaume d'Espagne est représenté par :

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comme chef de délégation et avocat ;

S. Exc. M. Juan Prat y Coll, ambassadeur du Royaume d'Espagne auprès du Royaume des Pays-Bas ;

Mme Araceli Mangas Martín, professeur de droit international à l'Université de Salamanque,

M. Carlos Jiménez Piernas, professeur de droit international à l'Université d'Alcalá de Henares,

Mme Paz Andrés Saénz de Santa María, professeur de droit international à l'Université d'Oviedo,

M. Jorge Cardona Llorens, professeur de droit international à l'Université de Valence,

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Les Etats-Unis d'Amérique sont représentés par :

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comme chef de délégation et avocat ;

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M. Todd F. Buchwald, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis d'Amérique,

M. Peter Olson, conseiller juridique adjoint chargé des questions européennes au département d'Etat des Etats-Unis d'Amérique,

M. John D. Daley, avocat-conseiller au département d'Etat des Etats-Unis d'Amérique,

Mme Kristen Eichensehr, assistante spéciale du conseiller juridique au département d'Etat des Etats-Unis d'Amérique,

Mme Karen K. Johnson, conseiller juridique adjoint à l'ambassade des Etats-Unis d'Amérique au Royaume des Pays-Bas,

M. John J. Kim, conseiller juridique à l'ambassade des Etats-Unis d'Amérique au Royaume des Pays-Bas,

Mme Emily Kimball, avocat-conseiller au département d'Etat des Etats-Unis d'Amérique,

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Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2009/29.

Ms Anna M. Mansfield, Deputy Legal Adviser, U.S. Mission to the United Nations and other International Organizations, Geneva,

Mr. Phillip M. Spector, Senior Adviser to the Legal Adviser, U.S. Department of State,

Mr. Jeremy M. Weinberg, Attorney-Adviser, U.S. Department of State,

as Counsel.

The Russian Federation is represented by:

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as Head of Delegation;

Mr. Maxim Musikhin, First Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands;

Mr. Ivan Volodin, Acting Head of Section, Legal Department, Ministry of Foreign Affairs;

Mr. Konstantin Bersenev, First Secretary, Fourth European Department, Ministry of Foreign Affairs;

Ms Anastasia Tezikova, Third Secretary, Legal Department, Ministry of Foreign Affairs;

Ms Ksenia Gal, Assistant attaché, Legal Department, Ministry of Foreign Affairs.

The Republic of Finland is represented by:

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Professor Martti Koskenniemi, University of Helsinki;

H.E. Mr. Klaus Korhonen, Ambassador of Finland to the Kingdom of the Netherlands;

Mr. Kai Sauer, Director, Unit for U.N. and General Global Affairs, Political Department, Ministry of Foreign Affairs;

Ms Sari Mäkelä, Legal Counsellor, Unit for Public International Law, Legal Service, Ministry of Foreign Affairs;

Ms Miia Aro-Sanchez, First Secretary, Embassy of Finland in the Kingdom of the Netherlands.

Mme Anna M. Mansfield, conseiller juridique adjoint à la mission des Etats-Unis d'Amérique auprès de l'Organisation des Nations Unies et dans d'autres organisations internationales à Genève,

M. Phillip M. Spector, conseiller principal du conseiller juridique du département d'Etat des Etats-Unis d'Amérique,

M. Jeremy M. Weinberg, avocat-conseiller au département d'Etat des Etats-Unis d'Amérique,

comme conseils.

La Fédération de Russie est représentée par :

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comme chef de délégation ;

M. Maxim Musikhin, premier secrétaire à l'ambassade de la Fédération de Russie au Royaume des Pays-Bas ;

Mme Ivan Volodin, chef de section en exercice au département juridique du ministère des affaires étrangères ;

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Mme Ksenia Gal, attachée adjointe au département juridique du ministère des affaires étrangères.

La République de Finlande est représentée par :

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S. Exc. M. Klaus Korhonen, ambassadeur de Finlande auprès du Royaume des Pays-Bas ;

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Mme Sari Mäkelä, conseiller juridique à l'unité de droit international public au service des affaires juridiques du ministère des affaires étrangères ;

Mme Miia Aro-Sanchez, premier secrétaire à l'ambassade de Finlande au Royaume des Pays-Bas.

The PRESIDENT : Please be seated. The sitting is open. I note that Judge Abraham, for reasons explained to me, is unable to attend the oral proceedings today. The Court meets this morning to hear the following participants on the questions submitted to the Court: Spain, the United States of America, the Russian Federation and Finland. Each delegation is given 45 minutes to make its oral statement. I shall now give the floor to Professor Concepción Escobar Hernández.

Mme ESCOBAR HERNÁNDEZ :

1. Monsieur le président, Messieurs les juges, c'est pour moi un privilège et un grand honneur de m'adresser aujourd'hui à la Cour internationale de Justice, en représentation du Royaume d'Espagne, dans une procédure consultative aussi importante qui touche les principes fondamentaux du droit international contemporain.

2. L'Espagne est très fortement attachée au respect du droit comme ligne directrice de sa politique. Par conséquent, l'Espagne n'a aucun doute sur le rôle central que le droit doit jouer dans les relations internationales et dans ce cadre, mon pays a toujours eu une pleine confiance en cette Cour en sa qualité d'organe judiciaire principal des Nations Unies qui a la responsabilité de dire le droit et de se développer comme l'organe qui assure, en dernière instance, la prééminence du droit sur le plan international.

3. C'est à partir de cette perspective que le Gouvernement de l'Espagne a décidé de participer à cette procédure, en déposant un exposé écrit le 14 avril et des observations écrites le 17 juillet. Et c'est dans le même esprit de pleine coopération avec la Cour que nous prenons aujourd'hui la parole aux audiences publiques, pour vous présenter un exposé oral qui est la suite des arguments et commentaires que mon pays a déjà présentés par écrit, et qui ne peut être compris qu'en relation avec ceux-là.

4. C'est à cette occasion, que je ferai référence à un groupe de sujets choisis qui, à notre avis, présentent une importance particulière dans le cadre de cette procédure consultative : premièrement, l'exercice de sa compétence par la Cour ; deuxièmement, la portée de la question posée par l'Assemblée générale ; troisièmement, la résolution 1244 (1999) comme la réponse de la communauté internationale à la crise du Kosovo ; et quatrièmement, la conformité au droit

international de la déclaration unilatérale d'indépendance, à la lumière du régime international pour le Kosovo établi par le Conseil de sécurité.

Après l'analyse de ces quatre sujets, je me référerai aussi à trois autres questions qui ont été avancées par certains participants à la procédure : premièrement, la relation parmi la déclaration unilatérale d'indépendance, le principe de l'autodétermination des peuples et le soi-disant concept de la «sécession comme remède» ; deuxièmement, la valeur du silence du Conseil de sécurité et d'autres organes des Nations Unies ; et troisièmement, la prétendue neutralité du droit international à l'égard de la déclaration unilatérale d'indépendance.

I. LA COMPÉTENCE DE LA COUR

5. Monsieur le président, la participation de l'Espagne à la présente procédure se fait sur la base de la reconnaissance de la compétence qui appartient à la Cour dans le cas d'espèce.

6. En effet, comme la Cour l'a dit elle-même à plusieurs reprises, la Cour peut «donner un avis consultatif sur toute question juridique, abstraite ou non» (*Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004*, *C.I.J. Recueil 2004*, p. 154, par. 40). En ce faisant, la Cour exerce sa fonction de «déterminer les principes et règles existants, les interpréter et les appliquer … apportant ainsi à la question posée une réponse fondée en droit» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 134, par. 13).

7. A cet égard, je voudrais souligner le fait que nous n'avons aucun doute sur la nature juridique de la question qui a été posée par l'Assemblée générale. Il s'agit d'une question étroitement liée à l'interprétation de normes et principes fondamentaux, ainsi qu'aux normes, non moins importantes dans le cas de figure, qui régissent le régime international pour le Kosovo établi par le Conseil de sécurité, y compris le processus visant à déterminer leur statut futur. La dimension juridique de ces éléments que je viens de mentionner ne peut être sous-estimée, et elle mérite que l'organe judiciaire principal des Nations Unies se prononce à son égard.

8. Bien que les éléments politiques sous-jacents à la question posée par l'Assemblée générale soient évidents, nous ne pouvons pourtant pas oublier que la Cour même a souligné que ceci «est, par la nature des choses, le cas de bon nombre de questions qui viennent à se poser dans la vie

internationale» (*Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 73, par. 16), mais cela «ne suffit pas à la priver de son caractère de «question juridique»» *(ibid.)*.

9. En outre, comme la Cour l'a également proclamé expressément, l'exercice de la compétence consultative «constitue [sa] participation à l'action de l'Organisation» et par conséquent, «en principe, elle ne devrait pas être refusée» (*Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004*, *C.I.J. Recueil 2004*, p. 156, par. 44) de donner un avis consultatif. De ce point de vue, nous ne croyons pas qu'il soit possible d'identifier dans le cas d'espèce, des «raisons décisives» qui pourraient justifier que la Cour renonce à l'exercice de cette compétence, en avançant des critères d'opportunité ou même l'inutilité éventuelle de l'avis qu'elle puisse émettre. Bien au contraire, les sujets qui sont à la base de la question de l'Assemblée générale font référence au noyau des principes du droit international ainsi qu'au système de maintien de la paix et de la sécurité internationales établi par la Charte des Nations Unies.

10. En conclusion, l'Espagne n'a aucun doute sur le fait que la Cour internationale de Justice a toute compétence pour donner un avis consultatif sur la question qui lui a été posée. Et, par conséquent, nous faisons confiance au fait que la Cour accomplira sa fonction essentielle de dire le droit en contribuant ainsi à assurer le respect de l'état de droit sur le plan international.

II. LA PORTÉE DE LA QUESTION : LE SENS DE LA DÉCLARATION UNILATÉRALE D'INDÉPENDANCE

11. En deuxième lieu, j'aimerais me pencher sur la portée de la question qui vous a été adressée par l'Assemblée générale. Un sujet central pour la présente procédure consultative, car il peut conditionner la portée de l'avis que la Cour donnera à son tour.

12. L'Assemblée générale a prié la Cour de dire si «la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo est … conforme au droit international»[1].

[1] A/RES/63/3.

13. Sur la base de cette question, certains participants à la procédure ont avancé leur interprétation de la question dans le sens que la Cour ne devra y répondre qu'en tenant compte de la déclaration unilatérale d'indépendance en soi-même considérée.

14. L'Espagne partage une telle interprétation pour autant que cette déclaration est le fait qui a motivé la requête de l'Assemblée générale et qui détermine la date critique dont la Cour doit tenir compte. Ni les actes adoptés par les institutions provisoires du Kosovo après la déclaration, ni les actes de reconnaissance adoptés par des Etats tiers, ni aucun autre acte produit par une organisation internationale quelconque à partir et sur la base de la déclaration unilatérale d'indépendance, n'ont, par conséquent, de valeur pour répondre à la question qui a été formulée par l'Assemblée générale.

15. Cela dit, si bien l'Espagne est d'accord avec la considération de la déclaration comme le centre de la requête, nous ne pouvons pas partager une interprétation purement formelle de la question posée par l'Assemblée générale car cette interprétation conduit à extraire la déclaration de son contexte d'origine.

16. Parce que face à cette question, est-il possible d'y répondre en tenant compte tout simplement de la déclaration unilatérale d'indépendance adoptée par les institutions provisoires du Kosovo comme s'il s'agissait d'un fait isolé ? Est-il possible d'y répondre sans tenir compte du but poursuivi par les auteurs de la déclaration et des effets qu'ils prétendent en déduire ? Et enfin, est-il possible d'y répondre sans tenir compte du fait que la déclaration a été adoptée dans le cadre d'une situation bien précise et dans un contexte donné ?

17. D'après l'Espagne, à toutes ces questions correspond une réponse négative. Nous considérons que la Cour ne sera en mesure de répondre de façon adéquate à la question posée par l'Assemblée générale que si elle tient compte de deux éléments : premièrement, le fait que l'objectif à atteindre par la déclaration unilatérale d'indépendance est de créer un nouvel Etat séparé de la Serbie ; et deuxièmement, le fait que cette déclaration a été adoptée au détriment d'un régime international pour le Kosovo établi par le Conseil de sécurité et régi par des normes et principes de droit international ainsi que par la Charte des Nations Unies.

18. Autrement dit, la réponse sur la conformité au droit international de la déclaration unilatérale d'indépendance doit se construire sur la base de toutes les normes applicables au Kosovo à la date critique, en particulier la Charte des Nations Unies et la résolution 1244 (1999) du

Conseil de sécurité ; ainsi que des principes fondamentaux du droit international. Car, on ne peut pas l'oublier, la question du Kosovo est soumise, comme toute autre situation aussi complexe et aussi particulière soit-elle, aux principes fondamentaux qui constituent la base du système juridique international.

III. LA RÉSOLUTION 1244 (1999) DU CONSEIL DE SÉCURITÉ : UNE RÉPONSE ÉQUILIBRÉE À LA CRISE DU KOSOVO

19. Sans doute, un de ces principes fondamentaux est celui qui tient à la souveraineté et à l'intégrité territoriale. Nonobstant, il n'est pas nécessaire à cette occasion de nous prononcer, d'un point de vue général, sur la portée et la signification dudit principe. Son analyse, ainsi que l'analyse de la pratique du Conseil de sécurité à son égard, a déjà été faite par l'Espagne dans son exposé écrit, auquel nous faisons référence[2].

20. Mais permettez-moi maintenant, Monsieur le président, de m'occuper de l'applicabilité de ce principe fondamental au cas du Kosovo sous une approche différente, à savoir : celle-ci de la signification de la résolution 1244 (1999) en tant que réponse de la communauté internationale organisée face à la crise du Kosovo.

21. En effet, aucun des Etats qui participent à la procédure consultative, ni même les représentants des auteurs de la déclaration unilatérale d'indépendance, n'ont opposé d'argument contre la validité ou l'applicabilité de ladite résolution au moment présent. Cependant, les conclusions que chacun des participants à la procédure ont tirées de cette reconnaissance de la validité de la résolution 1244 (1999) sont fort différentes. C'est pour cette raison qu'il nous semble nécessaire de faire brièvement référence à l'origine et à la signification de la résolution.

22. Suite à la suspension par le président Milošević du statut d'autonomie de la province du Kosovo en 1989, une grave crise a éclaté sur ce territoire. Les faits qui s'ensuivirent ont engendré une spirale de confrontation et de violence qui a débouché sur un conflit armé pouvant être qualifié de menace contre la paix et la sécurité internationales et au sein duquel se sont produites de graves violations du droit international, en particulier des droits de l'homme, du droit international humanitaire et des droits des minorités. Face à cette grave situation, la réponse du Conseil de

[2] Exposé écrit du Royaume d'Espagne, avril 2009, p. 15-26, par. 20-34.

sécurité a été l'adoption de la résolution 1244 (1999). Une résolution qui est approuvée par le Conseil de sécurité dans le cadre du chapitre VII de la Charte et «ayant à l'esprit les buts et principes consacrés par la Charte des Nations Unies, ainsi que [sa] responsabilité principale … pour le maintien de la paix et de la sécurité internationales»[3]. Par conséquent, la résolution 1244 (1999) a comme résultat de situer le Conseil de sécurité au centre du processus de décision et de surveillance à l'égard du Kosovo.

23. Il s'agit, en outre, d'une résolution dans laquelle le Conseil de sécurité a ébauché un sage équilibre entre tous les intérêts en présence. En effet, face à une grave situation où on peut identifier des circonstances extrêmes qui portent préjudice à des principes fondamentaux du droit international et à la protection même de l'individu, le Conseil de sécurité n'a pas opté pour l'indépendance du Kosovo, et n'a pas déclaré non plus que la République fédérale de Yougoslavie ait perdu, de par ces faits, la souveraineté sur ledit territoire. Bien au contraire, face à cette situation de crise extrême le Conseil de sécurité s'est limité à établir un régime international intérimaire pour le Kosovo, bien équilibré, qui tient compte autant du principe de souveraineté et de l'intégrité territoriale que du principe de l'autodétermination des peuples.

24. Un régime international, j'aimerais le rappeler, qui est intégré par deux éléments étroitement liés :

i) en premier lieu, l'établissement d'une «administration intérimaire dans le cadre de laquelle la population du Kosovo pourra jouir d'une autonomie substantielle au sein de la République fédérale de Yougoslavie»[4] ;

ii) en deuxième lieu, la mise en œuvre d'un «processus politique visant à déterminer le statut futur du Kosovo»[5].

25. Ces deux éléments (l'administration intérimaire et le processus politique) constituent les axes du régime international pour le Kosovo et ils doivent être interprétés ensemble, sur une base contextuelle. Et, surtout, ils doivent être interprétés à la lumière du but de la décision du Conseil de sécurité, à savoir : le régime international intérimaire pour le Kosovo prévoit une solution pour

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[3] Résolution 1244 (1999), préambule (par. 1).

[4] Résolution 1244 (1999), par. 10.

[5] Résolution 1244 (1999), par. 11 *e)*.

la crise de ce territoire, y compris la détermination du statut futur du Kosovo ; une solution qui doit se conformer aux normes de droit international applicables et aux procédures décidées par le Conseil de sécurité.

26. Les deux éléments que je viens de mentionner constituent une unité indissociable et, par conséquent, de l'avis de l'Espagne, il n'est pas possible de maintenir la validité et l'applicabilité de la résolution 1244 (1999), en tenant compte tout simplement d'un seul de ces éléments. La résolution 1244 (1999) étant en vigueur, il faut conclure que le régime d'administration intérimaire continue à être applicable et que le processus politique pour la détermination du statut futur du Kosovo est toujours ouvert. Du moins, bien entendu, tant que le Conseil de sécurité n'en décidera pas autrement.

IV. LA RESOLUTION 1244 (1999) ET LE REGIME INTERNATIONAL POUR LE KOSOVO COMME PARAMETRES DE LA CONFORMITE AU DROIT INTERNATIONAL DE LA DECLARATION UNILATERALE D'INDEPENDANCE

27. Compte tenu du rôle central que la résolution 1244 (1999) joue à l'égard du Kosovo, il est évident que le régime international qui y est établi doit être pris en considération pour toute réponse à donner à l'égard de la conformité au droit international de la déclaration. Autrement dit, la déclaration unilatérale d'indépendance ne peut être conforme au droit international que si elle est conforme aux règles qui régissent soit le régime d'administration intérimaire soit le processus politique pour la détermination du statut futur du Kosovo.

a) *L'incompatibilité de la déclaration unilatérale d'indépendance avec le régime d'administration internationale intérimaire*

28. En premier lieu, en nous situant dans le domaine du régime d'administration intérimaire, on ne peut pas nier que le Conseil de sécurité a très fortement limité les compétences que la Serbie peut exercer sur le Kosovo. Toutefois cette limitation ne peut pas se traduire par la suppression, voire la méconnaissance, du principe de souveraineté et d'intégrité territorial de la République fédérale de Yougoslavie. Au contraire, comme l'Espagne l'a souligné dans son exposé écrit, la reconnaissance de la souveraineté et de l'intégrité territoriale de la Serbie fait partie de la résolution 1244 (1999), en constituant un des axes de l'équilibre d'intérêts que le Conseil de

sécurité a garanti par ladite résolution[6]. Cette interprétation a été confirmée dans les présentes audiences publiques par les exposés de l'Argentine, du Brésil et de la Chine, trois Etats qui ont participé à la négociation et à l'adoption de la résolution 1244 (1999)[7].

29. En outre, bien que la résolution 1244 (1999) ait également établi un régime d'auto-administration exercé par les institutions provisoires du Kosovo, ledit régime ne porte pas préjudice à la souveraineté ni à l'intégrité territoriale de la Serbie. Ainsi, pour bien comprendre la relation entre ces deux éléments, il faut tenir compte que :

i) comme il est dit expressément dans la résolution 1244 (1999), l'auto-administration s'exerce «au sein» de la République fédérale de Yougoslavie[8] ;

ii) le régime d'auto-administration est un régime internationalisé, défini et soumis aux normes qui ont une nature nettement internationale, parmi lesquelles non seulement la Charte des Nations Unies et la résolution 1244 (1999), mais aussi le cadre constitutionnel pour le Kosovo (approuvé par un règlement MINUK) et tous les autres actes adoptés à partir de la résolution du Conseil de sécurité ;

iii) l'auto-administration est soumise à la surveillance des organes internationaux créés par application de la résolution 1244 (1999) ; et

iv) les institutions d'auto-administration du Kosovo, qui ont une nature provisoire, ont elles-mêmes été créées sur la base de la résolution 1244 (1999) dont elles tirent leur légitimité. Elles répondent, par conséquent, à la nature du pouvoir constitué et non du pouvoir constituant.

30. En plus, il faut remarquer que les institutions provisoires d'administration autonome du Kosovo exercent leurs compétences avec la portée et les limites prévues dans le régime international auquel elles doivent se soumettre. Par conséquent, les institutions provisoires d'administration autonome, bien qu'elles soient qualifiées comme des «acteurs non étatiques», sont obligées par tous les principes fondamentaux et par les normes internationales qui font partie de ce régime.

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[6] Exposé écrit du Royaume d'Espagne, avril 2009, p. 27-28, par. 36-37.

[7] CR 2009/26, p. 40, par. 12 (Argentine) ; CR 2009/28, p. 17, par. 11 (Brésil) ; CR 2009/29, p. 29, par. 3 (Chine).

[8] Résolution 1244 (1999), par. 10.

31. En conséquence, d'après cette première perspective, une déclaration unilatérale d'indépendance, dont le but est de créer un nouvel Etat à partir de la sécession de la Serbie, ne serait pas conforme au droit international dans la mesure où elle s'oppose au principe de souveraineté et d'intégrité territoriale proclamé et garanti par la résolution 1244 (1999).

32. Il convient d'ajouter que la déclaration unilatérale d'indépendance est, en outre, un acte *ultra vires*, incompatible avec le régime d'administration internationale provisoire du Kosovo, en tant qu'il va bien au-delà du statut et des compétences octroyées aux institutions provisoires d'auto-administration du Kosovo selon la résolution 1244 (1999).

b) *L'incompatibilité de la déclaration unilatérale d'indépendance avec le processus politique pour la détermination du statut futur du Kosovo*

33. Sur un autre plan, il faut analyser aussi la conformité au droit international de la déclaration à la lumière du processus politique pour la détermination du statut futur du Kosovo. Dans cette perspective, il faut tenir compte des éléments qui caractérisent le processus, à savoir :

i) il a pour finalité de mettre fin à la crise du Kosovo, celle-ci étant entendue en termes compréhensifs;

ii) il doit être mis en œuvre à l'aide de «négociations entre les parties en vue d'un règlement»[9]. Selon le sens ordinaire du terme, un règlement ne peut pas se faire par le seul vœux d'une des parties mais moyennant un accord ; et

iii) la solution finale à attendre n'est ni prédéterminée, ni soumise à une quelconque limite. A l'exception de la limite découlant du fait que toute solution devra être atteinte moyennant un accord des parties intéressées, avec l'accompagnement de la communauté internationale. Une limite que, comme nous l'avons déjà souligné dans notre exposé écrit, est sous-jacente à la résolution 1244 (1999) et à l'ensemble du système construit à partir de celle-ci, en étant présente de manière continue dans la pratique de mise en œuvre de la résolution[10].

34. Par conséquent, il faut conclure que, dans cette deuxième perspective, la déclaration unilatérale d'indépendance est aussi en contradiction avec le droit international applicable, dans la

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[9] Résolution 1244 (1999), annexe 2, par. 8.

[10] Exposé écrit du Royaume d'Espagne, avril 2009, p. 58-60, par. 76-79.

mesure où elle implique une infraction de la procédure établie par le Conseil de sécurité pour aboutir à un arrangement communément accepté par les parties sur le statut futur du Kosovo.

35. Encore faut-il souligner une autre raison de poids qui explique la non-conformité de la déclaration au droit international : par le biais de cette déclaration unilatérale une des parties prétend s'attribuer la compétence du Conseil de sécurité de décider en dernière instance sur la procédure applicable au règlement de la question du Kosovo. Un comportement qui, sans aucun doute, va à l'encontre des pouvoirs du Conseil de sécurité et de sa qualité d'organe principal des Nations Unies dans le domaine du maintien de la paix et de la sécurité internationales.

36. Après la présentation de nos arguments touchant le noyau de la requête, je me tourne maintenant, Monsieur le président, vers trois autres sujets qui nous semblent présenter un intérêt spécial à l'égard de la présente procédure.

V. LA DECLARATION UNILATERALE D'INDEPENDANCE, LE PRINCIPE DE L'AUTODETERMINATION DES PEUPLES ET LE SOI-DISANT CONCEPT DE LA «SECESSION COMME REMEDE»

37. Tout au long de cette procédure consultative ont été avancés des arguments relatifs à la relation existante entre la déclaration unilatérale d'indépendance, le principe de l'autodétermination des peuples et le concept de la soi-disant «sécession comme remède».

38. Il n'est pas dans notre intention bien sûr de nier le rôle central que le droit à l'autodétermination joue au sein du système juridique international. Ceci dit, on ne peut pas oublier non plus que ledit principe ne peut pas être compris en des termes absolus. Bien au contraire, rappelons que l'autodétermination des peuples comporte une double dimension, interne et extérieure. De plus, toute interprétation d'un principe fondamental de droit international doit suivre clairement des critères systématiques, comme le témoignent la résolution 2625 (XXV) de l'Assemblée générale[11] et la jurisprudence émanant de la Cour internationale de Justice[12].

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[11] Disposition générale 2, par. 1 de la résolution 2625 (XXV).

[12] *Sahara occidental, avis consultatif*, *C.I.J. Recueil 1975*, p. 33, par. 58 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986,* par. 202 et suiv., 212 et suiv. et 242 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif*, *C.I.J. Recueil 2004*, p. 171, par. 88-89 ; *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, *arrêt*, *C.I.J. Recueil 2005*, p. 168, par. 162-165.

39. A cet égard, j'aimerais rappeler ce que j'ai déjà dit auparavant : la résolution 1244 (1999) établit un équilibre entre les deux principes fondamentaux applicables. Et le régime d'auto-administration du Kosovo constitue une forme d'exercice du droit à l'autodétermination, cette fois-ci de nature interne et dans le cadre du régime international intérimaire établi par le Conseil de sécurité.

40. Ceci étant dit, nous ne voulons pas ignorer que, certains participants à la procédure ont cependant avancé la possibilité de l'exercice du droit à l'autodétermination en sa dimension extérieure, en appuyant leurs arguments sur le concept de «sécession comme remède». Ce faisant, ils ont identifié la grave situation de violations des droits de l'homme, des droits des minorités et du droit international humanitaire, comme étant la cause susceptible de justifier une déclaration d'indépendance.

41. Monsieur le président, Messieurs les juges, l'Espagne reconnaît le rôle central que la protection de l'individu doit jouer dans les relations internationales et dans le droit international de nos jours. Dans cette perspective, nous n'avons aucun doute sur le fait que le plein respect des droits de d'homme doit être pris en considération pour l'interprétation des normes et principes du droit international, même dans le domaine du maintien de la paix et de la sécurité internationales. Mais ceci étant dit, nous considérons que cet élément (le respect des droits de l'homme) a déjà été pris en considération par le Conseil de sécurité au moment de l'adoption de la résolution 1244 (1999) et de l'établissement du régime international intérimaire pour le Kosovo. Et que cet élément a aussi été pris en considération dans le cadre du régime d'auto-administration du Kosovo, dont l'un des objectifs est l'établissement d'un système de reconnaissance et de protection des droits de l'homme, y compris les droits des minorités.

42. Compte tenu de ce que je viens de dire, nous ne considérons pas qu'il soit nécessaire de revenir à nouveau sur ce sujet. La question des graves violations des droits de l'homme a déjà été réglée en 1999. Et il n'est pas possible d'identifier de nouveaux événements qui se seraient produits à la veille de l'adoption de la déclaration unilatérale d'indépendance et qui pourraient être à la base de l'exercice d'un soi-disant «droit à la sécession comme remède».

43. En conclusion, dans l'hypothèse où la sécession remède serait admissible dans le droit international contemporain, elle ne serait pas applicable au cas de Kosovo. En outre, d'après

l'Espagne, il n'est pas même possible d'identifier des normes internationales en vigueur qui autorisent un tel droit. Par contre, comme le Comité pour l'élimination de la discrimination raciale l'a dit par sa recommandation générale XXI, bien que «les groupes ou minorités ethniques ou religieuses mentionnent fréquemment le droit à l'autodétermination comme fondement de la revendication d'un droit à la sécession», «le droit international ne reconnaît pas de droit général des peuples de déclarer unilatéralement faire sécession par rapport à un Etat»[13].

44. En tout cas, pour finir sur ce point, permettez-moi de citer ici l'affirmation contenue dans le rapport de la mission d'enquête internationale indépendante sur le conflit en Géorgie, créée par le Conseil de l'Union européenne en 2008 : «International law does not recognise a right to unilaterally create a new state based on the principle of self-determination outside the colonial context and apartheid. An extraordinary acceptance to secede under extreme conditions such as genocide has so far not found general acceptance.»[14] Nous partageons pleinement cette conclusion.

VI. LE SILENCE DU CONSEIL DE SÉCURITÉ ET D'AUTRES ORGANES DES NATIONS UNIES

45. Je voudrais me référer maintenant au soi-disant silence du Conseil de sécurité (et même d'autres organes des Nations Unies) à l'égard de la déclaration unilatérale d'indépendance des institutions provisoires d'auto-administration du Kosovo.

46. Cet argument a été avancé, directement ou indirectement, par certains participants à la procédure pour conclure soit à la validité de la déclaration unilatérale d'indépendance soit à la clôture ou l'interruption du processus pour la détermination du statut du Kosovo. Mais, d'après l'Espagne cet argument n'est pas acceptable d'un point de vue juridique.

47. En effet, comme nous l'avions déjà annoncé dans nos observations écrites[15], le silence du Conseil de sécurité ne peut pas être vu comme une sorte d'acceptation de la déclaration d'indépendance. Ce genre d'interprétation du silence n'est pas valable, car l'acquiescement ne peut jouer qu'à l'intérieur d'une relation juridique concrète et directe entre des parties aux intérêts

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[13] CERD : Recommandation générale XXI concernant le droit à l'autodétermination, par. 1 et 6 [HRI/GEN/1/Rev. 9 (vol. II), p. 29].

[14] Independent International Fact-Finding Mission on the Conflict in Georgia, vol. I, p. 17, par. 11 (http://www.ceiig.ch/Report.html).

[15] Observations écrites du Royaume d'Espagne, 17 juillet 2009, p. 3-4, par. 9-12.

contradictoires. Cependant, comme il est évident, ce n'est absolument pas le cas du Conseil de sécurité qui, de par sa nature, se place sur un plan nettement institutionnel à l'égard de la crise du Kosovo.

48. Mais, nous ne pouvons pas oublier non plus qu'une telle conclusion ne tiendrait pas compte des règles qui régissent l'adoption de décisions par le Conseil de sécurité suivant la Charte des Nations Unies. D'après lesdites règles, les décisions doivent être adoptées par le Conseil de sécurité expressément. Par conséquent, une «non-décision» ne peut être confondue avec une décision quelconque, encore moins avec une décision valide pour modifier ou priver de valeur juridique une mesure préalablement adoptée par le Conseil de sécurité dans le même domaine.

49. Dans ce sens, il nous paraît suffisant de rappeler maintenant l'affirmation faite par la Cour dans son avis consultatif sur les *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité :* «Le fait que telle ou telle proposition n'ait pas été adoptée par un organe international n'implique pas nécessairement qu'une décision collective inverse ait été prise.» (*C.I.J. Recueil, 1971*, p. 36, par. 69.) Une idée qui est même renforcée par le juge Fitzmaurice qui affirme dans son opinion dissidente que, lorsqu'une proposition n'a eu aucune suite, «en droit, on ne peut pas soutenir ensuite que la proposition a *été* acceptée «en réalité» ou qu'à tout le moins elle n'a pas été «véritablement» rejetée. Ces arguments sont d'ordre purement subjectifs : ne confondons pas droit et psychologie.» (*Ibid*., p. 250, note 29.)

50. A cet égard, nous voulons rappeler, en premier lieu, que l'envoyé spécial Ahtisaari a proposé au Conseil de sécurité d'approuver son plan d'indépendance pour le Kosovo. Ce que le Conseil de sécurité n'a jamais fait[16]. D'où on ne peut qu'en conclure la continuité de la procédure fondée sur les négociations entre les parties intéressées, afin d'aboutir à un arrangement.

51. Deuxièmement, le silence ne peut pas non plus produire d'effet sur la conformité au droit international de la déclaration unilatérale d'indépendance. Ladite déclaration ne sera objectivement conforme au droit international que si elle respecte les principes fondamentaux et les autres normes internationales applicables, y compris la résolution 1244 (1999). Par ailleurs, le silence ne peut

[16] A cet égard, le Secrétaire général a affirmé que «le Conseil n'a toutefois pas approuvé cette proposition» (S/2008/354, par. 3).

avoir d'autre effet que d'exprimer l'absence de consensus parmi les Etats membres du Conseil de sécurité, ce qui l'a empêché jusqu'à présent d'adopter aucune décision, mais sans qu'il s'ensuive de ce fait que le Conseil se voit dépourvu de ses compétences dans l'affaire.

52. D'autre part, le silence du Secrétaire général, de son représentant spécial et de la MINUK, ainsi que les changements qui se sont produits dans l'activité de l'ONU au Kosovo ne peuvent pas être interprétés non plus comme une sorte d'acquiescement. Certes, le représentant spécial et le Secrétaire général n'ont déclaré nulle et non avenue la déclaration, mais ils ne l'ont pas pour autant déclarée valide. En plus, ils n'ont pas signifié que le processus soit terminé. Ce qui ressort en particulier des multiples déclarations du Secrétaire général lui-même, selon lesquelles la résolution 1244 (1999) demeure en vigueur tant que le Conseil de sécurité n'en a pas décidé autrement, et du fait que le Secrétaire général est maintes fois revenu sur le principe de stricte neutralité de la présence internationale au Kosovo quant au statut de celui-ci[17].

VII. LA PRÉTENDUE NEUTRALITÉ DU DROIT INTERNATIONAL À L'ÉGARD DE LA DÉCLARATION UNILATÉRALE D'INDÉPENDANCE

53. Pour conclure cette dernière partie de mon exposé, j'aimerais dire quelques mots sur la soi-disant neutralité du droit international face à la déclaration unilatérale d'indépendance, comme conséquence de l'impossibilité de trouver des règles précises de droit international s'y référant.

54. Il s'agit, sans aucun doute, d'un argument pour appuyer la logique de ceux qui considèrent comme un *prius* la validité de l'indépendance du Kosovo. Mais, il faut dire très clairement qu'une telle affirmation de la neutralité du droit international ne peut pas se tenir en droit dans le cas d'espèce.

55. Le droit international est un système juridique composé non seulement des normes, mais aussi des principes qui doivent s'appliquer à un cas particulier. Ces normes et principes doivent, en outre, s'appliquer de façon systématique et contextuelle. Par conséquent, il n'est pas possible d'accepter, d'après un point de vue juridique, que le droit international puisse rester «neutre» à l'égard d'un acte (la déclaration unilatérale d'indépendance) qui aurait de graves conséquences sur le plan international. En outre, nous insistons à nouveau sur le fait que la déclaration unilatérale

[17] Exposé écrit du Royaume d'Espagne, avril 2009, p. 63, par. 83-84.

d'indépendance ne s'est pas produite dans le vide mais dans le contexte d'un régime international établi par le Conseil de sécurité qui est soumis au droit.

VIII. CONCLUSIONS

56. Monsieur le président, Messieurs les juges, je suis obligée de conclure à la conviction de l'Espagne sur la non-conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo. Une telle déclaration n'est pas conforme au principe de souveraineté et d'intégrité territoriale envers la Serbie. Elle n'est pas conforme non plus au régime international intérimaire pour le Kosovo établi par le Conseil de sécurité qui demeure en vigueur. En particulier, il faut remarquer que la déclaration unilatérale d'indépendance se heurte à l'application de la Charte et au respect des pouvoirs du Conseil de sécurité conformément à son chapitre VII. Il convient de souligner le manque de sécurité juridique qui pourrait se produire si un quelconque acteur, agissant unilatéralement, pourrait écarter les compétences du Conseil.

57. Et pour finir, je voudrais faire une déclaration de principe. Nous sommes face à une cour de justice, nous avons décidé de participer à une procédure judiciaire et, par conséquent, l'Espagne ne peut passer sous silence le fait que, de nos jours, l'état de droit, la prééminence du droit sur le plan international, ne peuvent pas être ni niés ni anéantis ; qu'il n'y a pas et qu'il ne pourra y avoir de paix véritable sans le respect du droit ; et que l'instabilité internationale puise ses racines dans l'ignorance, le mépris et le non-respect du droit. Bref, face à la politique des faits nous appelons la raison du droit.

Monsieur le président, Messieurs les juges, je vous remercie de votre aimable attention.

The PRESIDENT: I thank Professor Concepción Escobar Hernández for her presentation. I shall now give the floor to Mr. Harold Hongju Koh, to make the oral statement on behalf of the United States of America.

Mr. HONGJU KOH:

1. Mr. President, honourable Members of the Court, it is a great honour to appear before you today on behalf of the United States of America, a nation born of a declaration of independence

more than two centuries ago, to urge this Court to leave undisturbed the Declaration of Independence of the people of Kosovo.

2. The United States appears today as a friend of both Serbia and Kosovo. The people of the United States share a bond of friendship with the people of Serbia marked by co-operation in two world wars and long-standing political and economic ties that date back at least to the bilateral Treaty of Commerce of 1881. Our relationship with the people of Kosovo, strengthened through crisis these last two decades, continues to grow. That said, our sole task today is to address the narrow legal question before this Court.

3. Over the past week, those pleading before you have discussed a broad range of issues, including the validity of recognitions of Kosovo, the effectiveness of the United Nations, the legality of military actions in 1999, and the potential responsibility of non-State actors for internationally wrongful acts. Yet the precise question put to this Court is much narrower: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The answer to that question, we submit, is: Yes. For as a general matter, international law does not regulate declarations of independence, nor is there anything about Kosovo's particular Declaration that would render it not "in accordance with international law"[18]. Standing alone, a declaration neither constitutes nor establishes political independence; it announces a political reality or aspiration that must then be achieved by other means. Declaring independence is fundamentally an act of popular will — a political act, made by a body politic, which other States then decide whether to recognize or not[19].

4. To say that international law does not generally authorize or prohibit declarations of independence signals no lack of respect either for international law or for the work of this Court. Rather, such a statement merely recognizes that international law does not regulate every human event, and that an important measure of human liberty is the freedom of a people to conduct their own affairs. In many cases, including Kosovo's, the terms of a declaration of independence can mark a new nation's fundamental respect for international law. As our own Declaration put it, a "decent respect to the Opinions of Mankind" dictates "that facts be submitted to a candid world".

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[18]Written Statement of the United States of America ("US Statement"), pp. 50-55.

[19]*Id.*, pp. 51-52.

Of the more than 100 declarations of independence issued by more than half of the countries in the world[20], we know of none that has been held by an international court to violate international law. We submit that this Court should not choose Kosovo's Declaration of Independence as the first case for such unprecedented judicial treatment. For few declarations can match the political legitimacy of Kosovo's peaceful declaration, which issued from a body representing the will of the people, which was born of a successful, decade-long United Nations effort to bring peace and security to the Balkans region, and reflected the capacity of the people of Kosovo to govern themselves. As the principal judicial organ of the United Nations, this Court should decline the invitation to undo the hard work of so many other parts of the United Nations system, potentially destabilizing the situation and unravelling the gains so painstakingly achieved under resolution 1244[21].

5. Mr. President, a careful consideration of the pleadings before this Court compels three conclusions, which will structure the rest of my presentation:

— *First*, Kosovo's Declaration of Independence brought a necessary and stabilizing end to a turbulent chapter in the history of the Western Balkans, and made possible a transition to a common European future for the people of Kosovo and their neighbours. The real question this Court faces is whether to support reopening of this tragic past or whether instead to let Kosovo and Serbia look forward to this more promising future.

— *Second*, as a legal matter, there is no inconsistency between Kosovo's peaceful Declaration of Independence and principles of international law, including Security Council resolution 1244. Like others attending these proceedings who participated in these historical events, I attended the Rambouillet negotiations as United States Assistant Secretary of State for Democracy, Human Rights and Labor, and observed the great pains taken to respect international law and to preserve human rights throughout the lengthy diplomatic negotiations that led to resolution 1244, and ultimately to Kosovo's Declaration. We respectfully submit that a Security Council resolution drafted with such an intent did not give birth to a declaration of independence that violates international law.

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[20]David Armitage, *The Declaration of Independence: A Global History* 3, 20 (2007).

[21]See Written Comments of the United States of America ("US Comments"), pp. 3-4.

— *Third*, and finally, we question whether this case — which involves an unprecedented referral of a narrow, anomalous question — marks the appropriate occasion for this Court to exercise its advisory jurisdiction. But should the Court decide that it must render an advisory opinion, the Court would best be served by answering that narrow question in the affirmative: Kosovo's Declaration of Independence *is* in accordance with international law.

I. KOSOVO'S DECLARATION OF INDEPENDENCE

6. Mr. President, you have now heard many times the story of Kosovo's Declaration of Independence and the trauma from which it was born. That Declaration was the product of not one, but three overlapping historical processes, which did not preordain Kosovo's Declaration, but do help to explain it — the disintegration of Yugoslavia; the human rights crisis within Kosovo; the United Nations response.

7. First, from the *Bosnia* case, this Court knows well the painful story of the Yugoslav process: the rise of Serb nationalism in the 1980s, followed by the break-up first of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991-1992, then of the Federal Republic of Yugoslavia (FRY) more than a decade later. You know of the successive independence of Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and, finally, of Kosovo[22].

8. Second, you have heard about Kosovo's internal process: the grim, well-chronicled background of atrocities and ethnic cleansing; how the people of Kosovo suffered years of exclusion from public facilities and offices; how some 10,000 people were killed in State-sponsored violence, how 1 million people were driven from the territory, and how the people of Kosovo developed self-government over nearly ten years of separation from Belgrade. You know of the dramatic escalation of oppression by Belgrade in the late 1990s; of the atrocities that were recorded by the United Nations and human rights organizations; of the unsuccessful attempt to achieve a solution acceptable to both Serbia and Kosovo at Rambouillet; of the brutal campaign of ethnic cleansing launched by Belgrade against ethnic Albanians in the spring of 1999; and of the eventual adoption of Security Council resolution 1244 in June of that year[23].

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[22]See US Statement, pp. 8-9, 77-78.

[23]See *ibid.*, pp. 8-22.

9. Third, the Declaration at issue did not happen spontaneously; it emerged only after an extended United Nations process, in which a United Nations administration focused on developing Kosovo's self-governing institutions, and a sustained United Nations mediation effort exhausted all available avenues for a mutually agreed solution, before finally concluding — in Martti Ahtisaari's words — that "the only viable option for Kosovo is *independence*"[24].

10. By adopting resolution 1244, the Security Council sought to create a framework to promote two goals. The first was to protect the people of Kosovo, by building an interim environment where they would be protected by an international *security* presence — the NATO-led KFOR — and where they could develop political institutions free from Belgrade's coercion under an international *civil* presence in the form of UNMIK[25]. Second, the resolution authorized the international civil presence to facilitate a political process designed to determine Kosovo's future status, but only at a later stage[26].

11. This United Nations umbrella and game plan provided critical breathing space for Kosovo to stabilize and develop effective Provisional Institutions of Self-Government (PISG): an elected assembly, a president, a prime minister, ministries and a judiciary[27]. UNMIK steadily devolved authority to those Kosovo institutions, allowing the people of Kosovo to rule themselves free from Belgrade's influence[28]. In 2005, the Secretary-General's Special Envoy Kai Eide found the status quo unsustainable, which led the United Nations Security Council to launch a political process, led by Special Envoy Martti Ahtisaari, to determine Kosovo's future status[29]. But after many months of intensive negotiations involving all interested parties, Special Envoy Ahtisaari concluded in March 2007: (1) that even with autonomy, Kosovo's reintegration with Serbia was "simply not tenable"; (2) that continuing interim administration without resolving Kosovo's future status risked instability; and (3) that further efforts to find common ground between Kosovo and

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[24]Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 Mar. 2007, para. 5; emphasis added, Dossier No. 203; see also United States Statement, pp. 22-32.

[25]See US Statement, pp. 19-20.

[26]See *ibid.*, pp. 20-21.

[27]See *ibid.*, p. 23.

[28]See *ibid.*, p. 24.

[29]See *ibid.*, pp. 25-26.

Serbia were futile[30]. In Mr. Ahtisaari's words, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted", and "[n]o amount of additional talks, whatever the format, will overcome this impasse"[31]. Going forward, the Envoy concluded, "the only viable option for Kosovo is *independence*, to be supervised for an initial period by the international community"[32].

12. While some in these proceedings have questioned the integrity and impartiality of the Special Envoy, a most distinguished Nobel Laureate, the Secretary-General confirmed his full support for the Special Envoy's recommendations, having himself, in the Secretary-General's words, "taken into account the developments in the process designed to determine Kosovo's future status"[33]. The entire Contact Group "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable"[34]. And the Council of the European Union — including even those members who would later decline to recognize Kosovo's independence — expressed its "full support" for the Special Envoy and "his efforts in conducting the political process to determine Kosovo's future status"[35].

13. Nevertheless, a "Troika" of senior negotiators was charged to make a last-ditch effort to find a negotiated solution[36]. According to their report, the Troika "left no stone unturned in trying to achieve a negotiated settlement of the Kosovo status question"[37]. But when those Troika talks also reached impasse, Kosovo's elected leaders consulted widely and, on 17 February 2008, issued their Declaration announcing Kosovo as "an independent and sovereign state"[38].

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[30]See Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 Mar. 2007, paras. 3-9, 16, Dossier No. 203.

[31]*Ibid.*, paras. 3, 5.

[32]*Ibid.*, para. 3; emphasis added.

[33]See Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, attaching Report of the Special Envoy of the Secretary-General on Kosovo's Future State, S/2007/168, 26 Mar. 2007, Dossier No. 203; see also United States Statement, p. 30.

[34]Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 Dec. 2007, Ann. 3 (Statement on Kosovo by Contact Group Ministers, New York, 27 Sep. 2007), Dossier No. 209.

[35]Council of the European Union, 2756th External Relations Council Meeting of 16-17 October 2006, para. 6, available at http://www.westernbalkans.info/upload/docs/91337.pdf.

[36]See US Statement, p. 31.

[37]Statement of the Federal Republic of Germany, Ann. 5 (Letter of 5 December 2007 from German Ambassador Wolfgang Ischinger to European Union High Representative Javier Solana).

[38]See US Statement, pp. 32-33.

14. Like many declarations of independence, Kosovo's Declaration was a general manifesto, published to all the world, that affirmed the new State's commitments as a member of the international community. The Declaration accepted the obligations in the Ahtisaari Plan, and announced Kosovo's desire for friendship and co-operation with Serbia and all States[39].

15. Today, nearly two years later, we see that the Declaration of Independence was the ultimate product of all three processes I have described: it brought closure to Yugoslavia's disintegration; it enshrined human rights protections for all communities within Kosovo; and it broke the impasse in the United Nations process. Yesterday (CR 2009/29), counsel for Cyprus colourfully but inaptly suggested that the United Nations Security Council was involved in the "amputation" of Kosovo and the "dismemberment" of Serbia. But Cyprus never mentioned that Kosovo became independent not because of unilateral, brutal United Nations action, but through the interaction between a United Nations process that helped end brutality, and the parallel processes of Yugoslavia's disintegration and increasing Kosovo self-governance.

16. The simple fact is that resolution 1244 works. Without preordaining, it permitted Kosovo's independence. Kosovo is now independent and functioning effectively. Kosovo has been recognized by 63 nations, and all but one of its immediate neighbours, including former Yugoslav republics Slovenia, Croatia, Macedonia, and Montenegro. No fewer than 115 of the world's nations have treated Kosovo as a State, by either formally recognizing it or voting for its admission to international financial institutions. And the 2008 Declaration of Independence has opened the way for a new European future for the people both of Kosovo and the wider Balkans region.

II. LEGAL ARGUMENTS

17. Mr. President, against this reality, Serbia now seeks an opinion by this Court that would turn back time, although doing so would undermine the progress and stability that Kosovo's Declaration has brought to the region. As a legal matter, this Court should find that Serbia's desired outcome is dictated neither by general principles of international law, nor by Security Council resolution 1244.

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[39]See Declaration of Independence, Docket No. 192; US Statement, pp. 33, 56-57.

A. General international law

18. As we detailed in our written pleadings, Kosovo's Declaration of Independence declared a political aspiration, which cannot by itself violate international law. General international law does not as, a general matter, prohibit or authorize declarations of independence[40]. Other nations accept or reject the legitimacy of a declaration of independence by their willingness or refusal to treat the entity as a State: and that test only confirms the legitimacy of Kosovo's Declaration here. But without citing any authority, Serbia asks this Court to adopt the opposite, sweeping rule: that when territory has not been illegally annexed, Serbia claims, the international law principle of territorial integrity prohibits *all* non-consensual secessions, *a fortiori*, prohibits all declarations of independence, except where domestic law grants a right of secession or the parent State accepts the declaration before or soon after the secession[41]. Yet as our written filings establish, no such general international law rule bars declarations of independence, nor can there be such *ad hoc* exceptions to a general rule that does not exist[42].

19. To see that international law does not prohibit declarations of independence simply because they were issued without the parent State's consent, one need look no further than Yugoslavia, where the Slovenian and Croatian declarations of independence initiated Yugoslavia's break-up in 1991. When those declarations issued, Belgrade also declared, wrongly, that both declarations violated both Yugoslav and international law. But today, Belgrade no longer makes those claims. To the contrary, Serbia now asserts that Slovenia's and Croatia's secessions were lawful under international law *because* they were permitted under Yugoslav domestic law,

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[40]See Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Self-Determination in International Law: Quebec and Lessons Learned*, p. 136 (Anne Bayefsky, ed. 2000) ("It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law."); John Dugard and David Raič, "The Role of Recognition in the Law and Practice of Secession", in *Secession: International Law Perspectives*, p. 102 (Marcelo Kohen, ed. 2006) ("One will search in vain for an explicit prohibition of unilateral secession in international instruments. The same is true for the explicit recognition of such a right."); Daniel Thürer, "Secession", in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum, ed.) available at http://www.mpepil.com, p. 2 ("International law, thus, does not state conditions of legality of a secession, and neither does it provide for a general 'right of secession'. It does not in general condemn movements aiming at the acquisition of independence, either."); see generally US Statement, pp. 50-55; US Comments, pp. 13-14.

[41]Written Statement of the Government of the Republic of Serbia ("Serbia Statement"), para. 943.

[42]See US Written Comments, pp. 13-20; see also US Written Statement, pp. 50-55.

although Belgrade took precisely the opposite position at the time[43]. In reversing its position, Belgrade nowhere explains how the international law rule in this area can turn on a question of domestic law that the international community cannot knowledgeably evaluate. And the second *ad hoc* exception that Serbia offers — that a parent State can make lawful an unlawful declaration by later acceptance — conflicts with its own arguments in these proceedings: that the illegality of a declaration cannot be cured by subsequent events.

20. Neither did Kosovo's Declaration violate the general principle of territorial integrity. For that basic principle calls upon States to respect the territorial integrity of *other States*. But it does not regulate the internal conduct of groups *within* States, or preclude such internal groups from seceding or declaring independence[44]. Citing Security Council resolutions, Serbia claims that the obligation to respect territorial integrity also regulates non-State actors and precludes them from declaring independence, whether peacefully or not. But none of the resolutions it cites support that claim[45]. We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms, such as the prohibition against apartheid. But that is hardly the case here, where those declaring independence did not violate peremptory norms. In fact, Kosovo's Declaration makes such a deep commitment to respect human rights precisely because the people of Kosovo had experienced such egregious human rights abuses.

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[43]Compare Written Comments of the Government of the Republic of Serbia ("Serbia Comments"), para. 201 ("With regard to domestic law, some constitutions provide for a right to secession, as it was the case of the S.F.R.Y., only with regard to the six constituent nations"), with Stands and Conclusions of the S.F.R.Y. Presidency Concerning the Situation in Yugoslavia, 27 June 1991 (reprinted in *Yugoslavia Through Documents: From Its Creation to Its Dissolution*, Snezana Tifunovska (ed.), 1994, p. 305 (describing the Slovenian and Croatian declarations as "anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane").

[44]See Georges Abi-Saab, "Conclusion", in *Secession: International Law Perspectives*, Marcelo Kohen (ed.), 2006, p. 474 ("[I]t would be erroneous to say that secession violates the principle of territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours; it does not apply within the State."); Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996", in *Self-Determination in International Law: Quebec and Lessons Learned*, Anne Bayefsky (ed.), 2000, p. 136) ("[I]t must be recognized that international law places no analogous obligation [of respect for territorial integrity] upon individuals or groups within states. The provisions contained in the relevant international instruments bind states parties to them and not persons and peoples within states."); see generally US Comments, pp. 15-20.

[45]See US Comments, pp. 18-20.

B. Resolution 1244

21. Mr. President, Kosovo's Declaration of Independence comports not just with general rules of international law, but also with resolution 1244, which — as our written submissions detail — anticipated, without predetermining, that independence might be an appropriate outcome for Kosovo's future status[46].

22. Mr. President, Members of the Court, if you will look with me at the text of resolution 1244, you will see it was overwhelmingly driven by the Council's overriding concern for resolving the humanitarian and human rights tragedy occurring in Kosovo. It demands that the Federal Republic of Yugoslavia "put an immediate and verifiable end to violence and repression in Kosovo" by beginning a verifiable phased withdrawal of security forces on a timetable synchronized with the phased insertion of an international security presence[47]. And the key paragraphs 10 and 11 authorize the establishment of an international civil presence to "[f]acilitat[e] a political process designed to determine Kosovo's future status, *taking into account the Rambouillet accords*"[48].

23. Serbia claims that 1244's explicit reference to Rambouillet "clearly adopt[ed] the principle of the continued territorial integrity and sovereignty of the F.R.Y. over Kosovo"[49]. But at the time, Serbia claimed the opposite: it called the Rambouillet Accords an "unprecedented attempt to impose a solution clearly endorsing the separatists' objectives"[50]. This is not surprising, because as you heard yesterday from Denmark, a prime objective at Rambouillet was to respect the will of the people of Kosovo. That is why, as we have seen, Rambouillet carefully avoided predetermining any particular political outcome, on the one hand, neither favouring independence, but on the other, never ruling that possibility out.

24. Nor did anything in resolution 1244's description of the future status process give Serbia a veto over a future Kosovo declaration of independence[51]. To the contrary, the

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[46]See US Statement, pp. 68-79; US Comments, pp. 24-34.

[47]See Security Council resolution 1244 (1999), S/RES/1244, para. 3, Dossier No. 34.

[48]*Ibid.*, paras. 10, 11; emphasis added.

[49]Serbia Statement, para. 784; see also CR 2009/24, p. 71, para. 24 (Shaw, Serbia).

[50]See US Statement, pp. 16-17, 65.

[51]See US Comments, pp. 32-37.

Rambouillet Accords, to which resolution 1244 refers, rejected any requirement that the FRY consent to Kosovo's future status[52]. In the negotiations over the Accords — and the four so-called "Hill Agreements" upon which Rambouillet was modelled — the negotiators rejected any requirement that the Federal Republic of Yugoslavia consent before Kosovo's future status could be finally determined[53]. As Professor Murphy explained last Tuesday (CR 2009/25), the first three drafts of the Hill Agreements would have required the FRY's express agreement to change Kosovo's status at the end of the interim period. But, in the fourth draft of the Hill Agreement, that language was placed in brackets, and no similar requirement for Belgrade's approval of future status appeared in the final version of either the Rambouillet Accords or resolution 1244.

25. Some have claimed during these oral proceedings that the reference in the preamble of resolution 1244 to the "territorial integrity" of the Federal Republic of Yugoslavia proved that the Security Council was foreclosing independence as a possible outcome. During these proceedings, one State that sat on the Security Council at the time suggested that all States understood resolution 1244 to guarantee permanently the "territorial integrity"[54] of the Federal Republic of Yugoslavia. But if that were true, why did the Federal Republic of Yugoslavia protest at the time that the resolution "opens up the possibility of the secession of Kosovo . . . from Serbia and the Federal Republic of Yugoslavia"[55]? And why did nine of the States that were on the Security Council when it adopted resolution 1244 — Bahrain, Canada, France, Gambia, Malaysia, Netherlands, Slovenia, the United Kingdom and the United States — later recognize Kosovo, if they had already supposedly voted for a resolution that permanently barred its independence?

26. What Serbia's argument leaves out is the telling silence in resolution 1244, the dog that did not bark. Resolution 1244 said absolutely nothing about the territorial integrity of the Federal Republic of Yugoslavia *beyond the interim period.* Unlike the previous United Nations Security Council resolutions on Kosovo, resolution 1244 qualifies its reference to territorial integrity with the phrase "as set out in Annex 2". But Annex 2 refers to territorial integrity only in paragraph 8,

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[52]See US Statement, pp. 65-68.

[53]See *ibid.*

[54]CR 2009/26, p. 40, para. 12 (Ruiz Cerutti, Argentina).

[55]Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6, Dossier No. 33.

which in turn describes only the political framework agreement that will cover the *interim period.* And while the text of 1244 reaffirms the commitment of "member states" — not internal groups — to the territorial integrity of the FRY, even this it did only *during the interim period*, without limiting the options for future status[56].

27. As important, the resolution refers not to preserving the territorial integrity of Serbia, but the territorial integrity of the *Federal Republic of Yugoslavia*, an entity that no longer exists[57]. Even though the resolution required Kosovo to remain within the FRY, it never required Kosovo to remain within "Serbia". To the contrary, as we have explained, the resolution specifically avoided any such implication, to preserve the possibility of what were called at the time "third republic options", under which Kosovo might end up as a third republic within the borders of a three-republic Federal Republic of Yugoslavia, alongside Serbia and Montenegro[58].

28. Resolution 1244's reference to territorial integrity was further qualified by the resolution's explicit reference, in preambular paragraph 10, not just to Annex 2, which as I have explained applied only during the interim period, but also to the Helsinki Final Act. The Helsinki reference underscored the Security Council's overriding humanitarian concern with protecting civilians, by keeping Kosovo detached from the Serbia that had so harshly oppressed them[59]. Kosovo had famously suffered massive, systematic human rights abuses throughout the decade, which led the FRY to be suspended from participation in the OSCE. And thus, 1244's pointed reference to the Helsinki Final Act underscored that the Security Council was reaffirming the FRY's territorial integrity, not as an absolute principle, but as only one of many principles — including most obviously, Helsinki human rights commitments — that would need to be considered with each principle — in the Final Act's words — "being interpreted taking into account the others"[60].

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[56]See US Statement, pp. 68-71; US Comments, pp. 25-29.

[57]No one is challenging that Serbia is the legal continuity of the FRY, but the law of State succession does not mean that all references in international documents to a parent are automatically considered to apply to a continuation State. See US Comments, p. 29.

[58]See US Statement, pp. 74-78; US Comments, pp. 29-31. Our Written Comments describe Belgrade's desire to avoid this possibility. Belgrade called such proposals "the most perfidious fraud Serbia has ever been exposed to", US Comments, pp. 30-31.

[59]See US Statement, pp. 71-74.

[60]Helsinki Final Act, 1 Aug. 1975, available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

29. Serbia and its supporters never specify precisely which words in resolution 1244 they believe that Kosovo violated. But some suggest that Kosovo violated international law by preventing UNMIK from carrying out its mandate under paragraph 11 *(e)* "to facilitate a political process" designed to determine Kosovo's future status. But that paragraph required only that the international civilian presence facilitate "a" political process — not multiple political processes[61]. And by the time that Kosovo declared independence in February 2008, the specific political process envisioned by resolution 1244 had ended. The future status process had run its course, the negotiations' potential to produce any mutually agreed outcome on Kosovo's status had been exhausted. With the Secretary-General's support, the Special Envoy — who was charged with determining the scope and *duration* of that political process — had announced that "[n]o amount of additional talks, whatever the format, will overcome this impasse", and the Envoy had specifically declared that the only viable option for Kosovo was independence.

30. In these proceedings, some argue that the effort by some States, including the United States, to secure a new Security Council resolution on Kosovo in July 2007[62] somehow proves that we considered a successor resolution to 1244 legally necessary for Kosovo to become independent. But the draft 2007 resolution, like resolution 1244, was entirely "status-neutral". Its central legal purpose was to terminate UNMIK's operations in Kosovo, as the Ahtisaari Plan had envisioned. Nothing in the draft resolution would have decided on, or even endorsed a recommendation for, Kosovo's independence. Its non-enactment meant only that adjustments would be needed in the roles of UNMIK and the international actors envisioned in the Ahtisaari Plan. If anything, the success of the subsequent co-ordination only underscores the consistency of the declaration of independence with the operation of United Nations entities under resolution 1244.

31. In short, by February 2008, the absence of any prospect of bridging the divide between Serbia and Kosovo had rendered any further negotiations pointless[63]. In these proceedings, Serbia ironically charges Kosovo with bad faith, suggesting that Kosovo's position favouring independence in the negotiations is in "sharp contrast" with 1244's requirements that "the

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[61]See US Comments, pp. 32, 36.

[62]A draft of the resolution is attached as exhibit 36 to Serbia's Statement.

[63]US Statement, pp. 79-84.

sovereignty and territorial integrity of Serbia should be safeguarded"[64]. But neither UNMIK, Ahtisaari, nor the Troika ever suggested that Kosovo was negotiating in bad faith. Serbia claims that Kosovo did not need independence because Serbia had offered Kosovo the "highest degree of autonomy" under resolution 1244[65]. But anyone who has read the factual findings of the Trial Chamber in the *Milutinović* case, who has seen photographs of Serbian tanks stationed outside the Kosovo Assembly building in March 1989, or who followed events in the Balkans during the last two decades, understands why the entire Contact Group identified Belgrade's "disastrous policies of the past [as lying] at the heart of the current problem"[66]. The Contact Group admonished Serbia, not Kosovo, "to demonstrate much greater flexibility" and "to begin considering reasonable and workable compromises"[67].

32. Nor would it establish any violation of international law to argue that the Declaration of Independence was an *ultra vires* act by the Kosovo Assembly[68]. For even if it were true that the Declaration somehow exceeded the authority conferred on the Assembly by UNMIK under the Constitutional Framework, that would only amount to a claim that it was issued by the wrong persons in Pristina. But if the Declaration were considered flawed because it issued from the Provisional Institutions of Self-Government, that technicality could now easily be fixed simply by having a different constituent body within Kosovo reissue it. No one doubts that the people of Kosovo wanted independence, or that the Declaration expressed their will. The people of Kosovo declared independence not under a "top-down" grant of domestic law authority from UNMIK, but rather, from a "bottom-up" expression of the will of the people of Kosovo, who left no doubt of their desire for independence.

33. Finally, even assuming for the sake of argument that the Declaration did somehow violate the Constitutional Framework, that Framework, like other regulations adopted by UNMIK,

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[64]Serbia Statement, para. 919.

[65]CR 2009/24, p. 58, para. 46 (Zimmermann, Serbia); Serbia Statement, para. 203.

[66]Statement by the Contact Group on the Future of Kosovo, London, 31 Jan. 2006, available at http://pristina.usembassy.gov/press20060131a.html.

[67]Contact Group Ministerial Statement, Vienna, 24 July 2006, available at http://www.diplomatie.gouv.fr/en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf.

[68]US Statement, p.57, Note 231; US Comments, pp. 38-39.

operated as domestic, not international, law[69]. We have previously demonstrated that UNMIK regulations must be domestic law because they operated at the domestic level, replace existing laws, and regulate local matters[70]. In these proceedings Serbia has conceded the accuracy of this point, but argued that UNMIK rules somehow constitute international law because they were issued by the Security Council, an international authority[71]. But just because the Security Council authorized UNMIK to establish Kosovo's domestic law did not automatically convert that domestic law into international law. For example, an automobile driver in Kosovo might violate a speed limit in an UNMIK traffic regulation, but he surely does not violate international law simply because the entity that promulgated the law against speeding was created by an international body[72].

34. Mr. President, if there were ever a time when United Nations officials could have acted to set aside the Declaration of Independence, it was soon after that Declaration issued in February 2008. But the responsible organs of the United Nations made a considered decision nearly two years ago *not* to invalidate that Declaration of Independence. They made that decision with full awareness of that Declaration's specific acceptance of resolution 1244 and the international presences established by it, and fully aware of Kosovo's pledge to act consistently with all Security Council resolutions and requirements of international law[73].

III. THE COURT SHOULD ANSWER ONLY THE NARROW QUESTION POSED

35. Finally, Mr. President, the Court should answer only the narrow question posed. What all this has demonstrated is just how anomalous and narrow is the question presented in this case. It is not a question about whether Kosovo is an independent State today, nor whether it has been properly recognized. Nor is this case about whether UNMIK and the United Nations should be

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[69]UNMIK's grant of authority was to exercise "legislative and executive powers" — that is what it was doing when it promulgated Regulation 2001/9 — and its responsibility was to "change, repeal or suspend existing laws to the extent necessary for the carrying out of [its] functions", Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, Dossier No. 37. A contemporaneous 2001 commentary noted that Regulation 2001/9, the Constitutional Framework, assigns to the Special Representative of the Secretary-General and KFOR "the powers that are typically associated with a federal government", A. Zimmerman and C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State", 70 *Nordic Journal of International Law* 423, 428 (2001).

[70]See US Comments, pp. 39-42.

[71]See CR 2009/24, p. 48, paras. 39-41 (Djerić, Serbia).

[72]See US Comments, pp. 39-42 and citations therein.

[73]See US Statement, pp. 84-89; US Comments, pp. 43-45.

doing anything differently. It is not about whether United Nations institutions empowered to do so acted properly in declining to invalidate the Declaration of Independence nearly two years ago. Finally, it is not about whether Kosovo's future status talks — which were properly ended as "exhausted" years ago — could or should now be resumed.

36. The usual premise upon which the Court's advisory jurisdiction rests is that the requesting organ — here, the *General Assembly* — needs the Court's legal advice to carry out its functions effectively[74]. But here the question has been asked not to give the Assembly legal advice, so much as to give advice to Member States[75]. Resolution 63/3, which referred the advisory question to the Court, nowhere indicates how the Court's opinion would relate to any planned activity of the General Assembly nor does it identify any constructive use to which the General Assembly might put a Court opinion. And *unlike every prior occasion* on which the General Assembly has requested an advisory opinion, resolution 63/3 was adopted not in connection with a substantive agenda item for the General Assembly's work, but rather, only under an *ad hoc* agenda item created for the sole purpose of requesting an advisory opinion from this Court[76].

37. Ironically, the Member State who supported the referral of this narrow question has avowed that the Court's answer will not change even its conduct. Serbia has repeatedly said that it will not recognize Kosovo "at any cost, even in the event that the [Court's] decision is in favor of Pristina"[77]. But, Mr. President, this Court has no obligation to issue advisory opinions that the moving State has already suggested it might ignore, that seek to reopen long ended political negotiations that responsible United Nations officials have concluded are futile, or that seek to

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[74]See US Statement, pp. 42-45; US Comments, pp. 10-12.

[75]As this Court has emphasized in the past, advisory opinions serve to advise the organs of the *United Nations*, not individual Member States. In seeking support for its resolution, Serbia continually emphasized not the need of the General Assembly for an answer to the question, but the purported right of *Member States* to refer a question to the Court. Serbia frankly described this case as being "about the right of any member State of the United Nations to pose a simple, elementary question", asserting before the General Assembly that "[n]o country should be denied the right to refer such a matter to the ICJ"; and that a vote against the resolution "would in effect be a vote to deny the right of any country to seek — now or in the future — judicial recourse through the United Nations system". See US Statement, p. 44.

[76]See US Comments, pp. 11-12.

[77]See *ibid.*, p. 10.

enlist the Court to unravel delicate political arrangements that have brought stability to a troubled region.

38. We therefore urge this Court to leave Kosovo's Declaration undisturbed — either by refusing to issue an opinion or by simply answering in the affirmative the question presented: whether Kosovo's Declaration of Independence accords with international law[78]. As our written pleadings make clear, the Court may answer the question posed to it and opine that international law did not prohibit Kosovo's Declaration of Independence, without addressing other political situations or complex issues of self-determination raised by a number of States in these proceedings[79].

39. But if the Court should find it necessary to examine Kosovo's Declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case, which include the extensive Security Council attention given to Kosovo; the large-scale atrocities against the people of Kosovo that led to Rambouillet and the 1244 process; the United Nations concern for the will of the people of Kosovo, their undivided territory and the unique historical, legal, cultural and linguistic attributes; the lengthy history of Kosovo's autonomy; the participation of Kosovo's representatives in the internationally led political process; the commitment of the people of Kosovo in their Declaration to respect prior Security Council resolutions and international law; and the decision by United Nations organs to leave undisturbed Kosovo's move to independence[80].

40. Mr. President, in its presentation yesterday, Cyprus pointedly sought to analogize the 1244 process to the heart-wrenching, but misleading, case where a parent sends a small child off to State supervision, only to lose her forever. But upon reflection, the far better analogy would be to acknowledge the futility of the State forcing an adult child to return to an abusive home against her will, particularly where the parent and child have already long lived apart, and where repeated efforts at reconciliation have reached impasse. There, as here, declaring independence would be the only viable option, and would certainly be in accordance with law.

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[78]See US Statement, pp. 45-49; US Comments, p. 10.

[79]See US Comments, pp. 21-23.

[80]See *ibid.*, pp. 21-23.

IV. CONCLUSION

41. In conclusion, Mr. President, Kosovo's Declaration of Independence has proven to be necessary and politically stabilizing. The 2008 Declaration of Independence, and the ensuing recognition of Kosovo by many nations, brought much needed stability to the Balkans and closed the books on the protracted break-up of what once was Yugoslavia[81]. Kosovo's Declaration of Independence emanated from a process supervised by the United Nations, which through resolution 1244 and the institutions it established, was deeply involved in Kosovo's past and present. And the Declaration of Independence has now made possible a future in which Kosovo is not merely independent politically, but also self-sufficient economically, administratively, and civilly.

42. Although Serbia, acting through the General Assembly, has urged the Court to issue an advisory opinion it hopes will reopen status negotiations to redetermine Kosovo's future, it has given this Court no reason to upend what has become a stable equilibrium. For Kosovo is now independent. Both Kosovo and Serbia are part of Europe's future. As the principal judicial organ of the United Nations, this Court should not be conscripted into a Member State's effort to roll back the clock nearly a decade, undoing a careful process accomplished under resolution 1244 and overseen by so many other United Nations bodies: the Security Council; the Special Representative of the Secretary-General; two Special Envoys, UNMIK and the Troika[82]. And when Kosovo's independence has finally closed one of the most painful chapters in modern European history, this Court should not use its advisory jurisdiction to reopen that chapter. Instead, we should all look to a common future in which Serbia and an independent Kosovo have vitally important roles to play.

43. Mr. President, honourable Members of the Court, on behalf of my country, I thank you for your thoughtful attention.

The PRESIDENT: I thank Mr. Harold Hongju Koh for the oral statement and the comments of the United States of America that he has presented.

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[81] See *ibid.*, p. 3.

[82] See *ibid.*

I believe it is a good time to take our customary coffee break of 15 minutes. Thank you.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. I shall now give the floor to His Excellency Mr. Kirill Gevorgian to make the oral statement on the behalf of the Russian Federation.

Mr. GEVORGIAN:

INTRODUCTION

1. Mr. President, Members of the Court, it is a great privilege to me to address you again on behalf of my country. The question currently under consideration concerns the most fundamental principles of international law, and the authority of the world's principal collective bodies. It is also an opportunity for the Court to contribute to the strengthening of the international rule of law and to the achievement of the purposes of the United Nations Charter.

2. The Russian Federation has been an active participant of the political processes relating to Kosovo ever since the situation in that region appeared on the international agenda, always guided by its commitment to international law and by its special responsibilities as a permanent member of the United Nations Security Council.

3. The position of the Russian Federation on the question before the Court is reflected in our Written Statement. This morning I will focus on the points we find essential and also address the arguments most frequently put forward by the supporters of Kosovo's independence.

The question before the Court

4. The Russian Federation believes that the Court has jurisdiction to exercise the present request for advisory opinion. The question before the Court is a legal one, and the General Assembly, no doubt, was competent to raise it. The question is narrow in scope. However, to answer it, it is important to the Court to consider a broader process leading to purported independence of Kosovo. This is contemplated by the wording of the United Nations General

Assembly resolution 63/3, statements made in connection to its adoption[83], and by arguments advanced by the participants to these hearings.

I. GENERAL INTERNATIONAL LAW

Whether international law regulates declarations of independence

5. Mr. President, it has been argued that international law either does not regulate declarations of independence or does not generally prohibit them[84]. Contrary to that, as it was rightly pointed out by some delegations during these pleadings[85], several declarations of independence have been considered unlawful by the Security Council[86] or by the General Assembly, when they were a part of a broader scheme which itself was contrary to international law.

6. Indeed, an analysis of available cases leads to an inevitable conclusion: an independence declaration was considered unlawful if the underlying claim for statehood was considered unlawful. This was the case of northern Cyprus or Southern Rhodesia. And, vice versa, where the creation of a new State was in accordance with international law, then its declaration of independence was also lawful. This was the case, in particular, of the former republics of the Socialist Federal Republic of Yugoslavia and those of the Soviet Union.

7. To sum up: international law *does* govern declarations of independence, and the criteria of their legality are the same as those applicable to the legality of the creation of new States.

Whether the population of Kosovo is a self-determination unit

8. It is widely acknowledged that, outside the colonial context, secession without consent of the parent State may only occur in the exercise of the right of a people to self-determination and only in exceptional circumstances.

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[83] A/63/PV.22, 8 Oct. 2008.

[84] CR 2009/25, p. 38 (Müller); CR 2009/26, p. 12 (Frowein), pp. 27-29 (Wasum-Rainer); CR 2009/27, pp. 8-9 (Tichy); CR 2009/28, pp. 23-24 (Dimitroff); CR 2009/29, p. 65 (Metelko-Zgombić).

[85] CR 2009/29, p. 68 (Winkler). See also CR 2009/26, pp. 12-13 (Frowein) and CR 2009/27, p. 9 (Tichy); CR 2009/28, p. 24 (Dimitroff).

[86] United Nations Security Council resolution 541 (1983), 18 Nov. 1983 (Cyprus); Security Council resolutions 216 (1965), 12 Nov. 1965 and 217 (1965), 20 Nov. 1965 (Southern Rhodesia).

9. To be entitled to the right to self-determination, the population of Kosovo must qualify as a self-determination unit under international law. It has already been shown by other participants that the population of Kosovo does not fall under any of the traditional categories of peoples entitled to self-determination[87].

10. For this reason, the authors of the UDI and their supporters have spent considerable efforts to show that the population of Kosovo should be regarded as a people for the purposes of self-determination due to the particularities of the federal structure of the Socialist Federal Republic of Yugoslavia. The main points have been made about the scope of competences of Kosovo and the fact that it was directly represented at the federal level[88]. But that is hardly relevant. What matters is the legal qualification of a given population as of a people. And that is something that is obviously lacking from the successive Constitutions of Socialist Yugoslavia.

11. This finding with respect to Kosovo is supported by numerous international documents. The Court has already been advised that neither the opinion of the Badinter Commission[89], nor the Security Council resolutions[90], nor other relevant documents have ever spoken of a right to self-determination for people of Kosovo. Moreover, the Badinter Commission declared in 1992 that the process of the dissolution of the SFRY was complete, without having ever turned to a possibility of independence for Kosovo[91].

The meaning of the "will of the people" in Rambouillet Accords

12. In the context of self-determination, some participants have put an emphasis on the Rambouillet Accords, namely, on the words "the will of the people" in paragraph 3 of Article I in their final chapter[92]. That paragraph provides

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[87]CR 2009/24, p. 78 (Kohen); CR 2009/27, pp. 31-32.

[88]See, e.g., CR 2009/25, p. 17 (Wood); CR 2009/29, pp. 53-61 (Metelko-Zgombić).

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

[90]United Nations Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) 1239 (1998) and 1244 (1999).

[91]Opinion No. 8 , 4 July 1992, in Peace Conference on Yugoslavia, Arbitration Commission, Opinions No. 4-10, *European Journal of International Law*, Vol. 4, 1993, pp. 87-88.

[92]CR 2009/25, p. 12 (Hyseni), pp. 47, 52-56 (Murphy); CR 2009/27, p. 13 (Tichy).

> "Three years after the entry into force of this Agreement, an international meeting will be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act . . ."[93]

13. It has been argued that this provision recognized the existence of a "Kosovo people" and thus its entitlement to self-determination.

14. Mr. President, in reality, this example only shows how far the international community was from acknowledging the right of the population of Kosovo to self-determination.

15. First, the main idea of the Accords was to "establish institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia"[94]. Throughout the text, the Accords carefully avoided anything close to the "people of Kosovo": they consistently used terms such as "national communities"[95], "all persons in Kosovo"[96], "all citizens in Kosovo"[97], etc. So if the Rambouillet Accords did take a stance on self-determination, it was a negative one[98].

16. Second, the words "the will of the people" do not necessarily refer to the population of Kosovo only and could very well encompass the whole population of the country concerned, or else reflect the general notion of "popular will" as a principle of democracy.

17. And it should also be borne in mind that the Rambouillet Accords have never acquired any binding force.

18. In sum, Mr. President, the Rambouillet Accords cannot be seen as a recognition by the international community of the existence of a Kosovo people entitled to self-determination.

"Remedial secession" is not applicable to Kosovo

19. Mr. President, another argument put forward by the supporters of the UDI relates to the concept of the so-called "remedial secession".

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[93]Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, UN doc. S/1999/648, 7 June 1999.

[94]See Rambouillet Accords, *op. cit.*, Chap. 1, fourth preambular paragraph of the Constitution.

[95]See, e.g., *ibid*., preamble on p. 3; Art. I (1) of the Framework; Chap. 1, preamble, Art. I (2) and (7), Art. VII of the Constitution, etc.

[96]See, e.g., *ibid*., Art. II (3) and (6) of the Framework, etc.

[97]See, e.g., *ibid*., Art. I (2) of the Framework; Chap. 1, Art. I (2) and (7), Art. IX of the Constitution, etc.

[98]United Nations Security Council resolution 1244 (1999), operative para.11 *(a)* and *(f)*, Anns. 1 and 2.

20. If ever the situation in Kosovo came close to the criteria of remedial secession, that was in the spring of the year 1999. Yet, even at that time the international community reaffirmed the territorial integrity of the FRY.

21. For Kosovo to be able to rely on "remedial secession" in 2008, it has to demonstrate that the situation had aggravated as compared to 1999. It is obvious that this was not the case. By 2008, there was clearly no threat to the population of Kosovo coming from the Serbian authorities, and there were clearly full chances for a negotiated solution for a truly self-governing Kosovo within the State of Serbia.

22. Therefore, the notion of "remedial secession" is obviously inapplicable in the case at hand.

Conclusion: no basis for Kosovo independence in general international law

23. Mr. President, international law assesses the legality of declarations of independence against the same standards as are applied to the legality of the creation of States. If ever creation of a State through secession without consent of the parent State is permitted under current international law, it is only on the basis of the right of a people to self-determination and only in exceptional circumstances that evidently did not exist in Kosovo when the UDI was adopted.

24. The population of Kosovo has never been recognized as a self-determination unit. There is no basis for that either in the constitutional system of Socialist Yugoslavia or in the Rambouillet Accords, let alone other international instruments. Anyway, the international community reacted to the 1999 crisis without acknowledging the right of Kosovo to secession. Therefore, the events of 1999 cannot serve as the basis for independence for Kosovo in 2008 when the internal realization of all rights of the Kosovo population as a self-governing autonomy within the State of Serbia was clearly possible.

25. Consequently, in the view of the Russian Federation, general international law precludes Kosovo from declaring independence.

II. SECURITY COUNCIL RESOLUTION 1244

26. Mr. President, Members of the Court, the situation in Kosovo has been, and still is, governed by resolution 1244 adopted by the United Nations Security Council under Chapter VII of

the United Nations Charter. The régime established by the resolution safeguards the territorial integrity of Serbia and precludes any unilateral action in Kosovo either by its Albanian community or by Belgrade. The UDI is incompatible with the resolution which, by virtue of the United Nations Charter, is binding on all parties, including third States and non-State actors.

General remarks

27. Resolution 1244 was the result of a tragic chain of developments, including serious violations of human rights of the Kosovo Albanian community by the FRY's authorities, the emergence of the Kosovo Liberation Army (KLA), acts of terrorism committed by the KLA and other armed groups and then the internal armed conflict. All this is reflected in the Security Council resolutions which preceded resolution 1244. Then followed the unlawful use of force by NATO.

28. Resolution 1244 allowed to return the situation to the legal realm. In many respects, the implementation of the resolution has been positive. In many others, serious challenges remain. The Russian Federation is convinced that it is in the interest of all States and of all organs of the United Nations to strive for an ultimate success of the resolution. Moreover, any attempt to challenge the régime established by it represents a challenge to the authority of the Security Council, and thus is unacceptable.

29. In this context it is ironic, to say the least, that the Unilateral Declaration of Independence, clearly contradicting the resolution, was adopted by structures whose very existence was based on the resolution which was thus obviously binding upon them. Here, Russia joins those who have spoken of the *ultra vires* nature of the UDI by the Provisional Institutions of Self-Government of Kosovo[99]. As to the argument that the UDI was adopted not by the PISG but by some *ad hoc* democratically elected body[100], it is sufficient to say that it is not true factually, but even if it were true, it is irrelevant legally, since the régime established by the resolution 1244 is not to be breached by either the PISG or any other group or gathering.

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[99]See, e.g., CR 2009/24, pp. 41-43 (Djerić).

[100]See, e.g., CR 2009/25, pp. 34 *et seq.* (Müller); CR 2009/26, p. 26 (Wasum-Rainer); CR 2009/27, p. 7 (Tichy); CR 2009/29, p. 64 (Metelko-Zgombić).

30. Mr. President, the position of the Russian Federation, ever since the Kosovo issue arose on the Security Council agenda, was on the basis of the general principles of international law, it was unacceptable for the Security Council to encourage or authorize any action that would dismember a sovereign State. The goal that the Council's decisions remain within that principle has been secured. This is true for resolutions 1160, 1199, 1203, 1239, and this is also true for resolution 1244. The fact that resolution 1244 could not be construed as opening a possibility for a unilateral secession of a part of a sovereign State was a crucial element for Russia to vote in favour of that resolution.

31. Let me now explain why the resolution cannot be interpreted as allowing the principles of sovereignty and territorial integrity to be breached in respect of Serbia.

Substantial requirements for a final settlement: territorial integrity of Serbia

32. In the preamble of the resolution, the Security Council reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2". It has been argued that this provision is non-binding, that it only refers to the commitment of Member States and thus not to the commitment by the Security Council or non-State entities, and that the reference to Annex 2 means that these commitments are only valid as long as the interim period is in place[101].

33. Several remarks are in order here.

34. First of all, the duty to respect sovereignty and territorial integrity exists independently from resolution 1244. It is a legal obligation stemming from peremptory norms of international law. Those norms are binding not only upon Member States, but upon all subjects of international law. The Security Council could not conceivably either establish that obligation or terminate it; neither could it limit that obligation by any time-frame.

35. Further, the reference to Annex 2 in connection with the territorial integrity of Yugoslavia addresses paragraph 8 of that Annex speaking of

[101] CR 2009/25, pp. 50-51 (Murphy).

> "an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region".

36. To interpret this wording as limiting the commitment to territorial integrity only by the interim period would mean that territorial integrity may be disregarded unless expressly reaffirmed. Such an approach would clearly contradict the peremptory nature of the principle of territorial integrity. The fact that the sovereignty and territorial integrity of the FRY is mentioned along with the sovereignty and territorial integrity of "other countries of the region" clearly shows that the commitment to the territorial integrity of Serbia is permanent and unquestionable.

37. The real meaning of the preambular paragraph of the resolution was to underline that Annex 2 is to be read in harmony with the principle of territorial integrity; that Annex 2 developed that principle. This interpretation is in accordance with the rest of the text of the resolution that is in general based on the respect for the territorial integrity of Serbia. It is also important that in the preamble of resolution 1244 the Security Council is "reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo". Nothing suggests that this call is limited to the interim period established by resolution 1244.

38. Some participants rely on paragraph 11 *(e)* of the resolution that envisages "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords". It is argued that because the final provision of Rambouillet spoke about the "will of the people" as a basis for a settlement, the reference to Rambouillet means that the final settlement may envisage independence if that were the "will of the people"[102].

39. The reading is incorrect. The value of Rambouillet lies not in its final procedural provision. As I have already mentioned, Rambouillet is a detailed framework for a full-fledged self-government for Kosovo within Serbia.

40. Therefore, paragraph 11 *(e)* means that "Kosovo's future status" is to be determined along the lines proposed in the substantial part of Rambouillet, that is on the basis of self-government within Serbia.

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[102]CR 2009/25, pp. 12 (Hyseni) and 52 (Murphy); CR 2009/26, pp. 16-17 (Frowein); CR 2009/27, p. 13 (Tichy).

41. And this is further confirmed by the fact that the need to take account of Rambouillet is mentioned in the resolution more than once. All the other instances where it is mentioned speak about the interim period. And in the interim period, obviously, Rambouillet was to serve as a model for substantial self-government of Kosovo within Serbia. To say that the virtually identical references meant the whole of Rambouillet in three cases and only its final technical provision in the fourth case clearly goes against any sound logic.

42. Therefore, the allegations that the reference to Rambouillet in resolution 1244 opened the way for the independence of Kosovo, should be rejected.

43. On the contrary, the reference to Rambouillet is a clear indication that the final settlement for Kosovo must be within the State of Serbia. There is no language in resolution 1244 that can be interpreted otherwise.

Procedural requirements: a negotiated solution endorsed by the Security Council

44. So much about the contents of the settlement. Let me now turn to the procedure envisaged to reach the settlement.

45. Both the plain and the legal meaning of the word "settlement" is that it is a negotiated solution to a dispute.

46. Indeed, the second sentence of paragraph 8 of Annex 2 to the resolution contains a clear reference to "[n]egotiations between the parties for a settlement".

47. Apart from that, resolution 1244 requires that the final settlement is to be endorsed by the Security Council. Thus, paragraph 19 of the resolution provides that the international administration is deployed for an indefinite period of time, "unless the Security Council decides otherwise". Therefore, the interim period during which Kosovo is to remain under international administration, has to last until the Security Council takes the decision to terminate it.

48. Such understanding of the resolution is fully supported by subsequent practice, in particular during the final status process launched in 2005. Thus, the "Guiding Principles for a settlement of the status of Kosovo" agreed by the Contact Group in November 2005 and reflecting the joint approach of the international community to the final status process, stated: "A negotiated

solution should be an international priority. . . . The final decision on the status of Kosovo should be endorsed by the Security Council"[103].

49. It has been argued that the requirement of a negotiated settlement was superseded by the criterion of the settlement being in accordance with the "will of the people" in the Rambouillet Accords[104]. I have already demonstrated, that particular provision of Rambouillet is irrelevant for the purposes of the final settlement process.

50. To sum up, Mr. President, resolution 1244 envisages that the final settlement of the Kosovo status must be negotiated between the parties and endorsed by the Security Council. What is absolutely incompatible with the resolution, is a unilateral solution. As put in the Contact Group Guiding Principles, "[a]ny solution that is unilateral or results from the use of force would be unacceptable"[105].

The time frame of the final status process

51. There is another important procedural point related to the final settlement, namely, the time-frame. The supporters of the UDI argue that the final status process was terminated when President Ahtisaari declared that the negotiations had been exhausted.

52. Yet, as has been shown, under resolution 1244 it was for the Security Council to decide on the termination of the interim period and the beginning of the "final stage". Obviously, a resolution cannot be overruled by an individual opinion of a negotiator.

53. In fact, Mr. Ahtisaari's determination was not supported by the Security Council. The Council chose to continue the process, in accordance with the previously agreed principles. First came the Council's mission to Kosovo; then the Troika negotiations. The fact that they have not brought a result does not mean that the negotiations should be considered exhausted.

54. Accordingly, the interim period with respect to Kosovo is still ongoing. Therefore, all the provisions of the resolution concerning the preservation of the territorial integrity of Serbia during the interim period remain fully in force. For these reasons, the failure of the Ahtisaari Plan and the Troika negotiations could not authorize the Provisional Institutions of Self-Government, or

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[103]S/2005/709, 10 Nov. 2005, p. 2.

[104]See, e.g., CR 2009/25, pp. 52-56 (Murphy).

[105]S/2005/709, 10 Nov. 2005, p. 3.

indeed any subject in Kosovo, to unilaterally declare independence. They continued to be bound by the obligation to respect the territorial integrity of Serbia.

The approach of the parties to the negotiations

55. Mr. President, some further remarks on the final status process are appropriate at this stage.

56. At the very beginning and in full accordance with resolution 1244, Serbia declared that the process should lead to a settlement based on a special status of Kosovo within Serbia[106]. So the respect for the territorial integrity of Serbia was the consideration under which the country agreed to start the process.

57. In spite of that, the Ahtisaari Plan envisaged an independence for Kosovo. So the negotiator not only failed in securing a negotiated settlement, but came up with a proposal that ran counter to resolution 1244 and clearly disregarded the position of one of the parties.

58. At the Troika negotiations that followed with Russian participation, Serbia made successive proposals, each time agreeing to grant Kosovo more and more autonomous rights, including not only virtually full governmental powers inside Kosovo, but also a separate membership in international financial institutions. During the negotiations, Serbia adopted a new Constitution, in which the principle of a broad autonomy for Kosovo received the highest legal guarantee, while leaving it for the negotiations to establish the precise scope of the autonomy.

59. As regards the Kosovo side, their vision of the object of the negotiations was amply described by Mr. Hyseni last week as "negotiations on whether Serbia will or will not accept Kosovo as an independent State"[107]. This account demonstrates whose approach has not allowed to reach a negotiated settlement so far.

Conclusion: UDI contrary to resolution 1244

60. Mr. President, Members of the Court, now I come to conclusion.

61. First, resolution 1244 does not affect the territorial integrity of Serbia. The final settlement under the resolution is to be a self-governing Kosovo within Serbia.

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[106]S/PV.5289, 24 Oct. 2005, p. 9.

[107]CR 2009/25, p. 9, para.15 (Hyseni).

62. Second, the final settlement envisaged in the resolution is to be negotiated between the parties and endorsed by the Security Council. No unilateral action can be regarded as such a final settlement.

63. Third, the failure of the Ahtisaari Plan did not determine the final status process. The interim period during which Kosovo is to enjoy autonomy within Serbia, being governed by the international administration, is still ongoing. Resolution 1244 remains in force in its entirety.

64. Therefore, no institution has a right to unilaterally declare independence of Kosovo.

65. Accordingly, the Russian Federation respectfully submits that the UDI was not in accordance with resolution 1244 of the Security Council.

66. Mr. President, Members of the Court, I have demonstrated that the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo contravenes both general international law and Security Council resolution 1244. It is thus not in accordance with international law.

67. And my last remark, Mr. President. We often hear that international law is not law, or it allows exceptions, or else that everything that may be achieved by might will automatically be accepted as right. Mr. President, this is a case *par excellence* to show that international law does matter.

Thank you for your kind attention.

The PRESIDENT: Thank you very much, Your Excellency Mr. Kirill Gevorgian. I shall now give the floor to Ms Päivi Kaukoranta to make the oral statement on behalf of Finland.

Ms KAUKORANTA:

1. Mr. President, Members of the Court, on behalf of Finland I am honoured to take part in these proceedings. We are convinced that the advisory opinion will contribute to the stability and security on the Balkans and that the future of both States — Serbia and Kosovo — will be based on friendly relations and integration in the European Union. Let me say a few introductory words. The position of Finland in this case has been set out in our Written Statement of 16 April 2009. The legal status of Kosovo's Declaration of Independence of 17 February 2008 should be determined by situating it in the long process that began with the unilateral changes in Kosovo's

constitutional status and the violent break-up of the Socialist Federal Republic of Yugoslavia. The Declaration, for its part, was not regulated through any detailed rules of international law. It was a political act with a certain history. However, as the Arbitration Commission on the Former Yugoslavia has stated, the emergence of statehood is "a question of fact"[108]. Once the negotiations on Kosovo's future had ended in a stalemate and the Provisional Institutions of Self-Government of Kosovo had transformed themselves into representatives of the people of the province, the law must take cognizance of the situation. It must, I suggest, recognize that history as leading up to the creation of a new State.

2. Mr. President, it is impossible to read the facts accumulating at least since the 1989 revocation of Kosovo's autonomy and the 1991 unofficial referendum in which the Kosovo Albanians voted overwhelmingly for independence and leading up to the ethnic cleansing of Kosovo Albanians in 1999 as anything else than an indication of the total inability or unwillingness of the Yugoslav Government to create the kind of conditions of internal self-determination of Kosovo Albanians to which international law entitles them. Of course, as many have reminded the Court, the law attaches great importance to the principle of territorial integrity of States. But that principle is not determining in this case, as my colleague Professor Koskenniemi will argue in his presentation.

3. In the *Frontier Dispute* case in 1986 this Court observed in an African context that the principle of *uti possidetis* was based on the need of avoiding "fratricidal struggles" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 565, para. 20). In the territory of the former Yugoslavia those struggles had *already* been under way since 1991-1992, spreading to Kosovo in late 1998 and early 1999. In the case of *Prosecutor* v. *Milutinović*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia determined that the crimes that had been committed there included "hundreds of murders, several sexual assaults, and the forcible transfer and deportation of hundreds of thousands of people"[109]. In Kosovo, the territorial order had broken down, and it had done so owing to actions taken or supported by the

[108]Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI *ILM* (1992), p. 1495.

[109]International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Milutinović et al*, Judgement of 26 Feb. 2009, para. 1172, Vol. 3 of 4.

institutions of the Federal Republic of Yugoslavia and Serbia. In these circumstances, it is necessary to create conditions in which the communities of Kosovo can finally live in peace and justice. The years of the wars in Yugoslavia were also a period of the fall of the Berlin wall, the emergence of a new consensus in Europe and the world on the need to respect human rights and fundamental freedoms. Against this background, the facts that culminated in the Declaration of Independence of 17 February can only be read in one way: as the emergence of the State of Kosovo.

4. Our statement is in two parts. I will first say a few words about how international law lacks any mechanical rule on the attainment of statehood and how, instead, it takes account of the political facts leading up to the Declaration of Independence. I will show how this is supported by the *locus classicus* on the law on self-determination, a case of great importance to my country, the *Aaland Islands* case. My colleague Professor Koskenniemi will thereafter apply the law to the Kosovo situation, as it appears under the modern law of self-determination.

I. THERE IS NO MECHANICALLY APPLICABLE RULE ON THE ATTAINMENT OF STATEHOOD

5. Mr. President, the opponents of the lawfulness of the Declaration of Independence attack the view that the process leading to the independence of Kosovo is *sui generis* and must be assessed and adjudged as such. They say that international law must be applied consistently and globally and that to direct attention to what is special in the Kosovo situation is appeal to an exception to move from law to politics, arbitrary and conducive to risks to peace and stability.

6. With respect, this position, superficially appealing in its apparent respect for legality, is altogether beside the point and in fact relies on what it seems to deny. The argument about the special nature of Kosovo's process to independence does not at all deny the need of consistency or stability but is based on those concerns. A lasting outcome must take full account of the history of the Balkan populations, including their relations in the recent years. Serbia and its supporters have been trying to avoid the examination of this history by giving the impression that an absolute and inflexible rule — the rule on territorial integrity — decides the matter mechanically, as a kind of trump card. But this is wrong. We agree with Serbia that the matter must be resolved by reference to legal rules and principles. The Montevideo criteria of statehood, as well as the principles of

territorial integrity and self-determination are, however, of a general character. They cannot be mechanically applied but must be weighed against each other for their relevance to the facts of this case. Serbia, too, stresses that the matter will require "an examination that entails both factual and legal elements"[110]. It could hardly be otherwise. And a balanced assessment of those facts accepts the Declaration of Independence and dismisses the alternative possibility of return to the status quo.

7. It has become one of the well-entrenched principles of twentieth century international and public law that statehood emerges from fact. Accordingly, the effects of recognition, as affirmed by the Arbitration Commission of the Conference on Yugoslavia — so-called Badinter Commission — are not constitutive but "purely declaratory"[111]. There is no difference between the mother State and others here. Statehood is not a gift that is mercifully given by others; it emerges from the new entity itself, its will and power to exist as a State. In the words of the great French public lawyer Carré de Malberg:

> "la formation initiale de l'Etat, comme aussi sa première organisation, ne peuvent être considérées que comme un pur fait, qui n'est susceptible d'être classé dans aucune catégorie juridique, car ce fait n'est point gouverné par des principes de droit"[112].

To think otherwise would be to subsume the birth of States to the discretion of other States. But which State accepts that its statehood is a grant by others, given in reward for compliance with some rule? No State, I suggest. For every State, its statehood is *sui generis,* and dependent on its own history and power, not on the discretion of others, or the way geography may have situated it in one place rather than another. As Judge Dillard pointed out in the *Western Sahara* case, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, separate opinion of Judge Dillard, p. 122).

8. Mr. President, there are some facts that can be assessed by mechanical application of rules and other cases where many rules seem prima facie applicable and require careful attention to the facts of the situation. Or in other words, there is a difference between distributing parking tickets and legal assessment of a declaration of independence. In the former case, there is no need to

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[110]Written Comments of the Government of the Republic of Serbia, para. 44.

[111]Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI *ILM* (1992), p. 1495.

[112]Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat spécialement d'après des données fournies par le droit constitutionnel français* (2 vols., Paris, Sirey, 1920-1922), II, 490.

examine the particularities. The type of car, or where it came from, are facts — but legally irrelevant. The rule of "no parking" applies mechanically because what is being regulated is a matter of routine: everyday cases that repeat themselves in the millions. Independence is not like that. Here there is no routine — a recent history of the declarations of independence lists only "more than one hundred cases", each one distinguished historically, politically and factually from the others[113]. And here the differences are not irrelevant but at the heart of the statehood of each entity. A State is a State because it is special, not because it has come about by some procedural routine or some mechanical criterion. This is what those who attack the *sui generis* view appear to deny. As if deciding on statehood were like distributing parking tickets. Let me just take one example.

9. The opponents of Kosovo's independence suggest that the "Provisional Institutions" did not possess competence to declare independence. First, the Declaration was not issued by the Provisional Institutions of Self-Government but it was voted upon and signed by the representatives of the people of Kosovo acting as a constituting power, *pouvoir constituant*. Second, such contention suggests as if there were a rule to lay out which institutions may and which may not declare independence. The independence of my country, Finland, for example, was declared by a Parliament that was an organ of an autonomous part of the Russian empire in December 1917. From the perspective of Russian law, this was blatantly *ultra vires*. But, as confirmed by the recognitions in due course, that was no obstacle to Finnish independence. Furthermore, declarations issued earlier by Slovenia and Croatia were not regarded by the international community as prohibited by international law, even though they were made without prior authorization by the Socialist Federal Republic of Yugoslavia. A first declaration emerges virtually always from a domestic illegality; internationally, it is simply a political fact. But international law does intervene later, to assess the fact by reference to overriding concerns of peace and stability, on the principles of territorial integrity, human rights and self-determination.

10. Mr. President, let me now say a few words on the two important reports presented to the Council of the League of Nations in the *Aaland Islands* question in 1920 and in 1921. As is well

[113]David Armitage, *The Declaration of Independence: A Global History*, Harvard University Press, 2007, p. 20.

known, the question relates to a dispute between Finland and Sweden as to whether the inhabitants of the Åland Islands, an archipelago in the Baltic Sea, were allowed to choose between remaining under Finnish sovereignty and being incorporated in the Kingdom of Sweden. The Committee of Jurists appointed by the League Council stated that the principle of self-determination of peoples comes into play in situations where

> "the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure or uncertain from the legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established"[114].

11. The Committee acknowledged that minority protection by way of an extensive grant of liberty was a compromise solution where, for one reason or another, self-determination could not be accorded a complete recognition. Most importantly, however, it acknowledged that there were cases where minority protection could not be regarded as sufficient. In the words of the Commission of Rapporteurs appointed by the Council to recommend a programme of action in view of the Jurists' report:

> "The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[115]

In this case the Commission concluded that the Åland Islanders had neither been persecuted nor oppressed and that there was no justification for a separation.

12. Mr. President, already in the *Aaland Islands* case, the *locus classicus* of the law on self-determination, the eventuality was foreseen that persecution and oppression, combined with a situation of "abnormality", such as "the formation, transformation and dismemberment of States as a result of revolutions and wars"[116], might entitle a minority population to secession. This was thereafter reiterated by the Canadian Supreme Court in the case *Secession of Quebec*[117]. Similarly,

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[114]Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations, *Official Journal, Special Supplement*, No. 3, Oct. 1920, p. 6.

[115]Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations, doc. B.7. 21/68/106, 1921, p. 28.

[116]Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations, *Official Journal, Special Supplement*, No. 3, Oct. 1920, p. 6.

[117]Reference *re Secession of Quebec*, [1998], 2 *SCR*., p. 217, 20 Aug. 1998.

in the present case, the Court is called upon to weigh the facts pertaining as against the criteria of statehood, and the principles of territorial integrity and self-determination as they are understood today.

Mr. President, with your permission, I will now give the floor to my colleague Professor Koskenniemi.

Mr. KOSKENNIEMI: Mr. President, I am delighted to address this Court again as the representative of my country Finland.

II. SELF-DETERMINATION AS THE GOVERNING PRINCIPLE IN THE CASE OF KOSOVO

13. We have stressed the limited and open-ended nature of the law governing statehood. In this regard, the formulation of the request posed to the Court was perhaps unfortunate: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" This suggests the presence of precise rules of international law regulating matters such as the making of independence declarations. But there are no such rules. No treaty, no custom regulates the matter. No international law rule gave the Finnish autonomy organs in December 1917 the competence to declare independence. This is the case of every single declaration of independence we know of. A declaration is simply a fact, or the endpoint of an accumulation of facts. Just like possession of territory, population or government are facts. There is — as Madam Kaukoranta pointed out — no rule on how States are born. But once the requisite facts are there, the law cannot be oblivious to them. There is a brief, formally correct response that may be given to the General Assembly's request: namely, that the Declaration was in accordance with international law.

14. And yet, the absence of such a rule might not seem the end of the matter. Should the Court deem it necessary to address the significance of a declaration in more detail, we would like to add the following.

15. In the Anglo-Norwegian *Fisheries* case some years ago, this Court observed, in a situation where it had recognized that there were no detailed rules on the limits of the territorial sea, as follows:

> "It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom . . ., the delimitation undertaken . . . is not subject to certain principles which make it possible to judge as to its validity under international law" (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 132).

From that point the Court went on to examine the facts of the case by reference to what it later chose to call "equitable principles" — precisely an assessment of the particularities — including in that early case, the interests of Norwegian fishermen "peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (*ibid.*, p. 133). In a parallel way, the fact that there are no mechanical rules on declarations of independence may not make it impossible to judge what their effect should be. Such judgment must only be based on a balanced assessment of the relevant facts, including — as the Court then stated — the needs of the communities as can be detected from their histories.

16. Now, Serbia and its supporters claim that the rule of territorial integrity and consent of the parent State regulate the process of independence. But surely this is both conceptually and historically wrong? Was the United States born out of a legal process that peaked in the consent of Britain? Or Russia or Germany? Venezuela, Algeria or Bangladesh — or indeed Serbia? Did *any* of the republics formerly part of the SFRY emerge from a process that respected the integrity of the mother State or out of the consent of the latter? They did not. There are around 200 States in the world and around 200 histories of State-emergence each of which is different — it tempts me to say *sui generis* — though each is also capable of being assessed under the old Montevideo criteria: territory, population, effective government, you all know those[118]. But they of course do not apply mechanically. China has a population of 1.3 billion, Tuvalu less than 12,500. There are States with huge territories and States with very small ones and their governmental capacities vary enormously.

17. The supporters of Kosovo's independence, including Spain today, claim that the supporters of the legality of the Declaration seek to replace law by what they call "politics". The Court has already heard parallel accusations in many earlier cases and they have given it occasion to distinguish, for example, between decisions *ex aequo et bono* — something that does involve

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[118] According to these criteria, the State as a person of international law should possess the following qualifications: *(a)* a permanent population; *(b)* a defined territory; *(c)* government; and *(d)* capacity to enter into relations with other States.

political compromises — and what it chose to call equity *infra legem,* the case where the rule itself calls for the appreciation of circumstances[119]. This is how the Montevideo criteria, territorial integrity and self-determination, operate: they lay out broad criteria to appreciate the facts on the ground, what is and what is not relevant. The Serbian Written Comments acknowledge the significance of the Court's jurisprudence in this respect[120]. We agree that this, and only this is needed here: neither mechanical rule application, nor recourse to an exception, or indeed to politics, but to the application of the relevant legal principles — including those of territorial integrity and self-determination — in a way, in a way Mr. President, that is equitable in the circumstances. The case is not, after all, about distributing parking tickets.

18. Mr. President, Serbia and its supporters suggest that the principle of territorial integrity and consent of the parent State disqualifies the declaration of independence as conferring statehood on Kosovo. Nobody would deny that the principle of territorial integrity is well established in international law. But, as many have already noted here, the principle does not at all concern the relation between a State and an entity seeking self-determination. Under their very formulation and raison d'être instruments such as the Friendly Relations Declaration, from 1970[121], and the Helsinki Final Act of 1975[122] deal with *inter-State relations* and in particular the *duty of other States not to intervene* in internal political processes. Let me quote the 1970 Declaration. It lays out: "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". *States shall refrain in their international relations*. Nowhere about other entities. International law does contain rules relating to individuals today: those rules appear in the fields of human rights, economic relations and the environment. But rules about sovereignty or territorial integrity are not among those — and we understand well why. It would be absurd to claim that international law takes any position

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[119] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 48, para. 88.

[120] Written Comments of the Government of the Republic of Serbia, para. 128.

[121] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, United Nations General Assembly resolution 2625 (XXV), 24 Oct. 1970.

[122] Conference on Security and Co-operation in Europe, Final Act, Helsinki 1975, http://www.osce.org/documents/mcs/1975/08/4044_en.pdf (4 Dec. 2009).

beyond respect of human rights and non-violence in respect of the agendas of domestic groups or federalist movements, for example.

19. It may be said that as a general principle, territorial integrity nevertheless lays out a general value — the value of unharmed statehood — that international law seeks to protect. But in that case it should be weighed against countervailing values, among them the right of oppressed people to seek self-determination including by way of independence. Again, it is the factual context that should decide which value should weigh heaviest. The relevant facts we all know from the *Milutinović* case — and I quote from the case:

> "[T]he Trial Chamber is satisfied that there was a broad campaign of violence directed against the Kosovo Albanian population during the course of the NATO air strikes conducted by forces under the control of the FRY and Serbian authorities . . ."

The Chamber goes on, and I quote again:

> "In all of the 13 municipalities the Chamber has found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians from their homes, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. As these people left their homes and moved either within Kosovo or towards or across its borders, many of them continued to be threatened, robbed, mistreated, and otherwise abused. In many places men were separated from women and children, their vehicles stolen or destroyed, houses deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents."[123]

20. This campaign, as is well known, caused the departure of over 700,000 Kosovo Albanians in the period between March and June 1999 during which, also, many documented cases of killing, sexual assault and intentional destruction of civil infrastructure and religious sites occurred. The Security Council recognized the gravity of the situation in resolution 1244, as did the ICTY later. An international security and civilian presence was set up and has continued to govern or supervise Kosovo for a decade. What can, in such conditions, be the worth of territorial integrity? As I have stated, it does express a value of protecting the State. But is it the State that needs protection in this case? Even if the principle does have relevance, it cannot be mechanically applicable. We are not dealing with parking violations but historical facts of concern to large populations.

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[123]International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Milutinović et al.,* Judgement of 26 Feb. 2009, para. 1156 (Vol. 2 of 4).

21. The facts leading up to the Declaration of Independence of 17 February strikingly illustrate the situation, mentioned by the Commission of Rapporteurs in the *Aaland Islands* case where "the State lacks either the will or the power to enact and apply just and effective guarantees". Nothing was done on the Serbian side during the Ahtisaari negotiations in 2006-2007 or the later Troika period to alleviate the concerns Kosovo Albanians had for the return of a situation resembling the one in which the Milošević régime had already once removed the autonomy of the province. Indeed, in 2006, in the middle of the international status negotiations, Serbia unilaterally adopted a new Constitution which astonishingly insisted that Serbian State bodies in Kosovo should "uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations"[124]. Kosovo Albanians were ineligible to participate in this process.

22. Members of the Contact Group — representatives of Britain, France, Germany, Italy, United States and Russia — agreed on the impossibility of a return to any *status quo ante*. Already the Rambouillet Accords had stated, as we have heard today, that the "final settlement for Kosovo" was to be based on the famous statement, and I quote: "will of the people"[125]. No concept of mutual consent was incorporated in the Accords. It is true that, as our colleague from Russia said a moment ago, no people of Kosovo is identified in the Rambouillet Accords. But, of course, the story does not end there. In January 2006, just before President Ahtisaari began his 14-month-long effort to seek a negotiated solution, the Contact Group had occasion to specify what this meant. Let me quote them — the Contact Group. They agreed, and this is a verbatim quote, "that the settlement needs, inter alia, to be acceptable to the people of Kosovo"[126]. "Acceptable to the people of Kosovo." Everything is here — including the identification of the people of Kosovo. That formulation was agreed by all concerned — including the representative of Russia. In view of

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[124]Constitution of the Republic of Serbia, 2006, preamble, http://www.srbija.gov.rs/extfile/en/29554/constitution_of_serbia.pdf (4 Dec. 2009).

[125]Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999, Chap. 8, Art. I (3):

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures." (S/1999/648).

[126]Press Release, 31 Jan. 2006, para. 7, http://www.unosek.org/docref/fevrier/STATEMENT%20BY%20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf (4 Dec. 2009).

what was known of the attitude of the people of Kosovo, it could only mean recognition of independence as the fallback if no other arrangement could be found.

23. Those who deny the applicability of self-determination in this case do this by making a familiar distinction — namely, the distinction between the case of independence under colonial subjugation or alien domination — borrowing language from the 1970 Friendly Relations Declaration — and Kosovo on the other hand. Familiar distinction, I say. But how strong is it? What good reason of practice or principle might there be to limit the right to secession to decolonization? None. As Madam Kaukoranta observed, already in the *Aaland Islands* case, well before the decolonization period, the Committee of Jurists and the Commission of Rapporteurs agreed that secession was thinkable when the State was "undergoing transformation or dissolution" and cannot or will not give, as it put it, "effective guarantees for protection". It was this traditional position, and not any new law, that became operative during decolonization. It was this law that the Supreme Court of Canada had in mind when it stated "when a people is blocked from the meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession"[127]. A broad body of scholarship today addresses such a "qualified right of secession"[128]. I suggest, however, that instead of us, here, imagining a new rule, it is better to think of this as part of the traditional law of self-determination that was always to be balanced against territorial integrity and contained the possibility of its application, as the *Aaland Islands* case demonstrates, through an external solution.

24. But, of course, the Court is not called upon to rule on the validity of any such principle *in abstracto*. All it is asked to do is to assess the legality of a declaration of independence as part of a history that includes grave oppression by the FRY and Serbian authorities. This history also includes the unilateral adoption by Serbia of a Constitution in 2006 that sought to prejudice the result of the status talks and it includes the deadlock in the status negotiations as reported by the Special Envoy of the Secretary-General. In President Ahtisaari's words "[n]o amount of additional talks, whatever the format, will overcome this impasse"[129]. Ahtisaari was not alone in this

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[127]Reference *Re Secession of Quebec*, [1998] 2 *SCR* 217, para. 134.

[128]See especially Raic, *Statehood and Self-Determination*, 313-332.

[129]Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, para. 3.

assessment. It was reiterated by the Troika representatives from the European Union, the United States and the Russian Federation after four months of further negotiations. The Troika concluded that the parties were unable to reach an agreement[130].

25. Against this, Serbia and its supporters now suggest that the negotiations should be continued. But, of course, the duty to negotiate cannot be dependent on one party's assessment that not all avenues have been exhausted. One party cannot possess indefinite right of veto over a permanent solution. We now have the clear statement by the Special Envoy of the United Nations Secretary-General, endorsed by the Secretary-General himself, that there was no prospect of progress in further negotiation and that independence was the only viable solution. Who could be in a better position to determine this? In putting forward his proposal for "internationally supervised independence", the Special Envoy was fulfilling his mandate. Let me quote the Terms of Reference that were given to him. They stated:

> "the peace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General taking into account the co-operation of the parties and the situation on the ground".

"[W]ill be determined by the Special Envoy . . ." Now, the feasibility of negotiations is a matter of political judgment and not judicial determination. Surely best placed to determine this is the chief negotiator, who, as we all know, also happened to receive the Nobel Peace prize for brokering peace not only in Kosovo but in many places, including Namibia, Bosnia Herzegovina and Aceh. To suggest otherwise, or to hint at bias, as Serbia has done, speaks more eloquently about Serbia's negotiating attitudes than anything otherwise produced in this case.

26. Mr. President, let me reiterate the main points of the Finnish argument.

— First, there is no specific rule on declarations of independence. They must be seen as parts of the history of State-building that international law regulates by general principles such as the Montevideo criteria on statehood, non-use of force, territorial integrity, self-determination.

— Second, in this specific case, the two prima facie applicable principles are those of territorial integrity and self-determination. Because territorial integrity only governs relations between

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[130]Report of the European Union/United States/Russian Federation Troika on Kosovo of 4 Dec. 2007, S/2007/723, paras. 2 and 11.

and not inside States, its power is limited to that of a general value of protecting existing States that must be weighed against countervailing considerations.

— Third, the most important countervailing consideration is that of self-determination that has always implied the possibility of secession in case the parent State is unable or unwilling to give guarantees of internal protection. In view of the violent history of the break-up of the SFRY and, in particular, the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State. This was achieved by the facts of history and symbolized by the Declaration of Independence of 17 February 2008.

I thank you, Mr. President.

The PRESIDENT: Thank you very much, Professor Koskenniemi.

This concludes the oral statement and comments of Finland and brings to a close today's hearings. The Court will meet again tomorrow at 10 a.m. when it will hear France, Jordan and Norway. The Court is adjourned.

The Court rose at 12.50 p.m.