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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2009

Public sitting

held on Tuesday 1 December 2009, at 3 p.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 1er décembre 2009, à 15 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
		Simma
		Abraham
		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
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges

M. Couvreur, greffier

The authors of the unilateral declaration of independence are represented by:

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as Head of Delegation;

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Professor Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel;

H.E. Mr. Nexhmi Rexhepi,

Ms Vjosa Osmani,

Mr. Qerim Qerimi,

Ms Albana Beqiri,

Mr. Qudsi Rasheed, member of the English Bar,

as Advisers.

For the complete list of delegations of all participants, please refer to CR 2009/24.

Les auteurs de la déclaration unilatérale d'indépendance sont représentés par :

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comme chef de délégation ;

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M. Qerim Qerimi,

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M. Qudsi Rasheed, membre du barreau d'Angleterre,

comme conseillers.

Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2009/24.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the authors of the Unilateral Declaration of Independence. Thus I shall now give the floor to His Excellency Mr. Skender Hyseni.

Mr. HYSENI:

I. INTRODUCTION

1. Mr. President, Members of the Court, it is an honour to appear before you today. I should say at the outset how grateful we are to the Court for the invitation to participate both at the written stage and at this hearing. These proceedings are of great importance for the people of the Republic of Kosovo, who are following them with keen attention.

A. Kosovo today

2. The question before the Court concerns a particular Declaration of Independence that was issued on a particular day in February 2008. But allow me first to say a few words about the position of Kosovo today, so as to provide important context to these proceedings.

3. Just a few months after issuance of the Declaration of Independence, the Constitution of the Republic of Kosovo came into force in June 2008. This Constitution is consistent with the Settlement developed in 2007 by the Secretary-General's Special Representative, President Ahtisaari, for Kosovo's independence. Kosovo's Constitution is a modern constitution, which does reflect the highest international standards of human and minority rights. It protects the rights of all citizens of Kosovo and gives special rights to the various communities that live in Kosovo. The people of Kosovo are very proud of this foundational document.

4. The institutions of the Republic, comprising all three branches of government, are well-established. As provided in the Constitution, an Assembly exists for debating and enacting legislation and has to date passed around 120 laws. Further, a wide range of ministries implement Kosovo's laws on matters such as foreign affairs, trade, commerce, environmental protection, labour relations, agriculture and other important matters. An extensive array of civil and criminal courts operate in Kosovo at both the trial and appellate levels to enforce these laws, and the Constitutional Court began functioning earlier this year.

5. These laws cover crucial areas foreseen in the Ahtisaari Settlement, such as decentralization of local government, protection of minority rights, and protection of cultural and religious heritage. Both the new Constitution and the adoption and enforcement of these laws have created the basic prerequisites to implement the Ahtisaari Settlement in its entirety.

6. Despite the contrary assertions of Serbia, and indeed despite Serbian pressure, Kosovo Serbs are increasingly taking part in institution building in Kosovo. Reconciliation among all of our communities has been a standing priority of the institutions of the Republic of Kosovo. A Community Consultative Council has been established within the Office of the President of Kosovo, and the Prime Minister has established a Special Office for outreach to the minority ethnic communities.

7. The Constitution of the Republic of Kosovo and a number of laws govern the conduct of elections in Kosovo. The Law on General Elections, as well as that on Municipal Elections, was passed in June 2008. The Kosovo Central Election Commission was thus fully charged with the organization and conduct of the 15 November 2009 elections for the assemblies and the mayors of 36 municipalities across Kosovo. I am pleased to announce to the Court that the participation of non-majority communities in the November elections was sizeable. Out of 74 entities certified to contest these elections, 40 represent various minority communities. Twenty-two were Kosovo Serb political entities. The participation of the Serb community members in these elections was satisfactory in spite of the calls from Belgrade for a boycott. In a resolution adopted last Thursday, on 26 November, the European Parliament welcomed "the unprecedented good participation of Kosovo Serbs" and it regarded "[t]his as an encouraging indication that the Kosovo Serb community is willing to take up its responsibilities in the Kosovo institutions". There is a new momentum in building up a multiethnic Kosovo.

8. Observer missions to the 15 November elections in their eventual statements described those elections as free, fair and democratic. The European Parliament *Ad Hoc* Delegation welcomed in its statement the "ongoing decentralization process and peaceful election day in Kosovo". The European Union presidency statement "welcomed the orderly conduct of municipal elections", as well as a broad participation of different ethnic groups. The orderly conduct of the November elections was also welcomed in individual statements by many Governments and

observer missions from Europe and elsewhere. Very positive reactions on elections came from NATO Secretary-General, European Union Special Representative in Kosovo, Ambassadors from various States accredited to Pristina, and various national and international NGOs. And the Special Representative of the Secretary-General "considered the trend towards more active participation by the Kosovo Serb community as an encouraging step towards longer term reconciliation and integration with the local community".

9. The international community has played a vital role in securing peace and security, and in bringing hope to the people of Kosovo. The United Nations Mission in Kosovo (UNMIK) provided important support for the people of Kosovo, in preparing our institutions so that they would be ready for independence. Following independence, EULEX is now providing assistance in the Rule of Law sector. The people of Kosovo are grateful for all the contributions made, and being made, towards our development.

10. As for our relations with other States, 63 nations around the world have recognized Kosovo as a sovereign and independent State. The vast majority of States in Europe have recognized Kosovo, including all of our immediate neighbours, except Serbia. Other States have taken steps that indicate clear acceptance of Kosovo's sovereignty. A total of 109 States supported Kosovo's membership in the International Monetary Fund and the World Bank.

11. Kosovo has entered into diplomatic relations with many States. We now have 21 diplomatic missions and nine consular posts across the world. We have entered into a number of bilateral treaties, including with Albania, Austria, Denmark, Luxembourg, Slovenia, Turkey and the United States of America. On 17 October this year, we concluded a border agreement with the Republic of Macedonia, as foreseen in the Ahtisaari Settlement. We have recently concluded our first treaty succession agreement, with Belgium. Senior officials of Kosovo continue to have numerous bilateral and international meetings with their opposite numbers from other States, with both inward and outward visits.

12. Mr. President, Members of the Court, we are at peace today but, as you know, there was a time when the situation in Kosovo was different. This is well documented, including in the Yugoslav Tribunal's *Milutinović* judgment of February this year. We cannot and should not forget

the crimes against humanity and other horrors that were inflicted upon the people of Kosovo; such things must never happen again.

13. Yet, Mr. President, we in Kosovo are firmly committed and determined to look towards the future. There is now, finally, peace and security in Kosovo, and in the region; we are determined to preserve that peace. There are now constitutional protections of human rights in Kosovo, and in the region; we are determined to preserve those protections. Now it is more certain than ever before that the common future for both Kosovo and Serbia lies in eventual membership for both States in the European Union, as contemplated in the European Commission's latest report in October. Indeed, the future for all seven States of the western Balkans lies in European integration.

14. We also look forward to the day when we will be able to take our place as a Member of the United Nations. The commitments expressed in our Declaration of Independence and in our Constitution demonstrate our willingness to assume the responsibility of such membership. Indeed, the Government has adopted a draft law to enable Kosovo to implement Security Council sanctions, which the Assembly is expected to adopt shortly.

B. The impossibility and futility of further status negotiations

15. Mr. President, Members of the Court, with all that has happened, it is inconceivable that we could accede to Serbia's call to turn the clock back — to pursue further negotiations on whether Serbia will or will not accept Kosovo as an independent State. That would be highly disruptive, and could even spark new conflict in the region. Kosovo's independence is irreversible and that will remain the case, not only for the sake of Kosovo, but also for the sake of sustainable regional peace and security, to which Kosovo's independence has so greatly contributed.

16. As the Court will recall, by 2005 there was widespread agreement within the international community that the status quo in Kosovo was unsustainable. Consequently, intensive negotiations took place throughout 2006 and 2007 on Kosovo's final status, including on issues such as decentralization, protection of cultural and religious heritage, and minority rights. The United Nations Special Envoy, Martti Ahtisaari, now a Nobel Peace Prize winner, prepared a detailed Settlement, including a package of measures to protect Kosovo's minorities and a

recommendation of independence for Kosovo. In doing so, President Ahtisaari recognized that there was no way that Kosovo and Serbia could remain together in the same State after the horrific events of the 1990s. The Settlement was endorsed by the European Union and NATO. It was fully supported by the United Nations Secretary-General. It enjoyed widespread international support. But it was rejected by Serbia.

17. After a period of discussions in the Security Council and the despatch of a Security Council mission to the region, the Contact Group, consisting of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States, proposed that a "troika" of officials from the European Union, the Russian Federation, and the United States make one last effort to find common ground between Pristina and Belgrade. German Ambassador Wolfgang Ischinger stated at the outset of this effort that no stone should be left unturned in an effort to reach a mutually acceptable solution.

18. Kosovo did engage in the troika-led talks, actively and in very good faith. Yet a mutually acceptable outcome was still not possible, first and foremost because of Serbia's intransigence in seeing Kosovo as simply a piece of territory that Serbia must possess, with no regard whatsoever to the hopes, aspirations, and fears of the people living on the land.

19. With no stone having been left unturned, the people of Kosovo had to move forward. Lack of clarity about status was holding back our economy, discouraging international investment and preventing us from accessing international financial institution lending. Lack of clarity about status was preventing the people of Kosovo from taking full ownership over their own democratic institutions. In short, lack of clarity was denying the people of Kosovo, and indeed the entire region, of a clear roadmap for the future. We were exhausted after two decades of isolation, war and political uncertainty.

20. Lacking any agreement between Kosovo and Serbia, independence was the solution endorsed by Special Envoy Ahtisaari. Independence was the solution endorsed by the United Nations Secretary-General. Independence was the solution advocated by many members of the international community, including States within Europe and the Balkans, for they understood that to prolong Kosovo's uncertain status would have been greatly destabilizing, threatening the peace in Kosovo, and in the region, that the international community had striven so hard to achieve. So

independence was the course that was ultimately pursued by the people of Kosovo through their democratically-elected representatives on 17 February 2008.

21. Those who today call for renewed negotiations either are unaware of the situation and the great efforts made to achieve consensus or, worse, actively seek to create disorder in the region. Those who have recognized Kosovo in the region, in particular all of Kosovo's immediate neighbours except Serbia, have continually emphasized this point.

C. The Declaration of Independence

22. Mr. President, I now address more specifically the Declaration of Independence that was issued by the representatives of the people of Kosovo on 17 February 2008.

23. The Declaration is reproduced at Annex 1 to our first Written Contribution. After several preambular provisions, there are 12 operative paragraphs. Paragraph 1 states: "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state."

24. As expressed in our Declaration, as well as in our Constitution, Kosovo is committed to international law, including binding resolutions of the Security Council. That commitment has never wavered. Each time I have been to the Security Council this year, I have reiterated this commitment.

25. Another important aspect of the Declaration of Independence was the commitment, in paragraph 2, to the principles of democracy, secularism, multi-ethnicity, and non-discrimination. The fundamentals of human rights are essential to Kosovo. In paragraph 3, we accepted fully all of the obligations for Kosovo contained in the Ahtisaari Settlement, including the protection and promotion of the rights of all communities in Kosovo.

26. The final aspect of the Declaration of Independence that I wish to highlight is that it was issued in the name of the people of Kosovo, by their democratically-elected representatives meeting in an extraordinary session, as a constituent body in Pristina, as a number of States have rightly stressed in their written statements[3]. Issuance of the Declaration was not an act of the

[3]Kosovo, Further Written Contribution, para. 1.23. See, e.g., Austria, para. 8; Germany, pp. 6-7; Luxembourg, para. 13; Switzerland, para. 79; United Kingdom, para. 1.12; United States of America, pp. 32-33.

"Provisional Institutions of Self-Government" (PISG), or of the Assembly of Kosovo acting as one of the PISG. As I have explained to the Security Council in June this year:

> "the independence of the Republic of Kosovo was declared by elected representatives of the people of Kosovo, including by all . . . representatives of non-Albanian communities except the members of the Serb community"[4].

27. The Declaration of Independence was the manifestation and realization of the will of the people of Kosovo. The will of the people of Kosovo to determine freely their political status goes back many years. This was clear to all participants in the 1999 Rambouillet Conference. It was recognized through the "will of the people" clause in the Rambouillet Interim Agreement as the key element in resolving Kosovo's final status. It was clear immediately after the 1999 conflict, when resolution 1244 expressly referred to the Rambouillet Accords. It was clear throughout the period of UNMIK administration, and it was fully discussed and considered throughout the final status negotiations.

D. Kosovo's future relations with Serbia and the region

28. Notwithstanding the difficulties of the past and suffering that the people of Kosovo have been through, we still wish for good neighbourly relations with Serbia. We would welcome talks with Serbia on practical issues of mutual concern. Indeed this was what was foreseen in the Ahtisaari Settlement, which we wholeheartedly accepted in our Declaration of Independence. Such talks would be normal between neighbouring sovereign and independent States.

29. But any such talks must be held on an equal basis, between two sovereign States. We could not enter into negotiations that would bring into question our status as a sovereign and independent State. There can be no going back. Any attempt to do so would be severely destabilizing and dangerous to peace and security in the region.

30. Regional stability and co-operation with all our neighbours remains one of Kosovo's key priorities. We hope that, in due course, the Republic of Serbia will join in the efforts of the other countries in the western Balkans to establish an environment of co-operation and understanding throughout the region.

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[4]Security Council, Provisional Verbatim Record, Sixty-Fourth Year, 6144th Meeting, 17 June 2009, S/PV.6144, p. 23.

E. Presentation of legal argument

31. Mr. President, Members of the Court, we continue to rely on what is said in our Written Contribution of April of this year and in our Further Written Contribution of July. A considerable number of United Nations Members have submitted written statements and comments, or will address the Court during this hearing, in support of the position that the Declaration of Independence did not contravene any applicable rule of international law. We appreciate their support.

32. Mr. President, our counsel will take you through the main elements of our case, leading to our request to the Court, if it deems it appropriate to answer the question, to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

33. Mr. President, I would now most kindly urge you to invite Sir Michael Wood to continue the presentation of Kosovo's case. I thank you very much for your attention.

The PRESIDENT: I thank His Excellency, Mr. Skender Hyseni, and now call upon Sir Michael Wood.

Sir Michael WOOD:

II. SUMMARY OF LEGAL ARGUMENT AND OF THE FACTUAL BACKGROUND

1. Mr. President, Members of the Court, it is an honour to appear before you in these proceedings.

2. I propose, first, to give a brief overview of our legal case. Then, I will take you through some of the main events between 1998 and 2007, that form the essential background to the issuance of the Declaration of Independence. My colleagues Mr. Daniel Müller and Professor Sean Murphy will then deal in more detail with the legal issues.

A. Summary of legal argument

3. Our legal arguments may be summarized in five propositions.

4. *First*, the Court will need to consider the propriety of answering the question put by the General Assembly. We note that a number of States have raised serious questions in this regard[5].

5. *Second*, as many States have made clear in their written pleadings, the General Assembly's question to the Court is narrow and precise[6]. The question relates solely to the Declaration of Independence that was issued on 17 February 2008. It does not concern questions of statehood, it does not concern questions of recognition or membership in international organizations. On that, at least, there seems to be a measure of agreement today. We shall not, for this reason, react to what Professors Shaw and Kohen said this morning about Kosovo's statehood today. We have set out our position on this in our written pleadings, in particular in Chapter 2 of our Further Written Contribution. There is no doubt that Kosovo is today a sovereign and independent State. The description we heard this morning of the current position of the international actors in Kosovo has no basis in reality, as we have explained carefully in our Further Written Contribution.

6. *Third*, the third proposition is that general international law does not contain rules by which the legality of a declaration of independence, like that of 17 February 2008, may be assessed. In particular, the principle of sovereignty and territorial integrity could not have operated to prohibit the issuance of the Declaration.

7. *Fourth*, nothing in Security Council resolution 1244 of 1999 precluded the issuance of the Declaration of Independence in 2008.

8. Our *fifth* point is that some States, in their written pleadings, have focused on the principle of self-determination. We refer to it only as a subsidiary or alternative point. We do not consider that the Court need reach the issue. But, if it does, we are clear that in February 2008 the people of Kosovo were entitled to exercise the right of self-determination, and they did so by choosing

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[5]See the Written Statements of the Czech Republic, pp. 3-5; France, pp. 15-33, paras. 1.1-1.42; Albania, pp. 30-37, paras. 54-70; the United States of America, pp. 41-45; and Ireland, pp. 2-4, paras. 8-12, as well as the Written Comments of France, pp. 1-10, paras. 4-23); Albania, pp. 24-26, paras. 39-43; and the United States of America, pp. 10-12.

[6]See the Written Statements of the Czech Republic, p. 6; France, p. 36, para. 2.3; Austria, p. 3, para. 2; Egypt, pp. 3-4, para. 7; Germany, pp. 5-6; Poland, p. 4, para. 2.1; Luxembourg, pp. 5-6, paras. 9-12; the United Kingdom, p. 25, para. 1.16; the United States of America, pp. 45-46; Serbia, pp. 26-27, paras. 19-23; Spain, p. 7, para. 6 (iii); Estonia, p. 2; Japan, pp. 1 and 2; and of Denmark, p. 2. See also the Written Comments of Norway, p. 3, para. 7; Serbia, p. 28, para. 45; Germany, p. 3; the Netherlands, p. 2, para. 2.1; the United Kingdom, p. 5, para. 9; and of the United States of America, p. 10.

independence. We share the views of the many States, such as Albania and Switzerland, which have reached this conclusion[7].

B. Principal events

9. Mr. President, Members of the Court, I now turn to the main events leading to the issuance of the Declaration of Independence, that was done in the name of the people of Kosovo, now nearly two years ago, on 17 February 2008. I do so because it is important to understand the context in which that Declaration came about.

10. The *Milutinović* judgment of a trial chamber of the Yugoslav Tribunal, given on 26 February 2009, contains an authoritative and thorough account of many of the factual issues relevant to the present proceedings[8]. The Yugoslav Tribunal covered in depth such issues as the dual nature of Kosovo within the Socialist Federal Republic of Yugoslavia, the SFRY, and Serbia, prior to 1989[9]; it covers the events of 1989, when Kosovo's status as a federal unit was illegally removed by the Federal Republic of Yugoslavia's President, Slobodan Milošević[10]; and it covers in detail the events preceding the atrocities of 1998-1999[11]; and those atrocities themselves[12].

11. The *Milutinović* judgment constitutes, to use the words of this Court in its 2007 Judgment in the *Bosnia* v. *Serbia Genocide* case, "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature" *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 131,

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[7]See the Written Statements of Switzerland, pp. 15-26, paras. 57-96 ; Albania, pp. 40-44, paras. 75-85; Germany, pp. 32-37 ; Finland, pp. 3-5, paras. 7-12; Poland, pp. 24-29, paras. 6.1-6.16; Estonia, pp. 4-12; the Netherlands, pp. 3-7, paras. 3.1-3.11; Slovenia, p. 2; Latvia, p. 1, point 1; Ireland, pp. 8-12, paras. 27-34; and Denmark, pp. 12-13. See also the Written Comments of Albania, pp. 31-36, paras. 55-65; and of Switzerland, pp. 2-3, paras. 6-9.

[8]*Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug). See citations in Written Contribution, paras. 3.20, 3.27, 3.33, 3.49, 3.51, 3.52.

[9]Written Contribution, para.3.20.

[10]*Ibid*., para. 3.27.

[11]*Ibid*., para. 3.33.

[12]*Ibid*., paras. 3.49 and 3.51.

para. 213; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Judgment*, *I.C.J. Reports 2005*, p. 35, para. 61). In that Judgment — the *Genocide* Judgment — this Court, after carefully examining the procedures of the Yugoslav Tribunal, concluded "that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 134, para. 223). According to the Court's Judgment, even Serbia "based itself on the jurisprudence of the Tribunal" (*ibid.*, p. 131, para. 215) at both the trial and appellate levels. Of course, as Members of the Court will know, the *Milutinović* judgment is under appeal, and that appeal may include the evaluation made by the Trial Chamber of some of the facts, the evaluation that it made, but we nevertheless submit that the Court can attach weight to the Tribunal's finding of fact relevant to the present proceedings.

1. Events prior to 1998

12. Mr. President, turning to facts, I want first to recall briefly three important matters from the past, which still resonate today. I do so because Serbia's view of history, as expressed in its written pleadings, is distorted and lacks credence. The humanitarian catastrophe of 1998-1999, and the adoption of resolution 1244, did not come out of the blue.

13. The *first* point is this. In the period 1912 to 1918, Kosovo, which for centuries had been part of the Ottoman Empire, was forcibly occupied by the Kingdom of Serbia, and then incorporated into the new southern Slav State. It was immediately subjected to large-scale colonization. This was followed by a period of persecution — including what would now be called "ethnic cleansing" — lasting well into the 1920s[13]. There was a further period of brutal suppression in the 1950s and 1960s, within the Federal People's Republic of Yugoslavia, orchestrated by its Minister of the Interior, Aleksandar Ranković[14].

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[13]Written Contribution, paras. 3.03-3.07; Further Written Contribution, paras. 3.08-3.11.

[14]*Ibid.*, para. 3.13.

14. The *second* point is this: Kosovo has long had a status distinct from Serbia. Since 1946 it was a federal unit forming a direct part of the Yugoslav Federation, like Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Slovenia. Serbia's depiction of the constitutional position of Kosovo as wholly controlled by Serbia is simply wrong. Following the Second World War, and especially under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo enjoyed the status of a federal unit within the federal Yugoslavia, a status that under the 1974 Constitution was, in substance, the same as that of the six republics: it operated, and represented itself, directly at the federal level[15]. Thus, Kosovo had a dual nature, as a unit of a federal State, like the six republics, and as an autonomous province within Serbia. Under the federal Constitution, it enjoyed specific constitutional protections vis-à-vis Serbia, protections which simply could not survive the dissolution of the federal Yugoslavia. Kosovo had never accepted to be simply an autonomous part of a sovereign State of Serbia. Members of the Court, this is all very well described in the *Milutinović* judgment of the Yugoslav Tribunal[16]. It is also, for example, well set out by Slovenia in its Written Comments[17].

15. Contrary to what Professor Kohen announced this morning, Kosovo's autonomy was forcibly removed by the Milošević régime in 1989 by intimidation, and in contravention of the SFRY, Serbian and Kosovo Constitutions[18]. This is also well described in the Yugoslav Tribunal in *Milutinović*[19], and by Slovenia in its Written Comments[20]. Slovenia, for example, describes what actually happened in the SFRY constitutional court decision, as do we in our Further Written Contribution. As Slovenia concludes,

> "[t]he analysis of the legal history and other events shows that the Constitutional amendments of 1989 and the laws adopted on these bases regarding the action against

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[15]Written Contribution, paras. 3.15-3.22; Further Written Contribution, paras. 3.17-3.3.28.

[16]*Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), para. 213, cited in Written Contribution, para. 3.20.

[17]Slovenia, Written Comments, paras. 9-110.

[18]Written Contribution, paras. 3.23-3.28; Further Written Contribution, paras. 3.29-3.33.

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

[20]Slovenia, Written Comments, paras. 25-34.

the autonomy of Kosovo were a violation of the 1974 SFRY Constitution and of the rule of law principle"[21].

16. The *third* point dating from before 1999 that I want to recall briefly — and this is still vivid in the minds of many people living in Kosovo today — is the large-scale discrimination and the human rights violations of the late 1980s that lasted throughout the 1990s[22]. This tragic period for the people of Kosovo has also been well documented in the *Milutinović* judgment[23], as well as in numerous General Assembly and Security Council resolutions[24] and other United Nations documents referred to in our Written Contribution[25].

2. The humanitarian catastrophe of 1998-1999

17. Mr. President, I now come to the humanitarian catastrophe of 1998 and 1999. As Members of the Court will recall, at this time a humanitarian crisis in Kosovo unfolded on an unimaginable scale. The inability of the new constitutional structure in the Federal Republic of Yugoslavia (the FRY) to protect the human rights of the people of Kosovo had become clear in the 1990s. This culminated in crimes against humanity, ethnic cleansing, and other war crimes which led to massive refugee flows and an IDP crisis: approximately 90 per cent of the Kosovo Albanian population were driven from their homes, fleeing, many to the hills, many to neighbouring countries. The Yugoslav Tribunal in *Milutinović* found that the attacks on the Kosovo Albanians were the result of a deliberate policy of the authorities of the FRY and Serbia, one that vastly exceeded any possible misconduct by Kosovo Albanians[26]. Contrary to Serbia's claims, there can be no comparison whatsoever between the massive, officially inspired human rights violations committed by the Yugoslav and Serbian authorities and the acts committed by some Kosovo

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[21]Slovenia, Written Comments, para. 111.

[22]Written Contribution, paras. 3.29-37; Further Written Contribution, paras. 3.34-3.50.

[23]*Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), paras. 223-229, cited in Written Contribution, para. 3.33.

[24]General Assembly resolutions 48/153, 20 Dec. 1993; 49/204, 23 Dec. 1994; 50/190, 22 Dec. 1995; 51/111, 12 Dec. 1996; 52/139, 12 Dec. 1997; 53/164, 9 Dec. 1998; and 54/183, 17 Dec. 1999. In 1992, the situation of human rights in Kosovo was dealt with in the Assembly's resolution 47/147 on the "Situation of human rights in the territory of the former Yugoslavia" (18 Dec. 1992, para. 14).

[25]Paras. 3.34-3.37.

[26]*Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), passim, for example paras. 1156, 1178, cited in Written Contribution, paras. 3.49-3.51.

Albanians in the late 1990s. Nor can the actions of the FRY and Serbia be described as counter-insurgency actions. They amounted, rather, to a general attack on the Kosovo Albanian population.

18. The crisis of 1998-1999 is described in numerous United Nations documents referred to in our first Written Contribution: documents from the General Assembly, from the Security Council, from the Secretary-General, from the Commission on Human Rights and its Special Rapporteur, from the United Nations Commissioner for Human Rights, and others[27]. In May 1999 the Security Council expressed its "grave concern at the humanitarian crisis in and around Kosovo"[28]. This Court itself had occasion, in June 1999, to refer to "the human tragedy, the loss of life, and the enormous suffering in Kosovo"[29]. The General Assembly, in December 1999, condemned "the grave violations of human rights in Kosovo that affected ethnic Albanians"[30].

19. Mr. President, none of us who watched the images on television, day after day, will ever forget the columns of terrorized families carrying all their belongings, the very young, the very old, the trains packed with terrified evacuees, the crowded camps in neighbouring Macedonia and Albania, overflowing with people who feared that they would never see their homes again. How much more vivid must it still be, in the minds of those men, women and children, who lived through these horrors at first hand! They are reluctant to speak, but — if you press — virtually every Kosovar has a nightmare story to tell of those days, those weeks, those months. The pain is still there, it does not go away so fast, if at all. It is no wonder that the people of Kosovo cannot contemplate a future within Serbia.

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[27]Written Statement, paras. 3.47-3.60.

[28]Security Council resolution 1239 (1999) of 14 May 1999.

[29]*Legality of Use of Force (Yugoslavia* v. *Belgium)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 131, para. 16; *Legality of Use of Force (Yugoslavia* v. *Canada)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 265, para. 15; *Legality of Use of Force (Yugoslavia* v. *France)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, pp. 369-370, para. 15; *Legality of Use of Force (Yugoslavia* v. *Germany)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 428, para. 15; *Legality of Use of Force (Yugoslavia* v. *Italy)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 488, para. 15; *Legality of Use of Force (Yugoslavia* v. *Netherlands)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 549, para. 16; *Legality of Use of Force (Yugoslavia* v. *Portugal)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 663, para. 15; *Legality of Use of Force (Yugoslavia* v. *Spain)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 768, para. 15; *Legality of Use of Force (Yugoslavia* v. *United Kingdom)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 833, para. 15; *Legality of Use of Force (Yugoslavia* v. *United States of America)*, *Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 922, para. 15.

[30]General Assembly resolution 54/183 of 17 December 1999.

20. Mr. President, the crisis in Kosovo had worsened so dramatically by 1998, that diplomatic efforts intensified in the course of that year. They included action by the Security Council, which adopted a series of resolutions[31], largely ignored by Milošević, and action by the Contact Group of six States. Again, these diplomatic efforts are well described in the *Milutinović* judgment[32].

21. The negotiating process led by Ambassador Christopher Hill between mid-1998 and early 1999 made some tentative steps forward. Professor Murphy will describe this in some detail, because it is important to a proper understanding of resolution 1244. He will also cover the Rambouillet Conference, which ended with the Kosovo Albanians accepting an agreement proposed by the negotiators. That agreement was rejected by Serbia. Ultimately, as the Court is well aware, a number of States then acted to prevent further, large-scale, catastrophic human rights abuses in Kosovo.

3. Resolution 1244 and UNMIK (1999-2004)

23. I now turn to the period between June 1999, when Security Council resolution 1244 was adopted, and 2005, when final status talks were initiated. As I have said, Professor Murphy will deal in more detail with 1244 and the Hill and Rambouillet talks that preceded it. At this stage I want to stress just one thing. In considering all these efforts to bring about an enduring peace, it is essential to recall the clear distinction, understood by all those involved, between on the one hand, the establishment of conditions for a peaceful and stable situation on an interim basis and, on the other hand, the subsequent determination of the final status for Kosovo. Resolution 1244 dealt primarily with the interim period. It hardly touched on final status. It would not have been conducive to a return to peace and stability in Kosovo to have sought to resolve, back in June 1999, the final status question. Indeed, it was to be six years before it was felt that the time had come to commence talks on that issue.

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[31]Security Council resolutions 1160 (1998) of 31 Mar. 1998, and 1199 (1998) of 27 Sept. 1998.

[32]*Prosecutor* v. *Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), Judgement, 26 Feb. 2009 (available on the ICTY website: http://www.icty.org/case/milutinovic/4#tjug), Vol. 1, paras. 312-412.

24. In the months immediately following June 1999, efforts focused on the return to Kosovo and to their homes of the one and a half million refugees and displaced persons, and the rebuilding of their lives. Next came the establishment of the provisional institutions of self-government. It was only at a much later stage, beginning in 2004, that attention turned to the political process for Kosovo's final status. As at Rambouillet, all options were open — though resolution 1244 had acknowledged that the will of the Kosovo people was a fundamental premise of the political process that the United Nations would facilitate.

4. Final status talks (2005-2007)

25. So I come to the extensive efforts that were made to resolve Kosovo's final status. The Secretary-General, with the support of the Security Council, led that process. Final status talks were launched in 2005, by which time, as all agreed, the interim status was no longer sustainable. Comprehensive negotiations then took place that explored all possible aspects of an agreed solution. After two years of efforts, by the end of 2007 at the latest, all involved, including the Secretary-General and his Special Envoy, President Ahtisaari (all, that is, except Serbia) came to see Kosovo's independence as the only viable option. To prolong final status talks would have been seriously destabilizing for Kosovo and the Western Balkans more widely. Only in this context, did the democratically-elected representatives of the people of Kosovo declare independence.

26. A catalyst for the timing of the final status negotiations was a sudden upsurge of violence in Kosovo in March 2004. We reject the description of these events given this morning by the representatives of Serbia. We described what actually happened in our Further Written Contribution at paragraphs 364-366. There you will see the reality. For example, of the 19 persons who died, 11 were Kosovo Albanians. Nevertheless, these events of March 2004 came as a shock to the international community; they came as a shock to the Kosovo authorities and to the people of Kosovo. But given the unfounded allegations by Serbia, I want to make clear that the Kosovo authorities immediately condemned the violence and they have done all in their power to bring the perpetrators to justice.

27. Following the events of March 2004, the Secretary-General requested Ambassador Eide to conduct a general review of the Kosovo operation. His initial report of August 2004 suggested that "[r]aising the future status question soon seems — on balance — to be the better option"[33]. In Ambassador Eide's second report, transmitted to the Security Council in October 2005, he said that "an overall assessment leads to the conclusion that the time has come to commence [the final status] process"[34]. As he put it, "Kosovo will either move forward or slide backwards — having moved from stagnation to expectation, stagnation cannot again be allowed to take hold there"[35].

28. In a Presidential statement of 24 October 2005, the Security Council agreed with this assessment, welcomed the Secretary-General's readiness to appoint a Special Envoy to lead the process, and reaffirmed "its commitment to the objective of a multi-ethnic and democratic Kosovo, which must reinforce regional stability"[36].

29. In November 2005, President Ahtisaari was appointed by the Secretary-General as his Special Envoy to lead the final status process. I shall not rise to the disgraceful assertions of bias that were heard this morning against the most distinguished Nobel prize-winner and public servant. The Secretary-General's letter of appointment, which is Document No. 198 in the Dossier provided to the Court by the United Nations Secretariat, stated that the Special Envoy would "lead the political process to determine the future status of Kosovo in the context of resolution 1244 (1999) and the relevant Presidential Statements of the . . . Council"[37]. The Terms of Reference that were annexed to the Secretary-General's letter can also be found at Document No. 198. They emphasized that the Special Envoy "will lead this process on behalf of the Secretary-General". They further stated "[t]he pace and duration [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 cooperation of the parties and the situation on the ground". The Special Envoy

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[33]Report on the situation in Kosovo, S/2004/932, 30 Nov. 2004, Enclosure, Dossier No. 71.

[34]"A comprehensive review of the situation in Kosovo", S/2005/635, 7 Oct. 2005, Ann., para. 62, Dossier No. 193.

[35]*Ibid.*, para. 63.

[36]Statement by the President of the Security Council, S/PRST/2005/51, 24 Oct. 2005, Dossier No. 195.

[37]Letter from Secretary-General Kofi Annan to Mr. Martti Ahtisaari, 14 Nov. 2005, Dossier No. 198.

was to have "maximum leeway in order to undertake his task" and was "expected to revert to the Secretary-General at all stages of the process".

30. Thus Mr. President, Members of the Court, President Ahtisaari was acting directly for the Secretary-General, and had very broad discretion as to the modalities and duration of the final status process. There is no indication in the letter of appointment, or in the Terms of Reference annexed to that letter, that the settlement of the final status for Kosovo could only occur if it had the consent of Serbia, or if there were a further decision of the Security Council. That omission seems to have been deliberate.

31. President Ahtisaari conducted fifteen rounds of negotiations in the course of 2006. Belgrade's position throughout was that independence was unacceptable. Belgrade even made the wholly untenable claim that international law precluded a settlement involving independence[38]. Kosovo's position was also clear. Pristina insisted that the settlement should result in the independence of Kosovo. But within the framework of independence, there could be far-reaching protections for minority communities (including within the system of governance of Kosovo), protections for religious and historic monuments, and of course protections for human rights.

32. Notwithstanding a high-level meeting on 24 July 2006, positions remained far apart. The ensuing Contact Group statement stressed that "Belgrade needs to demonstrate much greater flexibility in the talks than it has done so far", and the Contact Group reiterated that

> "once negotiations are underway, they cannot be allowed to be blocked. The process must be brought to a close, not least to minimise the destabilising political and economic effects of continuing uncertainty over Kosovo's future status"[39].

33. In their later statement of 20 September 2006, Contact Group Ministers said:

> "Striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing. Ministers encouraged

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[38]See Serbia's opening "platform", 5 Jan. 2006 (cited in M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009), p. 200): a line repeated in the Assembly of Serbia's resolution of 14 Feb. 2007 (Assembly Resolution following United Nations Special Envoy Martti Ahtisaari's "Comprehensive proposal for the Kosovo status settlement" and continuation of negotiations on the future status of Kosovo-Metohija, available at http://www.mfa.gov.yu/Policy/Priorities/KIM/resolution_kim_e.html).

[39]High-level meeting on the future status of Kosovo, Contact Group Statement, Vienna, 24 July 2006, (available at http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf).

> the Special Envoy to prepare a comprehensive proposal for a status settlement and on this basis to engage the parties in moving the negotiating process forward."[40]

34. Then, on 30 September 2006, while the final status talks were ongoing, Serbia took a dramatic step that signalled a complete unwillingness to engage in meaningful negotiations. On that day, Serbia adopted a new Constitution. The new Constitution was narrowly approved a month later by a referendum in which Kosovo Albanians were ineligible to participate. The referendum campaign "emphasised that defending Kosovo was the main point of the constitution", as did Party leaders when urging the Assembly to adopt the Constitution[41].

35. The preamble to the new Constitution of Serbia, which remains in force to this day, focuses almost exclusively on Kosovo. It consists of just two paragraphs, the second of which reads:

> "Considering [. . .] that the province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations"[42].

36. There are many provisions in this Constitution of 2006 that make the same point. For example, the Presidential oath commences with the words: "I do solemnly swear that I will devote all my efforts to preserve the sovereignty and integrity of the territory of Serbia, including Kosovo and Metohija as its constituent part"[43].

37. So, Mr. President, in the middle of the final status negotiations, the adoption of this Constitution signalled a complete entrenchment of Serbia's position regarding the status of Kosovo. It also revealed Serbia's true view as to what "autonomy" would mean for the people of Kosovo. The Constitution provides that "The substantial autonomy of . . . the Autonomous Province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution"[44]. After reviewing this

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[40]Contact Group Ministerial Statement, New York, 20 Sep. 2006, para. 4 (available on http://www.unosek.org/docref/2006-09-20_-_CG_Ministerial_Statement_New_York.pdf).

[41]International Crisis Group, Europe Briefing No. 44, 8 Nov. 2006, *Serbia's New Constitution: Democracy Going Backwards*, p.4.

[42]Constitution of the Republic of Serbia 2006, preamble.

[43]*Ibid*., Art. 114.

[44]Constitution of the Republic of Kosovo, Art. 182, para. 2.

language, the Venice Commission of the Council of Europe concluded that "the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not"[45]. In other words, under the 2006 Constitution, the Assembly of Serbia, could characterize Kosovo's so-called "autonomy" to mean whatever it wanted the concept to mean. Like Humpty Dumpty in *Through the Looking Glass*, when they use a word it means just what they choose it to mean — neither more nor less[46].

38. The adoption of this new Constitution, addressing Kosovo in such stark terms, not only demonstrates Serbia's entrenched negotiating position, and not only Serbia's precarious idea of "substantial autonomy", but also Serbia's utter disregard for the will of the people of Kosovo. It is yet another example of Serbia treating Kosovo as a mere piece of land. For this Constitution was drafted without any involvement of the institutions or people of Kosovo. The International Crisis Group concluded that "[t]he main purpose of the new constitution was to demonstrate Serbian hostility to and create further legal barriers against, Kosovo independence"[47].

39. Mr. President, Special Envoy Ahtisaari presented his draft comprehensive Settlement to Belgrade and Pristina on 2 February 2007. On that day, the Contact Group issued a statement encouraging both Parties "to engage fully and constructively with the Special Envoy in this phase of the process"[48].

40. Further negotiations took place, in the course of which Kosovo essentially accepted the Settlement, while Serbia, in a move reminiscent of its actions at Rambouillet eight years before, presented a whole new version of the document, among other things referring to Kosovo throughout as "the Autonomous Province of Kosovo and Metohija", which was to be governed in

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[45]European Commission for Democracy through Law (Venice Commission), *Opinion No. 405/2006 on the Constitution of Serbia*, 19 Mar. 2007, para. 8 (available at the Venice Commission's website <http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-e.pdf>). Art. 182, para. 2, of the Constitution provides: "The substantial autonomy of . . . the Autonomous Province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution."

[46]Lewis Carroll, *Through the Looking Glass* and *What Alice Found There*, Chap. VI.

[47]International Crisis Group, Europe Briefing No. 44, 8 Nov. 2006, *Serbia's New Constitution: Democracy Going Backwards*, p. 1.

[48]Joint Contact Group Statement, 2 Feb. 2007 (available on http://www.unosek.org/docref/Joint Contact Group Statement 2nd february 2007.doc).

accordance with the Constitution of the Republic of Serbia and within its sovereignty[49] — and hence in a manner that would leave Kosovo exposed to future changes in Serbian national law adopted against its wishes.

41. The Secretary-General presented President Ahtisaari's Report on Kosovo's Future Status, together with his proposed Settlement, to the Security Council on 26 March 2007[50]. The Special Envoy's recommendation was that: "Kosovo's status should be independence, supervised by the international community."[51]

42. In his report, President Ahtisaari said, "[i]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse"[52]. Indeed, he put it rather bluntly, "Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept nothing short of independence"[53]. He was also of the view that

> "Kosovo's current state of limbo cannot continue. . . . Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole."[54]

43. Ahtisaari explained that reintegration into Serbia was not a viable option[55], and that continued international administration was not sustainable[56]. He concluded that independence with international supervision was the only viable option[57]. President Ahtisaari's recommendation was endorsed by the Secretary-General of the United Nations[58].

44. In his covering letter to the Security Council, the Secretary-General said:

> "Having taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by

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[49]M. Weller, *Contested Sovereignty: Kosovo's Struggle for Independence*, 2009, pp. 210-211.

[50]S/2007/168 and Add.1 [Dossier Nos. 203 and 204]. Addendum 2 consists of a note about the availability of certain maps.

[51]Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, heading [Dossier No. 203].

[52]*Ibid.*, para. 3.

[53]*Ibid.*, para. 2.

[54]*Ibid.*, para. 4.

[55]*Ibid*., paras. 6-7.

[56]*Ibid*., paras. 8-9.

[57]*Ibid*., paras. 10-14.

[58]See para. 43 above.

> my Special Envoy in his report on Kosovo's future status [that is independence] and the Comprehensive proposal for the Kosovo Status Settlement."

45. In its pleadings before this Court, and in many public statements about these Court proceedings, Serbia argues that, if Kosovo's Declaration of Independence is not found to contravene international law, there will be worldwide repercussions. This is simply not the case. As Ahtisaari himself underlined:

> "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosević's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary."[59]

46. Mr. President, Members of the Court, the next stage was that, at Russia's suggestion, a Security Council mission went to the region in April 2007[60]. Like Ahtisaari, the mission concluded that the positions of the sides remained far apart[61].

47. A final effort to reach a settlement acceptable to both States was undertaken by the Troika, consisting of very senior representatives of the European Union, the Russian Federation, and the United States of America[62]. In August 2007, the Secretary-General welcomed this initiative, restating his belief that the status quo was unsustainable and requesting a report by December 2007[63].

48. Between August and December 2007, over a four-month period, the Troika undertook an intense schedule of meetings with the parties, who were represented at the highest level. They were fully supported by Contact Group Ministers, who repeated that "striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing"[64]. The Troika could not achieve a settlement acceptable to both sides. They

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[59]Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, para. 15 [Dossier No. 203].

[60]For the composition and terms of reference of the mission, see letter dated 19 April 2007 from the President of the Security Council to the Secretary-General, S/2007/220, Ann., Dossier No. 206.

[61]Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007, para. 59, Dossier No. 207.

[62]M. Weller, *Contested Sovereignty: Kosovo's Struggle for Independence* (2009), Chap. 13.

[63]Available on http://www.un.org/apps/sg/sgstats.asp?nid=2692.

[64]Statement on Kosovo by Contact Group Ministers, 27 Sept. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209.

reached the same conclusion as Ahtisaari and the Security Council mission to the region. In their report, presented to the Council in December, the Troika concluded that "the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo."[65]

49. Thus, Mr. President, Members of the Court, by December 2007, there was widespread acceptance, including by the United Nations Secretary-General and his Special Envoy, that all efforts to achieve a settlement acceptable to both sides had been exhausted. At the same time, it was not possible to secure a decision of the Security Council on the way forward. It was, nevertheless, clear that independence, as recommended by the Special Envoy and endorsed by the Secretary-General, was the only outcome acceptable to the overwhelming majority of the people of Kosovo. It was clear that to prolong the process would not bring results; rather, it would serve to destabilize Kosovo and the entire western Balkans.

50. Kosovo was fully prepared to entrench protections for all of the people of Kosovo, especially the Serb community, within the context of independence, consistent with the Ahtisaari Settlement, and in close co-ordination with the interested members of the international community. This occurred through the Declaration of Independence of 17 February 2008 and the Constitution of the Republic of Kosovo, which entered into force on 15 June 2008.

C. Conclusions from the final status negotiations

51. Mr. President, Members of the Court, in concluding let me set out five central propositions that emerge from these efforts to secure a negotiated final status.

52. *First*, there was agreement among all major participants that the status quo in Kosovo was unsustainable[66].

53. *Second*, there could be no return to the pre-March 1999 situation in Kosovo[67].

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[65]Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 10 Dec. 2007, para. 2, Dossier No. 209.

[66]See, among many such statements, the second Eide Report ("A comprehensive review of the situation in Kosovo", S/2005/635, 7 Oct. 2005, Ann., para. 63, Dossier No. 193); the Report of the Security Council Mission ("the current status quo was not sustainable", S/2007/256, 4 May 2007, para. 59, Dossier No. 207); the Contact Group Ministers on 27 Sep. 2007, who "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable" (Statement on Kosovo by the Contact Group Ministers, New York, 27 Sep. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209). Ahtisaari said in his report, "Kosovo's current state of limbo cannot continue" (Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, Ann., para. 4, Dossier No. 203).

54. *Third*, once the final status process had started, it could not be blocked and would have to be brought to a conclusion[68]. In other words, the process could not continue indefinitely and might lead to a settlement without the consent of one of the parties.

55. *Fourth*, the Security Council and the Secretary-General entrusted President Ahtisaari with responsibility for the negotiations, including expressly, in his terms of reference, for determining their duration. He ultimately concluded that negotiations had been exhausted.

56. And *fifth*, under resolution 1244, the final status process was to take into account the Rambouillet Accords, which meant that any settlement had to be acceptable to the people of Kosovo[69]. Further, any settlement had to ensure implementation of standards with regard to Kosovo's multi-ethnic character, and promote the future stability of the region[70].

57. Mr. President, it is clear from these propositions that in no sense did Kosovo's Declaration of Independence occur as an unexpected or radical event, let alone one that violated international law. Rather, the issuance of the Declaration came as a natural consequence of the political process initiated by the Security Council in 2005, that had run its course by the end of 2007.

58. Mr. President, Members of the Court, that concludes my presentation. I thank you for your attention, and I request that you now call on Mr. Daniel Müller.

The PRESIDENT: Thank you, Sir Michael Wood. I now call upon Mr. Daniel Müller.

Mr. MÜLLER: Thank you, Mr. President.

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[67]Contact Group Statement, London, 31 Jan. 2006 (available on <http://www.unosek.org/docref/fevrier/statement by the contact group on the future of Kosovo - Eng.pdf>).

[68]"A comprehensive review of the situation in Kosovo", S/2005/635, 7 Oct. 2005, Ann., para. 70, Dossier No. 193; Guiding principles of the Contact Group for a settlement of the status of Kosovo, S/2005/709, 10 Nov. 2005, Ann., Dossier No. 197; Contact Group Statement, Vienna, 24 July 2006 (available on <http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf>); Statement on Kosovo by the Contact Group Ministers, New York, 27 Sep. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209.

[69]Or, as it was put at Rambouillet, in Security Council resolution 1244 (1999), and in the preamble to the Constitutional Framework of 2001, the final settlement would have to be on the basis of/take full account of "the will of the people".

[70]Statement on Kosovo by the Contact Group Ministers, New York, 27 Sep. 2007, S/2007/723, 10 Dec. 2007, Ann. III, Dossier No. 209.

III. LA DEMANDE D'AVIS CONSULTATIF, LA DÉCLARATION D'INDÉPENDANCE ET SA CONFORMITÉ AVEC LE DROIT INTERNATIONAL GÉNÉRAL

Monsieur le président, Messieurs les juges, c'est un honneur et un privilège de me présenter devant vous cet après-midi pour exposer nos observations concernant la demande d'avis consultatif dont vous êtes saisis.

1. Par cette demande matérialisée dans sa résolution 63/3 du 8 octobre 2008, l'Assemblée générale a posé à la Cour la question suivante :

> «La déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo est-elle conforme au droit international ?»[71]

2. Notre réponse à la question, sir Michael l'a déjà annoncé, est fort simple : aucune règle du droit international général n'interdit la déclaration d'indépendance du 17 février 2008 proclamée au nom du peuple du Kosovo par leurs représentants démocratiquement élus. Elle est donc «conforme au droit international». Il me revient de vous présenter les arguments juridiques qui nous ont amenés à cette conclusion partagée par la plupart des Etats ayant participé à la procédure écrite (III). Le professeur Murphy expliquera tout à l'heure pourquoi la résolution 1244 (1999) du Conseil de sécurité[72] n'interdit pas non plus la déclaration d'indépendance.

3. Mais permettez-moi, Monsieur le président, de commencer ma présentation avec quelques considérations concernant la demande d'avis consultatif et le sens qu'il convient de donner à la question posée par l'Assemblée générale (I), avant de dire quelques mots sur la déclaration d'indépendance des représentants du peuple kosovar en date du 17 février 2008 (II). C'est cette déclaration qui est, ou devrait être, au centre de la demande d'avis en dépit de la formulation, que l'on peut trouver maladroite, de la question adoptée par l'Assemblée générale sur proposition de la seule Serbie. Je vais revenir sur ce point qui semble encore diviser les Etats ayant participé à la procédure écrite dans un instant.

I. La demande d'avis consultatif et la question de l'Assemblée générale

4. La demande d'avis de l'Assemblée générale, adoptée par 77 voix contre 6 avec 74 abstentions[73], et la question qu'elle contient sont loin de faire le consensus entre les 192 Etats

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[71] A/RES/63/3, 8 octobre 2008 [dossier, pièce n° 7].

[72] S/RES/1244 (1999), 10 juin 1999 [dossier, pièce n° 34].

[73] A/63/PV.22, 8 octobre 2008, p. 11 [dossier, pièce n° 6].

Membres des Nations Unies[74]. Dans leurs exposés et observations écrits, plusieurs Etats ont fait part de leur doutes et objections quant à l'opportunité judiciaire d'y répondre.

5. Eu égard à «l'obligation [de la Cour] de s'assurer, chaque fois qu'elle est saisie d'une demande d'avis, de l'opportunité d'exercer sa fonction judiciaire, sur la base du critère des «raisons décisives»» (*Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, p.157, par. 45), vous devriez, selon la position de plusieurs Etats Membres[75] que nous avons déjà rappelée dans notre contribution écrite additionnelle[76], refuser de répondre à la demande d'avis consultatif. Car une réponse — indépendamment de son contenu — ne constituerait pas «une participation de la Cour à l'action de l'Organisation». Pour l'Etat ayant parrainé la résolution 63/3, la Serbie, il s'agit de l'exercice de *son* droit de «poser à la Cour une question simple, élémentaire sur un problème qu'*il* considère comme étant d'une importance vitale»[77] Et encore ce matin, M. Dušan [Bataković] a souligné qu'il s'agit d'une question vitale pour son pays, la Serbie. Tout compte fait, la Cour a été priée d'agir comme un conseil juridique pour les Etats Membres de l'Organisation. Mais ce n'est aucunement votre fonction, Messieurs de la Cour : «L'avis est donné par la Cour non aux Etats, mais à l'organe habilité pour le lui demander» (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 71 ; *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 24, par. 31 ; *Applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunités des Nations Unies, avis consultatif, C.I.J. Recueil 1989*, p. 188, par. 31 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, p. 158, par. 47). Jamais il n'a été question de donner à l'Assemblée générale un avis autorisé du point de vue juridique sur la conformité de la déclaration d'indépendance. La Cour et la procédure consultative mise à la disposition des organes de l'Organisation des Nations Unies ne doivent pas être instrumentalisées

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[74] A/63/PV.22, 8 octobre 2008, p. 12 (sir John Sawers). Voir aussi exposé écrit du Royaume-Uni, p. 21, par. 1.7 ou exposé écrit des Maldives, p. 2.

[75] Voir notamment les exposés écrits de la République tchèque (p. 3-5), de la France (p. 15-33, par. 1.1-1.42), de l'Albanie (p. 30-37, par. 54-70), des Etats-Unis d'Amérique (p. 41-45) et de l'Irlande (p. 2-4, par. 8-12), ainsi que les observations écrites présentées par la France (p. 1-10, par. 4-23), par l'Albanie (p. 24 à 26, par. 39 à 43) et par les Etats-Unis d'Amériques (p. 10-12).

[76] Contribution écrite additionnelle du Kosovo, p. 5-8, par. 1.12-1.17

[77] A/63/PV.22, 8 octobre 2008, p. 2 ; les italiques sont de nous [dossier, pièce n° 6].

ainsi par un Etat pour chercher un «conseil d'ordre juridique» ou pour faire résoudre ses problèmes par votre haute juridiction.

6. Au cas où vous jugeriez néanmoins approprié, Messieurs de la Cour, d'accueillir la demande d'avis, la Cour doit s'en tenir à la formulation de la question soumise, sans qu'elle puisse en élargir les termes. En vertu de sa jurisprudence, «lorsqu'elle rend son avis, la Cour est en principe liée par le libellé des questions formulées dans la requête» (*Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, *avis consultatif*, *C.I.J. Recueil 1973*, p. 184, par. 41 ; *Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies*, *avis consultatif*, *C.I.J. Recueil 1982*, p. 349, par. 47).

7. Nous avons expliqué dans nos écritures[78] que la question posée par la Serbie à travers l'Assemblée générale contient plusieurs éléments biaisés et orientés : la déclaration y est décrite comme étant «unilatérale», ses auteurs ont été identifiés d'une façon erronée et la question semble présupposer que le droit international connaît effectivement des règles régissant des déclarations d'indépendance. Mais indépendamment de ces éléments, la question est précise et restreinte et la plupart des Etats l'a reconnu dans leurs exposés et observations écrits[79]. Selon la Serbie elle-même, la question «ne prête nullement à controverse»[80] et il n'est pas nécessaire «de l[a] modifier ou d'y ajouter des éléments»[81]. M^e^ Djerić a réitéré cette position ce matin. Vous êtes donc appelés à répondre à la seule et unique question, très précise et restreinte, de la conformité de la déclaration d'indépendance du 17 février 2008 avec le droit international. Autrement dit, pour paraphraser les termes de l'avis consultatif sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*[82], la Cour doit déterminer les principes et règles existants et, s'il y en a — *quod non* —

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[78] Contribution écrite du Kosovo, p. 126-128, par. 7.04-7.10, contribution écrite additionnelle du Kosovo, p. 9, par. 1.21.

[79] Voir les exposés écrits de la République tchèque (p. 6), de la France (p. 36, par. 2.3), de l'Autriche (p. 3, par. 2), de l'Egypte (p. 3 et 4, par. 7), de l'Allemagne (p. 5 et 6), de la Pologne (p. 4, par. 2.1), du Luxembourg (p. 5 et 6, par. 9 à 12), du Royaume-Uni (p. 25, par. 1.16), des Etats-Unis d'Amérique (p. 45 et 46), de la Serbie (p. 26 et 27, par. 19-23), de l'Espagne (p. 7, par. 6 iii)), de l'Estonie (p. 2), du Japon (p. 1-2) et du Danemark (p. 2), ainsi que les observations écrites de la Norvège (p. 3, par. 7), de la Serbie (p. 28, par. 45), de l'Allemagne (p. 3), des Pays-Bas (p. 2, par. 2.1), du Royaume-Uni (p. 5, par. 9) et des Etats-Unis d'Amérique (p. 10).

[80] A/63/PV.22, 8 octobre 2008, p. 2 [dossier, pièce n^o^ 6].

[81] A/63/PV.22, 8 octobre 2008, p. 2 [dossier, pièce n^o^ 6].

[82] *Licéité de la menace ou de l'emploi d'armes nucléaires*, *avis consultatif*, *C.I.J. Recueil 1996*, p. 234, par. 13.

les appliquer à la déclaration d'indépendance du 17 février 2008 afin d'apporter à la question posée une réponse fondée en droit.

8. La question ne porte sur rien d'autre et il n'y a aucune façon, ni aucune nécessité, de lui accorder un sens plus «complet»[83]. Elle ne porte pas sur le problème, différent, de la qualité étatique de la République du Kosovo aujourd'hui, et nous n'allons pas revenir sur les arguments dépourvus de tout fondement présentés ce matin. La question ne porte pas non plus sur la légalité ou l'opportunité de ses soixante-trois reconnaissances, ou encore des traités conclus par la République du Kosovo[84], y compris ceux concernant sa participation à des organisations internationales ou la démarcation de ses frontières[85]. Contrairement à certaines demandes d'avis consultatif dont la Cour a été saisie dans le passé[86], l'Assemblée a évité de vous demander de vous prononcer sur les conséquences de la conformité ou la non-conformité de la déclaration d'indépendance du Kosovo avec le droit international. Elle vous a seulement demandé si cette déclaration était interdite par le droit international lorsqu'elle a été adoptée il y a presque deux ans maintenant. Permettez-moi de faire remarquer par ailleurs que, eu égard à son objet, la question semble utiliser la mauvaise forme temporelle[87].

9. Contrairement à la position présentée à plusieurs reprises par les conseils de la Serbie ce matin, une éventuelle réponse à la question posée ne concerne pas d'autres cas dans lesquels des mouvements séparatistes ont tenté ou tentent de réaliser la scission de certaines parties du territoire d'un Etat préexistant par la force[88]. La demande de l'Assemblée générale, rédigée exclusivement par la Serbie, ne concerne à l'évidence que la déclaration d'indépendance du 17 février 2008 au

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[83] Voir l'allégation de la Serbie, observations écrites de la Serbie, p. 28, par. 45.

[84] Voir la liste des accords internationaux conclus par la République du Kosovo sur le site de la Gazette officielle de la République du Kosovo (http://www.ks-gov.net/GazetaZyrtare/MN.aspx).

[85] Accord entre la République du Kosovo et la République de Macédoine relatif à la démarcation physique de la frontière d'Etat, 16 et 17 octobre 2009, publié sur le site internet de la Gazette officielle de la République du Kosovo (http://www.ks-gov.net/gazetazyrtare/Documents/anglisht-222.pdf).

[86] Voir notamment *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*, *avis consultatif*, *C.I.J. Recueil 1971*, p. 16, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, *avis consultatif*, *C.I.J. Recueil 2004*, p. 136. Cf. également *Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme*, *avis consultatif*, *C.I.J. Recueil 1999*, p. 62 et *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte*, *avis consultatif*, *C.I.J. Recueil 1980*, p. 73.

[87] Exposé écrit de l'Allemagne, p. 8.

[88] Observations écrites de la Serbie, p. 12, par. 4.

moment et dans les circonstances qui lui sont propres et qui ne correspondent aucunement à la sombre image que la Serbie veut lui donner.

10. Monsieur le président, Messieurs de la Cour, si vous considérez approprié de donner suite à la demande d'avis, vous devriez répondre à cette seule question, très précise : la déclaration d'indépendance du mois de février 2008 était-elle en violation avec les règles applicables du droit international ? Notre réponse est aussi précise que concise : ni le droit international général ni la résolution 1244 du Conseil de sécurité, sur laquelle mon collègue le professeur Murphy va revenir tout à l'heure, ne contiennent de règles qui s'opposent à la déclaration d'indépendance du Kosovo. Et ceci m'amène à dire quelques mots sur cette déclaration d'indépendance du 17 février 2008.

II. La déclaration d'indépendance du 17 février 2008

11. Pour commencer, Monsieur le président, laissez-moi vous dire une fois pour toute qu'il n'y a pas de «déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo». La formulation de la question par la Serbie est, à cet égard, erronée. Conformément à l'article 1.5 du cadre constitutionnel pour un gouvernement autonome provisoire[89], les institutions provisoires d'administration autonome étaient l'Assemblée, le Président du Kosovo, le gouvernement, les tribunaux, ainsi que «[l]es autres institutions et organes précisés dans le cadre constitutionnel» tel que le médiateur, le ministère public et la chambre spéciale de la Cour suprême pour toutes les questions relatives au cadre constitutionnel. Un regard rapide sur cette liste ne laisse aucun doute : ces institutions n'ont jamais été les auteurs d'une déclaration commune et encore moins d'une déclaration d'indépendance.

12. La seule déclaration d'indépendance du 17 février 2008 est celle qui a été lue en albanais, qui a fait l'objet d'un vote et qui, par la suite, a été signée par les représentants du peuple du Kosovo[90]. Nous avons déposé auprès du Greffe une reproduction grandeur nature de cette déclaration et avons produit une photocopie de l'original dans notre contribution écrite[91] accompagnée des traductions anglaise et française. Permettez-moi, Monsieur le président, de

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[89] Règlement n° 2001/9 relatif à un cadre constitutionnel pour un gouvernement autonome provisoire au Kosovo, UNMIK/REG/2001/9, 15 mai 2001 [dossier, pièce n° 156].

[90] Contribution écrite du Kosovo, annexes, annexe 2, p. 11-14 (p. 235-238).

[91] Contribution écrite du Kosovo, annexes, annexe 1 (p. 207 et 209).

remarquer que les traductions anglaise et française reproduites dans le dossier soumis au nom du Secrétaire général[92] ne correspondent pas à l'original albanais de la déclaration telle qu'elle a été proclamée.

13. Certes, à plusieurs points de vue, la réunion des représentants du peuple lors de laquelle la déclaration a été votée et signée a pu être confondue avec l'Assemblée du Kosovo. Pourtant, elle ne constitue pas un acte de cette Assemblée au même titre que les lois adoptées par elle dans le cadre de sa fonction d'institution provisoire d'administration autonome. Il n'est également pas correct d'affirmer que M. Sejdiu, le président du Kosovo, et M. Thaçi, le premier ministre, ont endossé la déclaration par leur signature dans leur qualité d'institutions provisoires ou de membre d'une institution provisoire. Les circonstances particulières de la session extraordinaire de l'Assemblée, présentées en détail dans notre contribution écrite[93], montrent qu'il s'agissait d'un acte particulier adopté au nom du peuple kosovar, par ses représentants démocratiquement élus réunis en constituante à Pristina.

14. M[e] Djerić a voulu vous faire croire que tous les éléments de preuve confirment que l'Assemblée en tant qu'institution provisoire était l'auteur de la déclaration d'indépendance. Mais il a oublié un élément tout à fait crucial. Messieurs de la Cour, il suffit en effet de regarder le texte de la déclaration qui a été lue publiquement ce jour-là. Son auteur n'est pas l'Assemblée et elle ne prétend pas l'être. C'est notamment à cet égard que les traductions dans le dossier soumis au nom du Secrétaire général sont inexactes. La déclaration ne commence nullement avec les mots «L'Assemblée du Kosovo … Approuve», mais, d'une façon on ne peut plus claire, par les termes suivants : «Nous, les représentants de notre peuple, démocratiquement élus, déclarons…»[94]. Ce membre de phrase suffit à réfuter la position présentée par la Serbie, ainsi que celles de l'Argentine et de Chypre qui continuent d'insister, sans jamais se référer au texte justement, que la déclaration est un acte de l'Assemblée du Kosovo. Aucun de ces Etats n'explique cependant pour quelle raison l'ensemble de la déclaration est rédigée à la première personne du pluriel — «nous

[92] Dossier, pièce n° 192.

[93] Contribution écrite du Kosovo, annexes, p. 109-113, par. 6.03-6.12.

[94] Contribution écrite du Kosovo, annexes, annexe 1, par. 1 de la déclaration d'indépendance.

déclarons»[95], «nous acceptons»[96], «nous adopterons»[97], «nous saluons»[98], «nous invitons et accueillons»[99], «nous sommes convaincus»[100], «nous exprimons»[101] et «nous affirmons»[102] — et non pas à la troisième personne du singulier, comme ce devrait être le cas si l'Assemblée avait été l'auteur de la déclaration.

Ils n'expliquent pas pourquoi la déclaration a été rédigée à la main sur du papyrus et pourquoi elle a été signée par tous les élus du peuple du Kosovo et non pas par le seul président de l'Assemblée. Et ils n'expliquent pas non plus pourquoi la déclaration n'a pas été publiée en tant qu'acte des institutions provisoires dans la gazette officielle de ces institutions, comme c'est le cas pour l'ensemble des actes adoptés par l'Assemblée agissant en cette qualité. Le texte de la déclaration l'explique : il ne s'agit pas d'un acte de l'Assemblée du Kosovo en tant qu'institution provisoire, mais d'une déclaration faite par les représentants du peuple, démocratiquement élus, comme plusieurs Etats l'ont par ailleurs souligné dans leurs exposés et observations écrits[103].

15. Par leur déclaration, les élus affirment la volonté du peuple et proclament que «le Kosovo est un Etat indépendant et souverain»[104]. Le préambule situe cette initiative dans le contexte historique particulier du Kosovo dont sir Michael vous a déjà présenté les grandes lignes.

16. Mais la déclaration du 17 février 2008 contenait bien plus que la proclamation de l'indépendance. Comme S. Exc. M. Hyseni l'a déjà dit au début de notre présentation, les représentants du peuple ont pris, en effet, des engagements fermes quant à quelques principes de base concernant l'organisation politique du futur Etat — une «république démocratique, laïque et multiethnique guidée par les principes de non-discrimination et de la protection égale devant la

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[95] Contribution écrite du Kosovo, annexes, annexe 1, par. 1 et 2 de la déclaration d'indépendance.

[96] Contribution écrite du Kosovo, annexes, annexe 1, par. 3 et 8 de la déclaration d'indépendance.

[97] Contribution écrite du Kosovo, annexes, annexe 1, par. 4 de la déclaration d'indépendance.

[98] Contribution écrite du Kosovo, annexes, annexe 1, par. 5 de la déclaration d'indépendance.

[99] Contribution écrite du Kosovo, annexes, annexe 1, par. 5 de la déclaration d'indépendance.

[100] Contribution écrite du Kosovo, annexes, annexe 1, par. 6 de la déclaration d'indépendance.

[101] Contribution écrite du Kosovo, annexes, annexe 1, par. 7 et 11 de la déclaration d'indépendance.

[102] Contribution écrite du Kosovo, annexes, annexe 1, par. 12 de la déclaration d'indépendance.

[103] Voir exposé écrit de l'Allemagne, p. 6 ; exposé écrit du Luxembourg, p. 6, par. 13 ; exposé écrit du Royaume-Uni, p. 23, par. 1.12 ; exposé écrit de l'Estonie, p. 3 et 4 ; exposé écrit de la Finlande, p. 5 et 6, par. 13-15 ; observations écrites de l'Allemagne, p. 7 ; observations écrites de la Suisse, p. 2, par. 3.

[104] *Ibid.*, par. 1.

loi»[105] conformément aux obligations découlant du plan Ahtisaari[106]. Ils ont également pris l'engagement d'une «appartenance responsable à la communauté internationale»[107], avec toutes les conséquences qui en découlent. Ainsi, les représentants du peuple n'ont pas seulement réaffirmé la validité de la résolution 1244 (1999), ils ont également invité les présences internationales à continuer de jouer leur rôle dans le futur[108]. De surcroît, ils ont souscrit publiquement et de manière irrévocable aux obligations internationales clés découlant de la Charte des Nations Unies et de l'acte final de Helsinki, aux obligations concernant le bon voisinage entre Etats, le respect des frontières et la coopération avec le Tribunal pénal pour l'ex-Yougoslavie. Ils ont également réaffirmé leur attachement à la paix et à la stabilité de la région et aux bonnes relations avec leurs voisins, notamment la République de Serbie[109]. Et les représentants de continuer : «Dans tous ces domaines, nous agirons en accord avec les principes du droit international et avec les résolutions du Conseil de sécurité de l'Organisation des Nations Unies, y compris la résolution 1244 (1999).»[110] L'Etat nouvellement créé a immédiatement endossé les engagements et assurances assumées dans la déclaration comme étant ses obligations internationales lorsque le président et le premier ministre écrivirent aux Etats étrangers afin de demander leur reconnaissance. L'exposé écrit de la Norvège montre que cette démarche a bien été comprise ainsi[111].

17. Monsieur le président, Messieurs les juges, on voit mal comment une telle déclaration par laquelle les représentants démocratiquement élus d'un peuple s'engagent au respect scrupuleux des règles élémentaires du droit international peut ne pas être conforme à ces règles.

Mais, Monsieur le président, avant d'aborder ce troisième point de ma plaidoirie, puis-je suggérer que ceci constitue un bon moment pour la pause café habituelle ?

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[105] *Ibid.*, par. 2.

[106] *Ibid.*, par. 3.

[107] *Ibid.*, par. 8.

[108] *Ibid.*, par. 5.

[109] *Ibid.*, par. 7-11.

[110] *Ibid.*, par. 12.

[111] Exposé écrit de la Norvège, p. 7, par. 22, p. 10, par. 32-34.

The PRESIDENT: Yes, Mr. Müller. I believe that this is a good point of breaking up your presentation. We shall have a short recess of 15 minutes and we shall come back to you. Thank you.

The Court adjourned from 4.25 to 4.40 p.m.

The PRESIDENT: Please be seated. Now I invite Mr. Müller to continue his presentation.

M. MÜLLER : Thank you.

III. La conformité de la déclaration d'indépendance avec le droit international général

18. Monsieur le président, Messieurs de la Cour, pourquoi donc la déclaration d'indépendance du 17 février 2008 est-elle conforme au droit international ou, à vrai dire, n'était-elle pas en violation de ses règles ? Parce que le droit international ne contient aucune règle régissant les déclarations d'indépendance, ni négativement — en les interdisant — ni positivement — en les encourageant (A). Notamment le principe de l'intégrité territoriale, sur laquelle ceux qui soutiennent la position de la Serbie se sont basés pour essayer de démontrer la non-conformité de la déclaration d'indépendance du Kosovo avec le droit international, ne l'interdit aucunement (B). Constater l'absence de toute règle interdisant la déclaration d'indépendance suffit par ailleurs à répondre à la question posée par la Serbie à travers l'Assemblée générale[112]. Il n'est pas nécessaire, contrairement aux arguments de l'Etat ayant parrainé la demande d'avis consultatif[113], de démontrer que les représentants du peuple kosovar avaient le droit, reconnu par le droit international, d'adopter et de proclamer une déclaration d'indépendance. Le droit international n'en connaît guère, parce qu'il n'encourage pas la sécession, sans pour autant l'interdire. Toutefois, si, pour répondre à la question, nous devrions démontrer le droit des Kosovars de se constituer en Etat indépendant — ce qui, à notre avis, n'est pas le cas —, nous considérons que le principe de l'autodétermination des peuples le fonde juridiquement (C).

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[112] Contribution écrite du Kosovo, p. 137-139, par. 8.03-8.06. Voir aussi exposé écrit de l'Albanie, p. 27, par. 45 ; exposé écrit de l'Autriche, p. 14, par. 22 ; exposé écrit de l'Allemagne, p. 8 et exposé écrit du Royaume-Uni, p. 24, par. 1.14.

[113] Observations écrites de la Serbie, p. 92, par. 205.

A. Le droit international ne règle pas les déclarations d'indépendance

19. Mais, pour revenir à mon premier argument, Monsieur le président, le droit international ne règle pas les déclarations d'indépendance[114]. Il ne s'agit que d'un élément factuel dans le processus qui aboutit, ou n'aboutit pas, à l'établissement d'un Etat en tant que «fait primaire»[115]. Bien qu'il n'en déplaise au professeur Kohen, le droit international ne crée pas l'Etat, son sujet par excellence, mais constate son existence[116], en prend acte et en tire toutes les conséquences. A ce titre, le droit international ne peut que constater l'existence de la République du Kosovo en tant qu'Etat souverain et indépendant disposant d'un territoire, d'une population et d'un pouvoir politique qui y exerce un contrôle efficace. Mais, Messieurs de la Cour, ce n'est pas la question qui vous a été posée. La Cour n'est pas appelée à se prononcer sur la qualité étatique de la République du Kosovo[117]. Bien que la déclaration d'indépendance ait sans aucun doute visé ce résultat, ce n'est pas elle qui l'a réalisé au regard du droit international[118]. Il est donc erroné de soutenir qu'elle produirait un effet au regard du droit international et serait, par conséquent, sujette à ce droit en raison du fait que les représentants du peuple kosovar ont exprimé leur volonté de créer un Etat souverain.

20. Au même titre que le droit international général ne régit pas la création ou la disparition de l'Etat, il n'est aucunement concerné par l'expression de la volonté de créer un Etat dans une déclaration d'indépendance formulée par des représentants du peuple. Il ne la qualifie ni de licite, ni d'illicite et reste indifférent au sort que lui réserve le droit interne de l'Etat directement

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[114] Contribution écrite du Kosovo, p. 140-157, par. 8.07-8.37 et contribution écrite additionnelle du Kosovo, p. 59, par. 4.03. Voir aussi exposé écrit de la République tchèque, p. 7 ; exposé écrit de la France, p. 35-39, par. 2.2-2.9 ; exposé écrit de l'Autriche, p. 14 et 15, par. 24 ; exposé écrit de l'Allemagne, p. 27-29 ; exposé écrit du Luxembourg, p. 7, par. 16-17 ; exposé écrit des Etats-Unis d'Amérique, p. 50-51 ; exposé écrit de l'Estonie, p. 4 ; exposé écrit de la Finlande, p. 4-5, par. 7 et 10 ; exposé écrit du Japon, p. 2 ; observations écrites de l'Allemagne, p. 6 et 7 ou encore observations écrites du Royaume-Uni, p. 16, par. 33.

[115] G. Abi-Saab, «Cours général du droit international public», *RCADI*, vol. 207, 1987-VI, p. 68-69 et «Conclusion», *in* M. G. Kohen (dir. publ.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 470, P. Daillier, M. Forteau et A. Pellet, *Droit international public (Ngyuen Quoc Dinh)*, 8e éd., *LGDJ*, Paris, 2009, p. 574, n° 339.

[116] Commission d'arbitrage de la conférence pour la paix en Yougoslavie, avis n° 1, 29 novembre 1991, *RGDIP*, t. XCVI, 1992, p. 264 [dossier, pièce n° 233]. Voir aussi avis n° 8, 4 juillet 1992, *RGDIP*, t. XCVII, 1993, p. 588-589 [dossier, pièce n° 235].

[117] Voir par. 8 ci-dessus.

[118] T. Christakis, «The State as a «primary fact»: Some thoughts on the principle of effectiveness», *in* M. G. Kohen (dir. publ.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 145. Voir aussi exposé écrit de l'Autriche, p. 15, par. 25 ; exposé écrit du Japon, p. 2 et 3 ou observations écrites du Royaume-Uni, p. 18, par. 36.

concerné[119]. Une déclaration d'indépendance peut bien aller, et va dans la plupart des cas, à l'encontre des dispositions du droit interne. Cela n'implique cependant aucunement qu'une telle déclaration est conforme ou contraire au droit international[120].

21. Contrairement aux allégations erronées et basées dans la plupart des cas sur une lecture tendancieuse des résolutions de l'Assemblée générale ou du Conseil de sécurité, la pratique étatique confirme l'indifférence du droit international à la question de la validité d'une déclaration d'indépendance[121]. Nul besoin cependant, Monsieur le président, de remonter loin dans le passé : les bouleversements intervenus en Europe dans les années 1990 suffisent amplement à démontrer que le droit international ne qualifie ni de valide ni d'invalide des déclarations d'indépendance en tant que telle. Nous avons donné dans notre contribution écrite, l'exemple de la déclaration d'indépendance de la Slovaquie proclamée par le conseil national slovaque le 17 juillet 1992, quelques mois avant la dissolution de la Tchécoslovaquie. Aucun Etat n'a considéré cette déclaration d'indépendance comme non valide par rapport, ou non conforme, au droit international[122].

22. Plus particulièrement, Messieurs de la Cour, plusieurs des anciennes républiques yougoslaves ont proclamé leur indépendance avant même que la RSFY ait cessé d'exister : la Slovénie et la Croatie, après avoir interrogé leurs peuples, ont fait des déclarations en ce sens le 25 juin 1991 ; la population de la Macédoine a exprimé sa volonté d'indépendance dans un référendum du mois de septembre 1991 ; et le parlement de la Bosnie-Herzégovine a adopté une résolution de souveraineté le 14 octobre de cette même année. Malgré la position ferme de la part des autorités de Belgrade qui considéraient que ces déclarations et sécessions étaient contraires aux règles constitutionnelles et mettaient en péril l'intégrité territoriale et les frontières de la RSFY[123], les Etats européens ont engagé un processus politique visant la reconnaissance de ces nouveaux

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[119] Contre : observations écrites de la Serbie, p. 91, par. 201.

[120] *Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie)*, *arrêt*, *C.I.J. Recueil 1989*, p. 51, par. 73 ou *Certains intérêts allemands en Haute-Silésie polonaise*, *fond*, *arrêt*, *1925*, *C.P.J.I. série A n° 7*, p. 19. Voir aussi l'article 3 des articles sur la responsabilité de l'Etat pour fait internationalement illicite, Nations Unies, Assemblée générale, résolution A/RES/56/83, 12 décembre 2001, annexe et son commentaire dans *Ann. CDI*, 2001, vol. II, 2e partie, p. 37-39. Cf. exposé écrit du Royaume-Uni, p. 58-59, par. 5.2-5.7 ; exposé écrit des Etats-Unis d'Amérique, p. 51.

[121] Observations écrites de la Serbie, p. 92 et 93, par. 206.

[122] Contribution écrite du Kosovo, p. 144, par. 8.15.

[123] *Ibid.*, p. 150, par. 8.27 et p. 151, par. 8.29.

Etats. Personne n'a suggéré que les déclarations d'indépendance violaient le droit international. Il est par ailleurs remarquable que, dans le cadre de la conférence pour la paix en Yougoslavie, la commission d'arbitrage composée d'éminents juristes de plusieurs Etats s'est prononcée, en droit, sur les demandes des nouveaux Etats à être reconnus. Et pourtant, dans aucun de ses avis concernant ces demandes, la commission ne soulève ou n'examine la question d'une prétendue conformité ou non-conformité des déclarations d'indépendance avec le droit international[124]. Certes, en ce qui concerne la Bosnie-Herzégovine, la commission a émis des doutes quant à la réalité de la volonté de la population de se constituer en Etat souverain[125] ; mais elle n'a ni condamné la déclaration déjà faite ni empêché la tenue d'un référendum afin de dissiper ces doutes[126]. En 1996, la Cour de céans, après avoir établi que la République de Bosnie-Herzégovine était devenue un Etat Membre des Nations Unies, a dit : «Peu importent alors les circonstances dans lesquelles elle a accédé à l'indépendance» (*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, *exceptions préliminaires*, *arrêt*, *C.I.J. Recueil 1996 (II)*, p. 611, par. 19).

23. Plusieurs Etats ont cependant prétendu lors de la phase écrite que les déclarations d'indépendance sont en tant que telles effectivement soumises au respect du droit international parce que, dans certaines situations comme une tentative de création d'un Etat par l'emploi ou la menace de la force d'un Etat tiers ou l'instauration d'un régime fondé sur l'apartheid ou la discrimination raciale, ces déclarations ne sont pas reconnues par la communauté internationale, voire sont invalidées par le Conseil de sécurité. La déclaration d'indépendance dont vous êtes saisis ne rentre à l'évidence dans aucun de ces cas de figure[127]. Mais il ne résulte aucunement des exemples donnés dans les exposés et observations écrits que de telles déclarations d'indépendance proclamées en recourant à la force armée, par exemple, soient intrinsèquement non valides ; leur condamnation par le Conseil de sécurité et la communauté internationale résulte plutôt du principe selon lequel il ne faut pas reconnaître une situation créée par une violation grave d'une obligation

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[124] Commission d'arbitrage de la conférence pour la paix en Yougoslavie, avis n^{os} 4, 5, 6 et 7, 11 janvier 1991, *RGDIP*, tome XCVII, 1993, p. 564 à 583.

[125] Commission d'arbitrage de la conférence pour la paix en Yougoslavie, avis n° 4, 11 janvier 1991, *RGDIP*, tome XCVII, 1993, p. 567, par. 4.

[126] *Ibid*.

[127] Cf. observations écrites de l'Albanie, p. 29, par. 51.

découlant d'une norme impérative du droit international général ou prêter aide ou assistance au maintien d'une telle situation[128].

24. La création de l'Etat est toujours un simple fait au regard du droit international, même aujourd'hui, et le «demi-siècle d'évolution du droit international»[129] auquel la Serbie veut faire croire n'y a rien changé. La pratique étatique concernant les déclarations d'indépendance proclamées au début des années 1990 par les anciennes républiques de l'ex-Yougoslavie confirme nettement la proposition que le droit international n'interdit pas de telles déclarations. Celle du 17 février 2008 constitue la dernière des déclarations d'indépendance des unités fédérées de la RSFY et s'intègre dans le processus de la dissolution de l'ancienne Yougoslavie. Les événements extraordinaires commençant en 1988/1989 ont poussé les républiques à déclarer leur indépendance, tout comme ces événements, aggravés par la catastrophe humanitaire de 1998/1999 et ses suites, ont finalement confirmé au peuple kosovar qu'il n'y avait pas d'autre possibilité que de choisir la même voie. La conformité de ces déclarations avec le droit international n'a jamais été remise en question. Certes, le droit international a joué un rôle lors de l'identification des nouveaux Etats à travers les critères factuels bien connus. Mais le droit s'est borné à constater l'existence de ces nouveaux Etats — ni plus, ni moins.

B. La règle de l'intégrité territoriale n'interdit pas la déclaration d'indépendance du Kosovo

25. Il n'y a donc rien dans l'ordonnancement juridique international qui interdit la déclaration d'indépendance du 17 février 2008. En particulier le principe qui garantit la souveraineté et l'intégrité territoriale des Etats ne s'oppose aucunement à l'adoption de la déclaration d'indépendance par les représentants du peuple kosovar[130]. Bien qu'il soit incontestable que l'établissement de la République du Kosovo en tant qu'Etat souverain remet en cause l'emprise territoriale de la Serbie, la déclaration d'indépendance ne constitue pas une violation de la règle de l'intégrité territoriale telle qu'elle est aujourd'hui consacrée par le droit international.

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[128] Art. 41, par. 2, des articles sur la responsabilité de l'Etat pour fait internationalement illicite, Nations Unies, Assemblée générale, résolution A/RES/56/83, 12 décembre 2001, annexe et son commentaire (*Ann. CDI*, 2001, vol. II, 2e partie, p. 122-124). Voir également contribution écrite du Kosovo, p. 145 et 146, par. 8.18.

[129] Observations écrites de la Serbie, p. 95.

[130] Contribution écrite additionnelle du Kosovo, p. 60-75, par. 4.05-4.30.

26. Il ressort clairement de la formulation de l'article 2, paragraphe 4, de la Charte, ainsi que de tous les autres instruments juridiques qui consacrent le principe de l'intégrité territoriale, que

> «[l]es *Membres de l'Organisation* [c'est-à-dire *les Etats*] s'abstiennent, *dans leurs relations internationales*, de recourir à la menace ou à l'emploi de la force … contre l'intégrité territoriale ou l'indépendance politique de tout Etat»[131].

Cette disposition qui reflète la règle coutumière[132] impose donc aux seuls Etats de respecter l'intégrité territoriale d'autres Etats. Elle ne peut être appliquée à des situations se produisant à l'intérieur d'un même territoire et ne peut s'appliquer à des déclarations d'indépendance qui, par principe, sont formulées par des entités non étatiques[133].

27. Le même raisonnement s'impose quant au principe connexe de la stabilité des frontières : il ne s'applique, comme nous l'avons démontré dans notre contribution écrite additionnelle[134], qu'aux modifications coercitives des frontières d'un Etat par un autre Etat et ne peut pas être invoqué par un Etat contre sa propre population.

28. Dans ce domaine, Monsieur le président, il apparaît que le droit *des gens* porte bien mal son nom — si on ignore l'origine latine du terme — et ne s'impose qu'aux Etats. Il ne protège ici l'entité souveraine que contre ses pairs, l'Etat contre l'Etat.

29. Les résolutions de l'Assemblée générale qui, selon les dires de la Serbie (réitérées par le professeur Shaw ce matin) et quelques autres Etats, élargissent le champ d'application du principe de l'intégrité territoriale et interdiraient par là même des déclarations d'indépendance, ne font rien de tel. Ni la résolution 1514 (XV) de l'Assemblée générale, ni la déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies de 1970[135], ni non plus la résolution 1244 du Conseil de sécurité, dont le professeur Murphy parlera dans un instant, et aucun autre des textes invoqués par la Serbie[136] ne s'éloigne du champ d'application restreint de l'article 2, paragraphe 4, de la Charte.

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[131] Les italiques sont de nous.

[132] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, *fond*, *arrêt*, *C.I.J. Recueil 1986*, p. 99-101, par. 188-190.

[133] Voir contribution écrite additionnelle du Kosovo, p. 61-63, par. 4.06-4.09 ; observations écrites de l'Albanie, p. 29, par. 49-51 ; observations écrites de la Suisse, p. 2, par. 3 ; observations écrites du Royaume-Uni, p. 19-22, par. 39-45.

[134] Contribution écrite additionnelle du Kosovo, p. 65 et 66, par. 4.12.

[135] Nations Unies, Assemblée générale, résolution 2625 (XXV), 24 octobre 1970, annexe.

[136] Contribution écrite additionnelle du Kosovo, p. 63-65, par. 4.10-4.11.

Qui plus est, elles le confirment à l'instar de la clause de sauvegarde contenue dans l'article 46, paragraphe 1, de la déclaration des Nations Unies sur les droits des peuples autochtones que le professeur Shaw a mentionnée, en passant, sans en dire le texte. Elle prévoit :

> «Aucune disposition de la présente déclaration ne peut être interprétée comme impliquant pour un Etat, un peuple, un groupement ou un individu *un droit quelconque* de se livrer à une activité ou d'accomplir un acte contraire à la Charte des Nations Unies, ni considérée comme *autorisant ou encourageant* aucun acte ayant pour effet de détruire ou d'amoindrir, totalement ou partiellement, l'intégrité territoriale ou l'unité politique d'un Etat souverain et indépendant.»[137]

Cette disposition ne reconnaît simplement pas de droit à l'indépendance aux entités non étatiques, pas plus qu'elle ne les autorise ou encourage à déclarer leur indépendance. Mais, contrairement à la lecture biaisée à laquelle s'est livrée la Serbie, elle n'impose aucunement un devoir aux entités non étatiques de s'abstenir à de tels actes. Elle ne les interdit point[138].

30. L'article 46, paragraphe 1, de cette déclaration, ainsi que maintes autres résolutions de l'Assemblée générale[139], apportent donc la confirmation que le droit international ne favorise pas la sécession, mais ne l'interdit pas non plus. Le droit international prend seulement acte d'une sécession réussie. Dans ce cas, «[l]e droit s'incline devant le fait étatique»[140]. Au même titre que la sécession, une déclaration d'indépendance constitue un «legally neutral act»[141] en droit international pour emprunter les mots du professeur Crawford. En tant qu'élément factuel dans la création d'un nouvel Etat, elle n'est ni encouragée ni interdite en vertu du principe de l'intégrité territoriale de l'Etat prédécesseur. Elle n'est tout simplement pas concernée par le droit international.

31. Monsieur le président, Messieurs les juges, il n'y a donc aucune règle du droit international général qui régit, et encore moins qui interdit, la déclaration d'indépendance du Kosovo. C'est une réponse tout à fait satisfaisante à la question contenue dans la résolution 63/3 de

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[137] Nations Unies, Assemblée générale, résolution A/RES/61/295, 13 septembre 2007, annexe ; les italiques sont de nous. Voir également contribution écrite additionnelle du Kosovo, p. 65, par. 4.11.

[138] Voir aussi observations écrites de l'Albanie, p. 33, par. 58.

[139] Contribution écrite additionnelle du Kosovo, p. 63-65, par. 4.10- 4.11.

[140] A. Pellet, «Le droit international à l'aube du XXI^{e} siècle (La société internationale contemporaine — Permanences et tendances nouvelles)», *Cours euro-méditerranéens Bancaja de droit international*, vol. I, 1997, p. 59. Voir aussi exposé écrit de la Finlande, p. 4, par. 6, exposé écrit du Japon, p. 3.

[141] J. R. Crawford, *The Creation of States in International Law*, 2^{e} éd., Clarendon Press, Oxford, 2006, p. 390.

l'Assemblée générale. Mais pour dissiper tout doute quant à notre position vis-à-vis du principe de l'autodétermination et du droit à l'indépendance, permettez-moi d'en dire quelques mots.

C. Dans les circonstances de l'espèce, le peuple kosovar était autorisé par le droit international de se constituer en Etat

32. Monsieur le président, ma première remarque concernant la question d'un droit à l'indépendance demeure toujours la même : il n'est pas nécessaire que vous décidiez de cette question. Elle n'est pas incluse dans celle de l'Assemblée générale. Il ne vous a pas été demandé si la déclaration d'indépendance du Kosovo est autorisée par le droit international, mais si elle y était conforme[142]. J'y ai déjà apporté notre réponse et il n'y a rien à y ajouter, je crois.

33. Mais, et ceci est ma deuxième remarque, il ne s'agit aucunement d'une dérobade contrairement aux allégations que vous avez dû entendre ce matin. Nous pensons que le peuple du Kosovo avait le droit de disposer de lui-même et a pu l'exercer, en 2008, en choisissant l'indépendance dans les circonstances particulières de l'espèce[143]. Car deux conditions sont remplies :

— D'abord, la population du Kosovo constitue un peuple, un groupe susceptible d'être titulaire d'un droit à l'autodétermination (interne d'abord, externe si cela devient nécessaire). Le préambule du cadre constitutionnel pour un gouvernement autonome provisoire promulgué en 2001 par le représentant spécial du Secrétaire général utilise à plusieurs reprises la qualification de «peuple» du Kosovo et l'article 1.1 précise sans ambiguïté : «Le Kosovo est une entité sous administration internationale provisoire qui, ainsi que son peuple, présente des caractéristiques historiques, juridiques, culturelles et linguistiques uniques.»[144] On a également dit que, lorsqu'elle octroie à la population du Kosovo un statut d'autonomie substantielle, la

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[142] Contribution écrite du Kosovo, p. 157-158, par. 8.38-8.41, contribution écrite additionnelle du Kosovo, p. 75-76, par. 4.31, p. 86, par. 4.53. Voir aussi exposé écrit de l'Allemagne, p. 8, observations écrites du Royaume-Uni, p. 5-6, par. 10.

[143] Contribution écrite additionnelle du Kosovo, p. 76-86, par. 4.32-4.52. Voir aussi les exposés écrits de la Suisse, p. 15-26, par. 57-96, de l'Albanie, p. 40-44, par. 75-85, de l'Allemagne, p. 32-37, de la Finlande, p. 3-5, par. 7-12, de la Pologne, p. 24-29, par. 6.1-6.16, de l'Estonie, p. 4-12, des Pays-Bas, p. 3-7, par. 3.1-3.11, de la Slovénie, p. 2, de la Lettonie, p. 1, point 1, de l'Irlande, p. 8-12, par. 27-34 et du Danemark, p. 12-13 et les observations écrites de l'Albanie, p. 31-36, par. 55-65 et de la Suisse, p. 2-3, par. 6-9.

[144] Règlement n° 2001/9 relatif à un cadre constitutionnel pour un gouvernement autonome provisoire au Kosovo, UNMIK/REG/2001/9, 15 mai 2001 [dossier, pièces n° 156].

résolution 1244 (1999) admet non seulement l'existence d'un groupe distinct, mais lui reconnaît un véritable droit d'autodétermination sans oser le terme[145].

— En second lieu, les atrocités commises à l'encontre de la population du Kosovo dont sir Michael vous a parlé tout à l'heure, ainsi que l'attitude dont la Serbie a fait preuve depuis 1999 jusqu'à aujourd'hui vis-à-vis de la population qui habite le territoire du Kosovo n'ont laissé au peuple aucun autre choix que de se déclarer indépendant. Dans ce cas, le droit international, le droit *des gens*, doit reconnaître un droit à la sécession, non pas pour punir l'Etat responsable, mais pour sauver les êtres humains qui souffrent de son fait[146].

34. Ces considérations clôturent ma présentation. Je vous remercie, Monsieur le président et Messieurs les juges, pour la bienveillante attention que vous m'avez accordée. Je vous prie, Monsieur le président, de donner maintenant la parole à mon collègue, le professeur Sean Murphy.

The PRESIDENT: Thank you, Mr. Müller, for your presentation. I now call upon Mr. Murphy to take the floor.

Mr. MURPHY: Thank you, Mr. President.

IV. THE DECLARATION OF INDEPENDENCE DID NOT CONTRAVENE RESOLUTION 1244 (1999)

1. It is a great honour and pleasure to appear once again before this Court.

2. Mr. Müller has just addressed why the Declaration of Independence by Kosovo cannot be regarded as a violation of general international law. I will now explain why the Declaration did not contravene United Nations Security Council resolution 1244. My presentation will address five key points.

3. First, resolution 1244 (1999) contained no prohibition, express or implied, on a declaration of independence, nor any requirement of Serbia's consent to such a declaration.

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[145] Dans ce sens, voir C. Tomuschat, «Secession and self-détermination», dans M. G. Kohen (dir. publ.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 34 et P. Weckel, «Plaidoyer pour le processus d'indépendance du Kosovo : réponse à Olivier Corten», *RGDIP*, vol. 113, 2009, n° 2, p. 264.

[146] Voir C. Tomuschat, «Secession and self-détermination», dans M. G. Kohen (dir. publ.), *Secession: International Law Perspectives*, Cambridge University Press, 2006, p. 41, M. N. Shaw, *International Law*, 6e éd., Cambridge University Press, 2008, p. 523 et A. Pellet, «Le droit international à l'aube du XXIe siècle (La société internationale contemporaine — Permanences et tendances nouvelles)», *Cours euro-méditerranéens Bancaja de droit international*, vol. I, 1997, p. 58.

4. Second, the lack of any requirement of Serbian consent is confirmed by resolution 1244's assertion that the final status process must take into account the March 1999 Rambouillet Accords. Those Accords contained no requirement of Serbian consent to the determination of Kosovo's final status, and instead anchored the final status determination upon "the will of the people" of Kosovo.

5. Third, as anticipated in resolution 1244, the international civilian presence in Kosovo facilitated the final status process which commenced in 2005 and ended in 2007. A decision by the people of Kosovo to pursue independence did not contravene or inhibit "facilitation" of this final status process; rather, the decision was fully consistent with the process.

6. Fourth, United Nations officials authorized to set aside inconsistent measures by authorities in Kosovo did not set aside the Declaration of Independence. This reaction strongly supports the proposition that the issuance of the Declaration did not violate resolution 1244.

7. And fifth, for various reasons, the Declaration of Independence cannot be regarded as a violation of international law either as an *ultra vires* act of the Provisional Institutions of Self-Government (PISG) or as a contravention of the Constitutional Framework for Provisional Self-Government, promulgated by the Secretary-General's Special Representative in Kosovo (SRSG) in 2001.

A. Resolution 1244 (1999) contained no prohibition, express or implied, on a declaration of independence, nor any requirement of Serbian consent to such a declaration

8. Turning to my first point: Serbia has repeatedly asserted that resolution 1244 prohibited Kosovo's Declaration of Independence. Yet Serbia is unable to point to any such language in resolution 1244.

9. There is no reference of any kind in the resolution to a declaration or statement by Kosovo's leaders, let alone a reference that prohibits such a declaration. The lack of any such provision may be contrasted with a different Security Council resolution relied upon by Serbia itself this morning, and that is Security Council resolution 787, which was adopted in 1992[147]. In paragraph 3 of that resolution, as counsel for Serbia noted, the Security Council turned its attention to the possibility of a declaration of independence by the leaders of Republika Srpska in

[147]Security Council resolution 787 (1992), 16 Nov. 1992, para. 3.

Bosnia-Herzegovina. Worried that such a declaration might be issued, the Security Council expressly affirmed in resolution 787 that it would not accept "any entities unilaterally declared".

10. Yet, in resolution 1244, no such language appears, even though it was well known in 1999 that the people of Kosovo desired to establish an independent State. The lack of any such language we submit makes clear that resolution 1244 did not preclude the possible issuance of a declaration of independence by the representatives of the people of Kosovo.

11. Resolution 787 also helps demonstrate two further points. First, even in a resolution where the Security Council expressly addressed a possible declaration of independence, it did not *forbid* the issuance of the declaration itself, in the sense of asserting that the declaration in question would violate an obligation imposed by the Council. Rather, the Council simply stated that it would not *accept* any such declaration, such as when considering the admission of an entity to membership in the United Nations. This approach is consistent with the observation in our written pleadings that generally the Security Council does not seek to regulate entities other than States[148].

12. Second, although the Council in resolution 787 opposed Republika Srpska's declaration under those particular circumstances, the Council nowhere indicated that it regarded all such declarations as violating general international law. This approach is consistent with our contention that, as a general matter, international law does not seek to regulate the issuance of declarations of independence[149].

13. Not only does resolution 1244 lack any reference to a declaration of independence, it also lacks any provision calling for a final status settlement in which Kosovo remains a part of either the Federal Republic of Yugoslavia (FRY) or Serbia. In this regard, resolution 1244 may be contrasted with resolution 1251 (1999), which was adopted in the *same month* of 1999. In resolution 1251, the Council considered the situation of northern Cyprus and stated, in paragraph 11, that

> "a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation,

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[148]KFWC (Further Written Contribution), paras. 5.67-5.74.

[149]KWC (Written Contribution), paras. 8.08-8.37.

> and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession"[150].

14. Yet, in resolution 1244, adopted in the very same month, no statements of any kind are present indicating that a political settlement for Kosovo must be based on Serbia or the FRY with a "single sovereignty and international personality", or that the political settlement must "exclude secession". The language is simply not there.

15. Consider two further Council resolutions from 1999 relating to the situation unfolding in Georgia. In resolution 1225 of January 1999 and resolution 1255 of July 1999 — thus, these are resolutions that pre-date and immediately post-date resolution 1244 — the Council expressly called for a "settlement on the political status of Abkhazia *within the State of Georgia*"[151]. In other words, the Council expressly stated that the settlement should be one that involved Abkazia remaining within the sovereign State of Georgia.

16. Again, in resolution 1244, no such language appears. So, at the end of the day, it is no surprise that Mr. Hans Corell, who was the Legal Counsel to the United Nations when resolution 1244 was adopted, has opined, in his private capacity, that resolution 1244 per se "does not guarantee that Serbia would have maintained Kosovo within its border", and then it goes on "that the resolution does not foresee that Kosovo should remain within the borders of Serbia"[152].

17. The lack of any prohibition in resolution 1244 regarding a declaration of independence, or any demand that Kosovo stay within Serbia, is readily confirmed by the fact that all the key leading participants have viewed resolution 1244 as establishing a "status-neutral" framework. Now counsel for Serbia this morning spoke of a "status-neutral" approach by the United Nations today, but the point is that everyone views resolution 1244 itself as a "status-neutral" framework. The Secretary-General repeatedly refers to resolution 1244 as "status-neutral"[153], as does the SRSG[154]. Members of the Security Council refer to the resolution in this way[155]. Even Serbia has

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

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

[152]Remarks of Hans Corell, Proceedings of the American Society of International Law 2008, p. 134.

[153]E.g., S/2009/300, para. 6.

[154]E.g., S/PV.6144, p. 4.

[155]E.g., S/PV.6144, p. 10, Vietnam; *ibid*., p. 15, China; *ibid*., p. 19, Uganda; S/PV.6202, p. 20, China.

confirmed to the Security Council itself that resolution 1244 is "status-neutral"[156]. It is difficult to see how resolution 1244 can, on the one hand, be "status-neutral" and, on the other hand, have forbidden a particular final status in the form of Kosovo's independence.

18. Confronted with this difficulty, Serbia at times refrains from arguing that resolution 1244 directly prohibited the Declaration of Independence, and instead argues that resolution 1244 prohibits such a declaration in the absence of Serbia's consent. On this reading, it is not the Declaration per se that violated resolution 1244, but instead the issuance of such a declaration in the absence of Belgrade's consent.

19. This reading of resolution 1244 is equally problematic, for the language of resolution 1244 nowhere calls for approval by Serbia of Kosovo's final status. If the Council had intended to decide that such consent must exist prior to the resolution of Kosovo's status, it certainly could have said so, but it did not. Council resolutions pre-dating resolution 1244 had gone so far as to call for negotiations between Belgrade and Pristina[157]. In resolution 1244, however, even that language has been dropped.

20. So what *did* the Council say in resolution 1244 about Kosovo's final status?

21. The Court will note that most of the resolution was *not* directed at the issue of Kosovo's final status. It was directed at the role of the international community during an interim period. In paragraph 1 of resolution 1244, the Council states that a political solution to the 1999 Kosovo crisis will be based on the general principles expressed in Annexes 1 and 2 to the resolution, which were the principles on which NATO's military campaign were brought to a close, such as the withdrawal of all Serbian military and police forces from Kosovo. Paragraphs 2 through 4 of the resolution then indicate the various steps for the withdrawal of those forces, while paragraphs 5 through 11 elaborate on the deployment of the international military and civilian presences to Kosovo. Virtually all of these provisions are addressing the interim period.

22. Now, in its written and oral pleadings, Serbia relies upon the preambular reference in resolution 1244, which reaffirms the commitment of Member States to the "territorial integrity" of the Federal Republic of Yugoslavia. Now, this provision is not addressing a commitment of the

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[156]E.g., S/PV.6202, p. 7, statement of Serbian Foreign Minister Jeremić.

[157]KFWC, para. 5.32.

Security Council, let alone an obligation or prohibition imposed by the Council. Further, this preambular provision only refers to "territorial integrity" "as set out in Annex 2", and in Annex 2 the issue of "territorial integrity" relates solely to "the interim political framework", meaning the political framework existing prior to final status.

23. Counsel for Serbia laments that the Security Council could not possibly have been reaffirming a commitment of Member States that would last only during the interim period. But the language says what it says. And it differs from formulations in prior resolutions. This preambular provision also refers to "territorial integrity" as set out in the Helsinki Final Act. But as we explained, at page 147 of our Written Contribution, the principles expressed within the Helsinki Final Act recognize a variety of competing concepts, ones that seek to protect territory from external uses of force but that also seek to promote human rights and the rule of law. As such it is not possible to ascribe to the Helsinki Final Act a single fixed notion disfavouring the legality of declarations of independence.

24. Rather than look at the preamble to determine the Council's position on Kosovo's final status, it is necessary to look at the operative part of the resolution, and specifically to paragraph 11, which sets forth the responsibilities of the international civilian presence. Again, most of paragraph 11 is addressing the interim period. However, subparagraphs 11 *(e)* and 11 *(f)* state that the international civilian presence's responsibilities include two things:

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

25. Those are the provisions in resolution 1244 that speak to Kosovo's final status and the Declaration of Independence did not violate them. When the time came, the United Nations *did* facilitate the final status talks that were launched in 2005 and concluded in 2007, without any interference by Kosovo authorities, let alone interference in the form of a declaration that was issued in the following year. Nor did the Declaration impede the overseeing of the transfer of authority to institutions established under a final status settlement.

26. Again, to the extent that it addresses these provisions in resolution 1244, Serbia simply tries to read into subparagraphs 11 *(e)* and *(f)* a requirement of Serbian consent to the Declaration

of Independence. Serbia tries to insist that the words "political process" in subparagraph 11 *(e)* or the words "political settlement" in subparagraph 11 *(f)* must mean "Serbian consent to Kosovo's final status". Obviously the language of paragraph 11 does not say that. Rather, what it does say in subparagraph 11 *(e)* is that the future status must take into account "the Rambouillet accords". Now, the background and language of those Accords make abundantly clear that Serbia's interpretation of paragraph 11 as requiring Serbian consent to final status is completely wrong. And to confirm this requires some attention to what happened both before and during the Rambouillet Conference, which takes me to my second point.

B. By contemplating a political process for Kosovo's final status that takes into account "the Rambouillet accords", the Council accepted that the final status determination would not require Serbian consent

27. In 1998, the Contact Group tasked Ambassador Christopher Hill with achieving an agreement that would stabilize the unfolding Kosovo crisis. The four drafts of the agreement considered during this "Hill Process" pre-dated the Rambouillet Accords and resolution 1244, but they were important in setting the stage for both these instruments. Analysis of the texts confirms that the idea of a Belgrade-Pristina mutual agreement on final status was rejected and ultimately replaced instead with the idea of a final status settlement based on various factors, the first of which is the "will of the people" of Kosovo[158].

28. Turning first to the Hill Process, all four drafts of the proposed Hill agreement reflect that it was not thought possible to resolve Kosovo's final status at the outset. Instead, the central focus of the negotiations had to be on establishing an interim stage, one designed to create the immediate conditions for the return to a peaceful and normal life for the inhabitants of Kosovo.

29. A short provision found at the end of each of the Hill drafts very briefly addressed the process for Kosovo's final status. This provision avoided prejudging what the final status would be and, in its fourth and final version, avoided giving Serbia any veto over resolution of that status.

30. In the first Hill proposal of 1 October 1998, the relevant clause stated:

> "In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals

[158]KFWC, paras. 5.05-5.18.

> by either side for additional steps, *which will require mutual agreement for adoption*."[159]

Hence, the first Hill proposal included an express requirement that the final status determination would require "mutual agreement" between Belgrade and Pristina. The second Hill proposal, 1 November 1998, repeated this final provision[160]. The third Hill proposal, 2 December 1998, also repeated this provision, but replaced the word "sides" with "Parties"[161].

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

> "In three years, there shall be a comprehensive assessment of this Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps, *by a procedure to be determined taking into account the Parties' roles in and compliance with this Agreement*."[162]

32. In other words, the last version of the Hill proposals, in that last version, the reference to "mutual agreement" by the "sides" or the "Parties" is completely dropped. Instead, the proposed provision adopted an approach to Kosovo's final status that would involve a "comprehensive assessment" under "international auspices" of a "procedure" that would "take into account" the two sides' roles in compliance with the agreement. No aspect of this (or any other) provision precluded the possibility of the people of Kosovo declaring independence or required Serbian consent prior to determination of Kosovo's final status.

33. The final Hill proposal was produced after the Yugoslav offensive of December 1998, and after the massacre of some 45 Kosovo Albanians in the village of Reçak/Račak on 15 January 1999. Two days after it was issued, the Contact Group called upon the parties to meet at Rambouillet for further negotiations. Thus, coming only days after the end of the Hill Process,

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[159]KFWC, para. 5.07; emphasis added.

[160]KFWC, para. 5.07 ("In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving the implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption.").

[161]KFWC, para.5.07 ("In three years, the Parties will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption.").

[162]KFWC, para. 5.08; emphasis added.

and including Ambassador Hill himself as one of the negotiators, the Rambouillet negotiations built upon the Hill Process.

34. Like the Hill proposals, the Rambouillet Interim Agreement envisaged an interim period of substantial Kosovo autonomy followed by a final settlement. Indeed, the formal title of the accord is "Interim Agreement for Peace and Self-Government in Kosovo".

35. Moreover, like the final Hill proposal, the Rambouillet Interim Agreement abandoned the idea of Kosovo's final status being determined by "mutual agreement" between Belgrade and Pristina. The first draft of the Rambouillet Interim Agreement, dated 6 February 1999, drew upon that relevant clause in the final part of the last Hill proposal, stating:

> "In three years, there shall be a comprehensive assessment of the Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps."[163]

36. During the course of the Rambouillet negotiations, however, it became apparent that some greater content had to be given to the means by which Kosovo's final status would be determined. In doing so, the negotiators did not return to that original language of "mutual agreement" in the first three Hill proposals, but instead emphasized the need to base the final status upon "the will of the people" of Kosovo, in conjunction with certain other factors.

37. Specifically, Chapter 8, Article I, paragraph 3, of the final version of the Rambouillet Interim Agreement stated:

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."[164]

38. So, Mr. President, Members of the Court, looking at the progression of text from the first Hill proposal of October 1998 to the final version of the Rambouillet Interim Agreement of March 1999, it is quite apparent that the idea of a Belgrade-Pristina mutual agreement on final status had been dropped, and replaced with the idea of a final status settlement based on various factors, the first of which is the "will of the people" of Kosovo.

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[163]KFWC, para. 5.12.

[164]Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999, Chap. 8, Art. I (3), reproduced in S/1999/648, Dossier No. 30.

39. Kosovo signed the Rambouillet Interim Agreement. Serbia did not. Instead, Serbia sought a wholesale revision of the Rambouillet Accords which, among other things, would have replaced that final status provision referring to "the will of the people" with a different provision that would have required Serbia's consent to a final status settlement. Specifically, the Serbian authorities proposed to change the final clause so as to read:

> "After three years, the signatories shall comprehensively review this Agreement with a view to improving its implementation and shall consider the proposals of any signatory for additional measures, *whose adoption shall require the consent of all signatories*."[165]

The negotiators at Rambouillet rejected Serbia's proposed revision. This failed effort by Serbia confirms that the Rambouillet Interim Agreement, in its final form, contemplated a final status process in which "the will of the people" was assigned a pivotal role, and in which there was no requirement of Serbian consent.

40. Mr. President, in its pleadings to this Court, including this morning, Serbia asserts that the Rambouillet Interim Agreement accepted that Kosovo would remain a part of the Federal Republic of Yugoslavia unless Serbia consented. Yet, in the immediate aftermath of the Rambouillet meeting, the Government in Belgrade had a very, very different view, stating to the Security Council that the "solution" proposed at Rambouillet constituted an "ultimatum" in which Belgrade was being asked to voluntarily give up Kosovo[166]. Further, in explaining its rejection of the Rambouillet Accords, Belgrade asserted to the Council that it "cannot agree to the secession of Kosovo and Metohija, either immediately or after the interim period of three years"[167]. Such assertions were exaggerated, in that the Rambouillet Interim Agreement did not expressly provide that Kosovo would become an independent State after three years. Yet, by Belgrade's own contemporaneous admission in 1999, the Rambouillet Interim Agreement cannot be interpreted as requiring Serbian consent to independence and Serbia itself did not see it that way.

41. Rather, the provision in the Rambouillet Accords calling for a final status to be resolved after three years based on "the will of the people" was well understood at that time, even by Serbia,

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[165]KFWC, para. 5.13: FRY Revised Draft Agreement, 15 Mar. 1999, Chap. 8, Art. I (4), reprinted in Weller, pp. 489-490; emphasis added.

[166]S/PV.3989, p. 11.

[167]S/PV.3988, p. 14.

as including the possibility — indeed, perhaps the likelihood — of Kosovo's emergence as an independent State after the interim period. And as such, resolution 1244's authorization for the international civilian presence to facilitate a final status process "taking into account the Rambouillet accords" cannot be viewed as requiring a process in which Belgrade's consent was necessary to a final status settlement. That simply is not what the Rambouillet Accords contemplated.

C. The political process that ultimately unfolded, including the issuance of the Declaration of Independence, was fully consistent with requirements of resolution 1244

42. Mr. President, allow me to turn to my third point, which is that the political process on Kosovo's final status that ultimately unfolded, including the issuance of the Declaration of Independence in February 2008, was fully consistent with the requirements of resolution 1244.

43. Sir Michael Wood has already described the final status negotiations, as do our written pleadings[168], and I will not repeat the details of that process, but I do wish to highlight certain elements that establish consistency with the requirements of resolution 1244, specifically the requirement that the international civilian presence facilitate a "political process designed to determine Kosovo's future status, taking into account the Rambouillet accords".

44. First, the Security Council itself determined in 2005 to launch the final status negotiations. After Ambassador Kai Eide, in October 2005, found that the interim situation in Kosovo was no longer sustainable, the Security Council agreed with that assessment. Moreover, the Council expressly stated that it supported "the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244". It further welcomed "the Secretary-General's readiness to appoint a Special Envoy to lead the Future Status process"[169]. Hence, there is no question that, in 2005, the Security Council commenced the final status process envisaged by paragraph 11 of resolution 1244.

45. Second, there is also no question as to who was to lead this final status process. As Sir Michael noted, the Secretary-General proposed the appointment of former Finnish President

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[168]KWC, Chaps. V and IX.

[169]Dossier No. 195.

Martti Ahtisaari as his Special Envoy for supervising the process[170], a proposal welcomed by the President of the Security Council[171]. As I am sure that this Court is aware, this was not a casual selection. President Ahtisaari was already, at that time, a highly regarded and experienced diplomat, one who was well respected for his fairness and effectiveness, and who had a proven track record for resolving difficult conflicts.

46. In addition to welcoming the appointment of President Ahtisaari, the Security Council provided to the Secretary-General for his "reference" certain "guiding principles" for the final status talks that had been developed by the Contact Group, including the Russian Federation. Those principles called for the "launch" of a "process to determine the future status of Kosovo in accordance with Security Council resolution 1244" and made clear that this was a process that the Special Envoy would "lead".

47. Third, the Security Council fully understood that this process, once begun, must be taken to a conclusion; it could not continue indefinitely, based on the intransigence of one party or the other. In those same "guiding principles", it was stated that "[o]nce the process has started, it cannot be blocked and must be brought to a conclusion"[172]. Thus, the Security Council fully understood in 2005, even in the face of strongly held and quite possibly irreconcilable positions between Belgrade and Pristina, that the Council was commencing a political process that could not be blocked and would have to reach a conclusion at the end of the process.

48. Fourth, contrary to the suggestion made this morning by counsel for Serbia, there was no doubt as to who was to decide whether the process had run its course. The terms of reference provided by the Secretary-General to President Ahtisaari made clear that while he must engage in consultations with all the relevant actors, it was he — and he alone — who would determine the "duration" of the process[173].

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[170]Dossier No. 196.

[171]Dossier No. 197.

[172]*Ibid*., Ann.

[173]Dossier No. 198.

49. Nowhere in the Secretary-General's recommendation and appointment in 2005 of the Special Envoy, or in these terms of reference of the Special Envoy, was it stated that the process would only end when there was consent by Serbia or a Belgrade-Pristina agreement.

50. Fifth, the Special Envoy clearly fulfilled the mandate given to him by the Security Council. After receiving his instructions, President Ahtisaari set to work immediately and, over the course of 15 months, conducted extensive negotiations with all the relevant parties, including authorities in Belgrade and Pristina. Most of these meetings took place in Vienna, and while Kosovo and Serbia were certainly central to them, the meetings also involved a wide array of experts from the European Union, NATO, the OSCE, the Council of Europe, international financial institutions, and others.

51. As Minister Hyseni noted earlier this afternoon, no stone was left unturned. But on the issue of autonomy versus independence, the two sides' positions remained thoroughly entrenched and diametrically opposed. The Government in Belgrade insisted that Kosovo remain a part of Serbia, while Kosovo authorities, reflecting the long-standing desire of the people of Kosovo, insisted upon independence.

52. After fully exploring all these avenues, President Ahtisaari determined in 2007 that nothing more could be accomplished through negotiations. He said the potential for "any mutually agreeable outcome was "exhausted". No "additional talks, whatever the format," could overcome the "impasse"[174]; and this conclusion by President Ahtisaari about the futility of further negotiations is certainly consistent with this Court's own recognition, such as in the *South West Africa* cases, that there comes a time in negotiations when "a deadlock" is reached — when "both sides remain adamant" in their positions — in which case, the Court said "there is no reason to think that the dispute can be settled by further negotiations between the Parties" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 1962*, p. 346; *Mavrommatis Palestine Concessions*, *Judgment No. 2, 1924, P.C.I.J.,*

[174]Dossier No. 203.

Series A, No. 2, p. 13 (the same))[175]. President Ahtisaari not only concluded that such a deadlock had been reached, he also concluded that "the only viable option" for Kosovo was independence[176].

53. Thus, in accordance with his terms of reference, which stated that the duration of the status process would be determined by him, President Ahtisaari concluded that the time for ending the process had come, and that the only viable political settlement, as envisaged in resolution 1244, paragraph 11, was independence for Kosovo.

54. To that end, President Ahtisaari advanced his "Comprehensive Proposal for a Kosovo Status Settlement" and recommended independence, a proposal and recommendation fully supported by the Secretary-General[177]. Extensive efforts thereafter to secure Serbian co-operation failed. And it is only then, with a "real risk of progress beginning to unravel and of instability in Kosovo and the region"[178], that Kosovo's democratically elected representatives declared independence. When one steps back and looks at the totality of this process, it simply cannot be said that the Declaration was a sudden, surprising, unilateral act, nor one that violated paragraph 11 of resolution 1244.

55. When adopting resolution 1244, the Security Council authorized the international civilian presence, in paragraph 11, to facilitate a political process designed to determine Kosovo's final status. That process moved forward and it resulted in conclusions by the Secretary-General and by his Special Envoy that the status quo was unsustainable, and that further negotiations would serve no purpose, and that independence was the only viable option. Under such circumstances, it simply cannot be said that the Declaration of Independence of February 2008 contravened paragraph 11 of resolution 1244. Rather, the Declaration was an obvious and necessary next step for achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very authorities charged by the Security Council with leading the final status process.

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[175]See also *Oppenheim's International Law* (Robert Jennings and Arthur Watts, eds.), Vol. 1, 1182-1183 (9th ed. 1992) (States "are under no legal obligation to reach an agreement; nor does any obligation to negotiate necessarily involve an obligation to pursue lengthy negotiations if the circumstances show that such negotiations would be superfluous.").

[176]Dossier No. 203.

[177]Dossier No. 204.

[178]Dossier No. 82.

D. United Nations bodies charged with overseeing implementation of resolution 1244 and setting aside inconsistent measures in Kosovo did not set aside the Declaration

56. Mr. President, allow me to turn to my fourth point, which concerns the reaction of relevant United Nations officials and bodies to the issuance of the Declaration of Independence.

57. As the Court is aware, efforts to secure Security Council endorsement of certain institutional steps envisaged in the Ahtisaari Settlement were unsuccessful. While such endorsement was politically desirable, and would have allowed for the termination of UNMIK's mandate, such endorsement was not required prior to the issuance of a declaration of independence. Indeed, contrary to the assertion made this morning by counsel for Serbia, the draft resolution circulated within the Security Council in July 2007, even if it had been adopted, would not have addressed or authorized the issuance of a declaration of independence.

58. For present purposes, the important fact is that after issuance of the Declaration of Independence, neither the Security Council, nor the SRSG, chose to proclaim the Declaration null and void, or to set it aside, though they were empowered to do so. Resolution 1244 specifically charged the international civilian presence in Kosovo with "overseeing the development of provisional democratic self-governing institutions in Kosovo"[179] and, further, the provisional Constitutional Framework adopted by the SRSG stated that he would take "appropriate measures whenever [PISG] actions are inconsistent with resolution 1244 (1999) or this Constitutional Framework"[180]. Counsel for Serbia this morning confirmed that the SRSG was essential the supreme legislative and executive authority within Kosovo.

59. In fact, prior to the completion — prior to the completion of the final status process — the SRSG *had* — on several occasions — taken steps to prevent or set aside actions or declarations by the interim Kosovo authorities that constituted a move toward independence[181]. Yet the SRSG did *not* take any such action with respect to the February 2008 Declaration of Independence, which came after the end of the final status process. By not doing so, we submit, the "supreme

[179]Resolution 1244, para. 11 *(c)*.

[180]Constitutional Framework, Chap. 12, Dossier No. 156.

[181]KWC, paras. 9.24-26.

administrative authority"[182] in Kosovo acted in a manner that does not fit Serbia's claim that the Declaration violated resolution 1244.

60. There can be no doubt that the SRSG and other United Nations officials considered whether they should take such action. After issuance of the Declaration, Serbia formally demanded that the Secretary-General take steps to have the Declaration set aside, by instructing the SRSG to that effect[183]. The Secretary-General did not do so. Nor did the Security Council, either by resolution or through a statement of its President.

61. Our submission, Mr. President, is that the fact that neither the SRSG, nor the Secretary-General acted to set aside the Declaration strongly supports the proposition that the issuance of the Declaration in February 2008 did not violate resolution 1244.

E. The Declaration of Independence was neither an u*ltra vires* act of the PISG or a contravention of UNMIK's constitutional framework

62. I now turn to my fifth and final point. With no support in the language or in the negotiating history of resolution 1244, or in the subsequent practice under that resolution, for the proposition that the resolution prohibited a declaration of independence in February 2008, Serbia resorts to the argument that the Declaration was unlawful in a different way. Specifically, Serbia attempts to argue that the Declaration was an *ultra vires* act of the Provisional Institutions of Self-Government, the PISG, or a contravention of the SRSG's provisional Constitutional Framework for governance within Kosovo. Serbia's anxious attempt to find some kind of violation of some instrument is perhaps understandable as a litigation tactic, but it is wholly unpersuasive as a matter of law, for several reasons[184].

63. First, as discussed by Mr. Müller, the Declaration of Independence was not adopted by the PISG. Rather, this particular action was of a very special and extraordinary nature, one taken by the democratically-elected representatives of the people of Kosovo. That act simply cannot be judged as the act of a body established under the Constitutional Framework and charged with

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[182]Serbia Written Statement, paras. 895-96.

[183]KWC, para. 9.27.

[184]KFWC, paras. 5.61-5.66.

day-to-day administrative responsibilities, governing responsibilities, in Kosovo during the interim period.

64. Second, even if this action of the representatives of Kosovo were to be regarded as an action of the PISG, the legality of that action cannot be judged against standards set forth for the governance during the interim period. Since the final status process had concluded, issuance of the Declaration in February 2008 was not an act of an interim institution transgressing its limited authority; rather, it was the act of a constituent body declaring, in the name of the people, its readiness to exercise governing authority on a permanent basis, as contemplated by the political process that unfolded in resolution 1244.

65. Third, whether or not the PISG issued the Declaration, it fell to the Secretary-General's Special Representative, the SRSG, to determine whether the Declaration was an *ultra vires* act or whether it violated the Constitutional Framework that he had promulgated, if that was truly the case. Yet, as I previously noted, the SRSG took no such action.

66. Now, in this regard, an important point of United Nations institutional law arises. In this case, the Security Council delegated authority to the Secretary-General and to his Special Representative in charge of civilian administration within Kosovo. In doing so, the Council provided those officials with authority to develop whatever regulations were deemed necessary to implement the Council's resolution in theatre. If there is a question about whether there was a transgression in theatre of the rules adopted by the SRSG to regulate local matters, considerable weight should be accorded to that representative to determine whether a transgression has occurred and, if so, to correct it[185]. In this instance, the SRSG's decision not to declare null, or void, or to set aside the Declaration as an *ultra vires* act, or as a violation of his Constitutional Framework, was an authoritative, or at least highly persuasive, interpretation of what UNMIK's regulations required.

67. Fourth, even if one hypothesizes that the Declaration constituted an *ultra vires* act of the PISG, or that it violated the SRSG's Constitutional Framework, Serbia errs in regarding any such action as a violation of *international law* as referred to in the question put to this Court by the

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[185] *Jaworzina*, *Advisory Opinion*, 1923, *P.C.I.J.*, *Series B*, *No. 8*, p. 37.

General Assembly. Such action would only have been a violation of the *domestic* law applicable in Kosovo, for the Constitutional Framework was an UNMIK regulation and, like all UNMIK regulations, was part of the local law established for the interim administration of Kosovo. In this respect, the Declaration of Independence would have been *ultra vires* only in the same way that most declarations of independence are — as a contravention of the constitutional or other domestic law of the State concerned.

68. Finally, given the several assertions this morning that the Declaration brought to an end the régime under resolution 1244, I note that the issuance of the Declaration did not terminate or seek to terminate the role of UNMIK under resolution 1244. Resolution 1244 contemplated a role for UNMIK in both the interim and post-interim periods, which UNMIK continues to fulfil. Serbia itself accepts that the Declaration did not set aside the mandate of UNMIK and that UNMIK continued to perform certain functions after the adoption of the Declaration[186]. Kosovo accepts that it is for the Security Council to terminate the international civilian presence in Kosovo and that resolution 1244 remains the United Nations basis for UNMIK's presence in Kosovo.

F. Conclusion

69. Mr. President, Members of the Court, as Sir Michael indicated, Kosovo's basic position consists of the following five propositions.

70. *First*, the Court will need to consider the propriety of answering the question put by the General Assembly. A number of States have raised serious questions in this regard.

71. *Second*, if it is to be answered, the General Assembly's question to this Court is narrow and precise, relating solely to the Declaration of Independence that was issued in February 2008. It does not concern questions of statehood, recognition, or membership in international organizations.

72. *Third*, general international law contains no rules by which the legality of a declaration of independence may be assessed.

73. *Fourth*, as I have discussed, resolution 1244 of 1999 did not preclude the issuance in 2008 of the Declaration of Independence.

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[186]Serbia Written Statement, paras. 827 and 834.

74. *Fifth*, while some States have focused on the principle of self-determination, we have referred to it only as a subsidiary point, since we do not think the Court need reach the issue. But if it does, it is our submission that the people of Kosovo clearly were entitled to exercise the right of self-determination, and did so by choosing independence.

75. Mr. President, Members of the Court, for the reasons set forth in our written pleadings, and at the present hearing, we respectfully request that the Court — if it deems it appropriate to respond to the request for an advisory opinion contained in General Assembly resolution 63/3 — to find that the Declaration of Independence of 17 February 2008 did not contravene any applicable rule of international law.

76. This concludes our oral contribution. On behalf of all those who have spoken this afternoon, I have the honour to thank the Court for its very kind attention.

The PRESIDENT: Thank you very much, Professor Murphy. This concludes the oral contribution of the authors of the unilateral declaration of independence, and brings to a close today's hearings. The Court will meet again tomorrow, at 10 a.m., when it will hear Albania, Germany, Saudi Arabia and Argentina. The Court is adjourned.

The Court rose at 6 p.m.