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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Monday 7 December 2009, at 10 a.m., at the Peace Palace,

President Owada, presiding,

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

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le lundi 7 décembre 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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as Head of Delegation;

Mr. Saša Obradović, Inspector General in the Ministry of Foreign Affairs of the Republic of Serbia,

as Deputy Head of Delegation;

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Professor Dr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration,

Mr. Vladimir Djerić, S.J.D. (Michigan), Attorney at Law, Mikijelj Janković & Bogdanović, Belgrade,

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Mr. Igor Olujić, Attorney at Law, Olujić & Rabrenović, Belgrade,

Mr. Vladimir Cvetković, Counsellor, Embassy of the Republic of Serbia in the Kingdom of the Netherlands,

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Mr. Felix Machts, Assistant at the Walter-Schücking Institute of International Law, University of Kiel,

Mr. Marko Milanović, LL.M. (Michigan), PhD cand. (Cambridge),

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Ms Dina Dobrković, LL.B.,

Mr. Miroslav Gajić, LL.B.,

Ms Vesna Verčon Ivić, Third Secretary in the Ministry of Foreign Affairs of the Republic of Serbia,

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S. Exc. M. Werner Senfter, ambassadeur adjoint d'Autriche auprès du Royaume des Pays-Bas.

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Mme Rimac Zubieta, premier secrétaire à l'ambassade de l'Etat plurinational de Bolivie au Royaume des Pays-Bas ;

M. Erick Andrés Garcia, premier secrétaire à l'ambassade de l'Etat plurinational de Bolivie au Royaume des Pays-Bas ;

M. Luis Rojas, troisième secrétaire à la direction générale des affaires juridiques du ministère des affaires étrangères.

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Mr. José Akcell Zavala, First Secretary, Embassy of Brazil in the Kingdom of the Netherlands.

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Ms Mary-Ann Stavrinides, Senior Counsel of the Republic of Cyprus,

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

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M. Phan Duy Hao, S.J.D., expert juridique au département du droit international et des traités internationaux du ministère des affaires étrangères.

The PRESIDENT: Please be seated. The sitting is open. I note that Judge Koroma, for reasons explained to me, is unable to attend the oral proceedings today. The Court meets this morning to hear the following participants on the question submitted to the Court: China, Cyprus, Croatia and Denmark. Each of the participating delegations is given 45 minutes, strictly 45 minutes, to speak. I shall now give the floor to Her Excellency Ambassador Xue Hanqin.

Ms XUE:

1. Mr. President, distinguished Members of the Court, it is my great honour and privilege to appear on behalf of the Government of the People's Republic of China before the International Court of Justice ("the Court"). The Chinese Government attaches importance to the advisory opinion of the Court on the question of *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. This case raises a number of fundamental issues of international law, concerns the lasting peace and stability in the Balkans and affects the international legal order. At the invitation of the Court, the Chinese Government filed a Written Statement on the above-mentioned question on 16 April 2009. The Chinese Government has carefully studied the written submissions by other States and the authors of the Unilateral Declaration of Independence ("UDI") in question, and considers it necessary to make an oral statement on some important issues of international law. Although this is the first time for the People's Republic of China to participate in the proceedings of the Court, the Chinese Government has always held great respect for the authority and importance of the Court in the field of international law.

My oral statement will consist of four parts.

PART I. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1244 (1999)

2. At the outset, China wishes to reiterate the position stated in its Written Statement that United Nations Security Council resolution 1244 is the authoritative basis, as is so generally recognized by the international community, for handling the issue of Kosovo. Security Council

resolutions must be complied with in accordance with the United Nations Charter[1]. China maintains this position.

3. China has noticed that all written submissions have to varying degrees elaborated on the preambular paragraph of resolution 1244, which reads "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia"[2]. Many submissions have reaffirmed the legal effect of this paragraph[3], while others have expressed different opinions. These latter opinions hold that resolution 1244 did not address the principle of respect for sovereignty and territorial integrity. They argued that, as the above paragraph was only included in the preamble, it was merely a *considerandum* or a non-binding clause, rather than a guarantee of Serbia's sovereignty and territorial integrity[4]. China is concerned about this position. As a permanent member of the United Nations Security Council, China participated in the entire process of the consultations and adoption of resolution 1244, and does not believe that such an understanding is plausible.

4. From the background to the adoption of the resolution, it is clear that respect for sovereignty and territorial integrity of the Federal Republic of Yugoslavia ("FRY") served as one of the important bases upon which the resolution was adopted. In 1999, without the authorization of the Security Council, the North Atlantic Treaty Organization ("NATO") launched military strikes that lasted for 79 days against the sovereign State of the FRY, seriously violating the Charter of the United Nations and international law and undermining the authority of the Security Council. Under such circumstances, the Security Council had to fulfil its primary responsibility for the maintenance of international peace and security to seek a political solution to the Kosovo crisis. As is well known, throughout the Kosovo crisis that had evolved from an internal ethnic conflict into a threat to international peace and security, the maintenance of the FRY's sovereignty and territorial integrity had remained at the centre of the issue. The repeated statement of such principles in resolution 1244 and all other relevant documents indicates that any solution to the

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[1]Written Statement of China, Part I.

[2]Resolution 1244 (1999), preamble, para. 10.

[3]Written Statement of Cyprus, para. 92; Written Statement of Russia, pp. 20-22; Written Statement of Serbia, pp. 249-253; Written Statement of Spain, pp. 24-27; Written Statement of Argentina, pp. 28-32.

[4]Written Statement of the United Kingdom, para. 6.12; Written Contribution of the United States, p. 26; Written Contribution of the authors of the UDI in question, para. 9.05.

ethnic conflicts in Kosovo had to be found without prejudice to the FRY's sovereignty and territorial integrity. During the drafting process, China proposed an amendment to add a new preambular paragraph to the draft resolution, which amendment reads: "bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security". The amendment was intended to emphasize respect for the sovereignty and territorial integrity of the FRY and objection to the use of force in international relations. China's amendment was accepted in the resolution[5].

5. Here I would like to recall the statement made by the Chinese representative before the Security Council adopted the resolution:

> "The draft resolution before us has failed to fully reflect China's principled stand and justified concerns. In particular, it makes no mention of the disaster caused by NATO bombing in the Federal Republic of Yugoslavia and it has failed to impose necessary restrictions on the invoking of Chapter VII of the United Nations Charter. Therefore, we have great difficulty with the draft resolution. However, in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft resolution has reaffirmed the purposes and the principles of the United Nations Charter, and the primary responsibility of the Security Council for the maintenance of international peace and security and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this resolution."[6]

6. We can see clearly from the historical background of resolution 1244 that, instead of being a general statement without binding effect, the preamble of the resolution provides the guiding principles and the foundations for the political solution to the Kosovo crisis and the establishment of international administration in Kosovo.

7. The substantive paragraphs of the resolution that provided for the arrangements of the international administration and the subsequent mandate of the Provisional Institutions of Self-Government of Kosovo ("PISG") also demonstrated the respect for the FRY's sovereignty and territorial integrity. Reaffirmed in the preamble of the resolution, such commitment was equally reflected in the operative paragraphs. Under the resolution, the FRY was requested to withdraw from Kosovo all of its military, police and paramilitary forces and an international security presence was to be established in Kosovo. Such measures were aiming at deterring hostilities,

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[5]Resolution 1244 (1999), preamble, para. 1.

[6]See UN doc. S/PV.4011, p. 9.

establishing a secure environment and ensuring the operation of the international civil presence. The resolution also authorized the establishment of

> "an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo"[7].

The resolution used the word "welcome" to acknowledge and emphasize the agreement of the FRY to such presence[8]. The above arrangements demonstrated that with respect to the sovereignty and territorial integrity of the FRY, resolution 1244 confined the authority and the functions of the international civil presence to promoting substantial autonomy for all inhabitants living in Kosovo, a part of the FRY's territory. Under the resolution's authorization, the Constitutional Framework for Provisional Self-Government in Kosovo laid down the responsibilities and the powers of the PISG, which do not include any power to decide Kosovo's future status. All the above-mentioned arrangements have consistently maintained a clear limit that, as committed in resolution 1244, all Member States respect the sovereignty and the territorial integrity of the FRY.

8. While authorizing the deployment of the international civil and security presence, resolution 1244 also envisioned a "political process" to resolve Kosovo's status in accordance with some general principles and the required elements as contained in two annexes, which are introduced at the beginning of the operative part of the resolution[9]. Both annexes included the requirement that full account be taken of the sovereignty and territorial integrity of the FRY in the "political process"[10]. The resolution welcomed the FRY's acceptance of those general principles and the required elements[11]. All this means that, in the "political process" leading to the solution of Kosovo's status, whatever the procedure to be adopted, or the results to be achieved, the sovereignty and the territorial integrity of the FRY should be respected. In other words, all parties, including the FRY, now Serbia, must be involved in the process and any solution should be

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[7]Resolution 1244 (1999), operative para. 10.

[8]*Ibid*., operative para. 5.

[9]*Ibid*., operative para. 1.

[10]Resolution 1244 (1999), Ann. 1, para. 6 and Ann. 2, para. 8.

[11]*Ibid*, operative para. 2.

achieved by agreement. Just as stated by China during the Security Council deliberations, "any proposed solution should take full account of the views of the Federal Republic of Yugoslavia"[12].

9. Some States insisted in their submissions that "the 'political process' envisioned by resolution 1244 had run its course"[13] and, therefore, the prohibition of unilateral steps towards independence ended[14]. China does not agree with this view.

10. The situation in Kosovo was taken up by the Security Council because it constituted "a threat to international peace and security"[15]. It is up to the Security Council, as the organ bears the primary responsibility to maintain international peace and security under the United Nations Charter, to determine whether or not the "political process" has come to an end and decide what subsequent actions should be taken. As a matter of fact, the resolution has stated that the Security Council "decides to remain actively seised of the matter"[16]. Given the divergent positions of the States involved, the Security Council has so far neither adopted any new resolution nor endorsed the Comprehensive Proposal for the Kosovo Status Settlement[17] submitted by the Special Representative of the Secretary-General — "Ahtisaari Plan". Such silence should not be taken as to mean the "political process" towards the settlement of Kosovo's status has come to an end. Therefore, the UDI by the PISG, in whatever name, is contrary to resolution 1244.

11. It is for the purpose of maintaining peace and security that resolution 1244 has placed Kosovo under international administration. The parties to the situation should negotiate in good faith and actively seek a political settlement that is acceptable to both parties. Only by doing so could they reach a fair and reasonable outcome and a lasting peace be established in the Balkans.

PART II. GENERAL INTERNATIONAL LAW

12. The UDI by the PISG not only is incompatible with the Security Council resolution 1244, but it also contravenes the established principles of general international law.

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[12] UN doc. S/PV.4011, p. 8.

[13] Written Statement of the United States, p. 79.

[14] Written Statement of Germany, p. 42.

[15] Resolution 1244 (1999), preamble, para. 12.

[16] *Ibid.*, operative para. 21.

[17] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council. See UN docs. S/2007/168 and S/2007/168, Add.1.

13. First of all, it should be pointed out that the FRY, now Serbia, is not a continuation of the former Socialist Federal Republic of Yugoslavia ("SFRY"), but one of the new sovereign States that have emerged as the result of the dissolution of SFRY. It is beyond any doubt that Kosovo is an integral part of the territory of the said new State, the FRY. Therefore, the issue of the UDI in question is in essence about unilateral secession under international law.

14. Under the established principles of international law, a component part of a sovereign State is not entitled to unilateral secession.

15. Respect for territorial integrity of a sovereign State is one of the fundamental principles of contemporary international law. It plays the central role in the international legal system and serves as the cornerstone of the international legal order. Respect for territorial integrity is the essence of the principle of sovereign equality of States. Since the dawn of modern international law, the principle of State sovereignty and the territorial integrity has been consistently supported and reaffirmed by State practice. This principle is embodied in a large number of authoritative international legal instruments, including the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in 1970, and the Final Act of the Conference on Security and Co-operation in Europe, adopted in Helsinki in 1975.

16. As the most important subjects of international law and as members of the international community, sovereign States stand on territory as their foundation and the exclusive domain for the exercise of their sovereignty. Violations of the territorial integrity of a State have often resulted in disputes, even military conflicts among States, creating threats to international peace and security. Given the vital importance of territory, no State would accept that any of its component parts may secede from it without its consent. Indeed, the primary aim of the principle of State sovereignty and territorial integrity is to protect a State's territory from external violation and at the same time unilateral secession of a part of a State enjoys no protection under international law and a State can exercise its legitimate rights to prevent and deter secession in order to preserve its territorial integrity. This has been affirmed by overwhelming State practice.

17. Some written submissions asserted that since international law does not prohibit unilateral secession, the UDI by the PISG is therefore in accordance with international law. China does not agree with this position. Although there is no international legal rule specifically and expressly prohibiting unilateral secession, it cannot be inferred that international law is neutral on the matter. To determine the legality of a unilateral secession, it is necessary to take into account the specific circumstances of each and every case and the relevant rules of international law. In the present case before the Court, any general claim that international law does not prohibit unilateral secession offers no legal guidance for determining whether the UDI by the PISG is in accordance with international law. As was stated above, the UDI by the PISG is not in accordance with resolution 1244 and contravenes the principle of State sovereignty and territorial integrity. Therefore, there is no point in saying that international law is neutral in the present case. Even if the "political process" as envisaged by resolution 1244 had run its course as argued by some States, so far as the Security Council remains seised of the matter, no party to the situation should take unilateral actions to change Kosovo's status.

18. It should not be lightly assumed that in exercising its vested authority under Chapter VII of the United Nations Charter to adopt resolution 1244, the Security Council could have intended to imply that one solution to the Kosovo crisis would lie in its unilateral secession from the FRY, now Serbia. Even where peace and security are at stake, the Council never fails to observe the fundamental principle of territorial integrity of States and never allows such unilateral actions of secession.

PART III. PRINCIPLE OF SELF-DETERMINATION OF PEOPLES

19. Another issue concerned in the present case is the alleged right of "remedial self-determination" within the context of the principle of self-determination of peoples.

20. The Chinese Government has fully set forth its position on the principle of self-determination of peoples in international law in its Written Statement. Many written submissions have discussed this principle, but none has provided convincing arguments based on State practice to support that Kosovo is entitled to declare independence by exercising the right of self-determination in international law. On the contrary, many States have adopted a cautious

attitude towards the application of this principle in the present case[18]. In view of the varied interpretations of the principle of self-determination, China considers it necessary to further elaborate on its position.

21. Just as China has pointed out in its Written Statement, it was against the historical background of the decolonization movement that the principle of self-determination evolved into a fundamental principle of international law. The right of self-determination recognized by international law has its specially defined content and scope of application. The cases in which such a right has been exercised and then endorsed by the General Assembly, the Security Council or the Court have all fallen within, and never exceeded, the class of situations involving colonial domination, alien subjugation and foreign occupation.

22. To illuminate the relationship between the right of self-determination and the respect for State sovereignty and territorial integrity, China and many other States have cited paragraph 7 of the section on "the principle of equal rights and self-determination of peoples" of the Friendly Relations Declaration (1970), which states:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

23. Some States have referred to the foregoing as "a safeguard clause" and interpreted it, by *a contrario* reading of the text, as embodying a right to the so-called "remedial self-determination" or "remedial secession". China does not think such understanding and interpretation are correct and does not believe there is such a right under international law.

24. Firstly, the preparatory work of the Friendly Relations Declaration[19] shows that the purpose to include the above clause within the Declaration was to make clear that the right to self-determination was to be exercised by the peoples or regions under colonial domination, alien subjugation or foreign occupation, but not by any integral parts of sovereign and independent States with a multi-ethnic population. The objective of the said clause was to guarantee

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[18]Written Comments of the United Kingdom, pp. 5-6; Written Comments of the United States, pp. 21-23.

[19]See Written Statement of Serbia, pp. 221-224.

sovereignty and territorial integrity of a State rather than confer any such alleged "remedial right" so as to encourage internal ethnic minorities or groups to claim unilateral secession from the State.

25. Secondly, the so-called right to "remedial self-determination" clashes with the principle of State sovereignty and territorial integrity. It is obvious that if such a claim were permitted under international law, as it concerns the fundamental interests of States, there should have been positive and explicit legal provisions to that effect. No such provisions however exist in international law.

26. Finally, the alleged right to "remedial self-determination" is primarily inferred from the *a contrario* reading of the above-mentioned clause, but such a reading contravenes the objective and the purpose of the Friendly Relations Declaration. Up to this day, no authoritative international legal bodies have ever adopted such a reading. No support can be found either in State practice or *opinio juris* for such an alleged right under customary international law.

PART IV. RELEVANCE OF SUBSEQUENT DEVELOPMENTS OF THE UDI BY THE PISG TO THE LEGAL ISSUES PRESENTED IN THE PRESENT CASE

27. Some States have argued that, in view of the fact that more than 60 States have so far recognized the independence of Kosovo, even if the UDI were not in accordance with international law at the time of its issuance, Kosovo's independence has become a fait accompli in light of the post-UDI developments. China considers that such an argument is inappropriate in the present case. The purpose of seeking an advisory opinion by General Assembly resolution 63/3 from the Court is to address a concrete legal question, namely, "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" According to general principles of law, whether the UDI by the PISG is in accordance with international law should be determined by reference to the nature of the UDI at the time it was issued. The developments subsequent to the issuance of the UDI shall produce no effect on the answer to the question concerned.

28. Some States are of the view that the advisory opinion of the Court on the relevant question, whatever it may be, will not produce any practical effect on Kosovo's status. Such an attitude lacks sufficient respect for the rule of law in international relations. As the Security Council remains seised of the matter, China believes that the advisory opinion of the Court will exert a direct impact on international law as well as on the authority of the Security Council.

29. Mr. President, distinguished Members of the Court, as a permanent member of the Security Council, China has always adopted a responsible attitude with regard to the situations in the Balkans in accordance with the purposes and the principles of the United Nations Charter and has consistently advocated peaceful settlement of disputes in this region. It is China's sincere hope that lasting peace and stability can be secured in the Balkans where all peoples will live in harmony and build their homeland together. To realize this prospect, all parties in this region are required to seek compromise solutions through consultation and negotiation. Any unilateral act would not be conducive to building up regional peace and order. It is with this sincerity that China has come to the Court and presented the above statement.

Mr. President and distinguished Members of the Court, I thank you very much for your attention.

The PRESIDENT: I thank Her Excellency Ambassador Xue for her presentation. I now call His Excellency Mr. James Droushiotis to take the floor.

Mr. DROUSHIOTIS:

INTRODUCTION

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Cyprus, which is appearing for the first time in this Court, to introduce our oral submissions in this case.

2. Our written and oral observations have been prepared with a degree of care which reflects the great importance that the Republic attaches to the principles of international law that the Court is being invited to apply in responding to the request for an advisory opinion.

3. Cyprus's primary concern and reason for participating in this hearing is to emphasize to the Court the absolutely critical and fundamental importance to Cyprus, and to many other States, of adhering to those principles of international law in the context of this case.

4. Like its Balkan neighbours, Cyprus has endured attempts to impose political settlements by armed force. Meeting violence with violence is not the route that Cyprus has chosen. Instead, it has put its full trust in the rule of law in international relations.

5. Cyprus is relying upon the United Nations, and the International Court in particular, to adhere to international law and to reaffirm the established rules of international law that are the essential framework for peaceful relations between States. As you said in your speech to the United Nations General Assembly, Mr. President, "Law does not replace politics or economics, but without it we cannot construct anything that will last in the international community."[20]

6. As many of the written and oral statements made to the Court have emphasized, the situation in Cyprus is different from that in Kosovo. In our case there have been gross violations of the prohibition of the use of force against States. Such violations have their own particular consequences in international law. At the same time, neither situation is outside the scope of international law.

7. Cyprus has submitted two detailed written statements, and it reaffirms the submissions made in them. At this stage of the proceedings we wish to address certain questions of international law that have emerged during the two rounds of written submissions.

8. Cyprus's submissions will be continued by Mr. Vaughan Lowe.

Mr. LOWE:

9. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Cyprus to present this part of the Republic's oral submissions.

10. There are five principles that we ask the Court to reaffirm in its opinion in this case:

(a) first, acts of secession are *not* merely "neutral facts" about which international law has nothing to say: they are facts with legal significance, and they must be consistent with international law;

(b) second, that is particularly the case in circumstances where the act of secession is the result of an unlawful use of force;

(c) third, the fact that the United Nations proposes the terms for a possible settlement by agreement does not entitle any party to impose those terms unilaterally;

(d) fourth, the United Nations Security Council does not have the power to amputate part of the territory of a State without its consent;

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[20] http://www.icj-cij.org/presscom/files/1/15591.pdf.

(e) and fifth, international law applies to *all* international situations, however exceptional the circumstances: the question is not *whether* international law applies, but *how* international law applies to each case.

11. And I shall address the first four points, and Mr. Polyviou will address the fifth, and add some observations concerning self-determination.

1. Secession is not a legally neutral fact

12. Well, first, in our view secession and declarations of independence are regulated by international law. We reject the suggestion that they are legally neutral facts unregulated by international law.

13. The international order is based on what Article 2 of the United Nations Charter calls the "principle of the sovereign equality of all its Members". The meaning of that principle was explained in General Assembly resolution 2625, the "Friendly Relations Declaration". Sovereign equality entails the principles that "each State enjoys the rights inherent in full sovereignty", and that "the territorial integrity and political independence of the State are inviolable".

14. And that is why international law requires that changes of territorial title proceed according to what this Court called in *Cameroon* v *Nigeria* "the established modes of acquisition of title under international law" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 352, para. 65). It is necessary to point to *some* legally-recognized process for an effective transfer of sovereign title over territory.

15. There is thus in international law a presumption, reflected in the Helsinki Final Act, in favour of stability and the maintenance of territorial boundaries — a presumption *against* the fragmentation of States. Any entity that wishes to act contrary to this presumption must establish an entitlement to do so: and that is why it was necessary to provide expressly for a right of self-determination for peoples under colonial occupation.

16. But the action of the authors of the Declaration was inconsistent with these principles. The Declaration was an assertion, an implicit instruction, that in relation to matters in Kosovo third States should no longer deal with the authorities in Belgrade, no longer deal with UNMIK, but

should deal with the people in Priština instead. Kosovo seeks to be treated as a State. It wishes to join international organizations, to engage in diplomatic relations, to enjoy for itself and its agents the privileges and immunities of a State, and so on.

17. It is misleading to say that this implicit instruction is a legally neutral fact and that States are free to decide whether or not to recognize Kosovo, and that recognition — about which the Court is not asked — is declaratory of the factual situation.

18. It is misleading because if State A recognizes what claims to be a new State that has established itself on the territory of State B, and the new State does not fulfil the conditions prescribed by international law that entitle it to be treated as a State, its recognition by State A would be inconsistent with the legal rights of State B, which remains the sovereign State.

19. Indeed, State A might go further and, for example, give military assistance to the new State, or buy what the new State says is its property: and such actions would violate the legal rights of State B.

20. So State A must be satisfied that the new State is *entitled* to recognition before it recognizes it and, as it were, de-recognizes the sovereignty of State B in respect of the territory in question. The right to recognize and the right to be recognized are corollaries, one of the other.

21. Recognition is not a matter that is left to the unfettered discretion of States. That is why there are criteria, well established in international law, that must be met in order that an entity can be a State.

22. Those criteria are well known: territory; population; effective government; capacity to enter into relations with other States; and, as many of the statements in this case have pointed out, the criterion of legality — the requirement that the entity must not have been established by a process, or established in a form, that violates international law.

23. So, it is not correct to say that secession is a purely factual question about which international law must remain silent, and that all depends upon recognition. There is a question that arises, as a matter of logic and as a matter of law, *prior* to recognition. And that question is, is the entity entitled to recognition as a State? Is its claim that it is a State a claim that is in accordance with international law?

24. Well Cyprus submits that it is particularly important that the law in this area is analysed and stated with especial precision. It is only a short step from the proposition that secession and declarations of independence are neutral facts to the proposition that if a part of the territory of a sovereign State is in a position of *de facto* independence of the lawful government of that State, the population of that part is entitled to declare itself to be an independent State and other States are entitled to recognize it.

25. It is hard to think of a legal proposition that could do more to encourage instability and violence in international affairs, especially at the present time.

26. Cyprus has set out its observations on the extent to which Kosovo fulfils the criteria established by international law in its Written Statements: and I will not repeat them here. I only emphasize the point that declarations of independence are inextricably bound up with questions of legality and of international law.

27. And Cyprus thus asks the Court to make it clear that international law *does* regulate the question of secession, and that the enjoyment of a measure of *de facto* autonomy does *not* entitle a territory to break away from the sovereign State of which it is in law a part, or entitle third States to recognize that territory as an independent State.

2. *A fortiori* where unlawful force is used

28. My second point, Sir, is very brief. It is that the application of international law to situations of secession has a particular salience in circumstances in which an unlawful use of force is involved.

29. Thus, for example, an entity established by force, as in the case of the self-styled "Turkish Republic of Northern Cyprus", is created by a process that violates international law. And as Article 41, paragraph 2, of the International Law Commission's Articles on State Responsibility makes clear, there is a specific legal *duty* not to recognize situations brought about by unlawful uses of force or other serious breaches of international law.

3. Consistency with United Nations proposals is not enough

30. I turn to my third point. In the Written Statements before the Court, much is made of the significance of United Nations involvement in Kosovo and of United Nations Security Council resolution 1244.

31. The main facts concerning the United Nations involvement are not controversial. It is clear:

— first, that in 1999 Kosovo was a part of Serbia;

— second, that in June 1999 Serbia's governance of Kosovo was displaced by an interim United Nations administration (UNMIK) established with the express agreement of the Government of the FRY;

— third, that on 16 February 2008 Kosovo was still part of Serbia; and

— fourth, that the Declaration of 17 February 2008 purported to establish an independent and sovereign State on part of Serbia's territory, without the consent of the Serbian Government.

32. Well, it is easy to see how UNMIK became endowed with the legal competence to act as the administration in Kosovo: it did so with Serbia's consent. But it is difficult to see how a part of Serbia's territory, which the Serbian Government had agreed it would be entrusted to the temporary administration of the United Nations, could be lost to Serbia forever and against its will.

33. Cyprus fully accepts the central role of the United Nations, and in particular of the Security Council, in the maintenance of international peace and security. The United Nations system was created precisely in order to resolve international problems without resort to armed force, and it is vital that confidence in the United Nations be maintained.

34. But confidence, particularly in relation to action in contexts where the Security Council is seeking to persuade combatants to put down their arms and explore the possibility of peaceful settlement of their differences, requires that the United Nations act predictably and legitimately.

35. Predictably, in the sense that it acts within the powers that its Member States have given to it in the Charter and that it follows the prescribed procedures laid down in the Charter and in the Council's own resolutions.

36. Legitimately, in the sense that the Council acts consistently with international law — in accordance with international law — and upholds the rule of law.

37. This is not a clever or a subtle point; but it is an enormously important point. Unless the United Nations preserves its legitimacy and predictability, and supports the rule of law, why should governments place the future of their countries in its hands? And this Court, of course, is an organ of the United Nations, and a vital element in the maintenance of the legitimacy and predictability of that Organization.

38. Jurists around the world, writing of the situation in Kosovo, have raised many points of law in relation to the handling of the Kosovo question by the United Nations. Was the Kumanovo Agreement of 1999, which laid the foundation for United Nations Security Council resolution 1244, legally valid, or was it void under Article 52 of the Vienna Convention on the Law of Treaties as an agreement procured by the threat or use of force? Was resolution 1244 compatible with the Purposes of the United Nations, set out in Article 1 of the Charter? And so on.

39. Cyprus has no wish to raise here all of the legal arguments that might be raised; but it does attach great importance to the third and fourth principles in my submissions. Neither principle is controversial; but compliance with each of them is *essential* if the predictability and legitimacy of United Nations action is to be maintained.

40. My third principle is that where the United Nations Security Council proposes the terms for a possible settlement by agreement, that fact does not entitle any party to impose those terms unilaterally.

41. Some States have suggested that all conduct that is not actually inconsistent with, or not actually prohibited by, resolution 1244 is lawful — or if not necessarily lawful, that the consistency with resolution 1244 is a factor of legal significance.

42. In the view of Cyprus, the Kosovo Declaration was not in fact compatible with resolution 1244. When, in 1999, with the agreement of the Government in Belgrade, resolution 1244 established what it called "an interim administration for Kosovo"[21] the Security Council unambiguously reaffirmed the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region"[22]. It

[21]United Nations Security Council resolution 1244, Ann. 2, para. 5.

[22]United Nations Security Council resolution 1244, preamble; and cf. Ann. 2, para. 2 (which refers to "the other countries of the region").

spoke of "a political process towards the establishment of an interim political framework providing for substantial self-government for Kosovo".

43. There is not a single word to indicate that the United Nation's interim administration might end by it removing Kosovo from Serbian sovereignty. As counsel for Argentina made clear, nothing in the Security Council debates indicates that such an outcome was contemplated when Serbia consented to this plan; and the words of the joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma in the *Qatar* v. *Bahrain* case come to mind: "In the matter of territory, consent to a renunciation of sovereignty cannot be presumed; the renunciation must be expressed and established in unequivocal terms." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Judgment, I.C.J. Reports 2001*, p. 159, para. 38.)

44. But that is not really the point. The point is that even if it *were* possible to construe resolution 1244, or other United Nations texts, as favouring or recommending or accepting the possibility of a move towards independence for Kosovo, that would do no more than signal the *political* plausibility of independence as one among the range of possible developments contemplated by the drafters of the resolution. It would not, and it could not, either on the face of the resolution or by implication indicate that the option of independence could be chosen unilaterally by one of the parties involved in discussions over Kosovo, and then be made legally effective by that party's unilateral action.

45. The fact that the United Nations might decide that a particular plan for the settlement of a political dispute is desirable, or is one among a range of desirable options, does not give one party to that dispute the right to impose the plan unilaterally. There is a difference between action that is consonant with a political plan and action that is the exercise of a legal right.

4. The powers of the Security Council are not unlimited

46. My fourth principle is that, even though the Security Council was acting under Chapter VII of the Charter, and there is no express limit on its powers under Article 39 to "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security", the powers of the United Nations Security Council are not

unlimited. In particular, they do not extend to the power to transfer territory from one State to another against the will of the dispossessed State.

47. The wording of Articles 41 and 42 does not at all suggest that the Council has unlimited powers. Both Articles refer to means of applying pressure to States, by taking measures not involving the use of force or by taking military action. Nothing in those Articles even suggests the existence of a power to change the juridical status of the territory of a sovereign Member State by the adoption of a resolution, whether that resolution be adopted unanimously or by majority vote. Indeed, such a power to dismember States would be fundamentally incompatible with the principle of sovereign equality.

48. And it could scarcely be otherwise. One can see why States agree to a collective security system, and even to something like a collective policing system that might be used against them if they violate international law. There is a rational calculation that, on balance, the benefits that flow from the protection afforded to all law-abiding States by the system outweigh the constraints imposed by the system. But why would States agree that they could be dismembered, and have their territory transferred to another State?

49. And I pause to emphasize the practical significance of this point. What hope is there that States will be persuaded to accept international administration or other interim arrangements for dealing with crises of the kind that arose in the Balkans, if they know that they risk being told that the powers that they have temporarily shared with, or temporarily lent to, another body, have been irrevocably taken from them? It is like handing a child to someone to look after for a while; and then being told that you will never have the child back. What will that do to efforts in the United Nations, or the African Union, or the OSCE to bring an end to killing and to find peaceful settlements to international problems?

50. There is no evidence that the United Nations Charter vests any such power in the Security Council, nor that it was intended that such power should be invested in the Council. No one suggests that the Council's powers are plenary — and that it has, for example, the power to impose fines upon States. Nor is there any ground for the assertion that among the powers that were given to the Council is the power to transfer and dispose of the territory of Member States of the United Nations, against their will.

51. As Judge Fitzmaurice said in a much-quoted passage from his dissenting opinion in the Namibia case:

> "*The Security Council is not competent, even for genuine peace-keeping purposes, to effect definitive changes in territorial sovereignty or administrative rights.*
>
> 115. . . . *Even when acting under Chapter VII of the Charter itself*, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 294, paras. 114-115.)

52. The view summarized by Judge Fitzmaurice is cogent and persuasive. And while the Council has occasionally, for example, in the context of Iraq and Kuwait[23] *confirmed* boundaries established by international law, it has not actually arrogated to itself the power to *transfer* territory. And if the Security Council does not itself have that power, plainly it cannot confer any such power upon others.

53. Accordingly, Cyprus submits that while the wording of United Nations Security Council resolutions may be of interest and of importance for other legal aspects of the matter now before the Court, no United Nations resolution, however it is worded, could have the effect of lawfully depriving a United Nations Member State of a part of its sovereign territory against its will or of authorizing any such taking of a State's territory.

54. And even less, of course, could it be argued that the fact that the United Nations has not condemned the 17 February Declaration or declared it void somehow confers or attests to the legal effectiveness of the Declaration. If the United Nations cannot authorize the dismemberment of a State by express action, it certainly cannot do so by its failure to act.

55. That concludes my part in these submissions and Mr. Polyvios Polyviou will close the oral submissions now on behalf of the Republic of Cyprus. Thank you, Sir.

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[23] See United Nations Security Council resolution 687.

Mr. POLYVIOU:

5. There is no right of secession for minorities

56. Mr. President, Members of the Court, it is indeed an honour to appear before you on behalf of the Republic of Cyprus to conclude the Republic's oral submissions in this case.

57. We have explained the legal principles that Cyprus considers to be applicable in this case. These principles do not support the authors of the Declaration. Those arguing in favour of the authors of the Declaration must point to some entitlement in international law to justify Kosovo's breaking away from Serbia. I shall deal with two of the arguments they put forward; first, the suggestion that the Declaration might be justified as an act of self-determination; and, secondly, the argument that the situation is *sui generis* and that the ordinary rules of international law are not applicable to it.

58. The Republic of Cyprus has set out its submissions in its Written Statement. Its main point is that the right to self-determination is a right enjoyed by "all peoples" but not by minorities or other groups within a State. Minorities enjoy of course the full range of human rights, but they have no entitlement to dismember existing States.

59. This is the case even in circumstances in which the human rights of a minority might be said to be infringed. There are mechanisms for the vindication of human rights: in national laws; before regional bodies such as the European Court of Human Rights; in international bodies such as the United Nations Human Rights Council. Every one of them has a range of remedies and mechanisms at its disposal. Not one of them has the power to dismember of amputate a State.

60. If there are human rights violations, they must, of course, be remedied. The remedy lies in the State fulfilling its obligations to the human beings within its jurisdiction. It most certainly does not lie in breaking up the State.

61. The people of Kosovo are not, in the view of Cyprus, a "self-determination unit". They are without doubt entitled to have their human rights, and the rights of minorities within a State, respected and fulfilled. That is, of course, beyond question. But if their rights are violated that does not entitle them to break away from, or bring about the dismemberment of, the State.

6. *Sui generis* situations are not outside legal rules

62. The Republic of Cyprus notes that many of the Written Statements before the Court, including both statements supporting the position of the authors of the Kosovo Declaration and statements opposing it, have distinguished the case of Kosovo from that of the northern part of Cyprus. Some have done so by drawing attention to the gross violations of international law by which a régime was established in the north of Cyprus following the Turkish military invasion in 1974, and have said that such illegality precludes the legally effective establishment of a State. Others have pointed to the continuing legal duty, reflected in Security Council resolutions, and resting upon all States not to recognize the so-called "TRNC", the Turkish Republic of Northern Cyprus: and, indeed, only one State in the world, Turkey, the country responsible for the violations of international law in the case of Cyprus, has extended recognition to the TRNC.

63. The recognition of the characteristics of Kosovo that mark it, or may mark it out from other situations is, of course, helpful. Indeed, an analysis of Kosovo that did not give careful consideration to these characteristics would be deficient and inadequate.

64. There is, however, a danger in this approach, which not all of the Written Statements have altogether avoided. It is that one may begin with a list of the specific characteristics of Kosovo, and then proceed to the proposition that Kosovo is a case *sui generis*, and finally end with the conclusion that the established rules and principles of international law need not be applied to the case of Kosovo precisely because, allegedly, it is a case *sui generis*.

65. Such reasoning, Mr. President and distinguished Members of the Court, is plainly defective and must be resisted.

66. Of course every situation has its own particular characteristics that distinguish it from most other situations with which it has some things in common. When it is said that justice and the rule of law consist in treating like cases alike, it does not mean that the cases must be identical in order to fall within a given rule.

67. Mr. President and Members of the Court, it is fundamental and, indeed, axiomatic, that laws are designed to apply to all of the broadly similar cases that fall within the category that the particular law defines. Cyprus does not deny that Kosovo has its own characteristics. Indeed, every situation does. But while that is a reason for taking care to apply the rules of international

law properly to Kosovo, it is not a sufficient reason for saying that the rules of international law do not apply to Kosovo at all.

68. If the Court were once to say that it could in effect suspend the operation of the law in relation to one case because of its particular characteristics, it would establish, in the clearest possible terms, a precedent for suspending the operation of the law in relation to *any* case because of its particular characteristics.

69. Moreover, it is unlikely that the Court could confine the effect of its opinion to the specific case of Kosovo. Some of the characteristics which have been alleged in statements before the Court to lead to the conclusion that Kosovo is a *sui generis* case exempt from the application of international law could in the hands of any skilful advocate or manipulative politicians be generalized so as to be applicable to many other situations.

70. If the Court were to base its opinion on a characterization of Kosovo as a situation *sui generis*, it would cease to be a court of law and would take on the role of the other principal organs of the United Nations — that of deciding how a particular situation should be handled politically.

71. The Court has never taken such a role; and in the respectful submission of the Republic of Cyprus it should not do so now. The Court, we say with respect, most emphatically, should never abandon its role as a court of law and as the true custodian of the international legal order.

72. Finally and very briefly, Mr. President and Members of the Court, allow me to summarize the basic principles relied upon by the Republic of Cyprus:

(a) first, acts of secession are not "neutral facts" about which international law has nothing to say: they are acts with legal significance, and consequences, and they must be consistent with international law;

(b) second, the above is particularly the case in circumstances where the act of secession is the result of an unlawful use of force;

(c) third, the fact that the United Nations proposes terms for a possible settlement by agreement does not entitle any party to impose those terms unilaterally;

(d) fourth, the United Nations Security Council does not have the power to amputate part of a State without its consent; and

(e) fifth, Mr. President, and Members of the Court, international law applies to *all* international situations, however exceptional the circumstances.

73. Mr. President, Members of the Court, this concludes the oral submissions on behalf of the Republic of Cyprus. On behalf of the Republic of Cyprus, I would like to thank you for your attention. Thank you.

The PRESIDENT: Thank you very much, Mr. Polyvios Polyviou.

I believe this is an appropriate moment for the Court to have a brief coffee break. We have two more participants to speak, respectively for 45 minutes, and this is a moment to have a break. So, I declare that the Court is going to a brief recess of 15 minutes until 11.30 a.m.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated. I now call Her Excellency Madam Andreja Metelko-Zgombić to the floor.

Ms METELKO-ZGOMBIĆ:

1. Mr. President, honourable Members of the Court, it is my honour and privilege to appear before you again on behalf of the Republic of Croatia.

2. In my presentation I will offer our Government's reply to the submitted question, furnish certain information and express the viewpoints of my Government. We offer this contribution in the spirit of assisting the Court and contributing to the clarification of the circumstances pertinent to this matter.

I. INTRODUCTION

3. The Republic of Croatia recognized Kosovo as a sovereign and independent State on 19 March 2008. Some of the reasons for recognizing Kosovo's independence have previously been outlined in the joint statement issued by the Governments of the Republics of Croatia, Hungary and Bulgaria prior to their concurrent recognition of the Republic of Kosovo. The statement recalled the failure of the efforts by the international community to reach a negotiated solution between Belgrade and Priština on the status of Kosovo, and underlined the fact that in such circumstances

the status quo was unacceptable and change was needed. It pointed out that Kosovo was a *sui generis* case arising from the unique circumstances of the disintegration of the former SFRY, together with the continued period of international administration. The joint statement confirmed that the Kosovo institutions had committed themselves *inter alia* to fully implement the principles and arrangements envisaged in the Secretary-General Special Envoy's Comprehensive Proposal for the Kosovo Status Settlement.

4. In the joint statement the three countries emphasized that they attached paramount importance to stability in South-East Europe. They also affirmed their commitment to developing ties with Serbia that maintained good relations with its neighbours, enjoyed economic growth and kept a European orientation.

5. The Republic of Croatia established diplomatic relations with the Republic of Kosovo on 24 June 2008. That was after the Republic of Kosovo had adopted a Constitution and other fundamental documents outlining the legal structure of the newly formed State, that provided, *inter alia,* guarantees for the exercise and protection of human rights, in particular the rights of minorities.

6. The Republic of Croatia is confident that by recognizing the Republic of Kosovo, it recognized an international legal fact, namely, the existence of a new State. Croatia believes that by this recognition it has contributed to the creation of conditions for peace and stability in the region.

7. In the meantime, among the other countries in the region that have recognized the Republic of Kosovo are its two immediate neighbours that also adjoin the Republic of Serbia: the Republic of Macedonia and Montenegro, the latter of which formed a part, during an important period of time, of the same State of which Kosovo was also a part after the dissolution of the former Yugoslavia.

8. Now, when this case is before you, and after a large number of States have presented their positions on this issues, Croatia, as a successor State to the former Socialist Federal Republic of Yugoslavia (SFRY) and as a State from the region, considers it appropriate to present its views and put forward the information it possesses.

II. REPLY TO THE QUESTION BEFORE THE COURT

9. The question before the Court is this: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" In replying to the question Croatia submits that "the Declaration of Independence of Kosovo", adopted at the extraordinary session of the Assembly of Kosovo held on 17 February 2008, is not contrary to any applicable rule of international law. I shall also state that the Declaration violated no applicable principle of international law or binding act of the international community adopted in relation to the status of Kosovo.

10. Croatia considers that the question before the Court is a specific and narrow one, and that the answer to the question should equally relate only to the legality of the Declaration of Independence. In our reply, our starting premise is that there is no rule of international law that regulates, let alone prohibits, the issuance of a declaration of independence. By taking into account the presumption of permissibility endorsed by this Court and its predecessor in the cases in which the international legality of a contested action was assessed (such as the *Lotus* case, *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*) and the *Nuclear Weapons* Advisory Opinion (*I.C.J. Reports 1996 (I)*), Croatia submits that this Declaration is not contrary to international law. In this way it may be said to be "in accordance with international law".

11. State practice confirms that the adoption of a declaration of independence, or similar legal acts, frequently occurs during the creation of a new State. As such, this very act — the act of declaring independence — is legally neutral. Numerous scholars have treated this issue, and reference has been made in particular to some of them in a number of written submissions of States addressed to this Court[24]. The Republic of Croatia supports the views of many States that took the same line of reasoning in their written statements. The Republic of Croatia is of the opinion that, on this occasion, no further explanations are needed.

12. In addition, it should also be pointed out that it is not the act of declaring independence that leads to the creation of a new State. International law sets criteria that must be met in order for a State to emerge or exist. However, these conditions may be met, and very frequently are met, in succession. Thus, the creation of an independent and sovereign State of Kosovo also needs to be

[24]Written Statement of the United States of America, p. 50; Written Contribution of the Republic of Kosovo, paras. 8.08-8.10; Written Statement of the Federal Republic of Germany, pp. 27-29, etc.

viewed as a process that was unfolding before the adoption of the Declaration of Independence, and is now being assessed through the legitimate functioning of the institutions of the newly formed State.

III. CIRCUMSTANCES THAT LED TO KOSOVO'S INDEPENDENCE

13. Mr. President, it may be that the Court feels a need to consider the circumstances leading to the Kosovo accession to independence. Croatia would therefore like to draw to the Court's attention certain circumstances that it deems to be particularly relevant.

14. Above all, Croatia wishes to refer to:

— the constitutional position of Kosovo within the Socialist Federal Republic of Yugoslavia;

— the illegal removal of the autonomy of Kosovo and the events that influenced the position of Kosovo during the process of dissolution of the Socialist Federal Republic of Yugoslavia;

— the grave violations of the human rights of — and systematic repression against — the Kosovo Albanians by the Federal Republic of Yugoslavia, now Republic of Serbia;

— the establishment of the international administration in Kosovo pursuant to resolution 1244 and the development of the self-government institutions under the interim administration;

— the failure of all the efforts of the international community to reach a negotiated solution between Belgrade and Priština on the final status of Kosovo; and, finally,

— the adoption of the Declaration of Independence.

1. Constitutional position of Kosovo in the former SFRY

15. Reference to the constitutional position of Kosovo as an autonomous province within the Socialist Federal Republic of Yugoslavia almost two decades after this Federation ceased to exist, in the context of answering this question currently before the Court, is important for two reasons.

16. First, under the 1974 SFRY Constitution, Kosovo was a constituent unit of the former Federation, possessing a high degree of political and territorial autonomy. As a constituent unit of the former Federation, Kosovo possessed strong elements of statehood that were largely equal with those of the Republics.

17. Second, in the period following the dissolution of the former Federation, Kosovo's status was not adequately resolved. In the events that ensued, the elements of statehood enjoyed by Kosovo in the former Federation laid a foundation for Kosovo's international personality.

18. The 1974 Constitution of the SFRY introduced a federalist system that featured strong confederate elements. Yugoslavia was defined as a federal State made up of eight constituent units — six Republics (Bosnia and Herzegovina, Croatia, Montenegro, Macedonia, Slovenia and Serbia), and two autonomous provinces (Kosovo and Vojvodina). These were the parts of both the Federation and the Socialist Republic of Serbia.

19. The significance and status of the autonomous provinces are immediately evident from the constitutionally defined procedure whereby the federal Constitution was to be adopted and amended with the consent of the Assemblies of the republics and the autonomous provinces. Therefore, no change of their status as envisaged by the Constitution was possible without first obtaining their consent.

20. The constituent units of the Federation had primary jurisdiction over the performance of internal affairs. All affairs that were not explicitly granted to the federal State by the federal Constitution were reserved for the republics and the autonomous provinces.

21. The Constitutional Court of the SFRY decided on disputes between the Federation and any of its constituent units, as well as on disputes between any of its eight constituent units.

22. The functioning of the Federation, the composition of the federal bodies and the decision-making process bear out the principle of constitutional equality of the republics and autonomous provinces. All collective bodies of the Federation were based on the equal representation of the republics and the appropriate representation of the autonomous provinces.

23. The collective Head of State, the SFRY Presidency, was composed of one representative from each republic and each autonomous province. The President of the Presidency was elected for a period of one year according to a pre-determined order of the republics and the autonomous provinces.

24. The Assembly of the SFRY, which was the Federation's highest organ of authority, consisted of the Federal Chamber and the Chamber of Republics and Provinces. Both these houses of parliament ensured an appropriate representation of the republics and provinces.

25. The Chamber of Republics and Provinces was an important instrument for the exercise of the will of the republics and provinces at the federal level. It ensured that agreements which were reached among the Assemblies of the republics and autonomous provinces in those fields in which the federal laws and the enactments needed the *agreement* of all the Assemblies. This procedure was followed in reaching the most important decisions, such as the adoption of the federal budget the passing of federal legislation regulating the relationships within the monetary system, foreign exchange system, foreign trade relations, economic relations with foreign countries, etc., and in the ratification of international agreements signed by the SFRY.

26. The Chamber of Republics and Provinces decided jointly and on equal footing with the Federal Chamber on the appointment and removal from office of the highest Federation officials, such as the president and members of Yugoslavia's Constitutional Court and Supreme Court.

27. Even when electing members of the Government of the Federation, the so-called Federal Executive Council, account was taken of the principle of equal representation of the republics and appropriate representation of the autonomous provinces. These principles were also applied for the filling of the most senior positions in the federal bodies and of State administration.

28. As with the republics, the autonomous provinces had their territories and boundaries that could not be altered without their consent. Article 5 of the 1974 Constitution of the SFRY provided that the territory of republics may not be altered without the consent of the republic. The same applied for the territory of an autonomous province.

29. The 1974 Constitution provided for the strengthening of the statehood of the republics and autonomous provinces and their institutions. Each autonomous province had its own assembly and its executive council, as its government was termed, its own central bank, its judiciary, its police and its educational system. The Albanian language was one of the officially used languages in the autonomous province of Kosovo.

30. As with the republics, the autonomous provinces also had their own constitutions and legislation relating to the areas that were not within the exclusive jurisdiction of the Federation. Federal legislation consisted of laws regulating the procedural rules (on civil, criminal and enforcement proceedings) and only of certain fundamental substantive laws (for example, criminal or civil obligations law). Therefore, the republics and provinces had their own laws regulating

matters such as family relations, inheritance, property rights and criminal law. Due to the strong confederative element of the Federation, the SFRY also had a federal law on the resolution of conflicts of laws among its republics and provinces, in addition to federal law on the resolution of conflicts of laws with other States.

31. These factors indicate that Kosovo possessed strong elements of statehood within the SFRY, which were guaranteed and regulated by the Federal Constitution, the Constitution of the Republic of Serbia and the Constitution of the autonomous province of Kosovo. These elements of statehood meant that Kosovo as an autonomous province enjoyed a status that was largely equal with that of the republics in this Federation.

32. I shall conclude this part of my presentation by quoting the President of the Republic of Croatia, Stjepan Mesić, who was a member of the Presidency of the former SFRY at the time of its dissolution and who witnessed first-hand the events of the period. The article published in the *Večernji list* cited the following words of President Mesić, concerning the structure of the former State and the position of the republics within it:

> "Firstly — Yugoslavia consisted of republics and provinces, so provinces were the constituent elements of the Federation. Secondly — the provinces were parts of Serbia, which meant that — in addition to having constituent ties with the Federation — they were also linked with one of its federal units. Thirdly — the republics and provinces had united of their own free will to form Yugoslavia, from which it is to be concluded that they cannot be retained against their will within this state framework. In the case of provinces, this relates to both the framework of the Federation and the framework of the federal unit. And fourthly and finally — citizens, i.e., nations and nationalities in the provinces, exercise their sovereign rights."

33. Mr. President, Members of the Court, the events that unfolded during 1989/1990 and the circumstances surrounding the dissolution of the former Yugoslavia indicated that the political and legal conditions for the resolution of Kosovo's status did not exist at the time.

2. Illegal removal of Kosovo's autonomy

34. The March 1989 amendments to the Constitution of the Socialist Republic of Serbia brought about the destruction of the basic federalist concept of the 1974 Constitution. Through the adoption of these amendments the powers of the autonomous provinces were considerably decreased. Allow me to single out on one such amendment, namely, the one that revoked Kosovo's jurisdiction to object to amendments to the Constitution of Serbia.

35. This triggered demonstrations in Kosovo that led to the Federal Presidency decision to deploy the armed forces and federal police forces in Kosovo. Nevertheless, on 22 March 1989, the Government of Kosovo, under direct pressure of Serbia's political intervention, approved the amendments to the Constitution of the Socialist Republic of Serbia. Under such questionable circumstances of duress, also described in the ICTY judgment in the *Milutinović et al*.[25] case, and while Serbian police and military vehicles were on the streets of Priština, the Assembly of Kosovo agreed to amendments of the 1974 Constitution of Serbia. The Assembly of Serbia eventually adopted these amendments in Belgrade on 28 March 1989.

36. Notwithstanding the resistance and unrest from the Kosovo Albanians, in 1990 the Socialist Republic of Serbia adopted a new Constitution that fully abolished the autonomy of Kosovo and Vojvodina. This Constitution deprived the provinces of all their elements of statehood and the province of Kosovo was renamed "Kosovo and Metohija".

37. It was by these actions and pressures that Serbia revoked the high degree of political autonomy which Kosovo and Vojvodina had had until then. They were divested of the right to their own Constitution, legislative power, presidency, constitutional and supreme courts.

38. The 1990 Constitution also stripped Kosovo and Vojvodina of their territorial autonomy. The autonomous province was no longer entitled to give or withhold its consent to potential changes of its territory, and issues relating to its territory were to be solved by statute in the adoption of which the province played no role. The Constitution of the autonomous province of Kosovo was replaced by the "Statute" that was adopted by the National Assembly of Serbia. 39. By stripping Kosovo and Vojvodina of their status of constituent units of the Yugoslav Federation, the Assembly of the Socialist Republic of Serbia violated the 1974 SFRY Constitution and undermined the very foundations of this State.

40. An analysis of how these constitutional changes affected Kosovo's status, as well as an assessment of their constitutionality with regard to the 1974 SFRY Constitution, is in detail elaborated in the Written Comments of the Republic of Slovenia. On this occasion I am pleased to confirm that we agree with the views expressed therein.

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[25] *Milutinović et al*., Judgement, IT-05-87-T, Vol. I, para. 219.

41. By taking the above-described steps, Serbia abolished the autonomy of Kosovo and Vojvodina, guaranteed by the federal Constitution. Serbia kept their representatives on the Federation's bodies, thus ensuring dominance in political decision making. This created the conditions for Serbia's continued assertion of dominance over the SFRY's collective Presidency and the other bodies of the Federation, which no longer functioned in accordance with the principles of the 1974 Constitution.

42. Let me state at this point that at the constitutional level the process of the abolishment of the autonomous provinces related to both provinces. However, at the statutory level the various laws and measures adopted related only to Kosovo. With respect to Kosovo, a series of new measures entitled "Programme for the Realization of Peace and Prosperity in Kosovo" were adopted in order to improve the status of the Kosovo Serbs. While Serbs were offered various benefits relating to investments and related matters, the Kosovo Albanians were subject to a series of measures and laws degrading their position in Serbia. These measures constituted serious violations of their human rights, as the international community recognized. These discriminatory measures would result in the banning of Albanian-language newspapers and the closing of the Kosovo Academy of Sciences and Arts. A substantial majority of Kosovo Albanians was expelled from public and State services.

43. During the 1990s the Kosovo Albanians, which represented 90 per cent of Kosovo's inhabitants, clearly demonstrated their desire for their status to be regulated on a different basis than that imposed by Belgrade. The fundamental right guaranteed by the international law — namely, the right of equality and self-determination of peoples — in relation to the participation and representation of the Kosovo Albanians in the government and administration of their parent State — was denied to them through the unlawful abolition of Kosovo's autonomy.

44. As early as then, the people of Kosovo sought to re-establish and reclaim for "Kosovo" the characteristics of a constituent unit within the Federation. The Albanian members of the Assembly of Kosovo passed a resolution declaring Kosovo "an equal and independent entity within the framework of the Yugoslav Federation". The aspirations of the people of Kosovo to their own identity and the realization of the right to self-determination in a State in which these rights were denied to them developed into Kosovo's clearly expressed will to become an independent and

sovereign State. This was confirmed in the 1991 referendum on the adoption of the Declaration of Independence. Of 87 per cent of the eligible voters that took part in the referendum, 99 per cent voted for the adoption of the Declaration.

45. With regard to the dissolution of the Federation and the effect which this inevitably had on its constitutional elements, especially Kosovo, President Mesić, in the article I have already mentioned, emphasized the following:

> "This Federation dissolved. The constituent element associated with it disappeared but this does not mean that this element automatically passed on to what is today the Republic of Serbia merely because the province of Kosovo also formed a part of the Republic of Serbia in the Federal Yugoslavia. Precisely because the element of Kosovo's tie to the former Federation disappeared, and only the element of its tie to Serbia remained, the need to determine the new and final status of Kosovo arose."

3. The dissolution of the former SFRY and Kosovo's position in this process

46. Mr. President, honourable Members of the Court, the 1990s in Yugoslavia were marked by the first truly democratic elections. These resulted in the establishment of multi-party parliaments and multi-party systems in the republics of Croatia and Slovenia and eventually in the passing of declarations of independence and sovereignty in these two States on 25 June 1991. By the end of 1991 the same had also been done by Bosnia and Herzegovina and Macedonia.

47. The work of the Arbitration Commission, set up in 1991 within the framework of the Peace Conference of the former Yugoslavia, is of decisive importance for understanding the legal aspects of the dissolution of the Federation and the emergence of new States on the territory of the former Yugoslavia.

48. In its Opinion No. 1 of 29 November 1991, the Arbitration Commission concluded that the SFRY was in the process of dissolution. It also expressed a set of important views on the application of international law in the concrete case of the SFRY's dissolution, which in our opinion are still of value. Thus, the Commission pointed out that the existence or disappearance of a State is a question of fact, that the effects of recognition by other States are purely declaratory, and that it is international law which defines the conditions on which an entity constitutes a State.

49. The Arbitration Commission reached the conclusion that the SFRY was in the process of dissolution on the basis of the already adopted declaration of independence of the four republics —

Bosnia and Herzegovina, Croatia, Macedonia and Slovenia — and the fact that the composition and functioning of important federal organs no longer satisfied the criteria of participation and representation of all members of the Federation, which embodies the essence of every federal State. It is worth noting that the conformity of these decisions on independence with international law was never questioned by the Arbitration Commission. In Opinion No. 8 the Commission confirmed that the process of dissolution of Yugoslavia was complete and that this State no longer existed.

50. In this period, the European Community adopted the Declaration concerning the Conditions for Recognition of New States and Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. This meant that, by taking international law as the starting-point, they would assist the member States in reaching political decisions concerning the recognition of States that had formed on the territory of the SFRY.

51. The fulfilment of conditions set in the Declaration and Guidelines by Bosnia and Herzegovina, Croatia, Macedonia and Slovenia was considered in Opinions Nos. 4, 5, 6 and 7 of the Arbitration Commission. This cleared the way for the recognition of these States.

52. At the same time, Serbia and Montenegro did not raise the issue of their accession to independence and recognition. They claimed — without any legal basis — that they were the sole legal successors to the former Yugoslavia and the continuation of the SFRY, and that the other four republics had seceded illegally.

53. The views of the SFRY Presidency, in which Serbia was already at the time dominant, was presented in an extensive text entitled "Assessments and Positions of the SFRY Presidency Concerning the Proclamation of the Independence of the Republic of Croatia and Republic of Slovenia"[26]. This was drawn up in Belgrade on 11 October 1991. It irresistibly brings to mind views which have recently been heard in this courtroom and which are expounded in the written materials of the State that now, as it did then, contests the independence of the new State. This document states that the independence may be gained only with the agreement of Yugoslavia, the secessionist acts of Slovenia and Croatia are described as a direct threat to the territorial integrity of

[26]Reprinted in Snežana Trifunovska (ed.), *Yugoslavia Through Documents: From its Creation to its Dissolution*, p. 354.

Yugoslavia and every attempt to recognize these two States is assessed as a flagrant interference into the internal affairs of the State, as an act directed against Yugoslavia's international subjectivity and territorial integrity.

54. As has been already stated, although the will of the people of Kosovo was already then clearly expressed, the settlement of the issue of Kosovo's status was not discussed in that context at the time.

55. Kosovo, the constituent unit of the already former Federation, continued to be a territorial unit within the Federal Republic of Yugoslavia but enjoyed no autonomy. The events to come, however, increased the awareness of the international community that the issue of Kosovo status needed to be addressed.

4. Human rights violations of and systematic repression against the Kosovo Albanians

56. Mr. President, honourable Members of the Court, we consider that the continued and grave violations of the human rights of the Albanian population in Kosovo and the systematic repression of those individuals by the Federal Republic of Yugoslavia is of the utmost importance in considering the question before the Court.

57. The human rights violations took on great dimensions. In this way the resistance of the population of Kosovo to the actions taken by the Serbian authorities, its long-time passive resistance and its expressed desire for independence may be regarded as a form of expression of a legitimate right to self-defence.

58. The international community recognized the illegality of these acts. In the early 1990s the international community firmly and repeatedly condemned discrimination against and the violations of the human rights of the Albanian population in Kosovo.

59. The OSCE verification mission in Kosovo voiced its deep concern over the escalation of violence and the violations of human rights in Kosovo, as early as 1992. After the Federal Republic of Yugoslavia declined to give its consent for the extension of the said mission's mandate, the United Nations Security Council in its resolution 855 (1993) expressed its deep concern at this position of the Federal Republic of Yugoslavia and called upon it to reconsider its refusal to allow the extension of the OSCE mission in Kosovo.

60. The documents in which the international community considers and condemns such acts are numerous. An important example is the Report of the Interagency Needs Assessment Mission[27] submitted to the Security Council in 1999.

61. The widespread human rights abuses and crimes are also described in detail in the ICTY judgment in the *Milutinović et al.* case[28].

62. The international community's answer to this situation was the adoption of the resolution 1244 under Chapter VII of the United Nations Charter. The continued human rights abuses created a situation that constituted a threat to peace and security in the region.

5. Interim administration for Kosovo (United Nations Security Council resolution 1244 (1999))

63. Mr. President, I will briefly now turn to some aspects of the international presence in Kosovo.

64. Croatia submits that the Declaration of Independence is not in contravention to resolution 1244. The resolution did not prejudge the final status of Kosovo. It only envisaged the initiation, at a later stage, of a political process that would lead to the determination of Kosovo's final status. What the outcome of that process would be remained open for discussion. Thus, the independence of Kosovo was definitely one of the possible solutions to the final status of Kosovo in terms of the resolution. Both sides that participated in the negotiations were aware of this fact.

65. Indeed, the part of the resolution that announced the political process aiming at determining Kosovo's final status referred to the Rambouillet Accords (S/1999/648), in which the will of the people took centre stage on the list of factors that would be taken into account when deciding on the final status of Kosovo. This makes it even more clear that the independence of Kosovo, to which the will of the people had been referring for some time already, was, if not very probable, foreseen as one of the possible outcomes of the political process envisaged by the resolution.

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[27]Report of the Inter-Agency Needs Assessment Mission dispatched by the Secretary-General of the United Nations to Federal Republic of Yugoslavia (S/1999/662).

[28]*Milutinović et al*., Judgment, IT-05-87-T, especially in Vol. II, paras. 534-555, 669-690, 795-802, 1150-1265.

66. May I now turn your attention to several more elements of the resolution's implementation which confirm that even during the United Nations interim administration in Kosovo, Kosovo was recognized as a separate territorial unit and entity. It was in this period that Kosovo's international personality developed and crystallized.

67. In the Constitutional Framework for Provisional Self-Government in Kosovo of 2001, Kosovo was defined as an "entity under interim international administration" which is an "undivided territory". As such, Kosovo was defined as an integral and complete territorial entity that in the politico-administrative sense was completely separate from Serbia.

68. Under United Nations administration, Kosovo's continuity with respect to the law applicable in Kosovo at the time of the former SFRY was recognized. The UNMIK Regulation (UNMIK/REG/2000/59) provided that, in addition to the law passed by the Interim Administration, the law applicable in Kosovo was also "the law in force in Kosovo on 22 March 1989".

69. Furthermore, it is worth noting that, already under the Interim Administration, Kosovo had a certain international personality. The Interim Administration concluded international agreements, such as CEFTA, ECAA and a number of bilateral free trade agreements, on behalf of Kosovo.

6. Efforts of the international community to reach the final settlement on Kosovo's future status

70. From the adoption of resolution 1244 (1999) to May 2005 when the Secretary-General launched the process that would lead to the final settlement of Kosovo's future status, Kosovo had been under the interim international administration for six years.

71. As is elaborated in a number of written submissions, comprehensive negotiations took place with a view to exploring all possible aspects of an agreed solution.

72. Even after two years of negotiations, the points of view of Belgrade, which insisted on Kosovo remaining a part of Serbia, and of Priština, which strived for independence, were not brought any closer.

73. In view of the documents adopted throughout this period (such as the Report of the Special Envoy for Kosovo of 26 March 2006, the Report of the United Nations Security Council Mission in Kosovo of 4 May 2007 and the Kosovo Contact Group's Statement on Kosovo issued in

New York on 27 September 2007), it became clear that further maintenance of the status quo in Kosovo was unsustainable.

74. Finally, the Special Envoy of the Secretary-General for Kosovo, Martti Ahtisaari, ended this process by concluding that " the potential to produce any negotiated and mutually agreeable outcome on Kosovo's status is exhausted" and that "the only viable option for Kosovo is independence, to be supervised for an initial period by the international community"[29].

7. Adoption of the Declaration of Independence

75. In this context, the representatives of the people of Kosovo adopted the Declaration of Independence at the extraordinary plenary session of the Assembly of Kosovo on 17 February 2008, confirming the creation of a new and independent State. The very fact that the Declaration was signed by the President of Kosovo, the Prime Minister and the President of the Assembly and all the members of the Assembly present, called one by one by name to sign the Declaration, points to the fact that this act was adopted outside the regular framework of the Assembly. It is plain that all those present had the clear intention to act on behalf of the people of Kosovo.

76. By this Declaration the people of Kosovo confirmed their readiness to fully respect the obligations for Kosovo contained in the Comprehensive Proposal for the Kosovo Status Settlement. We see this Declaration as a clear commitment of the people of Kosovo to respect the rule of law and the protection of the rights of all ethnic groups living in Kosovo, including their active participation in political and decision-making processes.

77. Having this in mind, Croatia wishes to point out that the obligations assumed by the new State are an important indicator of the democratic development of the Republic of Kosovo and the future guarantee of peace and stability in the region.

IV. CONCLUSIONS

78. Mr. President, Members of the Court, in this presentation Croatia has elaborated the special set of circumstances that, from Croatia's point of view, have been met in the concrete case

[29]Report of the Special Envoy of the Secretary-General on Kosovo Future Status, paras. 1-3.

of Kosovo's accession to independence. The existence of the Republic of Kosovo is a fact of international law that has occurred in accordance with international law.

79. In conclusion, Mr. President, taking into account that international law does not regulate the issuance of the declaration of independence as such, Croatia invites the Court to declare that Kosovo's Declaration of Independence is in accordance with international law.

80. Mr. President, distinguished Members of the Court, I thank you for your kind attention.

The PRESIDENT: I thank Her Excellency Madam Andreja Metelko-Zgombić for her presentation. I now call upon His Excellency Mr. Thomas Winkler to take the floor.

Mr. WINKLER:

INTRODUCTION

Mr. President, distinguished Members of the Court, it is a great honour for me as Agent of the Kingdom of Denmark to appear before you today in these important proceedings.

In the view of my Government the essence of the question before the Court is: Whether the Declaration of Independence by the representatives of the people of Kosovo was contrary to international law?

Denmark believes that the answer to this question is: No. And we do so for the following three reasons:

(a) firstly, there is no general prohibition in international law against declarations of independence. The Security Council and General Assembly have in particular instances condemned declarations of independence. But this has been in situations where these declarations were part of an overall scheme violating fundamental norms of international law. There is no such condemnation in this case. Further, those opposing Kosovo's independence have shown no general prohibitive rule. In the absence of a prohibition, illegality cannot be presumed;

(b) secondly, resolution 1244 did not exclude independence for Kosovo as the possible outcome of the status process. Indeed, the resolution left the outcome open. On 17 February 2008 the process has been decisively exhausted. Intensive, good-faith efforts by Special Envoy Ahtisaari, the result of which was endorsed by the United Nations

Secretary-General, did not meet with Serbian approval. Nor did further efforts of the Troika, established by the Contact Group, produce a result. There was broad consensus that further negotiations would not have led to agreement between the parties on the status of Kosovo. And the status quo was untenable. Against this background resolution 1244 cannot be read to prohibit either the Declaration of Independence nor, indeed, independence itself;

(c) thirdly, this is a very particular case. Its unique factual and legal characteristics have been made abundantly clear during these oral proceedings. Both the events leading up to — and after — the dissolution of Yugoslavia in the 1990s, as well as the international community's exceptional involvement in Kosovo through resolution 1244, mark out this case as special. Therefore, we do not share the fear of some that Kosovo's Declaration of Independence will serve as a precedent that leads to instability. And we urge the Court not to give credence to such fears.

DENMARK'S PERSPECTIVE

Mr. President, before I address these three submissions in more detail, let me briefly set out the background for Denmark's participation in these advisory proceedings. I will do so by outlining the elements that have shaped our perspective.

My distinguished colleague from Croatia has just provided you with an important perspective from the near region. She has comprehensively explained the changes imposed on Yugoslavia's constitutional system in the late 1980s. The perspective of Denmark is also that of a European State, but we are somewhat further removed and therefore informed by a different background.

There have been no particular historical ties, or any special relations of trade, commerce or otherwise, between Denmark and the South-Eastern region of Europe. I believe it is a fair description to say that for many Danes it was the tragic events of the 1990s that brought particular attention to the Western Balkans. The events of that period were a stark reminder that the unspeakable horrors we had thought confined to history could still happen in Europe. So, like other members of the world community, we were faced with the acute challenge of how to bring peace and stability to the region.

In response, Danish forces have served continuously in peacekeeping missions in the Balkans since the early 1990s. Since 1999, there have continually been approximately 400 Danish peacekeepers in Kosovo, in implementation of resolution 1244. These troops have primarily been stationed in the ethnically diverse town of Mitrovica in Northern Kosovo.

The guiding principles of these and other Danish efforts in the region have been the promotion of human rights, stability and the promotion of economic development.

Mr. President, Denmark is a friend of both Serbia and Kosovo. Our presence here today in no way detracts from this. It is rather an expression of our firm commitment to working continuously for peace and prosperity for both nations. It goes without saying that Denmark would strongly have preferred Kosovo's final status to have been settled by negotiations between the parties. We worked hard to help forge the basis for such arrangement. But it proved elusive. And the status quo was not sustainable.

INTERNATIONAL LAW DOES NOT ADDRESS THE LEGALITY OF DECLARATIONS OF INDEPENDENCE

Mr. President, distinguished Members of the Court, I shall now address the first submission of the Danish Government: that there is no prohibition in general international law against declarations of independence.

Let me recall first, however, the very limited subject-matter of the question before the Court. It is narrow and it is specific. It only concerns the Declaration of Independence.

As has been stated by my distinguished Serbian colleague here in this hall less than a week ago: "[T]he question is a narrow one inasmuch as it deals with the UDI and does not address related, but clearly distinct, issues such as recognition"[30]. Denmark agrees.

The Court has not been asked by the General Assembly to advise on possible consequences of its findings. This is an issue which the General Assembly must be understood to have reserved for the political processes within the United Nations and beyond.

[30]CR 2009/24, p. 41, para. 17.

Secondly and related, a comment on the temporal character of the question before the Court. The question is somewhat oddly framed in the present tense: "Is the declaration of independence", etc. But, of course, the question concerns a factual event which took place in the past.

The way the question is phrased is similar to asking: "Is it illegal when I took the apple?"

In Denmark's view, the correct approach to the temporal aspects of the question is the following: the factual occurrence of the Kosovo Declaration of Independence can only be considered in view of the law and facts at the time of the Declaration. 17 February 2008 is the crucial date. The Court has not been requested to pronounce on the possible effect on the Declaration of subsequent events during the almost two years since the Declaration was made.

Mr. President, it is essentially Denmark's submission that general international law does not address the legality of declarations of independence by entities or peoples within a territory.

Evidently, as a matter of domestic law such declarations may very well be — and indeed often are — prohibited. But as a matter of international law the issuance of a declaration of independence is primarily a factual event. A factual event which together with other facts, such as a defined territory and permanent population, may be deemed to result, immediately or over time, in the creation of a new State. General international law does not pronounce on the existence of such facts. It is silent.

Only in rare circumstances has the Security Council or the General Assembly expressed a negative view of declarations of independence, namely, where such declarations were part of an overall scheme that violated fundamental norms of international law. As detailed in Denmark's Written Statement, examples include Katanga, Rhodesia and Northern Cyprus[31]. This shows that declarations have been condemned when completing a set of events that already constituted a serious breach of international law.

Significantly, there has been no condemnation of Kosovo's Declaration of Independence. On the contrary, as shall be shown, this Declaration was fully compatible with resolution 1244.

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[31] WS, pp. 4-5.

We have heard references to resolution 1246 of 11 June 1999 regarding East Timor, which explicitly provides for a popular consultation on independence of the East Timorese people. This is used to argue that declarations of independence can only be made if explicitly authorized[32].

On the other hand, we have also heard references to Security Council resolution 787 adopted in 1992 regarding Republika Srpska containing a provision to the effect that the Council would not accept any unilateral declarations of independence. This is, among others, used to argue that there is no prohibition in the absence of a specific determination[33].

While there should be no doubt that Denmark favours the latter line of argument, at least these conflicting views should be sufficient to demonstrate that there are no general rules of international law on declarations of independence.

Mr. President, I submit that it is for those maintaining that the Declaration is unlawful to show the existence of a general prohibitive rule of international law. Prohibitions cannot be presumed. Support for this view — whether it be termed the *"Lotus"* or the residual principle — can be found in the Court's practice referred to in Denmark's Written Statement[34]. This, in my view, is the guidance given to us by international law and it is sufficient to answer the question before the Court.

Again today we have heard arguments on the existence of such a prohibitive rule. With all due respect, Mr. President, Denmark is far from convinced. There seems to be a tendency to confuse the narrow question before the Court with much broader issues; issues which are clearly outside the ambit of these proceedings. Thus, some opposing the Declaration have argued that it is for others, for example, "to show . . . that title had lawfully passed to a new State of 'Kosovo'"[35].

Calls to explain the legal basis for transfer of title to territory secession and membership of international organizations, as we have heard this morning, in my view goes well beyond the issue of these advisory proceedings, which I respectfully repeat, is the Declaration of Independence.

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[32]CR 2009/24, p. 51, para. 9.

[33]CR 2009/25, p. 48, para. 10.

[34]P. 3.

[35]WS, Cyprus, para. 88.

In conclusion of this, my first submission, I propose a simple, but fully sufficient answer to the question before the Court: international law neither authorizes nor forbids declarations of independence and, therefore, Kosovo's Declaration of Independence did not contravene international law.

SECURITY COUNCIL RESOLUTION 1244

Mr. President, distinguished Members of the Court, a number of issues relating to resolution 1244 have been raised in other submissions. Even though Denmark favours a simple answer to the question before the Court, I believe it appropriate to provide some considerations on resolution 1244 and the process leading up to the declaration of independence.

This brings me to my second submission, which falls in two parts: firstly, it will be shown that all efforts to find a negotiated settlement on Kosovo's status as prescribed in resolution 1244 had been exhausted at the end of 2007; secondly, that resolution 1244 cannot be read to prohibit Kosovo's Declaration of Independence, nor did it require Serbian consent to this Declaration.

In regard to the first part, those opposing the Declaration of Independence argue that resolution 1244 required further negotiations between the parties. We respectfully disagree.

I shall not in detail repeat the comprehensive account of the status process already given. It seems, however, necessary to spend some time on this issue, especially given the attempts by some during these proceedings to portray President Ahtisaari's leadership of the process as flawed and his conclusions as unwarranted. To counter these claims, a brief reminder of the historical facts is necessary.

President Ahtisaari was appointed in November 2005 by the United Nations Secretary-General as his Special Envoy on Kosovo's future status process.

He was to lead the process on behalf of the Secretary-General and was authorized to determine the pace and duration of the process in consultation with the Secretary-General. Neither his mandate as Special Envoy nor resolution 1244 required that the settlement must be based on Serbian consent or for that matter exclude independence for Kosovo.

Significantly, Mr. President, this was never meant to be an open-ended process. On the contrary, there was broad agreement, as expressed by the Contact Group in 2006; "[t]hat 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"[36].

After numerous rounds of consultations and intensive efforts, President Ahtisaari in 2007 forwarded a detailed set of recommendations to the United Nations Secretary-General.

These recommendations, which were explicitly endorsed by the United Nations Secretary-General, were based on the premise that status quo of a continued international administration was unsustainable and that all avenues for reaching a negotiated settlement had been exhausted.

When the Security Council could not agree to endorse the Ahtisaari Plan, a last effort was made through a Troika established by the Contact Group. The unsuccessful attempt of the Troika brought to an end an unprecedented effort for reaching agreement on the status of Kosovo, an effort that had fully respected and honoured the process envisaged by resolution 1244.

This conclusion, Mr. President, is central to the analysis of Security Council resolution 1244, which is the subject of the second part of this submission. My point is this: resolution 1244 cannot be read to prohibit Kosovo's Declaration of Independence, nor did it require Serbian consent to this Declaration.

The central provisions in this regard are paragraphs 11 *(e)* and 11 *(f)* of resolution 1244. These operative provisions address the issue of final status. Neither implicitly or explicitly do they rule out the Declaration of Independence, nor do they require Serbian consent hereto. Rather, resolution 1244 leaves open the outcome of the status process. Resolution 1244 is "status neutral".

Had the Security Council wished to exclude specific outcomes of the status process it could have done so — as has been the case with numerous other Council resolutions on territorial disagreement. But it is common knowledge that already in 1999 there were diverging views in the Council on the desirability of this in relation to Kosovo.

Some States on the Council, as we heard this morning, believed that the reference to territorial integrity in the preamble of the resolution was to be the overriding principle. Other

[36]CR 2009/25, p. 23, para. 32.

Council members laid emphasis on the specific reference in the resolution to the Rambouillet Accords, which in turn referred to "the will of the people".

This reference, Mr. President, is crucial. It was clear, both during the negotiations at Rambouillet in the immediate period after the 1999 crisis, and throughout the years of the UNMIK administration, that the wish of the overwhelming majority of the population of Kosovo was to gain independence. This cannot be ignored.

Also relevant in this regard is the fact that the final version of the Rambouillet Accords excluded language from previous drafts which required "mutual agreement" by the parties. Counsel for Kosovo during his oral statement convincingly set out the significance hereof[37].

Mr. President, Security Council resolutions are legal documents which result from a political process. Often being the result of compromise, they are not always unambiguous or clear, even in the most central paragraphs. What is clear about resolution 1244, however, is that it initiated a status process for Kosovo.

It did so in the aftermath of brutal repression of the people of Kosovo and in parallel with the establishment of a United Nations administration that supplanted all Serbian exercise of jurisdiction in Kosovo. The outcome of the status process was, however, not predetermined. Resolution 1244 did not exclude Kosovo's Declaration of Independence, but — from a good faith reading of the resolution — it left the outcome open.

This, Mr. President, brings me to near the end of my second submission. I would, however, be remiss not to touch on the principle of self-determination, which a number of other statements have dwelt upon.

Numerous aspects of this principle have already been clarified by this Court. Yet a number of aspects remain unsolved and indeed controversial. The Danish Government does not expect the Court to advise on these questions here. Indeed, Denmark considers that the Court need not necessarily address the issue of self-determination, which to some extent is outside the ambit of the narrow question before the Court.

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[37] Cf. CR 2009/25, pp. 53-54.

Let me, however, point out that the Danish Government takes the view that some of the specific circumstances of this case are in fact reflective of the same values and interests that underpin the principle of self-determination.

Indeed, it can be argued that resolution 1244, in essence if not in word, recognized the people of Kosovo as a self-determination entity. This is clear from the fact that resolution 1244 was based on the premise that Kosovo's final status should not be determined without the involvement and consent on the part of the people of Kosovo.

The Rambouillet Accords' provision for the establishment of a mechanism for a final settlement on the basis of "the will of the people" is telling. These words are more explicit than Article 22 of the Covenant of the League of Nations addressed by this Court in the 1971 *Namibia* Opinion. Article 22 (1) of the Covenant was concerned with people not yet able to stand by themselves and their development which formed "a sacred trust of civilization".

In the *Namibia* Opinion, the Court interpreted this language in the light of subsequent developments enshrined in the principle of self-determination, concluding, that "[t]hese developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53). I note that this was a majority Opinion by this Court.

Mr. President, with this I conclude my second submission. The process foreseen in resolution 1244 had been fully respected in a manner compatible with underlying principles of international law.

THE UNIQUE CHARACTER OF THIS CASE

Mr. President, distinguished Members of the Court, I now turn to my third and final submission: that the case of Kosovo's Declaration of Independence has unique factual and legal characteristics. It cannot and should not serve as a precedent for secessionist movements.

Two particular issues gave this case its *sui generis* character: first, gross human rights violations against the Kosovo population in the 1990s followed by an eight-year international

administration in Kosovo under resolution 1244 and its unique status process; second, the particular constitutional role of Kosovo within Yugoslavia, prior to the events of the 1990s that led to the break-up of Yugoslavia.

My distinguished colleague from Croatia has just in detail described the constitutional framework, and together with the written contribution of Slovenia, I believe a comprehensive and convincing picture hereof has already been given.

It is not for Denmark to add to this, but merely to point out that the constitutional role of Kosovo, a self-governing province up to 1989, would seem quite closely to resemble that of the then constituent republics within Yugoslavia, republics that gained independence in the 1990s.

Mr. President, other entities might well find inspiration in the case of Kosovo and seek to promote their agendas in this context. But false parallels must, of course, be rejected. We see no credible reason to believe that such parallels should exist in reality or be promoted in practice.

We also note that there is broad consensus on Kosovo being a special case. This point was made in statements by all 27 countries of the European Union, including the Republic of Cyprus, by the United States and Russian representatives, by the United Nations Secretary-General and many more. This, and I think this is an important point to stress, is not a call to suspend the law as was argued this morning, but a call to make it clear that particular facts obviously have different legal consequences.

CONCLUSION

Mr. President, I now come to my conclusion. As stated initially, peace, stability and prosperity for the region and Europe as a whole has been the key focus for Denmark's involvement in the Western Balkans during the last two decades.

Denmark has been a strong proponent for the integration of both Serbia and Kosovo into European structures as appropriate. We note that the situation in Kosovo is now steadily improving, and that there is a European perspective for both Serbia and Kosovo.

Through the EULEX mission the European Union, including Denmark, is engaged in supporting Kosovo's institutions, and building the framework for an effective, transparent public administration for all the inhabitants of Kosovo.

This process, we believe, neither should — nor could — be reversed. It is time to look forward and address the real, daily needs of the people of Kosovo and of the region.

Mr. President, distinguished Members of the Court, this concludes Denmark's oral contribution. I thank you for your attention.

The PRESIDENT: I thank His Excellency Mr. Thomas Winkler for his statement.

That concludes the oral statement and comments of Denmark and brings to a close today's hearings. The Court will meet again tomorrow at 10.00 a.m. when it will hear Spain, the United States of America, the Russian Federation and Finland. The Court is adjourned.

The Court rose at 12.40 p.m.