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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Tuesday 1 December 2009, at 10 a.m., at the Peace Palace,

President Owada, presiding,

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

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le mardi 1er décembre 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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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;

Professor Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international,

Professor Malcolm N. Shaw QC, Sir Robert Jennings Professor of International Law, University of Leicester, United Kingdom,

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,

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Mr. Igor Olujić, Attorney at Law, Olujic & Rabrenovic, 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.,

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comme chef de délégation ;

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Mr. Qerim Qerimi,

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Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands.

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H.E. Mr. Wolfgang Paul, Ambassador of Austria to the Kingdom of the Netherlands;

H.E. Mr. Werner Senfter, Deputy Ambassador of Austria to the Kingdom of the Netherlands.

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La République d'Autriche est représentée par :

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

La République d'Azerbaïdjan est représentée par :

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

The Republic of Bulgaria is represented by:

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as Head of Delegation;

Mr. Danail Chakarov, Legal Adviser, Ministry of Foreign Affairs;

Mr. Ivan Yordanov, Political Adviser, Ministry of Foreign Affairs;

Mr. Nedialtcho Dantchev, Counsellor, Embassy of the Republic of Bulgaria in the Kingdom of the Netherlands;

Mr. Krassimir Bozhanov, Legal Adviser, Ministry of Foreign Affairs.

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The People's Republic of China is represented by:

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La République du Burundi est représentée par :

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Ms Lisbeth Holm Ravn, Junior Assistant, Royal Danish Embassy in the Kingdom of the Netherlands,

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

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

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

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

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

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The Republic of Finland is represented by:

Ms Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs;

Professor Martti Koskenniemi, University of Helsinki;

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

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

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

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

The French Republic is represented by:

Ms Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, Member and former Chairman of the United Nations International Law Commission, Associate of the Institut de droit international;

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

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

comme conseils.

La Fédération de Russie est représentée par :

S. Exc. M. Kirill Gevorgian, ambassadeur,

comme chef de délégation ;

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

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

M. Konstantin Bersenev, premier secrétaire, au 4e département européen du ministère des affaires étrangères ;

Mme Anastasia Tezikova, troisième secrétaire au département juridique du ministère des affaires étrangères ;

Mme Ksenia Gal, attaché adjoint au département juridique du ministère des affaires étrangères.

La République de Finlande est représentée par :

Mme Päivi Kaukoranta, directeur général du service des affaires juridiques du ministère des affaires étrangères ;

M. Martti Koskenniemi, professeur à l'Université d'Helsinki ;

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

M. Kai Sauer, directeur de l'unité des Nations Unies et des affaires internationales générales au département des affaires politiques du ministère des affaires étrangères ;

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

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

La République française est représentée par :

Mme Edwige Belliard, directeur des affaires juridiques du ministère des affaires étrangères et européennes ;

M. Alain Pellet, professeur à l'Université Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international ;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense;

Ms Sandrine Barbier, Chargée de mission, Directorate of Legal Affairs, Ministry of Foreign and European Affairs;

Mr. Antoine Ollivier, Chargé de mission, Directorate of Legal Affairs, Ministry of Foreign and European Affairs.

The Hashemite Kingdom of Jordan is represented by:

H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America,

as Head of Delegation;

H.E. Dr. Khaldoun Th. Talhouni, Ambassador of the Hashemite Kingdom of Jordan to the Kingdom of the Netherlands;

H.E. Mr. Waleed Obaidat, Counsellor, Director of the Legal Directorate of the Ministry of Foreign Affairs of the Hashemite Kingdom of Jordan;

Mr. Mahmoud Hmoud, Counsellor of Political and Legal Affairs, Embassy of the Hashemite Kingdom of Jordan in the United States of America;

Mr. Akram Harahsheh, Third Secretary, Embassy of the Hashemite Kingdom of Jordan in the Kingdom of the Netherlands.

The Kingdom of Norway is represented by:

Mr. Rolf Einar Fife, Director General, Legal Affairs Department, Ministry of Foreign Affairs,

as Head of Delegation;

H.E. Ms Eva Bugge, Ambassador Extraordinary and Plenipotentiary of the Kingdom of Norway to the Kingdom of the Netherlands;

Mr. Olav Myklebust, Acting Director General, Legal Affairs Department, Ministry of Foreign Affairs;

Mr. Martin Sørby, Deputy Director General, Legal Affairs Department, Ministry of Foreign Affairs;

Mr. Jo Høvik, Senior Adviser, Legal Affairs Department, Ministry of Foreign Affairs;

Mr. Irvin Høyland, Minister (Legal Affairs), Royal Norwegian Embassy in the Kingdom of the Netherlands.

M. Mathias Forteau, professeur à l'Université Paris Ouest, Nanterre-La Défense ;

Mme Sandrine Barbier, chargée de mission à la direction des affaires juridiques du ministère des affaires étrangères et européennes ;

M. Antoine Ollivier, chargé de mission à la direction des affaires juridiques du ministère des affaires étrangères et européennes.

Le Royaume hachémite de Jordanie est représenté par :

S.A.R. le prince Zeid Raad Zeid Al Hussein, ambassadeur du Royaume hachémite de Jordanie auprès des Etats-Unis d'Amérique,

comme chef de délégation ;

S.Exc. M. Khaldoun Th. Talhouni, ambassadeur du Royaume hachémite de Jordanie auprès du Royaume des Pays-Bas ;

S.Exc. M. Waleed Obaidat, conseiller, directeur au département des affaires juridiques du ministère des affaires étrangères du Royaume hachémite de Jordanie ;

M. Mahmoud Hmoud, conseiller chargé des questions politiques et juridiques à l'ambassade du Royaume hachémite de Jordanie aux Etats-Unis d'Amérique ;

M. Akram Harahsheh, troisième secrétaire à l'ambassade du Royaume hachémite de Jordanie au Royaume des Pays-Bas.

Le Royaume de Norvège est représenté par :

M. Rolf Einar Fife, directeur général, ministère des affaires étrangères du Royaume de Norvège,

comme chef de délégation ;

S. Exc. Mme Eva Bugge, ambassadeur extraordinaire et plénipotentiaire du Royaume de Norvège auprès du Royaume des Pays-Bas ;

M. Olav Myklebust, directeur général en exercice au département des affaires juridiques du ministère des affaires étrangères du Royaume de Norvège ;

M. Martin Sørby, directeur général adjoint au département des affaires juridiques du ministère des affaires étrangères du Royaume de Norvège ;

M. Jo Høvik, conseiller principal au département des affaires juridiques du ministère des affaires étrangères du Royaume de Norvège ;

M. Irvin Høyland, ministre (affaires juridiques), ambassade du Royaume de Norvège au Royaume des Pays-Bas.

The Kingdom of the Netherlands is represented by:

Dr. Liesbeth Lijnzaad;

Professor Dr. Niels Blokker;

Professor Dr. René Lefeber;

Mr. Tom van Oorschot;

Mr. Siemon Tuinstra;

Mr. Michel van Winden;

Ms Daniëlle Best.

Romania is represented by:

Mr. Bogdan Aurescu, Secretary of State, Ministry of Foreign Affairs;

H.E. Mr. Călin Fabian, Ambassador of Romania to the Kingdom of the Netherlands;

Mr. Cosmin Dinescu, Director-General for Legal Affairs, Ministry of Foreign Affairs;

Mr. Ion Gâlea, Director, Directorate-General of Legal Affairs, Ministry of Foreign Affairs;

Mr. Felix Zaharia, Principal Private Secretary to the Minister for Foreign Affairs;

Ms Alina Orosan, Second Secretary, Directorate-General of Legal Affairs, Ministry of Foreign Affairs;

Ms Irina Niță, First Secretary, Embassy of Romania in the Kingdom of the Netherlands.

The United Kingdom of Great Britain and Northern Ireland is represented by:

Mr. Daniel Bethlehem QC, Legal Adviser to the Foreign and Commonwealth Office, Representative of the United Kingdom of Great Britain and Northern Ireland,

as Counsel and Advocate;

Mr. Kanbar Hosseinbor, Deputy Representative of the United Kingdom of Great Britain and Northern Ireland;

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international,

as Counsel and Advocate;

Le Royaume des Pays-Bas est représenté par :

Mme Liesbeth Lijnzaad ;

M. Niels Blokker ;

M. René Lefeber ;

M. Tom van Oorschot ;

M. Siemon Tuinstra ;

M. Michel van Winden;

Mme Daniëlle Best.

La Roumanie est représentée par :

M. Bogdan Aurescu, secrétaire d'Etat du ministère roumain des affaires étrangères ;

S. Exc. M. Călin Fabian, ambassadeur de la Roumanie auprès du Royaume des Pays-Bas ;

M. Cosmin Dinescu, directeur général des affaires juridiques du ministère des affaires étrangères ;

M. Ion Gâlea, directeur à la direction générale des affaires juridiques du ministère des affaires étrangères ;

M. Felix Zaharia, directeur de cabinet du ministre des affaires étrangères ;

Mme Alina Orosan, deuxième secrétaire à la direction générale des affaires juridiques du ministère des affaires étrangères ;

Mme Irina Niță, première secrétaire à l'ambassade de Roumanie au Royaume des Pays-Bas.

Le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

M. Daniel Bethlehem, Q.C., conseiller juridique du ministère des affaires étrangères et du Commonwealth, représentant du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord,

comme conseil et avocat ;

M. Kanbar Hosseinbor, représentant adjoint du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord ;

M. James Crawford, S.C., professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge, membre de l'Institut de droit international,

comme conseil et avocat ;

Mr. Sam Wordsworth,

Ms Shaheed Fatima,

as Counsel;

Dr. Tom Grant, Research Fellow at the Lauterpacht Centre for International Law, University of Cambridge;

Ms Alice Lacourt, Legal Counsellor, Foreign and Commonwealth Office;

Ms Joanne Neenan, Assistant Legal Adviser, Foreign and Commonwealth Office;

Ms Joanna Hanson, Foreign and Commonwealth Office;

Ms Helen Fazey, Foreign and Commonwealth Office.

The Bolivarian Republic of Venezuela is represented by:

Dr. Alejandro Fleming, Deputy Minister for Europe of the Ministry of Popular Power for Foreign Affairs;

Dr. Agustín Pérez Célis, Ambassador of the Bolivarian Republic of Venezuela to the Kingdom of the Netherlands;

Mr. Carlos Herrera, Director of Control and Management in the Cabinet of the Deputy Minister for Europe;

Dr. Alfonso D'Santiago, Director of Multilateral Treaties, Office of Legal Department, Ministry of Popular Power for Foreign Affairs;

Mr. Jorge Petit, Third Secretary (Legal and Multilateral Section of the Embassy of the Bolivarian Republic of Venezuela in the Kingdom of the Netherlands).

The Socialist Republic of Viet Nam is represented by:

H.E. Mr. Ha Huy Thong, Ambassador of the Socialist Republic of Viet Nam to the Kingdom of the Netherlands;

Dr. jur. Nguyen Thi Hoang Anh, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs;

Ms Nguyen Thi Thanh Ha, LL.M. (Harvard), Minister Counsellor, Permanent Mission of Viet Nam to the United Nations (New York);

Mr. Phan Duy Hao, S.J.D., Legal Expert, Department of International Law and Treaties, Ministry of Foreign Affairs.

M. Sam Wordsworth,

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M. Tom Grant, collaborateur scientifique au Lauterpacht Centre for International Law de l'Université de Cambridge ;

Mme Alice Lacourt, conseiller juridique au ministère des affaires étrangères et du Commonwealth ;

Mme Joanne Neenan, jurisconsulte adjoint au ministère des affaires étrangères et du Commonwealth ;

Mme Joanna Hanson, ministère des affaires étrangères et du Commonwealth ;

Mme Helen Fazey, ministère des affaires étrangères et du Commonwealth.

La République bolivarienne du Venezuela est représentée par :

M. Alejandro Fleming, Secrétaire d'Etat aux affaires européennes au ministère du pouvoir populaire pour les relations extérieures ;

S. Exc. M. Agustín Pérez Célis, ambassadeur de la République bolivarienne du Venezuela auprès du Royaume des Pays-Bas ;

M. Carlos Herrera, directeur du contrôle et de l'administration au cabinet du Secrétaire d'Etat aux affaires européennes ;

M. Alfonso D'Santiago, responsable des traités multilatéraux au bureau du conseiller juridique du ministère du pouvoir populaire pour les relations extérieures ;

M. Jorge Petit, troisième secrétaire (division des affaires juridiques et multilatérales de l'ambassade de la République bolivarienne du Venezuela au Royaume des Pays-Bas).

La République socialiste du Viet Nam est représentée par :

S. Exc. M. Ha Huy Thong, ambassadeur de la République socialiste du Viet Nam auprès du Royaume des Pays-Bas ;

Mme Nguyen Thi Hoang Anh, docteur en droit, directrice générale au département du droit international et des traités internationaux du ministère des affaires étrangères ;

Mme Nguyen Thi Thanh Ha, LL.M. (Harvard), ministre-conseiller à la mission permanente du Viet Nam auprès de l'Organisation des Nations Unies (New York) ;

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.

The Court meets today to hear oral statements and comments by Members of the United Nations relating to the request for an advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, as well as to hear an oral contribution from the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo.

On 8 October 2008, by resolution 63/3, the General Assembly of the United Nations decided to request an advisory opinion from the Court. The text of the resolution was transmitted to the Court by a letter from the Secretary-General of the United Nations dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008. I shall ask the Registrar to read from the operative paragraph of that resolution the question on which the Court is asked to render an advisory opinion.

The REGISTRAR: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

The PRESIDENT: In accordance with Article 66, paragraph 1, of the Statute, the Registrar notified forthwith the request for an advisory opinion to all States entitled to appear before the Court.

By an Order dated 17 October 2008, the Court decided that the United Nations and its Member States were likely to be able to furnish information on that question. By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court also decided that

> "taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of

> the above declaration are considered likely to be able to furnish information on the question".

It therefore further decided "to invite them to make written contributions to the Court within the above time-limits".

By letter dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of the Court's decisions, and transmitted to them a copy of the Order.

Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question, which was subsequently placed on the Court's website.

By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The letter further indicated that the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo could present an oral contribution.

By letter of the same date, the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo were also informed accordingly.

The Registrar invited the United Nations and its Member States, as well as the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, to inform the Court by 15 September 2009 as to whether they intended to take part in the oral proceedings.

Written statements were filed, in the order of receipt, by the following participants: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone, Bolivia, and the Bolivarian Republic of Venezuela. The authors of the unilateral

declaration of independence by the Provisional Institutions of Self-Government of Kosovo filed a written contribution.

Written comments on the written statements and contribution were filed, in the order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain. The authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo submitted a written contribution regarding the written statements.

As I indicated a moment ago, the Court is meeting today to hear oral statements and comments relating to the request for an advisory opinion, as well as to hear an oral contribution from the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. In this regard, the Court has been informed that the following participants, set out in speaking order, wish to take the floor during the current oral proceedings: Serbia, the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, Albania, Germany, Saudi Arabia, Argentina, Austria, Azerbaijan, Belarus, Bolivia, Brazil, Bulgaria, Burundi, China, Cyprus, Croatia, Denmark, Spain, United States of America, Russian Federation, Finland, France, Jordan, Norway, Netherlands, Romania, United Kingdom, Venezuela, and Viet Nam.

The specific arrangements for the hearings have been made known by the Registry to the participants I have just mentioned by means of various communications. The schedule of the hearings has also been made public by a press release. This morning, the Court will hear Serbia; and this afternoon, the Court will hear the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. Both Serbia and the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo will speak for a maximum duration of three hours, and all the other participants in the oral proceedings will speak for a maximum of 45 minutes each.

Before inviting Serbia to address the Court, I would add that, in accordance with Article 106 of the Rules of Court, the Court has decided that the written statements and written comments submitted by Member States of the United Nations in the current advisory proceedings, as well as the written contributions submitted by the authors of the unilateral declaration of independence by

the Provisional Institutions of Self-Government of Kosovo, are to be made accessible to the public with effect from the opening of the present hearings. Further, these written submissions will from today be posted on the Court's website, to allow for consultation of both the original language version and the unofficial translation, as submitted to or prepared by the Registry. In addition, the text of the oral statements and comments, as well as the oral contribution of the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, will be placed on the Court's website.

Now I give the floor to H.E. Mr. Bataković. Your Excellency Mr. Bataković, you have the floor.

M. BATAKOVIĆ :

INTRODUCTION

1. Monsieur le président, Messieurs les juges, c'est un grand honneur, ainsi qu'une très haute responsabilité que de représenter mon pays, la Serbie, devant l'organe judiciaire principal des Nations Unies, lors de ces audiences publiques.

2. L'Assemblée générale des Nations Unies a saisi votre Cour, afin de lui demander de rendre un avis consultatif relatif à la conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo. Cette question revêt un intérêt majeur pour les Nations Unies, ainsi que pour l'ensemble de l'ordre juridique international, puisque la déclaration unilatérale d'indépendance n'est qu'une tentative pour mettre fin au régime juridique international établi pour le Kosovo par le Conseil de sécurité, en vertu de la résolution 1244 de 1999.

3. La déclaration unilatérale d'indépendance constitue ainsi un défi à relever pour l'organisation internationale et son autorité, tout particulièrement relativement à sa capacité future d'agir avec succès pour la réalisation de l'un de ses principes fondamentaux, le maintien de la paix et de la sécurité internationales.

4. La déclaration unilatérale d'indépendance est également un défi pour l'ordre juridique international, fondé sur les principes de souveraineté et d'intégrité territoriale des Etats. C'est

pourquoi la grande majorité des Etats s'est opposée à la sécession et a adopté une position défavorable à la déclaration unilatérale d'indépendance du Kosovo.

5. Monsieur le président, le positionnement des Nations Unies à l'égard de la déclaration unilatérale d'indépendance revêtira une importance fondamentale, non seulement au regard de leurs agissements concernant la situation au Kosovo, mais aussi pour l'ordre juridique international dans son ensemble. Je crois que nous convenons que la position des Nations Unies doit être fondée sur le droit international. Votre avis consultatif aura une portée primordiale pour l'Organisation et servira de guide à ses organes politiques — l'Assemblée générale, le Conseil de sécurité, et le Secrétaire général — lorsque ceux-ci devront prendre des décisions.

6. Monsieur le président, Messieurs les juges, il n'est point besoin de souligner que la question dont vous êtes saisis est vitale pour mon pays. Le Kosovo forme le berceau historique de la Serbie et constitue l'un des piliers essentiels de son identité. Les Serbes du Kosovo sont devenus *de facto* une minorité dans leur propre pays. Bien que la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo représente une violation flagrante de sa souveraineté et de son intégrité territoriale, la Serbie a décidé de réagir à cette décision illégitime et illicite d'une manière responsable et pacifique, ayant recours aux procédures existantes au sein des Nations Unies[1]. Toutefois, la Serbie est déterminée à persister dans la défense de son intégrité territoriale et de sa souveraineté, tout en faisant preuve de flexibilité dans la recherche de solutions pratiques, susceptibles de faciliter la situation actuelle. Suivant cette ligne de conduite, la Serbie a soutenu le projet du Secrétaire général des Nations Unies en vertu duquel la mission de l'Union européenne pour le Kosovo — EULEX — se déploie conformément à la résolution 1244 et ceci, sous l'autorité du représentant spécial.

7. Monsieur le président, le Kosovo se trouve sous administration de l'ONU depuis l'adoption de la résolution 1244 en 1999. Je voudrais rappeler que cette résolution a fait suite à l'emploi illicite de la force armée par certains Etats contre la République fédérale de Yougoslavie ; intervention qui a causé, rappelons-le, un nombre considérable de victimes civiles. C'est le Conseil de sécurité lui-même qui a mis en place une présence internationale civile et de sécurité au Kosovo.

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[1] Cf., par exemple, le discours du président de Serbie Boris Tadić à l'Assemblée générale de l'ONU, Nations Unies, doc. A/63/PV.5 (le 23 septembre 2008), p. 29.

Toutefois, le Conseil de sécurité n'a pas supprimé, il ne saurait le faire d'ailleurs, la souveraineté de la Serbie au Kosovo. Bien au contraire, la résolution 1244 a mis en exergue la nécessité de préserver l'intégrité territoriale de la République fédérale de Yougoslavie — la Serbie — sur la province du Kosovo, ce qui a été par la suite réaffirmé par la pratique des Nations Unies après 1999.

8. La résolution 1244 prévoit que le statut futur de la province sera déterminé par un processus politique. Tout règlement définitif doit être atteint de manière pacifique par voie de négociations. Naturellement, ce règlement doit résulter de l'accord des parties et doit être également soutenu par le Conseil de sécurité.

9. Malheureusement, les négociations concernant le statut du Kosovo, entreprises dès la fin de 2005, étaient dès leur commencement destinées à l'échec, notamment en raison de la partialité du négociateur principal Martti Ahtisaari et de la position de certains Etats membres du groupe de contact, qui ont encouragé l'indépendance du Kosovo, la présentant comme l'unique option[2]. Le succès des négociations était donc menacé, malgré l'attitude des plus flexibles de la Serbie, qui a proposé divers règlements pour le Kosovo. Elle a même offert au Kosovo la possibilité d'exercer d'une manière autonome presque toutes les prérogatives de l'autorité étatique et même de pouvoir devenir membre des institutions financières internationales[3]. La Serbie rejette l'affirmation selon laquelle toutes les alternatives de négociations ont été épuisées ; non seulement parce que les négociations de Vienne étaient biaisées depuis le début, mais aussi parce qu'elles ont été menées durant deux ans et demi, ce qui constitue une période brève par rapport à la durée de négociations dans d'autres situations où la paix et la sécurité internationales ont été menacées.

10. Monsieur le président, l'histoire de la crise n'est pas uniquement celle des négociations et des conflits armés, mais aussi celle des douleurs et des souffrances subies par les habitants de la Serbie, notamment par les citoyens du Kosovo, toutes origines nationales confondues. La Serbie démocratique condamne et regrette sincèrement les tragédies et les douleurs provoquées par ceux qui opéraient au nom de la Yougoslavie et de la Serbie durant le conflit du Kosovo, notamment les graves violations des droits de l'homme de la population albanaise au cours des années 1998-1999.

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[2] Observations écrites de la Serbie, par. 100 et suiv.

[3] Observations écrites de la Serbie, par. 117.

Nous considérons d'une extrême importance la poursuite pénale devant les tribunaux nationaux et internationaux de tous ceux qui ont perpétré des crimes durant ce conflit. En Serbie, plusieurs membres de l'armée et de la police ont été déjà jugés et condamnés pour des crimes commis au Kosovo.

Dans ce contexte, nous sommes obligés de mentionner que pendant le conflit de 1998-1999 le groupe paramilitaire albanais, la soi-disant «armée de libération du Kosovo» a perpétré des crimes graves à l'encontre des Serbes et d'autres communautés non albanaises, tout comme à l'encontre des Albanais loyaux aux autorités de la Serbie. Nous ne pouvons non plus passer outre le fait que la situation actuelle concernant les droits de l'homme de la population non albanaise au Kosovo est très grave et que leurs droits et libertés fondamentaux se voient sérieusement menacés dans leur essence. L'on veut pour preuve la pratique constante de déplacement forcé de la population serbe et autre non albanaise. Après la mise en place de l'administration internationale en juin 1999, environ 60 % des Serbes ont été exilés hors du Kosovo, tout comme environ 66 % des Roms et environ 70 % des habitants du Gora (la communauté de Goranci). Les villes principales du Kosovo, à l'exception d'une seule, ont été vidées de toute population serbe et non albanaise après 1999. La ville de Priština a été complètement nettoyée ethniquement, et ceci après la mise en place de l'administration internationale. Les déferlements orchestrés de violence ethniquement motivée ont eu pour cible la communauté serbe. Le pogrom entamé en mars 2004, qui a mené au déplacement forcé d'environ 40 000 Serbes en deux jours seulement, n'a pu être arrêté que par l'intervention militaire des forces internationales. Trente-cinq églises serbes ont été détruites en mars 2004, et environ 170 églises situées dans toute la province ont été détruites ou fortement abîmées depuis 1999. Les églises et les monastères du Kosovo sont les seuls monuments culturels en Europe, dont plusieurs d'ailleurs sont inscrits sur la liste du patrimoine mondial, qui doivent être protégés par les forces militaires internationales en raison de la menace réelle de destruction existante dans cet environnement hostile. Plus de 1300 civils serbes et non albanais ont été portés disparus, et le nombre de tués ces dix dernières années a atteint le même chiffre. Les crimes ethniquement motivés commis par des extrémistes albanais demeurent pour la plupart impunis.

11. Cependant, l'objet de cette affaire n'a pas trait aux violations des droits de l'homme, tant celles commises il y a une ou deux décennies que celles du présent. L'objet de cette affaire ne porte pas non plus sur le statut futur du Kosovo. La demande de l'Assemblée générale auprès de cette honorable Cour vise un avis consultatif relatif à la conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo.

12. Monsieur le président, Messieurs les juges, la déclaration unilatérale d'indépendance est une tentative afin de mettre un terme à l'administration de l'ONU et à la souveraineté de la Serbie sur sa province méridionale, ainsi que d'imposer l'indépendance comme règlement unilatéral pour le Kosovo. Elle est contraire au droit international, puisqu'elle déroge non seulement au principe fondamental de l'intégrité territoriale des Etats, mais aussi à la résolution contraignante du Conseil de sécurité 1244 et au régime juridique international établi pour le Kosovo par cette résolution. La République de Serbie est convaincue que les Nations Unies et la communauté internationale trouveront une réponse adaptée à ce défi qui porte atteinte aux fondements mêmes de l'ordre juridique international. Nous sommes persuadés que l'avis consultatif de la Cour constituera l'ossature juridique essentielle de cette réponse.

13. Nous sommes confiants que, une fois la Cour ayant apporté son éclairage juridique sur la question, les conditions seront créées pour atteindre un compromis sur le statut futur du Kosovo ; un compromis grâce auquel le Gouvernement de la Serbie et les autorités albanaises du Kosovo pourront trouver un terrain d'entente, contribuant ainsi à consolider la paix et la stabilité dans les Balkans occidentaux. Cette opportunité ne doit en aucun cas être gâchée. Notre vœu le plus cher et le plus sincère est que l'avis consultatif soit perçu par tous les acteurs concernés comme un encouragement à s'engager de bonne foi dans un processus visant un règlement respectueux du droit international ; ceci dans l'intérêt du Kosovo, du reste de la Serbie et de la région tout entière.

Monsieur le président, Messieurs les juges, je vous remercie de votre aimable attention et je vous saurais gré de bien vouloir appeler à la barre M. Djerić.

The PRESIDENT: I thank His Excellency, Mr. Bataković for his presentation. I now give the floor to Mr. Djerić.

Mr. DJERIĆ: Thank you Mr. President.

JURISDICTION, ADMISSIBILITY, SCOPE OF THE QUESTION, AND BINDING NATURE OF THE APPLICABLE LEGAL RULES

1. Mr. President, Members of the Court, it is a very great personal pleasure for me to have the honour once again of appearing before this honourable Court. In my presentation today, I will deal with a set of what may be called "preliminary questions":

— first, the jurisdiction and admissibility in the present case;

— second, the terms and scope of the question before the Court, in particular the issue of who are the authors of the unilateral declaration of independence ("UDI"); and

— finally, I will address the question of applicability of the international legal régime established by resolution 1244 (1999) to all actors in Kosovo.

Jurisdiction and admissibility

2. Mr. President, a great majority of States participating in the present proceedings accept that the Court has jurisdiction to entertain the General Assembly request for an advisory opinion and that there are no reasons that would prevent it from exercising its advisory jurisdiction[4]. We believe that this matter has been sufficiently discussed in various written submissions and that the jurisdiction of the Court and the admissibility of the request have been convincingly established. It is significant to note at this stage that only two States have challenged the jurisdiction of the Court.

3. The first challenge to the Court's jurisdiction is that the question of the UDI's legality is not a genuine legal question because international law does not prohibit secessions or declarations of independence[5]. Serbia and other States have already demonstrated that this objection is groundless[6], particularly because it confuses the nature of the question before the Court with a possible answer to that question. Simply put, saying that something is not prohibited or not regulated by international law is providing it with a legal qualification, which, in itself, is an answer to a legal question. Finally, even assuming *arguendo* that the UDI is not prohibited or regulated by general international law, it was adopted in a legal setting that is clearly regulated by

[4]See Written Comments of Serbia, para. 47, Note 43.

[5]Written Comments of France, para. 9.

[6]See, e.g., Written Comments of Argentina, para. 12 *et seq*.

the international legal régime established by Security Council resolution 1244 (1999). The question of the UDI's compatibility with this set of international norms is obviously a legal question.

4. A related objection to the jurisdiction of the Court is that the question of the UDI's legality is only a question of national law, falling within the domestic jurisdiction of the State concerned[7]. However, as has been demonstrated by the very comprehensive discussion of various applicable international rules during the written phase of the present proceedings, it is clear that the UDI is not solely a matter of the national law of Serbia[8] but is also a question of international law. As such, it is, to quote the Court, "by its very nature" within the Court's competence and not a matter essentially within the domestic jurisdiction (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 70-71)[9]. It therefore clearly follows that the Court has jurisdiction to deal with the request of the General Assembly in the present case.

5. Mr. President, turning to the issue of propriety of the Court's exercise of its advisory jurisdiction, I would like to recall the Court's emphatic statement that the request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29). Only where there are "compelling reasons" related to the propriety of the exercise of the Court's judicial function, should the Court decline the request[10]. This is an exceptionally high standard: not just any reasons, but only "compelling" ones, may lead to the refusal of the opinion.

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[7]Written Statement of Albania, para. 41 *et seq*.; Written Comments of Albania, paras. 35-36.

[8]As a matter of national law, the Government of Serbia has annulled the UDI, see Written Statement of Serbia, para. 6.

[9]See also C. Tomuschat, "Article 36", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice —A Commentary* (2006), p. 637.

[10]*Certain expenses of the United Nations (Art. 17, para. 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 155; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004* (hereinafter: "Wall"), p. 157, para. 45.

6. Those raising the issue of propriety of the Court's exercise of its jurisdiction in the present proceedings, on the one hand, question the motives of the General Assembly in requesting the advisory opinion[11] and, on the other, challenge the usefulness of such an opinion[12]. Serbia, as well as other States, has already responded to these two claims[13], but an additional comment is warranted here.

7. What needs to be mentioned is that the Court has consistently declined to enquire into the motives that led a United Nations organ to request an advisory opinion[14]. In this context, I would just like to say that those questioning the motives of the General Assembly in fact put in doubt the bona fide nature of resolution 63/3, as well as the good faith of the majority that voted in its favour.

8. I need not spend much time describing the interest of the General Assembly and of the United Nations Organization in the question before the Court, as this interest is self-evident[15]. I would like to point to a simple fact that, according to the Secretary-General, the UDI has presented a significant challenge to the authority of the United Nations and its administration in Kosovo[16]. It seems rather bizarre to say that the General Assembly does not have an interest in such a situation. Not only does the Assembly fund UNMIK, but it also has responsibilities in relation to the powers and functions of organs of the United Nations and the maintenance of international peace and security, to mention just a few of its relevant competences[17]. The object of its request is, to quote your opinion in the *Western Sahara* case, "to obtain from the Court an opinion which the General

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[11]Further Written Contribution of the authors of the UDI, para. 1.12 *et seq*; Written Comments of the United States, pp. 10-12; Written Comments of France, para. 6; Written Comments of Albania, para. 39 *et seq*.

[12]Written Comments of France, paras. 7 *et seq.*; Written Comments of Albania, para. 43.

[13]See Written Comments of Serbia, para. 57 *et seq.*; Argentina, para. 12 *et seq*; Written Statement of Cyprus, para. 5 *et seq*.

[14]*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61. See also *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)* (hereinafter *"Legality of the Threat or Use of Nuclear Weapons*"), pp. 233-234, para. 13.

[15]Written Statement of Serbia, paras. 45 *et seq*, 71 *et seq*; Written Comments of Serbia, paras. 57-63; Written Statement of Cyprus, para. 8 *et seq.*; Written Comments of Argentina, para. 14 *et seq*.

[16]See, e.g., Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN doc. S/2008/211, 28 Mar. 2008, para. 30.

[17]See Arts. 10 and 11 of the United Nations Charter; see also *ibid*., Art. 4.

Assembly deems of assistance to it for the proper exercise of its functions" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39).

9. Another challenge to the propriety of the Court's advisory opinion in the present case is that the General Assembly's request should be refused because the competent organs of the United Nations have taken a neutral attitude towards Kosovo's status[18]. However, this claim is both inaccurate and fails to appreciate the functions and roles of different United Nations organs.

10. The General Assembly has requested an opinion from the Court in the present case, which obviously means that it has not taken a position regarding Kosovo's status. The Security Council has not taken a position either, due to well-known political disagreements within the Council. Indeed, an opinion from the Court on the legality of the UDI could be an important element in the Council's deliberations.

11. As for the Secretary-General, he has adopted a status-neutral approach pending further guidance from the Security Council[19]. This is not a legal determination, but a political position. This has nothing to do with the Court, which is the principal judicial organ of the Organization with completely different functions and responsibilities under the Charter, and which is requested by another principal United Nations organ to provide a legal opinion in the present case. Moreover, it is apparent from the dossier submitted on behalf of the Secretary-General that he did not have the benefit of legal advice in the present matter, which is an additional reason for the Court to provide its legal guidance.

12. Mr. President, it has been claimed that an advisory opinion in the present case would be devoid of any effect or useful purpose as it cannot have effect on Kosovo's independence[20]. Contrary to what is claimed, however, the opinion of the Court will indeed have a useful purpose as its primary function and effect is to guide the General Assembly and other United Nations organs in their activity concerning the situation in Kosovo in various matters within their competence. This is the purpose of every advisory opinion — to provide the requesting organs with "the elements of law necessary for them in their action" (*Legal Consequences of the Construction of a*

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[18]Written Comments of France, paras. 7-8.

[19]See, e.g., Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN doc. S/2008/354, 12 June 2008, para. 19.

[20]See Written Comments of France, para. 11 *et seq*.; see also Written Comments of Albania, para. 43.

Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 162-163, para. 60). We have shown that the General Assembly would make a full use of the Court's opinion in relation to a number of matters[21]. Similarly, the importance of the Court's opinion for deliberations in the Security Council cannot be underestimated.

13. The claim that the Court's opinion will have no useful effect implies that the law may simply be overruled on the basis of self-created so-called "irreversible" facts. Considering that Kosovo is under international administration, which retains the ultimate administrative and security power in the province, it is clear that there are sufficient instruments to implement the consequences of any advisory opinion by the relevant international authority. Thus, it appears that the States making the claim that the Court's opinion would be devoid of any effect or useful purpose are in fact announcing that they are going to ignore legal determinations made by the Court, if these are not in accordance with their current political position. Mr. President, this is not a bona fide approach expected, indeed, required from Member States of the United Nations.

14. Finally, as a matter of law, the Court stated in an earlier case: "The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 16; *Wall*, p. 163, para. 61.)

It is precisely on this basis that the Court stated that it "cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose" (*Wall*, p. 163, para. 62).

15. Thus, the Court has taken the firm position that it is not its task to assess whether the opinion would be useful for the requesting organ *(ibid.)*. This is a prudent approach since otherwise the Court would have to substitute its judgment for that of the requesting organ.

16. It is therefore clear that there is no reason, let alone a compelling one, that would lead the Court to decline an advisory opinion in the present case. Considering that Kosovo is under United Nations administration, the Court will in the present case not only provide an advisory opinion that

[21]See *supra*, para. 8; see also Written Statement of Serbia, para. 84 *et seq*; Written Comments of Serbia, paras. 61-63.

is pertinent but would, at the same time, once again faithfully discharge its functions as "the principal judicial organ of the United Nations"[22].

The meaning and scope of the question before the Court

17. Mr. President, I will now turn to the meaning and scope of the question before the Court. At the outset, let me say that the question is a narrow one inasmuch as it deals with the UDI and does not address related, but clearly distinct issues, such as recognition. However, an examination of the UDI's legality still needs to address all various aspects of the UDI and their legality under international law. The UDI is not merely a verbal act, a declaratory statement. Most importantly, the UDI has been an attempt to create an independent State, to violate Serbia's territorial integrity and to terminate or modify the international legal régime for the administration of Kosovo. All these aspects of the UDI need to be analysed in order to determine whether the UDI is in accordance with international law[23] and this is what my colleagues will do today.

18. I will now turn to the issue of who actually adopted the UDI, which is also related to the meaning of the question before the Court. According to its authors and some States supporting them[24], the UDI was not an act of the Assembly of Kosovo and the Provisional Institutions of Self-Government, but allegedly "an act of the democratically-elected representatives of the people of Kosovo meeting as a constituent body to establish a new State"[25]. This is a claim that did not appear prior to these proceedings.

19. Mr. President, both the Assembly of Kosovo that adopted the UDI and the President and Prime Minister that endorsed it were established as Provisional Institutions of Self-Government under the Constitutional Framework for Kosovo. They gained their official status and legitimacy on the basis of elections organized under the Constitutional Framework and resolution 1244 (1999). They cannot now escape their obligations under these two instruments.

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[22]Art. 92 of the Charter.

[23]See Written Comments of Serbia, paras. 43-45.

[24]Written Contribution of authors of the UDI, para. 6.01 *et seq*., and Further Written Contribution of authors of the UDI, para. 1.22 *et seq.*; Written Statements of Austria, para. 16, Estonia, p. 3, Finland, paras. 17-18, Germany, p. 25, Netherlands, paras. 3.3-3.4, Norway, paras. 13-17, Poland, paras. 3.40-3.41, United Kingdom, paras. 1.12-1.13, United States, pp. 32-33; Written Comments of Albania, paras. 79 and 90; Germany, p. 7; Norway, para. 9; Switzerland, para. 3; United Kingdom, para. 24.

[25]Written Contribution of authors of the UDI, para. 6.01.

20. The authors cite a number of procedural irregularities, as well as formal differences, which distinguish the adoption of the UDI from the adoption of legal acts by the Assembly of Kosovo[26]. However, their argument suffers from one fatal problem to begin with: it does not correspond to reality. It is contradicted by the transcript of the session[27]; it is contradicted by the views of the Kosovo authorities themselves at the time the UDI was adopted[28]; it is also contradicted by the then views of those States that recognized Kosovo, although now they take a different position[29]. Finally, it is contradicted by the views of impartial international observers and bodies[30].

21. First, the transcript of the Assembly of Kosovo session at which the UDI was adopted expressly states that the Assembly was convened in accordance with the Constitutional Framework[31], that is, as a provisional institution of self-government. There is no indication in the transcript that this was a session of some *ad hoc* constituent body. Rather, it clearly shows that this was a session of *the Assembly of Kosovo*, on which it first adopted its agenda and then proceeded to adopt the UDI. After the UDI was adopted, the Assembly members signed its text, as did the President and Prime Minister of Kosovo, who, in this way, endorsed the UDI.

22. In this context, it is important to note that the Albanian term used by the UDI for the President of Kosovo, under which he put his signature to the UDI, is the same as the term used in the Constitutional Framework for Kosovo: "Kryetari i Kosovës"[32]. In contrast, the "constitution" of the so-called "Republic of Kosovo" uses a different term for "president": "Presidenti i Republikës së Kosovës"[33]. This also indicates that the UDI was signed by the President of Kosovo in his capacity of a Provisional Institution of Self-Government under the Constitutional Framework for Kosovo.

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[26]Written Contribution of authors of the UDI, paras. 6.10-6.19.

[27]See Written Comments of Serbia, paras. 33-34.

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

[29]*Ibid.*, para. 38, notes 26-36.

[30]*Ibid.*, para. 37.

[31]Written Contribution of authors of the UDI, Ann. 2, p. 4.

[32]See, e.g., Arts. 1.5 *(b)* and 9.2.1 of the Constitutional Framework for Kosovo. The Albanian version is available at http://www.unmikonline.org/regulations/unmikgazette/03albanian/A2001regs/RA2001_09.pdf.

[33]See, e.g., Art. 84 of the Constitution of the so-called "Republic of Kosovo", for the Albanian text see http://www.assembly-kosova.org/common/docs/Kushtetuta_sh.pdf.

23. Moreover, at the time the UDI was adopted, the President of Kosovo wrote to the President of Germany that "*the Assembly of Kosovo* declared Kosovo's independence"[34]. Thus, according to the President of Kosovo himself, it was "the Assembly of Kosovo" that adopted the UDI — not the "democratically-elected representatives of the people" or "a constituent body".

24. This is also confirmed by statements of the United Nations Secretary-General and of the European Union[35]. This was also the view of States that have recognized the so-called "Republic of Kosovo"[36].

25. However, contrary to all evidence, and for the purpose of the present proceedings, the authors of the UDI argue that it was not adopted by the Provisional Institutions of Self-Government but by some "constituent body". Mr. President, this is a self-serving construction that has been devised in an attempt to place the UDI outside the international legal régime for Kosovo, as supposedly this legal régime would not apply to such a "constituent body". All the evidence, however, points to the same conclusion — that the UDI was adopted by the Assembly of Kosovo and was endorsed by the President and Prime Minister of Kosovo. But even if the UDI were an act of a "constituent body" this would not change the conclusion that it is contrary to international law.

The binding force of the international legal régime established by Security Council resolution 1244

26. Mr. President, Security Council resolution 1244 (1999) created an international legal régime for Kosovo that imposes international obligations upon all relevant actors in Kosovo — international obligations which have been violated by the UDI. However, in a last-ditch attempt to defend the UDI, the authors and some States supporting them try to counter this obvious fact with two arguments: first, that resolution 1244 (1999) only binds States and not the authors of the UDI; and second, that UNMIK regulations are not international but domestic law.

27. I will demonstrate that both these arguments are untenable. I will first deal with the claim that resolution 1244 (1999) does not bind the authors of the UDI[37]. In the view of Serbia, the

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[34]See Written Statement of Germany, Ann. 2; emphasis added.

[35]See Written Comments of Serbia, para. 37.

[36]See *ibid.*, para. 38.

Security Council can bind non-State actors and it has done so many times in its practice[38] including, as I will discuss in a moment, in the case of Kosovo. While the Charter is obviously primarily concerned with obligations of Member States in the application of the Security Council measures[39], there is nothing in it that would restrict Security Council action with respect to non-State entities and individuals, if such action is necessary for the maintenance or restoration of the international peace and security. This is evident from the text of Article 41 of the Charter which indicates that the Security Council "*may* call upon the Members" to apply its measures not involving the use of armed force. This clearly leaves open the possibility that there are measures which do not require their application by Member States. Normally, the Security Council measures are applied by States which by their internal legislation bind persons on their territory. But there is nothing in the Charter that would restrict the Security Council to decide otherwise. In particular, in a situation when a territory is administered by the United Nations, like Kosovo, and there is no Member State that can exercise the territorial jurisdiction and implement Security Council measures, there is simply no other way to achieve their goal other than to address them directly to non-State entities in the said territory.

28. Mr. President, this is confirmed by practice. A leading commentary of the United Nations Charter, when discussing whether individuals subject to international administrations can be addressed by the Security Council measures having direct effect on them, concludes the following:

> "[T]he UN's assumption of this . . . task has been widely welcomed by States, and Article 41 has thus evolved into a basis for the creation of direct legal effects in the domestic sphere, conferring on the UN some characteristics of a supranational organization."[40]

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[37]Those espousing such view are not in agreement whether the Security Council can bind non-State actors as a matter of principle. *Compare* Further Written Contribution of authors of the UDI, paras. 5.70-5.71 (the Security Council cannot bind non-State entities) with Written Comments of the United States, p. 35 (reserving the position but expressing doubt that the Security Council can bind non-State entities), and Written Comments of the United Kingdom, para. 22 (the Security Council can bind non-State entities, but only with explicit language as to the actors addressed and the substantive content of their obligations).

[38]See, e.g., Security Council resolutions on Angola: resolution 785 (1992), paras. 6, 8 and 9, resolution 793 (1992), para. 4, resolution 811 (1993), paras. 2-4, resolution 864 (1993), paras. 6-9, 11, 14, 16, as well as the first preambular paragraph of section B; and on Afghanistan: resolution 1193 (1998), paras. 2, 6-9, 14-16; resolution 1265 (1999), paras. 1-3, 5, 9, 10; resolution 1333 (2001), paras. 1-3.

[39]See, in particular, Article 25 of the Charter.

[40]J. Frowein and N. Krisch, "Introduction to Chapter VII", in B. Simma *et al.* (eds.), *The Charter of the United Nations: A commentary*, Vol. I, p. 716, MN 45.

29. All this shows that the Security Council can bind non-State actors. A related but different question is how this should be done. There is nothing to suggest, as claimed by the United Kingdom, that the only way to do so is to use explicit language both with regard to the actors to be bound and the substance of their obligations[41]. Rather, it is both prudent and in accordance with the Charter to leave this choice to the Security Council.

30. Mr. President, the Security Council has introduced binding obligations for all actors in Kosovo[42]. It should be recalled that already its resolutions preceding resolution 1244 (1999) contain obligations expressly addressed to Kosovo leaders and to the ethnic Albanian community in Kosovo. The authors of the UDI contend that these are only "political demands"[43]. But this is refuted by resolution 1203 (1998), in which the Security Council stated, in strong and unequivocal language, that it

> "[d]emands also that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo"[44].

Significantly, the Security Council recalled its previous resolutions on Kosovo when adopting resolution 1244 (1999)[45].

31. As far as resolution 1244 (1999) is concerned, it set out basic principles of a political solution to the Kosovo crisis, as well as the steps to reach such solution. The achievement of these goals is simply impossible without the involvement of the Kosovo Albanian community and without their compliance with the obligations set forth by the Security Council. For this reason, resolution 1244 (1999) contains both specific and general obligations binding on the Kosovo Albanians or certain of their organizations. A specific obligation is the requirement that "the KLA and other armed Kosovo Albanian groups end immediately all offensive actions. . ."[46].

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[41]See Written Comments of the United Kingdom, para. 22.

[42]See the Written Statements of Serbia, para. 505 *et seq.*; Argentina, para. 116 *et seq.*; Romania, para. 14; Russia, paras. 24, 26, 72; Spain, para. 66 *et seq.*; and Written Comments of Serbia, para. 375 *et seq.*; Cyprus, para. 18.

[43]Further Written Contribution of the authors of the UDI, para. 5.72.

[44]Security Council resolution 1203 (1998), para. 4.

[45]Security Council resolution 1244 (1999), preambular paragraph 2.

[46]*Ibid.*, para. 15.

32. The general obligations may be deduced from determinations made by the Security Council, which *inter alia* concern the principles of a political solution for Kosovo and of a political process that should lead to such a solution, as well as the creation of international civil and security presences and their responsibilities. For example, the Security Council's designation of the principles and requirements on which to base a political solution to the Kosovo crisis, contained in paragraph 1 of the resolution, must be binding on all parties, including the Kosovo Albanians. It would simply make no sense to bind the States concerned, including the FRY, but not one of the two main parties to the conflict who is also a party in the process of finding a political solution to the crisis.

33. Similarly, when the Security Council decided that an international administration be established in Kosovo[47], this *a fortiori* meant that all individuals in Kosovo must comply with this determination and, consequently, must co-operate with the United Nations administration and comply with its decisions.

34. Mr. President, to contend that these determinations are not binding on all relevant actors, including the Kosovo Albanian community, is to jeopardize the fulfilment of resolution 1244 (1999) and would clearly be contrary to the purpose for which it was adopted. It would also unduly restrain the powers of the Security Council under the Charter.

35. Both the Security Council and its Member States have indeed confirmed that resolution 1244 (1999) created obligations binding on all relevant actors, including the Kosovo Albanians. As the United Kingdom representative pointed out at the time of its adoption, "[t]his resolution applies also in full to the Kosovo Albanians"[48]. Subsequent practice of the Security Council confirms this as well[49]. For example, in its presidential statement of 24 May 2002, the Security Council called on Kosovo's elected leaders "to focus their attention on the urgent matters for which they have responsibility, in accordance with resolution 1244 (1999) of 10 June 1999 and the Constitutional Framework"[50]. This clearly indicates that Kosovo's leaders were regarded by

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[47]Security Council resolution 1244 (1999), para. 10.

[48]UN doc. S/PV.4011, 10 June 1999, p. 18 (Mr. Greenstock).

[49]For more, see Written Comments of Serbia, paras. 381-386.

[50]UN doc. S/PRST/2002/16, 24 May 2002.

the Security Council as having obligations under both documents. Of particular significance in the context of the present proceedings is the fact that the Security Council has specifically and repeatedly emphasized the obligation of the Kosovo Albanian leaders to respect the final status provisions in resolution 1244 (1999)[51]. It is therefore beyond doubt that the Security Council understood this resolution as imposing obligations on all actors, including the Kosovo Albanians and their leaders.

36. This interpretation is shared by the Secretary-General, who in a 2003 report stated that "[a]ll local leaders should adhere strictly to resolution 1244 (1999) and the Constitutional Framework"[52]. The same approach is also followed by the Special Representative of the Secretary-General for Kosovo, as is evident, for example, from the Constitutional Framework for Kosovo[53].

37. It is therefore clear that Security Council resolution 1244 (1999) imposes obligations on non-State actors, including the authors of the UDI, regardless of how they are characterized — be it as the Provisional Institutions of Self-Government, or Kosovo's elected leaders or any other group of individuals in Kosovo.

38. In addition, all actors in Kosovo are bound by UNMIK regulations. As has already been discussed in Serbia's Written Statement, the UDI violates the Constitutional Framework for Kosovo and other relevant UNMIK regulations in various ways[54]. In order to avoid this inevitable conclusion, the authors and the States supporting them submit two arguments. First, they claim that the UDI is not illegal because the relevant United Nations organs allegedly acquiesced to it and this will be dealt with by my friend and colleague Professor Zimmermann. The second argument is that the Constitutional Framework and other UNMIK regulations constitute domestic, not

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[51]See UN doc. S/PRST/2001/27, 5 Oct. 2001 and UN doc. S/PRST/2001/34, 9 Nov. 2001.

[52]Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN doc. S/2003/421, 14 Apr. 2003, para. 55. For more, see Written Comments of Serbia, paras. 387-388.

[53]Constitutional Framework for Kosovo, Arts. 1.4. (Kosovo shall be governed in accordance with resolution 1244 (1999) and the Constitutional Framework) and 2 *(a)* (Provisional Institutions of Self-Government must exercise their responsibilities in accordance with these two documents).

[54]See Written Statement of Serbia, para. 866 *et seq.*

international law and, hence, the UDI has not violated international law[55]. And I will now turn to that argument.

39. Mr. President, it is, I hope, uncontroversial that UNMIK is a subsidiary body of the United Nations[56] and that regulations adopted by UNMIK are acts emanating from a United Nations subsidiary body. This means that these regulations are, by their very origin, of an international nature. Further, the Special Representative of the Secretary-General was empowered to issue these regulations by the Security Council exercising its Chapter VII powers, and not by any local authority. This means that their binding force also derives from the Security Council. Therefore, both as regards their origin and as regards their binding force, UNMIK regulations possess an international nature.

40. It is not contested that UNMIK regulations operate mainly at the local level of Kosovo. But in this, they are not dissimilar from other international legal instruments, which unquestionably may directly create rights and obligations for non-State actors[57].

41. Scholars also agree that UNMIK regulations and acts of other international administrations are international acts and, as such, form a part of international and, specifically, United Nations law. At the same time, they point out that these acts also form part of the domestic legal order of the territory in question[58]. But their dual character does not mean, of course, that acts of international administrations are not part of international law. Indeed, no one has suggested that this was the case, except the authors of the UDI and three States that support their position[59].

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[55]Further Written Contribution of the authors of the UDI, paras. 5.66, 5.73 and 6.34; Written Comments of the United States, pp. 39-42; Written Comments of the United Kingdom, para. 32; Written Comments of the Netherlands, para. 2.3.

[56]See Arts. 7 and 29 of the United Nations Charter.

[57]See, e.g., common Art. III of the 1949 Geneva Conventions.

[58]See M. Ruffert, "The Administration of Kosovo and East-Timor by the International Community", 50 *ICLQ* (2001) 613, p. 623; M. Bothe and T. Marauhn, "The UN Administration in Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration", in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* 217, pp. 228-229; L. von Carlowitz, "UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination", 41 *Archiv des Völkerrechts* (2003) 336, p. 341; E. de Wet, "The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law", 8 *Max Planck UNYB* (2004), p. 331; R. Wilde, "International Territorial Administration and Human Rights" in N. White and D. Klaasen (eds.), *The UN, Human Rights and Post-Conflict Situations* (2005), pp. 167 *et seq.*; C. Stahn, *The Law and Practice of International Territorial Administration* (2008), pp. 650-651; B. Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (2008), p. 335.

[59]Further Written Contribution of the Authors of the UDI, paras. 5.66, 5.73 and 6.34; Written Comments of the United States, pp. 39-42; Written Comments of the United Kingdom, para. 32; Written Comments of the Netherlands, para. 2.3.

It is only the United States that makes a more developed argument in this regard, but their argument assumes that UNMIK regulations must be domestic law because they operate at the domestic level, replace existing laws and regulate local matters[60]. However, this description, which is not inaccurate as much as it is incomplete, misses the main point: UNMIK regulations are issued by an international authority — a United Nations subsidiary organ — and they draw their binding force from an international act — a binding Security Council resolution and, ultimately, the United Nations Charter. Therefore, they are international law, while also functioning as local law applicable to Kosovo.

42. Mr. President, in conclusion, let me summarize my argument:

— first, the Court is competent to deal with the General Assembly's request for an advisory opinion in the present case and there are no reasons why this opinion should be refused;

— secondly, the authors of the UDI are the Provisional Institutions of Self-Government in Kosovo;

— thirdly, regardless of how we characterize the authors of the UDI, they are bound by Security Council resolution 1244 (1999) and UNMIK regulations, which have been violated by the UDI;

— and finally, UNMIK regulations are part of international law, and the UDI must also be judged against their provisions.

43. Mr. President, distinguished Members of the Court, with this I conclude my presentation. I would like to thank you for your kind attention. Mr. President, I would appreciate it if you could call Professor Zimmermann to the Bar.

The PRESIDENT: Thank you Mr. Djerić. I now give the floor to Professor Zimmermann.

[60]Written Comments of the United States, pp. 39-42.

Mr. ZIMMERMANN:

THE UNILATERAL DECLARATION OF INDEPENDENCE VIOLATES SECURITY COUNCIL RESOLUTION 1244 (1999)

1. Mr. President, Members of the Court, let me start by, once again, expressing my honour to appear before this Court. This is even more true so since these proceedings are of utmost relevance for the functioning of the overall system of the United Nations and its ability to maintain and restore international peace and security.

I. Introduction

2. Mr. President, this case is primarily, but not exclusively, about Kosovo. Before this Court lies also the question whether the international status of a territory subject to United Nations administration, established by the Security Council acting under Chapter VII, can unilaterally be altered.

3. The Unilateral Declaration of Independence (UDI) does not constitute the first instance where the authority of the Security Council has been challenged by unilateral action related to Kosovo.

4. It was already in 1999 that unilateral military action was undertaken without Security Council approval. It was resolution 1244 which, after more than 70 days of unilateral military action, finally restored the authority of the Security Council.

5. Yet, what you will hear from some other participants is the proposition that you should interpret resolution 1244 as having opened the path for renewed unilateral action without Security Council approval or endorsement — unilateral action taken by one party to the conflict and supported by those very States that had acted unilaterally in 1999 in the first place.

6. It is up to this Court, as the principal judicial organ of the United Nations, to decide whether this really constitutes a tenable interpretation of resolution 1244 — Serbia respectfully submits that it does not.

7. More specifically, I will now show that, in addition to running counter to general international law, the UDI also violates resolution 1244 because,

— *first*, resolution 1244 affirmed the territorial integrity of the FRY and clearly precluded the unilateral separation of Kosovo;

— *second*, an international legal régime was established by resolution 1244 and such régime cannot be unilaterally destroyed;

— *third*, the UDI cannot amount to the final settlement envisaged by resolution 1244;

— *fourth*, the UDI encroaches upon the prerogatives of the Security Council under the Charter;

and finally

— that the status-neutral approach of the United Nations Secretary-General vis-à-vis the UDI does not, and cannot, amount to any form of acquiescence.

II. Resolution 1244 precludes the unilateral separation of Kosovo

8. Mr. President, let me start by demonstrating that resolution 1244 precludes the unilateral separation of Kosovo.

9. Members of the Court, on 11 June 1999, *one single day after the adoption of resolution 1244*, only one single day thereafter, the Security Council adopted resolution 1246 pertaining to the international legal status of East Timor. Operative paragraph 1 of said resolution provided for

> "a popular consultation . . . in order to ascertain whether the East Timorese people accept . . . a special autonomy for East Timor within the . . . Republic of Indonesia or reject the proposed special autonomy for East Timor, *leading to East Timor's separation from Indonesia*"[61].

10. In sharp contrast thereto, no such provision had been inserted in resolution 1244. This alone is telling. And it was done on purpose — on purpose because the inclusion of any clause providing for the possibility of a unilateral separation of Kosovo from the FRY, now Serbia, explicitly or otherwise, would not have mastered sufficient support in the Security Council.

11. What is even more striking, rather than providing for a right of Kosovo to separate from Serbia, resolution 1244 formally reaffirmed the territorial integrity of Serbia. It thus precluded the possibility of Kosovo unilaterally seceding. Instead, resolution 1244 provided for a political process to determine the future status of Kosovo by way of an agreed settlement to be endorsed by

[61] Emphasis added.

the Security Council. No hint of a referendum, not even by way of cross-reference, and no reference to the right of self-determination can be found in resolution 1244.

12. Yet, the authors of the UDI, as well as the minority of States supporting their claim, want the Court to believe that the Security Council, by adopting resolution 1244, wanted to depart from fundamental rules of international law, which underpin the entire system of international law[62], namely, the guarantee of the territorial integrity and sovereignty of States. And they want you to believe that the Council has done so without even expressly saying it.

13. Given the fundamental nature of the principle of territorial integrity in international law, which will be further addressed by my friend and colleague Professor Shaw, there was no need for the Security Council, when adopting resolution 1244, to *decide* that Serbia's territorial integrity must be safeguarded. Rather, the Council — firmly basing itself on general international law — simply *reaffirmed* the sovereignty and territorial integrity of the FRY, now Serbia.

14. It should thus come as no surprise that the reaffirmation of Serbia's territorial integrity is to be found in the preamble of resolution 1244, just as, to provide but one example, the guarantee of the territorial integrity of Iraq is also frequently referred to in preambular paragraphs of various Security Council resolutions[63].

15. It is against this background that one has to consider the alleged neutrality of resolution 1244 as to the final status of Kosovo[64]. The starting-point is that there is no right to unilaterally secede under general international law. The Security Council took note of that prohibition by reaffirming Serbia's territorial integrity and accordingly its title to the territory in question. Had the Security Council really wanted to provide otherwise, it would have been obliged to do so explicitly. Yet, it did not.

16. I will now further demonstrate that the adoption of the UDI also violated the legal régime set up by Security Council resolution 1244 (1999).

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[62]See Written Comments of Serbia, paras. 412, 228 *et seq*.; Written Statement of Serbia, Chaps. 6 and 8.

[63]See Security Council resolutions 1500 (2003), 1546 (2004), 1557 (2004), 1619 (2005), 1700 (2006), 1770 (2007), 1790 (2007) and 1830 (2008). See further the Written Statement of Serbia, para. 473; Written Comments of Serbia, para. 413.

[64]See Further Written Contribution of authors of the UDI, paras. 5.37 *et seq*.; *ibid.*, para. 9.10; Written Comments of United Kingdom, paras. 18 *et seq*.

III. The UDI violates the legal régime set up by Security Council resolution 1244 (1999)

17. Mr. President, Members of the Court, under resolution 1244, and as explicitly confirmed by UNMIK regulations adopted by the Special Representative of the Secretary-General, the supreme legislative and executive authority with respect to Kosovo is vested in UNMIK. It is exercised by the Special Representative of the Secretary-General.

18. The Constitutional Framework creating the Provisional Institutions of Self-Government reaffirmed the supreme legislative and administrative authority of the Special Representative in and throughout Kosovo. It also confirmed that said Provisional Institutions of Self-Government could not take action that are inconsistent with resolution 1244 or the Constitutional Framework, thus also rendering the UDI illegal under the legal régime provided for in resolution 1244. Accordingly, for this reason alone, the UDI must be considered not to be in accordance with international law.

19. Several contributions have made attempts to circumvent this obvious hurdle. All of them can however be easily refuted. For one, my friend and colleague Vladimir Djerić has already demonstrated that, indeed, the UDI was adopted by the Provisional Institutions of Self-Government, and not by some mysterious "constituent body".

20. Besides, I will subsequently show that the UDI cannot amount to the final settlement required to bring to an end the interim period provided for in resolution 1244.

21. Accordingly, the UDI not only violates general international law and resolution 1244 as such, but also runs counter to the legal framework created to implement resolution 1244, and, in particular, the Constitutional Framework setting up the Provisional Institutions of Self-Government.

22. This brings me to my next point, namely, the notion of "political settlement", as provided for in resolution 1244.

IV. The notion of "political settlement" as contemplated in resolution 1244

23. Mr. President, resolution 1244 contains a requirement that any change to the international status of Kosovo, as forming part of the Republic of Serbia, must be part of a

"political settlement"[65]. Yet, "the terms of any eventual settlement must be mutually acceptable to both sides" — must be mutually acceptable to both sides.

24. These are the words of then United States Ambassador Holbrooke[66]. Serbia could not agree more. And it is also obvious that, pending such a mutually acceptable settlement to be endorsed by the Security Council acting under Chapter VII, the *status quo ante* and Serbia's title to territory remain unaltered.

25. It is quite telling that certain States have fundamentally modified their own previous position, although the aims of the representatives of the Kosovo Albanians were well-known ever since the early 1990s and although it was obvious that reaching such a settlement, including reaching consensus in the Security Council, would not be easy. Indeed, the Security Council was aware of it when it adopted resolution 1244 and it was for this very reason that the validity of resolution 1244 is not limited in time[67].

26. States supporting the UDI now argue that the unilateral declaration of independence, even one not endorsed by the Security Council, was a possible scenario contemplated in resolution 1244. If that was true, one might wonder why the Security Council had then envisaged negotiations between the parties in the first place, if one of the parties could terminate them at will and why it had provided that the legal régime set up by resolution 1244 was to remain in place until such time as the Security Council terminated it?

27. One might also ask why the Security Council had not spelled out the option of a UDI, as it had done in the resolution I mentioned at the beginning of my presentation, if indeed, as claimed, the Security Council had wanted to provide for such a possibility?

28. It should also be recalled that the Security Council had deliberately used the term "settlement" to describe the outcome of the envisaged political process, which term it had borrowed from Article 2, paragraph 3, and Article 33 of the Charter, which provisions in turn themselves exclude unilateral action.

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[65]Security Council resolution 1244 (1999), operative para. 11 *(c)*, *(f)*.

[66]Mr. Holbrooke (United States), UN doc. S/PV.4258, 18 Jan. 2001, p. 9, Dossier No. 96; see also Written Comments of Serbia, para. 449.

[67]Security Council resolution 1244 (1999), operative para. 19; see also Written Comments of Serbia, paras. 414 *et seq.*; Written Statement of Serbia, paras. 799 *et seq*.

29. Besides, the term "settlement" is commonly used to describe solutions reached by common accord[68]. There is no hint whatsoever of an indication that the Security Council had a different meaning of the term "settlement" in mind when it used it in resolution 1244.

30. Given this ordinary meaning of the term "settlement", there was accordingly no need for the Security Council to further underline the necessity to reach a mutually acceptable solution by additionally also using other terms such as "agreement".

31. The fact that the Security Council, in other parts of resolution 1244, uses such different language[69] is simply due to the fact that the Security Council, by using the term "settlement", had wanted to stress the need to reach a *mutual* acceptance by both sides, Serbia and the representatives of the Albanian population of Kosovo, while the terms "agreement of the FRY" or "FRY's agreement", as used in resolution 1244 elsewhere, refer to the acceptance by one party only.

32. Moreover, it is only such an interpretation that is in line with the overall object and purpose of resolution 1244, namely, to provide for a solution based on respect for international law, in particular respect for the territorial integrity of States, while at the same time being acceptable to both sides. It is indeed only such a mutually acceptable solution endorsed by the Security Council that will, on the long term, guarantee enduring peace and stability in the region. It is only such an agreed solution that is able to safeguard fundamental human rights for *all* members of the population of Kosovo, including minorities.

33. Finally, the term "settlement", unlike the term "agreement", also indicates the comprehensive and long-lasting character of the solution to be reached.

34. Accordingly, given that no political settlement has been reached, no institutions established under a final settlement exist either. Moreover, under paragraph 11, littera *(f)* of resolution 1244, any transfer of authority from the provisional authorities of self-government to institutions established under a political settlement would have to take place under the auspices of UNMIK. Yet, UNMIK has not taken any step providing for such transfer after it had become clear that the plan proposed by Special Representative Ahtisaari would not be endorsed by the Security Council.

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[68]See Written Comments of Serbia, paras. 436 *et seq.*; Written Statement of Serbia, paras. 750 *et seq.*, 913 *et seq.*

[69]Security Council resolution 1244 (1999), preambular para. 9, operative para. 5.

35. It has been argued that any such interpretation would lead to a *de facto* veto of Serbia as to the content of the final settlement provided for in resolution 1244[70]. If that were to be true, how could one then qualify the right the authors of the UDI claim to have? One could refer to this claim, to their claim, as some kind of a "super-veto" to not only prevent a certain solution, but even to unilaterally impose their preferred option on both, the State that has title to the territory in question, namely, Serbia, and the Security Council.

36. It should also be recalled that the international community has, over many years, undertaken tireless efforts to settle certain territorial problems on the basis of international law, Cyprus and Palestine being examples at hand. The international community, led by the United Nations and its organs, including this very Court, has done so without giving in to unilateral attempts to create a *fait accompli* on the ground, and the Court's Opinion in the *Wall* case (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*) being one of the most prominent and important examples.

37. Indeed, one should not be influenced by attempts to threaten the Court by an open or hidden assumption that a solution based on international law would be unworkable, or that one should take into account so-called "realities" — and even less so "realities" created in violation of general international law, the Charter and resolution 1244.

38. Following the very logic of the authors of the UDI, it may become possible to argue that in the situations to which I have just referred to, namely, Palestine or Cyprus, the respective situation has similarly reached a deadlock and that the international community should accordingly give in to so-called "realities on the ground" — just as the authors of the UDI and its supporters want this Court to accept the so-called "reality" allegedly created by the UDI. The dangers of such proposition are self-evident I believe.

39. Mr. President, it has been argued that the negotiations required by resolution 1244 have run their course. Let me just make two points in that regard on both procedure and substance.

40. As far as procedural matters are concerned, it is the Security Council that has started the negotiation process under its auspices. The Council has not made any determination that the

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[70]See further Written Contribution of the Authors of the UDI, paras. 5.19 *et seq*.; Written Comments of the United Kingdom, para. 17.

process has come to an end, one way or the other. Indeed, while Special Representative Ahtisaari and the Secretary-General have taken certain positions as to the chances of future negotiations, they do not have the authority to make binding and final determinations in that regard.

41. In particular, Special Representative Ahtisaari only had a limited mandate to *mediate* in the political process and not to *arbitrate*. While he had a mandate to make a *proposal*, a recommendation, he did not have one to render decisions.

42. Besides, it is well-known that negotiations were still undertaken after the recommendation made by Special Representative Ahtisaari and there are no obstacles to start them anew with a fresh impetus — in particular after the parties have received legal guidance from your advisory opinion, which Serbia will fully take into account in its approach to bring about a mutually acceptable solution.

43. Serbia also trusts, and indeed expects, that all other relevant actors, including the Security Council and its members, will similarly be guided by the outcome of these proceedings, including with regard to the continued role of UNMIK vis-à-vis the local authorities in Kosovo.

44. It has to be noted, however, that such renewed negotiations must not only be based on international law, but must also be facilitated in an unbiased manner. With all due respect to the actors involved, it was certainly not helpful, to say the least, for the mediator appointed by the Secretary-General to refer publicly to Serbia as a thief that had stolen Kosovo from the Albanian Kosovo population, as if Serbia did not have a valid title to the territory ever since 1913. Indeed, Special Representative Ahtisaari is on public record for having, *inter alia*, stated the following, and let me quote:

> "Let me give you an example how . . . I look at the Kosovo negotiations . . . [L]et's take an example, that Serbia is like a thief who has stolen the wallet from Kosovo. And if I am a mediator, I am not advising them that could the Serbian thief actually decide himself how much money he wants to give to the fellow whose wallet he'd stolen . . . he has to give the whole damn wallet to you and then, most probably, go to jail for what he did. . . . Everyone knew that independence was coming."[71]

Just imagine the havoc that such an approach might cause in other situations!

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[71] Interview with Mr. Ahtisaari, CNN, 10 December 2008, available at: http://www.youtube.com/watch?v=z61yrrRoOmw (visited on 23 Nov. 2009); see Written Comments of Serbia, para. 108 for the full text of the interview.

45. It is also telling that the then President of the United States, George W. Bush, publicly declared that the only possible outcome of the ongoing negotiation process could be the independence of Kosovo[72]. He did so at a moment when a further round of negotiations had not even started — negotiations which the United States and others now call a bona fide attempt to leave no stone unturned in the search for a mutually acceptable outcome[73].

46. As to the substance of the negotiations, let me reiterate that Serbia has offered the highest degree of autonomy to Kosovo, framed in accordance with models generally perceived as having been successful and legitimate in various regions of the world. It is also obvious that any negotiated solution would lead to the necessary amendments to the Serbian constitution, which would mean that such solution for Kosovo would be constitutionally entrenched[74] in addition to being internationally guaranteed.

47. That brings me to my next point — namely, the role of the Security Council.

V. The final settlement for Kosovo and the role of the Security Council

48. Mr. President, it was the Security Council that reinstated its primacy for the maintenance of international peace and security after the unilateral use of military force against the FRY by adopting resolution 1244.

49. It was the Security Council which, acting under Chapter VII, adopted resolution 1244 and created the current legal status of Kosovo.

50. It was the Security Council that decided that resolution 1244 will continue to be in force until the Council decides otherwise[75].

51. It was the Security Council that decided to remain actively seised of the matter[76].

52. It was the Security Council that started the political process for the settlement of the future status of Kosovo[77].

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[72]The President's News Conference With Prime Minister Sali Berisha of Albania in Tirana, Albania, June 10, 2007, available at: http://www.presidency.ucsb.edu/ws/index.php?pid=75342; see Written Comments of Serbia, para. 113.

[73]See, e.g., Written Statement of the United States, p. 82; Written Statement of the United Kingdom, para. 3.33 *et seq.*; Written Statement of Germany, p. 27. See, for further details, the Written Comments of Serbia, para. 100.

[74]Written Comments of Serbia, para. 118.

[75]See Security Council resolution 1244 (1999), operative para. 19.

[76]See Security Council resolution 1244 (1999), operative para. 21.

53. And it is also for the Security Council to decide when this process has come to an end and to then endorse the outcome of the process.

54. As the Special Representative of the Secretary-General stated with regard to the final status of Kosovo:

> "Its future status is open and will be decided by the UN Security Council. Any unilateral statement in whatever form which is not endorsed by the Security Council has no legal effect on the future status of Kosovo."[78]

— a position that was subsequently reiterated time and again[79].

55. In the same vein, the Head of the Mission of the Security Council stated, on behalf of the Council, after a visit to the area, in unequivocal terms:

> "[n]o unilateral steps will determine Kosovo's final status. The United Nations Security Council will, in consultation with all concerned, ultimately determine Kosovo's final status."[80]

56. Let me note in particular that none of these statements[81] was, in one way or the other, made subject to certain conditions or limited in its scope, temporally or otherwise. Last but not least, they were made specifically in light of the well-known aspirations of the Kosovo Albanian leadership to strive for independence at all costs and in disregard of international law. These statements were also made in view of the Kosovo Albanian leadership's willingness to eventually circumvent the competences of the Council under the Charter, should they not be able to secure a settlement with Serbia and the required majority in the Security Council.

57. Indeed, as late as 2007, attempts were made to reach consensus in the Security Council and to bring about a solution in line with the prerogatives of the Council under the Charter. Our learned friends representing those States which made these attempts in 2007 now try to downplay their own efforts. They simply do so because their proposals were not accepted by the Security Council.

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[77]See Security Council resolution 1244 (1999), operative para. 11 *(e)*.

[78]Statement by Michael Steiner, Special Representative of the Secretary-General of 7 Nov. 2002, Dossier No. 187; also cited by Cyprus in its Written Comments, para. 6.

[79]See Written Comments of Serbia, para. 460.

[80]Report of the Security Council Mission to Kosovo and Belgrade, Federal Republic of Yugoslavia, 14 to 17 Dec. 2002, UN doc. S/2002/1376, 19 Dec. 2002, Ann. I, p. 17.

[81]For further examples see the Written Statement of Serbia, paras. 799 *et seq*.

58. Let me pause for a second and consider what these very States would say about their own 2007 draft resolution, which was supposed to provide for a Security Council endorsement of a UDI and the Ahtisaari plan in particular, had it been adopted.

59. You would now certainly hear from them that such a resolution had been necessary to bring about a change in the status of Kosovo and that it had been fully in line with the prerogatives of the Council to do so. Yet, the draft resolution was not adopted by the Council and indeed not even formally tabled because they knew it would not receive the necessary majority.

60. Mr. President, let me conclude this part of my presentation with a brief reflection. In recent years the Security Council, acting under Chapter VII, has provided for the administration of certain territories directly by the United Nations. Such United Nations administration has proven to constitute an important mechanism to maintain or restore international peace and security in a given region.

61. On all occasions, the respective territorial States have given their consent to such United Nations administration. The consent of Croatia with regard to Eastern Slavonia and the consent of the FRY with regard to Kosovo are two pertinent examples. It would constitute a most dangerous precedent not only with regard to general international law, but also with regard to the system of collective security provided for by the Charter, if States were now to learn that the setting-up of such a United Nations administration constitutes nothing but a first step in a process of secession by the territory concerned, otherwise not provided for in international law.

62. Indeed, one might wonder whether both, the relevant members of the Security Council, as well as the individual States concerned, would in the future accept such solutions, were the Court to tolerate that such United Nations-led administration is nothing but a road towards secession.

63. Let me now deal with my last point, namely, the allegation that the reactions of the United Nations and its organs can be perceived as a tacit approval of the UDI.

VI. The alleged acquiescence of the United Nations

64. Mr. President, let me start with an obvious remark. Everybody in this Great Hall of Justice is well aware that there is no consensus in the international community on the legality or,

rather, illegality of the UDI. Indeed, the very request made by the General Assembly, as well as the various written and oral statements made and to be made by Member States, including all permanent members of the Security Council, are proof of this disagreement, including disagreement on the interpretation of resolution 1244.

65. In such a situation, where there was a lack of consensus within the Security Council and a lack of legal guidance, the Secretary-General and his Special Representative decided to take a status-neutral approach[82]. However, they remain, as everyone else, bound by resolution 1244.

66. Accepting the surprising thesis that this approach amounts to a tacit approval of the UDI would clearly be at odds with this express position of "strict status neutrality", which in fact is a decision not to take a position pending further guidance by the Security Council. As has already been discussed, the Security Council has not taken a position on the UDI due to political disagreements within the Council. This cannot possibly be interpreted as acquiescence. To contend otherwise would lead to almost absurd results, as illustrated by the following example.

67. Let me, *arguendo*, apply the argument to a situation where the Council is similarly not in a position, given its composition and the voting requirements under the Charter, to condemn an illegal use of force, in particular, where one of the permanent members itself is involved, in one way or the other, in such use of force. Would a failure to condemn such use of force mean that the Council has acquiesced in it? Certainly not.

68. Accordingly, the mere inaction and non-condemnation of the UDI may neither be perceived as amounting to acquiescence because the organs of the United Nations have clearly not accepted the legality of the UDI in any relevant manner.

VII. Conclusion

69. Mr. President, Members of the Court, let me summarize:

70. Resolution 1244 does not recognize a right of secession for Kosovo. Instead it reaffirms the territorial title of the FRY, now Serbia. Accordingly, the UDI cannot amount to the final settlement envisaged by resolution 1244.

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[82]Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr. Boris Tadić, UN doc. S/2008/354, 12 June 2008, Ann. I, Dossier No. 88; see also the Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN doc. S/2008/354, 12 June 2008, para. 19.

71. Any final settlement has to be agreed upon by the parties under the auspices of the Security Council by way of negotiations. This excludes any form of non-consensual independence for Kosovo, not endorsed by the Security Council.

72. Only the Security Council may make binding determinations as to the conclusion of the final status process.

73. The illegality of the UDI has not been remedied by any alleged form of acquiescence of United Nations organs. While the Secretary-General takes a status-neutral approach due to the lack of guidance, the Security Council itself was not and is not in a position to either welcome or condemn the UDI, due to divergent views within the membership of the Council.

74. Let me once again stress that resolution 1244 reinstated the role and primacy of the Security Council with regard to the maintenance of international peace and security after a unilateral military action. This would be reversed by accepting the legality of the UDI adopted by one side without any form of Security Council endorsement and would at the same time fundamentally challenge the very foundations of the system of collective security set up by the Charter.

75. Doing so would also amount to awarding actors who were unwilling to continue with a negotiation process in good faith, because they knew they were supported by a certain number of States, and in particular by those States that had unilaterally used military force in 1999 and were willing to disregard both the principle of territorial sovereignty, as reaffirmed in resolution 1244, as well as disregard the Council's pivotal role under the Charter.

76. The rules of international law which are applicable to situations where the Council, acting under Chapter VII of the Charter, provides for the temporary administration of a part of the territory of a Member State by the United Nations must uniformly apply to all States and in all relevant situations. Otherwise the acceptability of such temporary administration for both, the Security Council and the States concerned, would be significantly endangered. Yet, this can only be done if the alleged possibility of unilateral secession, as claimed by the authors of the UDI, is rejected and by confirming that the UDI is not in conformity with international law.

77. Mr. President, honourable Members of the Court, this brings me to the end of my presentation. I very kindly thank you for your attention and that might eventually be the appropriate time for the usual break.

The PRESIDENT: Thank you, Professor Zimmermann for your presentation. Indeed I feel that we are now just in the middle of the morning session and I wish to propose that the Court is going to have a short recess of 15 minutes and then we are going back to the presentation by Professor Shaw.

The Court adjourned from 11.35 to 11.55 a.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Shaw.

Mr. SHAW:

THE UNILATERAL DECLARATION OF INDEPENDENCE VIOLATES THE GENERAL INTERNATIONAL LAW PRINCIPLE OF RESPECT FOR TERRITORIAL INTEGRITY

1. Mr. President, Members of the Court, it is indeed a pleasure and an honour to be addressing the Court once again and this time on behalf of the Republic of Serbia.

2. This request for an advisory opinion centres upon resolution 1244. That is indisputable. But that is not all. The matter under consideration very much concerns one of the key principles of international law and that is the principle of respect for the territorial integrity of States. That makes these proceedings of interest and concern for so many States, a significant number of whom will be represented before the Court during the next ten days. Any real or perceived weakening of the principle of territorial integrity as a consequence of these proceedings would be a source of considerable apprehension to the very many States in the world who face a challenge from within and from without to their territorial integrity. The Court's advice will, therefore, be eagerly awaited and of significant weight and consequence.

3. My submissions to you will make the following points. First, the principle of respect for the territorial integrity of States is a foundational principle of international law. Secondly, this general principle of international law now applies to non-State entities. Thirdly, the principle was

reaffirmed in the process leading up to and including resolution 1244. Fourthly, the principle of territorial integrity cannot be rendered contingent by an argument based on a highly questionable interpretation of resolution 1244. Fifthly, an illegal act cannot be converted into a legal act by subsequent political activity. Finally, and in any event, the purported State of Kosovo still fails to satisfy the required criteria of statehood.

I. The principle of territorial integrity

4. Mr. President, Members of the Court, the obligation to respect the territorial integrity of States flows from the sovereignty and equality of States, the very cornerstones of international law[83]. Few principles in present-day international law have been so firmly established as that of territorial integrity which requires that the very territorial structure and configuration of a State be respected. In addition to constituting one of the key elements in the concept of sovereign equality, territorial integrity has been seen as essential in the context of the stability and predictability of the international legal system as a whole.

5. The principle of territorial integrity has been comprehensively affirmed, confirmed and reaffirmed in a long series of international instruments, binding[84] and non-binding, ranging from United Nations resolutions of a general[85] and of a specific character[86] to multilateral, regional[87] and bilateral agreements. There can be no doubting the legal nature of this norm, and the centrality of it in the international legal and political system. This Court has indeed recently referred to "the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty" (case concerning *Sovereignty over Pedra Branca/Pulau*

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[83] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I. C. J. Reports 1949*, pp. 4, 35.

[84] See, e.g., Article 2 of the United Nations Charter.

[85] See, e.g., the Colonial Declaration, General Assembly resolution 1514 (XV); the Declaration on Principles, General Assembly resolution 2625 (XXV); the Definition of Aggression, General Assembly 3314 (XXIV) and the United Nations Millennium Declaration, General Assembly resolution 55/2 affirmed in the World Summit Outcome, General Assembly resolution 60/1, para. 5.

[86] For other examples, see Written Statement of Serbia, para. 440 *et seq*.

[87] See, e.g., the Helsinki Final Act 1975; the Charter of the Commonwealth of Independent States 1992; and the Charter of the Organization of American States, as amended in 1967, 1985, 1992 and 1993. See Written Statement of Serbia, para. 440 *et seq*.

Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, para. 122)[88].

6. This has not been denied by States in these proceedings. No State has impugned the principle as such. On the contrary, many of them have explicitly confirmed its existence and importance[89]. The United Kingdom, for example, in so doing, admitted that "international law favours the territorial integrity of States in the interests of stability and the peaceful settlement of disputes, including disputes . . . within a State"[90]. However, some States and the authors of the UDI maintain that the principle only has application as between States[91]. Whatever the position may have been in the past, current international law now establishes the contrary.

II. The principle of territorial integrity applies to non-State entities as well as to States

7. The authors of the UDI and some States have sought to divert the argument by claiming that the principle of territorial integrity does not guarantee the permanence of a State as it exists at any particular moment[92] and that therefore the principle cannot operate to preclude declarations of independence made by peoples or groups within existing sovereign States[93]. It is simply limited to protection from coercive action and interference of other States[94]. The Republic of Serbia agrees that the principle does not freeze the territorial configuration of a State at any given moment. Consensual change is always possible. The relevant parties may agree to alter the territorial delineation of a State. Nothing prevents that. That is what is meant by peaceful settlement of disputes by negotiation and agreement, a concept so central to international law that it may not be lightly discarded. A point some have forgotten.

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[88]See also the Supreme Court of Canada, *Reference Re Secession of Quebec* [1998] 2 *SCR* 217, para. 112.

[89]See Further Written Comments of Serbia, paras. 238-246.

[90]Written Statement of the United Kingdom, para. 5.11. See also Written Comments of the United Kingdom, para. 4.5.

[91]See, e.g., Written Statement of the United Kingdom, para. 5.9; Written Statement of Switzerland, paras. 55-56; Written Contribution of authors of the UDI, paras. 8.06, 8.19 and 9.02 and Further Written Contribution of authors of the UDI, para. 4.06.

[92]See, e.g., Written Statement of the United Kingdom, para. 5.9; Written Statement of France, paras. 2.6-2.8 and Written Statement of the United States of America, p. 69.

[93]See, e.g., Further Written Contribution of authors of the UDI, para. 4.06.

[94]*Ibid.*, para. 4.13.

8. Others appear to submit that contemporary international law does not deal directly with the non-State entities. Serbia maintains on the contrary that the principle of territorial integrity does apply to such entities and the argument proceeds essentially as follows. First, the definition of international relations in so far as the application of international law is concerned has widened to include civil wars, violations of humanitarian law, terrorism and the internal seizure of power[95]. Secondly, international law now increasingly addresses non-State entities directly. Even the authors of the UDI admit, rather reluctantly it may be said, that the Colonial Declaration "may perhaps be read as broadening the beneficiaries of the principle of territorial integrity so as to include not just the State but the people of the State"[96]. Whether it be resolutions concerning terrorism[97], non-proliferation of weapons of mass destruction and the means of their delivery[98], or resolutions dealing with specific internal conflicts, international practice now clearly regards non-State entities as direct subjects of international law. The classical structure of international law has changed and no State or other entity may seek now to cling to it in the face of established evolution. The clock may not be turned back.

9. Thirdly, recent practice has shown a number of examples where non-State entities within an existing State are directly addressed in the context of internal conflict and with regard to territorial integrity. Such examples show clearly that the international community recognizes how critical is the principle of territorial integrity and how the principle is deemed to apply not only to third States but also to internal groups, however designated. For reasons of time, we will refer only to a few situations and briefly.

10. Security Council resolution 787 (1992) in operative paragraph 3 called on "all parties and others concerned to respect strictly the territorial integrity" of Bosnia and Herzegovina and affirmed that "any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted"[99]. Resolutions with regard to, for example, the Democratic Republic of the

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[95]See Written Comments of Serbia, para. 254 and references contained therein.

[96]Further Written Contribution of authors of the UDI, para. 4.10.

[97]See, e.g., Security Council resolution 1822 (2008) and other resolutions cited in Written Comments of Serbia, para. 257, footnote 292.

[98]Security Council resolution 1540 (2004) and other resolutions cited in Written Comments of Serbia, paras. 259-260 and footnote 295.

[99]See further, Written Statement of Serbia, paras. 442-452.

Congo, Somalia and Sudan have also strongly reaffirmed the importance of the sovereignty and territorial integrity of those States faced with internal conflict and secessionist endeavours[100]. In other words, the international community now accepts that non-State entities and groups within sovereign States may be directly required to respect the territorial integrity of that State.

11. Fourthly, specific international and regional instruments concerning the protection of minorities and indigenous peoples have in terms stated that the rights of such groups must be achieved within the territory of the State in question and have further insisted that nothing in the instrument in question may be construed as permitting any activity contrary to, *inter alia*, the sovereign equality, the territorial integrity and political independence of States. This formulation appears in, for example, the Declaration on Minorities of 1992, the European Charter on Regional or Minority Languages[101] and Framework Convention for the Protection of National Minorities[102], while the recent United Nations Declaration on the Rights of Indigenous Peoples[103] refers explicitly in this context to States, peoples, groups or persons[104].

12. It is, therefore, simply incorrect to maintain that international law does not apply directly to non-State entities nor that the norm of territorial integrity is today limited to third States alone. Practice makes it very clear that such norm is now recognized as applying to non-consensual situations of internal conflict and secessionist attempts. This has been most recently recognized in the Report on the Conflict in Georgia of the Mission established by the Council of the European Union[105].

13. The argument has been made that the principles of territorial integrity and self-determination are co-equal principles with the question of priority to be decided on a case-by-case basis[106]. My colleague and friend Professor Kohen will address the principle of self-determination later this morning. I would simply make the point that the argument is, as a

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[100]See, e.g., resolutions 1756 (2007), 1771 (2007), 1766 (2007), 1772 (2007), and 1846 (2008); and resolution 1784 (2007). See also resolutions 1770 (2007) and 1830 (2008) with regard to Iraq, Written Statement of Serbia, paras. 459-63. Other examples may be seen in Written Statement of Serbia, para. 475 *et seq*.

[101]Art. 5.

[102]Art. 21.

[103]General Assembly resolution 61/295.

[104]Art. 46 (1).

[105]The Report of the Independent International Fact-Finding Mission, Sept. 2009, Vol. II, pp. 136-137.

[106]E.g., Further Written Contribution of authors of UDI, paras. 4.37-4.38.

matter of international law, incorrect. The principles of territorial integrity and self-determination fit together. Outside of the colonial and foreign occupation contexts, self-determination is expressed in the form of rights within the sovereign State in question. Otherwise, the international community would be faced with assertions of a right to secession that could predominate in law over the right of national unity and territorial integrity — and there is no international practice that supports that proposition.

14. But we need not restrict our consideration to the establishment of the general principle, for the question of Kosovo has been directly addressed by the international community and in ways demonstrating clearly that the principle of territorial integrity applies to the relevant communities of that area. To this specific affirmation, we now turn.

III. Reaffirmation of the principle of territorial integrity in the process leading up to and including resolution 1244

15. Mr. President, Members of the Court, Resolution 1244, the focus of these proceedings, cannot be seen in isolation, particularly in so far as respect for the territorial integrity of Serbia, in the form of the FRY, was concerned. Indeed, one of the constants of the whole process leading up to the adoption of resolution 1244 was the reaffirmation of the territorial integrity of the FRY. This cannot be ignored or minimized. It matters.

16. Security Council resolution 1160 (1998), for instance, specifically affirmed the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" and in operative paragraph 3, emphasized that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the FRY and an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration[107]. Resolution 1203 (1998) made it crystal clear that these obligations went beyond United Nations Member States, for it also demanded, Mr. President, demanded that "the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)". Both of these resolutions reaffirmed the territorial integrity of the FRY.

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[107]See also Security Council resolutions 1199 (1998), 1203 (1998) and 1239 (1999). See further Written Statement of Serbia, para. 504.

17. And so we come to resolution 1244. This part of our pleading concerns only the territorial integrity point. The Court has already heard our more general arguments. This resolution, to restate the obvious, reaffirmed the sovereign title of the FRY, while establishing an international presence to administer Kosovo. No one has argued that the intention or effect of resolution 1244 was to deprive the FRY of title to Kosovo and no party has denied that the sovereignty and territorial integrity of the FRY was explicitly reaffirmed[108].

18. Resolution 1244 commenced by recalling its previous resolutions[109], in each one of which, as we have seen, the Security Council had called for a political solution based on the territorial integrity of the FRY and autonomy for Kosovo and had demanded that the Kosovo Albanian leadership and community accept this. This process of reconfirmation is legally significant. Resolution 1244 itself also reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2". I shall return to these instruments.

19. In addition, preambular paragraph 11 reaffirmed "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo", thereby, of course, further confirming title of the FRY. Of course, the fact that such reaffirmations of territorial integrity are contained in preambular clauses is not unusual, as my friend and colleague Professor Zimmermann has already pointed out. In fact, extensive practice demonstrates it is very usual and no State has argued that this means, therefore, that the territorial integrity of the particular State under consideration was thereby rendered contingent or conditional.

IV. Reinterpretation of territorial integrity as a contingent principle

20. However, the authors of the UDI[110] and some other participants[111] have argued that the reaffirmation of the FRY's territorial integrity was intended as a time-limited guarantee only. It was to apply to the so-called interim period only, to be discarded thereafter. A number of points

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[108]See also the UNMIK-FRY Common Document, 5 Nov. 2001, Written Statement of Serbia, para. 517 *et seq.* and Written Comments of Serbia, para. 281.

[109]Resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999).

[110]Further Written Contribution of authors of UDI, paras. 4.16 and 5.14.

[111]See, e.g., Written Comments of the United Kingdom, para. 17 and Written Comments of the United States of America, p. 25 and following.

will be made in response. First, in principle the territorial integrity of States cannot be truncated or time barred or be made contingent upon recognition by the Security Council. Territorial integrity is a foundational principle of international law and simply cannot be fundamentally re-engineered in such a cavalier fashion. Imagine the consequences for States generally if their territorial integrity could suddenly be put in question by an ambiguous process of interpretation of international instruments. The authors, and those supporting them, have put forward a dangerous, as well as a legally incorrect, doctrine.

21. Secondly, there is no argument between the parties apparently as to the application of the principle of territorial integrity during the interim period of seeking a political solution to the Kosovo problem. However, the strained argument that the application of the principle of territorial integrity to the FRY suddenly ceases after the interim period is remarkable and unsustainable. Thirdly, since the UDI cannot amount to a final settlement under the terms of resolution 1244, the interim period has not come to an end, so that even on the arguments of the authors and other participants, the territorial integrity of Serbia remains undiminished. Fourthly, the reference to territorial integrity refers to the FRY "and the other States in the region", so that any declared interim character of such reaffirmation would necessarily impact upon other States in the region, something that would cause some controversy no doubt.

22. Fifthly, the very terms in which the authors and other participants argue their case is flawed. The reaffirmation of the territorial integrity of the FRY and other States in the region is declared "as set out in the Helsinki Final Act and annex 2". The Helsinki Final Act[112] underlined the territorial integrity of participating States in several of its declared Principles and this reaffirmation was neither time limited nor contingent nor conditional. It simply reflected a foundational principle of international law.

23. Annex 2 calls for agreement to be reached on the basis of a number of principles. Principle 8 dealt with the establishment of an interim political framework agreement

[112]See, e.g., Principle I: "The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence" and Principle IV: "The participating States will respect the territorial integrity of each of the participating States". See also Principles II and III.

> "providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the FRY and the other countries of the region, and the demilitarisation of UCK".

Thus the balance in the resolution is very clear. In so far as the interim process was concerned there would be "substantial self-government for Kosovo" within the territorial integrity of the FRY. Before and beyond the interim process, the territorial integrity of the FRY was reaffirmed. Change was possible but only on the basis of consent. This position was indeed confirmed in the UNMIK-FRY Common Document signed on 5 December 2001 by the Special Representative of the United Nations Secretary-General and the FRY[113]. Indeed the whole focus of Principle 8 was upon the requirement for "negotiations between the parties for a settlement", thus explicitly excluding unilateral action by any side.

24. The reference to the Rambouillet Accords[114] in resolution 1244 is instructive, for the third recital of the agreement reaffirmed the commitment of the parties to the Purposes and Principles of the United Nations, as well as to OSCE principles, including the Helsinki Final Act, which expressly reaffirmed the territorial integrity of the participating States[115]. Further, the fourth recital of the agreement expressly recalled the commitment of the international community to the sovereignty and territorial integrity of the FRY. The authors of the UDI argue that the Rambouillet Accords and the negotiations that led up to them are important, not for what they say, but for what they do not say[116]. In truth, Mr. President, Members of the Court, they have to argue that, for what the Accords say is clear enough. Even though the circumstances of the time produced a document that did not completely satisfy the FRY, the Accords did emphasize the territorial integrity of that State.

25. The authors of the UDI argue that none of the texts emerging from the pre-1244 negotiations, including the failed Hill proposals and the Rambouillet Accords, expressly prohibited Kosovo from declaring independence[117] and that the resolution itself did not expressly prohibit a

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[113]See Written Statement of Serbia, paras. 517-521.

[114]UN doc. S/1999.648, 7 June 1999. See also Written Statement of Serbia, para. 336 *et seq.* and 781 *et seq*., and Written Comments of Serbia, para. 425 *et seq.*

[115]See also the reference to the Charter of Paris for a New Europe.

[116]See, e.g., Written Contribution of authors of the UDI, para. 9.13.

[117]See, e.g., Further Written Contribution of authors of the UDI, paras. 5.02, 5.05 and 5.12.

declaration of independence[118]. But that is hardly unusual in a situation where the reaffirmation of the FRY's territorial integrity was a constant refrain and where the whole focus was explicitly upon self-government or autonomy. It would in reality have been redundant to prohibit expressly any attempt at unilateral independence, for the simple reason that it had been implicitly prohibited by virtue of the very structures and principles declared and then accepted. Indeed, the very construction and configuration of negotiations leading to resolution 1244 and of the resolution itself and of subsequent practice was to find a way to establish an acceptable system of autonomy within sovereign Serbia. And the refrain of this process was, until the events of early 2008, the need for the agreement of the relevant parties, the central Government of Serbia and the Kosovo Albanian community. It is impossible to dispute the conclusion that the whole thrust of resolution 1244 was for a consensual, negotiated settlement accepted by the Security Council[119].

26. One argument that has been put forward, that the reaffirmation of territorial integrity contained in resolution 1244 applied to the FRY but not to Serbia[120], may be swiftly dealt with. In truth, no State has denied that Serbia is the legitimate continuation of the FRY via the State Union of Serbia and Montenegro from which Montenegro seceded in 2006. This was essentially confirmed by this Court, in its Judgment of 26 February 2007, in the *Bosnia* case and expressly recognized, for example, in the German Written Statement in these proceedings[121].

27. In concluding this section of the pleading, we may observe that the foundations of the case put forward by the authors of the UDI with regard to the matters under consideration are indeed puny and fragile. They depend upon an absence of any explicit reference prohibiting a unilateral declaration of independence and an extraordinary interpretation of territorial integrity which converts it into an interim or temporary norm capable of being rendered contingent upon a forced construction of an argued ambiguity in an international instrument.

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[118]See, e.g., Further Written Contribution of authors of the UDI, para. 5.19 *et seq*.

[119]See, e.g., Written Statement of Cyprus, para. 98.

[120]See, e.g., Written Contribution of authors of the UDI, para. 9.33 and Written Statement of the United States, p. 74 *et seq*.

[121]Written Statement of Germany, p. 37. See further Written Statement of Serbia, para. 291 *et seq*.

V. Recognition as such does not grant retroactive legality or purge illegality

28. Mr. President, Members of the Court, some have argued that whatever the situation may be as to the declaration of independence, subsequent developments have cured any illegality or deficiency that may have occurred[122]. This constitutes an attempt to divert the Court's attention from the question asked of it.

29. The issue before the Court concerns the legality or otherwise of the UDI adopted by the Provisional Institutions of Self-Government in Kosovo on 17 February 2008. Nothing more, nothing less. That date therefore constitutes a critical date upon which the rights and obligations of the relevant parties crystallized[123]. Nothing occurring, or said to have occurred, after that date can affect the legality or otherwise of the UDI, which is the question before the Court.

30. Of course, beyond that, Serbia maintains that international law emphasizes that an illegal unilateral act cannot produce legal consequences, *ex injuria jus non oritur*[124]. The Supreme Court of Canada in the *Quebec Secession* case, indeed, emphasized that

> "international recognition is not alone constitutive of Statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a 'legal' right to secede in the first place"

and, of course, continued "recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law"[125].

31. If this were not so, the structure of the international legal system would be significantly wounded. What is illegal cannot subsequently be rendered legal by the action of third parties. If that proposition were not accepted, unilateral illegal acts would flourish and undermine any sense of an international legal order.

32. Accordingly, whatever the political impact of such recognitions as have taken place, and it must be recalled that some two thirds of the States of the international community from all parts

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[122]See, e.g., Written Statement of the United Kingdom, para. 0.15 and Written Comments of the United Kingdom, para. 46 *(c)*.

[123]See Written Statement of Serbia, para. 986 *et seq*. and 1033 *et seq*., and Written Comments of Serbia, para. 501 *et seq*.

[124]See, for example, the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Judgment, I.C.J. Reports 2004*, separate opinion of Judge Elaraby, p. 254, para. 3.1. See also the case concerning the *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 76*,* para. 133.

[125][1998] 2 *SCR* 217, paras. 142 and 155.

of the world have not recognized a State of Kosovo nor has the United Nations accepted it as a member, the foundational principle of territorial integrity has not been modified nor has an unlawful, unilateral and non-consensual secession been rendered lawful. The creation of a new State is a mix of effectiveness and legality. Recognition as such cannot legitimate an illegal act nor recharacterize that unlawful act as legal in either domestic law and in international law. In any event, the question put before the Court by the General Assembly precludes any consideration of such recognitions as have occurred.

VI. Failure to meet the requirements of statehood

33. Mr. President, Members of the Court, Serbia maintains that even if the UDI were lawful, which of course is denied, the so-called "Republic of Kosovo" would in any event fail to fulfil the factual requirements for statehood laid down in international law. This is so for three essential reasons. First, the entrenched presence of international organizations in Kosovo, such as KFOR, UNMIK and EULEX with responsibilities that reflect the competence of governance detracts from the necessary criterion of effective government. Second, the roles of the United Nations Secretary-General's Special Representative and UNMIK detract from the necessary criterion of capacity to enter into foreign relations. Thirdly, the manner of emergence of the so-called "Republic of Kosovo" reflects an underlying illegality which prevents the purported State from being so regarded in international law. I will briefly address each of these points, but note and emphasize at this point that all of the international bodies concerned function, and continue to function, *explicitly* within the framework of resolution 1244.

34. First, KFOR, established under resolution 1244 as a NATO-led force, continues to be the ultimate military and security authority in the territory[126]. It consists today of some 14,000 troops and is mandated to establish and maintain a secure and safe environment in Kosovo and freedom of movement for all citizens[127]. EULEX was established by the European Union Council Joint Action on 4 February 2008[128], and contrary to the wishes of the so-called "independent" authorities[129],

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[126]See Written Statement of Serbia, para. 975.

[127]http://www.nato.int/cps/en/natolive/topics_48818.htm#objectives

[128]2008/124/CFSP, as amended by Council Joint Action 2009/445/CSP, 9 June 2009.

[129]See Written Comments of Serbia, para. 510.

with significant powers laid down specifically in the Joint Action *inter alia* to ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, through reversing or annulling operational decisions taken by the competent Kosovo authorities[130]. As the United Nations Secretary-General has confirmed, EULEX operates under the overall authority of the United Nations and within the framework of resolution 1244[131]. Accordingly, it is difficult to maintain that the so-called "independent" authorities exercise effective control as understood and required in international law.

35. Secondly, UNMIK was established under resolution 1244, with the United Nations Secretary-General's Special Representative at its head, with a wide authority to perform key civilian administrative functions, and it continues to operate in the territory. Paragraph *(i)* of Chapter 8 of the Constitutional Framework for Provisional Self-Government in Kosovo[132] reserves to the Special Representative *inter alia* the exercise of powers and responsibilities of an international nature, approving the budget, monetary policy, concluding agreements with States and international organizations in all matters within the scope of resolution 1244 and external relations with States and international organizations necessary for the fulfilment of his mandate. It is UNMIK which plays an important role, therefore, in the external relations of the territory, not least with regard to international organizations[133]. In these circumstances, it is impossible to maintain that the Provisional Institutions of Self-Government in Kosovo have the required capacity to enter into relations with foreign States as necessitated by the required criteria of statehood.

36. Thirdly, it is maintained that international law now requires an aspirant State to emerge in a manner not incompatible with the key principles of international law. For reasons that Serbia has made clear this morning, and which include the violation of the general principle of territorial integrity and the violation of Security Council resolution 1244, the so-called "Republic of Kosovo" fails the legality test and thus cannot be said to have come to independence in a manner required by international law. Its purported declaration of independence is thus tainted by illegality.

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[130]See Written Comments of Serbia, Art. 3.

[131]See, e.g., the Reports of the Secretary-General on UNMIK of 10 June 2009 and 30 Sept. 2009, S/2009/300, para. 6 and S/2009/497, para. 3, respectively. See also E. de Wet, "The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX", 103 *AJIL*, 2009, p. 83.

[132]UNMIK/Reg/2001/9, 15 May 2001, as amended by UNMIK/Reg/ 2007/29 and UNMIK/Reg/2002/9.

[133]See, e.g., Written Statement of Cyprus, para. 176 *et seq*.

VII. Conclusions

37. I may summarize my conclusions as follows:

(1) The principle of respect for the territorial integrity of States is a foundational principle of international law.

(2) This principle applies to non-State entities in a non-consensual context as well as to States.

(3)The principle of territorial integrity was reaffirmed in the process leading up to and including resolution 1244 with regard to the FRY.

(4) Territorial integrity is not a time-limited or contingent principle and cannot and was not so converted by the process leading up to and including resolution 1244.

(5) Recognition as such does not grant retroactive legality or purge illegality, what was illegal remains illegal.

(6) In any event, the UDI fails to satisfy the criteria of statehood with regard to the factual requirements of effective government and capacity to enter into relations with foreign States and with the requirement of legality in the process leading to the acquisition and recognition of statehood.

38. Mr. President, Members of the Court, this concludes my pleading and I thank you for your kind attention. I would be grateful, Mr. President, if you could now call upon Professor Kohen.

The PRESIDENT: Thank you, Professor Shaw, for your presentation. I now call upon Professor Kohen.

M. KOHEN :

LES ARGUMENTS DE L'AUTODÉTERMINATION, DE LA NEUTRALITÉ JURIDIQUE ET DU CARACTÈRE *SUI GENERIS* DU CAS DU KOSOVO DOIVENT ÊTRE REJETÉS

1. Monsieur le président, Messieurs les juges, c'est un privilège et une haute responsabilité de participer à cette procédure consultative, pour défendre la primauté du droit dans les relations internationales. Je suis particulièrement reconnaissant au Gouvernement démocratique de la Serbie de me fournir cette possibilité.

2. Je vais développer les trois propositions suivantes :

— *premièrement*, le principe du droit des peuples à disposer d'eux-mêmes ne constitue pas un fondement juridique à la déclaration unilatérale d'indépendance ;

— *deuxièmement*, le droit international n'est pas neutre face à cette déclaration ; et

— *troisièmement,* l'argument du prétendu caractère *sui generis* du Kosovo ne change pas l'application des règles pertinentes, lesquelles mènent au constat simple que la déclaration n'est pas conforme au droit international.

A. Le principe d'autodétermination n'est pas un fondement de la déclaration unilatérale d'indépendance

3. Je vais commencer par expliquer pourquoi le principe d'autodétermination ne peut pas servir de justification à la déclaration unilatérale d'indépendance. Il n'y a pas lieu de s'appesantir sur l'importance de ce principe fondamental du droit international, que la Cour a déjà relevé par le passé[134] et que la Serbie reconnaît pleinement. Il est bien connu que ce principe est souvent invoqué, sans qu'il soit pour autant applicable à la situation considérée, ou qu'il le soit d'une manière différente de celle revendiquée. Les mouvements séparatistes que l'on trouve partout dans le monde invoquent *tous* le droit des peuples à disposer d'eux-mêmes. Mais invoquer ce droit est une chose, l'avoir en est une autre.

4. Dans la présente affaire, le principe de l'autodétermination est avancé d'une manière assez timide par les séparatistes et ceux qui les soutiennent. La déclaration du 17 février 2008 ne mentionne même pas le droit à l'autodétermination[135]. Certains participants, y compris les auteurs de cette déclaration, vont même jusqu'à vous demander de ne pas vous prononcer sur la question[136]. Signaux assez tangibles du peu de conviction qu'ils ont dans la valeur juridique d'une telle argumentation. Ceux qui l'invoquent le font soit comme justification à la soi-disant

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[134] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, *avis consultatif, C.I.J. Recueil 1971*, p. 31, par. 52 ; *Sahara occidental*, *avis consultatif*, *C.I.J. Recueil 1975,* p. 31-32, par. 55-56 ; *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995,* p. 102, par. 29 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, p. 172, par. 88, et p. 199, par. 156.

[135] Serbie, exposé écrit, annexes, vol. II, annexe 2 ; cf. D'Argent, Pierre, «Kosovo : être ou ne pas être», *Journal des tribunaux*, Bruxelles, n° 6307, 2008, p. 262 ; Jia, Bing Bing, «The Independence of Kosovo : A Unique Case of Secession ?», *Chinese Journal of International Law*, 2009, vol. 8, n° 1, p. 31-32.

[136] Albanie, observations écrites, p. 34, par. 61 ; auteurs, contribution écrite I, p. 157, par. 8.38 ; Etats-Unis d'Amérique, observations écrites, p. 21 ; Norvège, observations écrites, p. 3, par. 8 ; Royaume-Uni, exposé écrit, par. 5.33, 6.65.

«sécession-remède»[137], soit en raison de la référence faite à «la volonté du peuple» dans le projet d'accord de Rambouillet[138], soit encore — mais par peu de participants à cette procédure — comme étant directement applicable au cas d'espèce[139].

5. Disons-le d'emblée : aucune résolution, ni du Conseil de sécurité, ni de l'Assemblée générale, ni d'aucune organisation régionale, ne reconnaît l'application du droit à l'autodétermination aux Albanais du Kosovo ou à l'ensemble de la population de cette province serbe. C'est un fait incontestable. Comme l'a affirmé catégoriquement le Gouvernement suisse le 14 avril 2008, lors d'une interpellation parlementaire : «Le Kosovo n'a jamais obtenu le statut de peuple ayant droit à l'autodétermination»[140].

6. Le constat est simple : chaque fois que l'ONU a estimé que le principe était applicable, elle l'a explicitement invoqué. Elle l'a fait dans le contexte de la domination coloniale, raciste ou étrangère[141] ; elle ne l'a, par contre, jamais fait — je dis bien, jamais — en faveur d'une minorité nationale, religieuse ou linguistique à l'intérieur des Etats. Jamais donc à l'égard du Kosovo, alors qu'elle s'est occupée explicitement de la question. Les occasions n'ont pourtant pas manqué pour l'Organisation d'affirmer et de reconnaître ce droit, si elle avait estimé qu'il existait effectivement

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[137] Finlande, exposé écrit, p. 4-5, par. 9-10 ; Irlande, exposé écrit, p. 2, 8-10, par. 27-32 ; Pologne, exposé écrit, p. 26, par. 6.10 ; Royaume-Uni, exposé écrit, p. 92 (pourtant, dans ses observations écrites, p. 5-6, par. 10, le Royaume-Uni considère que la Cour ne devrait pas appliquer ce concept dans le cas d'espèce) ; *Contra* : Serbie, exposé écrit, p. 214-230, par. 589-625, observations écrites, p. 142-149, par. 339- 359 ; Argentine, exposé écrit, p. 34, par. 85-86 ; Chypre, exposé écrit, p. 36-38, par. 140-147 ; Espagne, observations écrites, p. 5-6, par. 8 ; Iran, exposé écrit, p. 6-7, par. 4.1 ; Roumanie, exposé écrit, p. 42, para. 147, p. 44, para. 156 ; Russie, exposé écrit, p. 36-38, par. 97-103 ; Slovaquie, exposé écrit, par. 28.

[138] Allemagne, exposé écrit, p. 39 ; auteurs, contribution écrite II, p. 80, par. 4.40 ; Etats-Unis de l'Amérique, exposé écrit, p. 64-67 ; Pays-Bas, exposé écrit, p. 7, par. 3.3 ; Royaume-Uni, exposé écrit, p. 69 ; *Contra* : Serbie, exposé écrit, p. 125, par. 340 ; Argentine, exposé écrit, p. 39, par. 99 ; Argentine, observations écrites, p. 26, par. 60.

[139] Albanie, exposé écrit, p. 39, par. 74 ; auteurs, contribution écrite II, p. 80-86, par. 4.42-4.53 ; Pays-Bas, observations écrites, p. 5 ; Slovénie, exposé écrit, p. 2/3 ; Suisse, exposé écrit, p. 21, par. 77 ; *Contra* : Serbie, exposé écrit, p. 208-214, par. 570-588 ; Argentine, exposé écrit, p. 37, par. 95 ; Argentine, observations écrites, p. 26-27, par. 59-61 ; Bolivie, observations écrites, p. 6, par. 17-18 ; Chypre, exposé écrit, p. 31, par. 123 ; Roumanie, exposé écrit, p. 38, par. 131.

[140] L'Assemblée fédérale, le Parlement suisse, Interpellation, Problématique reconnaissance du Kosovo, Réponse du Conseil fédéral du 15.05.2008, disponible sur : http://www.parlement.ch/F/Suche/Pages/geschaefte.aspx?gesch_id=20083010 (Traduction : « Kosovo has never obtained the status of a people entitled to a right to self-determination »).

[141] Par exemple : résolution 1724 (XVI) de l'Assemblée générale (AG), 20 décembre 1961 (Algérie), AG résolution 1573 (XX), 19 décembre 1960 (Algérie), résolution 322 du Conseil de sécurité (CS), 22 novembre 1972 (Guinée-Bissau), AG résolution 3061 (XXVIII), 2 novembre 1972 (Guinée-Bissau), CS résolution 356, 12 août 1974 (Guinée-Bissau), CS résolution 301, 20 octobre 1971 (Namibie), CS résolution 384, 22 décembre 1975 (Timor Oriental), AG résolution 2787 (XXVI), 6 décembre 1971 (Palestine), AG résolution 3236 (XXIX), 22 novembre 1974 (Palestine), AG résolution 31/34, 30 novembre 1976 (Afrique du Sud, Namibie, Zimbabwe, Palestine), AG résolution 37/43, 3 décembre 1982 (Afrique du Sud, Namibie, Palestine), CS résolution 556, 23 octobre 1984 (Afrique du Sud), CS résolution 605, 22 décembre 1987 (Palestine), CS résolution 672, 12 octobre 1990 (Palestine), CS résolution 1435, 24 septembre 2002 (Palestine).

un peuple séparé ayant droit à disposer de lui-même. Mais tout ce que le Conseil de sécurité a fait a été d'imposer à l'Etat souverain d'entreprendre de négociations sur la question du statut futur du Kosovo.

7. Il n'y a aucune ambiguïté dans ce domaine. Dans votre avis consultatif du 9 juillet 2004, vous avez affirmé que «[s]'agissant du principe du droit des peuples à disposer d'eux-mêmes, la Cour observera que l'existence d'un «peuple palestinien» ne saurait plus faire débat» (*Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif*, *C.I.J. Recueil 2004*, p. 182-183, par. 118). Il s'en faudrait de beaucoup pour soutenir une semblable assertion à l'égard d'un prétendu «peuple kosovar», qui n'a même pas été désigné une seule fois de cette manière dans les résolutions pertinentes.

8. Ni la conférence de paix pour la Yougoslavie, ni la commission Badinter n'ont reconnu au Kosovo un droit à l'indépendance[142]. Les Albanais du Kosovo ont été traités comme les autres minorités existantes dans les nouveaux Etats issus de la République socialiste fédérative de Yougoslavie. La commission Badinter n'a pas reconnu le droit d'autodétermination aux populations serbes de Croatie et de Bosnie-Herzégovine et il n'y a aucune raison juridique pour traiter autrement les populations albanaises de Serbie[143].

9. A l'intérieur des Etats souverains, le principe d'autodétermination s'applique à l'égard de l'ensemble de la population, y compris les minorités et les peuples indigènes[144]. Ceci constitue le versant interne du principe. Comme mon estimé collègue et ami James Crawford l'a affirmé,

> «outside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States. Self-determination outside the colonial context is primarily a process by which the peoples of the various States determine their future through constitutional processes without external interference. Faced with an expressed desire of part of its people to secede, it is for the government of the State to decide how to respond, for example by insisting that any change be carried out in accordance with constitutional processes.

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[142] Serbie, exposé écrit, p. 103, 239-240, par. 261-263, 651-652.

[143] Avis n° 2 de la commission d'arbitrage pour l'ex-Yougoslavie, *RGDIP*, 1992, t. 96, p. 266 (11 janvier 1992).

[144] Résolution 61/295 de l'Assemblée générale, 13 septembre 2007, articles 3 et 46 ; Comité pour l'élimination de la discrimination raciale, recommandation générale n° 21, Le droit à l'autodétermination, quarante-huitième session, 1996, Nations Unies, doc. A/51/18, par. 9 ; *Renvoi relatif à la sécession du Québec* [1998] 2 *SCR* 217, par. 126.

> In fact, no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor State.»[145]

10. Durant les négociations sur le statut futur, la Serbie a fait preuve de la plus grande flexibilité, proposant le plus haut degré imaginable d'autonomie pour la province[146]. Mais comme il a déjà été montré précédemment, le représentant spécial, ainsi que certaines puissances, avaient dès l'ouverture du processus l'idée de séparer le Kosovo de la Serbie[147].

a) ***La prétendue «sécession-remède» n'est pas une règle de droit international et de toute manière, ses prétendues conditions ne seraient pas réunies***

11. Conscients que le principe d'autodétermination dans son application généralement reconnue ne permet pas de justifier la déclaration unilatérale d'indépendance, les auteurs de la déclaration et ceux qui les soutiennent se sont tournés vers une construction doctrinale fort controversée. La Serbie, ainsi que d'autres Etats, ont amplement démontré que la prétendue «sécession-remède» ne constitue pas une règle de droit international. Elle ne trouve fondement ni dans une interprétation correcte du paragraphe 7 de la résolution 2625 de l'Assemblée générale[148], ni dans les travaux préparatoires de cette résolution[149], ni dans la pratique des Etats[150]. De toute manière, même s'il s'agissait d'une règle consacrée, ses prétendues conditions mentionnées par la doctrine ne seraient pas réunies dans le cas d'espèce[151].

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[145] Crawford, James, *The Creation of States in International Law*, 2e éd., Oxford, Oxford University Press, 2006, p. 415 (Traduction : «en dehors du contexte colonial, le principe d'autodétermination n'est pas considéré comme donnant lieu à un droit de sécession unilatérale par des composantes d'Etats indépendants. L'autodétermination en dehors du contexte colonial est principalement un processus par lequel les peuples des différents Etats déterminent leur futur à travers des processus d'ordre constitutionnel, et sans interférence extérieure. Lorsqu'il fait face à un fort désir de sécession d'une partie de son peuple, il revient au gouvernement de l'Etat de décider de la réponse, par exemple en insistant sur le fait que chaque changement doit être conduit conformément aux processus constitutionnels. En fait, aucun nouvel Etat formé depuis 1945 en dehors du contexte colonial n'a jamais été admis aux Nations Unies contre l'opposition de l'Etat prédécesseur.»)

[146] Voir le discours de M. Boris Tadic, président de la République de Serbie, le 27 novembre 2007 à Baden, disponible à l'adresse suivante : http ://www.predsednik.rs/mwc/default.asp?c=303500&g=20071127103315&lng=eng&hs1=0.

[147] Serbie, observations écrites, p. 53-59, par. 101-114.

[148] Résolution 2625 (XXV) de l'Assemblée générale, 24 octobre 1970, «Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies». Voir : Serbie, exposé écrit, p. 214-221.

[149] Serbie, exposé écrit, p. 221-224.

[150] Serbie, exposé écrit, p. 224-229 ; Corten, Olivier, «Déclarations unilatérales d'indépendance et reconnaissance prématurées : du Kosovo à l'Ossétie du sud et à l'Abkhazie», *RGDIP*, 2008, t. 4, p. 726.

[151] Serbie, exposé écrit, p. 214-240, par. 589-653, observations écrites, p. 142-149, par. 339-359 ; Argentine, exposé écrit, p. 34, par. 85-86 ; Chypre, exposé écrit, p. 36-38, par. 140-147 ; Espagne, observations écrites, p. 5-6, par. 8 ; Iran, exposé écrit, p. 6-7, par. 4.1 ; Roumanie, exposé écrit, p. 42, par. 147, p. 44, par. 156 ; Russie, exposé écrit, p. 36-38, par. 97-103 ; Slovaquie, exposé écrit, par. 28.

12. Les tenants de cette thèse oublient certaines données clés dans la question du Kosovo. Ils oublient que les séparatistes eux-mêmes se sont exclus du processus politique yougoslave en proclamant leur indépendance pour la première fois en 1991, en créant leurs propres structures, en boycottant les élections locales et fédérales et en refusant même tout contact avec les forces d'opposition au régime de M. Milosevic[152]. Ils oublient que durant toutes les années 1990, les partis politiques albanais étaient enregistrés et que leur participation aux élections aurait empêché M. Milosevic d'arriver au pouvoir, et de s'y maintenir par la suite[153]. Ils oublient que c'est l'UCK qui a déclenché le *conflit armé interne*. Ils oublient finalement que le Conseil de sécurité et la mission de vérification de l'OSCE ont aussi bien condamné la répression des autorités centrales que les actes terroristes perpétrés par l'UCK, ainsi que les multiples cas de non-respect du droit humanitaire et des cessez-le-feu par cette dernière[154].

13. Si la «sécession-remède» était envisageable, pourquoi n'a-t-elle pas été invoquée en 1999, à savoir au pire moment de la situation en ce qui concerne les droits humains ? Au contraire, le 28 septembre 1999, le ministre français des affaires étrangères, Hubert Védrine, affirmait clairement que «les raisons qui avaient conduit à s'opposer à l'indépendance du Kosovo restaient aujourd'hui valables et qu'en particulier la position de l'administration américaine sur ce point n'avait pas évolué»[155].

14. L'argument de la «sécession-remède» est définitivement contré par un autre constat : les conditions de vie des minorités sont bien meilleures depuis dix ans dans les autres régions de la Serbie qu'elles ne le sont au Kosovo. Comme la commission des questions juridiques et des droits de l'homme du Conseil de l'Europe l'a indiqué en février 2008, «il convient de souligner qu'à de nombreux égards, les minorités nationales jouissent d'une bien meilleure protection de leurs droits

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[152] Serbie, exposé écrit, p. 102-108 et 236-237, par. 258-278 et 642-643.

[153] Serbie, exposé écrit, p. 107-108, par. 273-278.

[154] Serbie, exposé écrit, p. 113-128, par. 290-348.

[155] Sénat, affaires étrangères, défense et forces armées, mardi 28 septembre 1999, disponible sur : http ://www.senat.fr/commission/etr/d_etrg991002.html.

en Voïvodine que partout ailleurs en Serbie»[156]. A propos des municipalités majoritairement albanaises de Preševo, Bujanovac et Medvedja, toutes proches du Kosovo, le commissaire aux droits de l'homme du Conseil de l'Europe a affirmé en mars de cette année qu'«[à] l'exception des Roms, qui continuent d'être marginalisés, les relations entre [l]es groupes ethniques [albanais, serbes et roms] dans les trois municipalités sont stables dans l'ensemble et s'améliorent»[157]. La Serbie a en effet accompli des progrès de taille dans l'affirmation de la démocratie et dans la protection des droits humains en général et des droits des minorités en particulier. Au contraire, malheureusement, les conditions de vie pour les populations non albanaises au Kosovo restent extrêmement difficiles. Je me bornerai à signaler que les personnes déplacées de souche non albanaise sont toujours dans l'impossibilité de regagner leurs foyers ; que des disparitions forcées se sont produites en pleine administration du territoire par l'ONU et que le sort des personnes concernées demeure inconnu[158] ; que des pogroms antiserbes se sont produits en 2004 et que les institutions provisoires d'administration autonome (je cite le représentant espagnol au sein du Conseil de sécurité) «ont essayé d'utiliser [ces événements] pour servir leurs intérêts politiques, revendiquant l'indépendance et le transfert des compétences de la MINUK»[159]. Tout cela devrait

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[156] Conseil de l'Europe, rapport de la commission des questions juridiques et des droits de l'homme, rapporteur M. Jürgen Herrmann, «La situation des minorités nationales en Voïvodine et de la minorité ethnique roumaine en Serbie», 14 février 2008, assemblée parlementaire, doc. 11528, p. 22, par. 111, disponible à l'adresse suivante : http ://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11528.htm (Version anglaise : «it should be emphasised that in many respects national minorities enjoy a far better protection of their rights in Vojvodina than anywhere else in Serbia»).

[157] Conseil de l'Europe, rapport par le commissaire aux droits de l'homme, M. Thomas Hammarberg, sur sa visite en Serbie (13-17 octobre 2008), Strasbourg, 11 mars 2009, par. 165, disponible sur : https ://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2009)8&Language=lanFrench&Ver=original&Site=COE&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679. (Version anglaise : «Relations between the [Albanese, Serbian and Roma] ethnic groups are largely stable and improving throughout the three municipalities, with the exception of the Roma who continue to be marginalized.»).

[158] Rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 16 septembre 1999, Nations Unies, doc. S/1999/987, par. 37 ; rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 23 décembre 1999, Nations Unies, doc. S/1999/1250, par. 16 et 70 ; rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 3 mars 2000, Nations Unies, doc. S/2000/177, par. 64 ; rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 6 juin 2000, Nations Unies, doc. S/2000/538, par. 52-55 ; rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 18 septembre 2000, Nations Unies, doc. S/2000/878, par. 41-42 ; rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 15 décembre 2000, Nations Unies, doc. S/2000/1196, par. 41 ; rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, 2 octobre 2001, Nations Unies, doc. S/2001/926, par. 39.

[159] M. Arias (Espagne), Conseil de sécurité, 4967e séance, 11 mai 2004, Nations Unies, doc. S/PV.4967, p. 17 (Version anglaise : «they attempted to use the violence for their own political objectives, calling for independence and the transfer of UNMIK's competencies»).

choquer la conscience de la communauté internationale au même titre que les autres exactions commises dans les Balkans.

15. Monsieur le président, Messieurs les juges, en aucun cas la sécession ne constitue un «remède» aux problèmes du Kosovo. Bien au contraire, la déclaration unilatérale a aggravé les tensions interethniques, ce qu'a reconnu l'ombudsman pour le Kosovo[160]. Elle a creusé davantage le fossé existant entre les communautés de la province d'une part, entre cette dernière et le reste du territoire serbe d'autre part, divisant davantage le Conseil de sécurité, l'Union européenne et la communauté internationale dans son ensemble.

16. Vous entendrez certainement cet après-midi un tableau idyllique de la situation des populations non albanaises. Mais on ne vous parlera vraisemblablement pas des vrais problèmes, ou l'on vous dira que la faute en incombe à Belgrade, comme si le Gouvernement serbe — qui d'ailleurs n'administre pas le territoire — devrait se plier aux exigences séparatistes et reconnaître une prétendue indépendance proclamée en toute illicéité.

b) ***Quelle que soit l'interprétation de l'expression «la volonté du peuple» employée à Rambouillet, elle n'est pas le seul critère déterminant***

17. J'en viens maintenant à l'expression «la volonté du peuple» utilisée dans les «accords de Rambouillet» et dans d'autres textes, notamment dans le cadre constitutionnel pour un gouvernement autonome provisoire adopté par le représentant spécial du Secrétaire général[161].

18. Les «accords de Rambouillet» prévoyaient, trois ans après leur entrée en vigueur, l'établissement d'un *mécanisme* en vue d'un règlement définitif, «sur la base de la volonté du peuple, de l'avis des autorités compétentes, des efforts accomplis par chacune des Parties dans la mise en œuvre du présent accord, et de l'acte final d'Helsinki». Outre l'ambiguïté délibérément entretenue par l'emploi du terme «peuple», sa «volonté» n'apparaît ici que comme un critère parmi d'autres pour l'ouverture d'un processus en vue de la détermination de la destinée du territoire. S'il s'agissait d'un peuple ayant droit à l'autodétermination, le «peuple kosovar» aurait droit de

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[160] Ombudsman Institution in Kosovo, «Eighth Annual Report 2007-2008», disponible à l'adresse suivante : http ://www.ombudspersonkosovo.org, p. 37.

[161] Accords de Rambouillet, 7 juin 1999, Nations Unies, doc. S/1999/648 ; cadre constitutionnel pour un gouvernement autonome provisoire, UNMIK/REG/2001/9, 15 mai 2001. Voir : Allemagne, exposé écrit, p. 39 ; auteurs, contribution écrite II, p. 80, par. 4.40 ; Etats-Unis de l'Amérique, exposé écrit, p. 64-67 ; Pays-Bas, exposé écrit, p. 7, par. 3.3 ; Royaume-Uni, exposé écrit, p. 69.

décider de son sort indépendamment de l'avis des autres acteurs en présence ; or, ni Rambouillet ni la résolution 1244 ne constitue un processus d'exercice du droit de ce prétendu peuple à disposer de lui-même. Les Nations Unies n'ont en outre jamais envisagé une décision unilatérale. La référence faite à l'acte final d'Helsinki vient encore confirmer cette appréciation : ce texte met en effet l'accent sur le respect de l'intégrité territoriale et l'intangibilité des frontières.

19. Quant au cadre constitutionnel, le texte explique lui-même que le choix du statut futur du Kosovo suivra un processus conformément à la résolution 1244, et que celui-ci «tiendra pleinement compte de tous les facteurs en jeu, notamment la volonté du peuple»[162]. Par conséquent, il n'ajoute rien à la question et ne permet en aucune manière de justifier la déclaration unilatérale.

20. Dans leurs commentaires écrits, les Etats-Unis d'Amérique s'attribuent la paternité de l'expression «la volonté du peuple» et citent le président Jefferson afin d'en expliquer la portée[163]. Mais cela ne fait nullement avancer la cause de la sécession, car il s'agit plutôt là d'une référence au principe démocratique à l'intérieur de l'Etat. Nos amis états-uniens auraient certainement pu citer la célèbre phrase du président Abraham Lincoln : «government of the people, by the people, for the people»[164]. Je m'aperçois bien sûr que, compte tenu de leur politique actuelle, cela aurait été très embarrassant de citer cette phrase, prononcée quelques mois après la bataille qui a marqué le tournant dans son combat contre les sécessionnistes du Sud. Une sécession que le président Lincoln considérait comme contraire tant à la Constitution qu'au droit des gens[165].

21. Revenons tout de même à la fin du XX^{e} siècle. Le ministre français des affaires étrangères de l'époque, Hubert Védrine — sans doute la voix la plus qualifiée pour expliquer le contenu des «accords de Rambouillet» —, a clairement affirmé que ces derniers «n'avaient pas retenu l'organisation d'un référendum au Kosovo à l'issue de la période de transition, comme l'avaient demandé les Kosovars, mais seulement une clause de rendez-vous afin de prendre en

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[162] UNMIK/REG/2001/9, 15 mai 2001.

[163] Etats-Unis d'Amérique, exposé écrit, p. 29, note de bas de page 89.

[164] «Address at Gettysburg, Pennsylvania », 19 novembre 1863, reproduit dans Lincoln, Abraham, *Selected Speeches and Writings*, New York, Vintage Books, 1992, p. 405 (traduction : «Le gouvernement du peuple, par le peuple, pour le peuple»).

[165] «First Inaugural Address», 4 mars 1861, dans : Lincoln, Abraham, *Selected Speeches and Writings*, New York, Vintage Books, 1992, p. 288-290.

compte les souhaits de la population»[166]. M. Védrine a réitéré cette idée après l'adoption de la résolution 1244 : «Ni les accords de Rambouillet, ni aucun autre texte ne prévoient de référendum sur l'indépendance.»[167].

22. Par conséquent, la simple référence à la prise en considération de «la volonté du peuple», parmi d'autres éléments, dans le cadre d'un processus politique, ne permet pas de justifier la déclaration unilatérale d'indépendance.

B. Le droit international régit la déclaration unilatérale d'indépendance et ne lui accorde aucun fondement juridique

23. J'en viens maintenant à l'argument avancé en dernier recours par les sécessionnistes et leurs actifs supporteurs. Cet argument se décompose en deux points : l'un consiste à dire que les déclarations d'indépendance ne sont pas régies par le droit international ; l'autre affirme que, dans tous les cas, l'indépendance du Kosovo serait un fait irréversible.

24. Monsieur le président, Messieurs les juges, s'il existait sur terre un seul territoire sur lequel la sécession ne serait pas permise, ce territoire serait le Kosovo. En effet, outre les principes fondamentaux et autres règles générales du droit international contemporain applicables, dans le cas d'espèce le territoire en question est soumis à un régime international établi par une résolution du Conseil de sécurité, qui prévoit explicitement la nécessité d'une nouvelle résolution pour que soit mis fin à ce régime[168]. Si l'on croit encore en l'existence et en l'utilité de l'Organisation, *personne* n'a le droit de modifier et d'aller à l'encontre du cadre juridique défini par une résolution obligatoire du Conseil de sécurité.

25. Messieurs les juges : imaginez-vous quel serait l'attitude des Etats qui défendent aujourd'hui la déclaration unilatérale d'indépendance, si la Serbie avait voulu modifier le régime territorial établi par la résolution 1244, soit en redéfinissant la distribution des compétences entre la Serbie et l'administration internationale, soit en mettant fin unilatéralement à ce régime. On aurait certainement soutenu que la Serbie n'était pas en mesure de procéder de la sorte, de tels

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[166] Assemblée nationale, commission des affaires étrangères, compte rendu n° 31, 13 avril 1999 (séance de 17 heures) ; disponible sur : http://www.assemblee-nationale.fr/11/cr-cafe/98-99/c989931.asp.

[167] Assemblée nationale, commission de la défense nationale et des forces armées, compte rendu n° 33, 22 juin 1999 (séance de 18 h 30) ; disponible sur : http://www.assemblee-nationale.fr/11/cr-cdef/98-99/c9899038.asp.

[168] Résolution 1244 (1999), par. 19.

agissements étant contraires à la résolution 1244. Mais selon ces mêmes Etats, que les institutions provisoires du Kosovo proclament leur indépendance n'est pas incompatible avec la résolution 1244 !

26. Selon les tenants de la théorie de la neutralité juridique face à la sécession, le droit international reconnaît seulement à l'Etat le droit de prendre toutes les mesures possibles respectueuses du droit pour maintenir son intégrité territoriale[169]. C'est en effet une prérogative de l'Etat, même si ce n'est pas tout. Si l'on appliquait cette proposition au cas du Kosovo, que se passerait-il ? La résolution 1244 a établi un régime d'administration internationale sur le territoire. La Serbie se verrait ainsi matériellement privée d'exercer son droit à prendre toutes les mesures à sa portée pour garantir son intégrité territoriale. Mais c'est précisément ici que la garantie du respect de l'intégrité territoriale contenue dans la résolution 1244 trouve toute sa valeur. En aucun cas les Nations Unies pourraient jouer le rôle de complices d'un mouvement sécessionniste qu'elles n'ont jamais approuvé.

27. Monsieur le président, Messieurs les juges, la répétition mécanique de la formule «la création d'Etats est un fait qui n'est pas régi par le droit» ne reflète plus la réalité d'aujourd'hui. C'est aussi le constat récent de l'opinion experte sur laquelle s'est basé le rapport de la mission d'enquête internationale indépendante sur le conflit en Géorgie établie par l'Union européenne[170].

28. Le droit n'est en effet pas resté neutre lors de l'accession à l'indépendance de nombreux Etats issus de la décolonisation : ces Etats *avaient droit* à leur création, en vertu du principe d'autodétermination. Tous les nouveaux Etats créés après 1945 sont nés de manière conforme au droit international, soit par le processus de décolonisation, soit par des résolutions de l'Assemblée générale, soit par la dissolution de l'Etat prédécesseur, soit — en cas de séparation — par le consentement de l'Etat parent. De même, le droit international n'est pas resté neutre face à des entités qui, bien que revêtant les attributs factuels d'un Etat, ne le sont pas, dans la mesure où leur création est contraire au droit international. Exemples des déclarations unilatérales d'indépendance considérées explicitement par les Nations Unies comme *illicites* sont celles du Katanga, de la

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[169] Royaume-Uni, observations écrites, p. 21, par. 44.

[170] Rapport de la mission d'enquête internationale indépendante sur le conflit en Géorgie, 30 septembre 2009, disponible sur : http://www.ceiig.ch, vol. II, p. 136 et 137.

Rhodésie, de Chypre Nord et des bantoustans. Par contre un exemple de déclaration unilatérale d'indépendance considérée par l'ONU comme *licite* est celle de la Guinée-Bissau et du Cap-Vert[171]. Le principe du «Lotus»[172] n'a pas de place ici[173]. Certes, le droit sans les faits ne peut pas créer les Etats, mais les faits sans le droit non plus. Et nous sommes ici précisément dans ce dernier cas de figure, les faits en moins car même l'effectivité du contrôle étatique fait défaut[174].

29. Dépourvus d'arguments juridiques, les partisans de la sécession vous invitent à tenir compte d'une prétendue «réalité irréversible»[175]. Mais de quelle réalité parlent-ils ? Le fait est que, malgré le soutien formidable — et c'est peu dire — des Etats très puissants, les pronostiques des auteurs de la déclaration unilatérale d'indépendance[176] ne se sont pas concrétisés. Quelques jours avant la déclaration unilatérale, M. Hashim Thaci avait estimé qu'un Kosovo indépendant recevrait «une reconnaissance internationale massive, issue d'environ cent pays, immédiatement après sa proclamation»[177]. La réalité est tout autre presque deux ans après. En fait, il s'agit même d'une situation encore moins effective que beaucoup d'autres situations semblables d'autoproclamation illicite de l'indépendance. La seule autorité légitime pour administrer le territoire se trouve toujours sur le terrain, la force internationale établie par le Conseil de sécurité demeure l'autorité suprême incontestée en la matière. Les moyens pour rétablir pleinement la légalité sont simples et à portée de main.

30. L'argument d'une prétendue «réalité irréversible», qui ne changerait pas même si la Cour constate l'illicéité de la déclaration unilatérale, constitue une tentative ouverte d'imposer un fait accompli. Or, si la déclaration unilatérale d'indépendance n'est pas conforme au droit

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[171] Serbie, observations écrites, p. 92-94, par. 206-211.

[172] Lotus, *arrêt n° 9, 1927, C.P.J.I. série A n° 10*.

[173] Serbie, exposé écrit, p. 350-356, par. 1017-1032.

[174] Serbie, exposé écrit, p. 332-338, par. 966-985.

[175] France, exposé écrit, p. 19, par. 1.13-1-14 ; Royaume-Uni, observations écrites, p. 2, par. 6.

[176] «Kosovo will proclaim independence on 17 February, Serbia says», *EUObserver.com*, 8 février 2008, disponible sur http://euobserver.com/9/25629?rss_rk=1 ;«Serb President vows to preserve Kosovo», *ElEconomista.es*, 15 février 2008, disponible sur http://www.eleconomista.es/mercado-continuo/noticias/366438/02/08/Serb-president-vows-to-preserve-Kosovo.html ; «Serbian president Tadic vows to preserve Kosovo», *China Daily*, 16 février 2008, disponible sur : http://www.chinadaily.com.cn/world/2008-02/16/content_6460182.htm.

[177] «Kosovo will proclaim independence on 17 February, Serbia says», *EUObserver.com*, 8 février 2008, disponible sur : http://euobserver.com/9/25629?rss_rk=1 (Texte originel en anglais : ««massive international recognition [from] about 100 countries» immediately after it is proclaimed»).

international, il s'ensuit qu'elle ne produit pas d'effets. Comme l'affirmait votre prédécesseur sir Hersch Lauterpacht :

> «To admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character.»[178]

31. Il est temps de mettre fin à un tel mépris. Il est temps de faire comprendre aux acteurs internationaux que, quelle que soit leur puissance matérielle, ils sont tous tenus au respect du droit international. La qualification juridique d'un fait ou d'une situation fait aussi partie intégrante de la réalité. Dans les circonstances de l'espèce, les conséquences de votre qualification juridique pourront même être appliquées plus aisément sur le terrain que dans d'autres contextes plus difficiles de contrôle ou de prétentions territoriales illicites.

C. Le prétendu caractère *sui generis* du Kosovo ne justifie pas non plus la déclaration unilatérale d'indépendance

32. J'en viens maintenant à l'argument du caractère *sui generis* du Kosovo, qui se double de l'affirmation insistante suivant laquelle la prétendue indépendance du Kosovo ne constituerait pas un «précédent»[179]. Ces arguments constituent l'aveu de la difficulté de trouver une justification juridique. Ils proposent ni plus ni moins l'existence d'un droit uniquement applicable au Kosovo.

33. Si tout cas est un *«unicum»* (*Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 290, par. 81), dans le sens où il est différent des autres[180], chacun doit être apprécié à la lumière des règles de droit international général et spécial qui lui sont applicables[181]. Or, le droit est fait de règles abstraites qui s'appliquent à tous les membres de la société de manière égale. Les faits ou situations

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[178] Lauterpacht, Hirsch, *Recognition in International Law*, Cambridge, Cambridge University Press, 1947, p. 421 (Traduction : «Admettre qu'à part certaines exceptions bien définies, un acte illicite ou ses conséquences immédiates peuvent devenir *suo vigore* une source de droit pour l'auteur de l'illicite, équivaudrait à introduire dans le système juridique une contradiction qui ne peut être résolue que par le déni de sa nature juridique.»)

[179] Serbie, observations écrites, p. 77-80, par. 162-169 ; Argentine, exposé écrit, p. 26, par. 60, observations écrites, p. 18-19, par. 33-35 ; Chypre, exposé écrit, p. 19, par. 78, observations écrites, p. 14-15, par. 33. *Contra :* Allemagne, observations écrites, p. 6 ; Danemark, exposé écrit, p. 6 ; France, exposé écrit, p. 42-43 ; Japon, exposé écrit, p. 8 ; Luxembourg, exposé écrit, p. 3, par. 5 ; Pologne, exposé écrit, p. 24, par. 5.2.5 ; Slovénie, exposé écrit, p. 2/3.

[180] Serbie, observations écrites, p. 67, par. 128. Cf. aussi : Vollebaek, Knut, haut commissaire de l'OSCE pour les minorités, «Address on Minority Rights in Kosovo», Humanitarian Law Centre Conference on Minority Rights in Practice, Pristina, Kosovo, 11 septembre 2008, disponible sur : http ://www.osce.org/kosovo/13215.html, p.5.

[181] Serbie, observations écrites, p. 65-80, par. 124-170.

concrètes exigent l'identification des règles applicables. Nos contradicteurs ne se sont même pas mis d'accord pour établir une liste unique des éléments qui feraient du Kosovo un cas *sui generis*[182]. La Serbie a déjà réfuté l'un après l'autre tous les éléments mentionnés à l'appui du prétendu caractère *sui generis*. Pris isolément ou dans son ensemble, ils ne justifient pas la déclaration unilatérale d'indépendance[183].

34. J'ouvre une parenthèse pour me référer brièvement à deux éléments historiques erronés — parmi d'autres — mentionnés dans des observations écrites pour justifier le prétendu caractère *«sui generis»* du Kosovo[184]. Ils concernent le changement du statut du Kosovo en 1989. Ce changement a été effectué avec le consentement de l'Assemblée du Kosovo et il en va de même pour la Voïvodine[185]. La Cour constitutionnelle de la Yougoslavie a confirmé la conformité au droit en vigueur du changement de statut[186]. Contrairement à ce que les auteurs de la déclaration prétendent[187], la Cour constitutionnelle n'était pas un organe politique. Elle était bel et bien un organe judiciaire composé sur une base égalitaire, y compris par un juge du Kosovo de souche albanaise, et qui avait une longue histoire de révoquer la législation des républiques — y compris celle de la Serbie — non conforme à la Constitution fédérale[188].

35. Je reviens aux considérations générales sur le caractère *sui generis* du Kosovo. C'est un fait que chaque fois que quelqu'un essaie d'échapper à l'application des règles, on invoque le fait d'être une exception. Ici, il n'y a aucune exception prévue par une quelconque règle qui soit applicable. Le prétendu «cas unique» ou *«sui generis»* constituerait en fait un très mauvais précédent. L'accepter sous une forme juridique serait la consécration de ce que nos amis anglophones affirment avec sagesse : «Bad precedents make bad law.»

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[182] Serbie, observations écrites, p. 68-69, par. 133-134.

[183] Serbie, observations écrites, p. 68-77, par. 133-161.

[184] Finlande, exposé écrit, p. 5-6 ; auteurs, contribution écrite I, p. 51-58, par. 3.23-3.28.

[185] Serbie, exposé écrit, p. 76-77, par. 189 ; Serbie, observations écrites, p. 51-52, par. 97-98.

[186] Serbie, observations écrites, p. 51-52, par. 97-98.

[187] Auteurs, contribution écrite II, p. 38, par. 3.26.

[188] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie)*, exceptions préliminaires de la République fédérale de Yougoslavie, septembre 2002, disponible sur le site de la Cour à l'adresse suivante : http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=73&case=118&code=cry&p3=1, p. 104-109, par. 4.24-4.31.

Conclusions

36. J'arrive, Monsieur le président, à mes conclusions. Messieurs les juges, certains Etats se sont exprimés devant vous — et je crains fort qu'ils ne continuent à le faire durant la phase orale — comme s'ils étaient dans une conférence internationale pour discuter de l'avenir de la province serbe du Kosovo. Mais nous sommes ici devant la plus haute juridiction internationale. La question qui vous a été posée n'est pas de savoir si l'indépendance du Kosovo représente une bonne ou une mauvaise idée — et nous pensons qu'il s'agit d'une très mauvaise idée à tout point de vue ; la question juridique qui se pose est celle de savoir si les organes locaux d'autonomie créés par les Nations Unies pouvaient unilatéralement décider de s'ériger en organes d'un prétendu Etat indépendant.

37. Mes collègues ont démontré que la déclaration unilatérale d'indépendance est contraire au régime établi par la résolution 1244 et qu'elle porte atteinte à l'intégrité territoriale de la Serbie. Je viens d'illustrer que le principe d'autodétermination ne lui fournit pas de justification, et d'insister sur le fait que le cas du Kosovo est régi par le droit international et qu'il doit être apprécié à la lumière des règles applicables.

38. Monsieur le président, Messieurs les juges, je vous remercie de votre attention et vous prie, Monsieur le président, de donner la parole à M. Saša Obradović pour la brève présentation de nos conclusions.

The PRESIDENT: I thank you, Professor Kohen, for your presentation. I now call upon Mr. Obradović.

Mr. OBRADOVIĆ:

SUMMARY OF SERBIA'S LEGAL ARGUMENTS AND CONCLUSIONS

1. Mr. President, distinguished Members of the Court, it is an exceptional privilege to appear again before the principal judicial organ of the United Nations as a representative of the Republic of Serbia. This morning, my learned colleagues have demonstrated that the UDI is contrary to international law. My task now is to summarize our main arguments.

2. Mr. President, Serbia submits that international law does not remain neutral with regard to the unilateral declaration of independence. Kosovo is subject to an international legal régime

established by Security Council resolution 1244 (1999) which provides for an international administration of Kosovo, establishes a political process for the determination of the future status and does not allow unilateral secessionist attempts, and reaffirms the territorial integrity of Serbia.

3. The authors of the UDI did not have the authority to issue such a declaration. That act did not fall within their competences under resolution 1244 (1999) and the Constitutional Framework for Kosovo. Indeed, and by adopting the UDI, they blatantly violated these two instruments, as well as other rules of international law.

4. The UDI is not in conformity, *inter alia*, with the following rules of international law:

— firstly, the fundamental principle of respect for the territorial integrity of States which precludes non-consensual secessions from independent States;

— secondly, the rules of the international legal régime established by Security Council resolution 1244 (1999), guaranteeing the territorial integrity of Serbia, as well as providing for the United Nations administration in Kosovo. Such a régime can be modified or terminated only by the Security Council;

— thirdly, the rules of the international legal régime established by resolution 1244 (1999), which provide for a political process to determine the future status of Kosovo that cannot be terminated unilaterally or undermined by any of the parties concerned.

5. These rules of international law are not only applicable to the Provisional Institutions of Self-Government of Kosovo, but to all relevant actors in the province. Therefore, no matter which body or group adopted the UDI, it violated international law.

6. It has also been demonstrated that the principle of self-determination does not provide support for the UDI. The Kosovo Albanians do not constitute a separate "people" entitled to exercise the right of self-determination, nor does Kosovo constitute a self-determination unit entitled to become a separate State. Furthermore, the so-called "right to remedial secession" does not provide support for the proposition that the UDI is in accordance with international law. First, its proponents have failed to prove the existence of such a rule in international law. Second, even assuming that such a right exists *(quod non)*, its various requirements advanced by its proponents have not been met in the case of Kosovo.

7. The recognition of the so-called "Republic of Kosovo" by a minority of States cannot grant retroactive legality. We have demonstrated that the so-called "Republic of Kosovo" does not possess an effective independent government, which is a necessary criterion of statehood, as a matter of fact.

8. Finally, I wish to emphasize that Kosovo does not constitute a *sui generis* case in which a right to secession might exist. A number of similar situations exist throughout the world and the independence of Kosovo would certainly be used as a precedent by separatist movements. The very idea that Kosovo would be considered a *sui generis* case shows that there are no sufficient legal grounds that can otherwise be relied upon to justify its attempted secession from Serbia. It should be emphasized that, as a matter of principle, we must reject the idea that any "exceptionality" could justify violations of law. As we have already commented, while each and every case is unique in its own way, this does and should not prevent international law from being applied.

9. Mr. President, Members of the Court, these proceedings concern a question that is of utmost importance for international law and the legal order of the United Nations. A matter of days ago, you, Mr. President, affirmed that "[l]aw does not replace politics or economics, but without it we cannot construct anything that will last in the international community"[189].

Serbia shares this vision. It is the very reason that we appear before you in the present advisory proceedings.

10. The Republic of Serbia submits that:

(1) The International Court of Justice is competent to give the advisory opinion in the present case and that there are no compelling reasons that should lead the Court to decline to give its opinion; and, finally, that

(2) The Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo dated 17 February 2008 is not in accordance with international law.

On behalf of the Serbian delegation, I am pleased to express our sincere gratitude for your kind attention. Thank you.

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[189]Speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Sixty-Fourth Session of the General Assembly of the United Nations, 29 October 2009, available on the website of the Court: http://www.icj-cij.org/presscom/files/1/15591.pdf, p. 6.

The PRESIDENT: Thank you very much, Mr. Obradović. This concludes the oral statement and comments of Serbia. The oral proceedings will resume this afternoon at 3 p.m., in order for the authors of the unilateral declaration of independence to be heard on the questions submitted to the Court. The Court is adjourned.

The Court rose at 1.05 p.m.