REPUBLIC OF CYPRUS

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3 April, 2009

The Registrar,
International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Dear Registrar,

Re: ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT OF KOSOVO (REQUEST FOR ADVISORY OPINION)

I submit the Written Statement by the Republic of Cyprus, authorized by the Court in paragraph 2 of its Order of 17 October 2008 in relation to an advisory opinion by the Court on the question:

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

The original Written Statement together with 30 copies and a CD-ROM electronic copy are hereby presented for filing - by way of personal delivery to the Registry by H.E. the Ambassador of the Republic of Cyprus.

Please accept, Mr. Registrar, the assurances of my highest consideration.

Petros Clerides
Attorney General of the Republic of Cyprus
Agent of the Government of the Republic of Cyprus

/MM

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INTERNATIONAL COURT OF JUSTICE

RE: ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE BY THE PROVISIONAL INSITUTIONS OF KOSOVO

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT

SUBMITTED BY
THE REPUBLIC OF CYPRUS

17 APRIL 2009

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WRITTEN STATEMENT

I Summary

1. This written statement is filed by the Republic of Cyprus in accordance with the Order of the Court dated 17 October 2008 in response to the United Nations General Assembly's request for an advisory opinion contained in resolution 63/3 (A/RES/63/3), dated 8 October 2008.

2. The Republic of Cyprus has submitted this written statement for two reasons. First, over the past 35 years it has given very careful and sustained consideration to the legal consequences of unilateral declarations of independence by bodies claiming to be representatives of new States. It hopes that this experience may assist the Court. Second, the Republic of Cyprus considers it inevitable that whatever the Court may say in relation to Kosovo is very likely to be quoted and applied to other situations. The Republic wishes therefore to submit its views as to the salient characteristics of the Kosovo situation, in the hope that it may assist the task of responding to the precise question now before the Court and of avoiding the framing of propositions in ways that might be ill-suited to other situations which may appear to be superficially similar to that of Kosovo.

3. The points that the Republic of Cyprus wishes to make are set out in the following paragraphs of this written statement, but it may be helpful to summarize the submission here. After addressing the question of the jurisdiction of the Court and the admissibility of the request (paragraphs 5 to 14), and the absence of reasons that might prevent the Court from giving the requested advisory opinion (paragraphs 15 and 16), the statement sets out a short outline of the key facts (paragraphs 18 to 66). The precise terms of the request to the Court are considered next (paragraphs 67 to 74). While it is concluded that the request may be answered simply by pointing out that it was beyond the legal powers of the Provisional Institutions to make a declaration such as the purported 'declaration of independence' (paragraph 70), this statement continues to consider certain broader questions. It sets out a legal analysis of the Kosovo situation in which the following main points are made:-

   a. International law must be applied consistently and globally. It is contrary to the Rule of Law to create exceptions and to settle the legal rights and duties of States by treating them as *sui generis* cases. (Paragraphs 75 to 81)

   b. The starting point for the analysis of the Kosovo situation must be the principles of sovereignty and territorial integrity. The fundamental question is whether Serbia's sovereignty over Kosovo was lawfully terminated on 17 February 2008, and if so, on what lawful basis. (Paragraphs 82 to 90)

   c. Nothing in UN Security Council resolution 1244(1999) purports to authorize the secession of Kosovo. In any event, the UN Security Council does not have the legal power to modify territorial title or make changes to a State's territory without that State's consent. (Paragraphs 91 to 105)

   d. The Provisional Institutions are subordinate bodies created under the auspices of UN Security Council resolution 1244(1999) by UNMIK in its 'Constitutional

Framework' for Kosovo, and possessing limited legal powers. Under resolution 1244(1999), under the Constitutional Framework, and as a matter of international law, the Provisional Institutions had no legal power to make the 'declaration of independence'. (Paragraphs 106 to 113)

e. Serbia did not lose its sovereignty over Kosovo as a part of the process of the dissolution of the SFRY. (Paragraphs 115 to 122)

f. The population of Kosovo does not have a right of self-determination that might give them the right to secede from Serbia nor the right to dismember the existing State. Moreover, neither the population of Kosovo (which is not limited to ethnic Albanians) nor the Albanian population in Serbia as a whole constitutes a 'people' for the purposes of the right of self-determination in the sense of a right to independence. The Albanian population of Kosovo and the Albanian population of Serbia as a whole constitute a minority and as such, as a matter of international law, they enjoy all the human rights to which the people of a State, and the minorities within it, are entitled; this includes the right to participate in the constitutional arrangements of the State ('internal self-determination'). (Paragraphs 123 to 139)

g. There is no validity in the argument that as part of the right of self-determination there is a 'right of secession of last resort' for a part of a population which has suffered gross and systematic human rights violations. In any event, no such right could justify the 2008 'declaration of independence' because human rights violations by the Government of Serbia ended in 1999, and because secession was not a 'last resort', there being other options that could have given substantial internal self-determination or autonomy to Kosovo but which remained unexplored. (Paragraphs 140 to 148)

h. There is no general right in international law for part of the population of a State to secede from the State without its consent. This principle is essential to the stability of States and of the international relations between them. (Paragraphs 149 to 158)

i. There is no valid argument that an entity which appears to possess the 'factual' characteristics of a State and appears 'objectively' to be a State is *ipso facto* entitled to be treated as a State. (Paragraphs 162 to 191)

j. A State must possess a territory, a population, an effective government, and the capacity to enter into international relations. (Paragraphs 166 to 183)

k. Kosovo does not possess an effective government. Nor does it possess the capacity to enter into international relations, because its foreign relations powers are reserved to UNMIK. Accordingly, Kosovo does not satisfy the 'factual' criteria of Statehood. (Paragraphs 173 to 183)

l. Moreover, international law has developed so as to require not only that an entity possess the 'factual' characteristics of a State, but also that it has emerged in a manner that does not violate fundamental principles of international law. For example, international law precludes the establishment of States by the use of

force. Similarly, an entity cannot be established as a State in breach of limitations on the legal powers of those who purport to establish it. (Paragraphs 184 to 191)

m. For these reasons the Republic of Cyprus submits that Kosovo can have no claim to Statehood, and that the declaration of independence was a declaration inconsistent with international law. Again, it is emphasised that this does not mean that Kosovo has no legal rights: it means simply that Kosovo is not an independent sovereign State, and that Kosovo's rights remain those established by UN Security Council resolution 1244(1999) and developed under the processes which it prescribes. (Paragraphs 192 and 193)

II Terminology

4. The following phrases and terms are used in this written statement and are defined as follows:

Badinter Commission:	The Arbitration Commission of the Peace Conference on the Former Yugoslavia set up by the Council of Ministers of the European Community in 1991 to provide the Peace Conference on Yugoslavia with legal advice.
Constitutional Framework:	The legal basis for self-government in Kosovo promulgated by UNMIK in 2001: UNMIK/REG/2001/9 as amended by UNMIK/REG/2002/9 and UNMIK/REG/2007/29.
Contact Group:	An informal group comprised of United Kingdom, France, Germany, Italy, Russia and the United States which meets regularly to co-ordinate international policy in southeast Europe.
KFOR:	The Kosovo Force, a NATO-led international security force established pursuant to Security Council resolution 1244(1999). It has a broad mandate to maintain a safe and secure environment in Kosovo for all its inhabitants.
Provisional Institutions:	The Provisional Institutions of Self-Government are the local administrative bodies established by UNMIK in Kosovo pursuant to the terms of Security Council resolution 1244(1999).
SRSG:	Special Representative of the Secretary-General.
Unilateral declaration of independence:	Declaration made by the Provisional Institutions on 17

February 2008 that Kosovo is an independent State.

UNMIK: United Nations Interim Administration Mission in Kosovo, established by Security Council resolution 1244(1999).

III Procedural questions

Jurisdiction of the Court

5. Article 65 of the Statute of the Court provides:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

6. Article 96(1) of the Charter of the United Nations provides:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

7. In accordance with these provisions, the Court has jurisdiction on the basis that (i) the General Assembly is authorised by Article 96(1) to make a request for an advisory opinion, and it has done so by General Assembly resolution 63/3, adopted on 8 October 2008;[1] (ii) the General Assembly is competent to make the request since the request concerns matters within the scope of the Assembly's activities; and (iii) the request is for an opinion on a legal question. Of these points, the Republic of Cyprus considers it necessary to comment only in relation to the last two.

The General Assembly is competent to make the request

8. Paragraph 1 of Article 96 of the Charter authorises the General Assembly to make a request for an advisory opinion. The Article does not require that such a request should fall within the scope of the Assembly's activities, unlike the power to request opinions given to the organs mentioned in paragraph 2 of that Article. Nevertheless, in its previous jurisprudence, the Court has given consideration to whether the subject matter of a request concerns the activities of the requesting organ.[2]

9. In the case of the request under consideration, it is clear that its subject matter relates to the general activities of the General Assembly. The powers of the General Assembly are broad. As stated in Article 10 of the United Nations Charter, they include the power to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter". The specific powers to be found in Articles 11 to 14 of the Charter include consideration of

[1] UN doc. A/RES/63/3.

[2] E.g. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I. C. J. Reports 1950,* p. 70; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J .Reports 1996 (I),* p.226, at 232 and 233, paras. 11 and 12; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, Advisory Opinion, I. C. J. Reports 2004,* p.136, at 145, para.16.

general principles of co-operation in the maintenance of international peace and security,[3] making recommendations promoting international co-operation in political, economic, social, and other fields, and recommending measures for the peaceful adjustment of any situation which the Assembly deems likely to impair the general welfare or friendly relations among nations. Further, under Article 4 of the Charter, the decision of the General Assembly is necessary for the admission of a new Member in the United Nations.

10. For the exercise of all of these powers the General Assembly must act in accordance with the principles of international law regarding sovereignty and territorial integrity, the criteria for Statehood, and the right of self-determination. These essential building-blocks of the international order are central to the Assembly's activities. It is these issues which will be the subject of the advisory opinion requested of the Court.

11. Furthermore, the subject matter of the request to the Court falls within the specific activities of the General Assembly and of other organs of the United Nations with regard to the future status of Kosovo and the mandate of UNMIK.[4] The role of the Security Council in relation to its own resolution, 1244(1999), is clear; the General Assembly and the Secretary-General also have powers and functions in relation to the mandate of UNMIK under that resolution. The role of the General Assembly includes taking decisions, with the advice of its Fifth Committee, on the budget of UNMIK. The responsibilities of the Secretary-General include the support of the mandate of UNMIK. Following the unilateral declaration of independence by the Provisional Institutions, the exercise of the legal powers of UNMIK as an interim civil administration have been obstructed and the Secretary-General has made plans to adjust its operational role and to reconfigure the international civil presence. In this context, the Secretary-General reported to the Security Council at its meeting on 20 June 2008 that in view of the differing positions of Member States on the status of Kosovo "the United Nations has taken a position of strict neutrality on the question of Kosovo's status."[5]

12. The opinion of the Court on the legal status of the declaration of independence will be of crucial significance to any further consideration by the Secretary-General of whether it is appropriate to make recommendations for future reconfiguration of UNMIK, and on what basis, particularly in the light of the view of some members of the Council that any adjustment in the role of UNMIK should be a matter for the Security Council rather than the Secretary-General. The same considerations will be relevant to the General Assembly in their responsibilities for the budget of UNMIK.

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[3]Thus, for example, Item 85 on the agenda of the 63rd session of the General Assembly is entitled "Maintenance of international security - good-neighbourliness, stability and development in South-Eastern Europe". Under this Item, the Permanent Representative of the Russian Federation sent to the Security Council and the General Assembly the text of the Joint Statement by the Chamber Council of the Council of Federation and the Council of the State Duma of the Federal Assembly of the Russian Federation "concerning the consequences of the self-proclamation of independence by the territory of Kosovo (Serbia) adopted on 18 February 2008" (UN doc. A/63/62).

[4]The mandate of UNMIK and the exercise of some of its functions by EULEX is discussed further at paras. 43 and 63 below.

[5] The status-neutral position of the UN has been repeated in subsequent reports of the Secretary-General to the Security Council, see for example, para. 26 of his report dated 24 November 2008 (UN doc. S/2008/692).

The request is for an opinion on a legal question

13. Finally, the request for the advisory opinion concerns the legality under international law of the unilateral declaration of independence made by the Provisional Institutions of Kosovo. This is, in terms, a 'legal question'. The Court is being asked to interpret rules and principles of international law regarding fundamental aspects of the international legal order and of the United Nations system, including territorial integrity, self-determination and the criteria for Statehood. These tasks required of the Court are of a judicial nature. The question submitted by the General Assembly has been "framed in terms of law and raise[s] problems of international law; . . . it is by its very nature susceptible of a reply based on law".[6] It is therefore a question of a legal character.

Conclusion

14. The General Assembly's request for an advisory opinion satisfies the conditions of Article 65 of the Statute of the Court and Article 96(1) of the Charter both as regards the competence of the requesting organ, the General Assembly, and as regards the substance of the request, a legal question.

There are no compelling reasons preventing the Court from giving the requested advisory opinion

15. The Court has interpreted Article 65, paragraph 1, of its Statute as giving it discretion to render an opinion – or to refuse to render an opinion - even if the conditions for jurisdiction are met.[7] Nevertheless, the present Court has never refused to give a requested advisory opinion through an exercise of discretion, since the giving of such opinions represents the Court's participation in the activities of the United Nations. It has stated that only 'compelling reasons' should lead the Court to refuse its opinion.[8] The Court has further stated that it must be satisfied in respect of each request for an advisory opinion as to the propriety of its acceding to the request, by reference to the criteria of 'compelling reasons'.[9]

16. The purpose of advisory opinions is to furnish to the organ which has made the request the elements of law necessary for its action.[10] Far from there being compelling reasons for the Court to refuse to give an opinion, it is clear that the opinion will, as already stated in paragraphs 11 and 12 above, provide for many of the organs of the United

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[6] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, Advisory Opinion, I. C. J. Reports 2004,* p.136, at 153, para. 37, quoting in part *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at 37, para. 72.

[7] E.g. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1)*, p.226, at 234-235, para. 14.

[8] *Certain Expenses of the United Nations (Article 17(2) of the Charter), Advisory Opinion, I. C. J. Reports 1962,* p. 155*; Difference Relating to Immunity from Legal Process of Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I),* p.62, at 78-79, para. 29.*); Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, I. C. J. Reports 2004,* p.136, at 156, para. 44.

[9] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories I. C. J. Reports 2004*, p.136, at 157, para. 45.

[10] In its *Opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I.C. J. Reports 1951,* p. 15, at 19) the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action."

Nations, including the General Assembly and the Secretary-General, a determination of the principles and rules of international law necessary for them in the exercise of their responsibilities regarding the mandate of UNMIK and the alleged Statehood of Kosovo. The subject matter of the request is also of broader concern than the competence of the Provisional Institutions under international law. As indicated in paragraphs 75 to 81 below, the opinion of the Court will address fundamental rules and principles of international law which apply throughout the international legal order.

Conclusion

17. There are no 'compelling reasons' why the Court should not render the advisory opinion which has been requested of it; indeed the opinion will be of crucial significance in the work of the General Assembly and the Secretary-General of the United Nations.

IV Context

Introduction

18. The Court will have the benefit of a full account of the relevant history in other submissions made to it. The Republic of Cyprus wishes to draw the attention of the Court only to the following few facts, an understanding of which is necessary for the legal analysis and which it believes to be of particular importance to the Court's determination.

19. The Republic of Cyprus considers that the key period is from the early 1990's onwards, as this marked Kosovo's earlier unsuccessful attempts to declare independence and the dissolution of the State of the Socialist Federal Republic of Yugoslavia. However, a brief summary of earlier events concerning the sovereignty of Serbia over Kosovo is provided below.

20. In the 19th Century, the Balkan Peninsula, one of the world's most ethnically complex areas, contained many groups whose members were scattered across the administrative provinces through which the Ottoman Empire governed its territory and population. By 1913, the Ottoman Empire in Europe had effectively ended, with partitions of its territory resulting in seven States – Greece, Albania, Romania, Serbia, Montenegro, Bulgaria and Turkey (eastern Thrace). The so-called 'Great Powers' imposed or instigated 'settlements' intended to end the multitude of ethnic struggles, by means of multilateral treaties which regulated suzerainty, autonomy, sovereignty, the creation of States and their territorial frontiers. Although the Axis Powers breached the World War I settlements, these were restored at the end of World War II.

21. Serbia had become an independent State following the Treaty of Berlin in 1878, after about 50 years of internationally guaranteed autonomy. Albania was the last of the seven Balkan States to emerge, becoming independent in 1913. It was in the same year and in the same conference of Ambassadors in London (although a different session of the conference) that an area of Kosovo was ceded by the Ottoman Emperor to the State of Serbia. This was a different entity from what had been known as Kosovo under the Ottoman Empire. The Kosovo vilâyet was created under the Ottoman Tanzimat reform programme in 1864; apart from an earlier small administrative district, this was the first

time there had been a governmental institution entitled 'Kosovo'. The new vilâyet was a very extensive area, covering part of what is now the Former Yugoslav Republic of Macedonia, part of modern Bulgaria, part of what is Serbia outside the former Autonomous Province of Kosovo, part of Montenegro and part of Albania. Most of the Sançak of Novi Pasar was within the Kosovo vilâyet. (The latter was in 1913 divided between Montenegro and Serbia.) The Kosovo vilâyet was far larger than the territory currently alleged to be that of the independent State of Kosovo, the subject of these proceedings.

22. In December 1918, following declarations by representative councils in Croatia, Slovenia and Bosnia (then all within Austria-Hungary) and the Montenegro National Assembly, a new Kingdom of Serbs, Croats and Slovenes was formed. By virtue of this union, other parts of the Kosovo territory became a constituent part of the new State and it was with its territorial boundaries including the whole of what is now Kosovo that the State became one of the original members of the League of Nations, the Covenant of which obliged members to respect each other's territorial integrity.[11]

23. In 1929, following the assumption by the King of the Serb-Croat-Slovene State of dictatorial powers, the name of the State was changed to the Kingdom of Yugoslavia. During the Kingdom's occupation by Axis forces from 1941 to 1945 the area which was later to become the Autonomous Region of Kosovo and Metohija was not administered as a single entity. In March 1945 the Democratic Federal Yugoslavia was formed and some six months later the People's Assembly of the People's Republic of Serbia established the Autonomous Region of Kosovo-Metohija, declaring it to be a constituent part of Serbia.[12] A Popular Federal Republic of Yugoslavia was declared on 29 November 1945 and in 1963 the name of this State was changed to the 'Socialist Federal Republic of Yugoslavia'.

Socialist Federal Republic of Yugoslavia

24. In 1990, therefore, Kosovo was part of a multi-ethnic State, the Socialist Federal Republic of Yugoslavia ('SFRY'). The SFRY comprised six republics including the Republic of Serbia,[13] of which the province of Kosovo was a constituent part.[14] Within the SFRY, these federal units were demarcated by administrative boundaries.[15]

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[11] Article 10.

[12] Constitution of the Socialist Federal Republic of Yugoslavia 1963, Article 111.

[13] Constitution of the Socialist Federal Republic of Yugoslavia 1974, Article 5: "The territory of the Socialist Federal Republic of Yugoslavia is a single unified whole and consists of the territories of the Socialist Republics".

[14] Constitution of the Socialist Federal Republic of Serbia of 1974, Article 1: "The Socialist Autonomous Province of Vojvodina and the Socialist Autonomous Province of Kosovo are parts of the Socialist Republic of Serbia."; Constitution of the Socialist Federal Republic of Serbia (28 September 1990), Article 4, "The territory of the Republic of Serbia is a single whole, no part of which may be alienated" and Article 6 "The Republic of Serbia includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohia". See also the Constitution of the Socialist Federal Republic of Yugoslavia 1974, Article 1: "The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous Provinces of Vojvodina and Kosovo which are constituent parts of the Socialist Republic of Serbia".

[15] Constitution of the Socialist Federal Republic of Yugoslavia 1974, Article 5, "The territory of the Socialist Federal Republic of Yugoslavia is a single unified whole and consists of the territories of the Socialist Republics...Boundaries between the Republics may only be altered on the basis of mutual agreement". Article 3 specified that the Republics were "states based on the sovereignty of the people". By contrast, Article 4 specified that the Autonomous Provinces were "self-managing democratic socio-political communities based on the power

25. Serbia is ethnically highly heterogeneous: 27 different groups constituted a third of the population of the Republic of Serbia.[16] According to a census of 1991, approximately 17% of its total population were Albanians. A large proportion of these Albanians resided in the province of Kosovo, alongside various other ethnic and minority groups such as Roma, Montenegrins, Turks, Croats and Yugoslavs.[17] This pattern continues to be reflected in the population of Serbia today. The last census conducted in the Republic of Serbia, dated 2002, states that there were 61,647 Albanians in Serbian territory outside Kosovo.[18]

26. It is not only Serbia which has a diverse population. Although account had been taken of the political principle of self-determination in making the post-World War I settlements, the outcome, having regard to the complex residential patterns of scattered occupation by different ethnic groups, inevitably left large and small minorities outside the frontiers of the new or successor State in which their ethnic group constituted the majority of the population. The resulting population patterns, showing majority and minority populations in those States over the years, are described in Appendix II to this written statement.

27. The last official census in Kosovo was conducted in 1991. The Statistical Office for Kosovo estimated in 2008 that the population of Kosovo comprised 92% Albanians in 2006.[19] The shifts in populations in Kosovo over the last eighty years are apparent from the tables set out in Appendix II. The Tables show that Kosovo has always been inhabited by various ethnic and minority groups. The statistics also reflect the fact that since the conflict in the 1990's large numbers of non-ethnic Albanian groups left Kosovo following violent action taken against them as documented in reports of the UN Secretary-General[20] and various Non-Governmental Organisations.[21]

Early declarations of independence

28. Following a series of decrees and laws adopted by the Serbian Parliament, on 2 July 1990 the Kosovo Provincial Assembly[22] issued a 'Declaration of Sovereignty'.[23] It

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of self-management by the working class and all working people, *in which* the working people, nations and nationalities realize their sovereign rights" (emphasis added).

[16] 1991 census placed the percentage of Serbs in Republic of Serbia at approximately 64%.

[17] According to the census of 1991, the total population of Kosovo consisting of inter alia 82.2% Albanians and 10.9% Serbs and Montenegrins, with the remainder comprising inter alia of Romas, Turks, Croats, Yugoslavs and Muslims: See T. Judah, *Kosovo, What everyone needs to know* (2008), p.59.

[18] <http://webrzs.statserb.sr.gov.yu/axd/Zip/eSn31.pdf >. The Statistical Office for Serbia provides figure for total population in 2007 but with no breakdown of ethnic groups: <http://webrzs.statserb.sr.gov.yu/axd/en/drugastrana.php?Sifra=0013&izbor=odel&tab=1>. The Yearbook for 2008 provides figures based only on the 2002 census (see at p 74): <http://webrzs.statserb.sr.gov.yu/axd/en/god.htm >

[19] <http://www.ks-gov.net/ESK/eng/index.php?option=com_content&view=article&id=36&Itemid=26> See also Appendix II, Tables 6 and 7.

[20] E.g. UN doc. S/1999/779, para. 5: "a large number of Kosovo Serbs have left their homes for Serbia....a second wave of departures resulted from an increasing number of incidents committed by Kosovo Albanians against Kosovo Serbs."

[21] E.g. OSCE Report, Kosovo/Kosova: As Seen, As Told, Part II December 1999.

[22] The Provincial Assembly is defined in the Constitution of the Socialist Autonomous Province of Kosovo, 1974 at Article 300 as "a body of social self-management and the supreme organ of power within the framework of provincial rights and duties".

[23] For the text of the Declaration, see M. Weller, *The Crisis in Kosovo 1989-1999* (1999), p. 64.

declared "Kosova as an independent and equal constituent unit within the framework of the Federation (Confederation) of Yugoslavia entitled to the same constitutional denomination as other constituent units". At paragraph 3(a) of this Declaration, the Albanians of Yugoslavia were described as existing as a "national minority".

29. The Yugoslav Constitutional Court ruled that this Declaration was unconstitutional. The Court held that alteration of Serbia's boundaries required its consent in accordance with the SFRY Constitution. It stated that as a national minority there was no right to invoke self-determination in order to proclaim Kosovo a federal unit within Yugoslavia.

30. On 7 September 1990, the Kosovo Assembly adopted a Constitution for the 'Republic of Kosova'. On 28 September 1990, a new Constitution of the Socialist Federal Republic of Serbia was adopted by the Serbian Assembly. Nearly one year later, on 22 September 1991, the Kosovo Assembly made a formal declaration of "the Republic of Kosova as a sovereign and independent State with the right to participate as a constituent republic in Yugoslavia".[24]

31. With the exception of Albania,[25] no State recognised Kosovo as an independent State.[26]

Disintegration of the SFRY

32. In 1991 the disintegration of the SFRY began. It resulted in the emergence of a number of new, successor States. The status and name of the State of which Kosovo was a part have changed several times during and after the dissolution of the SFRY.

Federal Republic of Yugoslavia

33. On 27 April 1992, Serbia and Montenegro adopted the Constitution of the Federal Republic of Yugoslavia ('FRY'). This established the FRY as a sovereign and independent State (Article 1), composed of the Republic of Serbia and the Republic of Montenegro (Article 2) and affirmed that the Republic of Serbia included the province of Kosovo (Article 6). Kosovo remained a constituent part of the FRY.

34. The claim of the FRY to be the continuation of the SFRY was not accepted by all other States;[27] the FRY ultimately conceded in October 2000 that it was one of the equal successor States to the SFRY and it was admitted to the United Nations on that basis on 1 November 2000[28] and accordingly was able to operate on the international plane.

35. While the initiative for the recognition of the States emerging from the dissolution of the SFRY was taken by the EC States, eventually all the successor States accepted

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[24] For the text of the Declaration, see M. Weller, *The Crisis in Kosovo 1989-1999* (1999), p.72.
[25] UN doc. A/55/421 refers to "the recognition by the Albanian Parliament of the 'Republic of Kosovo' in 1991".
[26] Attempts to secure recognition through the London International Conference on the Former Yugoslavia and in the Follow-on Talks of the Special Group of Kosovo were unsuccessful. The Secretary-General of the Conference reported on 11 November 1992 that independence of Kosovo was not a solution "since existing boundaries must be maintained" (UN doc. S/24795, para. 91).
[27] While the FRY had persisted with its claim to be the continuation of the SFRY, the UN had restricted its participation in the Organisation's activities: SC res. 752 (1992); GA res. 47/1 (1992); letter of UN Legal Counsel (Fleischauer) to Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations dated 29 September 1992 (UN doc. A/47/485).
[28] SC res. 1326(2000); GA res. A/Res/55/12.

outcomes which were in accordance with the EC States' positions. So did the wider international community, in admitting the successor States to the UN. The absence of a dispossessed sovereign, together with the disappearance of the SFRY and the consent of the several successor States to the processes which had fixed their identities and territories, were crucial elements in reaching this international consensus. It is the presence of a 'dispossessed' sovereign (Serbia) and the absence of its consent which sharply distinguish these earlier cases occurring within the dissolution of the SFRY from the situation in Kosovo.

Badinter Commission

36. During this process of the dissolution of the SFRY, the Arbitration Commission of the Peace Conference on the Former Yugoslavia ('the Badinter Commission') was established on 27 August 1991. Set up by the Council of Ministers of the European Community, its purpose was to provide the Peace Conference on Yugoslavia with legal advice on issues arising from the fragmentation of the SFRY. It was guided by and applied general principles of international law.[29] According to the Badinter Commission the dissolution of the SFRY was complete by 4 July 1992.[30]

International Criminal Tribunal for the former Yugoslavia

37. Approximately one year later, the UN established the International Criminal Tribunal for the former Yugoslavia (ICTY) to deal with international crimes that took place during conflicts in the former Yugoslavia in the 1990s. Individuals charged with crimes committed there since 1991, including conduct in Kosovo and directed against persons there, have been indicted; and some have been convicted.[31]

Subsequent developments

38. The FRY changed its name to Serbia and Montenegro under the Constitutional Charter of the State Union of Serbia and Montenegro dated 4 February 2003.[32] The Constitution expressly stated that Serbia included the province of Kosovo.[33]

39. On 3 June 2006 Montenegro declared itself independent from Serbia and was then accepted as a United Nations Member State on 28 June 2006.[34] Serbia continued the legal personality of Serbia and Montenegro.[35] Kosovo remained within Serbia, a matter

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[29] Opinion No.1, para. 1(a). The ten opinions handed down by the Badinter Commission are reproduced in (1992) ILM 31 1494 – 1526 and also in 92 ILR (1993), 162-211.

[30] Opinion No.8, para. 4.

[31] E.g. *Milutinovic et al* IT-05-87, ICTY: Former Yugoslav Deputy Prime Minister, Nikola Šainović, Yugoslav Army General, Nebojša Pavković and Serbian police General Sreten Lukić were each sentenced to 22 years' imprisonment for crimes against humanity and violation of the laws or customs of war; Yugoslav Army General, Vladimir Lazarević and Chief of the General Staff, Dragoljub Ojdanić were found guilty of aiding and abetting the commission of a number of charges of deportation and forcible transfer of the ethnic Albanian population of Kosovo and each sentenced to 15 years' imprisonment; Milan Milutinović, the former President of Serbia, was acquitted of all charges.

[32] <http://www.mfa.gov.yu/Facts/const_scg.pdf>

[33] The preamble refers to "the state of Montenegro and the state of Serbia which includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija".

[34] GA res. A/RES/60/264.

[35] By a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General that the membership of Serbia and Montenegro was being continued by the Republic of Serbia (UN Press Release:

reaffirmed in the adoption of Serbia's new Constitution of 8 November 2006, which declared Kosovo "an integral part of the territory of Serbia".[36]

40. At all times, Kosovo remained part of Serbia. This was uncontested by other States.

Resolution 1244(1999), UNMIK, Provisional Institutions and KFOR

Resolution 1244(1999)

41. On 10 June 1999, the UN Security Council adopted resolution 1244(1999) under Chapter VII of the UN Charter. This resolution affirmed the commitment of all Member States to the principles of sovereignty and territorial integrity and stated that, pending a final settlement, "substantial autonomy" was to be established in Kosovo. No member of the Security Council voted against the adoption of the resolution, and Serbia consented to its terms.

UNMIK

42. Pursuant to paragraph 10 of the resolution, Kosovo was placed under a transitional UN administration, entitled the United Nations Interim Administration Mission in Kosovo ('UNMIK'). The Special Representative of the Secretary-General for Kosovo ('SRSG') was appointed by the Secretary-General to lead UNMIK. The General Assembly is responsible for the budget of UNMIK.

43. UNMIK has a wide-ranging mandate. Its responsibilities, as listed in paragraph 11 of resolution 1244(1999), include performing basic civilian administrative functions, maintaining civil law and order, supporting the reconstruction of key infrastructure as well as protecting and promoting human rights.

Provisional Institutions

44. Under the terms of resolution 1244(1999), UNMIK is also tasked with establishing and overseeing the development of provisional democratic self-governing institutions. Accordingly, in 2001 UNMIK promulgated a Constitutional Framework that established the Provisional Institutions of Self-Government ('Provisional Institutions').

45. The Framework provides that the Provisional Institutions are to work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's final status through a process at an appropriate future stage in accordance with resolution 1244(1999). The preamble to this Framework states that the exercise of the responsibilities of the Provisional Institutions in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of resolution 1244(1999), and powers are expressly reserved to the SRSG pursuant to Chapter 8. The relevant provisions of Chapter 8 are set out in Appendix I to this written statement. Chapter 2 reiterates that the powers of the Provisional Institutions must be exercised consistently with the provisions of resolution 1244(1999).

ORG/1469).

[36] The Preamble to the Constitution of Serbia states: "Considering also that the Province of Kosovo and Metohija is an integral part of the territory of Serbia".

46. The responsibilities of the Provisional Institutions set out in Chapter 5 of the Framework include economic and financial policy, fiscal and budgetary issues, administrative and operational customs activities, domestic and foreign trade, industry, investments and education.

KFOR

47. Paragraph 7 of Security Council resolution 1244(1999) authorised the establishment of an international security presence in Kosovo. Point 4 of Annex 2 to the resolution stated that it should have "substantial North Atlantic Treaty Organization participation" and "must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees". Pursuant to paragraph 9 of resolution 1244(1999) its mandate included deterring renewed hostility and threats against Kosovo by Yugoslav and Serb forces; establishing a secure environment and ensuring public safety and order; demilitarizing the Kosovo Liberation Army; supporting the international humanitarian effort; and supporting the international civil presence.

48. Accordingly, on 9 June 1999 a Military Technical Agreement was formed between the NATO-led international security force 'KFOR' and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia. This agreement stated that KFOR had "the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo". KFOR personnel first entered Kosovo on 12 June 1999.

Standards and Status

49. From 1999 onwards, the focus of the international community was on setting standards for Kosovo that had to be met by the institutions in Kosovo before the question of Kosovo's final status was addressed.[37] Referred to initially as benchmarks, the 'Standards before Status' policy was devised by the SRSG to ensure that Serbia's interests were defended by the international community, and to measure the progress achieved by the Provisional Institutions.

50. In December 2003, the SRSG presented to the Security Council a policy document which replaced the 'Standards before Status' headline with 'Standards for Kosovo'.[38] The introduction stated that:

> "this document sets out the standards that Kosovo must reach in full compliance with the UN Security Council resolution 1244(1999) and the Constitutional Framework and the original standards/benchmarks statement endorsed by the Security Council".

51. The standards identified were as follows: functioning democratic institutions; rule of law; freedom of movement; sustainable returns and the rights of communities and their members; economy; property rights; dialogue and Kosovo protection corps.[39]

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[37] <http://www.unmikonline.org/standards/docs/KSP2003-2007.pdf>

[38] <http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf>

[39] The Kosovo Protection Corps is a civilian emergency service agency established on 20 September 1999 by

The Eide Review

52. In June 2005, the Secretary-General appointed his Special Envoy, Mr Kai Eide, to undertake a comprehensive review of the situation in Kosovo. In his report of 7 November 2005,[40] Eide addressed the progress in relation to the standards and also the question of status.

53. Regarding standards, he concluded that "the foundation for a multi-ethnic society...is grim."[41] He stressed the importance of the standards implementation process and observed that "the record of implementation so far is uneven."[42]

54. Regarding the question of status, he concluded that:

> "the future status process must be moved forward with caution. All the parties must be brought together — and kept together — throughout the status process. The end result must be stable and sustainable. Artificial deadlines should not be set. Once the process has started, it cannot be blocked...."[43]

The Contact Group's Guiding Principles

55. The Contact Group considered Eide's report and submitted to the Security Council its 'Guiding Principles' for a settlement of the status of Kosovo.[44] It called on all parties to "refrain from unilateral steps" and confirmed that "The Security Council will remain actively seized of the matter". It outlined ten principles, the first of which stated that "The settlement of the Kosovo issue should be fully compatible with...international law". The sixth principle stated that:

> "Any solution that is unilateral or results from the use of force would be unacceptable...The territorial integrity and internal stability of regional neighbours will be fully respected".

Ahtisaari proposal

56. In November 2005, the Secretary-General appointed Mr Martti Ahtisaari as his Special Envoy for Kosovo. His mission was, following on from Eide's review, to lead the political process to determine the future status of Kosovo in the context of resolution 1244(1999).[45] Serbia participated willingly in this process.

57. Ahtisaari commenced negotiations on Kosovo on 21 February 2006. On 2 March 2007, he stated that "the parties remained diametrically opposed on the future status of Kosovo".[46] 24 days later he presented his "Comprehensive Proposal to the Secretary-

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UNMIK/REG/1999/8.
[40] UN doc. S/2005/635.
[41] Summary at page 3 and para. 44.
[42] Summary at page 1.
[43] Summary at page 5 and para. 70.
[44] UN doc. S/2005/709.
[45] UN doc. SG/A/955.
[46] <http://www.un.org/apps/news/story.asp?NewsID=21742&Cr=Kosovo&Cr1=>

General" with the recommendation that Kosovo's future status should move to independence, supervised by the international community.[47]

58. Further negotiations were commenced in August 2007 via a tripartite body comprised of negotiators from the EU, Russia and the US.[48] In its final report issued four months later, this body concluded that a negotiated settlement was in the best interests of both parties but that neither party was willing to cede its position.

European Union Rule of Law Mission in Kosovo

59. The European Union Rule of Law Mission in Kosovo ('EULEX') was established by EU Council Joint Action 2008/124/CFSP of 4 February 2008, on the European Union Rule of Law Mission in Kosovo. EULEX operates within the framework of resolution 1244(1999).[49] It was formed with executive powers to carry out some of the functions of UNMIK. As is said in the Joint Action at paragraph 7 "The United Nations Secretary-General also noted the readiness of the EU to play an enhanced role in Kosovo" and Article 5 states that "The operational phase of EULEX KOSOVO shall start upon transfer of authority from the United Nations Mission in Kosovo, UNMIK."

60. EULEX functions with the support of Serbia, as was confirmed in a letter dated 28 November 2008 from Mr Boris Tadić, the President of the Republic of Serbia, to Mr Javier Solana, High Representative for the Common Foreign and Security Policy of the European Union.

61. The central aim of EULEX is to assist and support the Kosovo authorities in the rule of law area, in particular in the areas of international policing, justice and customs, regarding which there is currently a transfer of responsibility from UNMIK. EULEX implements its mission through monitoring, mentoring and advising, and it retains certain executive responsibilities. Its powers are extensive and it may override the local authorities in Kosovo. Thus, Article 3(b) of the EU Council Joint Action states that EULEX shall:

> "ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities".

Current position

62. On 17 February 2008, the Provisional Institutions issued the declaration of independence. Serbia did not consent - and has not consented - to the purported secession of Kosovo from its territory.

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[47] UN doc. S/2007/168.

[48] Referred to as 'the Troika'.

[49] SC res. 1244(1999) is expressly referred to in paragraph 1 of EU Council Joint Action 2008/124/CFSP. As stated at para. 64 below the Secretary-General confirmed in his report dated 24 November 2008 that "EULEX will fully respect Security Council resolution 1244(1999) and operate under the overall authority and within the status neutral framework of the United Nations". The EU submitted its first report on the activities of EULEX to the UN Secretary-General, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/149, Annex 1.

63. In the wake of the declaration, the Secretary-General stated that the profile and structure of the United Nations in Kosovo should be adjusted in light of the evolving circumstances.[50] The Secretary-General subsequently recommended a reconfiguration of UNMIK, reducing its competences and establishing an enhanced operational role for EULEX in the field of the rule of law, notably in the areas of police, customs and justice.[51] In particular, the Secretary-General outlined a 'six-point plan' for the deployment of EULEX. The six fields identified are police, customs, justice, transportation and infrastructure, boundaries and Serbian patrimony.[52] On 9 December 2008 UNMIK commenced phasing out its policing component, handing responsibility over to EULEX.[53] Serbia has consented to these new arrangements.[54]

64. The United Nations has maintained a position of strict neutrality about the status of Kosovo.[55] For example, in his report dated 24 November 2008,[56] the Secretary-General confirmed three times the United Nations position of strict neutrality on the question of Kosovo's status.[57] At paragraph 50, he stated, in relation to the EU preparations for undertaking a rule of law operation, that:

> "EULEX will fully respect Security Council resolution 1244(1999) and operate under the overall authority and within the status neutral framework of the United Nations."

65. NATO has reaffirmed that KFOR shall remain in Kosovo on the basis of UN Security Council resolution 1244(1999), unless the United Nations Security Council decides otherwise.[58]

66. Of the UN Member States, only 55 have recognised Kosovo as an independent State. The remaining 137 Member States have not recognised Kosovo, and a significant proportion of them have said that they do not intend to do so.[59]

IV Terms of the request to the Court

67. In its resolution 63/3 (A/RES/63/3), the General Assembly decided to request the International Court of Justice to render an advisory opinion on the following question:

> "Is the unilateral declaration of independence by the Provisional Institutions

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[50] UN doc. S/2008/354, para.19 (dated June 2008). On 18 August 2008 a technical arrangement was agreed for the handover of assets between UNMIK and EULEX : <http://www.eulex-kosovo.eu/news/docs/Press-release-on-signing-of-technical-arrangement.pdf>

[51] UN doc. S/2008/692 (dated 24 November 2008).

[52] UN doc. S/2008/692, paras. 30 to 47.

[53] <http://www.unmikonline.org/news.htm#0912>

[54] UN doc. S/2008/692, para. 29: "I welcome the positive outcome of the discussions and the acceptance of Serbia of these arrangements".

[55] See the Reports of the Secretary-General dated 12 June 2008 (UN doc. S/2008/354); 15 July 2008 (UN doc. S/2008/458); and 24 November 2008 (UN doc. S/2008/692).

[56] UN doc. S/2008/692 (24 November 2008). Approved by UN Security Council, see UN doc. S/PRST/2008/44.

[57] Paras 24, 46 and 49.

[58] <http://www.nato.int/docu/pr/2008/p08-025e.html>

[59] Numbers of recognizing and non-recognizing States correct as at 6 March 2009.

of Self-Government of Kosovo in accordance with international law?"

68. It is important to note what the request covers and what it does not.[60] In effect, the Court is asked to decide, in accordance with international law, whether the declaration adopted by the Provisional Institutions of Kosovo was lawful: that is, whether the Provisional Institutions acted lawfully under international law in purporting to secede from the State of Serbia.

69. On the other hand, in the view of the Republic of Cyprus, the question does not ask the Court to determine whether States which have or have not recognised Kosovo as an independent State have acted lawfully, nor to decide upon consequences which might result from the action of the Provisional Institutions.

70. Under one interpretation of the question, the answer can therefore be brief: the Provisional Institutions had no competence under international law to make the declaration of independence, and the declaration is therefore not in accordance with international law. Although the Provisional Institutions represent, in the submission of the Republic of Cyprus, neither a State nor another subject of international law, it is meaningful and entirely appropriate to ask the Court to decide the question in accordance with international law. The declaration of independence which the Provisional Institutions have promulgated is intended to have an impact on the international plane and to create a subject of international law. It is therefore subject to the application of international law. Moreover, the Provisional Institutions are themselves created by international law, and the Court is asked to determine whether they have acted in accordance with that law. In its previous jurisprudence, the Court has taken decisions as to whether an authority operating in a territory on the basis of a mandate under international law has exceeded its authority and whether such acts are without legal effect. [61]

71. The Provisional Institutions owe their existence to international law since they are the creation of UNMIK, itself an organ of the Security Council and possessing a limited competence derived from and circumscribed by Security Council resolution 1244(1999). There was no power in any institution referred to or created by virtue of resolution 1244(1999) to reach a decision on the final status of Kosovo; nor did any of these bodies have the power to create other bodies which themselves had such a power. The result is that the Provisional Institutions had no power to do what they purported to do on 18 February 2008.[62] The point is elaborated more fully at paragraphs 106 to 113

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[60] Insofar as there is any ambiguity resulting from the drafting of the request, the Court may itself decide upon the exact question which it has been asked. *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, Advisory Opinion, I. C. J. Reports 2004*, p.136, at 153-154, at para. 38 states "The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court."

[61] *International Status of South West Africa, Advisory Opinion, I.C. J. Reports 1950,* p. 128, at 141-143 (no unilateral right of South Africa to modify the terms of the mandate); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, I.C. J. Reports 1962*, p. 319 (no suggestion that Court could not have reviewed the merits of South Africa's conduct if it had had jurisdiction); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 (The Court exercised a form of review over decisions of the General Assembly and Security Council about the lawfulness of South Africa's presence in South West Africa).

[62] See paragraphs 106 to 113 above.

below.

72. Accordingly, the unilateral declaration of independence was, as a matter of international law, beyond the powers of the Provisional Institutions and specifically beyond the powers of 'the Assembly of the Republic of Kosovo' (as it now styles itself); and it is a nullity in international law.

73. Although the question may thus be briefly answered, the Republic of Cyprus submits that the fundamental issues of international law which are implied in the question are of very great importance and practical significance, and should also be considered by the Court. It is primarily in relation to those issues that the remainder of these submissions is addressed.

74. The question submitted to the Court by the General Assembly does not ask the Court to determine the legality of situations other than that of Kosovo. But international law must be applied in a consistent and uniform manner and the Court is being asked to decide upon fundamental rules and principles which apply throughout the international legal order. The Republic of Cyprus has, over a long period, had occasion to give careful consideration to these rules and principles; drawing on its own experience, it offers the following submissions in an effort to assist the Court with its task.

VI Legal analysis

A. General application of international law

75. The central idea of law, and of equality before the law, is that rules of law apply to all persons, except where specific provision is made by another rule of law to the contrary. In the international legal system of sovereign and equal States, this principle is fundamental.[63] There must be general rules on basic elements of the legal system, including its rules on personality, which establish the criteria according to which those entities having rights and duties in the legal system may be identified. These categories of rules are so fundamental that their legal quality is sometimes taken for granted: but it is worth emphasising that they are legal rules,[64] the content and binding quality of which are to be assessed in the same manner as for other rules of international law.

76. Of the States which have made statements recently reacting to the claims of Statehood asserted by Kosovo, Abkhazia and South Ossetia, there are many which have given a legal explanation in justification for their statements. The point is not what position any particular State has taken on the status of Kosovo or Abkhazia or South Ossetia, but the demonstration through this body of practice that States regard the question of Statehood as being one of *international law*: only if the legal requirements are first satisfied is there a political discretion for States to take decisions on whether or not to recognise a 'lawful' State.

77. The generality of the rules regulating the basic substance of international law is of as great importance as is their binding quality: both are necessary to assure States of the

[63] I. Brownlie, *Principles of Public International Law* (7th ed, 2008), p.279: "sovereignty and equality of states represent the basic constitutional doctrine of the law of nations".
[64] R. Jennings and A. Watts (eds.), *Oppenheim's International Law: Peace* (9th ed, 2007), pp.119-123.

protection of their vital interests, notably guaranteeing their identities and allowing them to conduct their internal affairs according to their own conceptions.[65] 'Special cases' do not merely dilute the quality of legality of a system: they replace it with a political element, in which the power and commitment of individual actors becomes more significant than the legal rights that they enjoy. Claims that situations are *sui generis* reduce the universally recognised rights of States, and put them outside the ordinary processes of the making and application of international law.

78. Several of the States which have recognized Kosovo as a State have said that "Kosovo is not a precedent".[66] The international legal system does not have anything akin to a common law notion of judicial precedent, capable of generating rules with binding effect within the legal system and it is unlikely that those States which made the "no precedent" statements had in mind any judicial connotation. As a political matter, it is always open to a State to distinguish one situation from another, however alike they may seem to other States, or to identify one situation with another, however different they may seem. The States recognizing Kosovo undoubtedly intended that no other group could claim to be like the Albanian population of Kosovo and thus have a right to be a State (and to have that status acknowledged by other States). However, they are not able to bind others to their views. Indeed, it is far from clear that in political terms there are characteristics unique to the situation in Kosovo which differentiate it completely from all other similar cases, such that the assertion that "Kosovo is not a precedent" could carry persuasive force. The Albanian population of Kosovo is not the only minority within a national State seeking a State of its own or seeking to join with another State; nor is it the only group to have been the victim of serious human rights abuses by its own (former) government. Furthermore, the situation in Serbia is not the only intractable one which has involved the UN for a long period.

79. However much the recognizing States might have wished to avoid it, therefore, their actions in accepting Kosovo's Statehood run a high risk of fuelling or awakening hopes of favourable reactions to new or reiterated claims of groups within populations to be entitled to Statehood or even to be a State, with the obvious risks to stability which would follow. Where the Kosovo-recognising States see only difference, other States might see other situations as identical and act accordingly. The weakening of the protection of the principles of territorial integrity and non-intervention could hardly be avoided.[67]

80. As explained in more detail below at paragraphs 82 to 90, at the heart of the international legal conception of the State is the notion of territorial sovereignty. It is a fundamental principle that a State is entitled to the greatest protection of those spaces over which it has title, against the exercise of powers by other international actors which would interfere with the exercise of its authority there or, even more fundamentally, would seek to alter or eliminate that authority.[68] The stability of international relations

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[65] For what it means to be a State, see J. Crawford, *The Creation of States in International Law* (2nd ed, 2006), pp.40-45.

[66] For example, see the Security Council debates dated 18 February 2008 (UN doc. S/PV.5839): Belgium, id, p.9; United Kingdom, id, p.14; United States, id, p.19.

[67] R. Mullerson, "Precedents in the Mountains: On the Parallels and Uniqueness of the cases of Kosovo, South Ossetia and Abkhazia" (2009) 8 Chinese Journal of International law 2, 3-5, 16-17.

[68] *SS Lotus (France/Turkey) PCIJ 1927*, A/10, p.18.

is underpinned by respect for territorial title.[69]

Conclusion on the general application of international law

81. It is the contention of the Republic of Cyprus that the quality of the generality of the rules of international law and the prominence of the rule of territorial sovereignty are at the heart of the question which the Court has been asked to address. The Court should resist attempts to dilute the qualifications for Statehood and to modify the lawful means for the creation of States so as to accommodate so-called *sui generis* situations. Indeed, it should reaffirm the weight that is to be attached to established territorial sovereignty. If situations are *sui generis*, they should be dealt with by conferring an appropriate and special status on the particular entity, providing it with the necessary rights and powers in accordance with the processes and principles of international law but leaving the general concept of Statehood intact. They should not be dealt with by ignoring fundamental rules of international law.

B. Sovereignty and territorial integrity

82. The starting point for the Court is the fundamental principle of Serbia's sovereignty and territorial integrity. Any departure from these principles must be in accordance with international law. The Republic of Cyprus submits that there is no lawful basis for depriving Serbia of its territorial rights or for lawfully passing that title to a new State of 'Kosovo'.

83. The centrality of the stability of territorial sovereignty to the system of international law has been alluded to already. It is universally recognised to be of fundamental importance to the international order.[70] As observed by the Court "Between independent States, respect for territorial sovereignty is an essential foundation of international relations".[71] The status of the principle in international law is well-established as demonstrated by its consistent and repeated approval in a comprehensive range of international instruments.

84. The Badinter Commission (Opinion No.3), applying general principles of international law to the dissolution of Yugoslavia, confirmed that:

> "all external frontiers must be respected in line with the principle stated in the United Nations Charter,[72] in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV))[73] and in the Helsinki Final Act....."

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[69] See para. 86 below.

[70] I. Brownlie, *Principles of International Law* (7th ed, 2008), p 289: "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations"; M. Shaw, *International Law* (6th ed, 2008), p. 488: "The principle of the respect for the territorial integrity of states is well-founded as one of the linchpins of the international system".

[71] *Corfu Channel Case, I.C.J Reports 1949*, p.4, at 35. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment. I.C.J. Reports 1986*, p. 14, at 133, para. 263 which refers to the "fundamental principle of state sovereignty, on which the whole of international law rests".

[72] Article 2(1) and 2(4).

[73] "...all States enjoy sovereign equality ....the territorial integrity...of the State (is) inviolable... (preamble)...any

85. The Helsinki Final Act reads as follows:

> "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 ...territorial integrity and to freedom and political independence....
>
> IV: The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State"[74]

86. The stability of title to territory has always been a feature of international law and it has been bolstered as modern international law has developed. For example, the execution of the principle of self-determination has resulted in the creation of States, the peoples of which had the right to determine the political future of the territory on which the State was formed. The identification of that territory was almost always based on considerations of *uti possidetis,* that the previous international or administrative boundaries of the territory should be the boundaries of the new State. These boundaries have had a very strong persistence in modern international relations and have been modified only in exceptional circumstances with the consent of the States involved.[75]

87. The integrity of all boundaries, post-self-determination and otherwise, has been reinforced by the development of the rule that boundaries may not be altered by any use of force.[76] This was a major change in the international system where previously the establishment of new States and changes in territorial title were commonly effected by the use of force.[77] Furthermore, States are now under a positive legal obligation not to recognise States created by, or territorial title gained by, the use of force,[78] an obligation which has on occasion been reinforced by decisions of the Security Council.[79] This aspect of the rule on the prohibition of force is one of the foundations of the UN Charter

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attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."

[74] See also the Concluding Document of the Vienna Meeting 1986 of representatives of the participating States of the Conference on Security and Co-operation in Europe which was held on the basis of the provisions of the Final Act relating to the Follow-up to the Conference (1989): "Principle 5....confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, at violating the territorial integrity, political independence or the unity of a State...."

[75] M. Shaw, *International Law* (6th ed, 2008), pp. 523-524.

[76] UN Charter, Article 2(4); GA res. 2625 (1970), Principle 1; African Union, Non-Aggression and Common Defence Pact 2005, Article 4; Badinter Commission, Opinion No.3, para. 2, s.4.

[77] See M. Zacher, "The Territorial Integrity Norm: International Boundaries and the Use of Force" 55 International Organisation 215 (2001) for an account of state practice, before and after 1945. Cf., P. Daillier and A. Pellet, *Droit international public* (6th ed, 1999), 409-410.

[78] International Law Commission, Articles on State Responsibility, Article 41(2) and Commentary, paras (6)-(9), ILC Yearbook 114-115 (2001-II.2) (also in J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), pp.250-251).

[79] SC res. 541(1983), para. 7; SC res. 550(1984), paras 2 and 3 (Cyprus); SC res. 662(1990), para. 2 (Kuwait).

and applies whether the initial use of force was lawful or unlawful.[80] Because the prohibition on the use of force is a rule of *jus cogens*, any consent of the State which is the victim of the use of force does not affect the wrongfulness of the use of force or reverse the invalidity of any change of title which purports to be made in consequence of it.[81] These developments in international law give an entrenched legal status to established title.

Conclusion on sovereignty and territorial integrity

88. It is undisputed that on 17 February 2008, the territory affected by the claim asserted in the unilateral declaration of the Provisional Institutions on 18 February 2008 was part of the territory of the State of Serbia. It is thus incumbent on those who claim that the substance of the declaration was compatible with international law to demonstrate the legal basis on which Serbia was deprived of its territorial rights and to show further that title had lawfully passed to a new State of "Kosovo". As the ICJ said in the *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*:

> "Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory."[82]

This principle is equally applicable to all instances where one party maintains that a previously established title of another State has been changed.

89. It is the unequivocal position of the Republic of Cyprus that nothing has occurred to cast doubt on Serbia's uncontested title to Kosovo, and that the claim to the contrary made in the unilateral declaration is incompatible with international law. During a visit to Belgrade on 22 July 2008, the Foreign Minister of the Republic of Cyprus gave full support to Serbia's sovereignty and territorial integrity and said:

> "the future status of Kosovo has to be solved through bilateral agreement with the observation of the principle of international law. That is why Cyprus will never recognise the unilaterally declared independence of Kosovo-Metohia".

During a visit to Serbia on 23 February 2009, the President of the Republic of Cyprus Mr Demetris Christofias said "we support Serbia's struggle to protect its sovereignty and territorial integrity". Citing the Republic of Cyprus' position of principle regarding the non-recognition of Kosovo's unilateral declaration of independence, he noted:

> "This is our firm and consistent position of principle and we will follow this

[80] SC res. 478(1980) on East Jerusalem, basing the decision not to recognize the purported change in status of East Jerusalem on a violation of Geneva Convention IV and calling on States to accept the Council's decision, paras 2 and 5.
[81] A Orakhelashvili, *Peremptory Norms in International Law* (2006), pp.218-223.
[82] *I.C.J Reports 2008*, para. 122.

policy in the framework of the European Union and the international community...

We are by your side not just because we deal with a violation of international law in Cyprus as well as a violation of its territorial integrity and sovereignty, but because your case, just like ours, is a case of principle".

90. In the next section it is submitted that the fundamental principles of international law regarding sovereignty and territorial integrity are not displaced by resolution 1244(1999). On the contrary, the resolution indicates that it is these principles that must be applied.

C. Resolution 1244(1999) does not render the declaration lawful

91. Any settlement of Kosovo's status must be in accordance with resolution 1244(1999) which was adopted by the Security Council pursuant to Chapter VII of the United Nations Charter, and is binding upon Member States in accordance with Article 25 of the Charter. The fact that the resolution remains in force and provides the relevant legal framework has been repeatedly confirmed both by the Security Council and by the Secretary-General in his reports to the Council.[83]

92. The sovereignty and territorial integrity of Serbia is unambiguously confirmed in the resolution.[84] The preamble reaffirms "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" and thus provides the lens through which all other provisions should be interpreted. Further, operative paragraph 1 states that any "solution to the Kosovo crisis shall be based on the general principles in annex 1 and... 2". Both of those annexes provide that the political process must take "full account" of the "principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region".

93. Finally, operative paragraphs 11(a) and (e) of resolution 1244(1999) refer to the Rambouillet Accords, which themselves explicitly affirmed the sovereignty and territorial integrity of what was then the Federal Republic of Yugoslavia. The Preamble of the Rambouillet Accords pledges adherence to the Helsinki Final Act, in particular to "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" and Chapter 1 of the Accords states that institutions of democratic self-government in Kosovo should be "grounded in respect for the territorial integrity and sovereignty of

[83] Report of Secretary-General dated 15 July 2008 (UN doc. S/2008/458, para. 30); Report of the Secretary-General dated 12 June 2008 (UN doc. S/2008/354, para. 14); Report of the Secretary-General dated 28 March 2008 (UN doc. S/2008/211), para. 29. See also Secretary-General statements before the Security Council dated 20 June 2008 (UN doc. S/PV.5917) and 18 February 2008 (UN doc. S/PV.5839) and statement issued on 17 February 2008 (UN doc. SG/SM/11424). See also the Report of the Secretary-General dated 17 March 2009 (UN doc. S/2009/149). A majority of members of the Security Council explicitly reaffirmed the continuing validity of resolution 1244(1999) in the debate on the Report dated 23 March 2009 (UN doc. S/PV.6097).

[84] J. Friedrich, "UNMIK in Kosovo, Struggling with Uncertainty" Max Planck Yearbook of United Nations Law, Vol 9 (2005) 225, 248 "Resolution 1244 stresses that a solution to the crisis should take the principles of sovereignty and territorial integrity of the FRY into consideration.....a right of secession... is not recognised in Resolution 1244"; R. Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (2008), p.145 "sovereignty as to title was affirmed"; M. Shaw, *International Law*, (6th ed, 2008), p.210 "This comprehensive administrative competence is founded upon the reaffirmation of Yugoslavia's sovereignty and territorial integrity and thus continuing territorial title over the province".

the Federal Republic of Yugoslavia".

94. As is clear from its express words, the resolution does not permit the independence of Kosovo.[85] It provides for the "substantial autonomy"[86] of Kosovo. The Ahtisaari proposal for internationally supervised Statehood for Kosovo was firmly rejected by Serbia;[87] and in any event the fact that independence was mooted as a possible solution by a third party cannot alter the express terms of the extant resolution, which clearly confirms the territorial integrity of Serbia and does not provide for the secession of Kosovo.

95. It has been argued by some States which have recognized Kosovo that a right to secede can be drawn from the fact that it has been under an international administration since 1999. Such an argument has no legal validity.

96. Serbia has maintained its *de jure* right to sovereignty over Kosovo since the Federal Republic of Yugoslavia, (to which Serbia is the successor in this context), agreed to the arrangement set out in resolution 1244(1999); it has not accepted that the resolution has modified its rights. The whole arrangement established in accordance with the resolution was adopted after the FRY had given its consent to the broad lines of it.[88] It was, accordingly, an arrangement adopted in a manner consistent with the maintenance of Serbia's sovereignty over Kosovo. Serbia has largely refrained from physically exercising its rights in Kosovo, as is to be expected given that it consented to the provisions of resolution 1244(1999) and accepted its terms. Even so, Serbia has carried out some State activities in Kosovo, notably the conduct of elections,[89] even after the declaration of independence. This is, however, of relatively little legal significance in this context. While the exercise of sovereign rights in a territory may reinforce the assertion of title to that territory, it is not to be equated with title itself.[90] Serbia's title to Kosovo was firmly established for many years before the declaration of independence.

97. Even if it were accepted, which the Republic of Cyprus does not, that resolution 1244(1999) preserved Serbia's territorial rights over Kosovo only for an interim period until a final solution is reached (and, therefore, that the resolution does not necessarily

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[85] O.Corten, "Déclarations Unilatérales d'indépendence et Reconnaissances Prématurées: du Kosovo à L'Ossétie du Sud et à L'Abkhazie" (2008) Revue Générale de Droit International Public 721, 729-741, argues that the declaration of independence is incompatible with SC res. 1244(1999).

[86] Para. 10, paragraph 11(a) and annex 2, principle 8.

[87] UN doc. S/PV.5673 and S/PV.5672.

[88] Evidenced in the preambular paragraph "Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper", and in operative paragraphs 1 and 2 in which the Security Council "(1.) Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2; (2.) Welcomes the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above."

[89] Local elections were held in Kosovo by Serbian authorities on 11 May 2008, www.reuters.com/articlePrint?articleId=USL1110304620080511.

[90] For instance, the title of a displaced sovereign persists following the military occupation of (a part of) its territory – Hague Regulations Respecting the Laws and Customs of War on Land, 1907, Article 43, annexed to the Fourth Hague Convention, 100 BFSP 338; S. Talmon, Recognition of Governments in International Law (1998), pp.219-227; (UK) Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), ss.11.9-11.11, pp.278-279.

preclude the possibility that a final solution could involve some modification of Serbia's territorial sovereignty), resolution 1244(1999) plainly does not give to the Secretary-General, or to the international presences, the power themselves to terminate Serbia's *de jure* rights. Nor does the resolution contemplate the transfer of any such power to the institutions, including the provisional authorities, created by the international presence in Kosovo.[91] There is nothing in either the resolution or the fact of international administration which gives Kosovo some kind of right of secession which is not available under general international law.[92]

98. Furthermore, the thrust of resolution 1244(1999) is that of a consensual negotiated settlement accepted by the Security Council. A unilateral imposition of a solution by one entity is contrary to both the text and spirit of the terms of the resolution. Annex 1 and paragraph 5 of Annex 2 of the resolution clearly state that the establishment of substantial autonomy for the Kosovo is "to be decided by the Security Council". In addition, resolution 1244(1999) provides for a political "*process*"[93] leading to a "*settlement*". The term "settlement" is repeated four times in the resolution.[94] A natural reading of the term 'settlement' requires the meeting of minds between relevant actors.

99. This interpretation is supported by the fact that States have repeatedly rejected the idea of determining the status of Kosovo by a unilateral act, on the basis that this would be incompatible with the resolution; and they have confirmed the importance of co-operation.[95] The Contact Group has also stressed that:

> "any solution that is unilateral....would be unacceptable. There will be no changes in the current territory of Kosovo....The territorial integrity and internal stability of regional neighbours will be fully respected".[96]

100. The United Nations has no legal power to remove or curtail the sovereignty of any State over its territory; and nothing in resolution 1244(1999) purports to do so. This was strikingly and insistently reaffirmed in Sweden's Non-Paper, "A European Strategy for Kosovo".[97] There it is said that:

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[91] K. A. Wirth, "Kosovo am Vorabend der Statusentscheidung: Überlegungen zur rechtlichen Begründung und Durchsetzung der Unabhängigkeit" (2007) 67 ZaöRV 1065-1106. See para. 67 above for the terms of the request for the advisory opinion.

[92] See S. Oerter, "The Dismemberment of Yugoslavia: an Update on Bosnia and Herzegovina, Kosovo and Montenegro", (2007) 40 GYIL 457, 508.

[93] Paragraph 11(e), annex 1 and annex 2, principle 8.

[94] Paragraph 11 (a) (c) (f); annex 2, principle 8.

[95] See the Presidential statement of 24 April 2002 which states that the Security Council considered that "dialogue and co-operation... is vital to the full and effective implementation of resolution 1244" (UN doc. S/PRST/2002/11); the French representative observed that "The Assembly in particular must renounce initiatives that are contrary to resolution 1244(1999) or the Constitutional Framework. No progress can be achieved in Kosovo on the basis of unilateral action that is contrary to resolution 1244(1999)" (UN doc. S/PV.4770, dated 10 June 2003); the Italian representative stated that "1244...(is the) cornerstone of the international community's commitment to Kosovo...urge all concerned in Kosovo and in the region to co-operate in a constructive manner...on fully implementing resolution 1244(1999) while refraining from unilateral acts and statements..." (UN doc. S/PV.4823 dated 12 Sept 2003): the UK representative had earlier noted in 2000 that "It will, in the end, be up to Belgrade and elected representatives of Kosovo's communities to reach final *agreement* between themselves *on status*, with the help and support of the international community. *That is the import of resolution 1244(1999)*..." (emphasis added) (UN doc. S/PV/4225 dated 16 November 2000).

[96] Contact Group, Ten Guiding Principles, (UN doc. S/2005/709).

[97] 13 December 2007: *www.europaportalen.se/xvrigt/kosovo-nonpaper-december2007.pdf*

"With UNSCR 1244 continuing to be in force, and used to authorize the continued international presence, a full legal recognition of an independent state of Kosovo hardly seems possible.

..... As long as 1244 remains in force, the status of Kosovo will be one of less than complete independence and sovereignty.

..... There are numerous precedents for recognition that does not go all the way to full and complete independence. Anyhow, a full and complete recognition is hardly possible as long as UNSCR 1244 remains in force and Kosovo is not able to enter key international organisations like the UN, the OSCE and the Council of Europe."

101. That is a view which the Republic of Cyprus, too, considers to be correct. Indeed, the Republic of Cyprus wishes to make it clear that it does not accept that there is any power in the Security Council to modify territorial title with binding effect under Chapter VII.[98]

102. The mandatory powers of the Security Council under Chapter VII are dependent upon a finding that there is a threat to international peace and security and are to be directed to meeting the threat or restoring peace. Those powers are wide but not unlimited.[99] It is to be emphasized that in the instance where the Security Council has come closest to determining a territorial question without the consent of one of the States involved, the demarcation of the Iraq-Kuwait boundary under resolution 687(1991), the Council consistently characterised the exercise as a "technical" one of demarcation of an existing boundary.[100] Iraq initially contested both the process by which the demarcation were arrived at and the basis on which the Commission relied to decide the boundary. The long-term commitment of Kuwait and Iraq to the line settled by the Demarcation Commission depends upon the unilateral acceptances of it by each State rather than upon any decision of the Security Council.

103. Such powers as the Council has with respect to territorial title are restricted to making recommendations to States under Chapter VI, Article 37(2), when, again, the enduring legal basis for title would be the agreement reached by States in pursuance of the recommendation. If the Security Council has no power, even expressly, to change title to territory, then it clearly has no power to do so by implication and Security Council resolution 1244(1999) may not be read to suggest that it does.

Conclusion on resolution 1244(1999)

104. In its terms, resolution 1244(1999) is predicated on the continued existence of the sovereignty of Serbia over the territory of Kosovo. The resolution makes express reference to Serbia's consent to the international presences in part of its territory. The

[98] Cf., K. A. Wirth, "Kosovo am Vorabend der Statusentscheidung: Überlegungen zur rechtlichen Begründung und Durchsetzung der Unabhängigkeit" (2007) 67 ZaöRV 1065-1106; G Denis, *Le pouvoir normatif du Conseil de sécurité* (2004), at pp. 60-61, 258-261 and 328.

[99] The Security Council has created the Ad Hoc International Criminal Tribunals for Yugoslavia and Rwanda under resolutions 827(1993) and 955(1995) but with respect to each the Council accepted that it did not have the power to confer substantive jurisdiction on the Tribunals other than for existing crimes under customary international law.

[100] Resolutions 773(1992), 833(1993) and Presidential Statement S/24113 (1992).

resolution looks to conditions for the interim administration of Kosovo. If that status is to result in changes contrary to Serbia's established legal rights, it may be made only with Serbia's consent. The fact that Serbia has consented to the exercise of governance functions by international bodies in Kosovo, including the facilitation of local institutions, does not allow those international bodies to confer on those institutions the power to strip Serbia of its territorial sovereignty over Kosovo. The Security Council has no power to make changes in a State's territory without that State's consent.

105. Not only is the declaration of independence inconsistent with resolution 1244(1999); it was also made by a body, the Provisional Institutions, which had no power, under that resolution or otherwise under international law, to make the declaration. This is discussed more fully in the following section.

D. The Provisional Institutions had no power to make the declaration of independence and therefore the declaration is unlawful.

106. The Republic of Cyprus submits that that the declaration purporting to create an independent State was a matter beyond the legal competence of the Provisional Institutions.

107. UN Security Council resolution 1244(1999) authorized the UN Secretary-General:

> "to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo" [101]

108. UNMIK accordingly promulgated the Constitutional Framework[102] which established the Provisional Institutions of Self-Government. Since the Provisional Institutions are institutions of limited authority, they must point to a legal basis for any action which they take. Chapter 2 of the Constitutional Framework states that:

> "The Provisional Institutions of Self-Government and their officials shall (a) Exercise their authorities consistent with the provisions of UNSCR 1244(1999) and the terms set forth in this Constitutional Framework."

109. The Framework vested ultimate governmental authority in the SRSG, with the intention that powers should be transferred over a period of time to the Provisional Institutions in Kosovo. Chapter 8 of the Constitutional Framework (see Appendix I) lists among the "reserved powers and responsibilities which remain exclusively in the hands of the SRSG" the following:

> "(m) Concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244(1999);

[101] Para.10.
[102] UNMIK/REG/2001/9 (15 May 2001) amended by UNMIK/REG/2002/9 and UNMIK/REG/2007/29.

(n) Overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;

(o) External relations, including with States and international organisations, as may be necessary for the implementation of his mandate. In exercising his responsibilities for external relations, the SRSG will consult and co-operate with the Provisional Institutions of Self-Government with respect to matters of concern to the institutions"

110. UNMIK lists no Foreign Ministry among the departments of the Provisional Institutions,[103] and it was UNMIK that entered into international trade agreements on behalf of the Provisional Institutions in 2003 and 2005.[104]

111. The limited responsibilities of the Provisional Institutions are outlined in Chapter 5 of the Framework. They manifestly do not include the power to change Kosovo's territorial status.[105] Even the responsibility for preserving municipal boundaries remains within the powers of the SRSG.[106] The Provisional Institutions were created under the authority of the UN; and the UN defined the scope of the powers that the Provisional Institutions could exercise. Those powers did not include the power to conduct foreign relations on behalf of Kosovo, let alone a power to abandon the UN-defined goal of "substantial autonomy" and declare Kosovo independent. The declaration of independence was quite clearly a violation of the legal limitations imposed by the Security Council on the powers of the Provisional Institutions.

112. The powers of the Provisional Institutions are thus limited by international law, and in exercising those powers the Institutions must keep within the terms of resolution 1244(1999) and the Constitutional Framework. Not only do the Provisional Institutions have no power to declare Kosovo independent, but also any such declaration is contrary to the terms of resolution 1244(1999) which expressly affirms the sovereignty and territorial integrity of Serbia.[107] As the SRSG stated in 2001:

> "The issue of an eventual declaration of independence would hence be obsolete, since this is by no means within the authority of the self-government..... It is very clear, in how we have defined the powers of the provisional self-government, that questions about the final status or the sovereignty are not part of the mandate. That is a reserved power and will be dealt with when we come to the final political settlement."[108]

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[103] For the structure of the Provisional Institutions, see the 'Provisional Institutions for Self Government Organigram', at < http://www.unmikonline.org/pisg/PISG_organigram_2008.pdf >.

[104] See < http://www.unmikonline.org/regulations/unmikgazette/02english/IAE/IAE.htm >

[105] The fact that it was not within the competence of the Provisional Institutions to adopt acts determinative of Kosovo's final status has also been observed by the UNMIK Legal Office (UNMIK/FR/0040/01, 25 May 2001) and it was stated in the UNMIK-FRY Common Document dated 5 November 2001 that 'the position on Kosovo's future status remains as stated in SC resolution 1244(1999) and that this cannot be changed by any action taken by the Provisional Institutions of Self-Government'.

[106] Constitutional Framework Document, Chapter 8.1(v).

[107] J. Friedrich, "UNMIK in Kosovo, Struggling with Uncertainty" (2005) 9 Max Planck Yearbook of United Nations Law 225, 260: "The Constitutional Framework is not intended to be a constitutional document.....UNMIK remains within the limits of Resolution 1244 insofar as it does not allow Kosovo to have a constitution, because this would have to be seen as a step towards an independent final status without a previous political settlement and run contrary to Resolution 1244."

[108] UN doc. S/PV.4387 dated 3 Oct 2001.

Conclusion on the power of the Provisional Institutions

113. The unilateral declaration of independence was, as a matter of international law, beyond the powers of the Provisional Institutions, since those powers were limited by the Constitutional Framework made under Security Council resolution 1244(1999). In the following section we go on to consider whether there is any basis in the rules of customary international law to give those Institutions any right to claim Statehood.

E. Claims that Serbia has lost its title over Kosovo by the operation of a rule of law

114. In this submission, the Republic of Cyprus has dealt with the argument that the Provisional Institutions are entitled under resolution 1244(1999) to declare independence, concluding that the resolution does not provide any valid legal basis for the removal of Kosovo from Serbia's sovereignty. It now turns to certain arguments that might be advanced under the general rules of international law. It has already disposed of the argument that for an area to be under the sovereignty of a State it has to be under the effective control of that State.[109] Three other kinds of claim that Serbia has lost its title to Kosovo will be considered. First, that the events leading up to 18 February 2008 represent the final act in the dissolution of Yugoslavia (SFRY); second, that the change of title was founded on the application of the law of self-determination; and third that the loss of Serbia's title was due to the exercise of a "right of secession". It is concluded that none of these has had any impact on Serbia's territorial right to Kosovo.

(i) Serbia's sovereignty over Kosovo is not affected by the dissolution of the SFRY

115. The dissolution of the State of the Socialist Federal Republic of Yugoslavia began in 1991. Towards the end of 1991, the States of the European Communities reached the conclusion that disintegration was inevitable, and also that what was happening could not accurately be characterized as the secession from the SFRY of certain territories, on which new States were being formed, leaving the identity of the old SFRY intact if much diminished in territorial scope.[110] Instead, the EC States saw the process of dissolution of the SFRY as one which would result in the emergence of a number of successor States on what had previously been the territory of the SFRY. The EC States sought to influence what was happening, *inter alia*, by use of their recognition prerogatives, accompanied by the innovatory device of an arbitral commission (the Badinter Commission[111]) to offer advice to the European Peace Conference on Yugoslavia and to the EC States about whether or not the several claimants to Statehood had satisfied the criteria for recognition set out in the EC Guidelines.[112]

116. As was noted at paragraphs 36 and 84 above, the Commission based its advice on general international law,[113] as applied to the circumstances in the region, though the advice about recognition of particular States was not regulated by international law but by the terms of the initiative of the EC States expressed in its recognition guidelines.

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[109] See para. 96 above.
[110] See paras. 32 to 40 above.
[111] For details, see M Craven "The European Community Arbitration Commission on Yugoslavia", 66 BYIL 333 (1995). See also para 36 above.
[112] (1992) 31 ILM 1486.
[113] Badinter, Opinion No.1, para. 1(a).

The Commission endorsed the view that the SFRY was disintegrating[114] and reached conclusions on whether or not four of the six entities which applied to it had satisfied the EU conditions for recognition.[115]

117. The Commission followed the declaratory view of recognition, which it said was the position in international law.[116] It said:

> "a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state; that in this respect, the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory;
> b) that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty...."

The Commission concluded eventually that in all cases, entities which had been recognized as States had already achieved the status of States.[117]

118. The Commission relied on a modification of the application of the *uti possidetis* principle, which it held to be a rule of general international law relevant not only to post-colonial, self-determination cases but also to the break-up of federal States. It considered that the previous internal boundaries of the federal State components of the SFRY were the new international boundaries for the emerging States, contrary to the ambitions of those trying to alter the boundaries by force and establish new, ethnically homogeneous States with different boundaries.[118]

119. An application to the Badinter Commission for recognition was made on behalf of Kosovo in December 1991,[119] but was not considered by the Commission.[120] The Commission was asked whether the Serb populations of Croatia (the Krajina) and of Bosnia-Herzegovina had a right of self-determination. The Commission said that they did not, and in particular that any right of self-determination must not involve changes to frontiers fixed according to the principle of *uti possidetis*. The Commission decided that in this context *uti possidetis* meant adopting the boundaries of the federal States within the SFRY as the international boundaries between them when they became States. Accordingly, the Serbian populations were entitled to be treated in conformity with the international law protection afforded to minorities *within* a State.[121] It is an irresistible inference that the Commission would have taken the same position about the population of Kosovo, since the Commission decided that the unit entitled to self-

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[114] Badinter, Opinion No.1, para. 3.
[115] Badinter, Opinions Nos.4-7. On the recognition criteria, see EPC Declarations on the Recognition of New States in Eastern Europe and the Soviet Union and on Yugoslavia, 16 December 1991: (1992) 31 ILM 1486.
[116] Badinter, Opinion No.1. para. 1 (a); Opinion No.8, para. 1.
[117] Badinter, Opinion No.1; No 11.
[118] Badinter, Opinion No.3, para. 2.
[119] Letter from Dr Rugova to Lord Carrington, Peace Conference on Yugoslavia, 22 December 1991, in H Kreiger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, (2001), p.118; see also the Report of the Secretary-General of the UN (UN doc. S/24795).
[120] M Vickers, *Between Serb and Albanian: a History of Kosovo* (1998), p.252; R Caplan, *Europe and the Recognition of New States in Yugoslavia* (2005), p.139.
[121] Badinter, Opinion No.2.

determination was the FRY.[122] It should be emphasised that if previous internal boundaries within a disintegrating State are to be relied on as the international boundaries of the emerging States, those boundaries must be the ones established under the domestic law of the now disappeared State.[123] At the time of the independence of the FRY, the territory of Kosovo was, according to the law of the SFRY, part of Serbia.[124]

120. The Badinter Commission made reference to self-determination and to the protection of minorities as principles of international law. The manner in which it did so is significant. It referred to self-determination for the purpose of fixing the limits of the units which might achieve Statehood and then apply for recognition, rather than as the basis for selecting the peoples which had a right of self-determination that then might be exercised in favour of a claim of Statehood. The identification of the territorial limits of the self-determination units by the Badinter Commission has been accepted by all the States which have emerged from the dissolution of the SFRY, despite major efforts by armed force, movement of populations and political measures to change them. The Commission's conclusions were reinforced by the terms of the Dayton Agreement which brought the Bosnian wars to an end. While elaborate constitutional arrangements were made for the federal State of Bosnia and Herzegovina, no changes were proposed to its external boundaries, which followed those of the former federal State of Bosnia-Herzegovina within the SFRY.

121. The result of the process of disintegration of the SFRY was the emergence of a number of new, successor States. Kosovo was then and is today part of the territory of Serbia. Even after the international presences took their places in Kosovo after the adoption of Security Council resolution 1244(1999), States and international bodies understood that Serbian sovereignty continued.

Conclusion: There is no right to independence arising from the dissolution of the SFRY

122. The population of Kosovo thus have no claim to be entitled to Statehood on the basis that they have acquired this right by the dissolution of the SFRY. That process has long since finished, and was conducted according to standards by which any claim by Kosovo to independence would have been inadmissible.[125]

(ii) The unilateral declaration has no basis in the right of self-determination

123. The Republic of Cyprus submits that there is no validity in a claim that the population of Kosovo have a right of self-determination under international law which might give them a right to secede from Serbia.

124. The right of self-determination of peoples is firmly established in international law. The Court has noted that "the principle of self-determination has been recognised by the United Nations Charter and in the jurisprudence of the Court...[and] is one of the

[122] This is the necessary implication of Opinion No.8.
[123] See M Shaw, "The Heritage of States: the Principle of Uti Possidetis Juris Today" (1996) 77 BYIL 75, 116-119.
[124] See para. 33 above.
[125] Badinter, Opinion No.8 stated that "the process of dissolution of the SFRY... is now complete and the SFRY no longer exists." ((1992) 31 ILM 1486 at 1523)).

essential principles of contemporary international law."[126] While there is a long history behind the principle of self-determination, its status as a legal right and the content of that right was not fixed at the time of the making of the UN Charter. Rather, it evolved, first, during the decolonisation period and, second, in the context of the development of the international law of human rights.

125. In the decolonisation period, the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the General Assembly in 1960[127] affirmed that "All peoples have the right to self-determination." Insofar as that right conferred the entitlement to "complete independence", it was limited to "trust and non-self-governing territories or all other territories which have not yet attained independence" (paragraph 5). Immediately after requiring the transfer of power to such territories, the resolution affirms that:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

126. This stipulates that the right of self-determination does not give a right to dismember existing States. So far as the right to independence was concerned, the Declaration was limited to processes of decolonisation and similar situations.

127. The 1970 Friendly Relations Declaration[128] affirmed the right of self-determination and stated that the right could be exercised by the establishment of a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined by a people.[129] With its focus on the right of peoples to choose their own external political status, this is often termed the right of 'external self-determination'.

128. The Friendly Relations Declaration also made it clear that 'peoples' enjoying the right of external self-determination included those subjected to "alien subjugation, domination and exploitation". This was a category recognised as referring to the situations of Palestine, and of Namibia (then under South African domination). One distinguished commentator has described this category as one where a State dominates the people of a foreign territory against their will by recourse to force.[130] The right applies particularly in relation to military invasion or belligerent occupation of a foreign territory:

> "The right to external self-determination is thus, in a sense, the counterpart of the prohibition on the use of force in international relations. In many cases, the breach of external self-determination is simply an unlawful use of force looked at from the perspective of the victimised *people* rather than from that of the besieged

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[126] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at 102, para. 29 ; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.37.

[127] G.A. res. 1514 (XV) of 14 December 1960.

[128] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter: GA res. 2625(XXV) of 24 October 1970.

[129] GA res. 1541(XV) of 15 December 1960 had already specified the first three of these modes.

[130] A. Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (1995), pp. 90-99.

sovereign State or territory."[131]

129. During the decolonisation period, therefore, the right of external self-determination applied to the inhabitants of non-self-governing territories, of trust and mandated territories, and of territories similarly under alien domination as discussed above. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples was simply a resolution of the General Assembly but it is widely regarded as reflecting customary law, whether at the time or subsequently, so far as the right of self-determination for colonial countries and peoples is concerned.[132] The right of self-determination reflected in the General Assembly resolutions was essentially a right of decolonisation and freedom from military occupation.[133] Minorities within a State were not covered by the resolutions, and were emphatically not within the scope of the concept of self-determination.

130. Within the context of the law of human rights, the UN Covenants on Civil and Political Rights and on Cultural, Economic and Social Rights, adopted in 1966, each referred to the right of self-determination in their respective Articles 1, which is identical in each Covenant. Article 1 reads as follows:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

131. Like the General Assembly resolutions in the decolonisation period, the Covenants refer to the holders of these rights as 'peoples'. Minorities within a State are not included.[134] The position of minorities is separately addressed, in Article 27 of the Covenant on Civil and Political Rights, which provides that persons belonging to minorities:

> "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language."

132. The application of the Covenants is of course not limited to colonial situations; and the Covenants are drawn up in a more general and binding form that the resolutions on

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[131] A. Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (1995), p. 99.
[132] R. Jennings and A. Watts (eds.), *Oppenheim's International Law: P*eace (9th ed, 2007), p. 286 n. 17.
[133] See generally chapter II of M. Pomerance, *Self-Determination in Law and Practice* (1982).
[134] R. Higgins, *Problems and Process* (1994), p.124; P. Thornberry, "Self-determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q. 871 (1989).

decolonisation. The right to external self-determination in colonial situations is reaffirmed in paragraph 3 of Article 1 of the Covenants. The Article as a whole, however, impliedly recognises the right of access to political systems, and economic and cultural rights. This is termed internal self-determination[135] and is a right for all people living within a State's jurisdiction.[136] There is accordingly a shift of meaning in both 'self-determination' (to include internal self-determination) and 'peoples' (to mean all people within a State). The reference to the UN Charter in paragraph 3, as one distinguished commentator has put it, "aims at excluding the right of secession".[137]

133. The numerous later references to the right of self-determination in international instruments, such as in the Helsinki Final Act of the Conference on Security and Co-Operation in Europe,[138] are not expressly limited to colonial situations. But the right they affirm, for situations other than colonial and non-self-governing territories, is not the right of external self-determination. That would amount to accepting an unlimited right of secession, a position which is not supported by the *travaux* of such instruments or more generally in international law.[139] Indeed the wording of some texts seems consciously to limit the right as existing subject to the principle of territorial integrity.[140] While the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the Helsinki Final Act referred to the right of self-determination in principle 4, the following principle states that the participating States:

> "...confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States."[141]

134. Having regard to this and other instruments,[142] the reference in the Helsinki Final Act to a people determining its external political status must be read as the expression of external political status for the whole population of a State through the government of

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[135] "....the *travaux préparatoires* of the covenants do not establish that the right of self-determination, *defined as a unilateral right to independence,* was intended to apply outside the context of decolonisation." Hurst Hannum, "Rethinking self-determination in international law" 34 *Virginia Journal of International Law* (1993) 1 at p.32

[136] R. Higgins interprets 'peoples' in the Covenants in the sense of '*all* the peoples of a given territory' (R. Higgins, *Problems and Process* (1994), p.124).

[137] A. Cassese, *United Nations Law/Fundamental Rights* (ed,) Cassese (1979), p. 143.

[138] 1 August 1975.

[139] D. Raic, *Statehood and the Law of Self-determination* (2002), p.234.

[140] E.g. Charter of Paris 19-21 November 1990 which reaffirms "the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states".

[141] Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference On Security and Co-Operation In Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, 15 January 1989.

[142] E.g. Charter of Paris 19-21 November1990 which reaffirms "the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states".

the existing State.[143] The international instruments which continue to refer to the right of self-determination give no right for a part of an existing State to dismember the State. An example from the African Commission on Human and People's Rights illustrates the point. In *Katangese Peoples' Congress v Zaire,* the Commission considered the Katangese a people for the purpose of self-determination. But the Commission rejected their claim to secession and said that "Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire."[144] The Committee on the Elimination of Racial Discrimination considered the point in its Recommendation XXI on the right to self-determination in 1996 (A/51/18). The Committee noted that "ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession." The Committee stated:

> "In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paragraphs 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned."

135. Self-determination is thus a right of peoples beyond the decolonisation context, and has been recognised as such in numerous instruments. The right applies between the State and all its population, giving people the right to choose the form of government and have access to constitutional rights. This is internal self-determination. As a distinguished commentator puts it:

> "Self-determination for peoples or groups within a State is to be achieved by participation in the constitutional system and on the basis of respect for its territorial integrity."[145]

136. The *first* consequence of this reasoning for the claim asserted in respect of Kosovo is that neither the population of Kosovo (which is not limited to ethnic Albanians[146]) nor the Albanian population in Serbia as a whole, are a 'people' for the purpose of the right of external self-determination.[147]

137. Even in the Milosevic era, when there was repressive State action and violation of human rights, the Security Council, the Contact Group and the other mechanisms used for mediation between the two sides did not accept that Kosovo had a right to independence. As a distinguished commentator summed up the position in the mid-1990s:

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[143] A. Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (1995), p.287.
[144] *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995).
[145] J.Crawford, *The Creation of States in International Law* (2nd ed, 2006), p. 417.
[146] See paras. 25 and 27 above and Appendix II.
[147] See, to the same general effect, the conclusion of Bing Bing Jia, Tsinghua University Law School, Beijing, "The Independence of Kosovo: A Unique Case of Secession" 8 Chinese Journal of International Law (2009) p. 27 at pp.31-37.

"....the status of Kosovo as part of Serbia (and thus of the FRY) was not questioned by the outside world and, in contrast to the populations of the republics which made up the SFRY, the Kosovars were not generally perceived as possessing a right of self-determination (at least in the form of a right to create an independent State)."[148]

138. Nothing that has happened since then has converted the ethnic Albanians resident in Kosovo into a self-determination entity. Security Council resolution 1244(1999), as is explained above, supports the view that far from a right of external self-determination being accepted by the Security Council, the territorial integrity of Serbia was to be safeguarded. Indeed, not only is there no right of external self-determination for the ethnic Albanians, but the dismemberment of Serbia is contrary to the right of self-determination of the Serbian population taken as a whole.

139. The *second* consequence of this reasoning is that the Kosovo Albanians and the Albanians in the State of Serbia as a whole constitute a minority and as such enjoy all the human rights to which the people of a State, and the minorities within it, are entitled. Thus, to assert that Kosovo does not have a right of external self-determination is not at all to ignore the undoubted human rights of all of its population, including the rights laid down in Article 27 of the ICCPR and in Article 25 of the ICESC. Serbia has international law obligations to each group as a whole and to individuals as members of that group. All are entitled to treatment which recognizes their status and which allows them both individually and as a group effective participation in the State. For breaches of those obligations Serbia would bear State responsibility; but the remedy for any such breaches is not the splitting up of the State.

No 'right of secession of last resort'

140. It has sometimes been argued that there is a right of external self-determination outside the colonial context where a distinct part of a population has suffered gross and systematic violations of human rights, that is, where the right of internal self-determination has not been accorded to them. This purported right is sometimes derived from an interpretation of paragraph 7 of the 'principle of equal rights and self-determination of peoples' in the Friendly Relations Declaration, which reads as follows:

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

This paragraph is followed by paragraph 8, which reads:

> "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."

[148] Professor (now Judge) Christopher Greenwood, "Humanitarian Intervention: the Case of Kosovo" in *Essays on War in International Law* (2006), p. 593 at p.598.

141. The principle in paragraph 7 was reaffirmed in similar terms by the United Nations World Conference on Human Rights in Vienna in 1993.[149] An attempt is sometimes made to draw from an *a contrario* interpretation of the provision the conclusion that if a government does not accord internal self-determination, in the sense of access to its constitutional system on a racially non-discriminatory basis, to its whole people, those people have a right to take action dismembering the territorial integrity of the State.

142. This 'right of secession of last resort' would thus make a 'people' of the 'victim' part of the population. But this enormous step cannot validly be taken from an interpretation of the provision in question. First, such a major right as this would require a positive source, rather than a mere *a contrario* reasoning. Second, the overwhelming majority of States participating in the drafting of the Declaration did not agree that peoples might have a right of secession from an existing State.[150] Third, the provision refers back to the right of self-determination as set out in the 1960 Declaration, which, as we have noted, refers largely to colonial situations and certainly does not refer to minorities within a State. Fourth, even if the provision does not rule out secession there are plenty of international law principles that do (see paragraphs 149 to 158 below). In short, the provision does not recognise a right of secession. On the contrary, and at the most, it affirms the right of internal self-determination.

143. While the claim that there is a 'right of secession of last resort' has been supported by some writers and by *a contrario* reasoning such as that above, it is without support in State practice.[151] It has not emerged as a rule of customary law. It is not found in any treaty. And it has no support from the practice of the UN.[152] In its decision on the question of the secession of Quebec, the Supreme Court of Canada considered whether there was such a right and concluded that "it remains unclear whether this ... proposition actually reflects an established international law standard".[153]

144. Recent State practice is, indeed, clearly against the existence of any such right.[154] The Government of Russia has, admittedly, supported the assertion to independence of South Ossetia following alleged human rights and humanitarian law abuses by Georgia.[155] It has also supported the claimed independence of Abkhazia. But although these 'States' have been recognized by Russia, a much larger number of States has complained that these recognitions are unlawful, and that the status of the territories remain unchanged.[156] The purported secessions from Georgia in defiance of the wishes

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[149] Vienna Declaration and Programme of Action, 25.6.1993 (UN doc. A/CONF.157/24 (Part I), 13 October 1993. Reproduced in (1993) 32 ILM 1061).

[150] A. Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (1995) p. 112.

[151] P Hilpold, "Die Sezession: zum Versuch der Verrechtlichung eines faktischen Phänomens" (2008) 63 ZöR 117-142.

[152] J. Crawford states: "Outside the colonial context the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the State from which it has purported to secede. There is no case since 1945 where it has done so." *The Creation of States in International Law* (2nd ed, 2006), p.417. He discusses the practice with regard to unilateral secession at pp. 415-418.

[153] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, reproduced in 115 ILR p.539 at 585, para. 130.

[154] P Hilpold, "Die Sezession: zum Versuch der Verrechtlichung eines faktischen Phänomens" (2008) 63 ZöR 117-142.

[155] UN Security Council debate dated 28 August 2008 (UN doc. S/PV.5969).

[156] See for example the declaration by the Presidency of the Council of the European Union dated 26 August 2008 which reads: "The Presidency of the Council of the European Union takes note of the decision taken by the Russian authorities to recognize the independence of Abkhazia and South Ossetia. The Presidency strongly condemns this decision, which is contrary to the principles of Georgia's independence, sovereignty and

of the territorial sovereign have been criticised as being contrary to the principle of territorial integrity. The international community as a whole has clearly not adopted the position that South Ossetia and Abkhazia have any legal right of secession.

145. While the case of Bangladesh is sometimes mentioned in support of a claim to 'secession of last resort', that case was not fully resolved, and the admission of Bangladesh into the United Nations took place only after recognition of the State by Pakistan.[157] In any event, this one case alone cannot give rise to a valid claim for the existence of a right of secession in the circumstances of gross human rights breaches. Accordingly, there is no right of 'secession of last resort' as a strand of the law of self-determination or otherwise, on which the population of Kosovo could rely to create a State on part of the territory of Serbia, however serious might have been the human rights violations in the past by the Serbian authorities.

146. Finally, even if there were a 'right of secession of last resort' this would not have an application to Kosovo. *First*, the rationale behind any recognition of a right of last resort is to enable a people to protect themselves from destruction by human rights abuses. But the human rights violations by the government of Serbia ended in 1999. Since the Milosevic era there have been extensive changes in the government of Serbia. Some of those persons responsible for the abuses committed in Kosovo have been prosecuted by the International Criminal Tribunal for the former Yugoslavia.[158] Allegations of ill-treatment several years ago cannot be a justification for allowing the dismemberment of a State now.

147. *Second*, secession was not 'the last resort' for Kosovo. Alternative solutions could have satisfied any right of internal self-determination in conformity with the general trend in international law towards options of internal self-determination rather than external self-determination, i.e. secession. It would also have respected the widespread reservations of States towards full-scale independence. As indicated in paragraph 57 above, the time given to explore such options by Special Envoy Ahtisaari was very short and could not be said to give rise to a claim for any action as a 'last resort'. Indeed, although references to the human rights abuses of the Milosevic era have frequently been made in relation to the situation of Kosovo, a right of 'secession as a last resort' does not seem to have been advanced as a matter of law by governments which have recognised Kosovo as a State.[159]

Conclusion: Kosovo has no right to external self-determination

148. In sum, neither the General Assembly resolutions, nor the human rights Covenants, nor

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territorial integrity, recognized by the United Nations Charter, the final Act of the conference on security and cooperation in Europe and the relevant Security Council Resolutions. In this context, the Presidency strongly recalls its commitment to the principle of Georgia's territorial integrity within its internationally recognized borders."

[157] Bangladesh declared its independence in December 1971 but was not recognized by Pakistan until February 1974 and was not admitted to the UN until September 1974.

[158] For example, former Serbian president Milan Milutinovic and five co-accused have been tried for war crimes and crimes against humanity: *Milutinovic et al* IT-05-87, ICTY. Discussed at n.31 above.

[159] O. Corten indeed concludes, having examined such statements made on recognition, that "le Kosovo semble plutôt plaider contre la validité de la théorie de la "sécession-remède". ("Déclarations Unilatérales d'indépendence et Reconnaissances Prématurées: du Kosovo à L'Ossétie du Sud et à L'Abkhazie" (2008) Revue Générale de Droit International Public 721 at 727).

any other rule of customary or treaty law gives any basis for an argument that there is a right of external self-determination for a part of the population of an existing State. Accordingly, the Kosovo population cannot draw from the right of self-determination any right to dismember the State of Serbia.

(iii) A 'right of secession'

149. It is sometimes argued that the authorities of a discrete area within an established State have a 'right of secession' even absent any consideration of self-determination. What is claimed is a right to remove the territory and its people from the extant sovereignty without the consent of the 'parent' State, whether by a process within the State's constitution or in some other way. The purpose of the secession may be to establish a new State or to join another State. Thus, the authorities in Somaliland claim a right to secede from Somalia and create their own State;[160] and those in Nagorny-Kharabakh claim to have established a State by secession from Azerbaijan.[161]. However, there is no such 'right' – how could there be for a non-State group, absent some element of self-determination which gives a 'people' a right in international law? Claims to a right to secede have been rejected by the 'parent' States and have not been accepted by other States (except in very exceptional circumstances and then, always subject to further objection by the 'parent' State).

150. As Professor Crawford writes:

> "... unilateral secession did not involve the exercise of any right conferred by international law, International law has always favoured the territorial integrity of States, and correspondingly, the government of a State was entitled to oppose the unilateral secession of part of the State by all lawful means."[162]

151. He concludes his survey of State practice as follows:

> "... State practice since 1945 shows very clearly the extreme reluctance of States to recognize or accept unilateral secession outside the colonial context."[163]

152. The crucial element is the position of the established sovereign State, for he goes on:

> "... where the government of the State concerned has maintained its opposition to an attempted unilateral secession, such secession has in modern practice attracted virtually no international support or recognition."[164]

153. International practice militates strongly against the legality of secession. Claims to a 'right of secession' are frequently supported by appeals to history but these claims enjoy no support in international law in cases where the established sovereign resists the

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[160] www.somalilandgov.com
[161] www.nkr.am/eng/constitution
[162] J. Crawford, "State Practice in International Law in relation to Secession" 69 BYIL 85, 86-87 (1998).
[163] Id, 114.
[164] Id, 116.

secession. The practice is remarkably consistent: the treatment of Chechnya[165], Tibet[166], Aceh[167], and Papua,[168] may be cited as examples. The instability which would result from the concession of a general right to secession to any group proclaiming its ambition to create a new State is obvious and it is not surprising that State practice shows no examples in the period since 1945 of non-consensual secession, outside the colonial context.

154. In a rare judicial examination of the question of secession in international law, the Supreme Court of Canada (which had received extensive evidence from experts in international law on the matter) said:

> "It is clear that international law does not specifically grant the component parts of sovereign States the legal right to secede unilaterally from their 'parent' State."[169]

155. The Republic of Cyprus endorses this opinion and is strongly opposed to any modification of the existing position, which is essential for the stability of States and for the international relations between them.[170] Matters such as this are to be managed by negotiation, with solutions to be found within the prevailing territorial dispositions, save where the national government concedes a settlement which leads to a change of title and, perhaps, the creation of a new State. The Republic of Cyprus notes that, in rather different circumstances, attempts to find a solution to the Cyprus problem and the situation in the occupied area of its own territory have continued for more than thirty years; but no international body or any State other than Turkey currently recognizes a State in the occupied area. Those negotiations proceed on the basis that the Republic of Cyprus is a single State within the whole of its territory.[171]

156. The absence of practice which endorses a right of secession may be contrasted with the great weight of practice supporting other rules of international law which reinforce the territorial rights of States, notably the effect of the doctrine of *uti possidetis* both on the persistence of colonial boundaries for post-colonial States in Africa[172] and on the

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[165] D. Raic, *Statehood and the Law of Self-determination* (2002), pp.375-378.

[166] For China's rejection of the latest call even for autonomy for Tibet, see <http://www.iht.com/articles/2008/11/10/arts/tibet.php>.

[167] Memorandum of understanding between the Government of the Republic of Indonesia and the Free Aceh Movement (15 August 2005): "The Government of Indonesia (GoI) and the Free Aceh Movement (GAM) confirm their commitment to a peaceful, comprehensive and sustainable solution to the conflict in Aceh with dignity for all. The parties commit themselves to creating conditions within which the government of the Acehnese people can be manifested through a fair and democratic *process within the unitary state and constitution of the Republic of Indonesia*" (emphasis added). Text at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SODA-6FC7HP?OpenDocument>.

[168] (2007) 78 BYIL, UKMIL 2007, pp.686-687.

[169] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, reproduced in 115 ILR p.539, at 572, para. 111.

[170] See paras. 82 to 90 above.

[171] Another example where negotiations have continued for many years concerns the disputed territory of Kashmir.

[172] M. Shaw, "The Heritage of States: the Principle of Uti Possidetis Juris Today" (1996) 77 BYIL 7, pp.116 to 119. *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986,* p. 554, at 565, para. 20 (*uti possidetis* a "general principle, which is logically connected to the phenomenon of obtaining independence wherever it occurs."); *Land Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) I.C.J Reports 1992*, p. 350, at 559, para. 333 states "when the principle of *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-

emphasis put on constitutional solutions for the protection of minorities and other groups, such as devolution and autonomy.[173] It should be noted that in post-colonial examples, the principle of self-determination has not trumped a claim of territorial sovereignty deriving from the application of *uti possidetis* – factors such as ethnicity, pre-colonial title or economic coherence have never been regarded as sufficient ground for departing from a boundary line deriving from *uti possidetis*.[174]

Conclusion on the non-existence of a right of secession in this case

157. It is clearly the case that Serbia has not given any consent to the secession of Kosovo. Accordingly, there is no 'right' for the people of Kosovo – even less, for the ethnic Albanian community in Kosovo – to secede from Serbia. As is explained at paragraphs 173 to 183 below, such *de facto* authority as the Provisional Institutions have in Kosovo is, both as a matter of law and as a matter of fact, dependent upon the international presences there. Serbia consented to these international presences, but only on the basis that there was no effect on its sovereign rights over the territory.

Conclusion on 'rights' to assert Statehood

158. The conclusion is that the Provisional Institutions can show no rule of international law which explains how the sovereignty of Serbia over Kosovo, incontestably in place on 17 February 2008, could have been terminated on the next day, so as to allow the Provisional Institutions to declare a new State on Serbian territory in a way compatible with international law. They cannot explain how their declaration of independence itself could have the legal effect of severing Serbian sovereignty and creating an independent State of Kosovo.

F. The unilateral declaration has not created a State

Introduction

159. In the preceding paragraphs the Republic of Cyprus has put forward four broad submissions:

    i. that the declaration is incompatible with the fundamentally important principles of sovereignty, territorial integrity, and the sanctity of international borders;[175]

    ii. that there is nothing in Security Council resolution 1244(1999) to permit the declaration of independence;[176]

    iii. that the declaration of an independent State was a matter beyond the legal competence of the Provisional Institutions;[177] and

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independence sovereign."

[173] For example, the Constitution of Bosnia-Herzegovina established by the Dayton Accords (1996) 35 ILM 170; "Good Friday" Agreement for Northern Ireland, <www.nio.gov.uk/agreement.pdf>.

[174] M. Shaw, "The Heritage of States: the Principle of Uti Possidetis Juris Today" (1996) 77 BYIL 75.

[175] Paras. 82 to 90 above.

[176] Paras. 91 to 105 above.

[177] Paras. 106 to 113 above.

iv. that there is no legal principle under general international law which could provide an exceptional justification for the dismemberment of Serbia.[178]

160. Here the Republic of Cyprus makes its fifth broad submission: that there is no credible argument that, even though there was no legal right to establish an independent State of Kosovo, international law will overlook the illegality and treat Kosovo as a State because it has the objective characteristics of a State.

161. In order to explain its view of the relevant principles of international law these observations of the Republic of Cyprus will, for the sake of clarity, first consider the general criteria of Statehood and comment briefly upon the points at which Kosovo appears to fall short of satisfying those criteria. This systematic approach should not be allowed to obscure the main point which the Republic of Cyprus wishes to emphasize, which is that Statehood is not a status that can be achieved in defiance of international law. Specifically, Statehood is not a status that can be claimed by a group that has established a factual presence in, and a degree of control over, an area of land in violation of international law, for example through the use of force.

'The criteria of Statehood'

162. It is sometimes suggested that any entity which displays the characteristics of a State is *ipso facto* a State, and entitled to be recognized as such regardless of the manner in which it came into existence. This might be called the notion of 'objective Statehood'. Were this notion correct as a matter of international law, and were Kosovo to be securely[179] in possession of those characteristics, it might be argued that Kosovo could be considered a State and that the declaration of independence is accordingly an accurate declaration of the existing state of affairs. The Republic of Cyprus does not consider that Kosovo does possess the characteristics of a State. Furthermore, it considers that international law now attaches a condition of legality to the achievement of Statehood, which is of particular importance in the context of the question put to the Court.

163. The Republic of Cyprus notes that this question was carefully discussed by the Supreme Court of Canada in the *Reference re Secession of Quebec*,[180] where the Court emphasized the crucial distinction between the power of an entity to declare itself independent and the right of an entity to do so. It said that:

> "A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right

[178] Paras. 114 to 158 above.

[179] Merely transitory possession of (to anticipate the factual criteria of Statehood) a permanent population, a defined territory, and an effective and independent government would not be sufficient: insurgents may possess those attributes even while there is an army in the field attempting to restore the control of the established government over the entire territory of the State which they are attempting to seize or from which they are attempting to secede. In order to be a State it is necessary that the entity appear likely to be able to maintain its possession of the requisite factual characteristics.

[180] [1998] 2 S.C.R. 217.

to do so, but if it is, then it is exercised without legal foundation."[181]

164. This question is entirely independent of the questions of the existence of a duty of recognition and of the effects of recognition. For the purposes of this Written Submission, the Republic of Cyprus accepts the view of the Conference on Yugoslavia Arbitration Commission (the 'Badinter Commission') that "recognition is not a prerequisite for the foundation of a State and is purely declaratory in its impact."[182] Conversely, an entity that is, as a matter of international law, incapable of being a State, cannot be converted into a State by recognition. This point, too, is reflected in the judgment of the Canadian Supreme Court in the *Reference re Secession of Quebec*. The Court said that:

> "As a court of law, we are ultimately concerned only with legal claims. If the principle of "effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968), 7 *West. Ont. L. Rev.* 93, at p. 96), it necessarily means that legality follows and does not precede the successful revolution. *Ex hypothesi*, the successful revolution took place outside the constitutional framework of the predecessor State, otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other States, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right."[183]

165. In the present case the question put to the Court is one of legality. Thus, the question of the status of Kosovo is one to be answered on the basis of the criteria established by international law. Statements recognizing or not recognizing Kosovo made by other States may have some value as evidence of Kosovo's compliance with those criteria; but they can have no determinative legal effect upon Kosovo's status.

The Basic Factual Elements of Statehood

166. The relevant factual[184] characteristics of a State have in the past often been said[185] to be those to which reference was made in the 1933 Montevideo Convention on Rights and Duties of States.[186] Article 1 of the Montevideo Convention reads as follows:

> "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."

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[181] At para. 106.
[182] Opinion No. 10 (1992), para. 4: (1992) 31 ILM 1488 at 1526.
[183] At paras 142, 144.
[184] The characteristics are, of course, not purely factual in nature: but this is a convenient way to refer to characteristics that are 'objective' in the sense that they may be discerned by third states, and not characteristics that are bestowed by third states upon the entity in question.
[185] See, for example, the Decision of the ICTY Trial Chamber dated 16 June 2004 in Case No. IT-02-54-T, *Prosecutor* v *Slobodan Milosevic*, at paragraphs 85-92.
[186] 165 LNTS 19.

167. As has often been pointed out,[187] the fourth factual criterion, the 'capacity to enter into relations with other States'[188] is a consequence rather than an *indicium* of Statehood, and is in any event a characteristic that is shared by certain non-State entities, such as international organizations. It is generally accepted that this criterion should be understood to refer to the need for the independence of the entity, so that its authorities may decide for themselves, free from the direction or control of any other entity, the nature of their dealings with other States.[189] 'Puppet' regimes, for example, fail to satisfy this criterion and have accordingly not been recognized as States.[190]

168. Some States and jurists follow a slightly different approach, identifying three rather than four factual elements of Statehood.[191] The three elements are: a) *Staatsvolk* or population; b) *Staatsgebiet* or territory; and c) *Staatsgewalt* or (effective) government. The last element, *Staatsgewalt*, is, however, understood to include both internal and external sovereignty; and the latter is understood as signifying independence, i.e. legal independence.[192] This approach, therefore, is consistent with the Montevideo formula as that formula has in fact been applied.

169. The Republic of Cyprus considers, broadly speaking, that this approach reflects the factual criteria of Statehood, in the sense that no entity that does not fulfil these criteria can properly be said to be a sovereign State in international law.

170. Practice in relation to the break-up of the former State of Yugoslavia confirms the continuing validity of this approach to the identification of the factual elements of Statehood. The Badinter Commission, which reported on these questions and explicitly based its Opinions upon "the principles of public international law",[193] stated in its first Opinion:

> "that the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty."[194]

The wording is different but the effect is the same, the requirement of independence being imported through the reference to 'sovereignty'.

171. Compliance with the first three 'Montevideo' criteria – territory, population, and effective government – is essentially a question of fact, in the sense that only facts need to be established and no specifically legal judgment needs to be made.

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[187] See, e.g., J. Crawford, *The Creation of States in International Law* (2nd ed, 2006), p. 61.
[188] The criterion as commonly framed refers to relations with "with other States" rather than "with the other States.
[189] P M Dupuy, *Droit international public*, (8th ed, 2006), p. 31.
[190] See, e.g., the refusal to regard Manchukuo as a State: M. Shaw, *International Law* (6th ed, 2008), p.468.
[191] E.g., Germany: see (1996) 56 ZaöRV 1007-1008, (2000) 60 ZaöRV 901, and Talmon *Kollektive Nichtanerkennung* (2006) 223. This appears to derive from the doctrinal approach of the German jurist Georg Jellinek. For a recent example, see (2006) 66 ZaöRV 990.
[192] See the Oberverwaltungsgericht Münster, Decision Nr 89/1 (14 Feb 1989) in (1991) 51 ZaöRV 191. C Schaller 'Die Sezession des Kosovo und der völkerrechtliche Status der internationalen Präsenz' (2008) 46 AVR 131-171.
[193] Opinion No. 1 (1992), paragraph 1(a). See (1992) 31 ILM 1488 at 1495.
[194] Opinion No. 1 (1992), paragraph 1(b). See (1992) 31 ILM 1488 at 1495.

The criteria of Statehood: Population and Territory

172. Although Kosovo has been a part of Serbia since the early twentieth century and has been delimited at various times by internal administrative boundaries, the boundaries have not been constant. Equally, there have been significant shifts in the population, particularly over the past two decades during a period in which the large-scale population movements, which had a number of causes including ethnic cleansing. Those population shifts have seen a significant number of people of non-Albanian origin move out of Kosovo, changing the distribution of ethnic groups within Serbia (and, indeed, surrounding States).[195] These movements of boundaries and of population are relevant aspects of the question of Kosovo; but they involve a detailed account of the facts which is more appropriately provided by others, and on which the Court will no doubt be provided with extensive materials. Accordingly, the Republic of Cyprus has no further observations to make at this stage on the questions of territory and population, in so far as they relate to the criteria of Statehood under the Montevideo Convention.

The criteria of Statehood: Effective Government

173. In relation to the third Montevideo criterion – the existence of an effective government – the Republic of Cyprus observes that the Kosovo authorities appear to be some way from being able to function independently as an effective government in the territory.

174. The extent to which the government of Kosovo is dependent as a matter of fact upon the 'international presences' – that is, upon the armed forces and other agencies and personnel of third States – is clearly reflected in the 'tasks' of EULEX, which mandate it generally to "monitor, mentor and advise the competent Kosovo institutions"[196] and mandate it to "contribute to" certain tasks such as the fight against corruption, but give it primary or ultimate responsibility for other tasks. Thus, it is stipulated in Article 3 of the EU Council Joint Action which established EULEX that EULEX shall:

> "(b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities;
>
> .....
>
> (d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently.....
>
> .....
>
> (h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies."

[195] See Appendix II.
[196] Council Joint Action 2008/124/CFSP, Article 3(a).

175. It is apparent that much of the responsibility for governance still falls on the 'international presences'. The Provisional Institutions are not acting independently. They have not established control throughout Kosovo. For example, there is as yet no single legal space across the whole territory of Kosovo.[197]

The criteria of Statehood: Capacity to enter into relations with other States

176. The fourth Montevideo characteristic is different in nature from the first three. "Capacity to enter into relations with ... other states" is, in so far as it is a question distinct from the existence of a government, at least in part a legal and not a factual question. It is, moreover, a question that must be answered by reference to matters outside the entity: it cannot be the case that the entity can itself decide whether or not it has the capacity to enter into relations with other States.

177. That question would commonly be answered by asking whether the entity is permitted by the relevant constitution to have relations with other States. For example, a component unit of a federal State would ordinarily lack that capacity because many federal States reserve the conduct of foreign relations to the federal government.

178. Paragraph (i) of Chapter 8 of the Constitutional Framework reserves to the SRSG the exercise of "powers and responsibilities of an international nature in the legal field" and certain other matters.[198] Consistently with this stipulation, it is UNMIK which conducts much, if not all, of Kosovo's international relations. For example, it is UNMIK that has acted on behalf of Kosovo in enabling its participation in a number of international organisations and agreements such as the Energy Community, the European Common Aviation Area Agreement, the South East Europe Transport Observatory agreement, and the Central European Free Trade Area Agreement (CEFTA). Similarly, it is UNMIK which regularly attends the joint committee and sub-committee meetings of the CEFTA, and UNMIK which took over the Presidency of the Energy Community Treaty from 1 January until 30 June 2008, and which attends meeting of the EU Charter for Small Enterprises, and of the South East Europe Transport Observatory (SEETO).

179. It seems evident that as a matter of law the authorities in Kosovo do not have the legal capacity to enter into relations with other States. That capacity resides in the SRSG and UNMIK. Given the reservation of powers to the SRSG by the Constitutional Framework,[199] it plainly cannot be said that the Provisional Institutions of Self-Government in Kosovo have the lawful authority to act as if they were an independent government with the capacity to carry on international relations for Kosovo.

180. It may also happen that the capacity to enter into relations with other States is precluded by the operation of international law. If, for example, other States were under a legal obligation not to recognise or enter into State-to-State dealings with the entity, it would be nonsensical, for as long as that obligation exists, to say that the entity has the capacity to enter into relations with other States. The entity might *potentially* have the ability to enter into such relations: but it does not *actually* have the ability to do so at that stage.

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[197] See eurobserver.com, 11.02.2009.
[198] See Appendix I: Chapter 8, paragraphs (m)-(o).
[199] See para. 178 above.

181. There may also be a factual aspect to the question whether the Government has the capacity to enter into relations with other States. The Government of the entity may be nominally independent and free to enter into relations with foreign States, but in fact be demonstrably under the control of the government of another State.[200] In both of these circumstances, the fourth criterion would not be satisfied. It appears that as a matter of fact, and as indicated in paragraph 178 above, it is the SRSG, UNMIK, and the 'international presences' which have the key role in the conduct of international relations on behalf of 'Kosovo'.

182. The failure of Kosovo to meet the well-established 'Montevideo' criteria for Statehood has been examined in the preceding paragraphs. This is important, and sufficient to dispose of the question whether Kosovo may properly claim to be a State. It is, however, not the main focus of this submission by the Republic of Cyprus.

183. The main focus is on the critical role of the criterion of legality and the maintenance of the Rule of Law in international law. The following paragraphs make the further point that the attempt by the Provisional Institutions to override the legal limitations imposed by resolution 1244(1999) means that the declaration of independence was an act in violation of international law, and that this illegality is a further reason why Kosovo cannot be considered to be a State, quite apart from the question of the fulfilment of the 'Montevideo' criteria of Statehood.

'The criterion of legality'

184. State practice and the development of international law during the past half century have established that it is necessary not only that an entity satisfy the four essentially factual 'Montevideo' criteria described above, but also that the entity in question has emerged in a manner and by a process which is not incompatible with certain basic principles of international law.[201]

185. This additional requirement of 'legality' is logically and legally distinct from the requirement that the factual criteria of Statehood be fulfilled. An entity which evidently fails to meet the factual criteria of Statehood simply does not qualify for consideration as a State. That would be the case, for example, where a citizen purports to establish an 'independent State' on an offshore installation or some such structure.[202] Any purported declaration of independence in such circumstances is in law a non-existent act.

186. That position is to be distinguished from a situation in which an entity *does* possess the factual characteristics of a State – territory, population, effective government, and the capacity to enter into relations with other States – but has emerged in circumstances which constitute a violation of fundamental rules of international law.[203]

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[200] Manchukuo is a case in point.

[201] See, e.g., S Sur and J Combacau, *Droit international public*, (7th ed, 2006), 282-283; J. Crawford, *The Creation of States in International Law* (2nd ed, 2006), Ch. 3. This might be regarded as an instance of a broader principle which also underlies principles such as *ex injuria non oritur jus*, and the so-called 'Stimson doctrine' of the non-recognition of the acquisition of territory by force. See A D McNair, "The Stimson Doctrine of Non-Recognition", 14 BYIL 65 (1934).

[202] E.g., the "Principality of Sealand": < http://www.sealandgov.org/history.html >.

[203] See R Y Jennings, "Nullity and Effectiveness in International Law", in *Cambridge Essays in International Law. Essays in honour of Lord McNair*, (1965), pp. 64-87. The distinction reflects that between, for example, an

187. The violation of international law may take different forms. The entity may have been established by a process which itself constitutes a violation of rules of international law. The establishment of a 'State' by use of force would be an example. The entity may, on the other hand, have emerged in a manner that does not itself violate international law; but the entity may have characteristics which themselves violate international law. The emergence of the *Bantustans,* which served to entrench the apartheid regime in South Africa, is an example. No entities tainted by illegality in these ways would be accepted as States.

188. A further possibility is that the entity has been established in a manner that violates the legal obligations, or the legal limitations upon the powers, of those who purported to establish the State. If the actions of those who purport to establish the State go beyond what international law allows, the attempt to establish the State may be regarded as ineffective. For example the purported establishment of the German Democratic Republic ('GDR') by the USSR was regarded by the United States, the United Kingdom, and France as a violation of the obligations of the USSR under the Four-Power Agreements of 1945; and the GDR was accordingly not treated as a State.[204]

189. Thus, international law may preclude the achievement of Statehood by an entity and may do so by the operation of legal limitations upon the powers of the actor which purports to confer that international status of 'Statehood' upon the entity. This is the case in Kosovo. As was explained above,[205] neither the Provisional Institutions nor the UN Security Council had the legal capacity to declare that a part of Serbian territory was henceforth to be regarded as an independent sovereign State.

190. Put more generally, an assertion of independence which violates the terms of a binding Security Council resolution cannot be *legally* effective to create a new State. The assertion of independence would plainly not be in accordance with international law. And the Court is asked in this case to answer the question, "is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

191. It may be thought unnecessary to pursue this question here because it is in any event clear that Kosovo does not fulfil even the four basic 'Montevideo' criteria of Statehood. The Republic of Cyprus does, however, consider that regardless of whether Kosovo is disqualified from Statehood because of its failure to satisfy the four 'factual' criteria, it is necessary for the Court to address the issues raised in the previous paragraphs. The Republic of Cyprus respectfully submits that the Court should conclude that the declaration of independence could not be effective to establish Kosovo as a State since, as discussed above,[206] the Provisional Institutions had no capacity under international

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agreement entitled a 'treaty' between two private commercial corporations, which cannot be a treaty at all, and a treaty which, though having all of the essential characteristics of a treaty, is void *ab initio* because it is incompatible with a rule of *jus cogens*.

[204] See the decision of the UK House of Lords in *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd*, [1967] 1 AC 853. Similarly, in the *South West Africa* Advisory Opinion, this Court determined that South Africa's authority was based upon the terms of the Mandate, and that South Africa therefore had no power to modify unilaterally the international status of the territory of South West Africa: *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at 133, 141.

[205] Paras. 106 to 113 above.

[206] Paras. 106 to 113 above.

law to create it.

Conclusion on Kosovo and the legal criteria of Statehood

192. For these reasons the Republic of Cyprus submits that Kosovo can have no claim to Statehood, and that the declaration of independence was a declaration inconsistent with international law. Again, it is emphasised that this does not mean that Kosovo has no legal rights: it means simply that Kosovo is not an independent sovereign State, and that Kosovo's rights remain those established by UN Security Council resolution 1244(1999) and developed under the processes which it prescribes.

VII Conclusion

193. The Republic of Cyprus accordingly submits that:

a. The General Assembly's request for an advisory opinion satisfies the conditions of the Statute of the Court and of the United Nations Charter both as regards the competence of the requesting organ and as regards the substance of the request; and the Court accordingly has jurisdiction in the case.

b. There are no 'compelling reasons' why the Court should not render the advisory opinion which has been requested of it.

c. The generally applicable rules and principles of international law govern every situation of claimed Statehood. Even situations that are alleged to be '*sui generis*' must be shown to be so in accordance with the rules of international law.

d. Security Council resolution 1244(1999) does not render the declaration of independence lawful; indeed the declaration is incompatible with the resolution which remains in force.

e. The unilateral declaration of independence was, as a matter of international law, beyond the powers of the Provisional Institutions, since those powers were limited by the Constitutional Framework made under Security Council resolution 1244(1999) and there is no basis in customary international law for those Institutions to claim the right to assert Statehood.

f. Any departure from the principles of sovereignty and territorial integrity would have to be justified on the basis of international law. There are, however, no grounds under international law justifying the termination of the sovereignty of Serbia over Kosovo which undoubtedly existed on 17 February 2008. More specifically:

i. Serbia's sovereignty over Kosovo is not affected by the dissolution of the Socialist Federal Republic of Yugoslavia;

ii. The declaration has no basis in the right of self-determination; indeed, the dismemberment of Serbia is contrary to the right of self-determination of the

Serbian population taken as a whole;

iii. There is no other 'right of secession' under which the Provisional Institutions can justify the unilateral declaration of independence.

g. Kosovo does not meet the criteria for Statehood in international law and is not an independent sovereign State, because it lacks an effective government with the capacity to enter into relations with other States, and also because the declaration of independence violates the terms of a legally-binding Security Council resolution.

h. Accordingly, Kosovo's rights remain those established by UN Security Council resolution 1244(1999) and developed under the processes which it prescribes.

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Agent of the Government of the Republic of Cyprus

APPENDIX I

CHAPTER 8 OF THE CONSTITUTIONAL FRAMEWORK

Chapter 8

Powers and Responsibilities Reserved to the SRSG

8.1 The powers and responsibilities of the Provisional Institutions of Self-Government shall not include certain reserved powers and responsibilities, which will remain exclusively in the hands of the SRSG. These reserved powers shall include:

(a) Full authority to ensure that the rights and interests of Communities are fully protected;

(b) Dissolving the assembly and calling for new elections in circumstances where the Provisional Institutions of Self-Government are deemed to act in a manner which is not in conformity with UNSCR 1244(1999), or in the exercise of the SRSG's responsibilities under that Resolution. The SRSG shall exercise this power after consultation with the President of Kosovo. The Assembly may, by a decision supported by two-thirds of its members, request the SRSG to dissolve the Assembly. Such a request shall be communicated to the SRSG by the President of Kosovo;

(c) Final authority to set the financial and policy parameters for, and to approve, the Kosovo Consolidated Budget, acting on the advice of the Economic and Fiscal Council;

(d) Monetary policy;

(e) Establishing arrangements for the independent external audit of the Kosovo Consolidated Budget;

(f) Exercising control and authority over the UNMIK Customs Service;

(g) Exercising final authority regarding the appointment, removal from office and disciplining of judges and prosecutors;

(h) Deciding upon requests regarding the assignment of international judges and prosecutors, as well as change of venue, in accordance with the relevant UNMIK legislation in force;

(i) Exercising powers and responsibilities of an international nature in the legal field;

(j) Exercising authority over law enforcement institutions and the correctional service, both of which include and are supported by local staff;

(k) Exercising control and authority over the Kosovo Protection Corps;

(l) Exercising control and authority over the management of the administration and financing of civil security and emergency preparedness. Responsibility shall be gradually assumed by the Provisional Institutions of Self-Government;

(m) Concluding agreements with States and international organizations in all matters within the scope of UNSCR 1244(1999);

(n) Overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;

(o) External relations, including with States and international organisations, as may be necessary for the implementation of his mandate. In. exercising his responsibilities for external relations, the SRSG will consult and co-operate with the Provisional Institutions of Self-Government with respect to matters of concern to the institutions;

(p) Control over cross-border/boundary transit of goods (including animals). The Provisional Institutions of Self-Government shall co-operate in this regard;

(q) Authority to administer public, State and socially-owned property in accordance with the relevant UNMIK legislation in force, in cooperation with the Provisional Institutions of Self-Government;

(r) Regulation of public and socially-owned enterprises after having consulted the Economic and Fiscal Council and the Provisional Institutions of Self-Government;

(s) Administrative control and authority over railways, frequency management and civil aviation functions. Certain administrative functions shall be carried out by the Provisional Institutions of Self-Government and the relevant independent regulatory bodies;

(t) Control and authority over the Housing and Property Directorate, including the Housing Claims Commission;

(u) Defining the jurisdiction and competence for the resolution of commercial property disputes;

(v) Preserving the existing boundaries of municipalities;

(w) Responsibility to ensure that the system of local municipal administration functions effectively based on internationally recognized and accepted principles;

(x) Appointing the members of the Economic and Fiscal Council, the Governing Board of the Banking and Payments Authority of Kosovo, the chief executives of the Customs Service and Tax Inspectorate, and the Auditor General; convening and presiding over the Economic and Fiscal Council;

(y) Appointing international experts to the managing boards or commissions of the public broadcaster, the independent media regulatory body and other institutions involved in regulating the mass media, with the proviso that the number of such SRSG nominations will not constitute the majority of any such managing board or commission;

(z) Control and authority over the civil registry database, which shall be maintained in cooperation with the Provisional Institutions of Self-Government."

APPENDIX II

STATISTICS OF ETHNIC POPULATION GROUPS IN STATES OF THE FORMER YUGOSLAVIA, IN KOSOVO AND IN SOUTH-CENTRAL EUROPEAN STATES

Various statistical studies by States and other statistical services and by authors analysing such data are presented below to provide context in relation to issues where population may be relevant

A KOSOVO STATISTICS

1. Separate statistics during Ottoman rule for the vilâyet of Kosovo,[1] clearly indicating ethnic identity, are not available. Only with the advent of statistics of the Kingdom of Yugoslavia can a clearer indication of ethnic groups, and their relative expansion and contraction in the area currently alleged to be territory of an independent State of Kosovo, be obtained. A table of Kosovo population statistics appears in Branislav Krstic-Brano, *Kosovo. Facing the Court of History,* Humanity Books (2004), p.92. The author used data from the SFRY Federal Statistical Office (ibid., p.379):

TABLE 1

Population evolution [in Kosovo] between 1931 and 1991

Year	Total	Serbs, Montenegrins	%	Albanian	%	Croats, Muslims, Roma, Turks	%
1889	240,300	-	-	-	-	-	-
1900	378,300	-	-	-	-	-	-
1921	439,010	-	-	-	-	-	-
1931	552,064	150,745	27.3	331,549	60.1	-	-
1948	727,820	199,961	27.5	463,742	63.7	64,117	8.8
1953	808,141	221,212	27.4	524,559	64.9	62,370	7.7
1961	963,988	264,604	27.4	646,605	67.1	52,779	5.8
1971	1,243,693	259,819	20.9	916,168	73.7	67,706	5.4
1981	1,584,441	236,525	14.9	1,226,736	77.4	121,180	7.7
1991	1,956,196	214,555	11.0	1,596,072	81.6	145,559	7.4

[1] The Ottoman vilâyet of Kosovo was a very extensive area covering parts of the modern States of Albania, Montenegro, Serbia (beyond the area of the later Autonomous Province of Kosovo), the subsequent Former Yugoslav Republic of Macedonia (FYROM) and Bulgaria. The vilâyet was far larger than the territory currently alleged to be that of an independent State of Kosovo, the subject of these proceedings. See the Republic's submission to the Court, para 21.

2. The writer, Tim Judah, has published broadly similar figures. He contends that in the area which is today called Kosovo, the official population statistics of the former Socialist Federal Republic of Yugoslavia (hereinafter SFRY) showed population "trends". Judah noted that questions may be asked about the reliability of actual figures. The Table below is derived from him.[2]

TABLE 2

Modern Kosovo Population statistics, 1948-1991

Year	Serbs or Montenegrins	Population %	Albanians	Population %
1948	199,961	27.5	498,242	68.5
1964	264,604	20.9	646,805	67.2
1981	236,526	14.9	1,200,000	77.4
1991	215,346	10.9	1,607,000	82.2

B. STATISTICS FOR SERBIA AND MONTENEGRO (FRY) POPULATION IN 1991-1992 UPON SFRY DISSOLUTION

3. A pattern of mixed population throughout the States which had formerly constituted Yugoslavia was still obvious in the Federal Republic of Yugoslavia (FRY) even after the dissolution of the Socialist Federal Republic of Yugoslavia (henceforth SFRY). The Table below was derived from the 1991 census (taken while SFRY was in existence, although Albanians had declined to participate). The FRY population figures were:

TABLE 3

Yugoslavia (Serbia and Montenegro) population and minorities: 1991-92[3]

[2] Compiled from Tim Judah, *Kosovo. What Everyone Needs to Know* (2008), pp.59, 158, relying on SFRY census statistics from 1948-1991. Regarding the 1991 figure of Albanians in Kosovo, he states it was "more than 1.6 million". The figure included in Table 2 above is taken from Minority Rights Group International, *World Directory of Minorities*, (1997) p.252. The Directory also stated that the Albanian population might in reality be 2 million Albanians in Kosovo.

[3] Derived from *World Directory of Minorities*, supra, p.250. The Minority Rights Group figures are those in the 1991 census. Other reliable sources estimate Albanians at more than 2 million and Roma at 500,000 (4.8%). The populations of the States of Croatia, Bosnia and Herzegovina, Slovenia and the former Yugoslav Republic of

Population (mid-1992)	Numbers	%
Main Minority Groups		
Albanians	1,727,500	16.6
Montenegrins (in Montenegro and Serbia)	520,500	5.0
Hungarians	345,400	3.3
Yugoslavs	344,000	3.3
Muslims	327,500	3.1
Roma	137,265	1.3
Croats	109,214	1.0
Others	270,497	2.6
Total main minorities	3.781,876	
All groups	10,597,000 (mid-92)	100%
Serbs	6,816,124 (approximately)	c.64%

4. It will be observed that ethnic Albanians constituted the largest minority (16.6%) in Serbia and Montenegro and that Serbs constituted the majority of the population (c. 64%) of the State.

C. KOSOVO POPULATION BY ETHNIC COMPOSITION FROM 1921 TO 2006 – WITH CHANGES IN PERCENTAGES AND IN ABSOLUTE NUMBERS

5. The Statistical Office of Kosovo (hereinafter SOK)[4] has published ethnic population statistics for Kosovo for the years 1921 to 2006. They are shown in Table 4[5] infra:

Macedonia (hereinafter FYROM) are not included as the Socialist Federal Republic of Yugoslavia had by mid-1992 dissolved.

[4] The SOK is an independent professional office in the frame of Kosovo's Ministry of Public Service and acts under UNMIK Regulation 2001/14.

[5] This is Table 2 in the SOK publication, Demographic Changes of the Kosovo Population 1948-2006, Statistical Office of Kosovo, February 2008.
See: http://www.ks-gov.net/ESK/eng/index.php?option=com_docman&task=cat_view&gid=8&Itemid=8

TABLE 4

Kosovo population by ethnic composition – 1921-2006						
Years of census	Total	Albanians	Serbs	Turks	Romans	Others
1921	439.010	-	-	-	-	-
1931	552.64	-	-	-	-	-
1948	733.034	498.244	176.718	1.320	11.230	45.522
0%	100	68,0	24,1	0,2	1,5	6,2
1953	815.908	524.562	189.869	34.590	11.904	54.983
0%	100	64,3	23,3	4,2	1,5	6,7
1961	963.988	646.605	227.016	25.764	3.202	61.401
0%	100	67,1	23,5	2,7	0,3	6,4
1971	1.243.693	916.168	228.264	12.244	14.593	72.424
0%	100	73,7	18,4	1,0	1,2	5,8
1981	1.584.440	1.226.736	209.798	12.513	34.126	101.267
0%	100	77,4	13,2	0,8	2,2	6,4
1991	1.956.196	1.596.072	194.190	10.445	45.745	109.744
0%	100	81,6	9,9	0,5	2,3	5,6
2006	2.100.000	1.932.000	111.300	8.400	23.512	24.788
0%	100%	92	5,3	0,4	1,1	1,2
For the years of 1948, 1953, 1961, 1971, and 1981, data were obtained from the publication of the population censuses For 2006, data is assessment of SOK						

The SOK commented on its Table (supra) that:

> "*The Albanian ethnicity*, in 1948, constituted of 68% of the total number of population in Kosovo, in 1991 (the assessment of the Ex-Yugoslav Federation Statistics Office) 81,6%, and in 2006 has been 92% (the assessment of SOK).

Serb ethnicity in 1948 constituted of 24.1% of the total number of population in Kosovo, in 1991 constituted of 9.9%, and in 2006 has been 5.3% (the assessment of SOK).

Turk ethnicity in 1948 constituted of 0.2% of the total number of the population in Kosovo, in 1991 (assessment of the Ex-Yugoslav Federation Statistics Office) 0.5%, and in 2006 has been 0.4% (assessment of SOK).

Roma ethnicity in 1948 constituted of 1.5% of the total number of population in Kosovo, in 1991 constituted of 2.3%, and in 2006 has been 1.1% (assessment of SOK).

In the population censuses until 1981, the participation of the Albanian ethnicity in the registration (census) committees has been very low."

D. ESTIMATED KOSOVO POPULATION AFTER DISPLACEMENT (1997-1999) AND EARLIER MIGRATION (1990-1997) OF KOSOVO ALBANIANS AND DISPLACEMENT OF SERBS (1997-2003)

6. In the period of instability at the end of the 1990s and after the NATO campaign, there had been Serb displacement of ethnic Albanians, the return of ethnic Albanians, their retaliatory displacement of Serbs and of other minorities, and early administration of UNMIK. International organizations then produced estimates of the population of Kosovo.[6] Statistics by such organizations and estimates by the SOK are in approximate agreement.

In 2003, according to SOK estimates[7], the ethnic composition of Kosovo's population was:

[6] Inter alia, these included the Poverty and Human Resources Development Research Group.
[7] See «Kosovo-Some key indicators on population" reproduced in Statistics, an article published by the European Centre for Minority Issues (Flensburg, Germany) and accessed on 5 March 2009 at www.ecmi.de/emap/download/KosovoStatistics Final One.pdf

TABLE 5

Ethnic composition of Kosovo 2003

		%
Total population	1,900,000 estimate	
Ethnic groups:		
Albanian		88%
Serbian		7%
Other ethnic groups[8]		5%

7. The Statistical Office of Kosovo's 2008 Report assesses the Kosovo population as being 2.1 million habitual residents[9] in 2006.[10] Of these, the ethnic breakdown was as follows.

TABLE 6

	Kosovo (2006 estimate)	
Albanians	2,100,000	92%
Others		8%

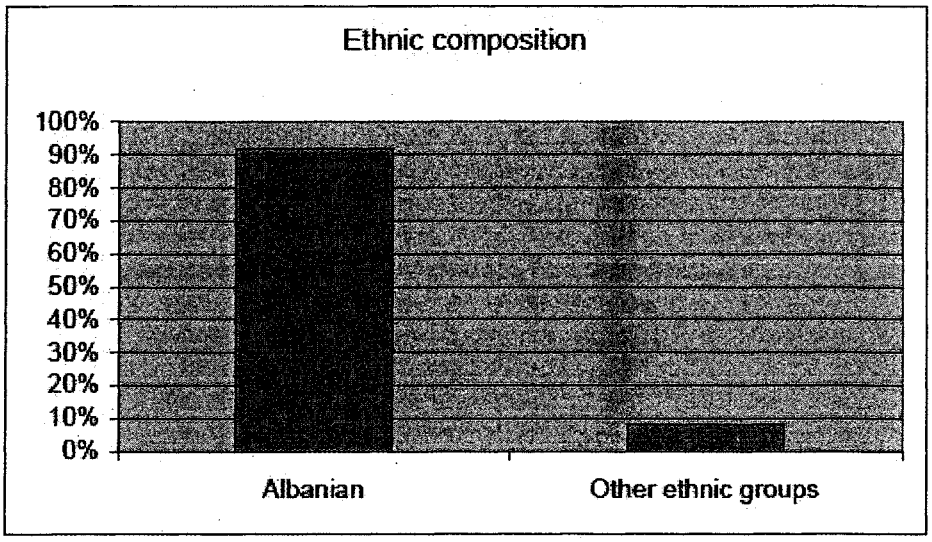
8. The following graph is from SOK´s website, graphically showing the situation:

[8] These included Muslims, Bosniaks, Roma, Gorani, Turks and others.

[9] i.e. persons not away from their permanent homes for 12 months or more. See p.19 of Demographic Changes of the Population of Kosovo 1948-2006, cited supra. SOK assessed that the total population of Kosovo residing outside it was 586, 543 inhabitants, making a total of 2,686.543 Kosovo inhabitants. Those residing outside would include displaced persons (whether Serb, Albanian or from other ethnic groups) and emigrants after 1948.

[10] http://www.ks-gov.net/ESK/eng/index.php?option=com_content&view=article&id=36&... (viewed at 5.3.2009). Before rounding, the figure was 2,153,139: http:www.ks-gov.net/ESK/eng/

TABLE 7



9. It will be noted from Tables 5 and 6 that the percentage of the Kosovo population constituted by minorities (Serbs and Others) had, between 2003 and 2006, declined by approximately 4%, with a corresponding increase in Albanian numbers and in the Albanian percentage from 88% to 92%.

10. A graphic illustration of the ethnic population of Kosovo in 2008 is provided by Judah.[11]

E. ETHNIC MINORITIES ACROSS STATES

11. Table 3 above makes it clear that the minorities in FRY were members of peoples who were spread across several other States. Moreover, the peoples who were minorities within FRY formed majorities in another national State in which they were predominant e.g. Hungary, Albania, Croatia and Bosnia- Herzegovina. ("Muslims" in

[11] See *Kosovo. What Everyone Needs to Know*, (2008), p.112. At pp 101-2, Judah quotes 2004 research by the European Stability Initiative (Berlin) showing that "there are still 130,000 Serbs living in Kosovo ... [then] representing two-thirds of the pre-war Serb population". [Using the 1991 SFRY census statistics, this would mean that 65,000 Serbs left.] Judah, at p.104, cited estimates by the Gorani leadership that only 8,000 of 18,000 Gorani (in the region South of Dragash) remained i.e. 56% left.

Table 3 basically consisted of "Bosniaks".) The nature and scale of the minorities situation in some of the States adjacent to Serbia is indicated in the succeeding paragraphs.

(i) Ethnic Albanians in FRY and elsewhere

12. In 1992, there was an estimated population of 3.4 million persons in Albania. According to the Albanian 1989 census, 1.99% of the population (63,700) were from the Greek and "Macedonian" minority groups (although other reliable estimates suggested that all members of minorities totaled 380,000 persons i.e. 10.6%). There were therefore at least 3 million ethnic Albanians in Albania.[12] There were also 443,000 ethnic Albanians in FYROM i.e. 23% of the population (according to the 1994 census)[13] and 40,000 Albanians in Montenegro in 1991.[14] Ethnic Albanians outside the area of Kosovo and Albania itself are graphically shown in a map in Poulton.[15]

13. Experts claim that there are large Albanian diasporas.[16] In Greece, the Minority Rights Group in 1997 estimated there were 200,000-300,000 recent Albanian immigrants in Greece, but, in 2005, the Albanian Government estimated 600,000 Albanians had migrated to Greece. In north western Greece there had also been an ethnic Albanian population at the time that area had been acquired in 1913. Other nearby States have Albanian diasporas. Italy received 250,000 Albanian migrants.[17] There is also a diaspora of several hundred thousand Albanians, who emigrated to the USA and countries of the Commonwealth, while many more Albanians have migrated to EU States and Switzerland. The Kosovo ethnic Albanians thus number well under 35% of the Albanian people.

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[12] World Directory of Minorities, p.201. Hugh Poulton, The Balkans, Minorities and States in Conflict, Minority Rights Publications, London, 1993 edition, at p.195, quotes the Albanian 1961 census as showing 95% of the population was Albanian. The Albanian census of 2001 estimated a population of 3 million.

[13] World Directory, p.233. According to the 2002 FYROM census, there were 509, 083 Albanians in FYROM in 2002, making up some 25% of the population.

[14] Poulton, supra p.75.

[15] Poulton, ibid., p.58.

[16] e.g:N. Malcolm (Kosovo: A Short History (1999)) estimates 100,000 Albanians left Kosovo for Turkey between 1945 and 1966; and see Denisa Kostovicova "Albanian diasporas and their political roles" in Is there an Albanian question? Chaillot Paper No.107, January 2008, Institute for Security Studies, EU, Paris, pp.73 et seq.

[17] Nicola Mai , "Albanian migrations: demographic and other transformations" in Is there an Albanian question? p.62.

(ii) Hungarians in FRY and elsewhere

14. Similar minority dispersals apply as respects Hungarians, who were 345,400 (3.3%) of the SFRY population in 1991,[18] while, according to the FRY census of 2002, Hungarians were 3.91% of the population of Serbia and Montenegro excluding the area of Kosovo. On the 2002 FRY census, they were 14.28% of the population of Vojvodina (with Serbs being 65%).[19] Hungarians numbered over 10 millions in Hungary.[20] Hungarians numbered 1,620,007 (7.1%) of Romania's population in 1992. Moreover, Hungarians numbered 567,000 (10.8%) of Slovakia's population in 1991.

(iii) Montenegro population statistics

15. According to the 2003 census, taken during the existence of FRY, the ethnic populations were as follows:

TABLE 8

Montenegro Population Census 2003		
Montenegrins	273,355	40.64%
Serbs	201,892	30.01%
Bosniaks	63,272	9.41%
Albanians	28,714	4.2%

16. According to unchallenged Montenegrin statistics after Montenegro's independence, the ethnic composition of the population was:

[18] World Directory, p.250. Most Hungarians live in the Vojvodina, which from 1974 until 1989 enjoyed rights of autonomy analogous to those enjoyed by Kosovo as an autonomous Province. The bulk of the Hungarian minority has not responded by seeking independence or union with Hungary in a manner similar to that of the Kosovo Albanians. In parts of northern Vojvodina, the Hungarian minority forms a local majority.
[19] 2002 Census: http://webrzs.statserb.sr.gov.yu/axd/Zip/eSn31.pdf
[20] World Directory, p.223.

TABLE 9

Montenegro Population post-2006 independence		
Montenegrins	267,669	43.16%
Serbs	198,414	31.99%
Bosniaks	48,184	7.77%
Albanians	47,682	7.072%
Muslims	24,625	3.97%

17. Both Tables, ignoring minor discrepancies, show 3 large ethnic or religious population groupings, with no group having an absolute majority, namely, over 40% Montenegrins, over 30% Serbs and about 18% of Bosniaks, Albanians and Muslims.

(iv) FYROM population statistics

18. According to the 1994 FYROM census, the ethnic composition of the population was:[21]

TABLE 10

FYROM population 1994 (total 1,937,000)		
Macedonians[22]	c.1,290,000	c. 66.3%
Albanians	443,000	23%
Turks	77,000	4%
Roma	44,000	2.3%
Serbs	39,000	2.0%
Others	46,000	2.4%

19. These figures were disputed by ethnic Albanians, who are concentrated in western areas of FYROM and the cities of Skopje and Kumanovo. They claim that their percentage of

[21] Derived from World Directory of Minorities, ibid., p.233.
[22] Since FYROM statistics are being cited, the language and description used by FYROM's statistical service are here employed.

the population is far larger than the 1994 census indicated. Allegedly, also, Roma numbers were underestimated, with the World Directory reporting an estimate of Roma constituting 10.3% of the population (200,000). It will be noted that Serbs are indicated as 2.0%. Serbian nationalist historians have claimed that Slav-Macedonian citizens of FYROM are in fact Southern Serbs, a claim much disputed by FYROM nationalist historians, while Bulgarian nationalist historians claim that they are Bulgarians.

(v) Bosnia and Herzegovina population statistics

20. Prior to the Bosnian war, Serbs were estimated by the 1991 SFRY census at 1,369,258 in Bosnia and Herzegovina (31.4% of the total population of 4.3 million). Most Serbs were resident in areas which later became part of Republika Srpska, one of the two governing entities of Bosnia and Herzegovina, forming a majority in Republika Srpska. Serbs also constituted minority groups elsewhere in Bosnia and Herzegovina.[23]

21. By July 2008, the estimate, prepared by CIA World Factbook on demographic statistics[24] is that the total population of Bosnia and Herzegovina was 4,590,310. Earlier ethnic statistics for 2000 were cited as follows:

TABLE 11

Bosniak	48%
Serb	37.1%
Croat	14.3%
Other	0.6%

22. In the statistical references (and elsewhere) "Bosniak" replaced "Muslim" as the appropriate term to differentiate ethnic identity from denominational loyalties. The CIA World Factbook does not provide an ethnic breakdown by particular areas, but it is undisputed that Croats, like Serbs, form local majorities in particular areas.

[23] The Badinter Commission in its Opinion No.2 (92 ILR 167 at 169) when asked for an opinion on whether the Serbian population in Croatia and Bosnia and Herzegovina had the right to self-determination, ruled that such populations were entitled to the rights accorded to minorities and ethnic groups and that members of such minorities were entitled to all the human rights and freedoms recognised in international law.

[24] http://www.cia.gov/library/publications/the-world-factbook/geos/bk.html

(vi) Croatia population statistics

23. In 1991 Serbs numbered 12.2% of the population of Croatia: Croats numbered 78.1%.[25] Following inter-ethnic violence during the war, there were major moves (in 1991 and then in 1995) of both population groups (about 200,000 Croats and about 550,000 Serbs). At the end of the war, the ethno-religious structure for Croatia's two largest nations was as follows:

TABLE 12

Post-war correlation of the ethno-religious structure of Croatia's two largest nations[26]

Croats	89.6%	Catholics	82.8%
Serbs	4.5%	Orthodox Christians	4.4%

24. It will be observed that there was a major fall in the population percentage of Serbs (from 12.2% to 4.5%) representing a reduction in numbers from 580,762 to 201,631 by 2001.

[25] World Directory, ibid., pp.213-215. According to the 1991 census, the number were 580,762 Serbs and of a total population which numbered 4.79 million in 1992. This is corroborated by the statistics for religious denominations: Orthodox Christians 11.1%.

[26] Derived from the Croatia 2001 census and materials in the CIA World Factbook: http://www.cia.gov/library/publications/the-world-factbook/geos/hr.html