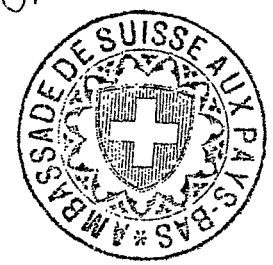
Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Ambassade de Suisse aux Pays Bas
713.4 - WEK

L'Ambassade de Suisse présente ses compliments à la Cour internationale de Justice et en se référant à sa note du 15 avril 2009, concernant la conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo, a l'honneur de lui soumettre sous ce pli, une version *inofficielle* en langue anglaise.

L'Ambassade de Suisse saisit cette occasion pour renouveler à la Cour internationale de Justice l'assurance de sa haute considération.



La Haye, le 25 mai 2009

Annexes : mentionnées

Cour internationale de Justice
Palais de la Paix

La Haye

Unofficial translation

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo

(Request for Advisory Opinion)

Written statement

Addressed to the

International Court of Justice

by the

Swiss Confederation

in accordance with
the order of the Court
of 17 October 2008

I. INTRODUCTION

1. On 8 October 2008, the United Nations General Assembly ("General Assembly") adopted Resolution 63/3 (A/RES/63/3) by which it decided, in accordance with Article 65 of the Statute of the International Court of Justice ("Statute"), to ask the International Court of Justice ("Court") to give an advisory opinion on the following question:

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

2. In its Order of 17 October 2008, the Court decided, in accordance with Article 66, paragraph 1, of the Statute,

> "that the United Nations Organisation and its Member States are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion".

3. The Court fixed 17 April 2009 as the time-limit within which written statements on the question may be presented to the Court in accordance with Article 66, paragraph 2, of the Statute.

4. Furthermore, the Court fixed 17 July 2009 as the time-limit within which the States or organisations having presented written statements may submit written comments on the other statements in accordance with Article 66, paragraph 4, of the Statute.

5. Finally, in the same order of 17 October 2008, the Court decided that:

> "taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question".

6. Switzerland wishes to avail itself of the possibility of furnishing a written statement and, in respecting the time-limit fixed, submits the following considerations to the Court.

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II. BRIEF REMINDER OF THE POSITION OF SWITZERLAND

7. In the interest of transparency, Switzerland would like to recall briefly its position with regard to Kosovo, prior to addressing the questions of the Court's competence, the appropriateness of the Court exercising its jurisdiction and, finally, the actual substance of the question submitted to the Court.

8. Switzerland is one of the States that recognised Kosovo. Ten days after the adoption of the declaration of independence by Kosovo, Switzerland decided to recognise Kosovo and establish diplomatic and consular relations. On this occasion, the President of the Confederation made the following public declaration:

> "Bern, 27.02.2008 – Recognition of Kosovo and the establishment of diplomatic relations
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> Today, on the recommendation of the Federal Department of Foreign Affairs and following consultations with the Foreign Affairs Committees of the Council of States and the National Council, the Federal Council decided to recognise Kosovo and to establish diplomatic and consular relations between the two countries.
>
> The Federal Council took note of the Declaration of Independence adopted by the Assembly of Kosovo on 17 February 2008 and the formal invitation to recognise Kosovo that was addressed to the Swiss government by the President and the Prime Minister of Kosovo on the same day.
>
> In particular, the Federal Council welcomed the clear commitment expressed by the authorities of Kosovo in the two above-mentioned documents to respect in full the obligations set out in the Comprehensive Proposal for Kosovo Status Settlement of the Special Envoy of the Secretary-General of the United Nations for Kosovo, Martti Ahtisaari, especially those concerning the protection of minorities and the supervision of Kosovo's independence by means of an international civilian and military presence.
>
> The Federal Council also noted that the authorities of Kosovo intend to cooperate with the NATO military presence, KFOR, on the basis of Resolution 1244/1999 of the United Nations Security Council.
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> In a situation such as this, where emotions run very high and there is a conflict of interests, an ideal solution is not possible. Nevertheless the Federal Council considers this new step in the political reconstitution of the region to be preferable to any alternative. In addition, it considers that in view of the circumstances of this particular case, Switzerland's recognition of the independence of Kosovo does not constitute a precedent.
>
> Clarification of the status of Kosovo is a precondition for the stability as well as for the economic and political development of the whole of the Western Balkans. The Federal Council declares its intention to pursue Switzerland's commitment in the region and to take an active part in the international efforts both in Kosovo and in the region as a whole.
>
> Switzerland has always adopted balanced positions on issues concerning the Balkans, taking into account the legitimate interests of all parties involved. The Federal Council wishes to emphasise that Switzerland's recognition of Kosovo goes hand in hand with its desire to develop further its good relations with Serbia and to strengthen the very close cooperation that exists between Serbia and Switzerland."

9. On 8 October 2008, at the time of the vote of the General Assembly on Resolution 63/3 which is at the origin of the request for an advisory opinion, Switzerland decided to abstain.

10. As is known, Resolution 63/3 was adopted by the General Assembly with 77 votes against 6 and 74 abstentions. Consequently, the case was brought before the Court.

11. Switzerland attaches the highest importance to public international law and to the role of the International Court of Justice. The Swiss Confederation therefore wishes, to the extent of its abilities, to help furnish elements needed to answer the question submitted to the Court.

12. Switzerland hopes that if the Court were to decide to provide the advisory opinion, the opinion would help strengthen the process of consolidating stability and peace in the region.

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III. PRELIMINARY CONSIDERATIONS

a) Competence of the Court

13. By virtue of Article 65, paragraph 1, of the Statute, 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 ("Charter") to make such a request. The request of the General Assembly contained in Resolution 63/3 has been formulated in application of Article 96, paragraph 1, of the Charter, by virtue of which the General Assembly may request the Court to give an advisory opinion on any legal question.

14. The General Assembly has not exceeded the functions and powers assigned to it in the Charter and, in the opinion of Switzerland, respects the limitations imposed in particular by the provisions of paragraph 1 of Article 12. The question submitted by the General Assembly was put in legal terms. The fact that this question also has political aspects in the current situation does not deprive it of its legal nature[1]. Neither the political nature of the reasons that might be behind the request nor the political implications which the advisory opinion could

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[1] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court confirmed its practice in this respect. In paragraph 13 of the Opinion it says:

> *"The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* p. 172, para. 14*). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948,* pp. 61-62*; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950,* pp. 6-7*; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 155*).*

(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996-I, pp. 233-234, para. 13).

have is relevant with regard to the establishment of the competence of the Court[2]. Nor does the contingency that there may be factual issues underlying the question posed alter its character as a legal question in the meaning of Article 96 of the Charter[3].

15. In the opinion of Switzerland, the Court is competent to respond to the request.

b) Appropriateness of exercising its competence

16. Article 65, paragraph 1, of the Statute states that: "[the] Court may give an advisory opinion..." (emphasis added). The Court thus exercises a discretionary power to decide whether or not to give an advisory opinion that has been requested of it. In this context the Court has always been aware of its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter). It has stressed the following:

> "The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 71; see also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 155; and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United*

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[2] In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, the Court made use of the occasion to confirm:

> *"Moreover the Court affirmed, in its Opinion on the Legality of the Threat or the Use of Nuclear Weapons, that*
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> > *'the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have no relevance in the establishment of its competence to give such an opinion' (I.C.J. Reports 1996 (I), p. 234, para. 13).*
>
> *The Court is of the view that there is no element in the present proceedings which could lead to conclude otherwise."*

(*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* pp. 155f, para. 41).

[3] In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* the Court had already affirmed:

> *"In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues."*

(*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. 27, para. 40).

Nations, Advisory Opinion, I.C.J. Reports 1989, p. 189."[4]

17. In accordance with the constant case law of the Court, only "compelling reasons" could prompt it to refuse to reply to a request from the General Assembly[5]. No instance of a refusal to act upon a request for an advisory opinion, based on the discretionary powers of the Court, has been recorded in the history of the Court[6].

18. The question that arises is whether or not, in this particular case, any such "compelling reasons" exist. In this respect three grounds could be taken into consideration in particular:

a) the lack of consent (cf. below paras. 19 to 20),
b) absence of the necessary factual information (cf. para. 21),
c) the political inappropriateness (cf. paras. 22 and 23).

19. In so far as the first element, the lack of consent, is concerned, the Court affirmed in its Advisory Opinion on *Western Sahara*, that:

> "the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction."[7]

20. However, the situation in which the Court finds itself with regard to the request formulated in Resolution 63/3 does not correspond to the one envisaged in the passage cited. One cannot view the request in this particular case as circumventing the principle of consent applicable to requests emanating from States. To begin with, Kosovo was not able to give its consent to the jurisdiction of the Court, not yet being a member of the United Nations and consequently not a party *ipso facto* to the Statute; nor has it become party to the Statute of the Court by virtue of Article 93, paragraph 2, of the Charter. Furthermore, there is another reason for which one cannot speak of circumventing the fundamental condition of consent to jurisdiction: the question which the General Assembly put to the Court cannot be equated with a dispute limited to a purely bilateral dimension. It is part of a much wider framework

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[4] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996-I,* p. 235, para. 14.

[5] See *Judgements of the Administrative Tribunal of the ILO on requests against Unesco, Advisory Opinion, I.C.J. Reports 1956,* p. 86; *Certain expenditures of the United Nations (article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Resolution 276 (1970) of the Security Council, Advisory Opinion, I.C.J. Reports 1971,* p. 27; *Application for review of judgement n° 158 of the Administrative Tribunal of the United Nations, Advisory Opinion, I.C.J. Reports 1973,* p. 183; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 21; *Applicability of section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989,* p. 191; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996-I,* p. 235, para. 14.

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 156, para. 44.

[7] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 25, para. 33.

and is of more general interest to the United Nations[8].

21. A second ground on which the Court might refuse to act upon a request from the General Assembly for an advisory opinion would be "the actual lack of 'materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact'"[9]. The reply to the question put by the General Assembly undoubtedly involves a thorough examination of the facts. In this respect the many reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, together with the report of the Special Envoy of the Secretary-General on the future Status of Kosovo of March 2007[10] are certain to be useful. At any rate, it is for the Court itself to decide whether or not the material elements available are sufficient to enable it to reply in the affirmative to the request of the General Assembly. The way in which the situation has developed in Kosovo appears in any case to be well documented.

22. A third ground on which the Court might decide not to act upon such a request is political inappropriateness. This might be based for example on the argument that an opinion of the Court could have negative effects on the ground or that the opinion would serve no useful purpose. Both of these arguments were put forward in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* The Court nonetheless decided as follows:

> "The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it."[11]

23. In the past the Court has given careful consideration to the possible existence of compelling reasons that would make it necessary for it to decline the request for an opinion on the grounds of political inappropriateness. Taking into account the conditions established in the case law of the Court on this subject[12], Switzerland sees no reason that would compel

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[8] See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 159, para. 50.

In its Advisory Opinion on the *Western Sahara*, the Court also stressed the following:

> *"The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."*

(Western Sahara, Advisory Opinion, I.C.J. Reports 1975, pp. 26f, para. 39).

[9] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 28, para. 46.

[10] S/2007/168, 26 March 2007.

[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 160, para. 54.

[12] In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that

the Court to refuse to give consideration to the question of the conformity with international law of Kosovo's declaration of independence.

24. Consequently, Switzerland has the honour of presenting hereafter its comments with regard to the question before the Court.

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IV. THE DECLARATION OF INDEPENDENCE IN LIGHT OF INTERNATIONAL LAW

a) General comments

25. The question put to the Court is whether Kosovo's declaration of independence of 17 February 2008 is in accordance with international law.

26. The declaration of independence by a State is a factual, unique event occurring at a precise, more or less important moment in history. In legal terms, a declaration of independence may often raise questions of public law, in particular of constitutional law, because it can bring with it a profound change, perhaps even a total rupture with the public law order in force at that time.

27. Declarations of independence are rarely the subject of in-depth consideration under international law, however. For example, the question as to whether and at what moment an

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> *"[the] General Assembly itself has the authority to decide as to the usefulness of an opinion in consideration of its own needs"*.

(*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996-I*, p. 238, para. 16).

It went on to say:

> *"The Court knows that, whatever conclusions it might reach in the opinion which it renders, these conclusions would be pertinent to the debate taking place in the General Assembly, and would furnish an additional element in the negotiations on the question. Apart from this observation, the effect which the opinion would have is itself a matter of opinion."*

(*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996-I*, p. 238, para. 17).

In its Advisory Opinion concerning *Western Sahara*, the Court made the following remark:

> *"It is in any case not for the Court to say in what way or to what extent its opinion might influence the action taken by the General Assembly. The Court's function is to render an opinion founded in law, once it has reached the conclusion that the questions put to it are pertinent, that they will have a timely practical effect and consequently that they are neither pointless nor purposeless."*

(*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73).

Finally, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court observed that

> *"[the] Court cannot substitute its own view as to the usefulness of the opinion requested for that of the organ making the request, in the present instance the General Assembly."*

(*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 163, para. 62).

entity becomes a State under international law is very different to the question as to whether and at what point in time independence was declared. An entity wishing to secede may very well become a State under international law without making a declaration of independence at all. Conversely, a declaration of independence by an entity wishing to secede does not necessarily lead to the birth of a State under international law. It is not surprising therefore, that declarations of independence have rarely been studied within the context of international law.

28. It would however be going too far to claim that international law remains entirely silent on the subject of declarations of independence and that such declarations thus fall into a legal vacuum.

29. For a start, seceding entities are subject to and must comply with *erga omnes* rules under international law. It would, for example, be theoretically possible for a declaration of independence to contain an incitement to genocide, thereby breaching one of the peremptory norms of international law (*jus cogens*). It is immediately clear from an analysis of Kosovo's declaration of independence that it does not in any sense breach any peremptory norm of international law. To the contrary, its authors have placed the greatest importance on the respect for human rights, on the prohibition of the use of force and on other principles of international law. The fact that Kosovo's declaration of independence is the subject of a request for an advisory opinion of the Court cannot in any way be seen as implying that it could be in breach of *jus cogens* norms or obligations *erga omnes* under international law.

30. It is the opinion of Switzerland that the General Assembly's interest in Kosovo's declaration of independence is rather due to a particular circumstance: the declaration of independence was a step in a long process towards independence, a process which entailed international supervision and whose outcome does not satisfy all parties concerned. This process was launched by Security Council Resolution 1244, presented below in section b.

b) Security Council Resolution 1244 and its implementation

i) Brief historical summary

31. The Security Council dealt with the situation in Kosovo as from 31 March 1998 when, for the first time in this context, it adopted a resolution under Chapter VII of the Charter calling for an immediate political solution to the Kosovo crisis[13]. It repeated its call on 23 September

[13] S/RES/1160. Prior to the worsening of the crisis in Kosovo in 1998, the international community had launched several initiatives to facilitate a political resolution between the concerned parties. The 1991 Hague conference peace plan on Yugoslavia provided that *"the republics shall apply fully and in good faith the provisions existing prior to 1990 for autonomous provinces."* (Peace Conference on Yugoslavia, Carrington Draft Paper, "Treaty Provisions for the Convention", UN Doc S/23169, annex VII, 18 October 1991).

The 1992 London conference had created a working group to study a means of resolving the crisis in Kosovo. This led to the signature on 1 September 1996 of the Sant'Egidio accord between the Federal Republic of Yugoslavia and Ibrahim Rugova, on behalf of Kosovo; the agreement provided for the normalisation of the education system for Albanian-speaking children and youth (*St. Egidio Education Agreement*, 1 September 1996, signed by Ibrahim Rugova and Slobodan Milosevic, and *Agreed Measures for the Implementation of the Agreement on Education of 1 September 1996*, Belgrade, 24 March 1998, signed by Ratomir Vico, Goran

1998, stating it was gravely concerned by "the indiscriminate use of force" and "alarmed at the impending humanitarian catastrophe"[14]. On 24 October, it said it was "deeply alarmed and concerned at the continuing grave humanitarian situation throughout Kosovo and the impending humanitarian catastrophe"[15]. On 14 May 1999, it once more expressed "grave concern at the humanitarian catastrophe" and requested that humanitarian aid be immediately delivered to the refugees[16]. In Resolution 1244[17], it regretted that the demands made in its resolutions had not been fully complied with and announced that it was determined to resolve the grave humanitarian situation in Kosovo.

32. Security Council Resolution 1244 was adopted on 10 June 1999, one day following the signature by the Federal Republic of Yugoslavia (FRY) and Serbia of an agreement with NATO on the posting of an international peacekeeping force in Kosovo (KFOR).

33. Resolution 1244, adopted with 14 votes in favour and one abstention, refers firstly to the Statement by the G8 meeting of St Petersburg of 6 May 1999 which had adopted general principles for a political settlement to the Kosovo crisis. Secondly, it refers to the Agreement on the Principles (Peace Plan) to Move towards a Resolution of the Kosovo crisis which was presented to the leaders of the FRY on 2 June in Belgrade by Mr. Ahtisaari, then President of Finland and representing the European Union, and Mr. Chernomyrdin, Special representative to the Russian Federation[18]. On 3 June 1999, the government of the FRY and the Serbian Parliament approved the agreement. These two documents are annexed to Resolution 1244.

34. The objective of Resolution 1244 was to lay the foundation upon which the political solution to the status of Kosovo would be based. In this Resolution, the Security Council demanded, in particular, the immediate end to acts of violence and repression and the withdrawal from Kosovo of all FRY military and police forces. Furthermore it decided upon the deployment of international security and civil presences – the KFOR and the United Nations Interim Administration Mission in Kosovo (UNMIK) – with the agreement of the FRY and under the United Nations auspices.

Percevic, Dobrosav Bjeletic, Fehmi Agani, Abbdulj Rama and Redzep Osmani, in: Heike Krieger, *The Kosovo Conflict and International Law, An Analytical Documentation, 1974-99*, Doc. 8).

After 1997, it was mainly a contact group (comprised of foreign ministers from the United States, France, Germany, Russia, the United Kingdom and Italy) who were concerned in matters relating to Kosovo; its mediation attempts resulting in the Rambouillet Accords in 1999 (Interim Agreement for the Peace and Autonomy of Kosovo). For the text of these agreements refer to the letter of 4 June 1999, addressed to the Secretary-General by the Permanent Representative of France to the United Nations, S/1999/648, annex – Rambouillet Accords.

None of these initiatives had a lasting effect: The Hague Peace Plan of 1991 was rejected by Serbia, the Sant'Egidio accord was never implemented by the Federal Republic of Yugoslavia – a matter remarked upon with regret by the General Assembly of the United Nations – and the Rambouillet Accords of 1999 were only signed by the representative for Kosovo and not by the Federal Republic of Yugoslavia.

[14] S/RES/1199.

[15] S/RES/1203.

[16] S/RES/1239.

[17] S/RES/1244.

[18] Agreement on the Principles (Peace Plan) to Move towards a Resolution of the Kosovo Crises, presented in Belgrade on 2 June 1999 to the Leadership of the FRY by the President of Finland, Mr. Ahtisaari, Representing the European Union, and Mr. Chernomyrdin, Special Representative of the Russian Federation.

35. Whilst the role of the international security presence was to ensure a secure environment, the role of the international civil presence was *inter alia* to facilitate a political process designed to determine Kosovo's future status. The Security Council demanded the withdrawal from Kosovo of all FRY police, military and paramilitary forces, and demanded equally that all armed Kosovo Albanian groups cease all offensive actions. Finally, it requested that the Secretary-General keep them informed of all developments at regular intervals.

36. On 10 December 2003, after a few years without major developments in the process for determining the final status of Kosovo, UNMIK submitted a document "Standards for Kosovo", setting down the standards required for the establishment of a stable and democratic multi-ethnic society in Kosovo. These standards were endorsed by the Security Council[19].

37. In March 2004, UNMIK submitted an "Implementation Plan for the Standards for Kosovo" which was to serve as a basis for evaluating the progress made in the implementation of the standards. In his report of 30 November 2004[20] however, the Special Envoy of the Secretary-General considered the plan in question to lack credibility insofar as it seemed impossible to apply the standards in their entirety before commencing negotiations on Kosovo's status. The Special Envoy proposed that a set of immediate priorities be defined so that the aforementioned negotiations could take place in reasonable and achievable conditions.

38. This approach gave the process new momentum and led to positive developments. In 2005, in his "global examination of the situation in Kosovo"[21], the Special Envoy of the Secretary-General reported on these developments whilst at the same time drawing attention to certain areas where progress still needed to be made. Despite having some reservations, he recommended that a process to determine the final status of Kosovo be launched. This conclusion received the approval of the Security Council[22].

39. In March 2007, after more than one year of talks with both parties, the new Special Envoy of the Secretary-General, Mr. Ahtisaari, presented a report which showed that negotiations had come to an impasse and confirmed that all possibilities of reaching a negotiated outcome had been exhausted. Confronted with this impasse he concluded that the only viable solution for this "unique case" was independence supervised by the international community and submitted a "Comprehensive Proposal for the Kosovo Status Settlement"[23].

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[19] Statement by the President of the Security Council of 12 December 2003, S/PRST/2003/26.

[20] Annex to the letter of 17 November 2004, from the Secretary-General to the President of the Security Council, S/2004/932.

[21] Annex to the letter of 7 October 2005, from the Secretary-General to the President of the Security Council, S/2005/635.

[22] Statement by the President of the Security Council of 24 October 2005, S/PRST/2005/51.

[23] Letter of 26 March 2007, from the Secretary General to the President of the Security Council and accompanying annex, S/2007/168 (2007).

40. This proposal, also known as the "Ahtisaari Plan", contained provisions for constitutional, economic and security issues as well as provisions concerning the promotion and the protection of the rights of communities, the decentralisation of government and the protection and preservation of cultural and religious heritage. The proposal was accepted by the representatives of Kosovo but rejected by the representatives of Serbia.

41. In a last attempt to find a way out of the deadlock, a troïka, made up of representatives of the European Union, Russia and the United States, was formed in an attempt to keep negotiations going between the parties. After 120 days of intense negotiations the parties failed to come to an agreement[24].

ii) Accordance of the declaration of independence with Resolution 1244 of the Security Council

42. Security Council Resolution 1244 cannot be understood as prohibiting in any way a declaration of independence by Kosovo.

43. In paragraph 10 of the preamble, the Security Council reasserts the sovereignty and territorial integrity of the FRY. Preambles to UN resolutions set out the context for interpretation of the operative paragraphs and remind States that they need to respect the principles set forth in the preamble when implementing the measures taken in the operative part.

44. It is standard practice for the Security Council to reaffirm the sovereignty and territorial integrity of a State, in particular when taking enforcement measures against it under Chapter VII of the Charter. In so doing the Security Council indicates to that State that it is neither its intention that the State lose its national sovereignty as a result of the measures taken nor that its borders be altered. This allaying formula is however of relative importance only: in the preamble to Resolution 1272 whereby the Security Council was putting a transitional administration in place in East Timor, it reasserted the sovereignty and territorial integrity of Indonesia whilst, in the same resolution, expressly supporting the ultimate independence of East Timor within the framework of a transition process under the authority of the UN[25]. By analogy, the reference to the territorial integrity of the FRY contained in paragraph 10 of the preamble to Resolution 1244 does not in any way mean that the future status of Kosovo must be confined within the borders of the FRY.

45. The first operative paragraph also indirectly alludes to the territorial sovereignty of the FRY, because the Security Council decides therein that "the political solution to the Kosovo crisis shall be based on the general principles in annex 1" to the Resolution. The annex referred to launches a "political process towards the establishment of an interim political

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[24] Letter of 10 December 2007, from the Secretary-General to the President of the Security Council, S/2007/723.

[25] S/RES/1272 of 25 October 1999, para. 12 of the Preamble: "Reaffirming respect for the sovereignty and territorial integrity of Indonesia"; but in para. 3 of the Preamble: "...begin a process of transition under the authority of the United Nations towards independence, which it [the Security Council] regards as an accurate reflection of the will of the East Timorese people."

framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia (...)"[26]. This indirect reference is not a perpetual reassertion of the territorial integrity of the FRY either, but only relates to the political process leading towards the establishment of an interim political framework agreement. The Security Council did not, in Resolution 1244, provide for any specific measures, should that political process eventually fail.

46. In this context, it should also be pointed out that the Rambouillet Accords referred to in Resolution 1244 explicitly provide that the will of the people of Kosovo must be respected in the definitive solution to the question of status[27].

47. In addition, Resolution 1244 mandates UNMIK to prepare Kosovo for its future status, without specifying the tasks of the mission in respect of this status. The responsibilities given to the mission by the Security Council include for example "promoting the establishment, pending a final settlement, of substantial autonomy and self-government" and "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"[28]. What subsequently brought Kosovo to independence rather than to a return under the Government of Belgrade, were the actual developments on the ground – under the regime of Resolution 1244 and while the Security Council had multiple occasions to pronounce itself on the matter. It is at the end of the UN-led process and as a simple consequence of the implementation of the measures laid down in Resolution 1244 that the Secretary-General finally saw no other choice than to unambiguously recommend independence for Kosovo under the supervision of the international community.

48. If the Security Council had really wanted to preclude Kosovo's independence, it would have done so in clear and unequivocal terms in a binding operative paragraph of the resolution[29]. The Security Council deliberately chose not to make any definitive pronouncement on the subject, though, when it adopted Resolution 1244. The latter contemplates a "final settlement", whilst saying nothing of the content, form or scope of such "settlement". The Security Council did not therefore fix in advance the final settlement for Kosovo's status; it limited itself to launching a political process with the aim of arriving at a political solution.

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[26] S/RES/1244 (1999), annex 1, p.6.

[27] Rambouillet Accords, Chapter 8, Art. I on Amendment and Comprehensive Assessment, para. 3: "Three years after the entry into force of this, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act".

[28] S/RES/1244 (1999), para. 11, let. a and e.

[29] In its Resolution 541 of 18 November 1983 for example, the Security Council viewed the proclamation made by the Turkish Cypriot authorities on 15 November 1983 "which purports to create an independent state in northern Cyprus" as being "incompatible with the Treaty of 1960 relating to the Republic of Cyprus". In the operative clauses of the Resolution, the Security Council considered "the declaration referred to above legally invalid and call[ed] for its withdrawal" (para. 2). As a result, it "call[ed] upon all States to respect the sovereignty, independence, integrity and non-alignment of the Republic of Cyprus" (para. 6) and expressly called upon "all States not to recognise any Cypriot state other than the Republic of Cyprus" (para. 7).

49. This is confirmed, if confirmation were necessary, by the minutes of the meeting of the Security Council of 10 June 1999. The representative of the government of the FRY requested that the wording of the Resolution be modified to the following effect:

> "The Security Council draft resolution should contain the following positions: a firm and unequivocal reaffirmatibn of full respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia; a political solution to the situation in Kosovo and Metohija that would be based on broad autonomy... The solution for Kosovo and Metohija must fall within the legal frameworks of the Republic Serbia and the Federal Republic of Yugoslavia, which implies that all State and public services in the province, including the organs of law and order, should function according to the Constitutions and laws of the Federal Republic of Yugoslavia and the Republic of Serbia... In sub-item (a) and (b) of operative paragraph 9, the draft resolution requests in all practical terms that the Federal Republic of Yugoslavia renounce a part of its sovereign territory. Furthermore, in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia."[30]

50. The Security Council did not agree with the demands of the FRY: the territorial integrity of the FRY was not reaffirmed in absolute terms within the operative part of the resolution, nor does it contemplate that the international civil presence in Kosovo should comply with the laws of the FRY or Serbia. What is more, during the course of the meeting of 10 June 1999, the representative for the United Kingdom remarked that:

> "This Chapter-VII resolution and its annexes clearly set out the key demands of the international community, which Belgrade must satisfy. The interpretations and conditions which the delegation of the Federal Republic of Yugoslavia has attempted to propose have been rejected."[31]

51. The minutes of the adoption of Resolution 1244 illustrate clearly that the Security Council had taken no position over the future status of Kosovo. If Resolution 1244 does not contain any provision for Kosovo's future status, it is not due to an oversight in its drafting. On the contrary, the Security Council had absolutely no intention of prejudicing the process launched by the Resolution. The process was deliberately left open from the start.

52. For the reasons set out above, Resolution 1244 cannot in any way be interpreted as precluding the secession of Kosovo.

c) Accordance with general international law

53. Switzerland will now respond to the question of whether other elements of international law could give rise to the notion that the declaration of independence on 17 February 2008

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[30] S/PV.4011, 10 June 1999.

[31] S/PV.4011, 10 June 1999.

was contrary to international law. As already noted in paragraph 29, one cannot criticise the declaration of independence as contradicting peremptory norms of international law (e.g. the prohibition of the use of force or obligations relating to fundamental human rights). Above all, the question has to be examined whether the declaration of independence is in violation of other norms or legal principles, notably the generally recognised principle in international law concerning the territorial integrity of States.

i) Principle of territorial integrity

54. Respect for territorial integrity is an integral component of the principle of sovereignty recognised under international law. The guarantee of the territorial integrity of States ensures the stability of the international order.

55. Article 2, paragraph 4, of the Charter, which embraces the principle of territorial integrity, only refers to the relevant obligation for all member states "in their international relations". The obligation is directed towards other States, it applies "externally". Conversely, the inviolability of territorial integrity stipulated in Article 2, paragraph 4, does not apply to entities within a State, i.e. it does not apply "internally".

56 Even if the principle of territorial integrity should be understood as a legal principle of a general nature extending beyond the scope of Article 2, paragraph 4 of the UN Charter, applying also to entities within a State, then such a principle would not be absolute, but it would itself be subject to restrictions. One possible restriction would be the right of peoples to self-determination, also firmly anchored in international law.

ii) Right of peoples to self-determination

57. International law guarantees the principle of territorial integrity, but it also recognises the right of peoples to self-determination. Both principles are recognised in the UN Charter, as well as in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975), and in the Charter of Paris for a New Europe (1990).

58. The actual extent of the right to self-determination remains a matter of dispute. In Switzerland's view, in the course of the past few decades this right has developed from a principle arising from a political aspiration into a directly applicable norm of international law, which now represents a provision of customary international law and an obligation *erga omnes* [32]. The exercise of this right is subject to a number of specific conditions, however.

[32] *East Timor (Portugal vs. Australia), Judgment, I.C.J. Reports 1995*, p. 90, para. 29: "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *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*, pp. 31-32, paras. 52-53 ; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law."

59. In Article 1, paragraph 2, of the Charter, the right of peoples to self-determination first appeared as a programmatic norm. It was paragraph 1 of Article 1 common to the 1966 UN Covenants on human rights that first gave it the outline of a legal definition. It stipulates that all peoples have the right to self-determination, and that on the basis of this right they can freely determine their political status and freely pursue their economic, social and cultural development. A few years later, the General Assembly elaborated the most authoritative and comprehensive formulation so far of the right to self-determination in its 1970 "Declaration 2625 on the Principles of International Law concerning Friendly relations and Co-operation among States in accordance with the Charter of the United Nations" (or *Declaration on Friendly Relations*)[33], with certain provisions becoming recognised as customary international law[34]. This transition from a political principle of self-determination to a right was confirmed within the context of decolonisation through the case law of the International Court of Justice in its advisory opinions concerning *South West Africa* (1971)[35] and *Western Sahara* (1975)[36], and its ruling in the *East Timor* case[37].

60. The assertion of principles of friendly relations also touches on the relationship between national sovereignty, territorial integrity and the right of peoples to self-determination. According to the principles set out in the Declaration on Friendly Relations, for the people concerned the creation of a sovereign and independent State constitutes a means of exercising their right to self-determination. The Declaration contains a specific clause to this effect:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[38]

61. It stipulates that the right of peoples to self-determination cannot be interpreted as authorising secession if the state concerned conducts itself in accordance with the principles of equality before the law and right of peoples to self-determination, and if the government represents the whole population within its territory, regardless of their race, religious beliefs or colour. A similar safeguard clause has been confirmed in the Vienna Declaration and Programme of Action at the World Conference on Human Rights (1993):

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[33] A/RES/25/2625, 24 October 1970, annex.

[34] Cf. *Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda), I.C.J. Reports 2005*, p. 56, para 162; *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 101, para. 191.

[35] *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*, pp. 31-32, paras 52-53.

[36] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59.

[37] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 102, para. 29.

[38] A/RES/25/2625, 24 October 1970, annex.

> "In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among states in accordance with the Charter of the United Nations, [the right of self-determination] shall not be constructed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."[39]

62. This means that international law expressly protects a State's territorial integrity to the detriment of the right of peoples to self-determination if its government represents the whole population without any form of discrimination. In this case, the population is exercising its right to self-determination through its representatives within the government, which is obliged to respect the principle of equality before the law.

63. Conversely, a State's territorial integrity is not protected to an unlimited extent if its government does not represent the whole population, arbitrarily practices discrimination against certain groups, and thus clearly violates the right of peoples to self-determination. In such a case, the declaration of independence by people forming part of a larger national population could be in compliance with international law and the principle of territorial integrity.

64. The Canadian Supreme Court, for example, examined this question in its 1998 *Reference re Secession of Quebec*. Here it drew a distinction between internal and external right to self-determination:

> "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases, and even then, under carefully defined circumstances."[40]

65. Thus the Canadian Supreme Court did not completely rule out the right of a people to declare unilateral independence against the wishes of the State to which it formerly belonged, stating that this was an exceptional action that could only be carried out under carefully defined circumstances. For the Supreme Court it is indisputable in international law that such circumstances can arise in the case of a population that has been colonised or subjected to foreign domination. The Court also does not rule out the possibility that the circumstances may arise in another case, namely:

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[39] A/CONF.157/23, 12 July 1993, para. 2.

[40] *Reference re Secession of Quebec, Supreme Court* (1998), 2 SCR 217; International Law in Domestic Courts ILDC 184 (CA 1998), para. 126 [*Reference re Secession of Quebec*].

> "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession ... Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated."[41]

66. According to prevailing doctrine, a people may by way of exception exercise the right to external self-determination if the State systematically and gravely violates the right to internal self-determination[42] on the basis of distinctive group traits, in such a manner that the group concerned can no longer be expected to remain within the State concerned. If a people finding itself in such a situation were unable to exercise the right to external self-determination, then the right of peoples to self-determination would lose its intrinsic function[43]/[44]. Switzerland shares this view.

67. In Switzerland's view, respect for territorial integrity is undoubtedly an important principle of international law. However, it is not isolated from other fundamental principles of international law, and in particular it cannot be called on for the purpose of excluding a right to secession under all circumstances. A right to secession based on the right of peoples to self-determination can exist, but may only be exercised in exceptional circumstances, when all other means of exercising the right to self-determination have failed or have to be regarded as futile due to grave and systematic violations of human rights[45]. In other words, the proclamation of an independent State distinct from the former one must remain a solution of last resort in order for a population to be able to exercise its right to self-determination internally, and enjoy the human rights and the rights of members of minorities that are

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[41] *Reference re Secession of Quebec*, para. 135.

[42] For example, murder, unlimited imprisonment without a legal basis, destruction of family relations, dispossession without regard to basic needs, special prohibition of certain religious beliefs or use of own language, enforcement of such prohibitions through the use of brutal means and measures (cf. Karl DOEHRING, Self-Determination, in: Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edition, Oxford 2002) [DOEHRING 2002], p. 58.

[43] James CRAWFORD, *The Creation of States in International Law* (Oxford 2006) [CRAWFORD 2006], p. 119; Antonio CASSESSE, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge 1995), pp. 109 ff; Daniel THÜRER, *Das Selbstbestimmungsrecht der Völker; mit einem Exkursus zur Jurafrage* (1976), p. 15 f.; Daniel THÜRER, *Das Selbstbestimmungsrecht der Völker und die Anerkennung von Staaten*, in: Hanspeter Neuhold/Bruno Simma (ed.), *Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konfliktes* (Baden-Baden 1996) [THÜRER 1996], p. 50; Hans-Joachim HEINTZE, in: Knut Ipsen, Völkerrecht (5th edition, Munich 2004) [HEINTZE 2004], pp. 421 ff; DOEHRING 2002, pp. 57 f.; Christian TOMUSCHAT, *General Course on Public International Law*, Académie de Droit International, Recueil des Cours 1999 (The Hague 2001), pp. 253 f; Dietrich MURSWIEK, *Die Problematik eines Rechts auf Sezession – neu betrachtet*, Archiv des Völkerrechts (AVR) 31 (1993) [MURSWIEK 1993], pp. 313 f.

[44] Sovereignty and territorial integrity should not be regarded here as absolute values, but they should be based on a legitimacy arising from the responsibility adopted towards legal subjects. They do not represent an end in itself, but are in the service of people and human rights, which alone legitimise their institutionalisation. Cf. Daniel THÜRER, *Der Wegfall effektiver Staatsgewalt; 'The Failed State?'* Berichte der Deutschen Gesellschaft für Völkerrecht (BDGV) 34 (1995), p. 15; see also CRAWFORD 2006, p. 384: "International law has extended its protection of the territorial integrity of States, though not to the point of providing a guarantee."

[45] *Reference re Secession of Quebec*, para 134 ; CRAWFORD 2006, p. 119; Hans-Joachim HEINTZE, in: Ipsen 2004, pp. 422 f; DOEHRING 2002, p. 58; Daniel THÜRER, in: Encyclopedia of Public International Law (North-Holland 2000), p. 371 [THÜRER EPIL]; MURSWIEK 1993, pp. 313f.

guaranteed by international law[46]. In such extreme situations, the right of a people to separate itself from a State through a unilateral declaration of independence has to be defined as an *ultima ratio* solution. This concept was already defended in 1921 by the Second Commission of the League of Nations in connection with the wish of the people of the Åland islands to secede from Finland[47].

68. Even if one wanted to admit that respect for territorial integrity could also be applied internally in a State, it would be possible to assert, in Switzerland's view, that the strict conditions to be met in order to call on the right to self-determination were in fact fulfilled in the specific case of Kosovo: that the people of Kosovo can exercise its right to self-determination (see iii below), that it had been subjected to grave and systematic violations of human rights and the rights of members of minorities (see iv below), and that for the people of Kosovo the declaration of independence in fact constituted a solution of last resort *(ultima ratio)* (see v below).

iii) The right of the people of Kosovo to exercise the right of peoples to self-determination, and democratic legitimisation for exercising this right

69. Article 1 common to the two UN Covenants on human rights states that all peoples possess the right to self-determination[48]. Efforts by States to restrict this right to colonised peoples were rejected[49].

70. The legal notion of people entitled to self-determination is imprecise. To date, the practice of States has been deliberately to avoid conclusively defining the notion of a people. To quote Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities:

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[46] See Article 1 of the International Covenant on Civil and Political Rights: "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". See also Article 27 of the same Covenant: "In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

[47] *Commission of Rapporteurs, League of Nations Doc.* B.7.21/68/106 (1921), *Official Journal, Suppl. No. 5*, 1921, p. 24: "The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."

[48] See also General Comment no. 12: Article 1 (Right to self-determination), adopted at its 21st session (1984) by the Commission on Human Rights established by the Covenant on Civil and Political Rights (HRI/GEN/1/Rev. 9 (Vol. I) pp. 213 f.): "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants".

[49] At the time of the ratification of the two human rights covenants, in 1979, India declared that: "the words 'the right of self-determination' ... apply only to the peoples under foreign domination and ... do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity". France, Germany and the Netherlands were against this restriction, stating that the UN Charter did not foresee any condition limiting the exercise of the right of peoples to self-determination.

"The fact is that, whenever in the course of history a people has become aware of being a people, all definitions have proved superfluous."[50]

71. Switzerland agrees in principle with the view expressed here, but would add certain other points[51]:

1. The right to self-determination is closely linked with the principle of equality. All peoples possess this right to the same extent. It cannot be granted to one people but denied to another in a selective manner on subjective grounds.

2. The right to self-determination applies to a collective that goes beyond a mere group of individuals. What binds a people is a shared consciousness or a common political will. This results from the exact nature of the right of peoples to self-determination which is a fundamental standard of the democratic State. Thus any effort to define the notion of a people entitled to self-determination in a conclusive, objective and scientifically observable manner, is intrinsically contradictory.

3. As a general rule, in order to exercise the right to self-determination, the people concerned have to share a common territorial basis.

72. To quote Rosalyn Higgins:

"To what unit does the concept of self-determination apply? If the international order is not to be reduced to a fragmented chaos, then some answer must be provided to this question ... Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power. It is necessary to start with stable boundaries and to permit political change within them."[52]

73. For James Crawford, the question of the legal definition of the notion of 'people' as in the right of peoples to self-determination turns on the identification of the territories likely to exercise such a right. In his own words:

"At the root, the question of defining 'people' concerns identifying the categories of territory to which the principle of self-determination applies as a matter of right."[53]

74. In his view, it is also clear that this right can only be exercised without constraint on the basis of the principle of equality, since it is a right that is closely tied to fundamental rights. He continues:

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[50] Aureliu CRISTESCU, *Le droit à l'autodétermination* (New York 1981, N Doc. E/CN.4/Sub.2 /404/Rev.1), p. 38, para. 274.

[51] THÜRER 1996, pp. 45 f, see also THÜRER EPIL, pp. 364 ff.

[52] Rosalyn HIGGINS, *The Development of International Law through the Political Organs of the UNO* (London 1963), p. 104.

[53] CRAWFORD 2006, p. 126.

> "First, it applies to entities whose right to self-determination is established under or pursuant to international agreements, and in particular to mandated, trust and non self-governing territories. Secondly, it applies to existing States, excluding for the purposes of self-determination those parts of the state that are themselves self-determination units as defined. ... However, there is a further possible category of self-determination units, that is, entities part of a metropolitan State but that have been governed in such a way as to make them, in effect non-self-governing territories – in other terms, territories subject to carence de souveraineté. Possible examples are Bangladesh, Kosovo and perhaps Eritrea."[54]

75. The people of Kosovo can thus exercise a right of self-determination that is different from that of the population of Serbia. This can arise:

> "when the inhabitants [of the territories forming distinct political-geographical areas] are arbitrarily excluded from any share in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing."[55]

76. Finally, in its *Reference re Secession of Quebec* (1998), the Canadian Supreme Court commented as follows on this issue:

> "It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose."[56]

77. Based on the above-mentioned doctrine, Switzerland's conclusion is that the people of Kosovo possess the right to self-determination. Kosovo was in fact a *non-self-governing territory* as defined by Crawford.

78. The fact that close ties exist between the right of peoples to self-determination and the fundamental rights of a democratic society sets at the same time the condition that the demand for self-determination can only be considered if the majority of the population within the territory concerned declare that they are in favour of self-determination. This condition is also met.

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[54] CRAWFORD 2006, p. 126.

[55] CRAWFORD 2006, p. 127.

[56] *Reference re Secession of Quebec*, para. 124.

79. The declaration of independence on 17 February 2008 was made by democratically elected representatives of the people of Kosovo. The elections had taken place on 17 November 2007. In his report dated 3 January 2008 to the Security Council, the Secretary-General commented as follows on the elections in Kosovo: "The elections took place without incident following a generally fair and calm campaign period, and were confirmed by the Council of Europe to have been in compliance with international and European standards"[57]. At the time of the declaration of independence, the majority also undertook to respect the fundamental rights of persons belonging to minorities. Kosovo must be a multi-ethnic State that respects the rights that are guaranteed in accordance with international law[58].

80. In these circumstances, the people of Kosovo can exercise the right of peoples to self-determination.

iv) Grave and systematic violations in Kosovo of the rights of persons belonging to minorities, and of the principles of human rights

81. In 1989, Serbia's parliament revoked the province's autonomy. As a result Kosovo's parliamentary assembly was deprived of the right to object to amendments of the Constitution of the Republic of Serbia. In 1990, Serbia's parliament then disbanded the functioning of the Assembly and Executive Council of Kosovo, and the authorities of Serbia assumed the right to administer the affairs of Kosovo directly and to nullify decisions which Kosovar public authorities had taken[59].

82. The grave and systematic violations in Kosovo of the rights of persons belonging to minorities and the principles of human rights are well documented. The General Assembly first began to look into the situation regarding the rights of members of minorities and human rights in Kosovo in 1992[60]. One year later it ascertained a deterioration. In its Resolution 48/153, which was adopted by consensus, it "strongly condemns in particular the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities". In particular it urged the FRY :

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[57] S/2007/768, para. 3.

[58] Cf. Declaration of Independence, paragraph 2: "We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes."

[59] Serbia's action against Kosovo violated the constitution of Yugoslavia dating from 1974, which recognised Kosovo as an autonomous province within Yugoslavia, with a status equivalent to that of the six republics, with its own parliament, its own constitution, its own judiciary and its own joint representation in all bodies of the Federation, including the presidency. It should be noted here that the violation of the 1974 constitution occurred at the beginning of the development that was to result in the break-up of Yugoslavia. Cf. Joseph MARKO, *The constitutional development of Kosovo/a 1913-1995*, in J. Marko (ed.): *Kosovo/a. An Analysis of the Kosovo/a Conflict from the Perspective of Political Science, Comparative and International Public Law* (Berlin 2000), pp. 261-279.

[60] A/RES/47/147, 26 April 1993 (adopted on 18 December 1992).

"a) To take all necessary measures to bring to an immediate end the human rights violations inflicted on the ethnic Albanians in Kosovo, including in particular, discriminatory measures and practices, arbitrary detention and the use of torture and other cruel, inhuman or degrading treatment and the occurrence of summary executions;
b) To revoke all discriminatory legislation, in particular which has entered into force since 1989;
c) To re-establish the democratic institutions of Kosovo, including the Parliament and the judiciary;
d) To resume dialogue with the ethnic Albanians in Kosovo ... "[61].

83. Towards the end of 1994, the General Assembly noted a further deterioration in the situation concerning the respect for minority rights and human rights: discriminatory expulsion of a large proportion of ethnic Albanian officials, harassment of Albanian-language information organs, discrimination against Albanian students and teachers, closure of schools, universities and cultural institutions. The Resolution condemned the large-scale repression by the police and armed forces of the FRY and Serbia against the defenceless ethnic Albanians population, and qualified their actions as "ethnic cleansing". The General Assembly again demanded the restoration of "genuine democratic institutions in Kosovo, including the parliament and the judiciary" as well as respect for the "will of the inhabitants as the best means of preventing an escalation of the conflict there"[62].

84. The resolutions concerning Kosovo that were adopted by the General Assembly each year until December 1999 indicate a constant deterioration on the ground[63]. The situation regarding human rights and the rights of members of minorities was visibly deteriorating in Kosovo, where part of the population was becoming increasingly radical[64], and where migration was steadily gaining momentum – a situation which threatened to lead to an outbreak of a major crisis with very severe consequences for the civilian population. In the preamble to its last resolution (54/183) dated 17 December 1999, the General Assembly recalled the "years of repression, intolerance and violence in Kosovo, the challenge to build a multi-ethnic society on the basis of substantial autonomy"[65].

85. The International Criminal Tribunal for former Yugoslavia (ICTY) also closely examined the situation at that time in Kosovo. Former members of the Kosovo Liberation Army and high-level officials of former Yugoslavia and Serbia had to answer for their actions before the ICTY. Regardless of the criminal responsibility of the accused officials, the conclusions drawn by the Tribunal show that there was an extensive campaign of violence in Kosovo. In the case of *Milutinović et al*, the Court concluded that an armed conflict took place in Kosovo

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[61] A/RES/48/153, 7 February 1994 (adopted on 20 December 1993), para. 19.

[62] A/RES/49/204, 13 March 1995 (adopted on 23 December 1994).

[63] Cf. A/RES/50/190, 6 March 1996 (adopted on 22 December 1995); A/RES/51/111, 5 March 1997 (adopted on 12 December 1996); A/RES/52/139, 3 March 1998 (adopted on 12 December 1997); A/RES/53/164, 25 February 1999 (adopted on 9 December 1998); A/RES/54/183, 29 February 2000 (adopted on 17 December 1999).

[64] Cf. A/RES/53/164, 25 February 1999 (adopted on 9 December 1998), para. 9.

[65] A/RES/54/183, 29 February 2000 (adopted on 17 December 1999), para. 3 of the Preamble.

from the middle of 1998 until the middle of 1999[66]. The ICTY also concluded that, during this period, the armed forces and the police placed under the control of the authorities of the FRY and Serbia conducted a widespread campaign of violence against the Albanian civilian population of Kosovo, and deliberately drove Kosovo Albanians out of their homes[67]. Furthermore, the ICTY came to the conclusion that, in the course of this campaign, numerous murders, acts of sexual violence and other crimes were committed by the armed and police forces[68]. The Court found that some of these actions constituted persecution against the Albanian civilian population of Kosovo on the basis of their ethnic origin[69].

86. Even after the Milosević era had come to an end, in 2000, Serbia's policies towards Kosovo continued to include aspects of discrimination against the Albanian majority in Kosovo. The Serbian Constitution of 2006, which defines Kosovo as forming an integral part of Serbia, was implemented in Kosovo without consideration of the Albanian majority population, who were not invited to participate in the preparation of the new draft constitution, and whose votes did not count in the referendum on its adoption[70]. Estimations suggest that the constitution could not have been adopted by the electorate of Serbia if Kosovo Albanians had had a chance to vote against it or if their votes had been accounted for as a boycott[71]. The procedure adopted for this referendum thus appears to clearly contradict the views repeatedly expressed by Serb officials, claiming that Kosovo formed an integral part of Serbia. The procedure could also be perceived as being part of an obstructionist policy put in place by Serbia in order to impede the political process initiated in Security Council Resolution 1244 with a view to finding a definitive solution to the question of Kosovo's status. Moreover, it may also be perceived as an indication that Serbia was not willing to include the entire population in the territory into the existing system of democratic representation without resorting to discrimination based on ethnic origin or other criteria.

v) Declaration of independence on 17 February 2008: last resort for Kosovo to exercise its right of self-determination (*ultima ratio*)

87. What was particularly notable about the efforts by Kosovo to gain independence is undeniably the fact that the process to determine Kosovo's future status was supported by the international community. This leads back to the Security Council Resolution 1244 (cf. paragraphs 31 ff). Over the years, the implementation of this Resolution brought about the

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[66] ICTY, IT-05-87, *Prosecutor vs Milan Milutinović et al,* ruling dated 26 February 2009, Vol. I, para. 841.

[67] ICTY, IT-05-87, *Prosecutor vs Milan Milutinović et al,* ruling dated 26 February 2009, Vol. II, paras. 1156 to 1178. See also findings of the court of first instance, which established that the actions carried out by the armed forces under the control of the authorities of the Republic of Yugoslavia and Serbia constituted crimes against humanity and, in certain cases, war crimes: *ibid.* "Legal findings", paras. 1179 to 1262.

[68] *Ibid.* cf. especially Vol. II, paras. 238, 382, 432-433, 549, 679, 1189, 1192, 1194.

[69] ICTY, IT-05-87, *Prosecutor vs Milan Milutinović et al,* ruling dated 26 February 2009, Vol. II, paras. 1193, 1198, 1209, 1211, 1213, 1218, 1223, 1224, 1237, 1249.

[70] See International Crisis Group, *Serbia's New Constitution, Democracy going backward,* Policy Briefing No. 44, 8 November 2006.

[71] Wolfgang BENEDEK, *Implications of the Independence of Kosovo for International Law,* in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), *International Law between Universalism and Fragmentation,* Festschrift in Honour of Gerhard Hafner (2008), p. 13.

view that the political process originally conceived to be open would inevitably lead to Kosovo's independence. After almost eight years of administration by the UN, on 26 March 2007[72] the Secretary-General recommended Kosovo's status should be independence, supervised by the international community. His recommendation was based on the report of his Special Envoy, Mr. Martti Ahtisaari, concerning the future status of Kosovo.

88. In his report, the Special Envoy explained why Kosovo could not be reintegrated into Serbia. His conclusion that the reintegration of Kosovo into Serbia was not a viable option was based *inter alia* on the following considerations:

> "For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo."[73]

89. Having noted that maintaining international administration threatens to compromise economic and social development, the report comes to the conclusion that "[i]ndependence is the only option for a politically stable and economically viable Kosovo"[74]. The proposed international supervision would guarantee that the democratic process would be pursued in Kosovo, and that in particular the rights of members of minorities would be protected. In order to promote the economic reconstruction of Kosovo and its capacity for social reconciliation, international supervision would have to concentrate on consolidating the rule of law, decentralisation, community rights and the protection of the Serbian Orthodox Church.

90. In addition, the Special Envoy noted in his report that Kosovo's independence against the will of Serbia was an unusual means of settling a conflict, and that it had to be viewed in the context of Resolution 1244 as well as the tumultuous dissolution of the Socialist Federal Republic of Yugoslavia:

> "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary ... Concluding this last episode in the dissolution of the former Yugoslavia will allow the region to begin a new chapter in its history – one that is based upon peace, stability and prosperity for all."[75]

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[72] S/2007/168.

[73] S/2007/168, para. 7.

[74] S/2007/168, para. 10.

[75] S/2007/168, paras. 15-16.

91. The mission established by the Security Council in April 2007[76], carried out, as previous missions, under the auspices of the USA, Russia and the European Union, failed to yield new results[77].

92. One of the main reasons behind the recommendation of the Secretary-General was that any other solution would have ignored the will of the majority of the population of Kosovo. From 1994 onwards, the General Assembly had appealed to Belgrade to respect the will of the inhabitants of Kosovo, since Serbia had unconstitutionally suppressed the autonomous status of Kosovo and had initiated a policy of ethnic cleansing in this province[78]. This demand was included in the text of the 1999 Rambouillet Accords.

93. Resolution 1244 established an international administration which was required to govern Kosovo *de facto* as a State independent from Serbia. All possible amicable solutions were explored with Serbia within the framework of an intense political process initiated by Resolution 1244, but unfortunately no agreement could be reached. On this particularly important point – i.e. negotiation for a political solution – UNMIK was unable to implement Resolution 1244 as planned, since the authorities in Belgrade and the Serb community in Kosovo demonstrated a great deal of opposition[79]. The referendum on the constitution held in 2006 made it clear that the authorities in Belgrade did not have any intention of allowing the whole population of Kosovo to participate in the political decision-making process in Serbia.

94. Given the Charter and the right of peoples to self-determination, placing Kosovo back under the sovereignty of Serbia against the will of the population of the province would have constituted a most dreadful step by the international community. From the beginning of the negotiations carried out within the framework of Resolution 1244, the contact group had underscored the necessity to respect the will of the people of Kosovo when settling the question of its status[80]. According to the Special Envoy to the Secretary-General, the only solution was independence under the supervision of the international community, which at the same time also had to guarantee respect for the rights of members of minorities in Kosovo. The Secretary-General also asked the members of the Serb community in Kosovo to "reverse their fundamental position of non-cooperation"[81] and fulfil their role as citizens in the political life of Kosovo.

95. The declaration of independence was adopted on 17 February 2008, once it had become clear that the process that had been pursued since 10 June 1999, i.e. for almost a decade, could not come to a consensual solution. The declaration reiterated Kosovo's commitment to

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[76] S/2007/256, 4 May 2007.

[77] S/2007/723, 10 December 2007.

[78] A/49/204, 23 December 1994.

[79] This was in contravention of the conditions of UN General Assembly Resolution 54/183 dated 17 December 1999, which underscores that the authorities of the Federal Republic of Yugoslavia are obliged to respect the provisions of Security Council Resolution 1244 (1999), as well as the general principles for a political settlement of the crisis in Kosovo, which were adopted on 6 May 1999.

[80] Declaration by the contact group on the future of Kosovo, London, 31 January 2006, para. 7.

[81] S/2007/168, para. 12.

act in accordance with the principles of international law and in compliance with the resolutions of the UN Security Council. It underscored Kosovo's intention to respect all obligations that formed an integral part of the Ahtisaari Plan, including those relating to the protection of minorities and supervision of its independence in the form of an international civilian and military presence.

96. In light of the above, the declaration of independence by Kosovo was indeed an act of last resort *(ultima ratio)*. Thereby, the last criterion for Kosovo to exercise the right of peoples to self-determination is also met. Therefore, Switzerland is of the view that there is no element, even under general international law, that could give rise to the interpretation that Kosovo's declaration of independence was not in accordance with international law.

97. For Switzerland, Kosovo became an independent State on 17 February 2008. Switzerland is of the view that it would no longer be possible for Kosovo to be returned to its former status. Moreover, any attempt to restore the *statu quo ante* would be regrettable and even appalling from the perspective of the principles of the Charter[82]: in a region that has already been severely tested, it would show flagrant disregard for the will clearly expressed by a large majority of the population of Kosovo.

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V. CONCLUSIONS

98. In Switzerland's view, the following factors are decisive in responding to the question submitted by the General Assembly to the Court.

a) The declaration of independence by Kosovo on 17 February 2008 does not contravene peremptory norms of international law or any other important provisions of international law with *erga omnes* character. On the contrary, it reflects the firm will of Kosovo to fully respect international law, in particular the prohibition of the use of force, and to respect human rights, including the rights of members of minorities.

b) Kosovo's declaration of independence does not contradict Resolution 1244 of the UN Security Council. In Switzerland's opinion, this Resolution initiated a process without prejudging either its outcome in general or the definitive status of Kosovo in particular. The subsequent independence of Kosovo was one of several options. While not opting for it, Resolution 1244 deliberately included independence as a possible solution. Equally,

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[82] Simon Chesterman recalls, for example, that:

> *"[I]n those rare situations, in which the United Nations and other international actors are called upon to exercise state like functions, they must not lose sight of their limited mandate to hold that sovereignty power in trust for the population that will ultimately claim it."*

Simon CHESTERMAN, *You, The People – The United Nations, Transitional Administration, and State-Building*, (Oxford and New York 2004), p. 257.

Resolution 1244 does not contain any provision that makes the solution of the question of Kosovo's status dependent on the consent of the Federal Republic of Yugoslavia.

c) The declaration of independence on 17 February 2008 is not in conflict with the principle of territorial integrity. This principle as defined in the Charter of the United Nations only applies to international relations, and thus does not apply within a State. In view of this, the principle of territorial integrity could be regarded as irrelevant in the examination of declarations of independence by secessionist entities.

d) Alternatively, should the principle of territorial integrity be understood as a legal principle of a general nature extending beyond the scope of Article 2, paragraph 4, of the UN Charter, Switzerland considers that it has not been violated, given the particular situation of Kosovo. Indeed the situation of Kosovo fulfilled all the conditions – however stringent – under which a people may exceptionally claim independence by exercising the right to self-determination: existence of a people holding the right to self-determination and territorial unity, established democratic will on the part of a large majority of the population within the State's territorial limits, grave and systematic violations of the rights of members of minorities and human rights, and secession as a measure of last resort *(ultima ratio)*.

e) The situation in Kosovo was characterised by the fact that intense international efforts were made from 1999 onwards under the auspices of the UN Security Council to find a political solution to the status of Kosovo. For many years, all actors, and in particular Kosovo, sought a solution as consensual as possible. Kosovo's declaration of independence was only made after it became clear that it would not be possible to find a consensual solution within a reasonable period of time. The implementation of Resolution 1244 by the international community thus gave rise to a situation which, since all international efforts to find a consensual solution had ended in failure, left Kosovo with no other option than to declare its independence.

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