REPUBLIC OF CYPRUS

LAW OFFICE OF THE REPUBLIC

A.G. File No. 36/1969/Y.4/17

8 July 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)

In terms of paragraph 3 of the Court's Order of 17 October 2008 (in relation to an advisory opinion by the Court on the accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo) I submit the Republic of Cyprus's Written statement in terms of paragraph 2 of their Order.

The original of this 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

INTERNATIONAL COURT OF JUSTICE

Re: ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT OF KOSOVO

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT COMMENTING ON OTHER WRITTEN STATEMENTS

SUBMITTED BY
THE REPUBLIC OF CYPRUS

JULY 2009

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RE: KOSOVO

WRITTEN STATEMENT

I. Introduction

1. There is much in the Written Statements submitted by other States with which the Republic of Cyprus agrees, and there are also points with which the Republic of Cyprus disagrees. This additional Written Statement by the Republic of Cyprus does not attempt either to identify all of the agreed points or to identify or respond to all the points with which the Republic of Cyprus disagrees. On matters of fact, the Republic of Cyprus notes that some of the Written Statements appear to be based upon understandings of the facts which differ from those held by the States most directly concerned with events in Kosovo and / or by the Republic of Cyprus. The Republic makes no comment on these points, considering the fundamental legal principles to be clear, and that the Court will take appropriate steps to satisfy itself on questions of fact that have a decisive importance for the application of those principles. On matters of law, the Republic of Cyprus seeks to set out in this submission the few main issues of principle before the Court on which a range of views have been expressed and to elaborate and clarify the Republic's position in relation to them.

2. The Republic considers the main points of principle to be the following:

   a Claims to independence and secession are addressed and governed by international law;

   b The legal principle of crucial importance in the present context is the principle of territorial integrity, which binds the Provisional Institutions in particular by reason of their status under Security Council resolution 1244 (1999);

   c A case-by-case treatment of allegedly *sui generis* situations is fundamentally

antithetical to the rule of law and to the principle of the sovereign equality of States; and

d Claims to Statehood must be assessed in the light of fundamental principles of legality.

In conclusion, the case of Kosovo is governed by the principles of public international law, and by the specific obligations arising under UN Security Council resolution 1244 (1999); and the declaration of independence is not compatible with those principles and obligations.

II. Preliminary jurisdictional point: the declaration was made by the Assembly

3. Before addressing these issues of principle, the Republic of Cyprus will dispose of one preliminary point regarding the jurisdiction of the Court. Some of the submissions to the Court assert that the unilateral declaration of independence was an internal constitutional act, not made by the Assembly of the Provisional Institutions of Kosovo but by the people of Kosovo, and that it was therefore not governed by international law, so that the request for an Advisory Opinion does not concern a legal question within the jurisdiction of the Court.

4. The Republic of Cyprus notes that all the indications are that in adopting the declaration the Assembly of the Provisional Institutions of Self-Government was acting *as* the Assembly of the Provisional Institutions of Self-Government. Whether or not all of the procedures of the Assembly were followed exactly, the Assembly was convened as the Assembly, albeit in special session. The invitation to the session was 'extended in accordance with the Kosovo Constitutional Framework'.[1] The declaration was tabled on the Assembly's agenda. The members of the Assembly, elected in accordance with the procedures laid down by Chapter 9 of the

1 Page 4 of the transcript of the special plenary session of the Assembly of Kosovo, annexed at page 225 to the submission of the authors of the unilateral declaration of independence.

Constitutional Framework, spoke of themselves as the elected representatives, thus claiming for themselves the legitimacy conferred upon them by the democratic process instituted under resolution 1244 (1999).

5. The question addressed to the Court refers to 'the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo'. The argument that the declaration did not issue from the Assembly but from Assembly members, whose capacity was not limited to the powers delegated by resolution 1244 (1999), has appeared at a late stage. Not one of the speakers in the UN General Assembly debate who opposed a request to the Court for an advisory opinion stated that the wording of the request was defective in this respect.[2] Even the United Kingdom, which made detailed arguments against the submission of the request, including detailed drafting points on the wording of the resolution, did not disagree with the assertion that the Assembly of the Provisional Institutions of Self-Government had made the declaration.[3]

6. In any event, the Republic of Cyprus hopes that the Court will not base its opinion on the finer points of the internal procedures followed by the Kosovo Assembly but rather on the purported international aspect of the declaration. The declaration was apparently issued by the Assembly, and accordingly was subject to the provisions of Security Council resolution 1244 (1999), and therefore to international law. The limitations on the powers of *any* entity to declare independence while Kosovo was under UN administration was affirmed by the Special Representative of the Secretary-General in 2002:

> "Kosovo is under the authority of UN Security Council resolution 1244 (1999). Neither Belgrade nor Pristina can prejudge the future status of Kosovo. Its future status is open and will be decided by the UN Security

2 A/63/PV.22, UN dossier 6. See also the annex to the letter from the Permanent Representative of the United Kingdom of 2.10.2008 (A/63/461, UN dossier 5).
3 Pages 2 and 11 of A/63/PV.22, UN dossier 6.

Council. Any unilateral statement *in whatever form* which is not endorsed by the Security Council has no legal effect on the future status of Kosovo."[4] (emphasis added)

7. Furthermore, the assertion that the declaration is not governed by international law gives rise to a controversial issue which is itself an aspect of the legal dispute on which the Court is asked to pronounce. It is accordingly within the jurisdiction of the Court.

III. International law governs claims to secession or independence

8. We turn to the question of the applicability of international law to claims of secession. Two points arise. First, the submissions of some States have denied that the declaration was the act of a body with any status in international law, so that international law was not in any way applicable to it, and consequently the declaration could not be said to be incompatible with international law.

9. Second, the submissions of some States have maintained that the declaration is an act of secession to which international law is not applicable or is neutral. These two assertions are addressed below.

(a) Acts of the Provisional Institutions of Self-Government are governed by international law

10. Questions regarding the identity and status of the entity making the declaration have been dealt with in paragraphs 3 to 7 above. The declaration appears to emanate from the Assembly of the Provisional Institutions of Self-Government. In any event, no claim that it was made not by the Assembly as such but by the members of the Assembly could render the declaration immune from the restraints imposed by

international law and by the provisions of resolution 1244 (1999) and instruments made under it.

11. It has always been clear that any action by the Assembly of the Provisional Institutions of Self-Government which attempted to change the status of Kosovo would be subject to Security Council resolution 1244 (1999) and to the international instruments issued by virtue of that resolution. For example, the Assembly was warned in the following terms by the UN concerning an earlier attempt by the Assembly to discuss a declaration of independence:

> "consideration of this matter by the Assembly would be contrary to United Nations Security Council resolution 1244 (1999), the Constitutional Framework for Provisional Self-Government in Kosovo and to the Provisional Rules of Procedure of the Assembly."[5]

12. In addition, Cyprus wishes to emphasise that the declaration itself purported to be a document with effects in international law. The declaration seeks to establish a claim to Statehood for Kosovo and to make commitments for that putative State on matters such as its continued territorial identity, the commitment to human rights obligations, and the establishment of measures for the protection of minorities. The document also asserts explicitly that "all States are entitled to rely" on the commitments given therein. Furthermore, it is evident that the intent of the declaration was to deprive Serbia, a sovereign State, of part of its territory; and that is an act which necessarily operates in the field of international law.

4 Statement by Michael Steiner, Special Representative of the Secretary-General; UN dossier 187.
5 Letter dated 7.2.2003 from the Principal Deputy Special Representative of the Secretary-General to the President of the Assembly of Kosovo (UN dossier 189). See also the letter dated 6.11.2002 from the Special Representative of the Secretary-General to a similar effect (UN dossier 185).

(b) International law is applicable to the declaration

13. Some States have suggested that the declaration does not give rise to questions of international law upon which the Court can offer an opinion, either because international law does not apply to acts of secession or because, while international law may in principle apply to acts of secession, it is neutral in relation to them – there is neither a right to secede nor a prohibition on secession under international law. Whichever way the point is put, the Republic considers it to be fundamentally incorrect, as contrary to the principle of territorial integrity and other legal instruments such as Security Council resolutions; and it invites the Court to dismiss this suggestion.

Contrary to principles of general international law

14. The principle of sovereign equality of States is the first of the Principles set out in the UN Charter.[6] Territorial integrity is one of the elements of this Principle.[7] The constitutive rules of the principle of territorial integrity include prohibitions on intervention in any coercive form, the threat or use of force[8] and attempts at partial or total disruption of national unity and territorial integrity of a State.[9]

15. The 'Friendly Relations Declaration'[10] of the UN General Assembly underlines the legal force of these rules:

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6 Article 2.1 of the UN Charter reads: "The Organization is based on the principle of the sovereign equality of all its Members".

7 See 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). This states that an element of sovereign equality is that "The territorial integrity and political independence of the State are inviolable".

8 Art 2.4 of the UN Charter reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

9 For example, the preamble of the Friendly Relations Declaration General Assembly resolution referred to at n7 above states: "Convinced in consequence that any 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".

10 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).

> "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....States..." (emphasis added)

The use of the word "authorizing" is significant. It makes clear that without such an authorisation the action would be prohibited. It indicates that there is a general international legal rule — a rule which this clause precisely intends to preserve — according to which any action dismembering or impairing the territorial integrity of a State is prohibited, whether that action emanates from within or without the State, unless it is specifically allowed by a permissive rule of international law.

16. The rules implementing the principle of territorial integrity have been affirmed not only in UN resolutions[11] but also in regional instruments such as the Helsinki Final Act 1975[12] and the Charter of Paris for a New Europe.[13]

17. It is because of the force of the principle that States and the UN have considered that any exceptions to the principle of territorial integrity and to the stability of international borders need to be set out in and controlled by legal rules. The development of the right of self-determination in colonial situations is such an express exception.[14] The Friendly Relations Declaration achieved this carve-out from the principle of territorial integrity for the right of self-determination by stating that the territory of a non-self-governing territory has a separate and distinct identity from the metropolitan State.[15] Thus, international law does address the

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11 See for example paragraph 4 of the UN Millennium Declaration (General Assembly resolution 55/2 dated 8 September 2000) and paragraph 5 of the 2005 World Summit Outcome (General Assembly resolution 60/1 dated 24 October 2005).

12 See for example section 1(A) IV entitled "Territorial Integrity of States". The Helsinki Final Act is referred to in the preamble of resolution 1244 (1999).

13 See page 8: "We are determined to co-operate in defending democratic institutions against activities which violate the independence, sovereign equality or territorial integrity of the participating States."

14 This development is discussed in more detail at paragraphs 124 to 129 of the Republic of Cyprus's first Written Statement. The Supreme Court of Canada stated in the *Quebec* case [1998] 2 S.C.R. 217 at paragraph 112 that the right of secession "arises in the exceptional situation of an oppressed or colonial people".

15 It states: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate

question of the dismemberment of States: there is no room for an argument that international law says nothing against secession and must therefore be presumed to permit it.

18. That the relevant rules and principles concerning territorial integrity have application not only to the relations of States but also to entities which are seeking to secede from a State is clear from UN and State practice. The history of the struggle for self-determination indicates that international law confers rights and imposes obligations on national liberation movements and non-self-governing territories.[16] The Security Council's resolutions are replete with references to obligations on non-state entities.[17] International humanitarian law similarly imposes obligations on entities struggling to secede or take over the government.[18] The application of Security Council resolution 1244 (1999) to the powers of the Provisional Institutions of Kosovo strengthens this conclusion so far as the present case is concerned.[19]

Contrary to other legal instruments

19. It is not only principles of general international law which are applicable in this context but also international agreements and other specific instruments. An instructive case is that of the Republika Srpska. The National Assembly adopted a resolution on 21 February 2008 claiming the right to organise a referendum on its

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and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles".

16 As the Supreme Court of Canada stated in the *Quebec* case [1998] 2 S.C.R. 217 at paragraph 113: "While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states - such as the right of a people to self-determination."

17 See for example resolutions in relation to (i) Southern Rhodesia: SC res. 460 (1970) at para 6, 463 (1980) at para 2 and 455 (1979) at para 1 (ii) the former Yugoslavia: SC res. 942 (1994) at para 3 and 787 (1992) at para 3 (iii) Kosovo: SC res. 1199 (1998) at para 6 and 1203 (1998) at paras 4 and 10 (iv) Somalia: SC res. 1814 (2008) at para 16 (v) Sudan: S/PRST/2008/15 (v) Guinea-Bissau: SC res. 1233 (1999) at paras 11 and 1216 (1998) at para 5.

18 For example, see the Additional Protocols to the Geneva Conventions of 1949 (1977).

19 The continued application of the resolution has been repeatedly confirmed both by the Security Council and by the Secretary-General in his reports to the Council; see paragraph 91 and footnote 83 of the Republic of Cyprus's first Written Statement to the Court. See also the Report of the Secretary-General dated 10 June 2009 (UN doc. S/2009/300, paras 1, 6 and 40).

legal status. The response from the High Representative was clear:

> "The High Representative stresses that Bosnia and Herzegovina is an internationally recognized state whose sovereignty and territorial integrity is guaranteed by the Dayton Peace Agreement. Entities of Bosnia and Herzegovina have no right to secede from Bosnia and Herzegovina under the Dayton Peace Agreement. The constitutional structure of Bosnia and Herzegovina, including the existence of the entities, can only be changed in accordance with the amendment procedure prescribed in the Constitution of BiH." [20]

20. A further example is that of the purported secession from the Republic of Cyprus of the "TRNC" when the so-called "Turkish Cypriot authorities" made a declaration purporting to create an independent state in the northern part of Cyprus under military occupation by Turkey. In this context, several States cited in their Written Statements the example of Security Council resolution 541 (1983) of 18 November 1983 concerning Cyprus. That resolution referred to the declaration by the "Turkish Cypriot authorities", a non-international entity. The declaration was incompatible with the principle of territorial integrity and with the 1960 Treaty of Guarantee, and its illegality was affirmed by the Security Council.[21]

21. These are examples where claims to secession by non-state entities have been recognised as unlawful, because they are contrary to international instruments. This is also the case with Kosovo, whose attempted secession is contrary to resolution 1244 (1999).

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20 Press release dated 22 February 2008: http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=41342

21 SC res. 541 (1983) stated that the Council "Deplores the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus".

State practice concerning secession

22. Those States which say that declarations of secession generally fall outside the purview of the law cite State practice in support. But much of the practice cited relates to events occurring long before the development of modern international law principles.[22] Further, the citation of these episodes does not take into account the significant body of practice indicating that secession *is* a matter regulated by international law, and to which international law is in general opposed.[23] Indeed, the Security Council frequently affirms the territorial sovereignty of States,[24] and such statements illustrate the point that States and international organizations do regard the principle of the territorial integrity of States as precluding the legality of claims to secession.

23. The *Quebec* case makes this clear. The Supreme Court of Canada stated that:

> "... international law places great importance on the territorial integrity of nation States and, by and large, leaves the creation of a new State to be determined by the domestic law of the existing State of which the seceding

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22 For example, reference is made to the United States Declaration of Independence of 1776.

23 See for example practice in relation to (i) Georgia: S/PV.6143, 15.6.09; S/PV.5969, 28.8.08; the President of the United States stated that "the territorial integrity and borders of Georgia must be respected....In accordance with the United Nations Security Council Resolutions that remain in force, Abkhazia and South Ossetia are within the internationally recognised borders of Georgia, and they must remain so" (White House News Release, 26 August 2008); the UK "recognises the sovereignty and territorial integrity of Georgia to include South Ossetia and Abkhazia. We do not recognise the claims to independence of the separatist movements in these regions" ((2006) 77 BYIL, UKMIL 2006) (ii) Somalia: "We [UK] do not recognise Somaliland as an independent state, neither does the rest of the international community. The UK has signed up to a common position and to many UN Security Council Presidential Statements, which refer to the territorial integrity and unity of Somalia" ((2006) 77 BYIL, UKMIL 2006) (iii) Iraq: "the way in which we [UK] are dealing with those secessionist tendencies. Like every previous relevant Security Council resolution, resolution 1546 reaffirms the territorial integrity of Iraq - its existing borders......International borders, however, cannot be rewritten by any political party of any one country, and they will not be in this case. The future of Iraq's constitution must lie within the existing international borders" ((2005) 76 BYIL, UKMIL 2005) (iv) Chechnya: see (2006) 77 BYIL, UKMIL 2006 (HC Deb 1 November 2006 Vol 451 c466 W-467W) and Strobe Talbott, Supporting Democracy and Economic Reform in the New Independent States, 6 U.S. Dept. of State Dispatch 119, 120 (1995) (reporting remarks by Deputy Secretary of State Talbott before Subcommittee on Foreign Operations of the Senate Appropriations Committee).

24 See for example (i) Georgia and Abkhazia: SC res. 896 (1994) at para 5, 1065 (1996) at para 3, 971 (1995) at para 4, 1716 (2006) at para 1, 1808 (2008) at para 1 (ii) Bosnia-Herzegovina: SC res. 787 (1992) at para 3 (iii) Afghanistan: SC res. 1076 (1996) at para 3 (iv) Somalia: S/PRST/2006/11 (this resolution refers to S/2006/122 which addresses Somaliland) (v) Cyprus: SC res. 353 (1974) at para 1, 774 (1992) at para 2, 1179 (1998), 1217 (1998) and 1251 (1999).

entity presently forms a part. (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with the domestic constitution, international law is likely to accept that conclusion, subject to the right of peoples to self-determination."[25]

As was discussed in Cyprus' earlier submission,[26] there is no room for a claim to self-determination in the situation of Kosovo, and Cyprus notes that few submissions before the Court claim that there is. Kosovo therefore falls within the general rule referred to above, whereby any change in territory is determined by the domestic law of the existing State.

Occasional silence in the face of secession does not alter the position

24. The Republic of Cyprus does not dispute that the international community will sometimes have nothing to say about a claim to secession by part of the territory of a State. Such claims may, at least initially, be the actions of individuals and other non-State actors; and it is for the territorial State to respond to them, taking whatever action is necessary to assert its authority in the areas claimed by the secessionists.[27] It is not surprising that States are often silent in the face of such attempts at secession within neighbouring States. But it cannot be inferred from such silence that secession is regarded as being a matter entirely beyond the reach of international law or consistent with it.

25 Paragraph 112.

26 Paragraphs 123-148.

27 Cyprus observes that ordinarily, the local State is not precluded from using force to exercise its authority over secessionists in the contested area (subject only to the law of human rights and international humanitarian law about the manner in which it does so), and it is appropriate for other States not to interfere in the matter. In the case of Kosovo, however, the situation was very different. Serbia was precluded from using the full powers of the State to respond to the declaration, both by the terms of Security Council resolution 1244 (1999) and by agreements which Serbia had made with the UN. The Government of Serbia nonetheless made it clear in February 2008 that it would use whatever measures remained lawfully available to it to preserve its title over Kosovo and it has done so.

25. In the submissions of some States, there are suggestions that it is significant that there was no resolution by the Security Council or the Special Representative of the Secretary-General declaring Kosovo's declaration unlawful. There are of course examples where the Council failed to react to assertions of independence which were widely condemned.[28] But failure by the Council to react to the Kosovo declaration is not relevant to the fact that all such claims must be assessed by reference to international law; and the inaction of the Council cannot in any event change the legal position of States or the rules of international law.

Conclusion regarding applicability of international law to acts of purported secession

26. The Republic of Cyprus accordingly submits that international law is applicable to acts of purported secession, and that the legal effectiveness of such acts is determined by their consistency with rules of international law. It cannot be the case, as has been suggested by some States in their submissions, that the dicta referred to as 'the *Lotus* principle' (the 'presumption of freedom') are applicable here. These dicta cannot have relevance to an entity whose powers are limited by international instruments and which only has such powers as are conferred upon it.[29] Even if the so-called *Lotus* principle were applicable it would not assist the argument in favour of the declaration because, as was explained above, there is a legal prohibition on secession which is implicit in one of the most fundamental principles of international law, the principle of territorial integrity, and explicit in resolution 1244 (1999).

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28 For example, Biafra unsuccessfully attempted to secede from Nigeria. The UN did not address the attempted secession and it was dealt with on a regional level by the Organisation of African Unity. However, the then UN Secretary-General did state that "so, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocable [sic]. As an international organisation, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State" ((1970) 7:2 UN Monthly Chronicle 34 at 36).

29 The Supreme Court of Canada stated in the *Quebec* case [1998] 2 S.C.R. 217 at paragraph 143 that "The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional".

27. It may also be noted that States which have made submissions to the Court arguing that the Kosovo situation is *sui generis* (arguments with which the Republic of Cyprus disagrees for the reasons given below) indicate thereby that they recognise that international law governs the situation and that they must justify some exception to the principle of territorial integrity. There are indeed exceptions to the principle (such as the principle of self-determination) but none of these apply to the case of Kosovo.

IV. 'Sui generis'

28. Numerous States have submitted that the claimed independence of Kosovo is '*sui generis*' and is accordingly a special case. Of course, in a political sense Kosovo is a special case, because it is subject to a UN administration. But all cases have their own particular facts.[30] The logic of the argument that *the Court* must consider Kosovo to be a *sui generis* case is that the general rules of international law do not apply to Kosovo. This argument does not purport to apply the rules of international law to special facts; on the contrary, it attempts to exempt the situation of Kosovo from the rules.

29. It is inconsistent to assert, first, that the present case is not regulated by international law and then in the same breath to rely on an argument that seeks to establish an exception to an otherwise applicable rule of international law. Since international law does indeed govern the situation, the attempts to classify Kosovo as a special case falling outside the law must also be assessed by reference to the law. In rejecting the notion that Kosovo can be labelled 'sui generis' in the sense of excepting it from the ordinary rules of law, the Republic of Cyprus reiterates two points made in its first Written Statement.[31]

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30 For example, the Conclusion of the Council of the European Union of 18 February 2008 that Kosovo constituted a *sui generis* case was a political assessment not a legal statement which, in any event, expressly reaffirmed the EU's adherence to principles of sovereignty and territorial integrity, and the right of each State to decide in accordance with its national policies and international law what relations it would have with Kosovo.

31 See the Republic of Cyprus's first Written Statement: paragraphs 75 to 81.

The law cannot be waived

30. First, the generality and binding quality of the rules regulating the basic substance of international law are absolutely fundamental. To allow for 'special cases' results in an unacceptable dilution of the quality of legality of the international legal system of sovereign States, a system which protects certain essential and universally recognised rights. There can be no right to waive the obligation to conform to the principles of international law on an issue so central to the rule of law and the international system.

31. Those States which submit that, in the interests of international stability, the independence of Kosovo must be treated as *sui generis* may well be basing their views on political factors. Such political interests cannot, and should not, undermine the application of general and binding fundamental rules of international law. Indeed, it is through adherence to key principles, such as territorial integrity, that the stability of international relations is ensured. To allow the application of fundamental rules of international law to be a matter for political discretion would be contrary to the requirements of certainty and clarity which are central to the rule of law.

32. The *sui generis* exception would, in effect, permit States to base decisions on whether or not a new State has emerged from a purported secession upon wholly political factors. The appropriate place for political decisions, however, is in connection with recognition once the criteria for Statehood have been met; and such recognition is declaratory, not constitutive, of Statehood.

The precedential effect of the Kosovo episode cannot be avoided

33. Second, it is not possible for international law to provide for the labelling of decisions or situations so as to limit their precedential effect. The international legal

system does not have anything akin to a common law notion of judicial precedent and it is always open to a State to identify one situation with another. If some States declare a case '*sui generis*', that cannot obviate, or even circumscribe, the danger that other entities will rely on that case to support a claim for Statehood.

Unsustainability of the sui generis argument

34. In addition, the Written Statements before the Court serve only to demonstrate the complete unsustainability of the *sui generis* argument in practice, for the following reasons.

35. First, there is no consistency regarding which factors, or which combination of factors, are necessary for Kosovo's characterisation as *sui generis*. Some States rely on a long list of factors, while other States reduce the distinguishing factors to just three or four points. There are factors that appear on some lists which are omitted from others: for example, the significance of the text of the declaration. These inconsistencies demonstrate the subjective nature of the alleged test. Such an *ad hoc* characterisation of a case as *sui generis* is wholly at odds with the requirements of clarity and predictability that are central to the Rule of Law.

36. Second, many of the factors identified are inconclusive. For example, at what point are negotiations 'exhausted' and at what stage is independence the 'only alternative'? And who or what body is to make this determination? These factors are not of a kind that can be incorporated in any legal system which values the Rule of Law. On the contrary, their application can lead only to divergence and inconsistency in approach.

37. Third, to permit a sui generis 'exception' based on the various factors identified would have potentially disastrous consequences on the international plane. For example, the alleged criterion that 'negotiations are exhausted' would undermine

incentives to continue with good faith discussions despite an initial lack of success and offer the ultimate reward for obstinacy. Similarly, to rely on prior human rights abuses as a factor would radically alter the entire architecture of international law which, while imposing State responsibility for such conduct and providing national and regional mechanisms for the enforcement of human rights norms, does not provide a sanction of territorial dismemberment.[32] In addition, much reliance is placed in the Written Statements on the involvement of the UN in Kosovo. Identification of a UN presence as a relevant factor could discourage States from consenting to such arrangements, fearful that it would trigger a slide towards the severance or secession of part of its territory.

38. The Republic of Cyprus submits that the Court should be very wary of relying on such factors as these to justify any kind of an exception to the general principles of international law. There are other situations around the world in which some or all of these factors might be said to exist. The consequences which would flow, almost inevitably, from the advice that the Court may give cannot be wholly ignored, and weigh in favour of the exercise of considerable caution.

39. In short, there is no possibility of departing from the rules of international law by relying on an argument that there is a special case without calling in question fundamental principles of the rule of law. As a distinguished commentator has noted: 'The term *'sui generis'*, often used to describe situations not readily categorized, tends to pre-empt analysis; it is used to end discussion, not to advance it.'[33]

40. Cyprus notes that many States that rely on a *sui generis* argument also expressly accept that the argument cannot lead to a State being created as a result of a violation of a fundamental norm of international law, such as the prohibition on the

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32 See the Republic of Cyprus's first Written Statement, paragraph 139: "For breaches of those obligations Serbia would bear State responsibility; but the remedy for any such breach is not the splitting up of the State."
33 James Crawford, *The Creation of States in International Law* (2nd ed, 2006) p.197, n.3.

use of force.[34] The Republic of Cyprus is in full agreement with that position.

V. International law governs questions of Statehood

41. Some States have asserted that because of the factual situation of Kosovo following the declaration, as well as recognition by a number of States (and the membership of Kosovo in international organisations), the Court should accept that it is irrelevant whether or not the declaration was unlawful at the time it was made. The Republic of Cyprus recalls its earlier submissions that the process of acquiring Statehood is more than a factual question and that the criteria for Statehood are not solely of a factual nature but also depend upon international law.[35] International law is not indifferent to the way in which any facts have been created.

42. For example, if the facts relating to the assertions of Statehood have been established because of third-party intervention, most particularly by the use of force, then no State may be lawfully founded, and no title to territory lawfully changed. This proposition has indeed been accepted even by States which argue that international law is irrelevant to the Kosovo declaration.

43. A further example arises where the claimant entity threatens to act incompatibly with fundamental rules of international law. The unilateral attempt to seize independence by the authorities in Southern Rhodesia in 1965 was condemned by the Security Council as "the usurpation of power by a racist settler minority in Southern Rhodesia"; and the Council regarded the declaration of independence "as having no legal effect".[36]

44. It is important to underline the fact that the invalidity of claims to independence of this sort derives from the general rules of international law and the principles of

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34 For example, see the Written Statement of UK (paras 5.34-35, 5.48), France (para 2.13), Germany (p 30) and Ireland (paras 22 and 23). These Written Statements expressly refer to the example of the "TRNC".

35 See paragraphs 184 to 191 of the Republic of Cyprus's first Written Statement.

territorial integrity and the non-use of force and non-intervention. It does not derive from the terms of any Security Council resolution. The State which is the object of the use of force has the legal right not to have its title to any part of its territory affected as a result of the use of force, whatever the reaction of the Security Council. Although in some circumstances the Security Council has responded to situations of this kind by adopting resolutions which address the legality of declarations of Statehood,[37] in the final analysis it is not for the Council to decide what will be regarded as unlawfulness and what legal consequences to ascribe to it: that is a matter for international law and, as appropriate, for the Court.

VI. Conclusion

45. The Republic of Cyprus is aware of both the importance and of the diversity of the political interests of States in the handling of the Kosovo situation. Some may judge that acceptance of Kosovo as a State will create stability in the region: others may take the very opposite view, and regard it as a trigger for instability in many areas of the world. These are the circumstances that make it, in the view of the Republic of Cyprus, essential that the Court hold to its particular role within the UN structure and give an authoritative *legal* ruling, setting out plainly the rules of international law which are in principle applicable to all States and uniformly apply in all relevant situations. It is that uniformity of applicability which enables the law to protect the interests of strong and weak alike. Political leaders and institutions may agree upon practical compromises: but it is essential that the law retains its integrity and objectivity.

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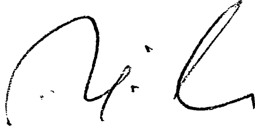
36 SC res. 217 (1965).

37 For example, see (i) its reaction to the invasion of Kuwait by Iraq and the attempted incorporation of Kuwait's territory into Iraq. The Council decided that the annexation "has no legal validity and is null and void" (SC res. 662 (1990) 9 August 1990) and (ii) its response to the 'TRNC". SC res. 541 (1983) stated that the Council "Deplores the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus". SC res. 550 (1984) stated the Council "Condemns all secessionist actions ... declares them illegal and invalid and calls for their immediate withdrawal...Reiterates the call upon all States not to recognise the purported state of the "Turkish Republic of Northern Cyprus" set up by secessionist acts and calls upon them not to facilitate or in any way assist the aforesaid secessionist entity".

Petros Clerides



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