United States Department of State

Washington, D.C. 20520

www.state.gov

July 17, 2009

Sir,

Pursuant to the Court's Order of 17 October 2008, I have the honor to enclose thirty copies of the Written Comments of the United States of America concerning the request of the United Nations General Assembly for an advisory opinion on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. I have also enclosed a diskette containing the text of the Statement.

Accept, sir, the assurances of my highest consideration.

Sincerely,

Harold Hongju Koh
Legal Adviser

Enclosures:
As stated

Mr. Philippe Couvreur,
Registrar,
International Court of Justice,
Peace Palace,
The Hague.

INTERNATIONAL COURT OF JUSTICE

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 COMMENTS OF THE UNITED STATES OF AMERICA

JULY 2009

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CHAPTER I
INTRODUCTION

Pursuant to the Order of this Court dated 17 October 2008, the United States submits these Written Comments regarding the Written Statements submitted on 17 April 2009.

In its Written Statement of 17 April, the United States explained, first, why Kosovo's peaceful declaration of independence was necessary, inevitable and stabilizing and, second, why this Court—should it decide to opine on the question referred by the General Assembly—should find that declaration fully in accordance with international law. None of the arguments put forward in the various Written Statements cast doubt on that conclusion.

Since its declaration of independence on 17 February 2008, Kosovo has functioned as an independent state, with steadily growing bilateral and multilateral support. Most recently, 109 states supported Kosovo's admission as a member in the World Bank, the International Monetary Fund, or both. The United States Written Statement recounted how Kosovo's declaration of independence became both necessary and inevitable:

- Kosovo's independence was the last step in the decades-long disintegration of the former Yugoslavia. Belgrade had acted forcibly and unlawfully to deprive Kosovo of its autonomy, forcing Kosovo to seek independence from Belgrade in order to escape a brutal and intolerable repression. Before finally breaking free of that repression, the people of Kosovo endured a campaign of ethnic cleansing, the likes of which had not been seen in Europe since the Second World War, save perhaps by the people of Bosnia. The campaign ultimately uprooted fully 90% of the majority population, of whom a high proportion were expelled from the country, leaving the rest to fend for themselves in harsh conditions. For all practical purposes, these horrific events destroyed the ability of both the oppressors and those oppressed to share a common political space.

- In June 1999, the Security Council recognized the reality of that fracture by a foresighted decision to adopt Resolution 1244, which played three vital functions. *First*, the Council addressed the immediate political crisis by halting the armed conflict in Kosovo and foreclosing resumption of the brutal campaign of ethnic cleansing. *Second*, although Resolution 1244 formally treated Kosovo as part of the Federal Republic of Yugoslavia (FRY)[1] for an interim period, the Security Council created conditions in which the people of Kosovo could exercise self-

[1] But not necessarily of Serbia. *See infra,* Chapter V(I).

government and autonomy, supported by the international community and relieved of the FRY/Serbian control that had blocked their political development. In so doing, the Council deliberately and comprehensively precluded Belgrade from exercising governing authority over Kosovo, and substituted for it a new international administration. *Third,* and most important for purposes of this case, Resolution 1244 sought to promote a long-term solution to the "Kosovo question" that would prevent conflicts in that territory from spawning further threats to international peace and security. Toward this end, the Security Council authorized efforts to facilitate an internationally-overseen process designed to determine Kosovo's future status, in which Belgrade was only one of many participants.

- Resolution 1244 worked. Within days of its adoption, the FRY/Serbian security forces withdrew from Kosovo, the military campaign concluded and international forces authorized by the Security Council assumed control over the situation. The international security force has progressively reduced its numbers from as many as 50,000 at its height in 1999 to 14,000 today (and to an anticipated 2,500 within two years). For over ten years, both under United Nations supervision and now as part of an independent state, Kosovo's political structures matured and have conducted their daily activities without reference to Belgrade. Under the transitional United Nations administration, supported by the Organisation for Security and Co-Operation in Europe, the European Union and other international organizations, a full range of governmental bodies, both political and administrative, were established, which enabled the people of Kosovo, of all ethnicities, progressively to assume responsibility for their own governance.

- Finally, consistent with Resolution 1244, the stage was set for a durable solution to the "Kosovo question," based on Kosovo's assumption of independence and commitment to a multi-ethnic state arising out of the Comprehensive Proposal developed by Special Envoy Ahtisaari and endorsed by the Secretary-General. Although Serbia and Kosovo could not reach agreement on Kosovo's future status, the process unfolded largely as envisioned by Resolution 1244. The Special Envoy supervised a thorough and balanced political process, making every effort to frame a solution that would be acceptable to both sides, and ultimately concluded that "[n]o amount of additional talks, whatever the format," could overcome the disagreement between Serbia and Kosovo over independence. The "potential to produce any mutually agreeable outcome on Kosovo's status [having been] exhausted," the Special Envoy concluded that Kosovo's independence had become the only viable solution for Kosovo, Serbia, and the world.

- By February 2008, there was no viable alternative to an independent Kosovo. As even Serbia concedes, the ethnic Albanian population of Kosovo as a whole, as

well as their leaders, had become irrevocably committed to independence.[2] As the UN Secretary-General put it, "a return of Serbian rule over Kosovo ... is simply not tenable."[3] Moreover, by 2008, the international administration that had served Kosovo well after 1999 was no longer sustainable. Kosovo's Declaration of Independence brought new stability to a troubled region. The Declaration freed not just Kosovo but also Serbia, which is liberated from an illusory effort to retain control over Kosovo that had distorted its politics and stunted its development for years. The transition has been peaceful, without the widespread ethnic violence or population movements that some had feared. Kosovo has assumed and is effectively exercising full governmental functions, and Kosovo's mature and responsible actions since independence have both demonstrated that it is a source of stability in the region and earned ever-growing acceptance of its statehood in the international community. These achievements must be recognized as a signal success for the United Nations, and constitute a legacy in which the Organization can take great pride. Both Kosovo and Serbia are now free to pursue the European future that offers the most certain course to the durable peace and security both seek.

Implementation of Resolution 1244 has been one of the most complex, prolonged, intensive and ambitious efforts ever undertaken by the United Nations. Its success reflects exceptional vision on the part of the Organization, and exceptional commitment by member states. The UN Secretariat—including two Secretaries-General, successive Special Representatives and the Special Envoy, who structured and guided the political process designed to determine Kosovo's status—demonstrated consistent determination, resourcefulness and high professionalism in bringing about the achievement of the Council's core objectives in adopting Resolution 1244.

In crafting its response to the request now before it, this Court is encouraged to recall this history and recognize the potential its opinion might have either to cement or dissolve this important historical accomplishment. Those now challenging the legality of Kosovo's declaration of independence would have this Court provide them fodder to roll back the clock nearly a decade, undoing the progress fostered by Resolution 1244 and seeking to return the legal situation to where it was in 2005 before the political process began.[4] In doing so, they provide no plausible suggestions for how accepting their

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[2] *See, e.g.*, Written Statement of the Government of the Republic of Serbia ("Serbia Statement"), para. 339 (conceding that it was clear that a referendum in Kosovo "could lead to only one result, namely the secession of Kosovo from the FRY and Serbia").

[3] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 March 2007, para. 7 [Dossier No. 203].

[4] *See, e.g.*, Serbia Statement, para. 775 (arguing that Security Council resolution 1244 (1999) requires Kosovo now to return to negotiations with Serbia); Written Statement of the Republic of Cyprus ("Cyprus Statement"), para. 98 (same); Written Statement of the Russian Federation ("Russian Federation

position could better comport with or achieve the objectives of Resolution 1244, or result in a better resolution of the situation in Kosovo. Nor do they explain why recommenced talks would take any course different from that of the political process and subsequent Troika effort from 2005 to 2007.

In the final analysis, this Court can contribute to the stabilizing effect of Kosovo's emergence to statehood following a successful UN process by declining to answer the question referred or, in accordance with well-established principles, confirm that the declaration is in accordance with international law. The Court may acknowledge that declarations of independence present matters of fact that are neither authorized nor prohibited by international law, without undercutting fundamental principles of territorial integrity, reducing the universally recognized rights of states, or disrupting the process for making and applying international law.[5] As explained in the US Written Statement and in Chapter IV below, declarations of independence that are conjoined with other events or acts that are serious international law violations will in the future (as in the past) continue to be condemned. Dismissing the attack on Kosovo's declaration of independence will not promote such national disintegration. Kosovo's declaration of independence was not conjoined with any violation of international law, but rather was preceded by peaceful negotiations and extensive international consultations under the administration of the United Nations, which resulted in a declaration that enshrined Kosovo's commitment to, *inter alia*, "respect the human rights and fundamental freedoms of all [its] citizens," to maintain "a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law," and to "act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999)."[6] Because both the backdrop to and content of Kosovo's declaration of independence fully respected both international law in general and Resolution 1244 in particular, dismissing this attack on Kosovo's declaration of independence and Kosovo's peaceful emergence as an independent state will strengthen, not weaken, international law.

Statement"), paras. 59-64 (same).

[5] *See, e.g.*, Cyprus Statement, para. 77.

[6] Declaration of Independence, paras. 1, 4, 12 [Dossier No. 192].

More than two hundred years ago, the United States of America broke from a repressive colonial history by declaring independence, providing its reasons out of a "decent respect to the opinions of mankind." That Declaration of Independence, which brought forth a new nation, conceived in liberty and dedicated to the proposition that all persons are created equal, has served as a beacon for freedom-loving people ever since. By not disturbing the reality of Kosovo's declaration of independence, backed by the unquestioned will of the people of Kosovo, the Court will similarly advance an essential goal of international law and an essential purpose of Security Council Resolution 1244: the restoration and maintenance of international peace and security.

CHAPTER II
RECENT DEVELOPMENTS

The three-month period since the submission of Written Statements in this proceeding has seen further international acceptance of Kosovo, advances in conditions on the ground, and reinforcement of Kosovo's course toward a multi-ethnic European democracy integrated into regional and global institutions.

As previously mentioned, during voting by member states of the International Monetary Fund and World Bank Group that took place during the three-month period, a total of 109 states cast affirmative votes supporting Kosovo's full country membership in one or both of the Bretton Woods institutions, in contrast to just 12 that cast negative votes in one or the other ballot.[7] As a recent IMF mission to Pristina observed, Kosovo's "rapid accession to these institutions is testimony to the authorities' tireless efforts and commitment to improving the stability and welfare of this young state."[8] On 29 June, Kosovo signed and delivered its instruments of acceptance of the agreements with the Fund and the Bank, becoming the 186th member of each institution.[9]

Individual recognitions of Kosovo have continued, most recently by Saudi Arabia, the Comoros, Bahrain, the Dominican Republic and Jordan. As of mid-July 2009, 62 states had formally recognized Kosovo.[10] There are other indicia of steadily growing

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[7] In the IMF vote, 96 countries voted to admit Kosovo, while 10 voted against. For the World Bank, 96 countries—including 13 that had not voted for Kosovo in the IMF ballot— voted to admit Kosovo, against 7 negative votes. By similar votes, Kosovo also was accepted for membership in the other affiliates of the World Bank Group—the International Finance Corporation (IFC), the International Development Association (IDA), and the Multilateral Investment Guarantee Agency (MIGA).

[8] Republic of Kosovo—IMF Staff Visit Concluding Statement, Pristina, 24 June 2009, available at: http://www.imf.org/external/np/ms/2009/062409.htm.

[9] IMF Press Release No. 09/240, 29 June 2009, available at: http://www.imf.org/external/country/UVK/index.htm; World Bank Press Release No. 2009/448/ECA, 29 June 2009, available at: http://www.worldbank.org/kosovo. Only countries are eligible for IMF membership. *See* Articles of Agreement of the International Monetary Fund, Art. 2, 2 U.N.T.S. 39. The IMF had already determined in the context of Kosovo's application for membership in July 2008 that Kosovo was a new independent state. IMF Press Release No. 08/179, 15 July 2008, available at: http://www.imf.org/external/np/sec/pr/2008/pr08179.htm. World Bank eligibility is contingent on IMF membership.

[10] Serbia has mischaracterized the position of countries that have not formally recognized Kosovo to date, suggesting that this exhibits a "refusal to recognise." Serbia Statement, Chapter 10-C-II. In a similar vein, Foreign Minister Vuk Jeremić has stated that recognitions from 60 out of 192 UN member states "means that a vast majority of countries recognises Serbia's territorial integrity." *See* "Pristina will have to start dialogue with Belgrade," 27 June 2009 (hereafter, "Jeremić Comments of 27 June"), available on the Government of Serbia website: http://www.srbija.gov.rs/vesti/vest.php?id=56994. These views, however, fail to acknowledge the nature of recognition—the absence of an affirmative expression of recognition does not mean that a state has decided that an entity does not constitute a state or refuses to treat it as such. This

acceptance of Kosovo as a member of the international community, including by countries that as a matter of national policy do not issue formal recognition declarations. In June, New Zealand became the latest country not counted among the formal recognizers to accept standard and diplomatic passports issued by Kosovo.[11] The 57-nation Organisation of the Islamic Conference adopted a resolution on 25 May noting "the progress made towards strengthening the democracy in Kosovo, serving peace and stability in Kosovo and the whole region."[12]

On the ground in Kosovo, UNMIK has continued to draw down and reconfigure its presence to focus on fostering political dialogue and activities in specific areas, while the European Union's rule-of-law mission (EULEX) has stepped up its activities monitoring, mentoring and advising Kosovo's rule-of-law institutions.[13] The steady improvement in security conditions overall prompted NATO ministers on 11 June to endorse plans that would reduce the current 14,000-strong KFOR presence to 10,000 by January 2010 and 2,500 within two years, provided a series of benchmarks is met.[14]

In domestic governance, the one-year anniversary of the entry into force of the Constitution of Kosovo was marked in Pristina on 15 June. The roster of the Constitutional Court was completed in June with the appointment of three international judges, joining six domestic counterparts named in May. The international judges were appointed by the International Civilian Representative in Pristina, in accordance with the Constitution of Kosovo and the relevant provisions of the Comprehensive Proposal, following close consultation with the Office of the President of the European Court of Human Rights.[15] Municipal elections—the first nationwide polls throughout Kosovo since independence—have been set for 15 November. Kosovo authorities have continued to encourage displaced Kosovo Serbs to return to their homes, though the pace of returns remains slow.[16]

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is reflected in the overwhelming votes in the IMF and the World Bank, in which more than fifty states from every region of the world in addition to those which had formally recognized Kosovo voted to accept the Republic of Kosovo as a member.

[11] *See* New Zealand Department of Labour, Immigration New Zealand, Internal Administration Circular No. 90-03, 5 June 2009, available at: http://www.immigration.govt.nz/NR/rdonlyres/17997B01-AA5A-42B3-B33F-D1A07FDC6C5E/0/IAC0903KosovoPassports.pdf.

[12] Organisation of the Islamic Conference, Resolution No. 14/36-POL on the Situation in Kosovo, 23-25 May 2009, available at: http://www.oic-oci.org/36cfm/w/en/res/36CFM-POL-RES-FINAL.pdf.

[13] *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 10 June 2009, para. 18 and Annex I.

[14] *See* "NATO endorses drawdown of Kosovo force," *Agence France Presse*, 11 June 2009; *see also* NATO news summary, available at: http://www.nato.int/cps/en/SID-6AA00B76-1B5CEE0B/natolive/news_55445.htm.

[15] *See* ICO News Release 18/2009, 12 June 2009, available at: http://www.ico-kos.org/d/090612_CC_international_judges.pdf.

[16] Security Council, 6144th Meeting, S/PV.6144, 17 June 2009, p. 4 (Remarks of the Special Representative

Kosovo's continuing progress has been affirmed in recent months by an array of international actors, sounding the common themes of Kosovo's contributions toward regional stability, its European future, the need to maintain and advance the welfare of the country's Serb and other ethnic minorities, and the irreversibility of its independence.[17] As United States Vice President Biden told Kosovo parliamentarians on 21 May in Pristina, "I believe in your effort to create a modern state, one that can propel all its citizens toward a common European future. This is the future for all communities in Kosovo."[18] In the view of the United States, this future for Kosovo is likewise the future for Serbia and all countries of Southeast Europe. As Vice President Biden said during that same trip, in remarks alongside Serbian President Boris Tadić in Belgrade, the United States wishes to "deepen our cooperation with Serbia to help solve the problems of the region, to help Serbia become a strong, successful democratic member of the Euro-Atlantic community."[19]

With respect to the pending advisory proceedings, Serbia has claimed publicly that an advisory opinion of this Court will force the reopening of negotiations that would yield some form of "compromise" over Kosovo's status.[20] According to Foreign Minister Jeremić, "[i]n order for the solution to be acceptable for Serbia the Kosovo Albanians

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of the Secretary-General and Head of UNMIK); Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 10 June 2009, paras. 30-33.

[17] *See, e.g.*, Remarks by Vice President Joe Biden, 21 May 2009 (hereafter, "Vice President Biden Remarks of 21 May"), available at: http://www .whitehouse.gov/the_press_office/Remarks-By-The-Vice-President-To-The-Assembly-Of-Kosovo/ ("Kosovo's independence was and remains today, in my view and the view of my government, the only viable option for stability in the region"); Statement issued at the Eighth meeting of the International Steering Group for Kosovo, 15 June 2009, available at: http://www.ico-kos.org/d/090615%20Eighth%20ISG%20meeting%20ENG.pdf ("In the past year the people of Kosovo have made significant progress in building a democratic, multi-ethnic State on the principles of democracy and human rights in accordance with its European perspective"); Remarks by Martti Ahtisaari on anniversary of entry into force of the Constitution of Kosovo, 15 June 2009, available at: http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2009/06/17/feature-02 ("Kosovo's independence is irreversible and this is evident from the recognitions that continue to arrive from around the world. ... Acceptance of this reality by all would go a long way toward ensuring stability not only for Kosovo, but for the entire Western Balkans region and Europe as well").

[18] Vice President Biden Remarks of 21 May.

[19] Remarks by the Vice President in Joint Statement to the Press, 20 May 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-By-The-Vice-President-At-The-Palace-Of-Serbia/.

[20] *See, e.g.*, "Government success in addressing foreign policy priorities," 24 June 2009, available at: http://www.srbija.gov.rs/vesti/vest.php?id=56860 ("We expect that a solution for the Kosovo issue acceptable for all sides will be reached after the ICJ gives its opinion.... explained Jeremic") (hereafter "Jeremić Comments of 24 June"); Jeremić Comments of 27 June ("Serbian Minister of Foreign Affairs Vuk Jeremic expressed assurance that the International Court of Justice (ICJ) in The Hague will come to a conclusion that the unilateral declaration of independence by Kosovo is against international law and stressed that Pristina will then have to start a dialogue with Belgrade if they want to clear out the unclear situation").

must state that their declaration of independence was illegitimate and accept Serbia as their country."[21] While this position is neither reasonable nor realistic, it confirms that there is no plausible option for reopening "negotiations" on Kosovo's status.

Nor would it serve the interests of the United Nations or the Court for an advisory opinion to be used as a tool to hinder Kosovo's economic development, stymie further recognitions, block Kosovo's membership in international institutions, and possibly redraw borders in Europe's most conflict-ridden region.[22] A more positive model is available, however, as both Serbia and Kosovo have indicated a strong commitment to joining the European Union, offering the prospect of finding a new identity and *modus vivendi*, no longer as constituents of a federal Yugoslavia, but of a free and democratic union of European states.

In sum, the picture of Kosovo that continues to emerge is of a new state steadily strengthening its governing institutions, contributing to regional stability, and consolidating its presence on the international scene. With a total of 115 countries to date either having recognized the Republic of Kosovo or having voted to accept it as a member country of one of the global financial institutions, international acceptance of Kosovo is widespread and growing. Developments over the past year and a half serve only to reinforce that Kosovo's declaration of independence of 17 February 2008 marked a reasonable and ultimately irreversible outcome to the wrenching "Kosovo question" that has afflicted the Balkans and beyond for the preceding two decades. For the reasons outlined in the United States Written Statement of 17 April 2009, and in the chapters of this Written Comment that follow, such an outcome is fully in accordance with international law.

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[21] Jeremić Comments of 24 June.

[22] *See* Jeremić Comments of 27 June ("We are sure that the court's verdict will show that international law was violated in the case of Kosovo. Pristina will then be in a difficult position as no more recognitions will be possible. After such a verdict, Kosovo will certainly will *[sic]* not be able to become [a] member of certain international organisations. Pristina will have to start a dialogue and negotiations with Belgrade to overcome that situation, said Jeremic.") *See also* Branka Trivić, "Serbia Charts Kosovo Strategy Ahead of ICJ Ruling," 4 May 2009, available at: http://balkaninsight.com/en/main/analysis/18496/ (registration required) (mentioning comments of Serbian officials regarding possible partition of Kosovo and the domestic political considerations associated with the referral to the ICJ).

CHAPTER III

HOW THE COURT MIGHT ADDRESS THE QUESTION REFERRED

In its Written Statement, the United States (1) highlighted the narrowness of the question that the General Assembly has referred, and (2) questioned whether this would be an appropriate case for the Court to exercise its discretion to decline to render an advisory opinion.[23]

As to the narrowness of the question, the Written Statements—including Serbia's—are in general agreement that the question before the Court relates only to the legality of the declaration of independence, and the record reflects that the question was deliberately crafted in this way in order to find the "lowest common denominator" for garnering sufficient support in the General Assembly to have the question referred.[24] Thus, the Court is not being asked to resolve issues about whether states could recognize Kosovo, whether activities undertaken by UNMIK to facilitate a smooth transition following the declaration have been lawful, or whether Kosovo is today a state. Serbia intimates that the answer to the question posed by the General Assembly will nevertheless be "of considerable relevance"[25] to states' decisions about recognition. This is hard to square with the position of the Serbian government that it "will not recognize Kosovo, at any cost, even in the event that the decision is in favor of Pristina."[26] But the key point is that the initial round of Written Statements confirms that a particularly narrow question has been posed to the Court, and that any opinion rendered by the Court should be confined to the question posed.

There remains, however, a genuine issue whether this would be an appropriate case for the Court to exercise its discretion to refrain from rendering an opinion.

The basic function of an Advisory Opinion is to "furnish[] to the requesting organs the elements of law necessary for them in their action."[27] The United States described reasons to question whether the General Assembly in fact required legal clarification of the question posed in order to perform its functions and, accordingly, whether the Court would further the purpose of its advisory jurisdiction by rendering an

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[23] *See* Written Statement of the United States of America ("U.S. Statement"), pp. 41-49.

[24] *See ibid.*, p. 45. As Serbia states in its Written Statement, the question "concerns the legality of the UDI under applicable rules of international law. It is no more and no less than this." Serbia Statement, para. 19.

[25] Serbia Statement, para. 22.

[26] "Jeremic: Whatever ICJ Decides, Serbia Will Not Recognize Kosovo," 22 April 2009, Daily Press Summary, Ministry for Kosovo and Metohija, Republic of Serbia, available at: http://www.kim.sr.gov.yu/cms/item/news/en.html?view=story&id=11615&sectionId=11.

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, at p. 156, para. 60.

opinion in this case.[28] Where, as here, an opinion is sought to meet the desire of particular member states for legal advice, the Court would be justified in not applying its traditional presumption that providing a requested opinion is necessary as part of the Court's "participation in the activities of the Organization."[29] In prior cases, member states (or the resolutions themselves) often identified a concrete, future activity of the General Assembly for which the Court's opinion would be useful. In this case, by contrast, Resolution 63/3 does not indicate how the Court's opinion would relate to any planned activity of the General Assembly. Nor did any state at the time identify a use to which the Assembly might put an opinion. In fact, the record reveals that the purpose of the question seems to have been solely to aid individual states in their capacity as states, rather than to aid the General Assembly in discharging its functions under the Charter.

Serbia and its supporters, however, now claim that the Assembly needs such an opinion to do its own work. But, in fact, the resolution appears to have been adopted on the flawed assumption that, in the words of the resolution's sole sponsor, there is a "right of *any member State* of the United Nations to pose a simple, elementary question" to the Court.[30]

It is perhaps most telling that Resolution 63/3 was not adopted in connection with a substantive agenda item covering any of the issues for which Serbia's supporters now speculate that the General Assembly needs the advisory opinion. Rather, it was adopted under an agenda item created *ad hoc* for the sole purpose of requesting an advisory opinion from the Court.[31] In this particular respect, the request appears to differ from *every prior occasion on which the General Assembly has requested an advisory opinion.*[32] For example, in the *Nuclear Weapons* case, the Assembly debated the request

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[28] *See generally*, U.S. Statement, pp. 41-45.

[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, at p. 156, para. 44.

[30] *See* U.S. Statement, pp. 43-44.

[31] Agenda of the 63rd Session of the U.N. General Assembly, A/63/251, 19 September 2008.

[32] *See* Official Records of the Second Session of the General Assembly, Plenary Meetings of the General Assembly, Vol. 2 (13 November – 29 November 1947), pp. 1043-80 (Admission of a State to the United Nations) (discussing substantive matter of the admission of Ireland, Portugal, Transjordan, Finland, Italy and Austria); Official Records of the Fourth Session of the General Assembly Plenary Meetings (20 September-10 December 1949), pp. 130-50 (Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania) (discussing effort to have the disputants "appear before the General Assembly in order to state their individual cases"); *ibid.*, pp. 312-29 (Competence of Assembly Regarding Admission to the United Nations) ("For the past three years the problem had been discussed in all its aspects."); *ibid.*, pp. 523-37 (International Status of South West Africa) (discussing "the question of South West Africa, with which the General Assembly had already been concerned for four sessions"); Official Records of the General Assembly, Vol. 1 (19 September - 15 December 1950), Fifth Session, Plenary Meetings, p. 383-88 (Reservations to the Convention on Genocide) (noting that the question had "acquired a certain practical urgency in view of the special circumstances created by the entry into force of the Convention for the Prevention and Punishment of the Crime of Genocide" and that "those circumstances made it imperative to

for an advisory opinion under the specific agenda item, "General and Complete Disarmament."[33] Likewise, in the *Construction of a Wall* case, the immediate impetus for the request for an advisory opinion was the Secretary-General's report on Israeli compliance with Resolution ES-10/13.[34] The fact that the request here relates to no item on the General Assembly's agenda underscores the degree to which the question was referred not to secure advice for the General Assembly, but rather to meet the purported need for legal advice of particular member states.

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decide whether states which had made reservations to which objections had been raised were to be counted among those whose accession was necessary for the entry into force of the convention."); General Assembly, 42nd Session, 104th Meeting, A/42/PV.104, 2 March 1988 (Headquarters Agreement) (discussing the dispute between the United Nations and the United States regarding the application and interpretation of certain provisions of the United Nations Headquarters Agreement). For certain requests for an advisory opinion, the resolution itself makes plain that the substance of the issue was under consideration. *See, e.g.*, General Assembly resolution 258, A/RES/258, 3 December 1948 (Reparation for Injuries Suffered in the Service of the United Nations) (discussing a "series of tragic events" and noting a desire to "ensur[e] that reparation be made for the injuries suffered"); General Assembly resolution 785, A/RES/785, 9 December 1953 (Effect of Awards of Compensation) ("Considering the request for a supplementary appropriation of $179,420 . . ."); General Assembly resolution 904, A/RES/904, 23 November 1954 (Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa) (noting adoption of "special rule F on the voting procedure to be followed"); General Assembly resolution 942, A/RES/942, 3 December 1955 (Admissibility of Hearings of Petitioners by the Committee on South West Africa) (discussing question raised "by the Committee on South West Africa" with respect to procedures); General Assembly resolution 1731, A/RES/1731, 20 December 1961 (Certain Expenses) (discussing "matter of financing the United Nations operations in the Congo"); General Assembly resolution 3292, A/RES/3292, 13 December 1974 (Western Sahara) (noting statements by various delegations and explicitly referring to "the discussion of this question at [the] thirtieth session").

[33] *See* Report of the First Committee, General and Complete Disarmament, A/49/699, 7 December 1994; General Assembly, 49th Session, 90th Meeting, A/49/PV.90, 15 December 1994.

[34] *See* General Assembly, Emergency Special Session, 23rd Meeting, A/ES-10/PV.23, 8 December 2003.

CHAPTER IV

KOSOVO'S DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH GENERAL INTERNATIONAL LAW

In its Written Statement, the United States explained that international law does not as a general matter regulate declarations of independence, nor is there anything about Kosovo's declaration of independence in particular that would render it not "in accordance with international law." This is confirmed by state practice relating to the former Yugoslavia, where the declarations of independence by the republics were not treated as violations of international law, regardless of whether they may have—as such declarations often do—violated domestic law.[35] International law only governs situations involving declarations of independence to the extent that international law would otherwise regulate the circumstances, such as where the declaration is conjoined with the establishment of an apartheid regime or foreign-armed intervention.[36] As one noted commentator has summarized:

> It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorises nor condemns such attempts, but rather stands neutral. Secession as such, therefore, is not contrary to international law. .... This conclusion, however, applies unless and until certain other circumstances become manifest. If for example, third parties intervene in the situation, international law becomes directly involved and particular relevant norms apply. Rules relating to aggression, intervention, use of force and humanitarian law will become pertinent.[37]

Some of the Written Statements suggest that secessionist efforts generally are illegal under international law because they violate the principle of territorial integrity.[38] They assert that this principle operates not only as between states (*i.e.*, as a principle prohibiting states from acts that violate the territorial integrity of other states) but also to

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[35] U.S. Statement, pp. 50-55.

[36] *Ibid.*, p. 56; *see also* Georges Abi-Saab, "The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law," in *Self-determination in International Law: Quebec and Lessons Learned* (hereafter, "*Quebec and Lessons Learned*"), p. 72 (Anne Bayefsky, ed. 2000).

[37] Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Quebec and Lessons Learned*, p. 136 (emphasis omitted).

[38] *See, e.g.*, Serbia Statement, paras. 423-28, 524; Cyprus Statement, paras. 82-90; Russian Federation Statement, paras. 76-78; Written Statement of the Kingdom of Spain ("Spain Statement"), paras. 20-22, 27.

actors within a state, so as to prevent actors within states from taking actions to seek or assert independence.[39] Section I of this chapter explains why, in the view of the United States, this is not correct.[40] Section II addresses various assertions made in the Written Statements about the right of self-determination, but explains that the Court need not resolve these questions to conclude that Kosovo's declaration of independence was in accordance with international law.

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[39] Serbia Statement, paras. 412-524.

[40] As a result, Serbia's attempt to articulate three "exceptional cases" in which a new state can legally be created through secession (perhaps in order to accommodate the indisputable fact that other states have emerged through secession in the post-colonial period), is founded on an erroneous premise. *See* Serbia Statement, para. 943. Because declarations of independence are not, standing alone, prohibited by international law, the Court need not find an "exception" in order to conclude that Kosovo's declaration of independence was in accordance with international law.

That said, it is worth noting that the three categories are not obvious. For example, the assertion that international law permits secession only if it is permissible under domestic law is itself subject to the problem that, at least in a case like this, it is quite difficult for the international community to assess what a country's domestic law permits. Thus, while Serbia now suggests that the SFRY Constitution envisaged the possibility of secession for the former SFRY republics, but not for Kosovo (*see* Serbia Statement, paras. 945-48), at the time, the SFRY vehemently argued that the declarations of independence by the former republics did in fact violate the SFRY Constitution, were illegal under domestic law, and had no constitutional or legal validity. *See* Stands and Conclusions of the SFRY Presidency Concerning the Situation in Yugoslavia, 27 June 1991 (reprinted in *Yugoslavia Through Documents: From Its Creation to Its Dissolution* (Snežana Trifunovska, ed. 1994) (hereafter, "Trifunovska"), p. 305) ("these were anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane and ... as such they could have no constitutional and legal validity."). Among other things, in arguing against the independence of Croatia and Slovenia, the SFRY pointed to Article 5 of the Constitution, which provided that that any changes to the SFRY's frontiers or boundaries between republics and provinces must occur through mutual agreement. Constitution of the Socialist Federal Republic of Yugoslavia, 21 February 1974, Art. 5 (reprinted in Trifunovska, p. 226). The SFRY asserted that "only collective decisions reached by agreement on the realization of the right of peoples to self-determination is concordant with the concept of our constitutional-legal system." Assessment and Positions of the SFRY Presidency Concerning the Proclamations of the Independence of the Republic of Croatia and Slovenia, Belgrade, 11 October 1991, para. 5 (reprinted in Trifunovska, p. 355). Moreover, despite its current position, Belgrade proceeded to use significant armed force in an attempt to prevent the secession of the SFRY constituent republics and to detach parts of their territory.

Serbia's suggestion that the SFRY Constitution forbade Kosovo's secession is similarly debatable. For example, writing about Kosovo's status under the SFRY Constitution last year, the President of one of the other successor states of the SFRY, Croatia, noted that "the republics *and provinces* united in Yugoslavia of their own free will, and this clearly implies that they could not be kept within the state framework against their will." Stjepan Mesić, "Kosovo -- problem koji ne trpi odgađanje" ("Kosovo -- A Problem that Tolerates No Delay"), *Večerni List*, 16 February 2008 [U.S. Statement, Annex 1] (emphasis added).

Section I. Kosovo's Declaration Of Independence Is In Accordance With The Legal Principle Of Respect for Territorial Integrity, Which Operates Between States

Some of the Written Statements argue that the principle of territorial integrity operates on non-state actors within a state, and that this principle renders Kosovo's declaration of independence internationally unlawful.[41] In its Written Statement, the United States underscored that the principle of territorial integrity of states is axiomatic and applies to all states.[42] However, contrary to Serbia's assertions, territorial integrity is a principle of international law that governs conduct between and among states, not the actions of non-state actors within states.[43] As one commentator has explained:

> ... [I]t would be erroneous to say that secession violates the principle of the territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours; it does not apply within the State.[44]

Similarly, in a report prepared in response to questions related to the possible secession of Quebec in 1992, five international legal experts concluded:

> ... [I]nternational law and, in particular, the principle of territorial integrity does not preclude non-colonial peoples from gaining independence....[45]

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[41] *See* Serbia Statement, paras. 413, 476, 498; *see also* Russian Federation Statement, paras. 76, 82-88; Written Statement of the Argentine Republic ("Argentina Statement"), paras. 75-82.

[42] U.S. Statement, p. 69.

[43] *See* 1 *Oppenheim's International Law* § 119 (6th ed. 1992) ("The duty of *every state* itself to abstain, and to prevent its agents and, in certain cases, nationals, from committing any violation of another state's independence or territorial integrity or personal authority is correlative to the corresponding right possessed by *other states*.") (emphasis added); *see also Corfu Channel Case, Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4 at p. 35 ("*[b]etween independent States*, respect for territorial sovereignty is an essential foundation of international relations") (emphasis added); Thomas Baty, *The Canons of International Law* (1930), pp. 87-88 ("A nation, to be a nation, must be free from foreign interference."); Montevideo Convention on the Rights and Duties of States (1933), Art. 11 ("The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed *by another state* directly or indirectly or for any motive whatever even temporarily.") (emphasis added).

[44] Georges Abi-Saab, "Conclusion," in *Secession: International Law Perspectives*, p. 474 (Marcelo Kohen, ed. 2006).

[45] Thomas Franck, Rosalyn Higgins, Alain Pellet, Malcolm Shaw & Christian Tomuschat, "The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty," in *Quebec and Lessons Learned*, pp. 284-85. *See also* Alain Pellet, "Legal Opinion on Certain Questions of International Law Raised by the Reference," in *Quebec and Lessons Learned*, p. 98 ("In the first place, the principle of territorial integrity does not concern the relations between state and its own population, but rather the relations of states among themselves."); Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Quebec*

A. THE LEGAL PRINCIPLE OF TERRITORIAL INTEGRITY DOES NOT PRECLUDE NON-STATE ACTORS FROM DECLARING INDEPENDENCE

The documents that Serbia and others cite in their Written Statements serve only to highlight that the principle of territorial integrity is a long-established principle of customary international law governing the conduct of states, which has been codified in numerous treaties and international and regional instruments, and is not in dispute in the instant matter. For instance, the first instrument that Serbia cites is the Covenant of the League of Nations. Following the First World War, the principles of territorial integrity and non-intervention were formalized in Article 10 of the Covenant, which provided that "*Members of the League* undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[46] This is the classic articulation of the international legal principle of territorial integrity but, as is clear from the text, it applies between states, and it prevents the use of force by a state against the territorial integrity of another state.

Serbia next cites the Charter of the United Nations, noting that Article 2(4) of the Charter provides that "*[a]ll Members shall refrain* in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[47] As with the Covenant, the Charter underscores that the principle of territorial integrity is one that operates in "international relations," as against the threat or use of force by another state. The General Assembly's Declaration on Friendly Relations similarly proclaims the commitment of member states to respect the territorial integrity of other states, stating that "*[e]very State* shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."[48]

Serbia then cites the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), as evidence that the principle of territorial integrity is not limited to relations between states.[49] Yet that declaration, which was adopted in the context of decolonization, is directed at preventing

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and Lessons Learned, p. 136 ("it must be recognized that international law places no analogous obligation [of respect for territorial integrity] upon individuals or groups within states. The provisions contained in the relevant international instruments bind states parties to them and not persons and peoples within states").

[46] Covenant of the League of Nations, Art. 10, available at: http://avalon.law.yale.edu/20th_century/leagcov.asp (emphasis added).

[47] Charter of the United Nations, Art. 2(4) (emphasis added) [Dossier No. 210]. *See* Serbia Statement, para. 430; Cyprus Statement, para. 87; Russian Federation Statement, para. 77.

[48] General Assembly resolution 2625, A/RES/2625, 24 October 1970 (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations) [Dossier No. 226].

[49] Serbia Statement, para. 431.

colonial powers—*i.e.*, states—from maintaining control of or dividing up territories under their administration in connection with the decolonization process,[50] as opposed to any duty of non-state actors to respect that principle.[51]

Serbia's arguments based on regional treaties and arrangements all suffer the same flaw—they simply confirm that the well-established principle of territorial integrity is one that applies as between states. For example, the Helsinki Final Act of 1975 provides that "[t]he *participating States will respect each other's sovereign equality and individuality* as well as all the rights inherent in and encompassed by its sovereignty,

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[50] *See, e.g.,* Official Records of the General Assembly, Fifteenth Session (Part I), Plenary Meetings, Vol. 2 (27 October – 20 December 1960), p. 1271 (Indonesian representative) ("When drafting this document my delegation was one of the sponsors of paragraph 6, and in bringing it into the draft resolution we had in mind that the continuation of Dutch colonialism in West Irian is a partial disruption of the national unity and territorial integrity of our country."); *ibid.* p. 1284 (Morocco representative) (describing situations of intervention by colonial powers and noting that "paragraph 6 explains very well what our delegation understands by territorial integrity. When we discussed this document and agreed to become a sponsor, we had in mind a long list of examples of the partitioning and disruption of the unity of national territories."); *Yearbook of the United Nations* (1960), pp. 45, 47; *see also* Thomas Franck, Rosalyn Higgins, Alain Pellet, Malcolm Shaw & Christian Tomuschat, "The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty," in *Quebec and Lessons Learned*, pp. 282-83 ("The concern for the simultaneous preservation of the territorial integrity of 'countries', i.e. the colonies themselves, can be explained by the desire of a majority of the member States of the United Nations to defeat attempts by certain colonial powers to carve up, for their own benefit, the territories in their care.").

[51] The other General Assembly resolutions cited by Serbia similarly reinforce the obligation of states under the Charter to respect the territorial integrity of other states; none of these resolutions expand or modify this obligation to apply to non-state actors. *See, e.g.,* General Assembly resolution 55/2, A/RES/55/2, 18 September 2000 (United Nations Millennium Declaration), para. 4 [Dossier No. 229] (reaffirming the commitment of all states to respect the "territorial integrity and political independence" of other states). Serbia points to several resolutions of the General Assembly that note that nothing in the particular document should be construed as authorizing or encouraging action that would impair or dismember the territorial integrity of a state. *See* Serbia Statement paras. 430-39 (citing General Assembly resolution 2625, A/RES/2625, 24 October 1970) (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations) [Dossier No. 226] ("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"); General Assembly resolution 61/295, A/RES/61/295, 13 September 2007 (Declaration on the Rights of Indigenous Peoples) art. 46 [Dossier No. 231] ("Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.")). In each case, these resolutions do nothing to add or subtract from the international legal landscape concerning territorial integrity: they neither enunciate a rule of international law governing the conduct of non-state actors, nor establish a legal rule preventing declarations of independence, but rather merely state that the resolution in question does not confer rights or obligations in this regard beyond that which previously existed.

including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence."[52] The other such treaties and arrangements cited by Serbia similarly confirm the principle.[53] In short, a plain reading of the language of the cited documents establishes no rule of international law that would prohibit non-state actors from declaring independence.

B. Historical Examples Of "Internal" Conflicts Do Not Establish That The Legal Principle Of Territorial Integrity Precludes Non-State Actors From Peacefully Declaring Independence

Some of the Written Statements also cite a series of particular situations involving internal armed conflicts (Bosnia and Herzegovina, Croatia, the Democratic Republic of the Congo, Georgia, Somalia, and Sudan) to support arguments that the principle of territorial integrity precludes non-state actors from peacefully declaring independence.[54] To the contrary, however, these cases prove nothing more than that the Security Council has included language designed to promote the maintenance of the unity of particular states where it has concluded that doing so will advance international peace and security. None of the resolutions asserted that a secessionist entity had violated international law by declaring independence, or announced a generally applicable rule of international law that would prohibit non-state actors from peacefully declaring independence, or even

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[52] Helsinki Final Act, 1 August 1975, Declaration on Principles Guiding Relations Between Participating States [Dossier No. 219].

[53] *See, e.g.,* Charter of Paris for a New Europe, 21 November 1990 [Dossier No. 219] ("In accordance with our obligations under the Charter of the United Nations and commitments under the Helsinki Final Act, we [the Heads of State or Government of the States participating in the Conference on Security and Cooperation in Europe] renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the principles or purposes of those documents."); Charter of the Commonwealth of Independent States, 22 January 1993, art. III, available at: http://untreaty.un.org/unts/120001_144071/6/8/00004863.pdf ("the member states shall build their relations in accordance with the following correlated and equivalent principles: ... territorial integrity of states and refrain from any acts aimed at separation of foreign territory"); Charter of the Organization of American States, 1948, art. 1, available at: http://www.oas.org/juridico/English/charter.html ("The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."); Charter of the Organization of African Unity, 1963, art. III, available at: http://www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf ("The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles... Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."); Charter of the Organisation of the Islamic Conference, 1972, available at: http://www.oic-oci.org/is11/english/Charter-en.pdf ("The Member States undertake that in order to realize the objectives in Article 1, they shall... act in accordance with the following principles ... All Member States undertake to respect national sovereignty, independence and territorial integrity of other Member States").

[54] *See* Serbia Statement, paras. 440-76; *see also* Argentina Statement, para. 80.

established that action by the Security Council to maintain the unity of a state will necessarily be the most appropriate way to promote international peace and security in other circumstances.[55]

Serbia's reliance on Security Council resolutions adopted during the conflicts in Bosnia and Herzegovina and Croatia in the 1990s[56] is particularly telling. The situations in Bosnia and Croatia were not simply internal conflicts. The Security Council adopted these resolutions to meet the threat of concerted military efforts of the FRY itself to detach, dominate, and perhaps annex parts of Bosnian and Croatian territory, in campaigns accompanied by widespread ethnic cleansing and other grave human rights violations.[57] Time and again the Security Council underscored that these were far more than—as Serbia's Written Statement now attempts to characterize them[58]—"civil war/secessionist situations." Indeed, the historical record is quite clear that it was not internal conflicts, but rather the external interference of the FRY in these two countries, that lay at the heart of the threat to international peace and security that prompted the Security Council to act.[59]

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[55] *See* Michael C. Wood, "The Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law*, Vol. 2 (1998), pp. 77-78 (noting that the Security Council "may impose obligations (which under Article 103 of the Charter prevail over any other treaty obligations), it may reaffirm existing rules, it may apply existing rules, it may depart from or override existing rules in particular cases, *but it does not lay down new rules of general application.*") (emphasis added).

[56] *See* Serbia Statement, paras. 442-49.

[57] *See, e.g., Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, para. 386 ("there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993))"); *ibid.*, para. 241 ("The Court finds it established that the [FRY] was thus making its considerable military and financial support available to the Republika Srpska."); Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia," *Am. J. Int'l L.*, Vol. 86 (1992), pp. 597, 600 ("The two Serbian interventions [in Bosnia and Herzegovina and Croatia] were somewhat analogous: in both instances the armed forces formerly controlled by the Yugoslav central authorities were apparently used to support a Serbian minority in gaining control over territory, possibly with the aim of integrating these areas into a greater Serbia."); Noel Malcolm, *Kosovo: A Short History* (1998), p. 350 (noting "the launching of Serbia's war of territorial expansion against Bosnia in April 1992").

[58] Serbia Statement, para. 440.

[59] *See, e.g.,* Security Council resolution 752 (1992), S/RES/752, para. 3 ("demands that all forms of interference from outside Bosnia and Herzegovina, including by units of the Yugoslav People's Army as well as elements of the Croatian army, cease immediately, and that Bosnia and Herzegovina's neighbours take swift action to end such interference and respect the territorial integrity of Bosnia and Herzegovina."); Security Council resolution 787 (1992), S/RES/787, para. 5 ("Demands that all forms of interference from outside the Republic of Bosnia and Herzegovina, including infiltration into the country of irregular units and personnel, cease immediately..."); Security Council resolution 757 (1992), S/RES/757 (condemning the failure of "authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro),

In sum, the international legal principle of territorial integrity—which has always been formulated as a state-to-state principle—does not render unlawful under international law declarations of independence by non-state actors.[60]

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including the Yugoslav People's Army, to take effective measures to fulfil the requirements of resolution 752 (1992)" and deciding to impose sanctions on the FRY and Yugoslav People's Army); *see also* Security Council, 3522nd Meeting, S/PV/3522, 21 April 1995 (U.S. Ambassador) ("the authorities in Belgrade should understand that suspension of additional sanctions will depend on their willingness to take further steps towards peace, most notably by recognizing the Republic of Croatia and the Republic of Bosnia and Herzegovina within their internationally recognized borders."); Security Council resolution 836 (1993), S/RES/836 ("Condemning military attacks, and actions that do not respect the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina, which, as a State member of the United Nations, enjoys the rights provided for in the Charter of the United Nations").

[60] Arguments about the principles of stability of boundaries and *uti possidetis* (*see, e.g.,* Serbia Statement, paras. 574-79; Cyprus Statement, paras. 82-89) also are unavailing, as those principles do not operate on non-state actors, nor do they prohibit declarations of independence. The principle of *uti possidetis juris* ("as you possess, so you shall possess") is one which provides that "*states* accept their inherited colonial boundaries." Rosalyn Higgins, *Problems & Process: International Law and How We Use It,* p. 125 (1994) (emphasis added); *see also* Marcelo Kohen, "Introduction," in *Secession: International Law Perspectives*, pp. 14-15 (Kohen, ed. 2006) ("*Uti possidetis*, as a customary rule providing for the respect of territorial limits as they exist at the moment of independence, does not come into issue during the process of secession."); Steven Ratner, "Drawing a Better Line: Uti Possidetis and the Borders of New States," *Am. J. Int'l L.*, Vol. 90, pp. 590-91 (1996) ("Thus, *uti possidetis* is agnostic on whether or not secessions or breakups should occur and is not simply the legal embodiment of a policy condemning them."). Commentators have seriously questioned the Badinter Commission's reliance on this principle, derived from the decolonization process, to resist any redrawing of boundaries between the former republics of Yugoslavia in the context of receiving applications from Croatia and Bosnia and Herzegovina for recognition as new states. *See, e.g.,* Hurst Hannum, "Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?", *Transnat'l L. & Contemp. Probs.*, Vol. 57, p. 66 (1993) ("This opinion is dubious if it purports to identify a rule of international law which requires the maintenance of existing administrative borders outside the colonial context."); Susan Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, p. 240 (McGill-Queen's 2002) ("In short, the territorial solution adopted in Yugoslavia was the result of a policy decision that was quite possibly justified. It was not, however, required by international law."); Peter Radan, "Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission," *Melb. U. L. Rev.*, Vol. 24, p. 62 (2000) ("The principle is not, as claimed by the Badinter Commission, recognised as a general principle applicable to all cases."). However, even the Badinter Commission acknowledged that the principle was intended to apply only "once the process in the SFRY [led] to the creation of one or more independent states." Conference on Yugoslavia Arbitration Commission: Opinion 3, 11 January 1992 (reprinted in 31 *I.L.M.* 1488, pp. 1499-1500 (1992)).

Section II. The Court Need Not Decide Whether Kosovo Has Validly Exercised A Right Of Self-Determination To Respond To The Question Referred By The General Assembly

Serbia argues that no right of self-determination exists outside of colonial, mandate/trust territories, or foreign occupation contexts.[61] Although Serbia then contends that neither the population of Kosovo nor Kosovo Albanians could be "a people" entitled to exercise such a right,[62] it claims that, even if they were, there can never be a remedial/external right of self-determination that applies to any situation,[63] even under the most egregious of circumstances.[64] These are difficult and highly contested issues,[65] far afield from the question before the Court. Their complexity is multiplied with respect to Kosovo, where the Security Council's actions under Chapter VII not only affected the legal terrain but also reflected an international understanding that the people of Kosovo have been treated in an especially egregious way, warranting special measures by the international community to protect them, including assuming international administration of Kosovo. Indeed, even some of Serbia's staunchest supporters argue that there is, in fact, a right of remedial/external self-determination under certain circumstances, in direct opposition to Serbia's position in this case.[66]

The United States continues to believe that the question referred to the Court can be answered without addressing the contours of international law regarding self-determination.[67] This Comment offers no view on the issues of who is a "people," whether there is a remedial/external right of self-determination in certain egregious situations, or to whom such a right could flow. Kosovo's declaration of independence need not be an exercise of the right of external self-determination to be consistent with international law. As Judge Higgins has stated:

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[61] Serbia Statement, para. 557.

[62] *Ibid.*, paras. 588, 653, 654(v).

[63] *Ibid.*, paras. 589-625.

[64] *Ibid.*, paras. 626-633.

[65] *See, e.g.*, James Crawford, "The Right of Peoples: 'Peoples' or 'Governments'?" in *The Rights of Peoples*, p. 58 (James Crawford, ed. 1988).

[66] *See, e.g.*, Russian Federation Statement, para. 88 ("It is also true that the ["safeguard"] clause may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question.").

[67] *See also* Written Statement of the United Kingdom ("United Kingdom Statement"), paras. 5.33, 6.65; Expose Ecrit de la Republique Français ("France Statement"), para. 23; Written Contribution of the Republic of Kosovo ("Kosovo Contribution"), paras. 8.38-8.41.

> Even if, contrary to contemporary political assumptions, self-determination is not an *authorization* of secession by minorities, there is nothing in international law that *prohibits* secession or the formation of new states.[68]

Therefore, to answer the question posed to the Court, it is sufficient to find that international law did not prohibit the declaration of independence—which does not require resolving issues of self-determination.

Nonetheless, should the Court find it necessary to examine Kosovo's declaration of independence through the lens of the right of self-determination—including for example whether Kosovo is a "self-determination unit" for purposes of applying self-determination principles—then the Court should consider Kosovo's specific legal and factual circumstances, including that:

- Multiple Chapter VII Security Council resolutions acknowledged the gravity of the situation in Kosovo;
- A Chapter VII Security Council resolution established a United Nations Administration in Kosovo to ensure an end to the serious abuses for which there was no clear end in sight because of continued concerns for the safety of the population;
- Security Council resolution 1244 (1999) itself refers to the "people of Kosovo," and the Constitutional Framework that was promulgated by the Secretary-General's Special Representative recognized Kosovo as a distinct entity and as having "an undivided territory," and recognized that Kosovo and its people had "unique historical, legal, cultural and linguistic attributes;"[69]
- Judgments from the International Criminal Tribunal for the former Yugoslavia, such as the *Milutinović et al.* judgment of 26 February 2009,[70] confirm that Kosovo was stripped of its substantial autonomy,[71] culminating in large-scale atrocities against the population of Kosovo;

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[68] *See* Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), p. 125 (emphasis in original).

[69] UNMIK Regulation No. 2001/9, On a Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK/REG/2001/9, 15 May 2001, Art. 1.1 [Dossier No. 156].

[70] *Prosecutor v. Milan Milutinović, Nicola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lasarević, Sreten Lukić*, Judgement, 26 February 2009, available at: http://www.icty.org/case/milutinovic/4#tjug.

[71] The Tribunal's version of the revocation of Kosovo's autonomous status is starkly different than Serbia's. Serbia describes the events as unfolding in a very ordinary manner, as if no different than the kind of mundane activity routinely addressed by legislatures:

> [T]he 1974 Constitution of Serbia, was modified in 1989. This was done through amendments to the Constitution of Serbia, in the constitutionally prescribed procedure and with the consent of

- The representatives of Kosovo's population participated in good faith in an internationally-led political process, conducted in accordance with Resolution 1244 and the Security Council's direction, until it was declared by the responsible international officials to have come to an end and that maintenance of the status quo would be unacceptable;
- Democratically-elected leaders of Kosovo, supported by the population, peacefully declared independence, committing themselves to respect prior Security Council resolutions and international legal protections for all of its inhabitants; and
- Neither the Security Council nor its authorized representatives invoked their powers to modify or set aside Kosovo's move to independence.

> Kosovo and another Serbian autonomous province, Vojvodina. Their status of autonomous provinces remained under both the federal and Serbian constitutions, but they enjoyed less autonomous powers, particularly in the legislative realm. At no time was the Albanian minority, either in Kosovo or elsewhere in Serbia, excluded or discriminated from the participation in the public affairs of the State.".

Serbia Statement, para. 641. The Tribunal's description is of these events is quite different. It cites the evidence of extreme duress under which the Kosovo Assembly was placed at its meeting on 23 March 1989 when the amendments were "adopted" and concludes:

> The Chamber is in no doubt that the Kosovo Albanians perceived the amendments as removing the substantial autonomy previously enjoyed by Kosovo and Vojvodina, and that, in fact, that was their effect. For example, the regulation of education and the taxation system was placed within the jurisdiction of the Government of Serbia, and responsibility for the public security services was placed under republican control. All were previously within the exclusive competence of the provincial authorities. Two amendments were of particular significance: the removal of the need for the consent of the provincial assemblies to further constitutional amendments affecting the whole republic; and the greater power of the Serbian Presidency to use MUP forces in Kosovo to 'protect the constitutional order.' Following these constitutional amendments the situation in Kosovo deteriorated, with public protests leading to street violence.

Prosecutor v. Milutinović, et al., Judgement, 26 February 2009, Vol. 1, pp. 86-87, available at: http://www.icty.org/case/milutinovic/4#tjug. It is not coincidental that UNMIK chose 22 March 1989— the day before the Kosovo Assembly "adopted" the amendments—as the date after which laws adopted by Belgrade would not apply in Kosovo. *See* UNMIK Regulation 1999/24 (12 December 1999).

CHAPTER V

THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH RESOLUTION 1244

In its Written Statement, the United States explained how Kosovo's declaration of independence was in accordance with the text, overall purpose and approach of Security Council resolution 1244 (1999). At its heart, Resolution 1244 was designed to protect the people of Kosovo, to create an environment in which Kosovo could develop its own political institutions, and at a later stage to facilitate a process designed to determine Kosovo's future status. In developing its own political institutions, Kosovo would be free of the influence of the FRY, whose authority would be replaced by an international civil presence to assist the people of Kosovo in establishing new institutions of government, and which would progressively transfer responsibilities to these institutions. At the same time, an international security presence, in the form of KFOR, would prevent the return of Belgrade's security forces and apparatus, and provide security in their place. Kosovo would as a formal matter remain within the FRY, but the time during which this would be the case would be an "interim" period.

Resolution 1244 clearly anticipated that independence might be the most appropriate outcome for Kosovo's future status, and did not seek to preclude it. The resolution authorized the international civil presence to "facilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords," but there was no requirement for the future status to be "agreed" between Serbia and Kosovo—only an authorization for the international civil presence to facilitate a process. By the time that Kosovo declared independence in February 2008, the future status process had run its course, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status [was] exhausted,"[72] it was universally recognized that the *status quo* was unsustainable, and Special Envoy Ahtisaari—with the Secretary-General's support—had recognized that "the only viable option for Kosovo [was] independence."[73]

The Written Statements submitted by Serbia and its supporters challenge this view, contending that Resolution 1244 precluded independence. But their key points are either in error or do not disturb the conclusion that Kosovo's declaration of independence was in accordance with Resolution 1244.

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[72] Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, p. 2 [Dossier No. 203].

[73] *Ibid.*

Section I. References To Territorial Integrity in Resolution 1244 And Related Documents Anticipated The Possibility Of Kosovo's Declaration Of Independence

Some of the Written Statements raise arguments based upon references to "territorial integrity" in Resolution 1244 and various other documents. In large part, the United States positions with respect to these arguments are set forth in the Written Statement it submitted to the Court in April. The United States provides additional information here, however, to respond to some of the arguments made in other Written Statements.

References to Territorial Integrity in Resolution 1244 and Preceding Resolutions. Serbia's Written Statement describes Security Council resolutions related to Kosovo that preceded Resolution 1244 and argues that, "against this background," the reference to the sovereignty and territoriality of the Federal Republic of Yugoslavia in preambular paragraph 10 of Resolution 1244 "guarantees the territorial integrity of the FRY and contradicts any right of the so-called 'Republic of Kosovo' to unilaterally declare independence."[74] The "background"—the resolutions related to Kosovo that preceded Resolution 1244—is indeed important in understanding the resolution, but in the view of United States the implications of that background are quite different than what Serbia contends.

As explained in Chapter IV, the principle of territorial integrity does not preclude entities from seeking to emerge or actually emerging as new states on the territory of an existing state, and thus no more prohibits the emergence of a new state on the territory of the FRY than it precluded the previous emergence of new states on the territory of the SFRY in the early 1990s. Rather, the principle of respect for territorial integrity is a principle that applies as between states. Indeed, preambular paragraph 10 is itself crafted as a statement of the commitment of "member states" to these principles, and does not on its face say anything about any commitment of non-state entities (or, for that matter, non-member states) to the FRY's territorial integrity.[75] Preambular paragraph 10 thus cannot stand as a legal bar to Kosovo's declaration of independence. The fact that the statement is preambular, and does not purport to create international legal obligations even for member states, makes it all the more difficult to see how the inclusion of this phrase could constitute a "guarantee" by the Security Council of the territorial integrity of the FRY.

Even if there were residual questions about this point, the very resolutions to which Serbia refers as important for understanding the resolution demonstrate precisely

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[74] Serbia Statement, p. 249.

[75] The text of preambular paragraph 10 is: "Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2."

the opposite of what Serbia claims. It is indeed correct that earlier Security Council resolutions on Kosovo contained language reaffirming the commitment of member states to the FRY's sovereignty and territorial integrity.[76] But as discussed in the United States Written Statement,[77] the fact that preambular paragraph 10 of Resolution 1244 qualifies that reaffirmation so that it applies only "as set out in the Helsinki Final Act and annex 2" is a critically important difference.

With respect to Annex 2, the only part of it that refers to principles of sovereignty and territorial integrity is paragraph 8, which describes:

> 8. A political process towards the establishment of an interim political framework agreement providing for 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 and the other countries of the region, and the demilitarization of UCK.

Thus, paragraph 8 describes a political framework agreement that would apply to an *interim* period, and it is the agreement covering this *interim* period that should take into account the principles of sovereignty and territorial integrity. Thus, quite unlike the earlier Security Council resolutions on Kosovo, when preambular paragraph 10 refers to the FRY's territorial integrity, it does so only in the context of an interim period.

The reference to territorial integrity in preambular paragraph 10 was further qualified by the fact that the principles were being referred to only "as set out in the Helsinki Final Act." As explained in more detail in the United States Written Statement, this reference to the Helsinki Final Act underscored the central importance of the human rights dimension to the situation in Kosovo and the fact that those principles continued to be relevant even though the FRY's right to participate in the OSCE had been suspended. Moreover, this reference highlighted the fact that the principle should be understood not as an absolute, but as one among many considerations that—in accordance with Principle X of Helsinki—were to be applied equally with "each of them being interpreted taking into account the others."[78]

In sum, even though the preambular language of paragraph 10 creates no binding obligations under international law, the fact that its references to territorial integrity were qualified shows how the Security Council viewed the situation at the time: that Kosovo

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[76] *See* Security Council resolution 1160 (1998), S/RES/1160 [Dossier No. 9]; Security Council resolution 1199 (1998), S/RES/1199 [Dossier No. 17]; Security Council resolution 1203 (1998), S/RES/1203 [Dossier No. 20].

[77] U.S. Statement, pp. 68-74.

[78] *Ibid.*, p. 72.

was for the time being—but might not remain—part of the FRY, and that numerous other principles would appropriately bear on Kosovo's future status.[79]

References to Territorial Integrity in Contemporaneous Documents. In addition to referring to language in previous Security Council resolutions on Kosovo, Serbia also refers to other documents related to Resolution 1244: the Ahtisaari-Chernomyrdin principles (Annex 2 to Resolution 1244); the G-8 Foreign Ministers Statement of 6 May 1999 (Annex 1 to Resolution 1244); and the Military Technical Agreement of 9 June 1999 (MTA).[80] The references in Annex 2 have already been discussed above, and the language in Annex 1 is in fact identical to that in Annex 2. In both cases, these documents refer to the territorial integrity of the FRY only in the context of an interim period. Serbian arguments based upon passages in the MTA—notably what it calls references to "'Kosovo' on one side, and 'locations in Serbia outside Kosovo' on the other"—are similarly unavailing. There is no dispute that Kosovo was not independent at that time the MTA was concluded.[81] The relevant point is not the situation that existed at the outset of the interim period, but rather that the Council limited its language not to extend beyond the interim period.[82]

References to Territorial Integrity in the Rambouillet Accords. Serbia makes similar arguments about the references to territorial integrity in preambular paragraph 4 of the Rambouillet Accords, which Serbia's Written Statement describes "as the document which should be taken into account in the political process that would

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[79] Serbia also refers to resolutions adopted by the Security Council on Bosnia and Herzegovina that include preambular language that reaffirms the commitment of the Council "to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders." In particular, it cites the adoption of the latest of these resolutions, Resolution 1845 of 20 November 2008, to suggest that the Security Council considered Kosovo's independence to be unlawful. *See* Serbia Statement, para. 825. If anything, the inclusion of this language—both before and after Kosovo's independence—stands as further evidence that the principle of territorial integrity is axiomatic and does not preclude entities from seeking to emerge or actually emerging as new states on the territory of an original state. Any argument that the language suggests that Kosovo's declaration of independence was illegal seems particularly strained in that nine of the members of the Security Council when resolution 1845 was adopted are states that have recognized Kosovo.

[80] *See* Serbia Statement, paras. 656-74.

[81] Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, concluded on 9 June 1999 [Dossier No. 32].

[82] Serbia makes a similar argument with respect to language in preambular paragraph 4 of Resolution 1244. That paragraph states the Security Council's determination to "resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes." Again, however, there is no dispute that Kosovo remained part of the FRY at the outset of the interim period; rather, the relevant point is that the Council's language was limited to the interim period, and reflected that Kosovo's status in the longer term remained open.

determine Kosovo's future status."[83] But like the other such references in Resolution 1244, the G-8 Foreign Ministers Statement, and the Ahtisaari-Chernomyrdin principles, the Rambouillet references to territorial integrity are also limited to the interim period.

Indeed, Serbia itself emphasizes this point—that Rambouillet was designed to apply only to an *interim* period—when attempting to strengthen its arguments about the meaning of various terms. In this connection, Serbia highlights the importance of the fact that "the official name of the so-called Rambouillet Accords was '*Interim* Agreement for Peace and Self-Government in Kosovo.'"[84] The United States has described the broader implications of the references in Resolution 1244 to the Rambouillet Accords in its Written Statement.[85] The key point for present purposes is that the very structure of the Accords, as well as its title, make clear that they were designed to apply only during an interim period, and that the reference to territorial integrity in its preamble should not be read more broadly.

While Serbia in its Written Statement now argues for an interpretation of Rambouillet that would preclude secession, at the time it read the language in precisely the opposite way. Just days after the final negotiations broke down, the FRY explained in the Security Council that it had rejected the Rambouillet Accords because they were "a crude and unprecedented attempt to impose a solution *clearly endorsing the separatists' objectives*."[86] The FRY went on to state specifically that it could not agree to the Accords because "we cannot agree to the *secession of Kosovo* and Metohija, either immediately or after the interim period of three years."[87] In a subsequent Security Council meeting, the FRY described the Rambouillet Accords even more bluntly, as requiring it to give up Kosovo:

> [Yugoslavia] has been offered two alternatives: either voluntarily to give up a part of its territory or to have it taken away by force. This is the essence of the 'solution' for Kosovo and Metohija that was offered by way of an ultimatum at the 'negotiations' in France.[88]

It is difficult in light of these statements to see how Serbia now can credibly assert before this Court that the reference to Rambouillet in Resolution 1244 is important

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[83] *See* Serbia Statement, paras. 781-84. The language of preambular paragraph 4 of the Rambouillet Accords is "*Recalling* the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."

[84] Serbia Statement, para. 739 (emphasis added).

[85] U.S. Statement, pp. 64-68.

[86] Security Council, 3988th Meeting, S/PV.3988, 24 March 1999, p. 14 (emphasis added).

[87] *Ibid.* (emphasis added).

[88] Security Council, 3989th Meeting, S/PV.3989, 26 March 1999, p. 11.

because it "clearly adopt[ed] the principle of the continued territorial integrity and sovereignty of the FRY over Kosovo."[89]

References to the Territorial Integrity of the "FRY" (as Distinct From the Territorial Integrity of "Serbia"). Serbia's Written Statement points out, correctly, that "Serbia continues the international legal personality of the Federal Republic of Yugoslavia."[90] Serbia is not correct, however, in asserting that "any reference to the territorial integrity of the [FRY] in the practice of United Nations organs and of individual states must be understood as referring to the territorial integrity of Serbia."[91] In particular, it is not correct that the reference to the territorial integrity of the FRY in preambular paragraph 10 now "must be understood as referring to the territorial integrity of Serbia.[92]

The law and practice of state succession involves many difficult questions, but one point is clear: while there may be a presumption that legal provisions remain applicable to a "continuation" state, the application of this presumption to a particular right or obligation depends on the particular circumstances.[93]

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[89] Serbia Statement, para. 784. Serbia also argues that the reference to the "will of the people" should be understood as a reference to something other than the will of the people of Kosovo. The "will of the people" is a phrase derived at least in part from the historical traditions of the United States, including notably the famous statement by United States President Thomas Jefferson in an 1801 letter that "the will of the people... is the only legitimate foundation of any government, and to protect its free expression should be our first object." Letter from Thomas Jefferson to Benjamin Waring (reproduced in *The Writings of Thomas Jefferson, Memorial Edition*, Vol. 10 (Lipscomb and Bergh, eds. 1904), p. 236). Serbia's argument is based on the fact that other provisions in the Rambouillet Accords refer to the "population of Kosovo" and thus the different phrase "people" must refer to something other than the "population of Kosovo." Beyond the fact that the context in which Rambouillet refers to the "Kosovo population" is so different (*e.g.*, references in various provisions to certain percentages of the "population of Kosovo," in which substitution of the word "people" would not be normal English phrasing) the inference Serbia seeks to draw simply does not follow, and the people of Kosovo are indeed the very people that the Rambouillet Accords are about. *See* Rambouillet Accords, S/1999/648, 18 February 1999 [Dossier No. 30].

[90] Serbia Statement, para. 24.

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

[92] *Ibid.*

[93] Different authorities formulate the scope of the exception—that is, the circumstances in which the presumption will not apply—in different ways. For example, in the context of treaty obligations, *see* D.P. O'Connell, "Reflections on the State Succession Convention," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 39 (1979), p. 725, at p. 737 (treaty obligations inapplicable if "the situation is so changed that the purpose behind the treaty could not be realised, or would be distorted"); Rein Müllerson, "New Developments in the Former USSR and Yugoslavia," *Va. J. Int'l L.*, Vol. 33 (1993), p. 299, at p. 317 ("most treaties cannot be automatically applied unchanged" when state succession occurs, "because of changed circumstances"); Vienna Convention on Succession of States in Respect of Treaties (1978), art. 35(c), available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf (treaty inapplicable if its application to successor state would "be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation").

With respect to Resolution 1244, even if preambular paragraph 10 could be interpreted as requiring Kosovo to remain part of the FRY indefinitely, the situation would have been fundamentally changed when Serbia and Montenegro became separate states. A reading of preambular paragraph 10 that simply substituted Serbia for the FRY would disregard the underlying logic of the situation and the historical context in which Resolution 1244 was adopted.

Resolution 1244 embodied a deliberate rejection of any principle that Kosovo need remain part of "Serbia." As discussed in more detail in the U.S. Statement,[94] preambular paragraph 10 was deliberately formulated to avoid an implication that Kosovo would need to remain within "Serbia," so as not to foreclose what were referred to as "third republic" or "inside FRY, outside Serbia" solutions. The possibility of such solutions was discussed extensively at the time as perhaps the only plausible way to maintain the external borders of the FRY while simultaneously acknowledging the fact that it was becoming increasingly untenable for Kosovo to remain part of Serbia.[95]

To be sure, the FRY and Serbia vehemently objected to such proposals, including formal objections by the FRY at the United Nations.[96] FRY and Serbian leaders also objected in public comments, demanding, for example, deletion of "third republic" proposals as a condition for re-starting the negotiations that they had broken off after Rambouillet.[97] According to the FRY and Serbia negotiators, "making Kosovo-Metohija

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[94] U.S. Statement, pp. 74-78.

[95] *See, e.g.*, "Hungarian Envoy Suggests Yugoslavia Should Become a 'Loose Federation,'" *BBC Monitoring Europe – Political*, 10 May 1999 (quoting Hungarian Radio, Budapest, on 9 May 1999) (noting Hungary's interest in a third republic solution); "First International Protectorate, Then Independence for Kosovo," *Turkish Daily News*, 11 April 1999 (interview with Enver Hasani, a legal adviser to the Kosovo delegation at Rambouillet) ("[t]he idea [of the proposed Rambouillet accords] appears to be that Kosovo becomes a third republic within the federation"); Paul Williams, "Hour 2: Professor Paul Williams of American University, Legal Adviser to the Kosovo Delegation, Talks of the Referendum and the Possible Reactions in the Upcoming Three Years," *All Things Considered, National Public Radio*, 25 February 1999 (Kosovo Albanians "might find that their long-term interests lie in becoming a third republic within the federal republic of Yugoslavia"); "Foreign Ministry Spokesman Reiterates Russian Position on Kosovo," *BBC Monitoring Former Soviet Union – Political* , 6 February 1999 (quoting Ekho Moskovy radio report on interview with Vladimir Rakhmanin, director of the press and information directorate of the Russian Foreign Ministry) (describing that Russian desire to maintain external borders did not preclude third republic options); "Hungary ready to back military intervention in Balkans – Minister," *BBC Summary of World Broadcasts*, 26 September 1998 (quoting Hungarian TV2 Satellite Service, Budapest, in Hungarian, 24 September 1998) (quoting Albania's foreign minister arguing that "[t]he best solution now would be for Kosovo to be the third republic of Yugoslavia"); International Crisis Group, *The New Kosovo Protectorate*, ICG Balkans Report No. 69, 20 June 1999, p. 6, available at: http://www.crisisgroup.org/home/index.cfm?id=1594&l=1 (describing a third republic scenario as one of three possible solutions); "Outrage in Kosovo," *The Economist*, 23 January 1999, p. 16 (arguing that the best outcome for Kosovo would be to turn it into a third Yugoslav republic).

[96] *See* Security Council, 3868th Meeting, S/PV.3868, 31 March 1998, p. 18 [Dossier No. 8].

[97] *See, e.g.*, Statement of Deputy Prime Minister Drasković, *BBC Monitoring Europe – Political*, 27 March

a separate federal unit [was] the most perfidious fraud Serbia has ever been exposed to" and "'Serbia must decisively refuse' such proposals."[98]

Against this background, the language on territorial integrity of the "FRY" that was included in the resolution represented a clear rejection of the position of the FRY and Serbia. As described in the U.S. Statement,[99] FRY and Serbian negotiators raised their objections when Ahtisaari and Chernomyrdin presented the principles for ending the 1999 conflict and adopting Resolution 1244 in Belgrade in early June 1999, but any attempts to secure language to preclude "third republic" or "inside FRY, outside Serbia" solutions failed, understandably so given the fate that had befallen the people of Kosovo within Serbia. With the separation of Serbia and Montenegro, however, the possibility of Kosovo remaining within the external borders of a common state, but not within Serbia itself, became untenable. In the final analysis, while the United States has no quarrel with the general assertion that Serbia continues the international legal personality of the FRY, it simply does not follow that the meaning of preambular paragraph 10 could thereby be radically transformed to now require that Kosovo remain part of "Serbia."

Section II. Resolution 1244 Referred To "Autonomy" And "Self-Government" As Controlling Principles Only During The Interim Period

Serbian arguments that the references in Resolution 1244 to "autonomy" and "self-government" "exclude any form of independence, and even more so exclude a unilateral declaration of independence"[100] are contradicted by the wording and structure of the resolution itself. Just as was described in Section I, the relevant references in each case are to the situation that would apply in the interim period, not the ultimate political solution that might develop.[101]

1999 (quoting Tanjug News Agency, Belgrade, in English, 26 March 1999) (statement by FRY Deputy Prime Minister that talks can continue any time upon deletion of "the provisions granting to Kosovo-Metohija the status of a third republic or independent state").

[98] *See* Statement of Deputy Prime Minister Marković, head of the Serbian negotiating team, "Accepting US Plan for Kosovo Would be 'Political Suicide' for Milosevic," *BBC Summary of World Broadcasts*, 28 November 1998 (quoting Beta News Agency, Belgrade, in English, 26 November 1998).

[99] U.S. Statement, pp. 76-77.

[100] Serbia Statement, paras. 728, *et seq.*

[101] *See, e.g.*, Security Council resolution 1244 (1999), S/RES/1244, Annex 1 [Dossier No. 34] (referring to "substantial self-government" as an element to be provided for in the *interim* political framework agreement); *Ibid.*, Annex 2, para. 8 (same); *Ibid.* Annex 2, para. 5 (same with respect to self-government and autonomy); *Ibid.*, para. 11 (referring to "institutions for democratic and autonomous self-government" as "*provisional* institutions"); *Ibid.*, para. 10 (referring to "substantial autonomy" as something to be enjoyed by the people of Kosovo in an *interim* administration).

Section III. Nothing In Resolution 1244 Required That Kosovo's Future Status Be Determined Only By Agreement

As the United States explained in more detail in its Written Statement, Resolution 1244 contained no requirement for Serbia and Kosovo to agree to a future status. Serbia had fought hard for a provision guaranteeing it a right of veto in the negotiations on the agreements preceding Rambouillet and in Rambouillet, but failed, and no such provision was included in Resolution 1244.[102] Serbia's arguments that somehow the wording of particular parts of paragraph 11 implicitly provide such a right of veto are unavailing.

A. Resolution 1244 Nowhere Refers To An "Agreement" Regarding Kosovo's Future Status

Paragraph 11(e) of Resolution 1244 states that the responsibilities of the international civil presence would include "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords." Serbia argues that the use of the phrase "political process" means that the Council required an agreement between Serbia and Kosovo:

> The very term 'political process' implies that all parties concerned shall be involved and that they have to find a mutually agreeable solution through negotiation.[103]

While this was undoubtedly the outcome for which the Security Council (and the international community at large) hoped, the Council was also well aware of the fundamental differences of view between Kosovo and Serbia and of the failed efforts over the years to achieve such an agreement. It did not include such a requirement in Resolution 1244, and no explanation is offered, nor is one apparent, why the fact that the Council authorized the international civil presence to facilitate a "political process" would mean or even suggest a requirement that any solution be mutually agreed.

Serbia next argues that the use of the word *settlement* in paragraph 11 of Resolution 1244 is equivalent to the word *agreement*, contending that "[i]t is obvious that 'settlement' cannot but mean agreement, not a unilateral measure taken by one of the parties" and that Resolution 1244 thus required "that a solution as to the final status of Kosovo must be reached by agreement between the parties."[104] But this argument is wrong for at least two reasons.

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[102] *See* U.S. Statement, pp. 65-68.

[103] Serbia Statement, para. 753.

[104] *Ibid.*, para. 754.

First, the word *agreement* was not the word used. This fact is all the more noteworthy in that other provisions in Resolution 1244 do indeed refer to *agreements,* including agreements by the FRY. Specifically, this is the case with respect to paragraph 4 of the resolution, referring to the possibility of a return of only an "agreed" number of Yugoslav and Serb personnel to Kosovo for certain specific purposes, thus reflecting that the Council was quite capable of speaking clearly about the need for agreement when that was its intent.

Second, the terms on which the United Nations conducted the future status negotiations did not assume such a right of a veto by Serbia at the conclusion of that process. Thus, the Guiding Principles adopted by the Contact Group when the future status negotiations were launched, and included when the Security Council welcomed the appointment of President Ahtisaari as Special Envoy in November 2005,[105] state specifically that "[o]nce the process has started, it cannot be blocked," and the Contact Group reaffirmed in the course of the future status process itself that negotiations "can not be allowed to be blocked."[106] Indeed, the Contact Group statements make clear that any settlement must "be acceptable to the people of Kosovo," but include no such statement with respect to Belgrade or the people of Serbia, specifically noting instead the fact that Belgrade's "disastrous policies of the past lie at the heart of the current problems."[107]

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[105] Letter dated 10 November 2005 from the President of the Security Council to the Secretary-General, S/2005/709, 10 November 2005 [Dossier No. 197].

[106] Contact Group Ministerial Statement, Vienna, 24 July 2006, available at: http://www.unosek.org/docref/ Statement of the Contact Group after first Pristina-Belgrade High-level meeting held in Vienna.pdf.

[107] Contact Group Statement on the Future of Kosovo, London, 31 January 2006, available at: http://www.unosek.org/docref/fevrier/STATEMENT%20BY%20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf. Serbia's reliance on statements in the Guiding Principles to the effect that the parties should refrain from unilateral steps misses the point that these were political statements intended as rules of conduct for the parties to follow in the future status negotiations themselves. The essential point was that both Serbia and Kosovo should not take steps during the process that would undermine whatever prospects the negotiations would have for success. The idea that this was intended as a rule granting or recognizing a veto for Serbia if the negotiations failed to produce an agreement is fundamentally inconsistent both with the terms of Resolution 1244 itself, and with the many other Contact Group statements, including those cited above, that affirmed that the process could not be blocked. Kosovo participated in that political process in good faith, and the declaration of independence was issued only after that political process had run its course. *See also* U.S. Statement, pp. 79-83. Serbia's reliance on the Contact Group statement about unilateral acts is particularly unconvincing in view of Serbia's own actions at the height of the political process. Mere weeks after the Contact Group's September 2006 statement, Serbia adopted a new constitution which—unilaterally—pronounced Kosovo as "an integral part of the territory of Serbia" and sought to preclude even *discussion* of independence. Contemporary accounts make clear that a hastily-conducted referendum to approve the constitution was both intended and in fact seen as turning entirely on this provision of the new constitution. "Kosovo referendum results strengthens [*sic*] Serbia: PM," *Agence France Presse*, 29 October 2006, available at http://www.kosovo.net/news/archive/2006/ October_31/1.html. *See also* U.S. Statement, n. 109 and associated text; Report of the Secretary-General on the United Nations Interim Administration

Time and again the Contact Group encouraged Kosovo and Serbia to reach a mutually agreed solution as the most desirable outcome, and this might well have been crystallized in the form of a bilateral agreement of some sort. But consistently the Group's statements also reflected that Belgrade's agreement might not be possible, and each time it refrained from indicating that any such agreement was required. For example, the Contact Group's statement of 20 September 2006 described the situation in this way:

> Regarding Kosovo's political status, Ministers recognize that distance remains between the positions of Belgrade and Pristina, as was made clear at the high-level meeting in Vienna on 24 July. Ministers support the Special Envoy's efforts to work with the parties in cooperation with the Contact Group to arrive at a realistic outcome that enhances regional stability, is acceptable to the people of Kosovo and preserves Kosovo's multiethnic character. *Striving for a negotiated settlement should not obscure the fact that neither party can unilaterally block the status process from advancing.*[108]

B. Resolution 1244 Does Not Otherwise Require An Agreement

Serbia's argument that an agreement was required on Kosovo's future status would be wrong even if paragraph 11 in fact had authorized the international civil presence to facilitate a political process designed to determine Kosovo's future status solely pursuant to *an agreement between Kosovo and Serbia.* Authorization for the international civil presence to facilitate a process designed to reach such an agreement would not have meant that Kosovo and Serbia would have been required to reach such an agreement, or that the situation would have remained without a solution indefinitely in the absence of one.

1. The Declaration of Independence Did Not Prevent The International Civil Presence From Carrying Out Its Mandate

Article 25 of the Charter of the United Nations is the basic source of the requirement under international law to abide by decisions of the Security Council. It provides that:

Mission in Kosovo, 20 November 2006, S/2006/906, para. 6 [Dossier No. 78].

[108] Contact Group Ministerial Statement, New York, 20 September 2006, available at: http://www.unosek.org/docref/2006-09-20_-_CG%20_Ministerial Statement New%20 York.pdf (emphasis added).

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.[109]

Though not free from doubt, for present purposes it can be assumed *arguendo* that the same obligation under Article 25 applies to non-UN member states, and to entities that are not states (which is how Serbia would characterize Kosovo both now and at the time independence was declared).[110] In that case, it might be claimed that Kosovo's issuance of its declaration of independence violated its international legal obligations if it prevented the international civil presence from facilitating "a political process designed to determine Kosovo's future status" under paragraph 11(e) or overseeing the transfer of authority to institutions established under a political settlement under paragraph 11(f).

But by the time Kosovo declared independence in February 2008, the international civil presence had already completed its "facilitat[ion] [of] a political process," as contemplated by Resolution 1244. The extensive efforts of Special Envoy Ahtisaari, followed by the last-ditch effort of the "Troika" to determine if an agreement could be reached, made clear that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted"[111] and that "[n]o amount of additional talks, whatever the format, will overcome this impasse."[112] In short, there was no longer an ongoing political process to determine Kosovo's future status. Kosovo had accepted the Comprehensive Proposal put forward by Ahtisaari and supported by the Secretary-General—a posture that was supportive of the Secretary-General's efforts to

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[109] *See also* Article 48 of the Charter: "The action required to carry out the decision of the Security Council for the maintenance of international peace and security shall be taken by *all the Members of the United Nations or by some of them*, as the Security Council may determine" (emphasis added).

[110] The proposition accepted *arguendo* above—that the requirement to accept and carry out the decisions of the Security Council applies equally to non-UN member states or to non-state entities—is not obvious. Indeed, there have been widely differing views about whether Security Council decisions create legal obligations for states that are not UN members in connection with Article 2(6) of the Charter. *See, e.g.*, *The Charter of the United Nations: A Commentary*, Vol. I, p. 141 (Bruno Simma, *et al.*, eds. 2002) ("It is a controversial issue whether Art. 2(6), which refers to states which are not members of the UN, is capable of having any legal effect on those states"). Moreover, even if Article 2(6) is read as reflecting that non-member states have international legal obligations to carry out the decisions of the Council, questions would remain whether such decisions create international legal obligations for non-state actors, at least in the absence of some kind of specific indication from the Security Council that it intends such a result. If the obligation to "accept and carry out" the decisions of the Security Council does not apply to non-state actors, then it would be difficult to see how Kosovo's declaring independence could be seen by Serbia—whose fundamental position is that Kosovo was and today remains a non-state actor—as having violated international law, even if its actions were inconsistent with Resolution 1244.

[111] Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007, para. 3 [Dossier No. 203].

[112] *Ibid.*

implement Resolution 1244. Nothing in Resolution 1244 required the international civil presence to initiate yet a further status process—paragraph 11(e) of the resolution speaks about the international civil presence facilitating "a" political process—and the absence of any prospect of bridging the divide between Serbia and Kosovo would have made further such negotiations pointless. Indeed, nine of the members of the Security Council—including three of the five permanent members—have already recognized Kosovo, and there is no prospect of the Security Council authorizing a new political process.

The contrast between the situation in February 2008 and earlier periods—notably in 2005, when the SRSG had indicated it would have been prepared to nullify a declaration of independence by Kosovo—is thus striking. A declaration of independence by a group might amount to a violation of the resolution only if it prevented the international civil presence from facilitating "a political process designed to determine Kosovo's future status." So long as the United Nations was planning or actively engaged in efforts to foster an agreement between Kosovo and Serbia, a declaration of independence might be seen as preventing that process from proceeding, and in this manner be seen as inconsistent with the requirement to accept and carry out the decisions of the Security Council. By February 2008, however, the United Nations was no longer engaged in such efforts. That is why it was appropriate for the Secretary-General and the SRSG to reject Serbian demands to annul Kosovo's declaration of independence in February 2008, even though they had clearly indicated they would have annulled such a declaration in the period before the status process had run its course.

2. Kosovo Did Not Negotiate in Bad Faith

Serbia argues that Kosovo's position during the negotiations was always to seek independence, unlike what it contrasts as the good faith that Serbia displayed throughout the process.[113] It characterizes Kosovo's position of advocating for independence as being "in sharp contrast to" the fact that Resolution 1244 requires that "the sovereignty and territorial integrity of Serbia should be safeguarded."[114]

In fact, the record shows that it was the FRY and Serbia whose conduct was subject to criticism at the time, as reflected in statements of the Contact Group about the posture it assumed. Thus, it was Belgrade that the Contact Group said "needs to demonstrate much greater flexibility in the talks than it has done so far;"[115] Belgrade that the Contact Group statements affirm "needs to begin considering reasonable and

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[113] Serbia Statement, para. 917 ("Serbia has always negotiated in good faith with the representatives of Kosovo Albanians and international mediators in order to find a mutually acceptable solution").

[114] *Ibid.*, para. 919.

[115] Contact Group Ministerial Statement, Vienna, 24 July 2006, available at: http://www.unosek.org/docref/Statement of the Contact Group after first Pristina-Belgrade High-level meeting held in Vienna.pdf.

workable compromises;"[116] Belgrade that was told "to bear in mind that the settlement needs, *inter alia*, to be acceptable to the people of Kosovo;" [117] and Belgrade that was admonished that the "disastrous policies of the past lie at the heart of the current problems."[118]

The idea that it was in some manner improper or in "bad faith" for Kosovo to seek independence is, in any event, baseless. No other participant in the process suggested that Kosovo's position in the negotiations constituted bad faith. Indeed, in November 2005, when the Kosovo Assembly adopted a resolution providing a mandate for Kosovo's representatives in the future status negotiations to seek independence, the SRSG said specifically that in providing such a mandate "the Assembly has appropriately assumed its responsibility."[119] If anything, the fact that Serbia views Kosovo's position in the negotiations as bad faith is further testament to the futility of attempting further negotiations.

Section IV. Arguments Relating To The Constitutional Framework And Other UNMIK Regulations Do Not Show Kosovo's Declaration To Be In Conflict With International Law

Serbia argues that the declaration of independence was not in accordance with international law because it was an *ultra vires* act by the Kosovo Assembly and inconsistent with the role of UNMIK and its regulations. These arguments also lack merit. The declaration of independence itself makes clear that it was intended as an expression of the will of the people, not the exercise of a formal grant of authority from UNMIK. Moreover, UNMIK regulations had the character of domestic law, such that failure to comply with them would not in any event have constituted a violation of international law.

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[116] Contact Group Ministerial Statement, Vienna, 24 July 2006, available at: http://www.unosek.org/docref/Statement of the Contact Group after first Pristina-Belgrade High-level meeting held in Vienna.pdf.

[117] Contact Group Statement on the Future of Kosovo, London, 31 January 2006, available at: http://www.unosek.org/docref/fevrier/STATEMENT%20BY%20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf.

[118] *Ibid.*

[119] SRSG Statement on the Resolution Passed by the Kosovo Assembly, UNMIK/PR/1445, 17 November 2005 [Dossier No. 199].

A. KOSOVO'S ASSEMBLY DID NOT EXCEED ITS CONSTITUTIONAL AUTHORITY IN VIOLATION OF INTERNATIONAL LAW

Serbia argues that:

> the Assembly acted *ultra vires* under the Constitutional Framework when it declared that Kosovo is a sovereign and independent State. The Constitutional Framework does not provide the Assembly with any authority to deal with matters relating to the international legal status of Kosovo, let alone to declare its independence.[120]

The heart of these arguments is not that the declaration of independence is impermissible as such, but rather that it is impermissible because it was adopted by the Kosovo Assembly.[121] However, these contentions fail to take account of the extensive documentation put forward by the authors of the declaration that it was not made by the Kosovo Assembly acting in its capacity as one of the Provisional Institutions of Self-Government but, rather, by the representatives of the people of Kosovo.[122] In the view of the United States, the central point is that the declaration was an expression of the "will of the people," not the exercise of a formal grant of authority from UNMIK.[123] Moreover, as the United States further pointed out in its Written Statement, if it were seriously contended that the declaration of independence was unlawful simply because it was issued by the "PISG" rather than by a body unrelated to the institutions of self-government that the international civil presence had helped to develop, that technical flaw could easily have been remedied by convening a new constituent body for the purpose of re-declaring independence.[124] The fact that the declaration of independence in fact represents the will of the great majority of the people of Kosovo is beyond peradventure.[125]

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[120] Serbia Statement, para. 886.

[121] Serbia appears to be making essentially the same arguments with respect to the UNMIK-FRY Common Document, paragraph 5 of which reaffirmed "that the position on Kosovo's future status remains as stated in UNSCR 1244, and that this cannot be changed by any action taken by the Provisional Institutions of Self-Government." *Ibid.*, para. 519. It was of course clear at that time—in the very early stages of the process, and well before the future status had even commenced—that the SRSG would not accept a declaration of independence. In any case, it is worth noting that the Common Document simply says that the "position on Kosovo's status remains as stated in UNSCR 1244" (without elaborating what that status is) and that "this" (*i.e.*, the fact that the position on Kosovo's status remains as stated in UNSCR 1244, as opposed to the particular status that Kosovo at that time had) cannot be changed by the PISG.

[122] Kosovo Contribution, Chapter VI.

[123] U.S. Statement, p. 57, n. 231.

[124] *Ibid.*

[125] Nowhere in its Written Statement does Serbia suggest that the declaration does not reflect the will of the people of Kosovo and, indeed, it appears to concede the point. *See, e.g.*, Serbia Statement, para. 339 (it was clear that a referendum in Kosovo "could lead to only one result, namely the secession of Kosovo from

B. THE DECLARATION OF INDEPENDENCE IS NOT INCONSISTENT WITH UNMIK CONTINUING TO HAVE RESPONSIBILITIES UNDER RESOLUTION 1244

Serbia appears to claim that, whether or not the declaration of independence is in accordance with Resolution 1244, it nevertheless violated international law because it was inconsistent with the regulations that UNMIK had put in place or because, as Serbia puts it, the declaration of independence "challenged and contravened the supreme administrative authority of UNMIK."[126]

But, in fact, UNMIK has continued to operate in Kosovo after adoption of the declaration of independence, and continues to operate there today.[127] Moreover, while it is quite clear that Kosovo was declaring independence from Serbia, the declaration of independence did not repudiate either UNMIK or Resolution 1244, and in fact the declaration contains specific language committing Kosovo to act consistent with the resolution.[128] There is no incompatibility between Kosovo's independence from Serbia and UNMIK's continuing to have responsibilities under Resolution 1244. The Security Council clearly may authorize subordinate bodies such as UNMIK to function in fully independent states like Kosovo (as, indeed, it has functioned there for a decade in the context of Serbian claims to sovereignty). The refusal of the SRSG —the head of UNMIK—and the Secretary-General to annul the declaration of independence is particularly significant in this context, insofar as it is the supposed challenge to their authority that is claimed to have invalidated the declaration of independence.

C. THE CONSTITUTIONAL FRAMEWORK AND OTHER UNMIK REGULATIONS OPERATED AS DOMESTIC, NOT INTERNATIONAL, LAW

The Constitutional Framework, like the other regulations that UNMIK adopted, was designed to operate as domestic law, not international law. That fact is critical for purposes of this case because the question referred to the Court is whether the declaration of independence "is in accordance with *international law*."

The nature of UNMIK's regulations is reflected in the practice and the record. Thus, the first regulation adopted by UNMIK in 1999 provided:

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the FRY and Serbia").

[126] Serbia Statement, para. 895.

[127] *See, e.g.,* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 10 June 2009, para. 40 ("In line with the parameters contained in my reports of 12 June and 24 November 2008 (S/2008/354 and S/2008/692), and pursuant to the Security Council's presidential statement of 26 November 2008, UNMIK has moved forward with its reconfiguration within the status-neutral framework of resolution 1244 (1999).").

[128] Declaration of Independence, paras. 5, 7 [Dossier No. 192].

> All *legislative and executive authority* with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.[129]

The "legislative and executive authority" to which this refers is clearly of domestic authority, of an inherently domestic nature, as is the administration of the judiciary, which is the one specific element that the regulation mentions.

The Secretary-General's first report on UNMIK described that he had decided that the authority vested in UNMIK would be exercised by a Special Representative ("SRSG"), and that:

> In doing so, he may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration.[130]

The reference to "existing laws" that the Secretary-General authorized the SRSG to change is clearly a reference to the law otherwise in place in Kosovo at that time, which was Yugoslavia's domestic law, and the law into which it would be changed would similarly operate as domestic law. The Secretary-General's report specified that UNMIK would utilize this authority to "initiate a process to amend current legislation in Kosovo" and that this would include "criminal laws, the law on internal affairs and the law on public peace and order"—once again making clear the domestic law nature of the regulations that UNMIK would promulgate. UNMIK regulations thereafter operated on the same level as and alongside pre-existing domestic law so as, together with that pre-existing law, to form the domestic legal regime applicable in Kosovo. Thus, UNMIK Regulation 1999/24 specifically provided that:

> The law applicable in Kosovo shall be:
>
> > (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments thereunder; and
> >
> > (b) The law in force in Kosovo on 22 March 1989.[131]

The FRY itself viewed the decision to vest legislative and executive authority in

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[129] Regulation No. 1999/1 On the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1, 25 July 1999, sec 1.1 (emphasis added) [Dossier No. 138].

[130] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, para. 39 [Dossier No. 37].

[131] Regulation No. 1999/24 On the Applicable Law in Kosovo, UNMIK/REG/1999/24, 12 December 1999, section 3 [Dossier No. 146] (This regulation replaced Regulation No. 1999/1, so as to change the relevant date from 24 March 1999 to 22 March 1989).

UNMIK as a decision—in its view in contravention of Resolution 1244—to vest domestic authority in UNMIK. Thus, the FRY complained that the decision to vest legislative and executive authority:

> takes over from the legitimate governmental bodies and authorities in the Federal Republic of Yugoslavia their inviolable sovereignty over the executive, legislative and judicial authority in Kosovo and Metohija.[132]

Put plainly, the FRY objected to the vesting of legislative and executive authority in UNMIK precisely because it was usurping the *domestic* authority that—in its view—the FRY should have continued to enjoy.

As has been noted by others,[133] the Constitutional Framework was itself promulgated as a regulation, given a number (2001/9) like other regulations, and put into force by signature of the SRSG precisely because it was being treated by UNMIK in the same manner as other regulations.[134] The very name "Constitutional Framework" echoes the understanding that it would operate in the way that a Constitution would normally operate under domestic law. UNMIK regulations governed activities in every walk of ordinary life, including for example banking ("No person shall engage in the business of a bank or financial institution without an effective license"),[135] registration and operation of non-governmental organizations ("[a]n NGO shall not distribute any net earnings or profits."),[136] collection of value added tax (a person subject to the tax "shall apply to be registered for value added tax purposes with the Tax Administration within 30 days of the entry into force of the present regulation"),[137] and motor vehicle registration ("only vehicles with valid registration and license plates will be permitted to operate in

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[132] Letter dated 16 July 1999 from the President of the Federal Government of the Federal Republic of Yugoslavia to the Secretary-General, Annex to Letter dated 19 July 1999 from the Chargé d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations to the Secretary-General, S/1999/800, 19 July 1999, p. 3.

[133] *See, e.g.*, Kosovo Contribution, para. 4.33.

[134] *See* Briefing by SRSG Hans Haekkerup, 3 May 2001, available at: http://www.unmikonline.org/press/2001/trans/tr030501a.html (explaining that Kosovo representatives would not sign the Constitutional Framework because it had the same status as any other UNMIK Regulation: "The only one who will sign this document is me. The plan has never been anything else. This is a regulation…").

[135] UNMIK Regulation 1999/21, On Bank Licensing, Supervision and Regulation , UNMIK/REG/1999/21, 15 November 1999, section 3.1, available at: http://www.unmikonline.org/regulations/unmikgazette/02english /E1999regs/RE1999_21.pdf.

[136] UNMIK Regulation 1999/22, On the Registration and Operation of Non-Governmental Organizations in Kosovo, UNMIK/REG/1999/22, 15 November 1999, section 1.3, http://cso-ks.com/repository/docs/UNMIK_reg_99_22_eng.pdf.

[137] UNMIK Regulation 2001/11, On Value Added Tax in Kosovo, UNMIK/REG/2001/11, 31 May 2001, section 3.1, available at: http://www.unmikonline.org/regulations/2001/reg11-01.pdf.

Kosovo").[138] Clearly a person who engaged in banking without a license, or an NGO that distributed earnings, or a company that failed to register for the value added tax, or a motorist who operated a vehicle with expired license plates—all might be subject to penalty under domestic law because they had violated provisions in UNMIK regulations. But because UNMIK regulations were designed to operate as domestic law, none of them would be considered to have acted in a manner that is not "in accordance with international law."

Thus, even if one accepted *arguendo* Serbia's proposition that Kosovo's declaration of independence was inconsistent with the Constitutional Framework or other UNMIK regulations, it would not follow that those actions were not "in accordance with international law."

Section V. Efforts To Secure A Security Council Resolution In 2007 Do Not Prove That Kosovo's Declaration Violated International Law

There is no question that it would have been preferable if a new Security Council resolution on Kosovo could have been adopted. For its part, Serbia argues that the fact that various states pursued such a resolution "confirms" that independence was impermissible without a new Security Council resolution.[139]

Serbia's argument does not withstand scrutiny. Nothing in Resolution 1244 requires the approval of the Security Council for Kosovo's independence or any other future status for Kosovo. As described above, the resolution simply authorized the international civil presence to facilitate a political process designed to determine Kosovo's future status. The central legal purpose of a new resolution would have been to end the mandate of the international civil presence established in 1999 and to have UNMIK complete its operations in Kosovo. Indeed, the end of the mandate was clearly contemplated under the Ahtisaari Proposal,[140] but under paragraph 19 of Resolution 1244 could not occur until the Security Council so decided. A new resolution would have provided for the termination of UNMIK's mandate, and was also seen as the best way to provide clear mandates, under Chapter VII, for the International Civilian Representative and EU missions envisioned in the Ahtisaari Proposal.

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[138] UNMIK Regulation 1999/15, On Temporary Registration of Privately Operated Motor Vehicles in Kosovo, UNMIK/REG/1999/15, 21 October 1999, section 3, available at: http://www.unmikonline.org/regulations/1999/re99_15.pdf.

[139] Serbia Statement, para. 820.

[140] *See, e.g.,* Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, art. 15.1(g) [Dossier No. 204].

At no time, however, would the draft resolution have decided that Kosovo was independent. Thus, the draft resolution contained no provision that would have purported to make Kosovo an independent state, no provision calling upon states as a political matter to recognize Kosovo or to treat it as a state, and not even a provision endorsing the recommendation for independence made by Ahtisaari and supported by the Secretary-General. The resolution would have allowed the regime for international supervision of Kosovo's independence to proceed in the manner provided for in the Ahtisaari Proposal,[141] but it was not a prerequisite for independence itself. It is undoubtedly true that a new resolution could also have had symbolic and political importance in helping to consolidate political support for an independent Kosovo, but this was a political rather than a legal consideration.

In the absence of a resolution, adjustments in the regime for international supervision were in fact necessary after Kosovo's leaders declared independence, including an appropriate role for UNMIK under Resolution 1244. As the United States indicated in its Written Statement, as a practical matter coordination on the ground has proven successful in ensuring appropriate adjustments.[142] Of particular note, the ability to develop satisfactory alternative arrangements has been due in significant part to the efforts of the Secretary-General, including his decision following the declaration of independence to reconfigure UNMIK in order to reduce its operations and to allow for the European Union to take on an increasing role in the rule of law sector.[143] For its part, Kosovo has unequivocally accepted the obligations for it set out in the Ahtisaari Proposal. The fact that the regime for supervising Kosovo's independence has been successfully modified without adoption of a new resolution or repeal of Resolution 1244 only underscores that Kosovo's declaration of independence did not contravene Resolution 1244, and thus is fully in accordance with international law.

Section VI. The Court Should Respect The Decision Of The Responsible United Nations Officials Not To Declare The Declaration Of Independence Unlawful

As all parties that addressed the point in their April submissions agreed, neither the Secretary-General nor the SRSG took steps to challenge Kosovo's declaration of

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[141] The draft resolution would have contained two sets of operative decisions or authorizations regarding the mechanisms for supervising Kosovo's independence. First, paragraph 5 of the draft resolution would have set forth a Security Council decision under which the mandate of UNMIK would have been terminated. Second, paragraphs 6 and 7 would have provided mandates for the international civil presences described in the Ahtisaari Plan. *See* Serbia Statement, Annex 36. In the absence of the adoption of the resolution, arrangements for these presences have been undertaken pursuant to a combination of the continuing authority of Resolution 1244 and the invitation of the Government of Kosovo.

[142] U.S. Statement, p. 30, n. 116.

[143] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/458, 15 July 2008, para. 3 [Dossier No. 89].

independence when it was adopted. The Secretary-General and the SRSG declined to take such action notwithstanding specific demands to do so from the President of Serbia, and notwithstanding clear authority to declare invalid any action by the parties if doing so was necessary to implement Resolution 1244 (authority they had exercised many times in the past).[144] The situation on the ground has evolved considerably since the declaration, and the Secretary-General has worked diligently to take appropriate action in light of these changes, including by his decision to adjust operational aspects of the international civil presence and reconfigure UNMIK for the European Union to take on an increasing role in the rule of law sector through its EU Rule of Law Mission (EULEX). All of this has been undertaken in order to achieve the over-arching mandate of UNMIK, described in the Secretary-General's April 2009 report, "to help the Security Council achieve an overall objective, namely, to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance regional stability and prosperity in the western Balkans."[145]

There is no question that a resolution mutually acceptable to Kosovo and Serbia would have been desirable. But this goal proved impossible, and the Secretary-General, the SRSG and the other United Nations officials to whom the implementation of resolution 1244 was entrusted had to address the situation as it actually developed. As events unfolded these officials were charged with making the necessary decisions on how best to proceed in pursuit of the maintenance of international peace and security within the framework of resolution 1244. Their decisions—including notably the decision not to strike down Kosovo's declaration of independence—were taken in the context of the declaration's specific reaffirmation of Kosovo's acceptance of Resolution 1244 and the international presences established by it, and Kosovo's pledge to act consistently with all requirements of international law and all resolutions of the Security Council.[146] There could be no doubt of what was at stake in making these decisions, given the Balkans legacy as the site of Europe's most devastating wars and atrocities since the Second World War.

In previous cases, the Court has given careful consideration to such decisions taken by United Nations organs or officials in the exercise of their authority under the Charter. Such deference is not an abdication of the Court's role, but a means of ensuring a proper relationship between the Court and other components of the United Nations system. Here, those United Nations officials called upon each day to deal with a volatile and evolving situation determined not to challenge Kosovo's declaration of independence. This, in turn, has led to an increasingly stable situation in which both

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[144] *See* U.S. Statement, pp. 85-88.

[145] Report of the Secretary-General (Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2009 to 30 June 2010), A/63/803, 2 April 2009, para 2.

[146] Declaration of Independence, paras. 5, 7 [Dossier No. 192].

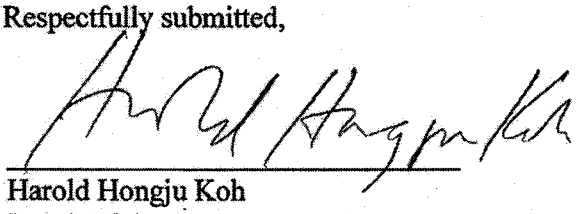
Kosovo and Serbia can focus their attention on pursuing a common future in the European community. It is the hope of the United States that the Court can contribute to these developments by either exercising its authority to decline to answer the question referred or, in accordance with well-established legal principles, confirming that the declaration is in accordance with international law.

CHAPTER VI

CONCLUSION

For the foregoing reasons, the United States respectfully submits that, if the Court chooses to answer the question referred by the General Assembly, it should conclude that Kosovo's declaration of independence is in accordance with international law.

Respectfully submitted,



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Washington, D.C.
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