INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT

SUBMITTED BY
THE REPUBLIC OF CYPRUS

17 APRIL 2009

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

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

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

Conclusion on 'rights' to assert Statehood

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

F. The unilateral declaration has not created a State

Introduction

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

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

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

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

---

independence sovereign."

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

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

[175] Paras. 82 to 90 above.

[176] Paras. 91 to 105 above.

[177] Paras. 106 to 113 above.

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

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

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

'The criteria of Statehood'

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

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

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

[178] Paras. 114 to 158 above.
[179] Merely transitory possession of (to anticipate the factual criteria of Statehood) a permanent population, a defined territory, and an effective and independent government would not be sufficient: insurgents may possess those attributes even while there is an army in the field attempting to restore the control of the established government over the entire territory of the State which they are attempting to seize or from which they are attempting to secede. In order to be a State it is necessary that the entity appear likely to be able to maintain its possession of the requisite factual characteristics.
[180] [1998] 2 S.C.R. 217.

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

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

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

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

The Basic Factual Elements of Statehood

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

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

---

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

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

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

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

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

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

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

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

---

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

The criteria of Statehood: Population and Territory

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

The criteria of Statehood: Effective Government

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

'The criterion of legality'

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

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

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

---

[200] Manchukuo is a case in point.

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

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

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

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

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

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

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

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

---

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

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

[205] Paras. 106 to 113 above.

[206] Paras. 106 to 113 above.

law to create it.

Conclusion on Kosovo and the legal criteria of Statehood

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

VII Conclusion

193. The Republic of Cyprus accordingly submits that:

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

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

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

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

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

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

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

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

Serbian population taken as a whole;

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

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

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

Petros Clerides

Attorney-General of the Republic of Cyprus

Agent of the Government of the Republic of Cyprus