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 ADVISORY OPINION)

ORAL STATEMENT OF FINLAND

The PRESIDENT: Thank you very much, Your Excellency Mr. Kirill Gevorgian. I shall now give the floor to Ms Päivi Kaukoranta to make the oral statement on behalf of Finland.

Ms KAUKORANTA:

1. Mr. President, Members of the Court, on behalf of Finland I am honoured to take part in these proceedings. We are convinced that the advisory opinion will contribute to the stability and security on the Balkans and that the future of both States — Serbia and Kosovo — will be based on friendly relations and integration in the European Union. Let me say a few introductory words. The position of Finland in this case has been set out in our Written Statement of 16 April 2009. The legal status of Kosovo's Declaration of Independence of 17 February 2008 should be determined by situating it in the long process that began with the unilateral changes in Kosovo's

constitutional status and the violent break-up of the Socialist Federal Republic of Yugoslavia. The Declaration, for its part, was not regulated through any detailed rules of international law. It was a political act with a certain history. However, as the Arbitration Commission on the Former Yugoslavia has stated, the emergence of statehood is "a question of fact"[108]. Once the negotiations on Kosovo's future had ended in a stalemate and the Provisional Institutions of Self-Government of Kosovo had transformed themselves into representatives of the people of the province, the law must take cognizance of the situation. It must, I suggest, recognize that history as leading up to the creation of a new State.

2. Mr. President, it is impossible to read the facts accumulating at least since the 1989 revocation of Kosovo's autonomy and the 1991 unofficial referendum in which the Kosovo Albanians voted overwhelmingly for independence and leading up to the ethnic cleansing of Kosovo Albanians in 1999 as anything else than an indication of the total inability or unwillingness of the Yugoslav Government to create the kind of conditions of internal self-determination of Kosovo Albanians to which international law entitles them. Of course, as many have reminded the Court, the law attaches great importance to the principle of territorial integrity of States. But that principle is not determining in this case, as my colleague Professor Koskenniemi will argue in his presentation.

3. In the *Frontier Dispute* case in 1986 this Court observed in an African context that the principle of *uti possidetis* was based on the need of avoiding "fratricidal struggles" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 565, para. 20). In the territory of the former Yugoslavia those struggles had *already* been under way since 1991-1992, spreading to Kosovo in late 1998 and early 1999. In the case of *Prosecutor* v. *Milutinović*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia determined that the crimes that had been committed there included "hundreds of murders, several sexual assaults, and the forcible transfer and deportation of hundreds of thousands of people"[109]. In Kosovo, the territorial order had broken down, and it had done so owing to actions taken or supported by the

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[108]Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI *ILM* (1992), p. 1495.

[109]International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Milutinović et al*, Judgement of 26 Feb. 2009, para. 1172, Vol. 3 of 4.

institutions of the Federal Republic of Yugoslavia and Serbia. In these circumstances, it is necessary to create conditions in which the communities of Kosovo can finally live in peace and justice. The years of the wars in Yugoslavia were also a period of the fall of the Berlin wall, the emergence of a new consensus in Europe and the world on the need to respect human rights and fundamental freedoms. Against this background, the facts that culminated in the Declaration of Independence of 17 February can only be read in one way: as the emergence of the State of Kosovo.

4. Our statement is in two parts. I will first say a few words about how international law lacks any mechanical rule on the attainment of statehood and how, instead, it takes account of the political facts leading up to the Declaration of Independence. I will show how this is supported by the *locus classicus* on the law on self-determination, a case of great importance to my country, the *Aaland Islands* case. My colleague Professor Koskenniemi will thereafter apply the law to the Kosovo situation, as it appears under the modern law of self-determination.

I. THERE IS NO MECHANICALLY APPLICABLE RULE ON THE ATTAINMENT OF STATEHOOD

5. Mr. President, the opponents of the lawfulness of the Declaration of Independence attack the view that the process leading to the independence of Kosovo is *sui generis* and must be assessed and adjudged as such. They say that international law must be applied consistently and globally and that to direct attention to what is special in the Kosovo situation is appeal to an exception to move from law to politics, arbitrary and conducive to risks to peace and stability.

6. With respect, this position, superficially appealing in its apparent respect for legality, is altogether beside the point and in fact relies on what it seems to deny. The argument about the special nature of Kosovo's process to independence does not at all deny the need of consistency or stability but is based on those concerns. A lasting outcome must take full account of the history of the Balkan populations, including their relations in the recent years. Serbia and its supporters have been trying to avoid the examination of this history by giving the impression that an absolute and inflexible rule — the rule on territorial integrity — decides the matter mechanically, as a kind of trump card. But this is wrong. We agree with Serbia that the matter must be resolved by reference to legal rules and principles. The Montevideo criteria of statehood, as well as the principles of

territorial integrity and self-determination are, however, of a general character. They cannot be mechanically applied but must be weighed against each other for their relevance to the facts of this case. Serbia, too, stresses that the matter will require "an examination that entails both factual and legal elements"[110]. It could hardly be otherwise. And a balanced assessment of those facts accepts the Declaration of Independence and dismisses the alternative possibility of return to the status quo.

7. It has become one of the well-entrenched principles of twentieth century international and public law that statehood emerges from fact. Accordingly, the effects of recognition, as affirmed by the Arbitration Commission of the Conference on Yugoslavia — so-called Badinter Commission — are not constitutive but "purely declaratory"[111]. There is no difference between the mother State and others here. Statehood is not a gift that is mercifully given by others; it emerges from the new entity itself, its will and power to exist as a State. In the words of the great French public lawyer Carré de Malberg:

> "la formation initiale de l'Etat, comme aussi sa première organisation, ne peuvent être considérées que comme un pur fait, qui n'est susceptible d'être classé dans aucune catégorie juridique, car ce fait n'est point gouverné par des principes de droit"[112].

To think otherwise would be to subsume the birth of States to the discretion of other States. But which State accepts that its statehood is a grant by others, given in reward for compliance with some rule? No State, I suggest. For every State, its statehood is *sui generis,* and dependent on its own history and power, not on the discretion of others, or the way geography may have situated it in one place rather than another. As Judge Dillard pointed out in the *Western Sahara* case, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* separate opinion of Judge Dillard, p. 122).

8. Mr. President, there are some facts that can be assessed by mechanical application of rules and other cases where many rules seem prima facie applicable and require careful attention to the facts of the situation. Or in other words, there is a difference between distributing parking tickets and legal assessment of a declaration of independence. In the former case, there is no need to

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[110]Written Comments of the Government of the Republic of Serbia, para. 44.

[111]Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI *ILM* (1992), p. 1495.

[112]Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat spécialement d'après des données fournies par le droit constitutionnel français* (2 vols., Paris, Sirey, 1920-1922), II, 490.

examine the particularities. The type of car, or where it came from, are facts — but legally irrelevant. The rule of "no parking" applies mechanically because what is being regulated is a matter of routine: everyday cases that repeat themselves in the millions. Independence is not like that. Here there is no routine — a recent history of the declarations of independence lists only "more than one hundred cases", each one distinguished historically, politically and factually from the others[113]. And here the differences are not irrelevant but at the heart of the statehood of each entity. A State is a State because it is special, not because it has come about by some procedural routine or some mechanical criterion. This is what those who attack the *sui generis* view appear to deny. As if deciding on statehood were like distributing parking tickets. Let me just take one example.

9. The opponents of Kosovo's independence suggest that the "Provisional Institutions" did not possess competence to declare independence. First, the Declaration was not issued by the Provisional Institutions of Self-Government but it was voted upon and signed by the representatives of the people of Kosovo acting as a constituting power, *pouvoir constituant*. Second, such contention suggests as if there were a rule to lay out which institutions may and which may not declare independence. The independence of my country, Finland, for example, was declared by a Parliament that was an organ of an autonomous part of the Russian empire in December 1917. From the perspective of Russian law, this was blatantly *ultra vires*. But, as confirmed by the recognitions in due course, that was no obstacle to Finnish independence. Furthermore, declarations issued earlier by Slovenia and Croatia were not regarded by the international community as prohibited by international law, even though they were made without prior authorization by the Socialist Federal Republic of Yugoslavia. A first declaration emerges virtually always from a domestic illegality; internationally, it is simply a political fact. But international law does intervene later, to assess the fact by reference to overriding concerns of peace and stability, on the principles of territorial integrity, human rights and self-determination.

10. Mr. President, let me now say a few words on the two important reports presented to the Council of the League of Nations in the *Aaland Islands* question in 1920 and in 1921. As is well

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[113]David Armitage, *The Declaration of Independence: A Global History*, Harvard University Press, 2007, p. 20.

known, the question relates to a dispute between Finland and Sweden as to whether the inhabitants of the Åland Islands, an archipelago in the Baltic Sea, were allowed to choose between remaining under Finnish sovereignty and being incorporated in the Kingdom of Sweden. The Committee of Jurists appointed by the League Council stated that the principle of self-determination of peoples comes into play in situations where

> "the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure or uncertain from the legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established"[114].

11. The Committee acknowledged that minority protection by way of an extensive grant of liberty was a compromise solution where, for one reason or another, self-determination could not be accorded a complete recognition. Most importantly, however, it acknowledged that there were cases where minority protection could not be regarded as sufficient. In the words of the Commission of Rapporteurs appointed by the Council to recommend a programme of action in view of the Jurists' report:

> "The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[115]

In this case the Commission concluded that the Åland Islanders had neither been persecuted nor oppressed and that there was no justification for a separation.

12. Mr. President, already in the *Aaland Islands* case, the *locus classicus* of the law on self-determination, the eventuality was foreseen that persecution and oppression, combined with a situation of "abnormality", such as "the formation, transformation and dismemberment of States as a result of revolutions and wars"[116], might entitle a minority population to secession. This was thereafter reiterated by the Canadian Supreme Court in the case *Secession of Quebec*[117]. Similarly,

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[114]Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations, *Official Journal, Special Supplement*, No. 3, Oct. 1920, p. 6.

[115]Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations, doc. B.7. 21/68/106, 1921, p. 28.

[116]Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations, *Official Journal, Special Supplement*, No. 3, Oct. 1920, p. 6.

[117]Reference *re Secession of Quebec*, [1998], 2 *SCR*., p. 217, 20 Aug. 1998.

in the present case, the Court is called upon to weigh the facts pertaining as against the criteria of statehood, and the principles of territorial integrity and self-determination as they are understood today.

Mr. President, with your permission, I will now give the floor to my colleague Professor Koskenniemi.

Mr. KOSKENNIEMI: Mr. President, I am delighted to address this Court again as the representative of my country, Finland.

II. SELF-DETERMINATION AS THE GOVERNING PRINCIPLE IN THE CASE OF KOSOVO

13. We have stressed the limited and open-ended nature of the law governing statehood. In this regard, the formulation of the request posed to the Court was perhaps unfortunate: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" This suggests the presence of precise rules of international law regulating matters such as the making of independence declarations. But there are no such rules. No treaty, no custom regulates the matter. No international law rule gave the Finnish autonomy organs in December 1917 the competence to declare independence. This is the case of every single declaration of independence we know of. A declaration is simply a fact, or the endpoint of an accumulation of facts. Just like possession of territory, population or government are facts. There is — as Madam Kaukoranta pointed out — no rule on how States are born. But once the requisite facts are there, the law cannot be oblivious to them. There is a brief, formally correct response that may be given to the General Assembly's request: namely, that the Declaration was in accordance with international law.

14. And yet, the absence of such a rule might not seem the end of the matter. Should the Court deem it necessary to address the significance of the declaration in more detail, we would like to add the following.

15. In the Anglo-Norwegian *Fisheries* case some years ago, this Court observed, in a situation where it had recognized that there were no detailed rules on the limits of the territorial sea, as follows:

> "It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom . . ., the delimitation undertaken . . . is not subject to certain principles which make it possible to judge as to its validity under international law" (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 132).

From that point the Court went on to examine the facts of the case by reference to what it later chose to call "equitable principles" — precisely an assessment of the particularities — including in that early case, the interests of Norwegian fishermen "peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (*ibid.*, p. 133). In a parallel way, the fact that there are no mechanical rules on declarations of independence may not make it impossible to judge what their effect should be. Such judgment must only be based on a balanced assessment of the relevant facts, including — as the Court then stated — the needs of the communities as can be detected from their histories.

16. Now, Serbia and its supporters claim that the rule of territorial integrity and consent of the parent State regulate the process of independence. But surely this is both conceptually and historically wrong? Was the United States born out of a legal process that peaked in the consent of Britain? Or Russia or Germany? Venezuela, Algeria or Bangladesh — or indeed Serbia? Did *any* of the republics formerly part of the SFRY emerge from a process that respected the integrity of the mother State or out of the consent of the latter? They did not. There are around 200 States in the world and around 200 histories of State-emergence each of which is different — it tempts me to say *sui generis* — though each is also capable of being assessed under the old Montevideo criteria: territory, population, effective government, you all know those[118]. But they of course do not apply mechanically. China has a population of 1.3 billion, Tuvalu less than 12,500. There are States with huge territories and States with very small ones and their governmental capacities vary enormously.

17. The ~~supporters~~ opponents of Kosovo's independence, including Spain today, claim that the supporters of the legality of the Declaration seek to replace law by what they call "politics". The Court has already heard parallel accusations in many earlier cases and they have given it occasion to distinguish, for example, between decisions *ex aequo et bono* — something that does involve

[118]According to these criteria, 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 other States.

political compromises — and what it chose to call equity *infra legem,* the case where the rule itself calls for the appreciation of circumstances[119]. This is how the Montevideo criteria, territorial integrity and self-determination, operate: they lay out broad criteria to appreciate the facts on the ground, what is and what is not relevant. The Serbian Written Comments acknowledge the significance of the Court's jurisprudence in this respect[120]. We agree that this, and only this is needed here: neither mechanical rule application, nor recourse to an exception, or indeed to politics, but to the application of the relevant legal principles — including those of territorial integrity and self-determination — ~~in a way~~ in a way Mr. President, that is equitable in the circumstances. The case is not, after all, about distributing parking tickets.

18. Mr. President, Serbia and its supporters suggest that the principle of territorial integrity and consent of the parent State disqualifies the declaration of independence as conferring statehood on Kosovo. Nobody would deny that the principle of territorial integrity is well established in international law. But, as many have already noted here, the principle does not at all concern the relation between a State and an entity seeking self-determination. Under their very formulation and raison d'être instruments such as the Friendly Relations Declaration, from 1970[121], and the Helsinki Final Act of 1975[122] deal with *inter-State relations* and in particular the *duty of other States not to intervene* in internal political processes. Let me quote the 1970 Declaration. It lays out: "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". *States shall refrain in their international relations.* No ~~where~~ word about other entities. International law does contain rules relating to individuals today: those rules appear in the fields of human rights, economic relations and the environment. But rules about sovereignty or territorial integrity are not among those — and we understand well why. It would be absurd to claim that international law takes any position

[119]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 48, para. 88.

[120]Written Comments of the Government of the Republic of Serbia, para. 128.

[121]Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, United Nations General Assembly resolution 2625 (XXV), 24 Oct. 1970.

[122]Conference on Security and Co-operation in Europe, Final Act, Helsinki 1975, http://www.osce.org/documents/mcs/1975/08/4044_en.pdf (4 Dec. 2009).

beyond respect of human rights and non-violence in respect of the agendas of domestic groups or federalist movements, for example.

19. It may be said that as a general principle, territorial integrity nevertheless lays out a general value — the value of unharmed statehood — that international law seeks to protect. But in that case it should be weighed against countervailing values, among them the right of oppressed people to seek self-determination including by way of independence. Again, it is the factual context that should decide which value should weigh heaviest. The relevant facts we all know from the *Milutinović* case — and I quote from the case:

> "[T]he Trial Chamber is satisfied that there was a broad campaign of violence directed against the Kosovo Albanian population during the course of the NATO air strikes conducted by forces under the control of the FRY and Serbian authorities . . ."

The Chamber goes on, and I quote again:

> "In all of the 13 municipalities the Chamber has found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians from their homes, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. As these people left their homes and moved either within Kosovo or towards or across its borders, many of them continued to be threatened, robbed, mistreated, and otherwise abused. In many places men were separated from women and children, their vehicles stolen or destroyed, houses deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents."[123]

20. This campaign, as is well known, caused the departure of over 700,000 Kosovo Albanians in the period between March and June 1999 during which, also, many documented cases of killing, sexual assault and intentional destruction of civil infrastructure and religious sites occurred. The Security Council recognized the gravity of the situation in resolution 1244, as did the ICTY later. An international security and civilian presence was set up and has continued to govern or supervise Kosovo for a decade. What can, in such conditions, be the worth of territorial integrity? As I have stated, it does express a value of protecting the State. But is it the State that needs protection in this case? Even if the principle does have relevance, it cannot be mechanically applicable. We are not dealing with parking violations but historical facts of concern to large populations.

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[123] International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Milutinović et al.,* Judgement of 26 Feb. 2009, para. 1156 (Vol. 2 of 4).

21. The facts leading up to the Declaration of Independence of 17 February strikingly illustrate the situation, mentioned by the Commission of Rapporteurs in the *Aaland Islands* case where "the State lacks either the will or the power to enact and apply just and effective guarantees". Nothing was done on the Serbian side during the Ahtisaari negotiations in 2006-2007 or the later Troika period to alleviate the concerns Kosovo Albanians had for the return of a situation resembling the one in which the Milošević régime had already once removed the autonomy of the province. Indeed, in 2006, in the middle of the international status negotiations, Serbia unilaterally adopted a new Constitution which astonishingly insisted that Serbian State bodies in Kosovo should "uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations"[124]. Kosovo Albanians were ineligible to participate in this process.

22. Members of the Contact Group — representatives of Britain, France, Germany, Italy, United States and Russia — agreed on the impossibility of a return to any *status quo ante.* Already the Rambouillet Accords had stated, as we have heard today, that the "final settlement for Kosovo" was to be based on the famous statement, and I quote: "will of the people"[125]. No concept of mutual consent was incorporated in the Accords. It is true that, as our colleague from Russia said a moment ago, no people of Kosovo is identified in the Rambouillet Accords. But, of course, the story does not end there. In January 2006, just before President Ahtisaari began his 14-month-long effort to seek a negotiated solution, the Contact Group had occasion to specify what this meant. Let me quote them — the Contact Group. They agreed, and this is a verbatim quote, "that the settlement needs, inter alia, to be acceptable to the people of Kosovo"[126]. "Acceptable to the people of Kosovo." Everything is here — including the identification of the people of Kosovo. That formulation was agreed by all concerned — including the representative of Russia. In view of

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[124]Constitution of the Republic of Serbia, 2006, preamble, http://www.srbija.gov.rs/extfile/en/29554/constitution_of_serbia.pdf (4 Dec. 2009).

[125]Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999, Chap. 8, Art. I (3):

> "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures." (S/1999/648).

[126]Press Release, 31 Jan. 2006, para. 7, http://www.unosek.org/docref/fevrier/STATEMENT%20BY%20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf (4 Dec. 2009).

what was known of the attitude of the people of Kosovo, it could only mean recognition of independence as the fallback if no other arrangement could be found.

23. Those who deny the applicability of self-determination in this case do this by making a familiar distinction — namely, the distinction between the case of independence under colonial subjugation or alien domination — borrowing language from the 1970 Friendly Relations Declaration — and Kosovo on the other hand. Familiar distinction, I say. But how strong is it? What good reason of practice or principle might there be to limit the right to secession to decolonization? None. As Madam Kaukoranta observed, already in the *Aaland Islands* case, well before the decolonization period, the Committee of Jurists and the Commission of Rapporteurs agreed that secession was thinkable when the State was "undergoing transformation or dissolution" and cannot or will not give, as it put it, "effective guarantees for protection". It was this traditional position, and not any new law, that became operative during decolonization. It was this law that the Supreme Court of Canada had in mind when it stated "when a people is blocked from the meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession"[127]. A broad body of scholarship today addresses such a "qualified right of secession"[128]. I suggest, however, that instead of us, here, imagining a new rule, it is better to think of this as part of the traditional law of self-determination that was always to be balanced against territorial integrity and contained the possibility of its application, as the *Aaland Islands* case demonstrates, through an external solution.

24. But, of course, the Court is not called upon to rule on the validity of any such principle *in abstracto*. All it is asked to do is to assess the legality of a declaration of independence as part of a history that includes grave oppression by the FRY and Serbian authorities. This history also includes the unilateral adoption by Serbia of a Constitution in 2006 that sought to prejudice the result of the status talks and it includes the deadlock in the status negotiations as reported by the Special Envoy of the Secretary-General. In President Ahtisaari's words "[n]o amount of additional talks, whatever the format, will overcome this impasse"[129]. Ahtisaari was not alone in this

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[127]Reference *Re Secession of Quebec*, [1998] 2 *SCR* 217, para. 134.

[128]See especially Raic, *Statehood and Self-Determination*, 313-332.

[129]Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 Mar. 2007, para. 3.

assessment. It was reiterated by the Troika representatives from the European Union, the United States and the Russian Federation after four months of further negotiations. The Troika concluded that the parties were unable to reach an agreement[130].

25. Against this, Serbia and its supporters now suggest that the negotiations should be continued. But, of course, the duty to negotiate cannot be dependent on one party's assessment that not all avenues have been exhausted. One party cannot possess indefinite right of veto over a permanent solution. We now have the clear statement by the Special Envoy of the United Nations Secretary-General, endorsed by the Secretary-General himself, that there was no prospect of progress in further negotiation and that independence was the only viable solution. Who could be in a better position to determine this? In putting forward his proposal for "internationally supervised independence", the Special Envoy was fulfilling his mandate. Let me quote the Terms of Reference that were given to him. They stated:

> "the peace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General taking into account the co-operation of the parties and the situation on the ground".

"[W]ill be determined by the Special Envoy . . ." Now, the feasibility of negotiations is a matter of political judgment and not judicial determination. Surely best placed to determine this is the chief negotiator, who, as we all know, also happened to receive the Nobel Peace prize for brokering peace not only in Kosovo but in many places, including Namibia, Bosnia Herzegovina and Aceh. To suggest otherwise, or to hint at bias, as Serbia has done, speaks more eloquently about Serbia's negotiating attitudes than anything otherwise produced in this case.

26. Mr. President, let me reiterate the main points of the Finnish argument.

— First, there is no specific rule on declarations of independence. They must be seen as parts of the history of State-building that international law regulates by general principles such as the Montevideo criteria on statehood, non-use of force, territorial integrity, self-determination.

— Second, in this specific case, the two prima facie applicable principles are those of territorial integrity and self-determination. Because territorial integrity only governs relations between

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[130] Report of the European Union/United States/Russian Federation Troika on Kosovo of 4 Dec. 2007, S/2007/723, paras. 2 and 11.

and not inside States, its power is limited to that of a general value of protecting existing States that must be weighed against countervailing considerations.

— Third, the most important countervailing consideration is that of self-determination that has always implied the possibility of secession in case the parent State is unable or unwilling to give guarantees of internal protection. In view of the violent history of the break-up of the SFRY and, in particular, the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State. This was achieved by the facts of history and symbolized by the Declaration of Independence of 17 February 2008.

I thank you, Mr. President.

The PRESIDENT: Thank you very much, Professor Koskenniemi.

This concludes the oral statement and comments of Finland and brings to a close today's hearings. The Court will meet again tomorrow at 10 a.m. when it will hear France, Jordan and Norway. The Court is adjourned.

The Court rose at 12.50 p.m.

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