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)

REPLY TO QUESTIONS OF MEMBERS OF THE COURT BY THE KINGDOM OF THE NETHERLANDS

21 DECEMBER 2009

1. Introduction

1. On 11 December 2009, during the oral proceedings on the request for an advisory opinion submitted by the General Assembly of the United Nations on the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, several members of the Court asked questions for participants in the oral proceedings. The Kingdom of the Netherlands wishes to avail itself of the opportunity to reply to the questions posed by Judges Koroma and Cançado Trindade.

2. Reply to the Question posed by Judge Koroma

2. Judge Koroma asked the following question:

> "It has been contended that international law does not prohibit the secession of a territory from a sovereign State. Could participants in these proceedings address the Court on the principles and rules of international law, if any, which, outside the colonial context, permit the secession of a territory from a sovereign State without the latter's consent?"

3. The Kingdom of the Netherlands appreciates this question as it is convinced that the Court will need to interpret treaty provisions relating to self-determination and ascertain the legal opinions and the practice of States to address this matter (see also para. 9 of the Oral Statement of the Kingdom of the Netherlands of 10 December 2009). It may safely be assumed that states with a view on the matter will have expressed that view in the proceedings in their written submission, written comments, oral statement, or reply to this question.

4. In the view of the Kingdom of the Netherlands, the secession of a territory from a sovereign State without the latter's consent outside the colonial context may be permitted on the basis of the right of a people to self-determination. The right to self-determination includes the right of peoples "freely to determine their political status" (Articles 1 of the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights (1966 Covenants)), "freely to determine, without external interference, their political status" (General Assembly Resolution 2625 (XXV) (Resolution 2625), "freely [to] determine their political status" (Section I.2 of the 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights), or "in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development" (Part VIII of the Final Act of the Conference on Security and Co-operation in Europe to which reference is made in the Preamble to Resolution 1244) (see also para. 3.4 of the Written Submission of the Kingdom of the Netherlands of 17 April 2009).

5. Resolution 2625 lists modes of implementing the right to self-determination of peoples. It mentions (a) the establishment of a sovereign and independent state, (b) the free association or integration with an independent state, and (c) the emergence into any other political status freely determined by a people. Secession of a territory from a state necessarily precedes the establishment by a people of a sovereign and independent state, or the free association or integration of a people with another state. The text of the Resolution does not limit the choice by a people for a particular mode of implementing the right to self-determination to the colonial context. Likewise, the text of the Resolution does not require a people obtain the consent of the state from which that people seeks to secede. Any limitation of a people's right to choose a particular mode of implementing the right to self-determination can only be

inferred, *a contrario*, from the savings clause in Resolution 2625. Pursuant to this clause, the principle of equal rights and self-determination of peoples is not to 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". However, it follows also from this clause that the principle of territorial integrity does not prevail if States are not "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" (see also para. 3.7 of the Written Submission of the Kingdom of the Netherlands of 17 April 2009).

6. The 1996 Covenants – or any of the other instruments mentioned in paragraph 4 above – do not further elaborate the modes of implementing the right to self-determination by a people. However, nothing in these instruments limits the choice for a particular mode to specific situations, such as the colonial context, or subject the choice for a particular mode to the consent of the state from which a people seeks to secede. This view is corroborated by the *travaux préparatoires* of the 1966 Covenants. In the course of the negotiations,

> "[s]uggestions were made which would indicate the substance of the right of self-determination in a concrete form. For instance, the right of self-determination should include the right of every people or nation 'to establish an independent State', to 'choose its own form of government', to 'secede from or unite with another people or nation', etc. These suggestions were not adopted, for it was thought that any enumeration of the components of the right of self-determination was likely to be incomplete. A statement of the right in abstract form, as in paragraph 1 of the article, was thought to be preferable."[1]

7. Thus, it must be concluded that the instruments recognizing the right to self-determination of peoples includes the exercise of this right through secession; and, furthermore, that these instruments neither limit the exercise of this right through secession to the colonial context nor to the consent of the state from which a people seeks to secede. What is lacking in these instruments are only the conditions that must be satisfied for a people to be permitted to choose one mode of implementing the right to self-determination rather than another. It is on this point that the legal opinions and the practice of states need to be ascertained. The Kingdom of the Netherlands has expressed its legal opinion as regards the conditions that must be satisfied before a people may choose a mode of implementing its right to self-determination that amounts to the exercise of the right to external self-determination and, by implication, secession during these proceedings (see paras. 3.9-3.11 of the Written Submission of 17 April 2009 and paras. 6-8 of the Oral Statement of 10 December 2009 of the Kingdom of the Netherlands).

8. In this respect, we have noted that it is hardly surprising that there are not many instances of the lawful exercise of the right to external self-determination outside the context of non-self governing territories and foreign occupation. First, the post-colonial right to external self-determination only emerged in the second half of the last century. Second, conditions must be satisfied before a people may resort to external self-determination. In the course of these proceedings, many instances have been cited where the people concerned did, indeed, fail to meet these conditions and could not lawfully exercise the right to external self-determination. Yet, there are several instances where the international community has accepted the exercise of the right to external self-determination outside the colonial context and without the consent of the state from which the people concerned seceded. We have cited the establishment of

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[1] UN Doc. A/2929 (1955), p. 15 (para. 15); see also M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987), at 34.

Bangladesh and Croatia as examples (see also para. 10 of the Oral Statement of the Kingdom of the Netherlands of 10 December 2009).

9. We have also noted that instances where States disintegrated on the basis of consensual agreement differ from the present case, but are not necessarily irrelevant. In some of these instances, the peoples concerned acknowledged that the violation of the right to self-determination in the past had made it impossible for them to continue living together in one state. We have cited the establishment of Eritrea and Slovenia as examples (see also para. 11 of the Oral Statement of the Kingdom of the Netherlands of 10 December 2009).

10. In sum, it follows from the instruments recognizing the right to self-determination of peoples, in particular the 1966 Covenants and Resolution 2625, that a people may secede from the territory of a sovereign state without the latter's consent outside the colonial context.

11. The principle of territorial integrity arguably limits the modes of implementing the right to self-determination by a people outside the colonial context (see also para. 3.6 of the Written Submission of the Kingdom of the Netherlands of 17 April 2009). This limitation is reflected in the savings clause of Resolution 2625, referred to in paragraph 5 above, that seeks to balance the right to self-determination and the principle of territorial integrity. The balancing of conflicting norms of international law is governed by the principle of equity and takes into account the specific circumstances of the case at hand. These considerations have guided the Kingdom of the Netherlands in the formulation of conditions that must be satisfied by a people before a people may secede from a state to exercise its right to external self-determination.

12. In case of the breach of a people's right to self-determination by the State in which the people has sought to exercise its right to self-determination, the balance must shift towards the protection of the right to self-determination. It is a general principle of international law that the international responsibility of a State which is entailed by an internationally wrongful act involves legal consequences (see Article 28 of the Articles on Responsibility of States for Internationally Wrongful Acts). Specific consequences apply in case of a serious breach of obligations under peremptory norms of general international law, a category of norms which arguably includes the right to self-determination (see also para. 3.2 of the Written Submission of the Kingdom of the Netherlands of 17 April 2009). If the various modes of implementing the right to self-determination, as enshrined in the abovementioned instruments, are to have any meaning, a people must at least be free to choose any of these modes in the case of a serious breach of that people's right to self-determination.

3. Reply to the Question posed by Cançado Trindade

13. Judge Cançado Trindade asked the following question:

> "United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11 *(a)* to 'substantial autonomy and self-government in Kosovo", taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this *renvoi* to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people's eligibility into statehood, in the framework of the legal regime set up by Security Council's resolution 1244 (1999)? And what are the factual preconditions for the configurations of a 'people', and of its eligibility into statehood, under general international law?"

14. Paragraph 11 of Resolution 1244 sets out the main responsibilities of the international civil presence in Kosovo. The reference to the Rambouillet Accords in subparagraph (a) means that the international civil presence must take full account of the Rambouillet Accords in the exercise of its responsibility to promote the establishment of substantial autonomy and self-government in Kosovo. Hence, it provides guidance to the international civil presence for the exercise of this responsibility. Meaningful self-government was established by the promulgation and implementation of the Constitutional Framework for Provisional Self-Government in Kosovo; the Constitutional Framework was adopted by the Special Representative of the Secretary-General on 15 May 2001 and its implementation was completed at the end of 2003. Due consideration to the Rambouillet Accords only had to be given in the course of the development of the Constitutional Framework.

15. The reference to the Rambouillet Accords in paragraph 11(a) of Resolution 1244 does not have a bearing on the issues of self-determination and/or secession in relation to the current request for an advisory opinion. Substantial autonomy and self-government in Kosovo were to be established under Resolution 1244 "pending a final settlement". The international administration for Kosovo, established by the Security Council under Resolution 1244, was meant to be an "interim administration" (para. 10 of Resolution 1244). Accordingly, the substantial autonomy and self-government in Kosovo under Resolution 1244 was not meant to continue on a permanent basis. Following the exhaustion of all efforts to achieve a final settlement and the proclamation of independence of Kosovo on 17 February 2008, it came to an end.

16. The Kingdom of the Netherlands has addressed the factual preconditions for the configuration of a 'people', and of its eligibility into statehood, under general international law in its Written Comments of 17 July 2009. It has argued that anthropological and social criteria are relevant to determining whether a group of persons constitutes a people. Anthropological criteria refer to (a) common features of a group of persons, such as their ethnic origin, their traditions, their culture, their language, their religion or their homeland (objective criteria), and (b) the will of a group of persons to constitute a people, such as a sense of kinship (subjective criterion). In view of the anthropological heterogeneity of the peoples of the world, the presence of any such features varies from people to people, and can only be identified on a case-by-case basis. Furthermore, common features of a group of persons and/or the will of such group of persons to be a people may be subject to change over time (see para. 3.6 of the Written Comments of the Kingdom of the Netherlands of 17 July 2009). For the purpose of the exercise of the right to self-determination by means of the establishment of an independent state, a people must also have a common territorial basis. A proclamation of independence must be linked to this territorial basis, follow existing international boundaries and former internal boundaries, and respect the principle of *uti possidetis juris* (see para. 3.8 of the written comments of the Kingdom of the Netherlands of 17 July 2009).

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21 December 2009