

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 KINGDOM OF THE NETHERLANDS

17 JULY 2009

1. Introduction

1.1 In Resolution 63/3, adopted on 8 October 2008, the General Assembly of the United Nations decided to request the International Court of Justice to render an advisory opinion on the following question:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

The unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo referred to in Resolution 63/3 is understood to be the proclamation of the independence of Kosovo on 17 February 2008 at an extraordinary meeting of the Assembly of Kosovo (Kosovo Declaration of Independence).

1.2 In its Order of 17 October 2008, the Court designated 17 April 2009 as the time-limit within which written statements on the question might be presented to it, by the United Nations and States entitled to appear before the Court, in accordance with Article 66.2 of the Court’s Statute. In the same Order, the Court further invited the “authors” of the Declaration to make “written contributions” to the Court. The Kingdom of the Netherlands, as a Member State of the United Nations and by virtue of Article 92 of the Charter of the United Nations (UN Charter) also a Party to the Statute of the Court, availed itself of the opportunity afforded by the Court’s Order of 17 October 2008 to make a written statement on the abovementioned request by the General Assembly for an advisory opinion of the Court. The written statement of the Kingdom of the Netherlands was presented to the Court on 17 April 2009.

1.3 In its Order of 17 October 2008, the Court designated 17 July 2009 as the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements, in accordance with Article 66.4 of the Statute. As the Kingdom of the Netherlands has presented a written statement, it wishes to avail itself of the opportunity offered by that Order to present written comments on other written statements.

2. General observations

2.1. The Kingdom of the Netherlands notes that in some written statements reference is made to the law of statehood and the law of recognition to address issues relating to the statehood of Kosovo and the recognition of Kosovo by other States. It is the opinion of the Kingdom of the Netherlands that the determination of the statehood of Kosovo and the legality of the recognition of Kosovo by other States are not part of the terms of the abovementioned request by the General Assembly for an advisory opinion. Hence, the Court has not been requested to render an advisory opinion on the questions of whether Kosovo is a State and whether the recognition of Kosovo by other States is in accordance with international law.

2.2 The Kingdom of the Netherlands notes that in some written statements the question is addressed of whether specific provisions of the Kosovo Declaration of Independence are in accordance with international law. The “unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo”, referred to in Resolution 63/3, is understood by the Kingdom of the Netherlands to be the proclamation of the independence of Kosovo on 17 February 2008 at an extraordinary meeting of the Assembly of Kosovo (see para. 1.1 above and para. 1.1 of the written statement of the Kingdom of the Netherlands of 17

April 2009). The proclamation of independence is contained in paragraph 1 of the Kosovo Declaration of Independence which reads as follows:

“We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.”

It is the opinion of the Kingdom of the Netherlands that the request of the General Assembly is limited to this paragraph of the Kosovo Declaration of Independence. Hence, the Court has not been requested to render an advisory opinion on the question of whether any other provisions of the Kosovo Declaration of Independence are in accordance with international law.

2.3 The Kingdom of the Netherlands notes that in some written statements it is alleged that the proclamation of independence constitutes a violation of the Constitutional Framework for Provisional Self-Government in Kosovo. This Constitutional Framework is equivalent to a national legal instrument and is not part of international law. The abovementioned request by the General Assembly for an advisory opinion is restricted to the question whether the proclamation of independence is in accordance with international law. It is therefore submitted that the question of whether the proclamation of independence is in accordance with the Constitutional Framework is not part of the terms of said request. Hence, the Court has not been requested to render an advisory opinion on the question of whether the proclamation of independence is in accordance with the Constitutional Framework.

2.4 The Kingdom of the Netherlands notes that in some written statements a critical date is established. The Kingdom of the Netherlands has no objection to the establishment of 17 February 2008 as the date that is relevant to determining whether the proclamation of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law. However, it is the opinion of the Kingdom of the Netherlands that the establishment of a critical date does not prevent the Court from taking into account subsequent practice to interpret legal instruments that were adopted before 17 February 2008, such as Security Council resolutions on the situation relating to Kosovo, including Resolution 1244.

3. International law of self-determination

Subjects of the right to self-determination

3.1 In its Written Statement of 17 April 2009, the Kingdom of the Netherlands stated that “[t]he holders of the right to self-determination are ‘peoples’. Pursuant to the Rambouillet Accords, which have been identified as guidance for the political process under Resolution 1244 (Annex 1, 6th item, and Annex 2, para. 8), the ‘final settlement’ for Kosovo must be based on ‘the will of the people’ (Chapter 8, Article I.3). This is also reflected in the Kosovo Declaration of Independence which asserts that it reflects ‘the will of our people’ (para. 1) and refers to the ‘people’ in several paragraphs of its Preamble. The independence of Kosovo on 17 February 2008 was thus proclaimed [...] on behalf of the ‘people’.” (para. 3.3).

3.2 The Kingdom of the Netherlands notes that in some written statements it is alleged that neither the population of Kosovo as a whole nor any portion of that population constitutes a people and, hence, has the right to self-determination, at least not to external self-

determination. It is either alleged that recognition by an international organization is required or that a 'people' means the population of an existing State as a whole.

3.3 In some written statements, it is alleged that, for the purposes of the right to self-determination, a group of persons must have been recognized by an international organization as a 'people' to constitute a 'people' for the purposes of the right to self-determination. Reference is made to the *Western Sahara* case where the Court stated that "[t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were either based on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." (*ICJ Reports 1975*, p. 12, para 59). This statement was made in an advisory opinion relating to the decolonization of a non-self-governing territory. The United Nations has performed a central function in the process of decolonization of such territories, in particular with respect to territories placed under trusteeship agreements. The responsibilities of the General Assembly in the process of decolonization were mainly of a recommendatory nature. It does not follow from these recommendations that recognition by the General Assembly or any other organ of the United Nations is required for a group of persons to constitute a 'people' and to be a holder of the right to self-determination. Similarly, recognition by an international organization of a group of persons as a 'people' or such a people's right to self-determination is no more than an indication of support for such a people's cause.

3.4 In some written statements, it is alleged that, for the purposes of the right to self-determination, a 'people' means the population of an existing State as a whole. Some States have made reservations or declarations to the common Article 1 of the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights (1966 Covenants) to that effect. According to these States, the words "the right to self-determination" do not apply to "sovereign independent States or to a section of a people or nation", do not apply to "a section of people within a sovereign independent state" or only apply in "the historical context of colonial rule, administration, foreign domination, occupation and similar situations". The Kingdom of the Netherlands has objected to such reservations or declarations, pointing out that any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments undermines the concept of self-determination itself and thereby seriously weakens its universally acceptable character. Other States have entered similar objections. The Supreme Court of Canada has also found that any such attempt to limit the scope of the right to self-determination cannot be inferred from the relevant documents (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 124):

"It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose."

3.5 Since the existence of a people entitled to self-determination in Kosovo has been challenged in some written statements, the Kingdom of the Netherlands feels compelled to

present its views on the identification of the subjects of the right to self-determination. The Kingdom of the Netherlands shares the view presented by Switzerland in its written statement that the legal concept of a 'people' has so far not been explicitly defined in international law and has thus remained vague (see para. 70 of the written statement of Switzerland of 15 April 2009). This view is corroborated by the *travaux préparatoires* of the 1966 Covenants. The absence of a definition of the term 'people' as well as the arguments against attempting to define the term were repeatedly noted during the negotiations of the common Article 1 of the 1966 Covenants (M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987)). It appears therefore that the term 'people' was deliberately not defined in the 1966 Covenants and, hence, that no legal conditions apply beyond the ordinary meaning of the term. Accordingly, the negotiation history of the 1966 Covenants too militates against the limitation of the application of the right to self-determination to peoples that have been recognized by an international organization or to the population of an existing State as a whole.

3.6 To determine whether the population of Kosovo or a portion thereof constitutes a people, it thus becomes necessary to identify the ordinary meaning of the term 'people'. According to *The Oxford English Dictionary*, a 'people' means "[a] body of persons composing a community, tribe, race, or nation" (2nd ed., 1989); according to Webster's *Ninth New Collegiate Dictionary*, it means "a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group" (1983); and according to the *Dictionnaire Le Nouveau Petit Robert*, it means an "[e]nsemble d'êtres humains vivant en société, habitant un territoire défini et ayant en commun un certain nombre de coutumes, d'institutions" (2000). It appears from these definitions 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. This means, first, that at any given moment in time the citizens of a State may or may not be a people or form part of a people. Second, a people may live divided over two or more States; the people concerned may be a numerical minority within one State and may, at the same time, be the numerical majority or a numerical minority in another State. Third, a numerical minority in a State may or may not be a people. The population of Kosovo, or at least its Albanian population, has most if not all of the abovementioned features in common distinguishing it from other peoples and has, through democratically-elected institutions, expressed the will to proclaim its independence and, by implication, its will to be a people. Social criteria refer to the organization of a group of persons through common institutions. The population of Kosovo has organized itself for many years through institutions, including political organizations. It is submitted that, pursuant to the ordinary meaning of the term 'people', the population of Kosovo constitutes a people.

3.7 For the purpose of the exercise of the right to self-determination, it is relevant that the Court, in the *Western Sahara* case, stressed that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned" and defined the principle of self-determination as "the need to pay regard to the freely

expressed will of peoples” (*ICJ Reports 1975*, p. 12, at paras. 55 and 59). The proclamation of the independence of Kosovo satisfies this condition. The proclamation, as contained in the Kosovo Declaration of Independence, was issued by “democratically-elected leaders” and reflects “the will of the people” (para. 1).

3.8 For the purpose of the exercise of the right to self-determination by means of the establishment of an independent state, a people must satisfy an additional condition. Such a people must have a common territorial basis. The territorial basis of the population of Kosovo was the autonomous province of Kosovo within the Socialist Federal Republic of Yugoslavia. The proclamation of independence is linked to this territorial basis, follows existing international boundaries and former internal boundaries, and respects the principle of *uti possidetis juris* (see para. 3.8 of the written statement of the Kingdom of the Netherlands of 17 April 2009).

3.9 The Kingdom of the Netherlands notes that some written statements challenge the power of the Assembly of Kosovo to proclaim the independence of Kosovo. Resolution 1244 attributes specific powers to the Provisional Institutions of Self-Government of Kosovo, including the Assembly of Kosovo. Although these powers did not explicitly attribute the right to proclaim the independence of Kosovo, nor did Resolution 1244 prohibit the proclamation of independence of Kosovo on 17 February 2008 (see para. 2.9 of the written statement of the Kingdom of the Netherlands of 17 April 2009). If the Court finds that the Assembly of Kosovo proclaimed the independence of Kosovo, it is submitted that the right of the Assembly to represent the people and to proclaim the independence of Kosovo is not derived from Resolution 1244, but from other sources of international law, namely the law of self-determination. Pursuant to the law of self-determination, a proclamation of independence must reflect the will of the people as the holder of the right to self-determination. The will of the people can be expressed by several means, including through democratically-elected institutions. The Assembly of Kosovo is a democratically-elected institution. For the exercise of the right to self-determination, it is not relevant that the Assembly of Kosovo is also one of the Provisional Institutions of Self-Government of Kosovo under Resolution 1244. An institution may derive its powers from more than one source of law.

Legal basis of the right to external self-determination

3.10 The Kingdom of the Netherlands notes that in at least one written statement it is alleged that the exercise of the right to external self-determination is tantamount to imposing a type of sanction that is wholly outside the field of State responsibility for wrongful acts. In its Written Statement of 17 April 2009, the Kingdom of the Netherlands stated that the obligation to respect the right of self-determination is a norm whose peremptory character is generally accepted (para. 3.2). A serious breach of a peremptory norm of general international law has particular consequences (Art. 41 of the Articles on Responsibility of States for Internationally Wrongful Acts). These Articles, at least Part Three on the Implementation of the International Responsibility of a State, address interstate relations and not, as such, relations between States and other subjects of international law, such as peoples. The violation of an obligation incumbent on a State towards other subjects of international law is also governed by secondary norms of international law that, in our opinion, are not dissimilar to the Articles on Responsibility of States for Internationally Wrongful Acts. Such a violation must have legal consequences and particular consequences in the case of a serious breach of a peremptory norm under international law. The particular consequences listed in the Articles on Responsibility of States for Internationally Wrongful Acts are not exhaustive as evidenced by

the savings clause. This savings clause provides that the listing of particular consequences in the Articles on Responsibility of States for Internationally Wrongful Acts is without prejudice to any further consequences that a serious breach of a peremptory norm of international law may entail under international law (Art. 41.3). It is submitted that the right to external self-determination is such a particular consequence which is, furthermore, rooted in an established practice in relation to non-self-governing territories and peoples under foreign occupation.

3.11 The application of a particular consequence in the case of a serious breach of a peremptory norm under international law should not result in the breach of the same or another peremptory norm of international law. The exercise of the right to external self-determination affects the territorial integrity of an existing State. It is submitted that the principle of territorial integrity is not a peremptory norm of international law. In the Vienna Convention on the Law of Treaties, a “peremptory norm of general international law” is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted” (Art. 53). States have the sovereign right under international law to relinquish part of their territory to another State by means of a treaty of cession or to a newly independent State by means of a consensual agreement to secession. International law thus permits States to derogate from the principle of territorial integrity. It cannot therefore be said that the preservation of the territorial integrity of a particular State is the concern of all States and that all States can be held to have a legal interest in its protection.

4. Submissions

4.1 In addition to the submissions presented in its written statement of 17 April 2009, the Kingdom of the Netherlands submits further that:

- the determination of the statehood of Kosovo and the legality of the recognition of Kosovo by other States are not part of the terms of the request by the General Assembly for an advisory opinion of the Court;
- the question of whether provisions of the Kosovo Declaration of Independence other than the proclamation of independence, as contained in a paragraph 1, are in accordance with international law are not part of the terms of the request by the General Assembly for an advisory opinion of the Court;
- the question of whether the proclamation of independence is in accordance with the Constitutional Framework for Provisional Self-Government in Kosovo is not part of the terms of the request by the General Assembly for an advisory opinion of the Court;
- the establishment of a critical date does not prevent the Court from taking into account subsequent practice to interpret legal instruments that were adopted before 17 February 2008;
- the population of Kosovo, or at least a part of that population, constitutes a ‘people’;
- the right of the democratically-elected leaders of Kosovo to represent the people and to proclaim the independence of Kosovo is derived from the law of self-determination;
- the right to external self-determination is a particular consequence under the law of State responsibility.

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