

**Note Verbale dated 17 April 2009 from the Embassy of the
Grand Duchy of Luxembourg in the Netherlands**

[Translation]

The Embassy of the Grand Duchy of Luxembourg presents its compliments to the Registry of the International Court of Justice and has the honour to transmit to it herewith, in accordance with the letter from the Registrar of the ICJ dated 20 October 2008, the Written Statement of the Grand Duchy of Luxembourg in connection with the Request for an Advisory Opinion concerning the “Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo”.

The Embassy of the Grand Duchy of Luxembourg avails itself of this opportunity to renew to the Registry of the International Court of Justice the assurances of its highest consideration.

INTERNATIONAL COURT OF JUSTICE

(REQUEST FOR ADVISORY OPINION)

**ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION
OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS OF
SELF-GOVERNMENT OF KOSOVO**

WRITTEN STATEMENT OF THE GRAND DUCHY OF LUXEMBOURG

30 March 2009

[Translation by the Registry]

INTERNATIONAL COURT OF JUSTICE

(REQUEST FOR ADVISORY OPINION)

**ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION
OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS
OF SELF-GOVERNMENT OF KOSOVO**

WRITTEN STATEMENT OF THE GRAND DUCHY OF LUXEMBOURG

Contents

- I. Introduction
- II. The Kosovo case is *sui generis*
- III. The limited scope of the question submitted to the Court
- IV. The legal arguments
- V. (a) No rule of international law prohibits the declaration of independence
- VI. (b) Security Council resolution 1244 (1999) of 10 June 1999 does not prohibit the declaration of independence by the people of Kosovo
- V. Conclusion

I. Introduction

1. In its resolution 63/3 (A/63/L.2) of 8 October 2008, the United Nations General Assembly requested the Court 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?”

2. General Assembly resolution 63/3, which was tabled by Serbia alone, was adopted by 77 votes in favour to six votes against, with 74 abstentions. A significant number of United Nations Member States did not take part in the vote. Some 60 per cent of United Nations Member States therefore preferred not to support resolution 63/3.

3. Luxembourg abstained in the vote on resolution 63/3. Luxembourg, which maintains its steadfast support for the International Court of Justice, continues to believe that this resolution is unlikely to foster greater stability in Kosovo in particular and the Western Balkans in general, a region which is engaged in an active process of developing closer relations with the European Union.

4. In its Order of 17 October 2008, the Court held that the United Nations and its Member States were, in accordance with Article 66, paragraph 2, of its Statute, “likely to be able to furnish information on the question submitted to the Court for its advisory opinion”. It fixed 17 April 2009 as the time-limit within which they could present written statements on the question to the Court. These observations are presented pursuant to that decision.

II. The Kosovo case is *sui generis*

5. A combination of several factors peculiar to the Kosovo situation makes this a case which is patently one of a kind. Consequently, assuming that the Court sees fit to reply to the question put to it, and given the lack of comparable cases, such a reply can only relate to the situation in Kosovo and cannot in any event create a legal precedent.

6. The factors which combine to make the case of Kosovo manifestly *sui generis* are as follows:

- the background to the conflict of the 1990s, especially the late 1990s, in the context of the violent break-up of Yugoslavia, as evidenced for example by numerous documents of the United Nations and other international organizations¹;
- the nature and scope of the events which took place in 1998 and 1999: crimes against humanity, wholesale repression in Kosovo, mass ethnic cleansing, massacres, looting and the need for intervention by the international community to put an end to these events;

¹Document CSCE/HS/1, 10 July 1992; General Assembly resolutions 47/147 of 18 December 1992, 48/153 of 20 December 1993, 49/196 of 23 December 1994, 50/193 of 22 December 1995, 51/116 of 12 December 1996 and 52/147 of 12 December 1997; Security Council resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998 and 1203 (1998) of 24 October 1998, and the reports of the Secretary-General following the adoption of these resolutions; OSCE reports “Kosovo/Kosova. As Seen, As Told. An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999” and “OSCE Background Paper — Human Rights in Kosovo, 1999”; Report of the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, 27 September, United Nations doc. E/CN.4/2000/10.

- the involvement of the international community, under the auspices of the United Nations, and the extended period of international administration pursuant to Security Council resolution 1244 (1999);
- the process of determining its status, under the auspices of the United Nations.

7. The Secretary-General's Special Envoy for the Kosovo status process, Martti Ahtisaari, wrote the following in his report of March 2007:

“Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.” (Para. 15.)

8. The characterization of the Kosovo case as *sui generis* does not, moreover, depend on the attitudes of the States currently supporting or rejecting Kosovo's independence. Thus, while there remain some European Union Member States which have not recognized the independence of Kosovo, the Ministers for Foreign Affairs of the Member States of the European Union unanimously acknowledged the Kosovo case as *sui generis* in the conclusions of the European Council of 18 February 2008:

“[The Council] underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.”

III. The limited scope of the question submitted to the Court

9. The phrasing of the question submitted to the Court is the product of lengthy preparatory work and consultations carried out by the one State which proposed resolution 63/3. Any coincidence or lack of precision in its wording can thus be ruled out. The specific phrasing of the preamble of resolution 63/3 bears out this analysis. It follows from this that the drafters of the question are seeking an answer to precisely that question alone.

10. In these circumstances, the Court, should it see fit to reply to the question put to it, must confine itself to that question, which should be narrowly interpreted, and refrain from extending, interpreting or reformulating it.

11. The question submitted to the Court refers solely to the declaration of independence and its accordance with international law. When the draft resolution was presented to the General Assembly, the Serbian Minister for Foreign Affairs stated that:

“The question posed is amply clear and refrains from taking political positions on the Kosovo issue.” (General Assembly, 8 October 2008, A/63/PV.22.)

Serbia itself has moreover ruled out any rephrasing of the question:

“We believe that the draft resolution in its present form is entirely non-controversial. It represents the lowest common denominator of the positions of the Member States on this question, and hence there is no need for any changes or additions.”

12. The question posed therefore does not relate to the present or future status of Kosovo or to the issue of recognition. Consequently, the reply which the Court may be required to furnish cannot determine the present or future status of Kosovo or the effect of the recognition of Kosovo's independence by third States.

13. The question posed implies that the declaration of independence comes from the “Provisional Institutions of Self-Government of Kosovo”. However, the text of the declaration of independence, and the statements made when it was adopted by the representatives of the Kosovar people, show that those who adopted and signed the declaration did not do so in their capacity as an organ of the provisional institutions of self-government of Kosovo, but indeed as representatives of the Kosovar people, expressing the will of the people of Kosovo.

14. The question posed characterizes the declaration of independence as “unilateral”. While any declaration of independence is by nature unilateral to some extent, this reference in the question is clearly designed to prejudge the Court's decision. The public statements by numerous representatives of third States at the time of the declaration of independence and the statements by numerous representatives of third States at the time of the vote on resolution 63/3, as well as the significant number of swift recognitions of Kosovo's independence, confirm that this declaration of independence had the support of the international community.

IV. The legal arguments

15. The Court will have to consider whether there exists in international law a rule prohibiting the declaration of independence. Luxembourg maintains that no such rule exists.

(a) No rule of international law prohibits the declaration of independence

16. Generally speaking, a declaration of independence is a factual event which can give rise to the creation of a State only in combination with other factual elements (including a defined territory, a settled population and an effective government). The Court has been asked to consider solely the compatibility of the declaration of independence with international law. However, it is established that international law does not govern declarations of independence. These can therefore not be contrary to international law.

17. This is confirmed by the break-up of Yugoslavia, given that the declarations of independence by the former Federal Republics were not disputed under international law by the international community, despite the lack of prior authorization by the Socialist Federal Republic of Yugoslavia.

(b) Security Council resolution 1244 (1999) of 10 June 1999 does not prohibit the declaration of independence by the people of Kosovo

18. Security Council resolution 1244 (1999) of 10 June 1999 does not prohibit the declaration of independence by Kosovo and does not require that any such declaration should be subject to prior approval by the former Yugoslav Republic, Serbia or the Security Council.

19. On the contrary, resolution 1244 authorized the Secretary-General to establish, under United Nations auspices, an international civil presence. The duties of that presence included the encouragement and development of democratic institutions of self-government for Kosovo. Resolution 1244 prevented Serbia from exercising any government authority whatsoever over Kosovo.

20. Paragraph 11 (a) of resolution 1244 mentions among the “main responsibilities” of the international civil presence that of “promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of Annex 2 and of the Rambouillet accords (S/1999/648)”. It is apparent from the wording of this provision that it is to apply only for a transitional period, and that a “final settlement” is expected.

21. Paragraph 11 (e) of resolution 1244 refers to “facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords” as one of the “main responsibilities of the international civil presence”. Hence resolution 1244 contemplated the possibility of the independence of Kosovo “on the basis of the will of the people”².

22. Resolution 1244 therefore points to the need for a “final settlement” of the question of Kosovo’s status and for a political process that will determine it. Resolution 1244 does not contain any provision prejudging the outcome of that political process. The independence of Kosovo is neither explicitly aspired to nor ruled out in it. According to the terms and the spirit of resolution 1244, such independence therefore remains entirely possible.

23. Following the detailed negotiations carried out by the Special Envoy of the United Nations Secretary-General, which included both the Serbian and Kosovar authorities, the Special Envoy reaffirmed that the status quo was untenable, that it was pointless to continue the negotiations and that the only viable option for Kosovo was to become an independent State.

24. After the Secretary-General had expressed his full support for the Special Envoy’s position, and after the failure of a final effort by the Troika to explore whether any chance of finding an agreement still remained, Kosovo declared itself independent, thus fully complying with the process initiated by resolution 1244.

25. At no time did the Special Representative of the Secretary-General for Kosovo describe the declaration of independence as unlawful.

26. The reference in the preamble of resolution 1244 to the sovereignty and territorial integrity of the “Federal Republic of Yugoslavia”, as set out in the Helsinki Final Act and Annex 2

²Rambouillet accords, Chap. 8, Art. I, para. 3.

of resolution 1244, does not mention the question of a possible declaration of independence by the representatives of the Kosovar people. Annex 2, moreover, refers only to the period of temporary administration. The reference in the preamble therefore has no connection with the question of the final status of Kosovo.

V. Conclusion

27. For the reasons set out in this Written Statement, the Grand Duchy of Luxembourg asks the Court, should it see fit to reply to the Request for an Advisory Opinion contained in General Assembly resolution 63/3, to find that the declaration of independence by the Kosovar people dated 17 February 2008 does not breach any rule of international law.

Luxembourg, 30 March 2009

(Signed) Georges FRIDEN,
Agent of the Government of the
Grand Duchy of Luxembourg.
