Ambassador of the Slovak Republic
The Hague

The Hague, 16 April 2009
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Enclosure (6 pages)

Dear Sir,

Pursuant to the provisions of Article 66(2) of the Statute of the International Court of Justice, and in response to the invitation addressed to the Government of the Slovak Republic by the Registrar of the International Court of Justice in its Order of 17 October 2008, enclosed I have the honour to submit certain general comments of the Government of the Slovak Republic on the request for an Advisory Opinion submitted to the Court through Resolution 63/3 (A/63/L.2) of 8 October 2008, in which the General Assembly of the United Nations asked the Court to respond to the following question:

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

Sincerely yours,

Honourable
Mr. Philippe Couvreur
Registrar
International Court of Justice

The Hague

Statement by the Slovak Republic for the International Court of Justice on the request made by the United Nations General Assembly (resolution A/RES/63/3 of 8 October 2008) for an advisory opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?".

A. Introduction

1. This statement is submitted by the Slovak Republic in accordance with the Order of the International Court of Justice of 17 October 2008. The Slovak Republic believes that the Unilateral Declaration of Independence adopted by the Provisional Institutions of Self-Government in Kosovo on 17 February 2008 is not in conformity with several norms and principles of International Law.

2. The Slovak Republic attaches a great importance to the legal pronouncement of the principal judicial organ of the United Nations and will duly take into account in its policy the Advisory Opinion the Court is to render upon request of the General Assembly. The current policy of the Slovak Republic is based on the following legal consideration:

B. Territorial Integrity of States

3. Few principles in present-day international law are so firmly established as that of the territorial integrity of States. Though it is an ancient principle, linked to the notion of the State itself, it has been solemnly and particularly forcefully reaffirmed in the last more than sixty years. The principle of territorial integrity of States is widely proclaimed and accepted in practice and forms a part of the *corpus* of international law.

4. The principle of the territorial integrity of States is protected by the rules prohibiting interference within the domestic jurisdiction of states as, for example, stipulates Article 2(7) of the United Nations Charter. Article 2(4) of the United Nations Charter makes it particularly one of the principles of the United Nations Organization, linking it to the ban on the threat or use of force in international relations, and the principle is set forth in the same terms under the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which regards it as one of the elements of the principle of sovereign equality.

5. The Helsinki Final Act adopted on 1 August 1975 by the Conference on Security and Cooperation in Europe stipulates:

> "The participating States *will respect the territorial integrity of each of the participating States.*
>
> Accordingly, they *will refrain from any action* inconsistent with the purposes and principles of the Charter of the United Nations *against the territorial integrity, political independence or the unity of any participating State*, and in particular from any such action constituting a threat or use of force.
>
> The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such

measures or the threat of them. No such occupation or acquisition will be recognized as legal." (Emphasis added)

These commitments are reiterated in the Paris Charter for a New Europe of 21 November 1990.

6. The right to secede does not exist in international law. The creation of a new State in a colonial context is not secession. The right to self-determination in a post-colonial context does not mean that the peoples who enjoy such right are recognized as having a right to independence. Unilateral secession did not involve the exercise of any right conferred by international law. Outside the colonial context, the principle of self-determination is not recognized in practice as giving rise to unilateral rights of secession by parts of independent states. Self-determination outside the colonial context is primarily a process by which the peoples of the various states determine their future through constitutional processes without external interference. Faced with an expressed desire of part of its people to secede, it is for the government of the state to decide how to respond, for example by insisting that any change be carried out in accordance with constitutional processes.

7. International law has always favored the territorial integrity of states, and correspondingly, the government of a state was entitled to oppose the unilateral secession of part of the state by all lawful means. Third states were expected to remain neutral during such a conflict, in the sense that assistance to a secessionary group, which had not succeeded in establishing its independence, could be treated as intervention in the internal affairs of the state in question.

8. The unwillingness of the international community to accept unilateral secession from an independent state can be illustrated also by reference to the so-called "safeguard clause" to the Friendly Relations Declaration, which, in elaborating the Charter principle of self-determination specifies that:

"Nothing in the foregoing paragraphs shall 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* 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." (Emphasis added)

9. The United Nations World Conference on Human Rights held in Vienna in 1993 reaffirmed the „safeguard clause" in slightly different language. The Vienna Declaration provides, in relevant part:

"In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this [the right of self-determination] *shall not 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* conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory *without distinction of any kind.*" (Emphasis added)

10. In accordance with this formula, a state whose government represents the whole people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed or colour, complies with the principle of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity. The people of such a state exercise the right of self-determination through their participation in the governmental system of the state on a basis of equality.

11. The position stated by the Commission of Jurists appointed by the League of Nations to examine the *Aaland Islands* situation in 1920 remains true, notwithstanding subsequent developments in the principle of self-determination:

> "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish."

12. The principles of sovereignty and territorial integrity set by the Helsinki Final Act should be interpreted by taking into account other key principles stipulated in the Act, including the principle of equal rights and self-determination of peoples. Furthermore, according to the declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States of October 24, 1970, the principle of self-determination should not be interpreted as "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states conducting themselves in compliance with principle of the equal rights and self-determination of peoples".

13. The Slovak Republic considers the principle of the territorial integrity of States as a basic pillar of the international law on which the international community is established and has functioned. This principle must be seriously taken into consideration in any case of the possible recognition of the UDI.

C. Self-determination of National Groups / Minorities

14. In the phrase "all peoples have the right to self-determination", there is no universally accepted definition of the word "peoples" nor of the notion of self-determination. For some scholars the right to self-determination always includes the right to form a State, even where the people that enjoy such right could be content with other political structures. For others, this right has a much broader scope and implies that any human collectivity which defines itself as such has the right to be recognized, to chose its future and to participate in the democratic expression of the political will within the State to which it is joined. In fact, whichever of these two arguments would prevail, both of them rule out any right to secede in a non-colonial situation

15. The emphasis in all relevant instruments and in the state practice on the importance of territorial integrity, means that "peoples" is to be understood in the sense of *all* peoples of given territory. All members of distinct minority groups are part of the peoples of the territory. However, minorities *as such* do not have a right of self-determination. That means that they have no right to secession, to independence, or to join with comparable groups in other states.

16. Minorities are to be protected through the guarantee of human rights that every individual is entitled to and through the provision of minority rights. These rights find contemporary formulation in Article 27 of the International Covenant on Civil and Political Rights of 1966, that provides:

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language."

17. There is a common pattern of international responses to unilateral secession and threats of such secession in the non-colonial context, a pattern which has a normative significance. This may be summarized as follows:
(a) There is strong international reluctance to support unilateral secession or separation, and there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territorial unit. In principle, self-determination for peoples or groups within the state is to be achieved by participation in its constitutional system, and on the basis of respect for its territorial integrity.
(b) In most cases, referenda conducted in territories wishing to secede have returned very substantial majorities in favour. But even in cases where there is a strong and continued call for independence, it is a matter for the government of the state concerned to consider how to respond in a democratic and respecting way.
c) Even in the context of separate colonial territories, unilateral secession was the exception. Self-determination was in the first instance a matter for the colonial authority to implement; only if it was blocked by the colonial authority did the United Nations support unilateral secession. Outside the colonial context, the United Nations has been extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede.

D. Security Council Resolution 1244 (1999)

18. The Security Council [SC] Resolution 1244, passed on 10 June 1999, confirms the territorial integrity of the Federal Republic of Yugoslavia/Republic of Serbia and does not predetermine the independence of the Province of Kosovo.

19. SC Resolution 1244 was adopted under Chapter VII of the United Nations Charter and so there are binding obligations for all Members of the UN which arise from it, so long as it remains an operative instrument.

20. In its Preamble, SC Resolution 1244 specifically reaffirmed: "The commitment of all Members States to the *sovereignty and territorial integrity of the Federal Republic of Yugoslavia* and the other states in the region, as set out in the Helsinki Final Act and Annex 2" (emphasis added). As in the case of international treaties, the preamble is of a great importance for determining the meaning of all operative paragraphs, none of which should be taken out of the general context of the document, while the preamble reflects the circumstances and goals of the document's adoption.

21. It is important to interpret this Resolution in its integrity and jointly with other related SC Resolutions and further documents adopted by the states in order to implement the stipulations of the Resolution and accepted by all most important participants of the

Kosovo settlement process. This is, in particular, the Contact group guiding Principles for the Settlement of Kosovo's Status.

22. The confirmation of the commitment of the Security Council to the territorial integrity of the then Federal Republic of Yugoslavia (now Republic of Serbia which continues the international legal personality of the Federal Republic of Yugoslavia) over Kosovo can be find, besides the SC Resolution 1244, also in other Security Council resolutions, e.g. in SC Resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999). SC Resolution 1160 (1998) inter alia stipulated: "[T]he principles for a solution of [this] Kosovo problem *should be based on the territorial integrity of the Federal Republic of Yugoslavia* and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo." (Emphasis added)

23. SC Resolution 1244 warranted the territory of Kosovo being placed under the auspices of the UN. Instrumental to this process were two measures overseen by the UN: firstly, "the Federal Republic of Yugoslavia... begin and complete a complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized"; secondly, the establishment of "an interim administration for Kosovo under which the people of *Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia*," (emphasis added). It is on this basis that the United Nations Mission in Kosovo (UNMIK) has since had exclusive transitional control of Kosovo.

24. SC Resolution 1244 explicitly reiterates the agreed formulations of "substantial autonomy" and "meaningful self-administration" for Kosovo. Such formulations, combined with the consistent omission of any reference to the principle of self-determination, conclusively indicate that there is no legal basis whatsoever for the type of independent statehood that has been unilaterally declared and recognized by some States. This lends credence to the claims that this unilateral declaration and recognition thereof violates Serbia's sovereignty and is not in conformity with international law.

25. In making the unilateral declaration of independence and adopting the Constitution of the Republic of Kosovo, Kosovo's Assembly has acted *ultra vires*. The UNMIK „Constitutional Framework for Provisional Self-Government" confirms that Kosovo's "Provisional Institutions of Self-Government" had no powers to act in the foregoing ways. To do so is to be in breach of the obligation to in no way "affect or diminish the ultimate authority of the SRSG [Special Representative of the Secretary General] for the implementation of UNSCR 1244(1999)". In this respect, as Chapter 8 Para. 2 of the UNMIK „Constitutional Framework" reserves the powers to the SRSG in the domains of defense, justice, legal affairs and foreign affairs, it is suggested that the provisions within The Constitution of the Republic of Kosovo such as Article 2, Article 65 paragraph (12), Article 84 paragraphs (7), (10), (12) and (15) – (25), Article 93, Article 131, Article 151 contradict the "Constitutional Framework" and are therefore unlawful and untenable.

26. The fact that the SC Resolution 1244 does not contain provisions that exclude the possibility of Kosovo's independence is by no means a confirmation of a right to independence. To the contrary, the formulation "substantial autonomy within the Federal Republic of Yugoslavia" in the Resolution's Paragraph 10 should be interpreted as an evidence that a settlement based on this Resolution should not lead to independence of Kosovo.

27. However SC Resolution 1244 may be read it surely does not bear the meaning that, in 1999, the Security Council authorized the separation of Kosovo sometime in the future even if the resolution nowhere expressly excludes it. There has been no "second resolution" which would fill the gap in Resolution 1244. And even though SC Resolution 1244 does not explicitly prohibit secession or prohibit states from recognizing secession (like Security Council Resolutions 216 and 217 in the case of Rhodesia's Unilateral Declaration of Independence in 1965), it nonetheless seems to set forth the framework for self-determination that does not include independence. It seems that all the parties in the case were attempting to create an autonomous arrangement. In the Kosovo case, internal self-determination would be achieved through substantial autonomy within Serbia.

28. The Slovak Republic by no means disputes serious violations of international law in the past by the Federal Republic of Yugoslavia in its treatment of the Kosovars. However, officials individually responsible have been indicted and prosecuted for criminal violations of international law in Kosovo at the International Criminal Tribunal for Former Yugoslavia. To trace a right to change the status of Kosovo back to the events of 1999 does not comport with the law. There is no authority for a rule of law which allows the "punishment" of States, especially by something as a loss of territory, for breaches of the law.