EMBASSY OF FINLAND
THE HAGUE

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VERBAL NOTE

The Embassy of Finland presents its compliments to the Registrar of the International Court of Justice and has the honour, with reference to the letter of the Registrar, dated 20 October 2008, concerning the request for an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, has the honour to submit the statement of Finland. The signed original copy will be delivered early next week.

Due to time constraints the statement is submitted in English only. The Embassy regrets that it is not in a position to file the statement in both of the official languages of the Court.

The Embassy of Finland avails itself of this opportunity to renew to the Registrar of the International Court of Justice the assurance of its highest consideration.

16 April, 2009

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Attached:
- Statement of Finland (30 copies)
- CD ROM containing the Statement of Finland

Mr. Philippe Couvreur
The Registrar of the International Court of Justice
Peace Palace
2517KJ The Hague

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)

STATEMENT OF FINLAND

APRIL 2009

1. The Object of the Advisory Opinion Requested from the Court

1. On 8 October 2008 the United Nations (UN) General Assembly adopted resolution A/RES/63/3, in which it requested the International Court of Justice, in accordance with Article 65 of the Statute of 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?" The formulation of the request calls for two comments.

2. First, although the request is formulated to deal with the legality, under international law, of action taken by the Assembly of Kosovo, the interest of the General Assembly must lie in determining *the legal consequences* of the declaration of independence. Nothing can be said about the character of the declaration under international law that would not simultaneously be an answer to the question: does it confer on Kosovo the status of an independent State? A second problem concerns the absence in international law of specified criteria on how statehood may be conferred to an entity. In the course of history, States have gained their independence in a wide variety of ways, often involving statements by political leaders, groups of leaders, provincial organs, or assemblies of very differing kinds. Examining those cases *ex post facto* does not render sufficient basis for drawing inferences regarding the presence of a rule of customary international law of a very specific character about criteria that such statements would have to fulfil in order to contribute to the emergence of statehood.

3. This does not, however, mean that international law would have nothing to say about such statements or declarations. They must be examined on a case by case basis and by reference to the general law concerning statehood. A declaration of independence involves a claim about the exercise of sovereignty in a territory. In accordance with the well-known formula in the *Island of Palmas* case (1928) sovereignty "in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[1]

4. The possession of sovereignty (and hence statehood) has been understood to require the presence of an "animus" and a "corpus" – that is to say, "intention and will to act as a sovereign and some actual exercise or display of such authority".[2] As stated in Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia, the existence of a State (i.e.

[1] *Island of Palmas case*, II UNRIAA, at 838.
[2] *Legal Status of Eastern Greenland*, Permanent of Court of International Justice Ser A/B 53, at 46.

the presence of "animus" and "corpus") is "a question of fact".[3] The determination of the legal effect of the unilateral declaration of independence must thus be done by examining the factual circumstances in which it was given. Does the Assembly of Kosovo validly express the will to exercise sovereignty and does it represent the people and the territory?

2. The Law on Self-Determination

5. The most frequently invoked legal principle in connection with the creation of States since 1945 has been the right of self-determination (Articles 1(2), 55, 73 and 76(b) of the UN Charter). Most recently, in the *East Timor Case* (1995) the ICJ stated that the right to self-determination was an essential principle of contemporary international law that had an *erga omnes* character (i.e. no State can ignore it).[4] As is well-known, self-determination may be realised in different ways, only one of which involves the exercise of independent statehood (external self-determination). The usual – and indeed widely practiced – means of its realisation is through the establishment of a minority or autonomy regime within an existing State. That self-determination should not violate territorial integrity was forcefully iterated by the UN General Assembly in the Friendly Relations Declaration in 1970.[5] It was reaffirmed by Opinion No. 2 of the Arbitration Commission of the Conference on Yugoslavia: "the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".[6]

6. In post-1945 law, self-determination is accompanied by a strong rule in favour of the territorial integrity of existing States. However, although the nexus is strong, it is not and has never been absolute. The cases of Namibia (1990) and East Timor (2002) exemplify situations where independence emerges as the only viable form of self-determination in response to continued oppression by the territorial State and no expectation that internal self-determination could be meaningfully realised in the foreseeable future.

7. That territorial integrity may be overridden in exceptional cases was affirmed expressly, and with particular relevance to the situation in the area of former Yugoslavia, in the early

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[3] Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, XXXI ILM (1992), at 1495. The Yugoslav Crisis was mainly dealt with at the international level through the Conference on Yugoslavia, established on 27 August 1991 by the European Communities. The Conference on Yugoslavia established an Arbitration Commission chaired by Robert Badinter, to advise it on the legal issues in relation to the crisis.
[4] *East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995, at 102, para. 29.
[5] UNGA Res. 2625 (1970), 24 October 1970, "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."
[6] Conference on Yugoslavia, Arbitration Commission, Opinion No. 2, XXXI ILM (1992), at 1498.

locus classicus by the Commission of Jurists on the *Aaland Islands* question in 1920. Having affirmed that the right of self-determination may not normally be invoked against existing States, the Commission held that where the boundaries of existing States have become contested, as in the context of a revolution or a major war, self-determination may emerge as a criterion for future territorial settlement:

> "From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law [...].
>
> Under such circumstances, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilisation, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations."[7]

8. It has sometimes been suggested that the widespread application of the principle of self-determination during the decolonization process was a "special case" and that after the end of the process the door to statehood by this means had been closed. This is wrong. Not only would it create an arbitrary distinction between entities seeking self-determination and the various "situations of fact" in which such claims are made, it also misunderstands the rationale of the principle itself, as expressed in the *Aaland Islands* case and later. This rationale was echoed in the Friendly Relations Declaration of 1970, in the paragraph quoted above,[8] which referred to States that conduct themselves in compliance with the relevant principles and possess a government representing the whole people belonging to the territory. It was also articulated in the decision of the Supreme Court of Canada in 1998 concerning the right of Quebec to unilaterally secede from Canada. The Court concluded that international law grants a right to secession where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms part".[9]

9. The rationale invoked in these cases points to a distinction between normal situations and those of abnormality, or rupture, situations of revolution, war, alien subjugation or the absence of a meaningful prospect for a functioning internal self-determination regime. The First World War and the ensuing revolutions constituted such an "abnormality" in the *Aaland Islands* case, just like "colonialism" in the 1950s and 1960s, or the prolonged war in the territory of the former Yugoslavia in the 1990s. In such situations, to rely on the principle of

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[7] 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 O.J. Spec. Suppl. No. 3, (October 1920), at 6.
[8] *Supra* note 5.
[9] *Reference re Secession of Quebec* (1998), 161 D.L.R (4th) 385 (S.C.C.) August 20, 1998.

"stability and finality of boundaries",[10] for example, or *uti possidetis,* would be to put the cart before the horse: there is little or no stability of boundaries to be protected. Instead, the very question "who possesses" or "which boundary" has become part of the controversy and cannot therefore be used as a criterion for resolving it.

10. This is precisely the situation in which Kosovo found itself in during the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY).[11] The dismemberment of the SFRY had even been formally recognised by the UN. That the SFRY had ceased to exist led the UN to conclude that the Federal Republic of Yugoslavia (FRY, consisting of Serbia and Montenegro) should apply for new membership in the UN. Since then, the FRY was transformed into a State union between Serbia and Montenegro with the latter declaring independence in 2006. The question of the status of Kosovo had not been addressed, let alone resolved. When that question finally emerged at the international level in 1997, it had already become contentious between Serbia and Kosovo. Five aspects in the factual background of the Declaration of Independence justify regarding the situation as "abnormal":

a) **Violent break-up of the SFRY.** Kosovo has been at the core of the political upheaval that led to the creation of several independent states in the area of the Socialist Federal Republic of Yugoslavia. The decision by Serbia to curtail the internal self-determination of Kosovo in late 1980s was closely connected with the policy that led to the violent break-up of the federation. While the dissolution was completed in 1992 in the sense that the SFRY had ceased to exist,[12] the situation remained violent and highly unstable. The Milošević regime continued to pursue a deliberate policy of repression and persecution with regard to Kosovo, seeking to ensure that the ethnic Albanian majority in Kosovo become politically powerless.

b) **Unilateral changes in Kosovo's constitutional status.** Kosovo's constitutional status, which under the 1974 Constitution of the SFRY was in many respects comparable to that of the republics, was diminished to "territorial autonomy"

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[10] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962,* I.C.J. Reports 1962, at 34-35.

[11] Here is how the Commission of Jurists described the situation where self-determination receives an independent role: "if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a 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. This transition from a *de facto* situation to a normal situation *de jure* ...tends to lead to readjustments between the members of the international community and to alterations in their territorial and legal status; consequently, this transition interests the community of States very deeply both from political and legal standpoints". *Ibid,* at 6.

[12] Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 8, XXXI ILM (1992), at 1523.

through changes in Serbia's constitution in 1989 and 1990. The status of Kosovo Albanians as a "nationality" was reduced to being a "national minority". Through a whole series of unilateral actions, Serbia denied Kosovo representative government and effective participation in decision-making.

c) **Persecution of Kosovo Albanians in 1989–1999.** In the period 1989–1999 a consistent pattern of persecution, serious human rights violations and crimes against humanity were directed at Kosovo Albanians. These culminated in the spring of 1999 in massive displacement of people in and from Kosovo. A reference can be made, inter alia, to the *Milutinović et al.* Judgement of 2009, which points to excessive and indiscriminate force used by the forces of the FRY and Serbia in 1998, and of a broad campaign of violence directed against the Kosovo Albanian civilian population during the course of the NATO air-strikes, conducted by forces under the control of the FRY and Serbian authorities.[13]

d) **The international recognition of the special nature of the situation**. The abnormal character of the situation was recognized by UN Security Council resolution 1244 (1999) that established an international security presence in Kosovo, requiring that the FRY put an immediate and verifiable end to violence and repression in Kosovo, and begin a complete withdrawal from Kosovo of all its military, police and paramilitary forces. The Security Council determined that the situation in the region continued to constitute a threat to international peace and security and that Kosovo Albanians were to be protected against violations by the agents of the FRY.

e) **Failure by Serbian authorities to provide a credible framework for internal self-determination**. UN Security Council Resolution 1244 (1999) left open the question of the final status of Kosovo while launching a negotiation process with a view to agreeing on the question in the future. The political process opened by the resolution did not, however, bring about a negotiated solution. By 2007, its potential was exhausted. The Special Envoy of the UN Secretary-General concluded that the parties were not able to reach an agreement on Kosovo's future status and that no amount of additional talks, whatever the format, would overcome the impasse. "Pretending otherwise and denying or delaying resolution

[13] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milutinović et al.*, Judgement of 26 February 2009.

> of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole." The only viable option for Kosovo, according to the Special Envoy, was independence, to be supervised for an initial period by the international community.[14]

11. These five aspects of the situation in Kosovo during the period 1989–2007 create the factual background against which the legal effects of the Declaration of Independence must be determined. The 1921 Commission of Rapporteurs that addressed the *Aaland Islands* question observed that self-determination may be realized though secession when the prospects of its credible internal realization are no longer present:

> "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".[15]

12. This is the situation where the people of Kosovo found themselves at the time of the unilateral Declaration of Independence. The acts of the FRY authorities in the relevant period demonstrated that "the State lacks either the will or the power to enact and apply just and effective guarantees". Kosovo could not expect to enjoy meaningful internal self-determination as part of the FRY. In view of the continuing suppression by the authorities of the FRY of the right of self-determination, and in the absence of any guarantees that such suppression would cease, the only realistic solution was to realize the right by independent statehood.

3. Representation

13. In order for the Declaration by the Assembly of Kosovo to have the legal effect of conferring independent statehood on Kosovo there must be sufficient evidence that those institutions represent the people of the territory and exercise some degree of control over it. Again, customary international law is thin on specific criteria to this effect. It does provide that the creation of States requires the presence of a territory, a people, as well as a government that has sufficient territorial control to enable it, in the words of the *Island of Palmas* case, "to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State

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[14] UN Doc. S/2007/168 (26 March 2007) paras. 1, 3, 4 and 5.
[15] 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), at 28.

may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty".[16]

14. What this broad criterion may mean in practice has frequently been litigated in territorial disputes where the flexibility of the relevant standard and the need to pay attention to the special circumstances has been highlighted. In the words of the Permanent Court of International Justice in the *Eastern Greenland* case (1933): "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim."[17] In that case, the difficulty lay in the fact that the area was "thinly populated". Although this is not here the case, the rationale laid out in the *Island of Palmas* case is still applicable. In a situation where both sides are able to make some prima facie plausible claim, the decision, as observed by Max Huber "would have to be founded on the relative strength of the titles invoked by each Party".[18]

15. A critical aspect of the situation at hand is the international presence established by UN Security Council resolution 1244 (1999). Under the UN administration, Kosovo developed a legally separate existence from Serbia. The resolution set up the UN administration in Kosovo (UNMIK) with a mandate covering "all legislative and executive powers, including the administration of the judiciary."[19] Since then, joint administration structures with Kosovo institutions have been created and responsibilities not directly relating to sovereignty such as economic policy, trade, and administrative tasks have been transferred to the Kosovo institutions. At the same time, effective control by the institutions of the FRY has been drastically limited.[20]

16. The involvement of the international community is part of the way Kosovo resembles other situations involving UN assistance, such as East Timor, where limitation of internal self-determination, accompanied by serious human rights violations have opened the door to secession and independent statehood. In these cases, the assessment of effective control is complicated by the extensive international presence. What should be stressed, however, is that the significance of that presence ought to be read in the light of the continuing

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[16] *Island of Palmas case*, II UNRIAA, at 839.
[17] *Legal Status of Eastern Greenland*, Permanent Court of International Justice Ser. A/B No. 53, at 46.
[18] *Island of Palmas case*, II UNRIAA, at 869.
[19] Report of the Secretary General on the United Nations Interim Administration in Kosovo, UN Doc. S/1999/779 (12 July 1999) para. 35.
[20] Reference can be made for instance to the introduction of the Deutschemark (later Euro) as the local currency by the UNMIK.

oppression exercised by FRY institutions in Kosovo, to which it was a response, and the failure of those institutions to guarantee a reasonable system of internal self-determination. It would be hardly appropriate that those institutions could now invoke the presence of that protective operation to support their continued authority over Kosovo. *Ex injuria non jus oritur.*

17. As pointed out above, the special – indeed abnormal – character of the Kosovo situation has to do with the war in the territory of the former Yugoslavia in 1991–1997 followed by continued oppression of the people of Kosovo by the institutions of the FRY and the absence of any meaningful prospect of the realization of internal self-government. The predominant aspect of this case is its specificity, the emergence of the claim for independence out of a frustration of the prospects of internal autonomy in the course of the civil war and after the failure of the subsequent negotiations. In this regard, the "Provisional Institutions of Self-Government" referred to in the question satisfy the criteria expected of representation. The Kosovo Assembly that adopted the declaration of independence is founded on the Constitutional Framework[21] and was elected in a nation-wide process, conducted in 2007 under the supervision of the Council of Europe as well as various international and domestic groups.[22] According to the Council of Europe, the elections were conducted generally in line with Council of Europe principles as well as international and European standards for democratic elections.[23] Kosovo Assembly represents ethnic minorities according to the rules of share of seats established in the Constitutional Framework providing that 20 seats out of total 120 should be reserved to non-Albanian communities (10 to Kosovo Serbs and 10 allocated to other Communities). The Declaration of Independence was adopted unanimously with the Kosovo Serb members of the Assembly boycotting the session.[24]

18. The creation of States out of long and violent struggles rarely fulfils criteria discussed in ideal theories of democratic representation. If attention is on "the relative strength of the titles invoked by each party" as laid out in the *Island of Palmas*, then it is clear, however, that no other institution or body has nearly as good a claim to speak on behalf of Kosovo as the Assembly of Kosovo. Bearing in mind what has been said above about the abnormal nature of the situation, and the rationale of the self-determination principle, there seems little doubt that if international law were to ignore or by-pass the Declaration of Independence, it would

[21] Constitutional Framework for Provisional Self-Government UNMIK/REG/2001/9 (15 May 2001) as amended, Chapter 9, Section 1, http://www.unmikonline.org/constframework.htm (15 April 2009).
[22] OSCE Mission in Kosovo http://www.osce.org/kosovo/13208.html (3 March 2009).
[23] http://www.coe.int/t/dc/files/events/2007_kosovo/prelim_statement_en.asp (3 March 2009).
[24] BBC News Europe, Kosovo MPs proclaim independence, 17 February 2008, http://news.bbc.co.uk/2/hi/europe/7249034.stm (15 April 2009).

not serve one of the principal functions it has – to provide for stable and lasting solutions for territorial disputes that are based on respect for fundamental human rights and freedoms.

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19. **Therefore, it must be concluded that the Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Assembly of Kosovo) is in accordance with international law.**

Helsinki, 16 April 2009

Marcus Laurent
Director General for Legal Affairs