

DER BOTSCHAFTER
DER BUNDESREPUBLIK DEUTSCHLAND
DE AMBASSADEUR
VAN DE BONDSREPUBLIC DUITSLAND

Den Haag, 14 July 2009

Gz.:

H.E. Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague

Excellency,

upon instruction of my Government, I have the honour to refer to your letter of 20 October 2008 and to the Court's order of 17 October in respect of the Request 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?“.

In accordance with the Court's order, I have the honour to enclose an original, signed by Mr. Georg Witschel, Legal Adviser and Director General of the Legal Department, Federal Foreign Office, and 29 copies of Written Comments by Germany in this matter as well as an electronic version of this document.

Please accept, Excellency, the expression of my highest consideration.



(Dr. Thomas Läufer)

7/15

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)

***WRITTEN COMMENTS
OF THE FEDERAL REPUBLIC OF GERMANY
ON OTHER WRITTEN STATEMENTS***

July 2009

TABLE OF CONTENTS

I.	Introduction	3
II.	The question before the Court	3
III.	The factual background to the events leading to the Declaration of Independence	3
a)	The events of 1989-90	3
b)	The events of 1998-99	4
c)	The situation in 2005-2007	5
IV.	The <i>sui generis</i> character of the Kosovo situation	6
V.	The Declaration of Independence	6
VI.	Security Council resolution 1244 (1999) of 10 June 1999	7
VII.	Kosovo: A new reality	8

I. Introduction

In its Order of 17 October 2008 the Court invited States and organizations having presented written statements on the question put to the Court by the United Nations General Assembly in Resolution 63/3 of 8 October 2008 to submit written comments on the other written statements. Germany and a number of other States submitted such written statements.

Germany has carefully considered all of the written statements and the observations contained therein. They do not generally raise new issues that were not dealt with in the initial written statement of Germany. However, and while maintaining all factual and legal points made in that statement, Germany considers it useful, in view of statements submitted to the Court by other States, to underline and elaborate upon a number of particularly important issues.

1. The question before the Court

As indicated in its initial statement, Germany is of the view that the question put to the Court is a narrow one and that it relates only to Kosovo's Declaration of Independence. Kosovo's present or future status and the issue of recognition by third States are not before the Court. Germany would note that this seems to be generally accepted in the other written statements submitted to the Court. In particular, Serbia, in its own written statement, acknowledges that "the present request is confined to legal issues and concerns the legality of the UDI under applicable rules of international law. It is no more and no less than this."¹ The statement continues: "It should be noted that the present request does not directly relate to the question of recognition of the so-called "Republic of Kosovo" by certain States..."²

2. The factual background to the events leading to the Declaration of Independence

a) The events of 1989-90

It should be underlined that Kosovo's loss of autonomy in 1989-90 was not some constitutional adjustment of minor importance, which was welcomed by local leaders, but a fundamental upheaval in the relationship between the inhabitants of the then province of

¹ Statement of Serbia, p. 26, para. 19.

² Statement of Serbia, p.27, para. 22.

Kosovo and the central authorities in Belgrade. What happened was the removal of the constitutionally guaranteed autonomy of Kosovo by means of systematic and continuing repression. The result was not just a new, allegedly more workable arrangement for the government and administration of the then province of Kosovo, but the fundamental denial of political and social rights of participation to the vast majority of its population, accompanied by repeated and serious human rights violations.

b) The events of 1998-99

Likewise, the events of 1998-99 should not be described as some minor unrest that central authorities were countering with ordinary measures of policing. On the contrary, measures of repression and eviction taken by the central authorities resulted in a massive exodus, premeditated by the central authorities, of the Kosovar population. It is useful to refer for further analysis to the recent judgment of the International Tribunal for the Former Yugoslavia (ICTY) in the case of Prosecutor v. Milutinović et al³. The analysis of the ICTY demonstrates quite clearly a deliberate policy, orchestrated at the highest levels of central authorities.

There have thus been two traumatic events in the recent history of the Kosovo which cannot be properly described as times of mere unrest.

While no-one is denying that Kosovo-Albanian irregulars have played a role in the unfolding of the tragedy as well, this role is quite simply not comparable to the actions of the central authorities. There was a deliberate policy, centrally defined and executed, which included violent displacement through acts of killing, sexual assault and intentional destruction of places of worship of a whole population on the one hand, and there were individual acts of violence on the other hand. Any attempt to neutralize one set of actions by setting it off against the other must therefore clearly fail. As the events of 1989-90 and 1998-99 set the scene for what followed, this necessary differentiation is still relevant today.

³ Case No. IT-05-87, Judgment of 26 February 2009,

c) **The situation in 2005-2007**

It has been maintained in the statement of the Federal Republic of Germany that the situation as it had developed towards the end of 2007 constituted an exceptional case, a case *sui generis*, under whose circumstances the declaration of independence was compatible both with general international law and with UN Security Council Resolution 1244 (1999) of 10 June 1999. Two points bear repeating in this context.

First, it had become clear in 2004-05 that the people of Kosovo, after more than five years under UNMIK administration, were demanding a perspective on a permanent solution to the issue of the status of Kosovo. The international community could have ignored this demand only at their peril. Quite correctly, they did not ignore it but the Security Council of the United Nations rather set in motion a process that was intended and designed to lead to a permanent solution to the status issue. This process, overseen by former Finnish President Martti Ahtisaari, was geared towards a solution that would be acceptable to both sides, i.e. a solution based on consensus. But whatever the eventual outcome of this process, it was understood and accepted by all that simply doing nothing and maintaining permanently the status quo of international administration was not a viable option.

Second, while everyone had been hoping that the outcome of this process would be a consensual solution to the status issue, no-one could have ignored the possibility that such an outcome would be impossible to achieve. Failure is always one possible outcome of any political process – however unwanted an outcome it may be to all concerned. By March 2007 the extensive efforts of the Special Representative of the UN Secretary-General, Mr Martti Ahtisaari, to arrive at a solution acceptable to both had led to his presentation of a proposed settlement. When that proved unacceptable to the Serb side, the UN Security Council itself took over, but it failed to reach consensus on the contents of a possible resolution. Finally, there was another round of negotiations, under the auspices of a Troika (European Union, Russia, United States) established by and reporting to the UN Secretary-General. This Troika submitted a number of possible arrangements to the parties, including one that would have left the status question open while establishing a *modus vivendi* for the two sides. All these avenues were blocked by at least one of the parties, sometimes by both of them. Hence by the end of 2007 the process initiated in 2005 had come to its natural end; it had definitely and

finally failed. Just as it would not have been viable in 2005 to continue the *status quo* of international administration without searching for a permanent status solution, it would not have been viable post-2007 to continue indefinitely the process started in 2005, regardless of the total absence of any prospects of success. This contributed to creating the unique situation in which the declaration of independence has to be seen and assessed.

3. The *sui generis* character of the Kosovo situation

It has been argued in some of the written statements by other States that the invocation of Kosovo as being a “special case” could not *per se* provide a legal justification for independence⁴. ‘Special cases’ did “not merely dilute the quality of legality of a system: they replace it with a political element, in which the power and commitment of individual actors becomes more significant than the legal rights that they enjoy”⁵. This, in turn, would lead to “double standards” in international law which were unacceptable⁶.

Germany continues to maintain that Kosovo is, indeed, a special case. However, this does not mean that the Kosovo case is “outside the law” or that there is a “special law” for Kosovo. As Germany has emphasized in its initial written statement, what makes Kosovo “special” are the unique circumstances leading up to and surrounding Kosovo's Declaration of Independence. As other States have equally emphasized, “there is no parallel or analogy from this situation to other circumstances in other places in which some group or other may assert independence”⁷. The events surrounding Kosovo do not create a precedent. This view is shared by all Member States of the European Union, including those Member States that have not recognized Kosovo's independence⁸.

4. The Declaration of Independence

It should once again be underlined that a declaration of independence issued by an entity which thereby leaves the constitutional framework of a larger State is a factual event on which

⁴ Statement of Argentina, p.26, para. 60.

⁵ Statement of Cyprus, p. 19, para. 77.

⁶ Argentina, p. 32, para. 81.

⁷ Statement of the United Kingdom, p.9.

⁸ Cf. Council Conclusions on Kosovo, 18. February 2008, Annex 6 to the written statement: of Germany: “[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...”).

international law generally holds no opinion. The declaration is one among several elements that, when present cumulatively, allow the international community to address a territorial entity as a State and recognize its independence under international law.

As indicated in its initial written statement, Germany believes that contrary to the misleading language in the question put to the Court, Kosovo's Declaration of Independence was not an act of the Provisional Institutions of Self-Government (PISG) under the Constitutional Framework. It is quite clear from the circumstances of its adoption that those voting for and signing the Declaration of Independence were acting as the democratically-elected representatives of the people of Kosovo and not as mere members of an Assembly created under the international administration of Kosovo. They were acting, in this particular moment, not as *pouvoir constitué* but as *pouvoir constituant*, declaring the will of the people of Kosovo to live in a State of their own. The photographic reproduction of the hand-written original of Declaration of Independence included in Kosovo's written contribution⁹ bears ample testimony to the extraordinary character of the act performed, an act "unlike anything that might have been issued by the PISG"¹⁰. Hence the argument that the Kosovo parliament exceeded its powers under UNMIK arrangements, and therefore acted *ultra vires*, is beside the point.

5. Security Council resolution 1244 (1999) of 10 June 1999

As Security Council resolution 1244 (1999) contains references to the territorial integrity of the Federal Republic of Yugoslavia, it is important to put these references in their proper context.

In its original written statement, Germany highlighted in detail that wherever the territorial integrity of Yugoslavia (Serbia) is mentioned in resolution 1244 (1999), this is done in connection with an interim solution. The injunction to create any *faits accomplis* with regard to sovereignty over Kosovo was meant to allow the political process envisaged by the resolution enough time to develop without disturbance and, above all, without the danger of being suddenly made irrelevant by unilateral (and possibly violent) acts. What resolution 1244 does not, is to anticipate a specific result to the political process, and certainly not a final status

⁹ Statement of Kosovo, Annex 1.

¹⁰ Statement of Kosovo, p. 115.

solution inside the framework of the Republic of Serbia. On the contrary, the resolution does not say anything about any particular outcome to the final status process.

Resolution 1244 (1999) does not contain a requirement that the final status be “agreed”, only a mandate for the international civil presence to facilitate a political process leading to a final settlement.

However desirable an agreement between Kosovo and the Federal Republic of Yugoslavia (Serbia) might have been, resolution 1244 (1999) did not require it. To conclude otherwise would be to read into the resolution a veto for the Federal Republic of Yugoslavia (Serbia) over Kosovo's future.

It is clear that the injunction on unilateral changes laid down in Resolution 1244 (1999) ceased to operate when the political process had clearly, unequivocally and irretrievably failed. At the time Kosovo declared its independence on 17 February 2008, the political process had run its course. There was no longer an ongoing future status process. UN Special Representative Ahtisaari had declared that process over, and a last attempt by the Troika had failed. There was no prospect for a successful resumption of the future status process. When it became clear that no amount of further negotiations, with or without the assistance of third parties, showed any prospect of arriving at a solution, then the door for Kosovo to declare its independence opened, and resolution 1244 (1999) no longer prohibited such a step. To argue otherwise would be to condemn the parties for ever to live, side by side, in a frozen conflict. This would be incompatible with the role of the Security Council, which bears the primary responsibility for the maintenance of international peace and security.

6. Kosovo: A new reality

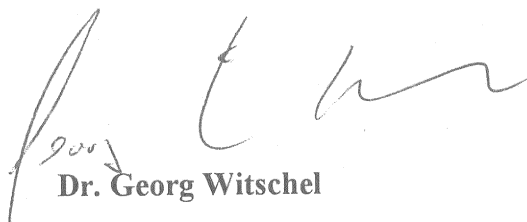
Almost one year and a half have passed since Kosovo's Declaration of Independence. This has led to “new realities on the ground” and a reconfiguration of the civil presence in Kosovo, paving the way for an enhanced role of the European Union mission EULEX in Kosovo. The Security Council has welcomed the cooperation between the United Nations and other

international actors, and the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans¹¹.

The institutions of the independent Republic of Kosovo have firmly established themselves. The international community is still present in Kosovo, but its role is more and more that of an observer and adviser. Kosovo has, today, been recognized by 60 States, and it has been admitted into both the International Monetary Fund and the World Bank Group. It has adopted its own Constitution, firmly establishing the rule of law, respect for international law, and with stringent demands for minority protection.

There is still much work to be done: Kosovo and Serbia have to cooperate in areas such as security, commerce, culture and much else. It is in the interest of both States to move forward and to enjoy friendly relations on a State-to-State basis. The future for both States lies in Europe, as partners of the European Union. Serbia's acceptance of the reality of Kosovo's independence is essential. Re-introducing uncertainty over Kosovo's status would be an obstacle to Kosovo's democratic development, economic reality and reconciliation. There can be no turning back for Kosovo.

Berlin, 8 July 2009



Dr. Georg Witschel

Legal Adviser and Director General of the Legal Department

Federal Foreign Office

¹¹ Presidential Statement of 26 November 2008, S/PRST/2008/44.