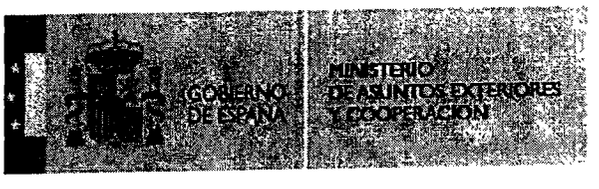
INTERNATIONAL COURT OF JUSTICE

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 KINGDOM OF SPAIN

JULY 2009



I. INTRODUCTION

1. Given the opportunity offered to UN Member States to submit written comments in the second part of the written phase of the advisory proceedings on the *Accordance with International Law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo* (ICJ Order of 21 October 2008), the Government of Spain has decided to submit these written comments to the International Court of Justice. Spain's decision stems from its firm purpose to actively cooperate with the ICJ, whose jurisdiction Spain trusts deeply and unfailingly.

2. First of all, Spain wishes to reiterate the arguments laid out in its written statement of 14 April 2009, as well as the conclusions reached in the said statement, which Spain continues to consider as being adequate and useful in the present advisory proceedings.

Nevertheless, having conducted a detailed examination of the written statements presented by other States, and of the written information supplied by the Provisional Institutions of Self-Government of Kosovo (PISG), Spain wishes to make some brief comments that are to be understood as complementary to its written statement of 14 April 2009.

These comments regard the scope of the principle of territorial integrity (II), the right to self-determination and secession (III), and certain issues related to the alleged acquiescence of certain international organs to the Unilateral Declaration of Independence (UDI) (IV). On the other hand, Spain does not consider it necessary, at this stage, to pronounce on the competence of the Court to exercise its jurisdiction or on the scope of the question. Regarding these two issues, Spain reiterates the arguments set out in its written statement of 14 April 2009.

At any rate, the present comments are made by Spain without prejudice to the possibility to proceed to a more extensive consideration of its content, or of other pertinent issues, at a later stage in the proceedings.

II. THE SCOPE OF THE PRINCIPLE OF TERRITORIAL INTEGRITY

3. As expressed in its written statement, Spain considers the principle of territorial integrity to be essential to guaranteeing stability and international peace and security. Therefore, this principle holds a central place among the fundamental principles of contemporary international law, and is part of the principle of sovereign equality of States and of the principle that States shall refrain in their international relations from the threat or use force against the territorial integrity or political independence of any State, as such principles are defined in General Assembly Resolution 2625 (XXV). Moreover, the fact that territory is one of the defining elements of statehood should not be left out, which entails that the principle of territorial integrity is also to be analyzed from this perspective.

4. Bearing the previous considerations in mind, Spain understands that it is not possible to make an absolute distinction between how the principle of territorial integrity can be invoked with regard to third States and how it can be invoked with regard to domestic entities operating within the territory of the State. Such a distinction aims at restricting the application of this principle to the purely international level. It thus results in a merely formal understanding of the principle of territorial integrity, which takes into account neither intra-state reality nor the most recent international practice.

On the other hand, the fact should not be overlooked that a violation of the principle of territorial integrity through actions carried out by domestic actors within the State will inevitably bear international

consequences. The reason is, first of all, that it affects an essential element of statehood, thus possibly affecting international legal personality and entailing a breach of obligations *erga omnes*. And, in the second place, it will predictably have other immediate consequences in the international scene in the form of acts carried out by other international actors, States in particular, following the domestic actions mentioned above.

5. In conclusion, Spain considers it untenable to reduce the principle of territorial integrity to a principle operating at an exclusively international level, which in turn means that this principle cannot be understood as an obligation that only third States and other subjects of international law must comply with. The scope- in terms of opposability- of the principle of territorial integrity cannot be limited in this manner.

III. SELF-DETERMINATION OF PEOPLES AND SECESSION

6. Secondly, Spain wishes to express its opinion regarding the meaning and scope of the right to self-determination which, as it is well known, is one of the fundamental principles of contemporary international law. This principle must be interpreted coherently and in connection with the rest of the fundamental principles of the international legal order, and especially with the principle of sovereignty and territorial integrity.

7. From this position, and broadly speaking, nothing would prevent this principle from applying in the Kosovo case, if the proper requirements for its application are given, and always within the parameters established by international law to that effect. Among the requirements, one could first underline the need to prove the existence of a people having the right to self-determination. Among the parameters, it must be underlined that the right to self-determination can be exercised along a number of different paths. The possibilities range from the various forms of self-government (special or general) within a pre-existing State to the

independence of the people in question and the subsequent creation of a new State. Generally speaking, International law currently in force does not favour one particular option over the rest regarding different forms of self-determination. Therefore, it cannot be concluded that there exists a tendency in international law and practice to equate the right to self-determination with independence.

From this perspective, and leaving now aside the issue regarding whether what exists in Kosovo is a people in the above referred sense or a minority, it must be underlined that Resolution 1244 (1999) is an outstanding example of how the right to self-determination has been given shape through a self-government regime inserted in, and guaranteed by, an international administration regime which has been established and regulated by the Security Council. And it cannot be concluded that this arrangement is contrary to international law, or to the right of self-determination of peoples, only because it has not automatically resulted in Kosovo's access to independence.

8. Moreover, Spain also wishes to express its opinion regarding secession as a form of sanction or remedy, which has no proper basis in contemporary international law. This understanding of secession faces serious problems in the case of Kosovo, even when linked to the safeguard clause defined in Resolution 2625 (XXV) as a means to find an adequate balance between the right to self-determination and territorial integrity. Thus, suffice it to say now that, in Spain's view, with regard to the massive and systematic human rights violations and minority rights violations in Kosovo, and to the suspension of Kosovo's self-government regime dictated by Serbia in 1989, the reaction of the international community has materialized, already in 1999, in precisely the establishment of an international administration regime of Kosovo which includes a self-government system of this Serbian province. In addition to such a regime, which sufficiently guarantees self-government under international control, the UN Security Council has set in motion a political process for the determination of the future status of Kosovo. This

process is, in the case at issue, the valid procedure for the final exercise by Kosovo- in a form yet to be defined- of a possible right to self-determination.

Bearing in mind this remedy fashioned by the international community in 1999, Spain considers that no other form of reaction or remedy is legally defensible, much less so through the secession-as-sanction or secession-as-remedy formulas, which, as pointed out above, have no proper legal basis in international law, this being of particular bearing on the case of Kosovo.

IV.- THE ALLEGED ACQUIESCENCE TO THE UNILATERAL DECLARATION OF INDEPENDENCE BY INTERNATIONAL ORGANS

9. As Spain pointed out in its written statement, for the purpose of rendering its Advisory Opinion, the ICJ should not take into account any act taking place after the UDI that is performed on the basis thereof, since the acts adopted on the basis of another act (the UDI) whose accordance or conformity with international law is in question can hardly be considered as valid in order to answer the question submitted by the General Assembly to the ICJ. This line of reasoning equally applies to any silence or omission that may have occurred after the adoption of the UDI by the PISG.

10. From this perspective, Spain wishes to reiterate, as it did in its written statement, and other States equally affirmed in full or in part in their written statements, that the situation in Kosovo has been, and is being, continually dealt with by the UN Security Council, that Resolution 1244 (1999) is currently in force in its entirety, and that the reorganization of the international presence in Kosovo is exclusively due to the need to adapt to changing practical circumstances and events taking place in Kosovo.

Therefore, the process to determine Kosovo's future status remains open, and neither its existence nor its legal validity can be called into question. This is true even if, given the different level of collaboration of the parties concerned, this process has gone, and is going, through different stages of diverse, sometimes critical, nature. The process has even undergone slowing down phases and periods of blockage of considerable importance.

However, it cannot be concluded from those facts that the Security Council has put an end to its functions and involvement in Kosovo, nor that the silence of the Security Council, or that of other UN organs, implies a measure of acquiescence to the UDI that may confer legal validity on it.

11. With regard to the first issue, Spain wishes to reiterate, as it did in its written statement, that it is for the Security Council to control the process to determine Kosovo's future status. In the fulfilment of that function, the Security Council cannot be unilaterally replaced by the PISG or other international actors, for such a replacement could be dangerously understood as an alteration of the system established by the UN Charter, which confers on the Security Council the primary responsibility in maintaining international peace and security. And it must be recalled that when such a responsibility is taken on by the Security Council, not even the General Assembly acting within the framework of the "Uniting for Peace" Resolution can replace it.

12. With regard to the second issue, it is true that acquiescence can play an essential part in creating international obligations and legal regimes. Nevertheless, it is also true that such effects have their limits. In particular, acquiescence is apt to produce such effects within a framework of inter-subject relations. Within this framework, action and acquiescence always take place between two subjects (or two sets of subjects) that are directly concerned by the legal regime whose

establishment is intended, and whereof rights and obligations will emerge that will affect each of the concerned subjects, or groups of subjects.

Such, however, is not the system whereby the Security Council and other UN organs act in Kosovo. It is neither the framework within which silence concerning the UDI has allegedly taken place (silence by the Security Council, by the Secretary General, or by other UN organs), a silence that would supposedly be a ground for deducing a sort of acquiescence.

Contrariwise, the silence of the Security Council, considered strictly as a body, must be understood, in Spain's view, as proof of a lack of consensus in the institutionalized international community regarding the validity of the UDI within the framework of the process to determine Kosovo's future status. This lack of consensus also regards the termination of the political process itself. At any rate, such a silence can by no means be interpreted as proof that the Security Council has not dealt with the issue, or as a form of acquiescence that would, if implicitly, support the claim that the end of the process started by Resolution 1244 (1999) has ended, or that would confer validity on the UDI, thus producing its accordance with international law. The practice of the relevant States is, needless to say, sufficiently significant in this respect.

On the other hand, the silence of the Secretary General, of its Special Representative, and of UNMIK, cannot be understood as forms of acquiescence to the validity of the UDI. Even though neither the Special Representative nor the Secretary General has declared that the UDI is null and void, this does not entail acceptance of its validity, or acceptance of the termination of the process. This is particularly clear if one bears in mind that the Secretary General himself has repeatedly declared that Resolution 1244 (1999) is currently in force as long as the Security Council does not decide otherwise, and that the Secretary General has defined, strictly and repeatedly, the principle of "status neutral" of the international presence in Kosovo. Such a status could not

be applied if the Secretary General and its Special Representative had, through their silence, manifested their acquiescence to the validity of the UDI and to the new international legal status of Kosovo emerging from it.

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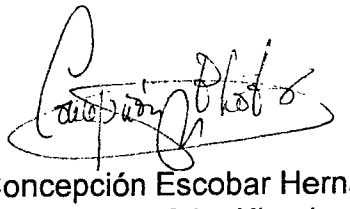
13. Finally, Spain wishes to express again the importance it attaches to these advisory proceedings and pleads with the Court to take into account, if it so deems appropriate, these written comments, as well as its written statement of 14 April 2009.

Madrid, 17 July 2009



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