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)

RESPONSE SUBMITTED BY FINLAND TO QUESTIONS OF JUDGE KOROMA AND JUDGE CANÇADO TRINDADE

DECEMBER 2009

On 11 December 2009, Judge Koroma and Judge Cançado Trindade put the following questions to the participants in the oral proceedings 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:
Judge Koroma:

"It has been contended that international law does not prohibit the secession of a territory from a sovereign State. Could participants in these proceedings address the Court on the principles and rules of international law, if any, which, outside the colonial context, permit the secession of a territory from a sovereign State without the latter's consent?"

Judge Cançado Trindade:

"United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11 *(a)*, to "substantial autonomy and self-government in Kosovo", taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this *renvoi* to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people's eligibility into statehood, in the framework of the legal régime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configurations of a 'people', and of its eligibility into statehood, under general international law?"

Finland respectfully submits the following response to these questions:

I SELF-DETERMINATION IN A NON-COLONIAL CONTEXT (Judge Koroma)

As pointed out in our written statement of 16 April 2009 and our oral statement of 8 December 2009, the principles of international law regarding self-determination, including the right of secession were laid out already in the *Aaland Islands* case in 1920 and 1921, that is to say, well before the decolonization period.

In 1920, the Council of the League of Nations set up a *Committee of Jurists* to give its opinion on the dispute between Finland and Sweden concerning the status of the Åland Islands, situated in the Baltic Sea between the two countries. After Finnish independence in December 1917, the Islands had continued to belong to Finland. The population of the Islands, however, was overwhelmingly Swedish speaking and wanted to become part of Sweden. The question of the role of the right of self-determination of the people of Åland, in particular the right to secede from Finland and join Sweden, arose in the settlement of the dispute.

The Committee of Jurists affirmed that the right of self-determination was usually a political principle that may not be invoked against existing States. However, it then added that where the boundaries of States had become contested, as in the context of revolution or major war, self-determination emerged as a legal criterion for future 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."[1]

Thus in 1920, the *Committee of Jurists* affirmed the legal relevance of self-determination as a criterion of territorial settlement in situations where legal normality had been disturbed by "revolutions or wars". In the following year, the Council established a *Commission of Rapporteurs* (1921) to give effect to the legal principles laid out by the Committee of Jurists. According to the Commission, 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".[2]

The principle that in certain exceptional situations self-determination may be realized through secession has thus been a part of international law throughout the 20th century. The practice of realization of self-determination through independence during the decolonization period did not emerge as *exception* to the existing law. It arose as an *application* of the principle set out in the *Aaland Islands* case. The most recent authoritative pronouncement of this principle is that by the Supreme Court of Canada in Re: *Secession of Quebec* (1998) where the Court summarized its argument that external self-determination (i.e. secession) was applicable in three situations, as follows:

> "In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."[3]

In other words, there is a right of secession in a non-colonial situation "where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development".

II FACTUAL PRECONDITIONS FOR "PEOPLE" (Judge Cançado Trindade)

The second question by Judge Cançado Trindade contains two parts. Finland would respectfully wish to give its answer only to the latter part, namely to the question "what are the factual preconditions for the configurations of a 'people', and of its eligibility into statehood, under general international law?"

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[1] Report of the International Committee (sic) 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.

[2] 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.

[3] Reference *Re Secession of Quebec*, [1998] 2 S.C.R. 217, para 138.

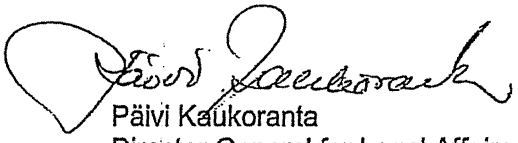
As stated in the Finnish written and oral statements, the emergence of States is a fact that is not regulated by any detailed rules of international law. There are no treaties and no customary law on state-formation beyond the criteria of the Montevideo Convention and the general principles of territorial integrity and self-determination. Also, there is no criterion for what amounts to a "people". Criteria that have been discussed in this respect include ethnic, religious, linguistic, territorial and historical principles of identification. In practice, such criteria usually overlap and conflict and few (if any) states are homogenous by any such measure. Moreover, to assume that States ought to be homogeneous by reference to such criteria would be morally and politically unacceptable; it would lead to a de facto endorsement of policies of ethnic (or religious, linguistic or political) cleansing as a way to statehood.

International legal instruments such as the Friendly Relations Declaration (UNGA Res 2625 (XXV)) or the Helsinki Final Act that refer to "people" do this principally in order to single out the whole population of a State as the beneficiary of (internal or external) self-determination. [4] This is sometimes the same as the "nation" although it does not necessarily have to be so.

When self-determination is said to apply to sub-groups within states, however, this is done usually without reference to specific criteria. This is natural. For groups with specific identity within States may constitute themselves by reference to many different (subjective) principles of identification: for example religious, linguistic, historical or territorial. In fact, there is no limit to such considerations; they are simply sociological or anthropological facts. Nor does international law put any limit to such self-identification (of course beyond respect for human rights and non-violence). The only exception has to do with situations where a group is claiming a *specific right* based precisely on the way it identifies itself. The basic situation is that of "indigenous people" where the identification of a group as an "indigenous people" lays the basis for a claim to a specific status or entitlement that law (for instance the 2007 UN Declaration on the Rights of Indigenous Peoples) creates.[5]

In other words, the "factual preconditions or configurations of a 'people'" are not determined by international law. There are no *legal* limits to the criteria by which a group may identify itself as a "people". Whether or not such identification exists is merely a matter of fact. The presence of that fact (i.e. the self-identification of a group as a "people") may contribute to and strengthen the desire of a group to establish itself as a State – including to doing this by secession. But at what point this fact (the fact of secession) should be recognized by the law (i.e. at what point a group has succeeded in establishing itself as a State) is a matter of assessment in which only the Montevideo criteria and the general principles of territorial integrity and self-determination apply.

Helsinki, 21 December 2009



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[4] The relevant language of the Friendly Relations Declaration reads: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter". The text of Principle VIII of the Helsinki Final Act reads: "By virtue of the principle of equal rights and self- determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."

[5] See UNGA Res 61/295 (13 September 2007).