

EMBASSY OF JAPAN
THE NETHERLANDS

Mr. Philippe Couvreur
Registrar
International Court of Justice
Carnegieplein 2
2517KJ The Hague

17 April 2009

Dear Mr. Couvreur,

I have the honour to submit herewith to the International Court of Justice the written statement of Japanese Government in response to the Court's Order of 17 October 2008 in connection with a request from the General Assembly of the United Nations for an advisory opinion on the "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo".

I avail myself of this opportunity to renew to the International Court of Justice the assurances of my highest consideration.



Minoru SHIBUYA

Ambassador of Japan to the Netherlands

Written Statement of the Government of Japan

On 8 October 2008, at its 63rd session, the United Nations General Assembly adopted resolution 63/3, whereby it requested the International Court of Justice to give 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 its Order dated 17 October 2008, the Court decided that the United Nations and its Member States may submit written statements on the question and fixed 17 April 2009 as the deadline for submission. The Registrar of the Court notified Japan of said Order by a letter dated 20 October 2008 addressed to the Ambassador of Japan to the Kingdom of the Netherlands, in accordance with Article 66, paragraph 2, of the Statute of the Court.

The Government of Japan abstained from voting on the above-mentioned General Assembly resolution because it considered this issue to have a strong political aspect and was therefore doubtful that the request for an advisory opinion of the Court would contribute to the stability of Kosovo and the region. The Government of Japan nevertheless wishes to submit this Written Statement, in order to make clear Japan's views on the legal question which is now before the Court, as an expression of its trust in and commitment to the Court and international justice.

1. The question on which an advisory opinion is requested

The Court should limit itself to giving an advisory opinion on the question that has been posed by the General Assembly.

The question on which an advisory opinion is requested is: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" It is very specific and strictly focused. Based on the wording of the question asked, what is being requested of the Court concerns only the issue of whether or not the issuance

of Kosovo's declaration of independence itself is prohibited by any rule of international law. We consider that the issue of the present and future status of Kosovo, namely, whether or not Kosovo is a State, is essentially outside the scope of the question, and that the Court would be going beyond the request if it were to consider that issue.

On the other hand, in view of the political circumstances under which the request for an advisory opinion was made, it is clear that the real question at stake behind the request is the legal assessment on the act of secession and independence of Kosovo, namely, whether Kosovo can be considered as a State or not. Consequently, it would be neither sufficient nor useful to address only the issue of the legality of the issuance of Kosovo's declaration of independence per se, without providing our legal assessment on factual events pertaining to the secession and independence of Kosovo.

In this Written Statement, we first address the legality of Kosovo's declaration of independence itself, which is the substance of the main question asked. We then move on to examine and state our views on how we assess the act of secession and independence of Kosovo.

The question of the legality of the act of recognition by foreign States is not a question put to the Court for an advisory opinion. We thus do not take up that issue in this Statement.

2. Declaration of independence as a factual event

A declaration of independence is a factual event. General international law is silent on the legality of the declaration of independence. For the formation of a State, international law generally requires that an entity shall meet the conditions of Statehood, namely an entity holds an effective government which governs a permanent population within a defined territory. The question of whether an entity fulfils these requirements usually comes into play in the context and in the phase of recognition by other States. However, a declaration of independence itself is neither a requirement of Statehood, nor does it presuppose

fulfillment of the above-mentioned requirements of Statehood beforehand. Thus, a declaration of independence is in itself a factual event and is not legally relevant under international law; nor does international law have any rule or principle which governs the effectiveness of the issuance of a declaration of independence.

3. Legal assessment of the act of secession and independence of Kosovo

As mentioned above, the declaration of independence itself is a factual event. However, it would not be a useful exercise to focus only on Kosovo's declaration of independence itself as a factual event, and examine its legality without taking account of the political circumstances which led to the request for an advisory opinion. Therefore, Japan wishes to consider next how we can legally assess the act of secession and independence of Kosovo, namely whether or not Kosovo can be considered as a State.

(1) General international law

International law provides that, in order to attain secession and independence as a State, an entity shall meet the requirements of Statehood, namely; an entity holds an effective government which governs a permanent population within a defined territory. The issue of whether these requirements are fulfilled in many cases becomes evident through recognition by other States or admission into international organizations. The issue of recognition, however, will not be taken up in this Statement, as it is a subject which lies outside the scope of the question put to the Court.

International law, in general, neither approves nor prohibits secession or independence by an entity which meets the requirements of Statehood. What we need to be mindful of is that in judging whether or not an entity fulfills the requirements of Statehood under international law, not only should we assess the existing facts concerning the entity, but we should also carefully examine the process by which the entity came to meet each requirement. For example, the process of independence and secession may be considered as not being consistent

with international law if that process is accompanied by a violation of the legal obligation of non-use of force.

Of particular relevance in this context is the so-called “right of peoples to self-determination”. It is stated in Article 1 of Part I of the “International Covenant on Economic, Social and Cultural Rights” and in the corresponding article of the “International Covenant on Civil and Political Rights”, both of 1966, that by virtue of this right of self-determination, all peoples freely determine their political status and freely pursue their economic, social and cultural development. Moreover, the Court has recognized this right of peoples to self-determination as an established principle of international law¹.

At the same time, however, this so-called right of self-determination has been interpreted in different ways. Its definition, content and scope thus remain yet to be established, and interpretations of this right in State practice, as well as in doctrine, vary. It is no longer disputed that colonial peoples' right of self-determination, to seek liberation from imperialist States governing them and attain independence or separate political status, is legally established. However, no provision in the above-mentioned International Covenants or other legal documents provides the general right of a group of people within a sovereign State, outside the colonial context, to seek secession from the State to which they belong and to create their own independent State. The doctrine is not unanimous as to the relations between the right to self-determination and the principle of territorial integrity of sovereign States.

The case of Kosovo can be regarded a case outside the colonial context, and as indicated above, we cannot arrive at an appropriate legal interpretation simply by looking into the relevance of the right of self-determination. Rather, what should be duly noted in the process leading up to Kosovo's declaration of

¹ See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, pp. 31-32, paras. 52-53 ; *Western Sahara*, Advisory Opinion of 16 October 1975, *ICJ Reports 1975*, pp. 31-33, paras. 54-59 ; *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, *ICJ Reports 1995*, p. 102, para. 29.

independence is the process of continuous engagement by the international community, in particular the United Nations, as will be described in section (3) below.

(2) Legal assessment in light of Security Council resolution 1244

Amongst the United Nations documents concerning Kosovo, United Nations Security Council (UNSC) resolution 1244, adopted at the end of the conflict in 1999, is most relevant. While focusing mainly on providing a legal basis for the engagement of the United Nations in the administration of the territory of Kosovo through the establishment of interim government institutions, UNSC resolution 1244 contains no language indicating any conclusion on the future legal status of Kosovo. Nor is there any language under which it may be understood that Kosovo's independence is precluded.

The resolution states that the United Nations Interim Administration Mission in Kosovo (UNMIK) "will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10), and that its responsibility primarily rests with "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords," "pending a final settlement" (para. 11). Accordingly, it is considered that the resolution applies only to the period of transition until the final status of Kosovo is settled and does not preclude a declaration of independence by Kosovo (followed by its secession and independence).

(3) Legal assessment in light of the *sui generis* nature of the case of Kosovo

The process leading to Kosovo's fulfillment of the conditions for Statehood is characterized, as detailed in paragraphs (a)-(d) below, by a continuous engagement on the part of the international community, in particular the United Nations. And it is this process that has made the issue of Kosovo a special case (*sui generis*). The process of the secession and independence of Kosovo is justified in

light of its *sui generis* nature. Regardless of the divergent positions of States on the secession and independence of Kosovo, the *sui generis* nature of the case of Kosovo is widely recognized in the international community, as evidenced by the Report of March 2007 by Mr. Martti Ahtisaari, the Special Envoy of the Secretary-General for the Future Status Process for Kosovo², the Declaration of Independence by Kosovo³, the Conclusions on Kosovo by European Union Foreign Ministers dated 18 February 2008⁴, as well as statements of Member States of the Security Council in its session held after the Declaration of Independence by Kosovo⁵.

(a) Under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia, which was comprised of six republics and two autonomous provinces, Kosovo was an autonomous province within the Republic of Serbia, which enjoyed a considerable degree of autonomy, almost equivalent to that of the six republics. This situation continued until Serbia revoked the autonomy of Kosovo in 1989. The dissolution of the former Yugoslavia began with the declarations of independence by Slovenia and Croatia in 1991, followed by an intense ethnic conflict and human rights violations in many parts of the region. The armed conflict ended in 1995 as a result of the mediation efforts by the international community, including the United Nations, and the former Yugoslavia was divided into five independent States. In the course of the dissolution of the former Yugoslavia, Kosovo Albanians, who constituted the majority of the population in Kosovo and who had been harboring anti-Serbian feelings since the revocation of Kosovo's autonomy, increased their demands for independence, leading to the fierce ethnic conflict between Kosovo Albanians and Serbian

² Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status (UN S/2007/168 of 26 March 2007), p. 4, para.15.

³ Declaration of Independence by the Assembly of Kosovo, 17 February 2008, paragraph 6 of the preamble.

⁴ EU Council (External Relations), Conclusions on Kosovo, 18 February 2008, final paragraph.

⁵ UN Doc. S/PV.5829, 18 February 2008.

forces which resulted in serious human rights violations and generated a large number of refugees and internally displaced persons.

- (b) In 1999, in response to the Serbian refusal to accept the peace proposal on Kosovo proposed by the international community, an air campaign was begun by NATO against Serbia, in an effort to prevent further expansion of the humanitarian catastrophe in Kosovo. Subsequently, as a result of the mediation efforts by the United Nations and other actors, the Serbian security forces withdrew from Kosovo, and the United Nations Security Council adopted resolution 1244, which for the maintenance of security in Kosovo, authorized the establishment of a United Nations mission for an interim administration and of an international security force led by NATO.
- (c) Avoiding effective control by Serbia since 1999, Kosovo has established and strengthened its interim government institutions by holding elections with the assistance of the international community and establishing its own assembly, presidency and government. The majority of the population has indicated that they aspire to the early independence of Kosovo.
- (d) In 2005, the Secretary-General of the United Nations appointed Mr. Ahtisaari, former President of Finland, as his Special Envoy for the Future Status Process for Kosovo. Mr. Ahtisaari mediated negotiations between the parties concerned, including Kosovo and Serbia. In March 2007, he submitted to the United Nations his proposal, which recommended Kosovo's independence under the supervision of the international community. Kosovo accepted this proposal recommending its independence, but Serbia rejected it. In the second half of 2007, after the Security Council failed to reach consensus on approval of the proposal, a "troika" consisting of negotiators from the European Union, the United States and Russia made renewed efforts to settle the status issue, but they failed to produce any substantive progress. This deadlock led the EU to conclude that a meaningful settlement through negotiations was longer feasible. Following this series of developments, Kosovo, considering that a continuation of further negotiations would not produce any meaningful results,

proclaimed its independence in February 2008.

The legal assessment of the secession and independence of Kosovo, to a large extent, depends upon the *sui generis* nature of the case which has resulted from the process of active and continuous engagement by the international community, in particular the United Nations. Accordingly, we cannot, and should not, deduce any general rule or principle of international law from the legal assessment of the case of Kosovo.

4. Conclusion

As we have seen, the declaration of independence by Kosovo is a factual event, and there exists no rule of international law which governs it, as it is not legally relevant.

Furthermore, the secession and independence of Kosovo is justified in consideration of its *sui generis* nature, and does not contravene any applicable rule of international law, including UNSC resolution 1244. Therefore, the declaration of independence by Kosovo can be considered as being in accordance with the legal assessment of the act of secession and independence of Kosovo.

On a final note, Japan wishes to add that any advisory opinion on this question which may be given by the Court should not be regarded as a precedent establishing a general principle on the secession and independence of a State.