

Note Verbale to the Registrar dated 17 July 2009
from the Embassy of Switzerland

[Translation]

The Embassy of Switzerland presents its compliments to the International Court of Justice and, further to its Note of 15 April 2009 concerning the accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, has the honour to transmit to it herewith the Written Comments of Switzerland, in French with an unofficial translation into English, in connection with the request for an advisory opinion.

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

Unofficial translation

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

addressed to the

International Court of Justice

by the

Swiss Confederation

in accordance with
the order of the Court
of 17 October 2008



1. In its order dated 17 October 2008, the International Court of Justice (hereafter referred to as the Court) decided that the United Nations and its Member States were likely to be able to provide information on the question submitted to the Court for an advisory opinion. It set 17 April 2009 as the date by which the written statements on the question submitted to the Court may be presented. In addition, the Court set 17 July 2009 as the date by which Member States and organisations that had previously presented a written statement may submit written comments in response to other written statements.

2. On 15 April 2009, Switzerland availed itself of the possibility offered by the Court. This written statement remains valid in its entirety. Switzerland has carefully considered all of the written statements submitted to the Court and wishes to buttress in the present comments certain arguments concerning the considerations presented by other States.

3. In the view of Switzerland, the declaration of independence was not proclaimed by the Provisional Institutions of Self-Government of Kosovo, even though the formulation of the question submitted to the Court suggests otherwise. In fact the proclamation was made by democratically elected representatives of the people of Kosovo who were not assembled as a body of the Provisional Institutions of Self-Government and thus did not act as such. In making this declaration, these representatives expressed the democratically established will of the population of Kosovo.

4. Switzerland considers that respect for territorial integrity is an important principle of international law. However, it is neither absolute nor isolated from other fundamental principles of international law.

5. Switzerland reiterates its argument that the principle of territorial integrity featured in particular in the United Nations Charter (hereafter referred to as the Charter) applies exclusively to international relations, and not within a State. In light of this, Switzerland considers that the principle of territorial integrity is not relevant to the examination of declarations of independence by secessionist entities.

6. Alternatively, even if the principle of territorial integrity should be understood as a legal principle of a general nature extending beyond the scope of article 2, paragraph 4, of the Charter – that is to say applying within a State – Switzerland considers that the situation of Kosovo fulfilled the set of stringent conditions under which a people may, exceptionally, claim independence by having recourse to the right to self-determination. In this context, Switzerland refers to the arguments set out in paragraphs 57 to 97 of its written statement, insisting on the condition of *ultima ratio*.

7. The condition of *ultima ratio* presupposes a process which establishes clearly that in order to exercise its right to self-determination, a people is left with no alternative other than secession. The right to self-determination cannot be exercised externally until after the exhaustion of all possible avenues aiming to restore a situation in which human rights are respected, including the right to internal self-determination¹. Such a process requires time.

¹ For the concepts of “internal self-determination” and “external self-determination”, Switzerland refers to paragraphs 64-66 of its written statement.

Switzerland is of the view that, in the case of Kosovo, all possible avenues were clearly and unquestionably exhausted. Indeed, in the case of Kosovo, the international community established a framework which ended serious and systematic violations of human rights, and for nearly nine years it worked to find a settlement between the parties involved. Arguing that the cessation of violations of human rights due to the international presence to conclude that the people of Kosovo was no longer entitled, on 17 February 2008, to exercise its right to self-determination externally, would render the condition of *ultima ratio* devoid of meaning. On the contrary, the process of international mediation that had been completed – and hence the time that had elapsed since 1999 – made it possible to ensure that the condition of *ultima ratio* was fulfilled. The people of Kosovo was quite clearly entitled to exercise its right to self-determination externally after this elapse of time.

8. From 2005 onwards, the Secretary General of the United Nations and the Security Council agreed on several occasions that failure in the resolution of the future status of Kosovo would result in the de-stabilisation of Kosovo and of the region². After several years with no major developments towards a settlement, the situation had become untenable, so that it was simply not conceivable to leave the issue of future status unresolved³. Maintaining the *status quo* was no longer viable. It was precisely at this moment that the Security Council launched negotiations on the future status under the auspices of the Secretary General and of his Special Envoy.


9. As of the end of 2007, despite all the negotiation efforts to reach a settlement on the future status of Kosovo, it was widely acknowledged that there would be no agreement between Kosovo and Serbia. Consequently all new efforts would have been futile. The declaration of independence of 17 February 2008 was proclaimed after the Secretary General and his Special Envoy had established that the only possible solution was the independence of Kosovo under the supervision of the international community (March 2007)⁴, and only after it had become widely accepted that no agreement could be reached (December 2007)⁵.

10. Moreover, it should be stressed that Security Council Resolution 1244 did not make the settlement of the future status of Kosovo dependent either on the consent of the Federal Republic of Yugoslavia or of Serbia, nor on that of the Security Council. However, Resolution 1244, by referring to the Rambouillet Accords, called for a solution which respected the will of the people of Kosovo. Thus the said resolution did not exclude the possibility of the independence of Kosovo, provided that this corresponded to the will of the people of Kosovo. Switzerland therefore considers that Resolution 1244 did not in any way preclude the independence of Kosovo.

11. Finally, Switzerland wishes to refer the Court to the conclusions presented in paragraph 98 of its written statement of 15 April 2009.



THE AMBASSADOR OF SWITZERLAND


Dominik M. ALDER

² Letter dated 7 October 2005, from the Secretary General addressed to the President of the Security Council, S/2005/635 and Statement by the President of the Security Council of 25 October 2005, S/PRST/2005/51.

³ Letter dated 7 October 2005, from the Secretary General addressed to the President of the Security Council, S/2005/635.

⁴ Letter dated 26 March 2007, from the Secretary General addressed to the President of the Security Council, S/2007/168 (2007).

⁵ Letter dated 10 December 2007, from the Secretary General addressed to the President of the Security Council, S/2007/723.