

ROYAL DANISH EMBASSY

The Hague

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Enclosure

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17 April 2009

Sir,

Re: Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo

With reference to your letter of 20 October 2008 addressed to HE the Ambassador of the Kingdom of Denmark to the Kingdom of the Netherlands regarding the request for advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, I have the honour to attach herewith the statement of Denmark in this regard, in accordance with Article 66, paragraph 2, of the Statute of the Court.

Also attached are thirty original signed copies of the statement along with a CD-ROM containing the text of the statement.

Sincerely Yours

A handwritten signature in black ink, appearing to read 'K. Biering', written over a large, stylized flourish that extends to the right and loops back under the signature.

Kirsten Biering
Ambassador of Denmark to the Netherlands

Enc.

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN ADVISORY OPINION

Accordance with International Law of the Unilateral

Declaration of Independence by the Provisional

Institutions of Self-Government of Kosovo

(General List No. 141)

WRITTEN STATEMENT

BY THE GOVERNMENT OF DENMARK

1. Introduction

In its order of 17 October 2008, the International Court of Justice invited Member States of the United Nations to submit written statements regarding the accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. In reply to this invitation, this written statement is presented by the Government of Denmark as an expression of Denmark's commitment to the continued stability and development of Kosovo and the region as a whole.

Like others, the Danish Government would have preferred the issue of Kosovo's final status to have been settled in the form of a negotiated agreement between the Kosovo Albanian and Serbian representatives. Intensive efforts and prolonged deliberations, however, proved fruitless, and it became clear that such agreement could not be reached by the parties.

In response to Kosovo's declaration of independence, the Danish Minister for Foreign Affairs, Dr Per Stig Møller, on 21 February 2008 expressed Denmark's formal recognition of the Republic of Kosovo and its readiness to establish diplomatic relations. This decision reflected the Danish Government's considered view that recognition of Kosovo's independence was conducive to the stability and development of Kosovo and the region as a whole and that Kosovo's independence was in accordance with international law.

In recent years, Denmark has actively contributed to the efforts of the international community to stabilize Kosovo and help develop a multi-ethnic, democratic society. Since 1999, Denmark has contributed more than EUR 200 million in assistance to the international effort in Kosovo, and has continually provided approximately 400 peacekeepers to the international security presence (KFOR) established under Security Council resolution 1244. During the nine-year UNMIK administration of Kosovo, two Danish nationals¹ served as Special Representatives to the UN Secretary General, heading UNMIK, and Denmark has in all relevant international fora supported efforts of ensuring a political settlement between the parties. More recently, Denmark has been a strong proponent of the

¹ Mr. Hans Hækkerup (2000-2001) and Mr. Søren Jessen-Petersen (2004-2006)

integration of both Serbia and Kosovo into European structures as appropriate. Denmark has also provided personnel and other resources to the EU rule of law mission (EULEX) set up in Kosovo in 2008.

As the Court now has been requested to advise on the declaration of independence, the Danish Government considers it appropriate to state its reasons why the declaration of independence of 17 February 2008 was in accordance with international law.

2. The declaration of independence was in accordance with international law

2.1. The specific and narrow question before the Court

By resolution 63/3 the UN General Assembly decided, in accordance with article 96 of the UN Charter, to request the International Court of Justice to render an advisory opinion on the following question: *“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”*

The Danish Government does not doubt that the Court will be acutely aware of the specific and narrow character of this question. At the same time, the Danish Government deems it important to underline that the question before the Court concerns only the conformity of Kosovo's declaration of independence with international law. The crucial date is 17 February 2008. It would be going beyond the request, and the particular diplomatic context leading to its adoption, were the Court to respond to other questions, such as Kosovo's statehood, the legality of recognitions and non-recognitions by third States, or any future negotiations between Kosovo and Serbia.

In particular, it is to be noted that the Court has not been asked to advise on the consequences ensuing from its findings regarding the question put before it. This is an issue which the General Assembly and the Member States of the United Nations have expressly reserved for the political processes within the UN and beyond. The creation of a new State is the result of a predominately political process possibly spanning over many years. It would not be helpful to Kosovo and Serbia, the UN or other interested parties, nor to the Court itself, if the Court were to enter into such

unchartered waters in an attempt to contribute to political mapping.

2.2. Applicable general international law regarding declarations of independence

Central to the narrow and specific question before the Court is whether, in international law, there is a prohibition against the issuance of a declaration of independence. It is for those maintaining that the declaration is unlawful to show the existence of such a prohibitive rule.

Basically, an act is permitted under international law unless it can be shown that it is prohibited in either treaty law or customary international law.

One can not only find support for this presumption in the old dicta of the Permanent Court of International Justice that “restrictions upon the independence of States cannot ... be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules.”²

In 1986, the International Court of Justice found that it could not pass judgment on the militarization of Nicaragua “since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.”³

In 1996, the International Court was equally clear, advising that “State practice shows that the illegality of the use of certain weapons as such does not result from the absence of authorization but, on the contrary, is formulated in terms of prohibition.”⁴

Similarly, in addressing the question now before the Court, the declaration of independence must be taken to be in accordance with international law unless a prohibition laid down by treaty or otherwise applies.

² The Lotus, PCIJ Series A No. 10 (1927), pp. 18 and 19.

³ Nicaragua, ICJ Reports [1986] 14, para. 269.

⁴ Legality of Nuclear Weapons, ICJ Reports [1996] 226, para. 52.

In the view of the Danish Government, no such general prohibition exists. There is no support for a general prohibition under customary international law. Moreover, no treaty prohibition has been established. As a matter of international law, the issuance of a declaration of independence is primarily a factual event, which together with other factual elements, such as a defined territory and a permanent population, may be deemed to result, immediately or over time, in the creation of a new State.

2.3. UN practice

The absence of a general prohibition against the issuance of declarations of independence has been confirmed in UN practice. Only in rare circumstances has the Security Council or the General Assembly expressed a negative view on declarations of independence, and this only where such declarations could be said to be part of an overall scheme that violates fundamental norms of international law.

For example, in 1961, the Security Council “[s]trongly deprecate[d] the secessionist activities illegally carried out by the provincial administration of Katanga” and “[d]eclare[d] that all secessionist activities against the Republic of the Congo are contrary to the Loi fondamentale and Security Council decisions”.⁵ Concerns related not least to the existence of foreign intervention.

The declaration of independence by the regime in Southern Rhodesia in 1965 was met with condemnation by the General Assembly;⁶ and also by the Security Council which called upon “all states not to recognize this illegal racist minority regime...”.⁷

Among other examples, we point to the rejection by the international community of declarations of independence of the so-called Bantustans,⁸ and the Turkish Republic of

⁵ Security Council resolution 169 (1961) of 24 November 1961.

⁶ General Assembly resolution 2024 (XX) of 11 November 1965.

⁷ Security Council resolution 216 (1965) of 12 November 1965.

⁸ General Assembly resolution 3411D (XXX) of 28 November 1975 and Security Council resolution 264 (1969) of 20 November 1969.

Northern Cyprus.⁹

It follows that, in certain instances, declarations of independence occurring in the context of a manifest breach of fundamental norms of international law have been met with universal condemnation. However, it is important to stress that those declarations have been the completion of what already constituted a breach of international law. It was thus not the declarations of independence themselves that, taken in isolation, were found to be contrary to international law.

Moreover, these were declarations made in fundamentally different contexts from that of the declaration of independence issued by the representatives of Kosovo on 17 February 2008. The Kosovo declaration spelled out clearly the commitment of Kosovo to a multi-ethnic, democratic future for Kosovo and protection for the rights of all of Kosovo's communities as embodied in the Kosovo constitution. Today, this commitment is in the process of being implemented in Kosovo.

2.4. Practice relating to the SFRY

In dealing with declarations of independence issued by Slovenia, Croatia, Bosnia and Herzegovina and Macedonia in 1991, the Arbitration Commission under the Conference on Yugoslavia confirmed that the existence or disappearance of a State is "a question of fact".¹⁰

Notably, the fact that the Socialist Federal Republic of Yugoslavia (SFRY) was taken at the time to retain its international personality did not result in the declarations of independence being seen as contrary to international law, even though they had been issued against the will of the SFRY. Quite to the contrary, to the extent issued by former Republics they were given effect through the recognitions of Slovenia, Croatia, Bosnia and Herzegovina and Macedonia as independent States.

As for the declaration of independence issued by the people of Kosovo on 17 February 2008, the particular circumstances indicate both why this declaration

⁹ Security Council resolution 541 (1983) of 18 November 1983.

¹⁰ Opinion No. 1 of 29 November 1991, 92 ILR 162.

cannot be equated with the abovementioned instances where such declarations of independence have been condemned by the international community; and why Kosovo was and is *sui generis* and does not serve as a precedent for other secessionist movements.¹¹

It is the view of the Danish Government that at least two key elements give the case of Kosovo a unique character: 1) the history and dissolution of the SFRY, and 2) Security Council resolution 1244.

2.5. The dissolution of the SFRY

Firstly, the special status of Kosovo must be seen in light of the fact that Serbia itself came into existence as a State only a few years after the SFRY had begun its disintegration. The independence of Kosovo came in the context of what in the words of the UN Secretary-General Special Envoy for the future status process for Kosovo, President Martti Ahtisaari could be seen as the conclusion of “the last episode in the dissolution of the former Yugoslavia [that is, the SFRY]”.¹²

To understand the importance of the interrelationship between the dissolution of the SFRY and Kosovo’s independence it is helpful briefly to revisit the particular constitutional framework of SFRY and Kosovo’s special status within it.

The 1974 constitution of the SFRY provided for a federal structure built on six republics and two autonomous provinces of which Kosovo was one. Under the 1974 constitution, Kosovo thus had a dual nature; both a Federal unit, similar to the six Republics, and an autonomous province within

¹¹ The unique character of the Kosovo situation was also highlighted in the unanimous statement of EU’s 27 foreign ministers expressed through the declaration of the General Affairs and External Affairs Council of the European Union meeting on February 18, 2008. Here the Council reiterates its adherence to the principles of the UN Charter and the Helsinki Final Act and 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 which does not call into question these principles and resolutions.

¹² Report of the Special Envoy of the Secretary-General on Kosovo’s future status process, S/2007/168 of 26 March 2007, para 16. The report is reproduced as Dossier No. 203 in the Dossier submitted to the Court on behalf of the Secretary General pursuant to article 65, 2 of the Statute (hereafter Dossier) <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=21&case=141&code=kos&p3=0>.

Serbia. Moreover, Kosovo shared the Presidency of the SFRY with the other Republics, and had a number of rights vis-à-vis Serbia, including the right of veto over constitutional changes.

The emphasis in the 1974 constitution on both the republics and provinces as constituent elements of the SFRY and of the voluntary nature of their participation in the Federation¹³ underscore the significance of events in 1989/90 when Kosovo's autonomy was removed.¹⁴

The inability of the new constitutional structure adequately to protect the human rights of the people of Kosovo was demonstrated throughout the 1990s, culminating in the 1998-99 crises where more than 700,000 civilians sought or were forced into refugee camps out-side of Kosovo and an estimated additional 600,000 persons were internally displaced. There were a number of credible reports of serious crimes being committed primarily against the Kosovo Albanian population; reports that were subsequently confirmed through findings of the International Criminal Tribunal for the former Yugoslavia.¹⁵

The forced change in Kosovo's constitutional status in 1989/90 and the subsequent human rights violations, took place in the context of the armed conflict in and among certain of the republics of the SFRY and the dissolution

¹³ For a brief description of the 1974 constitutional framework see also Croatian president Stjepan Mesić in an article "Kosovo – A Problem That Tolerates No Delay" which was published in the newspaper "Večernji List" on Saturday 16 February 2008.

¹⁴ For a description of this process see inter alia ICTY Judgment, Prosecutor v. Milan Milutinović et al. (IT-05-87-T) Judgment of 26 February 2009 at para 217 – 221.

¹⁵ Prosecutor v. Milan Milutinović et al., op cit. inter alia at para 1178 where the Trial Chamber found "that there was a campaign of violence directed against the Kosovo Albanian civilian population, during which there were incidents of killing, sexual assault, and the intentional destruction of mosques. It was the deliberate actions of [the forces of the FRY and Serbia] during this campaign that caused the departure of at least 700,000 Kosovo Albanians from Kosovo in the short period of time between the end of March and beginning of June 1999. Efforts by the MUP to conceal the killing of Kosovo Albanians, by transporting the bodies to other areas of Serbia, as discussed in greater detail below, also suggest that such incidents were criminal in nature." See more generally, the UN material on the period from March 1998 to the establishment of UNMIK in June 1999 contained in the Dossier submitted to the Court on behalf of the Secretary-General (Part II A, Dossier No. 8-28).

of Federation.

While it is not for the Danish Government authoritatively to interpret the constitutional framework of another State, it is maintained that these particular factual and legal characteristics clearly distinguish Kosovo from other cases.

2.6. Resolution 1244

The second and related reason for the *smi generis* character of Kosovo's declaration of independence flows from the particular circumstances surrounding the international community's response through resolution 1244 to the 1998/99 crisis.

Following the armed intervention by the North Atlantic Treaty Organization (NATO), the Security Council on 10 June 1999 adopted Security Council resolution 1244 under Chapter VII of the UN Charter, authorizing both a civil and military international presence. Among the central purposes of resolution 1244 were to ensure protection of the population of Kosovo, to create the conditions for the development of Kosovo's institutions and, at a later stage, to facilitate a process for determining Kosovo's final status.

In the words of UN Special Envoy Ahtisaari, resolution 1244 responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary UN administration and envisaging a political process designed to determine Kosovo's future.¹⁶

For several years the status issue was set aside while the creation of conditions conducive to reaching agreement were addressed. But in 2005 UN Special Envoy Kai Eide recommended that the status process be initiated,¹⁷ and subsequently, as already noted, President Martti Ahtisaari was appointed as the UN Secretary-General's Special Envoy on Kosovo's future status process. In March 2007 his

¹⁶ Cf. Ahtisaari Report para 15.

¹⁷ UN Special Envoy Kai Eide stated in October 2005: "There will not be any good moment for addressing the future status of Kosovo. [...] Nevertheless, an overall assessment leads to the conclusion that the time has come to commence this process.", cf. S/2005/635 of October 7, 2005 (Dossier No. 193).

conclusions were presented to the Security Council.¹⁸ Special Envoy Ahtisaari put forward a detailed set of recommendations for Kosovo, including a proposal for a phased transition to independence under international supervision. This recommendation was made on the basis of the widely shared view that a reintegration of Kosovo was not a viable option, that status quo of continued international administration was unsustainable, and that all avenues for reaching a negotiated settlement had been exhausted.

Intensive work was undertaken to secure Security Council endorsement of the Ahtisaari Report in the form of a resolution to replace resolution 1244. Belgium, France, Italy, the United Kingdom and the United States, presented a draft Security Council resolution to this effect, but no agreement could be reached.

A final attempt at forging agreement was made in the autumn of 2007 when a Troika, consisting of the Russian Federation, the United States and the European Union facilitated additional extensive negotiations between the parties. However, the Troika concluded: “The parties were unable to reach an agreement on the final status of Kosovo.”¹⁹

The efforts of the Troika brought to an end an unprecedented effort within the UN system at reaching agreement on a status issue; an effort that had fully respected and honoured the process envisioned by resolution 1244.²⁰

¹⁸ In his letter forwarding the Ahtisaari Report to the Security Council the Secretary-General stressed his full support for the recommendations regarding Kosovo’s future status contained in the Report, cf. S/2007/768 of 26 March 2007 (Dossier No. 203)

¹⁹ Report of the Russia/US/EU Troika on Kosovo, December 4, 2007. That the parties to the negotiations had very diverging views can be illustrated by the fact that during those negotiations, as Kosovo’s representatives argued strongly in favour of independence, Serbia in 2006 amended its constitution to the effect of constitutionally seeking to exclude the possibility of Kosovo’s independence. The Constitution of Serbia was adopted by the National Assembly of the Republic of Serbia on 30 September 2006 and endorsed by a referendum on 28 and 29 October 2006.

²⁰ The Government would further note that at no point did the Secretary-General’s Special Representative (SRSG) in Kosovo declare the Declaration of Independence as invalid despite the SRSG’s responsibility for ensuring that steps taken by Kosovo’s authorities were consistent with resolution 1244.

Resolution 1244 does not exclude independence. Resolution 1244 contains no prohibition on a declaration of independence by Kosovo, nor any requirement that such a declaration only be issued with the consent of the Federal Republic of Yugoslavia (FRY) or Serbia, or the Security Council.²¹

Resolution 1244 paragraph 11 (f) speaks of the role of the international civilian presence in “facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet Accords”, but resolution 1244 left the process undefined except to characterize it as political. The resolution’s determination of Kosovo’s “autonomous status” was for an interim period that would at a subsequent point be superseded by a “final status”.

The reference to the Rambouillet Accords in resolution 1244 is significant. In Chapter 8, Art. I (3) of these Accords reference is made to “the will of the people”. It was clear both during the negotiations at Rambouillet, in the immediate period after the 1999 crises, and throughout the years of the UNMIK administration that the wish of the overwhelming majority of the population of Kosovo was to gain independence.²²

Resolution 1244’s preambular reference to “the commitment of all Member States to the sovereignty and territorial integrity” of the FRY “and the other States of the region” in accordance with Annex 2 of the resolution did not establish a prohibition of a declaration of independence. Indeed, the reference was concerned with the

²¹ The views expressed by UN Secretary-General SRSG Jessen-Petersen at a press briefing at UNMIK headquarters on 21 November 2005 were made at the time of the initiation of the status process under Special Envoy Ahtissari in 2005 (see UNMIK Unofficial transcript, Press Briefing Notes, 21 November 2005). His remarks – that a unilateral declaration of independence would have been in violation of resolution 1244 – came in the context of the beginning of the status process, and cannot be equated with the situation after Special Envoy Ahtisaari had presented his report and negotiations had come to a standstill in 2007/2008. Indeed, at the time of Kosovo’s declaration of independence on 17 February 2008, UN SRSG did not declare the declaration illegal or indeed express any criticism.

²² In this context it should be noted that also the Kosovo Contact Group comprised of United States, Russia, Great Britain, France, Italy, and Germany stated that a final solution should be acceptable to the people of Kosovo, see inter alia Kosovo Contact Group Statement, London, 31 January 2006.

commitment of UN Member States, as opposed to the people of Kosovo, and it was balanced in that it referred also to States other than FRY and, more generally, to existing principles of international law. As for Annex 2, it is focused solely on the period of interim administration.

Kosovo's declaration of independence. Faced with a complete deadlock in the status negotiations and a framework in resolution 1244 which did not exclude a declaration of independence, the question was how to resolve a situation which, in the words of Special Envoy Ahtisaari, was in urgent need of resolution. In presenting his report to the Security Council, Special Envoy Ahtisaari said:

“Uncertainty over [Kosovo’s] future has become a major obstacle to Kosovo’s democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo’s status risks challenging not only its own stability but the peace and stability of the region as a whole”.²³

While the negotiating process between the parties and in the Security Council had broken down, the challenges on the ground remained very real. In this exceedingly difficult political situation, the people of Kosovo chose the only way forward which they deemed available to secure the development and prosperity of Kosovo and the region as a whole. Hence on 17 February 2008 Kosovo declared independence.

In its declaration of independence, Kosovo undertook to protect and promote the rights of all communities in a democratic, secular and multiethnic republic. In expressing their recognition, Denmark and other States placed significant emphasis on these obligations.²⁴ Kosovo has adopted and – together with its

²³ Ahtisaari Report para 4.

²⁴ Letter from Minister for Foreign Affairs, Dr. Per Stig Møller, of 21 February 2008 to Fatmir Sedjii, President of Kosovo and Hashim Thaci, Prime Minister of Kosovo.

partners – is implementing a constitution protective of human rights and minority rights.

In light of the above the Danish Government is of the view that there is no basis for finding that Kosovo's declaration of independence on 17 February 2008 was in violation of resolution 1244.

2.7. *Self-determination*

This conclusion is also compatible with principles regarding peoples' right of self-determination. For one thing, Kosovo's final status could not be determined without the involvement and consent on the part of the people of Kosovo. While there are implications of the right of self-determination not yet fully developed in international practice, the Danish Government sees no reason why denial of meaningful internal self-determination, as Kosovo was arguably subjected to at least from the late 1990's, should be deemed irrelevant in relation to an otherwise legitimate claim of independence.

The international community is thankful to the International Court of Justice for its numerous contributions in past decades to the development of the right of self-determination. The practice of the Court will not be discussed in detail here. It is deemed sufficient to emphasize that, in 1986, referring to the principle of *uti possidetis*, the Court held that “[t]he essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples”.²⁵

Thereby, the Court acknowledged, firstly, a conflict between the principle of *uti possidetis* and the principle of self-determination. Secondly, the Court found that, normally, the former trumped the latter. However, the Court was careful not to state that the principle of self-determination automatically yields to principles of territorial integrity. The Arbitration Commission under the Conference on Yugoslavia endorsed the transformation of internal borders into

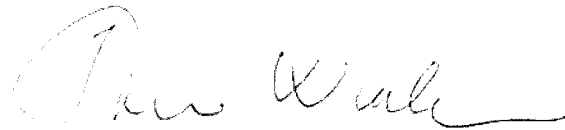
²⁵ Frontier Dispute, ICJ Reports [1986] 554, para. 25.

international frontiers in situations not more compelling than the one now, in part, before the Court.²⁶

3. Conclusion

In conclusion, the Danish government maintains that no general prohibition exists in international law against declarations of independence. To the extent international law provides any guidance on the legality of declarations of independence this leads to the conclusion that the Kosovo declaration of 17 February 2008 was in accordance with international law.

An opinion of the Court calling into question the status of Kosovo as an independent State could have a detrimental effect on peace and security in Kosovo and the region as a whole. Significant efforts were invested in ensuring an agreed settlement between the parties up to February 2008, and it would seem highly improbable that an advisory opinion under these particular circumstances could give positive impetus for new negotiations on the status issue. Also, it is difficult to envisage a final status different from that sought on 17 February 2008 by the people of Kosovo.



Ambassador Thomas Winkler,
Under-Secretary for Legal Affairs

Copenhagen, 16 April 2009

²⁶ Opinion No. 3 of 11 January 1992, 92 I.L.R. 170.