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 AN ADVISORY OPINION)

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

17 APRIL 2009

1. Introduction

1.1 In Resolution 63/3, adopted on 8 October 2008, the General Assembly of the United Nations decided 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 unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo referred to in Resolution 63/3 is understood to be the proclamation of the independence of Kosovo on 17 February 2008 by the extraordinary meeting of the Assembly of Kosovo (Kosovo Declaration of Independence).

1.2 In its Order of 17 October 2008, the Court designated 17 April 2009 as the time limit within which written statements on the question may be presented to it, by the United Nations and States entitled to appear before the Court, in accordance with Article 66.2 of the Court's Statute. In the same Order, the Court further invited the "authors" of the Declaration to make "written contributions" to the Court.

1.3 As the Kingdom of the Netherlands is a Member State of the United Nations and by virtue of Article 92 of the Charter of the United Nations (UN Charter) also a Party to the Statute of the Court, it wishes to avail itself of the opportunity afforded by the Court's Order of 17 October 2008 to make a written statement on the abovementioned request by the General Assembly for an advisory opinion of the Court.

2. Security Council resolutions on the situation relating to Kosovo

Introduction

2.1 The Security Council has adopted a number of resolutions on the situation relating to Kosovo, including four resolutions acting under Chapter VII of the UN Charter (1160, 1199, 1203 and 1244). In Resolution 1199, it affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region and in Resolution 1244 it determined that the situation in the region continued to constitute a threat to international peace and security. Resolution 1244 provided the international community with a general framework to address the situation relating to Kosovo. In this Resolution, the Security Council decided, *inter alia*, on the principles for a political solution to the Kosovo crisis (para. 1) and the deployment in Kosovo of international civil and security presences (para. 5). It authorized the Secretary-General, with the assistance of relevant international organizations, to establish the international civil presence in Kosovo (para. 10). Further to this authorization, the Secretary-General established the United Nations Interim Administration Mission in Kosovo (UNMIK). The deployment of the international civil and security presences is to continue unless the Security Council decides otherwise (para. 19).

2.2 It is submitted that the Kosovo Declaration of Independence has not affected the applicability of Resolution 1244. Its authors explicitly stated that they "shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999)" (Kosovo Declaration of Independence, para. 12).

The Secretary-General has also concluded that Resolution 1244 remained in force following the proclamation of independence on 17 February 2008 and continues to remain in force unless the Security Council decides otherwise (S/2008/211, para. 29). The international security and civil presences accordingly remained in Kosovo after 17 February 2008.

International Civil Presence in Kosovo

2.3 Notwithstanding the continued applicability of Resolution 1244, the Kosovo Declaration of Independence constituted an event which has had consequences for the implementation of the Resolution on the ground. The Secretary-General observed that "[i]t is evident that Kosovo's declaration of independence has had a profound impact on the situation in Kosovo" (S/2008/211, para. 30). In the absence of further guidance from the Security Council, he subsequently decided to reconfigure UNMIK "in order to adapt UNMIK to a changed reality and address current and emerging operational requirements in Kosovo" (S/2008/458, para. 3). He consulted all stakeholders on the reconfiguration which enabled him to note on 15 July 2008 that "all parties have accepted the reconfiguration of the structure and profile of the international presence [...] to one that corresponds to the evolving situation in Kosovo" (S/2008/692, para. 28). On 24 November 2008, he pointed out that the reconfiguration "is taking place in a transparent manner with respect to all stakeholders and is consistent with the United Nations position of strict neutrality on the question of Kosovo's status" (S/2008/692, para. 49).

2.4 It is submitted that the delegation of the power to establish the international civil presence by the Security Council to the Secretary-General encompasses the power, subject to any guidance from the Security Council, to authorize adjustments in a manner consistent with Resolution 1244. Following the proclamation of independence on 17 February 2008 and subsequent events in Kosovo, the Secretary-General used this power to reconfigure UNMIK with the agreement of all stakeholders.

(i) Exercise of delegated power

It is submitted that the reconfigured international civil presence is consistent with Resolution 1244. The *modus operandi* of the reconfiguration is set out in paragraph 16 of the report of the Secretary-General of 12 June 2008 (S/2008/354). The original objective of establishing the international civil presence was "to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo" (para. 10 and Annex 2, para. 5). Since its inception, UNMIK has contributed to the achievement of this objective. According to the Secretary-General, UNMIK has "helped Kosovo make significant strides in establishing and consolidating democratic and accountable Provisional Institutions of Self-Government and in creating foundations for a functioning economy" (S/2008/354, para. 2). The original objective has evolved in the light of the changed reality resulting from the establishment and consolidation of democratic and accountable institutions in Kosovo, the evolving political process to achieve a political solution to the situation relating to Kosovo (see below), the proclamation of the independence of Kosovo on 17 February 2008, and subsequent events in Kosovo. To address this reality, the Secretary-General observed that "UNMIK, guided by the imperative need to ensure peace and security in Kosovo, has acted, and will continue to act, in a realistic and practical manner and in the light of the evolving

circumstances" (S/2008/211, para. 30). In the light of the overriding objective to ensure peace and security in Kosovo, the international civil presence was reconfigured to respond to these evolving circumstances and to progress towards the peaceful drawdown of the *interim administration* of Kosovo by the United Nations. The reconfiguration was undertaken to fulfil a prime purpose of the United Nations: to promote and maintain a peaceful settlement of the situation relating to Kosovo. The exercise of delegated power through the reconfigured international civil presence is therefore consistent with Resolution 1244.

(ii) Acceptance of the exercise of delegated power

In numerous advisory opinions, the Court has not confined itself to a textual interpretation of the relevant law relating to the exercise of the powers of international organizations. It has also subsequently verified whether such an interpretation was generally confirmed in practice (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p.179; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, in particular pp. 160, 165; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 22; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, pp. 149-150)*. This approach should therefore also be followed here. It is submitted that the exercise of delegated power in this case, as analyzed above, has been generally accepted in practice. The Secretary-General informed the Security Council of his intention to reconfigure UNMIK (S/2008/211; S/2008/354) and reported to the Security Council on a regular basis on the implementation of the reconfiguration after he took the decision to reconfigure UNMIK (S/2008/458; S/2008/692; S/2009/149). Following several rounds of discussions during which the reconfiguration was considered, the President of the Security Council was authorized to state on behalf of the Council, on 26 November 2008, that "[t]he Security Council welcomes the Secretary-General's report on the United Nations Interim Mission in Kosovo (S/2008/692) of 24 November 2008 and, taking into account the positions of Belgrade and Pristina on the report which were reflected in their respective statements, welcomes their intentions to cooperate with the international community" (S/PV.6025, at 21). In his subsequent report, the Secretary-General stated that "[p]ursuant to the presidential statement of the Security Council of 26 November 2008, UNMIK has accelerated the process of the Mission's reconfiguration in line with the provisions of [his] report of 24 November 2008 and [his] special report of 12 June 2008" (S/2009/149, para. 35). This report was generally welcomed in the subsequent discussion in the Security Council (S/PV.6097). The Secretary-General has therefore properly exercised the authority given to him to establish and, when the evolving circumstances so warranted, to adjust the international civil presence in Kosovo.

2.5 It is submitted that the provisions of Resolution 1244 relating to the international civil presence did not prohibit the Kosovo Declaration of Independence. The Secretary-General has stressed that "[t]he United Nations has maintained a position of strict neutrality on the question of Kosovo's status" (S/2008/458, para. 29). He has also stressed that the reconfiguration is "consistent with the United Nations position of strict neutrality on the question of Kosovo's status" (S/2008/692, para. 49). As the nature, scope and modalities of the reconfiguration have been defined by the Kosovo Declaration of Independence, and since this reconfiguration has been found to be consistent with Resolution 1244, the Declaration of Independence that preceded the reconfiguration must therefore also be considered consistent with Resolution 1244.

Political solution to the situation relating to Kosovo

2.6 Resolution 1244 envisages a political process to achieve a "political solution" (para. 1), a "final settlement" (para. 11(a)), or a "political settlement" (para. 11(c)), of the situation relating to Kosovo. The ultimate objective of this process is to reach an agreement on the status of Kosovo with the agreement of all stakeholders.

2.7 It is submitted that the provisions of Resolution 1244 relating to the political process did not prejudge the outcome of that process. Resolution 1244 provided guidance for the political process in its Annexes. This guidance referred in several paragraphs to the territorial integrity of the Federal Republic of Yugoslavia. In the Annexes, reference was made to "[a] political process towards the establishment of an interim political framework agreement providing for [a] substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region" (Annex 1, 6th item, and Annex 2, para. 8). It appears from this formulation that the territorial integrity of the Federal Republic of Yugoslavia was a relevant factor to be taken into account in the political process. At the same time, this formulation does not prejudge the outcome of the process and permits a political solution to the situation relating to Kosovo that does not preserve the territorial integrity of the Federal Republic of Yugoslavia. This observation also applies to the Preamble of Resolution 1244, which reaffirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region". The references in Resolution 1244 to the territorial integrity of the Federal Republic of Yugoslavia did not therefore, as such, prohibit the proclamation of the independence of Kosovo on 17 February 2008.

2.8 The political process designed to determine the future status of Kosovo commenced in June 2005 with the appointment by the Secretary-General of a United Nations Special Envoy for the Future Status Process for Kosovo, the former Finnish President Martti Ahtisaari. The political process continued under the supervision of the Special Envoy for more than a year, but did not in the end result in a negotiated political solution. In his report, the Special Envoy concluded that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted" (S/2007/168, para. 3 (26 March 2007)) and "the only viable option for Kosovo is independence" (S/2007/168, para. 5). These conclusions were accompanied by a Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1). On 26 March 2007, the Secretary-General conveyed the Special Envoy's report to the Security Council, stating: "I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement" (S/2007/168). The Security Council neither endorsed nor rejected the Special Envoy's conclusions. In the following months, further efforts were made to facilitate an agreement on the status of Kosovo with the full engagement of all stakeholders but without success. On 10 December 2007, the Secretary-General conveyed a report on these efforts to the Security Council (S/2007/723). During meetings on 19 December 2007, 17 January 2008 and 14 February 2008, the Security Council was not able to provide further guidance on achieving a political solution on the status of Kosovo.

2.9 It is submitted that the provisions of Resolution 1244 relating to the political process did not prohibit the proclamation of the independence of Kosovo on 17 February 2008 in the circumstances prevailing at the time of the proclamation. It was only after the exhaustion of

repeated efforts to reach a negotiated political solution and in the absence of further guidance from the Security Council that the independence of Kosovo was proclaimed, with due respect for Resolution 1244, on 17 February 2008. This proclamation of independence constituted a change in the status of Kosovo effected without the agreement of all stakeholders. A political solution on the status of Kosovo that has the agreement of all stakeholders has, therefore, yet to be achieved.

2.10 It is, furthermore, relevant that earlier decisions taken within the framework of the Assembly of Kosovo in 2002 and 2003 that affected the future status of Kosovo were annulled by the Secretary-General's Special Representative (see e.g. S/2002/779, para. 8 and S/2003/113, para.12). On 24 May 2002 the Security Council adopted a Presidential Statement in which it deplored "the adoption by the Assembly of Kosovo, in its session of 23 May 2002, of a 'resolution on the protection of the territorial integrity of Kosovo'" and in which it concurred "with the Special Representative of the Secretary-General that such resolutions and decisions by the Assembly on matters which do not fall within its field of competence are null and void" (S/PRST/2002/16). It is significant that, in contrast, following the evolving situation in Kosovo, neither the Special Representative nor the Security Council moved to annul the proclamation of the independence of Kosovo on 17 February 2008. The abovementioned decisions taken in 2002 and 2003 were taken *before* the commencement of the political process on the status of Kosovo, whereas the proclamation of independence on 17 February 2008 was only made *after* the political process had been exhausted and in the absence of further guidance from the Security Council on achieving a political solution on the status of Kosovo. This supports the view that the proclamation of the independence of Kosovo on 17 February 2008 can be justified under Resolution 1244 in the circumstances prevailing at the time of the proclamation or was, at least, not prohibited by Resolution 1244.

Conclusions

2.11 It is the opinion of the Kingdom of the Netherlands that:

- the proclamation of the independence of Kosovo on 17 February 2008 has not affected the application of Resolution 1244;
- Resolution 1244 did not prohibit the proclamation of the independence of Kosovo on 17 February 2008; and
- a political solution on the status of Kosovo that has the agreement of all stakeholders has yet to be achieved.

3. International law of self-determination

Introduction

3.1 In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court noted that the principle of self-determination was enshrined in the UN Charter; was reaffirmed by the General Assembly in Resolution 2625 (XXV) (Resolution 2625) which requires States to refrain from any forcible action which deprives peoples of their right to self-determination; and was laid down in the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights (1966 Covenants) which require States to respect and promote the realization of that right in conformity with the provisions of the UN Charter (Articles 1) (*ICJ Reports 2004*, p. 136, at para. 88). In this advisory opinion, as was noted by

Judge Higgins in her separate opinion, the Court, for the first time, accepted a right of self-determination outside the colonial context (*ICJ Reports 2004*, p. 217, at para. 30).

3.2 It is submitted that the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law. The right to self-determination has been characterized as an "inalienable right" (1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, Section I.2; 1984 General Comment No. 12 of the Human Rights Committee on Articles 1 of the 1966 Covenants, para. 2). In the *East Timor* case, the Court described as "irreproachable" the assertion that the right of peoples to self-determination has an *erga omnes* character (*ICJ Reports 1995*, p. 90, at para. 29). In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court observed that the obligation to respect the right of peoples to self-determination is an obligation *erga omnes* (*ICJ Reports 2004*, p. 136, at para. 155). With reference to the *East Timor* case, the International Law Commission describes "the obligation to respect the right of self-determination" as a norm whose peremptory character is "generally accepted" (Commentary to Article 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, para. 5). The Court has recognized the existence in international law of peremptory norms in the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction of the Court and Admissibility of the Application* (*ICJ Reports 2006*, p. 32, at para. 64).

3.3 The holders of the right to self-determination are 'peoples'. Pursuant to the Rambouillet Accords, which have been identified as guidance for the political process under Resolution 1244 (Annex 1, 6th item, and Annex 2, para. 8), the "final settlement" for Kosovo must be based on "the will of the people" (Chapter 8, Article I.3). This is also reflected in the Kosovo Declaration of Independence which asserts that it reflects "the will of the people" (para. 1) and refers to the "people" in several paragraphs of its Preamble. The independence of Kosovo on 17 February 2008 was thus proclaimed by an extraordinary meeting of the Assembly of Kosovo acting on behalf of the 'people'.

3.4 The right to self-determination includes the right of peoples "freely to determine their political status" (Articles 1 of the 1966 Covenants), "freely to determine, without external interference, their political status" (Resolution 2625), "freely [to] determine their political status" (Section I.2 of the 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights), or "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" (Part VIII of the Final Act of the Conference on Security and Co-operation in Europe to which reference is made in the Preamble to Resolution 1244). The proclamation of independence by a people is but one method of exercising this right to political self-determination.

Internal self-determination and external self-determination

3.5 It is submitted that a people must exercise its right to political self-determination in accordance with international law. International law includes the principle of territorial integrity. It is therefore relevant to determine whether the right to self-determination is exercised in a manner that preserves international boundaries (internal self-determination) or in a manner that involves a change of international boundaries (external self-determination).

The proclamation of independence involves a change of international boundaries and therefore constitutes an instance of the exercise of external self-determination.

3.6 It is submitted that – outside the context of non-self-governing territories, foreign occupation and consensual agreement – a people must, *in principle*, seek to exercise the right to political self-determination with respect for the principle of territorial integrity and thus exercise its right within existing international boundaries. It is also submitted that the right to political self-determination may evolve into a right to external self-determination in exceptional circumstances, i.e. in unique cases or cases *sui generis*. This is an exception to the rule and should therefore be narrowly construed. The resort to external self-determination is an *ultimum remedium*.

3.7 Support for the existence of a right to external self-determination – outside the context of non-self-governing territories, foreign occupation and consensual agreement – can be found, albeit *a contrario*, in Resolution 2625. This Resolution provides that:

> "Nothing in the foregoing paragraphs [addressing the principle of equal rights and self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" (See also Section I.2 of the 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights).

It appears from this paragraph that the principle of territorial integrity may not, at least not under all circumstances, prevail if States are not "conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". It may be recalled that the Court attached particular significance to Resolution 2625 in the establishment of customary international law in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Merits* (*ICJ Reports 1986*, p. 14, at para. 188).

3.8 The Arbitration Commission of the Conference on Yugoslavia (Badinter Commission) found that "it is well-established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise" (Opinion No. 2 of 11 January 1992, reproduced in ILM, Vol. 31, 1992, p. 1497). This finding only refers to a rule for the identification of boundaries following the proclamation of independence and is without prejudice to the existence of a right to proclaim independence. The international boundaries of Kosovo follow existing international boundaries and former internal boundaries and hence respect this finding of the Arbitration Commission. The Court addressed the relation between the principle of *uti possidetis* and the right of self-determination in the *Case Concerning the Frontier Dispute*. It found that "[a]t first sight this principle [of *uti possidetis*] conflicts outright with another one, the right of peoples to self-determination" and concluded that, in the regional context of that case, "[t]he essential requirement of stability in order to survive, to develop and gradually consolidate their independence in all fields, has induced African States judiciously to consent to respecting colonial frontiers, and to take account of it

in the interpretation of the principle of self-determination of peoples" (*ICJ Reports 1986*, p. 554, at para. 25). The context of the present case is different and, therefore, requires a further analysis of the relationship between the principle of *uti possidetis* and the right to self-determination that satisfies the essential requirement of stability.

3.9 It is submitted that the exercise of the right to external self-determination is subject to the fulfilment of substantive and procedural conditions that apply cumulatively. Such a right only arises in the event of a "serious breach" of (a) the obligation to respect and promote the right to self-determination or (b) the obligation to refrain from any forcible action which deprives peoples of this right (substantive condition). A breach of an obligation arising under a peremptory norm of general international law is considered serious if it involves "a gross or systematic failure" of the obligation in question (Article 40.2 of the Articles on Responsibility of States for Internationally Wrongful Acts). According to the International Law Commission, a breach is "systematic" if it is "carried out in an organized and deliberate way" and "gross" if it is of a "flagrant nature, amounting to a direct and outright assault on the values protected by the rule" (Commentary to Article 40 of the Articles on Responsibility of States for Internationally Wrongful Acts, para. 8).

3.10 It is submitted that there is a breach of the obligation to respect and promote the right to self-determination in the event of (i) a denial of fundamental human rights or (ii) the existence of a government that does not represent the whole people belonging to the territory. In Resolution 2625, the General Assembly recognized that a denial of fundamental human rights "constitutes a violation of the principle [of equal rights and self-determination of peoples]". It also recognized that only States "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" are conducting themselves in compliance with the principle of equal rights and self-determination of peoples. The absence of a government representing the whole people belonging to the territory would thus amount to non-compliance with the principle. Such non-compliance may also be described as a violation of the right to internal self-determination.

3.11 Furthermore, all effective remedies must have been exhausted to achieve a settlement (procedural condition). Accordingly, all avenues must have been explored to secure the respect for and the promotion of the right to self-determination through available procedures, including through bilateral negotiations, the assistance of third parties and, where accessible or agreed, recourse to domestic and/or international courts and arbitral tribunals.

Serious breach of the obligation to respect and promote the right to self-determination in Kosovo

3.12 It is submitted that there has been a serious breach of the obligation to respect and promote the right to self-determination in Kosovo.

(i) Absence of a government representing the whole people belonging to the Federal Republic of Yugoslavia

In the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo had the status of an autonomous province. The autonomous status of Kosovo and other autonomous provinces originated in a decision of the People's Assembly of the People's Republic of Serbia of 1945 "in accordance with the express will of the population of these areas" (Article 111 of the 1963 Constitution of the SFRY; see also Articles 2 of the 1946, 1974 and 1981 Constitutions).

The Yugoslav and Serbian authorities gradually brought an end to Kosovo's autonomy and aimed to take control over it. Their success in doing so led to the complete marginalization of the Kosovo Albanians in Kosovo. This process was described by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in its judgment in the case of *Milutinović et al.* dated 26 February 2009 (Case No. IT-05-87-T). The case was against six former high-ranking Yugoslav and Serbian political, military and police officials. The Trial Chamber found five of the accused guilty of crimes against humanity and violations of the laws or customs of war in Kosovo, and it imposed lengthy prison sentences.

According to the Trial Chamber, in the early 1980s, after the death of SFRY President Josip Broz (Tito), Kosovo Albanians sought full recognition for Kosovo as a republic within the SFRY. This led to demonstrations, some of which turned violent and the police and Yugoslav Army were deployed. At the same time, there were increasing calls by the Serbs to reduce the autonomy of Kosovo. Against the backdrop of the breakup of the SFRY, this led to an amendment to the Serbian Constitution in 1989 that identified a need to "normalise" the "deteriorated situation" in Kosovo. "Special measures" were put in place, which involved the federal authorities assuming responsibility for security within Kosovo. The Trial Chamber in *Milutinović et al.* concluded that:

> "from around 1989 differences between the aspirations of the majority of the Kosovo Albanian population and the designs of the FRY and Serbian state authorities created a tense and unstable environment. Efforts by the authorities to exert firmer control over the province and to diminish the influence of the Kosovo Albanians on local governance, public services, and economic life polarised the community. Indeed, laws, policies, and practices were instituted that discriminated against the Albanians, feeding into local resentment and feelings of persecution." [Judgment, Volume 1, para. 237]

> "A so-called 'parallel system' thus developed, involving an unofficial 'government' and the provision of services to the Kosovo Albanian population financed by a substantial émigré community and a voluntary 'solidarity tax'." [Judgment, Volume 1, para. 226]

These findings demonstrate the absence of a government representing the whole people belonging to the Federal Republic of Yugoslavia, which amounts to a breach of the obligation to respect and promote the right to self-determination in Kosovo. This breach was serious because it was systematic: the amendment to the Constitution together with the discriminatory laws, policies and practices constitute evidence that the breach was carried out in an organized and deliberate way. The breach was also serious in that it was gross: the development of a parallel system of government for Kosovo Albanians constitutes evidence of the flagrant nature of the breach, amounting to a direct and outright assault on the values protected by the rule on a representative government.

(ii) Denial of fundamental human rights in Kosovo

According to the Trial Chamber in *Milutinović et al.*, from mid-1998 the political crisis in Kosovo culminated in an armed conflict, involving forces of the Federal Republic of Yugoslavia (FRY) and the Republic of Serbia (Serbia), and forces of the Kosovo Liberation Army. The armed conflict continued throughout the NATO aerial bombardment campaign from 24 March to 10 June 1999. Throughout the armed conflict incidents occurred in which excessive and indiscriminate force was used by the Yugoslav Army and the forces of the Serbian Ministry of the Interior. This resulted in damage to civilian property, population displacement, and civilian deaths. By the time of the NATO campaign, a joint criminal enterprise was in place. The Trial Chamber found that:

> "the common purpose of the joint criminal enterprise was to ensure continued control by the FRY and Serbian authorities over Kosovo and that it was to be achieved by criminal means. Through a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo, the members of the joint criminal enterprise were aware that it was unrealistic to expect to be able to displace each and every Kosovo Albanian from Kosovo, so the common purpose was to displace a number of them sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission." [Judgment, Volume 3, para. 95]

Forces of the FRY and Serbia deliberately expelled at least 700,000 Kosovo Albanians, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. Across Kosovo, forces of the FRY and Serbia conducted a broad campaign of violence directed against the Kosovo Albanian civilian population, involving killing, sexual assault and the intentional destruction of mosques.

These findings demonstrate that the campaigns of terror and violence resulted in the denial of fundamental human rights in Kosovo, which amounted to a breach of the obligation to respect and promote the right to self-determination in Kosovo. This breach was serious because it was systematic, the joint criminal enterprise, in particular, evidencing that the breach was carried out in an organized and deliberate way. The breach was also serious in that it was gross: the number of expelled Kosovo Albanians and the nature and extent of the violence directed against them constituted evidence of the flagrant nature of the breach, amounting to a direct and outright assault on the values protected.

Serious breach of the obligation to refrain from forcible action which deprives peoples of their right to self-determination in Kosovo

3.13 The findings of the ICTY Trial Chamber above - particularly in respect of the forcible displacement of Kosovo Albanians - at the same time established that there had been a serious breach of the obligation to refrain from any forcible action which deprives peoples of their right to self-determination in Kosovo.

Exhaustion of all effective remedies to achieve a settlement on the status of Kosovo

3.14 It is submitted that all effective remedies have been exhausted in the effort to achieve a settlement on the status of Kosovo. For this purpose, a political process was implemented under the auspices of the Security Council. It was only after many efforts to achieve a settlement on the status of Kosovo that the Special Envoy of the Secretary-General concluded that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted" (S/2007/168, para. 3) and "the only viable option for Kosovo is independence" (S/2007/168, para. 5). These conclusions were supported by the Secretary-General (S/2007/168). Subsequently, when it appeared that the Security Council was unable to agree on a resolution that would have endorsed the proposals made by the Special Envoy, the Contact Group (France, Germany, Italy, Russian Federation, United Kingdom, United States) proposed to establish a Troika composed of representatives of the EU, the Russian Federation and the US to try to find a solution. This Troika worked intensively for four months on the issue of the future status of Kosovo. The working schedule of the Troika comprised 10 sessions at the highest possible level, including a final three-day conference in Baden, Austria, as well as two trips to the region. The Troika delivered its report on 4 December 2007 (S/2007/723, Enclosure). Its objective was to facilitate an agreement between the parties. Notwithstanding the high-level, intensive and substantive discussions between

Belgrade and Pristina that the Troika was able to facilitate, an agreement on the final status of Kosovo could not be reached. As the Troika reported, "neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo" (S/2007/723, Enclosure, para. 2). Extensive further discussions took place in a number of meetings of the Security Council (19 December 2007 (S/PV.5811), 16 January 2008 (S/PV.5821 and S/PV.5822) and 14 February 2008 (S/PV.5835)) but did not result in a solution. It was therefore only after the exhaustion of the political process and in the absence of further guidance from the Security Council that the independence of Kosovo was proclaimed on 17 February 2008.

Resolution 1244

3.15 It is submitted that the inalienable right to self-determination has been affected neither by Resolution 1244 nor by the passage of time since the serious breach of the obligation to respect and promote the right to self-determination in Kosovo and the obligation to refrain from any forcible action which deprives peoples of this right. On the contrary, the time has been used to satisfy the procedural condition for the exercise of the right to external self-determination, namely the exhaustion of all effective remedies to achieve a settlement on the status of Kosovo.

Status of international law relating to external self-determination

3.16 The Kingdom of the Netherlands acknowledges that the emergence of the right to external self-determination has not been without controversy. On the one hand, the exercise of this right results in a reconfiguration of the international community and may affect the essential requirement of stability referred to by the Court in the *Case Concerning the Frontier Dispute*. On the other hand, as a result of past events, it may be that stability can only be achieved through change. The law, in particular the law on self-determination, should provide guidance in this process of change.

3.17 In 1992, the Conference on Yugoslavia Arbitration Commission found that "international law as it currently stands does not spell out all the implications of the right of self-determination" (Opinion No. 2). In 1998, the Supreme Court of Canada was in a position to spell out a number of these implications, including implications of the right to external self-determination. It considered whether "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 134). For the purposes of the case under consideration, it was not necessary for the Supreme Court of Canada to make a determination with respect to this proposition and it merely stated that "it remains unclear whether this [...] proposition actually reflects an established international law standard" (para. 135). At the same time, it cited the reference to "a denial of fundamental human rights" in Resolution 2625 in the context of a "clear case where a right to external self-determination accrues" (para. 133).

3.18 The controversial nature of the implications of the right to self-determination is also reflected in the position of States. It may be noted that a few States have made reservations or declarations to the 1966 Covenants limiting the scope of the right to self-determination to certain categories of peoples, notably peoples under foreign occupation. The Kingdom of the Netherlands has objected to such reservations or declarations, pointing out that any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments

undermines the concept of self-determination itself and thereby seriously weakens its universally acceptable character. Other States have entered similar objections.

3.19 It is therefore unsurprising that the views of States differ with respect to the proclamation of the independence of Kosovo on 17 February 2008. This has been recognized in the Preamble to General Assembly Resolution 63/3, which notes the awareness of the General Assembly that the proclamation of the independence of Kosovo on 17 February 2008 "has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order".

3.20 The response of members of the international community to the disintegration of States in the 1990s has provided new information on the practice and legal opinions of States. If the Court is unable to conclude that a rule of customary international law on the right to exercise external self-determination outside the context of non-self-governing territories, foreign occupation and consensual agreement has emerged, it is submitted that international law does not prohibit the exercise of external self-determination in exceptional circumstances, i.e. in unique cases or cases *sui generis*. This emanates from the practice and legal opinions of several States, including those of the Kingdom of the Netherlands.

Conclusions

3.21 It is the legal opinion of the Kingdom of the Netherlands that the right to political self-determination includes the right to external self-determination in the case of a serious breach of the obligation to respect and promote the right to self-determination or the obligation to refrain from any forcible action which deprives peoples of this right where all effective remedies have been exhausted. The recognition of Kosovo by the Kingdom of the Netherlands is based on this legal opinion and constitutes an instance of State practice in a case where the conditions for the exercise of the right to external self-determination were satisfied.

3.22 If the Court is unable to conclude that a rule of customary international law on the right to exercise external self-determination outside the context of non-self-governing territories, foreign occupation and consensual agreement exists, it is submitted that international law neither authorizes nor prohibits the proclamation of the independence of Kosovo on 17 February 2008.

4. Submissions

4.1 The Kingdom of the Netherlands submits that:

- The proclamation of the independence of Kosovo on 17 February 2008 has not affected the application of Resolution 1244;
- Resolution 1244 did not prohibit the proclamation of the independence of Kosovo on 17 February 2008;
- A political solution on the status of Kosovo that has the agreement of all stakeholders has yet to be achieved;
- There has been a serious breach of the obligation to respect and promote the right to self-determination and the obligation to refrain from any forcible action which deprives peoples of this right in Kosovo which justified the proclamation of

independence on 17 February 2008 after all effective remedies to achieve a settlement on the status of Kosovo had been exhausted.

4.2 It is, therefore, the opinion of the Kingdom of the Netherlands that the answer to the question should be that the proclamation of the independence of Kosovo on 17 February 2008 is in accordance with international law or, alternatively, that international law neither authorizes nor prohibits the proclamation.

******