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H.E. Philippe Couvreur
Registrar
International Court of Justice
Carnegieplein 2
2517 KJ The Hague
The Netherlands

17 April 2009

Excellency,

I have the honour to transmit to the International Court of Justice the written statement of Ireland on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. Enclosed please find 30 copies of this statement, an electronic copy of the statement on CD-ROM and an accompanying letter from the Mr. James Kingston.

Original copies of the statement will be transmitted to the Court by the Embassy upon receipt from the relevant authorities in Dublin.

Yours sincerely,

Frank Power
Chargé d'Affaires a.i.

Telefón
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Tagairt
Reference }

AN ROINN GNÓTHAÍ EACHTRACHA
Department of Foreign Affairs

BAILE ÁTHA CLIATH 2
Dublin 2

17 April 2009

Mr Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

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

Dear Mr Couvreur

I refer to your circular letter of 10 October 2008 informing that the Secretary General of the United Nations had notified the International Court of Justice of the adoption by the UN General Assembly, on 8 October 2008, of resolution 63/3 whereby the General Assembly decided to request the Court to give an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo; and to your circular letter of 20 October 2008 on the filing of written statements in the above proceedings.

Enclosed please find 30 copies of Ireland's written statement and an electronic copy of the statement on CDROM.

Yours sincerely

James Kingston
Agent of the Government of Ireland

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE BY THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT OF KOSOVO

STATEMENT OF THE GOVERNMENT OF IRELAND

17 APRIL 2009

I. Introduction

1. On 8 October 2008, by resolution 63/3 (A/63/L.2), the General Assembly of the United Nations requested the International Court of Justice to render an advisory opinion, pursuant to article 65 of the Statute of the Court, on the following question:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

2. UNGA Resolution 63/3 was adopted by 77 votes to 6, with 74 abstentions (including Ireland).

3. Ireland presents the following written statement in accordance with article 66(2) of the Statute and the Order of the Court dated 17 October 2008, deciding that the United Nations and its Member States are considered likely to be able to furnish information on the question.

II. Factual background and position of Ireland

4. On 17 February 2008, the Kosovo Assembly adopted a resolution which declared Kosovo to be "a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law".[1] It undertook to implement the obligations set out in the Comprehensive Proposal for the Kosovo Status Settlement (hereinafter referred to as the "Ahtisaari Proposal"[2]), emphasising "those that protect and promote the rights of communities and their members".

5. On 28 February 2008, Ireland recognised the independence of the Republic of Kosovo. Ireland did so after long and careful consideration of the complex political and legal factors pertaining to this matter.

6. In announcing Ireland's recognition of Kosovo, the Minister for Foreign Affairs referred to some of the factors which in his view made Kosovo a unique case. He said:

> "We regret that years of talks failed to produce an agreement between Belgrade and Pristina. The reality is that the legacy of the conflict of the late 1990s made the return of Serb dominion in Kosovo unthinkable, and also undermined the prospects for a long-sought compromise. After almost nine years under UN-led interim administration, more than 90% of Kosovo's population wants independence, and this is supported by most of our partners in the EU, many of whom have already recognised Kosovo.
>
> Ireland strongly supported last year's proposal by the UN Secretary General's Special Envoy on Kosovo, former Finnish President Martti Ahtisaari, which

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[1] Kosovo Declaration of Independence, 17 February 2008: http://www.assembly-kosova.org/common/docs/declaration_independence.pdf.

[2] Report of the UN Special Envoy of the Secretary-General on Kosovo's future status, UN Doc S/2007/168 dated 26 March 2007, including a Comprehensive Proposal for the Kosovo Status Settlement: http://www.unosek.org/docref/report-english.pdf.

recommended that Kosovo's status should be independence, supervised by the international community. This proposal included detailed provisions concerning the promotion and protection of the rights of communities and their members. I am pleased to note the commitment by Kosovo to implement fully the Ahtisaari recommendations."[3]

III. Outline of submissions

7. Ireland respectfully submits that the Court should have regard to the following in its consideration of the request of the UN General Assembly for an advisory opinion in this matter:

a. the Court should exercise its discretion to decline to provide the requested advisory opinion;

b. further or alternatively, if the Court does not decline jurisdiction, it should confine its opinion only to the lawfulness of the unilateral declaration of independence;

c. the unilateral declaration of independence of Kosovo was not unlawful, as international law does not prohibit unilateral declarations of independence;

d. further or alternatively: that the unilateral declaration of independence of Kosovo was not unlawful, as it represented an exercise of self-determination in the context of gross or fundamental human rights abuses.

A. The Court should exercise its discretion to decline to provide the requested advisory opinion

8. Ireland accepts that the question before the Court is a "legal question" within the meaning of article 96 of the Charter and article 65 of the Statute, in the sense that it is "framed in terms of law and raise[s] problems of international law".[4] Further, Ireland does not request the Court to consider whether article 10 of the Charter[5] confers on the General Assembly competence in this matter.

9. While not disputing the Court's competence and jurisdiction in this matter, Ireland respectfully submits that the Court should exercise its discretion to decline to provide the requested opinion.

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[3] Statement of the Minister for Foreign Affairs Dermot Ahern TD, announcing Ireland's recognition of the Republic of Kosovo, 29 February 2008.

[4] *Western Sahara,* Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, 12, at paragraph 15, cited in *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts,* Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, 66, at paragraph 15.; and *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, 226, at paragraph 13.

[5] Conferring on the General Assembly a competence relating to any questions or matters within the scope of the Charter.

10. Although the Court has to date not refused to give an advisory opinion, it has consistently confirmed that its Statute leaves the Court discretion whether to give an advisory opinion requested of it, once it has established its competence to do so.[6] It has a "discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met."[7] Although an opinion should not generally or in principle be refused, "compelling reasons" may lead the Court to decline to give the opinion requested.[8] Ireland submits that there are compelling reasons for declining to provide an opinion in the present case.

11. The Court has found that its advisory function is to give an opinion based on law "once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose".[9] Although the Court will not "substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion",[10] the purpose of an advisory opinion is to furnish the requesting organ with a statement of the law necessary for it in its action or the proper exercise of its functions.[11]

12. Ireland is of the view that the Court should provide advice only if it is necessary for the requesting organ to proceed with its work in the knowledge that it is acting in accordance with international law.[12] In Ireland's view, this consideration should influence the Court's assessment of when it should exercise its discretion to refuse an advisory opinion. The status of Kosovo is not an issue before the United Nations General Assembly at this time, such as to require legal guidance for action by that organ. The UN Security Council is "actively seized" of the matter; and under UN Security Council Resolution 1244 (1999), it is to the Security Council that the UN

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[6] E.g. *Legality of the Threat or Use of Nuclear Weapons*, supra, at paragraph 14.

[7] *Legal Consequences of the Construction by Israel of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, at paragraph 44.

[8] E.g. *Construction of a Wall*, supra, at paragraph 44.

[9] *Western Sahara* , supra, at paragraph 73.

[10] *Construction of a Wall*, supra, at paragraph 62; *Legality of the Threat or Use of Nuclear Weapons*, supra, at paragraph 15.

[11] *Construction of a Wall*, supra, at paragraph 50:

> "The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United nations and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground".

See also *Legality of the Threat or Use of Nuclear Weapons*, supra, at paragraph 15: "the purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion".

[12] "The Court regards its role as the provision of advice so that the requesting organ may proceed with its work in the knowledge that it is acting in accordance with international law": Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), at 198.

Secretary General reports on implementation of that resolution.[13] Although not disputing the Court's formal jurisdiction, in light of this - and in the absence of a Security Council request for an advisory opinion – Ireland submits that the Court may choose to exercise its discretion not to render the requested opinion and should do so in this instance.

B. That if the Court does not decline jurisdiction, it should confine its opinion only to the lawfulness of the unilateral declaration of independence

13. The question put to the Court by UNGA Resolution 63/3 is: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" Ireland is of the view that, should the Court decide to render an advisory opinion, it should confine its opinion to that question alone.

14. In his separate opinion in the *Construction of a Wall* case, Judge Owada held that the Court should consider judicial propriety, not alone in relation to the question of *whether* it should comply with the request for an advisory opinion, but also in relation to the question of *how* it should exercise jurisdiction.[14] In his view, the:

> "critical criterion for judicial propriety in the final analysis should lie in the Court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists".[15]

Thus, although the fact that a case contains "an aspect of addressing a bilateral dispute" should not in itself prevent a Court from exercising its competence, this fact has an:

> "important bearing on the whole proceedings that the Court is to conduct in the present case, in the sense that the Court in the present advisory proceedings should focus its task on offering its objective findings of law to the extent necessary and useful to the requesting organ, the General Assembly, in carrying

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[13] UN Security Council Resolution 1244(1999) of 10 June 1999, UN Doc S/RES/1244 (1999), paragraph 20 and 21.

[14] Separate opinion of Judge Owada, *Construction of a Wall*, supra, at paragraph 10:

> "While the existence of a bilateral dispute thus should not exclude the Court from exercising jurisdiction in advisory proceedings as a matter of judicial propriety, however, it is my view that the existence of a bilateral dispute *should be a factor to be taken into account by the Court in determining the extent to which, and the manner in which, the Court should exercise jurisdiction* in such advisory proceedings." (emphasis added)

and id. at paragraph 2:

> "in order to ensure that it is not only *right* as a matter of law but also *proper* as a matter of judicial policy for the Court as a judicial body to exercise jurisdiction in the concrete context of the case. This means, at least to my mind, that the Court would be required to engage in an in-depth scrutiny of all aspects of the particular circumstances of the present case relevant to the consideration of the case, if necessary going beyond what has been argued by the participants."

[15] Id., at paragraph 13.

out its functions relating to this question, rather than adjudicating on the subject-matter of the dispute between the parties concerned".[16]

15. This approach is consistent with the very object of advisory opinions, namely that:

> "The object of the General Assembly has *not* been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to *obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions* ...".[17]

16. Judge Owada further, while stressing the cardinal importance of keeping "in balance the overall picture which has formed the entire background of the construction of the wall", also noted as a general or starting position that "the request for an advisory opinion is focussed on a specific question and that the Court should treat this question, and this question only... ."[18]

17. Ireland is of the view that – consistent with the purpose of advisory opinions as set out above – if rendering an advisory opinion in the present case, the Court should - in the terms of the *Western Sahara* decision - limit itself to an:

> "objective [finding] of law to the extent necessary and useful to the requesting organ, the General Assembly, in carrying out its functions relating to this question, rather than adjudicating on the subject-matter of the dispute between the parties concerned".[19]

C. That the UDI of Kosovo was not unlawful, as international law does not prohibit unilateral declarations of independence

18. Ireland is of the view that international law contains neither a general right to nor a general prohibition on unilateral declarations of independence (secession). In the absence of such a prohibition – and in the absence of illegality in the circumstances of a particular case by virtue of breach of peremptory norms or breach of the prohibition on intervention – unilateral declarations of independence are not contrary to international law. Accordingly and from the perspective of international law, the unilateral declaration of independence of Kosovo should in all the circumstances be considered an act not prohibited by international law.

19. Ireland is of the view that international law is generally silent or neutral on the legality of secession. In support of this view, Lauterpacht argues that:

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[16] Id., at paragraph 14.
[17] *Western Sahara*, supra, at paragraph 39 (emphasis added).
[18] Separate opinion of Judge Owada, *Construction of a Wall*, supra, at paragraph 27.
[19] *Western Sahara*, supra, at paragraph 39.

> "International law acknowledges as a source of rights and obligations such facts and situations as are not the result of acts which it prohibits and stigmatizes as unlawful. Thus, for instance, secession from an existing state, although constituting a breach of the law of the State concerned, is not contrary to international law"[20]

and further that "successful secession from the parent State is a fact which is not contrary to international law".[21]

20. Judge Rosalyn Higgins, former President of the Court, similarly is of the view that:

> "it is not the case that this view of self-determination[22] means that new frontiers can never be recognized. Even if, contrary to contemporary political assumptions, self-determination is not an *authorization* of secession by minorities, there is nothing in international law that *prohibits* secession or the formation of new states. The principle of *uti possidetis* provides that states accept their inherited colonial boundaries. It places no obligation upon minority groups to stay a part of a unit that maltreats them or in which they feel unrepresented. If they do in fact establish an independent state, or join with an existing state, then that new reality is one which, when its permanence can be shown, will in due course be recognized by the international community".[23]

This view of international law as silent on secession is shared by numerous other jurists.[24]

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[20] Hersch Lauterpacht, *Recognition in International Law* (1948), at 409.
[21] Id., at 6.
[22] Responding to a question of whether self-determination is "to be understood as being limited to an exercise of rights within the inherited frontier".
[23] Higgins, supra, at 125 (emphasis in original).
[24] E.g. Oppenheim too makes a distinction between legality under domestic and international law, stating:

> "although a rebellion will involve a breach of the law of the state concerned, no breach of international law occurs through the mere fact of a rebel regime attempting to overthrow the government of the state or to secede from the state".

L.F.L. Oppenheim, *International Law*, 9th Ed. (1992), *Volume 1: Peace*, at 161-162.

Hannum has similarly consistently argued that international law is silent on secession: see e.g. "The right of self-determination in the twenty-first century", (1998) 55 Washington and Lee Law Review 773:

> "There simply is no right of secession under international law... Of course, there is no prohibition in international law against secession, either".

See also e.g. Outcome and Rapporteur's Summary of the Amsterdam International Law Conference on Peoples and Minorities in International Law, 18-20 June 1992, Refugee Studies Centre RSC/A-21.1 HAN at 4:

> "The present state of international law is neutral, i.e. it neither supports nor prohibits secession, although an increasing number of scholars may be found who maintain that such a right is or ought to exist".

21. This view is also supported by the Supreme Court of Canada which, in its decision in *Reference re Secession of Quebec*, indicated that "international law contains neither a right of unilateral secession nor the explicit denial of such a right".[25]

22. Ireland acknowledges that it is well-established that illegality may arise where secession is attempted in violation of peremptory norms of international law.[26] Similarly, and in accordance with the *jus cogens* status of the illegality of resort to the threat or use of force against the territorial integrity or political independence of any state, the Declaration on Friendly Relations confirms that no territorial acquisition resulting from the threat or use of force by one state against another shall be recognised as legal.[27] The unilateral declaration of independence of Kosovo was not brought about in violation of peremptory norms of international law such as to fall within these exceptions.

23. It is also the case that the UN Security Council may declare a specific attempted secession illegal in the circumstances of the individual case, such as where the attempted secession is in itself in violation of self-determination, as occurred in relation to Southern Rhodesia, Transkei and other similar cases.[28] In the case of Southern Rhodesia, the Security Council explicitly recorded the 1965 declaration of independence as having no legal validity, referred to the minority government as an "illegal authority" and "called on all states not to recognize this illegal racist minority regime".[29]

For further authorities see e.g. Christopher Borgen, "Introductory Note to Kosovo's Declaration of Independence", (2008) 47 ILM 461:

> "since the birth of the United Nations, diplomats and jurists have emphasized that a right to self-determination was not a general right of secession. Allowing secession as a remedy would have clashed with a cornerstone of the UN which is to protect the territorial integrity of states. However one cannot say that international law makes secession illegal. If anything, international law is largely silent regarding secession".

[25] *In the matter of Section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26; and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996* ("*Reference re Secession of Quebec*") [1998] 2 S.C.R. 217, at paragraph 112.
[26] Ti-Chiang Chen, *The International Law of Recognition* (1951) at 429.
[27] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), (*Merits*) Opinion 27 June 1986, ICJ Reports 1986, 392, at paragraph 190, confirming the international prohibition on use of force to be a "conspicuous example of a rule of international law having the character of *jus cogens*".
Declaration of principles of international law concerning Friendly Relations and Cooperation among States, adopted by the General Assembly in 1970, UNGA Res 2625 (XXV). James Crawford, *The Creation of States in International* Law, 2nd Ed., (2006), at 148, finds that, accordingly, "an entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a state".
[28] See e.g. Oppenheim, supra, at 162, note 1.
[29] UN Security Council Resolutions 215 (12 November 1956) and 217 (22 November 1965). Note that the obstacle to establishment of Rhodesia as an independent state was that:

"the minority government's declaration of independence was and remained internationally a nullity, as a violation of the principle of self-determination"

Crawford, supra, at 130.

24. The situation in Kosovo is not unlawful. Security Council Resolution 1244 (1999) cannot be seen as determining independence for Kosovo as unlawful. Ireland is of the view that the resolution does not define the outcome of final status talks, but rather that its annexes confirm only that, pending a final settlement, an "interim political framework" shall afford substantial self-governance for Kosovo and take into account the territorial integrity of the Federal Republic of Yugoslavia.[30]

25. In Ireland's view, the structure of these arrangements suggest that it is the establishment of interim self-governing institutions that must take account of the principles of sovereignty and territorial integrity of the FRY (as occurred) and not the "final settlement" (which is not expressly subject to the same condition). To do otherwise would have been to pre-empt that settlement, to be determined by a political process "designed to determine Kosovo's future status, taking into account the Rambouillet accords"[31], which reference by implication acknowledged the possible outcome of independence.

26. Ireland submits that, in accordance with the above, the unilateral declaration of independence of Kosovo was not contrary to international law, as international law generally contains no prohibition of such declarations; and the exceptions to this rule – relating to breach of peremptory norms and/or determination of illegality by the Security Council on the basis of such a breach – do not apply.

D. Further or alternatively: that the unilateral declaration of independence of Kosovo was not unlawful, as it represents an exercise of self-determination in the context of gross or fundamental human rights abuses

27. The Court has previously held "that the right of peoples to self-determination, as it evolved form the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. ... it is one of the essential principles of contemporary international law".[32] It is accordingly only the scope of self-determination which is at issue in this instance.

28. Ireland is of the view that, outside the colonial context, the right to self-determination does not give rise to a unilateral *right* of secession by constituent parts of existing states: "International law expects that the right to self-determination will be

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See also further e.g. the characterisation by the Security Council of the proclamation of independence of the Turkish Republic of Northern Cyprus as "invalid": Security Council Resolution 541 (1983): http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/453/99/IMG/NR045399.pdf?OpenElement. See further the declaration as "invalid" of the independence of Transkei: General Assembly Resolution 31/6A (1976), endorsed in Security Council Resolution 402(1976): http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/294/90/IMG/NR029490.pdf?OpenElement

[30] Annexes 1 and 2 including the principle of "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 principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia...".

[31] UN Security Council Resolution 1244 (1999), supra, at paragraph 11(e).

[32] *East Timor (Portugal v. Australia)* Opinion 30 June 1995, ICJ Reports 1995, 90, at paragraph 28.

exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states".[33] Accordingly, "there is no legal right of secession where there is representative government"[34] and a State whose government represents the whole of the people within its territory on an equal basis complies with the principle of self-determination and is entitled to the protection of its territorial integrity under international law.[35]

29. However, an exceptional right of secession has been referred to in decisions on self-determination since the earliest days of its application, for example, the Åland Islands arbitration in 1920-1921 resulted in a finding by the International Committee of Jurists that "there was no right to secede absent 'a manifest and continued abuse of sovereign power to the detriment of a section of population'."[36] This decision "lends support to the principle in international law of *carence de souveraineté*, that is, where a territory is so misgoverned by the state that secession is permitted".[37]

30. Ireland agrees with the view expressed by the Canadian Supreme Court that although "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states", "where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise".[38] Such an exception to the general rule, allowing for a right to secession in the case of gross or fundamental human rights abuses, "arises in only the most extreme of cases and, even then, under carefully defined circumstances" and as a "last resort".[39] It may be considered to arise "only when a people had been subject to such repression by the majority within a state that separation was the only feasible alternative"[40], or where a people is "discriminated against in such a way that remaining in the state cannot be demanded any longer".[41]

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[33] Supreme Court of Canada, *Reference re Secession of Quebec*, supra, at para 122.
[34] Higgins, supra, at 115.
[35] As may be required under the Declaration on Friendly Relations. See also e.g. Ved Nanda, "Self-determination under International Law: Validity of Claims to Secede" (1981) 13 Case W. Res. J. Int'l L. 257, at 269-270:

> "Consequently a state has to meet the requirement of possessing a 'government representing the whole people' before it is entitled to protection from 'any action which would dismember or impair... [its] territorial integrity or political unity'. Thus under special circumstances the principle of self-determination is to be accorded priority over the opposing principle of territorial integrity".

[36] Borgen, supra.
[37] Ana Filipa Vrdoljak "Self-Determination and Cultural Rights" in F. Francioni and M. Scheinin (Eds.), *Cultural Human Rights* (2008), at 46.
[38] *Reference re Sucession of Quebec*, supra, at paragraph 122.
[39] Id., supra, at paragraphs 126 and 134.
[40] Outcome of the Amsterdam Conference 1992, supra, at 4.
[41] Christian Tomuschat, *Modern Law of Self-Determination* (1993), at 26. See also Hannum who, while of the view that there is in general no legal right to secession, argues that:

> "There are two instances in which secession should be supported by the international community. The first occurs when massive, discriminatory human rights violations, approaching the scale of genocide, are being perpetrated. If there is no likelihood of a change in the attitude of the central government, or if the majority population supports the repression, secession may

31. It is notable that – even prior to its unilateral declaration of independence – Kosovo was being suggested as such a territory:

> "There is a further possible category of self-determination units, that is, entities part of a metropolitan State but that have been governed in such a way as to make them in effect non-self-governing territories – in other terms, territories subject to *carence de souveraineté*. Possible examples are ... Kosovo ...."[42]

32. Ireland is of the view that these elements ought properly to be applied in concert – that this right may arise, as a last resort, only in the case of gross and fundamental human rights abuses and further, where an element of discrimination is involved (that is, where the central authorities exclude a defined group from the meaningful exercise of internal self-determination).[43]

33. Ireland, in coming to its decision on recognition of Kosovo, concluded that it was indeed a *sui generis* case meeting these requirements. It had regard to a number of factors including the following:

i. The status of Kosovo under the Constitution of the Socialist Federal Republic of Yugoslavia. Although the 1974 Constitution provided that Kosovo and Vojvodina were autonomous provinces within Serbia, "by most criteria of constitutional law they were at the same time fully-fledged federal bodies".[44] Such autonomy was not limited to autonomy within Serbia, including also direct representation "on the main federal Yugoslav bodies".[45] It expressly provided for "full equality between the republics and autonomous provinces in regard to their participation in the federation, by determining that federal decisions were to be made 'according to the principles of agreement among the republics and autonomous provinces'."[46] This equality of position is further evident in the constitutional requirement of consent not only of Republics but also of the

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> be the only effective remedy for the besieged group. ... a second possible exception might find a right of secession if reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government without accompanying large scale abuses. This exception, however, would play only when minimal demands are rejected, it does not mean that at the States or the UN should substitute its judgment of what is politically reasonable for that of the parties involved".

"The Specter of Secession: responding to claims for ethnic self-determination" (1998) 11 Foreign Affairs 13, at 16.

[42] Crawford, supra, at 126.

[43] Antonio Cassese, *Self-determination of peoples: a legal appraisal summary of exception to the right to territorial integrity* (1995), at 119-120:

> "When the central authorities of a sovereign state persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights and deny the possibility of reaching a peaceful settlement within the framework of the state structure... a racial or religious group may secede... once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail".

[44] Noel Malcolm, *Kosovo: A short history* (1998), at 327.

[45] Id.

[46] Heike Kreiger (Ed.), *The Kosovo Conflict and International Law* (2001), at 1.

Autonomous Provinces for alteration of territories, frontiers or boundaries[47], and continued to be the case until the 1989-1990 amendments of the Serbia Assembly removing such autonomy.[48]

ii. The protracted period of international administration, in accordance with UN Security Council Resolution 1244 (1999), including the gradual devolution of authority from UNMIK to local authorities during a political process designed to determine Kosovo's future status.[49] Further, that the continuation of such international administration was not sustainable in the long term.

iii. The widespread and gross human rights abuses perpetrated by the Serb authorities against the Kosovar Albanians, as referred to by UN Security Council Resolution 1244, noting the "grave humanitarian situation" and "threat to international peace and security" involved and UN General Assembly Resolution 54/183 on the situation of human rights in Kosovo.[50]

iv. The clear and overwhelming desire of more than 90% of Kosovo's population for independence.

v. The absence of other remedies or feasible alternatives, following lengthy negotiations and international engagement, and having regard to the view of the UN Special Envoy that reintegration to Serbia was not a viable option, that continued international administration was not sustainable and that independence with international supervision was the only viable option for Kosovo.[51]

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[47] Article 5 of the 1974 Constitution of the SFRY provided as follows:

> The territory of the Social Federal Republic of Yugoslavia is a single unified whole and consists of the territories of the Socialist Republics. The territory of a Republic may not be altered without the consent of that Republic; and the territory of an Autonomous province - without the consent of that Autonomous Province. The frontiers of the Socialist Federal Republic of Yugoslavia may not be altered without the consent of that Autonomous Province. The frontiers of the Socialist Federal Republic of Yugoslavia may not be altered without the consent of all Republics and Autonomous Provinces. Boundaries between the Republics may only be altered on the basis of mutual agreement, and if the boundary of an Autonomous province is involved – also on the basis of the latter's agreement.

Translated and reprinted in Kreiger, supra, at 3.

[48] Malcolm, supra, at 343 et seq. In this regard it may be noted that "it is often taken as axiomatic that autonomy cannot be unilaterally revoked by the central government once it has been constitutionally established". Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009), at 10.

[49] See e.g. Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001.

[50] "Condemning the grave violations of human rights in Kosovo that affected ethnic Albanians prior to the arrival of personnel of the United Nations Interim Administration Mission in Kosovo and troops of the international security presence, as demonstrated in the many reports of torture, indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanians in Kosovo by the Yugoslav police and military".

UN General Assembly Resolution 54/183, 29 February 2000, UN Doc. A/RES/54/183.

[51] Report of the Special Envoy, supra at paragraphs 6-14.

34. In all the circumstances, Ireland is of the view that the case of Kosovo represents a *sui generis* case representing an exercise of self-determination in the context of gross or fundamental human rights abuses.

IV. Conclusion

35. Ireland respectfully suggests that the issues addressed above are of importance and relevance to the substance of the referral and that the Court:

i. should exercise its discretion not to provide the requested advisory opinion in this matter, or alternatively

ii. if the Court elects to provide an advisory opinion in this instance:

- it should confine its opinion only to the lawfulness of the unilateral declaration of independence;
- it should find that the unilateral declaration of independence of Kosovo was not unlawful, as international law does not prohibit unilateral declarations of independence;
- further or alternatively, the Court should find that the unilateral declaration of independence of Kosovo was not unlawful, as it represented an exercise of self-determination in the context of gross or fundamental human rights abuses.

17 April 2009