**Reply of the Argentine Republic to questions posed by Judges Koroma and Cançado Trindade at the close of the oral proceedings**

*[Translation]*

**Question posed by Judge Koroma:**

> "It has been contended that international law does not prohibit the secession of a territory from a sovereign State. Could participants in these proceedings address the Court on the principles and rules of international law, if any, which, outside the colonial context, permit the secession of a territory from a sovereign State without the latter's consent?"

**Reply of the Argentine Republic:**

1. Some participants in the advisory proceedings have indeed argued that international law does not prohibit the secession of a territory from a sovereign State[1]. The Argentine Republic is of the view that this argument is fallacious. The application of the fundamental principles of international law, such as respect for territorial integrity and non-interference in matters that lie essentially within the domestic jurisdiction of States conduces to the prohibition of secession at the international level. The position taken by the United Nations, which opposed the secession of Katanga and supported respect for the territorial integrity of the Congo, probably marks the turning point in terms of the opposability to secessionist movements of the principle of respect for territorial integrity. Subsequent practice has confirmed such opposability, as is shown by the positions taken by the international community regarding the situations within Bosnia and Herzegovina, Georgia, the Federal Republic of Yugoslavia (now the Republic of Serbia), Azerbaijan, Somalia, Sudan, the Comoros and the Philippines, among others[2].

2. The existence of a rule of international law authorizing secession in cases of serious violation of human rights or the rights of minorities has been posited in these proceedings. This is the so-called theory of "corrective secession" or "remedial secession". Argentina has already explained why, in its opinion, such a rule does not exist in positive international law[3]. Argentina has also explained why the principle of the right to self-determination cannot be used to justify the non-consensual separation of part of the territory of a sovereign State[4].

3. A so-called "principle of effectiveness" was also put forward during the oral proceedings as a possible rule justifying secession[5]. However, the quintessential features of any legal system, and international practice, stand in stark contradiction to the claim that an enduring *de facto*

---

[1]CR 2009/26, paras. 12-13 (Frowein, Albania); CR 2009/27, paras. 19-22 (Tichy, Austria); CR 2009/30, para. 19 (Koh, United States of America); CR 2009/31, para. 43 (Al Hussein, Jordan); CR 2009/32, paras. 17-22 (Crawford, United Kingdom); CR 2009/25, para. 30 (Müller, Authors).

[2]Written Comments of the Republic of Serbia, paras. 263-274.

[3]Written Statement of Argentina, para. 97; Written Comments of Argentina, para. 59; CR 2009/26, para. 25 (Ruiz Cerutti, Argentina).

[4]Written Statement of Argentina, paras. 87-100; Written Comments of Argentina, paras. 59-61; CR 2009/26, paras. 21-26 (Ruiz Cerutti, Argentina).

[5]CR 2009/26, p. 30, para. 29 (Wasum-Rainer, Germany): "Of course, not every factual situation is in accordance with the law just because it is factual. When it comes to the question of statehood, however, international practice clearly refers to the principle of effectiveness."

situation is in itself a legal justification for that same situation. The Canadian Supreme Court, in its reference concerning Quebec, correctly established the relationship between a power and a right:

> "A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation."[6]

Or again:

> "It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state. Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected."[7]

International practice clearly shows that certain situations which could be characterized as effective do not on that account warrant being described as involving the creation of a State. Evidence for this can be found in the cases of Southern Rhodesia, the so-called "Turkish Republic of Northern Cyprus" and "Somaliland", among others. Thus, the alleged "principle of effectiveness" provides no legal basis for secession.

4. Argentina is therefore not aware of any rule of international law which explicitly or implicitly authorizes the secession of a part of a sovereign State without the latter's consent. International practice since 1945 has been consistent and uniform in this respect: all successful secessions since that time have benefited from the consent of sovereign States. Such consent has taken several forms and has been given at different times, both before and after the attempted secession, but consent was unquestionably given. This was the case for Singapore[8], Bangladesh[9], the Baltic States[10], the other States that emerged from the former Soviet Union[11], Eritrea[12] and Montenegro[13].

---

[6] *Reference Concerning Certain Questions Relating to the Secession of Quebec from Canada*, para. 106, available at http://csc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.html.

[7] *Ibid.*, paras. 107-108.

[8] Agreement between the Government of Malaysia and the Government of Singapore, 7 August 1965, 563 *UNTS* 89. See Security Council resolution 213 (1965) and General Assembly resolution 2010 (XX).

[9] Bangladesh was recognized by Pakistan on 2 February 1974. See Security Council resolution 351 (1974) and General Assembly resolution 3202 (XXIX).

[10] The Soviet Union recognized the independence of the Baltic States on 6 September 1991. See the comments made by the President of the Security Council, Mr. Merimée (France), S/PV. 3007, 12 September 1991; and Security Council resolutions 709 (1991), 710 (1991) and 711 (1991).

[11] Cf. the Minsk Declaration of 8 December 1991 and the Protocol of Alma Ata of 21 December 1991. *ILM*, 1992, Vol. XXXI, pp. 142-149.

[12] General Assembly resolutions 47/114 and 47/230; Security Council resolution 828 (1993).

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp. 29-31, paras. 67-75; General Assembly resolution 60/264.

5. It is well known that cases of dissolution must be distinguished from cases of secession. In the case of the former, the predecessor State ceases to exist; as a result, the principle of territorial integrity is not at issue since there is no longer a State capable of asserting the right to respect for its territorial integrity. The international community considered that the case of the Socialist Federal Republic of Yugoslavia (SFRY) was one of dissolution, not secession[14], contrary to the position initially taken by the Federal Republic of Yugoslavia (Serbia and Montenegro)[15].

6. In conclusion, there are no legal rules authorizing the secession of part of a sovereign State without the latter's consent.

*

* *

**Question posed by Judge Cançado Trindade:**

> "United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11 *(a)*, to 'substantial autonomy and self-government in Kosovo', taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this *renvoi* to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people's eligibility into statehood, in the framework of the legal régime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configurations of a 'people' and of its eligibility into statehood, under general international law?"

**Reply of the Argentine Republic:**

1. It should be noted at the outset that the "Rambouillet Accords" constitute no more than a proposed agreement submitted to the central government authorities of Belgrade and to the representatives of the Albanian community in Kosovo, which did not lead to a successful outcome. The reference made to the "Rambouillet Accords" in resolution 1244 (1999) does not make that text a binding instrument; it means only that account should be taken of what had been proposed to the Parties in March 1999.

2. Argentina has already discussed the scope of this reference in paragraph 11 *(e)* of resolution 1244 (1999) and shown that it does not authorize a unilateral declaration of independence[16]. However, the question posed relates to the reference contained in subparagraph *(a)* of paragraph 11 of the resolution concerned:

---

[14]Security Council resolution 1326 (2000); General Assembly resolution 55/12.

[15]Note dated 27 April 1992, addressed to the Secretary-General by the Permanent Mission of Yugoslavia to the United Nations, United Nations doc. A/46/915, 7 May 1992.

[16]Written Statement of Argentina, paras. 98-99; Written Comments of Argentina, para. 60; CR 2009/26, para. 23 (Ruiz Cerutti, Argentina).

> "11. *Decides* that the main responsibilities of the international civil presence will include: *(a)* Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648)."

**A. First part of the question**

3. The first part of the question concerns what is to be understood by the reference to the "Rambouillet Accords". Argentina is of the view that this reference implies that the international authorities in charge of the administration of the territory were required to take full account of the régime of self-government provided for in great detail in the text presented at Rambouillet. Subsequent practice shows that UNMIK did in fact model the autonomy and self-government régime on the "Rambouillet Accords".

**B. Second part of the question**

4. The second part of the question concerns the possible bearing of this reference on the issues of self-determination and/or secession. Argentina is of the opinion that this reference relates to the organization of a régime of autonomy and self-government, which necessarily implies a form of internal self-determination, thus excluding any possibility of unilateral secession or recognition of an external right to self-government. In view of the fact that serious violations of human rights and international humanitarian law had been committed by the Belgrade Government, the establishment of this régime can also be interpreted as a rejection of the doctrine of "corrective secession" or "remedial secession".

5. The verb "promoting" is also significant. It implies that the task of establishing "autonomy and self-government" was not to be the responsibility of the international presence alone (otherwise the appropriate verb would have been "establishing"), but that it also fell to the two interested parties. Moreover, the verb "promoting" is followed by the phrase "pending a final settlement", which also authorizes our interpreting this paragraph to mean that the future prospect envisaged at the time was indeed autonomy and self-government within the sovereign State. When it spoke to its vote on resolution 1244, Argentina explained that that was how it had interpreted the situation. Its representative on the Security Council stated that

> "[this resolution] lays the foundation for a definitive political solution to the Kosovo crisis that will respect the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. The rights of minorities and of all the inhabitants of Kosovo, without exception, to live in a climate of peace and tolerance must also be unequivocally recognized."[17]

Similarly, the French representative clearly affirmed in respect of the régime established by resolution 1244 (1999) that "[t]he Security Council will remain in control of the implementation of the peace plan for Kosovo"[18], which necessarily rules out any possibility of unilateral secession.

**C. Third part of the question**

6. The third part of the question reads as follows: "If so, what would be the prerequisites of a people's eligibility into statehood, in the framework of the legal régime set up by Security

---

[17]Mr. Petrella (Argentina), S/PV.4011, p. 19.

[18]Mr. Dejammet (France), S/PV.4011, p. 12.

Council resolution 1244 (1999)?" In Argentina's view, the legal régime set up by resolution 1244 (1999) does not at all permit us to speak of a "people" vested with a right to establish an independent State. Neither Rambouillet nor resolution 1244 (1999) recognized the applicability of the principle of self-determination to the Albanian community or to all the inhabitants of Kosovo. The only way for these populations to obtain the status of an independent State lies in the acceptance of that possibility by the sovereign State. Even the Security Council is not competent to decide on the destiny of territories under the sovereignty of Member States of the Organization.

**D. Fourth part of the question**

7. The fourth part of the question explicitly calls for clarification of the factual preconditions, under general international law, for the configuration of a "people" and its eligibility for statehood. In Argentina's opinion, the international practice that followed the adoption of the United Nations Charter provides a basis for identifying important legal criteria in this area. There are five such criteria.

8. The *first* criterion is that any human community claiming the status of a "people" does not necessarily possess such status in terms of the *right to self-determination*. Argentina referred to this matter in its written and oral statements, citing the relevant jurisprudence of the Court[19].

9. The *second* criterion is that international law distinguishes between peoples, minorities and indigenous peoples, that these three categories have different rights and that only the former enjoy the right to external self-determination.

10. The *third* criterion is that international law distinguishes between peoples subject to colonial or foreign domination and those that already have statehood. General Assembly resolution 56/141 on "Universal realization of the right of peoples to self-determination" on the one hand reaffirms the right of peoples "under colonial, foreign and alien domination" to self-determination, and on the other notes that foreign intervention and occupation threaten to suppress "the right to self-determination of *sovereign peoples* and nations"[20]. The latter are entitled to create their own State; the former have already done so and it is the internal aspect of self-determination which then becomes relevant.

11. The *fourth* criterion, a corollary of the third, is that the legal status of the territory is essential to determining whether a people has the right to external self-determination. As has been pointed out: "[c]ontrary to the situation obtaining in the case of colonial peoples, a right to secession cannot be inferred from a right of self-determination in the case of a people integrated into a State: the difference in nature of the territories concerned precludes any analogy"[21]. And former President Rosalyn Higgins states: "[u]ntil it is determined where territorial sovereignty lies, it is impossible to see if the inhabitants have a right of self-determination"[22].

---

[19]Written Statement of Argentina, paras. 89-91; Written Comments of Argentina, para. 59; Oral Statement of Argentina (Ruiz Cerutti), para. 26.

[20]Adopted on 19 December 2001; emphasis added.

[21]P. Dailler, Mr. Forteau, A. Pellet, *Droit international public*, 8th ed., Paris: *LGDJ*, 2009, pp. 584-585, para. 344.

[22]R. Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law", *RCADI*, 1991, Vol. 230, p. 174.

12. The *fifth* criterion that emerges from international practice is the fundamental role played by competent international bodies in determining whether or not a "people" possesses the right of self-determination. As is affirmed by Pierre-Marie Dupuy,

> "[t]he recognition by the international community of a people's right to self-determination is most commonly expressed through a vote within the plenary organ of international or regional institutions with political functions, chief among which stand, in the first category, the United Nations General Assembly itself (which has undoubtedly, moreover, seen a considerable expansion, in practice, of its powers in the area of decolonization), and in the second category, the various regional organizations ( . . .). The possession of the right to self-determination is decided in practice not by self-election, but through designation by a third body. A typical case is one where the assessment of legality is dependent on a judgment based on the legitimacy of the way in which it is exercised"[23].

13. As regards the other factual elements conducive to determining a people's right to self-determination mention may be made of the criteria adopted by the General Assembly in its resolution 1541 (XV), which include both territorial and human aspects: "a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it"[24]. In fact, these criteria provide a basis for determining whether or not a people is "a colonial people". As the Court itself has noted, even in the case of decolonization, any population established on a non-autonomous territory does not necessarily constitute a "people" entitled to self-determination[25]. In the case of populations established on the territory of sovereign States, the distinction between the whole (the "people") and any constituent parts (minorities, indigenous peoples) remains applicable. In the context of its debate on national minorities, the Parliamentary Assembly of the Council of Europe adopted a recommendation on "The concept of nation", in which it distinguishes the "civic nation" from the "cultural nation". National minorities, while belonging to the "civic nation" of the State in which they reside, would form part of "cultural nations"[26]. The term "civic nation" reflects what is meant by "people" in international law in relation to the principle of self-determination, whereas "cultural nations" include minorities.

**Conclusion**

14. In conclusion, the reference to the "Rambouillet Accords" in paragraph 11 *(a)* of resolution 1244 (1999) was intended to make use of the institutional model provided for in those draft accords in order to promote the establishment of a régime of autonomy and self-government within the framework of a sovereign State. The aim was to apply internal self-determination, thereby excluding any possibility of secession or of validly invoking a right to external self-determination. Under resolution 1244 (1999), the only possible way of securing the creation of an independent Kosovo is to obtain the consent of the sovereign State in the context of a political process.

15. Under general international law, only peoples are entitled to self-determination. A primary fundamental distinction is the one between peoples, minorities and indigenous peoples. A

---

[23]P.-M. Dupuy, *Droit international public*, 9th ed., Paris, Dalloz, 2008, pp. 149-150, para. 133.

[24]Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 *(e)* of the Charter, resolution 1541 (XV), Ann., Principle IV.

[25]*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 33, para. 59.

[26]Recommendation 1735 (2006), adopted on 26 January 2006, available at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/FREC1735.htm.

second fundamental distinction is the one between colonial peoples or peoples under foreign domination, on the one hand, and peoples established within sovereign States, on the other. The former are concerned by the external aspect of the right to self-determination, the latter by its internal aspect. The legal status of the territory concerned plays a decisive role, as does the recognition or non-recognition by competent international bodies of a human community as a "people" entitled to self-determination. Self-qualification is not a sufficient basis for recognizing a people's entitlement to self-determination.

---