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)

ANSWER OF THE REPUBLIC OF SERBIA TO THE QUESTIONS PUT TO THE PARTICIPANTS IN THE ORAL PROCEEDINGS BY JUDGES KOROMA, BENNOUNA AND CANÇADO TRINDADE

1. QUESTION PUT BY JUDGE KOROMA

The question:

"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?" (CR 2009/33, p. 23)

1.1. Outside the colonial context, secession is a highly exceptional way of creating States in contemporary international law. Practice since the establishment of the United Nations demonstrates that consent from the sovereign State has been present in *all* situations of successful secession giving rise to the birth of new States. This consent has either been more or less contemporaneous with the

secessionist attempt (as in the cases of the Baltic States and Eritrea)[1] or it has followed the secessionist attempt (as was the case of Bangladesh).[2] As is well known, outside the specific case of the Baltic States, the remaining republics of the Soviet Union gained independence by agreement among the interested parties, and the breaking up of the Socialist Federal Republic of Yugoslavia was considered by the international community to constitute a situation of dissolution of the predecessor State, and not a case of secession.[3] Other situations of separation of States have been the outcome of an internal process in which the parent State and one of its components have agreed on the separation of the latter (as was the case of the separation of Singapore from Malaysia,[4] or the separation of Montenegro from the State Union of Serbia and Montenegro), and are sometimes referred to as cases of *devolution*.[5]

1.2. The response to the question is twofold. *First*, there are no *specific* rules of international law authorizing secession without the sovereign State's consent. In particular, during the proceedings it has been demonstrated that the doctrine of so-called "remedial secession" is not an existing rule of international law.[6] In order for their arguments to be logically coherent, those participants that claim that international law is purportedly "neutral" with regard to secession must implicitly acknowledge this. *Second*, there can be very exceptional situations where, in accordance with applicable general rules and principles of international law, secession would be permitted.

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[1] The Baltic States effectively reasserted their independence in August 1991 and the Soviet Union recognised their independence on 6 September 1991. Ethiopia accepted the holding of a referendum leading to the independence of Eritrea on 4 May 1993 (see Eritrea/Ethiopia Claims Commission, *Partial Award (Civilian Claims) (Eritrea's Claims)*, 17 December 2004, available on the website of the Permanent Court of Arbitration at http://www.pca-cpa.org/showpage.asp?pag_id=1151, para. 7). This latter case can also be seen as one of devolution.

[2] Pakistan accepted the secession of Bangladesh on 2 February 1974.

[3] For the Soviet Union, see Agreement establishing the Commonwealth of Independent States, (1992) 31 ILM 143, and the Protocol of Alma Ata of 21 December 1991, (1992) 31 ILM 147. For the SFRY, see Opinions No. 1 and 8 of the Conference on Yugoslavia, Arbitration Commission, 29 November 1991, 92 ILR 162, and 4 July 1992, 92 ILR 194, respectively; and Security Council resolutions 757 (1992), 777 (1992), and 1326 (2000), and General Assembly resolution 55/12.

[4] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, judgment of 23 May 2008, paras. 29 and 185.

[5] J. Crawford, *The Creation of States in International Law* (2nd ed. 2006), p. 330.

[6] CR 2009/24, Mr. Kohen (Serbia), pp. 80-83, paras. 11-16; CR 2009/29, Ms. Xue (China), pp. 34-36, paras. 19-26; CR 2009/30, Mr. Gevorgian (Russian Federation), pp. 43-44, paras. 19-22; CR 2009/30, Ms. Escobar Hernández (Spain), pp. 17-19, paras. 37-44.

1.3. International practice offers scarce examples of the latter situations. *First*, this could be the case of the secession of entities from a State where these entities had previously been illegally incorporated into the State over a certain period of time. For example, this was the dominant perception of the situation of the Baltic States when they first declared their independence in 1990/91. *Second*, there might be the situation of a territory that was integrated into a State through a resolution of the United Nations under certain conditions, where these conditions were subsequently not respected, thereby justifying the secession of the incorporated entity from the State with the assistance of the United Nations. An example of this would be the case of Eritrea. It was a decision of a United Nations organ (the General Assembly), which had the capacity to decide the fate of the territory (on the basis of Article 23 of the 1947 Treaty of Peace with Italy[7]), and which decided to integrate Eritrea into Ethiopia on condition of its autonomy and within the framework of a federated State.[8] After a prolonged period of many decades in which the conditions set out in General Assembly resolution 390 (V) were not met, the United Nations participated in the final process that led to the holding of a referendum in which the Eritreans opted for independence.

1.4. A *third* hypothesis according to which international law may permit secession is where the constitutional order of the parent State envisages this possibility with respect to some of its components. This is currently the case of Ethiopia,[9] Uzbekistan,[10] and St. Kitts-and-Nevis.[11] It can also be that internal agreements

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[7] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 19, para. 34.

[8] General Assembly resolution 390 (V), Article 1 of which provides "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown."

[9] Article 47 of the Constitution of Ethiopia, available in English on the website of the Parliament of the Federal Democratic Republic of Ethiopia at http://www.ethiopar.net . Article 47(2) provides "Nations, Nationalities and Peoples within the States enumerated in sub-Article 1 of this article have the right to establish, at any time, their own States." This right is exercisable according to the procedures set out in Article 47(3).

[10] Article 74 of the Constitution of Uzbekistan, which provides "The Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nationwide referendum held by the people of Karakalpakstan." Available at http://www.umid.uz/Main/Uzbekistan/Constitution/constitution.html .

[11] Article 113 of the Federation of Saint Kitts and Nevis Constitutional Order of 1983, 1983 No.881, available on the website of the Office of the Prime Minister of St. Kitts and Nevis at http://www.cuopm.com . This article provides that "The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this

also foresee the possibility of separation, as is the case of Sudan.[12] In the past, this was also the case in the former Soviet Union for the Soviet Socialist Republics,[13] in the former SFRY for its six constitutive nations,[14] and in the Union State of Serbia and Montenegro for its two components.[15] This acknowledgment at the domestic level that the secession of a component of the State is legally possible is not a matter exclusively for domestic law. International law must take notice of the recognition by domestic law that some internal units of a State are entitled to secede or to exercise an external right of self-determination. If, in a hypothetical situation, these constitutional provisions recognizing a right to secede are not respected by the State, there might be room for the acceptance of the secession at the international level, through the application of the right to self-determination to these entities previously recognized by the sovereign State itself as having such a right, which has an international effect.

1.5. It is clear that the case of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo does not fall within any of the extraordinary circumstances mentioned above. On the contrary, as demonstrated during the advisory proceedings, this case is one of non-conformity with international law.

Constitution shall no longer have effect in the island of Nevis." This must be done in accordance with the other provisions of Article 113.

[12] Machakos Protocol of 20 July 2002, Chapter 1 of the Comprehensive Peace Agreement between the Government of Sudan and the Sudan's People's Liberation Movement/Army of 9 January 2005. See: *Abyei Arbitration, Final Award of 22 July 2009*, available on the website of the Permanent Court of Arbitration at the following address: http://www.pca-cpa.org/showpage.asp?pag_id=1306, p. 244, para. 706.

[13] Article 72 of the 1977 Constitution of the U.S.S.R. provides that "To every Union Republic is reserved the right freely to secede from the U.S.S.R."

[14] The Basic Principle I of the Constitution of the SFRY, 1974, provided that "[t]he nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession..." (Serbia WS, Annex 52). As Serbia has already noted during the written proceedings, the Kosovo Albanians were not a constitutive nation of the SFRY (Serbia WS, pp. 72-76; para. 173-187). The autonomous provinces of Kosovo and Vojvodina did not therefore have a right to secede under the 1974 constitution.

[15] Article 60 of the Constitutional Charter of the State Union State of Serbia and Montenegro (Serbia WS, Annex 58).

2. QUESTION PUT BY JUDGE BENNOUNA

The question:

"Est-ce que les auteurs de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo ont fait auparavant campagne, lors de l'élection de novembre 2007 de l'assemblée des institutions provisoires d'administration autonome du Kosovo, sur la base de leur volonté de déclarer unilatéralement, une fois élus, l'indépendance du Kosovo, ou bien ont-ils, au moins, présenté à leurs électeurs la déclaration unilatérale d'indépendance du Kosovo comme l'une des alternatives de leur action future?" (CR 2009/33, p. 24)

2.1. In response to the above question posed by Judge Bennouna, Serbia firstly notes that elections for the Assembly of Kosovo were held on 17 November 2007 as a result of a decision of the Special Representative of the Secretary-General in Kosovo issued on 31 August 2007. The decision to hold elections was announced after a meeting between the Special Representative and the Kosovo Albanians' representatives at the status negotiations during which it was agreed that the status process had "absolute priority" and that "the holding of elections was conditioned on the political parties not acting in any way that is detrimental to the status process."[16]

2.2. The elections, in which only 42.8 % of the electorate participated,[17] were monitored by the Council of Europe Election Observation Mission ("Observation Mission"), which was invited by UNMIK to lead an independent international observation of the electoral process.[18] The reports of the

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[16] See "SRSG announces elections date for Kosovo", UNMIK press release, 31 August 2007, UNMIK/PR/1692, available at: http://www.unmikonline.org/DPI/PressRelease.nsf/0/2494F176CFDFB541C1257348005BAD33/$FILE/pr1692.pdf .

[17] See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2007/768 (3 January 2008), para. 3.

[18] Council of Europe Election Observation Mission V in Kosovo (CEEOM V), Final Report, 28 March 2008, para. 1, available at http://www.coe.int/t/dc/press/news/CEEOM_kosovo_%20EN.pdf.

Observation Mission and of the election observers from the Council of Europe's Congress of Local and Regional Authorities (who also participated in the Observation Mission), provide a detailed account of the November 2007 elections.[19]

2.3. With respect to the issue raised by Judge Bennouna, the report of the election observers from the Congress of Local and Regional Authorities states as follows:

> "9. [...] There was a significant effort made by the political entities to reach people through TV and the print media. A significant focus fell on policy issues in the campaign, rather than a concentration on personality politics or the 'Big Politics' issue of Status – which did not ultimately overwhelm the campaign.
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> 10. In the local elections, there was a continuous emphasis during the campaign on issues such as – Water, Electricity, Illegal Development, Infrastructure and Jobs. This was resonated in the Assembly campaign, but was further augmented by such issues as – Health, Education, Corruption and Highways.
> There was a Memorandum of Understanding signed by the Political Parties on October 5th, 2007, to keep the 'Status Question' out of the election, and that largely worked. Unlike in previous campaigns, there were not many Albanian double-headed eagles to be seen fluttering from flagpoles around the towns. Resulting from this, there was a realism to the campaign that seemed to reflect the concerns of the Kosovan people [...]."[20]

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[19] See *ibid.* & Kosovo Municipal and Assembly Elections (Serbia) observed on 17 November and 8 December 2007, Explanatory Memorandum, Standing Committee, Congress of Local and Regional Authorities, Doc. CG (14)34REP (31 January 2008), available at https://wcd.coe.int/ViewDoc.jsp?id=1243331&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864 .

[20] Kosovo Municipal and Assembly Elections (Serbia) observed on 17 November and 8 December 2007, *supra* note 19, paras. 9-10.

2.4. The above account is confirmed by the final report of the Election Observation Mission:

> "As wished by the international community, the political campaign was largely focused on employment, economy, education, health and local issues, rather than on the issue of the future status of Kosovo."[21]

2.5. The above testifies that the November 2007 elections were from the very beginning intended to be detached, as far as possible, from the final status process and, in particular, were not to come into conflict with that process. This was accepted by the leaders of the Kosovo political parties at their meeting with the Special Representative of the Secretary-General held on 31 August 2007.[22] They further committed themselves "to keep[ing] the 'Status Question' out of the election" by signing the Memorandum of Understanding of 5 October 2007.[23]

[21] Council of Europe Election Observation Mission V in Kosovo (CEEOM V), Final Report, *supra* note 18, para. 106.
[22] See "SRSG announces elections date for Kosovo", UNMIK press release, 31 August 2007, *supra* note 16, and Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2007/582 (28 September 2007), para. 4.
[23] See Kosovo Municipal and Assembly Elections (Serbia) observed on 17 November and 8 December 2007, *supra* note 19, para. 10.

3. QUESTION PUT BY JUDGE CANÇADO TRINDADE

The question:

"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?" (CR 2009/33, p. 24)

A. Meaning of the *Renvoi* Contained in Paragraph 11 (a) of Security Council Resolution 1244 (1999) Referring to Substantial Autonomy and Self-Government in Kosovo Taking Full Account of the Rambouillet Accords

I. Content of paragraph 11 (a)

3.1. Paragraph 11 *(a)* of United Nations Security Council resolution 1244 (1999) provides:

> "The Security Council,
> [...]
> 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);"

3.2. Accordingly, the international civil presence, i.e. UNMIK, was tasked by the Security Council to promote substantial autonomy ('autonomie') and self-government ('auto-administration') in Kosovo. In so doing UNMIK was required to "fully take into account" (apart from annex 2 of Security Council resolution 1244 (1999)) the Rambouillet accords.

3.3. It must *first* be noted that, as has already been demonstrated in Serbia's written submissions,[24] the notions of substantial autonomy and self-government mentioned in paragraph 11 (a) of resolution 1244 (1999) do not and cannot amount to independence.

3.4. *Secondly*, given that no final settlement within the meaning of Security Council resolution 1244 (1999) generally, and its paragraph 11 (a) in particular, has yet been reached,[25] paragraph 11 (a) of Security Council resolution 1244 (1999) still applies and continues to govern the legal status of Kosovo.

II. Meaning of the *renvoi*

3.5. As to the *renvoi* to the Rambouillet accords contained in paragraph 11 (a), it must be further noted that it is a limited one since it only requires UNMIK, when promoting substantial autonomy and self-government in Kosovo, *to take full account of* the Rambouillet accords. Such accords therefore are not made binding as such upon either UNMIK or the parties by virtue of paragraph 11 (a) of Security Council resolution 1244 (1999).

3.6. In that regard it should also be mentioned in passing that a similar requirement is contained in paragraph 11 (e) of resolution 1244 (1999), providing that the international civil presence shall facilitate

[24] See Serbia WS, paras. 728 *et seq.*, 732 *et seq.*; Serbia WC, para. 433.
[25] See Serbia WS, paras. 750 *et seq.*; 913 *et seq.*; Serbia WC, paras. 436 *et seq.*

"a political process designed to determine Kosovo's future status, *taking into account the Rambouillet accords.*" [26]

3.7. When compared with the wording of paragraph 11 (a) ("taking full account"), the wording of paragraph 11 (e) ("taking into account") further limits the relevance of the Rambouillet accords when it comes to reaching a negotiated agreement on the final status of Kosovo.

3.8. It should also be noted in this regard that the Rambouillet accords merely provide for a *mechanism* to reach a final status agreement,[27] but not for a final settlement as such. This mechanism provides that the will of the people is but one of four equally relevant factors of which the other three are: the view of the relevant authorities; each Party's efforts regarding the implementation of the agreement; and the principles contained in the Helsinki Final Act.

3.9. As far as paragraph 11 (a) of Security Council resolution 1244 (1999) is concerned, it stipulates that the international civil presence, when setting up the system of self-government in Kosovo providing for substantial autonomy within the FRY/Serbia, had to take into full account a detailed draft constitutional organization of the autonomy regime for Kosovo, as envisaged by the said accords.[28]

3.10. In 2001, UNMIK, as the international civil presence foreseen in resolution 1244 (1999), accordingly implemented paragraph 11 (a) of Security Council

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[26] Emphasis added.

[27] The relevant provision provides:

"Three years after the entry into force of this Agreement, *an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo,* on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures." (emphasis added)

Chapter 8, Article I(3) of the Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, see UN doc. S/1999/648 (7 June 1999), Annex (Dossier No. 30).

[28] As to the autonomous régime envisaged in the Rambouillet accords see in particular Art. I of the therein proposed Constitution of Kosovo.

resolution 1244 (1999) by adopting the Constitutional Framework for Provisional Self-Government.[29]

3.11. It is this Constitutional Framework for Provisional Self-Government which regulates and limits the extent of competences to be exercised by the Provisional Institutions of Self-Government in Kosovo in accordance with paragraph 11 (a) of Security Council resolution 1244 (1999) and by the same token also provides for the required substantial autonomy.

B. The Bearing of the *Renvoi* to the Rambouillet accords on the Issues of Self-Determination and Secession

3.12. By referring to the Rambouillet accords as needing to be fully taken into account when establishing substantial autonomy and self-government in Kosovo, the Security Council essentially accepted that the degree of autonomy and self-government provided for Kosovo in the said draft agreement was appropriate in order to safeguard the rights of the population of Kosovo (and thus their exercise of *internal* self-determination within the FRY/Serbia), while at the same time safeguarding the territorial integrity of the FRY/Serbia.

3.13. The Security Council thus established a careful balance between the interests of the territorial State on the one hand and those of the Albanian population of Kosovo on the other.

3.14. By including the *renvoi* to the Rambouillet accords in paragraph 11 (a) as a benchmark for Kosovo's degree of autonomy and self-government, the Security Council also excluded secession, and in particular so-called remedial secession, as a possible response to the Kosovo crisis, since it considered the Rambouillet model of autonomy as being a sufficient safeguard for the population of Kosovo.

[29] UNMIK/REG/2001/9 of 15 May 2001.

3.15. It must further be noted that the Rambouillet accords carefully avoided any reference to a 'people of Kosovo' or a 'Kosovo people'. Rather, the Rambouillet accords use, throughout the text, the term 'Kosovo population'/'population du Kosovo'.[30] It follows that the drafters deliberately did not equate the 'Kosovo population' with the notion of a 'people' as understood in general international law.

C. Prerequisites of a People's Eligibility into Statehood in the Framework of the Legal Régime Established by Security Council Resolution 1244 (1999)

3.16. As noted above, the Rambouillet accords do not refer to the population of Kosovo as a people entitled to self-determination, nor do the Rambouillet accords refer in any way to a right of self-determination, and even less to secession, of the population of Kosovo.

3.17. Indeed, an explicit proposal by the Kosovo Albanian side to insert a reference to the entitlement of the "people of Kosovo [...] to exercise the right to self-determination" in the Rambouillet accords was not accepted.[31]

3.18. Similarly, no understanding was reached during the Rambouillet negotiations that the 'will of the people' – even when taken alone and not as one of four equally relevant factors – was considered to be tantamount to a right of secession.

3.19. It was only the delegation of the Kosovo Albanians which had during the negotiations *unilaterally* stated that *in their understanding* the 'will of the

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[30] See the Rambouillet accords, *supra* note 27: Framework, Art. II, No. 6; Chapter I, Art. II, No. 1, lit. b (i) and (ii), No. 3; Chapter II, Art. VI, No. 1, lit. a (ii).

[31] See Kosova Delegation Statement on New Proposal for a Settlement of 18 February 1999, reproduced in M. Weller, *The Crisis in Kosovo 1989-1999* (1999), pp. 444 – 445.

people' clause included a right to hold a referendum.[32] However, *even in their own view*, the outcome of such a referendum would only be considered by a future international conference to be held in accordance with the Rambouillet accords but would not, as such, determine the future status of Kosovo.

3.20. Besides, it was only the United States delegation that indicated a willingness to give *certain bilateral* assurances to the effect that the formulation referring to the 'will of the people' did refer to a right of the population of Kosovo to make manifest their will in relation to the future status of the territory.[33]

3.21. In contrast thereto, French Foreign Minister Hubert Védrine, as one of the sponsors of the Rambouillet conference, confirmed that the agreement

> "n'avaient pas retenu l'organisation d'un référendum au Kosovo à l'issue de la période de transition, comme l'avaient demandé les Kosovars, mais seulement une clause de rendez-vous afin de prendre en compte les souhaits de la population"[34]

3.22. Security Council resolution 1244 (1999) in turn neither refers to a 'people of Kosovo' nor to a 'Kosovo people'. This stands in sharp contrast to Security Council practice in other cases, where the Council has, to give but one example, *inter alia* explicitly referred to "the East Timorese people".[35]

3.23. Accordingly, the Security Council clearly did not consider the population of Kosovo to be a people entitled to external self-determination and thus even less as possessing a right of secession.

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[32] Letter from the Delegation of Kosovo to US Secretary of State Albright of 23 February 1999, reproduced in Weller, *ibid.*, p. 471.

[33] See M. Weller, "The Rambouillet conference on Kosovo", International Affairs 1999, p. 211 et seq. (232). See, also, Secretary of State Albright Press Conference, Rambouillet, 23 February 1999:

> "(...) a number of factors will be taken into consideration by that meeting as to the permanent status of Kosovo, among them the view of the people. *And the Kosovors interpret this, their interpretation* of it is that it's a referendum."

M. Weller, *The Crisis in Kosovo 1989 – 1999 (1999)*, pp. 472 – 474, at p. 473 (emphasis added).

[34] "[...] had not decided on the holding of a referendum in Kosovo after the transitional period, as the Kosovars had demanded, but only a review clause to take into account the wishes of the population". See Assemblée nationale, commission des affaires étrangères, compte rendu No. 31, 13 April 1999 (séance de 17h00); available at: http://www.assemblee-nationale.fr/11/cr-cafe/98-99/c989931.asp .

[35] Security Council resolution 1246 (1999), operative para. 1.

3.24. This was confirmed in the aftermath of the adoption of Security Council resolution 1244 (1999) when the then French Minister of Foreign Affairs Védrine again stated:

> "Ni les accords de Rambouillet, ni aucun autre texte ne prévoient de référendum sur l'indépendance."[36]

3.25. It follows therefore, that within the framework of the legal régime established by Security Council resolution 1244 (1999), there is no room for the eligibility of a separate "people" into statehood, unless this was agreed by both parties as part of the political process related to the future status of Kosovo and endorsed by the Security Council.

D. "And what are the factual preconditions for the configurations of a 'people', and of its eligibility into statehood, under general international law?"

3.26. International law has provided clear criteria for the definition of a "people" regarded as entitled to the right of self-determination and clear mechanisms for the exercise of this right. Not to do so, of course, might have led to a situation where any group could self-identify as a "people" and then demand the international legal right of secession from independent States, something which would seriously destabilise the international legal and political order.

3.27. The operative areas of the legal norm of self-determination have been clearly identified in international legal practice and doctrine. Essentially, the norm of external self-determination as conferring rights under international law has been

[36] "Neither the Rambouillet Accord, nor any other text envisaged a referendum on independence." See Assemblée nationale, commission de la défense nationale et des forces armées, compte rendu No. 33, 22 June 1999 (séance de 18h30); available at: http://www.assemblee-nationale.fr/11/cr-cdef/98-99/c9899038.asp .

accepted as applying with regard to mandate and trusteeship territories,[37] the colonial territories of the former European empires[38] and, to some extent, foreign occupations.[39] In this way the requisite self-determination unit has been recognized. Self-determination also applies as a principle of human rights within independent States in the form of internal self-determination.[40] It manifestly does not apply as a general rule legitimizing secession from independent States nor does it confer any rights of secession upon groups, entities or peoples within such independent States.

3.28. International law has specifically identified other groups, such as minorities and indigenous peoples, as having rights under international law (either directly or by means of individual members of such groups). But such rights are strictly limited to rights operative within the sovereign State in question and are stated explicitly as not to be interpreted as implying any contradiction to the overriding principle of territorial integrity. For example, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992 provides in Article 1 that States, "shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities *within their respective territories*" (emphasis added) and the Declaration concludes by explicitly stating in article 8 (4) that:

> "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles

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[37] See article 22 of the Covenant of the League of Nations. See also *International Status of South West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, pp. 128, 132; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971*, pp. 16, 28–9; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Judgment of 26 June 1992*, I.C.J. Reports 1992, pp. 240, 256-7; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, I.C.J. Reports 2002*, pp. 303, 409.

[38] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971*, pp. 16, 31 and *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 12, 31-3. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 136, 172 and the *Quebec Secession* case, [1998] 2 S.C.R. 217, para. 132.

[39] See as regards Palestine, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 136, 182-3.

[40] See the *Quebec Secession* case, [1998] 2 S.C.R. 217, para. 126.

of the United Nations, including sovereign equality, territorial integrity and political independence of States".[41]

3.29. Further, the UN Declaration on the Rights of Indigenous Peoples, 2007, specifically recognizes the right to self-determination of such peoples (articles 1 and 3) and states in article 46 (1) that:

> "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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".[42]

3.30. The question of the definition of "people" was addressed in the *Western Sahara* case, where the Court declared that:

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances".[43]

3.31. This important statement by the Court indicates that a particular definition of a "people" for the purposes of recognition of the right to self-determination has emerged and in seeking to identify whether or not a particular claimed group

[41] General Assembly resolution 47/135.
[42] General Assembly resolution 61/295.
[43] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 12, 33.

constitutes a "people" for the purposes of self-determination in international law, recognition by the competent international organization is required. The United Nations, therefore, has developed a methodology for identifying relevant territories and laying down specific ways to apply the principle of self-determination.[44] A "people" not so identified and thus falling outside the classification of a self-determination unit for the purposes of the full exercise of the right would, accordingly, be entitled to the exercise of human rights operative within the territorial configuration of the particular independent State in question as an expression of what is often termed internal self-determination.

3.32. The only exception to this analysis might be where the Constitution of the State in question specifically provides for the right of specific "peoples" within that State to secede. Examples of this are referred to above in paragraph 1.4. However, this is clearly not the situation with regard to the position of Kosovo within Serbia.

Belgrade, 21 December 2009

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[44] See e.g. General Assembly resolutions 9 (I), 66 (I), 1541 (XVI), and 1654 (XVI).