A. Question addressed by Judge Koroma:

"It has been contented 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?"

Romania's approach

1. During the written and oral proceedings of the case regarding the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion)*, Romania submitted that *outside the colonial context, as a rule, secession is prohibited by International Law; there is only a proposed exception to this rule, whose acceptance by International Law is not yet fully clear.*[1] Romania entirely maintains this submission.

2. Romania's position is based on the fact that secession of a territory without the consent of the sovereign State contravenes the well-established principles of *sovereignty of States, sovereign equality, territorial integrity and inviolability of borders.* These principles represent the legal basis for the rule generally prohibiting secession. Furthermore, *there is no principle or rule of international law that, outside the colonial context, permits secession of a territory from a sovereign State without the latter's consent.*

3. The principle of sovereign equality of States and the principle of territorial integrity impose on States to refrain from recognizing any territorial modification that is the result of an illegal situation[2]. The International Court of Justice admitted in the *Wall Opinion*, that "States are under an obligation not to recognize the illegal situation".[3] In Romania's view, the above mentioned principles of sovereign equality and territorial integrity contain two legal components: first, recognition and second, the legality of the situation that is recognized, in this case the territorial change.[4] It is this second aspect, the legality of the territorial change ("the illegal situation", as the *Wall Opinion* put it), that should be examined by the Court.

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[1] See Written Comments of Romania, Chapter 4, paras.110-159, pp.32-45; also Oral Statement of Romania, CR 2009/32, paras.10-21, pp.20-21 (Aurescu) and paras. 2-5, 13-30, pp. 26-27, 30-36 (Dinescu).
[2] UN General Assembly Resolution 2625 (XXV), principle 1, para. 9, principle 5, para. 7.
[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, p.* 200, para. 159.
[4] Oral Statement of Romania, CR 2009/32, para. 11 (Aurescu).

4. Thus, even if it was argued by certain participants that recognition may fall outside the scope of the question, it is sure that at least this second component of the principle of territorial integrity, that is "the illegal situation" related to an alleged change of borders, should be examined by the Court. Therefore, it is inappropriate to accept the argument that, for the reason that recognition is allegedly not the object of the question, the Court should not examine whether *secession is regulated by international law or not.*[5] Romania considers that secession is regulated by international law, as confirmed *inter alia* by both the Supreme Court of Canada[6] and the Fact-Finding Mission for the Conflict in Georgia:[7] prohibition of secession is the rule, a rule to which there might be a possible exception, the so-called "remedial secession".

5. The existence of this exception has been discussed in doctrine and by the Supreme Court of Canada in its well-known case *re Secession of Quebec (1998).* Its applicability to the case under discussion was analyzed by several States in the written and oral pleadings, including Romania. In answering judge Koroma's question, Romania will not repeat its submissions from the pleadings, while emphasizing that it fully maintains them.[8]

6. The "remedial secession" is not an institution specifically established by International Law; there is no express principle or norm of international law regulating its existence or scope of application; rather, the concept originates from a certain interpretation of GA Resolution 2625 (XXV) – the General Assembly Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which, referring to the right of peoples of self-determination, states that

> "[...] nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."[9]

A similar language can be found in the Vienna Declaration of the UN World Conference on Human Rights, 25 June 1993.[10]

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[5] Oral Statement of Romania, CR 2009/32, para. 11 (Aurescu).
[6] Oral Statement of Romania, CR 2009/32, para. 3 (Dinescu).
[7] *Ibidem,* para. 23.
[8] Written Comments of Romania, paras.138-159, pp.40-45; also Oral Statement of Romania, CR 2009/32, paras.25-30, pp.34-36 (Dinescu).
[9] A/RES/2625 (XXV).
[10] Chapter I, para.2 (on the right of peoples to self-determination); available at http://www2.ohchr.org/english/law/vienna.htm.

7. Stemming from this language, it can be argued that, in cases where States *do not conduct themselves* in compliance with the principle of equal rights and self-determination of peoples and thus *are not possessed* of a government representing the whole people and *abusively exclude* a certain part of it from the government on consideration of race, creed or color, the right to self-determination could be invoked in order to remedy this situation, by a secession of the territory inhabited by that part of the people discriminated and abusively excluded from the government of the State.

8. The doctrine and the Supreme Court of Canada developed this interpretation into the notion of what became to be known as "remedial secession" – *i.e.* the possibility of the secession of a territory from a State without the latter's consent, in most extreme situations characterized by the total denial of any role in the government to the inhabitants of that particular territory or other gross violations of their human rights, and only if no other remedies preserving the territorial integrity of the State exist. Remedial secession would thus be only a last-resort solution.

9. The concept of "remedial secession" is still far from the general acceptance in doctrine, jurisprudence or State practice. The very recent *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia,*[11] as well as the opposing views expressed by various States that took part to the procedures of the present case are clear in this respect.

10. The inapplicability of the "remedial secession" in the given circumstances of the Kosovo case was presented in detailed in the Written and Oral Statements of Romania.[12]

Conclusion

Taking into consideration all the above, the answer to Judge Koroma's question is: There is no principle or rule of international law permitting, outside the colonial context, the unilateral secession of a territory from a sovereign State without the latter's consent. The rule is that, outside the colonial context, the secession of a territory from a sovereign State without the latter's consent is prohibited. The only exception to this rule – the so-called "remedial secession" – is a doctrinal and jurisprudential construction, still controversial and lacking general acceptance in international law.

[11] Quoted in the Oral Statement of Spain, CR 2009/30, para.44, p.19 and of Romania, CR 2009/32, para.22, p.33 (Dinescu).
[12] Written Comments of Romania, paras.138-159, pp.40-45; also Oral Statement of Romania, CR 2009/32, paras.25-30, pp.34-36 (Dinescu).

B. Question addressed by Judge Cançado Trindade

"United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11 (a), to "substantial autonomy and self-governing 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 regime 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?"

Romania's approach

1. References to the Rambouillet Accords in the UNSC Resolution 1244 are to be found in four instances:

i) para.11 lit.(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";

ii) para.11 lit.(e): "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords";

iii) annex 1, 6th tirée: "A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA";

iv) annex 2 para.8: "A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions".

2. These references can be grouped in two categories: references to the Rambouillet Accords in the context of the interim status of substantial autonomy and self-government in Kosovo pending the final settlement (points i), iii) and iv) above) and a reference to the Rambouillet Accords in the context of Kosovo's future status (point ii) above). Even though Judges Cançado Trinidade's question concerns only the reference from point i) above, Romania will consider all references to the Rambouillet Accords found in Resolution 1244.

3. From the outset it has to be mentioned that *all* references to the Rambouillet Accords establish the obligation to "take account of" or "take into account" the said accords. The references in the context of the interim period provide for *full* account to be taken of the Rambouillet Accords, *as well as of other elements*, the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia being among these. On the other hand, the reference in the context of the final settlement reads only "*taking into account* the Rambouillet accords" – the word "fully" is not included in the phrase any more. Considering the coherence of the language in the other three instances where references to the Rambouillet Accords are made, the exclusion of the word "fully" in this situation cannot be seen as a pure technical occurrence.

4. Romania remarks that the language used in Resolution 1244 does not give the Rambouillet Accords the legal value of a document *in conformity with which* the interim or final status of Kosovo have to be determined. Resolution 1244 does not provide for the interim or final status of Kosovo to be "*in conformity with*" or "*according to*" or "*in accordance with*" or "*on the basis of*" the Rambouillet Accords. A far softer language is used. Furthermore, while regarding the interim status the Rambouillet Accords are to be taken fully into account, they are only one element among others, including the sovereignty and the territorial integrity of the F.R. of Yugoslavia. Regarding the final status, the Rambouillet Accords only have to be "taken into account" – not even *fully*.

5. In conclusion, the *renvois* to the Rambouillet Accords from Resolution 1244 are to be understood as indications of elements to be taken into consideration, for instance, when designing the interim status of Kosovo during the provisional international administration or when negotiating the final settlements. In the former situations the accords have to be fully taken into account, together with other equally important elements. In the latter they only have to be taken into account. By no means it can be submitted that the Rambouillet Accords are to be considered *the* legal basis for the final Kosovo status or that this status has to fully respect all of their provisions.

6. Regarding the relation between the references to the Rambouillet Accords and the issues of self-determination or secession, one should remark that such a question can be posed only in connection to Kosovo's final settlement. In what concerns the interim status, during the provisional international administration, the status of Kosovo as an integral part of Serbia, enjoying substantial autonomy and self-government, was not questioned. As such, the references to the Rambouillet Accords concern *renvois* to the relevant provisions of the accords regarding the framework of the substantial autonomy and the coordinates of the presence of the international community.

7. On the other hand, during the procedures of the present case, it was submitted that the *renvoi* to the Rambouillet Accords from para.11 lit.(e) of Resolution 1244 does have a very important significance in the context of the final status of Kosovo. In this context, a particular importance was given to para.3, of Art. I of Chapter 8 of the Rambouillet Agreement, which reads as follows:

> "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 [...]".

In view of this language, as well as of the *renvoi* to the Rambouillet Accords from Resolution 1244, two arguments were developed:

- that there is no need for an *agreed* solution on the final status of Kosovo, since there is no mention of a "veto" power of either of the parties;
- that the term "will of the people" means that Kosovo has the right to self-determination, implying secession from Serbia even in the absence of Serbia's consent.

Since the question put by Judge Cançado Trinidade refers only to the second issue, this comment will refer only to this issue, while reiterating the submissions regarding the need for an agreed solution from Romania's written and oral statements.

8. The *renvoi* to the Rambouillet Accords from para.11 lit.(e) of Resolution 1244 cannot be interpreted in the sense that Resolution 1244 thus provided for Kosovo to be entitled to the right to self-determination, including unilateral secession from Serbia, for several reasons.

9. First, the "will of the people" is not the *sole* criterion to be considered. It is only one from several criteria, among which the need to observe the principles enshrined in the Helsinki Final Act is of particular importance. The cornerstones of the Helsinki Final Act are the principles of sovereign equality, inviolability of frontiers and territorial integrity of States. The language of art.I para 3 of Chapter 8 the Rambouillet Agreements is clear: there is no hierarchy among the elements to be considered or a pre-eminence of a certain element among the others. The "will of the people" is not the main, or the most important element, and the final status of Kosovo has to take into account, for instance, the territorial integrity of Serbia as much as it has to consider "the will of the people".

10. Second, the term "will of the people" is not the same as "self-determination". This is obvious from the *travaux preparatoirs* of the Rambouillet Accords. Thus, the Kosovo delegation submitted the proposal for a new paragraph to be included, reading "The people of Kosovo are entitled to the right to

self-determination. This right shall be exercised at the conclusion of the interim period of three years."[13] This proposition was finally not included in the text of the Agreement.

11. Third, the "will of the people", together with the other elements, including the principles provided by the Helsinki Final Act, merely have to be "taken into account". Resolution 1244 does not even ask for *full* account to be taken of it, unlike in other situations. Thus, in no way can it be attributed to the notion the significance of conferring to Kosovo the "right" to unilaterally secede from Serbia.

12. Forth, the notion is not clear. The term "people" of Kosovo is not used even once in the Rambouillet Accords; in exchange, the term "population of Kosovo" is used whenever necessary to refer to the inhabitants of Kosovo. The sole place where the term "people" is used in the Rambouillet Accords is in art. I para.3 of Chapter 8 – the reference to the "will of the people". The "people" in discussion is not specified. The States that equal this reference with the entitlement of Kosovo to self-determination obviously understand that the provision refers to the "will of the people *of Kosovo*". Nevertheless, there is no such specification in the text of the Rambouillet Accords, and the notion of "people of Kosovo" is not used at all throughout the agreement, unlike the notion of "population of Kosovo" which is used whenever necessary. Having carefully analyzed the text of the Rambouillet Accords, Romania submits that it contains no definition or consecration of the "Kosovar people" or the "Kosovo people".

13. In conclusion, in answering to Judge Cançado Trinidade's question, Romania submits that the *renvois* to the Rambouillet Accords in Resolution 1244 cannot be interpreted as entitling Kosovo to the right of self-determination implying secession from Serbia without Serbia's consent. The *renvois* are only indications to the elements and criteria to be taken into account by the international community and the interested parties in shaping the status of substantial autonomy and self-government of Kosovo during the provisional international administration, as well as during the process for final settlement. The legal regime set up by Resolution 1244 does not regulate the entitlement of Kosovo, as a "people", to external self-determination or statehood by unilateral secession from Serbia.

14. Regarding the final part of the question put by Judge Cançado Trinidade, concerning the factual preconditions for the configuration of a "people" and of its eligibility into statehood under general international law, Romania reiterates its submission from its Written Statement: outside the colonial context, "peoples", as subjects to international law entitled to the right to self-determination,

[13] Kosova Delegation Statement on New Proposal for a Settlement, 18 February 1999, in Mark Weller, *The Crisis in Kosovo 1989 – 1999*, Documents and Analysis Publishing Ltd., Cambridge, pp. 444 – 445.

are the peoples of the existing States, with no distinction of ethnicity, race or creed. As such, they are entitled to the exercise of their right to self-determination, by determining, in full freedom, their internal and external political status, without external interference, and by pursuing as they wish their political, economic, social and cultural development.[14]

15. Most frequently, within the peoples of the existing States there are groups which differ from the main group or among themselves, on consideration of ethnicity, language, race or religion. The persons belonging to such national, ethnic, linguistic, racial or religious minorities enjoy all rights recognized to human beings, in particular the rights tailored for the specific situations of persons belonging to such minorities. They also enjoy the right to internal self-determination, together with the rest of the people of the States in which they live. On the other hand, it is widely admitted that such minorities do not enjoy the right to external self-determination, i.e. of secession from the existing States, so they are not eligible for separate statehood.[15]

15. Only one possible exception from this rule transforms parts of the peoples of the existing states, in extreme circumstances, into entities eligible for statehood: the so-called "remedial-secession". Romania re-iterates its findings regarding this concept from the answer to the question put by Judge Koroma and will not repeat them.

[14] Written Comments of Romania, Chapter 4, paras.110-130, pp.32-38; also Oral Statement of Romania, CR 2009/32, paras. 13-15, pp. 30-31 (Dinescu).

[15] For an accurate presentation of the rights of persons belonging to national minorities, see Rosalyn Higgins, *Problems & Process; International Law and How We Use It*, Clarendon Press, Oxford, 1996, pp.124-125.