Question put 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?

Answer of the United States of America

As many participants in these proceedings have emphasized, the question before the Court is limited to the narrow, somewhat anomalous, question of whether Kosovo's declaration of independence is "in accordance with international law." Yet a declaration of independence is a political expression of a will or desire by an entity to be accepted as a state by the members of the international community, an event that international law does not as a general matter prohibit, authorize or indeed regulate as such.[1] While international law may govern situations involving declarations of independence to the extent that international law would otherwise regulate the circumstances, as in cases where a declaration is conjoined with illegal uses of force or violations of other peremptory norms of international law, such as the prohibition against apartheid,[2] there is nothing about the circumstances of Kosovo's particular declaration of independence that would render it a violation of international law.[3] Accordingly, the declaration is—in the words of the question before the Court—"in accordance with international law", and the United States respectfully submits that there is no need to search for a rule of international law providing affirmative authorization for the declaration.

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[1] *See generally*, Written Statement of the United States of America ("U.S. Written Statement") pp. 50-55; Written Comments of the United States of America ("U.S. Written Comments"), pp. 13-20; *see also* Verbatim Record, C/R 2009/30, 8 December 2009, pp. 23-24 (paras. 3-4) (United States of America), 29-30 (paras. 18-20) (ibid.); Verbatim Record, CR 2009/32, 10 December 2009, pp. 48-54 (paras. 9-30) (United Kingdom).

The principle of territorial integrity, which Serbia and its supporters have argued operates to render internationally unlawful declarations of independence by non-state actors, does not apply. For that principle of international law governs relations between and among states, and does not preclude declarations of independence by non-state entities. *See* U.S. Written Comments, pp. 15-20; *see also* Verbatim Record, CR 2009/32, 10 December 2009, p. 53 (para. 26) (United Kingdom) (noting that the primary function of territorial integrity "is the protection of the State from external intervention; it is not a principle which determines how the State shall be configured internally, still less is it a guarantee against change.").

The absence of prohibition is further confirmed by the broad consensus among commentators that secession—which frequently involves a declaration of independence as an early step—is a matter of fact. *See* Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Self-Determination in International Law: Quebec and Lessons Learned*, p. 136 (Anne Bayefsky, ed. 2000) ("as a matter of law the international system neither authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law."); James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, OUP, 2006, pp. 389-90 ("secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.").

[2] *See* U.S. Written Statement, p. 56; U.S. Written Comments, p. 13.

[3] *See* U.S. Written Statement, pp. 56-60.

There has never been a need for international law rules expressly authorizing declarations of independence or the secession of a territory from a sovereign State without the latter's consent. The need for such affirmative authorization might arise if, as Serbia and many of its supporters argue—erroneously in our view—international law contained a general prohibition against secession and declarations of independence. If one accepted that premise, one would then need to identify exceptions to this general prohibition to account for the fact that, undeniably, the international community has regularly accepted declarations of independence as permissible under international law, including those declarations made outside of the colonial context or cases of illegal annexation. For its part, Serbia has argued that exceptions exist where domestic law grants a right of secession or where the parent state accepts the secession before or soon after the secession.[4] However, Serbia has failed to cite to any principles of international law that would provide a basis for these proposed conditions.[5] Serbia has argued that "exceptions" to general rules exist to explain the world as it actually is, when in fact there is no need to postulate such "exceptions", when no such general rule exists to which such exceptions are needed.[6]

There is a separate issue of whether situations exist outside the colonial context in which there is an affirmative right of secession under general international law provided by the right of self-determination. Serbia has argued unequivocally that there is no such right. But as this Court well knows, this issue has been the subject of much debate internationally, and even some of Serbia's staunchest supporters have argued that a right of remedial/external self-determination exists in appropriate cases.[7] As our Written Comments detail, the complexity of these issues would be multiplied in the case of Kosovo, where the Security Council's actions under Chapter VII of the United Nations Charter not only affected the legal terrain, but also reflected an international understanding that the people of Kosovo suffered especially egregious harm, warranting special measures by the international community to protect them.[8] In any event, secession need not be an exercise of the right of self-determination to be consistent with international law. As Judge Higgins has explained—

> 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.[9]

In the final analysis, the United States respectfully submits that there is no need for inquiry into whether international law affirmatively authorized the declaration of independence, or into these other issues regarding self-determination and a right to secede. The sole narrow question presented by the General Assembly to the Court is whether Kosovo's declaration of

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[4] *See* Written Statement of the Government of the Republic of Serbia, para. 943, *et. seq.*

[5] *See* U.S. Written Comments, n. 40; Verbatim Record, CR 2009/30, 8 December 2009, pp. 29-30 (paras. 18-20) (United States of America).

[6] Verbatim Record, CR 2009/30, 8 December 2009, p. 29 (para. 18) (United States).

[7] *See, e.g.*, Written Statement by the Russian Federation, para. 88.

[8] *See*, U.S. Written Comments, pp. 21-23.

[9] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), p. 125 (emphasis in original)

independence is in accordance with international law. Thus, the absence of any rule of international law prohibiting the declaration of independence should end the Court's analysis of general international law in this case.

Question put 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?

Answer of the United States of America

As the Court is aware, the position of the United States throughout these proceedings has been that international law does not as a general matter regulate declarations of independence,[1] and that Kosovo's declaration of independence is in accordance with international law regardless of whether one concludes that it had a *right* to declare independence under general international law regarding self-determination.[2] Nonetheless, in the United States' view, the reference to the Rambouillet Accords in paragraph 11(a) does bear on the issue of Kosovo's declaration of independence.[3]

Paragraph 11 of Resolution 1244 sets forth the main responsibilities of the international civil presence in Kosovo. Paragraph 11(a) describes the key responsibility for the international civil presence during the early years following adoption of the resolution as promoting the establishment of "substantial autonomy and self-government in Kosovo." The provision makes clear that, in undertaking these efforts, the international civil presence was to take full account of the Rambouillet Accords. In practice, pursuant to its mandate under paragraph 11(a), the international civil presence was instrumental in promoting the development of political institutions under which the people of Kosovo could govern themselves free from Serbia's coercion. By so doing, Resolution 1244 enabled the people of Kosovo to develop the capacity for self-government as an independent country by the time that independence was declared in February 2008. The efforts of the international civil presence under paragraph 11(a) culminated in the promulgation of the Constitutional Framework for Provisional Self-Government, under which were established institutions to effectuate substantial autonomy and self-government in

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[1] *See* Written Statement of the United States of America ("U.S. Written Statement"), pp. 50-56; Written Comments of the United States of America ("U.S. Written Comments"), pp. 13-20.

[2] *See, e.g.*, U.S. Written Comments, pp. 21-23; Verbatim Record, CR 2009/30, 8 December 2009, p. 38 (para. 38) (United States of America) (noting that Kosovo's declaration of independence need not be an exercise of the right of external self-determination to be consistent with international law); Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (1994), p. 125 ("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.") (emphasis in the original).

[3] The United States takes this opportunity to underscore that the narrow question before this Court on referral from the General Assembly concerns only the accordance of the declaration of independence of Kosovo with international law, and not secession or other potentially-related issues, such as whether Kosovo qualifies as an independent state, whether third states may recognize or treat it as an independent state, how UNMIK should now relate to it, or whether further status negotiations can or should now be undertaken. *See* Verbatim Record, CR 2009/30, 8 December 2009, pp. 36-37 (para. 35) (United States of America).

Kosovo—an assembly, a president, courts, ministries and other institutions of government were established—and internationally-recognized human rights norms were enshrined as a fundamental part of Kosovo's law.[4]

The views of the United States on the reference to the Rambouillet Accords in paragraph 11(a) are set out at pages 64-65 of our Written Statement. As indicated in our Written Statement, the reference signaled that:

> -- the arrangements put in place during the interim period under Resolution 1244 were designed to promote the kind of autonomy that would have governed during the interim period under the Rambouillet Accords; and
>
> -- those arrangements were to be structured with an eye towards the arrangements for future status contemplated by Rambouillet, including but in no sense mandating the possibility of independence.

If the Court should find it necessary to take up the question of self-determination, the references to Rambouillet in paragraph 11(a), as well as the terms and structure of the Constitutional Framework promulgated pursuant to the authority of this provision, both provide a basis for concluding that it would be appropriate in the context of Resolution 1244 to view Kosovo as an entity of the type that could become independent over time.

> -- Rambouillet itself treats Kosovo as a distinct territorial unit, to be separately governed in a democratic manner; entitled to its own legislative, executive, judicial, and other institutions, and its own Constitution; and entitled to international protection against oppression by the state of which it had formed a part;[5]

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[4] *See* Constitutional Framework, UNMIK Regulation No. 2001/9 [Dossier No. 156].

[5] *See* Rambouillet Accords, S/1999/648. 18 February 1999 [Dossier No. 30]. Rambouillet of course also speaks of the "will of the people." For its part, Serbia has argued that the reference to the "will of the people" in Rambouillet should be understood as a reference to something other than the will of the people *of Kosovo*. As we indicated in our Written Comments:

> The "will of the people" is a phrase derived at least in part from the historical traditions of the United States, including notably the famous statement by United States President Thomas Jefferson in an 1801 letter that "the will of the people . . . is the only legitimate foundation of any government, and to protect its free expression should be our first object." Letter from Thomas Jefferson to Benjamin Waring (reproduced in *The Writings of Thomas Jefferson, Memorial Edition*, Vol. 10 (Lipscomb and Bergh, eds. 1904), p. 236). Serbia's argument is based on the fact that other provisions in the Rambouillet Accords refer to the "population of Kosovo" and thus the different phrase "people" must refer to something other than the "population of Kosovo." Beyond the fact that the context in which Rambouillet refers to the "Kosovo population" is so different (*e.g.*, references in various provisions to certain percentages of the "population of Kosovo," in which substitution of the word "people" would not be normal English phrasing) the inference Serbia seeks to draw simply does not follow, and the people of Kosovo are indeed the very people that the Rambouillet Accords are about.

U.S. Written Comments, n. 89. The meaning of the phrase "will of the people" was subsequently confirmed by its usage in the Constitutional Framework, which refers repeatedly to the "people of Kosovo" and leaves no doubt that the phrase "will of the people" was understood by the international civil presence authorized under Resolution 1244

-- for its part, the Constitutional Framework similarly provides that "Kosovo is an undivided territory," that Kosovo and its people had "unique historical, legal, cultural and linguistic attributes,"[6] that full account needed to be taken of the "will of the people" in the process of facilitating Kosovo's future status,[7] and that the term "people" indeed referred to the "people of Kosovo";[8] and

-- as the United States made clear in its oral pleadings, "if the Court should find it necessary to examine Kosovo's Declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case, which include the extensive Security Council attention given to Kosovo; the large-scale atrocities against the people of Kosovo that led to Rambouillet and the 1244 process; the United Nations concern for the will of the people of Kosovo, their undivided territory and the unique historical, legal, cultural and linguistic attributes; the lengthy history of Kosovo's autonomy; the participation of Kosovo's representatives in the internationally led political process; the commitment of the people of Kosovo in their Declaration to respect prior Security Council resolutions and international law; and the decision by United Nations organs to leave undisturbed Kosovo's move to independence."[9]

Serbia has suggested that the references to the Rambouillet Accords in Resolution 1244 were designed to make clear that the secession of Kosovo was prohibited.[10] But at the time that Resolution 1244 was adopted, Belgrade argued precisely the opposite: that paragraph 11 "opens up the possibility of the secession of Kosovo and Metojiha from Serbia and the Federal Republic of Yugoslavia."[11] As we have described in our written and oral presentations, the FRY contended at the time that Rambouillet was a "crude and unprecedented attempt to impose a solution clearly endorsing the separatists' objectives" and the FRY rejected the Accords in no small part because it could not agree to Kosovo's secession – either immediately or following the interim period that would have been established under Rambouillet.[12] Similarly, with respect to the Constitutional Framework, at the time that it was promulgated Serbia complained about its many provisions that suggested that Kosovo could be considered a self-determination unit, capable of becoming independent.[13] In sum, the reference in Resolution 1244, paragraph 11(a),

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as meaning the will of the people of Kosovo. *See* Constitutional Framework, UNMIK Regulation No. 2001/9 [Dossier No. 156].

[6] Constitutional Framework, UNMIK Regulation No. 2001/9, Chapters 1.1 and 1.2 [Dossier No. 156].

[7] *Ibid.*, preambular para. 6.

[8] *See, e.g., ibid.*, preambular paras. 4, 5, and 8; Chapter s 1.1, 5.7, and 6.

[9] Verbatim Record, CR 2009/30, 8 December 2009, p. 38 (para. 39) (United States of America).

[10] *See, e.g.*, Written Statement of the Republic of Serbia, paras. 781-84; Verbatim Record, CR 2009/24, 1 December 2009, p. 71 (para. 24) (Republic of Serbia).

[11] Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of Resolution 1244, S/PV.4011, 10 June 1999, p. 6 [Dossier No. 33].

[12] *See* Security Council, 3988th Meeting, S/PV.3988, 24 March 1999, p. 14; U.S. Written Comments, pp. 27-29; Verbatim Record, CR 2009/30, 8 December 2009, p. 31 (para. 23) (United States of America).

[13] *See* Letter dated 5 June 2001 from the Permanent Representative of Yugoslavia to the United Nations addressed to the President of the Security Council, S/2001/563, para. 1 [Dossier No. 159].

to "substantial autonomy and self-government in Kosovo," taking full account of the Rambouillet Accords, only confirms our view that Kosovo's ultimate declaration of independence—which both the Resolution and Rambouillet anticipated, but did not mandate—was "in accordance with international law."