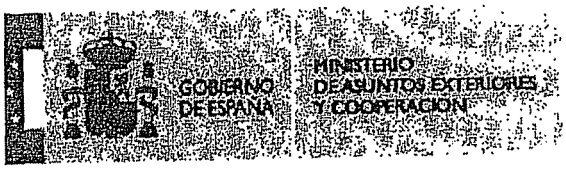
INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

ANSWERS GIVEN BY THE KINGDOM OF SPAIN
TO THE QUESTIONS POSED BY JUDGES KOROMA,
BENNOUNA AND CANÇADO TRINDADE

DECEMBER 2009



1.- As a continuation of its spirit of full cooperation with the International Court of Justice as the main judicial body of the United Nations, the Kingdom of Spain considers it appropriate to answer the questions posed by Judges Koroma, Bennouna and Cançado Trindade at the end of the public hearings related to the advisory proceedings on the *accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo.*

Spain will give a separate answer to each of the questions asked by the judges, and in the same order as the questions were posed. However, given that the three questions have elements in common and are inter-related, the three answers given by Spain must be understood as forming a unity.

A) QUESTION POSED BY JUDGE KOROMA

2.- Judge Koroma's question has been posed in the following terms: *"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?"*

3.- In these proceedings, the Kingdom of Spain has contended that, apart from cases of colonial rule or foreign occupation, international law does not authorize the exercise of a right to external self-determination. Therefore, it neither authorizes unilateral secession, which cannot be considered as an existing institution or right in contemporary international law. Consequently, Spain considers that it is not possible to answer in positive terms to the question posed by Judge Koroma.

Nevertheless, with regard to the exercise by the International Court of Justice of its advisory jurisdiction, Spain considers it useful to answer the said question in negative terms, reiterating the inexistence, outside the colonial context, of any rule whatsoever authorizing the unilateral secession of part of a territory from a sovereign pre-existing State without the consent of the latter.

4.- Such an assertion is based, first, on respect for the principle of sovereignty and territorial integrity of the State, a principle that, as Spain highlighted in its Written Statement, "is inscribed in the essential, non-derogable core of the basic principles of international law as set out in the United Nations Charter and in Resolution 2625 (XXV)", as well as in other international instruments, among which stand out the Helsinki Final Act, the Charter of Paris for a New Europe or the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (Resolution 50/6 of the General Assembly of the United Nations)[1].

Moreover, it cannot be forgotten that, as Spain has had the opportunity to prove in its Written Statement[2], territorial integrity has been equally sanctioned by international practice, in particular by the established practice of the United Nations and its Security Council. In this respect, suffice it to recall that the Security Council has been constant and uniform in adopting a position of unequivocal support and respect for

[1] Written Statement of the Kingdom of Spain, par. 25
[2] Written Statement of the Kingdom of Spain, par. 20-34.

sovereignty and territorial integrity of States, be it in cases of flagrant use of force by a State against another State, be it in internal armed conflicts which, in its opinion, have jeopardized international peace and security, thereby compelling it to intervene and get involved in its solution, in the fulfilment of its responsibility to maintain international peace and security. This practice has stood regardless of the gravity of the conflicts in question and of the international law violations committed therein, which have bred serious threats to international peace and security and, in certain cases, even failed-State situations. In this respect, secessionist tensions, the ethnic and religious dimension of part of the serious human rights violations committed against civilians in those conflicts, or the intervention of the International Criminal Court and other international criminal tribunals, have not altered the firm, well-established practice of the Security Council, which was meant to preserve the sovereignty and territorial integrity of the States ravaged by those conflicts.

The same has taken place in the case of Kosovo.

5.- It can neither be affirmed that unilateral secession of part of the territory of a State may result from the application of the principle of self-determination of peoples, which would only warrant independence, in an undisputed manner, within the context of colonial situations or cases of occupation.

Such a conclusion can be inferred from international practice, which has been subject to thorough, specialized doctrinal analysis yielding the conclusion that a right to secession based on self-determination does not exist.

In this regard, one could quote Professor Crawford's authoritative opinion affirming that "by comparison with the acceptance of self-determination leading to the independence of colonial territories covered by Chapters XI and XII of the Charter ('external self-determination'), the practice regarding unilateral secession of non-colonial territories is very different. Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent States if the secession is opposed by the government of that State. In such cases the principle of territorial integrity has been a significant limitation. Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State."[3].

This opinion is supported by Professor Tancredi, who concludes that "[i]l panorama relativo ai conflitti seccesionisti sviluppatisi all'indomani, e come conseguenza, di un processo di decolonizzazione svoltosi nel rispetto dei confini coloniali preesisteenti, mostra una inequivocabile avversione della comunita internazionale all'accoglimento di ogni quasivoglia diritto di autodeterminazione secessionista" (*The history of secessionist conflicts erupted after, and as a result of, a decolonization process that had respected pre-existing colonial borders is proof of an unequivocal aversion on the part of the international community to the acceptance of any right whatsoever to secessionist self-determination)* [4].

[3] J. Crawford, *The Creation of States in International Law*, 2ª ed., Clarendon Press, Oxford, 2006, p. 390.
[4] A. Tancredi, *La secessione nel diritto internazionale*, Cedam, Milán, 2001, p. 373. (The English version of this quote is an unofficial translation of Professor Tancredi's original text).

6.- The search for a foundation of a so-called right to unilateral secession within the context of the exercise of the right to self-determination cannot even be made through the so-called "secession as remedy", which would be based on the so-called safeguard clause contained in the *Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, according to which "[n]othing 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 colour".

In fact, as Spain pointed out in its Written Statement, "upon analysis of the above clause, in view of the "*travaux préparatoires*" carried out regarding Resolution 2625 (XXV) and of the contextual interpretation to be made of the latter in relation to the other provisions within the *Declaration*, including those concerning the specific principle referred to, it cannot be concluded that respect for sovereignty and territorial integrity of States is subservient to the exercise of an alleged right to self-determination exercised via a unilateral act, and which is of great significance as regards the existence of personality under international law"[5]. This interpretation is reinforced by the authoritative opinion of Professor Antonio Cassese, who affirms that "[w]hatever the intentions of the draftsmen and the result of their negotiations, and whatever the proper interpretation of the clause under discussion, it cannot be denied that state practice and the overwhelming view of states remain opposed to secession."[6].

In a similar sense one could invoke General Recommendation XXI of the Committee for the Elimination of Racial Discrimination, in which this body, unlikely to incur in ignorance of, or contempt for, human rights, affirmed that although « ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession», «[i]nternational law has not recognized a general right of peoples unilaterally to declare secession from a State »[7].

The *Independent International Fact-Finding Mission on the Conflict in Georgia,* for its part, has also declared that "international law does not recognize a right to unilaterally create a new state based on the principle of self-determination outside the colonial context and apartheid. An extraordinary acceptance to secede under extreme conditions such as genocide has so far not found general acceptance"[8].

At any rate, as Spain has already indicated, invoking the "secession remedy" has no significance at all in the case of Kosovo, because "with regard to the massive and systematic human rights violations and minority rights violations in Kosovo, and to the suspension of Kosovo's self-government regime dictated by Serbia in 1989, the reaction of the international community has materialized, already in 1999, in precisely the

[5] Written Statement of the Kingdom of Spain, par. 24.
[6] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* , Cambridge, CUP 1995, p. 121
[7] CERD, General Recommendation XXI, par.. 1 and 6 (HRI/GEN/1/Rev. 9 (vol. II), p. 29).
[8] *Independent International Fact-Finding Mission on the Conflict in Georgia*, vol. I, p. 17, par. 11. (http://www.ceiig.ch/Report.html).

establishment of an international administration regime of Kosovo which includes a self-government system of this Serbian province. In addition to such a regime, which sufficiently guarantees self-government under international control, the UN Security Council has set in motion a political process for the determination of the future status of Kosovo. This process is, in the case at issue, the valid procedure for the final exercise by Kosovo –in a form yet to be defined- of a possible right to self-determination.

Bearing in mind this remedy fashioned by the international community in 1999, Spain considers that no other form of reaction or remedy is legally defensible, much less so through the secession-as-sanction or secession-as-remedy formulas, which, as pointed out above, have no proper legal basis in international law, this being of particular bearing on the case of Kosovo"[9].

7.- Finally, although some of the participants in the present proceedings have affirmed that the inexistence of an explicit prohibiting rule must be interpreted as an acceptance of secession in contexts other than colonial situations, this line of argument cannot be shared by Spain. It is on the contrary necessary to emphasize that, in this context, the absence of a prohibiting rule cannot be understood as the implicit authorization of an alleged "right to secession". The exercise of such a "right" would immediately result in a limitation of the rights and powers of a sovereign State, in utter disregard of the will thereof. We would thus be faced with a rule restricting rights, which could only be adopted in an express manner. Since a rule adopted in this manner is lacking, unilateral secession is not permitted by contemporary international law outside the colonial context.

Likewise, it is neither legally acceptable to affirm that the unilateral declaration of independence and unilateral secession are purely factual realities that are not ruled by international law. Far from it, as the *Independent International Fact-Finding Mission on the Conflict in Georgia* has declared, "this argument is not fully persuasive, especially as international law increasingly addresses situations within the territory of states. International law is not silent in that regard"[10].

8.- In conclusion, on the basis of the preceding arguments, it is not possible to accept the existence of principles or rules of international law which, outside the colonial context, permit the secession of a territory from a sovereign State without the latter's consent. Or, as the *Independent International Fact-Finding Mission on the Conflict in Georgia* has affirmed: "To sum up, outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of secession is not accepted in state practice. A limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial "right" or allowance

[9] Written Comments of the Kingdom of Spain, July 2009, pp. 5-6. Exposé oral du Royaume d'Espagne, CR 2009/30, pp. 18-19, par. 40-42.

[10] *Independent International Fact-Finding Mission on the Conflict in Georgia*, vol. II, Cap- 3, p. 137 (http://www.ceiig.ch/Report.html).

does not form part of international law as it stands. The case of Kosovo has not changed the rules."[11]

B) QUESTION POSED BY JUDGE BENNOUNA

9.- Judge Bennouna's question has been posed in the following terms: *Did the authors of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo previously campaign, in the elections of November 2007 for the Assembly of the Provisional Institutions of Self-Government of Kosovo, on the basis of their willingness, once elected, to declare Kosovo independent unilaterally, or did they at least present the unilateral declaration of Kosovo's independence to their electors as one of the alternatives for their future actors?*

The question refers to a purely factual element that, in Spain's view, is irrelevant for the present proceedings. Nevertheless, in case the International Court of Justice deems it appropriate to assess this fact, it is the wish of Spain to make the following observations.

10.- It is no surprising fact that, in the electoral process culminating in the election of the Assembly of Kosovo in November 2007, the pro-independence Kosovar parties should include the proposal for the independence of Kosovo in their political agendas and their respective electoral campaigns. From this perspective, the expression of the wish for independence in political programs or electoral campaigns is nothing but an expression of freedom of speech by the above- mentioned political parties that is part of the principles that must inform a democratic election. This freedom finds no other limit than the prohibition to declare oneself in favour of acts that are in violation of the legal order under whose rule and cover the election takes place.

To this it must be added, on the other hand, that, according to comparative law, electoral programs and promises do not legally bind their authors, that is, the political parties that make them; nor do they give rise to any kind of legal obligation between such political parties and the electorate allowing voters to claim their fulfilment through legal means. In short, political programs and promises operate in the realm of political will and policy considerations, and not in the realm of law, bearing consequences only as moral and political obligations binding a party with respect to its voters.

This is also generally applicable to all the elections held in Kosovo, which means that the inclusion of the claim for independence in electoral programs and campaigns must be understood as the mere expression of a political "wish" that, moreover, is not in itself contrary to the international regime for Kosovo established by Resolution 1244(1999). In this respect, it must be reiterated that, as has been explicitly pointed out by Spain in its Written Statement as well as in its Oral Statement[12], the said resolution does not pre-determine the final outcome of the process for the determination of Kosovo's future status, nor does it prevent the parties taking part in the political process from advocating different or opposite positions. It only guarantees that no party can unilaterally impose its own position, given that the settlement on the final status of

[11] *Independent International Fact-Finding Mission on the Conflict in Georgia*, vol. II, Cap- 3, p.141.
[12] Written Statement of the Kingdom of Spain, par. 76; Exposé oral du Royaume d'Espagne, CR 2009/30, p. 16, pár. 33.

Kosovo requires an agreement of both parties reached within the framework of a political process established to that end.

11.- However, the previous considerations do not warrant the conclusion that including an option in favour of independence in electoral programs and campaigns run in Kosovo in November 2007, which resulted in the election of the new Assembly, should have enough legal binding force so as to change the very nature of the provisional institutions of self-government of Kosovo, or to alter the process for the determination of Kosovo's future status established by the United Nations Security Council. On the contrary, this is a factual and political element, completely alien to law in general, and to the international regime for Kosovo derived from Resolution 1244(1999) in particular.

In this respect the following must be recalled:

i) The election was called to elect the representatives of the population of Kosovo in the provisional institutions of self-government established according to Resolution 1244(1999) and to the rest of rules that apply to the provisional regime of international administration of Kosovo. The election was not called to elect the members of a constituent assembly that would create a new State, whether or not that was the project of the parties running in those elections, and regardless of the fact that such a project gathered the support of part of the Kosovar population[13]. Therefore, the mere political wish of certain parties and of a sector of the Kosovar population (irrespective of any issues of political legitimacy) does not suffice to transform the legal nature of the institutions established on the foundation of a Security Council Resolution adopted within the framework of Chapter VII of the UN Charter.

ii) The subject-matter of the electoral process was not, and could not be, Kosovo's declaration of independence, because such independence could only be attained, if at all, in the final phase of the political process for the determination of Kosovo's future status set in motion by the Security Council through Resolution 1244(1999), a process which, therefore, cannot be unilaterally altered. The wish for independence unilaterally expressed by the pro-independence political parties, and supported by part of the population of Kosovo, can by no means replace the will of the UN Security Council, which has initiated a political process based on negotiation and agreement and which, by definition, provides the ultimate guarantee to the said process.

12.- To sum up, any electoral promise made within the framework of the international administration regime of Kosovo still in force, must give way before the authority of Security Council Resolution 1244 (1999), adopted according to Chapter VII of the UN Charter.

And, consequently, Spain considers that the electoral promises referred to in his question by Judge Bennouna are of no relevance for the opinion to be given by the International Court of Justice on the accordance with international law of the unilateral

[13] Participation in the 2007 election reached 40.10% of the electorate. It reached 53.57% in 2004 and 64.30% in 2001 (http://www.osce.org/kosovo/13208.html).

declaration of independence by the provisional institutions of self-government of Kosovo.

C) QUESTION POSED BY JUDGE CANÇADO TRINDADE

13.- Judge Cançado Trindade's question has been posed in the following terms: *"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 regime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configuration of a "people", and of its eligibility into statehood, under general international law?"*

In reality, this complex question can be broken down into three sub-questions, namely:

i) What is the meaning of the *renvoi* made by Resolution 1244 (1999) to the Rambouillet Accords? Does it have a bearing on self-determination and/or secession?

ii) If at all, what conditions should a people meet in order to be eligible for statehood, in the framework of the legal regime established by Security Council Resolution 1244 (1999)?

iii) What are the factual preconditions for the configuration of a "people" and for its eligibility into statehood under general international law?

Spain will give a separate answer to each of these questions, even though such answers are inter-related and must be understood as forming a unity.

i) What is the meaning of the renvoi made by Resolution 1244 (1999) to the Rambouillet Accords? Does it have a bearing on self-determination and/or secession?

14.- Resolution 1244 (1999) refers to the Rambouillet Accords in article 11, paragraph a), in order to define one of the main responsibilities of the International civil presence in Kosovo, namely: "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". The aforementioned "substantial autonomy" will unfold "within the Federal Republic of Yugoslavia"[14], at least until the future status of Kosovo deriving from the political process set in motion and sponsored by the Security Council is determined.

From this perspective, the reference to the Rambouillet Accords must be understood as having a twofold meaning: firstly, it is a reference to respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, which has been explicitly proclaimed in the Rambouillet Accords; secondly, it is a reference to the principles that must rule the provisional regime of self-government of Kosovo within the FRY, which had already been defined in those Accords.

[14] Res. 1244 (1999), par 10.

In particular, as Spain underlined in its Written Statement, the reference to the Rambouillet Accords strengthens the presence of the principle of sovereignty and territorial integrity in the case of Kosovo, because in such Accords "respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia constitutes the basis for the system of self-government of Kosovo and inspires the Draft Constitution for Kosovo; it is present when defining the regime for implementing the accords, including the deployment of NATO, and it is expressed in many spheres which, such as border control or customs control, are part of the core content of State sovereignty"[15].

Therefore, the reference to the Rambouillet Accords in paragraph 11.a) of Resolution 1244 must be understood as a manifestation of the balance struck among the different relevant interests by the Security Council in this resolution, which, as Spain has pointed out in its Oral Statement, creates a «équilibre entre les deux principes fondamentaux applicables». Such a balance guarantees respect for the sovereignty and territorial integrity of the FRY (present-day Serbia) without prejudice to the exercise of the right to self-determination of Kosovo, understood as "une forme d'exercice du droit à l'autodétermination, cette fois-ci de nature interne, dans le cadre du régime international intérimaire établi par le Conseil de sécurité.»[16].

15.- From this perspective, the *renvoi* to the Rambouillet Accords has a direct bearing on the two fundamental principles of international law that apply directly to the international regime for Kosovo established by the Security Council through Resolution 1244 (1999), namely : i) the principle of sovereignty and territorial integrity whose respect it assures ; ii) the right to self-government of Kosovo which, through the reference to the Rambouillet Accords and through the explicit mention of Resolution 1244 (1999), is guaranteed in its dimension of internal self-government.

16.- Contrariwise, the reference to the Rambouillet Accords in paragraph 11.a) of Resolution 1244 (1999) can have no bearing whatsoever on the principle of external self-determination or on a possible secession, since the Rambouillet Accords contain no specific provisions in this respect.

In fact, Resolution 1244 (1999) also refers to the Rambouillet Accords in paragraph 11.e), according to which it is also a main responsibility of the international civil presence to facilitate « a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords ». This makes it necessary to reflect upon the meaning of this reference which is no longer related to the regime of international administration of Kosovo (including the self-government regime within Serbia) but to the political process meant to determine Kosovo's future status. This reference, moreover, is worded in different terms to paragraph 11.a) (« taking into account » in paragraph e), « taking full account » in paragraph a)).

[15] Respect for the sovereignty and territorial integrity of the FRY is present all along the text of the Rambouillet Accords. From the Preamble and the articles related to the provisional Constitution for Kosovo, to the provisions on the Policy and Civil Public Security, as well as the Economic Issues and the provisions on the international military presence in Kosovo. For a more detailed analysis, see Written Statement of the Kingdom of Spain, par. 37 and footnote 54.

[16] Exposé oral du Rouyaume d'Espagne, CR 2009/30, p. 18, par. 39. See also p. 13, par. 23.

However, the sole explicit reference to the process to determine the future status of Kosovo contained in the Rambouilet Accords appears in Chapter 8, Artícle I, paragraph 3, according to which « [t]hree years after the entry into force of the 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 ».

It is, as can be seen, a merely procedural decision which, apart from having never entered into force, does not warrant the conclusion that Kosovo is entitled to a right to independence. In this respect, the reference to the Rambouillet Accords at this level is to be considered as a reference to the principles that must inspire, along with those mentioned in Resolution 1244 (1999), the political process for the determination of the future status of Kosovo set in motion by the Security Council. Among such principles there is absolutely no mention to the right to exercise external self-determination and the reference to the « will of the people » is neither the sole nor the prevailing criterion (although a necessary one) to define the « final settlement for Kosovo ». This criterion must be seen in connection with the rest of the criteria mentioned in the cited article.

Consequently, also from this perspective, it is to be concluded that the *renvoi* to the Rambouillet Accords has no bearing whatsoever on the recognition of an alleged right to secession in favour of Kosovo.

17.- Thus interpretation of the meaning of the reference to the Rambouillet Accords is confirmed in the light of the European Council Conclusions of 24/25 March 1999[17], held in Berlin which, referring to the Rambouillet negotiations, stated the following:

> "The draft agreement, which was signed by the Kosovo Albanians in Paris, meets these requirements: on the basis of the sovereignty and territorial integrity of Yugoslavia it assures Kosovo a high degree of self-government, guarantees the individual human rights of all citizens in Kosovo according to the highest European standards, envisages extensive rights for all national communities living in Kosovo and creates the basis for the necessary reconstruction of the war-torn region."

Insisting that there was one single objective:

> "The international community's only objective is to find a political future for Kosovo, on the basis of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, which does justice to the concerns and aspirations of all the people in Kosovo."

Therefore, a balance between respect for territorial integrity and the people's will of self-government were the defining parameters of the Rambouillet Accords, an objective assumed by Resolution 1244.

[17]Presidency Conclusions, Cologne European Council, 24 and 25 March 1999, Part III Statements on Kosovo, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/ACFB2.html

ii) *If at all, what conditions should a people meet in order to be eligible for statehood, in the framework of the legal regime established by Security Council Resolution 1244 (1999)?*

18.- As already underlined in the preceding paragraphs Resolution 1244 (1999) strikes an adequate balance between the principle of sovereignty and territorial integrity and the principle of self-determination of peoples. It cannot be maintained, therefore, that Resolution 1244 (1999) does not deal at all with the exercise of self-determination by Kosovo. Nevertheless, it deals with it at two levels that must be distinguished. Firstly, within the provisional regime of international administration of Kosovo the right to self-determination can only be understood in its internal dimension (self-government of Kosovo within Serbia). Secondly, in the framework of the political process for the determination of Kosovo's future status, self-determination in the broad sense is not excluded, but the way the right to self-determination is to be exercised (self-government within Serbia/creation of a new State) is not defined. Resolution 1244 merely sets as a condition that the future status of Kosovo must be the fruit of a common agreement between the parties concerned which –in reality- prevents the application of the self-determination of peoples in the classical sense.

At any rate, it is within these parameters that the question posed by Judge Cançado Trindade must be answered.

19.- Regarding the exercise of the right to self-determination in the framework of the provisional regime of international administration of Kosovo, it must be concluded that it is not possible to answer the question that has been asked. Suffice it to recall that under that regime "the self-government of Kosovo" is exercised as internal self-determination and that, it is logically not in the purview of Resolution 1244 (1999) the idea of a possible people eligible for statehood, since that administration regime does not intend to constitute a new State but to establish a self-government regime within a pre-existing State.

With regard to the process to determine Kosovo's future status, Resolution 1244 (1999) contains no direct or indirect position on the creation of a new State, since that result –or any other- must be the product of the political process and the agreement between the parties concerned. Therefore, neither is it possible, in this context, to identify the requirements that an alleged people of Kosovo should meet to have access to statehood. Access to statehood must be the result, in any case, of the political process set by the Security Council, and not of the specific conditions that this people in question may possess, because it should be recalled that we are not faced with a classical case of exercise of the right to self-determination but with the determination of the future statute of a territory with a view to solving an international crisis. This determination must be made in accordance with the procedure established by the Security Council acting on the basis of Chapter VII of the UN Charter.

20.- At any rate, if a basis must be found in Resolution 1244 (1999) to define the concept of people in the case of Kosovo, the fact must be highlighted that this resolution seems to embrace an open concept, although one conditioned by the territory to which the resolution applies. It is thus remarkable that the Council refers without

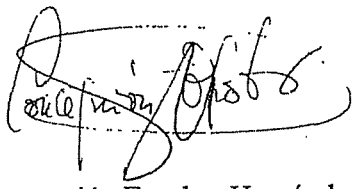
distinction to the "Kosovo population"[18], to "the people of Kosovo"[19], to "all people in Kosovo"[20], or to "all inhabitants in Kosovo"[21], in the context of the self-government regime and of the political process to determine Kosovo's future status. And mention is not being made of the multiple general references to the "self-government for Kosovo", the "self-administration for Kosovo" or to "Kosovo's future status".

Therefore, the concept of a people entitled to a right to self-determination, or even possibly acceding to statehood does not seem to have been within the concerns of the Security Council when setting up the international regime for Kosovo built upon Resolution 1244(1999). The Council, on the contrary, seems to have been content to identify a territory in which there is a population benefiting from the aforementioned international regime. In conclusion, Spain considers that the concept of people in the framework of the international regime established by Resolution 1244(1999) is not relevant to answer the question posed by the General Assembly.

iii) *What are the factual preconditions for the configuration of a "people" and for its eligibility into statehood under general international law?*

21.- Bearing in mind the preceding arguments, Spain considers that it is not necessary to answer this question in the present advisory proceedings. Far from that, it has been proven that the legal framework related to the question asked to the Court is circumscribed by the special regime created by Resolution 1244 (1999), which takes sufficiently into account the fundamental principles of international law that apply to the case of Kosovo. In this regard, the debate over the factual preconditions that must be met in advance to constitute a "people" and be eligible for statehood under general international law yields no relevant element to that legal framework.

Madrid, 21 December 2009



Concepción Escobar Hernández
Representative of the Kingdom of Spain

[18] Res. 1244 (1999), Preamble, par. 5.
[19] Ibid, operative par. 10; Annex 2, par. 5.
[20] Ibid, Annex 2, par. 4.
[21] Ibid, operative par. 10; Annex 1, fourth principle; Annex 2, par. 5.