UNITED KINGDOM'S RESPONSE TO THE QUESTIONS PUT BY JUDGES KOROMA AND CANÇADO TRINDADE

1. Judge Koroma put the following question to the participants at the end of the oral proceedings:

> "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?"

2. As the United Kingdom stated in oral argument, international law contains no prohibition against declarations of independence as such.[1] Whether a declaration of independence leads to the creation of a new State by separation or secession depends not on the fact of the declaration but on subsequent developments, notably recognition by other States.[2] As a general matter, an act not prohibited by international law needs no authorization. This position holds with respect to States. It holds also with respect to acts of individuals or groups, for international law prohibits conduct of non-State entities only exceptionally and where expressly indicated.

3. In certain circumstances, the right of self-determination may entail a right to form an independent State.[3] The Advisory Opinions in the *Namibia*, *Western Sahara*, and *Wall* cases do not exhaust the situations in which the Court might address self-determination. The United Kingdom has not considered that issue in the circumstances of the present case, though a number of participants in the present proceedings have explored it in detail, including the issue of self-determination outside the colonial context.[4]

4. As guardian of the constitutional order of Canada, the Supreme Court of Canada made the point that, if an *affirmative* right to secession exists under international law, this would be only in "exceptional circumstances ..."[5] But the question adopted by the General Assembly in these proceedings is not phrased in terms of authorisation or permission.

5. Before World War I, secession was quite common as a means by which new States were created. No prohibition against declarations of independence leading to separation or secession appears in inter-War practice. Nor did the Charter introduce such a prohibition in 1945. In practice, since 1945, and in particular since 1991, there have been numerous instances of State creation, including by way of declarations of independence. No new prohibition, however, has emerged from the practice.

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[1] CR 2009/32, pp.48-52, paras.9-22.

[2] See further, James Crawford, *The Creation of States in International Law* (2nd edn, OUP, 2006) pp. 539-546.

[3] See Crawford, *Creation of States*, pp.107-131.

[4] See, for example, CR 2009/32, p.9, paras.7-8 (Lijnzaad, Netherlands); CR 2009/26, pp.18-23, paras.2-17 (Gill, Albania).

[5] CR 2009/32, p.51, para.19 (emphasis added), quoting *Reference re Secession of Quebec*, 1998, 2 SCR 217, para.112.

Furthermore, no prohibition emerged from the *Quebec* reference: the only national court proceedings in which the right to secede was expressly and thoroughly explored. The experts presenting opinions to the Canadian Supreme Court in the *Quebec* reference, both for the *amicus curiae* representing the interests of Quebec and for the Government of Canada, agreed that international law does not prohibit secession.[6] The Supreme Court did not disagree.[7]

6. It has also been noted in the present proceedings that certain international instruments contain terms concerning the rights of peoples or communities within States (outside the context of decolonization): see e.g. the Declaration on the Rights of Indigenous Peoples, GA res 61/295, 13 September 2007.[8] Article 46(1) of the Declaration makes it clear that it does not (a) suggest "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, separately, (b) authorize or encourage "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". This is a necessary precaution given the subject-matter of those declarations. It is also a precaution phrased in terms of the scope, *ratione materiae* and *ratione personae,* of obligations existing under the Charter. It does not equate declarations of independence with violations of the Charter, nor does it evidence the existence of a blanket prohibition under international law on declarations of independence in all circumstances or suggest a further extension of the international law obligations of non-State actors.[9]

7. **Judge Cançado Trindade put the following question to the participants at the end of the oral proceedings:**

> "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?"

8. Paragraph 11(a) of Security Council resolution 1244 (1999) concerned an interim period, characterised by substantial autonomy and self-government in Kosovo. This interim period was the principal, although not the only, focus of the

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[6] CR 2000/32, p.50, paras.17-18.

[7] CR 2009/32, p.51, para.19. The absence of a rule of international law prohibiting a particular act by no means entails that States must recognize that act or any legal consequences of it. Recognition is the principal institution through which States address the consequences of declarations of independence, or of any other attempt at the creation of a new State. States have exercised great caution with respect to secessionist acts within the territory of other States. Where no State, or very few States, have recognized the putative State as such, this will be determinative. The caution of States with respect to such acts reflects their concern to preserve international stability. But the question before the Court deliberately avoids dealing with issues of recognition or other legal consequences, as the United Kingdom has noted: CR 2009/32, pp.46-48, paras.1-8.

[8] CR 2009/24, p.67, para.11 (Shaw, Serbia).

[9] In this respect, the 2007 Declaration follows the 1970 Friendly Relations Declaration.

Rambouillet accords. It is in this context that full account was to be taken of the accords.[10] Paragraph 11(a) also required that full account was to be taken of annex 2 to resolution 1244 (1999), ie, the peace plan presented by Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the Russian Federation Plan.[11] This peace plan was also focused exclusively on the interim period.[12] Paragraph 8 of annex 2 required *inter alia*, for purposes of this interim phase, that full account was taken of "the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia".

9. In contrast to paragraph 11(a), paragraph 11(e) of resolution 1244 (1999) explicitly used different language when addressing the subsequent (post-interim) phase, described as the "political process designed to determine Kosovo's future status". Significantly, paragraph 11(e) makes no reference to annex 2 (including its language of territorial integrity of the Federal Republic of Yugoslavia.[13] The reference here was to the Rambouillet accords alone and, by necessary implication, given the context, to Chapter 8, Article I(3) thereof which referred to "the will of the people". This, indeed, is how the Special Representative of the Secretary-General (SRSG) appears to have understood the paragraph 11(e) reference to the Rambouillet accords.[14]

10. On 24 October 2005, the Security Council approved the commencement of the political process provided for in paragraph 11(e) designed to determine Kosovo's future status.[15]

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[10] Pursuant to paragraph 11(a), the first of the "the main responsibilities of the international civil presence" of the international civil presence was to promote "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)".

[11] S/1999/649, 7 June 1999.

[12] See, in particular, Annex 2, paragraph 5: "[e]stablishment of an interim administration for Kosovo"; and paragraph 8: "establishment of an interim political framework agreement" (emphasis added).

[13] Mr Bethlehem, CR 2009/32, p.44, para.25. See also at para.27: "My purposes in making this point are three: *first*, to emphasize that resolution 1244 (1999) contemplated two processes, an *interim* process and a *political* process designed to determine Kosovo's future, and that these processes were addressed differently in the resolution; *second*, to highlight that, in line with the appreciation that everything was open for discussion, the territorial integrity of the Federal Republic of Yugoslavia was quite explicitly *not* a cornerstone of the political process; and, *third*, to emphasize that the resolution did not do what it could have done, had this been in the minds of the members of the Council. It neither precluded Kosovo's independence nor required Serbia's consent to such a development."

[14] In the Preamble to the 2001 Constitutional Framework for Provisional Self-Government, the SRSG determined as follows: "... within the limits defined by UNSCR 1244(1999), responsibilities will be transferred to Provisional Institutions of Self-Government which shall work constructively towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244(1999), take full account of all relevant factors including the will of the people" (emphasis added).

[15] Meeting of the Security Council of 24 October 2005, UN Doc. S/PV 5290: "The Security Council agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the United Nations Secretary-General's intention to start a political process to determine Kosovo's future status, as foreseen in Security Council resolution1244 (1999). The Council reaffirms the framework of the resolution, and welcomes the Secretary-General's readiness to appoint a Special Envoy to lead the future status process."

11. Against this background, the purpose of the *renvoi* to the Rambouillet accords in paragraph 11(a) of resolution 1244 (1999) was to provide for an appropriate framework of "substantial autonomy and self-government". This appreciation is consistent with the reference to annex 2 in this paragraph. In contrast, the *renvoi* to the Rambouillet accords in paragraph 11(e) of the resolution is a reference to Chapter 8 Article I(3) of the accords, which provided that a mechanism should be determined "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". This appreciation is consistent with the absence of any reference to annex 2 in paragraph 11(e).

12. In the United Kingdom's view, resolution 1244 (1999) did not address general issues of self-determination or secession. It was a highly specific resolution which addressed the unique circumstances of Kosovo. It did not, accordingly, address general issues of eligibility for statehood or the factual preconditions of a "people". It follows that the United Kingdom did not enter into detail on the issues of entitlement to statehood in its pleadings, whether within the framework of the legal régime set up by resolution 1244 (1999) or as a matter of general international law. It nonetheless notes the recognition of the existence of a Kosovan 'people' in the SRSG's Preamble to the 2001 Constitutional Framework, and also in the statement of the Contact Group Ministers of 27 September 2007.[16]

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[16] Letter dated 10 December 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/723, Annex III: Statement on Kosovo by Contact Group Ministers, New York, 27 September 2007. This underlined that "any settlement needs to be acceptable to the people of Kosovo, ensure standards implementation with regard to Kosovo's multi-ethnic character and promote the future stability of the region". **[Dossier No. 209]**