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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Thursday 10 December 2009, at 10 a.m., at the Peace Palace,

President Owada, presiding,

***on the* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le jeudi 10 décembre 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***sur la* Conformité au droit international de la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Shi
		Koroma
		Al-Khasawneh
		Buergenthal
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Shi
Koroma
Al-Khasawneh
Buergenthal
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges

M. Couvreur, greffier

The Kingdom of the Netherlands is represented by:

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Professor Dr. Niels Blokker;

Professor Dr. René Lefeber;

Mr. Tom van Oorschot;

Mr. Siemon Tuinstra;

Mr. Michel van Winden;

Ms Daniëlle Best.

Romania is represented by:

Mr. Bogdan Aurescu, Secretary of State, Ministry of Foreign Affairs;

H.E. Mr. Călin Fabian, Ambassador of Romania to the Kingdom of the Netherlands;

Mr. Cosmin Dinescu, Director-General for Legal Affairs, Ministry of Foreign Affairs;

Mr. Ion Gâlea, Director, Directorate-General of Legal Affairs, Ministry of Foreign Affairs;

Mr. Felix Zaharia, Principal Private Secretary to the Minister for Foreign Affairs;

Ms Alina Orosan, Second Secretary, Directorate-General of Legal Affairs, Ministry of Foreign Affairs;

Ms Irina Niță, First Secretary, Embassy of Romania in the Kingdom of the Netherlands.

The United Kingdom of Great Britain and Northern Ireland is represented by:

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Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international,

as Counsel and Advocate;

For the complete list of delegations of all participants, please refer to CR 2009/29.

Le Royaume des Pays-Bas est représenté par :

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M. Niels Blokker ;

M. René Lefeber ;

M. Tom van Oorschot ;

M. Siemon Tuinstra ;

M. Michel van Winden;

Mme Daniëlle Best.

La Roumanie est représentée par :

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S. Exc. M. Călin Fabian, ambassadeur de la Roumanie auprès du Royaume des Pays-Bas ;

M. Cosmin Dinescu, directeur général des affaires juridiques du ministère des affaires étrangères ;

M. Ion Gâlea, directeur à la direction générale des affaires juridiques du ministère des affaires étrangères ;

M. Felix Zaharia, directeur de cabinet du ministre des affaires étrangères ;

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Ms Alice Lacourt, Legal Counsellor, Foreign and Commonwealth Office;

Ms Joanne Neenan, Assistant Legal Adviser, Foreign and Commonwealth Office;

Ms Joanna Hanson, Foreign and Commonwealth Office;

Ms Helen Fazey, Head of Kosovo Section, Western Balkans Group, Foreign and Commonwealth Office.

M. Samuel Wordsworth, membre des barreaux d'Angleterre et de Paris,

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Mme Joanna Hanson, ministère des affaires étrangères et du Commonwealth ;

Mme Helen Fazey, chef de la section Kosovo du groupe chargé des Balkans occidentaux du ministère des affaires étrangères et du Commonwealth.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the following participants on the question submitted to the Court: the Netherlands, Romania and the United Kingdom of Great Britain and Northern Ireland. I shall now give the floor to the first speaker, Dr. Liesbeth Lijnzaad, representing the Netherlands.

Ms LIJNZAAD:

1. Introduction

1. Good morning, Mr. President, Members of the Court, it is an honour for me to address this Court and to clarify my Government's views on the question before you. I feel particularly privileged to address you today on Human Rights Day: an affirmative answer to the question before the Court will deliver a clear message to States that effective, dissuasive and proportionate remedies are available in the event they violate the human rights of peoples within their borders.

2. The law should serve us, the people of the world. Law has developed to facilitate and regulate the interaction between individuals and groups of individuals, such as a people or a State. For the law to achieve its purpose, it must provide stability. However, it must also provide the flexibility to allow for societal adjustment when developments in society so require, and it must provide for effective, dissuasive and proportionate remedies when there has been a breach of the law. In this case, the law allowed the proclamation of independence by the people of Kosovo.

3. I will address the following points in my statement:

— the existence and exercise of the post-colonial right to self-determination, in particular the conditions that must be satisfied for a people to exercise the right to external self-determination; and

— the lawful exercise of the right to external self-determination by the people of Kosovo.

2. The post-colonial right to self-determination

4. Mr. President, Members of the Court, in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court, for the first time, accepted a right of self-determination outside the context of decolonization. The right to self-determination includes the right of peoples to freely determine their political status. The

proclamation of independence by a people is but one method of exercising this right of political self-determination.

5. A people must exercise its right to political self-determination in accordance with international law. International law includes the principle of territorial integrity. It is therefore necessary to determine whether the right to self-determination has been exercised in a manner that preserves international boundaries, that is, internal self-determination, or in a manner that involves a change of international boundaries, that is, external self-determination. The proclamation of independence by the people of Kosovo was directed at a change of international boundaries and, therefore, constitutes an instance of the exercise of the right to external self-determination.

6. A people must first seek to exercise its post-colonial right to political self-determination with due respect for the principle of territorial integrity, that is, within existing international boundaries. The right to political self-determination may, however, evolve into a right to external self-determination in exceptional circumstances. This is an exception to the rule and it is therefore to be construed narrowly. The resort to external self-determination is a last resort and it is subject to conditions.

7. First, there are substantive conditions. A right to external self-determination only arises in the event of a serious breach of either:

— the obligation to respect and promote the right to self-determination due to the absence of a government representing the whole people belonging to the territory, or the denial of fundamental human rights to a people; or

— the obligation to refrain from any forcible action which deprives people of this right.

8. There is also a procedural condition. All effective remedies must have been exhausted in the pursuit of a settlement before a people may have resort to the exercise of the right to external self-determination. Accordingly, all avenues must have been explored to secure the respect for and the promotion of the right to self-determination through available procedures, including bilateral negotiations, the assistance of third parties and, where agreed or accessible, recourse to domestic or indeed international courts and arbitral tribunals.

9. Mr. President, Members of the Court, in the course of these proceedings, it has been argued that the existence of the post-colonial right to external self-determination has not been

demonstrated by the States supporting it. There is an abundance of literature on the law of self-determination. It provides a wealth of material, including on the exercise of the right to external self-determination. It is informative, but it may not be authoritative. The divergence of views in doctrine prevents, in our view, its use as a source of international law under Article 38 of the Statute of the Court. To answer the question before it, the Court will need to interpret treaty provisions relating to self-determination and ascertain the legal opinions and the practice of States on the matter. Indeed, the written statements, written comments and oral statements in these proceedings will enable the Court to do exactly that.

10. It is hardly surprising that there are not many instances of the lawful exercise of the right to external self-determination outside the context of non-self-governing territories and foreign occupation. First, the post-colonial right to external self-determination only emerged in the second half of the last century. Second, as mentioned before, substantive and procedural conditions must be satisfied before a people may resort to external self-determination. In the course of these proceedings, many instances have been cited where the people concerned did, indeed, fail to meet these conditions and could not lawfully exercise the right to external self-determination. Yet, there are several instances where the international community has accepted the exercise of the right to external self-determination. We would cite the establishment of Bangladesh and Croatia as examples.

11. Instances where States disintegrated on the basis of consensual agreement differ from the present case, but are not necessarily irrelevant. In some of these instances, the peoples concerned acknowledged that the violation of the right to self-determination in the past had made it impossible for them to continue living together in one State. We would cite the establishment of Eritrea and Slovenia as examples.

3. The exercise of the right to self-determination by the people of Kosovo

12. Mr. President, Members of the Court, the violation of human rights in Kosovo at the end of the last century has been well documented, in particular by the United Nations Special Rapporteur on the former Yugoslavia, and has been recognized by several organs of the United Nations, including the General Assembly, the Security Council and the International

Criminal Tribunal for the former Yugoslavia. Even Serbia has recognized in these proceedings that human rights violations have occurred in Kosovo.

13. These violations are at the root of our view that the people of Kosovo are, as a people, entitled to external self-determination. In our Written Comments, we have submitted that there is a people in Kosovo. We would point out that, in contrast to what was stated by Serbia in these proceedings, the Swiss Government has adopted the same position in these proceedings and in domestic parliamentary proceedings. Today, I will further argue that the right to external self-determination in this case originates in the serious breaches by Serbia of the right to self-determination of the people of Kosovo and its corresponding obligations, namely, its obligation to respect and promote this right, and its obligation to refrain from any forcible action which deprives the people of Kosovo of this right.

3.1 The breach of the obligation to respect and promote the right to self-determination

14. Thus, there has been a serious breach of the obligation to respect and promote the right to self-determination of the people of Kosovo, because:

— there was no government representing the whole people in the Federal Republic of Yugoslavia; and

— there has been a denial of the fundamental human rights in Kosovo.

3.1.1 The absence of a government representing the whole people

15. Mr. President, Members of the Court, allow me to address the first point. There was no government representing the whole people in the Federal Republic of Yugoslavia. In the Socialist Federal Republic of Yugoslavia, Kosovo had the status of an autonomous province. The Yugoslav and Serbian authorities gradually brought Kosovo's autonomy to an end and aimed to take control. Their success in doing so led to the complete marginalization of the Kosovo Albanians in Kosovo. This process was described by the International Criminal Tribunal for the former Yugoslavia in its *Milutinović* judgment of February this year[1].

[1]It may be noted that appeals have been filed after the submission of the Written Statement by the Kingdom of the Netherlands on 17 April 2009 which are still pending.

16. In the early 1980s, after the death of President Tito, Kosovo Albanians sought full recognition for Kosovo as a republic. This led to demonstrations, some of which turned violent, and the police and Yugoslav army were deployed. At the same time, there were increasing calls by the Serbs to reduce the autonomy of Kosovo. Against the backdrop of the break-up of Yugoslavia, measures were put in place which involved the federal authorities usurping responsibility for security within Kosovo. The Tribunal concluded that:

> "from around 1989 differences between the aspirations of the majority of the Kosovo Albanian population and the designs of the [Federal Republic of Yugoslavia] and Serbian state authorities created a tense and unstable environment. Efforts by the authorities to exert firmer control over the province and to diminish the influence of the Kosovo Albanians on local governance, public services, and economic life polarised the community. Indeed, laws, policies, and practices were instituted that discriminated against the Albanians, feeding into local resentment and feelings of persecution.
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> . . . . . .
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> A so-called 'parallel system' thus developed, involving an unofficial 'government' and the provision of services to the Kosovo Albanian population financed by a substantial émigré community and a voluntary 'solidarity tax'."

17. These findings demonstrate the absence of a government representing the whole people belonging to the Federal Republic of Yugoslavia, which amounts to a breach of the obligation to respect and promote the right to self-determination in Kosovo. This breach was serious because it was systematic: the abrogation of autonomous powers together with the discriminatory laws, policies and practices constitutes evidence that the breach was organized and deliberate. The breach was also serious in that it was gross: the necessity for Kosovo Albanians to develop a parallel system of government constitutes evidence of the flagrant nature of the breach, which amounted to a direct and outright assault on the values protected by the rule on a representative government.

3.2 The denial of fundamental human rights

18. Mr. President, Members of the Court, I now turn to the second point. There has also been a denial of fundamental human rights to the people of Kosovo. From mid-1998 the political crisis in Kosovo culminated in an armed conflict, involving forces of the Federal Republic of Yugoslavia and Serbia, and forces of the Kosovo Liberation Army. The armed conflict continued

throughout the NATO aerial bombardment campaign from 24 March to 10 June 1999. Throughout the armed conflict incidents occurred in which excessive and indiscriminate force was used by the Yugoslav army and the forces of the Serbian Ministry of the Interior. This resulted in damage to civilian property, population displacement, and civilian deaths. The Tribunal found that:

> "the common purpose of the joint criminal enterprise was to ensure continued control by the [Federal Republic of Yugoslavia] and Serbian authorities over Kosovo and that it was to be achieved by criminal means. Through a widespread and systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo, the members of the joint criminal enterprise were aware that it was unrealistic to expect to be able to displace each and every Kosovo Albanian from Kosovo, so the common purpose was to displace a number of them sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission."

19. Forces of the Federal Republic of Yugoslavia and Serbia deliberately expelled at least 700,000 Kosovo Albanians, either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure. Across Kosovo, forces of the Federal Republic of Yugoslavia and Serbia conducted a broad campaign of violence directed against the Kosovo Albanian population, involving killing, sexual assault and the intentional destruction of mosques.

20. These findings of the Yugoslavia Tribunal demonstrate that the campaign of terror and violence involved war crimes and crimes against humanity, and resulted in the denial of fundamental human rights in Kosovo. This amounted to a breach of the obligation to respect and promote the right to self-determination within Kosovo. This breach was serious because it was systematic, the joint criminal enterprise in particular evidencing that the breach was organized and deliberate. The breach was also serious in that it was gross: the number of expelled Kosovo Albanians and the nature and extent of the violence directed against them constituted evidence of the flagrant nature of the breach, which amounted to a direct and outright assault on fundamental human rights.

3.2 The breach of the obligation to refrain from any forcible action

21. In Kosovo, there has additionally been a serious breach of the obligation to refrain from forcible action which deprives people of their right to self-determination. This also follows from the findings of the Tribunal, particularly in respect of the forcible displacement of Kosovo Albanians.

3.3 The exhaustion of all effective remedies

22. Mr. President, Members of the Court, not only the substantive condition, but also the procedural condition that applies to the exercise by the people of Kosovo of the right to external self-determination has been met. After all, all effective remedies that could be employed to settle the status of Kosovo had been exhausted. For this purpose, a political process was implemented under the auspices of the Security Council. It was only after the failure of all efforts to achieve a settlement that the Special Envoy of the Secretary-General concluded on 26 March 2007 that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status had been exhausted and the only viable option for Kosovo was independence. These conclusions were fully supported by the Secretary-General of the United Nations.

23. Subsequently, when it appeared that the Security Council was unable to agree on a resolution that would have endorsed the proposals made by the Special Envoy, a Troika was established, composed of representatives of the European Union, the Russian Federation and the United States, to try to find a solution. The Troika worked intensively for four months on the issue of the future status of Kosovo and delivered its report on 4 December 2007. Its objective had been to facilitate an agreement between the parties. Notwithstanding the high-level, intensive and substantive discussions between Belgrade and Pristina that the Troika was able to facilitate, an agreement on the final status of Kosovo could not be reached. As the Troika reported, neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.

24. Extensive further discussions took place in a number of meetings of the Security Council, but did not result in a solution. It was therefore only after the exhaustion of the political process and in the absence of further guidance from the Security Council that the independence of Kosovo was proclaimed on 17 February 2008.

25. The observation of Serbia in its Written Comments, that the procedural condition to exhaust all effective remedies had not been met, because of the very fact of the holding of these advisory proceedings, is beside the point. The request for an advisory opinion was clearly not an *effective* remedy for the people of Kosovo as this people could not have submitted a proposal to that effect to the General Assembly, could not have negotiated the terms of reference or the request in the General Assembly with the Members of the United Nations, and secured a vote in favour of

such a request. It would have been for Serbia to propose to seek an advisory opinion from this Court during the status negotiations or, alternatively, to refer the question of the exercise of the right of external self-determination by the people of Kosovo to an arbitral tribunal. Serbia, however, has not done so at that time.

26. It has also been said that the people of Kosovo cannot exercise the right to external self-determination in 2008, because the situation in Kosovo has not aggravated since 1999. We have already submitted in our Written Statement that, in this case, the right to self-determination was not affected by the passage of time since the serious breaches of this right. The time was used, first, to establish international security and civil presences in Kosovo and, second, to facilitate a political process to achieve a political solution of the situation relating to Kosovo. Thus, the time was used to satisfy the procedural condition for the exercise of the right to self-determination, namely, the exhaustion of all effective remedies to achieve a settlement on the status of Kosovo.

4. REFLECTIONS

27. Mr. President, Members of the Court, the emergence of the right to external self-determination has not been without controversy. On the one hand, the exercise of this right results in a reconfiguration of the international community and may affect the essential requirement of stability referred to by the Court in the case concerning the *Frontier Dispute*. On the other hand, as a result of past events, it may be that stability can only be achieved through change. The law, in particular the law on self-determination, provides guidance in this difficult process of change.

28. In the case before us, the law supports the people of Kosovo. Following the serious failure of Serbia to comply with its obligations relating to the self-determination of the people of Kosovo, the people of Kosovo could no longer be expected to live together with the people of Serbia in one State. In this case, lawful use has been made by the people of Kosovo of the remedy that international law provides for these very serious human rights violations.

29. Is there reason to fear, as has been argued in these proceedings, that the recognition by the Court of the right to external self-determination of the people of Kosovo would be a dangerous precedent — a precedent that could easily be followed by other groups of individuals who declare themselves to be a people entitled to self-determination? In our view, such fear is not justified. On

the contrary, it would be the absence of an effective, dissuasive and proportionate remedy for the violation of the right to self-determination that endangers peace and stability. The recognition by the Court of this remedy of last resort, including the conditions that must be satisfied to have recourse to it, will contribute to peace and stability. It will deter States from violating human rights, and peoples from too readily seeking to avail themselves of this remedy. The conditions set the bar high. They set it very high indeed.

5. CONCLUSIONS

30. Mr. President, Members of the Court, it is the legal opinion of the Kingdom of the Netherlands that the right to political self-determination includes the right to external self-determination in the case of a serious breach of the obligation to respect and promote the right to self-determination, or the obligation to refrain from any forcible action which deprives peoples of this right where all effective remedies have been exhausted. The recognition of Kosovo by the Kingdom of the Netherlands is based on this view and constitutes an instance of State practice in a case where, exceptionally, the conditions for the exercise of the right to external self-determination were satisfied.

31. We reaffirm the submissions made in our Written Statement and Written Comments. In particular, in our statement, we have reaffirmed and argued:

— the existence and exercise of the post-colonial right to self-determination, in particular the conditions that must be satisfied to resort to the right to external self-determination; and

— the lawful exercise of the right to external self-determination by the people of Kosovo.

32. Furthermore, we have reaffirmed and demonstrated that lawful use was made by the people of Kosovo of the right of external self-determination, because:

— there has been a serious breach of the obligation to respect and promote the right to self-determination in Kosovo;

— there has also been a serious breach of the obligation to refrain from forcible action which deprives peoples of their right to self-determination in Kosovo; and

— all effective remedies to settle the status of Kosovo have been exhausted.

33. It is, therefore, the opinion of my Government that the answer to the question should be that the proclamation of independence of Kosovo on 17 February 2008 is in accordance with international law.

Thank you for your attention.

The PRESIDENT: I thank Dr. Liesbeth Lijnzaad for her statement. I shall now give the floor to His Excellency Mr. Bogdan Aurescu to present the oral statement by Romania.

Mr. AURESCU:

1. Mr. President, Members of the Court, it is a great honour and privilege to appear again before this Court.

2. In September 2008, I had the honour to plead, as Agent, counsel and advocate for my country, in the first contentious case of Romania before the Court — the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*. The Judgment rendered unanimously on 3 February 2009 proved that recourse to judicial settlement of international disputes is the best instrument for a country like mine, which places the principles of international law at the very core of its foreign policy. The decision of the Court was welcomed with the highest degree of satisfaction by the Romanian people.

3. Mr. President, Romania fully maintains all the arguments submitted in the written phase of these proceedings. Today, we shall address only certain essential points: first, I will refer to the propriety of the advisory opinion and the meaning of the question; second, to the applicability of international law to this case; and, third, to the relevance of Security Council resolutions. My colleague Cosmin Dinescu will discuss the applicability in this case of the international law on self-determination.

Propriety of the advisory opinion

4. Mr. President, Members of the Court, it was argued that compelling reasons[2] may prevent the Court from exercising its competence, such as the lack of legal effect of the opinion on the status of Kosovo or the impossibility of the General Assembly to trigger any consequences from

[2]CR 2009/25, p. 31, para. 5 (authors of the Unilateral Declaration of Independence).

this opinion. With due respect to the discretionary power of the Court to provide an advisory opinion, the Court should remain consistent with its practice, as stated in the *Palestinian Wall Advisory Opinion*: "The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.) Moreover, as recalled in the *Legality of the Threat or Use of Nuclear Weapons*, "the effect of [an] opinion is a matter of appreciation" for the United Nations body requesting it, as the General Assembly has the right to decide for itself the usefulness and the effect of the opinion (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* p. 237, paras. 16, 17). Therefore, the Court should not decline to answer the question posed on the ground that it allegedly lacks any legal effect or any useful purpose[3].

Meaning of the question

5. Mr. President, Members of the Court, I will refer now to the meaning of the question. It was argued that a declaration of independence per se is just a fact and as such is neither allowed nor prohibited by international law[4]. But if we were to accept such a narrow interpretation of the question *quod non*, then the Court should confirm the conclusion drawn by the delegation of Austria in its oral statement: "As already stated, a declaration of independence as such does not have the effect of creating secession or establishing a State."[5]

6. However, it is not only the Declaration of Independence that should be analysed by the Court, but also the legal consequences that this Declaration may directly entail. I would like to refer to three points on this subject.

7. First, the text of the Declaration cannot be ignored by the Court, as the most important part of it speaks of a declared "independent and sovereign State". The Declaration is genuinely linked to an alleged creation of a State. And it is this alleged creation of a State that is intended, by

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[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Report 2004 (I)*, p. 163, para. 62.

[4] CR 2009/25, p. 38, para. 18 (Authors of the Unilateral Declaration of Independence); CR 2009/26, p. 12, paras. 12, 13 (Albania); CR 2009/27, p. 7, para. 5 (Austria); CR 2009/28, p. 23, para. 22 (Bulgaria); CR 2009/30 p. 29, para. 18 (United States of America).

[5] CR 2009/27, p. 8, para. 10 (Austria); see also CR 2009/30, p. 29, para. 18 (United States of America): "Kosovo's Declaration of Independence declared a political aspiration".

its authors, to be its direct and immediate legal consequence. Therefore, this issue should be analysed by the Court. Indeed, as Professor Crawford proposes in his valued work *The Creation of States in International Law*, the creation of States cannot be regarded today as a mere question of fact, but as subject to international law rules and principles[6]. Thus, the question is not only whether the simple issuance of a declaration of independence is allowed or prohibited by international law, but whether international law allows or prohibits *unilateral secession* in the given circumstances of this case[7].

8. Second, having in mind the necessity to address the core issue of the case, that is, the legality of unilateral secession, the Court should not interpret the question narrowly. In its constant jurisprudence, the Court has often been required to broaden, interpret or even reformulate the question before it[8]. As stated in its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (*Advisory Opinion, I.C.J Reports 1980,* pp. 87-89, paras. 34-36), the Court has the power to determine the "true legal question" under examination. The "true legal question" in this case refers to whether the creation of a State on the basis of unilateral secession is legal in the given circumstances. There would be no reasons for the Court not to make use of its well-recognized powers in this respect.

9. Third, the opinion should provide useful guidance for the General Assembly and the other competent organs of the United Nations. As it has been recalled by the Court's constant case law, such as *Western Sahara Advisory Opinion*, the object of the request for an opinion is "to guide the United Nations in respect of its own actions" and to assist the General Assembly "for the proper exercise of its functions" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, paras. 39, 41, 42). As stated before[9], the United Nations organs decide for and by themselves on the usefulness of an opinion and on the possibility to act on the basis of it. The answer of the Court could be of real use to the exercise of the functions of the General Assembly, such as those based

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[6]See James Crawford, *The Creation of States in International Law,* Clarendon Press, Oxford, 2006, p. 6.

[7]See also Written Statement of the United Kingdom, p. 24, para. 1.14.

[8]*Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 154, para. 38.

[9]*Supra,* para. 7, footnotes 6,7.

on Articles 4 or 10 of the United Nations Charter, but only if the opinion addresses the "true legal question", the core issue of these proceedings, that is represented by the legality of the creation of a State by unilateral secession, in the given circumstances.

Applicable international law

10. Mr. President, Members of the Court, I would like to emphasize an important issue regarding the applicable law. It has been argued that secession is not prohibited by international law and that the principle of territorial integrity applies only between States and does not protect States from secessionist movements and that non-State actors are not bound by this principle[10]. Accepting this statement would lead to extremely severe consequences for the international legal order. It would mean that any province, district, county, or even the smallest hamlet from any corner of any State, is allowed by international law to declare independence and to obtain secession.

11. The principle of territorial integrity requires States to refrain from any steps that might jeopardize the territorial integrity of other States. This includes the obligation not to recognize a territorial change that is contrary to international law[11]. The principle embodies two legal components: first, recognition, and second, the legality of the territorial change. A misleading argument has been presented in this Hall of Justice, following three steps. One, it was argued that recognition *falls outside the scope of the question submitted to the Court* and, therefore, you are not able to examine it. Two, for this reason, the Court cannot examine either the territorial change that may be the object of recognition. Three, it was argued that this territorial change is not regulated by international law, but, at most, by the domestic law of certain States. Mr. President, Members of the Court, by this construction, several participants in the pleadings are invoking the so-called narrow meaning of the question in order to demonstrate that secession is not regulated by international law. This cannot be accepted. Prohibition of unilateral secession is one of the two elements of territorial integrity.

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[10]CR 2009/25, p. 30, para. 2, p. 43, para. 26 (authors of the Unilateral Declaration of Independence); CR 2009/26, p. 13, para. 19 (Albania); CR 2009/30, p. 30, para. 20 (United States of America).

[11]UN General Assembly resolution 2625 (XXV), principle 1, para. 9; principle 5, para. 7.

12. Even States supporting the Declaration of Independence accept that there is a rule generally prohibiting secession, and I am quoting from the oral statement of Albania:

> "there is no doubt that self-determination does not give rise to a general right of secession. However, in situations where the conditions are grossly and systematically violated and a people is denied full participation in the political life . . ., there is no prohibition against secession . . ."[12]

Mr. President, this is a clear acknowledgement that secession *is* regulated by international law. The prohibition of secession is the rule, while the *remedial secession in exceptional circumstances is proposed to be the exception*. My colleague Cosmin Dinescu will refer to this shortly.

Relevant United Nations Security Council resolutions

13. Mr. President, Members of the Court, I will now go to the next part of my presentation, concerning the relevance of United Nations Security Council Resolutions.

14. I will not provide a thorough analysis of the provisions of resolution 1244. I will address the Court only on four major points: first, the combined effect of resolution 1244 and previous resolutions; second, the alleged distinction between "interim settlement" and "final settlement"; third, the alleged "exhaustion of negotiation possibilities"; and fourth, the relevance of the absence of reaction from United Nations bodies.

Combined effect of resolutions — the status of Kosovo must respect the sovereignty of Serbia

15. Mr. President, Members of the Court, resolution 1244 should be seen in connection with resolutions 1160, 1199, 1203 and 1239, which are recalled in its second preambular paragraph. As the Court stated in the *Namibia* Advisory Opinion (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 51, para. 108), before analysing a resolution it is necessary for the Court to refer to previous resolutions, since they have a combined and cumulative effect.

16. Thus, resolution 1160 is the first to mention in paragraph 5 that the Council "agrees that the principles for a solution of Kosovo should be based on the territorial integrity of the Federal Republic of Yugoslavia". This operative paragraph is not subject to any conditions.

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[12]CR 2009/26, p. 20, para. 8 (Albania).

Resolution 1199 goes further, speaking of the "commitment of all Member States to the sovereignty and territorial integrity of the FRY" — this is from preambular paragraphs 12 and 13 — and this is reiterated in resolutions 1203 and 1239.

17. Resolution 1244 reaffirms in its preambular paragraph 10 this commitment to the sovereignty and territorial integrity of the FRY. It was argued that this reference in the preamble of the resolution does not entail a legal effect[13]. But such an argument cannot be upheld. First, the international jurisprudence is consistent in granting legal effect to preambles of resolutions and treaties — see for instance the *Namibia* Advisory Opinion[14] or the *Beagle Channel* Arbitral Award[15] — and second, the preamble of resolution 1244 must be read together with operative paragraph 5 of resolution 1160[16].

18. Moreover, it was argued that confirmation of territorial integrity is only for the interim period, because of the reference to "Annex 2"[17]. I will make two points on this issue. First, before mentioning "Annex 2", paragraph 10 refers to the Helsinki Final Act, which sets forth *inter alia* two key principles: territorial integrity and inviolability of frontiers. Second, the combined effect of resolutions 1160, 1199 and 1244 imposes the legal consequence that the status of Kosovo should respect the sovereignty of Serbia. As I stated before, this prohibits the establishment of independence without the agreement of both sides concerned.

Distinction between "interim settlement" and "final settlement"

19. It was also argued[18] that a distinction should be made between the "final settlement" — letters *(e)* and *(f)* of paragraph 11 of resolution 1244, and the "interim settlement" — letter *(a)* of paragraph 11, in the sense that only the latter is subject to the legal framing of "substantial

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[13]Written Contribution of the authors of the Unilateral Declaration of Independence regarding the Written Statements, p. 67, para. 4.15.

[14]*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 32, p. 46, para. 92, p. 51, para. 107, p. 52, para. 109, p. 53, para. 115.

[15]*Case Concerning a dispute between Argentina and Chile concerning the Beagle Channe*l, 18 Feb. 1977, *RIAA*, Vol. XXI, p. 89.

[16]*Supra*, para. 17.

[17]CR 2009/30, p. 32, para. 26.

[18]Written Statement of France, p. 23, para. 2.33; CR 2009/25, p. 51, para. 24 (authors of the Unilateral Declaration of Independence).

autonomy and self-government" within Serbia. Moreover, it was argued[19] that the final process should be submitted only to the principles of the Rambouillet Accords, which speak about the "will of the people". I will make four comments on these arguments.

20. First, as enshrined in paragraph 11 of the preamble of resolution 1244, the Security Council called in the previous resolutions for "substantial autonomy and meaningful self-administration" for Kosovo without distinction between an interim solution and a final solution. At the same time, both letters *(a)* and *(e)* of operative paragraph 11 refer to the Rambouillet Accords. Thus, there is no need for such a distinction.

21. Second, the Rambouillet Accords themselves, which should be "taken into account" according to resolution 1244, reaffirm in a number of provisions the sovereignty and territorial integrity of the FRY[20]. For instance, Article 1 of the "Framework" sets forth that "the national communities shall not use their additional rights to endanger the . . . territorial integrity of the Federal Republic of Yugoslavia".

22. Third, the fact that the final chapter of the Rambouillet Agreement refers in its Article I.3 to the "will of the people" should definitely not be interpreted in the sense of taking account "only" of the will of the people. This is only one criterion. We should not forget that during the negotiations for Rambouillet, the delegation of Pristina stated that "a reference to sovereignty would constrain the delegation of Kosova to insist on a clearer formulation of the obligation to hold a referendum" and proposed for the following provision to be included in the preamble: "The people of Kosovo are entitled to exercise the right to self-determination." But, these proposals were not accepted. The reference to sovereignty remained[21]. Moreover, the same paragraph I.3 refers also to the Helsinki Final Act, being well known that two of its core fundamental principles are territorial integrity and the inviolability of frontiers.

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[19]CR 2009/25, p. 52, para. 27 (authors of the Unilateral Declaration of Independence); CR 2009/30, p. 61, para. 22.

[20]The preamble of the "Rambouillet Agreement", Art. 1 of the Framework, the preamble of Chap. 1 of the Framework, Art. 1 of its Chap. 7.

[21]Kosova Delegation Statement on New Proposal for a Settlement, 18 Feb. 1999, in Mark Weller, *The Crisis in Kosovo 1989-1999,* Documents and Analysis Publishing Ltd., Cambridge, pp. 444-445 — the Statement provided: "(the proposal was not accepted)".

23. Fourth, in no way the Security Council could have imposed to one State to accept the secession of a portion of its territory, in the absence of agreement of the parties concerned or in other situations than those where self-determination applied, in the colonial context. As recalled by Judge Fitzmaurice in his dissenting opinion in *Namibia*, the Security Council may not "abrogate or alter territorial rights, whether of sovereignty or administration" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 294, para. 115, dissenting opinion of Judge Fitzmaurice).

The obligation to negotiate

24. Mr. President, Members of the Court, it was argued by certain participants to these proceedings that the principle of a negotiated and agreed solution was rendered inapplicable by the fact that "all possibilities of negotiation have been exhausted"[22].

25. In our case, the general international law obligation to negotiate in good faith precludes the assumption that all such possibilities have been exhausted. As the Court recalled in *North Sea Continental Shelf*[23] case and in *Fisheries Jurisdiction (United Kingdom* v. *Iceland*)[24], the parties are under the obligation to negotiate "with a view to arriving to an agreement, and not merely to go through a formal process". From the perspective of this case, it is apparent that this obligation was not fully respected. I quote from the Written Contribution of the authors of the Declaration: "Kosovo's position was clear. Pristina insisted that the settlement should result in the independence of Kosovo."[25] So, Kosovo's position was not only "clear", but also predetermined and immovable, from the very beginning of negotiations. It is of course true that the obligation to negotiate does not imply the obligation to reach an agreement, as the Permanent Court of International Justice stated in *Railway Traffic between Lithuania and Poland*[26]. However, the

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[22]E.g., Written Statement of the United Kingdom, pp. 67-68, 72-76.

[23]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47.

[24]*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 31; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*, p. 299.

[25]Written Contribution of the authors of the Unilateral Declaration of Independence, p. 98, para. 5.13.

[26]*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116.

obligation to negotiate implies the duty to accept the possibility of an agreement, and not to simply deny it by constant inflexible unilateral conduct.

Absence of a reaction from United Nations organs after the Declaration of Independence

26. Mr. President, Members of the Court, it was argued[27] that the absence of reaction of the Security Council after independence was declared could be interpreted as an acknowledgement from the part of the Council — or the international community in general — that secession did not breach any international law rules.

27. The compte rendu of the discussions of the Security Council meeting of 18 February 2008 provides a clear picture: there was disagreement among its members with respect to the legality of the attempt to create a new State.

28. Certain States denounced within that meeting the illegality of the Declaration of Independence, suggesting that United Nations bodies should take action. No decision was taken, however. In this context, I recall the Court's jurisprudence, especially the Advisory Opinion on *Competence of Assembly regarding Admission to the United Nations* (*Advisory Opinion, I.C.J. Reports 1950*, p. 9), stating that "The Court cannot accept the suggestion made . . . [that] the absence of a recommendation" could be treated as "equivalent to what is described . . . as an 'unfavourable recommendation'". Thus, an absence of a recommendation is nothing more than an absence of a recommendation.

29. Indeed, the United Nations position towards the status of Kosovo is "status neutrality"[28]. The fact that the Special Representative of the Secretary-General did not declare the Declaration of Independence as void, as Serbia requested, must in no way be interpreted as confirming the Declaration, but as consistent with this "status neutrality". As in the case of the Security Council, this absence of action means nothing more than an absence of action with no legal consequences attached.

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[27]E.g., Written Contribution of the authors of the Unilateral Declaration of Independence, pp. 175-176, para. 9.27. Also oral statements: CR 2009/25, pp. 60-61, paras. 56-61 (authors of the Unilateral Declaration of Independence); CR 2009/26, p. 13, para. 16 (Albania).

[28]S/2009/300; S/2009/149; S/2008/692; see, for example, statement of the Special Representative before the Security Council, 17 June 2009: "our *status neutrality* allows us to use our efforts to nurture and foster regional co-operation", doc. SC/9683, Security Council, 6144th Meeting, 17 June 2009.

30. What should be the meaning of "status neutrality" of the United Nations? First, disagreement among the United Nations Members both on a factual situation and on a legal question, as the General Assembly recalled in the preamble of resolution 63/3; second, the fact that the United Nations shall not back the position of either side, as long as there is no negotiated solution between Belgrade and Pristina. This reinforces the conclusion of my previous argument, that the solution in the case of Kosovo must be negotiated and agreed.

31. Mr. President, Members of the Court, allow me to summarize my arguments: (i) first, no compelling reasons should prevent the Court from exercising its jurisdiction; (ii) second, the Court should use its powers to interpret the question, in order to respond to the "true legal question"; (iii) third, general international law prohibits secession; (iv) fourth, the relevant Security Council resolutions provide for the respect of the territorial integrity of Serbia; (v) fifth, the solution of the Kosovo status process can be in no other way but negotiated and agreed by the parties.

32. Mr. President, Members of the Court, allow me to express my deepest gratitude for your kind attention. My colleague Cosmin Dinescu will continue the presentation of Romania.

M. DINESCU :

1. Monsieur le président, Messieurs les juges, c'est un grand honneur pour moi de paraître une nouvelle fois devant vous pour présenter la deuxième intervention de la Roumanie. Je me référerai dans mon exposé à l'applicabilité dans la présente affaire du droit des peuples à disposer d'eux-mêmes, une question traitée par pas mal de délégations, qui ont abouti, bien évidemment, à des conclusions diverses, sinon opposées. Avant de faire l'analyse de cette question, je me référerai brièvement à quelques points connexes.

L'existence ou non d'un droit à la sécession dans le droit international

2. Le premier élément est la question de la sécession. Certains participants à la présente procédure ont affirmé que, à l'instar des déclarations d'indépendance, lesquelles ne seraient ni réglementées, ni interdites par le droit international, la sécession, elle non plus, ne serait ni réglementée, ni interdite par le droit international[29]. Bien-sûr, très fréquemment la sécession est

[29] Voir, par exemple, l'exposé écrit du Royaume-Uni, p. 87-93, par. 5.12-5.33.

interdite par le droit constitutionnel interne, mais de telles interdictions seraient-elles pertinentes, étant donné que c'est le droit international qui est appliqué par la Cour, et non le droit interne[30].

3. La Roumanie ne partage pas une telle approche. Mon collègue et ami Bogdan Aurescu s'est déjà référé à certains aspects de cette question. J'y ajouterai quelques points importants. En ce qui concerne la relation entre la sécession et le droit international, on considère pleinement valables les principes énoncés par la Cour suprême du Canada dans son avis relatif à la sécession du Québec :

> «Le droit international attache une grande importance à l'intégrité territoriale des Etats Nations et, de manière générale, laisse le droit interne de l'Etat existant dont l'entité sécessionniste fait toujours partie décider de la création ou non d'un nouvel Etat... Dans les cas, comme celui qui nous occupe, où la sécession unilatérale serait incompatible avec la constitution interne, le droit international acceptera vraisemblablement cette conclusion, sous réserve du droit des peuples à disposer d'eux-mêmes, ou droit à l'autodétermination…»[31]

4. Donc, dans les situations où le droit interne des Etats ne permet pas la sécession, elle sera compatible au droit international seulement si *elle était une manifestation du droit des peuples à disposer d'eux-mêmes*. En d'autres mots : la présomption ne serait pas que la sécession soit conforme au droit international, donc les cas de non-conformité apparaîtraient seulement si la méconnaissance du droit était établie, mais à l'inverse : *la présomption est que la sécession n'est pas conforme au droit international, et les cas de conformité sont établis seulement s'ils sont basés soit sur le droit interne de l'Etat en cause, soit sur le droit des peuples à l'autodétermination.*

5. Dans ce contexte, sont pertinents les propos de Mme Rosalyn Higgins qui, en se référant aux mots du juge Dillard dans l'affaire du *Sahara occidental*, cités il y a deux jours dans l'exposé oral de la Finlande[32], remarquait que «it still has to be said that the territorial issue *does* come first. Until it is determined where territorial sovereignty lies, it is impossible to see if the inhabitants have a right of self-determination.»[33]

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[30] Voir, par exemple, l'exposé écrit du Royaume-Uni, p. 87, par. 5.13.

[31] *Renvoi relatif à la sécession du Québec*, Cour suprême du Canada, 1998, par. 112, disponible sur http://csc.lexum.umontreal.ca/fr/1998/1998rcs2-217/1998rcs2-217.html.

[32] «It is for the people to determine the destiny of the territory and not the territory the destiny of the people», *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 122, dans CR 2009/30, p. 54, par. 7 (Finlande).

[33] Higgins, Rosalyn, «International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law», *RCADI*, 1991, vol. 230, p. 174.

La date critique

6. Le deuxième point dont je vais discuter se réfère à la question de la date critique. Cette question est pertinente dans le contexte de l'analyse de l'applicabilité en l'espèce du droit des peuples à disposer d'eux-mêmes. La Roumanie note que certains participants aux procédures orales ont accordé de la pertinence à de nombreux éléments de fait ou de droit, soit épuisés antérieurement à la date de l'adoption de la déclaration d'indépendance, soit parus ultérieurement. A notre avis, baser l'analyse seulement sur des faits qui se sont produits presque une décennie avant la date critique, dans des circonstances fondamentalement différentes, représente une construction complètement artificielle, qui ne peut pas être acceptée. Une telle construction contreviendrait au principe général de droit *tempus regit actum*.

7. En conséquence, la date à prendre en considération pour l'analyse de l'applicabilité ou non du droit des peuples à disposer d'eux-mêmes est la date à laquelle la déclaration d'indépendance a été adoptée par les institutions provisoires d'administration du Kosovo. On ne peut qu'être d'accord avec la conclusion du Danemark à cet égard : «17 February 2008 is the crucial date»[34].

Le statut du Kosovo dans l'ancienne République socialiste fédérative de Yougoslavie

8. Monsieur le président, Messieurs les juges, plusieurs délégations se sont référées, dans leurs plaidoiries, au statut du Kosovo au sein de l'ancienne République socialiste fédérative de Yougoslavie (RSFY) et aux événements qui ont conduit à la terminaison de ce statut[35]. La Roumanie ne se prononce pas sur ces aspects du droit constitutionnel yougoslave et ne prétend pas les connaître mieux que certaines délégations qui représentent des pays anciens membres de la Fédération yougoslave.

9. Mais la Roumanie ne peut pas être d'accord avec la conclusion que le statut spécifique du Kosovo dans le cadre de l'ex-RSFY pourrait justifier la sécession unilatérale de la province ou l'applicabilité du droit à l'autodétermination à la date critique. Si le statut du Kosovo pendant l'ex-RFSY lui aurait permis d'invoquer avec succès un tel droit à l'époque de l'ex-RSFY est hors de la discussion : à la date de l'adoption de la déclaration d'indépendance, le Kosovo ne faisait plus

[34] CR 2009/29, p. 68 (Danemark).

[35] Par exemple, exposé oral de la Croatie, CR 2009/29, p. 59-59, par. 13-45 (Croatie).

partie de la République socialiste fédérative de Yougoslavie ; en effet, à ce moment l'ex-Fédération yougoslave avait déjà disparu depuis longtemps, la commission Badinter ayant confirmé sa «mort» dans sa huitième opinion seize ans avant. Dans ce contexte, je voudrais aussi exprimer le désaccord de la Roumanie avec certains arguments selon lesquels le processus de dissolution de l'ancienne Fédération yougoslave aurait continué après 1992[36], en incluant aussi l'indépendance du Monténégro ou la sécession du Kosovo. Le processus de dissolution de la République socialiste fédérative de Yougoslavie, caractérisé par des circonstances particulières, s'est terminé en 1992, tel que constaté par la commission Badinter, et les événements des années 2000 se sont produits dans des circonstances tout à fait différentes.

10. En conclusion, à la date critique, le Kosovo était partie intégrante de la Serbie, Etat continuateur de l'ex-République fédérale de Yougoslavie, mais non de l'ex-République socialiste fédérative de Yougoslavie. Comme la Cour s'est déjà prononcée, l'ex-RFY n'a pas été le continuateur de l'ex-RSFY, mais l'un des cinq Etats successeurs. Donc, même si le Kosovo aurait eu un statut particulier au sein de l'ex-RSFY, ce statut n'était plus applicable dans le cadre du nouvel Etat. Et c'est de ce nouvel Etat que le Kosovo tente faire sécession par la déclaration d'indépendance. Par conséquent, l'ancien statut du Kosovo dans l'ancienne Fédération yougoslave ne peut pas être invoqué comme justifiant un droit de sécession unilatérale ou l'applicabilité des droits à l'autodétermination. En même temps, je veux mentionner en passant que l'assertion que, après la dissolution de l'ex-République socialiste fédérative de Yougoslavie, le Kosovo n'est plus resté *de jure* comme partie de la nouvelle République fédérale de Yougoslavie[37] nous semble au moins étrange.

La qualité des auteurs de la déclaration d'indépendance

11. Un autre aspect qui doit être clarifié concerne la qualité dans laquelle les auteurs de la déclaration d'indépendance ont agi quand ils ont adopté cet acte. Pas mal de participants aux plaidoiries[38] ont opéré une distinction entre les institutions provisoires d'administration autonome

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[36] Voir, par exemple, l'exposé oral des Etats-Unis, CR 2009/30, p. 25, par. 7.

[37] CR 2009/31, p. 34, 41, par. 27-28, 53 (Jordanie).

[38] Voir, par exemple, l'exposé oral des auteurs de la déclaration d'indépendance, CR 2009/25, p. 11-17, par. 34-37 (Müller) ; l'exposé oral de la Norvège, CR 2009/31, p. 45-46, par. 13-15.

du Kosovo et les auteurs de la déclaration, qui ne représenteraient pas ces institutions mais un pouvoir constituant représentatif du Kosovo.

12. *Ad arguendo*, disons qu'on accepte une telle interprétation. Mais est-ce que ce fait changera les données de notre affaire ? A notre avis, la réponse est *non*. Indépendamment de la qualité des auteurs de la déclaration d'indépendance, cette déclaration, toute ensemble avec la sécession proclamée par elle, doit respecter les mêmes critères requis par le droit international applicable dans l'affaire : l'indépendance, comme solution pour le statut du Kosovo, quoique proclamée par les institutions provisoires d'administration ou par le pouvoir constitutif du Kosovo, ne peut pas être unilatérale. En même temps, la qualité du Kosovo de titulaire ou non du droit à l'autodétermination ne dépend pas de la qualité des auteurs de la déclaration ; il y a d'autres critères à appliquer.

Droit des peuples à disposer d'eux-mêmes — la règle

13. Monsieur le président, Messieurs les juges, je ferai maintenant l'analyse de l'applicabilité dans notre affaire du droit des peuples à l'autodétermination. On fonde notre position sur deux postulats :

a) premièrement, hors du contexte colonial, le droit des peuples à disposer d'eux-mêmes s'applique, comme règle, dans le cadre des Etats existants ;

b) et deuxièmement, une possible exception à cette règle serait la «sécession remède», selon laquelle le droit des peuples à disposer d'eux-mêmes pourrait s'appliquer à certaines parties des Etats existants, comme ultime ressort, dans des conditions strictement déterminées.

Je vais me référer aux deux questions dans les minutes suivantes.

14. La doctrine et la jurisprudence concordent en affirmant que, au-delà du contexte colonial ou des cas d'occupation, la règle établie par le principe d'autodétermination est que les peuples exercent ce droit dans le cadre des Etats existants. Le *dictum* de la Cour suprême du Canada, selon lequel «le droit d'un peuple à disposer de lui-même est normalement réalisé par voie d'autodétermination *interne* — à savoir la poursuite par ce peuple de son développement politique,

économique, social et culturel dans le cadre d'un Etat existant»[39] reste pleinement valable et ne fut contesté par aucun participant à nos plaidoiries.

15. D'ailleurs, la même conclusion a été clairement affirmée par l'éminent juriste James Crawford, dans son œuvre monumentale *The Creation of States in International Law.* Je suis sûr que M. Crawford nous dira davantage sur ce sujet aujourd'hui même, mais jusqu'à ce moment-là, j'oserai le citer :

> «[the principle of self-determination] applies to existing States … In this case the principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a State, a central element of which is the right of the people of the State to choose for themselves their own form of government.»[40]

16. Conformément à cette règle, il n'y a aucun conflit entre le droit à l'autodétermination et le droit à l'intégrité territoriale des Etats ; au contraire, les deux se renforcent mutuellement. Comme l'a dit la Cour suprême du Canada, «le droit à l'autodétermination est censé être exercé par des peuples, à l'intérieur d'Etats souverains existants, et conformément au principe du maintien de l'intégrité territoriale de ces Etats»[41].

17. Cette approche a été confirmée tout récemment par la mission internationale indépendante d'enquête sur le conflit en Géorgie, dans son rapport publié en septembre 2009 : «outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of a secession is not accepted in state practice.»[42]

18. En appliquant donc le principe de l'autodétermination à notre cas, il en résulte que le Kosovo n'est pas, et n'a pas été, à la date critique comme dans une quelconque période passée, une entité ayant le droit à l'autodétermination impliquant la sécession unilatérale de la Serbie. Le droit

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[39] *Renvoi relatif à la sécession du Québec*, Cour suprême du Canada, 1998, par. 126, disponible sur http://csc.lexum.umontreal.ca/fr/1998/1998rcs2-217/1998rcs2-217.html.

[40] «Il [le principe de l'autodétermination] s'applique aux Etats déjà existants ... Dans ce cas-là, le principe d'autodétermination prend la forme, très bien connue, de la règle de non-ingérence dans les affaires intérieures d'un autre Etat, dont l'élément central est le droit des peuples d'un Etat de choisir leur forme de gouvernement.» James Crawford, *La création des Etats dans le droit international* (*The Creation of States in International Law)*, 2e édition, Clarendon Press, Oxford, 2006, p. 126.

[41] *Renvoi relatif à la sécession du Québec*, Cour suprême du Canada, 1998, par. 122, disponible sur http://csc.lexum.umontreal.ca/fr/1998/1998rcs2-217/1998rcs2-217.html.

[42] «hors du contexte colonial, l'autodétermination est limitée pratiquement à l'autodétermination interne. Un droit à l'autodétermination externe dans la forme de la sécession n'est pas accepté dans la pratique des Etats.» ; rapport de la mission internationale indépendante d'enquête sur le conflit en Géorgie (Independent International Fact-Finding Mission on the Conflict in Georgia), disponible sur http://www.ceiig.ch/Report.html, p. 141.

des peuples à disposer d'eux-mêmes revient à tous les habitants de l'Etat serbe, y inclus les habitants du Kosovo, dans le cadre de l'Etat serbe.

19. Dans ce contexte, Monsieur le président, Messieurs les juges, je voudrais me référer à un autre argument avancé dans les plaidoiries : la référence à la «volonté du peuple» dans les accords de Rambouillet constituerait une base pour que le Kosovo jouisse du droit d'autodétermination impliquant la sécession. Je cite le représentant de la Norvège, qui a déclaré hier que

> «There is, therefore, incidentally no need in this case to undertake any further analysis of the principle of self-determination in international law. Resolution 1244 establishes, in the confined context of Kosovo, the unequivocal relevance of the will of the people of Kosovo in the determination of Kosovo's future status.»[43]

20. Mais la référence à la «volonté du peuple» ne représente pas la même chose qu'une référence au droit d'autodétermination. Premièrement, la «volonté du peuple» n'est pas le seul critère à être pris en compte dans le processus du règlement définitif pour le Kosovo. Plusieurs autres critères sont énoncés, y inclus «l'avis des autorités compétentes» ou «l'acte final d'Helsinki». Rien ne suggère guère l'existence d'une hiérarchie entre ces critères, qui aurait placé «la volonté du peuple» au sommet, comme le *principal* critère à considérer. Deuxièmement, il ne faut pas oublier que, pendant les négociations des accords de Rambouillet, les représentants de Pristina avaient proposé l'inclusion expresse du fait que «le peuple du Kosovo» est titulaire du droit à l'autodétermination ; cette proposition a été rejetée[44].

21. Par conséquent, la notion «volonté du peuple» n'est pas synonyme de «droit des peuples à disposer d'eux-mêmes» et la référence dans le texte des accords de Rambouillet ne peut pas être lue comme établissant le Kosovo comme titulaire du volet externe de ce droit. Il reste toutefois à déterminer si les conditions spécifiques du Kosovo à la date critique justifiaient l'application de l'éventuelle exception à la règle concernant l'autodétermination.

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[43] CR 2009/31, p. 51, par. 30 (Norvège).

[44] Kosova Delegation Statement on New Proposal for a Settlement, 18 février 1999, dans Mark Weller, *The Crisis in Kosovo 1989-1999,* Documents and Analysis Publishing Ltd., Cambridge, p. 444-445.

Droit des peuples à disposer d'eux-mêmes — une exception possible

22. «Scholarship has remained devided on the question of whether international law allows secession outside the colonial context in extreme circumstances.»[45] ; ce texte, extrait du rapport de la mission internationale d'enquête sur le conflit en Géorgie, fait preuve des incertitudes qui persistent encore en doctrine et jurisprudence concernant l'existence et la portée d'une exception à la règle concernant l'application du principe de l'autodétermination dans les cas des Etats existants.

23. Cette exception — la «sécession remède» — si on accepte son existence — n'intervient que comme ultime solution dans les situations de carence de souveraineté. «As a matter of international law as it stands — the savings clause does not imply that whenever the principles of non-discrimination and adequate representation are violated a «people» can lawfully claim a right to secession.»[46] C'est un extrait du rapport de la mission d'enquête sur le conflit en Géorgie qui conclut

> «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 does not form part of international law as it stands.»[47]

24. Quel que soit le statut de la «sécession remède» dans le droit international contemporain, il est clair que, pour que cette exception puisse s'appliquer dans une certaine situation, deux conditions doivent se trouver réunies :

— en premier lieu, la population d'une certaine partie de l'Etat en cause doit être soumise aux violations graves des droits de l'homme ou à d'autres formes d'oppression qui, au niveau interne, lui nieraient l'exercice du droit à l'autodétermination ensemble avec le reste de la population de cet Etat ; et

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[45] «Les académiques sont restés divisés sur la question si le droit international permet la sécession hors du contexte colonial dans des circonstances extrêmes.» ; rapport de la mission internationale indépendante d'enquête sur le conflit en Géorgie (Independent International Fact-Finding Mission on the Conflict in Georgia), disponible sur http://www.ceiig.ch/Report.html, p. 136.

[46] «En tant que question du droit international contemporain — la clause de sauvegarde n'implique pas que toute violation des principes de la non-discrimination et la représentation adéquate permettent à un «peuple» à demander licitement un droit de sécession.» ; rapport de la mission internationale indépendante d'enquête sur le conflit en Géorgie (Independent International Fact-Finding Mission on the Conflict in Georgia), disponible sur http://www.ceiig.ch/Report.html, p. 138.

[47] «Une permission limitée, conditionnée et extraordinaire de sécession comme ultime remède dans des cas extrêmes est débattue dans les milieux académiques juridiques internationaux. Toutefois, la plupart des auteurs sont d'opinion qu'un tel «droit» ou permission remède ne fait pas partie du droit international contemporain.» ; rapport de la mission internationale indépendante d'enquête sur le conflit en Géorgie (Independent International Fact-Finding Mission on the Conflict in Georgia), disponible sur http://www.ceiig.ch/Report.html, p. 141.

— en second lieu, dans une telle situation, qu'il n'existe pas une autre option valable pour remédier à ces carences dans le cadre de l'Etat respectif.

Les deux conditions sont cumulatives ; toutefois, l'analyse de la deuxième s'avère nécessaire seulement si la première est remplie : seulement si on refuse d'une manière abusive l'exercice significatif du droit à l'autodétermination interne à la population d'une certaine partie d'un Etat les évaluations des options réparatrices surgissent, la sécession étant le dernier recours.

25. Faisant l'application de la théorie au cas du Kosovo, il faudrait premièrement répondre si, *à la date critique*, la population du Kosovo était soumise à une violation flagrante des droits de l'homme ou à une autre forme d'oppression qui lui nierait l'exercice de son droit à l'autodétermination interne dans le cadre de l'Etat serbe.

26. La réponse ne peut être que négative : au moment de l'adoption de la déclaration d'indépendance, la population du Kosovo n'était pas soumise à une telle violation. Bien que le Kosovo était placé sous administration provisoire internationale, en conformité avec la résolution 1244, la Serbie, comme souverain, assurait le respect du droit à l'autodétermination de son peuple (y compris la population du Kosovo) par le respect complet des arrangements légaux en vigueur, notamment, au cas du Kosovo, la résolution 1244. En respectant la résolution 1244, l'Etat serbe prenait, en fait, la mesure qui était en son pouvoir à ce moment pour assurer le respect des droits fondamentaux de la population du Kosovo, y inclus le droit à l'autodétermination.

27. De plus, rien ne laisse à croire que, même dans l'hypothèse où le Kosovo avait été sous le contrôle effectif de l'Etat serbe à la date critique, sa population aurait été soumise aux violations graves de ses droits qui auraient justifier la sécession remède : même si le rappel des rapports positifs sur l'état des droits de l'homme en Serbie, rédigés par des institutions impartiales, inclus dans l'exposé écrit de la Roumanie[48], a été traité de «sélectif» par certains participants aux présentes plaidoiries[49], on ne peut pas nier que, en ce qui concerne le respect de l'Etat de droit, de la démocratie et des droits de l'homme, la Serbie de février 2008 et d'aujourd'hui n'a rien à faire avec la Serbie de 1999. Ce fait est confirmé par l'évolution du dialogue entre la Serbie et

[48] Voir l'exposé écrit de la Roumanie, p. 43-44, par. 151-156.

[49] Voir les observations écrites des auteurs de la déclaration unilatérale d'indépendance, note de bas de page n° 293.

l'Union européenne, concrétisé par la signature, seulement deux mois après la date critique[50], de l'accord de stabilisation et d'association, dont l'application intérimaire a été débloquée cette même semaine[51], confirmant le respect de l'Etat de droit en Serbie, y inclus sous l'aspect de la coopération avec le Tribunal pénal international pour l'ex-Yougoslavie, l'instance appelée à investiguer et juger, parmi d'autres, les crimes contre la population du Kosovo.

28. Parce qu'il est bien connu que dans les années 1990 des violations très sérieuses, même atroces, des droits de l'homme se sont produites au Kosovo. Mais la réponse de la communauté internationale face à ces violations n'a pas été la décision d'appliquer la sécession remède ; la réponse a été la résolution 1244 et, aussi, la présentation de ces faits à la juridiction du Tribunal pénal pour l'ex-Yougoslavie. La sécession remède ne peut pas se baser sur des faits produits une décennie avant — non plus sur des faits futurs, comme suggéré par certains participants aux présentes plaidoiries[52], y compris les Pays-Bas, dans la présentation qu'on vient d'entendre.

29. Au moment de la date critique, la population du Kosovo n'était pas l'objet de mauvais traitements de la part des autorités serbes de nature à justifier une sécession remède. De son côté, l'Etat serbe respectait, par le respect et la mise en oeuvre de la résolution 1244, ses obligations visant à assurer le droit à l'autodétermination (donc le volet interne) de la population du Kosovo. La résolution était le cadre de l'autonomie substantielle et de l'auto-administration du Kosovo au sein de la Serbie, elle était le cadre du respect de l'autodétermination interne. Etant arrivé à cette conclusion, il n'est pas nécessaire d'analyser la deuxième condition pour que la sécession remède soit admise, c'est-à-dire s'il y avaient d'autres options pour assurer l'exercice du droit à l'autodétermination interne, au sein de la Serbie, de la population du Kosovo. *N'existant aucune violation du droit, il n'était pas besoin d'un remède.*

30. En conclusion, à la date critique, les critères qui auraient pu justifier l'application d'une «sécession remède» du Kosovo, conçue comme exercice du droit de la population du Kosovo à l'autodétermination sous le volet externe, n'étaient pas remplis. Le Kosovo n'était pas une entité

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[50] Le 29 avril 2008.

[51] Conclusions du conseil des affaires générales de l'Union européenne du 7 décembre 2009.

[52] Par exemple, l'exposé oral de l'Allemagne, CR 2009/26, p. 31, par. 35-36.

titulaire du droit à l'autodétermination impliquant la sécession unilatérale de Serbie, donc la sécession désirée, toute ensemble avec la déclaration d'indépendance la proclamant, ne sont pas conformes au droit international.

Conclusions

31. Monsieur le président, Messieurs les juges, je voudrais vous présenter nos conclusions, en vous précisant qu'elles prennent aussi en compte les arguments non traités dans le présent exposé oral, mais inclus dans l'exposé écrit de la Roumanie :

a) la Cour a la compétence d'entretenir la requête pour avis consultatif et il n y a pas de «raisons décisives» pour que la Cour refuse de donner l'avis consultatif ;

b) la Cour doit déterminer la «véritable question juridique» posée, en analysant la question soumise dans son contexte et en liaison avec ses conséquences immédiates et intrinsèques, et d'une telle manière que la réponse soit utile à l'Assemblé générale et aux organes principaux des Nations Unies ;

c) la déclaration unilatérale d'indépendance n'est pas conforme aux dispositions de la résolution 1244 du Conseil de sécurité et des autres résolutions ou documents pertinents ; elle méconnaît aussi le régime juridique établi par les résolutions pertinentes de l'ONU, particulièrement la résolution 1244, qui est pleinement applicable ;

d) la déclaration unilatérale d'indépendance des institutions provisoires d'administration méconnaît le droit à l'intégrité territoriale de la Serbie et le principe de l'inviolabilité de ses frontières ;

e) le Kosovo n'est pas une entité titulaire du droit à l'autodétermination impliquant la sécession unilatérale de Serbie et, par conséquent, la déclaration unilatérale d'indépendance, ainsi que la sécession du Kosovo, ne sont pas conformes au droit international.

En conclusion, *la déclaration unilatérale d'indépendance des institutions provisoires d'administration autonome du Kosovo n'est pas conforme au droit international.*

Je vous remercie pour votre attention.

The PRESIDENT: I thank Mr. Cosmin Dinescu for his presentation. There is one more delegation, one more participant delegation which is expected to make its oral statement. I believe it is a good time now to take a short 15 minutes coffee break. We will reconvene at 11.30 a.m.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. I shall now give the floor to Mr. Daniel Bethlehem to make the oral submission of the United Kingdom.

Mr. BETHLEHEM:

1. Mr. President, Members of the Court, it is an honour for me to appear before you today in these proceedings in my capacity as Legal Adviser to the United Kingdom Foreign and Commonwealth Office. This is the eighth day of these oral hearings. We have followed the submissions closely. Virtually everything of substance that can be said has been said, and eloquently so. For these submissions we will therefore endeavour to stand back from the issues and focus on what we see as the pivotal points for the Court's deliberations as well as addressing a number of points made during the course of the hearings. We refer you to our written submissions for our more detailed arguments.

The pivotal issues in these proceedings

2. As we see it, there are two pivotal issues. The first is whether resolution 1244 prohibited Kosovo's Declaration of Independence. The second is whether Kosovo's Declaration of Independence was prohibited by general international law. There are other points, to be sure, but they arise along the way to these two central questions. There are also wider elements, such as the effect of the many recognitions of Kosovo's independence, the effect of other post-independence developments, and Kosovo's present status. But these are not part of the question addressed to the Court.

3. Mr. President, I will address the first of these issues, Professor Crawford will address the second.

General observations

4. Before I turn to resolution 1244, four observations of a more general nature are warranted, addressing, *first*, the outcome that Serbia seeks in response to the question referred to the Court; *second*, the current situation in and the status of Kosovo; *third*, the concerns expressed by some States at the potentially destabilizing effect of an acceptance of Kosovo's independence; and, *fourth*, the status of those who issued the Declaration of Independence.

5. Turning, *first*, to the outcome that Serbia seeks in response to the question referred to the Court. The question as formulated does not engage Kosovo's present status or the effect of the recognition of that independence by other States. Behind the question, however, as it is conceived by its author, is a challenge to Kosovo's independence and existence as a State. In his opening remarks for Serbia last week, Ambassador Bataković observed that the purpose of the advisory opinion was to secure an outcome in which Kosovo would engage with Serbia in good faith to achieve a solution to the question of its status that was consistent with international law[53].

6. Given this objective, the question that arises, and it is an appropriate question for a court of law, is where the outcome proposed by Serbia would take the two sides; where would it take us, the international community. In other words, would the outcome that Serbia seeks be sustainable? Professor Shaw, also speaking for Serbia, in seeking to make the point that international law now addresses non-State entities in certain specific circumstances, observed: "The clock may not be turned back."[54] But that is precisely the outcome that Serbia would wish from the Court. It seeks an advisory opinion that would compel Kosovo to re-engage with Serbia over its status. There is, however, no reason whatever to believe that an agreed outcome would be any more achievable now than it was in the past. Serbia has made it quite clear that it will never accept an independent Kosovo. Kosovo, for its part, has made it quite clear, that, given the legacy of abuse, it cannot again become part of Serbia. That impasse is as plain now as it was to the Contact Group, to the Secretary-General's Special Envoy, to the Troika, and to others. That impasse cannot be ignored.

7. A cardinal concern of every court must be to address whether the decision that is asked of it is capable of meaningful implementation. Courts strive not to order the unsustainable. They do

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[53]CR 2009/24, p. 35, para. 13.

[54]CR 2009/24, p. 66, para. 8.

not order estranged spouses to continue in a broken marriage. They seldom compel employers to re-hire aggrieved employees with whom the working relationship has broken down. In the present case, what we must hope for and what we must work towards is a rapprochement over time between Serbia and Kosovo under the umbrella of the European Union.

8. Turning, *second*, to the current situation in and status of Kosovo. We are almost two years on from Kosovo's Declaration of Independence. Foreign Minister Hyseni noted in his opening remarks that Kosovo is at peace today, with stable political institutions, successful elections recently held, engagement with international partners[55]. This stability is in many respects a feature and consequence of Kosovo's independence.

9. In his opening remarks for Serbia, Ambassador Bataković suggested that most States around the world opposed Kosovo's independence[56]. This is not accurate. There is no evidence of widespread opposition to Kosovo's independence. On the contrary, as the Court has heard, all of Kosovo's neighbours, with the exception of Serbia, have recognized Kosovo's independence. The vast majority of the member States of both the European Union and the Council of Europe have done so. A voting majority of the members of the Security Council at the point at which resolution 1244 was adopted — that is nine members — have recognized Kosovo. The total number of recognitions is 63, with upwards of 40 more having voted for Kosovo's membership of the International Monetary Fund and the World Bank[57]. In all likelihood, the vast majority of States that have not recognized Kosovo have no firm view on the matter, are hesitating in the face of the chilling effect of the present proceedings, or do not engage in formal practices of recognition. Apart from those 15 to 20 States that have participated in these proceedings and have, for their own very particular reasons, declared their opposition to Kosovo's independence, there is no evidence of widespread opposition to Kosovo's independence.

10. Turning, *third*, to the concerns expressed by some States at the potentially destabilizing effect of an acceptance of Kosovo's independence. The United Kingdom understands these concerns and takes them very seriously. In the circumstances that pertain, however, we do not

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[55]CR 2009/25, pp. 6-9, paras. 2-14.

[56]CR 2009/24, pp. 31-32, para. 4.

[57]CR 2009/25, p. 8, para. 10. See also the United Kingdom's Written Comments, para. 6.

believe that the concerns are warranted. It is nonetheless important that they are addressed. We sought to do so in our Written Statement in the clearest of terms which, given their importance, I reaffirm here today explicitly[58]. Stability in the international system is important and States in other parts of the world must have a clear understanding that the events in the Balkans, and Kosovo's Declaration of Independence, do not create risks of instability for them. We are very clear that the situation in Kosovo does not constitute a precedent for developments elsewhere. Kosovo's independence does not open the door for the fracturing of States more generally. Mr. President, Members of the Court, given these concerns, we would encourage the Court to consider saying in terms in its advisory opinion that the circumstances pertaining in Kosovo are highly particular and cannot be relied upon as a precedent in any other situation.

11. Let me dwell a moment longer on the special character of the Kosovo situation. This is, once again, a point that we have addressed fully in our written submissions, and I do not rehearse it in any detail here[59]. Contrary to the mischaracterization of this argument by some, we do not assert that Kosovo is to be judged by special rules of international law, or that it stood outside of the law. We do not assert a *sui generis* legal régime. The United Kingdom's contention is that, for reasons of the confluence of very particular *factual circumstances*, the situation of Kosovo does not create a precedent elsewhere.

12. In his closing remarks for Serbia last week, Mr. Obradović nonetheless stated that "[a] number of similar situations exist throughout the world and the independence of Kosovo would certainly be used as a precedent by separatist movements"[60]. He did not, however, quote any examples of such similar situations. In his submissions for Serbia, however, Professor Zimmermann gave two examples, Cyprus and Palestine, commenting that,

> "[f]ollowing the very logic of the authors of the UDI, it may become possible to argue that in the situations [of] Palestine or Cyprus, the respective situation has similarly reached a deadlock and that the international community should accordingly give in to so-called 'realities on the ground' . . ."[61].

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[58]Written Statement, para. 0.19.

[59]Written Statement,para. 0.22; Written Comments, paras. 11-14.

[60]CR 2009/24, p. 92, para. 8.

[61]CR 2009/24, p. 56, para. 38.

13. Let me take these examples in turn. In the case of northern Cyprus, an example also referred to with concern in the Cypriot submissions to the Court, the Security Council expressly concluded that the attempt to establish a State in the north of Cyprus was contrary to the 1960 Treaty establishing the Republic of Cyprus and the 1960 Treaty of Guarantee[62]. The Council went on, again expressly, to call upon all States not to recognize any State other than the Republic of Cyprus[63]. In that case, two resolutions of the Security Council expressly called for the non-recognition of northern Cyprus. That call has been steadfastly adhered to by the international community. An advisory opinion which affirms the legality of Kosovo's Declaration of Independence would have no precedential effect in the context of Cyprus.

14. Kosovo's Declaration of Independence is not incompatible with any treaty. The Security Council has not called upon the international community not to recognize Kosovo. The Council had competence to do so. It did not do so. Resolution 1244 (1999) could have said in express terms what some members of the Security Council at the time now contend that the resolution intended, namely, that no independence for Kosovo was possible without Serbian consent. The resolution did not so provide.

15. The Palestine example is interesting for other reasons, as there is some discussion about whether the Palestinian governmental institutions might declare the independence of Palestine. On Serbia's reasoning, were the Palestinian Legislative Council or other Palestinian representative body to declare the independence of Palestine, that declaration would not be in conformity with international law as it would have been declared by the Palestinian institutions of self-government established pursuant to the Oslo Accords between Israel and the Palestinian Liberation Organization and without any apparent competence to make such a declaration. We very much doubt whether the analysis that Serbia advances would be a tenable or credible analysis in that situation. It is not a tenable and credible analysis in the matter now before you.

16. This brings me to the *fourth* of my general points, the status of those who issued the Declaration of Independence. The Declaration of Independence was not an act of the Provisional Institutions of Self-Government. Nor did it purport to be. It was a Declaration of the

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[62]Security Council resolution 541 (1983).

[63]Security Council resolutions 541 (1983) and 550 (1984).

representatives of the people of Kosovo, reflecting what we have described in our Written Statement as "a unique constitutional moment in the history of Kosovo in which those elected by the people of Kosovo expressed the will of those they represented"[64]. The key issues for consideration in such circumstances are whether those issuing a declaration of independence represented those for whom they purported to speak and whether, in doing so, their voice was effective. Those declaring Kosovo's independence met both criteria.

Kosovo — retrospect and prospect

17. Mr. President, it is useful to recall the events of 20 years ago, in 1989, when Kosovo's autonomy within the then Socialist Federal Republic of Yugoslavia was crushed when Serbian tanks took up positions outside the Kosovo Assembly. I recall this event, and this passage of time, to highlight three points. The *first* is the tragedy that befell the region, and Kosovo, as that period opened and as the decade unfolded. We have a responsibility not to downplay, not to diminish, the extent of the human rights catastrophe that befell the people of the region, very largely at the hands of a dictatorial régime in Belgrade. And the *Milutinović* judgment of the International Criminal Tribunal for the former Yugoslavia confirms that atrocities on a very significant scale were committed against the people of Kosovo.

18. The *second* reason for recalling 1989, and the passage of 20 years since then, is to note how long it took to secure the measure of stability that we now have, and how this was achieved. The Serbian tanks in front of the Kosovo Assembly building were followed by ten years of trauma. After this came almost a decade of a search for a solution. This was not a search for a quick fix. It was rather a search for an enduring accommodation. This aspect was addressed in detail in our Written Statement, and I adopt the analysis set out therein.

19. Mr. President, Members of the Court, the *third* reason for recalling 1989, and the 20 years that have passed since then, is to look to the future. We are almost two years from Kosovo's independence. Kosovo is at peace today. This stability flows from Kosovo's independence. As Bulgaria noted in its submissions before the Court, a failure, in 2007-2008, to unblock the dispute over Kosovo's status would have led to a stalemate with severe consequences

[64] Written Statement, para. 1.12.

for the region as a whole[65]. Croatia observed that it considered that its recognition of Kosovo's independence contributed to the creation of conditions for peace and stability in the region[66]. We hope that the next ten years will bring a stable and brighter future than the two decades that have gone before.

Resolution 1244 (1999)

20. Mr. President, Members of the Court, I turn to resolution 1244 (1999). A number of States speaking before you have recalled that they were members of the Security Council in 1999 at the time of the adoption of resolution 1244 (1999). Argentina has made the point, and Brazil. China and Russia, as two of the permanent members, were of course closely involved in the process. The United States was also engaged, and France, and the Netherlands and Slovenia, all of which have also presented their views to the Court on the interpretation of the resolution. The United Kingdom was also intimately involved in the process.

21. Given the submissions before you, there is no escaping the point that there are duelling appreciations of what resolution 1244 (1999) meant.

22. What there can be no dispute about, however, is the words on the page. Those words do not prohibit Kosovo's independence. The disagreement comes down to what some contend must be implied into the resolution. It is also about the way forward when the political process contemplated by the resolution reached an unbridgeable impasse.

23. In saying this, I must emphasize that the United Kingdom did not come to support independence for Kosovo quickly or easily. Kosovo independence was not our default or presumed appreciation. The status-neutral character of the resolution was clear. It did not preordain any outcome. But, importantly, nor did it preclude any outcome.

24. In essence, resolution 1244 (1999) did four things. It adopted measures to secure and maintain an end to violence in Kosovo. It established *interim* institutions to ensure conditions for peace and normal life for all inhabitants in Kosovo. It established an *interim* framework based on substantial self-government for Kosovo taking full account of the sovereignty and territorial

[65]CR 2009/28, p. 18, para. 2.

[66]CR 2009/29, p. 51, para. 6.

integrity of the Federal Republic of Yugoslavia. And it put in train a *political* process designed to determine Kosovo's future status.

25. This differentiation between the *interim* phase and the *political* process is most clearly illustrated by paragraphs 11 *(a)* and 11 *(e)* of the resolution. Our good friends and colleagues, Romania, commented on this earlier today. Paragraph 11 *(a)* addresses substantial autonomy and self-government in Kosovo, pending a final settlement, and taking full account of Annex 2 of the resolution and the Rambouillet Accords. The reference to Annex 2 of the resolution addresses the principle of sovereignty and the territorial integrity of the Federal Republic of Yugoslavia during the interim period. In contrast to subparagraph *(a)*, subparagraph 11 *(e)* uses different language when addressing the political process designed to determine Kosovo's future status. Here, there is no reference to Annex 2 and the language of territorial integrity of the Federal Republic of Yugoslavia. The reference is simply to the Rambouillet Accords.

26. Both Spain and Russia addressed these provisions in their oral submissions[67]. Romania made more detailed submissions on this this morning. They failed, however, to address the clearly intentional decision to *exclude* reference to Annex 2 as an element to be taken into account in the political process designed to determine Kosovo's future. As you have heard in these proceedings, Rambouillet was based on the Hill final draft, which also excluded any Serbian right of veto to the permanent status outcome. We endorse Professor Murphy's analysis of this process last week. I note also that resolution 1244 (1999) did not reaffirm the Security Council's earlier resolutions. It simply recalled them.

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

[67]CR 2009/30, respectively pp. 13-14, paras.24-26, and p. 47, paras. 36-40.

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.

28. In the face of the unbridgeable impasse in the political process, the question was how resolution 1244 (1999) was properly to be construed and applied. On this, our analysis was, and remains, clear. The resolution was status neutral, neither scripting independence nor precluding it. Exhaustive efforts had been made by the international community, over an eight-year period, to secure an agreed solution. Those efforts had not been successful. They had, however, culminated in a carefully considered recommendation by the United Nations Secretary-General's Special Envoy in favour of independence. There was nothing in the resolution which either precluded independence in these circumstances or required Serbia's consent.

29. Mr. President, as others have said before us, there was a moment after Kosovo's Declaration of Independence when the Security Council might have addressed Kosovo's independence. It did not do so. The legality of the Declaration of Independence was not impugned by the Secretary-General. Nor was it impugned by the Secretary-General's Special Representative. These developments, or rather their absence, bolster our assessment that Kosovo's Declaration of Independence was not precluded by resolution 1244 (1999).

30. Mr. President, Members of the Court, before I hand over to Professor Crawford, let me conclude by saying that we do not see these proceedings as adversarial to Serbia. The past two decades have witnessed considerable trauma in the Balkans. Stability is fragile and needs to be protected, for the benefit of all of the peoples in the region. Serbia's democracy is not much older than Kosovo's. And, in the endeavour of enhancing stability and prosperity in the region, Serbia is an important partner with whom we are engaging in friendship and co-operation. We look forward to enhancing that co-operation, even as we seek, even through this legal process, to put the remaining ghosts of the past to rest. In his opening remarks, Foreign Minister Hyseni observed that "the common future for both Kosovo and Serbia lies in eventual membership for both States in the European Union"[68]. The United Kingdom supports that vision and we will continue to work towards its realization.

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[68]CR 2009/25, p. 9, para. 13.

31. Mr. President, with your permission, I would now like to ask Professor Crawford to address the second point that will be central to the Court's deliberations. Together with the American Declaration of Independence, his text has probably been the most widely quoted in these proceedings.

Mr. CRAWFORD:

DECLARATIONS OF INDEPENDENCE UNDER INTERNATIONAL LAW

The question before the Court

1. Mr. President, Members of the Court, according to Serbia, the question you are asked "is a narrow one inasmuch as it deals with the UDI and does not address related, but clearly distinct issues, such as recognition"[69]. Correspondingly it says that the legality of Kosovo's Declaration must be assessed as at 17 February 2008[70]. In short, Serbia wants this Court to condemn the Declaration of Independence in isolation, and to condemn it *as such*.

2. But Serbia's focus on the Declaration and on 17 February is misleading. Recognition and other "clearly distinct issues" was precisely what its presentation was about. Professor Zimmermann discussed recognition[71]. Professor Shaw did likewise[72]: he also included in the question the requirements of statehood[73]. And you have heard how, this morning, our Romanian friends had to completely rewrite the question in order to give the answer they wanted to it.

3. In fact, Serbia's focus on the Declaration of 17 February is a sleight of hand. Serbia wants the Court to say one historical thing so that it can say another current thing. It wants to draw conclusions from your answer about 17 February, conclusions that relate to the position now — while withholding from your jurisdiction the many events subsequent to that date which are a necessary part of any assessment. In other words, it wants you to judge the book of Kosovo without reading the later chapters — while nonetheless asserting that it will follow from your

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[69]CR 2009/24, p. 41, para. 17 (Djerić).

[70]Serbia R2/518-522.

[71]CR 2009/24, pp. 51-52, paras. 8-16 (Zimmerman).

[72]CR 2009/24, pp. 73-74, paras. 28-32 (Shaw).

[73]CR 2009/24, p. 74, para. 33 (Shaw).

ruling, confined to the Declaration of 17 February, that all subsequent steps, including recognition, are unlawful. You heard counsel for Serbia cite Sir Hersch Lauterpacht in support of the principle *ex injuria jus non oritur*[74]. The *injuria* that Serbia refers to is the Declaration of Independence. The *injuria* Lauterpacht was referring to was the invasion of Manchuria; in the following paragraph he referred to the annexation of Ethiopia. These were acts in international relations which were contrary to the most fundamental norms of the time in response to which the international community articulated the Stimson doctrine of non-recognition. They are quite unlike the present case.

4. Lauterpacht's own view of declarations of independence was precisely the opposite. I quote:

> "International law does not condemn rebellion or secession aiming at acquisition of independence. The formal renunciation of sovereignty by the parent State has never been regarded as a condition of the lawfulness of recognition."[75]

5. Mr. President, Members of the Court, I am a devoted but disgruntled South Australian. "I hereby declare the independence of South Australia." What has happened? Precisely nothing. Have I committed an internationally wrongful act in your presence? Of course not. Have I committed an ineffective act? Very likely. I have no representative capacity and no one will rally to my call. But does international law only condemn declarations of independence when made by representative bodies and not, for example, by military movements? Does international law only condemn declarations of independence when they are likely to be effective? It simply does not make any sense to say that unilateral declarations of independence are per se unlawful — yet no State in this case has suggested that general international law contains any more limited prohibition of such declarations; and none has been articulated in any of the sources of the law.

6. The reason is simple. A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community. That reaction may take time to reveal itself. But here the basic position is clear. There has been no condemnation by the

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[74]CR 2009/24, p. 88, para. 30 (Kohen), citing H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1948) 421.

[75]*Ibid.*, 8-10.

General Assembly or the Security Council; there have been a substantial number of recognitions. This is all in sharp contrast to cases where there has been a fundamental breach of international law in the circumstances surrounding the attempt to create a new State — as with the Bantustans, Southern Rhodesia, Manchukuo or the TRNC. In such cases the number of recognitions can be counted on the fingers of one hand, whether or not it is clapping.

7. In this context it must be stressed that international law *has* an institution with the function of determining claims to statehood. That institution is recognition by other States, leading in due course to diplomatic relations and admission to international organizations. A substantial measure of recognition is strong evidence of statehood, just as its absence is virtually conclusive the other way. In this context, general recognition can also have a curative effect as regards deficiencies in the manner in which a new State came into existence.

8. In common with many others who have appeared before you[76], the United Kingdom stresses that the Court has been asked a specific question. That question is intelligible and non-contradictory. Its proponent, Serbia, insisted on its formulation in the face of comments from the United Kingdom and others that it was the wrong question[77]. The question having been asked in those terms should be answered in those terms.

Illegality of declarations of independence as such — where is the evidence?

9. Mr. President, Members of the Court, it is said that declarations of independence are, as such, unlawful. Historically, they were the main method by which new States came into existence. Since when, and by what legal processes, have they been outlawed?

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[76]Anti-Declaration States: CR 2009/24, p. 41, para. 17 (Djerić, Serbia); CR 2009/30, p. 9, para. 7 (Escobar Hernández, Spain); CR 2009/30, pp. 40-41, para. 4 (Gevorgian, Russian Federation).

Pro-Declaration States: CR 2009/25, p. 14, para. 5 (Wood, Kosovo); CR 2009/25, p. 63, para. 71 (Murphy, Kosovo); CR 2009/26, p. 10, para. 7 (Frowein, Albania); CR 2009/26, p. 25, para. 4 (Wasum-Rainer, Germany); CR 2009/28, p. 23, paras. 18-20 (Dimitroff, Bulgaria); CR 2009/29, p. 52, para. 10 (Metelko-Zgombić, Croatia); CR 2009/29, pp. 67, 69, 72 (Winkler, Denmark); CR 2009/30, pp. 23, 36-38, paras. 2-3, 35-40 (Koh, USA).

See also Argentina, which urges consideration of wider issues, but concedes that the question is not of the type concerning "'les conséquences juridiques' d'une situation donnée", CR 2009/26, p. 49, para. 36 (Ruiz Cerutti, Argentina).

And see also Burundi, CR 2009/28, pp. 29-30 (no para. nos.) (d'Aspremont, Burundi): "L'accent mis sur la conformité au droit international montre très clairement que c'est une question de *légalité* qui est posée à la Cour. Il n'est donc nullement demandé à la Cour de se prononcer sur la question de savoir si le Kosovo constituait un Etat au jour de la déclaration d'indépendance ou au moment de la requête pour avis consultatif." (Emphasis in original.)

[77]See Written Statement of the United Kingdom, pp. 19-20, paras. 1.3-1.5.

10. Let us look at the sources of international law enumerated in Article 38 (2). No one has said that Kosovo's Declaration is prohibited by a particular treaty, comparable to the Cyprus Treaty of Guarantee which forbids separation of any part of Cyprus[78]. So that source of law is not at issue.

11. What about a general practice accepted as law? A prohibition on secession is certainly not to be found in pre-1919 international law.

12. Nor did the position change after 1919. The Aaland Islands Commissioners denied that any national group had the right "to separate themselves from the State of which they form part by the simple expression of a wish"[79], but there was no suggestion that international law made this expression of a wish into an internationally wrongful act.

13. Under the Charter too, the position did not change. In order to guarantee the territorial integrity of States, the Charter prohibited threat or use of force against the territorial integrity of Member States, but this prohibition is directed at other States. The Charter says nothing as to the lawfulness or otherwise of declarations of independence adopted by groups or peoples within a State.

14. State practice since 1945 has been consistent with the earlier position. To take the region in issue here, the events in the early 1990s in Yugoslavia were the subject of close scrutiny but neither the United Nations nor the European Union treated the multiple declarations of independence as themselves violative of international law[80]. They may or may not have been affected, but that is a different thing. Similarly with the Badinter Committee[81].

15. Nor is there any indication of such a prohibition as a general principle of law.

16. I turn to judicial decisions and the opinions of jurists. Issues of statehood have only occasionally arisen before you. But in dealing with *Bosnia and Herzegovina* you have not

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[78]Treaty of Guarantee (Cyprus-Greece-United Kingdom-Turkey), 16 Aug. 1960, 382 *UNTS* 2. See also Treaty of Alliance (Cyprus-Greece-Turkey), Art. II, 16 Aug. 1960, 397 *UNTS* 287.

[79]Report of the Commission of Jurists (Larnaude, Huber, Struycken), League of Nations *Special Supplement* No. 3 (Oct. 1920), pp. 5-6.

[80]E.g., CR 2009/30, p. 24, para. 4 (Koh, USA); CR 2009/30, p. 55, paras. 8-9 (Kaukoranta, Finland).

[81]See, e.g., respecting Croatia, Opinion No. 5 (11 Jan. 1992), 92 *ILR* 179, 180; respecting Slovenia, Opinion No. 7 (11 Jan. 1992), 92 *ILR* 188, 189. States noting that the Declarations of Independence of Slovenia and Croatia attracted no international censure: CR 2009/30, p. 29, para. 16 (Koh, USA); CR 2009/30, p. 55, para. 9 (Kaukoranta, Finland); CR 2009/27, pp. 10-11, para. 18 (Tichy, Austria). See also CR 2009/29, pp. 60-61, para. 49 (Metelko-Zgombić, Croatia) (noting that the Badinter Commission did not treat the Declarations of Independence as unlawful).

suggested that the declarations of independence were internationally unlawful; you simply cited them as facts[82]. But there is a precedent: the *Quebec* reference to the Canadian Supreme Court. There was a major difference in that case. Question 2 concerned whether Quebec had "the *right* to effect the secession of Quebec from Canada unilaterally"; here the question is whether Kosovo's Declaration of Independence was unlawful under international law. But one cannot have a right to do that which it is unlawful to do, and the Supreme Court proceedings and opinion are thus relevant here.

17. Seven international law experts gave evidence to the Supreme Court. Yet none of them suggested that there was such a rule. For example, Professor Abi-Saab — who cannot be accused of insensitivity to the concerns about the stability of developing States — said:

> "[W]hile international law does not recognize a right of secession outside the context of self-determination, this does not mean that it prohibits secession. The latter is basically a phenomenon not regulated by international law . . . it would be erroneous to say that secession violates the principle of the territorial integrity of the state, since this principle applies only in international relations . . . it does not apply within the state."[83]

And that was written on behalf of Quebec.

18. The lamented Professor Thomas Franck said:

> "[S]ecession is a well-known means of achieving statehood. It cannot seriously be argued today that international law *prohibits* secession. It cannot seriously be denied that international law permits secession . . . [T]he law imposes no duty on any people not to secede."[84]

Those propositions were expressly accepted by the experts for Canada[85]. All the experts agreed[86].

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[82]See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 604-605, para. 14. Yugoslavia's third and fourth preliminary objections asserted the unlawfulness of Bosnia and Herzegovina's "acts on independence" and declaration of independence. The fourth preliminary objection was eventually withdrawn; the third the Court rejected, fourteen votes to one (*ibid.*, p. 623, para. 47).

[83]*Ibid.*, pp. 72-73.

[84]*Ibid.*, p. 79; emphasis in original.

[85]See Crawford, "Response to Experts Reports of the Amicus Curiae": *ibid.*, p. 159, para. 9, pp. 160-161, paras. 13-14.

[86]Reprinted in Anne Bayefsky (ed.), *Self-Determination in International Law. Quebec and Lessons Learned* (Kluwer, The Hague, 2000); George Abi-Saab, "The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law," Pt. III, p. 72; Christine Chinkin, 233 *ff*; James Crawford, "Response to Experts Reports of the Amicus Curiae", p. 159, para. 9, p. 160, para. 13; Thomas M. Franck, "Opinion Directed at Question 2 of the Reference", para. 2.9, p. 78, "Opinion Directed at Response of Professor Crawford and Wildhaber", pp. 179-180, paras. 3-4, p. 181, para. 8; Alain Pellet, "Legal Opinion on Certain Questions of International Law Raised by the Reference", p. 122, para. 44, "Legal Opinion on Certain Questions of International Law Raised by the Reference", p. 212; Malcolm Shaw, "Re: Order in Council PC 1996-1497 of 30 September 1996", p. 136, para. 43, "Observations Upon the Response of Professor Crawford to the Amicus Curiae's Expert Reports", p. 221, para. 24.

19. So too did the Supreme Court, in its unanimous opinion, though speaking in the context, as I have said, of a *right* to secede. Under the heading "Absence of a Specific Prohibition" it said:

> "International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination . . ."

International law contains neither a right to unilateral secession nor the explicit denial of such a right — and the quote then went on with the passage which my friend Mr. Dinescu quoted this morning, without quoting the introductory words. It is true that the Court emphasized the principle of territorial integrity to which I will revert, but the point is that international law, according to the Court, properly informed, while disfavouring secession, does not prohibit it. Except in extreme cases there is no "right of unilateral secession" but nor is there the "explicit denial of a right".

20. Moreover the Supreme Court was acutely aware of the possibility of international recognition, if Quebec had declared its independence, even though it had no right to secede in the first place[87].

21. Turning to that other element of Article 38 (2) *(d)*, *la doctrine*, it is instructive to search standard texts for the proposition that declarations of independence are unlawful and cannot be validly recognized. It is not to be found in the sixth edition of Shaw, the eighth edition of Brownlie or the ninth edition of *Oppenheim* edited by Jennings and Watts[88]. It is not in the eighth edition of Dallier, Forteau and Pellet[89]. Instead these books contemplate the continued possibility of secession. For example Malcolm Shaw — to take a random example — says:

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[87] *Reference re Secession of Quebec*, 1998, 2 *SCR* 217, para. 142; Bayefsky, pp. 500-501.

[88] *Oppenheim's International Law,* 9th ed., Harlow: Longman, 1992, Sec. 276, p. 717:

> "Revolt followed by secession has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition. The question at what time a loss of territory through revolt is consummated cannot be answered once and for all, since no hard and fast rule can be laid down regarding the time when a state which has broken off from another can be said to have established itself safely and permanently. It is perhaps now questionable whether the term revolt is entirely a happy one in this legal context. It would seem to indicate a particular kind of political situation rather than a legal mode of the loss of territorial sovereignty. If a revolt as a matter of fact results in the emergence of a new state, then this is the situation [of acquisition of territory by the new state]."

[89] *Droit International Public,* 8th ed., Paris: Lextenso éditions, 2009, Sec. 344, p. 585:

> "*There is, of course [there is, of course], no international legal duty to refrain from secession attempts: the situation remains subject to the domestic law.* However, should such a secession prove successful in fact, then the concepts of recognition and the appropriate criteria of statehood would prove relevant and determinative as to the new situation."[90]

I particularly like the phrase "of course".

22. To conclude, there is no basis for asserting a new rule of international law prohibiting declarations of independence as such.

Why does international law not condemn declarations of independence as unlawful?

23. Mr. President, Members of the Court, in principle that should complete my task; international law does not regulate declarations of independence as such, and there is nothing in the surrounding circumstances, including resolution 1244, to impose any contrary obligation.

24. But it is worth exploring the reasons why international law takes this position. The first of them is that international law does not attempt to regulate — in the manner of Article 2 (4) of the Charter — the course of conflicts within a State. It is difficult enough to regulate inter-State conflict, as the Court is only too well aware.

25. A second reason is a formal one. Professor Shaw sought support for his submission that international law does prohibit declarations of independence by relying on the general category of subjects of international law. Waving in the direction of international human rights law, he implied that we are all subjects now[91]. But as you pointed out in the *Reparation* case, to be a subject of international law says nothing at all about the content of your rights and duties[92]. It would be odd if human groups were given status as subjects precisely to deny them capacity to become really effective subjects, that is, States. That irony is replicated at the level of Kosovo. When Serbia

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> "S'opposent également les environnements juridiques des deux phénomènes: alors que le droit international réglemente aujourd'hui de façon très précise le processus de décolonisation, la sécession n'est pas prise en compte en elle-même par le droit international. Elle l'est seulement en tant que perturbation des relations internationales, sous l'angle de la belligérance et de l'insurrection . . . La pratique confirme en général ce 'désengagement' du droit international en la matière. Quelle que soit sa légalité au plan interne, la sécession est un fait politique au regard du droit international, qui se contente d'en tirer les conséquences lorsqu'elle aboutit à la mise en place d'autorités étatiques effectives et stables."

[90]Malcolm Shaw, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008, p. 218; emphasis added.

[91]CR 2009/24, p. 66, para 8 (Shaw).

[92]*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 178-180.

actually controlled Kosovo, it eliminated its constitutional status, it went close to expelling its population: after lawfully losing control, in the aftermath of resolution 1244, it now seeks to elevate Kosovo into a subject of international law — but only in order to regain the sovereignty it so signally abused.

26. The third reason relates to the principle of territorial integrity. Territorial integrity is not a trump card which overrides or negates the rest of established international law. It applies, in the context of instruments such as the Friendly Relations Declaration, to relations between States. Its primary function 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. True, when new rights are announced in international law — such as the rights of indigenous peoples[93] — great care is taken to ensure that this is not understood as an authorization to secede. But the question before you is not phrased in terms of authorization.

Summary of the law on declarations of independence

27. Mr. President, Members of the Court, during the course of these proceedings a number of governments have cited my work on secession in support of what you will already have realized are apparently contrasting conclusions[94]. I hope I can be forgiven, by way of summary, for setting the record straight. The relevant passage reads:

> "It is true that the hostility by all governments to secession in respect of their own territory has sometimes led to language implying that secession might be contrary to international law . . . But this language does not imply the existence of an international law rule prohibiting secession . . . The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."[95]

28. The text goes on to emphasize that this position of legal neutrality is accompanied by deference to the territorial sovereign and a reluctance to accept secession unless there is no other alternative. That is why the doomsday scenarios of which you have been told do not reflect reality. The crucial point here, however, is that this reluctance does not mean either that declarations of

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[93]See, e.g., CR 2009/24, p. 67, para. 11 (Shaw, Serbia), citing Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295, 13 Sep. 2007, Art. 46.

[94]CR 2009/24, pp. 79-80, para. 10 (Kohen, Serbia); CR 2009/26, p. 39, para. 10, p. 45, para 24 (Ruiz Cerutti, Argentina); CR 2009/27, p. 19, paras. 18-19 (Mehdiyev, Azerbaijan); CR 2009/28, p. 31 (d'Aspremont, Burundi).

[95]James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, OUP, 2006, pp. 389-390.

independence are internationally unlawful, nor does it take the form of a general prohibition. It is still a matter for States, through their recognition practice, and international organizations through their admission practice, to consider each case in the light of the circumstances. What Serbia cannot do is to treat 17 February 2008 as a critical date, exclude all developments and responses thereafter, and pretend that international law definitively determined the status of Kosovo on that day. As I have shown, it did not.

Self-determination (including "remedial secession")

29. Mr. President, Members of the Court, finally, I should say a word about the right of self-determination. If it were necessary to find an authorization — an express authorization — in international law for the independence of Kosovo, then it would be necessary for the Court to address this question. But it is not necessary for you to find an authorization in order for you to answer the question, as I have shown. If the Court finds that the Declaration of 17 February 2008 was not, as such, contrary to international law, it need not reach the issue of self-determination. In fact, as the pleadings before you have shown, there is considerable support for the exercise of self-determination outside the colonial context. And that position is tentatively put forward in the book from which I have quoted. For example, common Article 1 of the two Human Rights Covenants does not limit self-determination to colonial cases but articulates a general right, which must have some content, especially *in extremis*.

30. Remedial self-determination was left open by the Canadian Supreme Court which did not need to decide it, given the advanced position of Quebec within Canada[96]. But you would need to decide it before you could answer the question in the negative, against Kosovo. I stress that Quebec has never had its distinct status negated and then constitutionally denied, nor two thirds of its people chased violently from their homes and lands.

Mr. President, Members of the Court, that concludes the United Kingdom's presentation. Thank you for your patient attention.

The PRESIDENT: Thank you very much, Professor James Crawford.

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[96] *Reference re Secession of Quebec*, [1998] 2 *SCR* 217, para. 135; reprinted in Bayefsky (ed.), pp. 499-500.

This concludes the oral statement and comment of the United Kingdom of Great Britain and Northern Ireland and brings to a close today's hearings. The Court will meet again tomorrow at 10 a.m. when it will hear Venezuela and Viet Nam. The Court is adjourned.

The Court rose at 12.15 p.m.