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.