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Impact of the ICJ Advisory Opinion on Kosovo on the secession of Kosovo and Nagorno-Karabakh

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Since the Second World War only one case can be classified as a successful unilateral secession, that is Bangladesh.[2] After the dissolution of USSR and Yugoslavia, all attempts to create an independent state through unilateral secession failed.That is why, the recognition of the unilateral declaration of independence of Kosovo resulted in so many disputes between States, since it was against established State practice. Consequently, the General Assembly of UN asked for an Advisory opinion before the International Court of Justice (hereinafter: the Court). The question had been formulated by Serbia and was phrased in the following way: "Is the unilateral declaration of independence by the Provisional Institutions of self-government of Kosovo in accordance with international law?" The Court held that Kosovo's declaration of independence of 17 February 2008 did not violate the international law.[3]

In line with its traditional judicial economy, the Court restricts its opinion strictly to the narrow formulation of the General Assembly. The Court considers that it is question on legality of declaration of independence but not on consequences of declaration of independence or a right to secession.[4] Consequently, the Advisory Opinion does not address Kosovo's statehood, the effects on the practice of recognition and the legality of the unilateral secession. Even though this Opinion is not suffisant to justify the conformity with

international law the unilateral declaration of independance of Kosovo, the Court's findings allow to clarify some legal aspects of the unilateral secession.

The Court distinguished 3 "legal orders" in the Advisory Opinion on Kosovo: general international law, Security Council Resolution 1244 and constitutional framework. In the present article, we focus on the implication of this Advisory Opinion for general international law which directly affects the unilateral secessions, including the secession of Nagorno-Karabakh.[5]

The Advisory Opinion on Kosovo shows that the international law regulates very few aspects of secession, as judge Simma noted, the international law is "deliberately neutral or silent"in this matter[6]. It is mainly an internal affair of the affected State. International law does not govern the substance of secession (a normative title to produce it) (I) but it regulates its procedural aspects ("how" it takes place) (II).

I. "Legal neutrality" of international law in regard of secession

*The principle of territorial integrity and secession:*The Court interpreted restrictively the scope of the principle of territorial integrity and refused any reinterpretation of Article 2 (4) of the UN Charter. It declared that "the scope of the principle of territorial integrity is

confined to the sphere of relations between States."[7] Most leading international lawyers were of the opinion that international law does not prohibit secession insofar as the principle of territorial integrity applied in inter-state relations and not between the state and its own population.[8] Consequently, the principle of territorial integrity is not relevant in the Kosovo case. Where internal developments within a State lead to a secession of a part of that State, there is clearly not a violation of the principle of territorial integrity. But where a declaration of independence is brought about by the intervention of a third State one may very well call that intervention a violation of the principle of the territorial integrity.[9] Therefore, with regard to the intervention of Armenia in the Nagorno-Karabakh the principle of territorial integrity is relevant. [10] Even though the principle is not applicable to the secessionist group in Nagorno-Karabakh, it is applicable to Armenia as a third state.

Right to external self-determination or"remedial secession": The supporters of Kosovo's independence expressed in the course of the proceedings that the population of Kosovo has the right to create an independent state as either a manifestation of a right to external self-determination or pursuant to what has been described as a right of "remedial secession".[11] The ICJ has clearly indicated that it was not asked to take a position on the legality of unilateral secessions, but only the legality of a unilateral declaration of independence.[12] But the leading experts are against to "remedial secession". Professor James Crawford noted that there is substantional agreement with him and the experts of *Amicus Curiae* (Professors G. Abi-Saab, T. Franck, A. Pellet, and M. Shaw) that in non-colonial territories, self-determination does not equal a right to secede. [13] Even though many legal scholars and some States support the "remedial secession" or the external self determination, these rights cannot be considered as the rules of the positive international

law. In fact, neither the international conventions nor the international customs, especially the State practice, provide such rule, moreover, it cannot be justified by international judicial decisions.[14]

Principle of the territorial integrity and the principle of self-determination: On the one hand, taking into account the Court's finding that the principle of territorial integrity does not apply between the state and its own population and on the other hand, taking into account the eminent experts opinion that the right to self-determination does not all translate into the right to independence (therefore, it cannot by itself be the cause of the breakup of a pre-existing State)[15] one can conclude that there is no contradiction between the right to self-determination (in the non-colonial context) and the principle of territorial integrity.[16]

The principle of territorial integrity does not prohibit secession and international law does not recognize a right to secede outside the colonial context of self-determination. Under international law, secession remains an internal matter falling within the domestic jurisdiction of the State in question. But "[a] secession, finally successful, may be acknowledged as leading to independence".[17] International law "neither prohibits secession nor permits it"[18] It remains "legally neutral".

II. Procedural conditions of secession

Prohibition of a process of State secession due to use of force and egregious violations of norms of international law, in particular those of a peremptory character: The Kosovo Advisory Opinion distinguishes "between the objective of secession and the means to reach it".[19] The absence of an international legal prohibition on the making of a declaration of independence led the Court to conclude that such a declaration (and secession effected by it) did not violate the international law. However not all means to achieve this end are allowed. The Court stated that use of force and other egregious violations of norms of general international law are prohibited in the secession process.[20] Particularly, if such unilateral declaration of independence results directly from racial discrimination and the suppression of the right of peoples to self-determination [in the colonial context] (the Southern Rhodesia), the use of force by a third state (the Northern Cyprus) or "ethnic cleansing" and other massive and systematic human rights violations, especially peremptory norms (the Republika Srpska). The Security Council has explicitly qualified the aforementioned declarations of independence as "legally invalid".[21]

(Ir)Respect for the procedural conditions in the case of Kosovo and Nagorno-Karabakh: Three types of actor can participate in the secession process: third states, mother state and secessionist group and they have to respect procedural conditions as mentioned above, because an entity created by the unlawful use of force and by the violation of peremptory norms cannot be considered as a state.[22] Comparing the secession process of Kosovo and Nagorno-Karabakh, we can observe that these two cases were different. In the Kosovo case, the third state did not intervene (potentially Albania). Serbia as a mother state is entitled to oppose secession but it cannot use any means to do so (only lawful means are authorized).[23] "The excessive and indiscriminate use of force by Serbian security forces …which have resulted in numerous civilian casualties and … the

displacement of over 230,000 persons from their homes"[24] also resulted in NATO's intervention in 1999 and then intervention of the United Nations. Kosovo declared its independence in February 2008.

In the case of Karabakh, there has been an unlawful use of force by a third state (by Armenia) and by secessionist group, occupation of the 7 regions around the Nagorno-Karabakh, "ethnic cleansing" which resulted in hundreds thousands refugees, and other egregious violations of norms of general international law, and even norms of a peremptory character such as the prohibition of torture and genocide.[25]

The distinguishing feature from Kosovo is that in the Nagorno-Karabakh not the mother state (Azerbaijan) but a third state (Armenia) and the secessionist group unlawfully used force and committed egregious violations of norms of general international law.

Kosovo's secession process was far from perfect and the legality of its secession process is still disputed, but with regard to the secession process of Nagorno-Karabakh, the procedural conditions of the secession (non-use of force and non-egregious violations of norms of general international law) were definitively violated.[26]

[1] LL.M in international law (University of Strasbourg)

[2]James Crawford, "State Practice and International Law in Relation to Secession", British Yearbook of International Law (1998) 69(1), p. 114-115; "Secession is the process by which a particular group seeks to separate itself from the State to which it belongs, and to create a new State." Unilateral (secession) means that the process is accomplished without consent

of the concerned State. Ibid. p. 85 and p. 115

[3]*Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of the International Court of Justice, 22 July 2010, (hereinafter: Opinion) for text, see UN document A/64/881, also available on the internet http://www.icj-cij.org/docket/files/141/15987.pdf.

[4] Opinion., § 51 and §56

[5]The Court dealt with these issues very briefly, only in six paragraphs. Opinion. § 79-84

[6]Opinion., Declaration of Judge Simma,
§9; http://www.icj-cij.org/docket/files/141/15993.pdf

[7]Opinion. , §80

[8]Professor James Crawford noted that " … the reason why seceding groups are not bound by the international law rule of territorial integrity is not that international law in any sense favorites secession. It is simply that (with the exception of certain minimum rules of human rights and humanitarian law) such groups are not subjects of international law at all, in the way that states are. A group does not become a subject of international law simply by expressing its wish to secede. Until an advanced stage in the process, secession is a matter within the domestic jurisdiction of the affected state. The principle of territorial integrity ensures to the benefit of affected state. That stage is entitled to resist challenges to its territorial integrity, whether these challenges are internal (e.g. secession) or external", James Crawford, "Response to Experts Reports of the Amicus Curiae", 15 January 1998, in Bayefsky, "Self-determination in International Law: Quebec and Lessons Learned" (Kluwer, 2000), pp. 157-158, § 6; Alain Pellet, "Report: Legal Opinion on Certain Questions of

International Law Raised by the Reference", in Bayefsky, p. 98; Thomas M. Franck, "Report: Opinion Directed at Question 2 of the Reference", in Bayefsky, p. 77-79;

[9]Jochen Frowein, "Kosovo and Lotus", In From bilateralism to community interest : essays in honour of judge Bruno Simma, Fastenrath, Ulrich / Oxford University Press / 2011, p.926 ; Alexis Vahlas "Les séparations d'États. L'Organisation des Nations Unies, la sécession des peuples et l'unité des États", thèse de doctorat, Université Panthéon-Assas (dir. M. Bettati), 2000, s.282-310; http://www.afri-ct.org/IMG/pdf/DR0017.pdf

[10]Security Council resolutions 822, 853, 874, 884 in 1993, General Assembly resolution 62/243 in 2008, Resolution of the Parliamentary Assembly of the Council of Europe 1416 in 2005, European Parliament resolution 2009/2216 in 2010.

[11]Opinion. Writing proceedings, Estonia 2.1.2, Ireland §7 (d); Nederland §3; Poland §6; Swiss §81-86. Also Judge Cançado Trindade in his separate opinion pronounced in favor of the remedial secession using "humanist" conception of international law : " …the State , which was created and exists for human beings, and not *vice-verca*" (§176)and in his the separate opinion Judge Yusuf : "To determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be considered, such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government"(§16).

[12] Opinion. §56

[13]James Crawford, Ibid., p. 155

[14]Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice,"

St Antony's international Review 6, no. 1 (2010): 37–56 ;Milano Sterio « La théorie de la sécession remède (remedial secession) : avatar contemporain du droit des peuples à disposer d'eux-mêmes ?
», http://www.droitconstitutionnel.org/congresNancy/comN2/dubuyTD2.pdf

[15]Expert opinion prepared in 1992 by T.M. Franck,, R. Higgins, A. Pellet, M.N. Shaw and C. Tomuschat, "…The territorial integrity of Québec in the Event of the Attainment of Sovereignty" in Bayefsky, "Self-determination in International Law: Quebec and Lessons Learned" (Kluwer, 2000), § 3.13, p. 283

[16]"…the principle of territorial integrity is simply not applicable [to a secessionist group]; it can therefore not be violated and a right to violate it [as a "remedial-secession"] is not logically possible. Here, again, secession as such is not governed by international law, which remains "neutral". O. Corten, " Territorial integrity narrowly interpreted: Reasserting the classical inter-state paradigm of international law", Leiden Journal of International Law, 24 (2011), p. 93

[17]James Crawford, Ibid., p. 156

[18]G. Abi-Saab, Conclusion, in M. Kohen (ed.), Secession: international law perspectives, NewYork,NY[etc.] : CambridgeUniversityPress, 2006, p. 473-474

[19]Anne Peters, "Does Kosovo lie in the Lotus-Land of Freedom?", Leiden journal of international law, 24 (2011), p. 105-106, The author conclude that "even if secession as such is in conformity with international law (or not regulated by it), the *process* is regulated.", ibid. p. 107.

[20]The Court stated that "Indeed, it is entirely possible for a particular act – such as a

unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it." and that "the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)", Opinion,§56 and §81.

[21]Opinion, §81; Northern Cyprus S/RES/ 541, 1983, South Rhodesia S/RES/217, 1965, Republika Srpska S/RES/787, 1992.

[22]Some authors add also "consent of majority population through referendum" as the procedural condition of the secession. Marcelo Kohen , Introduction, in M. Kohen (ed.), Secession: international law perspectives, Ibid., p. 14; Antenollo Tancredi, "A normative "due process" in the creation of States through secession" in M. Kohen (ed.), Ibid., p.190, Anne Peters, "Does Kosovo lie in the Lotus-Land of Freedom?" Ibid., p. 107

[23]Although international law does not prohibit secession, "a state is entitled to oppose secession by all lawful means", James Crawford, Ibid., p. 155-156

[24]Security Council resolution 1199 (1998)

[25]See note 11.

[26]In any case, Azerbaijan should not recognize the independence of Kosovo, even if its independence does not violate international law, because when it is the intention of the State making the unilateral acts that it should become bound according to its terms, that intention confers on the unilateral act the character of a legal undertaking, the State being

thenceforth legally required to follow a course of conduct consistent with this act. (Legal status of Eastern Greenland (Norway v. Denmark) Permanent Court of International Justice, 1933 [1933] P.C.I.J. ser. a/b, no. 53, p. 71; Nuclear tests case (Australia & New Zealand v. France) International Court of Justice, 1974 [1974] I.C.J. 253, p. 457).