

# **TERRITORIAL INTEGRITY VERSUS SELF-DETERMINATION: THE CASE OF KOSOVO BEFORE THE ICJ**

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Professor Ernest Petrič has been, together with Professor Silvo Devetak, my privileged friend and colleague from Slovenia long before the dissolution of the Yugoslav Federation. I recollect my lecturing at the Faculty of Social and Political Sciences of the University of Ljubljana, as well as a wonderful trip of our families to the awesome Lake of Bled. Later on, after the accession of independence of our States, our duties separated us from personal contacts, but I was enthusiastic in accepting the invitation to present a contribution to the Collected Papers in his honour.

The choice of the topic of my paper was easy. Recently I have published a larger article to the Collected Papers of my Friend Santiago Torres Bernárdez from Spain, the former Registrar and Judge of the ICJ in The Hague. It deals with the process of disintegration of Yugoslavia and contains a critical review of all cases before the ICJ in which the Belgrade Government was a party. By the present text relating to the 2010 Advisory Opinion on Kosovo, I am completing this analysis.

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Two conflicting legal principles are present in modern international relations, both of fundamental political importance. The first is the principle of territorial integrity of all existing States within their internationally recognized frontiers (the territorial *status quo*). The opposing principle is that of equal rights and self-determination of “peoples”.

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*Pogačnik, M. and others (ed.): Challenges of Contemporary International Law and International Relations – Liber Amicorum in Honour of Ernest Petrič, p. 131-156*

When in the 19<sup>th</sup> century all remnants of natural law were repudiated, waging of even aggressive wars was recognized as a prerogative of sovereignty of all “civilized” States. That was at the time of the balance of powers which had operated with some interruptions ever since the Peace of Westphalia of 1648.<sup>1</sup>

The collective security system established by the Covenant of the League of Nations in 1919 was designed radically to change that situation. Its aim was to submit the use of force to some legal restrictions and to prevent the violations of the obligations assumed by the States to this end. One of the cornerstones of that system was Article 10 of the Covenant, which prescribed the following:

“The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”

The Kellogg-Briand pact, i.e. the General Treaty for Renunciation of War of 1928 outlawed the wars of aggression all together and served as such after 1945 as the legal basis for the prosecution of the German and Japanese leaders for the “crimes against peace”.

The UN Charter of 1945 extended the legal prohibition of aggression into that of “the threat or use of force against the territorial integrity and political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. Hence, the respect of territorial integrity and political independence of existing States has been considered since 1919 as the condition *sine qua non* for the maintenance of international peace and security. This principle is in its operation static and has the tendency to maintain the existing situation.

The opposite principle – that of self-determination of peoples – has been the political objective of colonial countries and some other non-self-governing political sub-divisions of States since World War I. It introduces the dynamics in the international relations. It got the strong impetus at the outset of World War II when the axis powers aspired to achieve a territorial aggrandizement by aggressive wars and to establish their hegemony over the whole continents.

On 14 August 1941 the U.S. President Roosevelt and the British Prime Minister Churchill announced their mutual goals for the world after the defeat of Germany, Italy and Japan, under the name of the Atlantic Charter. They proclaimed *inter alia* the following: *first*, their countries seek no aggrandizement, territorial or other; *second*, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; *third*, they respect the right of

<sup>1</sup> As a counterpart, in the second part of the XIXth century and until the outbreak of World War I first general conventions were concluded with the aim of humanization of warfare.

all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.

That Atlantic Charter was later adhered to by all States forming the Anti-fascist coalition in that war.<sup>2</sup> But it inspired also all the peoples under the colonial sway in their battle for independence, first of all those from the British India.

This political goal was transformed into a rule of international law first in Article 1(2) of the UN Charter of 1945 as one of the purposes of the international organization:

„2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.“

The authentic interpretation of all the principles of the United Nations stipulated in the UN Charter was given in the resolution 2625 (XXV) of the General Assembly adopted on 24 October 1970 by consensus, under an extensive and unusual title: „The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations“.

Here are the crucial parts concerning this principle:

“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.“

Nevertheless,

„Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. “

<sup>2</sup> However, the Soviet Union under Stalin did not honour especially the first commitment. It retained the newly acquired territories in Eastern Europe from Finland to Romania, including its annexation of the three Baltic States.

Hence, the separation is not the only option in exercising the right of self-determination, but it should not be prevented, especially not by the use of force. The free association or integration with an independent State is a legitimate alternative to this end. For instance, after the fall of the Berlin wall in 1989, the Member States of the U.S.S.R., Yugoslavia and Czecho-Slovakia opted for the dissolution of the existing federations and for their full independence. Unlike them, the German Democratic Republic merged into the Federal Republic of Germany, while the People's Democratic Republic of Yemen and the Yemen Arab Republic created a new State: the Republic of Yemen. All of these territorial changes were legitimate modes of implementing the right of self-determination by their respective peoples.

In this framework the principle of territorial integrity of such States "conducting themselves in compliance with" this principle "and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" was confirmed. Therefore, according to this interpretation, all States are not entitled to the respect of their territorial integrity. This relates especially to the States that undertake forcible actions against peoples living on their territory which seek to bring about their right to self-determination.

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The legal nature of the principle of self-determination was strongly confirmed in some statements by the International Court of Justice in the sense that today nobody can easily deny it as a principle of positive international law. In the Judgment of 30 June 1995 on *East Timor* (Portugal v. Australia) the Court confirmed Portugal's assertion,

"...that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *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, pp.31-32. paras. 52-53; *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, pp.31-33, paras. 54-59); it is one of the essential principles of contemporary international law..."<sup>3</sup>

This right was the subject-matter of a more comprehensive explanation by the same Court in its Advisory Opinion of 9 July 2004 on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*. It was first noted:

<sup>3</sup> Cf., I.C.J. Reports 1995, p.102, para. 29.

“...that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV)..., pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred /in that resolution/... of their right to self-determination”. Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that rights and to respect it, in conformity with the provisions of the United Nations Charter.”

The Court further recalled its previous practice on this issue, quoting in particular its *East Timor* Judgment of 1995, where it made clear “that the right of peoples to self-determination is today a right *erga omnes*”.<sup>4</sup>

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Some other precisions are necessary for the correct understanding of the legal scope of these two principles in their relations.<sup>5</sup>

First, it must be stressed that the UN Charter invokes the principle of “equal rights and self-determination” of peoples in a territorial rather than in an ethnic sense. This right belongs to all inhabitants of a non-self-governing or other territory, and not to all members of an ethnic group regardless of their domicile and actual citizenship. This second interpretation is still current in Central and Eastern Europe. For instance, before 1945 German national socialists struggled for the rights of all members of their race in a larger sense to live in one big State under the Fuehrer Adolf Hitler. For this reason they exterminated, expelled or submitted to measures of harsh discrimination other inhabitants of the territories they considered as theirs. In addition, they waged aggressive wars in order to acquire space for settlements of their group. It was similar to that what occurred during the process of disintegration of the Yugoslav Federation when the leadership of Serbia fought for an enlarged State in which all Serbs would be united. These abusive interpretations of this principle contradict equal rights of all other groups living mixed in the respective territory and especially their right to bare existence.

In any such territory seeking self-determination all its inhabitants must be granted equal civil and political rights and responsibilities. However, the

<sup>4</sup> *I.C.J. Reports 2004*, para. 88.

<sup>5</sup> This author has explained this relationship with more details in his lectures at The Hague Academy of International Law. See -- “Création et disparition de l’Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)», Académie de droit international de La Haye, Recueil des Cours (RCADI), tome 279 (1999), Martinus Nijhoff Publishers 2000, pp. 197-375, at pp. 330-366.

members of ethnic, religious or linguistic groups who differ from the rest of the population must enjoy special rights in order to preserve their identity.

From this proceeds the relationship between this principle of equal rights and self-determination of peoples (in the territorial sense) and another principle of respect of the territorial *status quo* and that of *uti possidetis*.

This was an important problem exposed in the process of breaking-up of the Yugoslav Federation. The (Badinter) Arbitration Commission of the Conference on Yugoslavia had set out some legal principles which were intended to terminate the fratricidal conflict then in course. In spite of the fact that the conflict was not immediately stopped, these principles were ultimately adopted by all successor States of that Federation including the Federal Republic of Yugoslavia (Serbia and Montenegro) after the fall of Slobodan Milošević in 2000. However, Serbia still denies them in respect of its former province of Kosovo.

In its Opinion No. 2 of 11 January 1992, the Commission issued an important statement:

“...it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”<sup>6</sup>

Hence, any unilateral changes of frontiers by the existing or a new State are not allowed. Respective States must agree on any such alterations that are at variance with the principle of *uti possidetis*.

This entire legal framework was exhaustively explained in the Opinion No. 3 of the same date:

“*First* -- All external frontiers must be respected in line with the principle stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlines Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties.”<sup>7</sup>

<sup>6</sup> The Commission further found that what was explained above: „Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law“, and they are „entitled to all rights accorded to minorities and ethnic groups under international law. *Ibid.*, pp. 1497-1499. These minority rights and other human rights are *jus cogens* for all States taking part in the process of State succession.

<sup>7</sup> This also means that all the neighbouring States, namely Italy, Austria, Hungary, Romania, Bulgaria, Greece and Albania, had to respect these frontiers with all the successor States to the former SFRY. This is in fact the obligation they all assumed on the basis of the principle under (III) on the inviolability of frontiers in the Declaration on Principles of the Helsinki Final Act of 1975.

*Second* -- The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at.<sup>8</sup>

*Third* -- Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, (1986) ICJ Reports 554 at 565): "Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."

The principle applies all the more readily to the Republics since the second and the fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent.

*Fourth* -- According to a well established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act...<sup>9</sup>

In the second paragraph, under *Third* above, the Commission quoted the last Federal Constitution of the SFRY incompletely. It was stipulated in its Article 5 that the territories and boundaries of the Republics, as well as of the Provinces, could not be altered without their consent. Hence, the boundaries of the Provinces of Vojvodina and Kosovo were equally protected as those of the six Republics. By this deliberate omission, the conflict in Kosovo which took place latter on could not be avoided.

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<sup>8</sup> In the above Declaration on Principles it was nevertheless confirmed under (I) that the existing frontiers can be changed "in accordance with international law, by peaceful means and by agreement". Hence, even the existing States can modify their common frontiers subject to these conditions, but not unilaterally and using force.

<sup>9</sup> Cf., *International Legal Materials* 1992, No. 6, pp. 1499-1500.



Nevertheless, it rarely happens that all respective parties within a State behave in accordance with the above principles.<sup>10</sup> Here is a short comment on the consequences of the conflict of these two principles in practice. The usual pattern of their behaviour is the following:

Every State endeavours to keep its own territorial integrity and political independence against any internal or foreign threat. For this reason any attempts of separation from actual States and of creation of new States meet at least in the beginning the disapprovals by most other States, including those which gained their independence quite recently. This is in fear of encouraging the tendency of secession by some of their own territorial sub-divisions.

It is not unusual that the government in the existing State tries to suppress the rebellion of the national liberation movement seeking independence by the cruellest means at its disposal. At the outset, these criminal acts do not meet the opposition in the international community, including the UN organs.

The national liberation movement in question invokes on its behalf the right of its "people" to self-determination and it reacts to the crimes already committed by its own unlawful practices. Hence, such a "non-international armed conflict" (or civil war) rapidly deteriorates into a chain of serious breaches of international humanitarian law that affect all the population regardless of their ethnic origin or religious or linguistic differences. It creates the problem of a huge number of refugees to other States or displaced persons inside the State affected by the conflict. It imposes costly measures of relief to civilians and cannot be ignored by the international community anymore.

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After these considerations of general nature we shall focus our attention to the circumstances of the dissolution of the SFRY and especially of the separation of Kosovo from Serbia.

The proclamation by Kosovo of its independence on 17 February 2008 was the ultimate result of the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY), of which this former Serbian province was also a component

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<sup>10</sup> Among rare cases of peaceful and orderly separation were those of Norway separating from Sweden in 1905 and the dissolution of Czecho-Slovakia in 1992. The demise of the Soviet Union did not provoke the conflict similar to that in Yugoslavia. However, there are still territories which are not incorporated into the legal system of the universally recognized successor States. Such territories include Transnistria on the western side of Moldova, Nagorno-Karabakh which was separated from Azerbaijan and the Azeri population evicted, but not recognized as independent or formally incorporated into Armenia. Finally, the Georgian provinces of South Ossetia and Abkhazia have even gained the recognition of their independence by the Russian Federation, Nicaragua, Venezuela and Nauru, but not by Georgia.



part. After that event, on 8 October 2008, the UN General Assembly requested, on the incentive of Serbia, that the International Court of Justice in The Hague (ICJ) renders its advisory opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"<sup>11</sup>

However, Serbia has put essentially the same question before the Arbitration Commission of the Conference on Yugoslavia already on 4 November 1991: "Is the secession of Slovenia and Croatia from Yugoslavia, carried out unilaterally and in a violent manner, a legal act from the standpoint of the United Nations Charter and other legally relevant instruments?"<sup>12</sup>

We shall here shortly explain the outcome of the question put forward in 1991. The answer of the Arbitration Commission was that the SFRY was at that critical time "in the process of dissolution" (Opinion No. 1 issued on 29 November 1991).<sup>12</sup> Later on, in its three Opinions, all issued on 4 July 1992, the Commission concluded that this process "is now complete and that the SFRY no longer exists" (Opinion No. 8); that "the SFRY's membership of international organizations must be terminated according to their statutes and that none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY" (Opinion No. 9); and that "the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY" (Opinion No. 10).<sup>13</sup>

These were the views of an impartial judicial body which were at that time all strongly rebutted by the FRY as allegedly unlawful. That was in spite of the fact that it was Serbia that formulated the questions addressed to the Arbitration Commission. These Opinions were as such not obligatory for the UN political organs, but could have a certain persuasive value for the Member States of the European Community (now Union) in the UN organs.

Shortly after that the FRY (Serbia and Montenegro) stopped to oppose the declarations of independence by Slovenia, Croatia, Bosnia-Herzegovina and Macedonia, as well as their admission into the UN membership. But it continued to claim the identity and continuity with the SFRY on the reduced territory for itself alone. That was made under the impact of the disintegration of the Soviet Union.

In these circumstances the UN Security Council acted as an organ of diplomacy, creating a confusing political situation that lasted for eight subsequent

<sup>11</sup> Serbia then expected the Arbitration Commission to adopt its own narrow legalistic approach to the principle of territorial integrity of existing States and to condemn, or perhaps even to prevent Slovenia and Croatia from breaking up the integrity and independence of Yugoslavia, at that time a UN Member State. However, the Serbian leadership did not take into account the process of dissolution of two other federations in Eastern Europe contributing to the acceleration of the disappearance of the SFRY with its own anti-constitutional and violent acts more than the leaderships of the Soviet Union and Czecho-Slovakia did in their respective cases.

<sup>12</sup> See the text -- *International Legal Materials* 1992, No. 6, pp.1494-1497.

<sup>13</sup> *Ibid.*, pp. 1521-1526.

years. In the preamble to its resolution 777 of 19 September 1992 it confirmed the fact that “the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist”, but it did not recommend to the General Assembly to terminate its membership of the UN. In its operative part the Security Council considered that the FRY (Serbia and Montenegro) could not automatically continue the UN membership of the former SFRY, and therefore recommended to the General Assembly to decide that the FRY should apply for membership to the UN, “and that it shall not participate in the work of the General Assembly”.<sup>14</sup>

In its resolution 47/I of 22 September, the General Assembly simply passed over the fact of crucial importance that the SFRY has ceased to exist. It confirmed the suggestion by the Security Council that the FRY should apply for the membership of the UN. However, the most controversial was the last conclusion that the FRY “shall not participate in the work of the General Assembly”. Later on, that ban of participation was extended to the Economic and Social Council as well.

Hence, contrary to the suggestion in Opinion No. 8 by the (Badinter) Arbitration Commission, SFRY’s membership of the UN has never been terminated. The FRY was allowed to keep the place of that non-existing State until its own admission to the UN membership as a new State. Like in its previous practice on State Succession, the UN Office of Legal Affairs only complicated that situation with its rather useless “legal answers”, instead of proposing simple and clear solutions to the problems created by the political organs.

Finally, after Slobodan Milošević lost power in the elections near the end of 2000 there was a complete turnabout. The new Government of the FRY in Serbia practically adhered to all the views of the Arbitration Commission from 1991 and 1992. Its new position was in fact a precondition for its admission to the UN membership. The Government renounced its previous claims of identity and continuity with the SFRY. It retrospectively recognized the fact that since its proclamation by the participants of the Joint Session of the parliaments of Montenegro and Serbia of 27 April 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) was a new State equal in rights with four other successor States of the former SFRY.

However, the FRY pretended in its new status to be a new State without obligations from the treaties formerly entered into by the SFRY, including the 1948 Genocide Convention. It relied, in fact, in all this on the “clean slate doctrine”

<sup>14</sup> The Security Council probably expected the FRY to abide by the previous resolutions under Chapter VII of the UN Charter and stop its involvement in the conflict in Bosnia-Herzegovina. In this expectation, the FRY was allowed to keep its mission to the UN as the *de facto* continuation of the SFRY, which at that time was no more than a ghost State. It could perhaps hope to acquire the same position as that of the Russian Federation whose full continuation with the former USSR was generally accepted. However, because of the FRY’s non-cooperative attitude its wishes never materialized.

in respect of conventional obligations of its predecessor State, which is now not unanimously adopted in practice.<sup>15</sup>

As widely known, the Federal Republic of Yugoslavia, which retrospectively proclaimed itself as a new State, was short-lived. On 4 February 2003, it was reconstituted into a loose union of “Serbia and Montenegro”, thus changing its official name. On 3 June 2006, Montenegro proclaimed its own independence, and on 28 June it was admitted to the UN membership. Serbia was then for the first time fully cooperative in this process of separations of former Yugoslav territorial entities. Hence, the ICJ in its Judgment of 2007 on the Genocide Convention with Bosnia-Herzegovina noted that:

“Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia ... and has assumed responsibility for “its commitments deriving from international treaties concluded by Serbia and Montenegro”... thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be continuator of Serbia and Montenegro”.<sup>16</sup>

Unlike that position, when on 17 February 2008 the former Serbian and Yugoslav province of Kosovo, with the huge majority of Albanian population, proclaimed its own independence, Serbia confronted that act with fervent disapproval. Since then Kosovo has been recognized by a number of foreign States, but not by Serbia, the Russian Federation, China, Greece, and Spain and some other countries that are anxious to keep their own territorial integrity.

There is, however, no rational explanation for this sharp difference in positions. There have always been a substantial number of Montenegrins who consider themselves to be part of the Serbian nation. Both peoples belong to the same South-Slavic ethnic group and they speak almost the same language. Most of the Montenegrin believers remained members of the Serbian Orthodox Church, although there are recent attempts for revival of the Montenegrin national Church that existed before 1918.

Unlike the Serbs and the Montenegrins, the Albanians belong to a non-Slavic ethnic group. Their language, although being Indo-European, is not understandable by the Serbs and *vice versa*. Mixed marriages between these two communities are very rare.

Nevertheless, most Serbs consider Kosovo as the cradle of their statehood and civilization. Some of the most precious Orthodox sacral monuments dating

<sup>15</sup> This shifting in positions by the Belgrade Government on its international status, together with the discrepant conclusions by the UN organs and controversial opinions issued by the Legal Counsels of the UN, all of that influenced the I.C.J. to adopt inconsistent decisions in cases in which Serbia or the F.R.Y. were a party. See details – V. D. DEGAN: “Legal position of Serbia and Montenegro following the break-up of the SFRY, *Guerra y Paz: 1045-2009*, Obra homenaje al Dr. Santiago Torres Bernárdez, Universidad Del País Vasco 2010, pp.121-165.

<sup>16</sup> Cf., I.C.J. Reports 2007, p. 75, para.75.

from the Middle Ages are situated there. The seat of the Serbian Orthodox patriarchs was in Peć in South-Western part of Kosovo from the late 13th century until 1766 when it was abolished by the Ottoman power.

Orthodox Serbs probably formed majority in that ethnically mixed territory during the 13th and 14th centuries at the peak of the Serbian statehood. As a result of the Battle of Kosovo in 1389 the independence of Serbia was wiped out and after a short period of vassalage all of Serbia was annexed to the Ottoman Empire in 1455.

During the Ottoman period which lasted until 1912, the central Government from Istanbul strongly relied on the more and more Islamized Albanians. In subordinate position, exposed to the measures of discrimination and to the Turkish arbitrary power were two Christian communities of Orthodox Serbs and Catholic Albanians. Hence, during the 19th century Albanians became the majority population in the present area of Kosovo. This was the result of the great migrations during the Ottoman period. Before that time the Orthodox Serbs were practically non-existent as religious group in present Vojvodina, Croatia and also in Bosnia except for the southern part of Herzegovina (Hum).

Serbia finally "liberated" that area together with the present Macedonia during the First Balkan War in 1912. The former ottoman Vilayet of Kosovo was then divided between Serbia, Montenegro and Albania. These changes were finalized by the Treaty of London of 1913. Nevertheless, by that "liberation" the ethnic situation in Kosovo further deteriorated instead of finding a reasonable and durable solution which could satisfy legitimate expectations of all groups.

After World War I Serbia and Montenegro, and the former Habsburg countries populated by the Slavs were united on 1st December 1918 into the Kingdom of Serbs, Croats and Slovenes which in 1929 was renamed into the Kingdom of Yugoslavia. The then new State was based on the fiction of unity of these three South-Slavic peoples, thus excluding Bulgarians. During World War II that formerly centralized Monarchy was reconstituted by the Partisan movement into the Federation of six Republics: Serbia, Croatia, Slovenia, Macedonia, Montenegro and the ethnically mixed Bosnia-Herzegovina.

After that war two territories were adjoined to Serbia, and provided with a special status. The Autonomous Province of Vojvodina with Serbs as the most important group had a higher status of self-government, while the Autonomous Kosovo-Metohia Area with strong Albanian majority had almost no autonomy. By the new Federal Constitution of 1963 Kosovo-Metohia was also formally proclaimed as "province" with little changes at that time in practice.

During the period since 1912 the Serbian and later on Yugoslav authorities instituted a series of forcible measures aimed at decreasing the Albanian population and increasing the number of Serbs and Montenegrins by the policy of colonization in the Albanian populated areas. The Albanians were even proclaimed as Turks and two treaties in 1935 and 1938 were concluded with Turkey for their

expatriation there. The outbreak of World War II prevented that design. Schools in the Albanian and Macedonian languages did not exist.

The exception to this was the period during World War II when fascist Italy annexed Western Macedonia, most of Kosovo and some parts of Montenegro to Albania under a fake personal union with it. The colonists were then forced to leave these territories.

This anti-Albanian policy continued after 1945 until the fall of Aleksandar Ranković, the powerful federal Minister of Interior, in 1966. After that event the Yugoslav lifetime president Josip Broz Tito wanted to secure the survival of that Federation after his death. Through deep constitutional reforms since 1969, which were confirmed in the last Federal Constitution of 1974, Yugoslavia was transformed into a proper federation of its Member States. Both Kosovo and Vojvodina formally remained parts of Serbia, but they became elements of the Federation as well.

Already the 1971 Constitutional Amendments established the Presidency of Yugoslavia as its collective Head of State. In that supreme organ, which was the Commander-in-Chief of the Yugoslav Army, one member elected by their local Assemblies represented each of the Republics and Provinces respectively. It was provided that this Presidency would perform its functions parallel with Tito as its lifetime President, and autonomously after his passing away.

Most importantly, the Yugoslav League of Communists federalized itself into an association of the Leagues of Communists of all the Republics and Provinces respectively.

The Albanians in Kosovo and Macedonia experienced these reforms as their national renaissance. Since 1912, nobody had asked them whether they wanted to live within Serbia or Yugoslavia or not. In that short period of time they established institutions of higher education in their own language. All posts in the Federal administration, in diplomacy and in the Yugoslav Army were open to them if they were faithful members of the League of Communists.

However, this new era of equality of all republics and provinces and of a free alliance of all nations and other national groups in Yugoslavia lasted only until the death of Tito on 4 May 1980. Since then the nationalists in the leadership of the League of Communists of Serbia did their utmost to destroy the Yugoslav Federation based on these principles. They tried first of all to suppress the autonomy of Kosovo and Vojvodina and fully integrate them with Serbia. They were helped in this by an event in Kosovo itself.

In March 1981, mass demonstrations of students at the Prishtina University took place with the slogan: "Kosovo – Republic", claiming for the autonomous province the full status of the seventh Republic in the Federation. That claim appeared legitimate, but at that very time it was unwise. Thereafter, many Albanian communists were accused of the alleged crime of "counter-revolution" and were excluded from the Party. That meant the end of their career in Yugoslavia.

The student claims were the detonator of a greater Serbian nationalism. The root of the problem was a very unequal birth rate between di While the birth rate of the Albanians in Kosovo and Macedonia was the highest in Europe, higher even than in Albania itself, the birth rate of the Serbs and all other Yugoslav ethnic groups was very low or even negative. The Serbs feared to lose Kosovo because the share of the Serbs and Montenegrins fell to about 10 per cent in its total population. It was not difficult to manipulate with these feelings of the Serbs. They did not take into account that, when they constituted majority in the pre-Ottoman time in Kosovo, they did not exist as a group in countries they claim nowadays.

In that heated atmosphere, the leading position of the League of Communists of Serbia was assumed the ultra-nationalist Slobodan Milošević. In a series of carefully organized “anti-bureaucratic” demonstrations in 1988 and 1989, he won the full control over Vojvodina, Montenegro and Kosovo itself. With the adoption of the amendments to the Constitution of Serbia on 27 March 1989, the autonomy of Kosovo and Vojvodina was suppressed, obviously against the will of the majority of the Albanians in Kosovo. Prior to that, on 23 March, the Assembly of Kosovo itself had to adopt by the majority vote all these amendments. The building of the Assembly was at the time surrounded by tanks, and many Albanian politicians who dared to oppose Milošević’s policy had been arrested. After that, Milošević could rule over 90% of the Albanians in Kosovo only with ruthless police terror, and he actually did. But the terror could not last forever.

These violent events incited the Communist party leadership and people in other Republics to defend themselves from the “anti-bureaucratic revolutions” exported from Serbia and to seek even their separation from Yugoslavia. Milošević had prepared two scenarios for this situation that he created himself.

The first scenario was to impose through the League of Communists of Yugoslavia the hegemony of Serbia as it existed before World War II on the rest of Yugoslavia. The last Fourteenth Congress of the League was convoked in Belgrade in January 1990, but the result was that the delegates from Slovenia and Croatia left it, and that was the end of the League of Communists on the federal level. In Slovenia and Croatia there were organized free multi-party elections and that was a step towards the disintegration of Yugoslavia itself in 1991.

The alternative Milošević’s plan was that of creating the Greater Serbia by joining together all the territories in which the Serbs lived in all the Republics and Provinces, even those where they constituted a minority in population. Only Slovenia was protected from this attempt because it has no substantive Serbian population. In fact, it was not a matter of protecting the Serbs, but of seizing territories outside Serbia. The Yugoslav Army, abandoned by its non-Serb officers and by some Serb officers who still believed in the idea of Tito’s Yugoslavia, committed aggressive assaults, first in Slovenia and Croatia in the summer 1991 and the next year throughout Bosnia-Herzegovina.



After the formal suppression of autonomy of Kosovo in March 1989, members of the non-Serbian population, especially the Albanians, were dismissed on a massive scale from their jobs in mines and other enterprises, from schools, hospitals and cultural institutions. Education in the Albanian language was abolished at all levels, which prior to 1989 used to be a vested right of that population. Its Albanian population opposed to the large-scale measures of that discrimination by passive resistance only. It was expected that the Dayton-Paris Agreements would improve their situation as well. After these expectations were betrayed, the Kosovo Liberation Army was organized.

In 1998, the first large-scale clashes of the Serbian police and the Yugoslav Army with the Kosovo Liberation Army took place. Then, massive crimes were committed against the Albanian civilians. The UN Security Council resolution 1199 of 23 September 1998 noted the displacement of over 230,000 persons from their homes, of which 50,000 were without shelter and other basic necessities. The first wave of refugees appeared in the northern Albania, Macedonia and Bosnia-Herzegovina. During these events, massacres of the civilians occurred, including women and children, in particular in the village of Račak.

That situation was temporarily halted by a new Security Council resolution 1203 of 24 October 1998. A Verification Mission of the OSCE to Kosovo was agreed on, while NATO assumed the verification from the air.

Already the previous resolution 1160 of 31 March 1998 had supported a peaceful resolution of the Kosovo problem by the interested parties, based on the territorial integrity of the FRY and enhancing the status of Kosovo which would include "a substantially greater degree of autonomy and meaningful self-administration". The negotiations in Rambouillet, France, did not produce an agreement on this basis because the FRY refuted the solution proposed.

Parallel to the beginning of NATO air strikes on 23 March 1999, massacres of civilians and expulsion of populations in previously unseen proportions started. Up to a million refugees were driven to Albania, Macedonia, Montenegro and Bosnia-Herzegovina in 1999. That action was prepared in advance, and it was carried out according to plan. More than half of the population of Kosovo was expelled from their homes. Many villages were razed to the ground. That was Milošević's last lunatic attempt to assure in that "Serbian" province a balance between the Serbian and Albanian population.

It must be concluded that it was not the NATO action that was the reason for the exodus. The exodus in its massive proportions was premeditated, and a previous one had taken place, according to a plan, a year before.<sup>17</sup>

<sup>17</sup> Hence, NATO air strikes appear to fulfill the requirements of humanitarian intervention even in the absence of a Security Council resolution under Chapter VII of the UN Charter that should otherwise authorize it. In such situation enforcement action can be justified by general international law, at least as this author conceives it. The views of this author are in minority in respect to other doctrinal opinions expressed so far. See the details -- V.D. Degan: "Humanitarian intervention (NATO action against the Federal Republic of Yugoslavia in 1999)", L.C. Vohrah *et al.* (eds): *Man's Inhumanity to Man*, Essays on International Law in Honour of Antonio Cassese, Kluwer Law International 2003, pp.233-259, especially at pp.248-253.



In discussing the conflict of the two fundamental legal principles in abstract terms, the above facts should not be ignored.

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The NATO action ended with the adoption of the UN Security Council resolution 1244 (1999), under Chapter VII of the UN Charter, on 10 June 1999. As a result all the military, police and paramilitary forces of the FRY were withdrawn from Kosovo. Hence, Serbia lost its control over its former province probably forever. The interim administration of that province was established. It provided transitional administration “while establishing and overseeing the development of provisional democratic self-governing institutions”. On 12 June 1999 the Secretary-General presented to the Security Council “a preliminary operational concept for the overall organization of the civil presence”, which is known as the UN Interim Administration Mission in Kosovo (UNMIK).

The powers and responsibilities thus laid out in the Security Council resolution 1244 were set out in more details in the UNMIC regulation 2001/9 of 15 May 2001 on a “Constitutional Framework for Provisional Self-Government”. It defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and these Provisional Institutions of Self-Government elected by the local population. These institutions could not affect or diminish the ultimate authority of the first.

By 2007 a plan had been formulated for the future of Kosovo by the UN Special Envoy Martti Ahtisaari, the former president of Finland. He tried to dissipate the grievances by Serbia and to this end proposed the decentralization of the local government as a measure to protect the Kosovo Serb communities. The protection of the Serbian Orthodox Church heritage and institutional guarantees for the rights of Kosovo’s minorities were also provided. In order further to protect the legitimate interests of the Serbs, Ahtisaari finally recommended the independence of Kosovo after a period of interim supervision.

That attempt failed because of its refusal by Serbia and its ally Russia. During the protracted negotiations the Belgrade Government insisted on the imprecise formula for Kosovo: “more than autonomy, less than independence”, which was the way to thwart the final settlement, while its Albanians claimed no less than full independence from Serbia.

After these fruitless negotiations, on 17 February 2008, members of the Assembly of Kosovo declared that Kosovo is independent from Serbia; Kosovo Serb parliamentarians, however, boycotted the session. The Declaration of Independence pledged compliance with the process envisioned in the Ahtisaari Plan, and also stated: “/We/ shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution

1244". Hence, this Declaration did not unilaterally change the competencies and responsibilities of international bodies over Kosovo's territory.

The independence of Kosovo has been so far recognized by 75 countries out of 192 UN Member States. Among them are 22 out of 27 Member States of the European Union, and two-thirds of members of the Council of Europe. It was also recognized by all successor States of the former SFRY, except Serbia itself and Bosnia-Herzegovina.<sup>18</sup> It was further on recognized by the United States, Canada, Australia, Japan, South Korea, etc. On the other hand, the Russian Federation, Ukraine, Romania, Slovakia, Spain, Greece, Cyprus, most of countries from Asia including China and India, and most of African and Latin-American States still refuse to recognize Kosovo's independence. In this situation this new State cannot expect to be admitted to the UN and to most other international organizations in the near future.

Hence, the process of international recognition of Kosovo is being slowed, but remains irreversible. It would be in the best interest of Serbia and Kosovo Serbs that these two independent States normalize their relations on the basis of mutual recognition. Serbia lost Kosovo as its integral part a long time before 2008, because of its discriminatory, violent and non-democratic measures directed against the Albanians. It cannot be expected that it restores its full power over it, for instance in a new Balkan war, against the will of the majority of its population.

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In this light, all measures aimed at worsening the present international position of Kosovo seem to be unwise. Among these measures was the General Assembly resolution 63/3, adopted on the initiative of Serbia on 8 October 2008, with a request to the ICJ for an advisory opinion on the international status of Kosovo. The resolution was adopted by a vote of seventy-seven in favour, six against, and seventy-four abstaining. Most States that have already recognized Kosovo did not oppose this resolution. As was said, the General Assembly referred to the ICJ the following question:

"Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

One can ask oneself what is it that Serbia could have been expecting even in case of a negative answer by the Court to this question, which did not occur. States that have already recognized the independence of Kosovo would not withdraw their act, except in case of its loss of statehood, for instance by its unification with Albania. Such a negative answer could further slow down its recognition by other

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<sup>18</sup> The authorities of the Republika Srpska oppose the recognition of Kosovo by Bosnia-Herzegovina.

States, and that seems to be a high price for the genuine interests of Serbia in independent Kosovo.

The proceedings before the Court took place under the strong impact of political controversies concerning the two basic principles in the present world stated above. For this reason an unusually great number of the UN Member States took part in the written proceedings and issued oral statements in the course of hearings. The judges were also under the influence of the political positions of their respective States. They did their best in finding convincing legal arguments in favour of the attitudes so adopted.

However, when it became clear that in pursuance of the principle of self-determination, the majority will not oppose Kosovo's proclamation of independence, the minority judges tried without success to avert rendering of that advisory opinion.

Hence, in that Opinion issued on 22 July 2010 the Court unanimously found that it had jurisdiction to give the advisory opinion requested by the General Assembly. But it decided by nine votes to five to comply with that request, which falls to the discretion of the Court.

The main argument that the Court should refuse to give its advisory opinion was found in Article 12(1) of the UN Charter.<sup>19</sup> Hence, such a question should be put to the ICJ, not by the General Assembly, but by the Security Council which keeps the primary responsibility in resolution of this problem. However, the majority found that there is "nothing incompatible with the integrity of [its] judicial function" in answering the question put by the General Assembly.<sup>20</sup> Judge Skotnikov underlined in his dissenting opinion that "a political process designed to determine Kosovo's future status" envisaged in paragraph 11 (e) of the Resolution 1244 has not run its course and that a final status settlement is yet to be endorsed by the Security Council. Finally, by ten votes to four, the Court was of the opinion "that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law."

The majority of Judges has determined the scope and meaning of the question posed by the General Assembly on a narrow way in order to dissipate political controversies over the Kosovo's Declaration of Independence. The advisory Opinion stated the following:

"In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance

<sup>19</sup> This provision states: „While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.“

<sup>20</sup> *I.C.J. Reports 2010*, para. 47.

with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.”<sup>21</sup>

It was stated at another place that:

“The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it”<sup>22</sup>

However the Court partly tackled these questions too.

Some commentators criticized this approach as the alleged “*Lotus principle*” from the Judgment by the Permanent Court of International Justice of 1927 on the collision of the French and Turkish merchant ships on the high seas and on the jurisdiction of Turkish courts to exercise criminal jurisdiction on a French national. This author belongs to the majority who at another time strongly criticized a statement in that Judgment out of the context of the case, which is still often quoted:

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”<sup>23</sup>

The Court further asserted in that Judgment that within its territorial jurisdiction a State, failing the existence of a permissive rule to the contrary, may not exercise its power abroad. A State enjoys “a wide measure of discretion which is only limited in certain cases by prohibitive rules. As regards other cases, every State remains free to adopt the principles which it regards as best and most suitable”<sup>24</sup>

That attitude was understood as the basis of an extremist voluntaristic approach to this legal branch which rules out the very existence of precepts of general international law, including *erga omnes* obligations for States. However, a careful reading of the entire text of that Judgment leads to some more balanced

<sup>21</sup> *Ibid.*, para. 51.

<sup>22</sup> *Ibid.*, para. 56.

<sup>23</sup> P.C.I.J., *Series A*, No. 10, p. 18.

<sup>24</sup> *Ibid.*, pp. 18-19.

conclusions. It advocated the equality of all States and of their internal legal orders, including the judiciary. France strongly opposed this approach and it succeeded in the stipulation of opposite rules in general conventions on this subject-matter.<sup>25</sup>

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The most important point of this Advisory opinion was whether the Kosovo's declaration of independence violated international law in the light of the conflict of the above discussed principles of territorial integrity and self-determination.<sup>26</sup> We shall exhaustively quote here this part with our highlights and short comments.

"79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *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, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, para. 88)..."

<sup>25</sup> The Court's finding was: "once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship." *Ibid.*, p. 23. Nevertheless, the 1952 Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction declares that in such events no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of State of which such person is a national. That rule was confirmed in Article 11(1) of the 1958 Convention on the High Seas and again in Article 97(1) of the 1982 UN Law of the Sea Convention. These restrictive rules have begun to be attenuated by the recent conventional provisions concerning transnational crimes.

<sup>26</sup> See on the creation of new States --

James CRAWFORD: *The Creation of States in International Law*, Oxford 1979, 498 pages; 2nd Edition, Oxford 2006, 948 pages; V.D. DEGAN: "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *RCADI* 1999, tome 279, pp. 247-279, and the bibliography referred; also *Wuhan University Lectures on International Law II*, Wuhan University Press 2010, pp. 87-91.

The Court concluded:

“A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”

The Court further reminded that several participants in the proceedings before it have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity.

“The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”, which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV)...”

The Court’s conclusion was, however, that “the scope of the principle of territorial integrity is confined to the sphere of relations between States” (hence, not to the sphere of application of the principle of self-determination). It further stated:

“81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; 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*). In the context of Kosovo, the Security Council has never taken this position...”

This is followed by the conclusion in strong terms:

“The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.”

This is the most important part of that Advisory Opinion. In fact, it confirmed the ancient principle that the creation, as well as disappearance of a State is primarily a question of facts and not of law or legal procedures.

✱

A special issue in these proceedings was that of “*remedial secession*”.

“82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo.

The Court has already noted... that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in



the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999)."

The above statement by the Court must be understood in the sense that general international law does not prohibit unilateral declarations of independence as a legitimate manifestation of a right to self-determination. However, this permissive rule *a fortiori* covers all cases of "remedial secession" (such as occurred in Kosovo), but is not confined to them.

The Court finally concluded:

"84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999."

✱

The second aspect was whether the declaration of independence of Kosovo was contrary to the Security Council resolution 1244 and the UNMIK Constitutional Framework created thereunder. The majority judges rather bypassed this tricky aspect by insisting that this declaration was adopted neither by the Provisional Institutions of Self-Government of Kosovo (as claimed by Serbia) nor by the Assembly of Kosovo, but by the individual members of that Assembly, acting in personal capacity as the representatives of the people of Kosovo. Therefore, the declaration of independence by these individuals representing their constituencies was not contrary to general international law.

In the legal analysis the majority of judges found that neither the Resolution 1244 nor the UNMIK Constitutional Framework contained a prohibition of declaration of independence. A strict legal analysis could perhaps come to a different conclusion, but it is not within the scope of the present study.

✱

This Advisory Opinion of not more than 44 pages shows how individual judges behave when they are confronted with a political issue of high importance. Among various views issued in their personal capacity, the Individual Opinion of Brazilian Judge A. A. Cançado Trindade merits a special attention. His country, very distant from Kosovo and the rest of the Balkans had no particular interests in the merits of these proceedings. Hence Judge Cançado Trindade wrote an individual opinion on 71 pages which can serve as a useful complement to the Opinion adopted by the majority. He proved to be a distinguished judge and scholar, both in one person.

His attention turned to the preponderant humanitarian aspect of the question brought to the Court by the General Assembly. He stressed *inter alia* the facts that “no State can use territory to destroy the population, such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not *vice-versa*”. Further on, “it is precisely the humanitarian catastrophe in Kosovo that led to the adoption of the Security Council resolution 1244(1999), and the subsequent events, that culminated in the declaration of independence of 17 February 2008 by Kosovo’s authorities” (para. 40). In this framework he carefully summarized all resolutions and other statements on the tragedy in Kosovo by the Security Council, the General Assembly, the Economic and Social Council, and by the Secretary-General. The factual background presented in this Advisory Opinion falls short of such a presentation. Hence, the author of this paper recommends to all scholars who are interested in the Kosovo problem to read the text of this Individual Opinion.

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## CONCLUDING REMARKS

This Advisory Opinion seems to be important for the delicate relationship between unilateralism and consensualism, which is not entirely comprehended especially in some new States. The Court confirmed the absence of a general prohibition in international law against unilateral declarations of independence. In actual practice most new States have declared their independence unilaterally. This was confirmed by the doctrinal statement that the creation of States is a question of facts.<sup>27</sup> Only exceptionally new States were established on the basis of legal acts, either of internal or of international character.<sup>28</sup>

<sup>27</sup> Hence, the (Badinter) Arbitration Commission has also stated in the Opinion No. 1: „that in this respect, the existence or disappearance of the State is a question of facts“.

<sup>28</sup> Some examples are exposed in -- V.D. DEGAN: *Wuhan University Lectures on International Law II*, Wuhan University Press (China), p.84.

Unlike this situation, the frontiers of a new State with its neighbours are established in pursuance of the principle of *uti possidetis*, understood as a principle of *jus dispositivum* and not of *jus cogens*. Consequently, existing borders can be modified on the basis of this principle, but only by a free consent of interested States or by a decision of an international judicial body endowed by the parties with such a competence. No unilateral acts to this end can produce effects in international law, be they a State's constitutional provisions, laws passed by its legislature, or any other internal acts.<sup>29</sup>

However, the unilateral character of declarations of independence does not suffice for producing the desired effects in law and practice in all cases. As the ICJ has said above: "Sometimes a declaration resulted in the creation of a new State, at others it did not." This depends on many legal and factual conditions, including the recognition of a new entity by other States.<sup>30</sup>

The (Badinter) Arbitration Commission stated in its Opinion No.1: "that the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty". The declaratory character of the effects of international recognition of a new State proves correct only if it actually exists.

Nevertheless, the recognition of a new State is in its substance a political act with important legal consequences. According to general international law there is no duty to recognize, nor a right of a new State to be recognized by others. The recognition and refusal to recognize are acts of free will, which fall to the discretion of the existing States. A refusal to recognize can be considered as an unfriendly act, but it does not involve a violation of law. Yet an individual act of refusal of recognition of a new State, which actually exists and which has all features of an international person, results in anomalous and absurd situations, especially if inspired by the political and ideological motives. That can involve especially the new State of Kosovo in its international relations.

It must be kept in mind that the international community as a whole cannot ignore the existence even of an unrecognized State. The territory of such a State, which otherwise satisfies all the conditions of its statehood, cannot be considered as a no man's land (*terra nullius*), open for acquisition by its first occupant. Its territory cannot be over flown without its permission. Ships navigating under the flag of an unrecognized State in the high seas cannot be treated as vessels without nationality, and still less as pirate ships. Besides, every coastal State is under the obligation to respect the right of innocent passage through its territorial sea by

<sup>29</sup> See more details -- V.Đ. Degan -- V. Barić Punda: "Jednostrani akti država u pravu mora -- napose s obzirom na spor Slovenije i Hrvatske na Sjevernom Jadranu" /Unilateral acts of States in the Law of the Sea -- especially in respect to the dispute of Slovenia and Croatia in the North Adriatic/, *Zbornik radova Pravnog fakulteta u Splitu* 2008, br.4, pp.841-861.

<sup>30</sup> See on recognition of States -- V.D.DEGAN, *RCADI* 1999, tome 279, Chapitre IV: « Effets de la reconnaissance internationale de l'Etat nouveau », pp. 247-279, and the bibliography referred; *Wuhan Lectures*, pp. 87-91.

ships sailing under the flags of all States, be they recognized or unrecognized by it. This should apply in case that the land-locked Kosovo acquires merchant fleet navigating on the high seas under its flag.

Be that as it may, it is more important to a new State to be admitted to the membership of the United Nations than to be unanimously recognized by other States. After it acquires this status, it is a State like others for all UN organs, and its territorial integrity and political independence are under protection of the principles of the United Nations. Then a few member States which still refuse to recognize it cannot modify its objective international personality without breaching their legal commitments under the UN Charter.

Kosovo has the bad fortune to have to wait for its entry into the UN, in spite of the fact that it is, pursuant to Article 4(1) of the UN Charter, a peace-loving State and is ready to accept the obligations contained in the Charter.

## SUMMARY

Both the principle of territorial integrity of States and the principle of self-determination of “peoples” (in a territorial sense) belong to the body of positive international law. In spite of the fact that in actual practice they sometimes exclude one another, it cannot be proved that one derogates another as a legal principle. This paper deals with the conflict of these principles in the light of the process of disintegration of the Yugoslav Federation (the SFRY) and especially in the secession of Kosovo from Serbia, which was the subject-matter of the Advisory Opinion by the International Court of Justice rendered on 22 July 2010.

**CHALLENGES OF  
CONTEMPORARY INTERNATIONAL LAW  
AND INTERNATIONAL RELATIONS**

***LIBER AMICORUM  
IN HONOUR OF ERNEST PETRIČ***

Editor  
MIHA POGAČNIK



EVROPSKA  
PRAVNA  
FAKULTETA  
V NOVI GORICI