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RECOGNITION OF KOSOVO INDEPENDENCE AS A VIOLATION OF INTERNATIONAL LAW

Has International Law been violated by the states which recognized the independence of Kosovo? The raised question has resulted from the recent secession of Kosovo and Metohia. It is a starting point of the theoretical analysis of the problem of creation and recognition of states in international law. Contrary to the classical international law doctrine according to which the act of recognition is purely a political act and not subject to legal appreciation, the author demonstrates that an act of recognition of a state by another state can be considered in legal terms and possibly declared unlawful. This seems particularly true in the case of independence of Kosovo and Metohia since the UNSC Resolution 1244 protects the sovereignty and territorial integrity of the Republic of Serbia.

Key words: *Recognition of States.– Creation of States.– International Law Effectiveness.– Legality.– UN SC Resolution 1244.*

INTRODUCTION

On October 8th 2008, the General Assembly of the United Nations has adopted the Resolution requesting the International Court of Justice (ICJ) advisory opinion answering the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law". This request has given the principal judicial body of the United Nations a chance to express its opinion on several very important problems of international law, such as the question of territorial integrity, right of peoples to self-determination, secession and remedial secession, role and importance of the principle of

effectiveness in international law, and finally the wide ranging problem of creation of states.[1] One important question will however be out of the scope of the judicial review – the question of recognition of states.

The problem of recognition of states represents, at least declaratively, the main reason for the Republic of Serbia to start the advisory opinion proceedings and do not opt for the lodging of complaints before the ICJ against the states that have recognized the independence of the southern Serbian province. Different opinions given about this subject reflect the complexity of the basic question which could paradoxically be formulated in a very simple manner: have the states that have recognized the independence of Kosovo and Metohia violated international law?

The most common answer that could be heard in the Serbian public opinion is in accordance with the traditional legal doctrine considering recognition as unilateral and discretionary act based on the political analysis of advisability regarding the recognition of a new state.[2] In other words, given its nature, an act of recognition is not subject to the assessment of its legality. Professor of international law Vojin Dimitrijević, answering to the question how can we (Republic of Serbia) start contentious proceedings before ICJ against states that have recognized the independence of Kosovo, says that there is a problem, because the recognition is a "political decision" and that "any state can recognize anybody".[3] This opinion, although adherent to the traditional doctrine, is still problematic, especially concerning the case of Kosovo and Metohia. Namely, there is a huge discrepancy between the perception of law, i.e. the violation of law, and the opinion that by recognizing the independence of Kosovo and Metohia law has actually not been violated.

Before we return to the important question regarding the accuracy of the perception that in case of Kosovo and Metohia international law

[1] This problem has already been discussed by the Supreme Court of Canada in 1998 when delivering the opinion on almost the identical, however hypothetical question "2. Does International law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally". There is no doubt that problems of territorial integrity, effectiveness, as well as the question of remedial secession, its positive nature and its applicability to the case of Kosovo will form the axis of the discussion of the topic before ICJ.

[2] For the formulation of the traditional understanding see: Marc Perrin de Brichambaut, Jean-François Dobelle, Marie-Reine d'Haussy, *Leçons de droit international public*, Presses de Sciences Po / Dalloz, 2002, p. 52.

[3] Tamara Spaić, "Misija EU na Kosovu je u interesu Srbije", Intervju sa Vojinom Dimitrijevićem, *Blic*, 29.12.2007. See also: Jelena Cerovina, Marko Albunović, "Kosovo pred sudom", *Politika*, 28.02.2008: "When it comes to complaints against states that have recognized the independence of Kosovo, lawyers do not agree on chances for them to succeed. Namely, some think that, given that in law recognition of new states is a discretionary right of each state, such a decision cannot be attacked, so Serbian complaints would not be successful before ICJ".

has actually been violated, it is important to additionally clarify why we consider that it is insufficient, if not wrong, to invoke the political and discretionary nature of the act of recognition to demonstrate that that act is not subject to legal assessment, i.e. that it is legally neutral. Namely, most acts or decisions of one state are political, discretionary and unilateral acts. That is the consequence of the very nature of the international system, whose main characteristic is anarchy – defined by the absence of central governing authority – and whose main subjects are sovereign states.

When United States decided to military attack Iraq in 2003, it was also an eminently political and basically unilateral act of that state (i.e. USA). It is also undisputed that decisions on use of force are subject to legal assessment and could be considered either legal or illegal. The reason is simple – use of force is strictly regulated by the law of international peace and security arising from the Charter of the United Nations. In international order use of force is prohibited. Prohibition has only two exceptions: military action based on the decision of the Security Council for the purpose of the protection of international peace (article 42 of the UN Charter) and self-defense, prescribed by the article 51 of the UN Charter. The conclusion is that if the act of recognition cannot be subject to legal assessment, the reason does not lie in the political and discretionary nature of that act, but in the underdevelopment of the law, i.e. in lack of legal regulation regarding the act of recognition.[4]

We should make here a final clarification in order to define our problem. The lack of legal regulation is not so much related to the recognition of states, as it is to the subject of the recognition – the state, i.e. its creation. The Answer to the question why recognition of states is an act outside the scope of law, is not to be found in the act of recognition or in its nature, but in the understanding of the creation of states. Understanding of recognition of states as a legally neutral category is derived from the traditional understanding of creation of states in international law.

Professor Christopher J. Borgen, explaining the European Union's analysis of the UN SC Resolutions 1244, says: "The EU memorandum on Resolution 1244 contends that '[g]enerally, once an entity has emerged as a state in the sense of international law, a political decision can be taken to recognise [sic] it.' This reflects the general understanding that recognition itself is not a formal requirement of statehood. Rather, recognition

[4] The conclusion is a tautology. The concept of discretionary is precisely defined as the lack of legal regulation. The purpose of this artificial *breaking up* of the problem is to clarify the question and overcome the reflex *prima facie* refusal of the idea of the legal assessment of recognition. For a definition of the concept of *discretionary* see: Jean Salmon (dir.), *Dictionnaire de droit international public*, Bruylant/AUF, 2001, p. 344.

merely accepts a factual occurrence. Thus recognition is declaratory as opposed to constitutive".[5] This is an excellent description of the traditional construction and classical understanding of both creation of states and role of recognition: the existence of a state is a question of facts, not a question of law; the state objectively exists or does not exist; the act of recognition only verifies the existence of state, and therefore it is a declaratory act. This understanding of creation of state makes the act of recognition doubly neutral. First, recognition as such does not participate in the process of creation of state and it is solely of declaratory nature. Second, as the creation of state is a question of facts, not a question of law, i.e. legally neutral, the recognition cannot have different characteristics than its subject and could also be only legally neutral.

According to this traditional understanding, not only that it could not be answered to the question whether international law has been violated by the recognition of independence of Kosovo, but the question itself could not be possible to formulate.

However, is the traditional understanding of creation of states correct? In other words, to answer the question whether the states recognizing Kosovo and Metohia have violated international law, we should not only answer the question whether the secession of Kosovo and Metohia is legal, but on the first place whether the act of recognition of independence could be legal. Both questions are conditioned by the solution of the first and fundamental problem: is the creation of states a matter of law at all? If creation of states is only a matter of facts, any legal analysis would be pointless. If creation of states is subject to legal regulation, i.e. if there are requirements of legality for the creation of states, those requirements will be automatically transferred to the act of recognition. Accordingly, first part of this paper will be devoted to the critical analysis of the opinion that creation, and consequently, recognition of states are legally neutral questions (I). The second part of the paper will be devoted to the assessment of legality of secession of Kosovo and Metohia. This assessment is a precondition for answer to be given – whether the states that have recognized the independence of Kosovo and Metohia have violated international law?[6]

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[5] Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", *ASIL Insight*, Vol. 12, Issue 2. Internet, *http://www.asil.org/insights/2008/02/insights 080229.html.*

[6] The defined problem is very much coinciding with the problem that will be dealt by ICJ in order to answer the question of (il)legality of secession of the southern Serbian province.

1. CREATION AND RECOGNITION OF STATES AS LEGALLY NEUTRAL CATEGORIES: A CRITICAL REASSESMENT

In its first opinion from 29th November 1991, the Arbitration Commission of the Peace Conference on the former Yugoslavia, also known as the Badinter Commission, has expressed that the existence or disappearance of a state is a question of fact, as well as that the effects of recognition of other states are purely declaratory.[7] This is only one of many statements where a direct link between understanding of the creation of states and understanding of the act of recognition as legally neutral categories is to be found. However, we will see that conditions to attain statehood cannot be exclusively reduced to the existence of certain factual situation (1.1.) and that accordingly an act of recognition can be legally assessed (1.2.).

1.1. Existence of requirements for statehood

For the classical doctrine of international law, creation of states is exclusively question of facts, i.e. effectiveness. It is somewhat the minimal rule prescribed by international law: a state objectively exists from the moment when it has three classical constitutive elements of statehood: territory, population and government (1.1.1.). Not only that this is inherently problematic, but it also negates the requirement of legality for the creation of states (1.1.2.).

1.1.1. States are created in legal vacuum or the theory of effectiveness

We shall see that the reality often refutes the theory of effectiveness (1.1.1.1.) as it refutes the purely declaratory nature of the act of recognition (1.1.1.2.).

1.1.1.1. The theory of constitutive elements of statehood has not always been confirmed in reality

As a typical example of the formulation in international law of the theory on three constitutive elements of statehood authors usually cite the article one of the Convention on the Rights and Duties of States from Montevideo (1933), prescribing that "The state as a person of international law should also possess the following qualifications: a) a permanent population, b) a defined territory, c) government, and d) capacity to enter into relations with other states (MJ – this condition is usually understood as independence)".[8] Professor Jean Combacau is also on the same

[7] "Conférence pour la paix en Yougoslavie: Commission d'arbitrage: Avis n°1", 29/11/1991 in Pierre-Marie Dupuy, *Grands textes de droit international public*, Dalloz, 1996, p. 123.

[8] See: James Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, second edition, 2006, p. 45; Antonello Tancredi, "A normative 'due pro-

standing, claiming that the creation of states is a *legal fact*, i.e. that it is a result of actions and occurrences with legal significance assigned to them by the previously existing rule. That rule is: "*La qualité d'Etat au sens du droit international est acquise à tout pays politiquement organisé ayant accédé à l'indépendance*".[9] In other words "(...) *l'Etat existe en droit dès lors que le pays existe en fait*".[10] According to this understanding, the creation of states is outside of the legal sphere. The only rule that international law prescribes regarding this matter is that it is not subject to law but exclusively to the factual situation. Consequently, it is futile, moreover impossible, to analyze the creation of states through the lens of law, because the law does not have any role in this matter. This understanding arises from the primitive, decentralised character of the international law. Without judicial body with universal and binding jurisdiction, without enforcement of judicial decisions, without sanctions or system of nullity, international law cannot always cope with the reality, i.e. effectiveness. Professor Joe Verhoeven has expressed the abovementioned situation in best way by suggestively stating that *on ne voit pas très bien ce qu'un système (M.J. – système du droit international), impuissant à contester des effectivités, gagne à les refuser*.[11] In that context, it is clear that the principle of effectiveness plays a significant role in the international arena, even when it is a consequence of violation of international law, as said by Charles de Visscher: "*Il en résulte que le refus de reconnaître une situation issue d'agissements illicites ne conserve pas indéfiniment sa signification juridique. Une tension trop prolongée entre le fait et le droit doit fatalement se dénouer, au cours de temps, au bénéfice de l'effectivité*".[12] Before we return to the tension between facts and law, we should point out that practice doesn't always confirm the objective existence of the state, sometimes not even the *fatal triumph of effectiveness*.

There are a lot of examples where a certain entity had constitutive elements of statehood yet it never became a state. Effectiveness does not

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cess' in the creation of States through secession", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 171; John Dugard, David Raič, "The role of recognition in the law and practice of secession", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 96.

[9] Jean Combacau, Serge Sur, *Droit international public*, Paris, Montchrestien, 5 édition, 2001, p. 279. Professor Combacau refuses terminological choice of "constitutive elements" and calls them, more appropriately, "elements of creation". Besides this terminological clarification, three classical elements are explicitly present in the definition given by Combacau, stating that "(...) *un Etat apparaît lorsqu'un pays* [territory and population] *politiquement organisé* [government] *est devenu indépendant*", p. 272.

[10] *Ibidem*.

[11] Joe Verhoeven, "La reconnaissance internationale: déclin ou renouveau ?", *AFDI*, vol. XXXIX, 1993, p. 38.

[12] Charles de Visscher, "Les effectivités du droit international public"; Paris, Pedone, 1967, p. 25.

automatically get its legal transcription. Republic of Srpska Krajina, or Republic of Srpska, have undoubtedly possessed defined territory, population and government, yet they have never been deemed states, nor they became states. Today the same could be said for Transdnistria. In second half of seventies of the twentieth century Southern Rhodesia, although effectively existing, has not became a state. The Turkish Republic of Northern Cyprus has declared independence in 1983 yet even today the *tension between facts and law* has not been solved to the benefit of effectiveness. All of these examples are contrary to the theory of effectiveness. That the consent between facts and norms does not always have to exist is best shown on the opposite example of Bosnia and Herzegovina, that could not be considered as a state when it legally became one.[13] This last example opens the question of the nature of recognition and questions its declaratory character.

1.1.1.2. The opinion that recognition or absence of the same does not influence the objective existence of state does not have a standing in reality either

The third article of the aforementioned Montevideo Convention states that *the political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts*.

This article advocates the objective existence of state, i.e. the non-existing role of recognition in the process of state creation. This statement also has not a standing in practice, implying the inherent deficiencies of the theory of effectiveness. For most of the doctrine the act of recognition is purely of declaratory nature and it is reduced to registering the objective existence of a state. Contrary to the declaratory nature of recognition, part of the doctrine has given a constitutive character to recognition and considers it a precondition for creation of states.[14] Theory on declaratory effect of recognition has a logic of its own. Recognition, as a discretionary political act of a state, cannot be used as a benchmark and criterion of existence of a new state. In other words, the existence of a state cannot depend upon subjective actions of other states. Intended to show arbitrariness and logical impossibility of the constitutive theory, various authors ask the following question: "What if a newly created state is recog-

[13] On April of 1992 when it was recognized as sovereign state Bosnia and Herzegovina did not fulfill any of "requirements for the creation of state".

[14] For a short introduction in the debate on the nature of recognition see: James Crawford, *The Creation of States in International Law*, op. cit, pp. 4–36.

nized by some states, and not by others?".[15] We think that the question needs to be formulated in an other way: what if the newly created "state" is not recognized by none other state? We don't see what would be the effect of the objective existence of a state not recognized by any other state. Would it be a state having in mind condition 4 of the Article 1 of the Montevideo Convention regarding the necessity to enter into relations with other states?[16] Reality also confirms these doubts. The Turkish Republic of Northern Cyprus is not a state, because it is not recognized by any other state than Turkey. Republic of Srpska has also not become a state because it was not recognized by none other. Therefore it is needed to assume a balanced approach about the nature of recognition. Charles de Visscher has assumed, and most likely it is the most reasonable assumption, that recognition has both aspects – declaratory and constitutive: "La reconnaissance est déclarative en ce sens qu'elle constate l'effectivité d'une prétention. Elle a une portée constitutive du fait qu'elle met fin à un état de choses politiquement incertain pour y substituer une situation de droit définie".[17] Even this balanced approach cannot explain clearly the constitutive function of recognition in the case of Bosnia and Herzegovina, implying the inherent flaws of the theory of effectiveness.

When it comes to the theory of effectiveness its main fallacy is that effectiveness is not of exclusively objective character. When it comes to creation of states physical reality is shaped by the human will, subjective by its definition. There is a direct discrepancy between ideally conceived, statical and objective factual situation based on which it could be assessed that a situation firmly exists – in this case an entity with defined territory, population and government – and the fact that, on one hand, effectiveness has a dynamic undercurrent because the shape of things is subject to change and that, on the other hand, the states could influence the shape of things, i.e. effectiveness, by their conduct (e.g. recognition or lack thereof, by which states are subjectively proving that they consider that a certain situation exists as far as they are concerned). There is, however, one more significant critique that could be and must be addressed to the theory of effectiveness and that is emphasized by Théodore Christakis.[18] Namely, by relying on the factual situation, the law is actually

[15] See for example O. Račić in V. Dimitrijević, O. Račić, V. Đerić, T. Papić, V. Petrović, S. Obradović, *Osnovi međunarodnog javnog prava*, Beogradski centar za ljudska prava, 2005, str. 82.

[16] Unrecognized entity having the factual requirements of statehood could be deemed a state in sociological, weberian sense, but not in the sense of international law, because it simply could not become a subject of international law.

[17] As cited by Jean Salmon, *La reconnaissance d'Etat*, Paris, Armand Colin, 1971, p. 19.

[18] Théodore Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness", in Marcelo G. Kohen (ed.), *Secession, International Law Perspec-*

relying on the balance of power. Given that effectiveness is by definition always formed by the stronger party, we come to the elementary contradiction according to which the law actually takes into account the law of the strongest. This conclusion is a negation of law and therefore unacceptable. We will however see that it is not right to say that the effectiveness is almighty when it comes to the creation of new states, because it is widely accepted that new states cannot be created by violation of the fundamental norms of international law.

1.1.2. Existence of requirements for the legality is contradicting the theory of effectiveness and adds to factual requirements for the attainment of statehood

The creation of new states is not always conducted outside of legal realm. International practice shows that there are examples of creation of states, i.e. non-recognition of secession conducted *contra legem*, although constitutive elements of the state have been present, i.e. factual conditions have been fulfilled. International law knows generally accepted unlawful situations of creation of states (1.1.2.1.) whose domain is widened by the theoretical elaboration of the right of self-determination (1.1.2.2.)

1.1.2.1. Accepted cases of illegal creation of states

Accepted situations are related both to the breach of the right of the peoples to self-determination regarding the decolonization and to the case of aggression. Examples of Rhodesia and South African Bantustans clearly show that the state cannot be created against the will of the majority of the population, i.e. by breach of the right to self-determination. International community has never accepted – recognized – the existence of Southern Rhodesia proclaimed independent by the white minority leader Ian Smith in 1965, although the newly created state effectively existed, i.e. had all three constitutive elements of statehood. UN Security Council has condemned in Resolution 217 "usurpation of power by a racist settler minority in Southern Rhodesia" and pointed out that the declaration of independence, by the aforementioned minority, is "having no legal validity".[19] Just after the 1979, when most of the (black) population could freely declare, the internationally recognized Zimbabwe was formed. The same goes for the white minority in Southern African Republic, trying to separate from the black majority giving her, contrary to its will, small "independent" states – Bantustans (Transkei has became independent in 1976; Bophuthatswana in 1977; Venda in 1979; Ciskei in 1981) – that were simply forced to become independent. Those countries were not rec-

tives, Cambridge University Press, 2006, pp. 156–157.

[19] "Résolution 217 (1965) du 20 novembre 1965", Internet, *http://www.un.org/french/documents/scres.htm*.

ognized, and the UN General Assembly declared null and void the decision on creation of these states.[20] The reason for the nullity was not the absence of effectiveness of those "states", but the illegal nature of their creation.

Secession is also illegal if it is a result of the illegal use of force, i.e. aggression. The best example is the creation of the Turkish Republic of Northern Cyprus in 1983, after the effective partition of the island caused by the Turkish military intervention in 1974. This entity has not been recognized by any other country than Turkey. The reason for non-recognition is not the lack of effectiveness of the Turkish Republic of Northern Cyprus, but the illegal nature of its creation. UN Security Council in Resolution 353 (1974) demanded "immediate end to foreign military intervention in the Republic of Cyprus", requested for "withdrawal without delay from the Republic of Cyprus of the foreign military personnel", and called upon "all states to respect the sovereignty, independence and territorial integrity of Cyprus".[21] When few years later Turkish part of Cyprus declared independence, UN SC in Resolution 541 (1983) considered "therefore that the attempt to create a 'Turkish Republic of Northern Cyprus' is invalid, and will contribute to a worsening of the situation in Cyprus".[22] These examples, generally accepted in the international law doctrine, clearly show that effectiveness does not have a decisive role in the process of creation of states. Besides these two obvious cases of illegal creation of states, with theoretical development of the right of peoples to self-determination outside the context of decolonization, another limit, i.e. legal requirement for creation of states, arises.

1.1.2.2. Theoretical construction of the right of peoples to self-determination outside the context of decolonization[23]

The right of peoples to self-determination is most closely linked to the phenomenon of decolonization. It was never disputed that colonized peoples have the right to create their own state, illustrated by the Resolution of the UN General Assembly on the Granting of Independence to Colonial Countries and Peoples from 1960. What is the status and what

[20] "General assembly (...) rejects the declaration of 'independence' of the Transkei and declares it invalid", A/RES 31/6, 26 octobre 1976, "Politique d'*apartheid* du Gouvernement sud-africain", Internet, *http://www.un.org /french/documents/ ga/res/31/fres31.shtml*.

[21] "Résolution 354 (1974) du 23 juillet 1974", Internet, *http://www.un.org/french/documents/scres.htm*.

[22] "Résolution 541 (1983) du 18 novembre 1983", *Ibidem*.

[23] We will not elaborate in this paper the positive character of the remedial secession. We will accept, for the purpose of the analysis and the questioning of its applicability to Kosovo case, the presumption that remedial secession theory is a positive norm of international law.

are the consequences of the right of peoples to self-determination outside the context of decolonization?

The right of peoples to self-determination has two aspects. The first one is the internal aspect and respect for the rights of minority group of one state. Minimum and sufficient requirement for the respect of internal right of self-determination is that a minority group is not in any way discriminated in the state, that it participates in political life and that it is represented in the structures of government. A minority group could enjoy collective rights realized through certain form of autonomy in accordance with the constitutional organization and basic principles of public law of the state. On the other hand, external aspect of the right of the peoples to self-determination purports a separation of the part of the territory from the parent state in order to create a new state or annexation of the separated part to some other, already existing state. Outside the context of decolonization, international public law does not recognize the external right of peoples to self-determination, i.e. the right to secede. In a study devoted to this question professor Théodore Christakis has shown that no international instrument – from the UN Charter, international covenants on civil and political, economical, social and cultural rights, General Assembly Resolution 2625 on friendly relations and cooperation among states from 1970, to the Helsinki Final Act – as well as international practice, does not recognize the external right of peoples to self-determination.[24] In other words, internal right of peoples to self-determination is accepted, while external is not. This rule knows only one exception: in case of serious and massive breach of internal right of peoples to self-determination, the group has a chance to use the external aspect of that right.

In other words, if a state deprives its minority group from the internal right to self-determination, the group will obtain the external right to self-determination. Antonello Tancredi reminds that the source of this construction is to be found in the Advisory Opinion of the Second Commission of Rapporteurs in the case of Åland Islands (1921) where, after the refusal of the existence of a general right of secession, it is claimed that: "the separation of a minority from the State of which it forms a part and its incorporation into another State may only be considered as an altogether *exceptional* solution, *a last resort* when the State lacks either the

[24] See: Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La documentation française, 1999. For international practice see: James Crawford, *The Creation of States in International Law*, op. cit, pp. 388–418, as well as the report of the same professor from which it could be seen that, outside the context of decolonization, no new state, created as a result of unilateral secession, wasn't accepted to UN: James Crawford, "State practice and international law in relation to unilateral secession", Report, 19 February 1997, Internet, *http://canada.justice.gc.ca/en/news/nr/1997/ factum/craw. html*.

will or the power to enact and apply just and effective guarantees".[25] This mechanism got its legal expression in recent times. In the Resolution 2625 of the UN General Assembly the respect for the principle of territorial integrity is conditioned upon the existence of the government "representing the whole people belonging to the territory without distinction as to race, creed or colour". The condition from the paragraph 7 of the Resolution 2625 is taken over in Vienna Declaration on Human Rights of 1993, as well as declaration of heads of states on the occasion of the fiftieth anniversary of UN in 1995. As a practical example of this mechanism, secession of Bangladesh (Eastern Pakistan) from Pakistan in 1971 is put forward. The creation of the state of Bangladesh was not illegal because Bengali people (their internal right to self determination) were deprived of their rights and their relatively peaceful protest was crushed with repression that resulted in mass atrocities.[26] For most authors today, theory of remedial secession has become a positive norm of customary international law.[27] Although the practice is still scarce, i.e. it is reduced to the case of Bangladesh, there is a strong *opinio iuris* in favour of the mentioned principle, defined by Dugard and Raič as follows:

(a) There must be a people which, through forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within a part of the territory of that State

(b) The State from which the people in question wishes to secede must have exposed that people to serious grievances (carence de souveraineté), consisting of either

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[25] Antonello Tancredi, "A normative 'due process' in the creation of States through secession", op. cit, p, 178.

[26] Authors like Dugard and Raič cite over million casualties, John Dugard, David Raič, "The role of recognition in the law and practice of secession", op. cit, p.121.

[27] See: Christian Tomuschat, "Secession and self-determination", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 41; John Dugard, David Raič, "The role of recognition in the law and practice of secession", op. cit, p. 109; Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, op. cit. p. 314. *Contra*: Antonello Tancredi, "A normative 'due process' in the creation of States through secession", op. cit, p. 188. Tancredi takes as key evidence of non-existence of remedial secession in international law the example of Kosovo and Metohia. He thinks that Kosovo is an ideal example of possibility to check the theory of remedial secession because Kosovo and Metohia Albanians were subject to mass and flagrant human rights violations. This opinion does not correspond to reality. He also thinks that international community, through opinion expressed in according UN SC resolutions is firmly on the ground that the solution for the southern Serbian province must be found with full respect for sovereignty and territorial integrity of the Republic of Serbia. This opinion also has less and less stronghold in the reality and great powers politics. Similar opinion, in our view wrong, is brought out by professor Corten. See, Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du Sud et à l'Abkhazie", *RGDIP*, 2008–4, p. 748, prepared for print.

– a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance a pattern of discrimination) and/or

– serious and widespread violations of fundamental human rights of the members of that people

(c) There must be no further realistic and effective remedies for the peaceful settlement of the conflict.

Authors conclude that: "An act of unilateral secession that does not fulfill these conditions is an abuse of right and unlawful as a violation of the law of self-determination".[28] They continue by stating that: "the obligation of respect for the right of self-determination, including the prohibition of abuse of this right, has entered the law of statehood and may now be seen as a constitutive condition for statehood".[29]

Finally, it should be mentioned that lack of other examples of the applicability of this theory is nothing strange because remedial secession could be used only in extraordinary cases. As mentioned by T. Christakis, in order for this theory to apply, regular violations of the principle of representativeness or prohibition of discrimination are not enough; flagrant, serious and mass violations of human rights are necessary.[30]

It is therefore undisputed that there are situations where a certain entity illegally tries to become a state.[31] Traditional doctrinal construction of creation and recognition of states cannot be upheld any more. Moreover, the opinion that recognition is a discretionary and legally neutral act confuses even more when having in mind theoretical constructions legally assessing the act of state recognition.

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[28] John Dugard, David Raič, "The role of recognition in the law and practice of secession", op. cit, p. 109.

[29] *Ibidem*

[30] Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, op. cit. p. 314. Professor Christian Tomuschat arrives to similar conclusion: "Within a context where the individual citizen is no more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for secession as a measure of last resort after all other methods employed to bring about change have failed", Christian Tomuschat, "Secession and self-determination", op. cit, p. 41.

[31] Interesting notions are brought by James Crawford when he says that there are entities that have a basis (right) to become states and those that don't have basis for statehood: "(...) Instead, notions of entitlement or disentitlement to be regarded as a state have been influential, at least in some situations. Thus entities which would have otherwise qualified as a state may not do so because their creation is in some significant sense illegitimate (Rhodesia, the Bantustans, the Turkish Federated States of Cyprus). Palestine involves the converse problem, that of an entity which is not sufficiently effective to be regarded as independent in fact, but which is thought entitled to be a state". James Crawford, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL*, 1/1990, p. 310.

1.2. Act of recognition is subject to legal assessment

Years back, in international doctrine opinions are being brought out, frequently confirmed in practice, that act of recognition could represent a violation of international law (1.2.1.). Those opinions question the very nature of the act of recognition as discretionary act (1.2.2.).

1.2.1. Doctrine and practice

There are two doctrinal constructions: the theory of premature recognition (1.2.1.1.) and collective non-recognition of illegal situations (1.2.1.2.)

1.2.1.1. Premature recognition

The theory of "premature recognition" is based on the classical understanding of the creation of state. According to Kelsen, "Refusal to recognize the existence of a new state is no violation of general international law and thus constitutes no violation of the right of any other community. However, recognition of a community as a state, even though it does not fulfill the conditions laid down by international law, is a violation thereof".[32] Under the "conditions laid down by international law", Hans Kelsen assumes three classical conditions, the existence of territory with an independent government (actually four conditions: population, territory, government, independence). In other words, to recognize an entity as a state before it has a population and territory over which a government effectively and independently rules is a violation of international law. In that case recognition is illegal because it is premature. The theory of premature recognition is accepted in international doctrine.[33] Professor Jean Salmon says that each recognition that would not be based on the principle of effectiveness would constitute a breach of international law if that would represent a breach of principle of non-intervention in internal affairs of a state (which is almost always the case). He cites recognition of Manchuko by Japan in 1932 as an example of a premature recognition.[34] The principal value of the theory of premature recognition lies in the fact that it legally assesses the act of recognition subordinating his validity to the conditions set out by international law. We have seen that international law, besides classical factual conditions for creation of states, establishes also the conditions of legality. It is interesting that interna-

[32] Hans Kelsen, "Recognition in International Law: Theoretical Observations", *AJIL*, Vol. 35, No. 4, 1941, p. 610.

[33] See Jean Salmon (dir.), *Dictionnaire de droit international public*, op.cit, p. 948. See *contra*: Jean Combacau, Serge Sur, *Droit international public*, Paris, Montchrestien, 5 édition, 2001, pp. 288–290.

[34] Jean Salmon, *La reconnaissance d'Etat*, op.cit, pp. 36–37.

tional law doctrine and international practice have as well taken these conditions into account when questioning the recognition of new entities as states through collective non-recognition of illegal situations.

1.2.1.2. Collective non-recognition of illegal situations

In the introduction of the book "International Recognition" by Jean Charpentier, professor Suzanne Bastid states that the author is keen to accept the thesis according to which illegal situation lasting longer in time cannot remain outside the legal realm. Professor thinks that this thesis is not really supported because the practice, even on the American continent, based on the principle of collective non-recognition of situations arising from the use of force, must be taken into consideration.[35] One of the most important examples of mentioned practice, called "Stimson doctrine", is the case of Manchuko, a "state" created by Japanese intervention in 1932. This example clearly shows that the "international community" has found long before the creation of the UN system a way to respond to violations of law by collective non-recognition of situations arising from these violations. Since then, as we have seen, the practice has been ripe with examples of illegal creation of "states" and non-recognition of the same. The most important illustration of aforementioned practice is the case of the Turkish Republic of Northern Cyprus".[36] Logically, most authors think that in that case there is a duty of non-recognition of illegal situations of creation of states.[37] Moreover, professor Christakis thinks that recognition itself should be the question of lower importance, because "*À partir du moment où un acte juridique est nul, sa reconnaisance par un État tiers ne peut produire d'effets juridiques, si elle n'est pas elle-même illégale*".[38] However, as the author himself emphasizes later, the principle of non-recognition itself is the one ensuring the respect of law in international community hardly accepting the regime of nullity. Therefore, the question of non-recognition comes into focus. Jean Salmon claims that the recognition could not be granted against the im-

[35] Jean Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*, Paris, Pedone, 1956, p. X.

[36] European Community has on December 16th 1991. issued a Declaration on "*Guidelines* on the Recognition of New *States* in Eastern Europe and in the *Soviet* Union" where it is stated that "The Community and its Member States will not recognize entities which are the result of aggression.". See "Déclaration sur les lignes directrices sur la reconnaissance des nouveaux Etats en Europe orientale et en Union soviétique" in Pierre-Marie Dupuy, *Grands textes de droit international public*, op. cit, p. 130.

[37] Prohibition of recognition of situations arising from serious violations of international law could be found in Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) of the International Law Commission: Articles 40 and 41. Internet, *http://www1.umn.edu/humanrts/instree/ Fwrongfulacts.pdf*.

[38] Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, op.cit, p. 283.

perative norms of international law, because in the contrary the recognition itself would be illegal.[39]

Professors Dugard and Raič, after stating that the prohibition of the abuse of law of peoples to self-determination has become a constitutive requirement for statehood, claim the same by stating that: "(...) recognition of an otherwise effective territorial entity which has been created in violation of the right of self-determination, including the prohibition of abuse of thus right, is itself unlawful because it constitutes a violation of the prohibition of premature recognition and of the principle of non-intervention (an aspect of the principle of territorial integrity)".[40] It seems however that the authors are confusing in this opinion the two theoretical constructions. The theory of "premature recognition" should not be related to the recognition of the situation created *contra legem*. Illegal situation simply could not be recognized. Therefore, there is no "premature recognition" of the same. Similary confusing is professor Pierre-Marie Dupuy saying that "*pour être prématurées, de telles reconnaissances n'en sont pas pour autant attentoires au droit, tant du moins qu'elles n'aboutissent pas à consolider des situations internationalement illcites*".[41] By stating this, professor Dupuy actually refuses the theory of premature recognition but confirms the opinion that recognition of illegal situation is a violation of law. Finally, professor Borgen also thinks that the statement, according to which states should not recognize a new state if such recognition would perpetuate a breach of international law, could be a "good argument".[42]

Essentially unique doctrinal opinion about the problem of recognition of new states as well as the international practice regarding that question show that there is existing legal regulation regarding the act of recognition. This observation opens the question of qualification of the act of recognition as a discretionary act.

1.2.2. Discretionary nature of the act of recognition?

As we have seen in this paper, from the discretionary character of the act of recognition a number of domestic authors have concluded that the Republic of Serbia cannot sue states that have recognized the independence of the southern Serbian province before the ICJ. It is not sure that discretionary character is really an obstacle for the ICJ to come out

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[39] Jean Salmon, *La reconnaissance d'Etat*, op.cit, p. 36.

[40] John Dugard, David Raič, "The role of recognition in the law and practice of secession", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, op.cit., p.109.

[41] Pierre-Marie Dupuy, *Droit international public*, Paris, Dalloz, 1998, p.88.

[42] Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", op. cit.

about this question (1.2.2.1.) as well as it is not really sure that the act of recognition could be qualified as an absolutely discretionary act (1.2.2.2.).

1.2.2.1. The question of discretionary right is still essentially a legal question

The International Court of Justice, under presumption that there are grounds for establishment of jurisdiction, could not ignore the question whether certain act of recognition is a violation of international law and *prima facie* reject the case under the pretext of lack of jurisdiction *ratione materiae*. The International Court of Justice could hardly proceed in that way because the question of a discretionary right is still a legal question. As stated by George Selle, in the context of an advisory opinion by the ICJ on conditions for the acceptance of states in UN "*ce serait une singulière confusion dans les idées juridiques que de croire que la détermination d'une compétence discretionnaire n'est pas essentiellement une question juridique*".[43] Again, we don't see how the ICJ could reject the legal question related to the nature of the act of recognition, especially bearing in mind that the answer to the question what are discretionary competences of a state is to be given by international law.

However it is not sure whether the act of recognition is really of discretionary nature. Namely, it is undisputed that the act of recognition could violate the rights of state on whose territory a new state is being created. As emphasized by Kelsen, "the question whether the right of a state has in fact been infringed by the act of recognition – a question which is disputed between this state and the recognizing state – is only a special application of the general principle concerning the question whether in a given case one state has violated the right of another state".[44] There is no doubt that the answer to this question could be and must be given by the court as well as there is no doubt that the act of recognition, which could represent a violation of international law, is only partially of discretionary nature.

1.2.2.2. Relativity of discretionary nature of the act of recognition

Discretionary right of states is as wide as legal regulation is nonexisting in particular areas. As professor Ch. Rousseau states: "*La détermination des matières laisées a la compétence discrétionnaire de l'Etat est, donc, en un sens, une question de fait puisque'elle se réduit à la constata-*

[43] As cited by: Stevan Jovanović, *Restriction des compétences discrétionnaires des Etats en droit international*, Paris, Pedone, 1988, p. 106.

[44] Hans Kelsen, "Recognition in International Law: Theoretical Observations", op. cit, p. 610

tion des matières, qui à un moment donné, ne sont pas réglées par le droit international".[45]

The use of force, historically, is and ideal example of discretionary right of states in international order. However, from the establishment of contemporary law of international peace and security by the UN Charter the use of force is legaly regulated. States could still conduct wars. It is still a matter of eminently political and frequently unilateral decisions, but they are not of discretionary nature anymore. Aggression on Federal Republic of Yugoslavia in 1999 as well as the aggression on Iraq in 2003 are simply illegal actions. If the International Court of Justice had a chance to come out on these military interventions, it could hardly find a support for such (mis)doings in positive norms of international law. The development of international law reduces the field of discretionary decisions of states.

When it comes to recognition of states, it could be said that it is only a partially discretionary act of a state. Namely, in positive sense it is a discretionary act because there is no duty to recognize certain entities as states. In other words, states are free to recognize or not recognize a newly created state. In negative sense they could not recognize "states" created in illegal way! Actually, they could do so, just as they could use force outside the cases prescribed by the UN Charter, but such a recognition would be deemed illegal, just as that use of force would be deemed illegal too. Existing legal regulation and fundamental principles of international laws are strongly relativizing the discretionary character of the act of recognition. With development of international law, that character will be totally lost.

It remains to be seen whether in the case of Kosovo and Metohia international law has been violated by foreign states that have recognized the independence of the southern Serbian province. The answer to this question is conditioned upon the legality of secession of Kosovo and Metohia.

2. THE UNLAWFULL CHARACTER OF THE SECESSION AND RECOGNITION OF KOSOVO AND METOHIA

There is a vast number of arguments that can be put forward in favour of the assertion of the illegality of the secession of Kosovo and Metohia from Serbia and its recognition as an independent state. The most important arguments are the following: the secession of Kosovo and Metohia not only represents the violation of the principle of territorial

[45] As cited by: Stevan Jovanović, *Restriction des compétences discrétionnaires des Etats en droit international*, op. cit, p. 91.

integrity of a state (2.1.) but is also the result of the illegal use of force and represents the violation of the Resolution 1244 SCUN (2.2.).[46]

2.1. Respect for the principle of territorial integrity and possible exceptions

Within the context of non-applicability of the theory of remedial secession on the Kosovo case (2.1.2.), the principle of territorial integrity of a state protects Serbia from the attempt of secession (2.1.1.).

2.1.1. The principle of territorial integrity

Various opinions exist regarding the question of the correct meaning and the effect of the principle of territorial integrity. Is it a principle of an interstate character (2.1.1.1.), or an absolute rule (2.1.1.2.).

2.1.1.1. Inter-state character of the principle of territorial integrity

It is not certain that the principle of territorial integrity can protect a state in case of threat of secession. A certain number of authors solely insist on the interstate character of the principle of territorial integrity. The French professor Alain Pellet with group of authors, in the report on the territorial integrity of Quebec in case of attainment of sovereignty, emphasizes that *the principle of territorial integrity appears to be strictly an inter-State* rule and that *the principle of territorial integrity does not preclude non-colonial peoples from gaining independence*.[47] Support in favour of such an assumption can be found in the UN Charter which does not affirm the principle of territorial integrity as an autonomous one. This principle is mentioned in the Charter only in the direct relation with the prohibition of the use of force between states. Therefore, a logical conclusion can be reached according to which a state, victim of a secessionist movement which is not directly or indirectly aided from the outside, i.e.

[46] It can be argued, disregarding the requirement of legality, that Kosovo actually does not even fulfill the factual requirements since it does not fulfil the requirement of independence when the global role of NATO is taken into consideration. Having this in mind, its recognition would be at the very least premature.

[47] Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, Christian Tomuschat, *The Territorial Integrity of Québec in the event of the attainment of sovereignty*, March 4, 1992, Internet, *http://english.Republiquelibre.org/Territorial_integrity_of_Quebec_in_the_event_of_the_attainment_of_sovereignty*, § 3.14 and § 3.15. Similar opinion is brought out by Georges Abi-Saab: "Therefore, though in some respects the principle of non-intervention, by its effects, favours the central authority, it would be erroneous to say that secession violates the principle of the territorial integrity of State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours", Georges Abi-Saab, Conlusion in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 474.

from another state, cannot invoke the principle of territorial integrity from Art. 2§4 of the Charter of the UN. The principle of territorial integrity would only apply in the external aspect, i.e. in relation to other states, and could not be regarded as a protection from internal problems.[48]

2.1.1.2. Principle of territorial integrity: principle of an absolute character?

However the situation is somewhat complicated. Marcelo Kohen, after a detailed analysis of the concept of territorial integrity, concludes that it should be regarded as an autonomous principle, independent of the principle of the prohibition of the use of force.[49] Such an assumption is also supported by the fact that in certain international legal instruments the principle of territorial integrity is affirmed separately from the principle of the prohibition of the use of force.[50] It is stated in the Resolution of the UN General Assembly 1514 from 1960 that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[51] A year later the Security Council condemned secession attempt of the province of Katanga, explicitly calling upon the need to "maintain territorial integrity and political independence of the Congo". Contrary to the cases of Southern Rhodesia and the Turkish Republic of Northern Cyprus, in case of Katanga the illegality of the

[48] This opinion is also supported by Theodore Christakis: "The UN Charter [2§4] is not, in principle, applicable in case of secession which occurs without military intervention of other states", Théodore Christakis, *Le droit à l'autodétermination en dehors dines situations de décolonisation*, Paris, La documentation française, 1999, p. 145.

[49] One of the reasons for such an assumption lies in the fact that the principle of territorial integrity is older than the principle of the prohibition of the use of force. Paradoxically, while enumerating the situations in which the principle of territorial integrity is breached, professor Kohen does not explicitly specify the case of secession which is not aided by another state. It specifies, however, the case of the *division of the state in order to create a new artificial entity.* Finally, as a concrete example of this case, apart from Manchuko and the Turkish Republic of Northern Cyprus, Kohen mentions the UN Security Council Resolution 787 from 1992 which relates to Bosnia and Herzegovina and the respect of its territorial integrity. In such a way he confirms, not precisely enough though, the assumption according to which territorial integrity protects the state from all attempts of secession. Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, P.U.F, 1997, pp. 369–377.

[50] M. Kohen is giving as an example The Final Act of Helsinki (4th principle). *Ibidem*

[51] "Résolution 1514 (XV) de l'Assemblée générale des Nations Unies: Déclaration sur l'octroi de l'indépendances aux pays et peuples coloniaux ", 14/12/1960 in Pierre-Marie Dupuy, *Grands textes de droit international public*, Dalloz, 1996, p. 75. Even though the Resolution 1514 (1960) is dealing with decolonization, it nonetheless affirms in an autonomous way the principle of territorial integrity which can naturally be applied only to all states – emerging from decolonization or previously existing.

attempt to create a new state is derived solely from the breach of the principle of territorial integrity of the Congo.[52]

That the principle of territorial integrity certainly provides protection to a state from secessionist movements – even when they are not helped from abroad – is also indicated by the later international practice. OSCE, as well as the UN, have put an accent in all recent secessionist crises on respecting the principle of territorial integrity, in that way disabling the secession of parts of internationally recognized states. The principle is applied to:

- *Moldova and Transdnistria*: OSCE has in 1993 commenced a mission in the Republic of Moldavia with the aim of "Consolidation of the independence and sovereignty of the Republic of Moldova within its current borders and reinforcement of the territorial integrity of the State along with an understanding about a special status for the Trans-Dniester region".[53] OSCE has never deviated from this initial frame.
- *Azerbaijan and Nagorno-Karabakh*: due to the conflicts between Azerbaijan and Armenia regarding Nagorno-Karabakh, a region that is inhabited by Armenians and is situated at the borders of Azerbaijan, the UN Security Council adopted several resolutions, among which is Resolution 884 (1993), in which it has reaffirmed "the sovereignty and territorial integrity of the Azerbaijani Republic and of all other States in the region".[54] In this crisis also the solution is to be looked for within the frame which would not breach the mentioned principle.
- *Georgia and Abkhazia, i.e. Southern Ossetia*: in Resolution 1494 (2003) UN SC it is emphasized that "the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders, and the necessity to define the status of Abkhazia within

[52] "Résolution 169 (1961), Adoptée par le Conseil de sécurité à sa 942e séance, le 24 novembre 1961", Internet, *http://www.un.org/french/documents/view_doc.asp?symbol=S/RES/169(1961)&Lang=E&style= B*. It is true that the text of the Resolution mentions also the help that the secessionist movement obtained from abroad however we are still outside the unlawful situation which has occurred as the consequence of the illegal use of force. Leastways, all secessionist movements obtain such help. During the nineties such help from the outside was afforded to the seccesionist movement of Albanians from Kosovo and Metohia.

[53] "CSCE Mission to the Republic of Moldova", CSCE/19-CSO/Journal No.3, Annex 3, 4 February 1993, Internet, *http://www.osce.org/documents/mm/1993/02/4312_en.pdf*.

[54] Resolution 884 (1993), Adoptée par le Conseil de sécurité à sa 3313e séance, le 12 novembre 1993, Internet, *http://www.un.org/french/documents/sc/res/1993/884f.pdf*.

the State of Georgia in strict accordance with these principles".[55] Regarding the question of Southern Ossetia, the European Union has in several times confirmed the position that the solution to the conflict in Georgia should be "*fondé sur le respect de la souveraineté et de l'intégrité territoriale de la Géorgie à l'intérieur de ses frontières internationalement reconnues*".[56]

– *Bosnia and Herzegovina and the Republic of Srpska*: In all resolutions of the UN SC which are related to Bosnia and Herzegovina the imperative of respecting the principle of territorial integrity is emphasized. It is either the respect of the "territorial integrity of Bosnia and Herzegovina" Resolution 752 (1992); or the "commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders," – Resolution 1305 (2000) / Resolution1423 (2002).[57]

– *Russian Federation and Chechnya*: Although UN Security Council has never, logically, dealt with this matter, "international community" has never questioned the territorial integrity of Russian Federation. Professor Crawford quotes the statements of several high representatives of France (minister of foreign affairs), Great Britain (government) and USA (State department) from 1995 where they insist on following: "La Tchétchénie fait partie de la Fédération de Russie. Le respect *du principe de souveraineté et d'intégrité territoriale est une règle de base de la vie internationale*" – (France);

"(...) the exercise of the right [of self-determination] must also take into account questions such as what constitutes a separate people and respect for the principle [of] territorial integrity of the unitary state (...) we have repeatedly called on the Russians to work for a political solution which would allow the Chechen people to express their identity within the framework of the Russian Federation" – (Great Britain);

"We support the sovereignty and territorial integrity of the Russian federation" – (USA).[58]

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[55] Résolution 1494 (2003), Adoptée par le Conseil de sécurité à sa 4800e séance, le 30 juillet 2003, Internet, *http://daccessdds.un.org/doc/UNDOC/GEN/N03/446/50/PDF/N0344650.pdf?OpenElement*.

[56] "Déclaration de la Présidence au nom de l'Union européenne sur l'évolution récente de la situation en Géorgie-Abkhazie et Ossétie du sud", Bruxelles, 20 juillet 2006, Internet, *www.doc.diplomatie.gouv.fr/ BASIS/epic/www /doc/DDD/911474697.doc*.

[57] Internet, *http://www.un.org/french/documents/scres.htm*.

[58] James Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, second edition, 2006, p. 409–10.

We could question did not Badinter Commission stand on the same ground in its second opinion (11. January 1992.) when clearly stating that: "The Committee considers 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; 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".[59] We think that by stating this, Badinter Commission in an indirect way, i.e. by applying a very questionable principle of *uti possidetis juris*, implicitly but substantially applied the principle of territorial integrity of states.[60]

There is absolutely no reason or legal possibility that this principle could be disobeyed or breached today. It is interesting to point out that the opinion of the "international community" regarding this question was

[59] See Opinion no. 2 in Milenko Kreća, *Badenterova arbitražna komisija, kritički osvrt,* Jugoslovenski pregled, 1993, p. 99.

[60] Identical mechanism is applied in the report of legal experts in case of the territorial integrity of Quebec under the presumption of attaining the independence. Through the principle of *uti possidetis* and always problematic notion of minority they arrive to the following conclusion: "If Quebec were to attain independence, the principle of legal continuity (absence of a vacuum juris) would allow the territorial integrity of Quebec, guaranteed both by Canadian constitutional law and public international law, to be asserted over any claims aimed at dismembering the territory of Quebec, whether they stem from: the Natives of Quebec, who enjoy all the rights belonging to minorities (...); the anglophone minority (...); persons residing in certain border region (...), Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, Christian Tomuschat, *The Territorial Integrity of Québec in the event of the attainment of sovereignty*, March 4, 1992, op.cit, § 4.02. In other words, what is not applicable for independent and sovereign Canada, is applicable for sovereign and independent Quebec. In the same way, what was not applicable for independent and sovereign Socialistic Federative Republic of Yugoslavia was applicable for independent and sovereign Croatia or Bosnia and Herzegovina. This contradiction could not be possibly justified. It is correct that a large part of doctrine viewed Yugoslavian case through lens of dissolution of state. However, regardless whether we analyze the case of SFRY as dissolution of state or secession, solutions should have been different. Namely, in generally accepted perspective of dissolution of state (we will not dwell into all incoherent and contradictory aspects of that thesis), it was not possible to take into consideration anything related to the state "in process of dissolution", especially not the borders that existed between its republics. If the federal state doesn't exist anymore, its internal borders could not exist any more either, and the discussion about them must be opened, if they are disputed at the first place. If it is about secession, it is simply not allowed as confirmed by Badinter commission and could only be a result of agreement. Bosnia and Herzegovina as well as other Yugoslav Republics could not perform secession. Professor Marcelo Kohen gives somewhat different interpretation of these problematic examples based on the definition of peoples and the question of the bearer of the right to self-determination. However, it seems that Marcelo Kohen studies the whole problem through the lens of relation between right of peoples to self-determination and territorial integrity. Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, op. cit, pp. 422–433.

in compliance with the generally accepted practice and international law. In all UN Security Council Resolutions concerning the problem on Kosovo and Metohia, – before (Resolution 1160 (1998)) during (Resolution 1239 (1999)), or after the NATO aggression (Resolution 1244 (1999)) – UN Security Council clearly states the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia". Besides that, SC has in resolutions before NATO intervention insisted that "the Kosovo Albanian leadership condemn all terrorist actions", demanded that "such actions cease immediately" and emphasized that "all elements in the Kosovo Albanian community should pursue their goals by peaceful means only".[61] Finally, UN SC has always pointed as a goal "enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration within Serbia".[62] From all of the abovementioned undoubtedly it is derived that territorial integrity of Republic of Serbia would be breached by giving the independence to Kosovo and Metohia and that the independence would represent a violation of this important norm of international law. Question still arises whether the principle of territorial integrity is of absolute or relative character? Is there an exception when that principle must back down before imperative norms of law and justice?

2.1.2. Non-applicability of the theory of remedial secession on the case of Kosovo and Metohia

Principle of territorial integrity, as we have seen, protects Serbia from every attempt of secession. The only exception before which the abovementioned principle could back out – serious violation of the internal right of self-determination, i.e. theory of remedial secession – could not be applied in case of Kosovo and Metohia for two reasons. First: never has internal right of self-determination of Kosovo Albanians been questioned (2.1.2.1.). Second: even under the false presumption that internal right to self-determination has been violated, readiness of the Republic of Serbia to give substantial autonomy to its southern province disables the applicability of the theory of remedial secession (2.1.2.2.).

2.1.2.1. Internal right of self-determination of Kosovo and Metohia Albanians has never been questioned

Here we should soberly analyze occurrences in Kosovo and Metohia in period from 1989. to 1999, i.e. in period during which the Kosovo inhabitants were, according to their claims, deprived of their rights. Did

[61] "Résolution 1203 (1998), Adoptée par le Conseil de sécurité à sa 3937e séance, le 24 octobre 1998", Internet, *http://www.un.org/french/documents/scres.htm.*

[62] This opinion was in the first Resolution on Kosovo-Resolution 1160 (1998), as well as the last Resolution on Kosovo – Resolution 1244 (1999), Internet, *http://www.un.org/french/documents/scres.htm.*

serious and mass violation of human rights really occur? We think that the answer is negative. It is important to go back to the cause of discontent of the Albanian leadership in 1989. The reasons of the Albanian dissatisfaction were the amendments to the Constitution of Republic of Serbia adopted in March 1989 in accordance with the valid procedure (that is to say with the consent of the autonomous provinces), according to which the constitutional power was returned back to the exclusive competence of the state assembly (Amendment XLVII). Namely, the Republic of Serbia has stopped being *a federation inside a federation*. That year the autonomy of the southern Serbian province was not, as it is frequently considered, abolished.[63] Regulation of constitutional competences that clearly does not constitute a violation of human rights is a "cause" to further sequence of events. Albanian MPs declared illegally a "Republic of Kosovo" in Kosovo assembly on July 2nd 1990. The central Serbian authorities reacted to this illegal attempt of secession by suspending the provincial assembly. Kosovo and Metohia Albanians by so called Kačanik Constitution declared independence of the southern Serbian province on September 7th 1990, this time outside of any state institution. This sequence of events represents the beginning of the crisis.[64] It is true that during the nineties Serbian authorities were not representative because Albanian population did not participate in the government. But the question why was that the case is of extreme importance. Did any of ethnic discrimination as provided by law, existed, or was that a voluntary and elaborate making of the parallel state structure by Kosovo Albanians who, simply, decided not to participate in any way in the political life of the Serbian state, because they simply didn't want to live in it anymore? It is sure that legally, both formally and substantially, nothing prevented Albanians from participating in republic elections and fight for their goals in a democratic way. Contrary to that option, radicalization of the conflict and Albanian terrorism has caused the chain reaction with banal sequence terrorism-repression; however, nothing that would lead to justifying secession as *ultimum remedium*. Historically, internal right of Kosovo Albanians to self-determination has never been questioned.

2.1.2.2. Substantial autonomy disables the applicability of remedial secession theory

However, even if we should adopt the incorrect presumption that Kosovo Albanians have been deprived of their internal right to self-deter-

[63] Autonomy of Kosovo and Metohia has never been abolished, but suspended. Constitution of Republic of Serbia from September 28th 1990, on force until the adoption of the new constitution in 2006, provides for the autonomy of Kosovo and Metohia, Chapter VI (*Territorial organization*), articles 108–112.

[64] We could not retrospect on historical aspects of Kosovo and Metohia problem and decades long Albanian aspirations for independent Kosovo in the course of this work.

mination, what is sure today is that substantial autonomy that is offered to Albanian national minority exceeds all international standards of minority protection. According to the Serbian negotiations platform, the southern Serbian province would have exclusive competences and absolute self-government in all areas of life, except in certain domains where the competences would remain with the central government: "The province would independently conduct all competences, excluding a number of reserved powers for Serbia. Competences concerning foreign policy, border control, protection of human rights in last instance, monetary policy, customs policy, protection of Serbian religious and cultural heritage, as well as areas of special customs-inspection, would remain reserved for the central government".[65] But even in the conduct of abovementioned exclusive competences of authorities in Belgrade, Kosovo Albanians would participate. Calling upon the right to self-determination for justifying secession in that context is nothing more than the abuse of that right. The inevitable conclusion is that the creation of an independent state of Kosovo and Metohia is illegal, because it would, besides representing a violation of international norms on protection of territorial integrity, violate the prohibition of abuse of right to self-determination. There is, however, another strong argument in favour of the illegality of Kosovo and Metohia secession. It is the illegal use of force.

2.2. Secession of Kosovo and Metohia as a consequence of illegal use of force and Resolution 1244 UNSC

Besides representing a breach of the Resolution 1244 (2.2.2.), the secession of Kosovo and Metohia represents a consequence of an illegal use of force (2.2.1.).

2.2.1. Unquestionable causality between aggression in 1999 and unilateral declaration of independence

There is no doubt that the unilateral declaration of independence of Kosovo and Metohia would not be possible without NATO aggression on Federal Republic of Yugoslavia in 1999 (2.2.1.1.). The existence of the Resolution 1244 could not influence the abovementioned situation (2.2.1.2.).

2.2.1.1. Bombing in 1999 is the cause of effective secession of the southern Serbian province

It is frequently forgotten, and rarely mentioned, that the actual situation in Kosovo and Metohia is the result of illegal use of force, i.e. ag-

[65] Platform of state negotiations team on future status of Kosovo and Metohia, Internet, *http://www. srbija.sr.gov.yu/kosovo-metohija/index.php?id=51322.*

gression. International law precisely regulates the use of force. According to the Article 51 of the Charter "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". In case of determined threat to international peace and security by the Security Council, in accordance with the article 42 of the Charter "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security". Outside these two cases, the use of force is strictly prohibited and represents the crime of aggression, as defined by the Resolution 3314 (1974) of the General Assembly of UN.[66] Given that in 1999 there could be neither self-defence, nor did UN Security Council adopt the appropriate resolution, there is no doubt that the NATO intervention represented a grave violation of international legal norms, such as the principle of non-intervention in internal affairs, and most important of all, the prohibition of use of force. A parallel could be drawn with the case of Cyprus. Turkish Army invaded part of Cyprus in July 20th 1974, which resulted in factual partition of the island. Nine years later, on November 15th 1983, Turkish community declared independence of the state under the name of Turkish Republic of Northern Cyprus. UN Security Council has deemed this declaration of independence null and void because every secession that is the result of illegal use of force (aggression) is deemed illegal.[67] NATO in 1999 committed aggression against Federal Republic of Yugoslavia. Existing situation in Kosovo and Metohia and unilateral declaration of independence are direct consequences of such an illegal act. As in the case of Turkish Republic of Northern Cyprus, declaration on independent Kosovo should be deemed null and void by the "international community". However, there is an opinion that the causality link between NATO aggression and unilateral declaration of independence of Kosovo is discontinued because of the adoption of the Security Council Resolution 1244. Olivier Corten points out that in the case of Kosovo not only did the causality link was discontinued because of the adoption of the Security Council Resolution, but primarily because of the consent of the Federal Republic of Yugoslavia, after which the following resolution was adopted.[68]

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[66] "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter, as set out in this Definition". "Résolution 3314 (XXIX) de l'Assemblée générale des Nations unies: Définition de l'agression", in Pierre-Marie Dupuy, *Grand textes de droit international public,* Dalloz, 1996, p. 261.

[67] "Résolution 541 (1983) du 18 novembre 1983", Internet, *http://www.un.org/french/documents/scres.htm*.

[68] Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du Sud et à l'Abkhazie", op.cit, p. 748

2.2.1.2. Causality link between NATO bombing and unilateral declaration of independence of Kosovo and Metohia is not discontinued with Resolution 1244

Such an opinion seems unjustified. First it must be pointed out that the undisputed illegality of the armed intervention of the NATO cannot be *a posteriori* justified. Neither the signing of the Kumanovo Agreement nor the adoption of the Resolution 1244 by the UN Security Council cannot give, nor have they given, a legal basis for the NATO intervention. Both documents are discussing future questions and they are not justifying the starting and flagrant illegality of the NATO intervention, i.e. aggression.[69] Illegal character of abovementioned aggression is of objective nature.

When it comes to the causality link between aggression and secession it is extremely important to mention the following: the Resolution 1244 itself has never been applied completely – especially in the part prescribing the return of Serbian security forces in Kosovo and Metohia in accordance with the paragraph 4 of the Resolution. It is undisputed that the provision on the return of Serbian security forces (both military and police) on part of Serbian territory represented, besides affirmation of the principle of territorial integrity, the main reason for Serbia to accept the adoption of the Resolution 1244 (and sign the Military-Technical agreement in Kumanovo). If Resolution 1244 had been completely applied, Serbian security forces would be present in Kosovo and Metohia and secession would not be possible. In our opinion, a resolution which is not completely applied could not be relevant and therefore could not constitute a rupture of the relation of causality.

This observation brings us to a fundamental reason why the abovementioned opinion on the discontinuance of the causality sequence is not acceptable. Existence of the Resolution 1244 cannot represent a discontinuance of the causality link between aggression and declaration of independence, i.e. recognition of same, because the unilaterally declared independence is contrary to the UN Security Council Resolution 1244! Resolution 1244 cannot constitute an interim stage which would neutralise the initial illegality of NATO intervention, which is being transmitted to the illegality of both the declaration of independence and its recognition. Even if we should accept the opinion on discontinuance, then we would have to agree that it is a double discontinuance, because the unilaterally declared independence undoubtedly represents a discontinuance regarding the Resolution 1244. Essentially, unilateral declaration of independence has returned us to the spring of 1999 – i.e. to the state of war, because Resolution 1244 fundamentally represents a peace agreement which

[69] See Serge Sur, *Le recours à la force dans l'affaire du Kosovo*, Les notes de l'Ifri – n°22, IFRI, Paris 2000, p.17.

not only has not been applied, but was breached completely by the unilaterally declared independence – and the situation is logically being returned to *statu quo ante* 1244.

2.2.2. UNSC Resolution 1244 as specific prohibition of secession

The conclusion from previous is as follows: the attempt to create an independent state of Kosovo and Metohia is illegal. Such an attempt represents a triple serious violation of principle of territorial integrity, right to self-determination and prohibition of use of force. From these reasons, and according to the fundamental legal principle – *ex iniuria ius non oritur,* Kosovo and Metohia, from the aspect of international law, cannot become an independent state.[70] Besides these general principles, in case of Kosovo and Metohia there is a specific, binding Resolution of UN Security Council.[71]

According to the Article 25 of the Charter, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Although legal effect of Security Council resolutions could be discussed, it is undisputable that resolutions based on the Chapter VII of the Charter have binding character. Resolution 1244, adopted on June 10th 1999 represents one of major arguments of the Republic of Serbia in favour of claims that states that have recognized the independence of Kosovo and Metohia have violated international law. However, during the status negotiations, under the auspices of the Troika, it could be heard from the chairman, Mr. Wolfgang Ischinger that the "Resolution 1244 could be interpreted in different ways" and that not all of them lead to the same conclusion – i.e. to the protection of sovereignty and territorial integrity of the Republic of Serbia.[72] This statement by Mr. Ischinger is only one of manifestations of the so-called creative interpretation of legal norms.[73] However, a question whether the Resolution 1244 needs interpretation arises (2.2.2.2.) because the first, often forgotten, rule of interpretation of legal norms is that norms that are clear don't need interpretation (2.2.2.1.)

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[70] If we should use legal terminology of James Crawford, we should say that Kosovo simply does not have a basis to become a state (disentitlement).

[71] It is important to mention that the existence of the resolution of UN Security Council only strengthens general principles of international law. Even without the appropriate resolution of UN Security Council secession and recognition of Kosovo and Metohia would represent illegal acts. Resolution 1244 in this case only elaborates political solutions that should be looked in existing borders of Republic of Serbia and represents additional limitation, i.e. prohibition of secession.

[72] Wolfgang Ischinger has explictely expressed opinion on different possible interpretations of Resolution 1244 on the meeting in Vienna on October 22nd 2007.

[73] "Creative interpretation" is not a legal term and it is completely outside the scope of rules on interpretation of legal norms.

2.2.2.1. Resolution 1244 protects the territorial integrity and sovereignty of the Republic of Serbia

Resolution 1244 in several occasions confirms the sovereignty and the territorial integrity of the Republic of Serbia. In opening part Security council confirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2".[74] It also reaffirms "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo".

First article of the operative part of Resolution states as follow: "the Security Council decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2". Annexes 1 and 2 contain, therefore, basic principles that should provide a framework for a political solution of the Kosovo crisis. As a general principle for the solution of the crisis the Annex 1 is mentioning "A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA". The Annex 2 is mentioning the "Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations". Finally in paragraph 10 of the Resolution 1244 UN Security Council "authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo".

All above mentioned provisions are clear and explicitly confirm the sovereignty and territorial integrity of the Republic of Serbia. Could interpretations that would, as proposed by Mr. Ischinger, lead to different conclusion, find the ground in the text of the Resolution?

[74] According to the article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro all international obligations have been transferred from the Federal Republic of Yugoslavia to Serbia.

2.2.2.2. Are contrasting interpretations of the Resolution 1244 possible?

At first sight, the Resolution 1244 could be subject to different interpretations, given that the paragraph 11 introduces ambiguous concepts of final settlements and future status. In the article *a* of the mentioned paragraph it is pointed out that main responsibilities of the civil mission will include "promoting the establishment, pending a *final settlement*, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648)", while article *e* provides for "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648)". In above mentioned article *a final settlement* is clearly separated from the *substantial autonomy* which obviously represents an interim period until the final settlement is being established. This exact provision serves to prove that Resolution 1244 doesn't prohibit the independence of Kosovo and Metohia as form of *final settlement.*[75] However, in article *a* everything is returned to the Annex 2 which must be taken into full account. And by that a concept of *final settlement* is returned under the principle of "A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo".

Finally, there are provisions definitively confirming that the sense of the Resolution 1244 is to find a political solution for the Kosovo crisis through substantial autonomy within Federal Republic of Yugoslavia i.e. Serbia. It is the already mentioned paragraph 4 of the Resolution 1244 by which the Security council Confirms "that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2". Annex 2 contains following provision: "After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions: Liaison with the international civil mission and the international security presence; Marking/clearing minefields; Maintaining a presence at Serb patrimonial sites; Maintaining a presence at key border crossings". A resolution that prescribes the return of Serbian security forces so that they could, among other things, maintain presence at key border crossings, simply could not be interpreted as a legal instrument authorizing secession of Kosovo and Metohia but exclusively as an instrument confirming the sovereignty and territorial integrity of the Republic of Serbia. Therefore, recognition of independ-

[75] See Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", op. cit. and Snežana Bogavac, "Rezolucija Ujedinjenih nacija 1244 nije prepreka za priznanje Kosova", *Voice of America*, 24.01.2008, Internet, *http://www.voanews.com/Serbian/archive/ 2008–01/2008–01–24-voa6.cfm*.

ence of Kosovo and Metohia itself constitutes a violation of Resolution 1244, i.e. violation of international law.[76]

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Aforementioned doctrine as well as international practice clearly show that theory of legal neutrality of creation of new states as well as their recognition could hardly be justified. Factual conditions of statehood are complemented with the conditions of legality that must be fulfilled by certain entity in order to attain statehood. The possibility of legal assessment of the subject of the recognition is transferred to the act of recognition itself. Theory on premature recognition as well as practice of collective non-recognition of illegal situations explicitly confirm that the act of recognition is by no means legally neutral. From the legal perspec-

[76] For the end of the discussion on Resolution 1244 we should point out that professor Panayotis G. Haritos has brought to light dark actions conducted immediately before the adoption of the Resolution 1244 representing a violation of extremely important principle of international law – a principle of good faith. Professor Haritos clearly shows that a fraud has been attempted by adding the reference (S/1999/648) along the words "Rambouillet accords". That same reference is not to be found in Article 8 of annex II of resolution 1244 along the words "Rambouillet accords". Annex II has been derived from the Belgrade agreement from June 3rd 1999. The Belgrade agreement is the basis for all future documents, i.e. the Military-Technical Agreement as well as the Resolution 1244. "Rambouillet accords" in Belgrade agreement are referring only to what was agreed upon in Rambouillet, but not on the ultimatum presented to the parties under the title "Interim Agreement for Peace and Self-Government in Kosovo", providing for, among other things, free movement of NATO troops on the territory of Serbia (Chapter 7, Appendix B, article 8), as well as international conference that would in three years determine mechanism for the finding of the final settlement based on the will of the people (Chapter 8, Article 1, al. 3). As such, this was not accepted by the Serbian delegation in Rambouillet. However, it was this proposal, by intervention of the French representative in UN SC, that was incorporated into the Resolution 1244 under the title "Rambouillet Accords (S/1999/648)", on purpose and with the real title left out, and still very skillful for fraud to succeed because it was identified with the Rambouillet Accords from the Annex II of the Resolution 1244, i.e. the Belgrade Agreement. Reference in question is the registry number that was given by the SC to the refused ultimatum which was imputed by the French representative on June 7th instead of Rambouillet accords agreed upon. Independent from the reference in Resolution 1244, it is impossible to claim (and it would most certainly be illegal) that "Rambouillet accords" that are in Resolution 1244 sometimes mentioned with the abovementioned reference, sometimes without, are referring to the ultimatum titled "Interim Agreement for Peace and Self-Government in Kosovo". See Panajotis G. Haritos, "Status Kosova i Metohije prema međunarodnom pravu", u *Kosovo i Metohija, prošlost, sadašnjost, budućnost*, Srpska akademija nauka i umetnosti, Beograd, 2007, str. 367–401. Finally, even if we incorrectly presumed that this attempted fraud could have a legal consequence, unilateral declaration of independence would again be contrary to the Resolution 1244 SC UN, that would in that case prescribe specific procedure for the eventual attainment of independence. See: Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du Sud et à l'Abkhazie", op.cit, pp. 735–736 and p. 739.

tive, undoubtedly there is a strong argumentation to support the thesis that the international recognition could be illegal or in the case in question, starting point to this analysis, that the state that have recognized the independence of Kosovo and Metohia have violated international law. It is unlikely that the International Court of Justice, in contentious proceedings that would hypothetically be started against certain state that recognized unilateral and illegally declared independence of Kosovo and Metohia, would *prima facie* declare that it has no jurisdiction stating that the act of recognition is a political act upon the discretion of each state and that therefore it could not be a subject of dispute.

In a wider sense, it is clear that a very coherent and complete construction of something that could be called the law of statehood could be made. In such construction, where, as we already pointed out, the creation of states must fulfill certain requirements, secession could be possible only as a result of agreement, or as *ultimum remedium*, in case of hardest breaches of internal right of self-determination.[77] Of course, such a construction leaves aside the influence of politics, i.e. force, but it could be justified by an answer to an already cited question of professor Verhoeven, that *on ne voit pas très bien ce qu'un système (M.J. – système du droit international), impuissant à contester des effectivités, gagne à les refuser*.[78] The answer would be that by not accepting illegal effectiveness, international law would simply get more... legal character.

[77] This construction could be supplemented with problems of the bearer of the right to self-determination, precise distinctions between concepts of people and national minorities as well as the question of peoples pretending to have more nation states. However, main difficulties of this approach are in different sociological and political understandings of the concepts of peoples, citizens, nations etc. making it hardly operative for now.

[78] See footnote 11.