RIDEA Research Institute of Development and European Affairs

THE ISSUE OF *STATE SUCCESSION* IN THE LIGHT OF AN EVENTUAL 'GRAND FINALE' BETWEEN KOSOVO AND SERBIA

September 2019

Supported by: Norwegian Embassy

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BACKGROUND NOTE/STUDY

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Abbreviations

FRY	Federal Republic of Yugoslavia
GNP	Gross National Product
ICJ	International Court of Justice
ICR	International Civilian Representative
ISG	International Steering Group
PoE	Publicly Owned Enterprises
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
VCSS	Vienna Convention on State Succession

Introduction

1. Having declared its independence on 17 February 2008, having gained the recognition of 116 out of 193 UN Member States (as of 18 September 2019), and having acceded to numerous regional and international organizations, the Republic of Kosovo is now seeking to establish its rights and obligations as a successor state to the precedent entities of which it was a constituent part and by which it was administered (i.e., the United Nations Interim Administration Mission in Kosovo, UNMIK), subsequent to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991-92.

2. This paper will provide analysis of: firstly, international law regarding state succession; secondly, Kosovo as a successor state; thirdly, international law concerning state succession in respect of treaties; fourthly, Kosovo as a newly independent state; and fifthly, international law concerning state succession in respect of property and debts. It will conclude with a discussion of policy options and recommendations.

Background: Types of State Succession

3. State succession can occur in a number of different contexts, including the cession or yielding of territory (for example, the cession of Hong Kong from the United Kingdom to the People's Republic of China in 1997), the incorporation of one state into another (for example, the incorporation of the German Democratic Republic into the Federal Republic of Germany in 1990), the merger of two states (for example, the union of North and South Yemen in 1990), the complete dissolution of a state (as occurred with the Socialist Federal Republic of Yugoslavia in 1991-92), and the secession of part of a state from an existing state, whether consensually (for example, the secession of South Sudan from Sudan in 2011) or non-consensually (as with the secession of Bangladesh [East Pakistan] from Pakistan in 1971).

4. In the cases of both dissolution and secession, two or more states emerge on territory where previously there was only one state. The two scenarios are distinguished by whether there remains a state which continues the same legal personality as the previously existing state, although with a reduced territory and population. In a case of secession, the seceding state is a successor state, a new international legal person which by the operation of international law succeeds to certain rights and obligations of the state of which it was formerly a part; the continuator state carries forward the same legal personality as the state which previously existed. In the case of dissolution, there is no continuator state; the legal personality of the previously existing state is extinguished and all the new states which emerge on its territory have the status of successor states.

5. Distinguishing between secession and dissolution depends on an assessment of whether the previously existing state subsists despite the reduction of its territory and population (and potentially also a change of its political regime and name). International recognition plays a major role in determining whether a particular case is one of secession or dissolution. Thus, the other constituent republics of the Soviet Union agreed formally in December 1991 to dissolve the Soviet Union and to recognise the Russian Federation as the continuator state of the former Soviet Union and the other former Soviet Republics as successor states. Reflecting this decision, the Russian Federation automatically continued the Soviet Union's membership of the United Nations (including its permanent seat on the Security Council), while the other former Soviet republics had to apply for membership as new states.

6. In contrast, the Federal Republic of Yugoslavia (FRY) was not recognized internationally as the continuator state of the Socialist Federal Republic of Yugoslavia (SFRY) following the breakup of the latter. The Arbitration Commission on the Former Yugoslavia (Badinter Commission) stated on 29 November 1991 that 'the [SFRY] is in the process of dissolution' and on 4 July 1992 stated that the SFRY 'no longer exists'. Eventually, the FRY itself abandoned its claim to continuity, being admitted to the United Nations as a new member state in November 2000 and entering into an Agreement on Succession Issues in 2001

which referred to the FRY as one of the five successor states of the SFRY. Thus, the breakup of the SFRY between 1990 and 1992 was a case of dissolution and not secession.

7. The FRY was constitutionally restructured as the State Union of Serbia and Montenegro in 2003, and Montenegro became independent in 2006 following an independence referendum. On 5 June 2006, two days following Montenegro's declaration of independence, the Serbian Assembly adopted a declaration 'On obligations of public authorities of the Republic of Serbia in assuming powers of the Republic of Serbia as the successor State to the State Union of Serbia and Montenegro'. Despite the use of the term 'successor State', it is clear from the context and subsequent practice that Serbia claimed the status of, and was internationally recognized as, as the continuator state of the State Union. Serbia's membership of the United Nations continued, and Montenegro was admitted in its own right. Thus, the separation of Serbia and Montenegro is an instance of secession rather than dissolution, analogous to what occurred in the Soviet Union in 1991-92. The Republic of Serbia is the continuator of (with the same legal personality as) the FRY/State Union which emerged in 1992 as one of the successor states to the SFRY. Montenegro is a successor state to the FRY.

Kosovo as a Successor State

8. The Republic of Kosovo declared its independence on 17 February 2008. Justified on legal, moral and political grounds, the declaration of independence was also the end result of a UN-led international process for determining Kosovo's status. This process, which took place in the period from 2005 to 2007, was mediated by the UN Secretary-General's Special Envoy for the Future Status Process for Kosovo, the former Finnish President and Nobel Peace Prize laureate, Martti Ahtisaari. At the end of the negotiating process, President Ahtisaari proposed independence for Kosovo to be supervised for an initial period by the international community pending implementation of the Comprehensive Proposal for the Kosovo Settlement Status (also known as the 'Ahtisaari Plan'). The UN Secretary-General

fully endorsed the proposal of his Special Envoy but it failed to gain the support of Russia in the Security Council. The democratically-elected representatives of the people of Kosovo thus declared the country's independence, inaugurating a period of 'supervised independence' overseen by the International Steering Group (ISG) and its International Civilian Representative (ICR). On 2 July 2012, the ISG announced that the Comprehensive Settlement Proposal had been successfully implemented. The ISG, in turn, declared the end of the supervision of Kosovo's independence and the end of the mandate of the ICR on 11 September 2012.

9. In an Advisory Opinion of 22 July 2010, the ICJ confirmed that Kosovo's declaration of independence violated no applicable rule of international law; nor did it violate the special regime created by UN Security Council Resolution 1244 or the Constitutional Framework for Provisional Self-Government in Kosovo. In its own words, 'the [C]ourt has concluded…that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law.' The Advisory Opinion confirmed Kosovo's position and that of the numerous states that have extended recognition to Kosovo.

10. Kosovo thus lawfully became an independent and sovereign state in 2008. Applying the analytical framework laid out in the previous section, Kosovo's separation from Serbia falls within the category of secession rather than dissolution. Following Kosovo's lawful secession, Serbia has retained the majority of its territory and population, and has continued its existing membership of the UN, indicating that it is internationally recognized as the continuator state of the FRY/State Union/Serbia. As far as Kosovo and the states recognizing it are concerned, Kosovo is thus a successor state to the FRY/State Union/Serbia, like Montenegro (as discussed in paragraph 7).

11. Could it be argued that Kosovo is not a successor state to the FRY/State Union/Serbia but, rather, a successor state to the SFRY which dissolved in 1990-92? In Art 9 of the Kosovo Declaration of Independence, the democratically-

elected leaders of Kosovo undertook 'the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part…' Thus the Declaration recognizes that Kosovo succeeds to international obligations from the SFRY and from UNMIK but it does not refer to any such succession from the FRY/State Union/Serbia.

12. Kosovar authorities had, in fact, attempted to declare independence in 1992, along with Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia, but they were unable to exercise territorial control at that time and did not receive international recognition from other states (apart from Albania). Kosovo's lack of international recognition at this time can be traced in part to the decision of the Badinter Commission that, on the dissolution of the SFRY, the former boundaries between the republics of the SFRY became international frontiers protected by international law on the basis of the principle of uti possidetis juris.

13. However, earlier on 2 July 1990, the Kosovo parliament had proclaimed Kosovo a republic in Yugoslavia. The proclamation was in reaction to the decision by representatives of the Kosovo Assembly—handpicked by Serbia—on 23 March 1989 to renounce Kosovo's constitutionally protected autonomy. Then, on 7 September 1990 in the town of Kaçanik, the same parliament promulgated the Constitution of the Republic of Kosovo. It could thus be argued that Kosovo became a state with the dissolution of the SFRY along with the other constituent republics of the SFRY, notwithstanding Kosovo's non-recognition (apart from Albania). This argument is consistent with the Badinter Commission's opinion and also with the logic that Kosovo independence does not represent a precedent, which has been the concern of some states but instead represents a unique set of circumstances.

14. The reasoning of the Badinter Commission has in fact been criticized. It effectively gave the republics of the SFRY a presumptive right to statehood while depriving Kosovo of this right, solely on the basis that it did not have precisely the same

status under the constitutional law of the SFRY. In addition to the foregoing observation (in paragraph 13), this reasoning ignored the fact that the 1974 SFRY Constitution accorded both republics and autonomous provinces a very similar role and degree of autonomy. Thus, the Commission arguably should have applied the principle of uti possidetis juris to the Autonomous Province of Kosovo on an equal footing to the SFRY republics, giving it a presumptive right to become a state following the dissolution of the SFRY.

15. Although these points are compelling, there are still difficulties in arguing that Kosovo never became a part of the FRY. Even if the uti possidetis principle correctly applied would have created a presumption that Kosovo should obtain statehood following the dissolution of the SFRY, it seems clear that Kosovo did not, in fact, become a state until 2008. The FRY largely retained effective control of the territory until the Kosovo War of 1998-99, following which UNMIK was established. Furthermore, until 2008 Kosovo was regarded internationally as part of the territory of the FRY, as affirmed, for example, in UNSC Resolution 1244 (1999). Moreover, the 2008 Declaration of Independence establishes Kosovo's independent statehood from the time of the declaration.

16. It does not seem, therefore, that Kosovo can be a successor state directly to the SFRY. Rather, it is a successor state to the FRY/State Union/Serbia. The Ahtisaari Report (in Annex VI) states that that 'Kosovo shall assume its share of the international debt of the Republic of Serbia', a provision which assumes that Kosovo was previously part of the FRY/State Union/Serbia. The Kosovo Declaration of Independence, in turn, states that '[w]e accept fully the obligations for Kosovo contained in the Ahtisaari Plan.'

17. Thus Kosovo would appear to be a successor state to the FRY/State Union/Serbia. However, Kosovo's status between 1999 and 2008 gives rise to complications. During this time, although in strict law Kosovo was internationally considered to be part of the FRY/State Union/Serbia, its administration was carried out by UNMIK under a Security Council mandate under Chapter VII of the UN Charter. UNMIK's legal powers included the making of bilateral agreements with third

states on behalf of Kosovo on matters falling within its responsibilities. In a Note Verbale of March 12, 2004, the UN Assistant Secretary-General for Legal Affairs advised that the international conventions acceded to by the FRY/State Union after 10 June 1999 (the establishment of UNMIK) 'are not automatically applicable to Kosovo, although they can be made applicable thereto by incorporation through a bilateral agreement between UNMIK and a third State.' Thus, Kosovo cannot be bound by obligations entered into by the FRY/State Union/Serbia between 10 June 1999 and 17 February 2008, only by those entered into by UNMIK.

The Vienna Conventions on State Succession and Customary International Law

18. State succession is a complex and controversial area of international law. In the 1970s and early 1980s the International Law Commission worked on two treaties which attempted to clarify (and develop) international law in this area: the Vienna Convention on State Succession in Respect of Treaties 1978 (VCSS 1978) and the Vienna Convention on State Succession in Respect of State Property, Archives and Debts (VCSS 1983). However, neither Convention has been widely ratified. The VCSS 1978 is in force but has only 22 parties. The VCSS 1983 has only 7 parties and is not yet in force. State succession is thus a matter largely governed by customary international law, including in the case of Kosovo (although Serbia is a party to the VCSS 1978, Kosovo is not). But there is a significant amount of dispute about the contents of the relevant customary law owing to inconsistencies in and different interpretations of state practice.

19. The general rule in VCSS 1978 is that successor states automatically succeed to treaties in force for the predecessor state unless this would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Practice arising from the breakup of the Soviet Union, Czechoslovakia, and the SFRY seems mostly to support a presumption of succession in relation to multilateral treaties. Whether automatic succession also generally applies to bilateral treaties is more controversial. In practice a bilateral

exchange of notes usually occurs to confirm the continued applicability of existing treaties, but it is open to interpretation whether such an exchange of notes recognizes an automatic succession which has already taken place or whether it has a constitutive effect. As for the VCSS 1983, its general principle on succession to property and debts (requiring equitable division) are likely reflected in customary law but do not provide much concrete guidance. The Institut de Droit International, a group of eminent international lawyers, has suggested a number of more specific rules aimed at filling the gap, although it is not clear to what extent these rules reflect existing state practice.

20. At least some of the provisions of the VCSS 1978 and the VCSS 1983 are reflected in customary international law, although to what extent is a matter of disagreement. The Badinter Commission stated (in Opinion No 9) that 'the succession of states is governed by the principles of international law embodied in the Vienna Conventions [of 1978 and 1983]'. In Opinion no 13, the Commission took the more equivocal view that while 'there are few well-established principles of international law that apply to State succession…the 1978 and 1983 Conventions do offer some guidance.' In the context of the dissolution of the SFRY, all the former republics agreed that the principles reflected in the VCSS 1978 and 1983 were applicable.

Succession in Respect of Treaties

21. The general provision in the VCSS 1978 governing state succession in respect of treaties in cases where a part or parts of the territory of the state separates to form a new state or states is found in Art 34. This article provides as a general rule that successor states automatically succeed to the treaties in force for the predecessor state at the date of succession (unless such treaties are territorially limited to territory which does not become territory of the successor state). This general rule of automatic succession applies whether or not the predecessor state continues to exist, i.e. both in cases of dissolution and of secession. However, automatic succession does not apply if a) the states concerned otherwise agree; or b) it appears from the treaty or is otherwise established that the application of the

treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

22. Art 34 is a general provision. More specific provisions elsewhere in the Convention apply to certain kinds of treaties. Thus, Arts 11 and 12 of the Convention establish that state succession does not affect boundary regimes or obligations relating to the use of specific territory. Reflecting the need for stability in territorial matters, automatic succession applies to all such treaties. These rules are also part of customary international law, as confirmed by the ICJ in the *Gabčíkovo–Nagymaros Project* case. On the other hand, Art 4 provides that the VCSS 1978 is without prejudice to the rules concerning the acquisition of membership of international organizations. In most cases, successor states (as opposed to continuator states) do not succeed in membership of international organizations and have to apply to become new members, as Kosovo has done repeatedly.

23. The position in favour of automatic succession adopted in Art 34 remains controversial. It reflects a desire to ensure legal stability where state succession occurs. The diametrically opposed position—what is known as the 'clean slate' approach—contends that as the new state has not consented to the relevant treaties, it should not automatically be bound by them without a new expression of consent. In contrast to the general rule in Art 34 favouring automatic succession, a variation of the clean slate approach was applied in the VCSS 1978 to 'newly independent States' (former colonial dependencies which obtained independence) but since the process of decolonisation is largely completed, few new states will fall within that category (although see further discussion below in paragraphs [32] to [37]).

24. Since the VCSS 1978 has not been widely ratified, the key question is whether the general rule of automatic succession in Art 34 is reflected in customary international law. State practice is open to different interpretations on this point. The International Law Association in 2008 found that Art 34 was referred to by most successor states in cases of dissolution and secession and that these states

considered themselves as successors to multilateral treaties entered into by the predecessor states. However, in other cases, states adopted the clean slate approach rendering succession optional. The practice of the UN Secretary-General has been to request that successor states produce specific declarations of succession in respect of multilateral treaties to which the UN is the depository, raising the question of whether succession automatically occurs in the absence of such a declaration. In some cases, successor states have acceded to multilateral treaties, to which the predecessor state was a party, as a new party rather than make a declaration of succession. The case-law of the International Court of Justice is also not entirely clear. In its 1996 Judgment on Preliminary Objections in the Bosnian Genocide case the Court did not find it necessary to pronounce on whether a rule of automatic succession to treaties applied. Similarly, the Court avoided a general pronouncement on automatic succession to bilateral treaties in its 1997 judgment in the Gabčíkovo–Nagymaros Project case, confining its reasoning to treaties of a territorial character (see paragraph 22).

25. However, despite the complex nature of state practice, the prevalent tendency since the 1990s has been supportive of a presumption that treaties continue to apply to successor states. This position was adopted by the US Department of State in 1992 and also by EU member states in response to the breakup of the SFRY and Czechoslovakia, with certain states like Austria which had previously taken a 'clean slate' approach shifting to an affirmation of continuity. (Some have argued that the presumption only applies in cases of dissolution and not of secession, but it is not evident that states rely on this distinction in practice). On this view, the common practice of notification of succession to the depository of multilateral treaties, as in the case of UN treaties, is not a requirement for succession.

26. Although the ICJ has refused to pronounce on whether there is a general rule of automatic succession, its reasoning seems to support a presumption of succession. In the Genocide Convention (Croatia v Serbia) case, Croatia asserted that the FRY was a party by succession to the Genocide Convention from the beginning of its existence as a state. The Court referred to a declaration by the Constitutional Assembly of the FRY in 1992 that it would 'strictly abide by all the commitments

that the SFRY assumed internationally', a declaration transmitted in a note to the UN Secretary-General (although not as a formal notification to him as a treaty depository). Despite the fact that at that time the FRY was claiming to be the continuator state to the SFRY, the Court held that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties. The Court also held that, unlike ratification or accession to a treaty as a new party, notification of succession 'relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form.' Thus, the general acceptance by the FRY of its succession to the international obligations of the SFRY sufficed to establish that it was a party to the Genocide Convention at the relevant time.

27. The ICJ's reasoning does not resolve whether recognition by the successor state of its succession to treaty obligations is constitutive or merely declaratory, so that a state would automatically succeed to treaty obligations without any expression of consent on its part (although the quotation in the previous paragraph can be read to support the declaratory view, and Judge Elaraby specifically endorsed a rule of automatic succession even in the absence of a declaration in his separate opinion in Legality of the Use of Force (Serbia and Montenegro v Belgium). The ICJ's judgment in Croatia v Serbia does show, however, that a broad and general statement by a successor state accepting the international obligations of the predecessor state can be sufficient to establish the continued application of pre-existing treaties. Thus, the statement in the Kosovo Declaration of Independence undertaking 'the international obligations of Kosovo, including those concluded on our behalf by UNMIK and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part…' establishes that Kosovo has succeeded to treaties entered into by the SFRY and UNMIK, although it leaves the status of treaties entered into by the FRY before 10 June 1999 unclear (see paragraph 16). Although for political reasons Kosovo has been unable to submit formal notice of succession in respect of UN multilateral conventions to the UN Secretary-General, the ICJ's reasoning suggests that

Kosovo's acceptance of international obligations in its Declaration of Independence is sufficient for it to become a party by succession of multilateral treaties to which the SFRY was a party.

28. Even if there is a general presumption in favour of succession in respect of treaties, this does not apply to all treaties. One exception discussed in paragraph 22 involves membership of international organizations. More generally, as Art 34 indicates, automatic succession will not occur where this would be contrary to the object and purpose of the treaty or radically change the conditions for its operation. One widely accepted example of such a treaty is a political or military alliance, as such a treaty is closely tied to the identity of the contracting parties. Similarly, in some cases, it has been concluded that disarmament treaties do not apply to successor states (as opposed to the continuator state) as in the case of US-Soviet bilateral disarmament treaties. In contrast, it has been argued that there is a specific rule providing for automatic succession to human rights treaties; although the ICJ did not rely on this argument in the Bosnian Genocide and Croatia v Serbia cases, it was relied on by Judge Weeramantry in his Separate Opinion in the former case.

29. More generally, while a presumption of continuity likely applies to multilateral treaties open generally to states, it is less clear whether it applies to bilateral treaties or other treaties intended to be confined to a restricted number of parties. Art 34 VCSS 1978 does not distinguish between multilateral and bilateral treaties, apparently applying the principle of automatic succession to both. But some scholars argue that bilateral treaties are defined by the restricted number of parties and to apply them to a new state radically changes the operation of the treaty by definition. Thus, on this view, bilateral treaties only apply to a new state if both parties agree that they should continue in force (or if they fall within the category of territorial treaties discussed in paragraph 22).

30. The International Law Association concluded in 2008 that the fate of bilateral treaties concluded by the predecessor state is generally decided through negotiation between the successor state and the other party. Kosovo has

concluded agreements on treaty succession with a number of states, including Austria, Belgium, the Czech Republic, Finland, France, Germany, and the United Kingdom. Such agreements make clear that previously applicable bilateral treaties continue to apply. For example, the UK confirmed in an exchange of notes with Kosovo in 2008 that it 'regards treaties and agreements in force to which the United Kingdom and UNMIK, and the UK and the SFRY, and as appropriate the UK and the Federal Republic of Yugoslavia, were parties as remaining in force between the United Kingdom and the Republic of Kosovo'. (For discussion of the extent to which Kosovo succeeded to treaties of the FRY, see the discussion in paragraphs [11]-[17], above).

31. In the absence of such an agreement, the status of bilateral treaties is less clear. However, there are arbitral decisions which appear to support the view that bilateral investment treaties automatically bind a successor state. Notably, in the 2015 case of World Wide Minerals v Kazakhstan, it was held that Kazakhstan was bound as a successor state of the Soviet Union by the Canada-USSR BIT of 1989, although the text of the decision is confidential and the exact reasoning of the tribunal is not known. This would be in line with the principle of automatic succession as put forward in Art 34 VCSS 1978. (In the Kosovo context, an arbitral tribunal assumed that Kosovo was a party to the Germany-SFRY BIT of 1990, but this can be attributed to the fact that Kosovo and Germany have concluded an agreement on treaty succession, and that neither party to the case challenged the applicability of the treaty: ACP Axos Capital v Kosovo).

'Newly Independent States' and State Succession in Respect of Treaties

32. The VCSS 1978 contains a separate set of rules applicable only in the case of 'newly independent States'. A newly independent state is defined in Art 2(f) as 'a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible'. Former colonial territories would

qualify as a dependent territory so described. In contrast to the general rule of automatic succession in Art 34, the VCSS 1978 applies the clean slate rule to newly independent states. Such a state is not generally bound by treaties by reason of succession but may establish itself as a party to a previously applicable multilateral treaty by notification to the depository (or if there is no depository, to the parties), unless this would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Bilateral treaties only continue in force where both the newly independent state and the other state party expressly agree, or by reason of their conduct are considered as having so agreed.

33. The provisions concerning newly independent states, as just noted, were intended to apply to former colonies. The application of the 'clean slate' rule reflected the view that colonial status violated the right of self-determination, and that this right required that the new state should not be bound by treaties entered into (and thus 'imposed') by the colonial power unless it chose to affirm such treaties. (It should be noted however that the special rules for territorial treaties and international organizations, discussed in paragraph 22, also apply to newly independent states).

34. In the few cases of decolonization that have occurred since 1978, newly independent states have generally claimed the right to choose whether or not to accept previously applicable treaties, in line with the provisions of VCSS 1978. It could thus be argued that these rules reflect customary international law. However, it is widely assumed that with the end of decolonization the concept has lost its practical relevance. Broadly speaking, new states emerging outside the colonial context since the end of the Cold War have not been considered to fall within the category of newly independent states.

35. It could conceivably be argued that the concept of a newly independent state should be expanded to apply outside the colonial context to other instances where secession occurs in the exercise of the right of self-determination. In particular, the concept might be applied to cases of remedial secession, where a minority group within an existing state secedes in response to serious discrimination or

grave human rights abuses. As in the case of former colonies, it seems unjust for a new state to be bound by obligations entered into by a predecessor state that violated its people's right to self-determination. Kosovo's secession from Serbia is sometimes considered to be an example of remedial secession in the exercise of self-determination.

36. To support this argument, one could refer to the preparatory texts of the VCSS 1978. These suggest that the reasoning underlying the special rules on 'newly independent states' was that the population of dependent territories had been unable to participate in the government and foreign policy of the predecessor state and therefore should not be bound by treaties in which they had no say. Although the authors of the treaty primarily had in mind colonies geographically separate from the predecessor state's main territory, it appears arbitrary to confine the category to these situations. It can be compellingly argued that any territory whose people were systematically discriminated against and excluded under the predecessor state should fall within the same category. This is supported by the UN General Assembly's 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which indicates that the right of self-determination is violated where a state does not possess 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. The government of the FRY violated the right to self-determination in this way: it systematically discriminated against the population of Kosovo and largely excluded them from political representation and participation, including in the conduct of foreign affairs and the treaty-making process. Kosovo was thus a 'dependent territory' without the freedom to participate in the conduct of international relations, in the same position as a colony. As well as giving rise to the right of remedial secession, this suggests that Kosovo should be considered a newly independent state, just as a former colony would be.

37. However, there are difficulties involved in this argument. Firstly, the doctrine of remedial secession is itself controversial, and its application in the context of state succession would be novel. Secondly, it is not clear that claiming newly

independent state status would be advantageous to Kosovo. The provisions require newly independent states to 'opt-in' to previously applicable multilateral treaties by notification of the depository but in Kosovo's case there would likely be political obstacles to the continuator state accepting the notification. The provisions regarding bilateral treaties, which require the consent of the other party as well as of the newly state for such treaties to continue in force, may be less advantageous to successor states than automatic succession to bilateral treaties, which is arguably (although not certainly) the general rule (see paragraphs [29]–[31] above).

State Succession in Respect of Property and Debts

38. The VCSS 1983 contains rules applicable to state succession in respect of state property, debts and archives. However, as the International Law Association noted in 2008, these rules are mostly general in nature and subsidiary to agreements reached among the concerned states. Further, as noted previously the VCSS 1983 has very few parties and has never come into force (partly because of dissatisfaction concerning the principle of newly independent states' permanent sovereignty over natural resources). These aspects of succession are thus governed by customary law, but the applicable customary principles are quite vague.

39. In its Opinion No 12, the Badinter Commission stated that the fundamental rule applying to succession to state property, archives and debts is that states must achieve an equitable result by negotiation and agreement. It went on to state that if one of the parties concerned refused to cooperate, it would be in breach of that fundamental obligation and would be liable internationally, which would potentially allow for states sustaining loss to take non-forcible countermeasures in accordance with international law. After a period of non-cooperation by the FRY, an agreement was reached in 2001 by the five successor states to the SFRY concerning succession to the property, debts, and archives of the SFRY.

40. If an agreement cannot be reached, it is clear that in a case of secession the immoveable property of the predecessor state on the territory of the successor state passes to the successor state (Art 17(1)(a) VCSS 1983), as is confirmed by state practice. The position in relation to moveable property is less clear. Art 17(1)(b) states that moveable state property connected with the activity of the predecessor state in respect of the territory of the successor state passes to the successor state. In contrast, the Badinter Commission stated more simply (in Opinion no 14) that 'public property passes to the successor state on whose territory it is situated' and that 'the origin or initial financing of the property and any loans or contributions made in respect of it have no bearing on the matter'.

41. As for immovable property located in third states (for example, embassies), Art 18 of the VCSS 1983 provides that in the case of dissolution of the predecessor state it shall pass to the successor state in equitable proportions. However, it is silent on what rule applies in the case of a secession from a pre-existing state which continues to exist (as is the case in respect of Kosovo). Given the fundamental principle of equity that governs state succession in this area, the view of the Institut de Droit International (IDI) in Art 19 of its 2001 Resolution on State Succession in Matters of Property and Debts correctly identifies customary international law: in cases of secession a successor state has the right to an equitable apportionment of the property of the predecessor state situated outside its territory. The successor state is also entitled to an equitable proportion of the predecessor state's other movable property (Art 17(1)(c) VCSS 1983) and of all other property, rights and interests of the predecessor State (Art 20, IDI Resolution 2001). The underlying equitable principles also suggest that property of major importance to the cultural heritage of a successor state shall pass to that state (Art 16(5) IDI Resolution 2001).

42. State debt, as defined in the VCSS 1983, means any financial obligation of a predecessor state arising in conformity with international law towards another state, an international organization or any other subject of international law. The 2001 IDI Resolution expands the definition to include financial obligations to any natural or legal person under domestic law. In the absence of agreement between

the predecessor and successor state, state debt shall pass to the successor state in an equitable proportion, taking into account the property, rights, and interests which pass to the successor state in relation to that state debt (art 40 VCSS; art 23 IDI Resolution 2001). Some recent state practice suggests that localized debts (debts concluded by the predecessor state but for the benefit of the seceding part) are inherited by the successor state, although Art 28 of the IDI resolution 2001 instead provides that any benefits to the successor state be taken into account in the general equitable distribution.

43. Again, these general principles can be set aside by agreement between the states concerned. Thus the Russian Federation accepted the entirety of the Soviet debt, a decision presumably connected with its wish to obtain international support for its (successful) claim to be the continuator state of the Soviet Union.

44. Among the relevant factors for determination of an equitable apportionment, according to the IDI, are the respective parts in the Gross National Product (GNP) of the states concerned at the time of the succession or at the time of the decision or agreement on apportionment, and the formula adopted by the IMF for the apportionment of quotas among the states concerned (Art 11, IDI Resolution 2001). According to the Badinter Commission (Opinion no 13), claims which one state may have against another under the law of state responsibility for war damages or other breaches of international law are not directly relevant to an apportionment of state property, archives or debts for purposes of state succession. But the Commission also emphasised that it did not exclude the possibility of setting off assets and liabilities to be transferred under the rules of state succession against war damages. This is potentially of relevance to the apportionment between Serbia and Kosovo, given the breaches of international humanitarian law previously committed by the FRY/Serbia in Kosovo.

45. As with the VCSS 1978, the VCSS 1983 contains some specific provisions applicable to 'newly independent States'. Notably, Art 38 provides that no state debt shall pass to the newly independent state unless an agreement between them otherwise provides in view of the link between the debt and activity in the

territory of the newly independent State. As discussed in paragraphs [32] to [37], the category of a newly independent state was intended to cover former colonies and it is controversial whether Kosovo would be considered to fall within it.

46. Kosovo's willingness to accept the recommendations and obligations contained in the Ahtisaari Plan, as affirmed in its Declaration of Independence, suggests that it is prepared to 'assume its share of the international debt of the Republic of Serbia', the nature and magnitude of which to be determined through negotiations between Kosovo and the Republic of Serbia, taking into account 'the principles used for the allocation of sovereign debt in the case of the succession to the Socialist Federal Republic of Yugoslavia, in agreement with the relevant creditors' (Annex VI). Should the parties fail to reach agreement on debt allocation, the Plan envisions recourse to binding international arbitration.

47. The Ahtisaari Plan stipulates further, and Kosovo has presumably agreed, that all '[i]mmovable and movable property of the Federal Republic of Yugoslavia or the Republic of Serbia located within the territory of Kosovo at the time of [the] Settlement shall pass to Kosovo' (Art 8). Similarly, the Plan foresaw that publicly owned enterprises (POEs) and related obligations would be transferred to Kosovo (Annex VII).

Conclusions and Recommendations

48. As the foregoing analysis suggests, Kosovo can be regarded as a successor state to the Socialist Federal Republic of Yugoslavia (SFRY) but more credibly perhaps as a successor state to the Republic of Serbia, the latter a continuator state of the Federal Republic of Yugoslavia (FRY)/State Union of Serbia and Montenegro following the dissolution of the SFRY. While it could also be argued that Kosovo should be regarded as a newly independent state emerging from the (neo)colonial rule of Serbia, this line of argument requires the acceptance of assumptions about the nature of Serbia's historic relationship to Kosovo that is not widely shared among states.

49. State succession is a complex and controversial area of international law. It is governed in part by two international conventions (the Vienna Convention on State Succession in Respect of Treaties 1978 and the Vienna Convention on State Succession in Respect of State Property, Archives, and Debts). However, neither Convention has been widely ratified. State succession is thus a matter largely governed by customary international law but there is considerable disagreement among states with regard to the contents of the relevant customary law.

50. It is unclear whether there is a general rule in favour of automatic succession in respect of treaties. The prevalent tendency has been supportive of a presumption that treaties continue to apply to successor states, and thus would apply to Kosovo, but this view is not unchallenged. The implication of Kosovo's status between 1999 and 2008, when it was administered by the United Nations means that Kosovo cannot be bound by obligations entered into by the FRY/State Union/Serbia between 10 June 1999 and 17 February 2008, only by those entered into by the United Nations. Indeed, Kosovo takes the view, as reflected in its Declaration of Independence, that it only accepts the treaty obligations entered into by the SFRY and the United Nations.

51. The Convention rules applicable to state succession in respect of state property, debts and archives are mostly general in nature. As with treaties, therefore, these aspects of succession are also governed by customary law which, however, is largely underspecified. The Ahtisaari Plan contains detailed recommendations regarding the equitable apportionment of state property and debts which Kosovo has indicated in its Declaration of Independence that it is willing to accept.

52. On the assumption that Kosovo is a successor state to the Republic of Serbia, but bearing in mind the implications of Kosovo's status between 1999 and 2008 as discussed above, the following actions on the part of Kosovo are recommended:

- Kosovo should issue a broad and general re-statement[1] of its acceptance of the international treaty obligations of its predecessor state;

- Kosovo should continue to seek to negotiate agreements confirming the continuing applicability to Kosovo of bilateral treaties concluded with its predecessor state;

- Kosovo should seek to achieve, through negotiation and agreement with Serbia, an equitable apportionment of Serbian state property and debts;

- If agreement with Serbia on apportionment of state property and debts cannot be reached, Kosovo should seek resolution through arbitration;

- Pursuant to UN Security Council Resolution 9 (1946) of 15 October 1946, which provides the conditions under which the International Court of Justice shall be open to states not parties to the Statute of the ICJ, Kosovo should deposit in the Registry of the Court a declaration by which it accepts the Court's jurisdiction and undertakes to comply in good faith with the decisions of the Court and to accept all the obligations of a member of the United Nations under Article 94 of the Charter. Such a declaration, which may be either particular (in relation to a dispute or disputes which have already arisen) or general (in relation to all disputes or to one or several classes of disputes which have already arisen or which may arise in the future), is a requirement for states not party to the Statute to have access to the Court—a requirement which, if fulfilled, could in principle allow Kosovo to have access to the Court to resolve disputes with Serbia relating to succession issues;

- Kosovo should carefully continue to seek membership in international organizations, by virtue of which it affirms its status as a successor state.

[1] Kosovo having made such a statement already with its Declaration of Independence.

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