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A final agreement that may put Kosovo at a cross road: some lessons from other former contested states

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A FINAL AGREEMENT THAT MAY PUT KOSOVO AT A CROSS ROAD: SOME LESSONS FROM OTHER FORMER CONTESTED STATES

Introduction

The latest emergence of the idea of territorial exchange as a potential premise for an ultimate agreement between the two states is receiving an ever so much potency in the international arena.

High end representatives of the European Union¹ and United States of America² have failed to produce a clear-cut position either in support or against it. Reluctance to do so indicates that the international community is willing to consider any agreement, including unorthodox border revision ideas in an easily stirred up region. Ethnically based territorial exchange between two political adverse countries as a mean to a consensual agreement that would possibly grant Kosovo recognition from Serbia, its predecessor state, presents an unprecedented case in the modern history of the international relations. Be that as it may, it poses a dangerous test to the limits of international law, international order and it undermines the statehood of Kosovo in the first place³.

As such, it may set way for uncharted implications the outcome of which may be beyond control for a currently divided Europe Union and unconventional leadership in the United States of America. With that in mind, this paper looks at cases of contested states from 1945 and onwards that have eventually reached international recognition despite

initial refusal from their predecessor states and the international community. Case studies include Bangladesh, Eritrea, and East Timor.

Context

The end of World War II surged way for a new international order in which the emergence of new states is confined to few contextual premises. *Colonial context, dissolution of unions or federations and consensual secession* represent the leading models of state creation under post-World War II international law.

Colonial context as a basis for state creation was solidified only upon United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples⁴. It legally facilitated the emergence of new states in the beginning of 1960s and onwards that among others included Algeria, Botswana, Senegal, Tanzania and Sierra Leon – all former European colonies. Likewise, consensual Dissolution of Unions or the so-called velvet divorce, set ground for the emergence of new states. They include cases of Soviet Union's dissolution in 1991⁵, Singapore's withdrawal from the federation of Malaysia in 1965⁶, peaceful disintegration of Czechoslovakia into Czech Republic and Slovakia in 1993, or Montenegro's detachment from the Union of

¹ U.S. Ambassador in Kosovo remarks on dialogue, available at <https://xk.usembassy.gov/ambassador-delawies-message-on-dialogue/>

² High Representative of the Union for Foreign Affairs and Security Policy, Mrs. Frederica Mogherini remarks on border revision idea, available at <https://zeri.info/aktuale/214259/mogherini-do-te-mbeshtes-shkembimin-e-territoreve-midis-kosoves-dhe-serbise-nese/>

³ "Who sets the agenda? Preliminary remarks on border revision and territorial exchange between Kosovo and Serbia". *Group for Legal and Political Studies*. Available at <http://www.legalpoliticalstudies.org/who-sets-the-agenda->

[preliminary-remarks-on-border-revision-and-territorial-exchange-between-kosovo-and-serbia/](http://www.legalpoliticalstudies.org/who-sets-the-agenda-preliminary-remarks-on-border-revision-and-territorial-exchange-between-kosovo-and-serbia/)

⁴ 1960 United Nations Declaration on Granting of Independence to Colonial Countries and People, available at <http://www.un.org/en/decolonization/declaration.shtml>

⁵ "The Collapse of the Soviet Union", available at <https://history.state.gov/milestones/1989-1992/collapse-soviet-union>

⁶ Soon, L. 1969. Malaysia-Singapore Relations: Crisis of Adjustment, 1965-68. *Journal of Southeast Asian History*, 10(1), 155-176. Retrieved from <http://www.jstor.org/stable/20067736>

Serbia and Montenegro in 2006⁷. Similarly, dissolution of the Socialist Federal Republic of Yugoslavia in 1992 resulted in same outcome where in the absence or extinction of a parent state six new constituent states emerged⁸. The other premise for state creation in the post-second world war international order is consensual secession such has been the case of South Sudan's secession from the Republic of Sudan in 2011 which occurred only after a comprehensive agreement between the representatives of both sides had been reached⁹.

On the other hand, instances of self-declared states outside the above described premises, such has been the case with Biafra, Katanga, Turkish Federated State of Cyprus, Kashmir, or Tibet¹⁰, have promptly been charged as contested states and have failed to receive international recognition. That is because their right to statehood has and still is contested on the basis of international laws that grant the original states the legal legitimacy to dismiss the claim for formal independence of the fragmented territory. In doing so, the original state becomes the veto state of the new contested entity¹¹. Consequently, scores of other states are likely to take similar position to the one of the original states, as opposed to showing support for and granting recognition to the new emerging entity.

However, in words of Sir Hersch Lauterpacht, another country's decision for recognition "is not a matter of governed law but rather a question of policy"¹² and that is where the life line lays for contested states is in their attempt for successful succession. This goes

on to explain why some cases of contested states receive formal recognition from numerous United Nations Member states regardless of the opposition from the predecessor states, and marks the crossing road between declaratory and constitutive theories of state recognition in the international relations.

Case Studies

Bangladesh

Upon Pakistan's separation from India and the declaration of independence in 1947, then East Pakistan, which was situated in the east border side of India and had no land connection with West Pakistan maintained effective links with the west for over two decades¹³. However, its subservient position since the birth of Pakistan, the reign of terror by the military dictatorship in Pakistan, and failed political negotiations to accommodate their demands within a united Pakistan pushed the people of East Pakistan, Bangalees natives, to call for secession as an end resort¹⁴. The unilateral declaration of independence of Bangladesh in 1971 was met with fierce resistance from Pakistani leadership which authorized military actions to nullify secession efforts by the Bangalees. Although the international community shared the opinion that an independent Bangladesh is a more viable solution to the regional security than a united Pakistan in turmoil, by the end of 1971 the toll number of states that recognized Bangladesh as independent was only few.

⁷ Geldenhuys, D. 2009. Contested States in World Politics. Palgrave Macmillan.

⁸ Namely Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, Serbia and Montenegro.

⁹ The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement, available at <https://peaceaccords.nd.edu/sites/default/files/accords/SudanCPA.pdf>

¹⁰ Crawford, J. 1997. State Practice and International Law and Unilateral Secession. Report. Available at:

https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf

¹¹ Geldenhuys, D. 2009. Contested States in World Politics. Palgrave Macmillan.

¹² Hersch Lauterpacht cited in the Geldenhuys, D. 2009. Contested States in World Politics. Palgrave Macmillan.

¹³ Rafiqul Islam, M. 1985. Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh. Journal of Peace Research, 22(3), 211-221.

<https://doi.org/10.1177/002234338502200303>

¹⁴ Ibid.

Nevertheless, having had lost effective control over the territory of the pro-claimed Bangladesh, Pakistani authorities were compelled to enter into tri-partite negotiations first with India in 1973, who had directly interfered in the conflict by providing military support to the Bangelees side in their struggle for independence¹⁵, and then Bangladesh in 1974 upon their insistence. Negotiations were an attempt to reach an agreement for the repatriation of Pakistani prisoners of war and civil internees, including the 195 high ranking military officers which were being persecuted for war crimes by the Bengalese justice system. Ultimately, Pakistan agreed to recognize in principle the independence of Bangladesh which opened way for the New Delhi Agreement of April 1974 on the basis of which Bangladesh agreed to release all prisoners of wars, including all 195 high end military officials in exchange for recognition from Pakistan and good neighborly relationships¹⁶. Shortly after the agreement was reached, Bangladesh was admitted to the United Nations.

Eritrea

Eritrea shared a long history of conflict with Ethiopia. Both former Italian colonies entered into a federal agreement under the UN auspices in 1952¹⁷. To everyone's chagrin, the agreement that formed the Federation of Ethiopia and Eritrea was unilaterally abrogated by Ethiopia in 1962. By doing so, Ethiopia arbitrarily dismissed Eritrea's equal federal status and from then on considered Eritrea as its own province¹⁸. While the UN remained indifferent, the Eritrean People Liberation Front (EPLF) broke the conflict with Ethiopian government that lasted for almost

three decades without managing to attain international recognition to their claim for independence. During this time Ethiopia was governed by a military regime that remained unmoved in relation to Eritrea's claims, and as such this alone constituted the core political obstacle for the latter's international recognition.

All things being equal, a status quo under those settings would only prolong the struggle and the suffering of Eritrean people. A breakthrough occurred thirty years after the abrogation of the Ethiopian and Eritrean federation. In 1991, the military regime in Ethiopia was overthrown in what was a joint cooperation between the Ethiopian opposition movement and the Eritrean People Liberation Front¹⁹. In return, the Transitional Government of Ethiopia during the Peaceful and Democratic Transitional Conference of Ethiopia agreed to recognize the "right to self-determination of independence, when the concerned nation/nationality and people is convinced that their rights are denied, abridged or abrogated"²⁰. Two years later, in 1993, Eritrea exercised the right to self-determination that was granted during the conference through a referendum under the UN auspices, which resulted in a 99.8% vote in favor of independence. Days after the announcement of the results, Ethiopia recognized Eritrea's sovereignty and independence, and UN membership very soon after followed.

East Timor

At the outset of decolonization East Timor, a Portuguese colony, unlike its neighboring

¹⁵ Ibid.

¹⁶ 1974 BANGLADESH—INDIA—PAKISTAN: Agreement on the Repatriation of Prisoners of War and Civilian Internees. *International Legal Materials*, 13(3), 501-505. Available at <http://www.jstor.org/stable/20691263>

¹⁷ Crawford, J. 1997. *State Practice and International Law and Unilateral Secession. Report.* Available at: https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf

¹⁸ The United Nations and the Independence of Eritrea. 1996. *The United Nations Blue Books Series*, Vol 7. Available at

https://digitallibrary.un.org/record/229464/files/%5BST_%5DDPL_1850-EN.pdf

¹⁹ Weldemichael, A. 2014. *Formative Alliances of Northeast African Insurgents: Eritrean Liberation Strategy and Ethiopian Armed Opposition, 1970s–1990s.* *Northeast African Studies*, 14(1), 83-122. doi:10.14321/nortafirstud.14.1.0083

²⁰ Article 2, paragraph C of the Peace and Democratic Transitional Conference of Ethiopia, available at <https://chilot.files.wordpress.com/2011/11/the-transitional-period-charter-of-ethiopia.pdf>

countries failed to acquire independence, and remained under the colonial control until 1975²¹. In the wake of sustained international pressure on the Portuguese government to retract from their colonial days and amidst the civil war in East-Timor during which the pro-independence movement was quickly gaining support, the Portuguese government abdicated their responsibilities and fled East Timor. These events left East Timor in an international limbo. Portugal refused to claim responsibility for East Timor's decolonization while simultaneously rejecting to recognize its independence²².

East Timor had declared independence in 1975 after having had retained effective control over the territory²³. However, its neighboring state Indonesia - a former European colony itself- claimed that East Timor, like West Timor who had voluntarily joined Indonesia in 1949, should belong to Indonesia. Briefly after, Indonesia annexed East Timor. These military actions spurred an international human rights crisis - nearly half of local population was displaced, the majority of whom died of starvation and illness²⁴. Many states disapproved Indonesia's aggression towards East Timor and perceived it an illegal foreign occupation, however in terms of political recognition most states continued to *de facto* recognize Indonesia's authority of East Timor.

East Timor's contested international identity remained suspended until a change in Indonesia's internal politics was recorded. Resignation of long time President of Indonesia Suharto in 1998 produced a new momentum for East Timor's claim for

independence²⁵. Indonesia's new political constellation, while still firmly interested to keep East Timor under its administration showed more keenness to further advance the sustained effort to find a comprehensive and internationally acceptable solution. To that extent, in 1998 an agreement under the UN auspices was reached between the Republic of Indonesia as the current effective authority and Republic of the Portugal as the former colonial authority over East Timor. The two Governments agreed on the proposed constitutional framework for a special autonomy for the people of East Timor, which they will have the right to approve or reject through a referendum supervised by the UN Transitional Administration mission. In 1999, expectedly East Timorese voted massively against the special autonomy proposal, marking the beginning of a process towards independence²⁶. East Timor held its first election as an independent state in 2001, and promptly after become UN Member.

Conclusions

A conclusive review of the literature suggests that unilateral declaration of independence is never met with consensual international recognition. Consequently, the legal identity of those entities that try to emerge as independent states will remain ambiguous and contested until recognition of independence or consent for secession is granted from the predecessor state - generally through a legal binding agreement. However, understanding the format and content of the ultimate agreement that produces the legal effect of recognition or consent are of defining significance, especially in the face of a potentially upcoming ultimate agreement between

²¹ "East Timor Becomes 191st U.N Member Today". *The New York Times*. Available at <https://www.nytimes.com/2002/09/27/world/east-timor-becomes-191st-un-member-today.html>

²² Ibid.

²³ Crawford, J. 1997. State Practice and International Law and Unilateral Secession. Report. Available at: https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf

²⁴ Ibid.

²⁵ "The Fall of Suharto; Suharto, Besieged, Steps Down After 32 Year Rule in Indonesia". *The New York Times* Available at <https://www.nytimes.com/1998/05/21/world/fall-suharto-overview-suharto-besieged-steps-down-after-32-year-rule-indonesia.html>

²⁶ As stipulated in article 6 of the East Timor Peace agreement, available at https://www.usip.org/sites/default/files/file/resources/colleactions/peace_agreements/east_timor_05051999.pdf

Kosovo and Serbia. For that purpose, the selected cases are an attempt to provide a variety of examples where an ultimate agreement between the disputed parties may recognize, facilitate or redefine the constitution of a new international state.

First, the case of Bangladesh represents a *fait accompli* case where the tri-partite agreement between Pakistan-India-Bangladesh produced the acceptance and recognition of an already factual reality; Pakistan, after three years of negotiations, eventually agreed to *de jure* recognize Bangladesh's 1971 declaration of independence. Being as it is, Bangladesh represents a pioneering case where a unilateral secession was successfully exercised, and has since been viewed as a challenger of the paradigm that self-determination has no relevance beyond colonial context.

Second, the case of Eritrea is a case in the international relations where an agreement recognized and legally granted the right to declare independence at the will of the people; Ethiopia, under the role of the predecessor state facilitated the legal instruments for Eritrea to exercise the long expressed will to secede from Ethiopia, and this way allowed for the creation of a new reality.

Third, the case of East Timor depicts a situation under which unilateral declaration of independence was eclipsed by a lack of international willingness to support East Timor's claim for independence since its declaration in 1975. Unlike the case of Eritrea, a *pacta sunt servada* under the UN auspices between Portugal, as former colonial authority, and Indonesia, as the effective authority, granted East Timor's right to accept or reject the comprehensive proposal for a substantial autonomy under Indonesia. Rejection of the comprehensive

proposal automatically triggered the commencement of legally binding process for the independence of East Timor; therefore, the agreement between Portugal and Indonesia redefined East Timor historical narrative and only upon an approval was granted did East Timor manage to constitute an international identity.

On this basis, since Kosovo is well passed a time where a peaceful agreement with Serbia could have led and facilitate its independence similarly to the case of Eritrea, it currently stands on the cross road between a scenario where an ultimate agreement with Serbia will either produce a *de jure* recognition of political and effective reality created in February 2008 or a redefinition of the historical narrative intended to accommodate Serbia's terms and preferences.

Today, Kosovo counts over 110 formal recognitions from United Nations member states²⁷. Despite that its international identity remains suspended since Serbia, altogether with Russia, China and five UN state members, refuse to formally recognize Kosovo's independence, Kosovo has been effectively and legally independent since 2008. Hitherto, its historical and political narrative has been built upon the very *sui generis* premises that have warranted the international support, and as such has dismissed the relevance of the consent of the predecessor state the moment it declared independence and received wide international recognition. Reconsidering the premises upon which this support was granted, including the already internationally recognized borders, represents an open invitation for an agreement that circumvents Kosovo's historical narrative and violates its statehood, and meets Serbia's long withstanding interest to determine Kosovo's statehood at its will.

²⁷ Kosovo Foreign Minister statement on the number of countries that have recognize Kosovo, available at

<https://indiksonline.net/sa-shtete-e-kane-njohur-kosoven-esqaron-zv-kryeministri-pacolli/>

It should be reminded that Kosovo's *sui generis* statehood argument revolves around three specific elements; the human rights crisis, the United Nation response, and the disintegration of Yugoslavia. In the wake of disintegration of the Yugoslavia, Kosovo became a focal source of human rights crisis as the aggression towards Kosovar Albanians by the Serbian Authorities reached its peak in 1999, upon which the United Nations responded through an international military intervention in Kosovo within the framework of the Responsibility to Protect – R2P²⁸. These three elements, alongside with the Martin Ahtisaar's Comprehensive Proposal for the Settlement of the Kosovo Status²⁹ and the opinion of the International Court of Justice³⁰ are and should remain the only constituting cornerstone of Kosovo's statehood.

With that in mind, Kosovo representatives should switch focus towards reframing the

dialogue's agenda and distance themselves from any talks that may serve as the basis for an agreement that does not comply with Kosovo's declaration of independence. Instead, they should note that Serbia's European Union future is closely, if not strictly, tied to an ultimate settlement with Kosovo³¹. Serbia has become subject of constant external political pressure from European Union leading member states to conclude the normalization process with Kosovo as one of main conditions for a successful candidacy for the European Integration process³². Ergo the dialogue should serve as a platform where Kosovo reaches an ultimate agreement on the basis of conditionality of Serbia's recognition of Kosovo independence in exchange to Kosovo opening way to Serbia's European integration agenda.

²⁸ "Who sets the agenda? Preliminary remarks on border revision and territorial exchange between Kosovo and Serbia". *Group for Legal and Political Studies*. Available at <http://www.legalpoliticalstudies.org/who-sets-the-agenda-preliminary-remarks-on-border-revision-and-territorial-exchange-between-kosovo-and-serbia/revision>

²⁹ Comprehensive Proposal for the Settlement of the Kosovo Status. Available at <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>

³⁰ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403. Available at

³¹ "Who sets the agenda? Preliminary remarks on border revision and territorial exchange between Kosovo and Serbia". *Group for Legal and Political Studies*. Available at <http://www.legalpoliticalstudies.org/who-sets-the-agenda-preliminary-remarks-on-border-revision-and-territorial-exchange-between-kosovo-and-serbia/>

³² In its Western Balkans Enlargement Strategy of 2018, the EU states that: 'without effective and comprehensive normalization of Belgrade-Pristina relations through the EU-facilitated Dialogue there cannot be lasting stability in the region. A comprehensive, legally binding normalization agreement is urgent and crucial so that Serbia and Kosovo can advance on their respective European paths'.

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