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NOTES AND COMMENTS

LEGAL ASPECTS OF THE USE OF A PROVISIONAL NAME FOR MACEDONIA IN THE UNITED NATIONS SYSTEM

The admission of Macedonia to membership in the United Nations in April 1993 required the new member to be “provisionally referred to for all purposes within the United Nations as ‘the former Yugoslav Republic of Macedonia’ pending settlement of the difference that has arisen over the name of the State.”¹ The term “difference” here refers to the dispute between Greece and Macedonia over the use of the applicant state’s name. In its Resolution 817 of April 7, 1993 (by which the applicant state was recommended for admission to the United Nations), the Security Council “*urge[d]* the parties to continue to cooperate with the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia in order to arrive at a speedy settlement of their difference.”² Thus, the admission of Macedonia to the United Nations was subject to its acceptance of being provisionally referred to as the “Former Yugoslav Republic of Macedonia” (FYROM) and of negotiating with Greece over its name. I will examine the nature and legal basis of these requirements with respect to the conditions laid down in Article 4 of the UN Charter for the admission of states to the Organization.

The conditions for the admission of states were the subject of exhaustive political and legal deliberations at the United Nations during the 1940s when many states were applying for membership.³ During the first several years of the Organization’s existence, admission to, and even representation in, the United Nations were subject to various conditions (outside the scope of those contained in Article 4 of the Charter), which in some cases required recognition of the applicant (as an international subject) prior to its admission to membership.⁴

In an effort to resolve the dilemmas regarding the legal aspects of the conditions required for admission to membership and to eliminate the various stalemates that were occurring in the admission process, the UN General Assembly, by Resolution 113 (II) of November 17, 1947, requested that the International Court of Justice give an advisory opinion on the following question:

Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article?⁵

The following conditions are expressly set forth in Article 4, paragraph 1 of the UN Charter, which provides: “Membership in the United Nations is open to all other [i.e., other than the original UN members] peaceloving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” The next paragraph of the article states the

¹ SC Res. 817, UN SCOR, 48th Sess., Res. & Dec., at 132, para. 2, UN Doc. S/INF/49 (1993); GA Res. 47/225, UN GAOR, 47th Sess., Supp. No. 49, Vol. 2, at 6, UN Doc. A/47/49 (1993).

² SC Res. 817, *supra* note 1, para. 1.

³ *See, e.g.*, UN SCOR, 1st Sess., 2d series, Supp. 4, at 40, 47, 53 (1946); *id.*, 2d Sess., Spec. Supp. 3, at 29, 35–36, 42, 51–53 (1947).

⁴ *See* UN SCOR, 2d Sess., 181st mtg. at 1920, 1935 (1947); *id.*, 3d Sess., 330th mtg. at 16 (1948).

⁵ GA Res. 113 (II), UN GAOR, 2d Sess., Res., at 19 (1947).

procedural rule that “[t]he admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”

In its Advisory Opinion, *Admission of a State to the United Nations*, the Court first concluded that the question put to it in an abstract form had a legal nature. Consequently, the Court was required to provide an interpretation of Article 4, paragraph 1 of the Charter and, by virtue of Article 96 of the Charter and Article 65 of its Statute and as “the principal judicial organ of the United Nations,” it had the competence to give such an interpretation. The Court then observed that paragraph 1 of Article 4 in effect contains five conditions: to be admitted to membership in the United Nations, an applicant must (1) be a state; (2) be peace-loving; (3) accept the obligations of the UN Charter; (4) be able to carry out these obligations; and (5) be willing to do so. Further, the Court found that the question put to it by the General Assembly could be reduced to the following:

are the conditions stated in paragraph 1 of Article 4 exhaustive in character in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make admission dependent on conditions not expressly provided for in that Article, while a negative reply would, on the contrary, authorize a Member to make admission dependent also on other conditions.⁶

After thorough consideration, the International Court of Justice formulated its advisory opinion stating that a member of the United Nations that is called upon, by virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a state to membership in the Organization, is not juridically entitled to make its consent dependent on conditions not expressly provided in paragraph 1 of that article.⁷

Among the most important arguments used by the Court in arriving at the above opinion were that (1) the UN Charter is a multilateral treaty whose provisions impose obligations on its members; (2) the text of paragraph 1 of Article 4, “by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused”;⁸ and (3) the enumeration of the conditions in paragraph 1 of Article 4 is exhaustive (and “not merely stated by way of guidance or example”⁹), which follows from the fact that if the opposite were the case, “[i]t would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions.”¹⁰

In its deliberations, the Court specifically analyzed whether the political character of the organs responsible for admission (the Security Council and the General Assembly, by virtue of paragraph 2 of Article 4), or for the maintenance of world peace (the Security Council, pursuant to Article 24 of the Charter), engendered arguments leading to the contrary conclusion regarding the exhaustive character of the conditions enumerated in paragraph 1 of Article 4. The Court rejected this interpretation and held that “[t]he political character of an organ cannot release it from the observance of the treaty

⁶ See *Admission of a State to the United Nations* (Charter, Art. 4), Advisory Opinion, 1948 ICJ REP. 57, 61 (May 28).

⁷ *Id.* at 65.

⁸ *Id.* at 62.

⁹ *Id.*

¹⁰ 1948 ICJ REP. at 63 (in which case paragraph 1 of Article 4 would cease to be a legal norm). It follows that the conditions laid down in paragraph 1 of Article 4 are not only necessary, but also sufficient conditions for admission to membership in the United Nations.

provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.”¹¹ Thus, the Charter limits the freedom of political organs and no “political considerations” can be superimposed on, or added to, the conditions set forth in Article 4 that could prevent admission to membership. This does not mean, however, that the conditions of Article 4 preclude taking into account relevant political factors that fall within their scope. Appreciation of such factors derives from the very broad and elastic nature of the prescribed conditions and, according to the Court, it does not contradict the exhaustive character of these conditions.

The advisory opinion of the Court makes it apparent that, besides their exhaustive and explicit character, the conditions laid down in Article 4 of the Charter have two additional characteristics: (1) they must be fulfilled before admission is effected; and (2) once they are recognized as having been fulfilled, the applicant state acquires an unconditional right to UN membership. This last feature also follows from the “openness” to membership enshrined in Article 4, which comports with the universal character of the Organization.¹²

The advisory opinion of the International Court of Justice was presented to the General Assembly at its third session, in December 1948. At that session the General Assembly adopted Resolution 197 (III), by which it “[r]ecommend[ed] that each member of the Security Council and of the General Assembly, in exercising its vote on the admission of new Members, should act in accordance with the foregoing opinion of the International Court of Justice.”¹³

This resolution and the Court’s advisory opinion have direct legal relevance to the issue of the admission of Macedonia to membership in the United Nations, since these documents interpret the Charter in a manner that limits the power of the UN organs to impose conditions on admission. The preamble to Security Council Resolution 817, by which Macedonia was recommended for admission, recognized that “the applicant fulfils the criteria for membership laid down in Article 4 of the Charter of the United Nations.”¹⁴ According to *Admission of a State to the United Nations* and General Assembly Resolution 197, this statement means that the applicant has fulfilled all the required conditions for admission to membership in the United Nations and that no other conditions may be imposed. Contrary to the usual wording of Security Council resolutions recommending admission of a state, Resolution 817, after recognizing the fulfillment of the conditions in Article 4, contains an additional consideration, “that a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region.”¹⁵ This condition, which is found in the introductory part of the resolution, is reflected in its paragraph 2, which recommends the admission of the applicant state to membership in the United Nations. It describes “this State” as “being provisionally referred to for all purposes within the United Nations as ‘the

¹¹ *Id.* at 64.

¹² This view of the Court was elaborated specifically and in depth by Judge Alvarez in his concurring individual opinion. He stated that,

having regard to the nature of the universal international society, the purposes of the United Nations Organization and its mission of universality, it must be held that all States fulfilling the conditions required by Article 4 of the Charter have a *right* to membership in that Organization. The exercise of this right cannot be blocked by the imposition of other conditions not expressly provided for by the Charter, by international law or by a convention, or on grounds of a political nature.

Id. at 71.

¹³ GA Res. 197 (III), UN GAOR, 3d Sess., Res., pt. 1, at 30 (1948).

¹⁴ SC Res. 817, *supra* note 1, preamble.

¹⁵ *Id.*

former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State." The Macedonian Government strongly objected to the use of this provisional name,¹⁶ stating that "under no circumstances" was it prepared to accept that designation as the name for the country. Nevertheless, the text of the resolution remained unchanged. As a consequence, the imposed obligation to accept this provisional denomination and the closely related obligation to negotiate over the name of the country served as additional conditions that it was required to satisfy so as to gain admission to the United Nations.

These unusual conditions in Resolution 817 are extraneous to the limited list laid down in Article 4. Furthermore, these conditions transcend the act of admission in time. Since the Charter makes no provision for other conditions for admission, it appears that the conditions imposed on Macedonia have no legal basis. Certainly, the ICJ's advisory opinion makes clear that all the conditions for admission to membership must be fulfilled before admission is effected. Since the conditions that were imposed represent purely political considerations, they are incompatible with the letter and spirit of the UN Charter.

Also relevant is the fact that Security Council Resolution 817, after explicitly recognizing that the applicant state had "fulfil[ed] the criteria for membership laid down in Article 4," recommended to the General Assembly that the state be admitted. The act of recommendation necessarily recognized that the conditions of Article 4 had been fulfilled. The additional conditions that were attached to the recommendation of Macedonia for membership in the United Nations therefore created a logical inconsistency because the Charter contains a closed list of requirements. Once those requirements are found to have been satisfied, the state has a right to admission. Additional conditions attached by the Security Council and General Assembly appear to negate the conclusion that the state is entitled to admission in accordance with the Charter conditions that were met.

Thus, the recognition of its fulfillment of the conditions for admission means that the Security Council affirmed that the applicant country is a peace-loving state, able and willing to carry out the obligations in the Charter, which include (among others) the obligation set forth in Article 2, paragraph 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." On this basis, it appears contradictory and incompatible with the law for the Security Council resolution to report that "a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region." This provision implies that the applicant state is unwilling to carry out the obligation contained in Article 2, paragraph 4. The ICJ's above-mentioned advisory opinion and General Assembly Resolution 197 do not permit such contradictory statements—either the test for admission is met or it is not. The principles of exhaustiveness, explicitness, prior fulfillment and recognition, which are embedded in the Court's interpretation of the conditions of Article 4 of the Charter, must mean that it would be logically inconsistent for additional conditions to be attached to the resolutions that recommend or the decisions that provide for the admission of a state.

It can be argued that the logic of the Court's opinion also relates to the provision in Article 2, paragraph 7, of the Charter, which states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially

¹⁶ See UN SCOR, 48th Sess., Supp. for Apr.–June, at 35, UN Doc. S/25541 (1993).

within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”

Thus, in interpreting this paragraph in connection with the admission of states to membership in the United Nations, Judge Krylov (who took part in the 1948 ICJ proceedings) stated that a “Member of the United Nations is not justified in basing [its] opposition to the admission of a particular State on arguments which relate to matters falling essentially within the domestic jurisdiction of the applicant State.”¹⁷ This statement reiterates the principle, embedded in the advisory opinion of the Court and in General Assembly Resolution 197, that, once the appropriate UN organs determine that the criteria of Article 4 have been fulfilled, neither a UN organ nor a member of the Organization can condition the admission of the applicant state on any additional consideration, particularly if it essentially falls within that state’s domestic jurisdiction. Certainly, the name a state wishes to adopt is a domestic matter, having no direct impact on any other state.

Furthermore, on the basis of the principle of separability of domestic and international jurisdiction, it can be argued that the substantive Greek allegation that the name of the applicant implies “territorial claims” has no legal significance. Obviously, the name of a state, which is a subject of that state’s domestic jurisdiction (since every state naturally has an inherent right to a name), does not create international legal rights for the state that adopts the name, nor does it impose legal obligations on other states. Clearly, the name, per se, does not have a direct impact on the territorial rights of states. Greece advanced practically the same objections and demands as regards the recognition of Macedonia by the members of the European Community. Nevertheless, the EC Arbitration Commission on former Yugoslavia did not link the name of the country (Republic of Macedonia) to Greek territorial rights.¹⁸ Prominent scholars of international law have expressed similar views. For instance, in their course book on international law, Professors Henkin, Pugh, Schachter and Smit observe that there “appears to be no basis in international law or practice” for the Greek demand that Macedonia change its name, “claiming that the right to use that name should belong exclusively to Greece.”¹⁹ It is apparent that the Greek demands regarding the name of Macedonia are motivated mainly by concern that the admission to the United Nations of a state with that name may add strength in the political arena to possible Macedonian claims to Greek territory. The name itself has no legal bearing on such a potential dispute and no relevance to the qualifications that may legally be considered in connection with the admission of a state to the United Nations.

To nullify the Greek concerns that the name of the country implies territorial claims against Greece, Macedonia adopted two amendments to its Constitution on January 6, 1992. They assert that Macedonia “has no territorial claims against any neighboring states”; that its borders can be changed only in accordance with the Constitution and “generally accepted international norms”; and that, in exercising care for the status and rights of its citizens and minorities in neighboring countries, it “shall not interfere in the sovereign rights of other States and their internal affairs.”²⁰ It can further be noted that after the two countries concluded the Interim Accord of September 13, 1995, under the auspices of the United Nations, their relations entered into a period of steady and progressive development.

¹⁷ Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 1948 ICJ REP. 57, 113 (May 28) (Krylov, J., dissenting).

¹⁸ See EC Arbitration Commission on Yugoslavia, Opinion No. 6, 31 ILM 1507, 1511 (1992).

¹⁹ LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 253 (3d ed. 1993).

²⁰ For an English translation of the Macedonian Constitution, including amendments, see 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD & Supp. 98-6, at 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994, 1998).

From the point of view of legal theory, the inherent right of a state to have a name can be derived from the *necessity* for a juridical personality to have a *legal identity*. In the absence of such an identity, the juridical person (such as a state) could—to a considerable degree (or even completely)—lose its capacity to conclude agreements and independently enter into and conduct its relations with other juridical persons. Therefore, the name of a state appears to be an *essential element of its juridical personality* and its statehood. The principles of the sovereign equality of states²¹ and the inviolability of their juridical personality²² lead to the conclusion that the choice of a name is an inalienable right of the state. In this context, external interference with this basic right appears to be inadmissible, irrespective of territorial and similar arguments. This conclusion is consistent with the previously cited opinion of Henkin, Pugh, Schachter and Smit that states have no exclusive rights to names under international law. Perhaps the international community should develop appropriate legal mechanisms and rules for hypothetical situations when two or more states wish to adopt the same name. This is not the case in the Greek-Macedonian dispute, however, since the name “Macedonia” is used by Greece to designate one of its provinces (which is not an international legal person).

The question of a juridical linkage between the conditions for admission to UN membership and the conditions for recognition of a state was deliberated in the United Nations at the beginning of the 1950s. A memorandum on legal aspects of representation in the United Nations²³ was prepared by the Secretariat and communicated to the Security Council. The memorandum emphasized that the recognition of a state and its admission to UN membership are governed by different rules. Recognition is essentially a “political” decision of individual states, whereas admission to membership is a collective act of the General Assembly based on the right to membership of any state that meets the prescribed criteria. Therefore, there is no link—juridical or otherwise—between the conditions for recognition of a state by another state and the conditions for admission as a member to the United Nations. On this basis, the memorandum stressed that it is inadmissible to condition admission on recognition, since admission does not imply recognition by any government.²⁴ This conclusion is consistent with the previously discussed advisory opinion of the International Court of Justice and with the principle of universality of the United Nations.

In conclusion, once the conditions set forth in Article 4 of the UN Charter have been fulfilled, the applicant state acquires an inalienable right to UN membership. On the basis of the Security Council’s assessment that Macedonia had satisfied the conditions of Article 4 and General Assembly Resolution 197 regarding observance of the advisory opinion of the International Court of Justice, it appears that the Macedonian application for membership should have been handled in accordance with the existing standard admission procedure and law. The additional conditions related to the name of the state constitute violations of the Charter.

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²¹ UN CHARTER Art. 2, para. 1.

²² Declaration on Principles of International Law concerning Friendly Relations and co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 121, 123, 124, UN Doc. A/8028 (1970).

²³ Memorandum on legal aspects of the problem of representation in the United Nations, UN Doc. S/1466, at 2 (1950).

²⁴ *Id.* at 3.

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