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## Legal Mode for Advisory Redress at the International Court of Justice for the Case of Macedonian UN Membership

### ABSTRACT

The present article examines the legality of imposing additional conditions (with respect to those prescribed in the Charter) on Macedonia in SC Res. 817 (1993) and GA Res. 47/225 (1993) for its admission to UN membership. These conditions include acceptance by the applicant of a provisional name and an obligation to negotiate with another country (Greece) over its name. It is shown that the imposition of these conditions violates Article 4(1) and some other articles of the Charter. The consequences of the imposed conditions on the legal status of Macedonia as a UN member are also examined. The imposed conditions define a discriminatory status of the member state in violation of Article 2(1) of the Charter. It is shown that these violations of Charter provisions represent *ultra vires* acts of the UN Organization and involve its legal personality. These breaches of the Charter provisions also violate some of the basic rights of the applicant (and later member) state and gravely derogate its legal personality. The advisory jurisdiction of the International Court of Justice is considered to provide appropriate mechanisms for the judicial redress of the effects of the above illegal acts of the UN Organization.

*Key words:* United Nations, law, politics, state, Macedonia.

### Introduction

The admission of Macedonia to UN membership in April 1993 by the General Assembly resolution 47/225 (1993),<sup>2</sup> pursuant to the Security Council resolution

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<sup>2</sup> GA Res. 47/225, 8 April 1993 [hereinafter GA Res. 47/225 (1993)].

817 (1993)<sup>3</sup> recommending such admission, was associated with imposing on the applicant two additional conditions with respect to those explicitly provided in Article 4(1) of the UN Charter, namely acceptance of (i) being provisionally referred to as the 'Former Yugoslav Republic of Macedonia' (for all purposes within the United Nations) and (ii) of negotiating with another country over its name.<sup>4</sup> These impositions are part of the above mentioned resolutions, in which it has been also recognized (explicitly in SC resolution 817) that the applicant fulfills the standard criteria of Article 4(1) of the Charter required for admission. In a recent paper<sup>5</sup> we have analyzed the legal nature of the additional conditions imposed on Macedonia for its admission to UN membership in the context of the advisory opinion of International Court of Justice (I.C.J.) given in 1948 regarding the conditions for admission of a state in the United Nations<sup>6</sup> (and subsequently accepted by the General Assembly<sup>7</sup>) and concluded that the attachment of conditions (i) and (ii) to those specified in Article 4(1) of the Charter for the admission of Macedonia to UN membership is in violation with the Charter.

In the present article we shall examine the legal consequences of the unlawful admission of Macedonia to UN membership and the possible modes of judicial redress. The emphasis will be placed on the relationship between the rights of states as applicants or members of the UN Organization, as derived from the Charter, other general UN documents and the UN legal practices on one side, and the duties of the Organization relating to those rights (i.e. its adherence to the provisions of the Charter), on the other. Before analyzing in more depth the illegal character and legal effects of the breaches made by the UN Organization in the process of admitting Macedonia to UN membership and the means of reinstating the proper legal status of Macedonia as member of the United Nations, we shall give a brief account of the problem of legal responsibility of international organizations (in particular the United Nations) for their unlawful acts (or

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<sup>3</sup> SC Res. 817, 7 April 1993 [hereinafter SC Res. 817 (1993)].

<sup>4</sup> After a reference in the preamble to the SC recommendation for admission of the applicant to UN membership, the GA Res. 47/225 (1993) states that the General Assembly '[d]ecides to admit the State whose application is contained in document A/47/876 - S/25147 [i.e. the Republic of Macedonia] to membership in the United Nations, this State being 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.' The imposed condition for negotiation with Greece over the name of the applicant is implied in the last part of the decision. Note that this condition imposes at the same time an obligation to the applicant when admitted to UN membership.

<sup>5</sup> Igor Janev, "Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System", 93 *AJIL*, 1999, p. 155.

<sup>6</sup> *Admission of a State to the United Nations (Charter, Art. 4)*, ICJ Reports (1948) 57 [hereinafter *Admission*].

omissions), with special attention to those acts that are committed in their relations with their member states and other international legal persons.

### **Legal Responsibility of United Nations for Acts Involving their Relations with Member States**

The question of legal responsibility of international organizations for their illegal acts has been subject of discussions among legal scholars since the forties and fifties.<sup>8</sup> The main interest has been focused on the legal effects of such acts and the possibilities of their judicial redress. In absence of a developed legal practice in the area of international institutional life, the discussions on the subject had in the past a predominantly doctrinarian character. With the lapse of time, accumulation of a considerable body of relevant legal practice took place during the last five decades, which, coupled with the development and consolidation of certain legal concepts of international law (such as the legal personality of international organizations, etc.), laid the foundations for development of a fairly consistent theoretical framework for the treatment and redress of the illegal acts of international organizations.<sup>9</sup> An international organization, as an international legal person, derives its powers (explicitly expressed or implied) from its constitutional source and is bound to act only within the limits and in accordance with the terms of the grant made to it by its members. The most obvious illegal acts that an organization can commit in exercising its powers and functions are: breach of the constitutional provisions (e.g. by exceeding its powers), error in the interpretation of constitutional provisions, assertion of competence by an incompetent organ, improper exercise of a discretion on the basis of inaccurate or incomplete knowledge or for wrong reasons or motives, implementation of a decision adopted by a majority but inconsistent with the constitutional provisions, suspension or expulsion from the organization in absence of proper justification, wrongful apportionment of expenses among the members, breach of the staff rules and regulations, etc.<sup>10</sup> Unless there are specific provisions in the constitutional

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<sup>7</sup> GA Res. 197 (III, A), 8 December 1948 [hereinafter GA Res. 197 (III, A) (1948)].

<sup>8</sup> Paul Recueil Guggenheim, "La Validité et la Nullité des Actes Juridiques Internationaux", 47 *Hague Recueil*, 1949, pp. 195-263; see also the volumes of *Annuaire de l'Institut de Droit International*, 44-I (1952), 45-II (1954), 47-I (1957), 47-II (1957).

<sup>9</sup> D.W. Bowett, *The Law of International Institutions*, 4<sup>th</sup> edn., Sweet & Maxwell, London, 1982, pp. 362-5. For a more critical recent review of this issue, particularly regarding the acts of the Security Council, see Jose E. Alvarez, Thomas M. Franck, "Judging the Security Council", 90 *AJIL*, 1996, pp.1-39, and references therein.

<sup>10</sup> Elihu Lauterpacht, "The Legal Effects of Illegal Acts of International Organizations", in *Cambridge Essays in International Law. Essays in honour of Lord McNair*, Cambridge Press, 1965, pp. 88-121, at 89.

instrument of the organization (such as in the case of the European Communities<sup>11</sup>), the effects of the illegal acts of the organization are governed by the general principles and practice of international law.<sup>12</sup> The United Nations Organization possesses an international legal personality and the capacity to bring international claims,<sup>13</sup> but the Charter does not contain provisions which explicitly address the question of its responsibility for unlawful acts of its organs and the judicial redress of their consequences. The juridical responsibility of the United Nations Organization for its own acts is, however, a correlative of its legal personality and the capacity to present international claims. In the well known *Reparation*<sup>14</sup> case, the International Court of Justice, affirming the international legal personality of the United Nations Organization, pointed out that "... the rights and duties of an entity such as the [U.N.] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice",<sup>15</sup> thereby affirming that this organization has certain *duties* related to its purposes and functions. Although the International Court of Justice may, according to Article 65(1) of its Statute, give an advisory opinion on any legal question at the request of the General Assembly and Security Council, and of any UN organ or specialized agency within the UN system upon authorization by the General Assembly (Article 96 of the Charter), the Court still does not have any juridical control over the legal effects of the acts of the Organization. The advisory opinions of the Court have no binding power themselves, but may be (and normally are) accepted by the organs requesting them as they induce "moral consequences which are inherent in the dignity of the organ delivering [them]."<sup>16</sup> Exception to this rule is the General Convention on the Privileges and Immunities of the United Nations of 1946 which provides that the opinion given by the Court (upon the request of the Organization) regarding differences which could arise between the Organization and a signatory state shall be binding to the parties.<sup>17</sup>

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<sup>11</sup> See, e.g., Henry Schermers, Denis Waelbroeck, *Judicial Protection in the European Communities*, 4<sup>th</sup> edn., Kluwer Law International, 1987.

<sup>12</sup> Ian Brownlie, *Principles of Public International Law*, 4<sup>th</sup> edn., Oxford University Press, 1990, p. 701.

<sup>13</sup> *Ibid.*, pp. 680-1, pp. 688-90.

<sup>14</sup> *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Reports (1949) 174 [hereinafter *Reparation*].

<sup>15</sup> *Ibid.*, at 180.

<sup>16</sup> Judge Azevedo, in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First phase)*, ICJ Reports (1950) 80.

<sup>17</sup> General Convention on the Privileges and Immunities of the United Nations (13 Feb. 1946), Art. VIII, Sect. 30.

In the advisory jurisdiction of the Court there have been only a few cases in which the relations of the United Nations with the states have been involved. In the *Reparation and Mazilu*<sup>18</sup> cases the request for an advisory opinion was initiated and brought to the Court by the Organization. In the *IMCO*<sup>19</sup> and *Certain expenses*<sup>20</sup> cases, the request for Court's opinion was initiated by the member states (of the IMCO and the UN, respectively). For the purposes of our further discussions, we shall outline some of the characteristic features of these and a two other cases.

The *IMCO* case is illustrative in several respects. It is the first case in the history of international organizations and of the Court itself when the Court was requested to give its opinion on a question of breach of a constitutional document (the Convention for the establishment of IMCO) made by the plenary organ (the Assembly of IMCO) of the organization. Another feature of this case is that the question on legality of the committed act (the election of the Maritime Safety Committee at the first session of IMCO Assembly in 1959) was put before the Court by the IMCO Assembly itself (authorized by the UN General Assembly for such an action) on request by two member states of the organization (Liberia and Panama), which contended that in the course of the elections their constitutional rights had been violated (namely, to be automatically elected in the Committee membership in accordance with the explicitly prescribed criteria in Article 28 of the IMCO Convention which they had been fulfilling). What happened was that during the elections, most of the voting members of the organization had taken as a basis for their vote additional criteria, not expressly provided for in Article 28 of the Convention, to which they had attached greater relevance than to those laid down explicitly in that article. The Court delivered the opinion "that the Maritime Safety Committee of IMCO which was elected on January 15, 1959, [was] not constituted in accordance with the Constitution for the establishment of the Organization."<sup>21</sup>

The above opinion of the Court was accepted by the IMCO Assembly at its next session. The Assembly resolved that the previously elected Committee should be dissolved and decided "to constitute a new Maritime Safety Committee in accordance with Article 28 of the Convention as interpreted by the International Court of Justice and its Advisory Opinion."<sup>22</sup> The Assembly

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<sup>18</sup> *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports (1989) 177 [hereinafter *Mazilu* case].

<sup>19</sup> *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, ICJ Reports (1960) 145 [hereinafter *IMCO*].

<sup>20</sup> *Certain Expenses of the United Nations (Art. 17, para 2, of the Charter)*, ICJ Reports (1962) 151 [hereinafter *Certain Expenses*].

<sup>21</sup> *Supra* note 18, at 150.

<sup>22</sup> IMCO Assembly Resolution A. 21 (II), 6 April 1961.

also decided to confirm and adopt the measures which had been taken by the previously elected Committee in the period (1959-1961) between the two Assembly sessions. Without going into a more subtle analysis of the IMCO case,<sup>23</sup> we would like to point out the identity of the character of the illegal act (breach of a procedural constitutional provision by the plenary organ of the organization) in the IMCO case with that of Macedonian admission to UN membership. As we shall see later on, the legal consequences in the Macedonian case are, however, much more complex. Nevertheless, the IMCO case may serve as a model for the juridical redress of the Macedonian case as well.

In the *Certain expenses*<sup>24</sup> case the question put before the Court resulted from the largely divided views of the UN members regarding the constitutional basis of the expenditures authorized by a number of General Assembly resolutions for the operation of the UN Emergency Force (UNEF) in the Middle East and for the UN operations in the Congo (ONUC). (In the latter case the GA resolutions were undertaken in pursuance of the corresponding Security Council resolutions). The division of the UN members in this case was essentially related to the question of legality of the mentioned operations under the terms of the Charter, i.e. regarding the validity of corresponding GA resolutions. The request for the Court's opinion took the form of whether these expenditures constituted "expenses of the Organization" within the meaning of Article 17(2) of the Charter. The Court's opinion was given in the affirmative and was based on arguments that the decisions of the General Assembly regarding incurring expenditures for the above operations (having an observational character) are made in accordance with the mission of the United Nations (for the maintenance of world peace and security), that the General Assembly is authorized to consider such expenditures as part of the expanded regular budget of the United Nations and, in accordance with Article 17(2), to apportion them to the member states as an obligation. This case illustrates that the decisions of the General Assembly that are of binding nature represent acts of the Organization. According to Article 18 of the Charter, such acts of binding nature of the General Assembly are related to the budget of the Organization and to the *legal status* of its members (e.g. *admission*, suspension and expulsion of members).

In order to further elucidate the relationship between the legal responsibility of the United Nations Organization and the legal status of its members, we shall briefly outline the earlier mentioned *Reparation* case.<sup>25</sup> The question put before the Court in the General Assembly's request for advisory opinion was whether the United Nations, as an Organization, had the capacity to bring an

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<sup>23</sup> Lauterpacht, *supra* note 9, at 100-6.

<sup>24</sup> *Supra* note 19.

<sup>25</sup> *Supra* note 13.

international claim against a state responsible (*de jure* or *de facto*) for the injuries suffered by an agent of the Organization in the performance of its duties with a view to obtaining reparation due in respect to the damage caused (a) to the United Nations and (b) to the victim (or to persons entitled through him). In the derivation of its affirmative response to these questions, the Court first established that the UN Organization possessed international legal personality, necessary for discharging its functions and duties on the international plane, that the Charter defined the position of the member states in relation to the Organization (requiring their assistance in the discharge of Organization's functions (Article 2(5)), acceptance to carry out its decisions (and those of the Security Council) and giving the Organization the necessary privileges and immunities on their territories (Articles 104, 105)), and that the rights and duties of the Organization were closely related to its functions and purposes as specified or implied in the Charter. From the facts that the question on the capacity of UN Organization to bring an international claim against a member state was put in the context of the legal liability of that state (to pay reparations), and that the Court's opinion was given in the affirmative, it follows that the Charter is an international treaty to which the Organization effectively is a party and which, by defining the mutual rights and responsibilities of the parties, establishes a contractual relationship between them.<sup>26</sup> This is further reinforced by the fact that in deriving its opinion the Court also invoked the General Convention on the Privileges and Immunities of the United Nations which in an explicit way establishes the rights, duties and mutual responsibilities between the signatories (the member states) and the Organization, and even defines (Section 30 of Article VIII) the mode of judicial settlement of the disputes between the different parties (by an ICJ advisory opinion of binding character). It can be concluded that both the Charter and the Convention on Privileges and Immunities establish a relationship between the legal responsibility and the legal status of the international persons involved (the Organization and the member states). As we have seen, this relationship is of contractual nature and must involve the juridical liabilities of the parties.

The *Mazilu* case provides a typical example when the legal status of the UN Organization (as represented by one of its agents) is violated by a member state.<sup>27</sup> In performing his duties on an UN (ECOSOC) mission, Mr. Mazilu was deprived from his privileges and immunities by Romania, and ECOSOC requested the Court for an advisory opinion regarding the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of

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<sup>26</sup> The treaty character of the Charter has been also strongly emphasized by the Court in the *Admission* case (*supra* note 5).

<sup>27</sup> *Supra* note 17.

the United Nations in the case of Mr. Mazilu. Despite the official objection (i.e. non-consent) of Romania for presenting the request to the Court, the Court has considered the case and delivered its opinion in the affirmative. Being requested pursuant to Article 96(2) of the Charter, and not under Section 30 of Article VIII of the Convention (to which Romania had expressed reservation during its accession to the Convention), the Court's opinion could not have a binding force. (As noted earlier, Section 30 of Article VIII of this Convention provides a mechanism for settlement of the disputes between the Organization and the signatories of the Convention via a binding advisory opinion of the Court on matters related to the legal status of the parties).

The *Effects of Awards* case is an example when the Organization was found liable for violating the legal status of staff members of the Organization.<sup>28</sup> The question put before the Court by the General Assembly was to inquire whether there was any legal ground for refusing to give effect to an award of compensation made by the United Nations Administrative Tribunal in favor of a UN staff member whose contract of service had been terminated without his assent. The Court's opinion was given in the negative. This opinion was based on the arguments that a contract of service, concluded between a staff member and the UN Secretary General, acting on behalf of the Organization, engaged the legal responsibility of the Organization as a juridical person with respect to the other party, and that, in accordance with Article 10 of the Tribunal's Statute, the judgment of the Tribunal was binding to the parties, final and without appeal. This case illustrates that, when the Organization violates the legal status of its elements (including that of its staff members as defined by the contract of service), it becomes responsible as a legal person. Since the UN Charter possesses also features of contractual character, through which the Organization appears as a party, particularly in matters related to the legal status of its members (in other words, since the legal status of both the Organization and its member is of contractual origin), it can be concluded that the violation of any aspect of the legal status of either of them by the other leads to a legal responsibility of former and involves their legal personalities.

From the above briefly analyzed cases on which the ICJ has given its opinion, several conclusions can be drawn:

- 1) In discharging its constitutional functions the UN Organization has both rights and duties expressed in or derived from the constitutional provisions and has a legal responsibility for their lawful implementation;
- 2) The UN Charter, as a multilateral treaty, enables the Organization with an international legal personality for carrying out its duties and functions, and

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<sup>28</sup> *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports, 1957. 47 hereinafter *Effects of Awards*.

in the matters that involve the relations of the Organization (as a legal person) with its members it acquires features of contractual character (engaging the liability of the parties);

- 3) Breaches of constitutional provisions by the plenary organ of the Organization, related to the rights and legal status of its members, represent unlawful acts of the Organization (with respect to another international person), for which the Organization is legally responsible;
- 4) For violations by the Organization of the constitutional provisions, particularly the rights related to the legal status of its member states, the advisory opinion of the International Court of Justice may serve as an instrument for settlement of the disputes (as exemplified by the *IMCO* and *Effects of Award* cases).

### **The Unlawful Character of the Admission of Macedonia to UN Membership**

As mentioned in the Introduction, Macedonia was admitted to UN membership by the General Assembly resolution 47/225 (1993) subject to acceptance (i) to be referred with the provisional name “the Former Yugoslav Republic of Macedonia or all purposes within the United Nations”, and (ii) to negotiate with Greece over its name.<sup>29</sup> These two conditions for admission of Macedonia to UN membership are additional with respect to those laid down explicitly in Article 4(1) of the Charter, which the recommending SC resolution 817(1993) recognizes to be fulfilled by the applicant.<sup>30</sup> In characterizing the legality of the imposition of the above two conditions to the applicant for effecting its admission to UN membership, three questions should be analyzed:

- (a) are the conditions (i) and (ii) indeed additional to those laid down in Article 4(1) of the Charter, or are they only part of them, or contained in them;
- (b) does the conditions provided in Article 4(1) of the Charter form an exhaustive set of necessary and sufficient conditions for admission of a state to UN membership, or can this set be expanded by additional conditions;
- (c) are the UN political organs (the Security Council and the General Assembly) legally entitled to expand the admission criteria of Article 4(1) of the Charter on the basis of political considerations?

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<sup>29</sup> *Supra* note 1.

<sup>30</sup> *Supra* note 2.

In order to analyze these questions we remind that Article 4(1) of the Charter provides: "Membership in the United Nations is open to all other [i.e. other than the original UN members] peace loving 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 conditions for admission to UN membership, as expressly provided in this Article, require that the applicant (1) be a state, (2) be peace-loving, (3) accepts the obligations of UN Charter, (4) be able to carry out these obligations and (5) be willing to do so. The fulfillment of these conditions by the applicant is a prerequisite for recommending (by the Security Council) and effecting (by a decision of the General Assembly) the admission, i.e. they have to be satisfied, in the judgment of the Organization, prior to the act of admission. The Security Council resolution 817(1993), recommending the admission, recognized that Macedonia had fulfilled the above conditions at the time of its application to UN membership.

In order to identify the nature of the conditions (i) and (ii) imposed on Macedonia by (the SC resolution 817 (1993) and the GA resolution 47/225(1993), one should look first into their functional role, i.e. whether they determine the suitability of the applicant for membership. The conditions (i) and (ii), however, are imposed as requirements on the applicant at the moment of its admission to UN membership, and they transcend in time the act of admission. Such requirements do not serve the purpose of criteria, which the applicant should fulfill prior to its admission (like those in Article 4), but they are, rather, conditions which the applicant should accept to carry on and fulfill after its admission to membership. The strong Macedonian objection<sup>31</sup> to the inclusion of such conditions in the SC resolution 817(1993) was completely ignored, and the admission to UN membership was subjected to their acceptance. The conditions for admission, imposed on the state by the act of its admission, and which transcend that act in time, cannot be evidently regarded as part of, or contained in, those enumerated in Article 4(1), the fulfillment of which is required prior to the act of admission. In absence of the institute of "conditional admission" to the UN membership, the conditions (i) and (ii) must be regarded as *conditions transcending their cause*, i.e. as being additional to those contained in Article 4(1). The additional character of these conditions with respect to those laid down in Article 4(1) is also obvious from the fact that, as it has been mentioned earlier, the resolution SC Res. 817(1993) explicitly recognizes that the applicant satisfies the conditions for admission prescribed in Article 4(1) and recommends admission. The very fact that the conditions (i) and (ii) transcend in time the act of admission indicates that their character is not legal, but rather it is of political nature. We shall discuss in more detail the legal consequences of

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<sup>31</sup> See UN SCOR, 48th Sess., Supp. Apr., May, June, at 35, UN Doc. S/25541, 1993.

these conditions somewhat later on. At this point, we would like to emphasize that the imposition of additional conditions (i) and (ii) in the SC Res. 817 (1993) creates an internal logical inconsistency in this resolution. Apparently, the motivation for imposing the conditions (i) and (ii) to the admission of Macedonia to UN membership was the observation by the Security Council 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-neighborly relations in the region”.<sup>32</sup> This provision implies that the applicant state is unwilling to carry out the obligation contained in Article 2(4) of the Charter which requires that the “[m]embers 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 the other hand, the recognition contained in SC Res. 817 (1993) that the applicant state fulfils the admission criteria of Article 4(1) means that the Security Council affirms that the applicant state is a peace-loving state, able and willing to carry out the obligations in the Charter (including Article 2(4)). Therefore, the two statements in SC Res. 817 (1993) are contradictory to each other.

The questions (b) and (c) put forward at the beginning of this Section have been answered in the advisory opinion given by the International Court of Justice in the *Admission* case.<sup>33</sup> This opinion provides an interpretation of Article 4(1) of the Charter and has been accepted by the General Assembly.<sup>34</sup> The advisory opinion states that a “member of the United Nations that is called upon, by virtue of Article 4 of the Charter, to pronounce itself by vote, either in the Security Council or in the General Assembly, on 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”.<sup>35</sup> This opinion of the Court was based on the arguments that the UN Charter is a multilateral treaty whose provisions impose obligations on its members, that Article 4 represents “a legal rule which, while it fixes the conditions for admission, determines also the reasons for which admission may be refused”,<sup>36</sup> that the enumeration of the conditions in Article 4(1) is exhaustive, since in the opposite “[i]t would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions”<sup>37</sup> (in which case Article 4(1) would cease to be a legal norm).

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<sup>32</sup> *Supra* note 2, preamble.

<sup>33</sup> *Supra* note 5.

<sup>34</sup> *Supra* note 6.

<sup>35</sup> *Supra* note 5, at 65.

<sup>36</sup> *Ibid.* at 62.

<sup>37</sup> *Ibid.* at 63.

The conclusion of the Court was that the conditions set forth in Article 4(1) are exhaustive - they are not only the necessary but also the sufficient conditions for admission to membership in the United Nations.<sup>38</sup>

The Court specifically addressed the question whether it is the political character of the organs responsible for admission (the Security Council and the General Assembly, according to Article 4(2)), or the maintenance of world peace and security (Security Council, according to Article 24 of the Charter) that one can derive arguments which could invalidate the exhaustive character of the conditions enumerated in Article 4(1). The Court rejected this possibility and held that “[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.”<sup>39</sup> Thus, according to the Court's opinion, the Charter limits the freedom of political organs and no “political considerations” can be superimposed on, or added to, the conditions prescribed in Article 4(1) that could prevent admission to membership.

The advisory opinion of the Court also emphasized the functional purpose of the conditions: they serve as criteria for admission and have to be fulfilled, in the judgment of the Organization, prior to the recommendation and the decision for admission.<sup>40</sup> Further, once it has been recognized by the competent UN organs that these conditions have been fulfilled, the applicant acquires a (unconditional) right to UN membership.<sup>41</sup> This right follows from the “openness” to membership enshrined in Article 4(1) and from the universal character of the Organization. In the words of Judge Alvarez, “[t]he 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 convention, or on grounds of a political nature.”<sup>42</sup>

As mentioned earlier, the General Assembly, by its Resolution 197(III, A) of 1948, accepted the Court's interpretation of Article 4(1) of the Charter and recommended that “each member of Security Council and of the General Assembly, in exercising its vote on the admission of new Member, should act in accordance with the foregoing opinion of the International Court of Justice.”<sup>43</sup> Moreover, in the parts C, D, E, F, G, H, I, of the same GA Resolution 197(III)<sup>44</sup>

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<sup>38</sup> *Ibid.* at 62.

<sup>39</sup> *Ibid.* at 64.

<sup>40</sup> *Ibid.* at 65.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* at 71.

<sup>43</sup> *Supra* note 6, at 30.

<sup>44</sup> GA Res. 197 (III,-C,D,E,F,G,H,I), 8 December 1948.

of 1948, the General Assembly implemented the Court's interpretation of Article 4(1) of the Charter by requesting the Security Council to provide recommendations for admission of a number of states to UN membership, the delivery of which was blocked by certain Security Council members on the basis of arguments (of political nature) not strictly related to the conditions set forth in Article 4(1).

In view of the Court's interpretation of Article 4 of the Charter as a legal norm (which should be observed also by the UN political organs) and its acceptance by the General Assembly [the GA Res. 197(III, A)], it is obvious that the imposition of additional conditions on Macedonia for its admission to UN membership is a clear violation of Article 4(1) of the Charter. From the fact that the additional conditions transcend in time the act of admission (with no strictly specified time limit), it follows that their imposition did not serve the purpose of admission conditions (which should be fulfilled before the act of admission), but rather a specific political purpose. This indicates that the additional conditions imposed on Macedonia for its admission to UN membership have no legal character and, by their nature, are extraneous to those contained in Article 4(1).

The violation of Article 4(1) of the Charter by the General Assembly's Resolution 47/225(1993) is not a mere *ultra vires* act. The imposition of additional conditions to Macedonia for its admission to UN membership means denial of its *right* to admission once it has been recognized that it fulfilled the exhaustive conditions set forth in Article 4(1). This right is enshrined in the Article 4(1) itself ("Membership in the United Nations is *open* to all [other] peace-loving states ....") and is implied by the principle of universality of the United Nations Organization. For the Organization itself, the principle of its universality and the provision for its "openness" to membership create a *duty* to admit an applicant to UN membership when it has been recognized that it fulfills the criteria set forth in Article 4(1). Thus, the imposition of additional conditions on a state that fulfills the prescribed admission conditions violates the right of that state to become a member of the Organization and one of the fundamental principles of the Organization as well. The duty of the Organization to admit states that fulfill the conditions of Article 4(1) to UN membership without imposing additional conditions has been recognized by the General Assembly in its Resolution 197(III, parts C,D,E,F,G,H,I), as mentioned earlier.

### **Legal Implications and Consequences of the Imposed Admission Conditions**

We shall now turn to a more substantive analysis of the additional conditions imposed on Macedonia by the UN organs for its admission to UN membership. We remind at this point again that they include acceptance by the applicant (i) of

“being 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”,<sup>45</sup> and (ii) of negotiating with Greece over its name (implied in the second part of the above cited text common to both GA Res. 47/225(1993) and SC Res. 817(1993) and from the provision in the SC Res. 817 (1993) by which the Security Council “urges 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 the difference”<sup>46</sup>). The reason for imposing these conditions was given in the preamble of SC Res. 817(1993) in which the Security Council, after affirming that the applicant state fulfills the conditions of Article 4, observes 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-neighborly relations in the region”.<sup>47</sup> This observation of the Security Council, which has generated the imposition of the mentioned additional conditions for the Macedonian admission to the UN membership, was apparently based on the Greek allegation that the name of the applicant “implies territorial claims’ against Greece.”<sup>48</sup> Without examining the legal basis of the Greek allegation (see later for details on this aspect), the Security Council, in accordance with its responsibility for the maintenance of world peace and security provided for in Article 24 of the Charter, has used the above political consideration as a sufficient basis for imposing the additional conditions on Macedonia for its admission to UN membership. We have already seen that this is not in accordance with the GA Resolution 197(III, A) and the Court’s interpretation of Article 4(1). However, there are other, and perhaps even more important, legal implications of the imposed additional conditions. They are related to the inherent right of states to determine their own legal identity, to the principles of sovereign equality of states<sup>49</sup> and the inviolability of their legal personality,<sup>50</sup> and to the legal status (including the representation) of the member states.

By imposing the conditions on Macedonia regarding its name, the Security Council and the General Assembly essentially denied the right of Macedonia to choose its own name. The inherent right of a state to have a name can be derived

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<sup>45</sup> *Supra* note 1 and note 2.

<sup>46</sup> *Supra* note 2, para 1.

<sup>47</sup> *Supra* note 2, preamble.

<sup>48</sup> See UN SCOR, 48th Sess., Supp. Apr., May, June, at 36, UN Doc. S/25543 (1993).

<sup>49</sup> UN Charter, Art. 2(1).

<sup>50</sup> 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), 24 October 1970.

from the necessity that a juridical personality must 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 *interact* with other such juridical persons (conclude agreements, etc) and independently enter into and conduct its external relations. The name of a state is, therefore, an essential element of its juridical personality and, consequently, of its statehood. The principles of sovereign equality of states and the inviolability of their juridical personality lead to the conclusion that the choice of a name is a basic, inherent right of the state. This right is not alienable, divisible or transferable, and it is a part of the right to “self-determination” (determination of one's own legal identity), i.e. it belongs to the domain of *jus cogens*. External interference with this basic right is inadmissible. If this were not true, i.e. if an external factor is allowed to take part in the determination of the name of a state, under the assumption that the subject state has at least a non-vanishing influence on this determination, it can easily be imagined that the process of determination of the name of that state (e.g. via negotiations) may never end. The state may never acquire its name, which would create an extraordinary political and legal absurd on the international arena. It also goes without saying, that if such external interference with the choice of the name of a state would be allowed, even through a negotiation process, it might easily become a legally endorsed mechanism for interference in the internal and external affairs of the state, i.e. a mechanism for degradation of its political independence. Such effects of an external interference with the right of a state to choose its own name are very far from the accepted legal standards of international law. The extreme form of the external interference with the choice of name of a state would be the straight imposition of the name by an external (e.g. international) authority, which would simply mean a straight denial of the right of states to choose their own names. It is easy to see that this would lead to either drastic changes of the fundamentals of presently practiced international law, or to a legal chaos. From these reasons, the choice by a state concerning its own name must be considered an inherent right of the state, which belongs *stricto sensu* to its domestic jurisdiction. In exercising this right, states have, therefore, a complete legal freedom.

The denial by the UN political organs of the inherent right of Macedonia to choose its name, implied by the additional conditions imposed for its admission to UN membership, is, therefore, in violation of Article 2 (paragraphs 1 and 7) of the Charter. The respect of the principles embedded in this article are equally applicable to the Organization as is to its members (e.g. Article 2(7) explicitly forbids the Organization to intervene in matters, which are essentially within the domestic jurisdiction of the states), and their violation by the Organization directly involves its legal responsibility.

The violation of Article 2(1) of the Charter and of the principle of inviolability of the legal personality of states in the process of admission of Macedonia to UN membership has immediate consequences on its legal status within the United Nations as a member. With respect to other UN member states, Macedonia is obliged to bear within the UN system an imposed, provisional name (reference) and to continue to negotiate with Greece over its name. These additional obligations of Macedonia as a UN member distinguish its position from that of the other UN members and define a discriminatory status. Membership, as a legal status, contains a standard set of rights and duties, which are equal for all members of the Organizations (“sovereign equality of the Members”, Article 2(1)) and derogation or reduction of these membership rights and duties for particular states is inadmissible, particularly in the areas which are related to, or involve, the legal personality of member states. It follows that the additional obligations imposed on Macedonia as a UN member are again in violation of Article 2(1) of the Charter.

The discriminatory status of Macedonia as a UN member manifests itself in a particularly clear manner in the area of representation. In all acts of representation within the UN system, and in the field of UN relations with other international subjects, the provisional, and not the constitutional name of Macedonia is to be used. This is in violation with the right of states to non-discrimination in their representation in the organizations of universal character (i.e. the UN family of organizations) expressed in an unambiguous way in Article 83 of the Vienna Convention on Representation of States.<sup>51</sup> That article of the Convention provides that “[i]n the application of the provisions of the present Convention no discrimination shall be made as between states”.<sup>52</sup> The right to equal representation of states in their relations with the organizations of universal character is only a derivative of the principles of sovereign equality of the states within the Organization and inviolability of their juridical personality. The representation on a non-discriminatory basis, however, has a particular significance in the exercise of the legal personality of states in their relations with other states or organizations since it involves in a most direct and explicit way the legal identity of the states.

There is another viewpoint from which the legal status of Macedonia in the United Nations could be looked at. It can be questioned whether a state admitted to UN membership under conditions (or obligations), which extend in time with no specified limit and which, degrade its legal personality can be

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<sup>51</sup> Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, UN Doc. A/CONF. 67/16 (March 14, 1975). [See also 69 *AJIL* (1975) 730].

<sup>52</sup> *Ibid.* Art. 83.

considered as a *full* member of the Organization (in the sense of the principle of sovereign *equality* of the members), despite the fact that the state possess all other rights (and duties) provided by the membership status. Or, can such a state be considered rather, *de facto, conditionally admitted* to the UN membership? Let us suppose that the negotiating process may extend indefinitely. What would be the legal status of such a member carrying out a permanent obligation? Should it be expelled from the Organization's membership for not complying with the obligation in an efficient way (or for its obstruction)? Should the other negotiating party also be expelled from the Organization for the same reason (assuming that in the negotiations the parties have equal negotiating status)? But, expelling the state from UN membership for failing to fulfill the obligation imposed by the act of its admission would only prove that the state had been conditionally admitted to UN membership and that it had a legal status of a conditional member of the United Nations (a status which is not provided for by the Charter). If expulsion from membership is not affected, to avoid the conclusion that the membership status of the state was of conditional nature, then the Organization accepts to tolerate a permanent factual non-compliance of one of its members with an obligation. It may also be possible that the obstruction of the "settlement of the dispute in an efficient way" by negotiations is caused not by the party carrying the admission obligation, but by the other negotiating party (e.g. by insisting to enter into matters from the domestic jurisdiction of the first party, or from other - for instance, political reasons or motivations). The fulfillment of the imposed obligation could, thus, depend not solely on the good will of the party carrying the obligation, but also on the other party, i.e. on a factor, which is outside of its control. This introduces another component in the legal status of Macedonia in the UN membership, which is related to its independence in carrying out its membership obligations.

There is still another possible way to look at the legal status of Macedonia in the UN membership. By denial of the right of the state to free choice of its name, and by imposing to it a provisional name for use within the UN system (i.e. as an attribute to its membership), the UN organization essentially suspended the legal identity of one of its members at the moment and by the act of its admission to membership.<sup>53</sup> The suspension of the legal identity of a member state by the act of admission defines a legal status for that state within the UN characterized by a derogated legal personality and reduced (contractual) capacity for conducting its international relations both within and outside the UN system. This specific status

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<sup>53</sup> In both SC Res. 817 (1993) and GA Res. 47/225 (1993) the name of the applicant is not mentioned but the applicant is referred to as the State whose application is contained in document S/25147 (in the SC resolution), or in document A/47/876 - S/25147 (in the GA resolution). See also *supra* note 3.

of Macedonia as a UN member is clearly different from that of all other member states and is in violation with Article 2(1) of the Charter.

All the above contradictions and inconsistencies in the legal status of Macedonia in the UN membership have their origin in the violation of the Articles 4(1) and 2(7) of the Charter by the resolutions of Security Council and the General Assembly related to, respectively, the recommendation for and effecting of the admission of Macedonia to UN membership. We shall now reveal the source of these violations.

As indicated earlier, the imposition of additional conditions in the Security Council Resolution 817 recommending Macedonia for admission to UN membership was based on concerns regarding “the maintenance of peaceful and good-neighborly relations in the region”,<sup>54</sup> triggered by the Greek allegation that the applicant's name “implies territorial claims”<sup>55</sup> against Greece. Greece also advanced claims that the right of use of the name “Macedonia” belongs, for historical reasons, only to Greece. There is, however, no legal basis for linking the conditions for admission of a state to UN membership, as specified explicitly in Article 4(1) of the Charter, with allegations based on assumptions regarding possible future (political) developments. Indeed, based on the principle of separability of domestic and international jurisdiction, the name of the state, which is a subject of domestic jurisdiction, does not create international legal rights for the state that adopts the name, nor does it impose legal obligations on other states, which would be a negation of the basic idea and purposes of international law. Clearly, the name, *per se*, does not have an impact on the territorial rights of states.<sup>56</sup> Furthermore, from the inherent right of a state to determine its legal identity and from the principle that all states are juridically equal, it follows that all states have equal legal freedom in the choice of their names. For this reason, the Greek claims that Greece has an exclusive right to the use of the name “Macedonia” have “no basis in the international law and practice”.<sup>57</sup> The Greek opposition to the admission of Macedonia to UN membership under its constitutional name is not only without legal basis, but it is also in violation with the international law when interfering in matters, which are essentially within domestic jurisdiction of Macedonia.<sup>58</sup> Thus, by ignoring

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<sup>54</sup> *Supra* note 2, preamble.

<sup>55</sup> *Supra* note 47.

<sup>56</sup> The EC Arbitration Commission on Former Yugoslavia, when considering the question of recognition of Macedonia by the European Community, in its Opinion No. 6 [see 31 *ILM* (1992) 1507, 1511] has not linked the name of the country to the Greek territorial rights.

<sup>57</sup> Louise Henkin et al., *International Law: Cases and Materials*, 3rd edn., West, St. Paul, 1993, p. 253.

<sup>58</sup> *Supra* note 49, at 123.

the principles of separability of domestic and international jurisdictions in the case of Macedonian admission to UN membership, the Security Council has opened the door for violation of several articles of the UN Charter and for creation of an unusual membership legal status for one of the UN members, not instituted by the Charter.

### **Legal Responsibility of the UN Organization and Possible Modes of Redress**

In the preceding two sections of this study we have provided a number of arguments which show in a clear way that the inclusion of the two additional conditions in the SC Resolution 817 (1993) and GA Resolution 47/225(1993), related to the admission of Macedonia to UN membership, violates the provisions of Articles 4(1), 2(1) and 2(7) of the Charter and constitutes an *ultra vires* act of these organs. Since the admission to membership, effected by a decision of the General Assembly, expresses the legal capacity of the UN Organization to admit a state to membership, and since a state has also a legal capacity to become a member of the Organization, it follows that the act of admission engages the legal personalities of both the Organization and the applicant state and that the admission is a legal act of the Organization.<sup>59</sup>

As argued in Section 3 above, the responsibility of the Organization related to the unlawful admission of Macedonia to UN membership derives from the *right* of the applicant to admission when it fulfills the prescribed criteria laid down in Article 4(1) of the Charter and the *duty* of the Organization to admit such applicant to membership, following from the “openness” of the Organization and its mission of universality.<sup>60</sup> In this context, the provisions contained in Article 4(1) should be interpreted as a legal norm of an international treaty which governs the admission to UN membership.<sup>61</sup>

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<sup>59</sup> The ICJ advisory opinion given in the *Certain Expenses* case (*supra* note 19) affirms that, irrespectively of the distribution of powers among the organs of the UN organization, the acts of these organs with respect to a third party represent acts of the Organization. The decisions of the General Assembly made in accordance with Art. 18(2) of the Charter, including the decisions on admission to membership, have a binding character.

<sup>60</sup> The correlation between the right of a state fulfilling the conditions laid down in Art. 4(1) to admission to UN membership and the duty of the Organization to admit such a state to membership was elaborated in detail in the ICJ advisory opinion given in the *Admission* case (*supra* note 5). Particularly clear form of this correlation was given in the concurring individual opinion of Judge Alvarez (*Ibid.*, at 71).

<sup>61</sup> This interpretation of Art. 4(1) was given by the ICJ in the *Admission* case (*supra* note 5, at 62) and was accepted by the General Assembly (*see supra* note 6).

Observance of this legal norm is compulsory for the Organization as it is for the applicant state. The violation of Article 4(1) in the process of admission of Macedonia to UN membership constitutes, therefore, a breach of the Charter and the constitutionally guaranteed right of the applicant by the Organization. The specific content of the violation of Article 4(1) is the extension of the admission criteria by the UN political organs beyond those enumerated exhaustively in that article, i.e. an inappropriate and politically motivated interpretation of Article 4(1) contradicting the interpretation of that article given by the International Court of Justice in the *Admission* case and accepted (in 1948) by the General Assembly. In this sense, the breach of Article 4(1) of the Charter by the Organization in the case of Macedonian admission to UN membership is similar to the *IMCO* case,<sup>62</sup> discussed in Section 2, in which the breach of Article 28 of the IMCO Convention by the Assembly of IMCO was committed similarly because of an inappropriate interpretation of the provisions of that article (resulting in additional criteria for election in the IMCO Maritime Safety Committee membership).

As argued in Section 4, the determination of the legal identity of a state is an inherent right of that state, falling strictly within its domestic jurisdiction. This right, being strongly correlated with the right to self-determination, belongs to the domain of *jus cogens*. On the other hand, the legal identity is an essential element of the legal personality of a state, the inviolability, which again has the character of a *jus cogens* norm. The denial of the right of a state to determine its own name is, therefore, in violation with the norms of *jus cogens*, reflected in the provisions of Articles 1(2), 2(1) and 2(7) of the Charter and in the Declaration on Principles of International Law.<sup>63</sup> The Organization, as any other subject of international law, has a duty to respect these norms. Articles 2(7) specifically and expressly limits the powers of the Organization over matters from the strict internal jurisdiction of the states. The breach of this article in the case of the Macedonian admission to UN membership by interfering in the inherent right of this state to choose its own name is certainly an *ultra vires* act of the Organization (The Organization bears a legal responsibility for this unlawful act.). Since the basic principles embodied in the Charter are mutually interrelated and consistent with each other, breach of one principle (or legal norm) usually leads to violation of other principles (or norms). Thus, the violation of Article 2(7) also leads to violation of the principle enshrined in Article 2(1), as generalized by the Declaration on Principles of International Law (“sovereign equality of states”<sup>64</sup>), and *vice versa*.

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<sup>62</sup> *Supra* note 18.

<sup>63</sup> *Supra* note 49.

<sup>64</sup> *Ibid.*, at 122.

Furthermore, the violation of Articles 4(1) and 2(7) during the process of admission leads to a discriminatory legal status of Macedonia as a UN member, i.e. to the violation of Article 2(1) of the Charter. (Indeed, *ex injuria jus non oritur*). As we have argued in the preceding section, the breach of this article results effectively in suspension of the legal identity of the member state, inflicting thus a grave damage on its legal personality (e.g. by reducing its contractual capacity, its capacities in the domains of legation and representation, etc.), and on its external political and economic relations. The responsibility of the Organization for violating Article 2(1) derives from its duty to strictly observe this treaty provision (principle of the Organization), and from its mission in promoting the legal justice and the rule of international law.<sup>65</sup>

The violations of the Charter provisions contained in Articles 4(1), 2(1) and 2(7) may each serve as a sufficient legal basis (*ultra vires* acts) for requesting a judicial redress, i.e. for removal of the conditions imposed on Macedonia during its admission to UN membership and the resulting discriminatory legal status as a UN member. On the substantive level, however, they are all closely interrelated (as argued above), since the violation of Articles 2(1) and 2(7) underlines the violation of Article 4(1). On the other hand, the breach of Article 4(1) (which implies the violations of Articles 2(1) and 2(7)) appears to be the source generating the problems related to the specific legal status of Macedonia in UN membership. Further, the breach of Article 4(1) appears to be most obvious, since the admission of Macedonia to UN membership has not followed (in its substantive part) the standard admission procedure. Moreover, and most importantly, this breach is in direct discord with the General Assembly resolution 197 (III, A) regarding the interpretation of Article 4(1) given by the International Court of Justice in the *Admission* case.<sup>66</sup>

As a mechanism for judicial redress of legal consequences generated by the violation of Article 4(1) in General Assembly resolution 47/225 (1993) and Security Council resolution 817 (1993), the advisory jurisdiction of the International Court of Justice appears to be the most appropriate in this case. The question of legality of these resolutions in their parts related to the imposition of additional conditions on Macedonia regarding its name for its admission in UN membership (i.e. their compatibility with the provisions of Article 4(1) of the Charter) could be put before the Court by the General Assembly on request by Macedonia (possibly jointly with a group of Member States that have already recognized Macedonia under its constitutional name). Since this question is of purely legal nature, the General Assembly may request an advisory opinion from the Court (Article 96(1) of the Charter). The General Assembly cannot obstruct

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<sup>65</sup> UN Charter, preamble.

<sup>66</sup> *Supra* note 5..

such a request for an advisory opinion to be put before the Court because the requested opinion is related to the legality of its own act. Such an obstruction (based on whatever reasons) would essentially mean that the General Assembly, as a political organ, is imposing its own response to the question regarding the legality of its own act, or, imposing its own judgment in a case in which it is itself a "party" (representing the Organization).<sup>67</sup> This would be incompatible with the basic legal principles of juridical equality and *bona fide*, and with the mission and the duty of the UN Organization regarding the respect of international law.<sup>68</sup> Moreover, the earlier discussed *IMCO* case<sup>69</sup> provides an example in which the Organization has not obstructed the request for a Court's advisory opinion regarding the compatibility of a decision of the IMCO plenary organ with the provisions of its constitutional document. On the other hand, since the question regarding the legality of imposing additional conditions on Macedonia for its admission to UN membership is essentially a special case of the more general question (of the same character) already considered by the Court in the *Admission* case,<sup>70</sup> there cannot be any uncertainty about the Court's competence for its consideration. For the same reason, and from the obvious incompatibility of the additional conditions for the Macedonian admission to UN membership with the exhaustive character of the conditions set forth in Article 4(1) of the Charter, the Court's advisory opinion in this case cannot be different from its opinion already given in the *Admission* case. Similarly, the position of the General Assembly with respect to the Court's opinion in the Macedonian case cannot be different from its position<sup>71</sup> taken with respect to the Court's opinion in the *Admission* case. In fact, the Macedonian case is only a specific example of the general issue considered by the Court in the *Admission* case, created by the non-observance (or neglect) of the already adopted Court's interpretation of Article 4(1) of the Charter.<sup>72</sup>

The mode of redress via the advisory jurisdiction of the Court includes also the more subtle problem of the legal consequences of legally defective GA

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<sup>67</sup> As we have argued earlier, in the act of admission of a state to UN membership the legal personalities of both the Organization and the applicant state are involved.

<sup>68</sup> *Supra* note 64.

<sup>69</sup> *Supra* note 20.

<sup>70</sup> The question for which an advisory opinion of the Court was requested by the General Assembly had the form: "[i]s 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?" (See GA Res. 113(II), 14 November 1947).

<sup>71</sup> *Supra* note 6.

<sup>72</sup> *Ibid.*

resolution 47/225 (1993). Apart from its preamble (referring to the recommendation of the Security Council for admitting the applicant to UN membership with additional conditions and to the application of the candidate), GA resolution 47/225 (1993) contains a decision which includes two parts: (a) to admit the applicant State to membership in the United Nations, and (b) “this State being 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”.<sup>73</sup> Part (a) of the GA resolution reflects the assessment of the Security Council that “the applicant fulfills the criteria for membership laid down in Article 4 of the Charter and follows the Security Council recommendation for admission of the applicant state to UN membership.” Part (b) of the GA resolution contains the imposed additional conditions related to the name of the applicant (and future UN member) without the acceptance of which part (a) could not have been affected. Only part (b) of the GA resolution is *ultra vires* and only this part can be considered void. From the requirement of legality, the unlawful part (b) of the GA resolution should be considered void *ab initio*. However, practical consideration (within the General Assembly, after the favorable Court's advisory opinion is received and presumably adopted) may render the determination that part (b) of the resolution is void *ex nunc*.<sup>74</sup> In either case, according to the principle of separability,<sup>75</sup> the invalidation of part (b) of the resolution should not affect the validity of part (a). Obviously, the invalidation of part (b) of GA Res. 47/225 (1993) can be done by a new GA resolution, which would also affirm the use of constitutional name of Macedonia within the UN system.

Another basis for a judicial redress in the Macedonian case via the advisory jurisdiction of the International Court of Justice could be based on the violation of Article 2(1) of the Charter in GA Res. 47/225 (1993) by which the legal personality of the state is severely derogated (through suspension of its legal identity and imposing a discriminatory membership status). The question of derogation of legal personality of Macedonia by this GA resolution within the context of Article 2(1) has an obvious legal character and is, therefore, a legitimate subject for the Court's advisory jurisdiction. Since some of the basic principles of international law are involved in the subject (related, e.g., to the inherent rights of

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<sup>73</sup> *Supra* note 1. The formulation of part (b) of GA Res. 47/225 (1993) is identical with the formulation given in the recommendation of the Security Council resolution SC Res. 817 (1993). The SC resolution, however, somewhat expands on the character of the ‘difference’ and on its settlement by negotiations (*see supra* note 45).

<sup>74</sup> Such a determination was given, for instance, by the Assembly of IMCO when accepting and implementing the Court's advisory opinion (*see supra* note 21).

<sup>75</sup> *Supra* note 9, at 120.

states, inviolability of legal personality, equality of states, etc), the Court cannot formulate its opinion in a manner inconsistent with those principles. The General Assembly could neither ignore the Court's opinion based on such principles.

### Summary

We have presented a detailed analysis of the legal aspects of SC Res. 817 (1993) and GA Res. 47/225 (1993), which are related to the admission of Macedonia to UN membership. It has been demonstrated that the additional conditions imposed on Macedonia for its admission to the United Nations constitute a clear violation of Articles 4(1), 2(1) and 2(7) of the Charter and define a discriminatory legal status of the state as a member (again in violation of Article 2(1)). The responsibility of the United Nations Organization for violation of Charter's provisions derives from the duty of the Organization to respect the basic rights of the states (either as applicants to UN membership or as UN members), which are protected by the principles of international law enshrined in the mentioned articles of the Charter. The character of these violations is of the *ultra vires* type with respect to the legal norms of the Charter as a multilateral treaty. The violations of Articles 4(1), 2(1) and 2(7) involve the legal personalities of both the Organization and the Macedonian state. This provides a basis for instituting a judicial redress of the legal consequences resulting from the breach of constitutional provisions. We have discussed two possible pathways for such judicial redress, based on the violation of Article 4(1) and Article 2(1), respectively, and on the use of the advisory jurisdiction of the International Court of Justice.

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PRAVNI OKVIR ZA SAVETODAVNO MIŠLJENJE  
MEĐUNARODNOG SUDA PRAVDE U SLUČAJU  
PRIJEMA MAKEDONIJE U UN

APSTRAKT

U ovom članku razmatramo zakonitost dopunskih uslova prijema u UN (izvan onih propisanih Poveljon UN-a) u slučaju Makedonije sadržanih u rezolucijama Saveta bezbednosti 817 (1993) i Generalne skupštine UN 47/225 (1993) u postupku učlanjenja (ove zemlje). Ti uslovi sadrže prihvatanje od strane podnosioca zahteva sa privremenim imenom i obaveze da pregovara o svom imenu sa drugom državom (Grčkom). Pokazano je da se nametanjem ovih uslova krši član 4(1), kao i drugi članovi Povelje Ujedinjenih nacija. Pravne posledice tih uslova na pravni status Makednije u članstvu su takođe ovde ispitane. Nametnutim uslovima se za Makedoniju stvara diskriminatorni status u članstvu, što je suprotno članu 2(1) Povelje UN. Konsekventno, pokazuje se da takvo kršenje Povelje predstavlja *ultra vires* akte počinjene od strane UN, koji involviraju pravni subjektivitet ove organizacije. Kršenja normi Povelje ovde su u vezi i sa kršenjem ključnih prava države aplikanta (kasnije države članice) i, posledično, dolazi do suštinskog narušavanja pravnog subjektiviteta buduće članice. Iz svega ovoga nameće se zaključak da bi najpodesniji način razrešenja situacije u vezi sa pomenutim nelegalnim (parcijalno nelegalnim) pravim aktima od UN-a, odnosno posledicama problematičnih (njegovih rezolucija) bilo korišćenje savetodavne jurisdikcije Međunarodnog suda pravde.

*Ključne reči:* Ujedinjene nacije, pravo, politika, država, Makedonija.