SELF-DETERMINATION IN INTERNATIONAL LAW
Quebec and Lessons Learned

Legal Opinions Selected and Introduced by

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the actual practice. Nevertheless, Crawford would be correct if he confined his analysis of "territorial integrity" to the two instances where it does apply. The first is in regard to instances of actual secession, wherein the law presumes that the seceded state succeeds to the boundaries it had as a constituent province of the former parent-states. This principle of *uti possidetis* has been approved both by the International Court of Justice [Frontier Dispute (Burkina Faso/Mali), 1986 ICJ Rep. 554 at 565] and by the (Badinter) Commission for the Former Yugoslavia [Conference on Yugoslavia Arbitration Commission (Badinter Commission), Op. No. 3, 31 ILM 1499 (Nov. 1992)]. But it must be carefully noted that the rule applies not against secession but, rather, to elucidate the conditions under which a lawfully recognized secession occurs.

3.10 Second, the principle of territorial integrity itself is set out in the aforementioned Declaration on Friendly Relations, which states that "Nothing in the foregoing paragraphs [setting out the right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. . . ." A careful reading of this caveat to the right of self-determination set forth in the Declaration does not, however, reveal any legal bias towards territorial integrity of the sort perceived by Professor Crawford. It merely reasserts the firmly-established rules, namely: (1) that states shall not dismember other states (i.e. use force unlawfully) under the pretext of aiding self-determination; and (2) that the international law and its system is neutral as to secessionist movements (i.e. does not "authorize or encourage" those) that seek the break-up of established sovereign states. In other words, the law permits secession and will recognize it if successful, but neither prohibits nor encourages it in non-colonial situations.

3. Report by Alain Pellet "Legal Opinion on Certain Questions of International Law Raised by the Reference"*

INTRODUCTION

The third expert on international law consulted by the *Amicus Curiae* for the purpose of the Reference was Alain Pellet, Professor at the Université de Paris X – Nanterre and at the Institut d'études politiques de Paris, and President of the United Nations International Law Commission. Professor Pellet was asked by the *Amicus Curiae* to review the issues studied by Professor Crawford in his report for the Attorney General of Canada. Professor Pellet disagrees with Professor Crawford's assertion that a unilateral secession cannot be valid in international law. He admits that in the case of non-colonial peoples such as Québecers the right to self-determination does not grant them directly the right to secede since their identity as a distinct group is recognized within Canada. However, if a people proclaims its independence, the new state can be recognized through effective control of the government over the population and the territory. Professor Pellet's report entitled "Avis juridique sur certaines questions de droit international soulevées par le renvoi" was completed on December 2, 1997, and was submitted to the Court along with the *Amicus Curiae*'s main factum on December 18, 1997.

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I the undersigned, *agrégé* of the Faculties of Law, Professor at the University of Paris X-Nanterre and at the *Institut d'Études politiques de Paris*, and President of the International Law Commission of the United Nations, having been consulted by Mr. André Joli-Coeur, who has been appointed by the Supreme Court of Canada as *Amicus Curiae* in the Reference concerning certain questions relating to the secession of Quebec from Canada, in regard to certain questions of international law raised by that Reference, have expressed the following opinion:

I. OBJECT AND GENERAL PRESENTATION OF THE STUDY

a) The Consultant's terms of reference

1. By Order in Council P.C. 1996–1497 of September 30, 1996, the Government of Canada submitted the following questions to the Supreme Court of Canada:

> "1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> "2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
>
> "3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"

On February 27, 1997, the Attorney General of Canada filed a factum in which he concluded that the first two questions should be answered in the negative. In regard to the third question, the Attorney General concluded that there was no conflict between domestic and international law but added: "However, if there were such a conflict, however, Canadian courts would be bound to apply domestic law in preference to international law" (para. 211, pp. 70–80[1]).

The Attorney General of Canada has attached a supplement to the file, entitled "Experts' Report". This document contains a report by Professor James Crawford, who holds the Whewell Chair at Cambridge University in the United Kingdom, and who is a member of the International Law Commission of the United Nations.[2] Professor Crawford gives his opinion on modern state practice in relation to unilateral secession and the right of self-determination, along the lines of the answer that the Attorney General gave to the second question. The Experts' Report also includes a brief opinion by Luzius Wildhaber, Professor at the University of Basel and Judge of the European Court of Human Rights, who supports Professor Crawford's conclusions.

2. On July 11, 1997, Mr. André Joli-Coeur, of the law firm of Joli-Coeur, Lacasse, Lemieux, Simard and St-Pierre of Ste-Foy, Quebec, was appointed *Amicus Curiae* in regard to the matter with which the Reference is concerned, and was given the task of submitting oral and written arguments to support an affirmative answer to Questions 1 and 2 cited above, of filing any document deemed necessary for the submission of these arguments, and of bringing to the Court's attention any

[1] The references are made to the French version of the documents, which were communicated in that language to the undersigned.

[2] Hereinafter referred to as "the Consultant".

other fact which, as *Amicus Curiae*, he considered relevant to answering the questions submitted to the Court.

3. Under a contract dated October 5, 1997, the *Amicus Curiae* retained the undersigned for the following purpose:

> "To advise the *Amicus Curiae* on questions of international law raised by the Supreme Court of Canada in the Reference concerning certain questions relating to the secession of Quebec from Canada, which was submitted to the Supreme Court by Order in Council P.C. 1497 of September 30, 1996 of the Government of Canada."

Following a meeting that took place in New York on the same day, October 5, the undersigned was more particularly given responsibility for writing

> "A critical and detailed commentary on the opinion of Professor James Crawford, which has been submitted as a supplement to the factum of the Attorney General of Canada in the Reference."

That commentary is the subject of this study.

b) General presentation of the report of Professor Crawford, and plan of this study

4. In accordance with the terms of his engagement, the undersigned shall examine Professor Crawford's report in a critical light, following the plan that Professor Crawford has chosen. Some preliminary remarks are, however, necessary.

Although he adds some collateral arguments, based in particular on an alleged contradiction between the principle of the territorial integrity of states and secession, the Consultant's fundamental thesis is to maintain that the creation of a new state result, in virtually all cases, from an agreement between the representatives of the "secessionist" people and the predecessor state. To this end, he makes a distinction between the case of decolonization and the case of secessions that occur in a non-colonial context.

5. This distinction is surprising. The first scenario is not, *a priori*, relevant to the present case, since it seems difficult to claim that Quebec is in a colonial situation. Moreover, as far as contemporary international law is concerned, the creation of a new state in a context of decolonization is not interpreted as a secession because, as Professor Crawford himself reminds us[3]:

> "The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it."[4]

The only reason for including this hypothesis in the Consultant's study seem to be to strengthen the impression that he wishes to create, namely that even when

[3] Para. 24, p. 41.

[4] General Assembly Resolution 2625 (XXV) of October 24, 1970, "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", Principle 5, para. 6.

the right of people to self-determination unquestionably creates a subjective right to independence, that independence has its foundation not in that right but in the agreement of the interested parties. The undersigned will establish, in the first section of his study, that this argument is refuted by a careful examination of the implementation of the right to self-determination of peoples, as that right flows from Article 1, Paragraph 2 and Article 55 of the Charter of the United Nations and from the "subsequent development of international law in regard to non-self-governing territories."[5]

6. Secondly, Professor Crawford considers the question of "the unilateral secession and self-determination of non-colonial territories", and makes an effort to show, as the Commission of Jurists of the League of Nations affirmed in the *Aaland Islands* affair, that:

> "Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish."[6]

This starting point is rather paradoxical. It is, to say the least, questionable to rely upon the 1920 opinion, whose authors stated:

> "Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties is not sufficient to put it on the same footing as a positive rule of the Law of Nations."[7]

Whatever the situation may have been in 1920, this position certainly does not reflect the state of positive law at the end of the twentieth century. Today,

> "The right of peoples to self-determination, as it has developed from the Charter and the practice of the United Nations, is a right that is enforceable *erga omnes*. The principle of the right of self-determination of peoples has been recognized by the Charter of the United Nations and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, International Court of Justice Reports 1971*, pp. 31–32, para. 52–53; *Western Sahara, Advisory Opinion, International Court of Justice Reports 1975*, pp. 31–33, paragraphs. 54–59). This is one of the essential principles of contemporary international law."[8]

7. This does not, incidentally, dispose of the question, since it does not necessarily follow from the positive character – which is today unquestionable – of the

[5] ICJ, Advisory Opinions of June 21, 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Rep. 1971, p. 31 and of October 16, 1975, *Western Sahara*, Rep. 1975, p. 31.

[6] *League of National Official Journal*, Special Supplement 3, p. 5. Quoted by J. Crawford, para. 28, p. 21.

[7] *Ibid.* This passage is also quoted in the factum of the Attorney General, para. 131.

[8] ICJ, decision of June 30, 1995, in the matter of *East Timor*, Rep. 1995, para. 29, p. 102.

principle of the equality of the rights of peoples, and of their right to self-determination, that every people has a right to secede.

This is not, moreover, the thesis advanced in this study. The undersigned agrees with Professor Crawford in thinking that the precise character of the right of people to self-determination varies according to the concrete situations and circumstances in which the people in question finds itself. It is, as has been said, "a very general principle, with 'variable geometry'"[9], and as has likewise been noted, "peoples' rights embodies a category, not a definition".[10] These considerations justify a study of the practice that the Consultant has followed. Based as it is on biased presuppositions, however, this practice leads to erroneous conclusions, as the undersigned will show in the second section of this study.

8. The general thesis of this study is: By definition, and contrary to the muddled explanations given by Professor Crawford[11], any "secession" (in the broad sense of the term, including – if one wrongly includes it[12] – the creation of new states in the context of decolonization) is unilateral in the sense that it is always the consequence of a unilateral process. These processes may ultimately result (and often do result) in an agreement with the predecessor state, but such an agreement is never the basis. In all cases, such an agreement ratifies the exercise of a right: the right of colonial peoples to independence, in the context of decolonization (II), or the right of states that exist *de facto* to benefit from the international legal status of states, in non-colonial scenarios (III). The conclusions reached by the "study of the five jurists" in 1992 are thus confirmed. Under the principle of the right of peoples to self-determination, all peoples have the right to see their own identity recognized, and while contemporary international law does not guarantee the right of peoples that are not oppressed to form a separate state, neither does it forbid them to exercise their right in that way, and it bows to the fact of secession (IV).

[9] Thomas M. FRANCK, Rosalyn HIGGINS, Alain PELLET, Malcolm N. SHAW and Christian TOMUSCHAT, "The Territorial Integrity of Quebec in the Event of the Accession of Quebec to Sovereignty", National Assembly of Quebec, Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty, *Presentations and Studies*, Vol. I, *The Attributes of a Sovereign Quebec*, 1992, p. 388. The five jurists who signed this study are hereinafter referred to as "the five jurists".

[10] James CRAWFORD, "The Rights of Peoples – Some Conclusions" in J. CRAWFORD ed., *The Rights of Peoples*, Clarendon Press, Oxford, 1988, p. 170. See also Alain PELLET, "Quel avenir pour le droit des peuples à disposer d'eux-mêmes?", in Manuel Rama-Montaldo, dir., *Le droit international dans un modne en mutation* – Liber Amicorum *Eduardo Jimenez de Arechaga*, Fundacion de cultura universitaria, Montevideo, p. 267.

[11] Para. 9.

[12] See above, para. 5.

II. THE RIGHT OF COLONIAL PEOPLES TO SELF-DETERMINATION IS NOT BASED ON A CONSENSUAL FOUNDATION

9. In his study, Professor Crawford devotes considerable space to studying "the secession and self-determination of colonial peoples".[13] This is rather surprising *a priori*. On the one hand, one cannot – from the legal point of view at least – reasonably compare the situation of Quebec to that of a "non-self-governing territory" within the meaning of Chapter XI of the United Nations Charter.[14] On the other hand, no one would dispute the fact that colonial peoples enjoy, by reason of their right to self-determination, a right to independence that seems *prima facie* to oppose the thesis upheld by the Consultant.

The natural solution, which one might have expected, would thus have been to set aside, at the outset, an hypothesis that was irrelevant to the case under consideration.[15] However, this is not the position taken by Professor Crawford, who instead tries to show that independence is not the automatic outcome of decolonization, and that "self-determination could lead to a number of different outcomes, including 'integration with an independent state', whether the metropolitan state or a third state".[16] This is perfectly correct, but has no bearing on the case at bar.[17] Professor Crawford also tries to show that "the principle of self-determination [. . .] did not involve an automatic right of unilateral secession for the people" of the non-self-governing territories.[18] This, on the contrary, is not correct, but is probably intended to bolster the mistaken idea which underlies the Consultant's whole study, namely that secession is only in accordance with international law if the creation of the new state receives the consent of the state from which the new state separates.

This is no more true of colonial situations than it is of non-colonial contexts.[19]

10. As far as decolonization is concerned, it is obviously true that many "decolonization arrangements" have been concluded, and that they "dealt with the modalities of transfer of power and, in many cases, made provision for succession with respect to treaties, property and debt."[20] However, as Professor Crawford himself rightly observes, "The concern of the law of state[21] succession is with the *consequences* of a change of sovereignty [. . .]. It should be stressed that the law of state[22] succession assumes that a change of sovereignty has occurred in accordance with international law. It does not purport to regulate the process

[13] Paras. 11 to 25, pp. 37-41. See also para. 67, p. 60.

[14] See above, para. 5, and the "study of the five jurists", n. 9, para. 3.06, p. 278 and para. 3.09, pp. 280–281.

[15] This was the position of the five jurists in their study, n. 9, para. 3.06, p. 278.

[16] Para. 18, pp. 39–40.

[17] No one doubts that Quebec can remain an integral part of Canada.

[18] Para. 17, p. 39.

[19] See III B below.

[20] Para. 17, p. 39. The French translation of Crawford's text incorrectly speaks of "succession *of* treaties, *of* property and *of* debt".

[21] Not "*of the* states", as in the French translation.

[22] *Ibid.*

of transfer of sovereignty or creation of statehood which underlies the succession."[23] It is thus impossible to claim that the independence of states that emerged from the decolonization process was grounded in these agreements or "occurred *with* the agreement of the State responsible for the administration of the territory."[24] Such agreements were part of the consequences of independence; they did not establish it.

Those agreements do not form the basis for the right to independence of colonial peoples, who hold it directly and "automatically" from their right to self-determination, one component of which is the right to create a sovereign state.

11. Professor Crawford acknowledges that "the United Nations General Assembly urged that rapid decisions be made as to the self-government or independence of those territories, especially after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples [. . .] But it did not advocate or support unilateral rights of secession for non-self-governing territories, except where self-determination was opposed by the colonial power."[25] This is a very personal vision of things, and a presentation of legal and factual reality that is, to say the least, watered down . . .

12. One would look in vain, in the text of the Declaration on the Granting of Independence to Colonial Countries and Peoples of December 14, 1960, for any reference whatsoever to the need for the administering power to agree to the decolonization of the dependent territory. On the contrary, the General Assembly recognizes, in that Declaration, the "decisive role" played by all dependent peoples "in their accession to independence"[26], and states unequivocally:

> "1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.
>
> "2. All peoples *have the right* to self-determination; by virtue of that right *they freely* determine their political status and *freely* pursue their economic, social and cultural development.
>
> "4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable *them* to exercise peacefully and *freely* their right to complete independence, and the territorial integrity of their national territory shall be respected."[27]

This language, which is hardly compatible with the "consensual" analysis made by Professor Crawford, clearly shows that accession to independence results not from a voluntary agreement between the administering power and the colonial people, but solely from the free decision of that people. At the very most, the metropolitan state is called upon to take "immediate steps" to transfer "all powers to the peoples" of territories under trusteeship, of non-self-governing territories

[23] Para. 6, p. 35. The italics are as in the original; the footnote is omitted.

[24] Para. 17, p. 39; italics added.

[25] *Ibid.*

[26] Para. 3 of the preamble to the Declaration.

[27] Italics added.

and of all other territories that have not yet acceded to independence "without any conditions or reservations, *in accordance with their freely expressed will and desire* . . .".[28]

13. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, appended to Resolution 2625 (XXV) of October 24, 1970 expresses the same idea. In that Declaration, the United Nations General Assembly reaffirmed the following:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the principles of the Charter",

it being understood that

> "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."[29]

The conclusion must necessarily be drawn that accession to independence by colonial peoples, or by those who are likened to them, solely depends upon their decision, and owes nothing to any hypothetical agreement by the colonial power. For the dependent people, this is a right; for the administering power, a duty. This analysis is confirmed by an examination of practice.

14. It is obvious that when the colonial power did not oppose the accession to independence of the territories it administered, the competent organs of the United Nations, essentially the General Assembly and the Decolonization Committee, did not have the least reason to impede the exercise, by the peoples concerned, of their right to independence in agreement with the colonial power. In these scenarios, the General Assembly very logically limited itself to encouraging these initiatives and to taking note of their outcome.

For example – and these are only a few examples among many – the General Assembly:

– "noted with satisfaction" or "took notice of" the prospect of accession to independence of certain colonial territories[30];

– "noted" that the administering authority and the local authorities of certain territories under trusteeship had agreed to the accession of those territories to independence on a specific date[31]; and

[28] Para. 5; italics added.

[29] Fifth principle, paras. 1 and 4; italics added. See also Resolution 46/181 of December 19, 1991, International Decade for the Eradication of Colonialism, para. 3.

[30] For example, in regard to Western Samoa (Resolution 1626 (XVI) of October 18, 1961), Malta (Resolution 1950 (XVIII) of December 11, 1963), Nyassaland (Resolution 1953 (XVIII) of December 11, 1963), British Guyana (Resolution 2071 (XX) of December 16, 1965), etc.

[31] For example Togo (Resolutions 1253 (XIII) of November 14, 1958 or 1416 (XIV) of December 5, 1959), Cameroon (Resolutions 1282 (XIII) of December 5, 1958, 1349 (XIII) of March 13, 1959 or 1608 (XV) of April 21, 1961), Somalia (Resolution 1418 (XIV) of December 5, 1959), Tanganyika (Resolutions 1609 (XV) of April 21, 1961 and 1642 (XVI) of November 6, 1961), Nauru (Resolution 2347 (XXII) of December 19, 1967), Mozambique (Resolution 3294 (XXIX) of December 13, 1974), Sao Tomé and Principe (Resolution 3294 (XXIX) of December 13, 1974), etc.

– admitted, without any particular observation, the independent states that emerged from a process of decolonization[32]

15. However, while these are the only scenarios that Professor Crawford considers, they are obviously not the ones that are relevant in the present case. Much more informative are the cases where the General Assembly responded "where self-determination was opposed by the colonial power"; these are cases to which the Consultant only furtively alludes.[33] However, they show that the General Assembly acted with the firm conviction that the peoples of non-self-governing territories had the *right* to accede to independence, and the colonial powers had the *duty* to yield to the (unilateral) expression of will along these lines.

There is an abundance of examples of such cases:

– In all cases where the administering power thwarts the exercise of the right to self-determination of a colonial people, the General Assembly

> "*confirms* the inalienable right of the people [in question] to self-determination and national independence, in accordance with the provisions of General Assembly Resolution 1514 (XV)".[34]

Where the authorities of a territory under trusteeship and the administering power do not reach an agreement concerning the conditions for exercising the right of self-determination and more particularly the date on which that right would be exercised, the General Assembly sets these conditions[35] and, from 1965

[32] See, among many others, Resolutions 1476 to 1492 (XV) of September 20 and 28 and October 7, 1960 (Cameroon, Togo, Madagascar, Somalia, Congo (Leopoldville), Dahomey, Niger, Upper Volta, Ivory Coast, Chad, Congo (Brazzaville), Gabon, Central African Republic, Cyprus, Senegal, Mali and Nigeria), 1976 (XVIII) recently, 46/2 and 46/3 of September 17, 1991 (Micronesia and Marshall Islands).

[33] See above, para. 11, note 25.

[34] This formulation appears, apparently for the first time, in Resolution 1595 (XV) of April 7, 1961 concerning South West Africa. It is subsequently repeated in a very large number of resolutions, for example, in Resolutions 1702 (XVI) of December 19, 1961 and 1805 (XVII) of December 14, 1962, also concerning South West Africa. It likewise appears in: Resolutions 1605 (XV) of April 21, 1961 and 1746 (XVI) of June 27, 1962 concerning Rwanda-Urundi; Resolutions 1747 (XV) of June 28, 1962 and 1760 (XVII) of October 31, 1962 on Southern Rhodesia; Resolution 1807 (XVII) of December 14, 1962 concerning the territories administered by Portugal; Resolution 1951 (XVIII) of December 11, 1963 regarding the "Fiji Islands Question"; Resolution 1949 (XVIII) of December 11, 1963 on Aden; Resolutions 1954 and 1955 (XVIII) of December 11, 1963 (Basutoland, Bechuanaland and Swaziland, and British Guyana), etc. More recently, the formulation has been used in Resolutions 31/20 of November 24, 1976 or 51/26 of December 4, 1996 regarding Palestine. Today, it is systematically included in resolutions pertaining to non-self-governing territories. See, for example: Resolutions 45/23 to 45/32 passed on November 20, 1990, during the 45th Session, concerning Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Monserrat, the Turks and Caicos Islands, the Tokelau Islands, American Samoa, the American Virgin Islands and Guam; then, as of 1991, the annual recapitulative resolution on all these territories (see, for example, Resolution 50/38 of December 6, 1995).

[35] See, for example, Resolutions 1352 (XIV) of October 16, 1959 (Cameroon), 1743 (XVI) of December 23, 1962 (Rwanda-Urundi), 2226 (XXI) of December 20, 1966 (Nauru), 2248 (S-V) of May 19, 1967 (South West Africa).

on, mandates the Decolonization Committee to recommend a deadline for accession to independence of non-self-governing territories, even when they are not under trusteeship.[36]

– Generally speaking, the General Assembly is very particular about respect for the freely expressed will of a dependent people. Apart from the many resolutions pertaining to Portuguese territories[37], this concern is shown, for example, by the positions that the Assembly has taken in respect of Aden.[38]

– As of 1965, the General Assembly

> "*Recognizes* the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories"[39],

and, in the 1970 Action Program for the Full Application of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Assembly

> "*Reaffirms* the intrinsic right of colonial peoples to fight, by all the necessary means that they may have [an expression which, at the United Nations, implies the possible use of armed force], against the colonial powers that are suppressing their aspiration to liberty and independence".[40]

16. The Security Council itself adopted the same attitude. When it had to rule on problems associated with decolonization, it constantly emphasized the fact that the administering power had a legal obligation to respect the desire for independence expressed by the colonial people.

For example, the Council:

– Confirmed

> "the interpretation of self-determination laid down by in General Assembly Resolution 1514 (XV) as follows:
>
> 'All peoples have the right to self-determination; by virtue of that right

[36] See Resolution 2105 (XX), "Implementation of the Declaration on the Granting of Indcpendence to Colonial Countries", para. 9.

[37] See Resolution 1603 (XV) of April 20, 1961 calling upon the Government of Portugal "to consider urgently the introduction of measures and reforms in Angola for the purpose of the implementation of General Assembly Resolution 1514 (XV)", or Resolution 1807 (XVII) of December 14, 1962 "greatly deploring the continued disregard by the Portuguese Government of the legitimate aspirations for immediate self-determination and independence expressed by the peoples of the Territories under its administration". By its resolution 3294 (XXIX) of December 13, 1974, the Assembly welcomed "the declaration of the Government of Portugal accepting to fulfil its *obligations* under the relevant provisions of the Charter of the United Nations and recognizing the right of the peoples to self-determination and independence" (italics added).

[38] Resolution 2023 (XX), in which the General Assembly deplores "the attempts of the administering Power to set up an unrepresentative regime in the Territory, with a view to granting it independence contrary to General Assembly Resolutions 1514 (XV) and 1949 (XVIII), and appeals to all States not to recognize any independence *which is not based on the wishes of the people of the Territory freely expressed* through elections held under universal adult suffrage" (italics added).

[39] Resolution 2105 (XX), previous note 36, para. 10.

[40] Resolution 2621 (XXV) of October 12, 1970, para. 2.

> they freely determine their political status and freely pursue their economic, social and cultural development'."[41]

– Urgently called upon Portugal to implement

> "The immediate recognition of the right of the peoples of the Territories under its administration to self-determination and independence."[42]

– Reaffirmed, after the unilateral proclamation of independence by the white minority,

> "the inalienable rights of the people of Southern Rhodesia to freedom and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly Resolution 1514 (XV) of December 14, 1960, and [recognized] the legitimacy of their struggle to secure the enjoyment of their rights as set forth in the Charter of the United Nations."[43]

17. In its Advisory Opinion of October 16, 1975 concerning the *Western Sahara*, the International Court of Justice defined the principle of self-determination "as meeting the need to respect the freely expressed will of peoples".[44]

This definition is confirmed, in all respects, by the firm and constant practice described above, which Professor Crawfod overlooks. We may therefore conclude that, contrary to what he has written,[45] while administering powers have often cooperated in the process of decolonization, "the progress to self-government or independence was [not] consensual". In all cases, the unilateral will of the colonial people was the foundation for this development, without any agreement whatsoever of the colonial power being required (even though, for practical reasons, this agreement was eminently desirable and was sought). Both the General Assembly and the Security Council have reflected this reality through their consistent attitude, from 1960 on, in all cases where the administering power tried to throw up obstacles to thwart accession to independence, which was clearly recognized as a right that a dependent people could exercise unilaterally.

III. THE SECESSION OF A NON-COLONIAL TERRITORY DOES NOT IMPLY THE CONSENT OF THE PREDECESSOR STATE

18. On the subject of the secession of non-colonial territories, Professor Crawford offers a "minor" argument, which concerns the principle of the territorial integrity of states, described as a "significant limitation" on the unilateral secession of part

[41] Resolution 183 (1963) of December 11, 1963.

[42] Resolution 180 (1963) of July 31, 1963. See also Resolutions 163 (1961) of June 9, 1961 or 218 (1965) of November 23, 1965.

[43] Resolution 232 (1966) of December 16, 1996. See also Resolutions 202 (1965) of May 6, 1965, 216 (1965) of November 12, 1965, 217 (1965) of November 20, 1965, 253 (1968) of May 29, 1968, 460 (1979) of December 21, 1979, or 463 (1980) of February 2, 1980. Along the same lines concerning the Namibian people, see Resolutions 319 (1972) of August 1, 1972 or 566 (1985) of June 19, 1985, and for Timor, Resolutions 384 (1975) of December 22, 1975 and 389 (1976) of April 22, 1976.

[44] *Reports* 1975, para. 59, p. 33.

[45] Para. 17, p. 39.

of an independent state[46], and a "major" argument, which is based on the fundamental – and fundamentally erroneous – assertion of his report, namely that any accession to independence at the expense of a pre-existing state is necessarily founded on the consent of that state. Although these two aspects are closely interwoven in Professor Crawford's analysis, it is probably worthwhile to separate them for the sake of clarity in our argumentation.

19. Professor Crawford barely touches on the contradiction between "unilateral secession" and the principle of territorial integrity. We think it useful, however, to clarify that as important as this principle is in contemporary international law and international relations, it does not have the-scope that he ascribes to it.

In the very first sentences of his report, Professor Crawford writes:

> "In international law, self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity."[47]

This statement is not incorrect, but it is based on a confusion between two very different aspects of the principle of the right of peoples to self-determination: its internal component which, by its very definition, concerns the exercise of this right within the framework of a pre-existing state; and its external component which, also by definition, implies either the creation of a new state by the people concerned or the attachment of that people to a pre-existing state other than the state of origin.[48]

However, it is obviously not because a people is entitled to benefit from internal self-determination that it is deprived of the right to enjoy external self-determination, as is clearly shown by the case of the colonial peoples. Stating the problem in these terms is to assume it has been resolved without offering the slightest shred of proof.

There is, all things considered, no doubt that secession, unlike decolonization, does in fact undermine the territorial integrity of the state. Secession is, however, a fact, and it must be determined whether that fact is, or may be, in compliance with the rules of international law. Two powerful arguments militate in favour of an affirmative answer to this question:

– In the first place, the principle of territorial integrity does not concern the relations between state and its own population, but rather the relations of states among themselves. This is evidenced, for example, by the wording of paragraph 4 of Article 2 of the United Nations Charter, which is the major provision establishing and regulating this principle:

[46] Para. 26, p. 42.

[47] Summary, (a), p. 32.

[48] On the distinction between external and internal self-determination, see, for example, Allan ROSAS, "Internal Self-determination", in Christian TOMUSCHAT, ed., *Modern Law of Self-determination*, Kluwer, Dordrecht, 1993, pp. 225–252, and Jean SALMON, "Internal Aspects of the Right to Self-determination: Towards a Democratic Legitimacy Principle?", *Ibid.*, pp. 153–282.

> "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. . . "[49]

It follows that the principle of territorial integrity, as contemplated by the United Nations Charter, excludes any *foreign* intervention whose aim or effect is the dismemberment of a state, in particular through armed support given to a secessionist movement (as is shown, for example, by the reactions of the international community to the creation of "Bantustans" by South Africa[50] or to the establishment of the "Turkish Republic of Northern Cyprus"[51]). However, this in no way implies that secession as such would be condemned by international law.

– Secondly, while the principle of territorial integrity is unquestionably a principle of positive law, it is not compelling because no one would doubt that a state may, in the exercise of its sovereign jurisdiction, allow its territorial integrity to be undermined.[52] Consequently, it must be concluded that this territorial integrity may be undermined not only by virtue of a standard of *jus cogens* – and there is no doubt that the principle of the right of peoples to self-determination is the very type of an imperative standard[53] – but also by a simple mandatory rule, such as a rule that would impose respect for a successful secession (assuming that such a rule would not itself have a mandatory character).[54]

It is thus not possible to discuss the "minor argument" advanced by Professor Crawford without first resolving the issue that is at the heart of his argumentation: May a part of a state secede without the consent of that state?

20. The "major argument" put forward by Professor Crawford falls directly within the expositions that he devotes to "the secession [*sic*] and self-determination of colonial peoples".

Just as Professor Crawford tries to establish (mistakenly) the supposedly exceptional character of the unilateral exercise, by colonial peoples, of the right to self-determination, while the very essence of the right to self-determination is to belong exclusively and "unilaterally" to the people that holds it, he likewise

[49] Italics added.

[50] See Resolution 31/6A of October 26, 1976, by which the General Assembly "[TRANSLATION] *rejects* the proclamation of the 'independence; of Transkei and declares that it is null and void". See also, for example, Resolution 417 (1977) of the Security Council dated October 31, 1977.

[51] See Resolution 541 (1983) of the Security Council of November 18, 1983" "The attempt to create a 'Turkish Republic of Northern Cyprus' is invalid".

[52] In accordance with the definition given by Article 53 of the Vienna Convention on the Law of Treaties of May 23, 1969, a peremptory norm of general international law (*jus cogens*) is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[53] See above, para. 6, the position of the International Court of Justice in the *East Timor* case. See also the examples of standards of *jus cogens* given by the International Law Commission of the United Nations when preparing the draft articles that gave rise to the 1969 Convention (*ILC Ann. Rep.* 196, Vol. II, p. 270), or Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, November 29, 1991, RGDIP, 1992, p. 265.

[54] In this regard, see Yoram DINSTEIN, "Self-determination Revisited", in M. Rama-Montaldo, ed., *op. cit.*, note 10, p. 249.

attempts to show that there have been very few secession scenarios since 1945 and that, with the exception of Bangladesh, in the rare cases that could be "classified as unilateral secession [. . .] the consent of the relevant parties was given before independence was externally recognized as accomplished", and the separation process was accordingly not conducted unilaterally.[55]

In order to arrive at this conclusion, Professor Crawford must make a distinction between the concepts of secession and those of dissolution. However, while these legal institutions are unquestionably distinct and produce different effects in regard to the law of state succession, this distinction has no application, and is thus devoid of relevance, for the purposes of this study (A).

The reintroduction of cases of dissolution of states into the analysis alters the "statistical" date of the problem in a non-negligible way. Moreover – and in any case – the Consultant draws erroneous conclusions from the practice that he is examining (whether it concerns case of dissolution or case of secession in the strict sense of the term). Far from proving the consensual character of "successful" secessions, this practice clearly show that the creation of a new state by detachment of a part of the territory of a pre-existing state is purely a matter of fact. The establishment of that fact may of course be facilitated by the tolerant attitude of the predecessor state, but here again, as in the case of decolonization, it is not founded on the consent of that state (B).

A. The distinction between secession and dissolution is irrelevant for the purposes of the answers to be given to the questions examined

21. In paragraph 27 of his report, Professor Crawford states: "It is necessary to distinguish unilateral secession of part of a state and the outright dissolution of the predecessor state as a whole."[56]

Such a distinction unquestionably exists. The distinction is recognized by the Vienna Convention on Succession of States in Respect of Property, Archives and State Debts, whose articles 18, 31 and 41 contemplate the dissolution scenario, namely a case where "a State is dissolved and ceases to exist". The distinction also appears in the draft articles on "Nationality in Relation to the Succession of States"[57], and is recognized in case law. For example, the Arbitration Commission of the European (and later International) Conference on the Former Yugoslavia initially noted that the Socialist Federal Republic of Yugoslavia was "engaged in

[55] Para. 64, p. 59.

[56] Page 42. See also para. 67, p. 60.

[57] Section 22 and 23. See the Report of the International Law Commission on the work of its 49th session, General Assembly. Official Document, 52nd session, Supplement No. 10, A/52/10, pp. 66–67. On the other hand, the Vienna convention on Succession of States in Respect of Treaties does not give any individual consideration to dissolution of a state and does not devote any particular provision to the topic.

a process of dissolution"[58], and subsequently observed that this process had "come to an end and it must be acknowledged that the SFRY no longer exists".[59]

The particular feature of the dissolution of a state is that all the states that emerge from it are new, while in all other scenarios concerning the succession of states[60], including secession[61], the predecessor state continues to exist.

22. This is, moreover, the characteristic that draws the attention of Professor Crawford, who insists on the fact that consequently,

> "there is, by definition, no predecessor state continuing in existence whose consent to any new arrangements can be sought."[62]

Professor Crawford also insists:

> "Thus the distinction between unilateral secession and dissolution is clear in principle. [. . .] The main difference is that in cases of dissolution, no one party is allowed to veto the process. By contrast, where the government of the predecessor state maintains its status as such, its assent to secession is necessary, at least unless and until the seceding entity has firmly established control beyond hope of recall."[63]

The objectives pursued by the Consultant in thus emphasizing the disappearance of the predecessor state are quite obvious. He is attempting to reduce to practically nothing any precedents that might contradict the "consensual" thesis that he is defending, and he is seeking to justify his repeated assertion that "there is no case since 1945" where the United Nations has admitted a seceding entity to membership against the wishes of the government of the state from which it has purported to secede[64], since in his view "Bangladesh is the only clear case in international practice" of a state that has seceded without the consent of the predecessor state.[65]

By means of this questionable intellectual process, Professor Crawford is able to draw up a table, which on first glance seems to lend impressive support for his thesis:

– Successful secession without the consent of the predecessor state: 1 (Bangladesh).

– State dissolutions: 17 (USSR)[66]

[58] Notice No. 1, previous note 53, p. 265.

[59] Notice No. 8 of July 4, 1992, RGDIP, 1993, p. 590.

[60] "'Succession of states' means the replacement of one State by another in the responsibility for the international relations of territory" (article 1, para. 1.b of the above-mentioned Vienna Conventions of 1978 and 1983 on the succession of states).

[61] On the definition of secession, see below, para. 30 and note 95.

[62] Para. 27, p. 42.

[63] Para. 28, pp. 42–43.

[64] Summary (c), p. 32. See also para. 33, p. 44, para. 60, p. 57, para. 67, p. 60.

[65] Para. 28, p. 43. See also para. 64, p. 59.

[66] One might ask whether the break-up of the Soviet Union should be treated as a dissolution or a series of secessions. Professor Crawford is strongly in favour of the second interpretation. The undersigned, on the other hand, prefers the first. However, the answer to this question is of no importance to this study since in both cases, new states were created (see below, paras. 23 to 25). On the qualification of the Russian Federation as successor or "continuer" of the USSR, see Rein MÜLLERSON, "The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia", ICLQ, 1993, pp. 475–480, and

– "Consensual" secessions: 6 (see the list given in para. 30, p. 43).

– Aborted secession attempts due to lack of consent on the part of the state from which one or more peoples have tried to separate: 29 (see lists in paragraphs 50 and 51, pp. 52–53).

These "statistics", clearly designed to show that there is an international practice that allows one to affirm the existence of a customary rule excluding non-consensual ("unilateral") secession, runs into three fundamental objections. In the first place, they do not have the scope that the Consultant ascribes to them.[67] Secondly, they are based on inaccurate factual data. Finally, they are only made possible by the emphasis placed on the distinction between dissolution and secession, which is irrelevant for the problem being studied.

23. The terms in which the problem is stated must be kept clearly in mind: Does the creation of a new state on a part of the territory of an existing state require or not require the consent of that state?

To answer that question on the basis of an examination of practice, which is the approach adopted by Professor Crawford, it is clear that one must compare cases in which the creation of a new state failed due to lack of such consent with cases where a new state was successfully created despite the opposition of the state of origin. For the purposes of this comparison, it does not matter whether or not the state of origin still exists *at the conclusion* of the process; the only question is whether the state of origin did or did not consent to the secession or to its own disappearance. This scenario is not unrealistic, as is shown by the cases where a state (or the two states involved) disappeared through amalgamation with another state. Examples are the short-lived amalagmation of Egypt and Syria in the United Arab Republic (UAR) in 1958, the fusion of Zanzibar with Tanzania in 1962, the amalgamation of the two Yemens in 1990 or the reunification of Germany, also in 1990.

24. Moreover, as Professor Crawford himself acknowledges: "The distinction between dissolution of a state and unilateral secession of part of a state may be difficult to draw in particular cases. The dissolution of a state may be initially triggered by the secession or attempted secession of one part of that state."[68] This was the case for the former Yugoslavia. Initially, only two Republics, Croatia and Slovenia, proclaimed their independence, on June 25, 1991 (very clearly despite opposition from the federal authorities). This was the beginning of the "process of dissolution" noted by the Arbitration Commission in December 1991.[69] As far as these two states were concerned, however, these were secessions, and non-consensual secessions at that. This example shows that it is obviously unreasonable to make a distinction between dissolution and secession for the purposes of this study.

"Law and Politics in Succession of States: International Law on Succession of States", in G. Burdea and B. Stern, eds., *Dissolution, continuation et succession en Europe de l'Est*, Montchrestien, Paris, 1994, pp. 18–26.

[67] On this first point, see. B.b) below.

[68] Para. 27, p. 42.

[69] See above, para. 21 and note 58.

This does not mean that we are claiming that the distinction is not useful or operational. It is, but "downstream", once the new state is created, to resolve the problems of state succession that inevitably arise when one or more new states come into being.[70] Upstream, however, when the new state first appears, the distinction between secession and dissolution is entirely meaningless.

Furthermore, in its Notices 9 and 10 of July 4, 1992,[71] Notice 13 of July 16, 1993[72] and Notice 15 of August 13, 1993[73], the Arbitration Commission drew conclusions from the concept of dissolution in regard to the recognition of new states and the modalities of state succession. However, the Commission did not rely upon that concept to determine succession dates, which it set differently in each case, on the basis of the date of actual accession of each state to independence.[74]

25. If, as one should, one "reincorporates" the cases of state dissolutions into the practice studied, the picture changes considerably from that presented by Professor Crawford, especially since, contrary to what he asserts, the dissolution of the USSR clearly involved conflict.[75]

This is not, indeed, the only mistake that can be found in the lists drawn up by the Consultant, whose classifications are, to say the least, tendentious:

– Out of a concern for scientific accuracy, we should first set aside the case of the Baltic states, since it can be legitimately maintained that they were forcefully incorporated into the Soviet Union, and were never integrated into the USSR from a public international law perspective. What is involved here is not the creation of new states, whether by secession or dissolution, but rather "recuperation" (again not consensual[76]) of an independence that was confiscated in 1940.[77]

– As far as failed attempts at succession are concerned,[78] some do have a certain relevance for the study since they undoubtedly reflect, within a significant portion of the population concerned, a desire to accede to independence (Biafra, Bougainville, Katanga, Iraqi or Turkish Kurdistan, the Turkish Republic of Northern Cyprus, the Republika Srpska, and other ethnic entities in the former Yugoslavia and Tibet). However, others do not deserve to be taken into consideration because the demands for independence never translated into the slightest beginning of an actual process.[79]

– On the other hand, it is surprising that the lists drawn up by Professor Crawford

[70] See above, para. 21.

[71] RGDIP, 1993, pp. 591 and 594.

[72] RGDIP, 1993, p. 1109.

[73] RGDIP, 1993, p. 1115.

[74] Notice No. 11, July 16, 1993, RGDIP, 1993, p. 1102.

[75] See below, para. 36.

[76] See below, *ibid.*

[77] The clarification only concerns the characterization of the "renaissance" of the three Baltic Republics as sovereign states. It does not exclude the relevance of these precedents for the purposes of the study.

[78] See above, para. 22.

[79] This is the situation for all cases cited in paragraph 51, pp. 52–53, with the possible exception of the Faroe Islands.

do not contain precedents whose relevance is not in doubt, such as the partition of India in 1947 or the dissolution of the UAR in 1961.

Establishment of an exhaustive list of relevant cases is, of course, not absolutely necessary, and it might be difficult to do, since some subjectivity would be unavoidable in certain doubtful cases. However, the preceding remarks allow us to throw some light on what might be called the "tall tales of Professor Crawford". Under the appearance of scientific rigour, he in fact attempts to create, in the mind of the reader, an impression that is inaccurate, of a constant practice of "non-creation" of states to the detriment of an existing state when that state is opposed to the process. This is not the lesson that may be derived from a more impartial observation of reality.

B. International law gives effect to an actual secession, regardless of whether the predecessor state agrees to the secession

26. In 1992, at the request of the Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty of the National Assembly of Quebec, the undersigned wrote a report entitled "The Territorial Integrity of Quebec in the Event of the Accession of Quebec to Sovereignty". This report was prepared in close collaboration with four other international law specialists: Professor Thomas M. Franck, of New York University; Professor Rosalyn Hughes, of the London School of Economics, member at the time of the Human Rights Committee and presently Justice of the International Court of Justice; Professor Malcolm M. Shaw, of the University of Leicester; and Christian Tomuschat, of the University of Bonn, then Chairperson of the International Law Commission of the United Nations. They approved and co-signed the report, which was widely distributed.[80]

Although the questions asked were different from those that have been submitted to the Supreme Court of Canada, and dealt directly only with the territorial integrity of Quebec in the event that Quebec acceded to independence, the authors of the report nonetheless examined the issue of whether the principle of the equality of rights of peoples and of their right to self-determination could provide a legal basis for the claim of the people of Quebec (or of other peoples, such as the First Nations) to independence.

The conclusions of the five jurists on this point deserve to be recalled in detail:

> "3.14. The right to secession does not exist in international law. However, in the colonial context and from the legal point of view, the creation of a new state is not, strictly speaking, a secession [. . .] and in all cases, the right to self-determination does not constitute recognition of the right to independence of the peoples who hold that right (133 bis).
>
> "Does this mean that secession is forbidden by international law? Such a solution would be far removed from reality and would not be compatible with the cold realism of the law . . .

[80] See the "study of the five jurists", p. 241.

> "It is very clear that when faced with attempts at secession, the community of states manifests very strong reservations (134). The initial response of third states to threats of dissolution of the USSR and Yugoslavia was, to say the least, reserved, and the admission of Bangladesh to the United Nations was initially vetoed by China. Nevertheless, in these recent cases – and in other, older cases such as Belgium, Panama, etc. – states have definitely accepted the *fait accompli*.
>
> "It is difficult to summarize the matter, because of the great variety of situations. However, the following propositions may be advanced:
>
> "i) International law does not contain any right to secession, and in particular, one would look in vain, in positive law, for a provision or practice that would enable one to infer a right to secede from the right of peoples right to self-determination (135).
>
> "ii) When faced with an attempted secession, third party states generally manifest very strong reservations (except when they have particular reasons for being interested in the success of the attempt).
>
> "iii) Nonetheless, neither is there any legal rule impeding secession. The principle of territorial integrity appears to be an exclusively inter-state standard, whose effect in part overlaps that of the principle of non-intervention.
>
> "iv) Once a secession has succeeded, the actual exercise of state powers by the new authorities suffices to establish the existence of the new state [. . .]. Secession [thus] appears as a political fact, and international law simply draws conclusions from that fact when secession results in the establishment of effective, stable state authorities (136).
>
> "v) However, third states reserve a right of control through recognition, which will be refused to the new state if its existence is doubtful or if it owes its existence to the use of armed force, especially if this armed force too blatantly results from external aid (137).
>
> "3.15 The preceding remarks may be rather easily summarized as follows:
>
> "– Colonial situations excepted, the right of peoples to self-determination does not confer upon them a right to accede to independence.
>
> "– Conversely, however, international law and, in particular, the principle of territorial integrity do not create any obstacle to the accession of non-colonial peoples to independence.
>
> "In the case of Quebec, the consequence is that the people of Quebec could not base any claim to sovereignty on their right to self-determination, but would not, for all that, be prevented from acceding to sovereignty by invoking legal reasons. In particular, Canada may invoke the principle of its territorial integrity against other states (as an independent Quebec could in turn invoke its own principle of territorial integrity against Canada), but that does not protect it against the enforceability of a possible *de facto* secession of Quebec which, in fact if not in law, would be considerably strengthened through rapid recognition by many third states.

"133 bis. One of us thinks, however, that the right to self-determination is equivalent to the right to independence [. . .]. This difference of opinion does not, however, lead to conclusions different from those reached by the majority.

"134. Especially if there are doubts about the real aspirations to independence of the people considered, or if that independence is established with the help of external aid. See the cases of Katanga, Biafra and Cyprus. On the first two, see, e.g.: Jean SALMON, *La reconnaissance d'État*, University Collection, Armand Colin, Paris, 1971, pp. 91–200. On the third, see Maurice FLORY, "La partition de Chypre", *A.F.D.I.*, 1984, pp. 177–186.

"135. NGUYEN QUOC Dinh et al., *Droit international public*, L.G.D.J., Paris, 3rd ed., 1987, p. 467.

"136. *Ibid.*

"137. Case of the "Turkish Republic of Northern Cyprus". See, in particular, Resolutions 541 (1983) and 550 (1984) of the Security Council."[81]

The conclusions of the five jurists were thus both firm and qualified:

– *In the first place*, the principle of the right of peoples to self-determination does not create a right to independence of peoples that are not in a colonial situation.[82]

– *In the second place, however*, no principle of international law excludes the right of a people to secede, and when such is the case, the law of nations simply takes notice of the existence of the new state.

27. There is no reason to go back over these conclusions, which were stated five years ago, except to note that the principle that international law does not create an obstacle to unilateral secession when a people succeeds in imposing that secession by various means has been considerably reinforced by recent practice, essentially because of the accession of Eritrea to independence and the consolidation of the situation of the new states of Central Europe and of the states resulting from the dissolution of the former Soviet Union.[83]

28. The factum of the Attorney General of Canada does not hesitate to echo the report of the five jurists, but does so in a truncated, partial and therefore biased manner, mentioning only the first of the two conclusions of the this study[84], and being very careful not to say anything about the second, which is nonetheless indissociable from the first.

This procedure is blatantly reflected in the use that the Attorney General makes of a paper that the undersigned gave at a conference organized by the Canadian Bar Association on May 6, 1995, concerning the legal perspectives opened up by

[81] *Ibid.*, pp. 428–430.

[82] And it is certainly not reasonable to claim that Quebec is in a colonial situation. On this point, see *ibid.*, para. 3.06, p. 278 or para. 3.09, pp. 280–281.

[83] See below, para. 36.

[84] See paras. 163, pp. 321–322 or 185, p. 328.

the *Quebec Sovereignty Act*. Taking up the conclusions of the 1992 report on his own behalf, the undersigned stated at that time:

"One is therefore compelled to observe, very firmly, that there is nothing in contemporary international law that can be used as a foundation for any right to independence of non-colonial peoples, except perhaps – surely even! – if they are suffering oppression within the state in which they are now integrated. . . ."[85]

The Attorney General quotes this excerpt in paragraph 181 of his factum[86] but, following a rather dubious procedure, fails to quote the passage that immediately follows it, which is nonetheless essential to understanding the thesis presented both on that occasion and in the report of the five jurists:[87]

"Those opposed to the *indépendantistes* would, however, be wrong to see in the law of nations a confirmation of their positions, since the principle of territorial integrity, however important it may be in today's world, does not have the radical and absolute significance they would wish. Nothing is immutable, not even the state, and like any branch of law, international law yields to the fact. [. . .]

"The '*legal match*' between the sovereignists and those opposed to the *indépendantistes* is thus a draw. International law does not justify secession, even in the name of the right of peoples to self-determination, but it does not deny the legal reality of a secession that has succeeded. In other words, Quebeckers cannot find, in the principle of the equality of the rights of peoples and of their right to self-determination, a legal justification for whatever desire for independence they may have. However, if they impose secession in fact, if Quebec succeeds, with or without the consent of the Canadian federal authorities, to exercise effectively and permanently the functions of a state, then Quebec will be a state and international law will take notice of that fact, it being specified that recognition by the other states, including Canada, would only have a consolidating effect. . . ."[88]

29. In his report, Professor Crawford takes a more cautious approach. Since he is aware that neither the study of the five jurists nor the undersigned's paper do anything to support the radical and unqualified thesis he is defending, he purely and simply abstains from citing them.

[85] Sovereignty and Self-determination – Process and Conditions. Some Remarks by an International Law Specialist" in Canadian Bar Association, *The Quebec Sovereignty Act: Legal Perspectives*, Montreal, 1995, p. 4.

[86] Pp. 326–327.

[87] The Attorney General uses the same procedure in regard to the treatise on international law of which the undersigned is a co-author (Patrick DALLIER and Alain PELLET, *Droit international public (Nguyen Quoc Dinh)*, L.G.D.J., Paris, 5th edition, 1994, 1317 pp.), which he mentions repeatedly in order to establish that principle of the right of peoples to self-determination is not based on a right to secession (see factum, para. 181, pp. 326–327), but he likewise does not cite the caveat which immediately follows, in which the authors stress that "secession is a political fact and international law simply draws conclusions from that fact when secession results in the establishment of effective, stable authorities". This highlights the "disengagement" of international law in the matter (*op. cit.*, pp. 500–501).

[88] Paper cited, note 85, pp. 4–5.

On the merits, this does not make his thesis any more acceptable. By limiting himself to asserting that "in international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more 'peoples'[89] in the ordinary sense of the word"[90], the Consultant only partially accounts for the reality of international law:

– On the one hand, the practice that he is examining does not have the consistency that he ascribes to it, and his study shows that the consent of the predecessor states is in no way a necessary condition for the existence and recognition of the new state.

– On the other hand, he neglects important legal conclusions that can be drawn from this practice.

a) The practice of states does not have the consistency that Professor Crawford ascribes to it

30. The survey of practice conducted by Professor Crawford is not convincing:

– He includes a large number of cases that have little or no relevance, since they concern *indépendantiste* aspirations that are vague and very much confined to a minority.[91]

– On the contrary, he omits precedents that are genuinely illustrative.[92]

– He limits himself, artificially, to going back only as far as 1945.

Now to the extent that this limitation in time is justified in regard to the accession to independence of colonial peoples, for which the legal foundation today resides directly in the right of peoples to self-determination, to the same extent it is not justified in regard to secession strictly speaking, which is a state of fact of which international law, both before and after 1945, merely notes the existence.

It may be that in this respect, the Consultant has been misled by the manner in which the Reference was drafted.[93] The second part of the second question[94] does in fact focus attention on the "right to self-determination", but it must be read in conjunction with the first part, which is much more general: "Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" The question must, in consequence, be considered in its entirety: Is the unilateral creation of a

[89] The quotation marks with which Professor Crawford surrounds the word "peoples" reflects a certain uneasiness in regard to this fundamental conclusion . . .

[90] Summary, (a), pp. 31–32.

[91] See above, (a), pp. 31–32.

[92] *Ibid.*

[93] On this point, see also below, para. 45.

[94] See above, para. 1, p. 88.

sovereign state – such is the very definition of secession[95] – by Quebec a right in respect of international law, whether that right is grounded in the principle of the right of peoples to self-determination or in any other principle of international law?[96] It is thus not legitimate to limit one's inquiry to practice after 1945, and it is all the more surprising that the Consultant has taken this line since he does not hesitate to find expression of existing law in ancient *dicta*, which obviously no longer correspond to the state of law in effect.[97]

In support of this preliminary remark, an examination of the relevant practice leads us to findings that are very different from those made by Professor Crawford, whether in regard to the failed attempts at secession that he claims to list in paragraphs 50 and 51 of his report, or in respect of the creations of states that succeeded, which he mentions in paragraph 30.

Failed attempts at secession

31. As far as the first category is concerned, the starting point for appreciating the relevance of the cases considered must be the principle, properly stated by the Consultant, according to which the seceding entity must have "maintained *de facto* independence for some time."[98]

Using this criterion, we may divide the examples that the Consultant gives – which in this case are very exhaustive – into three groups:

i/ The first group concerns cases in which minority secessionist aspirations did not result in any initial effort at realization, even in the form of a simple proclamation of independence by reasonably representative authorities of the people concerned. This lack of realization leads us to eliminate virtually all the examples cited, in particular in paragraph 51, including that of Corsica, which Professor Crawford nonetheless discusses at length[99] while remarking, in a footnote[100], that "the separatist movement in Corsica has little popular support (ca 10%)". In the absence of any concrete realization, or even clear manifestation of a desire for independence, these cases are clearly not relevant precedents, and nothing of legal import can be inferred from them.

ii/ The second group may be reserved for cases in which independence was proclaimed but did not lead to any concrete realization, as in Bougainville or the

[95] This definition is indeed adopted by Professor CRAWFORD: "Secession [. . .] may be defined as the creation of a State by the use or threat of force and without the consent of the former sovereign . . ." (*The Creation of States in International Law*, Clarendon Press, Oxford, 1979, p. 247).

[96] Introducing Question 2 of the Reference, Professor Crawford writes: "The only arguable basis in modern international law for such a right would be by virtue of the principle of self-determination . . ." This is to regard the problem as largely resolved and not to allow oneself to wonder whether there might not be other possible bases for the right of a people to secede.

[97] On the use of the report of the Commission of Jurists in the *Aaland Islands* case, see above, para. 6.

[98] Para. 26, p. 42. See also para. 9, p. 36 or para. 28, p. 42.

[99] Para. 59, pp. 56–57.

[100] Note 70, p. 57.

Faroe Islands. The Consultant only discusses the latter example in any detail.[101] The Faroe Islands case merely shows that if the desire for independence is not sufficiently strong and runs up against the peaceful opposition of the state from which a people is thinking of detaching itself, the project is abandoned. This is, in truth, a matter of common sense. Even if it were a right, secession is assuredly not a legal obligation. Here again, because there is no effective realization, these examples do not challenge the fundamental thesis of this study, according to which secession is a matter of effectiveness.

iii/ In the third group, finally, we have the cases in which a people's desire for independence ran into the determined resistance of the state from which it wished to separate, and led to armed struggle. Katanga, Biafra and the crises in Bosnia and Chechenya are typical, tragic examples. In all cases, to varying degrees, the seceding peoples have managed to inject their claims with a certain "dose of effectiveness" and have even gone so far – as in the Biafran case, for example – as to control a large part of the territory claimed for several years.[102] In none of these cases, however, can one speak of state effectiveness. In accordance with a particularly well established principle of international law, state effectiveness implies "a *pacific* and continuous exercise of state authority".[103] Such *peaceful, pacific* effectiveness obviously does not exist when armed conflict rages.

"Successful" secessions (or dissolutions)

32. The second category of scenarios identified by Professor Crawford concerns "successful" secessions. By their very definition, they imply effectiveness, namely that the secessionist claim has materialized through the creation of a viable state, permanently enjoying state prerogatives.

Here again, subject to expanding the list[104], the precedents can be divided into three categories:

i/ Some states, which unfortunately are much more numerous than the Consultant indicates, have come into being as a result of a victorious armed struggle against the state from which they have seceded.

Professor Crawford admits this situation only for Bangladesh.[105] This is an unquestionable precedent, whose importance he nonetheless attempts to diminish,

[101] Para. 54, pp. 53–54.

[102] On Biafra, see in particular Francis WODIÉ, "La sécession du Biafra et le droit international public", RGDIP 1969, pp. 1018–1060. On Katanga see V. BERNY, "La sécession du Katanga", RJPIC, 1965, pp. 563–573. See also Jean SALMON, *La reconnaissance d'État*, Armand Colin, Paris, University Collection, pp. 91–200. The report of Professor Crawford contains an adequate description, for the purposes of this study, of the Bosnian and Chechen crises (paras. 55–58, pp. 54–56).

[103] Permanent Court of Arbitration (Max Huber), decision of April 4, 1928, *Island of Palmas*, RGDIP, 1935 (trans. Charles Rousseau), p. 195; italics added. See also Charle de VISSCHER, *Les effectivités en droit international public*, Pédone, Paris, 1967, pp. 101–11.

[104] See above, paras. 25 and 30.

[105] Paras. 33–34, pp. 44–45.

not only by presenting it as exceptional[106] (though it is less exceptional than he indicates), but also by making a curious and highly questionable analysis of the case:

– On the one hand, he attempts to reduce the Bangladesh situation to a case of direct implementation of the principle of the right of peoples to self-determination. This seems debatable. Indeed, if that were the case, it would be necessary to find that East Pakistan had never, nor in any way, been classified as a non-self-governing territory by the General Assembly or its Decolonization Committee, the only bodies having the competence to make such a classification. There would thus be a precedent in favour of a right of non-colonial peoples to independence, based directly on their right of self-determination. That right to independence would be directly transferable to Quebec, since it is not reasonable to base a description of colonialism on the fact that the election results were cancelled and Bengal had been placed under a military regime. On that reckoning, all the states of India could have described themselves, at some point or other in their history, as "colonized", and it would no doubt only be up to Quebeckers to create a situation of that kind . . .

– On the other hand, Professor Crawford insists on the fact that it was only after the Pakistani troops surrendered that the states other than India recognized Bangladesh, and that Bangladesh was admitted to the United Nations. This presentation calls for two comments.

In the first place, neither recognition nor admission to the United Nations creates a state. Either of these factors may, obviously, consolidate the existence of a state whose foundations are weak, and as the Arbitration Commission for the Former Yugoslavia noted, recognition, "like membership in international organizations, testifies to the conviction [of other states] that the political entity thus recognized is a reality and confers upon it certain rights and obligations in respect of international law."[107] Nonetheless, according to very predominant doctrine, "recognition by other states has purely declarative effects".[108]

Consequently and secondly, even though premature recognitions cannot be excluded (and are not necessarily illegal[109]), it is normal and legitimate for them to be expressed *after* the effective inauguration of the independence of which they are not a condition, but an indication. The same remarks apply to admission to the United Nations, and in the case of Bangladesh, the period of three years and two months that elapsed between that admission and the accession to independence definitely seems very short, given the obvious and massive intervention of a third party state on the side of the Awami League.[110]

[106] See above, para. 22, notes 64 and 65.

[107] Notice No. 8, July 4, 1992, RGDIP, 1993, p. 589.

[108] Notice No. 1, previous Note 53, p. 264. See also previous Notice No. 8. For general information on recent developments affecting the concept and practice of recognition, see Joe VERHOEVEN, "La reconnaissance internationale: déclin ou renouveau?", AFDI, 1993, pp. 7–40.

[109] V.J. VERHOEVEN, *ibid.*, pp. 24–25 or P. DAILLER and A. PELLAT, *op. cit.*, note 87, p. 535.

[110] On the prohibition of foreign military support for secessionist claims, see above, para. 19.

33. The precedent of Bangladesh is, indeed, far from being as isolated as Professor Crawford would have us believe. Among the cases he cites in rather disorganized fashion, two at least also form part of the regrettable series of situations where independence could only be imposed by a victorious armed struggle. These are the cases of Eritrea and of the states that emerged from the dissolution of the former Yugoslavia. There is not much to say about either of these cases, since it is evident that the secessions (or the dissolution) that led to the creation of these states involved conflict and were in no way consensual, as the Consultant is pleased to write.

Suffice it to recall that Eritrea was born out of a thirty-year war, which began on September 1, 1961 and only ended on May 24, 1991, with the capture of Asmara by the forces of the Popular Front for the Liberation of Eritrea (FPLE). That war caused at least 70,000 deaths among Eritreans alone. The agreement reached in London with the new Eritrean authorities on May 27, 1991, like the referendum of April 27, 1993 under the aegis of the United Nations, thus did not more than ratify a *de facto* state [government].[111]

34. Regarding the successor states of the former Yugoslavia, Professor Crawford concedes that they "came into existence through a complex and violent process", and sees in them "the only case since 1971 in which new states have emerged in a non-colonial context against the continued opposition of a government claiming to represent the predecessor state. Despite the opposition of the Belgrade regime, the breakaway republics were relatively soon recognized by third states and admitted to the United Nations."[112] This analysis is accurate, and it is unfortunate that the Consultant then strives to deprive this precedent of any meaning by asserting that the state dissolutions are irrelevant for the purposes of his study, and attempts to delude us into believing that the recognition of the new states may have played a role in their international recognition.

The undersigned has shown above (under heading A)) that the first objection is ill-founded. The second, regardless of the limited relevance of the phenomenon of recognition for the purposes of this study[113], is contradicted by the facts[114]

– The Republics of Croatia and Slovenia proclaimed their independence on June 25, 1991, but that independence was only acquired on October 8, 1991.

– Macedonia, which asserted its right to sovereignty on January 25, 1991, became independent on November 17, 1991.

– The Arbitration Commission for the Former Yugoslavia regarded March

[111] On the independence of Eritrea, apart from the literature cited by Professor Crawford (note 55, pp. 51–52), see, in the French language, Raymond GOY, "L'indépendance de l'Érythrée", AFDI, 1993, pp. 337-356 and the studies cited.

[112] Para. 38, p. 48.

[113] See above, para. 32.

[114] The independence dates for the former Yugoslavian Republics are those accepted by the Arbitration Commission for the Former Yugoslavia, Notice No. 11, previous Note 74, RGDIP, 1993, pp. 1102–1105. The facts concerning the recognitions effected (or not effected) by Yugoslavia (Serbia and Montenegro) are taken from a Yugoslav professor and author who is particularly well informed. See Milan SAHOVIC, "La reconnaissance mutuelle entre les Républiques de l'ex-Yugoslavie", AFDI, 1996, pp. 228–233.

6, 1992 as the date on which Bosnia-Herzegovina, for its part, seceded from the Socialist Federal Republic of Yugoslavia.

– Bosnia-Herzegovina, Croatia and Slovenia were admitted to the United Nations on May 22, 1992 (Macedonia was admitted only on April 8, 1993, for reasons unrelated to its relations with Yugoslavia (Serbia-Montenegro), which only recognized it afterwards).

– Slovenia was formally recognized by Yugoslavia (Serbia and Montenegro) on August 12, 1992.

– By the terms of Article 10 of the Dayton-Paris accord of December 14, 1994:

> "The Federal Republic of Yugoslavia and the Republic of Bosnia-Herzegovina recognize each other as independent sovereign states within their international borders".

– The "normalization" of relations among the five states was subsequently pursued, and is still not completed today.

It is obviously impossible to conclude, from this chronology, that the international recognition of the states issued from the former Yugoslavia owes anything to the position taken by the former Socialist Federal Republic of Yugoslavia or, since April 27, 1992, by Yugoslavia (Serbia and Montenegro), which claims to be the continuer. On the other hand, it clearly shows that the international community relied upon the fact of statehood, without being greatly concerned about the position of the state of origin in regard to the seceding republics, thus confirming the accuracy of the analysis of the Arbitration Commission, according to which "the existence or disappearance of a state is a question of fact."[115]

35. The same remarks could be made about the practice that Professor Crawford overlooks, whether we consider the partition of India, which was achieved with frightful bloodshed, or earlier secessions like that of Panama, which occurred following the break-up of Greater Colombia and the ensuing insurrection of the Panamanians in 1903. On that occasion, the United States, which was quickly followed by the other powers, recognized Panama a few days after the insurrection commenced.[116]

36. ii/ Statehood, most fortunately, does not always arise from armed conflict, and the state of origin often resigns itself to a secession that it seldom wishes for.

Professor Crawford's report gives a number of examples of secessions (or dissolutions) that fall into this category: the break-up of the Federation of Mali, the secession of Singapore from the Federation of Malaysia, the renaissance of the Baltic states[117] and the dissolution of the Soviet Union. Other examples could be added, including that of the break-up of the UAR. In all cases, the accession of the new states to independence took place with no, or almost no, bloodshed.

[115] Notice No. 1, previous note 52, p. 99.

[116] V.P. DAILLIER and A. PELLET, *op. cit.*, note 87, p. 533. For a detailed analysis of the practice followed in regard to secessions since the beginning of the 19th century, see J. CRAWFORD, *op. cit.*, note 95, pp. 247–266.

[117] See above, para. 25.

However, one cannot infer from that fact that the secessions were consensual. The state of origin of course consented, finally, to the creation of a new state, but only because it really had no choice, not because it approved the secession.

Although it is not necessary to go into great detail in this respect – since it seems evident that except in very unusual circumstances[118], a state does not lightheartedly consent to the loss of part of its territory and population – suffice it to note the following:

– In the case of the Federation of Mali,[119] Mali (and France, the former colonial power) disputed Senegal's right to withdraw from the Federation (two months after independence).[120]

– In the case of the United Arab Republic, the break with Syria was completely unilateral on September 28, 1961, even though Egypt quickly resigned itself to it (on October 5, 1961).[121] "Nasser thought for a moment of carrying out an operation using force, but since he refused to spill Arab blood, he rather quickly got over it".[122]

– As far as Singapore is concerned, the Independence Accord of August 7, 1965 was preceded by a period of high tension between the two contracting parties, and the withdrawal was, in reality, imposed on Singapore by Kuala Lumpur against a backdrop of ethnic rivalries.

– The re-establishment of the independence of the Baltic States was likewise imposed on the Soviet Union, which initially tried to oppose the move and only resigned itself to the *fait accompli* after some time had passed. The riposte of the USSR to the Lithuanian declaration of independence of March 11, 1990 and to the separatist statements of intent of Estonia and Latvia[123] was a categorical refusal, and led to the organization of a referendum with the avowed aim of maintaining the integrity of the Union. In all cases, independence was proclaimed (and effectively achieved) without the consent of the USSR, which only recognized the Baltic States on September 6, 1991 (after the member states of the European Communities, which decided to reestablish diplomatic relations with these states on August 27, 1991). Finally, it is remarkable that none of the three Baltic Republics relied upon Article 72 of the Soviet Constitution, which however provided for a right of secession in favour of the Soviet republics.[124] This clearly showed their intention to find a place in the sphere of international law.

– The same remarks can be made about the dissolution of the Soviet Union as a whole. The eleven Republics other than Russia "short-circuited" the maneuver of the Soviet central power, which was seeking to impede formal independence among them by concluding a "Treaty on the Union of Sovereign States", which would in fact have reestablished a federal state. In all cases, the declarations of independence (August–September 1991) preceded the recognition of that independence by Russia and the conclusion of the treaty creating the Community of Independent States (first signed at Minsk on December 8, 1991 and broadened at Alma Ata on December 21).

[118] See the case of the withdrawal of Singapore from Malaysia.

[119] In this case, what we have is no doubt more a dissolution than a secession. On this episode, see in particular Alain GANDOLFI, "Naissance et mort sur le plan international d'un État éphémère", AFDI, 1960, pp. 881–906, Rosalyn COHEN, "Legal Problem Arising from the Dissolution of the Mali Federation", *BYBIL*, 1961, pp. 375–384, or Habib GHERARI, "Quelques observations sur les États éphémères", AFDI, 1994, pp. 419–432.

[120] V.H. GHERARI, *ibid.*, pp. 426–428.

[121] See *ibid.*, pp. 426–429.

[122] Robert SANTUCCI, "L'Égypte républicaine", *Encyclopedia Universalis*, Vol. 8, 1990, p. 20.

[123] These two countries only proclaimed their independence on August 20, 1991, after referendums had been held in March 1991.

[124] See Antonio CASSESSE, *Self-determination of Peoples – A Legal Reappraisal*, Grotius Publ., Cambridge University Press, 1995, p. 260. For the chronology of the events, see, for example, Michel LESAGE, "La Communauté des États indépendants", in G. Burdeau and B. Stern, *op. cit.*, n. 66, pp. 82–84.

[125] One may, however, have some reservations about the case of Singapore.

[126] And accepted by Professor Crawford; see above, note 95.

[127] It is not unimportant that this unique example of a consensual process leading to the creation of states is supplied by a state dissolution. This shows that the exclusion of this form of emergence of new states, which Professor Crawford effects on the pretext that the consent of the predecessor state is excluded (see above, para. 22), should not occur. The agreement of the successor states takes shape and is expressed within the framework of the predecessor state, here Czechoslovakia, which has thus necessarily been called upon to respond to it.

37. iii/ It is impossible to qualify as "consensual" the processes of accession to independence described above. These processes did not of course result in armed conflicts, but to degrees that did admittedly vary, secession was always effected unilaterally and was imposed by one of the partners (in all cases except that of Singapore, the separatist people or peoples) in the central power. It seems rather unreasonable to use the existence of an agreement concluded following a process eminently (and very logically) marked by conflict-as a pretext for asserting that the secessions in question were consensual. Having been "pacific" (in other words, for not having led to armed conflict), the accession to independence has been, in all cases[125], unilateral and meets the current definition[126] of secession.

Consequently, and by elimination, the third and last category of successful secessions, namely those that are based on mutual agreement between the two peoples concerned, does not amount to much, and in truth to a single case, that of the "velvet divorce" of the Czech and Slovak Republics. This separation unquestionably led to a consensual dissolution of the former Czechoslovakia and the creation, likewise consensual, of two new successor states.[127]

b) The practice of states does not have the scope that Professor Crawford attributes to it

38. It is not always easy to know exactly what precise conclusions Professor Crawford is drawing from the practice to which he has devoted himself. However, the overall tone of his study clearly tends to show the following:

– States and the organized international community represented by the United nations do not encourage secession nor, more generally, the creation of new states. This conclusion is correct, even though it is based on partially false premises.

– A state may try to oppose the secessionist claims with which it is confronted. This conclusion is also correct, but this does not mean that a state may use any means to do so.

– Only the consent of what Professor Crawford calls the "parent state" justifies secession in law. This conclusion is not correct. Successful secessions are *de facto* secessions.

– The principle of the right of peoples to self-determination does not provide a legal basis for a right to secession. This conclusion is correct, but must be qualified and explained since secession is, for a people, one possible way of exercising its right to self-determination.

Each of this proposals should be briefly reconsidered.

i/ Secession is not encouraged by the international community

39. The Consultant repeatedly insists on what, in truth, seems to be an obvious fact: "There is strong international reluctance to support unilateral secession or separation."[128] There is hardly any doubt about this, and a long examination of practice was probably not necessary to arrive at such a conclusion. The "international community" – if the concept has meaning from the legal point of view – is made up of states of which very few have a population that is ethnically, religiously or linguistically homogeneous. It is understandable, and indeed inevitable, that in the majority of cases, and unless specific and immediate interests are at stake, states are not pleased to see their "fellow" states having to confront separatist aspirations by which they in turn might be threatened. This fact also explains why no general rule establishing a subjective right to secession has been formulated despite the spectacular renewal of the principle of the right of non-colonial peoples to self-determination.[129]

While this common-sense observation does not raise any objections, one of the manifestations of the "reluctance" on which Professor Crawford relies is questionable. He sees evidence for this reluctance in the fact that "the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede."[130] If the statement means that the United Nations does not admit seceding entities as long s they are not constituted as states, it is obviously true. By the terms of Article 4 of the Charter, only states may become members of the United Nations. On the other hand, if the statement means that the United Nations refuses admission to states that have emerged from a secession or a dissolution, it is quite simply false. All new states that have found themselves in that situation have, without exception, been admitted to the United Nations, including those that have imposed their independence by the force of arms. And while the admission of Bangladesh occurred three years after its accession to sovereignty, that was not in any way due to the opposition of Pakistan, but was rather caused by the veto

[128] Para. 67, p. 60. See also para. 26, p. 42 or para. 63, p. 59.

[129] See below, iv/.

[130] Para. 67, p. 60. See also the Summary, (c), p., 32 and para. 26, p. 42.

of China alone[131], the justification for the veto being the massive intervention of India in the process of accession to independence.

ii/ A state may oppose attempts at secession, but it may not use every means to do so.

40. The emphasis that Professor Crawford places on the consent of the "parent state", which for him is necessary, leads him to insist on the resistance that the parent states makes in all cases of non-consensual secession: "Faced with an expressed desire of part of its people to secede, it is for the government of the state to decide how to respond . . ."[132] However, while the Consultant does give an example of a possible response ("for example by insisting that any change be carried out in accordance with constitutional processes"[133]) and states that before 1945, "the government of a state was entitled to oppose the unilateral secession of part of the state by all lawful means"[134], he pays hardly any attention to the forms that this response may take from the viewpoint of contemporary international law.

Professor Crawford goes even further. Describing some particularly bloody, recent secessionist processes (whether successful or not), such as those concerning Eritrea, the former Yugoslavia or Chechenya, he hardly draws any conclusions from the responses of the international community, which nonetheless clearly condemned the use of armed force by a state confronting secessionist forces. These conclusions are, however of great importance, and one can certainly infer from them the emergence of an obligation to show restraint, which was unknown to classical international law, but today much more strictly delimits the rights and duties of both the secessionist people or peoples and the state that seeks to oppose the secession.

To limit ourselves to the case of the former Yugoslavia[135], it is extremely striking that in a single movement, the first collective international responses to be made public after the declarations of independence of Croatia and Slovenia and the immediate armed response of Belgrade both affirmed the attachment of the authors of the responses to the territorial integrity of Yugoslavia – and this is one manifestation of the reluctance of the international community in regard to secessionist tendencies[136] – and their condemnation of the use of force in that country, even by the federal government.[137] Resolution 713 (1991) of the Security Council, dated September 25, 1991, is in this respect highly significant. In that resolution, the Council

[131] Not the USSR, as Professor Crawford erroneously writes (para. 33, p. 44).

[132] Para. 60, p. 57. See also the Summary, (b), p. 32 or para. 67, p. 60.

[133] *Ibid.*

[134] Paragraphs 8 and 9, p. 36.

[135] It is, however, equally significant that the chancelleries of a number of states indicated, in terms that were often unambiguous, that the use of armed force was not acceptable in Chechnya, although what was involved was a conflict internal to a great power. Apart from the citations given by Professor Crawford (para. 57, pp. 54–55), see: for France, AFDI, 1996, pp. 1037–1038; for the United States or Germany, *Le Monde*, January 5, 1995 or May 11–12, 1995; and for the European Union, *ibid.*, January 25, 1995.

[136] See above, para. 39.

[137] See, in particular, the impressive series of Declarations of the 12 of March 26, May 8, July 5 and

"*Appeals urgently to and encourages* all parties [including, therefore, the government of the Socialist Federal Republic of Yugoslavia] to settle their disputes peacefully . . ."

and

"*Decides*, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia . . ."

The armed opposition of a sovereign state to secessionist movements is thus the subject not only of an international condemnation, but also of a sanction that is binding on all states.

The necessary conclusion in a situation of armed conflict of this type is, as Professor Thomas Franck noted: "The international system [. . .] will no longer side with Governments against secessionists except, perhaps, where the secession is being fomented or supported by an external intervening party."[138] Moreover, one can infer, from these precedents, a legal rule excluding the right to resort to force, either by the seceding forces or by the government of the state concerned. This constitutes a clear break with classical international law, which accords governments a monopoly on constraint over their respective territories.

iii/ "Successful" secessions are not the secessions accepted by the predecessor state, but *de facto* secessions

41. The leitmotif that recurs the most frequently in Professor Crawford's report is the assertion that any secession, in order to be lawful and to succeed, must obtain the consent of the state whose territorial integrity is threatened. The secession cannot lawfully succeed unless "the parent state *agrees to allow* a territory to separate and become independent . . ."[139] With the sole exception of Bangladesh, this has been the case, Crawford alleges, for all situations where independence has been acquired in a non-colonial context since 1945. Even within the context of decolonization, the consent of the administering power has constituted the common legal basis for independence, and in the case of Bangladesh itself, only the later consent of Pakistan enabled Bangladesh to become fully integrated into international society, through its admission to the United Nations. Since this analysis all too obviously does not square with the case of the former Yugoslavia, the Consultant treats it as anathema and declares it to be irrelevant.

It is sufficiently clear, from the foregoing, that there is no serious justification for excluding (or particularizing), for the purposes of this study, the creation of new states through dissolution (A, above), and that this analysis does not correspond to the precedents as they have effectively developed (a, above).

In reality, practice is very firmly set along different lines. The international community certainly does not encourage secession, but when a secession succeeds,

9 and August 6 and 20, 1991 (see A. PELLET, *op. cit.*, note 10, p. 263) and the many examples of national responses given by Thomas FRANCK, "Fairness in the International Legal and Institutional System -- General Course on Public International Law", RCADI, 1993-III,Vo. 240, p. 144.

[138] *Ibid.*, p. 145.

[139] Summary, (c), p. 32; italics added.

there is no example in which third states, and the United Nations, have not drawn the inferences therefrom, regardless of the attitude of the predecessor state. The new state in no way depends on the consent of the state from which it is derived for the legal justification of its existence; that justification lies in the mere fact that it exists and that it effectively and peacefully exercises state functions, that is, in accordance with the principle of effectiveness.

It goes without saying that the attitude of the state of origin may play a fundamental role in the achievement of that condition. Its opposition may have the effect of preventing the seceding people from creating the state to which it aspires. On the other hand, if the state of origin cooperates, is moderate in its opposition or, more frequently, becomes resigned to an outcome that it regards as inescapable, its attitude may do much to strengthen the new state entity. Nonetheless, if there is consent, that consent is not the legal condition for the legitimacy of the creation of the state resulting from the secession, and it remains merely a factor of the new state's effectiveness.

42. This thesis is very widely accepted not only by doctrine[140], but also by Professor Crawford and by Justice Wildhaber, who have both signed reports appended to the Attorney General's factum.

For example, in a recently published article, Justice Wildhaber writes:

"The secession of a minority group remains conceivable from the point of view of international law. A unilateral declaration of independence *that becomes effective* in relation to the former mother-land and third states may create a new state. [. . .] The main issue is whether a new entity *disposes of effective power*."[141]

Likewise, at the end of a careful presentation of precedents, Professor Crawford states his opinion as follows:

"The conclusion. seems to be that, in cases where the principle of self-determination does not operate, the criterion for statehood of seceding territories remains in substance that established in the nineteenth century: that is the maintenance of a stable and effective government over a reasonably well defined territory, to the exclusion of the metropolitan

[140] Apart from the "study of the five jurists", previous Note 9, paragraphs 2.39–2.43, pp. 408–412 and para. 3.14, pp. 428–430, previous para. 26, and the doctrine cited, see, for example: Matthew C.R. CRAVEN, "The European Community Arbitration Commission on Yugoslavia", *BYBIL*, 1995, p. 378 (this author states; "The emergence of the new States in Yugoslavia cannot be seen as the result of a process of devolution in that, throughout the operative period, the Federation consistently opposed the intended secession of the various Republics", pp. 378–379); Th. FRANCK, *op. cit.*, note 137, p. 135 ff., and "Postmodern Tribalism and the Right to Secession", in Catherine BRÖLMAN, René LEFEBER, Marjoleine ZIECK, eds., *Peoples and Minorities in International law*, Nijhoff, Dordrecht, pp. 12 ff., and Rosalyn HIGGINS, Comments, *ibid.*, p. 33; Malcolm SHAW, *Title to Territory in Africa*, 1986, pp. 202–208, or Patrick THORNBERRY, "The Democratic or Internal Aspect of Self-determination with Some Remarks on Federalism", in Christian TOMUSCHAT, ed., *op. cit.*, note 48, p. 118; etc.

[141] "Territorial Modifications and Breakups in Federal States", ACDI, 1995, p. 56. This author's doctrine is in fact uncertain because, while affirming that "here as elsewhere the facts triumph over dogma" (p. 73), he nonetheless reintroduces, apparently, the requirement of consent by the predecessor state, at least where Quebec is concerned (p. 64) . . .

State, in such circumstances that independence is either in fact undisputed or manifestly indisputable."[142]

This analysis surfaces repeatedly in the report that this author has written for the Attorney General of Canada:

- "It has always been possible for a group to separate from a state and to achieve independence by achieving exclusive control over its territory – if necessary, by winning a war of independence."[143]
- ". . . international law has been prepared to acknowledge political realities once the independence of a seceding entity was firmly established and in relation to the territory effectively controlled by it."[144]

Although this situation was presented as being in the past, the Consultant still seems to recognize that the analysis is still valid:

- ". . . where the government of the predecessor state maintains its status as such, its assent to the secession is necessary, at least *unless and until the seceding entity has firmly established control beyond hope of recall.*"[145]

This is, in fact, the rule that is illustrated by the practice presented above: Contemporary international law does not encourage the secession of non-colonial peoples, but it does not forbid it either. Here, law bows before fact and sanctions effectiveness. The consent of the state that has suffered the secession may considerably facilitate the effective establishment of the new state, but that consent is not, from the legal point of view, necessary.

iv/ Secession may be, for a people, a way of exercising its right of self-determination.

43. There is no doubt that "while in the United Nations practice the right to self-determination has primarily concerned peoples under colonial domination, it is by no means limited to them nor circumscribed by a political situation which is disappearing."[146] The whole of the question here is to know what the contents of this right are.

Some authors think that the right of self-determination includes a veritable right to secession. Professor Yoram Dinstein, for example, states: "Just as a host of peoples once living under colonial rule have gained the right to establish new States, a people unhappy about its political status within the bounds of an existing State – federal as much as unitary – is entitled to secede."[147] In the opinion of the undersigned, this is an extreme view, which does not correspond to positive law. While it can be admitted that an oppressed people, which is denied the right to its own existence within the state, may secede[148], this is not the case of the people

[142] *Op. cit.* note 95, p. 266.
[143] Para. 8, p. 36.
[144] Para. 9, p. 36.
[145] Para. 28, pp. 42–43; italics added.
[146] Eduardo JIMENEZ DE ARECHAGA, "International Law in the Last Third of a Century", RCADI, 1978-I, Vol. 159, p. 104. On this question, see Alain PELLET, *op. cit.*, note 10, pp. 255–297, *passim*.
[147] *Op. cit.*, note 54, pp. 248–249.
[148] In this sense, see, for example: Antonio CASSESE, *op. cit.*, note 124, p. 120, or Christian TOMUSCHAT, "Self-determination in a Post-colonial World", *op. cit.*, note 48, pp. 8–11.

of Quebec. Consequently, one cannot reasonably say that this people may claim a right to secession based on its right – which is unquestionable – to self-determination.[149]

However, this in no way means that there is no connection between the principle of the right of peoples to self-determination and the possible creation of a state of Quebec. As the Arbitration Commission of the Conference on the Former Yugoslavia strongly pointed out: "Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law."[150] The creation of a state meets that objective and, even if it is not the only way for a people to assert its identity, it is plainly one way. While secession is not a right arising from the right to self-determination, neither is it forbidden by international law. Consequently, by seceding, the people of Quebec would affirm its existence as a distinct people – this being the very core of the principle of the right of peoples to self-determination – and its action would be neither encouraged nor prohibited by international law.

IV. CONCLUSION

44. Professor Crawford's report purports to study "state practice and international law in relation to unilateral secession". Although the presentation is, on the whole, accurate as to facts, it does contain gaps and above all is strongly biased in the sense that in order to establish that consent of the "parent state" is a legally necessary condition for secession to be valid, its author must indulge in questionable, specious distinctions

- between practice prior to 1945 and practice after 1945;
- between dissolution and "unilateral secession"; and
- between "unilateral secession" and "the situation contemplated by Question 2" of the Reference.[151]

Conversely, he incorporates into his argumentation the practice followed in connection with decolonization, although the decolonization process has not taken the legal form of secessions. His purpose here is to show that "even" the colonial peoples have acceded to independence with the consent of the administering powers. This is often not so in fact, and never is in law since even though colonial powers have, in certain cases, "consented" to the advent of a new state, the foundation of the right of colonial peoples to independence is not this consent, but is rather the direct consequence of their right of self-determination.

The situation is not the same for non-colonial peoples. Although they also have a right to self-determination, that right does not directly confer upon them a right to secede if their identity as a distinct group is recognized within the state

[149] On this point, see the conclusions of the "five jurists", pp. 294–295.
[150] Notice No. 2 of January 11, 1992; RGDIP, 1992, p. 266.
[151] Para. 8, p. 36.

into which they are integrated. If such a people nonetheless claims independence, the creation of the new state is not justified by its right to self-determination, but rather by the principle of effectiveness. "The creation of the state is a question of fact" and is not prohibited by any rule of international law. When this fact is established, international law takes it into account.

In the case that concerns us, these considerations do not justify a negative answer to the second question asked in the Reference. The right of self-determination, which is recognized for all peoples, does not require that the people of Quebec be acknowledged to have the right to proceed unilaterally with the secession of Quebec, as this would exclude an affirmative answer to the second part of the question. However:

– *In the first place*, there is no rule of international law that prohibits the secession of a part of a state.

– *Secondly*, the constitution of a state unquestionably provides a people with a way of exercising its right to self-determination.

– *Thirdly*, while the principle of the right of peoples to self-determination does not constitute the legal foundation of a right to the creation of a new state by the people of Quebec[152], that creation would be justified in law by the principle of effectiveness if such a state came to be created, with or without the consent of Canada, and if the authorities of the new entity permanently exercised peaceful state authority over its territory and over the population settled therein.

45. Although it does not fall directly within my terms of reference[153], I wish to conclude with a personal comment regarding the wording of the questions submitted to the Supreme Court of Canada in the Reference. Professor Crawford, who claims to be limiting his study to describing state practice in relation to unilateral secession, does not ask himself any questions on this point.

I am a specialist in international public law, and I do not know anything about Canadian constitutional practice. However, I cannot help but feel very uncomfortable with the manner in which the questions that form the subject of the Reference have been framed. This feeling is due to the contrast between the first and second questions:

– In the first question, the Court is asked to determine whether Quebec *can*, under the Constitution of Canada, "effect the secession of Quebec from Canada unilaterally".

– In the second question, the Court is asked to state whether international law gives Quebec "the *right* to effect the secession of Quebec from Canada unilaterally".[154]

It is clear that if the wording of the second question had followed the wording of the first, the answer could only have been yes. It is undeniable that there is no rule in international law that opposes Quebec's secession from Canada and, accordingly, that National Assembly, legislature or government of Quebec *may* effect

[152] Regardless of the uncertainties concerning the definition of such a people. On this point, see the "study of the five jurists", previous note 9, para. 3.01, pp. 275–276.

[153] See above, para. 3.

[154] Italics added.

secession unilaterally. The inclusion of the word "right" in the second question introduces an element of uncertainty. If one considers the question of the requirement of a (subjective) right to secession, the answer must be negative, since no such right exists in international law. On the other hand, if the word "right" is defined as the absence of prohibition, then the answer is unquestionably affirmative. International law does not prohibit secession and, in that sense, Quebec without a doubt has the "right" to proceed with it.

I have no preconceived opinion regarding the appropriateness of such a secession. However, I am profoundly troubled and shocked by the partisan manner in which the questions are put, and I am taking the liberty of suggesting that a Court of Justice has a duty to react to what clearly seems to me to be an all too blatant attempt at political manipulation.