

National Question in Central Europe

Democratic Responses to Unresolved National and Ethnic Conflicts



International Conference 22-24. 03. 2013

National question in Central Europe:

Democratic responses to unresolved national and ethnic conflicts

International Conference - 22–24 March, 2013

Editor | András Lőrincz

Published by | Institute for Cultural Relations Policy

Executive Publisher | Csilla Morauszki

ICRP Geopolitika Kft., Gyöngyösi u. 45., Budapest

<http://culturalrelations.org>

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ISBN 978-615-5432-00-2

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ICRP INTERNATIONAL CONFERENCE



NATIONAL QUESTION IN CENTRAL EUROPE:

DEMOCRATIC RESPONSES TO UNRESOLVED NATIONAL AND ETHNIC CONFLICTS

BUDAPEST, 22–24 MARCH 2013

CONFERENCE PROCEEDINGS



Institute for Cultural Relations Policy

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FOREWORD

The second international conference organised by the Institute for Cultural Relations Policy (ICRP) was hosted by the King Sigismund College in March 2013. The keynote speakers of the event included academics and directors of various NGOs and think tanks from the Central European region, as well as representatives of the Hungarian Government. During the three days of the conference nearly 20 speakers held their presentation in front of an audience of nearly 100 participants from more than 10 countries.

As a part of the initiatives of the Institute for Cultural Relations Policy the conference was aiming to provide a forum to researchers, experts, young intellectuals, political actors, decision makers and other stakeholders involved in social sciences to present their researches and activities about the solution of Central European national challenges and problems. The ICRP initiated this forum to facilitate better understanding of the cultural diversity of Central Europe besides political, economic and legal aspects in ethnic and national minority conflict resolution.

On the basis of participants' feedback, the forum fulfilled its goals and preliminary expectations. We believe this meeting was the first milestone of a long-term cooperation in Central Europe.

The papers outlined below provide various ideas, visions and opinions about ethnic minority issues, national identity questions, interstate relations, conflict resolution, legal issues and integration policies as they try to give a better insight into the historical, social and political aspects of the national question in Central Europe.

Therefore, we are grateful to the authors and co-authors for their most valuable contributions to the National Question in Central Europe conference.

Finally, the editor would like to thank the members of ICRP Advisory Board for assistance and the sponsors for supporting the event and the proceedings.

This proceedings is issued on the responsibility of the Chief Executive Officer of ICRP Geopolitika Kft. Views expressed are those of the authors and do not necessarily reflect those of the Institution or its members.

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**COMPARATIVE ANALYSIS OF THE LEGAL ASPECTS
OF NAGORNO KARABAKH REPUBLIC INDEPENDENCE
AND THE INDEPENDENCE OF REPUBLIC OF KOSOVA**

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Key Words: *conflict, Karabakh, Kosovo, International Law, International Court of Justice, South Caucasus*

Abstract

After the fall of Berlin wall a wave of hope raised that the existing conflicts will be solved and the situation of permanent deterrence will end. But with the collapse of USSR and SFRY new frontiers and lines of allocation arisen. The world met many instability hearts which are still persistent in most part. The conflicts overwhelmed both Eastern Europe and South Caucasus approximately simultaneously and approximately in the same conditions. Thus the developments in the two regions became mostly intertwined here why it is common to compare them with each other.

Furthermore, the conflicts in Karabakh and Kosovo have been and are being discussed on the same context trying to use the same political, geopolitical, economic, ethnic, legal, economic and other approach. This has both its supporters and opponents who correspondingly insist that the conflicts are similar and the approach must be the same and that the conflicts are different and in different situation and in different geopolitical, political, economic, legal and military environment so the approach must be diversified and coinciding. Anyway each conflict is a special case that demands special individual approach.

Since 2010 as the International Courte of Justice determined that the declaration of independence by Kosovo does not violate International Law activated speculations on the Karabakh conflict on the context of the ICJ advisory opinion. Besides the discussed geopolitical, political, military and other differences the legal approach should be similar as the International Law is a unique system in the world that should be the same for all parties and its mission is to provide general solutions. Another delicacy of the international legal system is that it has to apply all the similar situations in the same way as the principle is one of its main pillars.

So to discuss the international legal aspect of the Karabakh future status it is first of all necessary to discuss the legal aspect of the process of declaration of independence in the frames of the positive law of the former USSR. Second it is necessary to compare the legal situation of the Karabakh situation with the principles of the International Law and UN resolutions taking into consideration the ICJ advisory opinion of 2010.

After the clarification of the legal aspect and context we may discuss the provisions of the ICJ advisory opinion of 2010 and decide whether they are general for all the coinciding situations or private for a certain situation in Kosovo.

These three steps allow to look into the root of Karabakh issue from the legal aspect and to see a solution based on general legal provisions and principles.

* * *

Introduction

Republic of Kosova¹ declared independence on 17th February, 2008. Since then 98 UN Member states recognised the independence of Kosovo of which 22 are European Union (EU) Member states². It was a long and painful road for the Kosovo people that came to a questionable mid-term resolution. It is a questionable mid-term resolution as not all UN member states recognise it and not all the parties and interesting sides are satisfied with the existing status quo. Anyway, the satisfaction in this case has more a political than a legal nature. Anyway, the case of Kosova is one of the still unresolved and unfinished processes the symbolically have been launched after the fall of Berlin wall.

With the collapse of the USSR and the FRY new frontiers and lines of allocation arisen. The world met many instability hearts which are still persistent in their most part. The conflicts overwhelmed both Eastern Europe and South Caucasus approximately simultaneously and approximately in the same conditions. Thus the developments in the two regions became mostly intertwined. Here why it is common to compare them with each other. Examples of such comparison are cases of Karabakh in the South Caucasus and Kosova in the South-Eastern Europe. The conflicts have been and are being discussed on the same context trying to use the same political, geopolitical, economic, ethnic, legal, economic and other approach. This has both its supporters and opponents who correspondingly insist that the conflicts are similar and the approach must be the same and that the conflicts are different and in different situation and in different geopolitical, political, economic, legal and military environment so the approach must be diversified and coinciding. Anyway each conflict is a special case that demands special individual approach³. Nevertheless, besides the discussed historical, geopolitical, political, military and other differences the legal approach should be similar as the International Law is a unique system that should be the same for all parties and its mission is to provide general solutions. Another delicacy of the international legal system is that it has to apply all the similar situations in the same way as the principle is one of its main pillars. So, herein we will try to discuss the background of the Declaration of independence of Nagorno Karabakh Republic on the 2nd September 1991 in the contexts of both International Law and the USSR positive law of the time as they were the only legal frames and basis for

¹ In the paper we use the name of the Republic of Kosovo as it is in official version – Kosova.

² <http://www.kosovothanksyou.com/?order=a#recognitions>

³ In this paper we do not refer to the development of historical background of the cases as the aim of the paper is discussion and comparison of the legal framework of the declarations of independence of the Republic of Kosova and the Nagorno Karabakh Republic.

any such declaration. We will do this taking into consideration the ICJ advisory opinion of 2010 on the legality under international law of Kosova's independence declaration that was sought by Serbia rejecting Kosova's independence⁴.

The advisory opinion of the 22nd July 2010

In accordance with Resolution 63/3 of 8 October 2008, the United Nations General Assembly tasked the International Court of Justice, the principal judicial organ of the United Nations, to render an Advisory Opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"⁵. As a result of the examination the Court has concluded that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law⁶.

Despite its advisory nature of the opinion raised many discussions in different societies where formally or informally it was announced the importance of the conclusion and the consequences that it may cause. One of the most frequently debated issues was "whether this opinion has a universal or a particular character?" It is not accidental that we've used to hear and now hear opinions both for and against the ICJ opinion not only for this certain case but also referring the generalisation of this opinion on similar unfinished cases. Even the US and the EU expressed their opinion against generalisation though they were for the adoption of the ICJ opinion in the form it is⁷. Thus, it's obvious, that if the Opinion did not complicate particularly the situation of Kosova and, in general, the solution of similar cases, anyway from the expressed viewpoints we may conclude that the Opinion did not clarify the whole context⁸.

⁴ <http://www.mfa-ks.net/?page=2,121>

⁵ UN ICJ Advisory opinion, paragraph 49.

⁶ *Ibid.*, par. 122.

⁷ Hague's Decision on Kosovo Doesn't Create Precedent, Gordon Says, July 27th, 2010, [online] Available at: <<http://www.yerevanreport.com/20100727/13531/hague-doesnt-create-precedent-gordon>>; Semneby, P., 2010. *The fact that Kosovo, South Ossetia and Abkhazia declared independence, does not make them the same* (Russian), 26 July 2010 [online] Available at: <<http://www.interfax.ru/txt.asp?id=146766&sec=1483&sw=%EF%E5%F2%E5%F0+%F1%E5%EC%ED%E5%E1%E8&bd=30&bm=6&by=2010&ed=30&em=7&ey=201&secid=0&mp=0&p=1>>

⁸ The same complicated position (it is called double standards policy) is displayed in the field of practical politics: the US and a number of its allies recognised the unilaterally proclaimed independence of Kosova while in respects of other cases (NKR, Abkhazia, South Ossetia, Transnistria, etc.) they either do not support right to self-determination (not emphasizing their support for territorial integrity, but do not even raise their adherence to the law of self-determination), or express support for the territorial integrity not generalizing their stance (clearly state that they are in favour of this or that certain country's territorial integrity), or vice versa, Russia recognised the independence of Abkhazia and South Ossetia but opposes the independence of Kosova. By the way, in the unity of all this contrasts the Karabakh issue is a kind of exception as the both world power centres avoid to express clear stances for or against one of the disputed principles. Meanwhile they have clearly expressed their positions regarding to the cases of Kosova, Abkhazia and South Ossetia. It's obvious that the reason of such reality is based on the different geopolitical interests and politicised approaches. Here why the parties contradistinguish the principle of International Law on "equal rights and self-determination of peoples" and a political concept about "territorial integrity".

Universal or Particular?

The opponents of the ICJ advisory opinion generalisation point out that the UN General Assembly's quest to the ICJ had a certain target and case that is the Kosova case not the declaration of independence in general. So, to answer the question "Whether the Opinion has a universal or particular nature?" we have to look into the document.

First of all the court in its opinion refers to the question discussing the issue of relationship between the International Law and the declaration of independence (whether there are any provisions in the International Law forbidding the declaration of independence) and, on the other hand, whether the principles of self-determination and territorial integrity are contradicting and mutually excluding each other.

On the first question the Opinion states that "State practice during this period (18th, 19th centuries and the 1st half of the 20th century – G. G.) points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation... A great many new States have come into existence as a result of the exercise of this right"⁹. Furthermore, referring to the attempts during the proceedings to contradict the principles of self-determination and territorial integrity the Court answers to the second question stating: "... the scope of the principle of territorial integrity is confined to the sphere of relations between States"¹⁰. Thus we may conclude that the abovementioned principles are not in a contradiction with each other as they have different objects: the principle of territorial integrity is to regulate the issues and relations between States while the principle of self-determination is to regulate the relations between nations in spite of state borders.

By the way, in this paragraph of its Opinion the ICJ also mentions the Helsinki Final Act of 1975 in the 4th article of which there is a reference to the principle of territorial integrity. So we may sum up that this conclusion of the Court gives an official answer to the political juggling of legal provisions about "supremacy" of one principle over the other especially the tales that "territorial integrity" has supremacy over the principle of self-determination.

Summing up its opinion the International Court of Justice refers also to the issue of UN Security Council resolutions condemning some declarations of independence (216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska) that were mentioned during the proceedings: "The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been,

⁹ UN ICJ Advisory opinion, paragraph 79.

¹⁰ *Ibid.*, par. 80.

connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). ... The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council”¹¹. Therefore, the court, analysing the existing norms of international law and the facts, once again confirms that illegality cannot have legal consequences (*Ex injuria non oritur jus*), and that unilateral declaration itself is not illegal, even more it is a common practice and correct procedure if it is not connected with unlawful use of force or with a violation of law.

Thus, the advisory opinion of the International Court of Justice does not apply only the Kosovo case but it discusses general norms and provisions of the International Law with which the Kosovo case is being compared. So it, first of all, has a universal nature and may be applied to other similar cases and, secondly, it contains several statements on legal provisions and principles of the International Law that are used to be manipulated. Hereby, the advisory opinion may play a role of a turning point in the history of nation building and, on the other hand, become an important source for commenting the provisions of the International Law. In general, this and similar decisions and conclusions of the Court have an important place in the system of international law, since they become a source of international law “as an auxiliary tool for the establishment of legal norms”¹².

Is this a precedent?

Hereby, to understand whether the ICJ Advisory opinion and its main provision may be applied to the Karabakh case we should, first of all, observe the legal aspect of the declaration of independence of the Nagorno Karabakh Republic and, secondly, compare the results with the provisions and statements of the Opinion as it is done in the Kosovo case. As the Advisory opinion states: “The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption”¹³. So we will do the same in the Karabakh case.

The legal context of the NKR independence

On the 2nd September, 1991 the joint session of the people’s deputies of the Nagorno Karabakh region and the Shahumyan region was adopted the declaration of independence. On the 10th December the same year the question of NKR independence was put to a referendum. All the time this process was going on the USSR was still existing with its political and constitutional system until the 25th December 1991. So, the only constitutional and legal context on which we may and have to discuss the legal background of the

¹¹ UN ICJ Advisory opinion, paragraph 81.

¹² Statute of the International Court of Justice, Article 38.

¹³ UN ICJ Advisory opinion, paragraph 57.

declaration of NKR independence consists of the USSR Constitution and the law of April 3, 1990 on “Law on the Procedures of the Resolution of Problems of Secession of a Union Republic from the USSR”.

In the USSR Constitution the article 72 referred to the right of secession stating “each union republic has the right to freely withdraw from the USSR”¹⁴. On the basis of this constitutional provision raises and develops the above mentioned law on the procedures of secession that solves the problems with a union republic, autonomy or a region withdrawal from the Union in details.

So the Article 3 of the law states: “In case the Soviet Republic has autonomous republics, autonomous regions or autonomous territories within its borders, referendums are to be conducted separately in each of the autonomies. The people residing in the autonomies are given a right to independently decide whether to remain in the Soviet Union or in the seceding Republic as well as to decide on their state legal status”¹⁵. So according to the referendum of September 2 Nagorno Karabakh withdrew not only from the Union Republic of Azerbaijan (SSR of Azerbaijan) but also the USSR itself.

The opponents of this statement may point out both the “Declaration on Restoration of the State Independence of the Republic” and the Constitutional act “On the state independence of the Azerbaijan Republic” adopted at the extraordinary session of the Supreme Council of Azerbaijani SSR, correspondingly, on 30th August and 18th October 1991 according to which the newly independent Azerbaijan declared itself a successor of the Democratic Republic of Azerbaijan of 1918–1920¹⁶. With this step the new authorities of Azerbaijan announced that the restoration of the republic of 1918–1920 exempts them from the jurisdiction Soviet law and Constitution. Besides this the National Assembly of Azerbaijan passed the resolution No. 279-XII on November 23, 1991, that was signed into law by Ayaz Mutalibov on 26 November, 1991 under the name “Law on Abolishment of Nagorno-Karabakh Autonomous Oblast”. This was an attempt to eliminate the right of the people of the Nagorno Karabakh Autonomous Oblast to use the abovementioned provisions of the law from April 3, 1990. Though this has two main counterarguments:

1. When the Azerbaijani Supreme Council attempted to adopt “Declaration on Restoration of the State Independence of the Republic” and the Constitutional act “On the state independence of the Azerbaijan Republic” and declared itself a successor of the Azerbaijani Democratic Republic of 1918–1920 it automatically refused all its legal claims over the de-jure territory of the Azerbaijani Soviet Socialistic Republic of 1920–1991 claiming its rights over the territory of the Azerbaijani Republic of 1918–1920 which never included the territory of Nagorno

¹⁴ USSR Constitution, adopted October 7, 1977, article 72.

¹⁵ Law on the Procedures of the Resolution of Problems of Secession of a Union Republic from the USSR, April 3, 1990, Article 3.

¹⁶ Constitutional act “On the state independence of the Azerbaijan Republic”, 18 October 1991, Baku, Article 2.

Karabakh¹⁷. Even more, the territory of the Nagorno Karabakh was attached to the territory of the Azerbaijani SSR according to a questionable and illegal decision of the Caucasian Bureau of the Communist party from the 5th July, 1921. So, the territory of Nagorno Karabakh have been included in the frames of the Azerbaijani SSR administrative borders according to the Soviet legal and constitutional system.

2. With the law on Abolishment of the Nagorno Karabakh autonomous Oblast the Azerbaijani authorities tried to prevent the realisation of their right by the people of the Oblast stated in the Law from the 3rd April, 1990. But they may be did not pay attention or tried not to notice the second paragraph of the same 3rd Article of the Law that stated “Referendum results are to be considered separately for the territory of a Soviet Republic with a compactly settled ethnic minority population, which constitutes majority on that particular territory of the Republic”¹⁸. So the people of the Nagorno Karabakh both as an autonomous unit and a compactly settled by an ethnic minority territory had the right to decide its status itself. Meanwhile the Azerbaijani authorities had no right to abolish the autonomous oblast of the Nagorno Karabakh as the solution of such questions was under the jurisdiction of the highest authorities of the USSR¹⁹.

Thus we may conclude that the appropriate legal and constitutional background of the declaration of independence by the people of Nagorno Karabakh is fully adequate and corresponds to the requirements highlighted in the Advisory opinion of the ICJ from 22nd July, 2010.

On the other hand the Court discusses whether the provisional authorities in Kosovo’s autonomy have acted in constitutional framework. Especially the Court pays attention to the question if all the bodies of Kosovo have acted jointly and whether the declaration of independence is the result of one of them or not²⁰. In the Karabakh issue we see that on this case a classic example of a joint action of the all bodies of the autonomy is the joint session of people’s deputies of the Nagorno Karabakh region and the Shahumyan region on the 2nd September of 1991. Afterwards, the decision of the session (the Declaration) was put on a referendum that is the highest index of democratic way of decision making. So, we may state that the actions of the authorities of the Nagorno Karabakh also totally coincide with the requirements of the ICJ stated in the Opinion on the Kosova independence. Herein, we may conclude that both legal frames and the very actions of the declaration of Nagorno Karabakh

¹⁷ According to the article 2 of the Gulistan Russian-Iranian contract of 12th October, 1813 Karabakh became a part of Russia. After the abolishment of Karabakh Khanate in 1822 it ceded to Yelizavetpoli with tsarist authorities. After the October Revolution of 1917 the Azerbaijani (then-Tatar) government just announced its claims over the Nagorno-Karabakh and tried to realise its “right” by force of arms. In this case also, the claims of the National Council of Caucasian Tatars in Baku, and afterwards of the Azerbaijani authorities were unreasonable and unlawful, because they were based solely on simple territorial claims which were not coinciding with the free expression of the will of the people of Nagorno-Karabakh. Finally, after the sovietisation of Azerbaijan and the South Caucasus the issue has been resolved at a session of Caucasian Bureau with an illegal decision.

¹⁸ Law on the Procedures of the Resolution of Problems of Secession of a Union Republic from the USSR, April 3, 1990, Article 3.

¹⁹ USSR Constitution, adopted October 7, 1977, article 73, point 1.

²⁰ UN ICJ Advisory opinion, paragraph 109.

independence by its people is totally consistent with the nature and the logic of the provisions of the International Law.

The case of the UN Security Council resolutions

Another topic often manipulated in the cases both of the Kosova and Karabakh is the question connected with the UN Security Council resolutions. In the Kosova case a such important document is resolution 1244 (1999) adopted on the 10th June 1999. On the Karabakh case the Security Council adopted 4 resolutions: 822(1993) (30th April, 1993), 853(1993) (29th July, 1993), 874(1993) (14th October, 1993), 884(1993) (12th November, 1993). The General Assembly also adopted 4 resolutions: 48/114 (20th December, 1993), 60/285 (7th September, 2006), 62/28 (5th December, 2007), 62/243 (14th March, 2008). In the frames of discussions on Karabakh conflict the Azerbaijani side often refers to the resolutions the first 4 of which refer to the wartime developments on the Karabakh frontline until 1994 ceasefire and the second 4 do not have binding force.

Anyway, even from a short look at the resolutions it becomes obvious that they are incomparable with the resolution 1244 (1999) as this is something like a road map of the Kosova issue solution and states the actions of the parties. By the way, in this resolution we have FRY and the international community as parties the latter of which recognises the territorial integrity of the first and its superiority over Kosova²¹. Even more, the international community takes obligations in the resolution to act as a peacemaker until a long-lasting peace and rule of law will be established in Kosova. It was also set in the Resolution that the Kosova case should be solved in the frames of the territorial integrity of FRY on a level of autonomy²². For this purpose there have been established international civil and police provisional administrations in Kosova.

The reality is that all the process ended up in a different result: the provisional administration declared independence in fact extending its mandate received from UN Security Council and the ICJ stated that the “Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo”²³.

Hereby, if the Resolution 1244 (1999), much more powerful and fundamental in its nature, does not preclude the declaration of independence in the very case of Kosova, the resolutions on the Karabakh case do not have potential even for being discussed on the context of the conflict resolution as they refer to the reality of wartime calling the sides not to go forward. This is a fact that these resolutions also operate on a different level than is the final determination of the status of Nagorno Karabakh Republic. So the final word is up to the

²¹ Resolution 1244 (1999), adopted by the Security Council at the 4011th session, 10th June, 1999, Preamble, point 10.

²² *Ibid.*, point 11.

²³ UN ICJ Advisory opinion, paragraph 114.

declaration of Independence of the republic of Nagorno Karabakh adopted by the people of Karabakh on a referendum on the 2nd September, 1991.

Thus, both from the point of view of international legality and constitutional framework and the legality of the actions of the authorities the Advisory opinion of the International Court of Justice from the 22nd July 2010 may be fully applied to the Karabakh. As a result it may be stated that the declaration of independence by the people of Karabakh fully coincides the provisions of the International law.

Conclusions

In the official letter of Australia recognizing the independence of Kosova it is written: “The United Nations and NATO have worked tirelessly since 1999 to assist in setting up self-governing institutions and to help the people of Kosovo rebuild their lives. Much remains to be done, and it is important that the international community, in particular the United Nations and European Community, continue efforts to bring about a lasting peaceful future for Kosovo and the region”²⁴.

Meanwhile, after the declaration of independence in Nagorno Karabakh Republic there have been formed all the state bodies that are realizing an effective government. The bodies form on the basis of the Constitution of the NKR that is adopted on a nationwide referendum. The authorities are being formed by the local political parties and politicians via periodical elections that receive high remarks from international monitors. It should be mentioned once more that the state bodies and the governing structure in NKR is established and formed by its people without any international interference. This shows that the ability of self-determination and self-organisation of the people of NKR is on an appropriate level and high enough to build a nation in a legal and democratic way that may be an example for many countries with internationally recognised independence. At the same time, NKR is a stabilizing factor in the South Caucasus which is not a minor issue in the context of the security and stability issues of the region.

²⁴ Australia Recognises the Republic of Kosovo, 19 February 2008 [online] Available at: <http://www.foreignminister.gov.au/releases/2008/fa-s034_08.html>

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