

## Recognition of States: A Comment

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Legal issues arising from dissolution of states, emergence of new states and recognition of the latter require a thorough understanding of the relevant facts. While it is obvious that any legal discourse must proceed from firm factual foundations, it is necessary to emphasize the importance of the circumstantial dimensions of the issues, given that the views on the pertinent facts usually diverge, at least during the policy-making stage.

Assessment of facts is much easier from a historical distance. Nobody questions today the wisdom of recognizing the dissolution of the Spanish colonial empire in Latin America, or the independence of Greece from the Ottoman rule. These events belong to history and have a comfortable place in contemporary textbooks on international law. However, at their time they were among the most controversial political issues of the time and contributed considerably to the collapse of the hitherto prevailing international system which was based on the principles of the Holy Alliance. The principle of legitimacy – as understood at that time – had to give way to independence of new states. Therefore, it seems necessary to recognize that the ‘facts’ and ‘policy matters’ concerning dissolution of states, emergence of new states and recognition of the latter contain more than facts *per se*: they also contain an important contextual dimension and it is necessary to make an effort to understand it as completely as possible. It is necessary to comprehend the historical context within which they take place, as well as their effect on the functioning of the international system.

The preceding remarks are necessary as an introduction to any discussion on the issues concerning the dissolution of Yugoslavia and the Soviet Union (at the time of publication of this comment, the list of European countries recently dissolved will also include Czechoslovakia). Indeed, the dissolution of these states belongs to a broader process of disintegration of the Central and East European political, economic and security system and to the overall transformation currently under way in Europe.

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Back in November 1989, immediately after the fall of the Berlin wall, George Kennan defined the European agenda as one requiring elaboration of a new political, economic and security framework for all of Central and Eastern Europe. This, according to Kennan's analysis of 1989, required the solution of problems of great historical depth. Whoever undertakes to study them, concluded Kennan,

... is going to find himself confronting situations to which better answers should have been found, but were not, at the end of the last world war, and even some arising from the break up of the Austro-Hungarian Empire left unresolved in 1918 and 1919.<sup>1</sup>

Disregard for historical context of facts may lead to serious mistakes. Legal analysts and, above all, policy makers should be aware of that. The policy of non-recognition of the changed reality in Central and Eastern Europe has been influenced by that oversight. Moreover, insensitivity to the contextual dimension often led to incorrect assessment of actual facts, and to unsuccessful policy efforts – particularly in the case of the dissolution of former Yugoslavia.

The article by Roland Rich is remarkably accurate in its presentation of complex facts and in their historical context. The war characterizing the dissolution of Yugoslavia started with the armed attack of the Yugoslav army against Slovenia on 27 June 1991. The apparent failure of the attack was followed by the Brioni Declaration of 7 July, and the Federal Presidency of the Socialist Federal Republic of Yugoslavia decided, with the obvious agreement of the Yugoslav army, to withdraw the army from Slovenia. That retreat began in the middle of July 1991 and was completed by 25 October 1991.

The defeat of the Yugoslav army in Slovenia marked the beginning of the dissolution of Yugoslavia. The war in Croatia which started in the second half of July 1991 (prior to that there were only armed incidents in Croatia, mostly resulting from Serb guerilla attacks on Croat police forces) made the process of dissolution of Yugoslavia irreversible. Yugoslavia was vitally depending on the coexistence of Serbs and Croats.<sup>2</sup> The large armed conflict among them in the Summer of 1991 spawned two crucial consequences: it rendered the continuation of a common Serbo-Croat state of Yugoslavia impossible and made all other nations of ex-Yugoslavia, and particularly the Bosnian Muslims, the victims.

These facts would have been easily grasped by policy-makers in the Summer of 1991 had they appropriately understood their historical context. The ability to realistically face the situation and draw concrete conclusions, including those necessary for the timely recognition of the successor states of the former Yugoslavia, was lacking. Instead, the European community – until the end of September 1991 the only major international power involved in the Balkan embroilment – relied heavily on the idea of keeping the defunct Yugoslavia as a single state. Slovenia and Croatia

1 George Kennan, 'An Irreversibly Changed Europe, Now to be Redesigned', *International Herald Tribune*, 14 November 1989.

2 For analysis of the relevant historical facts, see A.J.P. Taylor, *The Habsburg Monarchy* (1948).

remained unrecognized and the Belgrade government continued to be considered as holding an illusory authority over the whole territory of the former Yugoslavia. The conference on Yugoslavia (originally defined as 'Peace Conference') was convened without a clear understanding of its purpose – to many it seemed an instrument for the reconstitution of Yugoslavia and it relied on the illusion that a package solution was possible.

The policies on Yugoslavia were formulated in the Summer of 1991 under the threat of the dissolution of the Soviet Union. It is understandable (and very accurately described in the paper by Roland Rich) that the main Western states adopted an extremely cautious approach to the situation arising from the dissolution of the Soviet Union, given that it was one of the two superpowers. Therefore, it is natural that they did not wish to create any precedent in the case of the dissolution of Yugoslavia. The paradoxical aspect of this approach was that this type of caution was unnecessary, as the successor states of the former Soviet Union showed a remarkable level of political wisdom and common sense – and resolved most of the outstanding questions in 1991 by agreement.<sup>3</sup> Although that approach was, perhaps, influenced by the example of Yugoslavia (in particular by the ugly aspects thereof which probably had a deterrent effect), there is no reason to believe that the smooth transition from Soviet Empire into the Commonwealth of Independent States in 1991 was in any significant way influenced by the approach taken by the Western states.

In short, the policy pursued by the Western states with respect to the dissolution of Yugoslavia and the Soviet Union did not contribute to solving any of the historical problems in that part of the world. The process of change took its own course and the attempts to reverse or stop it were unsuccessful. The policy makers failed in many questions posed in the process, including those concerning the recognition of new states. For example, the EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991 contained a series of legal requirements including the declaration by the new states aspiring for recognition that they accept various international legal obligations. On the other hand, the guidelines, and the pertinent practice of Western states disregarded one of the classical criteria for recognition namely the criterion of effectiveness of the governments of the states which were aspiring for recognition.

Roland Rich accurately describes the inconsistencies characterizing the process of recognition. Although the EC and USA, together with other Western states reiterated, in various ways, their reliance on traditional international legal criteria for recognition, their policy of non-recognition of various states was far from being consistent application of legal criteria. Thus Slovenia which has fulfilled all traditional criteria

3 The Alma-Ata Declaration of 21 December 1991, quoted by Roland Rich, *supra* note 38 of his article, represents probably the most important manifestation of that process. In that declaration all successor states of the former Soviet Union agreed that the USSR ceased to exist.

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since July 1991 remained unrecognized by the EC until mid January 1992, and by the USA until April 1992. Macedonia which also fulfilled these criteria, at least since the end of 1991, has remained unrecognized for a much longer period due to a dispute over its name; a dispute which carries a great deal of irrationality in conformity with the history of the Balkans.

On the other hand, Bosnia and Herzegovina – which was unable to fulfil the criterion of effectiveness – became recognized in April 1992 and was admitted to the UN on 22 May 1992. However, it would be wrong to conclude that recognition and admission of that state to the UN was necessarily a political mistake. The recognition of Bosnia and Herzegovina was not only fair and just but also – paradoxically, in accordance with state practice. In the case of Bosnia and Herzegovina it should have been clear that the emerging state would need more than formal recognition, admission to the UN and establishment of diplomatic relations. The Conference on Yugoslavia could have been – but was not – used for the purpose of creating appropriate guarantees for the independence of Bosnia and Herzegovina. This omission was probably due to (a) divergent opinions among the major powers regarding the approach to the Yugoslav crisis in general and (b) the lack of readiness to act by force, if necessary, to protect the independence of Bosnia and Herzegovina and thus to give credibility to the international support for Bosnia and Herzegovina's independence.

It is important to note that jurists did not make the mistakes which characterized most of the political dealings with the dissolution of Yugoslavia. The Arbitration Commission of the Conference on Yugoslavia (the 'Badinter Arbitration Commission') rightly concluded in its Opinion No. 1 of 29 November 1991 that Yugoslavia was in the process of dissolution, given the fact that its federal organs had lost both representativity and effectiveness.<sup>4</sup> The criterion of effectiveness was duly recognized in this context. On 4 July 1992 the Arbitration Commission concluded in its Opinion No. 8 '... that the process of dissolution of the SFRY referred to in the Opinion No. 1 of 29 November 1992 is now complete and that the SFRY no longer exists'.<sup>5</sup>

The Arbitration Commission was accurate and consistent also in its opinions on the recognition of successor states. It duly recognized that in the cases of Slovenia and Macedonia all criteria were fulfilled and that in the cases of Croatia and Bosnia and Herzegovina additional activities were necessary (respectively, provision for an appropriate status of minorities and a referendum). Finally, in its Opinion No. 8 the Commission also stated that '... – Serbia and Montenegro, as Republics with equal standing in law have constituted a new state, the "Federal Republic of Yugoslavia", and on 27 April adopted a new constitution'.<sup>6</sup> Thus the Arbitration Commission provided a comprehensive legal interpretation of the status of successor states to former Yugoslavia.

4 Badinter Commission Opinion No. 1 is reprinted in 3 *EJIL* (1992) 182.

5 See below at 88.

6 See below at 88 (emphasis added).

The opinions of the Arbitration Commission were not legally binding and also did not deal with all implications of the situation of the dissolution of a state and emergence of successor states. The fact that the Arbitration Commission's opinion on recognition of Macedonia was not heeded by political fora of the EC, and that no serious action was taken to demonstrate that the Federal Republic of Yugoslavia (Serbia and Montenegro) was a new state, illustrated the difficulties involved in the political implementation of a legal opinion. Moreover, the fact that the Arbitration Commission was not invited to propose measures necessary to uphold independence of Bosnia and Herzegovina, a state with obvious shortcomings in the effectiveness of its government, is an illustration of the incomprehensiveness of the political approach which was taken. It might be argued that the Arbitration Commission should have proposed such measures independently even though this was not specifically requested. However, it remains doubtful whether such an activist approach would be wise in a situation characterized by the overwhelming prevalence of political considerations over application of legal criteria.

In short, the opinions of the Arbitration Commission of the Conference on Yugoslavia were legally consistent and correct, notwithstanding their inconsistent implementation and the silence of the Commission with regard to some questions which were of obvious relevance. The latter shortcoming was caused by political barriers and was not consequent from a decision of the Arbitration Commission itself.

On the other hand there are some questions which have not received a complete legal opinion and which were relevant to both the Yugoslav and Soviet cases of dissolution of states as discussed in Roland Rich's paper. The most important among them is the twin question of the territorial integrity of successor states and the protection of minorities on their respective territories.

The Arbitration Commission and the Conference on Yugoslavia have relied on the principle of *uti possidetis* with respect to the frontiers among the former republics. This was the first time that that principle was directly applied in Europe. The Arbitration Commission referred in its Opinion No. 3 to the 1986 International Court of Justice judgment in the dispute between Burkina Faso and Mali<sup>7</sup> to argue in favour of general applicability of the *uti possidetis* doctrine.<sup>8</sup> The EC and the international community have, in fact, relied on the same principle with respect to the successors of the former Soviet Union.

Roland Rich rightly highlights the difficulties involved in the realization of that approach, particularly in situations involving large minorities which are in some cases regional majorities. He concluded that it would be difficult to limit the application of that principle to a single geographic area (Europe) or to a type of nation with a particular method of internal organization (federalism). While this is generally correct it must also be recognized that both the Soviet Union and Yugoslavia were federations

7 Frontier Dispute (Burkina Faso/Mali), [1986] ICJ Rep. 3.

8 Badinter Commission Opinion No. 3 is reprinted in 3 *EJIL* (1992) 184.

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in which federal organization relied heavily on the ethnic component. Moreover, the federal units – the Republics – were constitutionally defined as ‘states’ with both defined borders and a considerable amount of constitutional power, which included authority in the field of international relations.<sup>9</sup> These were not purely formal features but also had considerable political importance, both in terms of the duration of those two federations and in the process of their dissolution. Therefore the dissolution of the Soviet Union and Yugoslavia cannot be seen as a real precedent for the situations that might arise in states with different types of history and another type of political organization.

The question of the protection of minorities and, where possible and necessary, the adjustment of frontiers, remains open. All political fora, including the EC, CSCE and the UN, along with the Arbitration Commission agreed to the principle that peaceful change of frontiers, based on the agreement of states concerned, was permissible. It seems that such a possibility would be more likely to be realized if the pertinent international organization provided an appropriate institutional framework to facilitate the process of agreement. Moreover, it also seems that international institutional support would be necessary to encourage and supervise the evolution of appropriate minority protection regimes. Such institutional arrangements, some of which have already been conceived within the framework of the CSCE would represent a contemporary realization of the concept of peaceful change – a well known notion in international law, and one that may facilitate future political change and minimize its impact on the international community.

9 The Constitution of the Socialist Federal Republic of Yugoslavia of 1974 defined the Republics as ‘states’ (Article 3) and stipulated (in Article 5) that the Republic’s territories and boundaries cannot be altered without their consent. In the case of the Soviet Union it is noteworthy that Article 80 of the 1977 Constitution of the USSR provided for the Federal Republics the right to establish diplomatic and consular relations with other states to conclude international treaties, and to participate in the work of international organizations.

## Recognition of New States

### Annex 1:

#### *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991)*

In compliance with the European Council's request, Ministers have assessed developments in Eastern Europe and the Soviet Union with a view to elaborating an approach regarding relations with new states.

In this connection they have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.

The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.

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### Annex 2:

#### *Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991)*

The European Community and its Member States discussed the situation in Yugoslavia in the light of their Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union. They adopted a common position with regard to the recognition of Yugoslav Republics. In this connection they concluded the following:

The Community and its Member States agree to recognize the independence of all the Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on 15 January 1992.

They are therefore inviting all Yugoslav Republics to state by 23 December whether:

- they wish to be recognized as independent States
- they accept the commitments contained in the above-mentioned Guidelines
- they accept the provisions laid down in the draft Convention—especially those in Chapter II on human rights and rights of national or ethnic groups – under consideration by the Conference on Yugoslavia
- they continue to support
  - the efforts of the Secretary General and the Security Council of the United Nations, and
  - the continuation of the Conference on Yugoslavia.

The applications of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date.

In the meantime, the Community and its Member States request the UN Secretary General and the UN Security Council to continue their efforts to establish an effective cease-fire and promote a peaceful and negotiated outcome to the conflict. They continue to attach the greatest importance to the early deployment of a UN peace-keeping force referred to in UN Security Council Resolution 724.

The Community and its Member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.<sup>1</sup>

<sup>1</sup> Opinions No. 1, 2, and 3 are reproduced in 3 *EJIL* (1992) 182-185.



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### **Annex 3: Opinions No. 4-10 of the Arbitration Commission of the International Conference on Yugoslavia**

#### *Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States*

In a letter dated 20 December 1991 to the President of the Council of the European Communities, the Minister of Foreign Affairs of the Socialist Republic of Bosnia-Herzegovina asked the Member States of the Community to recognize the Republic.

The Arbitration Commission proceeded to consider this application in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union adopted by the Council on 16 December 1991 and with the rules of procedure adopted by the Arbitration Commission on 22 December.

For the purposes of its deliberations the Commission took note of the following materials supplied by the Socialist Republic of Bosnia-Herzegovina (SRBH):

1. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;
2. Extracts from the relevant provisions of the 1974 Constitution of the SRBH, the constitutional amendments passed in 1990, the Constitution of the Socialist Federal Republic of Yugoslavia and the draft Constitution currently being prepared;
3. The 'Memorandum' and 'Platform' of the Assembly of the SRBH, dated 14 October 1991;
4. Letter of 27 December 1991 from the President of the Presidency of the SRBH to Lord Carrington, Chairman of the Conference on Yugoslavia, on the formation of an 'Assembly of the Serbian People in Bosnia-Herzegovina';
5. The Decision of 8 January 1992 by the Prime Minister of the SRBH, published in the Official Journal, whereby the Government undertook to abide by the international agreements cited in the Guidelines;
6. Answers, dated 8 January 1992, to the Commission's request for additional information on 3 January.

The Commission also had before it two letters, dated 22 December 1991 and 9 January 1992, from the President of the 'Assembly of the Serbian People in Bosnia-Herzegovina', copies of which were sent to the Chairman of the Commission on the same dates.

Having regard to the information before it, and having heard the Rapporteur, the Arbitration Commission delivers the following opinion:

1. By an instrument adopted separately by the Presidency and the Government of Bosnia-Herzegovina on 20 December 1991 and published in the Official Journal of the Republic on 23 December these authorities accepted all the commitments indicated in the Declaration and the Guidelines of 16 December 1991.

In that instrument the authorities in question emphasized that Bosnia-Herzegovina accepted the draft Convention produced by the Hague Conference on 4 November 1991, notably the provisions in Chapter II on human rights and the rights of national or ethnic groups.

By a Decision of 8 January 1992 the Government of the SRBH accepted and undertook to apply the United Nations Charter, the Helsinki Final Act, the Charter of Paris, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and all other international instruments guaranteeing human rights and freedoms and to abide by the commitments previously entered into by the SFRY concerning disarmament and arms control.

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The current Constitution of the SRBH guarantees equal rights for 'the nations of Bosnia-Herzegovina – Muslims, Serbs and Croats – and the members of the other nations and ethnic groups living on its territory'.

The current Constitution of the SRBH guarantees respect for human rights, and the authorities of Bosnia-Herzegovina have sent the Commission a list of the laws in force giving effect to those principles; they also gave the Commission assurances that the new Constitution now being framed would provide full guarantees for individual human rights and freedoms.

The authorities gave the Commission an assurance that the Republic of Bosnia-Herzegovina had no territorial claims on neighbouring countries and was willing to guarantee their territorial integrity.

They also reaffirmed their support for the peace efforts of the United Nations Secretary-General and Security Council in Yugoslavia and their willingness to continue participating in the Conference on Yugoslavia in a spirit of constructive cooperation.

2. The Commission also noted that on 24 October 1991 the Assembly of the SRBH adopted a 'platform' on future arrangements for the Yugoslav Community. According to this document the SRBH is prepared to become a member of a new Yugoslav Community on two conditions:

- (i) the new Community must include Serbia and Croatia at least; and
- (ii) a convention must be signed at the same time recognizing the sovereignty of the SRBH within its present borders; the Presidency of the SRBH has informed the Commission that this in no way affects its application for recognition of its sovereignty and independence.

3. The Commission notes:

- (a) that the declarations and undertakings above were given by the Presidency and the Government of the Socialist Republic of Bosnia-Herzegovina, but that the Serbian members of the Presidency did not associate themselves with those declarations and undertakings; and
- (b) that under the Constitution of Bosnia-Herzegovina as amended by Amendment LXVII, the citizens exercise their powers through a representative Assembly or by referendum.

In the eyes of the Presidency and the Government of the SRBH the legal basis for the application for recognition is Amendment LX, added to the Constitution on 31 July 1990. This states that the Republic of Bosnia-Herzegovina is a 'sovereign democratic State of equal citizens, comprising the peoples of Bosnia-Herzegovina – Muslims, Serbs and Croats – and members of other peoples and other nationalities living on its territory'. This statement is essentially the same as Article 1 of the 1974 Constitution and makes no significant change in the law.

Outside the institutional framework of the SRBH, on 10 November 1991 the 'Serbian people of Bosnia-Herzegovina' voted in a plebiscite for a 'common Yugoslav State'. On 21 December 1991 an 'Assembly of the Serbian people of Bosnia-Herzegovina' passed a resolution calling for the formation of a 'Serbian Republic of Bosnia-Herzegovina' in a federal Yugoslav State if the Muslim and Croat communities of Bosnia-Herzegovina decided to 'change their attitude towards Yugoslavia'. On 9 January 1992 this Assembly proclaimed the independence of a 'Serbian Republic of Bosnia-Herzegovina'.

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4. In these circumstances the Arbitration Commission is of the opinion that the will of the peoples of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established.

This assessment could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of the SRBH without distinction, carried out under international supervision.

Paris, 11 January 1992

### *Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States*

In a letter dated 19 December 1991 to the President of the Council of the European Communities, the President of the Republic of Croatia asked the Member States of the Community to recognize the Republic.

The Arbitration Commission proceeded to consider this application in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union adopted by the Council on 16 December 1991 and with the rules of procedure adopted by the Arbitration Commission on 22 December.

For the purposes of its deliberations the Commission took note of the following materials supplied by the Republic of Croatia:

1. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;
2. Document supporting the application for recognition of 19 December 1991, entitled 'Answers to the Declaration on Yugoslavia and to the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union';
3. Constitution of the Republic of Croatia of 22 December 1990;
4. Report on the results of the referendum held on 19 May 1991;
5. Constitutional Decision of 25 June 1991 on the sovereignty and independence of the Republic of Croatia, as confirmed by Article 140(1) of the Constitution;
6. Declaration of 25 June 1991 establishing the sovereignty and independence of the Republic of Croatia;
7. Constitutional Act of 4 December 1991 on human rights and freedoms and on the rights of national and ethnic communities and minorities in the Republic of Croatia;
8. Parliament's Decision of 28 December 1991 supporting the President of the Republic of Croatia's application for the recognition of the Republic;
9. Letter of 11 January 1992 sent by telecopier by the President of the Republic of Croatia in response to the Arbitration Commission's request of 10 January 1992 for additional information.

Having regard to the information before it, and having heard the Rapporteur, the Arbitration Commission delivers the following opinion:

1. In his answers to the Commission's questionnaire the President of the Republic of Croatia gives a positive response to the questions concerning:
  - (a) the Republic's acceptance of the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union; and
  - (b) his support for the peacekeeping efforts being made by the United Nations Secretary-General and Security Council and by the Conference on Yugoslavia.

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2. On 10 January 1992 the Arbitration Commission asked the Republic of Croatia to confirm its acceptance of all the provisions of the draft Convention drawn up by the Conference on 4 November 1991, notably those in Chapter II, Article 2(c), under the heading 'Special status'. The Commission notes that in his reply dated 11 January the President of the Republic of Croatia confirmed that all the provisions contained in the draft Convention of the Conference on Yugoslavia had been accepted in principle by the Republic on 3 November 1991 and had been incorporated into the Constitutional Act of 4 December 1991.
3. The Arbitration Commission considers that:
  - (i) the Constitutional Act of 4 December 1991 does not fully incorporate all the provisions of the draft Convention of 4 November 1991, notably those contained in Chapter II, Article 2(c), under the heading 'Special status';
  - (ii) the authorities of the Republic of Croatia should therefore supplement the Constitutional Act in such a way as to satisfy those provisions; and
  - (iii) subject to this reservation, the Republic of Croatia meets the necessary conditions for its recognition by the Member States of the European Community in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Communities on 16 December 1991.

Paris, 11 January 1992

### *Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States*

In a letter dated 20 December 1991 to the President of the Council of the European Communities, the Minister of Foreign Affairs of the Republic of Macedonia asked the Member States of the Community to recognize the Republic.

The Arbitration Commission proceeded to consider this application in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union adopted by the Council on 16 December 1991 and the rules of procedure adopted by the Arbitration Commission on 22 December.

For the purposes of its deliberations the Commission took note of the following materials supplied by the Socialist Republic of Macedonia:

1. Declaration of 19 December 1991 by the Assembly of the Republic of Macedonia, appended to the abovementioned letter from the Minister of Foreign Affairs;
2. Letter of 20 December 1991 from the Minister of Foreign Affairs of the Republic of Macedonia;
3. Answers to the Commission's questionnaire sent to the Republic concerned on 24 December 1991;
4. Report on the results of the referendum held on 8 September 1991;
5. Declaration of 17 September 1991 by the Assembly of the Republic of Macedonia;
6. Constitution of the Republic of Macedonia of 17 November 1991 and amendments passed on 6 January 1992;
7. Letter of 11 January 1992 sent by telecopier by the Minister of Foreign Affairs to the Chairman of the Arbitration Commission in response to the Commission's request of 10 January 1992 for additional information.

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Having regard to the information before it, and having heard the Rapporteur, the Arbitration Commission delivers the following opinion:

1. In his answers to the Commission's questionnaire the Minister of Foreign Affairs made the following statements on behalf of the Republic of Macedonia:
  - (a) In response to the question what measures Macedonia had already taken, or intended to take, to give effect to the principles of the United Nations Charter, the Helsinki Final Act and the Charter of Paris:

'The Constitutional Act for the implementation of the Constitution of the Republic of Macedonia states that the Republic of Macedonia shall base its international position and its relations with other states and international organs on the generally accepted principles of international law (Article 3).

The Constitutional Act for the implementation of the Constitution of the Republic of Macedonia defines that the Republic of Macedonia, as an equal legal successor of the Socialist Federal Republic of Yugoslavia together with the other republics, takes over the rights and obligations originating from the creation of SFRY (Article 4).'
  - (b) In response to the question what measures Macedonia had already taken, or intended to take, to guarantee the rights of the ethnic and national groups and minorities on its territory:

'The Constitution of the Republic of Macedonia provides for the establishment of a Council for Inter-Ethnic Relations, which shall consider issues of inter-ethnic relations in the Republic. The Council, composed of all the nationalities on parity basis, apart from the President of the Assembly, consists of two members from the ranks of the Macedonians, the Albanians, the Turks, the Vlachs and the Roms, as well as two members from the ranks of other nationalities in Macedonia. The Assembly is obliged to take into consideration the appraisals and proposals of the Council and to pass decisions regarding them. (Article 78).'
  - (c) In response to the question whether Macedonia would undertake not to alter its frontiers by means of force:

'Yes, the Republic of Macedonia respects the inviolability of the territorial borders which could be changed only in a peaceful manner and by mutual consent.

The Assembly of the Republic of Macedonia, in the declaration of 17 September 1991, states that the Republic of Macedonia, strictly respecting the principle of inviolability of the borders, as a guarantee for peace and security in the region and wider, confirms its policy of not expressing and having territorial claims against any neighbouring country (Article 4).'
  - (d) In response to the question whether Macedonia was willing to abide by all the undertakings given on disarmament and the non-proliferation of nuclear weapons:

'Yes, the Republic of Macedonia undertakes all relevant obligations referring to disarmament and nuclear non-proliferation, as well as security and territorial stability.'
  - (e) In response to the question whether Macedonia was prepared to settle by agreement all questions relating to state succession in Yugoslavia and regional disputes, or by recourse to arbitration if necessary:

'Yes, the Republic of Macedonia accepts the obligation and strives for the resolution of all issues referring to the succession of states and to regional disputes, and in case this cannot be reached, by arbitration.'
  - (f) In response to the question what measures Macedonia had already taken, or intended to take, to honour this undertaking:

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'The Constitutional Act for implementation of the Constitution of the Republic of Macedonia regulates the question of succession and states that the Republic of Macedonia as an equal successor with the other Republics of the SFRY shall regulate the rights and obligations of the SFRY based on the agreement with the other republics for the legal succession of the SFRY and the mutual relations (Article 4).'

- (g) In response to the question whether, and in what form, Macedonia had accepted the draft Convention of 4 November 1991 prepared by the Conference on Yugoslavia:

'The Assembly of the Republic of Macedonia, on a proposal by the Government of the Republic of Macedonia, passed a Declaration on 19 December 1991 accepting the draft Convention of the Conference on Yugoslavia (Article 3).'

- (h) In response to the question whether acceptance applied more specifically to Chapter II of the draft Convention:

'Yes, the Republic of Macedonia accepts the provisions from Chapter II of the draft Convention referring to the human rights and the rights of the national or ethnic groups.'

2. Following a request made by the Arbitration Commission on 10 January 1992 the Minister of Foreign Affairs of the Republic of Macedonia stated in a letter of 11 January that the Republic would refrain from any hostile propaganda against a neighbouring country which was a Member State of the European Community.
3. The Arbitration Commission also notes that on 17 November 1991 the Assembly of the Republic of Macedonia adopted a Constitution embodying the democratic structures and the guarantees for human rights which are in operation in Europe.

For the protection of minorities in particular the Constitution contains a number of special provisions, whose main features at least should be mentioned:

- (a) The main provision is to be found in Article 48(1), which states that members of the several nationalities have the right to the free expression, cultivation and development of their national identity; the same applies to national 'attributes'.
- (b) In Article 48(2) the Republic guarantees that the ethnic, cultural, linguistic and religious identity of the several nationalities will be protected.
- (c) Article 48(3) gives members of the several nationalities the right to set up cultural and artistic institutions and educational and other associations that will enable them to express, cultivate and develop their national identity.
- (d) Under Article 48(4) they also have the right to be educated in their own language at both primary and secondary levels.

These provisions are to be given effect by statute. In schools where instruction is to be given in the language of one of the other nationalities, the Macedonian language must also be taught.

- (e) In this connection Article 45 is important since it provides that any citizen may set up a private school at any educational level except primary. Article 19(4) provides that religious communities are also entitled to establish schools. In both these cases, however, the precise extent of the rights in question has still to be determined by legislation.
- (f) In the matter of language and script, Article 7(2) provides that in communities where the majority of the inhabitants belong to another nationality, the language and script of that other nationality must be used for official purposes, alongside the Macedonian language and the Cyrillic alphabet. Article 7(3) makes the same provision for communities where

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a substantial number of inhabitants belong to a given nationality. In both these cases, however, the rights in question have still to be determined in precise terms by legislation.

- (g) Article 9(1) of the Constitution prohibits any discrimination on grounds of race, colour, national or social origin, or political or religious convictions.
4. On 6 January 1992 the Assembly of the Republic of Macedonia amended the Constitution of 17 November 1991 by adopting the following Constitutional Act:
- 'These Amendments are an integral part of the Constitution of the Republic of Macedonia and shall be implemented on the day of their adoption.

### Amendment I

1. The Republic of Macedonia has no territorial claims against neighbouring states.
2. The borders of the Republic of Macedonia could be changed only in accordance with the Constitution, and based on the principle of voluntariness and generally accepted international norms.
3. Item 1 of this Amendment is added to Article 3 and Item 2 replaces paragraph 3 of Article 3 of the Constitution of the Republic of Macedonia.

### Amendment II

1. The Republic shall not interfere in the sovereign rights of other states and their internal affairs.
  2. This Amendment is added to paragraph 1 of Article 49 of the Constitution of the Republic of Macedonia.'
5. The Arbitration Commission consequently takes the view:
- that the Republic of Macedonia satisfies the tests in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia adopted by the Council of the European Communities on 16 December 1991;
  - that the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name 'Macedonia' cannot therefore imply any territorial claim against another State; and
  - that the Republic of Macedonia has given a formal undertaking in accordance with international law to refrain, both in general and pursuant to Article 49 of its Constitution in particular, from any hostile propaganda against any other State: this follows from a statement which the Minister of Foreign Affairs of the Republic made to the Arbitration Commission on 11 January 1992 in response to the Commission's request for clarification of Constitutional Amendment II of 6 January 1992.

Paris, 11 January 1992

### *Opinion No. 7 on International Recognition of the Republic of Slovenia by the European Community and its Member States*

In a letter dated 19 December 1991 to the President of the Council of the European Communities, the Minister of Foreign Affairs of the Republic of Slovenia asked the Member States of the Community to recognize the Republic.

The Arbitration Commission proceeded to consider this application in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern

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Europe and in the Soviet Union adopted by the Council on 16 December 1991 and the rules of procedure adopted by the Arbitration Commission on 22 December.

For the purposes of its deliberations the Commission took note of the following materials supplied by the Republic of Slovenia:

1. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;
2. Declaration of Slovenia's independence by the Assembly of the Republic of Slovenia on 25 June 1991;
3. Constitutional Charter adopted by the Assembly on 25 June 1991;
4. Constitutional Act to give effect to the Constitution, undated;
5. Declaration by the Assembly dated 20 November;
6. Text of the Constitution of 23 December 1991;
7. Brief note on the electoral system;
8. Brief note on the protection of minorities;
9. Documents concerning the plebiscite held on 23 December 1990;
10. Foreign Affairs Act of 5 June 1991.

Having regard to the information before it, and having heard the Rapporteur, the Arbitration Commission delivers the following opinion:

1. As stated above, on 19 December 1991 the Minister of Foreign Affairs of the Republic of Slovenia wrote to ask that the Community and its Member States recognize the Republic. This confirmed the application to the same effect made by the Republic of Slovenia on 26 June 1991.

The background to the application for recognition may be summarized as follows:

A plebiscite on the possibility of the Republic of Slovenia declaring its independence was held on 23 December 1990. An absolute majority of those voting replied in the affirmative to the question 'Should Slovenia become a sovereign and independent State?' According to figures provided by the Republic, 88.5% voted for independence and 4% against.

Following the plebiscite, after various proposals and attempts to agree on changes in the Socialist Federal Republic of Yugoslavia (SFRY) had come to nothing, the Assembly of the Republic of Slovenia adopted a Declaration of Independence on 23 June 1991, based on 'a unanimous proposal by all parties, groups or delegates represented in Parliament'.

According to further information concerning the electoral system and constitutional structure in the Republic of Slovenia, supplied on 8 January 1992 at the request of the Commission, the present Assembly was the outcome of elections held in April 1990, after which an Executive Council supported by six parties controlling a majority of the Assembly was formed.

It should be noted that Article 81 of the new Constitution of 23 December 1991 provides for universal, equal and direct suffrage and the secret ballot. The Constitutional Act to give effect to the Constitution provides that the present Assembly will remain in place until the election of the new Parliament (State Assembly), which is likely to be held in April or June 1992.

The effective political control exercised by the Assembly derives from the Assembly's Declaration of 20 November: the Slovene Delegation to the Hague Conference is required to report to it on the progress of negotiations and the positions that have been or are to be taken.

The Declaration states that 'the main foreign policy objective of the Republic of Slovenia is multilateral international recognition ..., the strengthening of its international position ...,



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the speedier implementation of measures that will enable the Republic to become a full member of the United Nations and of other international and financial organizations...'

It was in line with this objective, then, that the Minister of Foreign Affairs made the application for recognition. The Republic of Slovenia stated in its answers to the Commission's questionnaire that the application had also been approved by the Executive Council, the Presidency and the Foreign Affairs Committee of the Assembly of the Republic.

2. In general, the application for recognition made by the Minister on 19 December implies, in the terms of the answer to the Commission's questionnaire, 'a formal expression of acceptance of the Declaration on Yugoslavia and the conditions on the recognition of new states in Eastern Europe and in the Soviet Union.'

As regards each of these conditions, the Commission finds as follows:

- (a) Respect for the provisions of the United Nations Charter, the Helsinki Final Act and the Charter of Paris is stated in the Declaration of Independence of 25 June 1991 and in the application for recognition made on 19 December. The Republic of Slovenia stresses that it intends to apply for admission to the United Nations and the CSCE.

Moreover, Article 8 of the Constitution of 23 December 1991 stipulates: 'Laws and other regulations must be in accordance with the generally valid principles of international law and with international contracts to which Slovenia is bound. Ratified and published contracts are used directly.'

As regards the requirement that Slovenia's legal system should respect human rights, observe the rule of law and guarantee a democratic regime, the Republic's answers to the Commission's questionnaire cite a number of constitutional provisions which establish to the Commission's satisfaction that these principles will be acted upon.

The Republic of Slovenia undertakes to accept international machinery for monitoring respect for human rights, including individual petitions to the European Commission of Human Rights.

- (b) Concerning guarantees for the rights of ethnic and national groups and minorities in accordance with commitments entered into in the CSCE framework:

In its application for recognition the Republic of Slovenia declares that its Constitution and its laws respect these rights. It mentions certain articles of the Constitution (Articles 61 to 63) providing for freedom to express ethnic or national identity, freedom in the use of languages and alphabets in administrative or legal proceedings, the prohibition of ethnic, social, religious or other forms of discrimination; it refers to a number of statutes giving effect to these freedoms, relating to the use of languages in education or legal proceedings.

Article 3 of the Basic Constitutional Charter of 25 June 1991 and Article 64 of the Constitution (together with Articles 5 and 81) guarantee a number of specific rights to the Italian and Hungarian minorities (the right to national emblems, national identity and education in the national language, the rights to a degree of political autonomy and to minimum representation in central or local authorities, a right of veto on rules concerning the status of these minorities, etc.).

- (c) The commitment of the Republic of Slovenia to respect the inviolability of territorial boundaries made in the Declaration of Independence is repeated in the application for recognition. The Republic's frontiers are delimited in Article 2 of the Basic Constitutional Charter of 25 June 1991 unchanged by reference to the existing frontiers.

The Republic of Slovenia also stresses that it has no territorial disputes with neighbouring states or the neighbouring Republic of Croatia.

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- (d) As regards accepting all relevant commitments concerning disarmament and nuclear non-proliferation and regional security and stability, the Republic of Slovenia underlines the fact that its desire to gain independence and sovereignty peaceably is expressed in the Declaration of Independence; and that since the Federal Army began to withdraw on 25 October Slovenia's armaments have been reduced to the minimum needed to defend its territory.

Both in its application for recognition and in answer to the Commission's questionnaire, the Republic of Slovenia accepts that it is a successor state in respect of international treaties to which Yugoslavia is party, including the 1968 Nuclear Non-proliferation Treaty; once recognized, the Republic also intends to bring forward proposals on regional security and stability.

- (e) As regards the settlement by agreement of issues relating to state succession and regional disputes (including recourse to arbitration), the Republic of Slovenia accepts this condition both in its application for recognition and in its answers to the Commission's questionnaire; it also points out that this has been its position since the Conference began; lastly, it accepts the principle of going to arbitration where the parties are agreed, and accepts that the arbitral award is binding.
3. Recalling the fact that the Declaration by the Assembly on 20 November 1991 already referred to its support for the basic idea underlying Lord Carrington's plan, the Republic of Slovenia declared in its application for recognition that it accepts the principles contained in the draft Convention produced by the Conference on 4 November 1991.

The Republic also makes the point that the Constitution of 23 December was framed in such a manner as to give effect to the draft Convention.

With more particular reference to Chapter II of the draft Convention, relating to human rights and the rights of national or ethnic groups, a brief analysis of the Constitution enables the following findings to be made:

- (a) The protection of human rights appears to be sufficiently guaranteed by Chapter II of the Constitution, entitled 'Human Rights and Fundamental Freedoms' (Articles 14 to 65). More particularly, the human rights referred to in Article 2(a)(1) of the draft Convention are guaranteed as follows:
- (i) Article 17 recognizes the right to life and prohibits the death penalty;
  - (ii) Articles 18, 21 and 34 guarantee the right to human dignity and prohibit torture and inhuman and degrading treatment or punishment;
  - (iii) Article 49 prohibits forced labour;
  - (iv) Articles 19 and 20 guarantee the rights to liberty and security of person;
  - (v) the right to protection of the law, a fair trial, the presumption of innocence and the rights of the defence are guaranteed in Articles 23, 24, 25 and 27 to 30;
  - (vi) respect for private life is guaranteed in Articles 37 and 38;
  - (vii) Articles 41 and 46 guarantee freedom of thought, conscience and religion, including the right to conscientious objection;
  - (viii) freedom of expression is guaranteed in Articles 39 and 45;
  - (ix) freedom of assembly is guaranteed in Article 42;
  - (x) the right to marry and found a family is recognized by Articles 53 to 59; and
  - (xi) discrimination in the exercise of these rights is prohibited by Article 14 (in general) and by Articles 22, 43 and 49 (in specific areas).

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- (b) As regards the rights of national or ethnic groups and of their members, the Commission notes that Article 14 is the basic provision on equality and non-discrimination, prohibiting discrimination on grounds of nationality, race, language, political or other convictions or 'other circumstances':
- (i) Article 16, which regulates in strict terms the circumstances in which rights and fundamental freedoms may be suspended, provides that suspension may not involve discrimination within the meaning of Article 14; and certain freedoms (e.g. the right to life) may not be suspended at all;
  - (ii) the principle of non-discrimination is applied to particular areas, notably liberty of person (Article 19), the right to vote (Article 49), the right to express the fact of one's nationality or belonging to a national community (Article 61);
  - (iii) the rights of children are protected by several provisions in Articles 53 to 58, more specifically Article 56;
  - (iv) the right to use one's own language is guaranteed in Articles 61 and 62; and
  - (v) as regards participation in public affairs, there is universal and equal suffrage (Article 43), participation may be direct or through representatives (Article 44) and freedom of access to any employment is guaranteed by Article 49.

As has already been observed, respect for the cultural, linguistic and educational identity of the Italian and Hungarian minorities and their right to use their own emblems are guaranteed by Article 64 of the Constitution. A number of statutes dating from 1977 and 1988 have been transmitted to the Commission. These establish, in 'mixed' areas:

- (i) the right to use the Italian or Hungarian language in the courts and the right to have the prosecution do likewise; and
- (ii) the protection of the Italian and Hungarian cultures and languages in public education at pre-school, primary and secondary levels.

Lastly, while the Republic of Slovenia, as we have seen, accepts the international machinery that has been set up to protect and monitor respect for human rights, the Constitution of 23 December also institutes a Constitutional Court with jurisdiction to enforce respect for human rights and fundamental freedoms both in the law and in individual actions.

4. The Arbitration Commission consequently takes the view that the Republic of Slovenia satisfies the tests in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia adopted by the Council of the European Communities on 16 December 1991.

Paris, 11 January 1992

### *Interlocutory Decision (Opinions No. 8, 9 and 10)*

On 18 May 1992 the Chairman of the Arbitration Commission received a letter from Lord Carrington, the Chairman of the Conference for Peace in Yugoslavia, putting the following three questions to the Commission for an Opinion:

- 1- 'In terms of international law, is the Federal Republic of Yugoslavia a new State calling for recognition by the Member States of the European Community in accordance with the joint statement on Yugoslavia and the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union adopted by the Council of the European Communities on 16 December 1991?'

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- 2- 'In its Opinion No. 1 of 29 November 1991 the Arbitration Commission was of the opinion "that the SFRY (was) in the process of dissolution".<sup>2</sup> Can this dissolution now be regarded as complete?'
- 3- 'If this is the case, on what basis and by what means should the problems of the succession of states arising between the different states emerging from the SFRY be settled?'

The text of the three questions was sent to the Presidents of the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and to the Presidency of the Federal Republic of Yugoslavia, all of whom were invited to send a statement setting out in legal terms the arguments which they wished to press in support of their countries' respective positions on each of the three questions.

In a joint letter dated 8 June 1992, Mr Momir Bulatovic, President of the Republic of Montenegro, and Mr Slobodan Milosevic, President of the Republic of Serbia, informed the Chairman of the Arbitration Commission on behalf of the Federal Republic of Yugoslavia that they challenged the Commission's competence to give an Opinion on the three questions submitted to it. They argued that:

1. these questions did not fall within the mandate given to the European Community under the terms of the Brioni agreement;
2. outstanding matters between the FRY and the other Yugoslav Republics should be resolved by means of an overall agreement between them;
3. those which could not be resolved by agreement should be submitted to the International Court of Justice.

In letters from the Republic of Croatia dated 18 June 1992 and from the Republics of Macedonia and Slovenia dated 19 June 1992, these Republics contested this line of argument. The Republics of Montenegro and Serbia informed the Chairman of the Conference and the Chairman of the Commission of Arbitration in letters dated 19 June that they maintained their positions, Serbia considering in addition that the Commission did not have the power to pronounce upon its own competence.

The Arbitration Commission considers that it falls to it to ascertain its competence independent of any dispute on this point. It therefore serves no purpose to give a verdict on the admissibility of preliminary objections raised in the case.

1. The question whether the Commission is the judge of its own competence is of a prior nature and must be examined first. Only if the Arbitration Commission reaches a conclusion in the affirmative will it fall to it to give a verdict on its competence in the case at hand. For the purposes of this examination, it is necessary to look into the legal nature of the Commission.

2. The Commission was established not by the Brioni agreement of 7 July 1991 but by the joint statement on Yugoslavia adopted at an extraordinary meeting of ministers in the context of European political cooperation on 27 August 1991, for the purpose of establishing an 'arbitration procedure', which was not defined but was to lead to 'decisions'. These arrangements were accepted by the six Yugoslav Republics at the opening of the Conference for Peace on 7 September 1991. Although the arrangements were summary, it is clear from the terminology used and even the composition of the Commission that the intention was to create a body capable of resolving on the basis of law the differences which were to be submitted to it by the parties, which precisely constitutes the definition of arbitration (see ICJ, Judgment of 12 November 1991, Arbitral award of 31 July 1989, 1991 reports, p. 70).

3. As the International Court of Justice pointed out, 'since the Alabama case, it has been generally recognized that, following the earlier precedents, and in the absence of any agreements

2 Unofficial translation.

## Recognition of New States

to the contrary, the international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction (...) This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an instrument which has been pre-established by an international instrument defining its jurisdiction and regulating its operation'. (Nottebohm (Preliminary Objection), 1953 reports, p. 119). It therefore falls to the Commission to pronounce upon its competence.

4. This being contested across the board, the Commission considers that it falls to it to give judgment in a single decision on these objections before examining, if necessary, each of the questions which have been submitted to it.

5. The Commission finds that the initial rules governing its functioning were supplemented and clarified by certain texts following its creation and by the practice followed by the Conference for Peace in Yugoslavia and by the responsible authorities in the various Yugoslav Republics.

So, for example, in a new joint statement dated 3 September 1991, the Community and its Member States decided that 'In the framework of the Conference, the Chairman will transmit to the Arbitration Commission the issues submitted for arbitration, and the results of the Commission's deliberations will be put back to the Conference through the Chairman. The rules of procedure for the arbitration will be established by the Arbitrators, after taking into account existing organizations in the field.' The six Republics also accepted these arrangements.

6. In November 1991, the Republic of Serbia took the initiative of submitting three questions to the Commission, of which two were transmitted by the Chairman of the Conference, who also asked a third question of his own. All the Republics took part in this procedure and none made the least mention of any incompetence on the Commission's part, demonstrating an identical interpretation of its mandate, and thereby recognizing its competence in consultative issues as well.

7. The Arbitration Commission also notes that it was established in the framework of the Conference for Peace as a body of this Conference. Replying to the questions put by the Chairman of the Conference constitutes Commission participation in the work of the Conference, of which it is a body, and it would require conclusive reasons to bring it to refuse such a request.

In the present case, the Commission sees no reason to refuse to perform its functions.

8. The Conference for Peace in Yugoslavia has a mission 'to re-establish peace for all in Yugoslavia and to achieve lasting solutions which respect all legitimate concerns and legitimate aspirations'. (Joint statement of 7 September 1991 at the opening ceremony of the Conference).

Consequently, in attempting to enlighten the Conference on the legal aspects of problems which it encounters in carrying out this mission, the Arbitration Commission remains fully within the role entrusted to it by the European Community and its Member States on the one hand and the six Republics on the other.

9. The legal nature of the questions put, far from constituting an obstacle to the Arbitration Commission's exercising its competence, is, on the contrary, a justification: as the arbitral body of the Conference, the Commission can give a judgment only in law, in the absence of any express authorization to the contrary from the parties, it being specified that in this case it is called upon to express opinions on the legal rules applying.

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10. In consequence, the Arbitration Commission has decided:

- that it falls to it to give a judgment on its competence when it is so seized;
- that in this case, given the nature of the functions which have been given to it, it is competent to reply in the form of Opinions to the three Questions submitted to it on 18 May 1992 by the Chairman of the Conference for Peace in Yugoslavia.

Paris, 4 July 1992

### *Opinion No. 8*

On 18 May 1992 the Chairman of the Arbitration Commission received a letter from Lord Carrington, Chairman of the Conference for Peace in Yugoslavia, putting three questions to the Commission, the text of which is reproduced in the interlocutory decision delivered this day by the Arbitration Commission.

In the opinion of the Commission, the answers to the first and third questions depend on the answer given to the second. The Commission will therefore start by giving its opinion on Question No. 2. Question Nos. 1 and 3 will be dealt with in Opinion Nos. 10 and 9 respectively.

Question No. 2 runs as follows:

#### Question No. 2

'In its Opinion No. 1 of 29 November 1991 the Arbitration Commission was of the opinion 'that the SFRY (was) in the process of dissolution'. Can this dissolution now be regarded as complete?'

The Commission has taken note of the memos, observations and papers sent by the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

In an interlocutory decision today, the Commission found that this matter was within its competence.

1. In its Opinion No. 1 of 29 November, the Arbitration Commission found that:

- a state's existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a state;
- the SFRY was at that time still a legal international entity but the desire for independence had been expressed through referendums in the Republics of Slovenia, Croatia and Macedonia, and through a resolution on sovereignty in Bosnia-Herzegovina;
- the composition and functioning of essential bodies of the Federation no longer satisfied the intrinsic requirements of a federal state regarding participation and representativeness;
- recourse to force in different parts of the Federation had demonstrated the Federation's impotence;
- the SFRY was in the process of dissolution but it was nevertheless up to the Republics which so wished to continue, if appropriate, a new association with democratic institutions of their choice;
- the existence or disappearance of a state is, in any case, a matter of fact.

2. The dissolution of a state means that it no longer has legal personality, something which has major repercussions in international law. It therefore calls for the greatest caution.

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The Commission finds that the existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised.

By the same token, while recognition of a state by other states has only declarative value, such recognition, along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law.

3. The Arbitration Commission notes that since adopting Opinion No. 1:

- the referendum proposed in Opinion No. 4 was held in Bosnia-Herzegovina on 29 February and 1 March: a large majority of the population voted in favour of the Republic's independence;
- Serbia and Montenegro, as Republics with equal standing in law, have constituted a new state, the 'Federal Republic of Yugoslavia', and on 27 April adopted a new constitution;
- most of the new states formed from the former Yugoslav Republics have recognized each other's independence, thus demonstrating that the authority of the federal state no longer held sway on the territory of the newly constituted states:
- the common federal bodies on which all the Yugoslav republics were represented no longer exist: no body of that type has functioned since;
- the former national territory and population of the SFRY are now entirely under the sovereign authority of the new states;
- Bosnia-Herzegovina, Croatia and Slovenia have been recognized by all the Member States of the European Community and by numerous other states, and were admitted to membership of the United Nations on 22 May 1992;
- UN Security Council Resolutions Nos. 752 and 757 (1992) contain a number of references to the 'former SFRY';
- what is more, Resolution No. 757 (1992) notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically (the membership) of the former Socialist Federal Republic of Yugoslavia (in the United Nations) has not been generally accepted';
- the declarations adopted by the Lisbon European Council on 27 June makes express reference to 'the former Yugoslavia'.

4. The Arbitration Commission is therefore of the opinion:

- that the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists.

Paris, 4 July 1992

### *Opinion No. 9*

On 18 May 1992 the Chairman of the Arbitration Commission received a letter from Lord Carrington, Chairman of the Conference for Peace in Yugoslavia, asking for the Commission's opinion on the following question:

If this is the case, (is the dissolution of the SFRY now complete?) on what basis and by what means should the problems of the succession of states arising between the different states emerging from the SFRY be settled?<sup>3</sup>

3 Unofficial translation.

## Recognition of New States

The Commission has taken note of memos, observations and papers sent by the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

In an interlocutory decision today, the Commission found that this matter was within its competence.

1. As the Arbitration Commission found in Opinion No. 8, the answer to this question very much depends on that to Question No. 2 from the Chairman of the Conference.

In Opinion No. 8, the Arbitration Commission concluded that the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) had been completed and that the state no longer existed.

New states have been created on the territory of the former SFRY and replaced it. All are successor states to the former SFRY.

2. As the Arbitration Commission pointed out in its first Opinion, the succession of states is governed by the principles of international law embodied in the Vienna Conventions of 23 August 1978 and 8 April 1983, which all Republics have agreed should be the foundation for discussions between them on the succession of states at the Conference for Peace in Yugoslavia.

The chief concern is that the solution adopted should lead to an equitable outcome, with the states concerned agreeing procedures subject to compliance with the imperatives of general international law and, more particularly, the fundamental rights of the individual and of peoples and minorities.

3. In the declaration on former Yugoslavia adopted in Lisbon on 27 June 1992, the European Council stated that:

the Community will not recognize the new federal entity comprising Serbia and Montenegro as the successor State of the former Yugoslavia until the moment that decision has been taken by the qualified international institutions. They have decided to demand the suspension of the delegations of Yugoslavia at the CSCE and other international fora and organizations.

The Council thereby demonstrated its conviction that the Federal Republic of Yugoslavia (Serbia and Montenegro) has no right to consider itself the SFRY's sole successor.

4. The Arbitration Commission is therefore of the opinion that:

- the successor states to the SFRY must together settle all aspects of the succession by agreement;
- in the resulting negotiations, the successor states must try to achieve an equitable solution by drawing on the principles embodied in the 1975 and 1983 Vienna Conventions and, where appropriate, general international law;
- furthermore, full account must be taken of the principle of equality of rights and duties between states in respect of international law;
- the SFRY's membership of international organizations must be terminated according to their statutes and that none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY;
- property of the SFRY located in third countries must be divided equitably between the successor states;
- the SFRY's assets and debts must likewise be shared equitably between the successor states;
- the states concerned must peacefully settle all disputes relating to succession to the SFRY which could not be resolved by agreement in line with the principle laid down in the United Nations Charter;



## Recognition of New States

- they must moreover seek a solution by means of inquiry, mediation, conciliation, arbitration or judicial settlement;
- since, however, no specific question has been put to it, the Commission cannot at this stage venture an opinion on the difficulties that could arise from the very real problems associated with the succession to the former Yugoslavia.

Paris, 4 July 1992

### *Opinion No. 10*

On 18 May 1992 the Chairman of the Arbitration Commission received a letter from Lord Carrington, Chairman of the Conference for Peace in Yugoslavia, asking for the Commission's opinion on the following question:

In terms of international law, is the Federal Republic of Yugoslavia a new State calling for recognition by the Member States of the European Community in accordance with the joint statement on Yugoslavia and the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union adopted by the Council of the European Communities on 16 December 1991?

The Commission has taken note of memos, observations and papers sent by the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

In an interlocutory decision today, the Commission found that this matter was within its competence.

1. As the Arbitration Commission found in Opinion No. 8, the answer to this question very much depends on that to Question No. 2 from the Chairman of the Conference.

In Opinion No. 8, the Arbitration Commission concluded that the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) was complete and that none of the resulting entities could claim to be the sole successor to the SFRY.

2. On 27 April this year Montenegro and Serbia decided to establish a new entity bearing the name 'Federal Republic of Yugoslavia' and adopted its constitution.

The Arbitration Commission feels that, within the frontiers constituted by the administrative boundaries of Montenegro and Serbia in the SFRY, the new entity meets the criteria of international public law for a state, which were listed in Opinion No. 1 of 29 November 1991. However, as Resolution 757 (1992) of the UN Security Council points out, 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically (the membership) of the former Socialist Federal Republic of Yugoslavia (in the United Nations) has not been generally accepted'. As the Arbitration Committee points out in its ninth Opinion, the FRY is actually a new state and could not be the sole successor to the SFRY.

3. This means that the FRY (Serbia and Montenegro) does not *ipso facto* enjoy the recognition enjoyed by the SFRY under completely different circumstances. It is therefore for other states, where appropriate, to recognize the new state.

4. As, however, the Arbitration Commission pointed out in Opinion No. 1, while recognition is not a prerequisite for the foundation of a state and is purely declaratory in its impact, it is nonetheless a discretionary act that other states may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law, and particularly those prohibiting the use of force in dealings with other states or guaranteeing the rights of ethnic, religious or linguistic minorities.

## Recognition of New States

Furthermore, the Community and its Member States, in their joint statement of 16 December 1991 on Yugoslavia and the Guidelines, adopted the same day, on the recognition of new states in Eastern Europe and in the Soviet Union, has set out the conditions for the recognition of the Yugoslav republics.

5. Consequently, the opinion of the Arbitration Commission is that:

- the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY;
- its recognition by the Member States of the European Community would be subject to its compliance with the conditions laid down by general international law for such an act and the joint statement and Guidelines of 16 December 1991.

Paris, 4 July 1992