C. Regional instruments in the context of the former Yugoslavia

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Agenda item 68

REVIEW OF THE IMPLEMENTATION OF THE DECLARATION ON THE STRENGTHENING OF INTERNATIONAL SECURITY

Letter dated 17 December 1991 from the Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General

I have the honour to transmit the text, in English and French, of a Declaration of the European Council on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", issued on 16 December 1991 (see annex).

I should be grateful if you would have the text of the present letter and its annex circulated as a document of the General Assembly under agenda item 68.

(Signed) Robert J. VAN SCHAIK
Ambassador
Permanent Representative

ANNEX

Declaration of the European Council on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, issued on 16 December 1991

In compliance with the European Council's request, Ministers have assessed developments in Eastern Europe and in 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.

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Recognition—States—Effects of recognition—Whether constitutive or declaratory — Conditions for recognition — Break up of existing State — Yugoslavia

States — Criteria for statehood — Territory and population subject to an organized political authority — Federal State — Whether requirement that federal organs represent components of federation and wield effective power — Yugoslavia — Whether Socialist Federal Republic of Yugoslavia ceased to fulfil these conditions by December 1991—Whether in process of dissolution

State succession — Principles — Vienna Convention on State Succession in Respect of Treaties, 1978 — Vienna Convention on State Succession in Respect of State Property, Archives and Debts, 1983 — Whether reflecting customary international law — Outcome of succession to be achieved by negotiation on equitable basis — Yugoslavia — Whether Socialist Federal Republic of Yugoslavia in process of dissolution by December 1991 — Declarations of independence by certain Yugoslav Republics — Whether constituting secession — Whether any Republics or group of Republics constitute continuation of Socialist Federal Republic of Yugoslavia

OPINION No. 1

Conference on Yugoslavia, Arbitration Commission. 29 *November* 1991

(Badinter, *Chairman*; Corasaniti, Herzog, Petry, and Tomas y Valiente, *Members*)

SUMMARY: *The facts*:—During the summer of 1991, hostilities broke out in the Socialist Federal Republic of Yugoslavia (the "SFRY") following the declaration of independence by some of the six Republics which constituted the SFRY.[1] In a Declaration issued on 27 August 1991, the European Community and its Member States, acting within the framework of European Political Co-operation, announced that they were convening a peace conference ("the Conference on Yugoslavia") which would bring together the Federal Presidency and Federal Government of Yugoslavia, the Presidents of the six Republics and representatives of the European Community and its Member States. The Declaration stated that an arbitration procedure would be established in the framework of the Conference and provided that:

> The relevant authorities will submit their differences to an Arbitration Commission of five members chosen from the Presidents of Constitutional Courts existing in Community countries. The composition of the Arbitration Commission will be:
> —two members appointed unanimously by the Federal Presidency;
> —three members appointed by the Community and its Member States.
> In the absence of agreement on the members to be appointed by the Federal Presidency, they will be designated by the three members appointed by the Community.
> This Arbitration Commission will give its decision within two months.[2]

A second Declaration, issued on 3 September 1991, stated 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.[3]

At the opening of the Conference on 7 September 1991 the representatives of the six Republics accepted these arrangements.[4]

On 20 November 1991 the Chairman of the Conference wrote to the Chairman of the Arbitration Commission, requesting the Commission to consider whether those Republics which had declared themselves independent (or which had indicated that they would do so) had seceded from the SFRY or whether the SFRY had disintegrated, so that all six Republics were to be considered equal successors to the SFRY, without any of them, or any group of them, being able to claim to be the continuation of the SFRY.

Held:—The SFRY was in the process of dissolution and it was incumbent on the six Republics to settle such problems of State succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities. It was up to those Republics which so wished to work together to form a new association endowed with the democratic institutions of their choice.

(1) The Commission's answer to the question put had to be based upon the principles of public international law which defined the conditions on which an entity constituted a State. The existence or disappearance of a State was a question of fact; the effects of recognition by other States were purely declaratory.

(2) A State was a community which consisted of a territory and a population subject to an organized political authority and was characterized

[1] The six Republics were Bosnia-Hercegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

[1] Declaration on Yugoslavia issued by European Political Co-operation Procedure Extraordinary Ministerial Meeting in Brussels on 27 August 1991. The full text will be reproduced in D. Bethlehem and M. Weller, *The Yugoslav Crisis*, (to be published by Grotius Publications in the Cambridge International Documents Series).

[3] Declaration on Yugoslavia issued by European Political Co-operation Procedure Extraordinary Ministerial Meeting in The Hague on 3 September 1991. The full text will be published in D. Bethlehem and M. Weller, op. cit. n. 2 above.

[4] For discussion of the status and competence of the Arbitration Commission, see *Interlocutory Decision (Opinions 8, 9 and 10)* at p. 194 *et seq.*

by sovereignty. The internal political organization and constitutional provisions adopted were mere facts but had to be taken into account in determining the Government's sway over the territory and population.

(3) In a federal State, the existence of the State implied that the federal organs represented the components of the federation and wielded effective power. In the case of the SFRY, the essential federal organs no longer met the criteria of participation and representativeness inherent in a federal State.

(4) State succession meant the replacement of one State by another in the responsibility for the international relations of the territory concerned. It was governed by the principles of international law from which the Vienna Convention on State Succession in Respect of Treaties, 1978, and the Vienna Convention on State Succession in Respect of State Property, Archives and Debts, 1983, drew their inspiration. The outcome of succession should be achieved by negotiation between the States concerned on an equitable basis. The peremptory norms of international law, in particular those concerning respect for human rights and the rights of peoples and minorities, were binding on all the parties to the succession.

The following is the text of the opinion of the Arbitration Commission:

The Chairman of the Arbitration Commission received the following letter from Lord Carrington, Chairman of the Conference on Yugoslavia, on 20 November 1991:

We find ourselves with a major legal question.

Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.

Other Republics on the contrary consider that there is no question of seccession, but the question is one of a disintegration or breaking-up of the SFRY as the result of the concurring will of a number of Republics. They consider that the six Republics are to be considered equal successors to the SFRY, without any of them or group of them being able to claim to be the continuation thereof.

I should like the Arbitration Committee to consider the matter in order to formulate any opinion or recommendation which it might deem useful.

The Arbitration Commission has been apprised of the memoranda and documents communicated respectively by the Republics of Bosnia and Hercegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia, and by the President of the collegiate Presidency of the SFRY.

1. The Commission considers:

(a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a State; that in this respect, the existence or

disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory;

(b) that the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty;

(c) that, for the purpose of applying these criteria, the form of internal political organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government's sway over the population and the territory;

(d) that in the case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the federal organs represent the components of the Federation and wield effective power;

(e) that, in compliance with the accepted definition in international law, the expression "State succession", means the replacement of one State by another in the responsibility for the international relations of territory. This occurs whenever there is a change in the territory of the State. The phenomenon of State succession is governed by the principles of international law, from which the Vienna Conventions of 23 August 1978 and 8 April 1983 have drawn inspiration. In compliance with these principles, the outcome of succession should be equitable, the States concerned being free to settle terms and conditions by agreement. Moreover, the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.

2. The Arbitration Commission notes that:

(a) —although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence;

—in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

—in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

—in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav States;

—in Bosnia and Hercegovina, by a sovereignty resolution adopted by Parliament on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Hercegovina.

(b) The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representativeness inherent in a federal State;

(c) The recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people and wrought considerable destruction within a few months. The authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization.

3. Consequently, the Arbitration Commission is of the opinion:

—that the Socialist Federal Republic of Yugoslavia is in the process of dissolution;

—that it is incumbent upon the Republics to settle such problems of State succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities;

—that it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice.

[Report: Not yet published. This translation from the original French text was supplied by the Secretariat of the Arbitration Commission.]

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Human rights — Group rights — Ethnic minorities — Self-determination — Whether ethnic minority within territory possesses right of self-determination — Nature of minority rights — Right to recognition of identity — Whether including right of members of minority to the nationality of their choice — Yugoslavia — Serbian population of Croatia and Bosnia-Hercegovina

Territory — Self-determination — Limits of right of self-determination — Whether extending to ethnic groups within territory — Whether capable of involving changes to existing frontiers at time of independence — Principle of *uti possidetis* — Yugoslavia

OPINION No. 2

Conference on Yugoslavia, Arbitration Commission.[1] 11 *January* 1992

(Badinter, *Chairman*; Corasaniti, Herzog, Petry and Tomas y Valiente, *Members*)

SUMMARY: *The facts*:—On 20 November 1991 the Chairman of the Conference on Yugoslavia requested the Arbitration Commission to give an opinion on a question put by the Republic of Serbia:

> Does the Serbian population in Croatia and Bosnia-Hercegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?

Held:—The Serbian population in Bosnia-Hercegovina and Croatia was entitled to all the rights accorded to minorities and ethnic groups under international law and under the provisions of the draft Convention of the Conference on Yugoslavia of 4 November 1991, to which the Republics of Bosnia-Hercegovina and Croatia had undertaken to give effect. The Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including where appropriate, the right to choose their nationality.

(1) *Not all the implications of the right of self-determination* were clear under contemporary international law. Nevertheless, the right of self-determination must not involve changes to existing frontiers at the time of independence, except by agreement between the States concerned—the principle *uti possidetis juris*.

(2) Ethnic, religious and language communities within a State had the right to recognition of their identity under international law. One possible consequence of this principle might be for the members of the Serbian

[1] For details of the establishment of the Commission, see the summary to *Opinion No. 1*, p. 162, above.

population in the two Republics to be recognized under agreements between all the Republics concerned, as having the nationality of their choice.

The following is the text of the opinion of the Arbitration Commission:

On 20 November 1991 the Chairman of the Arbitration Commission received a letter from Lord Carrington, Chairman of the Conference on Yugoslavia, requesting the Commission's opinion on the following question put by the Republic of Serbia:

Does the Serbian population in Croatia and Bosnia-Hercegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?

The Commission took note of the *aide-mémoires*, observations and other materials submitted by the Republics of Bosnia-Hercegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia, by the Presidency of the Socialist Federal Republic of Yugoslavia ("SFRY") and by the "Assembly of the Serbian People of Bosnia-Hercegovina".

1. The Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination.

However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.

2. Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.

As the Commission emphasized in its *Opinion No. 1* of 29 November 1991,[2] published on 7 December, the—now peremptory—norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics *vis-à-vis* the minorities on their territory.

The Serbian population in Bosnia-Hercegovina and Croatia must therefore be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the Draft Convention of 4 November 1991, which has been accepted by these Republics.

3. Article 1 of the two 1966 international covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every

[2 See p. 162.]

individual may choose to belong to whatever ethnic, religious or language community he or she wishes.

In the Commission's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Hercegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned.

4. The Arbitration Commission is therefore of the opinion:

(i) that the Serbian population in Bosnia-Hercegovina and Croatia is entitled to all the rights accorded to minorities and ethnic groups under international law and under the provisions of the draft Convention of the Conference on Yugoslavia of 4 November 1991, to which the Republics of Bosnia-Hercegovina and Croatia have undertaken to give effect; and

(ii) that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality.

[Report: Not yet published. This translation from the original French text was prepared by the Commission of the European Communities.]

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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.

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.

[Report: Not yet published. This translation from the original French text was prepared by the Commission of the European Communities.]

Recognition — States — Effects of recognition — Whether constitutive or declaratory—Recognition as evidence of statehood — Effects in giving rise to rights and duties in international law

States — Dissolution of State — Socialist Federal Republic of Yugoslavia — Whether dissolved — Effects of collapse of federal authority — Declaration of independence by former Yugoslav Republics — New States achieving recognition — Admission of new States to membership of international organizations — Effects of dissolution of States — Relationship between the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia

OPINION No. 8

Conference on Yugoslavia, Arbitration Commission.[1] *4 July* 1992

(Badinter, *Chairman*; Corasaniti, Herzog, Petry and Tomas y Valiente, *Members*)

SUMMARY: *The facts*:—In its *Opinion No. 1*[2] on 29 November 1991 the Arbitration Commission stated that the Socialist Federal Republic of Yugoslavia ("the SFRY") was in the process of dissolution. On 18 May 1992

[1] For details of the establishment of the Commission, see the summary to *Opinion No. 1*, p. 162 above.

[2] See p. 162.

the Chairman of the Conference on Yugoslavia asked the Commission whether this process of dissolution could now be regarded as complete.[3]

Held:—The process of dissolution was now complete and the SFRY no longer existed.

(1) The dissolution of a State meant that it no longer had legal personality, something which had serious consequences in international law and which was not lightly to be presumed.

(2) The existence of a federal State was seriously compromised when a majority of the entities which comprised that State constituted themselves as independent States with the result that federal authority could no longer be exercised.

(3) While recognition of a State was only declaratory of the fact of statehood, such recognition and the admission of an entity to membership of international organizations was evidence that other States were convinced that the political entity so recognized was a reality and conferred upon it rights and obligations under international law.

(4) Since *Opinion No. 1* had been delivered, Bosnia-Hercegovina, Croatia, and Slovenia had been recognized as independent States by the Member States of the European Community and had been admitted to the United Nations, the SFRY's federal institutions had ceased to function, Serbia and Montenegro had constituted a new State, the Federal Republic of Yugoslavia ("the FRY") and the territory of the SFRY had come entirely under the control of the various new States. In addition, United Nations Security Council resolutions had spoken of the "former SFRY" and had noted that the claims of the FRY to continue the SFRY's membership of the United Nations had not been generally accepted. In these circumstances, the SFRY could no longer be regarded as being in existence.

The following is the text of the opinion of the Arbitration Commission:

On 18 May 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. Questions No. 1 and 3 will be dealt with in Opinions No. 10 and 9 respectively.

Question No. 2 runs as follows:

Question No. 2

In its *Opinion No. 1* of 29 November 1991[4] the Arbitration Commission was

[3] This question was one of three referred to the Commissions. The text of all three questions appears at p. 196.

[4] See p. 162.]

of the opinion "that the SFRY (was) in the process of dissolution". Can this dissolution now be regarded as complete?[5]

The Commission has taken note of the memos, observations and papers sent by the Republics of Bosnia-Hercegovina, 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, Croatai and Macedonia, and through a resolution on sovereignty in Bosnia-Hercegovina;

—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 constitute, 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.

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*:

[5] Unofficial translation.]

—the referendum proposed in *Opinion No. 4*[6] was held in Bosnia-Hercegovina 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-Hercegovina, 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 declaration 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.

[Report: Not yet published. This translation from the original French text has been prepared by the Commission of the European Communities.]

[6 See p. 173.]