

Symposium: Recent Developments in the Practice of State Recognition

Recognition of States: The Collapse of Yugoslavia and the Soviet Union

Roland Rich *

'According to what is probably still the predominant view in the literature of international law, recognition of states is not a matter governed by law but a question of policy.'¹ Thus begins Lauterpacht's 1947 book on recognition of states and in 1992 the proposition is more accurate than ever before.

In coming to a full circle, recent recognition practice has defeated arguments that there is a legal duty to extend recognition to an entity bearing the marks of statehood. Recognition of states is today more of an optional and discretionary political act than was thought to be the case only a year ago. Several decades of relatively consistent state practice in the decolonisation period has thus been overtaken by the past year's events in Eastern Europe.

Since the outbreak of the war in Croatia and the defeat of the coup in Moscow in August 1991, the international community has seen a plethora of practice in terms of recognition of states. Fifteen states emerged from the implosion of the Union of Soviet Socialist Republics (USSR) and five states are likely finally to emerge from the ruins of the Socialist Federal Republic of Yugoslavia (SFRY).

* BA, LL.B (Sydney Univ.), Master of International Law (Australian National Univ.). At the time of writing Mr Rich was Director of the Central Europe Section of the Australian Department of Foreign Affairs and Trade. He is currently Legal Adviser A in the Legal Office of that Department. The views expressed in this paper are the author's and do not necessarily reflect the Department's views.

¹ H. Lauterpacht, *Recognition in International Law* (1947) 1.

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This paper will examine recent practice in relation to the independence of the Baltic states, the recognition of former republics of the SFRY and the USSR and the special cases of Russia and the Federal Republic of Yugoslavia (FRY). It will then examine the effect of recent practice on issues such as the international community's attitude to secession, inviolability of borders, successor and continuing states and conditionality in relation to recognition.

In considering the issue of recent recognition practice it is worth bearing in mind that there is a public perception that the rules of recognition are becoming increasingly uncertain. This unease is exemplified in an editorial comment in the Washington Post of 16 May 1992 stating that 'no element of international policy has gone more askew in the break-up of Yugoslavia than recognition – whether, when, how, under what conditions – of the emerging parts.'

I. Recent Practice

A. The Baltic States

Latvia, Lithuania and Estonia were recognized as independent states in the early 1920's. The United States, for example, announced its *de jure* recognition on 28 July 1922 after noting 'the successful maintenance within their borders of political and economic stability' by the governments of the three Baltic states.² The 1920 Treaty between Russia and Latvia expressly states that the former 'recognizes without reservation the independence, autonomy and sovereignty of Latvia and forever renounces all sovereignty rights over the Latvian people and territory.'³ The Molotov-Ribbentrop Pact signed in August 1939 planned the annexation of the three Baltic republics. In June 1940 the Soviet invasion took place. Puppet governments 'requested' that the three republics be admitted as Soviet Socialist Republics and this step occurred in August 1940.⁴ The subsequent Nazi invasion and the Soviet return did not alter the legal status from Moscow's perspective. In the *glasnost* period, the Baltic states, like other Soviet republics, asserted their 'sovereignty' but their international status did not change as a result.

At the time of the attempted *coup d'état* in Moscow on 19 August 1991, the international status of the Baltic states was as follows. While most Western countries continued to extend *de jure* recognition to the three states, they also accepted *de facto* control over these territories by the USSR and, accordingly, most Western countries did not have diplomatic relations with the Baltic states. On 21 August, the date of the

2 United States Foreign Relations Report 1922 (II) 873.

3 Benton, 'The Plight of the Baltic States', *Conflict Studies* No. 180 (1985) 2.

4 *Ibid.*, at 3.

collapse of the coup in Moscow, Latvia reasserted its Declaration of Independence.⁵ Within 10 days, the independence of the three Baltic states, both in law and fact had been widely recognized internationally.

The noteworthy aspect of the decisions by the European Community Member States, the United States and others was that the term 'recognition' is not used in the various announcements. The EC statement of 27 August 1991 warmly welcomed 'the restoration of the sovereignty and independence of the Baltic states which they lost in 1940' and confirmed the decision of the EC members 'to establish diplomatic relations ... without delay'.⁶ President Bush's announcement of 2 September similarly spoke in terms of the establishment of diplomatic relations and noted that this marked 'the culmination of the United States' 52 year refusal to accept the forcible incorporation of the independent Baltic States by the USSR.'⁷

The formulations used in respect of the Baltic states reflect both legal niceties and political realities. In August 1991 it was important to be able to distinguish the Baltic states from other republics of both the USSR and the SFRY which were also claiming independence. In Western capitals around the world there was concern not to give a green light to the forces calling for the dismemberment of the USSR because of fears over instability in a nuclear armed superpower. At the time, President Gorbachev was still trying to maintain some form of centre. It was thus in the USSR's interest also to limit the precedential value of the independence of the Baltic states and although he had earlier described Western recognition of Baltic independence as 'hasty', President Gorbachev stated in an interview with CNN on 1 September that the independence of the Baltic states would be consistent with his approach to Soviet reform.⁸ Soviet recognition of the independence of the Baltic states followed on 4 September.⁹

B. Croatia and Slovenia Unrecognized

The Republic of Croatia and the Republic of Slovenia were two of the six republics of the SFRY. In reviewing recent events in Yugoslavia, it is worth recalling some salient provisions of the 1974 SFRY Constitution. The first Basic Principle listed in the Constitution begins with the formulation 'the nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right of secession...' But the application of this principle was limited by the fact that no mechanism existed in the Constitution to allow for secession.

It was further limited by two important distinctions. A distinction was made between the 'nations' of Yugoslavia and the 'republics' of Yugoslavia, the former

5 United Kingdom Foreign and Commonwealth Office, 'Demise of the Soviet Union', *Background Brief* (1992).

6 Declaration of European Community Foreign Ministers, Brussels, 27 August 1991.

7 State Department Press Statement, Washington, 2 September 1992.

8 Report on the USSR, Radio Free Europe/ Radio Liberty Research Report (RFE/RL), Vol. 3, No. 37, 13 September 1991, 23.

9 Ibid.

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being peoples like the Croats, Macedonians, Serbs and Slovenes without any necessary geographic connection and the latter being the six geographically defined federal units without any necessary ethnic connection. A second distinction was made between 'nations' and 'nationalities' with the latter being defined as 'members of nations whose native countries border on Yugoslavia...'¹⁰ Accordingly, the Albanians of Kosovo and the Hungarians of Vojvodina were regarded as 'nationalities' and did not have a right of self-determination or secession under the Constitution.

The situation in Yugoslavia as the democratisation process swept through Eastern Europe in the late 1980's could therefore be described as one where the rhetoric of self-determination could not easily be translated into practice. This dichotomy led to the use of force and created the dilemma in the international community as to how to react to the independence claims by the various Yugoslav republics.

On 25 June 1991, both Croatia and Slovenia declared their independence. The Constitutional Resolution Regarding the Sovereignty and Independence of the Republic of Croatia adopted by the Croatian Parliament based its actions 'upon the will of the nation demonstrated at the referendum of 19 May 1991,' and argued that 'the SFRY no longer is acting as the constitutional-legal organized state.'¹¹ Article I of the Resolution proclaims Croatia as a sovereign and independent state. Interestingly, however, Article II states that Croatia thus 'begins the process of disassociation from the other republics of the SFRY' and 'begins the process of gaining international recognition.'

The Slovenian Declaration of Independence is also based on the 'absolute majority vote in the plebiscite held on 23 December, 1990' and it rehearses the initiatives Slovenia took to achieve a peaceful dissolution of the SFRY before unilaterally proclaiming Slovenia's sovereignty and independence.¹² The Slovenian Declaration is more forthright in that it 'expects legal recognition from all countries which respect the democratic principles and the right of all nations to self-determination.'¹³

Following those Declarations, the Yugoslav National Army resisted attempts by the Slovenian and Croatian authorities to assert their independence and considerable violence occurred. The European Community assumed the principal mediation role in the conflict and on 7 July 1991, the Yugoslav parties meeting in Brioni agreed, *inter alia*, to a three month moratorium on the implementation of the Declarations of Independence.¹⁴

10 Glossary of Terms, 1974 Constitution of the Socialist Federal Republic of Yugoslavia.

11 'Statements on Croatian Democracy and Independence', Croatian Democratic Union, 1991, Preamble.

12 *Focus*, Special Issue, Belgrade, 14 January 1992, 92.

13 *Ibid.*, at 95.

14 *Ibid.*, at 178.

The moratorium allowed third states to interpret the previous Declarations of Independence as inchoate and no recognition action was taken by the EC countries or others.¹⁵ Apart from the complications of the Yugoslav situation, countries were loathe to set a precedent that would have a flow-on effect for the Soviet scene. Senator Evans, Australia's Minister for Foreign Affairs and Trade, was reflecting a widely held view when he answered a question in Parliament on 20 August 1991 concerning recognition issues. Senator Evans identified the four formal criteria for the recognition of statehood as 'permanent population, defined territory, government and a capacity to enter into relations with other states' and then added 'we look at whether the government is in effective control of the territory.'¹⁶ The problem of setting a precedent was alluded to when Senator Evans said 'it is a matter of adopting some consistency in the way in which one deals with these situations; otherwise one gets caught up in the most terrible conundrums in dealing with secessionist movements or splits of one kind or another in states all around the world.'¹⁷

After further widespread violence in Croatia, the European Community announced on 27 August that it was establishing both a Peace Conference on Yugoslavia and an Arbitration Commission comprising five Presidents from among the various Constitutional Courts of the EC countries.¹⁸ The Arbitration Commission became known as the Badinter Commission after the name of the French lawyer appointed as its president.

On 8 October, the Croatian Assembly noted the expiration of the three month moratorium accepted at Brioni and decided to 'sever the state-legal ties ... which constituted the hitherto SFRY,' and to 'recognize the independence and sovereignty of the other republics of the former SFRY on the basis of the principle of mutuality.'¹⁹ In the Declaration 'all countries, particularly the Member States of the EC and the UN are called upon to establish diplomatic relations with the Republic of Croatia.'²⁰ But the concern not to set a precedent in the USSR remained until Ukraine decided it did not need a precedent to assert its own independence.

C. Ukraine's Independence

The fundamental marriage at the heart of the USSR was the centuries-old partnership of the three slavnic nations of Russia, Ukraine and Byelorussia. Unlike the case of the splintering off of the Baltic states from the USSR, any divorce between these partners

15 There were, however, reports that Lithuania, itself unrecognized at this time, had extended recognition to Slovenia.

16 Australian Hansard, Senate, 20 August 1991.

17 Ibid.

18 Focus, *supra* note 12, at 129.

19 Ibid., at 178.

20 Ibid.

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would mean the end of the USSR. It was, after all, the three slavic republics together with the Transcaucasus Republic that formally established the USSR in 1922.

Like other Soviet republics, Ukraine had declared its sovereignty on 16 July 1990.²¹ Many observers saw this declaration, and that of Byelorussia of 27 July 1990,²² in terms of jockeying for economic advantage in the process of the devolution of power from the centre. On 24 August 1991, after the collapse of the Moscow coup, Ukraine went one step further by declaring its independence and Byelorussia followed suit the next day.²³ Ukraine's Declaration of Independence was, however, made subject to the results of a referendum to be held on 1 December 1991 and countries accordingly had good reason to hold off consideration of recognition until that time.

To the surprise of most observers who had underestimated the support for independence in Ukraine, participation in the referendum was over 80% and the vote in favour exceeded 90%.²⁴ The referendum result effectively completed the Declaration of Independence and other countries had no further excuse to hold off consideration of recognition. But there was one strong political factor militating against early recognition. President Gorbachev was working towards a Union Treaty which would preserve a Soviet centre and countries were loathe to undercut the stability that such a move seemed to represent, particularly in terms of continuing Soviet acceptance of its obligations under the various disarmament treaties.

Canada, home to a large community tracing its origins to Ukraine, decided not to wait for Gorbachev's Union Treaty. On 2 December 1991, Prime Minister Mulroney announced that Canada had decided to recognize Ukraine as an independent state.²⁵ The Canadian statement referred to the overwhelming support for independence in the referendum and undertook to enter into negotiations on diplomatic relations noting that 'as part of these negotiations, Canada will wish to be satisfied with respect to Ukraine's stated intentions that it will ensure that nuclear weapons remain under secure control until they are disposed of, comply with existing arms control, disarmament and other international agreements, and adhere to the principles of the Helsinki Final Act, the Charter of Paris and other CSCE documents, with particular attention to full respect for human rights and protection of minorities.'²⁶

Poland and Hungary also extended recognition on 2 December.²⁷ But perhaps the most telling step came later the same day when *Tass* reported a statement by President Yeltsin of Russia saying that 'the Russian leadership declares its recognition of the independence of Ukraine in accordance with the democratic expression of the will of

21 'Demise of the Soviet Union: Chronology, 1991,' *supra* note 5, at 12.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*, at 18.

25 Prime Minister's Press Release, Ottawa, 2 December 1991.

26 *Ibid.*

27 *International Herald Tribune*, 3 December 1991.

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its people. The Russian leadership is convinced of the stability of and need for the earliest establishment of new interstate relations between Russia and Ukraine, with the understanding that traditions of friendship, good neighbourliness and mutual respect will be preserved, and that obligations, including the non-proliferation and limitation of nuclear weapons, the upholding of human rights and other generally acknowledged norms of international law will be strictly observed.'²⁸

In retrospect, it is curious that Russian recognition did not lead to a flood of other nations extending recognition but the political context still militated against this. During this period, President Gorbachev was still attempting to maintain a role for the 'centre' and to establish a confederation of states bound together by a Union Treaty. Russian recognition of Ukraine was seen at the time as an attempt by Russian President Yeltsin to undermine President Gorbachev's efforts. Most countries preferred not to involve themselves in these manoeuvres and thus kept their silence. President Gorbachev's resignation would be the signal allowing the international community to recognize the newly independent states of the former USSR.

D. The European Community sets New Rules

The political need to take action in both the Yugoslav and the Soviet Union situations was mounting. It was becoming clear that the application of the traditional criteria for statehood would not provide the European Community, the principal mediator in the Balkan crisis, with a sufficient choice of diplomatic tools with which to work. Recognition as a simple declaration of an ascertainable fact did not provide sufficient means to allow the EC to influence the situation.

On 16 December 1991, the EC Foreign Ministers meeting in Brussels issued a 'Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union'²⁹ (Annex 1). Accompanying this Declaration was a 'Declaration on Yugoslavia'³⁰ (Annex 2). These two documents were significantly to influence international reactions on the issue of recognition of the newly emerging states of Eastern Europe and, arguably, transform recognition law.

At the time the Declarations were issued, the EC countries had welcomed the return of the three Baltic states into the community of nations but had not extended recognition to any 'new States' in Eastern Europe. Yet the use of this term in the title of the Guidelines document clearly foreshadowed that they would. The Declaration begins by referring to the Helsinki Final Act and the Charter of Paris, 'in particular the principle of self-determination'. It then affirms the readiness of the EC countries to

28 *Tass*, 2 December.

29 *Focus*, *supra* note 12, at 149.

30 *Ibid.*, at 151.

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recognize new states 'subject to the normal standards of international practice and the political realities in each case.'

The rider concerning political realities is a stark reminder of Lauterpacht's comment that recognition of states is a matter of policy but rarely has it been expressed in such a direct way. The Guidelines describe the candidates for recognition as those new states which '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'. The Guidelines then list the following requirements:

- 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 Guidelines conclude with the warning that the EC countries 'will not recognize entities which are the result of aggression' and, cryptically, that 'they would take account of the effects of recognition on neighbouring states.'

It could be argued that the Guidelines make the process of recognition more difficult because they purport to retain the 'normal standards of international practice' while adding a series of new requirements. In fact, however, the new requirements have tended to supplant the previous practice which was largely based on meeting the traditional criteria for statehood.

Having set a new regime for recognition of states in 'Eastern Europe and the Soviet Union', the EC then added further tests with regard to the situation in Yugoslavia. The Declaration on Yugoslavia introduced a process for applying the Guidelines which required any Republic of the Socialist Federal Republic of Yugoslavia (SFRY) to apply for recognition by 23 December 1991 stating 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 under consideration by the Conference on Yugoslavia – especially those in Chapter II on human rights and rights of national or ethnic groups
- 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 written applications would then be submitted to the Arbitration Commission established in parallel with the Conference on Yugoslavia for advice, and a decision would be taken and implemented by 15 January 1992. The Declaration included an interesting final paragraph which will be considered in relation to the SFRY's Republic of Macedonia.

This method of requiring an application for recognition which is examined by an arbitrator and then decided upon according to a set timetable is virtually unprecedented in recognition practice. The invitation by the EC was thus extended to all six Republics of the SFRY but there was to be no uniformity in the responses or the results.

E. The Demise of the Soviet Union

The date of the demise of the USSR is the subject of debate. Effectively, power passed from Gorbachev to Yeltsin after the failed August coup. In formal terms, however, according to the three Slavic republics of the USSR, it came on 8 December 1991. That was the day of the meeting between the leaders of Russia, Ukraine and the newly renamed Belarus in the city of Brest. The three republics stated that the USSR was 'ceasing its existence as a subject of international law and a geopolitical reality.'³¹ They then agreed to establish a Commonwealth of independent states (CIS) which would be open to all former republics of the USSR.

Significantly, in view of the conditions for recognition the European Community would place a few days later, the three Slavic republics agreed at Brest to guarantee 'compliance with international obligations ensuing from the treaties and agreements signed by the USSR' and pledged 'to preserve joint command over the common military-strategic space and single nuclear arms-controlling body.'³²

Gorbachev understood that the process was spinning out of his control when on 12 December he said he feared 'the destruction of the State is taking place.'³³ On 12-13 December the leaders of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan met at Ashkhabad and confirmed their willingness to participate in the CIS as 'equal co-founders.'³⁴

The three Slavic republics together with the five central Asian republics plus the Republics of Armenia, Azerbaijan and the newly renamed Moldova met at Alma-Ata on 21 December to proclaim formally the establishment of the CIS and the demise of the USSR. Of the fifteen former Soviet republics, Georgia and the three Baltic republics did not participate. The eleven participants signed five documents:

- the Alma-Ata Declaration setting out CIS principles

31 'Demise of the Soviet Union: Chronology, 1991', *supra* note 5, at 18. See also Blum, 'Russia Takes Over the Soviet Union's Seat at the United Nations', 3 *EJIL* (1992) 354.

32 *Ibid.*

33 *Ibid.*, at 19.

34 *Ibid.*

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- a Protocol on membership of the CIS
- a Protocol establishing two co-ordinating councils (comprising Heads of State and Heads of Government)
- a Protocol stating unanimous agreement that Russia should take over the USSR's permanent membership of the UN Security Council
- an Agreement naming Marshal Shaposhnikov as commander of the armed forces 'pending a solution to the question of reforming the armed forces' proposals for which were invited by 30 December 1991.³⁵

In addition, the four nuclear weapon holding states of Russia, Ukraine, Belarus and Kazakhstan signed an Agreement on nuclear weapons which:

- confirmed that the nuclear weapons are part of the collective defence of all CIS members
- confirmed the obligation not to be the first to use nuclear weapons
- undertook to respect non-proliferation principles
- agreed that all tactical nuclear weapons would be withdrawn from Belarus, Ukraine and Kazakhstan and dismantled
- Belarus and Ukraine, but not Kazakhstan, agreed to join the Nuclear Non-Proliferation Treaty as non-nuclear weapon states and also delegated the right to take decisions on the use of nuclear weapons to the Russian President.³⁶

Most observers would agree that, from the legal standpoint, the better view is that the USSR formally ceased to exist on 21 December 1991 when the 11 CIS participants adopted the Alma-Ata Declaration which noted that 'with the formation of the Commonwealth of Independent States the Union of the Soviet Socialist Republics ceases to exist.'³⁷ Unlike the 8 December agreement which was adopted by only three republics, the 21 December document was adopted by virtually all the entities which had from an early date become a part of the USSR. Georgia's absence from Alma-Ata because of internal turmoil cannot be seen as detracting from the authoritativeness of the Alma-Ata Declaration.

Having adopted its 16 December Guidelines, the countries of the European Community were in a position to take speedy action. On 23 December the EC issued a statement 'on the Future Status of Russia and the other former Soviet Republics' which noted that the 'international rights and obligations of the former USSR, including those under the United Nations Charter, will continue to be exercised by Russia. They welcome the Russian Government's acceptance of these commitments and responsibilities and in this capacity will continue their dealings with Russia, taking account of the modification of her constitutional status.'³⁸

In relation to Russia, the term 'recognition' was therefore not used by the EC because these countries accepted Russia's continuity of the international personality of

³⁵ *Tass*, 22 December 1991.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ EC Press Statement, Brussels, 23 December 1991.

the Soviet Union. In the 23 December statement, the EC stated its willingness to recognize the other former Soviet republics which met its Guidelines.

On 25 December 1991, President Gorbachev announced his resignation in a televised address and explained that he had handed over his function as supreme Commander-in-Chief to President Yeltsin along with the control over nuclear weapons.³⁹ It could well be argued that by that stage, President Gorbachev was President of a non-existing state and had nothing to resign from.

Liberated from the constraint to safeguard Gorbachev, President Bush used his Christmas address to the nation to announce the United States' recognition of all former Soviet republics. President Bush divided the new states into three categories:

- first, the US recognized Russia and announced support for Russia's assumption of the USSR's seat as a permanent member of the United Nations Security Council
- second, the US recognized the independence of Ukraine, Armenia, Kazakhstan, Belarus and Kyrgyzstan and, in view of bilateral commitments made to the US, agreed to establish diplomatic relations with them and sponsor those not already members to membership of the United Nations
- third, the US recognized as independent states the remaining six former Soviet republics – Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia and Uzbekistan – but foreshadowed the establishment of diplomatic relations only 'when we are satisfied that they have made commitments to responsible security policies and democratic principles, as have the other states we recognized today.'⁴⁰

A slightly different method was adopted by the Australian government in its recognition of the eleven founding members of the CIS on 26 December 1991.⁴¹ Australia noted that in forming the CIS, the eleven participants at Alma-Ata 'recognized Russia as the Soviet successor state' and accordingly, Australia accepted 'that there is continuity in statehood between Russia and the former USSR.' The Australian statement foreshadowed the transfer of accreditation of the Australian Embassy in Moscow from the USSR to Russia, and said Australia would shortly commence discussions on diplomatic relations with the governments of the ten other countries just recognized. The Australian statement was silent on Georgia because, as a later statement made clear, Georgia was in turmoil internally and did not meet the traditional criterion of statehood which required the existence of a government.

Having accepted Russia's continuing personality on 23 December, the EC announced its decision on the recognition of eight former Soviet republics on 31 December 1991.⁴² The eight countries had given assurances of their readiness to fulfil the requirements contained in the 16 December Guidelines. The EC statement noted that on receiving similar assurances from Kyrgyzstan and Tajikistan, recognition

39 'Demise of the Soviet Union: Chronology, 1991', *supra* note 5, at 21.

40 President Bush's televised address, 25 December 1991.

41 News Release of the Minister for Foreign Affairs and Trade, Canberra, 26 December 1991.

42 'Demise of the Soviet Union: Chronology, 1991', *supra* note 5, at 21.

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would also follow. Recognition by the EC of these two countries occurred on 16 January 1992.⁴³ The EC statement was silent on Georgia.

By March 1992, the turmoil in Georgia was abating and some semblance of effective government was taking control. Eduard Shevardnadze, a former Soviet Foreign Minister, was appointed acting Head of state of Georgia on 11 March.⁴⁴ On 23 March 1992 the EC decided to extend recognition to Georgia noting that it had now received the assurances required under the Guidelines of 16 December 1991.⁴⁵ On 24 March the United States announced that it had decided to enter into diplomatic relations with Georgia recalling that recognition had been extended on 25 December 1991.⁴⁶ The statement went on to say that 'in recent weeks the new Georgian government has taken steps to restore civilian rule.'

Australia moved to recognize Georgia on 29 March 1992.⁴⁷ The statement issued at the time recalled that Australia had not acted earlier 'because there was not a government exercising effective control.' The statement welcomed the appointment of Shevardnadze to head the interim state council.

F. Recognition of Croatia and Slovenia

All six Yugoslav republics responded to the invitation extended in the EC's Declaration on Yugoslavia but only four sought recognition. In his reply to the EC on 23 December 1991, Serbia's Foreign Minister recalled that Serbia acquired 'internationally recognized statehood' as early as the Berlin Congress of 1878 and on that basis had participated in the establishment in 1918 of the Kingdom of Serbs, Croats and Slovenes which became Yugoslavia. He concluded that Serbia 'is not interested in secession.'⁴⁸

The reply of the Montenegrin Foreign Minister of 24 December 1991 was also in terms of declining the EC offer to recognize Montenegro on the grounds that his country retained potential international personality. 'By the decision of the Berlin Congress of 1878 the then great powers unanimously recognized the independence and sovereignty of Montenegro... When Montenegro, upon unification became part of Yugoslavia, the sovereignty and international personality of Montenegro did not cease to exist, but became part of the sovereignty of the new state. In case Yugoslavia disunited and ceased to exist as an international entity, the independence and sovereignty of Montenegro continue their existence in their original form and substance.'⁴⁹

43 Ibid.

44 RFE/RL Research Report, Vol. 1, No. 12, 20 March 1992.

45 EC Press Statement, Brussels, 23 March 1992.

46 White House Press Briefing, Washington, 24 March 1992.

47 Prime Minister's Press Statement, Canberra, 29 March 1992.

48 *Focus*, *supra* note 12, at 276.

49 Ibid., at 282.

The other four republics of Yugoslavia requested recognition and undertook to comply with the requirements listed in the EC's Guidelines. The requests were backed by various republican constitutional and legislative documents. The documentation was then passed to the Badinter Commission for an opinion. Badinter had thus far released one opinion on 20 November 1991 in response to a question from Lord Carrington, President of the EC's Peace Conference on Yugoslavia, as to whether the situation in Yugoslavia should be seen as one of constituent parts thereof attempting to secede from the federal state. In response, the Arbitration Commission took the view that 'the Socialist Federal Republic of Yugoslavia is in the process of dissolution.'⁵⁰

On 11 January 1992, the Badinter Commission brought down Opinions 2 to 7.⁵¹ Opinion 2 dealt with the question of the right to self-determination by the Serbian minorities of Croatia and Bosnia and Herzegovina. The Badinter Commission held that because 'the right of self-determination must not involve changes to existing frontiers' the Serbian minorities are entitled to the rights accorded to minorities (as opposed to peoples) under international law. Opinion 3 decided that the principle of *uti possidetis* has general application and thus applies to the republican borders of Yugoslavia in the context of its current dissolution.

Opinions 4, 5, 6 and 7 dealt with the cases of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia respectively. The cases of Bosnia and Herzegovina and of Macedonia will be discussed below. Opinion 7 considered the various issues elaborated in the EC's 16 December 1991 Guidelines and its Declaration on Yugoslavia and concluded that the Republic of Slovenia satisfied the tests in those documents.

Opinion 5 came to the conclusion that there was a lacuna in the Croatian application. The EC's Declaration on Yugoslavia had set a requirement that the Yugoslav republics requesting recognition must undertake to abide by Lord Carrington's draft treaty, and in particular Chapter 2 of the draft relating to observance of human rights.⁵² Chapter 2 has a section 2(c) entitled 'special status' relating to the particular status of minorities. The draft provisions of this section confer substantial autonomy on minorities in respect of local government, local law enforcement and the judiciary, educational systems and other specific matters.⁵³ The Badinter Commission found that the Croatian Constitutional Act of 4 December 1991 did not fully incorporate all the provisions set out in the 'special status' section.

The Badinter Commission went on to say that the Croatian government should supplement its Constitutional Act as required to take into account the 'special status' provisions because in all other respects it met the conditions set out by the EC. This led

50 Ibid., at 238.

51 Opinions 1, 2, and 3 are reproduced in 3 *EJIL* (1992) 182-185. Opinions 4 to 10 appear as Annex 3 at 74-91.

52 *Focus*, *supra* note 12, at 202-217.

53 Ibid., at 205.

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the President of the Republic of Croatia to write to Mr Badinter confirming Croatia's acceptance in principle of those provisions, thus filling the lacuna identified by the Badinter Commission.

On 15 January 1992, basing themselves on the opinions of the Badinter Commission, the EC decided to extend recognition to Croatia and Slovenia.⁵⁴ Australia, Argentina, Canada and a number of European countries followed suit in the next few days.⁵⁵ Other countries from different parts of the world extended recognition to Croatia and Slovenia in the next few months including Russia,⁵⁶ Japan,⁵⁷ the United States,⁵⁸ China⁵⁹ and India,⁶⁰ culminating in the admission of Croatia and Slovenia as well as the Republic of Bosnia and Herzegovina to the United Nations on 22 May 1992.⁶¹

In an interesting development attesting to both the demise of the Socialist Federal Republic of Yugoslavia and the wide acceptance of Slovenia's independence, was the decision on 13 August 1992 by the Federal Republic of Yugoslavia (itself unrecognized as noted below) to extend recognition to Slovenia.

G. The Recognition of the Republic of Bosnia and Herzegovina

In Bosnia and Herzegovina's admission to the UN, the UN Security Council had unanimously recommended this country's membership and the General Assembly had unanimously accepted the recommendation. Yet every newspaper reader in the world knew by that time that not only could Bosnia and Herzegovina not be accurately described as independent, but it could hardly be described as a state.

In Opinion 4, the Badinter Commission held that although the various constitutional processes had been followed in the request to the EC for recognition, the absence of a referendum on the subject meant that 'the will of the peoples of Bosnia-Herzegovina to constitute [the republic] as a sovereign and independent State cannot be held to have been fully established.'⁶²

From 29 March to 1 April 1992, a referendum was duly held. The Serbian minority which forms some 31% of the population of Bosnia and Herzegovina boycotted the

54 Germany extended recognition to Croatia and Slovenia on 19 December 1991 but did not upgrade its Consulates in Zagreb and Ljubljana until 15 January 1992 in line with the EC. See 'Diplomatic Recognition of Croatia and Slovenia', Patrick Moore, RFE/RL Research Report, Vol. 1, No. 4, 24 January 1992, at 9.

55 Ibid.

56 17 February 1992.

57 17 March 1992.

58 7 April 1992.

59 27 April 1992.

60 11 May 1992.

61 UNSC Docs. A/46/912-S/23884, A/46/913-S/23885, A/46/921-S23971 of 21 May 1992 and UNGA Resolutions 46/236, 46/237 and 46/238 of 22 May 1992.

62 See Annex 3 at 76.

vote. The result was a turnout of 63.4% and a positive vote in excess of 99%.⁶³ Tension in Bosnia and Herzegovina was growing and there remained on the territory of the republic a substantial presence by the Yugoslav National Army which in the course of the conflict in Croatia had shown itself to be primarily motivated by the defence of the interests of the Serbian minorities outside Serbia.

Noting the fact that international recognition of Croatia together with the establishment of the UN Protection Force (UNPROFOR)⁶⁴ had led to a calming of the situation in the disputed areas of Croatia, the EC countries and the United-States began to consider the possibility of recognizing Bosnia and Herzegovina as a means of averting the sort of violence that had afflicted Croatia. UNPROFOR already had an incidental presence in Bosnia and Herzegovina because its headquarters were in Sarajevo, its supplies were in Banja Luka, and some of its military observers were deployed along the border with Croatia. On 10 March the EC and the US issued a joint statement in which they declared a willingness to recognize the Republic of Bosnia and Herzegovina.⁶⁵ In relation to Macedonia and Bosnia and Herzegovina, the statement said the EC and the US had 'agreed strongly to oppose any effort to undermine the stability and territorial integrity of those two republics.'

The EC countries and the US moved to recognize Bosnia and Herzegovina on 7 April 1992. The US statement noted in relation to Bosnia and Herzegovina, Croatia and Slovenia that these states 'meet the requisite criteria for recognition' but did not spell these out.⁶⁶ The EC statement issued on 6 April and foreshadowing recognition the next day, was particularly pithy. However, in a press conference accompanying the decision Portuguese Foreign Minister Deus Pinheiro, whose country held the rotating EC Presidency, said that Bosnia and Herzegovina had met all the criteria set by the EC including the holding of a referendum, in response to a question as to whether recognition would simply aggravate the conflict, he then added that 'we felt we should not give arguments to the radicals who are not in favour of the independence of the republic.'⁶⁷

Up to that time the main countries recognizing Bosnia and Herzegovina had been Bulgaria⁶⁸ and Turkey.⁶⁹ Many other countries now followed the EC/US lead and extended recognition to Bosnia and Herzegovina in the following few weeks including Croatia,⁷⁰ Canada,⁷¹ New Zealand,⁷² Czechoslovakia, Hungary and Poland,⁷³

63 RFE/RL Research Report, Vol. 1, No. 11, 13 March 1992, at 79.

64 Established under UNSC Res. 743 of 21 February 1992.

65 US/EC Declaration on the Recognition of the Yugoslav Republics, Brussels, 10 March 1992.

66 White House Press release, Washington, 7 April 1992.

67 Press conference, Lisbon, 6 April 1992.

68 15 January 1992.

69 6 February 1992.

70 7 April 1992.

71 8 April 1992.

72 8 April 1992.

73 All on 9 April 1992.

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Egypt,⁷⁴ Saudi Arabia⁷⁵ and Australia.⁷⁶ The Australian statement contained expressions of a widely held underlying concern over the situation in that country and called upon 'other Republics and the Yugoslav National Army not to interfere in the internal affairs of Bosnia and Herzegovina. Australia will not accept changes in borders brought about by force.'⁷⁷

However, the situation on the ground in Bosnia and Herzegovina did not reflect the avalanche of recognition, expressed and perhaps implied in the unanimous support for its UN membership. Peace talks continued in Lisbon but the guns would not be silenced. On 3 May on returning from Lisbon, the President of the Republic of Bosnia and Herzegovina was kidnapped at Sarajevo airport by the Yugoslav National Army.⁷⁸ He was released upon giving a promise of safe passage out of Sarajevo for Yugoslav National Army troops. But upon leaving their barracks, these troops were fired upon by local forces leading the EC negotiator to be quoted as saying 'it leads one to ask the question, does the Presidency of Bosnia have control over its own security forces?'⁷⁹ President Izetbegovic seemed to answer the question about the degree of control his government had when he said that his republic 'could not protect its independence without foreign military aid.'⁸⁰

H. The Case of the Former Yugoslav Republic of Macedonia

Thus, a country torn by violence and headed by a government sadly reduced to calls for outside intervention was widely recognized by the members of the international community. Meanwhile, a neighbouring republic which met all the traditional criteria for statehood was having its calls for recognition ignored.

Macedonia had requested EC recognition in a Declaration by its Assembly on 19 December 1991. The Badinter Commission considered this request in the light of the EC's 16 December Guidelines and its Declaration on Yugoslavia. The Declaration had a curious final paragraph as follows:

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.

74 16 April 1992.

75 17 April 1992.

76 1 May 1992.

77 Minister for Foreign Affairs and Trade, News Release, Canberra, 1 May 1992.

78 *Sydney Morning Herald*, 5 May 1992.

79 *Ibid.*

80 *ABC News*, 5 May 1992.

The Badinter Commission conducted a dialogue with Macedonia to determine whether this final paragraph was satisfied. In the course of this dialogue, the Minister for Foreign Affairs of the Republic of Macedonia undertook to refrain from any hostile propaganda against a neighbouring country. Further, the Assembly of the Republic of Macedonia amended its Constitution on 6 January 1992 so that it stated 'the Republic of Macedonia has no territorial claims against neighbouring states.'⁸¹ The Badinter Commission found that Macedonia satisfied all the tests and went on to say 'that the use of the name 'Macedonia' cannot imply any territorial claim against another State.'

However, when the EC met to consider the Badinter Opinions on 15 January, its members declined to extend recognition to the Republic of Macedonia. Only Bulgaria⁸² and Turkey⁸³ decided to extend recognition at that time and most other countries followed the EC lead and held off recognition decisions, the exceptions being Croatia,⁸⁴ Slovenia⁸⁵ and Lithuania.⁸⁶ The issue of the name of the republic continued to frustrate efforts to extend recognition and this problem was eventually spelled out in an EC statement on 2 May in which the EC referred to the former Yugoslav Republic of Macedonia and said 'they are willing to recognize that State as a sovereign and independent State within its existing borders and under a name that can be accepted by all the parties concerned.'⁸⁷ At the EC Lisbon Summit of 26-27 June, the EC went one step further when it again declared its willingness to recognize that republic 'under a name which does not include the term Macedonia.'⁸⁸

The President of the former Yugoslav Republic of Macedonia, Kiro Gligorov, commented on the EC's position on 3 May 1992.⁸⁹ He welcomed the EC's stated willingness to recognize Macedonia but added that 'conditioning this recognition with the name of our State which would be acceptable to all parties is, first, without precedent, and then ... brings our Republic and our people in a state of suspense and into a situation which no people would allow since it brings into question its identity and dignity.'

With neither side willing to make the compromises necessary to break the deadlock, the issue has been reduced to a contest of strength and influence between Athens and Skopje, with the former holding the considerable advantage of exercising a *de facto* veto over EC policy making on the question. Skopje can only ask that the

81 Quoted in Opinion 6, EC Arbitration Commission.

82 15 January 1992.

83 6 February 1992.

84 Perry, 'Macedonia: A Balkan Problem and a European Dilemma', in RFE/RL Research Report, Vol. 1, No. 25, 19 June 1992, at 35 (date of recognition not stated).

85 Ibid.

86 *Tass*, 26 June 1992.

87 EC Declaration, Guimares, 2 May 1992.

88 European Council, Declaration on the former Yugoslavia, Lisbon, 27 June 1992.

89 Statement issued by President Gligorov, 3 May 1992, Skopje.

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international community abide by a moral obligation to recognize entities meeting the normal criteria for statehood.

A major breakthrough achieved by the former Yugoslav Republic of Macedonia has been its recognition by Russia in August 1992 and Belarus in September 1992.⁹⁰ A Russian Foreign Ministry spokesman is quoted as saying Russia's step was 'dictated by concern about the security and stability of all nations in the Balkan region.'⁹¹

L. The Claims of the Federal Republic of Yugoslavia

The two Yugoslav Republics not seeking recognition from the international community were Serbia and Montenegro. They had a more ambitious claim. On 27 April 1992 the Assembly of the Socialist Federal Republic of Yugoslavia (SFRY) promulgated the Constitution of the Federal Republic of Yugoslavia (FRY) claiming that the SFRY 'is transformed' into the FRY, a state comprising two constituent republics, Serbia and Montenegro.⁹²

The FRY was thus said to be 'strictly respecting the continuity of the international personality of Yugoslavia' and undertook 'to fulfil all the rights conferred to and the obligations assumed by the SFRY in international relations, including its membership in all international organisations and participation in international treaties ratified or acceded to by Yugoslavia.'⁹³ Another claim was that 'diplomatic missions and consular posts and other offices of Yugoslavia will continue to operate and represent the interests of the Federal Republic of Yugoslavia.'⁹⁴

In support of this contention were two factors. The first was the existence of a recent precedent in that Russia had been accepted internationally as continuing the international personality of the USSR. Second, the FRY had the advantage of possession. The SFRY's foreign service had been progressively denuded of its non-Serbian or Montenegrin representatives and accordingly, the personnel in the Yugoslav missions abroad were by and large loyal to Belgrade and most accepted the FRY as the country they now represented.

In response many countries reserved their positions and stated that continuing dealings with FRY representatives were without prejudice to any eventual decision on the FRY's claim. Many countries made their reservations in the resumed session of the UN General Assembly in May 1992.⁹⁵ UN Security Council Resolution 757 also

90 *Tass*, 5 August 1992 and *Interfax*, September 1992.

91 *Ibid.*

92 UN Document S/23877 of 5 May 1992. The FRY claim was also made in other international organisations, e.g., see GATT Document L/7000 of 29 April 1992.

93 *Ibid.*

94 *Ibid.*

95 See for example UN Documents A/46/906 of 5 May 1992 containing the US reservation, A/46/905 of 5 May 1992 containing the Portuguese reservation on behalf of the EC, A/46/909 of 6 May 1992

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included a preambular paragraph noting that the claim by the FRY 'to continue automatically the membership of the former SFRY in the United Nations has not been generally accepted.'⁹⁶

The EC referred the matter to the Badinter Commission which issued Opinions 8, 9 and 10 on 4 July 1992.⁹⁷ The Commission came to the view that the process of dissolution of the SFRY identified in Opinion No. 1 of 29 November 1991 had by now been completed and that the SFRY no longer existed. Other aspects of the 4 July Opinions held that the FRY is a new state which cannot be regarded as the sole successor state of the SFRY and that the recognition of the FRY should be subject to general principles of international law and to the EC's Guidelines of 16 December 1991. According to the Badinter Commission, the consequences of the foregoing are that the FRY should not automatically succeed to the SFRY's seats in international organisations or to title to the SFRY's property abroad. The property would need to be divided equitably between the SFRY's various successor states by agreement or arbitration.

The UN Security Council dealt with the question in a more definitive way in its Resolution 777 of 19 September 1992.⁹⁸ The Resolution recommended to the General Assembly that

the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations ... (and) that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership of the United Nations and that it shall not participate in the work of the General Assembly.

United Nations General Assembly Resolution 47/1 also of 19 September 1992⁹⁹ accepted the Security Council's recommendation. These resolutions settled the continuity issue by specifically denying the FRY's claims but because the resolutions failed to expel the SFRY from the United Nations, the old SFRY flag continues to fly in New York even though all sides agree that this state no longer exists.

containing the Canadian reservation and A/46/907 of 5 May 1992 containing the Australian reservation.

96 S/RES/757 (1992) of 30 May 1992.

97 Commission of the European Communities, Secretariat of the Peace Conference on Yugoslavia, 4 July 1992. The opinions appear as Annex 3 at 84-91.

98 S/24570.

99 A/47/L.1.

II. Observations

A. 'The Political Realities in Each Case'

This paper began with a quote from Lauterpacht stating that recognition is not a matter governed by law but a question of policy. Recognition has been a major political question for centuries. Britain declared war on France for its action in recognizing the independence of the American colonies in 1778 and in 1816 Spain protested the recognition by Britain and others of the independence of the former Spanish colonies in Latin America.¹⁰⁰

However, over the course of this century, a certain degree of consistency had been built up based on state practice which followed the criteria for statehood elaborated in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.¹⁰¹ In the early 1920's, for example, the recognition of Lithuania's independence was delayed because of doubts about its frontiers and in the 1940's most countries refused to recognize the ephemeral war-time states of Manchukuo, Croatia and Slovakia.¹⁰² In more recent times the international community has refused to recognize the self-proclaimed independent Bantustans of South Africa.

There have always been exceptions to the rule, but the international community had generally come to accept the traditional criteria for statehood as the proper means for taking decisions on recognition. The reason for this is that these criteria provide a way of maintaining consistency as well as a defence against doubtful claims. They were found to be useful tools. But in the break-up of the USSR and Yugoslavia, their utility came under question and the EC countries took the view that recognition should be used more as an instrument of foreign policy rather than a formal declaration of an ascertainable fact.

The formulation by the EC of the new criterion of 'the political realities in each case' introduces a new level of *ad hoc* decision making that will, if this precedent is followed, make the issue of recognition more uncertain and unpredictable than hitherto.

B. Conditionality

In introducing their Guidelines in relation to Eastern Europe, the EC also departed from another basic understanding in relation to recognition practice. It had been thought that the setting of conditions with respect to such matters as religious practices, the level of 'civilisation' and the applicable political system were improper

¹⁰⁰ Lauterpacht, *supra* note 1, at 36.

¹⁰¹ 165 LNTS 19.

¹⁰² Lauterpacht, *supra* note 1, at 28.

because they implied a value judgement about how the new state should be organized.¹⁰³

The EC Guidelines set a host of new conditions. Many are laudable in that they promote human rights, support various non-proliferation regimes and encourage the settlement of disputes by peaceful means. Some are surprisingly specific such as the requirement in the EC Declaration on Yugoslavia requiring acceptance of a detailed treaty provision which was still in draft form. The effect is that the EC has moved away from the process of recognition as the formal acceptance of a fact to a process based on value judgments and through which the international community tries to create a fact. There can be few better examples of the attempt to constitute a state through widespread recognition than the case of the Republic of Bosnia and Herzegovina.

While the EC Guidelines are stated to be 'subject to the normal standards of international practice,' their application in fact has thrown doubt on the relevance of the traditional criteria for statehood. There has been widespread recognition of a state which has no control over one third of its territory (Croatia). A country has been admitted to the UN while it was clear that its government had no effective control over any areas including the capital city (Bosnia and Herzegovina). A putative country (Macedonia) is being denied recognition because a neighbouring country objects to its name even though it meets all traditional criteria and appears to meet the conditions set by the EC.

There is also uncertainty as to the effect of the conditionalities. The EC considers the conditions it has set to be factors determining recognition decisions. The US, on the other hand, has used the human rights and non-proliferation conditions as a test of whether to enter into diplomatic relations with the new states it has already recognized. However, US practice has not been consistent on the question of the application of the traditional criteria in relation to recognition decisions in that it has been prepared to recognize a country without a government in charge (Georgia) and a country where the government had no control over its territory (Bosnia and Herzegovina). At the same time, for several months the US did not extend recognition to a country (Slovenia) which met all the traditional criteria because it preferred not to deal with the related issue of recognition of Croatia and it continues to follow the EC line on Macedonia.

C. Questions of Secession and Frontiers

The decolonisation period may be said to be characterized by two broad political/legal considerations; support for the sanctity of inherited national borders and the unacceptability of secession. While not challenging these principles directly, the

¹⁰³ Lauterpacht, *supra* note 1, at 31.

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international community's reaction to the break-up of Yugoslavia has nevertheless cast some doubt on both issues.

The authorities in Belgrade have from the outset viewed the struggle for independence by Croatia and Slovenia as a question of secession. In Zagreb and Ljubljana, on the other hand, it was seen as a legitimate process of self-determination leading to the dissolution of the original state. The Badinter Commission's Opinions 1 and 8 support the view that this was not a matter of secession but one of the dissolution of the federal state. It argued that the various republics had expressed their desire for independence through referendums and that 'the composition and workings of the essential organs of the Federation ... no longer meet the criteria of participation and representativeness inherent in a federal State.'¹⁰⁴

The Badinter Commission was also asked whether the internal boundaries, for example between Croatia and Serbia, can be regarded as frontiers in terms of public international law. In its opinion, such boundaries could not be changed except by agreement and upon independence the internal republican boundaries become international frontiers. The Commission reached this conclusion by the application of the principle of *uti possidetis* which although it was 'initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle.'¹⁰⁵ In support of this view, the Commission cited the ICJ Judgement of 22 December 1986 in *Burkina Faso and Mali* which linked the principle not solely to the decolonisation process but to the 'phenomenon of the obtaining of independence, wherever it occurs.'¹⁰⁶

The sanctity of the SFRY's internal republican boundaries was also given political support in numerous declarations by individual nations and various multinational bodies. A particularly explicit version was issued in the Statement by the Heads of State or Governments participating in the meeting of the North Atlantic Council in Rome on 7-8 November 1991. The statement on Yugoslavia said in part that 'all attempts to change existing borders through the use of force or a policy of *fait accompli* are unacceptable; we will not recognize any unilateral change of borders, external or internal, brought about by such means.'¹⁰⁷ Acceptance of the 'inviolability of all frontiers' is one of the conditions laid down in the EC Guidelines.

We are therefore led to conclude, in the very narrowest view of the break-up of Yugoslavia and the USSR, that a constituent unit of a federal state in Europe, if it is acting on the basis of the view of its people expressed in a referendum and if it undertakes to abide by the sort of conditions set in the EC Guidelines, has a right to independence. It is difficult not to see this process as secession. In the concluding part

¹⁰⁴ Opinion 1, 3 *EJIL* (1992) 182.

¹⁰⁵ Translation Services of the Commission of the European Communities.

¹⁰⁶ [1986] ICJ Reports 554, at 565.

¹⁰⁷ *Focus*, *supra* note 12, at 229.

of this paper the question will be posed whether in fact the precedents can be read quite so narrowly.

Even on a narrow reading of the situation, a significant question arises as to whether the Russian Federation should be seen as a possible subject of this precedent. There are the sixteen original 'autonomous republics' in Russia, each with its defined borders. While most of these republics have been content to limit their claims to the need for economic sovereignty, at least two¹⁰⁸ have thus far declared some form of independence.

D. Continuity of International Personality

At the outset it is important to make the difficult distinction between a successor state and the continuing state. Russia and Serbia/Montenegro claim the latter status. Their claim is that the international personality of the predecessor state has been continued and, accordingly, seats in international organisations and diplomatic missions abroad still represent the continuing state. The claimant continuing states accept that other entities emerging from the predecessor state may be successor states entitled to 'a just distribution of the rights and responsibilities'¹⁰⁹ of the predecessor state but they do not continue the predecessor state's personality in international law.

Brownlie notes that 'the term "continuity" of States is not employed with any precision and may be used to preface a diversity of legal problems.'¹¹⁰ For example, alterations of territory as such do not affect the identity of a state. But the break-up of a federation into its constituent parts is fundamentally more than a mere change of territory. In view of the imprecision in the concept, it is difficult to do anything other than to treat each case on its individual merits.

As noted above, the eleven former Soviet republics participating at Alma-Ata adopted a Protocol on UN membership. Article 1 of the Protocol states that 'Member States of the Commonwealth support Russia in taking over the USSR membership in the United Nations, including permanent membership in the Security Council and other international organisations.'¹¹¹ This decision took into account, as stated in the preamble, the fact that Belarus and Ukraine continue to be UN members. This understanding was greeted with much relief in the international community as it allowed for the continued and stable operation of the Security Council at a time when many observers were worrying about the possible need for an amendment to the Charter Article 23 which names the USSR as a permanent member. The doctrine of continuity of international personality thus allowed Russia to take over the USSR seat,

108 Chechenia and Tatarstan, *infra* note 125.

109 View put forward by the Federal Republic of Yugoslavia in its standard note to international organizations (*supra* note 92).

110 I. Brownlie, *Principles of Public International Law*, (4th ed. 1990) 82.

111 *Tass*, 22 December 1991.

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just as the People's Republic of China had taken over the permanent seat of the Republic of China some years previously without amendment to the Charter.

Given the realities of the situation and in particular the fact that Ukraine and Belarus were already members of the UN and had never made a claim to a permanent seat in the Security Council, there was little other option but to have Russia, itself not then a member of the UN, take over the USSR seat.

It is the next step which caused some concern among the newly independent states of the former USSR because Russia parleyed an agreement limited to the subject of UN membership into a successful claim to be the continuing state for all purposes. Only days after the Alma-Ata meeting, the EC had accepted Russia's claim to the continuity of its international rights and obligations 'including those under the UN Charter.'¹¹² The US announcement of recognition limited its acceptance of continuity to support for Russia's takeover of the USSR seat.¹¹³ But in practice virtually the entire international community accepted Russia's broad continuity claim and throughout the world Soviet diplomatic and consular missions became Russian missions overnight.

In the excitement of the dissolution of the USSR, Ukraine, the second largest Soviet Republic in terms of population and influence, did not take any action to question the Russian claim. However, some months after Alma-Ata, President Kravchuk of Ukraine began to contest the Russian continuity claim and argued that the division of Soviet property including property abroad should be divided among all the successor states of the USSR.¹¹⁴

As noted above, the international community has definitively rejected the continuity claims of the Federal Republic of Yugoslavia.

One important difference between the continuity claims of Russia on the one hand and Serbia and Montenegro on the other is that Russia could point to the issue of UN membership in which it had the support of ten of the successor states of the USSR. Apart from Serbia and Montenegro, the other former republics of the SFRY have, on the contrary, vigorously asserted that all the former republics of the SFRY are successor states and that the issue of the division of assets must be settled by agreement.¹¹⁵

Another argument that carries considerable weight is that the interests of international stability were seen to be furthered in accepting Russia's claim to continuity. However, in the case of Serbia and Montenegro, the international community appears to want to make the point that there should be no rewards for the sort of unacceptable

112 EC Press Statement, Brussels, 23 December 1991.

113 President Bush's televised address, 25 December 1991.

114 Solchanyk, 'Kravchuk Defines Ukraine-CIS Relations', RFE/RL Research Report, Vol. 1, No. 11, 13 March 1992, at 9.

115 See for example, 'Peace Conference on Yugoslavia: Croatian Approach', Ministry of Foreign Affairs, Republic of Croatia, Zagreb, September 1991.

behaviour that led to the imposition of mandatory sanctions against Serbia and Montenegro.

The arguments concerning the application of the principle of continuity in relation to the Soviet and Yugoslav cases have not yet been fully played out. However, some clear trends have emerged. In any future situation one should ask the question whether the analogy is closer to the Russian case or the Serbian case.

E. Limitations on the Applicability of these Precedents?

In the six month period beginning on 1 December 1991 with the Ukrainian referendum to 22 May 1992 (the date on which three of the former Yugoslav republics were admitted to UN membership), there was an almost bewildering amount of decision-making on questions of recognition, succession and continuity. It is the commentator's task to try to draw some conclusions from this plethora of practice.

The first point to ask is whether recent practice should be seen as geographically limited to Europe alone. It is certainly the case that the statements and guidelines issued on these matters were restricted in their headings to the particular facts under review. For instance the heading of the seminal EC Guidelines of 16 December 1991 was 'Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union.'

It could also be validly argued that the European stage is *sui generis* because of the particular historical circumstances in that continent. The end of the Cold War 'marks this century's third grand transformation of the organizing structure and of the motivating spirit of global politics'¹¹⁶ and nowhere has this been felt more than in Europe. The coming of Communism froze the nationalist aspirations of many parts of Eastern Europe and with the passing of Communism such factors must now be dealt with.

While this argument may be a comfort to some because it would suggest that the break-up of the Soviet Union and of Yugoslavia is a precedent only for other federal countries of Eastern Europe such as the Czech and Slovak Federal Republic and perhaps the Russian Federation, it is difficult to accept such a limitation. Brzezinski after all talks about the effect on 'global politics' of the passing of the Cold War¹¹⁷ and it would thus be denying reality to argue that only Europe faced the consequences of the Cold War.

Many of the principles referred to in this process, such as the principle of self-determination, the principle of *uti possidetis*, the proscription against the threat or use of force and the insistence on disputes being settled by peaceful means are of universal

116 Z. Brzezinski, 'The Consequences of the End of the Cold War for International Security', 265 *Adelphi Papers* (1991/92) 4.

117 *Ibid.*

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application. Their application leading to certain results in Europe must run parallel to the results their application would lead to in other continents. Indeed the Conference on Security and Cooperation in Europe which has been seen as a relevant regional organisation in both the Soviet and Yugoslav cases includes members from North America. Surely the principles advocated for the USSR and Yugoslavia would also have application in, say, Canada.

Another possible limitation is to see the events in the former USSR and Yugoslavia as precedents for federal states only. After all, both these countries were federal states which have fractured along their republican boundaries. The extension of the principle of *uti possidetis* by the Badinter Commission to include the sanctity of the borders of the constituent parts of federal states adds weight to the argument that the emerging new rules and practices have no application to unitary states.

Such a result may be seen as a factor of stability because it would limit the scope of the applicability of the precedents. It would be a curious rule of law, however, that accepted a process of dissolution of a federal state but insisted that no such process was available to distinct peoples of other types of states. Thus Scots would have lesser rights than Bavarians, and Quebeckers would have more options than Corsicans regardless of any factors associated with the identification and rights of self-determination units.

This is not a theoretical issue. In the break-up of the USSR and Yugoslavia, the constituent federal units may have gained their independence but this has not ended the claims emanating from these regions. The former autonomous province of Kosovo is now formally a part of Serbia yet its population is 90% Albanian. A referendum held in Kosovo from 26 to 30 September 1991 resulted in an 87% participation rate and a 99.87% vote in favour of independence.¹¹⁸ The elected leaders of Kosovo undertook to meet all the obligations set out in the EC Guidelines. But the Badinter interpretations have left Kosovo recognized only by Albania.¹¹⁹ On 15 June 1992, the EC made very clear its views on the subject when it issued a statement recalling 'that frontiers can only be changed by peaceful means and (the EC countries) remind the inhabitants of Kosovo that their legitimate quest for autonomy should be dealt with in the framework of the EC Peace Conference.'¹²⁰

Kosovo is not the only sub-federal area of the SFRY to declare itself independent. Serbian enclaves in Croatia and Serbian and Croatian areas in Bosnia and Herzegovina have also taken this step. On 19 December 1991, seeing EC recognition of Croatia as imminent, the Serbian Republic of Krajina was proclaimed, covering an area of almost one third of Croatia's territory.¹²¹ On 7 April 1992, on the day the EC and the United States recognized the Republic of Bosnia and Herzegovina, the Assembly of Serbian

118 Letter to Lord Carrington from the Prime Minister of 'the Republic of Kosova' dated 22 December 1991.

119 January 1992 (RFE/RL Research Report, Vol. 1, No. 4, 24 January 1992, at 14).

120 EC Press Statement, Luxembourg, 15 June 1992.

121 RFE/RL Research Report, Vol. 1, No. 2, 10 January 1992, at 70.

People in Bosnia and Herzegovina met in Banja Luka and declared the independence of the Serbian Republic of Bosnia and Herzegovina which claimed over half the territory of the Republic of Bosnia and Herzegovina.¹²² On 6 May 1992, representatives of the Serbian and Croatian communities of Bosnia and Herzegovina met in Graz to discuss the partition of that Republic and the Serbian representative announced on Austrian television that agreement on the new borders had been reached.¹²³ The Croatian representative who attended the Graz meeting announced on 3 July 1992 the establishment of the new 'Croatian Community of Herzeg-Bosna', an entity which has been described as illegal by the Presidency of the Republic of Bosnia and Herzegovina.¹²⁴

None of these new entities meet the conditions laid down by the EC and indeed their new borders fly in the face of the presumption of the sanctity of the inherited internal borders of the SFRY. The issue of whether any of these entities meet the traditional criteria of statehood is not being addressed because they have not passed the EC threshold tests. Any acceptance of such entities would be seen as a green light for minorities throughout Europe to assert their independence. International recognition is therefore unlikely. The problem is that these new entities are stubbornly more representative of the military or ethnic facts on the ground than the situation which is recognized internationally; that is, that these areas are part of larger multi-ethnic states. The distressing process of 'ethnic cleansing' emphasizes the dichotomy between the growing reality on the one hand and the morally justifiable absence of international acceptance of this reality on the other.

The problem is not confined to Yugoslavia. Various parts of the new independent states of the former USSR are also claiming independence. Tatarstan's voters went to the polls on 21 March 1992 to decide if Tatarstan, a part of the Russian Federation, should be a sovereign state and 'a subject of international law' resulting in a vote of 61% in favour and 37% against.¹²⁵ On 5 May 1992 the Crimean Supreme Soviet adopted an Act declaring the state's independence from Ukraine and setting up a process for a referendum on the issue.¹²⁶ It is not clear if either entity will decide to follow through on these initial positions. In Nagorno-Karabakh the use of force has overtaken the issuing of statements and decrees as this predominantly Armenian enclave tries to break free of Azerbaijan. On 22 May 1992 the EC issued a statement, to 'condemn in particular as contrary to [CSCE] principles and commitments any actions against territorial integrity or designed to achieve political goals by force.'¹²⁷

122 RFE/RL Research Report, Vol. 1, No. 16, 17 April 1992, at 72.

123 RFE/RL Research Report, Vol. 1, No. 21, 22 May 1992, at 77.

124 *Sydney Morning Herald*, 8 July 1992.

125 Report on the Tatarstan Referendum on Sovereignty, US Commission on Security and Cooperation in Europe, 14 April 1992.

126 *Tass*, 6 May 1992.

127 EC Press Statement, Brussels, 22 May 1992.

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United States Secretary of State Baker made similar comments on the same day to the effect that 'all of us have subscribed to CSCE principles and goals and among those are the peaceful resolution of disputes and respect for borders that should be changed only through peaceful negotiations.'¹²⁸

As the underlying principles informing the actions of the international community in the cases of the break-up of the USSR and Yugoslavia are of general application, it will be difficult to limit their application to a single geographic area (Europe) or to a type of nation with a particular method of internal organisation (federalism). Yet, there is no disposition in the international community to open the door to numerous claims of independence and secessionist actions throughout the world. Lying uncomfortably between these principles and the practice of *realpolitik* is a wide grey area in which international law finds itself.

F. Conclusions

The main conclusion to be drawn is that the question of recognition of states has become less predictable and more a matter of political discretion as a result of recent practice. The traditional criteria for statehood retain an uneasy existence alongside the new EC Guidelines, which have been particularly influential in relation to the recognition of the new states emerging from the USSR and Yugoslavia.

The anarchic situation in Georgia led some countries to refrain from recognizing that country in accordance with the traditional criteria while in the case of the Republic of Bosnia and Herzegovina the international community used recognition in an attempt to arrest what looked like an inevitable slide into anarchy.

Issues such as the presence of foreign forces on a country's soil have been treated inconsistently or glossed over. This is understandable because there are times when train timetables cannot keep up with the march of history. A valid distinction could be made between situations which are the remnants of the Cold War such as the continuing presence of former Soviet troops in Germany and situations of hostile occupation such as the hold of Belgrade-supported local Serbian forces over large slabs of Croatia and Bosnia and Herzegovina. Yet even in the latter case, the absence of control by the central government over large parts of its territory did not halt recognition. Nor has the continuing unwelcome presence of 'Soviet' forces in the Baltic republics detracted from their independence in international eyes. At the same time, the absence of foreign forces from the former Yugoslav Republic of Macedonia (which was accomplished when the Yugoslav People's Army completed its withdrawal from Macedonia in March 1992¹²⁹) has not led states to accept that territory as a fit subject of recognition.

¹²⁸ Press conference, London, 22 May 1992.

¹²⁹ Perry, *supra* note 84, at 43.

Membership of the UN has also been seen differently by different countries insofar as a vote in favour may amount to recognition. India decided to extend recognition before Croatia, Slovenia and Bosnia and Herzegovina joined the UN. Sweden took the view that, having participated in the unanimous decision of the UN General Assembly to accept the membership of Bosnia and Herzegovina, 'this according to Swedish practice means that Sweden has recognized the Republic of Bosnia and Herzegovina.'¹³⁰ The Swedish view has considerable merit in that membership of the UN is only open to states and voting in favour of a new member state's application would seem to imply a statement of recognition of that new state. However, other states take a different view. Both Chile and Sri Lanka for example, having participated in the UN General Assembly vote admitting the Republic of Bosnia and Herzegovina, nevertheless considered it necessary a few days later to extend recognition on a bilateral basis.¹³¹

It now seems that the 'political realities' have gained primacy over the inclinations to maintain consistency by applying accepted criteria to test the fact of statehood. This should not be seen as necessarily a negative development. The application of the traditional criteria as the test for statehood and therefore the rationale behind recognition was largely amoral. How a government came to be in effective control over its territory was, for the most part, not considered to be a relevant factor.¹³² The adoption of conditions leading to recognition is an attempt to introduce a greater moral dimension. Yet the enemy of such a moral stand is inconsistency, the very factor which the traditional criteria tried to avoid. And there can be fewer better examples of inconsistency than the continuing refusal to recognize the independence of the former Yugoslav Republic of Macedonia even though it meets every criterion and every condition but simply refuses to change its name. The 'political realities' in this case seem to have more to do with internal EC politics than with the merits of the Macedonian case.

The EC's 12 December 1992 Edinburgh summit dealt with the question of the former Yugoslav Republic of Macedonia but did not advance the matter significantly. While falling short of endorsing the line taken at the Lisbon summit in relation to recognition, the Edinburgh summit did not really review this position and simply left EC Foreign Ministers seized of the question.¹³³ Authorities in Skopje may have no alternative but to consider the EC position as an abdication of the leadership role hitherto played by the EC. This could lead the government in Skopje to the conclusion that it should seek UN membership thus by-passing the EC altogether. In such

130 Ministry of Foreign Affairs Press Release, Stockholm, 22 May 1992.

131 Chile, recognition on 3 June, Sri Lanka, recognition on 9 June.

132 The international community's refusal to accept Soviet de jure control over the Baltic states was an example of an attempt to retain a moral dimension. But this is qualified by the inconsistency of recognizing Soviet de jure control over Moldavia, ceded to the USSR in the same illegal treaty as the Baltic states.

133 Conclusions of the Presidency – Edinburgh, 12 December 1992, Doc. SN 456/92 Part. D.

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circumstances, the issue of the effect of a vote for membership of the UN on the question of recognition will need to be closely considered by UN members.

Reverting to the long-running debate about whether recognition is declaratory or constitutive, recent events seem to point towards a trend to attempt to constitute states through the process of recognition. Bosnia and Herzegovina is an obvious example but Ukraine can also be seen to fit into this category.

The end of the Cold War will lead to many new situations where peoples will not feel as constrained as in the past to attempt to exercise their right to self-determination. In response to this phenomenon the international community is now faced with a far more complex problem than in the recent past. Old ideas about equating the status quo to stability, about the unacceptability of secession, about considering peoples only in terms of the states they live in and about the inviolability of existing international frontiers will be re-examined. When considering a question of recognition, states will have to ask themselves questions about whether such an action will contribute to a peaceful resolution of a conflict, and if the answer is in the affirmative, the traditional criteria for statehood may well have to be finessed.

Nor should we expect this new situation to be limited to the problems of Europe. The principles involved are universal and the new issues to be confronted may soon be seen to be problems on a global scale.