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SECESSIONIST SELF-DETERMINATION: THE CASES OF SLOVENIA AND CROATIA

Secession (1), as a manifestation of the broader principle of self-determination, has in the past few years emerged to prominence in international law and politics (2). The collapse of communism in the Union of Soviet Socialist Republics (USSR) and Eastern Europe, and the resulting end of the Cold War, has been the principal factor in this rise to prominence.

Prior to the end of the Cold War, self-determination was given a narrow focus by the international community. Demands based upon self-determination were confined to claims to independence from colonial rule. The "cryptic references" (3) to self-determination in the United Nations Charter (4) were generally interpreted to exclude secessionist self-determination (5), with the case of Bangladesh being the only exception (6). Indeed as Alexis Heraclides

(1) Secession can be defined as "the creation of a State by the use or threat of force and without the consent of the former sovereign". See James Crawford, *The Creation of States in International Law*, Clarendon Press, 1979, (hereinafter Crawford, *The Creation of States*), at 247.

(2) Crawford, *The Creation of States*, at 88-89 notes that "the question of the ambit of self-determination, the territories to which it applies, has at least arguably remained as much a matter of politics as law."

(3) Crawford, *The Creation of States* at 89.

(4) Articles 1(2) and 55. Various UN General Assembly Resolutions also deal with self-determination.

(5) Richard F. Iglar, "The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede" in (1992) 15 *Boston College International and Comparative Law Review*, 213-239, (hereinafter Iglar, "The Constitutional Crisis"), at 224-229.

(6) Bangladesh was not seen as creating a precedent, but rather as a unique phenomenon, unlikely to reoccur. See Alexis Heraclides, "Secession, Self-Determination and Non-Intervention:

has written, "the main legal bulwark against secession (was) the principle of self-determination which developed during the late 1950s and 1960s" (7). Illustrative of the then prevailing sentiment was the statement by then Secretary-General of the United Nations (UN), U Thant, who in 1970 stated unequivocally:

"(T)he United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State" (8).

Events since mid-1991 in the former Yugoslavia have shown U Thant to be wrong. In 1992 the former Yugoslav republics of Slovenia, Croatia and Bosnia-Herzegovina all achieved widespread recognition as international states and membership of the UN. In 1993 Macedonia was admitted to the UN under the name of The Former Yugoslav Republic of Macedonia (9), to be later followed by recognition being granted by a number of the member states of the European Community (EC). The republics of Slovenia and Croatia were the first to secede from Yugoslavia and were the first to be accorded widespread international recognition. The cases of Slovenia and Croatia were the first instances of successful secession since Bangladesh seceded from Pakistan in 1971. (10) Indeed the former Yugoslavia has provided the first (11) and only (12) cases of successful secession since Bangladesh.

In Quest of a Normative Symbiosis" in (1992) 45 *Journal of International Affairs*, 399-420, (hereinafter Heraclides "Secession"), at 406; Crawford, *The Creation of States*, at 116-117. Others have suggested that the Bangladesh case provides a precedent in international law justifying secession where one group within a state has been systematically oppressed by another: Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, 1978, (hereinafter, Buchheit, *Secession*), at 212-213. Oppression here relates to denial of relevant group's human rights. For a discussion of the "oppression theory" of secession see, Thomas Duncan Musgrave, *Self-Determination and National Minorities*, (Unpublished Doctoral Thesis), University of Sydney, 1993, (hereinafter Musgrave, *Self-Determination*), at 331-338.

(7) Alexis Heraclides, *The Self-determination of Minorities in International Politics*, Frank Cass & Co Ltd, 1991, (hereinafter Heraclides, *Self-Determination of Minorities*), at 21.

(8) Quoted in John Dugard, *Recognition and the United Nations*, Grotius Publications Ltd, 1987, (hereinafter Dugard, *Recognition*), at 85.

(9) On this question of whether admission to the UN equates to recognition by existing member states of the new state see Dugard, *Recognition*, at 41-80.

(10) On the Bangladesh secession see, Heraclides, *Self-Determination of Minorities*, at 147-164; Buchheit, *Secession*, at 198-215.

(11) The breakaway of the Baltic States from the USSR and their "recognition" by the international community, although occurring before the secessions of Slovenia and Croatia, were not cases of secession, given that the incorporation of the Baltic States into the USSR was never legally accepted by the international community. Thus these states retained their *de jure* recognition as independent states at all times, although the international community *de facto* admitted their annexation to the USSR. On the independence of the Baltic states see, Susan E. Himmer, "The Achievement of Independence in the Baltic States and its Justifications" in (1992) 6 *Emory International Law Review*, 253-291. In so far as the other republics of the USSR are concerned the dissolution of the USSR proceeded by agreement reached at Alma Ata in Kazakhstan, rather than secession, and all these republics eventually became part of the Commonwealth of Independent States. Dissolution of states by agreement is not prohibited by international law, and indeed there are a number of such cases that have occurred in the twentieth century: Musgrave, *Self-Determination*, at 198.

(12) The recognition of Eritrea and its admission to the UN in 1993 does not fit the category of secession from an existing independent state, but rather was an instance of decolonisation from

Although secession has rarely been achieved to date, there is little doubt that more successful secessions will occur in the future, with Africa, the former USSR and Eastern Europe providing the most likely examples (13). Scholars have argued that the principle of self-determination should not be confined to decolonisation, and must be extended to include a qualified right to secede from existing international states (14). For this reason the secessions of Slovenia and Croatia are important because of what they indicate about the emerging principles of international law relating to secessionist self-determination. The Slovene and Croat examples have sparked considerable discussion within the international law fraternity (15). This is a clear reflection of the growing relevance of secession within the body of international law.

Ethiopian rule. See Bereket Hahte Selassie, "Eritrean War of Independence" in Joel Krieger (ed), *The Oxford Companion to Politics of the World*, Oxford University Press, 1993, at 277-278.

(13) On the significance of the secessions of Slovenia and Croatia for the numerous potential secessionist movements in Africa see Jeffrey Herbst, "Challenges to Africa's Boundaries in the New World Order" in (1992) 46 *Journal of International Affairs*, 17-30, at 23-24. On Africa also see Ali A Mazrui, "The Bondage of Boundaries, Why Africa's Maps Will Be Redrawn" in *The Future Surveyed* (Supplement), *The Economist*, 11 September, 1993. One of the active secessionist movements in Africa is the claim for independence of Somaliland from Somalia: see Anthony J Carroll & R Rajagopal, "The Case for the Independent Statehood of Somaliland" in (1992-1993) 8 *The American Journal of International Law & Policy*, 653-681. The precedents of Slovenia and Croatia have also been cited in favour of recognition of the secession of the "Turkish Republic of Northern Cyprus" in Zaim M Necatigil, *The Cyprus Question and the Turkish Position in International Law*, Second Edition, Oxford University Press, 1993, (hereinafter Necatigil, *The Cyprus Question*), at 231-233.

(14) Buchheit, *Secession*, at 17; Lea Brilmayer, "Secession and Self-Determination: A Territorial Approach" in (1991) 16 *Yale Journal of International Law*, 177-201; Heraclides, "Secession", at 407-408; Heraclides, *Self-Determination of Minorities*, at 27-30; Allen Buchanan, *Secession, The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press, 1991, at 20-21; Allen Buchanan, "Self-Determination and the Right to Secede" in (1992) 45 *Journal of International Affairs*, 347-365; Necatigil, *The Cyprus Question*, at 226. See also Robert W McGee, "The Theory of Secession and Emerging Democracies: A Constitutional Solution" in (1992) 28 *Stanford Journal of International Law*, 451-476.

(15) Colin Warbrick, "Recognition of States" in (1992) 41 *International and Comparative Law Quarterly*, 473-482; Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" in (1992) 86 *The American Journal of International Law*, 569-607 (hereinafter Weller, "The International Response"); Benedict Kingsbury, "Claims by Non-State Groups in International Law" in (1992) 25 *Cornell International Law Journal*, 481-513, (hereinafter Kingsbury, "Claims By Non-State Groups"), at 504-508; Marc Weller, "International Law and Chaos" in (1993) *Cambridge Law Journal*, 6-9, (hereinafter Weller, "International Law and Chaos"); Alain Pellet, "The Opinions of the Badinter Arbitration Committee, A Second Breath for the Self-Determination of Peoples" in (1992) 3 *European Journal of International Law*, 178-181, (hereinafter Pellet, "The Opinions of the Badinter Arbitration Committee"); Lawrence S Eastwood Jr, "Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia" in (1993) 3 *Duke Journal of Comparative & International Law*, 299-349, (hereinafter Eastwood, "Secession"); Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union" in (1993) 4 *European Journal of International Law*, 36-65, (hereinafter Rich, "Recognition of States"); Danilo Turk, "Recognition of States: A Comment" in Patricia L Small, *Self-Determination in the New World Order*, Carnegie Endowment for International Peace, 1992, (hereinafter Halperin et al, *Self-Determination*), esp at 32-38; Milenko Kreca, *The Badinter Arbitration Commission, A Critical Commentary*, Jugoslovenski Pregled, 1993, (hereinafter Kreca, *The Badinter Arbitration Commission*); Musgrave, *Self-Determination*, at 202-220, 351-364.

SELF-DETERMINATION

The meaning of self-determination has been the subject of considerable controversy and discussion both by the practitioners and scholars of international law (16). In the European context it can be stated that the major West European states have linked self-determination to the principles of popular sovereignty and representative government. These states have insisted that self-determination had to be associated with the Western understanding of democracy and representative government. On this understanding of self-determination, whenever the population of a particular state or territory elect a representative government of their choice, self-determination takes place (17). This notion of self-determination sees it as a continuing process. Furthermore it is consistent with the principles of territorial integrity and inviolability of state borders.

In Central and East Europe, including the Balkans, the concept of self-determination has been traditionally understood as an expression of ethnicity and nationalism, in that self-determination entitled an ethnic group to its own nation-state (18). This ethnic self-determination permits the alteration of existing state boundaries, and clearly contemplates secession, as well as irredentism. The secession of the Bengali dominated East Pakistan from Pakistan in 1971 and the unresolved secession of Turkish Cypriots from Cyprus are examples of ethnic self-determination.

In the context of the secession of Slovenia and Croatia from Yugoslavia, each republic sought to justify secession on the basis of ethnic self-determination, and not on self-determination based on principles of popular sovereignty and representative government.

RECOGNITION AND SECESSION

An important aim of any secessionist claim is to seek international recognition as an independent state for the territory claimed by the secessionist movement. It is generally agreed that recognition is not necessary before independent statehood can be said to exist. In this sense recognition is essentially declaratory rather than constitutive (19). Thus nonrecognition does not necessarily mean that an international state does not exist.

However, in the context of secession recognition is of greater significance (20). It has been suggested that the achievement of independence by the secessionist republics of Yugoslavia can, at least in part, be attributed to the

(16) For a discussion of the concept of self-determination and the literature discussing it see, Edward A Laing, "The Norm of Self-Determination, 1941-1991" in (1991-1992) 22 *California Western International Law Journal*, 209-308.

(17) Musgrave, *Self-Determination*, at 175-182.

(18) Musgrave, *Self-Determination*, at 183-193.

(19) Crawford, *The Creation of States*, at 16-25; Ian Brownlie, *Principles of Public International Law*, Fourth Edition, Clarendon Press, 1990, (hereinafter Brownlie, *Public International Law*) at 88-91; *Oppenheim's International Law, Volume 1, Peace*, Ninth Edition, Robert Jennings & Arthur Watts (eds), Longman Group UK Ltd, 1992, (hereinafter, *Oppenheim's International Law*), at 128-133.

(20) Crawford, *The Creation of States*, at 248; Heraclides, *Self-Determination of Minorities*, at 25.

willingness of the international community to extend recognition to them (21). In the past, the lack of widespread international recognition of independent statehood has been an important factor in the failure of secessions such as Katanga and Biafra. In present times, the fact that the "Turkish Republic of Northern Cyprus", which seceded from Cyprus in November, 1983, has only been recognised by Turkey, means that it cannot be seen as an independent state and member of the international community in general (22). Much the same can be said of the "Republic of Kosovo", which seceded from Yugoslavia in October, 1991, but has only been recognised by Albania (23), and the "Republic of Serbian Krajina", which declared its independence from Croatia on 19 December, 1991. (24) On the other hand the recognition by a major power such as India, was critical to the ultimate success of the Bangladesh secession.

SELF-DETERMINATION IN SLOVENIA

In September, 1989 the Slovenian Assembly passed various amendments to its republican constitution, including a provision giving the Republic of Slovenia the "complete and undeniable right" to "self-determination, including the right of secession". This amendment was justified by reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the UN in December, 1966. (25)

Article 1 of the UN Resolution states that "all peoples have the right of self-determination. By virtue of that right they ... freely pursue their economic development." The Constitutional Court of Yugoslavia, in March, 1990, ruled that these amendments were illegal and should be revoked (26). This ruling was ignored by the Slovenian leadership, and on 2 July, 1990, the Slovenian Assembly overwhelmingly adopted the "Declaration on the Sovereignty of the Republic of Slovenia", basing the republic's claim to sovereignty on "the Slovenian nation's right to self-determination (27). Slovene Prime Minister Lojze Peterle, stated that the sovereignty declaration did not mean independence as yet, but would lead to independence unless Yugoslavia was re-organised into a con-

(21) Eastwood, "Secession", at 316.

(22) *Oppenheim's International Law*, at 130. On the Cyprus issue generally see Necatigil, *The Cyprus Question*; Musgrave, *Self-Determination*, at 391-402.

(23) On the Albanians of Kosovo see Fabian Schmidt, "Kosovo: The Time Bomb That Has Not Gone Off" in *RFE/RL Research Report*, Vol 2, No 39, 1 October, 1993, 21-29, especially at 23; Fabian Schmidt, "Has the Kosovo Crisis Been Internationalized?" in *RFE/RL Research Report*, Vol 2, No 44, 5 November, 1993, 35-39.

(24) On the Krajina Serbs see Stan Markotich, "Croatia's Krajina Serbs" in *RFE/RL Research Report*, Vol 2, No 41, 15 October, 1993, 5-10.

(25) On the general political background to the dissolution of Yugoslavia see Lenard J. Cohen, *Broken Bonds, The Disintegration of Yugoslavia*, Westview Press, 1993, (hereinafter Cohen, *Broken Bonds*); Predrag Simic, "Civil War in Yugoslavia - The Roots of Disintegration" in (1992) 5 *Yearbook of European Studies*, 73-100. On the 1989 Slovenian constitutional amendments see Robert M. Hayden, *The Beginning of the End of Yugoslavia, The Slovenian Amendment Crisis of 1989*, The Carl Beck Papers in Russian & East European Studies, No 1001, Centre for Russian and East European Studies, University of Pittsburgh, 1992.

(26) Cohen, *Broken Bonds*, at 115.

(27) Cohen, *Broken Bonds*, at 120. The Constitutional Court of Yugoslavia in January, 1991 ruled the Slovene sovereignty declaration to be unconstitutional, but this, as with other rulings of the Court, was ignored and had no political impact. See Cohen, *Broken Bonds*, at 177-178.

federation (28). Entry into such a confederation was viewed as being a voluntary act based upon "the inalienable and unexpendable right of every nation to self-determination" (29). On 23 December, 1990 in a plebiscite in Slovenia approximately 88.5% of the citizens who voted, expressed support for Slovenia's secession should that be deemed necessary (30). Three days later the Slovene Assembly adopted a declaration of the republic's sovereignty (31).

On 20 February, 1991 the Slovene Assembly passed a resolution by which Slovenia disassociated itself from Yugoslavia and the other republics. The disassociation, as opposed to secession (32), was justified "on the basis of the permanent and inalienable rights of self-determination of the Slovene nation, which is one of the basic principles (33) of international law" (34). Disassociation evolved into secession with the Declaration of Independence (35) of 24 June, 1991, which declared Slovenia "an independent state ... no longer ... a part of the Socialist Federal Republic of Yugoslavia", as of 25 June, 1991. The Declaration further stated that "Slovenia expects legal recognition from all countries which respect the democratic principles and the right of all nations to self-determination". Independence was based on "the fundamental principles of natural law, namely the right of the Slovene nation to self-determination, ... the principles of international law and the Constitution of the Republic of Slovenia, and on the basis of the absolute majority vote in the plebiscite held on December, 23, 1990." Given that the Slovene constitutional right to secession was based on self-determination principles, and that the 1990 plebiscite was seen as an exercise of these principles, the Declaration of Independence by Slovenia was deeply rooted in the notion of self-determination.

SELF-DETERMINATION IN CROATIA

In Croatia, claims to secession based upon self-determination were later in surfacing as compared to Slovenia. Following the electoral victories of Dr Franjo Tudjman and his Croatian Democratic Alliance, in late April and early May, 1990, the Croatian republican constitution was amended. The amended Constitution in Part I (Historical Foundations), declared that pursuant to the "right of the Croatian nation to self-determination and state sovereignty, including the inviolable right to secession and association", the Republic of Croatia was thereby "established as the national state of the Croatian nation and the state of the members of other nations and minorities who are its citizens" (36). By Article 140 Croatia would remain part of Yugoslavia "until a

(28) Cohen, *Broken Bonds*, at 121.

(29) Cohen, *Broken Bonds*, at 179.

(30) In the April, 1990 elections in Slovenia, Milan Kucan won a "stunning" victory, a victory which he partially attributed "to the popular perception that he was best qualified to defend 'Slovenia's right to self-determination in a non-disruptive manner'". See Cohen, *Broken Bonds*, at 94.

(31) Cohen, *Broken Bonds*, at 176.

(32) Cohen, *Broken Bonds*, at 219(n1).

(33) On whether self-determination is a legal right or political principle see Buchheit, *Secession*, at 90-91, and Necatigil, *The Cyprus Question*, at 213-215.

(34) *Focus*, Special Issue, (Belgrade), 14 January, 1992, (hereinafter *Focus*), at 14.

(35) For the text of the Slovene Declaration of Independence see *Focus*, at 92-96.

(36) Cohen, *Broken Bonds*, at 130-131, 176.

new agreement is reached by the Yugoslav republics, or until the Croatia Sabor decides otherwise." Furthermore Article 140 stated that if Croatia was in any way endangered, threatened or disadvantaged within Yugoslavia, Croatia would make appropriate decisions protecting its interests. Such actions would be justified "on the basis of the right to self-determination and the sovereignty of the Republic of Croatia" (37).

Following receipt of the Slovene Assembly's disassociation resolution of 20 February, 1991, the Croat Assembly (the Sabor), passed a resolution the following day endorsing the process of the "disunion" of Yugoslavia. The Assembly based the resolution on "the inalienable and inexpendable right of the Croatian nation to self-determination, including the right to secession and association with other nations and states" (38). On 28 February, 1991, the Serbian Autonomous Region of Krajina (SAR Krajina) within Croatia adopted a resolution on the disunion of Croatia and the Krajina region, which declared that Krajina wished to stay within Yugoslavia (39). On 19 May, 1991 an independence referendum was held in Croatia with 93% of those voting supporting the creation of a "sovereign and independent" Croatia (40). The Krajina Serbs boycotted the referendum, as in the previous week they had held their own referendum in which an almost unanimous vote was recorded in support of Krajina's union with Serbia (41).

On 25 June, 1991 The Croat Assembly passed its Declaration of Independence, proclaiming Croatia an independent and sovereign state, based upon Croatia's constitutional rights "to self-determination, including the right of secession" (42). The Declaration did not state that Croatia was seceding from Yugoslavia, but rather that Croatia was beginning the process of "disassociation" from Yugoslavia and beginning the process of gaining international recognition.

Croatia's Declaration of Independence was not as bold and forthright as its Slovenian counterpart. Whereas Slovenia declared itself no longer part of Yugoslavia, Croatia declared it was starting the process of disassociation from Yugoslavia. Similarly, Slovenia expected prompt international recognition, whereas Croatia was starting the process towards international recognition. On 7 July, 1991, at the behest of the European Community (EC), both republics agreed to a three month moratorium on implementation of their independence declarations. After the expiration of that period both republics, on 8 October, 1991, formally seceded from Yugoslavia (43). On 19 December, 1991, SAR Krajina declared its independence from Croatia under the name of Republic of Serbian Krajina.

In both Slovenia and Croatia, secession was justified on the basis of ethnic self-determination rather than self-determination base on principles of popular sovereignty and representative government. Both Slovenia and Croatia jus-

(37) Cohen, *Broken Bonds*, at 193(n12).

(38) For the text of the Croatian resolution see *Focus*, at 17-20.

(39) For the text of the Krajina resolution see *Focus*, at 21-22.

(40) Cohen, *Broken Bonds*, at 212.

(41) Cohen, *Broken Bonds*, at 213.

(42) For the text of the Croatian Declaration of Independence see Stipe Mesić, *Kako smo Srušili Jugoslaviju*, Politički Memoari, Globus, 1992, (hereinafter, Mesić, *Kako smo Srušili*), at 44-45.

(43) For the text of the Croat declaration of secession see *Focus*, at 178-180.

tified secession on the basis of the self-determination rights of the Slovene and Croat nations. This was more pronounced in the case of Croatia, with its substantial population of Serbs, who also claimed the right of ethnic self-determination. Thus, the Croatian constitutional amendments declared Croatia to be the "*national state* of the *Croatian* nation" and "*the state of other* nations and minorities who are its citizens."

THE INTERNATIONAL RESPONSE TO SECESSION BY SLOVENIA & CROATIA

In the months leading up to the Slovene and Croat declarations of independence, the international community publicly opposed secession by these republics and supported the territorial integrity of Yugoslavia (44). In his a letter of 28 March, 1991, to Yugoslav Prime Minister, Ante Markovic, President George Bush of the United States of America (USA) stated that "the United States ... will not encourage those who would break the country apart" (45). A subsequent and detailed State Department Statement in May, 1991 by Margaret Tutwiler, declared that "the US will not encourage or reward secession", and reiterated US support for unity in Yugoslavia. Unity was declared to mean "the territorial integrity of Yugoslavia within its present borders." The Statement further declared that "any dissolution of Yugoslavia is likely to exacerbate rather than resolve ethnic tensions" (46). Finally, on 21 June, 1991, during a visit to Yugoslavia US Secretary of State James Baker made it clear that the USA would not recognise the planned declarations of independence by Slovenia and Croatia (47).

The USSR, beset with its own centrifugal forces, supported Yugoslav unity. In April, 1991, Soviet Foreign Minister Bessmertnykh remarked that Yugoslavia's territorial integrity was "one of the essential preconditions for the stability of Europe" (48).

The EC expressed views similar to those of the USA (49). A high-powered EC delegation to Yugoslavia in late May, 1991 supported Yugoslavia's integrity (50). This attitude was reinforced at a meeting of EC Foreign Ministers on 23 June, 1991, which in an issued statement, declared that the EC would not recognise the independence of Slovenia or Croatia should these two republics unilaterally decide to leave Yugoslavia (51). On 19 June, 1991 the 35 member

(44) For a comprehensive discussion of the international and in particular the European, response to the Yugoslav crisis in 1991, see Jonathan Eyal, *Europe and Yugoslavia: Lessons From a Failure*, Whitehall Paper No 19, The Royal United Service Institute for Defence Studies, 1993, (hereinafter, Eyal, *Europe and Yugoslavia*).

(45) For the text of the Bush letter see *Focus*, at 44-45.

(46) For the text of the Tutwiler Statement see *Focus*, at 72-76.

(47) Cohen, *Broken Bonds*, at 217; Eyal, *Europe and Yugoslavia*, at 15-16.

(48) Cohen, *Broken Bonds*, at 215; Eyal, *Europe and Yugoslavia*, at 15.

(49) Maarten Lak, "The Involvement of the European Community in the Yugoslav Crisis During 1991" in (1992) *5 Yearbook of European Studies*, 175-185, (hereinafter Lak, "The Involvement of the EC") at 177-178.

(50) Cohen, *Broken Bonds*, at 216; Eyal, *Europe and Yugoslavia*, at 13.

(51) *The European Report*, No 1688, 26 June, 1991; Cohen, *Broken Bonds*, at 218; Eyal, *Europe and Yugoslavia*, at 13-14.

Conference on Security and Co-operation in Europe (CSCE) issued a Statement supporting Yugoslavia's integrity (52).

Following the Slovene and Croat declarations of independence management of the Yugoslav crisis, at the international level, passed, by general international consensus, to the EC.

Three days after the Slovene and Croat declarations of independence the European Council issued a Statement in which earlier pronouncements of the EC and CSCE on Yugoslavia were given continued support. Further the Statement declared that the Council was firm in its conviction that "neither unilateral acts, not threats or the use of force" could be the basis for the peaceful resolution of the Yugoslav crisis. On the other hand the Council Statement called for a three month moratorium concerning the Slovene and Croat declarations of independence (53). The Council's Statement was clearly equivocal. On the one hand it supported earlier statements supporting the territorial integrity of Yugoslavia, but on the other hand it did not close the door on recognising the secessions of Slovenia and Croatia. The door was left open by the call for the three month moratorium. The moratorium statement was a compromise provision, behind which lay deep divisions within the EC on the question of recognition of the seceding republics. This division reflected a conflict between international law principles relating to self-determination, on the one hand, and that of territorial integrity of existing states, on the other.

The division in the EC saw France and Spain in favour of maintaining a federal Yugoslavia. The other viewpoint favouring the possible recognition of Slovenia and Croatia was supported by Germany and Belgium in particular (54). Thus, German Chancellor Helmut Kohl, soon after the European Council Statement, declared his support for the principle of self-determination (55). Similarly, Belgian Prime Minister Wilfried Martens called upon the EC members "to envisage the recognition of independence of Slovenia and Croatia, if, after a period of three months, it is not possible to organise the co-existence of the republics on a new legal basis in a peaceful manner" (56). The division in EC ranks was all but publicly declared in a statement following an emergency meeting of EC Foreign Ministers on 5 July, 1991. The statement in openly referring to the clash of international law principles relating to self-determination and territorial integrity of existing states (57), reflected the conflicting views over the possible recognition of the rebel republics. On 8 July, 1991 European Commission President, Jacques Delors, in a statement reflecting the pro-recognition view within the EC, stressed that the EC had not ruled out the possibility of recognising Slovenia and Croatia, and also stressed that there was no question of contesting a people's right to self-determination (58).

On 27 August, 1991 an EC Declaration on Yugoslavia stated, in reference to Croatia, that the EC was determined never to recognise changes to frontiers which were brought about by force. The Declaration went on to state:

(52) Cohen, *Broken Bonds*, at 217; Eyal, *Europe and Yugoslavia*, at 15. For the text of the CSCE Statement see *Focus*, at 108.

(53) *Europe*, No 5523, 29 June, 1991; Cohen, *Broken Bonds*, at 229.

(54) *The European Report*, No 1691, 6 July, 1991.

(55) *Europe*, No 5525, 1-2 July, 1991.

(56) *Europe*, No 5528, 5 July, 1991.

(57) *Europe*, No 5529, 6 July, 1991, and *The European Report*, No 1692, 10 July, 1991.

(58) *The European Report*, No 1692, 10 July, 1991.

"The Community and its member States will never accept a policy of fait accompli. They are determined not to recognise changes of borders by force and will encourage others not to do so either" (59).

This was a significant statement in that it apparently accepted Croatia as a subject of international law. Further, it made it clear that the principles of territorial integrity applied not only to international borders, but also to internal federal boundaries of an internationally recognised state.

The 27 August, 1991 EC Declaration also established the EC Conference on Yugoslavia, and in due course appointed former British Foreign Secretary Lord Carrington as its Chairman. The mandate given to Lord Carrington included two significant conditions. Firstly, none of the six republics would be recognised as independent states unless there was an overall settlement reached that was acceptable to all six republics. Secondly, no changes could be made to boundaries except by peaceful means (60). This latter point was made explicitly clear in the EC Declaration on the occasion of the opening of the Conference on Yugoslavia on 7 September, 1991, which stated:

"We (the EC) are determined never to recognise changes of *any* borders which have not been brought about by peaceful means and by agreement." (Author's emphasis) (61)

In a similar vein a CSCE Statement of 10 October, 1991, stated that the member states would "never ... recognise any changes of borders, whether external or internal, brought about by force" (62)

In a joint Declaration of the EC, the USA and the USSR on 18 October, 1991, it was stated that there could be no acceptance of changes of borders, internal or external, obtained by force, and that all such changes would be considered "unacceptable in 1991 in the heart of Europe" (63).

The consequence of the EC approach was that if new international states were to emerge from Yugoslavia, these states would be based upon the republics of Yugoslavia, either as separate independent states, or as combinations of republics forming new states. This was confirmed in the EC Declaration of 8 November, 1991, which referred to the "prospects of recognition of independence of those Republics wishing it" (64).

It was at this stage that German political leaders assumed the initiative within the EC. Since July, 1991, Germany had been manoeuvring behind the scenes to secure Western recognition of Slovenia and Croatia (65). German

(59) For the text of the 27 August, 1991 EC Declaration see *Focus*, at 128-129.

(60) Lord Carrington, "Turmoil in the Balkans" in *The RUSI Journal*, Vol 137, No 5, 1-4, (hereinafter Carrington, "Turmoil in the Balkans"), at 1.

(61) For the text of the 7 September, 1991 EC Declaration see *Focus*, at 150.

(62) For the text of the 10 October, 1991 CSCE Statement see *Focus*, at 172-174.

(63) *Europe*, No 5592, 19 October, 1991.

(64) For the text of the 10 October, 1991 EC Declaration see *Focus* at 226-228. It must also be noted that a statement made on 4 October, 1991, by the Chairman of European Political Cooperation said that "it would be necessary to formulate a political solution on the basis of the perspective of recognition of the independence of those republics wishing it". See *Focus* at 169-171. This was the first formal admission of possible recognition of the secessionist republics. See Weller, "The International Response" at 581-582.

(65) Cohen, *Broken Bonds*, at 230. Thus on 3 July, 1991, German Foreign Minister Hans Dietrich Genscher assured prominent Croat politician Stipe Mesic that Germany would intervene with leading states to gain support for recognition of Slovenia and Croatia: Mesić, *Kako Smo Srušili*, at 75. In September, 1991, German Chancellor Helmut Kohl in addressing German parliament

public opinion, especially of its managerial elite, supported recognition of the seceding republics (66).

RECOGNITION OF SLOVENIA AND CROATIA

Under strong German pressure and following a "raucous" (67) meeting on 16 December, 1991, the EC issued its guidelines for recognition of the seceding republics. The conditions for obtaining EC recognition were:

(a) respect for the provisions of the UN Charter, the Final Act at Helsinki and the Charter of Paris, especially with respect to the rule of law, democracy and human rights;

(b) guarantees for the rights of ethnic and national groups and minorities;

(c) respect for the inviolability of all frontiers, which could only be changed by peaceful agreement;

(d) commitment to settle by agreement or arbitration, all questions concerning State succession and regional disputes;

(e) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability (68).

All the Yugoslav republics were invited to apply for recognition by 23 December, 1991. In their applications they had to state whether:

(a) they wished to be recognised as independent states;

(b) they agreed to accept the commitments in the above guidelines;

(c) they agreed to accept obligations respecting human rights and the rights of national or ethnic groups;

(d) they supported the continued effort of the UN and EC to resolve the Yugoslav crisis.

Finally, the EC required constitutional assurances that each applicant had no territorial claims towards any neighbouring EC member state (69).

Each application was to be referred to the Arbitration Commission headed by French lawyer Robert Badinter (the Badinter Commission), which

declared that if peaceful coexistence of the Yugoslav republics could not be obtained "we must in line with our understanding of the right to self-determination consider ... recognising under international law those republics which no longer wish to belong to Yugoslavia": Weller, "The International Response" at 586(n115). In October, 1991, Slovene politicians were assured by Bonn that recognition was "only a matter of choosing the right moment and the right circumstances": Cohen, *Broken Bonds*, at 233. On the behind the scenes German diplomatic efforts also see Eyal, *Europe and Yugoslavia*.

(66) Cohen, *Broken Bonds*, at 230.

(67) Cohen, *Broken Bonds*, at 233. It is reported that prior to the meeting there was a two-thirds majority of EC members against recognition, but that on the insistence of the German Foreign Minister, Hans-Dietrich Genscher, the meeting would not adjourn until his EC counterparts unanimously agreed to support recognition. By 4 am the next morning Genscher's demand was agreed to by the other 11 foreign ministers: Walter Roberts, "The Balkan Debacle Could Have Been Averted" in *Defence & Foreign Affairs Strategic Policy*, Vol 21, No 4-5, April-May, 1993, 6-7, (hereinafter Roberts, "The Balkan Debacle"), at 7.

(68) EPC Press Release 128/91 (16 December, 1991), reprinted in *Focus*, at 249-250.

(69) EPC Press Release 129/91 (16 December, 1991), reprinted in *Focus*, at 251-252. The last of the conditions, relating to no territorial claims against EC states, was included specifically to allay Greek fears that Macedonia had territorial claims to Greek Macedonia.

had been established pursuant to the EC Declaration of 27 August, 1991. (70) The EC further agreed that recognition of any of the republics should not occur before 15 January, 1992, to give time for the Badinter Commission to consider the applications that were received (71).

The Yugoslav Assembly in a Declaration of 21 December, 1991, strongly criticised the EC decision on issuing guidelines for recognition. The major criticism was on grounds that the EC had violated its own earlier conditions on any recognition, namely that no Yugoslav republic would be recognised as an independent state in the absence of an overall settlement accepted by all six republics (72). The EC decision, according to Lord Carrington, "changed the whole nature of the Conference (on Yugoslavia, removing) the one real instrument to keep the parties engaged in the negotiating process" (73), namely the prospect of recognition. UN Special envoy on Yugoslavia, Cyrus Vance agreed with Carrington's observation (74).

Applications for recognition were received from Slovenia, Croatia, Macedonia and Bosnia-Herzegovina. Additional applications were submitted by the Republic of Kosovo and the Republic of Serbian Krajina. The latter two applications could not be considered as the guidelines clearly only invited applications from former Yugoslav republics, a status that neither Kosovo nor Krajina enjoyed under the Yugoslav Constitution. The Badinter Commission in its opinions recommended recognition of Slovenia (75) and Macedonia (76), but not for Croatia (77) and Bosnia-Herzegovina (78).

In relation to Croatia, The Badinter Commission was not satisfied with the Croat constitutional provisions relating to minorities, and thus recommended against recognition. However, it further stated that if this deficiency was rectified, Croatia would then have satisfied the EC's conditions for recognition.

In relation to Bosnia-Herzegovina, the Badinter Commission recommended an internationally supervised referendum to be held before any recognition be granted, in order to see if a majority of its citizens wanted independence and international recognition. This in effect amounted to an additional condition for recognition as it was not included in the EC guidelines and conditions issued on 16 December, 1991.

(70) For the text of the 27 August, 1991 EC Declaration see *Focus*, at 128-129.

(71) Cohen, *Broken Bonds*, at 234.

(72) For the text of the 21 December, 1991 Yugoslav Assembly Declaration see *Yugoslav Survey*, Vol XXXII, No 4, 1991, at 5-7.

(73) Carrington, "Turmoil in the Balkans", at 1. This was also the view of Dutch diplomat Henry Wynaendts who served as part of Lord Carrington's negotiating team on the Yugoslav crisis: David Wedgwood Benn, "A Diplomat on Yugoslavia's Breakup" in (1993) 49 *The World Today*, 220-221 at 220.

(74) Cohen, *Broken Bonds*, at 234-235.

(75) The Badinter Commission, Opinion No 7, reprinted in Kreca, *The Badinter Arbitration Commission*, at 54-59.

(76) The Badinter Commission, Opinion No 6, reprinted in Kreca, *The Badinter Arbitration Commission*, at 50-54.

(77) The Badinter Commission, Opinion No 5, reprinted in Kreca, *The Badinter Arbitration Commission*, at 48-50.

(78) The Badinter Commission, Opinion No 4, reprinted in Kreca, *The Badinter Arbitration Commission*, at 46-48.

However, before any application for recognition had even been filed, Germany broke ranks with its other EC partners and on 18 December, 1991, recognised Croatia and Slovenia, although it stated that it would not implement its decisions on recognition until 15 January, 1992. (79) On 15 January, 1992, and left with no real option but to follow the German lead, the EC member states recognised Slovenia and Croatia. Macedonia was not recognised in deference to Greek demands that Macedonia change its name to exclude the word Macedonia from it. Bosnia-Herzegovina was not recognised in accordance with the Badinter Commission advice.

OBSERVATIONS ON THE RECOGNITION OF SLOVENIA & CROATIA

The first observation that can be made about the eventual recognition of Slovenia and Croatia, is that political factors, rather than legal ones, dominated in the decision to recognise. Statements on the Yugoslav crisis by key international players in the early part of 1991, calling for the territorial integrity of Yugoslavia and warning against secession, were largely made against the background of events in the USSR, which was in the process of dissolution. Concern that Yugoslavia would provide a precedent for the USSR, at a time when both the political leadership in the USA and the USSR were committed to the continued territorial integrity of the latter (80), meant that the international community was almost unanimous in calling for the maintenance of a unified Yugoslavia (81) However, with the failure of the August, 1991 military putsch in the USSR, and the emergence of Boris Yeltsin as the dominant figure in the USSR, a change of approach with respect to Yugoslavia was now possible. With Yeltsin's rise to prominence, and Russia's recognition of the Baltic states on 6 September, 1991, and the later agreement amongst other Soviet republics to form the Commonwealth of Independent States (CIS), the way was opened for the consideration of the secessionist claims of Slovenia and Croatia, in a more favourable manner (82). The precedent value of Yugoslavia for the USSR was no longer a concern. More than anything else, the rise to power of Yeltsin in the USSR and the eclipse of Mikhail Gorbachev, followed by the peaceful dissolution of the USSR, opened the way for the eventual recognition of the secessionist Yugoslav republics.

There is little doubt that Germany was the principal architect of the EC move to eventual recognition of Slovenia and Croatia. The German justification for such a policy was that recognition would bring an end to the hostilities

(79) Cohen, *Broken Bonds*, at 234.

(80) See Michael Beschloss & Strobe Talbot, *At The Highest Levels*, Little, Brown & Co, 1993, for details of US and Soviet concerns over the possible disintegration of the USSR.

(81) Allen Lynch & Reneo Lukic, "Russian Foreign Policy and the Wars in the Former Yugoslavia" in *RFE/RL Research Report*, Vol 2, No 41, 15 October, 1993, 25-32, at 27; Rich, "Recognition of States", at 40; Lak, "The Involvement of the EC", at 177.

(82) Dutch Foreign Ministry official Maarten Lak has since written: "Western interest in Yugoslavia had been conditioned by the Cold War realities of a divided Europe and as the old bipolarity began to break down so too did western concerns for Yugoslav security": Lak, "The Involvement of the EC", at 176.

that had engulfed a large part of Croatia in the latter part of 1991. (83) Thus, recognition was being used as an instrument to achieve foreign policy objectives (84).

The EC decision to ignore the opinions of its own Badinter Commission concerning recognition of Macedonia and Croatia was political. It was well known that whatever the Badinter Commission stated in its opinions Slovenia and Croatia would be recognised (85). As Eyal has observed:

"Badinter's mission was an utter irrelevance; this lawyer-politician persevered in playing his role in the charade more out of a sense of duty, rather than any serious conviction" (86).

On Macedonia, recognition was refused due to strenuous objections by the Greeks to the use of the name Macedonia (87). To overcome the Badinter Commission's to the recognition of Croatia, the EC sought hurried last minute assurances from President Franjo Tudjman that Croatia would guarantee the rights of minorities within Croatia. These assurances were given on 15 January, 1992, just prior to formal recognition being granted to Croatia (88). Events since recognition of Croatia clearly establish that the German justification for recognition was misguided, with fighting having continued, and indeed, in late 1993, threatening to escalate (89). This is what critics of the German push for recognition feared at the time, and the political wisdom of recognition has been widely criticised ever since (90). Thus, in February, 1993, former French Premier, Michel Debre, called upon France to suspend recognition that it has accorded to Croatia and other former Yugoslav republics (91), and in November, 1993, Greek European Affairs Minister Theodoros Pangalos, attacked the EC decision to recognise Croatia as being "wrong" (92).

(83) John Zametica, *The Yugoslav Conflict*, (Adelphi Paper 270), Brassey's (UK) Ltd, 1992, (hereinafter, Zametica, *The Yugoslav Conflict*), at 69.

(84) Hans-Heinrich Wrede, "'Friendly Concern' - Europe's Decision-making on the Recognition of Croatia and Slovenia" in (1993) 4 *The Oxford International Review*, No 2, 30-32; Rich, "Recognition of States", at 55; Weller, "The International Response", at 587.

(85) Eyal, *Europe and Yugoslavia*, at 48.

(86) Eyal, *Europe and Yugoslavia*, at 48.

(87) For a Greek perspective on the recognition of Macedonia, see Spyros Economides, "Riding the Tiger of Nationalism: The Question of Macedonia" in (1993) 4 *The Oxford International Review*, No 2, 27-29.

(88) Weller, "The International Response" at 593. *The Economist*, 18-24 January, 1992, commented that the assurances given by President Tudjman, "were as flimsy as the standards they were supposed to meet."

(89) Patrick Moore, "A Return of the Serbian-Croatian Conflict?" in *RFE/RL Research Report*, Vol 2 No 42, 22 October, 1993, 16-20.

(90) In an editorial *The European*, 27-30 May, 1993, described the decision to recognise as "precipitate". In October, 1993, newly elected Greek President, Andreas Papandreou, stated that the breakup of Yugoslavia should not have been allowed, placing the blame for the EC decision on Germany: "Withdrawal Of Sanctions On Serbia May Be Justified", *The European*, 21-24 October, 1993. See also Misha Glenny, "The Massacre of Yugoslavia" in *The New York Review of Books*, 30 January, 1992; Misha Glenny, *The Fall of Yugoslavia, The Third Balkan War*, Penguin Books, 1992, at 143; Zametica, *The Yugoslav Conflict*, at 68-70; Gregory R Copley, "The New 'Euro-Bantustans'" in *Defence & Foreign Affairs Strategic Policy*, Vol 21, No 1, 31 January, 1993, 2; Roberts, "The Balkan Debacle"; C G Jacobsen, "Myths, Politics and the Not-So-New World Order" in (1993) 30 *Journal of Peace Research*, 241-250, at 243-244.

(91) "Unilateral US Policy on the Balkans Tilts Peace Process" in *Defence & Foreign Affairs Strategic Policy*, Vol 21, No 2, 28 February, 1993, at 20.

From the perspective of international law one can observe that the EC decision to recognise Slovenia and Croatia is important for its implications as to principles relating to self-determination, the inviolability of borders and the recognition of states.

The principle of self-determination has clearly now evolved beyond the narrow application to post-World War II decolonisation. The right to self-determination has been extended to peoples forming part of an existing internationally recognised state. An important principle that emerges from the EC guidelines on recognition, is that self-determination rights can only be exercised by a clearly defined and established territorial unit within a state. The EC guidelines explicitly confined applications for recognition to the republics of Yugoslavia. On this ground alone recognition could not be granted to the former autonomous province of Kosovo, nor the Republic of Serbian Krajina. This has profound implications for federal state structures, and may influence political leaders to favour maintaining unitary structures and resist "constitutional devolution, if such devolution carries with it the seeds of a right to secession" (93). The EC decision to confine self-determination to established territorial units within a state, was no doubt due to a realisation that acceptance of a much broader right to self-determination entailed profound consequences for existing states, including many of its own member states, especially those with disaffected ethnic minorities (94).

The EC guidelines on recognition also are a clear instance of self-determination which conforms with the traditional Western understanding of self-determination being based on principles of popular sovereignty and representative government (95). The guidelines implicitly reject ethnic self-determination, even though the secessions of Slovenia and Croatia were based on ethnic self-determination.

The cases of Slovenia and Croatia clearly herald the emergence of a new international law on secession. Secession is not a new phenomenon (96), and many of today's long-established states were established in the past by means of secession. However, in the post-World War II era, secession was not favoured by a system of international law and relations that favoured the norm of

(92) "Greek Minister Hits Fiercely At Germany", *Sydney Morning Herald*, 27 November, 1993.

(93) Weller, "The International Response", at 606. In negotiations over the internal structure of Bosnia-Herzegovina, it is more likely that the Moslem resistance to divisions within Bosnia along ethnic lines, was based on grounds that it would pave the way for the Serbian and Croatian regions to secede and unite with Serbia and Croatia. In the case of Quebec, the EC guidelines would probably permit that province's secession from Canada. On Quebec's claims to secession, prior to the EC guidelines on Yugoslavia, see Gregory Marchildon & Edward Maxwell, "Quebec's Right of Secession Under Canadian and International Law" in (1992) 32 *Virginia Journal of International Law*, 583-623.

(94) In the context of the USA, the EC guidelines would preclude the secession from California of the northern California counties that in 1991 introduced plans to secede from California and create the 51st state of the USA. To this extent the Krajina secession from Croatia has parallels with the situation in California, in that neither Krajina nor the northern counties of California formed a single recognised administrative unit as at the time of secession: see Milica Zarkovic Bookman, *The Economics of Secession*, St Martin's Press, 1993, at 5-6.

(95) Musgrave, *Self-Determination*, at 218-220.

(96) Crawford, *The Creation of States*, at 247 states: "Until this century, secession was certainly the most conspicuous, as well as probably the most usual, method of the creation of new States."

territorial integrity over secessionist self-determination (97). This clearly is no longer the case.

The recognition of Croatia and Slovenia also has its implications for the principle of the inviolability of borders. International law provides that external or international borders must be respected (98). The Badinter Commission in its Opinion No 3 (99), advised that the same principles applied to established internal federal boundaries when a federation breaks apart and new states emerge in its place. As a result internal republican boundaries acquire the same status as international borders, and no changes to them can be made except by peaceful agreement. In reaching its conclusion on the inviolability of internal borders the Commission relied heavily on the principle of *uti possidetis juris*, and its application by the International Court of Justice in a 1986 decision concerning the border dispute between Burkina Faso and Mali. The principle of *uti possidetis juris* states that a newly independent state which was formerly a colony succeeds to all the territory within the former colonial boundaries. The Commission's extension of the *uti possidetis juris* principle to the dissolution of a federation has been both criticised (100) and supported (101) by international legal experts. It has also been suggested that the *uti possidetis juris* principle has another meaning, namely the principle of effective control, and that borders of a seceding state are determined by reference to where the seceding entity has effective control. In the context of Croatia this would mean that Croatia's borders would not include those regions approximating to the Republic of Serbian Krajina (102). In this context an EC Declaration of 31 December, 1991, assumes significance. The EC Declaration stated that:

"recognition does not imply the acceptance by the European Community and its Member States of the position of any republic as regards territory which is under dispute by two or more republics" (103).

This Declaration was issued with respect to the USSR, but would appear to be equally applicable to Yugoslavia, especially as the 16 December, 1991 guidelines for recognition applied to both the USSR and Yugoslavia. Clearly, the EC recognition of Slovenia and Croatia, and the opinions of the Badinter Commission which guided the process of recognition, has significant implications for the existing principles of inviolability of borders (104).

(97) In late 1991, after the Slovenian and Croatian declarations of independence, but before EC recognition was granted to the seceding republics, one international legal scholar maintained that Slovenia and Croatia, although possessed of the right to self-determination did not have the right to secede, as the right to secede was not part of international law: Iglar, "The Constitutional Crisis".

(98) See for example the United Nations Charter, and the Helsinki Final Act.

(99) Reprinted in Kreca, *The Badinter Arbitration Commission*, at 44-45.

(100) Kreca, *The Badinter Arbitration Commission*, at 32-40; Musgrave, *Self-Determination*, at 409-414. Weller expressed a general criticism of the Badinter Commission opinions as follows: "Overall, the generally very brief opinions of the Commission are likely to attract considerable and probably hostile scholarly interest. They are underpinned by the shallowest legal reasoning and do not appear destined to assist the international community greatly when addressing the potentially dangerous problem of secession in the future." See Weller, "International Law and Chaos", at 8.

(101) Pellet, "The Opinions of the Badinter Arbitration Committee", at 180; Kingsbury, "Claims By Non-State Groups", at 488. Kingsbury suggests that the principle should have extended to the boundaries of Yugoslavia's autonomous provinces, as well as the republics.

(102) Kreca, *The Badinter Arbitration Commission*, at 38-39.

(103) Quoted in Kreca, *The Badinter Arbitration Commission*, at 39.

On the question of recognition of statehood the EC has substantially modified accepted international practice. Firstly, traditional international law criteria for recognition have been abandoned, and secondly, new criteria have been added.

The traditional formulation of the basic criteria for statehood is contained in Article 1 of the Montevideo Convention, 1933, which states:

"The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States" (105).

In the case of Croatia, the provisions of Article 1 were not met, in that the Croatian government, at no time, has had control over approximately one-third of the territory of the newly recognised state. These areas have been controlled by the Serbs of Croatia, and Croat government forces have been unable to assume control over these regions for their government. The Croatian government has been, and remains, incapable of exercising sovereignty over a significant part of its putative population or territory (106).

On the other hand, the EC guidelines of 16 December, 1991 added further criteria to be satisfied before recognition could be granted. The EC guidelines stated that recognition would only be granted if, *inter alia*, the new states respected the provisions of the UN Charter, the Helsinki Final Act, and the CSCE Charter of Paris for a New Europe, particularly concerning the rule of law, democracy, and human rights. New states would also be required to guarantee the rights of ethnic and national minorities. Three observations can be made about these additional requirements. Firstly, apart from the nonbinding declarations of the CSCE there are no international treaties detailing the meaning of, nor the means of ensuring, the rule of law, democracy or the rights of ethnic and national minorities. Indeed, in some of these matters there is a variety of different views within the international community (107). Given this state of affairs the granting of recognition is open to quite arbitrary application. Secondly, in the area of human rights, the international law on that subject is one modelled on underlying Western principles and values. The implementation of existing human rights conventions to societies not steeped in Western traditions, apart from creating difficulties, raises the question of the validity of insisting that non-Western states abide by Western notions of human rights. In the case of the former Yugoslavia, this is directly relevant, given the Eastern Orthodox tradition of the southern and eastern republics (108). Finally, the EC guidelines on recognition amount to a breach of the principle of non-interference in the internal affairs of a state. This appears to be part of an emerging

(104) The principle of inviolability of internal boundaries has been attacked as unjust on political grounds. In the context of Yugoslavia it has been written: "Marshall Tito delineated borders for his Yugoslavia for his purpose - one of which was an ethnic mix that would preclude separatism(!) ... Like many other internal boundaries elsewhere, these stand testimony to their creator(s), not natural justice. To sanctify them as inviolable is to perpetuate and embed injustice, and conflict": Carl Jacobsen, "On the Search for a New World Security Order: 'The Inviolability of Borders': Prescription for Peace or War?" in (1992) *European Security*, 50-57, at 55.

(105) For a discussion of the criteria in the Montevideo Convention, see Crawford, *The Creation of States*, at 36-71.

(106) Musgrave, *Self-Determination*, at 361-362.

(107) Kingsbury, "Claims By Non-State Groups", at 505-506.

(108) Adamantia Pollis, "Eastern Orthodoxy and Human Rights" in (1993) 15 *Human Rights Quarterly*, 339-356.

trend in international law as is witnessed by the developing principle of international humanitarian intervention (109), and has raised the concerns of many under-developed states who view the "intervention principle" as merely a mask for Western domination and control of the Third World.

The end result of the EC practice as determined by the 16 December, 1991 guidelines, is that it has "turned recognition into a constitutive element of statehood", despite the fact that its own Badinter Commission declared that the recognition of states is "purely declaratory" (110). The debate on the declaratory versus constitutive theories (111) of recognition has again been revived. Furthermore, the various criteria in the EC guidelines make recognition an avowedly political act, with recognition of a secessionist claim based on self-determination becoming a privilege to be granted to the "deserving", rather than being a right of universal applicability (112).

CONCLUSION

The secession of Slovenia and Croatia, and their recognition as international states has had a significant impact on the principles of self-determination. It was on the basis of self-determination that both republics justified secession, and this argument found favour with the international community. The recognition of Slovenia and Croatia means that self-determination can manifest itself by the act of secession from an internationally recognised state. This is a dramatic departure from previous international practice. At the time of the drafting of the United Nations Charter and its provisions on self-determination, concerns were expressed, especially by the French, that these articles could lead to secessionist claims (113). This has now occurred. As a consequence there is now an emerging international law on secession. The EC guidelines upon which the aspirations of the secessionist Yugoslav republics were assessed, are important constituents in this new law on secession. As Musgrave has observed:

"The response of the international community to the events in Yugoslavia has done much to weaken the principle of territorial integrity and to encourage the notion that self-determination can be achieved through secession from an independent and sovereign state ... A precedent has thus been established whereby a separate state can be unilaterally created by a constituent unit of an existing sovereign state, and will be recognised as such by the international

(109) On international humanitarian intervention see Nigel Rodley (ed), *To Loose the Bands of Wickedness, International Intervention in Defence of Human Rights*, Brassey's UK Ltd, 1992.

(110) The Badinter Commission, Opinion No 1, reprinted in Kreca, *The Badinter Arbitration Commission*, at 41-43.

(111) See Crawford, *The Creation of States*, at 16-25; Oppenheim's *International Law*, at 128-130; Brownlie, *Public International Law*, at 88-91.

(112) That recognition should be a political act is regarded as proper by some commentators. See Halperin et al, *Self-Determination*, which adopts criteria for recognition of secessionist states, similar to those adopted by the EC in relation to Yugoslavia. The view of Halperin et al is criticised in a review of *Self-Determination*, by Hurst Hannum in (1993) 33 *Virginia Journal of International Law*, 467-471.

(113) A Rigo Sureda, *The Evolution of the Right of Self-Determination, A Survey of United Nations Practice*, A W Sijthoff, 1973, at 99.

community even though it has not fulfilled the traditional legal criteria for statehood" (114).

On a political level the EC decision to recognise Slovenia and Croatia was based on the false premise that it would end the carnage and bloodshed in Yugoslavia. Indeed, the result has been the opposite. The decision was made at the result of German pressure within the EC, and masked political divisions over the wisdom of recognition, whilst at the same time it severely strained the EC's crisis management capacity (115). Recognition of the rebel Yugoslav republics, or "wreckognition" (116) as *The Economist* labelled it, was, in the words of Eyal, "a shameful game that failed both to preserve the Community's reputation, or prevent the war from widening" (117). The political ramifications have been that the international community now has dramatically limited options available for reaching a speedy and equitable solution to the problems of former Yugoslavia.

(114) Musgrave, *Self-Determination*, at 363-364.

(115) Lak, "The Involvement of the EC", at 181.

(116) *The Economist*, 18-24 January, 1992.

(117) Eyal, *Europe and Yugoslavia*, at 49.