CONFERENCE ON YUGOSLAVIA ARBITRATION COMMISSION: OPINIONS ON QUESTIONS ARISING FROM THE DISSOLUTION OF YUGOSLAVIA*

[January 11 and July 4, 1992]
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Introductory Note
by
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1. Background

At a meeting held in Brussels on August 27, 1991, the European Community (the "EC") and its member States agreed in a declaration to convene a peace conference on Yugoslavia that would bring together the Federal Presidency and the Federal Government of Yugoslavia, the Presidents of the six Yugoslav republics, the President of the EC Council and representatives of the EC Commission and EC member States.

In this framework, an arbitration procedure would enhance the rule of law in the settlement of the differences relating to the Yugoslav crisis. Pursuant to the EC declaration adopted at the Brussels meeting on August 27, the "relevant authorities" (not specifically identified) would be entitled to submit their differences to an Arbitration Commission (the "Arbitration Commission") of five members chosen from the Presidents of Constitutional Courts in EC member States.

The EC and its member States had the power to appoint three members of the Arbitration Commission, and to this effect designated the President of the French "Conseil Constitutionnel", the President of the German Federal Constitutional Court and the President of the Italian Constitutional Court. The Yugoslav Federal Presidency was entitled to appoint unanimously the two other members. However, as this body Could not reach a unanimous agreement on the appointment, the three members of the Arbitration Commission chosen by the EC appointed the two other members, namely the President of the Spanish Constitutional Court and the President of the Belgian Conflicts Court ("Cour d'Arbitrage"). At its first meeting, the five members of

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[The Introductory Note to the selection of documents regarding the situation in the former Yugoslavia appears at 31 I.L.M. 1421 (1992). The selection of documents includes the U.N. Security Council Resolutions, 31 I.L.M. 1427 (1992); the European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 31 I.L.M. 1485 (1992); Documents Adopted at the London Conference of the International Conference on the Former Yugoslavia, 31 I.L.M. 1527 (1992); and the U.N. Secretary-General Report on the International Conference on the Former Yugoslavia, 31 I.L.M. 1549 (1992).]

the Arbitration Commission decided that the Chairman would be the President of the French "Conseil Constitutionnel" (Mr. Badinter), and the seat would be Paris.

While the result of an EC initiative, the Arbitration Commission has received the full support of the United States and the former Soviet Union by a joint statement dated October 18, 1991, among the EC, the U.S. and the former U.S.S.R.

2. The Applicable Law And Rules of Procedure

The EC declaration of August 27 did not specify which law the Arbitration Commission would apply. So far, the Arbitration Commission has decided the issues submitted for its advice essentially on the basis of public international law, including references to the peremptory norms of general international law (*jus cogens*).

As to the way of submitting issues to the Arbitration Commission and the applicable rules of procedure, just a few indications can be drawn from the written texts, while a more complete picture emerges from the practice of the peace conference and of the Arbitration Commission.

The EC declaration of August 27 required only that the Arbitration Commission would give its decisions within two months of being requested to act. The Arbitration Commission has consistently met this time limit, and delivered opinions 4 to 7 in less than one month.

A subsequent EC joint statement dated September 3, 1991, specified that the Chairman of the EC peace conference would transmit to the Arbitration Commission the issues submitted for arbitration. The results of the Arbitration Commission's deliberations would then be put back to the peace conference through its Chairman. This joint statement provided also that the Arbitration Commission would itself establish the applicable rules of procedure, giving due consideration to those adopted by similar institutions.

No rules of procedure have yet been made public. In any event, from the available decisions it appears that the basic principle of granting each party the full opportunity of stating its case applies. Fact-finding is paramount and the Arbitration Commission has examined documents and observations from various sources, including entities like the "Assembly of the Serbian Nation of Bosnia-Hercegovina".

3. The Arbitration Commission's Work

The Arbitration Commission has issued ten opinions and no awards so far. It delivered opinions 1 to 3 and 8 to 10 in response to specific questions formulated by the Chairman of the EC peace conference (in opinions 2 and 3, the questions had originally been raised by Serbia). Opinions 8 to 10 were preceded by an "interlocutory decision", which became necessary because Serbia and Montenegro had challenged the Arbitration Commission's competence to give an opinion on the questions submitted to it. In the interlocutory decision, the Arbitration Commission wrote that it is the judge of its own competence, and that in the specific instance

it was competent to reply, by way of opinions 8 to 10, to the questions raised by the Chairman of the EC peace conference.

Opinions 4 to 7 considered the applications for international recognition submitted by four constituent republics of the former Socialist Federal Republic of Yugoslavia. Such consideration by the Arbitration Commission was in accordance with the "Declaration on Yugoslavia" and the "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" [31 I.L.M. 1485 (1992)] agreed by the EC member States on December 16, 1991, as well as the rules of procedure relating thereto, which the Arbitration Commission adopted on December 22, 1991. In opinions 4 to 7 the Arbitration Commission examined, among other materials, the answers that the republics concerned gave in reply to a detailed questionnaire prepared by the Arbitration Commission itself.

Besides the ten opinions, the interlocutory decision and the questionnaire, the Arbitration Commission has also given comments, at the request of the Chairman of the EC peace conference, on the Republic of Croatia's Constitutional Law of December 4, 1991, as last amended on May 8, 1992.

While it is outside the scope of the present introductory note to examine the political influence and legal significance of the Arbitration Commission's work, the complex interaction between the deliberations of the Arbitration Commission and the political decisions of the EC institutions and member States is noteworthy. For example, the EC and its members States accepted only in part the advice of the Arbitration Commission on the recognition of the former Yugoslav republics and decided, on January 15, 1992, to proceed with the recognition of Slovenia and Croatia. On the other hand, in a joint statement dated July 20, 1992, the EC and its member States expressly referred to the Arbitration Commission's conclusions in opinion 10 and refused to accept the new Federal Republic of Yugoslavia (which comprises Serbia, together with its autonomous provinces, and Montenegro) as the sole successor to the former Socialist Federal Republic of Yugoslavia.

At present, the structure and functions of the Arbitration Commission are under review (see Paul Szasz's Introductory Note, 31 I.L.M. 1421 (1992), paragraph IV) as a consequence of the developments following the London Conference held on August 26-27, 1992.

I.L.M. Content Summary

1 [Public international law defines what a "state" is; public international law, as expressed in the 1978 and 1983 Vienna Conventions, defines "state succession" and the rights and duties of successor states]

2 [The SFRY no longer meets the criteria of a "state" under international law, because its essential governmental organs have become powerless]

3 [The Committee finds that the SFRY is in the process of dissolution]

[Authentic text: French]

OPINION No. 2 - I.L.M. Page 1497

[Introduction]

[The legal question presented is whether the Serbian people in Croatia and Bosnia-Herzegovina have the right to self-determination]

1 [The right to self-determination is not well-defined under international law; as it stands, the right cannot affect the location of boundaries (uti possidetis juris)]

2 [Peremptory norms of international law require respect for the rights of minorities]

3 [Individuals have the right to choose their ethnic, religious or language community; as a corollary, the Serbian people should be allowed to choose their nationality]

4 [The Serbian people in Croatia and Bosnia-Herzegovina have the rights of minorities and ethnic groups under international law and under the draft Convention of the Conference on Yugoslavia, including the corollary right to choose their nationality]

[11 January 1992]
[Authentic text: French]
[Signature]

OPINION No. 3 - I.L.M. Page 1499

[Introduction]

[The legal question presented is whether the boundaries between Croatia, Serbia and Bosnia-Herzegovina (as republics) will be regarded as international boundaries (after the dissolution of the SFRY)]

1 [Making the caveat that this opinion is given in the context of a "fluid" situation in the SFRY]

2 [Governing principles are set forth below]

First [External boundaries must be respected]

Second [Internal boundaries may not be altered except by agreement]

Third [According to the principles of (1) respect for the territorial status quo and (2) uti possidetis, the former internal boundaries become external boundaries, protected under international law, unless otherwise agreed; also, art. 5 of the SFRY Constitution provides that the republics' boundaries cannot be changed without their consent]

Fourth [Under international law, existing boundaries cannot legally be changed by force]

[11 January 1992]
[Authentic text: French]
[Signature]

OPINION No. 4 - I.L.M. Page 1501
[ON RECOGNITION OF THE SOCIALIST REPUBLIC OF BOSNIA-HERZEGOVINA (SRBH) BY THE EC AND ITS MEMBER STATES]

[Considering SRBH's request for recognition by the EC and Member States in accordance with the Guidelines on the Recognition of New States adopted by the EC Council on 16 December 1991 (EC Guidelines); list of materials supplied by SRBH]

[Opinion]

[Noting, among other things, that Serbian members of the Presidency did not associate themselves with the SRBH declarations and undertakings; noting that the "Serbian people of Bosnia-Herzegovina" voted for a "common Yugoslav State"

Concluding that SRBH has not been established as a sovereign and independent state]

[Done at Paris on 11 January 1992]

OPINION No. 5 - I.L.M. Page 1503
[ON RECOGNITION OF CROATIA BY THE EC AND ITS MEMBER STATES]

[Considering Croatia's request for recognition by the EC and Member States in accordance with the EC Guidelines; list of materials supplied by Croatia]

[Opinion]

[Noting, among other things, that the Constitutional Act of 4 December 1991 does not fully incorporate provisions of the draft Convention of 4 November 1991, notably provisions on "special status"]

[But for such shortcoming, Croatia meets the conditions for its recognition]

[Done at Paris on 11 January 1992]

Comments on Croatia's Constitutional Law of 4 December 1991, as amended on 8 May 1992 - I.L.M. Page 1505

[Noting that the amended version creates restrictions on the autonomy accorded to areas with special status and that it satisfies international law requirements regarding the protection of minorities]

[Done at Paris on 4 July 1992]

OPINION No. 6 - I.L.M. Page 1507
[ON RECOGNITION OF MACEDONIA BY THE EC AND ITS MEMBER STATES]

[Considering Macedonia's request for recognition by the EC and Member States in accordance with the EC Guidelines; list of materials supplied by Macedonia]

[Opinion]

[Concluding that Macedonia satisfies the EC Guidelines]

[Done at Paris on 11 January 1992]

OPINION No. 7 - I.L.M. Page 1512
[ON RECOGNITION OF SLOVENIA BY THE EC AND ITS MEMBER STATES]

[Considering Slovenia's request for recognition by the EC and Member States in accordance with the EC Guidelines; list of materials supplied by Slovenia]

[Opinion]

[Concluding that Slovenia satisfies the EC Guidelines]

[Done at Paris on 11 January 1992]

[Letter from President of Republic of Croatia to Chairman of Arbitration Commission]
[Confirming that provisions contained in draft Treaty were accepted in principle by Croatia. The principles have been included in the Constitutional Act]

[Zagreb, 11 January 1992]

INTERLOCUTORY DECISION (Opinions 8, 9 and 10) - I.L.M. Page 1518
[The Chairman of the Conference for Peace in Yugoslavia sought an opinion on 3 questions concerning SFRY, namely whether the dissolution of the SFRY was complete; whether FRY is a new state calling for recognition by the EC and Member States; and how problems of state succession should be settled among successor states. The Commission, after finding that it could rule on its own competence to consider the questions, decided that it was competent to reply to the questions posed]

[Done at Paris on 4 July 1992]

OPINION No. 8 - I.L.M. Page 1521
[Addressing the question of whether dissolution of the SFRY was complete, the Commission replied that the dissolution was complete and that the SFRY no longer exists]

[Done at Paris on 4 July 1992]

OPINION No. 9 - I.L.M. Page 1523
[Addressing the question of how to settle problems of state succession among the emerging successor states, the Commission replied that the successor states must negotiate a solution, applying general international law and the principles set forth in the 1978 and 1983 Vienna Conventions, including the principle of equality of rights and duties between states; no successor state alone may claim former membership rights in any international organization; SFRY assets and debts must be divided equitably among the successor states]

[Done at Paris on 4 July 1992]

OPINION No. 10 - I.L.M. Page 1525
[Addressing the question of whether the FRY (proposed by Montenegro and Serbia) is a new state calling for recognition by the EC and Member States, the Commission replied that the FRY is a new state that cannot be considered to be the sole successor to the SFRY; recognition of the FRY will be subject to the EC Guidelines]

[Done at Paris on 4 July 1992]

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMITTEE

OPINION N° 1

The President of the Arbitration Committee received the following letter from Lord Carrington, President of the Conference on Yugoslavia, on November 20th, 1991:

> "We find ourselves with a major legal question.
>
> Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.
>
> Other Republics on the contrary consider that there is no question of secession, but the question is one of a disintergration or breaking-up of the SFRY as the result of the concurring will of a number of Republics. They consider that the six Republics are to be considered equal successors to the SFRY, without any of them or group of them being able to claim to be the continuation thereof.
>
> I should like the Arbitration Committee to consider the matter in order to formulate any opinion or recommendation which it might deem useful."

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

1) The Committee considers:

a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a State; that in this respect, the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory;

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

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

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

e) that, in compliance with the accepted definition in international law, the expression "State succession" means the replacement of one State by another in the responsibility for the international relations of territory. This occurs whenever there is a change in the territory of the State. The phenomenon of State succession is governed by the principles of international law, from which the Vienna Conventions of August 23rd, 1978 and April 8th, 1983 have drawn inspiration. In compliance with these principles, the

outcome of succession should be equitable, the States concerned being free to settle terms and conditions by agreement. Moreover, the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.

2 - The Arbitration Committee notes that:

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

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

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

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

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

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

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

3 - Consequently, the Arbitration Committee is of the opinion:

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

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

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

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 2

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

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

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

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

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

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

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

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

3. Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or wishes.

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

4. The Arbitration Commission is therefore of the opinion:

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

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

Paris, 11 January 1992.

(signed)

R. Badinter

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 3

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

"Can the internal boundaries between Croatia and Serbia and between Bosnia-Hercegovina and Serbia be regarded as frontiers in terms of public international law?"

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

1. In its Opinion No 1 of 29 November 1991, published on 7 December, the Commission found that "the Socialist Federal Republic of Yugoslavia is in the process of breaking up". Bearing in mind that the Republics of Croatia and Bosnia-Hercegovina, *inter alia*, have sought international recognition as independent States, the Commission is mindful of the fact that its answer to the question before it will necessarily be given in the context of a fluid and changing situation and must therefore be founded on the principles and rules of public international law.

2. The Commission therefore takes the view that once the process in the SFRY leads to the creation of of one or more independent States, the issue of frontiers, in particular those of the Republics referred to in the

question before it, must be resolved in accordance with the following principles:

First - All external frontiers must be respected in line with the principle stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties.

Second - The boundaries between Croatia and Serbia, between Bosnia-Hercegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at.

Third - Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, (1986) ICJ Reports 554 at 565): "Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles ...."

The principle applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent.

Fourth - According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia.

Paris, 11 January 1992.

(signed)

R. Badinter

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 4
ON INTERNATIONAL RECOGNITION OF THE SOCIALIST REPUBLIC OF BOSNIA-HERCEGOVINA BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

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

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

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

1. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;

2. Extracts from the relevant provisions of the 1974 Constitution of the SRBH, the constitutional amendments passed in 1990, the Constitution of the Socialist Federal Republic of Yugoslavia and the draft Constitution currently being prepared;

3. The "Memorandum" and "Platform" of the Assembly of the SRBH, dated 14 October 1991;

4. Letter of 27 December 1991 from the President of the Presidency of the SRBH to Lord Carrington, Chairman of the Conference on Yugoslavia, on the formation of an "Assembly of the Serbian People in Bosnia-Hercegovina";

5. The Decision of 8 January 1992 by the Prime Minister of the SRBH, published in the *Official Journal*, whereby the Government undertook to abide by the international agreements cited in the Guidelines;

6. Answers, dated 8 January 1992, to the Commission's request for additional information on 3 January.

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

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

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

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

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

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

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

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

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

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

(i) the new Community must include Serbia and Croatia at least; and

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

3. The Commission notes:

(a) that the declarations and undertakings above were given by the Presidency and the Government of the Socialist Republic of Bosnia-

Hercegovina, but that the Serbian members of the Presidency did not associate themselves with those declarations and undertakings; and

(b) that under the Constitution of Bosnia-Hercegovina as amended by Amendment LXVII, the citizens exercise their powers through a representative Assembly or by referendum.

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

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

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

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

Paris, 11 January 1992.

(signed)

R. Badinter

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 5

ON THE RECOGNITION OF THE REPUBLIC OF CROATIA BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

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

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

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

1. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;

2. Document supporting the application for recognition of 19 December 1991, entitled "Answers to the Declaration on Yugoslavia and to the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union";

3. Constitution of the Republic of Croatia of 22 December 1990;

4. Report on the results of the referendum held on 19 May 1991;

5. Constitutional Decision of 25 June 1991 on the sovereignty and independence of the Republic of Croatia, as confirmed by Article 140(1) of the Constitution;

6. Declaration of 25 June 1991 establishing the sovereignty and independence of the Republic of Croatia;

7. Constitutional Act of 4 December 1991 on human rights and freedoms and on the rights of national and ethnic communities and minorities in the Republic of Croatia;

8. Parliament's Decision of 28 December 1991 supporting the President of the Republic of Croatia's application for the recognition of the Republic;

9. Letter of 11 January 1992 sent by telecopier by the President of the Republic of Croatia in response to the Arbitration Commission's request of 10 January 1992 for additional information.

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

1. In his answers to the Commission's questionnaire the President of the Republic of Croatia gives a positive response to the questions concerning:

   (a) the Republic's acceptance of the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union; and

   (b) his support for the peacemaking efforts being made by the United Nations Secretary-General and Security Council and by the Conference on Yugoslavia.

2. On 10 January 1992 the Arbitration Commission asked the Republic of Croatia to confirm its acceptance of all the provisions of the draft

Convention drawn up by the Conference on 4 November 1991, notably those in Chapter II, Article 2(c), under the heading "Special status".

The Commission notes that in his reply dated 11 January the President of the Republic of Croatia confirmed that all the provisions contained in the draft Convention of the Conference on Yugoslavia had been accepted in principle by the Republic on 5 November 1991 and had been incorporated into the Constitutional Act of 4 December 1991.

3. The Arbitration Commission considers that:

(i) the Constitutional Act of 4 December 1991 does not fully incorporate all the provisions of the draft Convention of 4 November 1991, notably those contained in Chapter II, Article 2(c), under the heading "Special status";

(ii) the authorities of the Republic of Croatia should therefore supplement the Constitutional Act in such a way as to satisfy those provisions; and

(iii) subject to this reservation, the Republic of Croatia meets the necessary conditions for its recognition by the Member States of the European Community in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Communities on 16 December 1991.

Paris, 11 January 1992

(signed)

R. Badinter

CONFERENCE FOR PEACE IN YUGOSLAVIA

ARBITRATION COMMISSION

Comments on the Republic of Croatia's Constitutional Law of 4 December 1991, as last amended on 8 May 1992

In a letter dated 3 June 1992, the Chairman of the Yugoslav Peace Conference, Lord Carrington, transmitted to the Arbitration Commission for consideration the Constitutional Law of 4 December 1991, as last amended on 8 May 1992, on the human rights, freedoms and rights of national and ethnic groups or minorities in the Republic of Croatia.

For the purposes of the examination, the Arbitration Commission studied:

- the text of the Constitutional Law of 8 May 1992 in the English version transmitted by the Croatian authorities;

- Croatia's comments, drafted in French and received by the Arbitration Commission's Secretariat on 26 June 1992;

- the English translation of Croatia's electoral law of 9 April 1992.

In Opinion No 5 of 11 January, the Arbitration Commission took the view that the Republic of Croatia satisfied the conditions for recognition by the Member States of the European Community set out in the joint statement on Yugoslavia and the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union adopted by the Council on 16 December 1991.

The Arbitration Commission did however, have a reservation about the compatibility of the Constitutional Law of 4 December 1991 with the draft Convention of 4 November 1991, notably the provisions of Article 2(c) of Chapter II regarding "Special status".

1. Comparison of the versions of 4 December 1991 and 8 May 1992 of the Constitutional Law shows that the amended version takes account of comments made by the Peace Conference in a memo annexed to a letter dated 22 February 1992 from the President of the Council of the European Communities to the President of the Republic of Croatia.

The Arbitration Commission notes in particular that:

1.1 An Article 22 has been added: it defines the geographical boundaries of the areas, now organized in two districts, where the special status provisions will apply if, according to the 1981 census, national or ethnic communities account for over 50% of the population.

1.2 The new Article 60 provides for the establishment of a provisional Court of Human Rights pending the institution of one on the territory of the former SFRY pursuant to Article 7(a)(1) of the draft Convention.

1.3 The original Article 62, which made application of the Constitutional Law subject to the establishment of complete and lasting peace throughout Croatian territory and the holding of free elections in areas with special status, has been deleted.

1.4 Lastly, a new Article 63 states that the national laws on which implementation of the Constitutional Law depends will be applied with due regard to the "essential content" of that Law.

2. The Arbitration Commission finds, however, that certain provisions of the draft Convention, in particular in Article 2(c) of Chapter II thereof, are not entirely reflected in the Constitutional Law adopted by the Croatian Parliament on 8 May 1992.

Thus:

2.1 The Law subjects the autonomy accorded to areas with special status to certain restrictions regarding:

- the fields in which the authorities of the areas concerned exercise sole jurisdiction;

- the procedures for the appointment of the political (Article 34) and judicial (Article 39) authorities in the areas concerned, which leave the final choice to the central authorities;

- the judicial (Articles 38, 41, 42 and 47), political (Articles 46, 47 and 84(2)) and budgetary (Articles 54, 55 and 57) control to which the authorities in the areas with special status are subject.

2.2 The Constitutional Law makes no mention of the demilitarization of the "special status" areas provided for in Article 5A of the Convention.

3. The Arbitration Commission finds that, although it must be implemented by all the republics, the draft Convention proposed on 4 November 1991 at the Conference on Yugoslavia does not define in detail the concept of autonomy and adjustments may be made by agreement between the republics.

4. Furthermore, the Arbitration Commission finds that even if the Constitutional Law in question does sometimes fall short of the obligations assumed by Croatia when it accepted the draft Convention of 4 November 1991, it nonetheless satisfies the requirements of general international law regarding the protection of minorities. Article 6(e) in particular is consistent with the fundamental principle of international law whereby all human beings are entitled to recognition, in the national context, of their membership of the ethnic, religious or language group of their choice.

Paris, 4 July 1992

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 6

ON THE RECOGNITION OF THE SOCIALIST REPUBLIC OF MACEDONIA BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

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

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

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

1. Declaration of 19 December 1991 by the Assembly of the Republic of Macedonia, appended to the abovementioned letter from the Minister of Foreign Affairs;

2. Letter of 20 December 1991 from the Minister of Foreign Affairs of the Republic of Macedonia;

3. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;

4. Report on the results of the referendum held on 8 September 1991;

5. Declaration of 17 September 1991 by the Assembly of the Republic of Macedonia;

6. Constitution of the Republic of Macedonia of 17 November 1991 and amendments passed on 6 January 1992;

7. Letter of 11 January 1992 sent by telecopier by the Minister of Foreign Affairs to the Chairman of the Arbitration Commission in response to the Commission's request of 10 January 1992 for additional information.

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

1. In his answers to the Commission's questionnaire the Minister of Foreign Affairs made the following statements on behalf of the Republic of Macedonia:

   (a) In response to the question what measures Macedonia had already taken, or intended to take, to give effect to the principles of the United Nations Charter, the Helsinki Final Act and the Charter of Paris:

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

   The Constitutional Act for the implementation of the Constitution of the Republic of Macedonia defines that the Republic of Macedonia, as an equal legal successor of the Socialist Federal Republic of Yugoslavia together with the other republics, takes over the rights and obligations originating from the creation of SFRY (Article 4)."

   (b) In response to the question what measures Macedonia had already taken, or intended to take, to guarantee the rights of the ethnic and national groups and minorities on its territory:

   "The Constitution of the Republic of Macedonia provides for the establishment of a Council for Inter-Ethnic Relations, which shall consider issues of inter-ethnic relations in the Republic. The Council, composed of all the nationalities on parity basis, apart from the President of the Assembly, consists of two members from the ranks of the Macedonians, the Albanians, the Turks, the Vlachs and the Roms, as well as two members from the ranks of other nationalities in Macedonia. The Assembly is obliged to take into consideration the appraisals and proposals of the Council and to pass decisions regarding them (Article 78)."

(c) In response to the question whether Macedonia would undertake not to alter its frontiers by means of force:

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

The Assembly of the Republic of Macedonia, in the declaration of 17 September 1991, states that the Republic of Macedonia, strictly respecting the principle of inviolability of the borders, as a guarantee for peace and security in the region and wider, confirms its policy of not expressing and having territorial claims against any neighbouring country (Article 4)."

(d) In response to the question whether Macedonia was willing to abide by all the undertakings given on disarmament and the non-proliferation of nuclear weapons:

"Yes, the Republic of Macedonia undertakes all relevant obligations referring to disarmament and nuclear non-proliferation, as well as security and territorial stability."

(e) In response to the question whether Macedonia was prepared to settle by agreement all questions relating to state succession in Yugoslavia and regional disputes, or by recourse to arbitration if necessary:

"Yes, the Republic of Macedonia accepts the obligation and strives for the resolution of all issues referring to the succession of states and to regional disputes, and in case this cannot be reached, by arbitration."

(f) In response to the question what measures Macedonia had already taken, or intended to take, to honour this undertaking:

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

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

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

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

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

2. Following a request made by the Arbitration Commission on 10 January 1992 the Minister of Foreign Affairs of the Republic of Macedonia stated in a letter of 11 January that the Republic would refrain from any hostile propaganda against a neighbouring country which was a Member State of the European Community.

3. The Arbitration Commission also notes that on 17 November 1991 the Assembly of the Republic of Macedonia adopted a Constitution embodying the democratic structures and the guarantees for human rights which are in operation in Europe.

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

   (a) The main provision is to be found in Article 48(1), which states that members of the several nationalities have the right to the free expression, cultivation and development of their national identity; the same applies to national "attributes".

   (b) In Article 48(2) the Republic guarantees that the ethnic, cultural, linguistic and religious identity of the several nationalities will be protected.

   (c) Article 48(3) gives members of the several nationalities the right to set up cultural and artistic institutions and educational and other associations that will enable them to express, cultivate and develop their national identity.

   (d) Under Article 48(4) they also have the right to be educated in their own language at both primary and secondary levels.

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

   (e) In this connection Article 45 is important since it provides that any citizen may set up a private school at any educational level except primary. Article 19(4) provides that religious communities are also entitled to establish schools. In both these cases, however, the precise extent of the rights in question has still to be determined by legislation.

   (f) In the matter of language and script, Article 7(2) provides that in communities where the majority of the inhabitants belong to another nationality, the language and script of that other nationality must be used for official purposes, alongside the Macedonian language and the Cyrillic alphabet. Article 7(3) makes the same provision for communities where a substantital number of inhabitants belong to a given nationality. In both these cases, however, the rights in question have still to be determined in precise terms by legislation.

(g) Article 9(1) of the Constitution prohibits any discrimination on grounds of race, colour, national or social origin, or political or religious convictions.

4. On 6 January 1992 the Assembly of the Republic of Macedonia amended the Constitution of 17 November 1991 by adopting the following Constitutional Act:

"These Amendments are an integral part of the Constitution of the Republic of Macedonia and shall be implemented on the day of their adoption.

Amendment I

1. The Republic of Macedonia has no territorial claims against neighbouring states.

2. The borders of the Republic of Macedonia could be changed only in accordance with the Constitution, and based on the principle of voluntariness and generally accepted international norms.

3. Item 1 of this Amendment is added to Article 3 and Item 2 replaces paragraph 3 of Article 3 of the Constitution of the Republic of Macedonia.

Amendment II

1. The Republic shall not interfere in the sovereign rights of other states and their internal affairs.

2. This Amendment is added to paragraph 1 of Article 49 of the Constitution of the Republic of Macedonia."

5. The Arbitration Commission consequently takes the view:

- that the Republic of Macedonia satisfies the tests in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia adopted by the Council of the European Communities on 16 December 1991;

- that the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name "Macedonia" cannot therefore imply any territorial claim against another State; and

- that the Republic of Macedonia has given a formal undertaking in accordance with international law to refrain, both in general and pursuant to Article 49 of its Constitution in particular, from any hostile propaganda against any other State: this follows from a statement which the Minister of Foreign Affairs of the Republic made to the Arbitration Commission on 11 January 1992 in response to the

Commission's request for clarification of Constitutional Amendment II of 6 January 1992.

Paris, 11 January 1992

(signed)

R. Badinter

CONFERENCE ON YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 7

ON INTERNATIONAL RECOGNITION OF
THE REPUBLIC OF SLOVENIA
BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

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

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

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

1. Answers to the Commission's questionnaire sent to the Republics concerned on 24 December 1991;

2. Declaration of Slovenia's independence by the Assembly of the Republic of Slovenia on 25 June 1991;

3. Constitutional Charter adopted by the Assembly on 25 June 1991;

4. Consitutional Act to give effect to the Constitution, undated;

5. Declaration by the Assembly dated 20 November;

6. Text of the Constitution of 23 December 1991;

7. Brief note on the electoral system;

8. Brief note on the protection of minorities;

9. Documents concerning the plebiscite held on 23 December 1990;

10. Foreign Affairs Act of 5 June 1991.

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

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

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

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

   Following the plebiscite, after various proposals and attempts to agree on changes in the Socialist Federal Republic of Yugoslavia (SFRY) had come to nothing, the Assembly of the Republic of Slovenia adopted a Declaration of Independence on 25 June 1991, based on "a unanimous proposal by all parties, groups or delegates represented in Parliament".

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

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

   The effective political control exercised by the Assembly derives from the Assembly's Declaration of 20 November: the Slovene

   Delegation to the Hague Conference is required to report to it on the progress of negotiations and the positions that have been or are to be taken.

   The Declaration states that "the main foreign policy objective of the Republic of Slovenia is multilateral international recognition ..., the strengthening of its international position ..., the speedier implementation of measures that will enable the Republic to become a full member of the United Nations and of other international and financial organizations ...."

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

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

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

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

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

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

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

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

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

Article 3 of the Basic Constitutional Charter of 25 June 1991 and Article 64 of the Constitution (together with Articles 5 and 81)

guarantee a number of specific rights to the Italian and Hungarian minorities (the right to national emblems, national identity and education in the national language, the right to a degree of political autonomy and to minimum representation in central or local authorities, a right of veto on rules concerning the status of these minorities, etc.).

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

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

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

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

(e) As regards the settlement by agreement of issues relating to state succession and regional disputes (including recourse to arbitration), the Republic of Slovenia accepts this condition both in its application for recognition and in its answers to the Commission's questionnaire; it also points out that this has been its position since the Conference began; lastly, it accepts the principle of going to arbitration where the parties are agreed, and accepts that the arbitral award is binding.

3. Recalling the fact that the Declaration by the Assembly on 20 November 1991 already referred to its support for the basic idea underlying Lord Carrington's plan, the Republic of Slovenia declared in its application for recognition that it accepts the principles contained in the draft Convention produced by the Conference on 4 November 1991.

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

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

(a) The protection of human rights appears to be sufficiently guaranteed by Chapter II of the Constitution, entitled "Human Rights and Fundamental Freedoms" (Articles 14 to 65).

More particularly, the human rights referred to in Article 2(a)(1) of the draft Convention are guaranteed as follows:

(i) Article 17 recognizes the right to life and prohibits the death penalty;

(ii) Articles 18, 21 and 34 guarantee the right to human dignity and prohibit torture and inhuman and degrading treatment or punishment;

(iii) Article 49 prohibits forced labour;

(iv) Articles 19 and 20 guarantee the right to liberty and security of person;

(v) the right to protection of the law, a fair trial, the presumption of innocence and the rights of the defence are guaranteed in Articles 23, 24, 25 and 27 to 30;

(vi) respect for private life is guaranteed in Articles 37 and 38;

(vii) Articles 41 and 46 guarantee freedom of thought, conscience and religion, including the right to conscientious objection;

(viii) freedom of expression is guaranteed in Articles 39 and 45;

(ix) freedom of assembly is guaranteed in Article 42;

(x) the right to marry and found a family is recognized by Articles 53 to 59; and

(xi) discrimination in the exercise of these rights is prohibited by Article 14 (in general) and by Articles 22, 43 and 49 (in specific areas).

(b) As regards the rights of national or ethnic groups and of their members, the Commission notes that Article 14 is the basic provision on equality and non-discrimination, prohibiting discrimination on grounds of nationality, race, language, political or other convictions or "other circumstances":

(i) Article 16, which regulates in strict terms the circumstances in which rights and fundamental freedoms may be suspended, provides that suspension may not involve discrimination within the meaning of Article 14; and certain freedoms (e.g. the right to life) may not be suspended at all;

(ii) the principle of non-discrimination is applied to particular areas, notably liberty of person (Article 19), the right to vote (Article 43), freedom of choice of employment (Article 49), the right to express the fact of one's nationality or belonging to a national community (Article 61);

(iii) the rights of children are protected by several provisions in Articles 53 to 58, more specifically Article 56;

(iv) the right to use one's own language is guaranteed in Articles 61 and 62; and

(v) As regards participation in public affairs, there is universal and equal suffrage (Article 43), participation may be direct or through representatives (Article 44) and freedom of access to any employment is guaranteed by Article 49.

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

(i) the right to use the Italian or Hungarian language in the courts and the right to have the prosecution do likewise; and

(ii) the protection of the Italian and Hungarian cultures and languages in public education at pre-school, primary and secondary levels.

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

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

Paris, 11 January 1992

(signed)

R. Badinter

TRANSLATION

Conference on Yugoslavia
Arbitration Commission
Chairman
Mr Robert Badinter

Mr Chairman,

In answer to your letter of 10 January 1992, allow me to make the following observations:

All the provisions contained in the draft Treaty produced by the Conference on Yugoslavia on 4 November 1991 were accepted in principle by the Republic of Croatia at the meeting in The Hague chaired by Lord Carrington on 5 November, and this is hereby confirmed.

The principles set out in the draft Treaty have been included in the Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities and Minorities of 4 December 1991. To our knowledge, Croatia is the only one of the former Yugoslav Republics to fulfil the obligations arising from Article II, paragraph 5Bc, of the Hague Agreement by adopting the Constitutional Act in accordance with the principles of the European Conventions for the Protection of Human Rights and of Minorities. This is without precedent so far in what was Yugoslavia.

Zagreb, 11 January 1992

Dr Franjo Tudjman
President of the Republic of Croatia

CONFERENCE FOR PEACE IN YUGOSLAVIA

ARBITRATION COMMISSION

INTERLOCUTORY DECISION
(Opinions No 8, 9 and 10)

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

1 - "In terms of international law, is the Federal Republic of Yugoslavia a new State calling for recognition by the Member States of the European

Community in accordance with the joint statement on Yugoslavia and the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union adopted by the Council of the European Communities on 16 December 1991?"*

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

3 - "If this is the case, on what basis and by what means should the problems of the succession of states arising between the different states emerging from the SFRY be settled?"*

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

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

(1) these questions did not fall within the mandate given to the European Community under the terms of the Brioni agreement;

(2) outstanding matters between the FRY and the other Yugoslav Republics should be resolved by means of an overall agreement between them;

(3) those which could not be resolved by agreement should be submitted to the International Court of Justice.

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

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

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

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* Unofficial translation.

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

3. As the International Court of Justice pointed out, "since the Alabama case, it has been generally recognized that, following the earlier precedents, and in the absence of any agreements to the contrary, the international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction (...) This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an instrument which has been preestablished by an international instrument defining its jurisdiction and regulating its operation" (Nottebohm (Preliminary Objection), 1953 reports, p.119). It therefore falls to the Commission to pronounce upon its competence.

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

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

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

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

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

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

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

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

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

10. In consequence, the Arbitration Commission has decided:

- that it falls to it to give a judgment on its competence when it is so seized;

- that in this case, given the nature of the functions which have been given to it, it is competent to reply in the form of Opinions to the three Questions submitted to it on 18 May 1992 by the Chairman of the Conference for Peace in Yugoslavia.

Paris, 4 July 1992

CONFERENCE FOR PEACE
IN YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 8

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

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

Question No 2 runs as follows:

Question No 2

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

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

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

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

- a state's existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a state;

- the SFRY was at that time still a legal international entity but the desire for independence had been expressed through referendums in the Republics of Slovenia, Croatia and Macedonia, and through a resolution on sovereignty in Bosnia-Herzegovina;

- the composition and functioning of essential bodies of the Federation no longer satisfied the intrinsic requirements of a federal state regarding participation and representativeness;

- recourse to force in different parts of the Federation had demonstrated the Federation's impotence;

- the SFRY was in the process of dissolution but it was nevertheless up to the Republics which so wished to constitute, if appropriate, a new association with democratic institutions of their choice;

- the existence or disappearance of a state is , in any case, a matter of fact.

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

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

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* Unofficial translation.

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

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

- the referendum proposed in Opinion No 4 was held in Bosnia-Herzegovina on 29 February and 1 March: a large majority of the population voted in favour of the Republic's independence;

- Serbia and Montenegro, as Republics with equal standing in law, have constituted a new state, the "Federal Republic of Yugoslavia", and on 27 April adopted a new constitution;

- most of the new states formed from the former Yugoslav Republics have recognized each other's independence, thus demonstrating that the authority of the federal state no longer held sway on the territory of the newly constituted states;

- the common federal bodies on which all the Yugoslav republics were represented no longer exist: no body of that type has functioned since;

- the former national territory and population of the SFRY are now entirely under the sovereign authority of the new states;

- Bosnia-Herzegovina, Croatia and Slovenia have been recognized by all the Member States of the European Community and by numerous other states, and were admitted to membership of the United Nations on 22 May 1992

- UN Security Council Resolutions Nos 752 and 757 (1992) contain a number of references to "the former SFRY";

- what is more, Resolution No 757 (1992) notes that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically (the membership) of the former Socialist Federal Republic of Yugoslavia (in the United Nations) has not been generally accepted";

- the declaration adopted by the Lisbon European Council on 27 June makes express reference to "the former Yugoslavia".

4. The Arbitration Commission is therefore of the opinion:

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

Paris, 4 July 1992

CONFERENCE FOR PEACE
IN YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 9

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

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

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

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

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

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

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

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

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

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

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

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

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

- the successor states to the SFRY must together settle all aspects of the succession by agreement;

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* Unofficial translation.

- in the resulting negotiations, the successor states must try to achieve an equitable solution by drawing on the principles embodied in the 1978 and 1983 Vienna Conventions and, where appropriate, general international law;

- furthermore full account must be taken of the principle of equality of rights and duties between states in respect of international law;

- the SFRY's membership of international organizations must be terminated according to their statutes and that none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY;

- property of the SFRY located in third countries must be divided equitably between the successor states;

- the SFRY's assets and debts must likewise be shared equitably between the successor states;

- the states concerned must peacefully settle all disputes relating to succession to the SFRY which could not be resolved by agreement in line with the principle laid down in the United Nations Charter;

- they must moreover seek a solution by means of inquiry, mediation, conciliation, arbitration or judicial settlement;

- since, however, no specific question has been put to it, the Commission cannot at this stage venture an opinion on the difficulties that could arise from the very real problems associated with the succession to the former Yugoslavia.

Paris, 4 July 1992

CONFERENCE FOR PEACE
IN YUGOSLAVIA

ARBITRATION COMMISSION

OPINION No 10

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

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

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

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* Unofficial translation.

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

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

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

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

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

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

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

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

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

- the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY;

- its recognition by the Member States of the European Community would be subject to its compliance with the conditions laid down by general international law for such an act and the joint statement and Guidelines of 16 December 1991.

Paris, 4 July 1992

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA DOCUMENTATION ON THE ARBITRATION COMMISSION UNDER THE UN/EC (GENEVA) CONFERENCE: QUESTIONS SUBMITTED TO THE ARBITRATION COMMISSION AND STATEMENTS RELATING TO THEIR SUBMISSION*

[April 20-July 2, 1993]
+Cite as 32 I.L.M. 1579 (1993)+

I.L.M. Content Summary

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*[Reproduced from the texts provided to *International Legal Materials* by the International Conference on the Former Yugoslavia (ICFY). The Questions are reproduced from Conference Information Note 56, Annex 1; the Statement of 30 April 1993 by the Government of the Federal Republic of Yugoslavia is reproduced from U.N. Document S/26038 (July 4, 1993), Annex, Enclosure; the Reactions [of 26 May 1993] of the members of the Arbitration Commission of the International Conference on the Former Yugoslavia to the statement made [on 30 April 1993] by the FRY Government on its competence are reproduced from the English translation of the ICFY; the Letter dated 2 July 1993 from the Deputy Prime Minister and Minister for Foreign Affairs of the the FRY, addressed to the Co-Chairmen of the ICFY, is reproduced from U.N. Document S/26038 (July 4, 1993), Annex.

[The note on the composition and terms of reference of the Arbitration Commission (January 27, 1993), the note on the reconstitution of the Arbitration Commission (February 19, 1993) and its Rules of Procedure (April 26, 1993) appear at 32 I.L.M. 1572 (1993). Advisory Opinions Nos. 11-15, issued on July 16 and August 13, 1993, in response to the six questions, appear at 32 I.L.M. 1586 (1993).

[The ten opinions of the earlier Arbitration Commission, constituted in 1991 by the European Community, appear at 31 I.L.M. 1488 (1992).]

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA

Palais des Nations, 1211 Geneva 10

Geneva, 20 April 1993

ENGLISH TRANSLATION

Six Questions to be Submitted to the Arbitration Commission by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia

1) In the light of the inventory in the report by the Chairman of the Working Group on Economic Issues, what assets and liabilities should be divided between the successor States to the former Socialist Federal Republic of Yugoslavia during the succession process?

2) On what date(s) did succession of States occur for the various States that have emerged from the Socialist Federal Republic of Yugoslavia?

3a) What legal principles apply to the division of State property, archives and debts of the Socialist Federal Republic of Yugoslavia in connection with the succession of States when one or more of the parties concerned refuse(s) to cooperate?

b) In particular, what should happen to property
- not located on the territory of any of the States concerned, or
- situated on the territory of the States taking part in the negotiations?

4) Under the legal principles that apply, might any amounts owed by one or more parties in the form of war damages affect the distribution of State property, archives and debts in connection with the succession process?

5a) In view of the dissolution of the Socialist Federal Republic of Yugoslavia, is the National Bank of Yugoslavia entitled to take decisions affecting property, rights and interests that should be divided between the successor States to the Socialist Federal Republic of Yugoslavia in connection with the succession of States?

b) Have the central banks of the States emerging from the dissolution of the Socialist Federal Republic of Yugoslavia succeeded to the rights and obligations of the National Bank of Yugoslavia deriving from international agreements concluded by the latter, in particular the 1988 Financial Agreement with foreign commercial banks?

6a) On what conditions can States, within whose jurisdiction property formerly belonging to the Socialist Federal Republic of Yugoslavia is situated, oppose the free disposal of that property or take other protective measures?

b) On what conditions and under what circumstances would such States be required to take such steps?

Statement of 30 April 1993 by the Government of the Federal Republic of Yugoslavia

As stated by the delegation of the Federal Republic of Yugoslavia at the Brussels meeting of the Conference on Yugoslavia and at the London Conference on Yugoslavia, the Federal Republic of Yugoslavia does not recognize the jurisdiction of the Arbitration Commission, known as the Badinter Commission, in the assets and liabilities division procedure and is not agreed that the Commission issue advisory opinions on the principles on the basis of which succession of States would be effected between the Socialist Federal Republic of Yugoslavia, as the predecessor State, on the one hand, and the secessionist former Yugoslav republics, as successor States, on the other.

The Government of the Federal Republic of Yugoslavia also deems unacceptable that the question of principles relevant for the succession procedure be discussed before any body, prior to substantial discussion of these principles within the Succession Group of the Conference on Yugoslavia.

The Government of the Federal Republic of Yugoslavia wishes to recall that in the sense of international law the Arbitration Commission was not established or composed for arbitration purposes, while in its work within the Conference on Yugoslavia so far it has been seriously in breach of both the law of procedure and the implementation of material law.

The Federal Government reiterates the position of the Federal Republic of Yugoslavia presented at the meeting of the Conference on Yugoslavia in Brussels and at the London Conference that all disputes that may arise vis-à-vis the division of assets and liabilities should be referred by agreement either to the Permanent Court of Arbitration in The Hague or to an ad hoc arbitration court.

The Government of the Federal Republic of Yugoslavia considers arbitration proceedings in the settlement of the contentious issues that may arise in the work of the Conference on Yugoslavia as proceedings before a court of law in the sense of general international law and not as proceedings before the Arbitration Commission presided by Mr. Badinter.

We recall in its reply to the letter of Mr. Badinter, President of the Commission, of 3 June 1992, that it considers the opinions of the Commission doctrinary in the sense of article 38 (d) of the Statute of the International Court of Justice, which do not constitute a legal ground for any valid decision. The Federal Republic of Yugoslavia shall consider null and void and non-binding any opinion of the Commission adopted in the procedure to which it has not agreed.

Reactions of the members of the Arbitration Commission of the International Conference on the Former Yugoslavia to the statement made by the FRY Government on its competence

1. By a letter dated 11 May 1993, the Co-Chairmen of the International Conference on the Former Yugoslavia forwarded to the Chairman of the Arbitration Commission a copy of a letter from the deputy head of the delegation of the Federal Republic of Yugoslavia (FRY) to the Conference, dated 5 May 1993, to which was attached a statement by the FRY Government regarding the referral to the Arbitration Commission.

2. In this statement, the FRY authorities raise a number of objections to the referral to the Commission by means of a letter from the Co-Chairmen of the Conference dated 20 April 1993, to which was attached a paper containing six questions relating to State succession in the Former Yugoslavia.

3. Although the FRY authorities did not send this statement to the Arbitration Commission itself, the members of the Commission considered this an appropriate opportunity to set out the scope and limits of its competence.

4. The competence of the Arbitration Commission is defined by its terms of reference dated 27 January 1993. These stipulate that the Commission is competent to:

> "(a) Decide, with binding force for the parties concerned, any dispute submitted to it by the parties thereto upon authorization by the Co-Chairmen of the Steering Committee of the Conference;
>
> (b) Give its advice as to any legal question submitted to it by Co-Chairmen of the Steering Committee of the Conference."

It is clear that, by their letter of 20 April 1993, the Co-Chairmen of the Conference referred the matter to the Arbitration Commission on the basis of paragraph 3 (b) above.

5. This has major implications:

- firstly, as the very terms of this provision make clear, the competence of the Arbitration Commission as an advisory body stems not from the consent of the parties concerned but from the mere fact of referral to it by the Co-Chairmen of the Conference;
- secondly, the reply given by the Commission to a question put before it in this context "is only of an advisory character: as such, it has no binding force" (cf. ICJ, advisory opinion of 30 March 1950, Interpretation of Peace Treaties, ICJ Reports 1950, p. 71).

6. As a consequence, it is for the Co-Chairmen, and for them alone, to evaluate the desirability of a request for an opinion, and the States participating in the Conference are not qualified to prevent them from doing so. The opinion is given by the Arbitration Commission not to the States, but to the Co-Chairmen, in order to furnish them with information needed to take decisions. The reply to such a request constitutes the Commission's participation in the working of the Conference. In that regard it may be recognized that, as the FRY Government writes, such advisory opinions form part of the "subsidiary means for the determination of rules of law" referred to in article 38, paragraph 1 (d) of the Statute of the ICJ.

7. It also follows that, if the negotiations between the parties concerned, for which the opinions of the Commission are not binding but may serve as points of reference, do not reach a conclusion, it is open to them to refer the dispute either to the Arbitration Commission on the basis of paragraph 3 (a) above of its terms of reference, or to any other adjudicatory or arbitral body of their choice.

8. While it is not their intention to enter into an argument with the FRY authorities, the members of the Arbitration Commission cannot accept the passage in the statement which claims that the Commission "in its work within the Conference on Yugoslavia so far ... has been seriously in breach both [of] the law of procedure and the implementation of material law". The Commission has always acted in a completely impartial manner, strictly following the adversary method which guarantees equality between the parties concerned. The Commission wishes to recall that it was only because the FRY declined to present its viewpoint during consideration of the questions which gave rise to

opinions Nos. 8-10 that the Commission was obliged to respond to these questions without being able to take account of the FRY's position.

9. The members of the Arbitration Commission wish to point out that the present clarification in no way prejudges either the competence of the Commission in this matter if it is challenged on grounds which they deem justified, nor the replies it may be led to give on the substance of the questions posed by the Co-Chairmen of the Conference on 20 April 1993.

TEXT OF LETTER DATED 2 JULY 1993 FROM THE DEPUTY PRIME MINISTER AND MINISTER FOR FOREIGN AFFAIRS OF THE FRY ADDRESSED TO THE ICFY CO-CHAIRMEN

I wish, first of all, to express my satisfaction at our recent meeting in Geneva within the International Conference on the Former Yugoslavia and its successful outcome, to which you made a significant contribution.

According to the practice of an open and sincere exchange of views, I take this opportunity to bring to your attention the serious problem we are facing concerning the Working Group on Succession Issues, owing to the renewed activity of the so-called Badinter Commission.

In this connection, I wish to inform you about the decision of the Government of the Federal Republic of Yugoslavia to withdraw its representatives from and to discontinue, on a temporary basis, its participation in the Working Group on Succession Issues of the International Conference on the Former Yugoslavia pending discontinuation of the work of the so-called Badinter Commission for the reasons which we have indicated on several occasions.

The substantiated reasons underlying the decision of the Federal Republic of Yugoslavia not to accept the competence of the so-called Badinter Commission as a body for settlement of disputes through arbitration have been presented in the statement by the Government of the Federal Republic of Yugoslavia, in my letter addressed to you as well as in our direct talks. First of all, it is a fact that the Commission has not been established in compliance with international law. Furthermore, in its opinions Nos. 1 to 10, the Commission has essentially violated the legal norms of international law, in respect of both procedure as well as the implementation of material law. In practice the opinions of the Commission, as an advisory body of the International Conference on the Former Yugoslavia, on the basis of which the Yugoslav participants at the Conference were to adopt relevant decisions by consensus taking also into account the Commission's opinion, were taken as judgements and served as a basis for making concrete decisions on relevant issues concerning the Yugoslav crisis.

Our side has particularly underlined the fact that the Government of the Federal Republic of Yugoslavia considers unjustifiable and unacceptable resort

to any court mechanism, prior to substantiated and comprehensive discussion on the principles on the basis of which the property of the Federal Republic of Yugoslavia should be ceded to successor States.

I would like also to recall that the Government of the Federal Republic of Yugoslavia and its representatives have underlined on several occasions that outstanding and pending questions that may arise in the work of the International Conference on the Former Yugoslavia could be solved, following a substantiated and comprehensive discussion, within a court procedure in accordance with international law.

For all the above reasons, the Government of the Federal Republic of Yugoslavia considers the opinions of the so-called Badinter Commission and the decisions and acts of other subjects based thereupon, null and non-binding for the Federal Republic of Yugoslavia.

Confident that, this time again, you will show understanding, please accept, Excellencies, the assurances of my highest consideration.

Vladislav JOVANOVIC
Deputy Prime Minister and
Minister for Foreign Affairs of the
Federal Republic of Yugoslavia

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA DOCUMENTATION ON THE ARBITRATION COMMISSION UNDER THE UN/EC (GENEVA) CONFERENCE: ADVISORY OPINIONS NOS. 11-15 OF THE ARBITRATION COMMISSION*

[July 16-August 13, 1993]

+Cite as 32 I.L.M. 1586 (1993)+

I.L.M. Content Summary

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*[Reproduced from the texts provided to *International Legal Materials* by the International Conference on the Former Yugoslavia (ICFY). Opinions 11, 12 and 13, dated July 16, 1993, are reproduced from U.N. Document S/26233 (August 3, 1993), Appendix VI, Enclosure. Opinions 14 and 15, dated August 13, 1993, are reproduced from English translations provided by the ICFY. These five opinions address a series of questions submitted to the Arbitration Commission by the Steering Committee Co-Chairmen on April 20, 1993. The text of the questions and subsequent statements appear at 32 I.L.M. 1579 (1993).

[The note on the composition and terms of reference of the Arbitration Commission (January 27, 1993), the note on the reconstitution of the Arbitration Commission (February 19, 1993) and its Rules of Procedure (April 26, 1993) appear at 32 I.L.M. 1572 (1993).

[The ten opinions of the earlier Arbitration Commission, constituted in 1991 by the European Community, appear at 31 I.L.M. 1488 (1992).]

A. OPINION NO. 11

On 20 April 1993, the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question No. 2 was:

> "On what date(s) did State succession occur for the various States that have emerged from the Socialist Federal Republic of Yugoslavia?"

On 12 May 1993, the co-Chairmen of the Steering Committee of the International Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the Federal Republic of Yugoslavia; this was addressed to the Co-Chairmen of the Steering Committee of the International Conference on 26 May 1993. None of the States parties to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the Socialist Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. In accordance with the generally accepted definition contained in article 2 of the 1978 and 1983 Vienna Conventions on the Succession of States, "'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

2. In the case in point there is a particular problem arising from the circumstances in which State succession occurred:

First, the predecessor State, the Socialist Federal Republic of Yugoslavia, has ceased to exist and, as the Commission found in its opinion No. 9, none of the successor States can claim to be the sole continuing State.

Second, the demise of the Socialist Federal Republic of Yugoslavia, unlike that of other recently dissolved States (USSR, Czechoslovakia), resulted not from an agreement between the parties but from a process of disintegration that lasted some time, starting, in the Commission's view, on 29 November 1991, when the Commission issued opinion No. 1, and ending on 4 July 1992, when it issued opinion No. 8.

3. However, while these circumstances need to be taken into account in determining the legal arrangements applying to State succession (see arts. 18, 31 and 41 of the Vienna Convention of 8 April 1983 on Succession of States in respect of State Property, Archives and Debts), they are immaterial in determining the date of State succession, which, as the Commission indicated in paragraph 1 above, is the date upon which each successor State replaced the predecessor State. Since, in the case in point, the successor States of the Socialist Federal Republic of Yugoslavia are new States, and since they became independent on different dates, the relevant date is, for each of them, that on which they became States.

As the Commission indicated in opinion No. 1, this is a question of fact that is to be assessed in each case in the light of the circumstances in which each of the States concerned was created.

4. The issue is the same as regards the Republics of Croatia and Slovenia, both of which declared their independence on 25 June 1991 and suspended their declarations of independence for three months on 7 July 1991, as provided by the Brioni declaration. In accordance with the declaration, the suspension ceased to have effect on 8 October 1991. Only then did these two Republics definitively break all links with the organs of the Socialist Federal Republic of Yugoslavia and become sovereign States in international law. For them, then, 8 October 1991 is the date of State succession.

5. Macedonia asserted its right to independence on 25 January 1991, but it did not declare its independence until after the referendum held on 8 September 1991, the consequences of which were drawn in the Constitution adopted on 17 November 1991, effective on the same day. That is the date on which the Republic of Macedonia became a sovereign State, having no institutional link with the Socialist Federal Republic of Yugoslavia. So 17 November 1991 is the date of State succession as regards Macedonia.

6. In opinion No. 4, issued on 11 January 1991, the Arbitration Commission came to the view that "the will of the peoples of Bosnia-Herzegovina to constitute the Socialist Republic of Bosnia-Herzegovina as a sovereign and independent State [could] not be held to have been fully established". Since then, in a referendum held on 29 February and 1 March 1992, the majority of the people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia. The result of the referendum was officially promulgated on 6 March, and since that date, notwithstanding the dramatic events that have occurred in Bosnia and Herzegovina, the constitutional authorities of the Republic have acted like those of a sovereign State in order to maintain its territorial integrity and their full and exclusive powers. So 6 March 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia.

7. There are particular problems in determining the date of State succession in respect of the Federal Republic of Yugoslavia because that State considers itself to be the continuation of the Socialist Federal Republic of Yugoslavia rather than a successor State.

As has been affirmed by all international agencies which have had to state their views on this issue, and as the Commission itself has indicated more than once, this is not a position that can be upheld.

The Commission opines that 27 April 1992 must be considered the date of State succession in respect of the Federal Republic of Yugoslavia because that was the date on which Montenegro and Serbia adopted the Constitution of the new entry and because the relevant international agencies then began to refer to "the former Socialist Federal Republic of Yugoslavia", affirming that the process of dissolution of the Socialist Federal Republic of Yugoslavia had been completed.

8. The Arbitration Commission is aware of the practical problems that might ensue from determining more than one date of State succession because of the long-drawn-out process whereby the Socialist Federal Republic of Yugoslavia was dissolved. One implication is that different dates would apply for the transfer of State property, archives and debts, and of other rights and interests, to the several successor States of the Socialist Federal Republic of Yugoslavia.

9. The Commission would point out, however, that the principles and rules of international law in general relating to State succession are supplemental, and that States are at liberty to resolve the difficulties that might ensue from applying them by entering into agreements that would permit an equitable outcome.

10. The Arbitration Commission consequently takes the view:

- That the dates upon which the States stemming from the Socialist Federal Republic of Yugoslavia succeeded the Socialist Federal Republic of Yugoslavia are:

  . 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia,

  . 17 November 1991 in the case of the former Yugoslav Republic of Macedonia,

  . 6 March 1992 in the case of the Republic of Bosnia and Herzegovina, and

  . 27 April 1992 in the case of the Federal Republic of Yugoslavia (Serbia-Montenegro).

- That, unless the States concerned agree otherwise, these are the dates upon which State property, assets and miscellaneous rights, archives, debts and various obligations of the former Socialist Federal Republic of Yugoslavia pass to the successor States.

Paris, 16 July 1993

B. OPINION NO. 12

On 20 April 1993, the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question No. 3 was:

"(a) What legal principles apply to the division of State property, archives and debts of the Socialist Federal Republic of Yugoslavia in connection with the succession of States when one or more of the parties concerned refuse(s) to cooperate?

"(b) In particular, what should happen to property

- not located on the territory of any of the States concerned; or

- situated on the territory of the States taking part in the negotiations?"

Question No. 6 was:

"(a) On what conditions can States, within whose jurisdiction property formerly belonging to the Socialist Federal Republic of Yugoslavia is situated, block the free disposal of that property or take other protective measures?

"(b) On what conditions and under what circumstances would such States be required to take such steps?"

The Commission considers that these two questions form an entity and should be answered in one and the same opinion.

On 12 May 1993, the Co-Chairmen of the Steering Committee of the International Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the Federal Republic of Yugoslavia; this was addressed to the Co-Chairmen of the Steering Committee of the International Conference on 26 May 1993. None of the States parties to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the Socialist Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. In its opinion No. 9, the Arbitration Commission recalled the few well-established principles of international law applicable to State succession. The fundamental rule is that States must achieve an equitable result by negotiation and agreement. The principle is applicable to the distribution of the State property, archives and debts of the Socialist Federal Republic of Yugoslavia.

2. If one or more of the parties concerned refused to cooperate, it would be in breach of that fundamental obligation and would be liable internationally, with all the legal consequences this entails, notably the possibility for States sustaining loss to take non-forcible countermeasures, in accordance with international law.

3. It follows from the principle formulated above that the other States concerned must consult with each other and achieve, by agreement between them, a comprehensive equitable result reserving the rights of the State or States refusing to cooperate.

Such an agreement is <u>res inter alios acta</u> in relation to third States, be they States refusing to cooperate or other States. In accordance with the established principle of international law enshrined in article 34 of the Vienna Convention on the Law of Treaties, whereby "a treaty does not create either obligations or rights for a third State without its consent", third States in whose territory property covered by State succession is situated are not required to take action in pursuance of such agreements.

However, such third States may, in the exercise of their sovereignty, give effect to them if they satisfy the conditions set out in paragraph 1 above.

4. Even in the absence of such agreements, third States may take such interim measures of protection as are needed to safeguard the interests of the successor States by virtue of the principles applicable to State succession.

5. Third States would be required so to do if an international agency with powers in the matter took decisions that were binding on States within whose jurisdiction property having belonged to the former Socialist Federal Republic of Yugoslavia was situated.

6. The Arbitration Commission consequently takes the view that:

- Refusal by one or more successor States to cooperate in no way alters the principles applicable to State succession as set out in opinion No. 9;

- Other States concerned may conclude one or more agreements conforming to those principles in order to secure the equitable distribution of the State property, archives and debts of the Socialist Federal Republic of Yugoslavia;

- Such agreements would not be binding on States which were not party to them, nor on other States in whose territory property having belonged to the Socialist Federal Republic of Yugoslavia was situated;

- However, this answer is without prejudice to the right of successor States sustaining loss by virtue of the refusal of one or more of the parties concerned to cooperate, to take countermeasures in accordance with international law, to the right of third States to take the necessary safeguard measures to protect the successor States and to such obligations as might be incumbent on third States to give effect to decisions taken by an international agency having powers in the matter.

Paris, 16 July 1993

C. OPINION NO. 13

On 20 April 1993, the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question No. 4 was:

"Under the legal principles that apply, might any amounts owed by one or more parties in the form of war damages affect the distribution of State property, archives and debts in connection with the succession process?"

On 12 May 1993, the Co-Chairmen of the Steering Committee of the International Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the Federal Republic of Yugoslavia; this was addressed to the Co-Chairmen of the International Conference on 26 May 1993. None of the States parties to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the Socialist Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. In opinion No. 9 the Arbitration Commission appreciates that there are few well-established principles of international law that apply to State succession. Application of these principles is largely to be determined case by case, depending on the circumstances proper to each form of succession, although the 1978 and 1983 Vienna Conventions do offer some guidance.

2. The Commission would point out in particular that articles 18, 31 and 41 of the Convention of 8 April 1983 are relevant where State succession occurs as a result of the dissolution of a pre-existing State. While equity has some part to play in the division of State property, archives and debts between successor States, these articles do not require that each category of assets or liabilities be divided in equitable proportions but only that the overall outcome be an equitable division.

3. However, this equitable outcome is to be obtained by reference to the law of State succession. The rules applicable to State succession, on the one hand, and the rules of State responsibility, on which the question of war damages depends, on the other, fall within two distinct areas of international law.

4. The equitable division of the assets and liabilities of the former Socialist Federal Republic of Yugoslavia between the successor States must therefore be effected without the question of war damages being allowed to interfere in the matter of State succession, in the absence of an agreement to the contrary between some or all of the States concerned or of a decision imposed upon them by an international body.

5. The Arbitration Commission would, however, underline the fact that its reply to the question referred to it is in no way prejudicial to the respective responsibilities of the parties concerned in international law. The possibility cannot be excluded in particular of setting off assets and liabilities to be transferred under the rules of State succession on the one hand against war damages on the other.

6. Subject to the observations made above, the Arbitration Commission consequently takes the view that amounts that might be owing by one or more parties in respect of war damages can have no direct impact on the division of State property, archives or debts for purposes of State succession.

Paris, 16 July 1993

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA

ARBITRATION COMMISSION

OPINION N° 14

On 20 April 1993 the Co-Chairmen of the Steering Committee of the Conference on Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question 1 was:

"In the light of the inventory in the report by the Chairman of the Working Group on Economic Issues, what assets and liabilities should be divided between the successor States to the former Socialist Federal Republic of Yugoslavia in connection with the succession process?"

On 12 May 1993 the Co-Chairmen of the Steering Committee of the Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the FRY; this was addressed to the Co-Chairmen of the Steering Committee of the Conference on 26 May 1993. None of the States party to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia-Hercegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the SFRY. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. The Arbitration Commission notes that the Draft Single Inventory of the Assets and Liabilities of the SFRY as at 31 December 1990 drawn up by the Working Group of the International Conference on the Former Yugoslavia on 26 February 1993 divides the assets and liabilities into two categories -- agreed items and non-agreed items.

As the Commission recalled in Opinion N° 9, the first principle applicable to state succession is that the successor States should consult with each other and agree a settlement of all questions relating to the succession.

Assets and liabilities listed in the Inventory of 26 February 1993 upon which the successor States have reached agreement should accordingly be divided between them.

2. As regards non-agreed items, the Arbitration Commission considers that it does not have sufficient information on which to base a decision as to each asset and liability listed in the Inventory. Moreover, it considers that these are not legal issues which it could profitably seek to resolve as part of its consultative remit and that it should confine itself to determining the general principles to be applied.

3. The Commission would nevertheless draw attention to the well-established rule of state succession law that immovable property situated on the territory of a successor State passes exclusively to that State. Subject to possible compensation if such property is divided very unequally between the successor States to the SFRY, the principle of the locus in quo implies that there is no need to determine the previous owner of the property: public property passes to the successor State on whose territory it is situated. The origin or initial financing of the property and any loans or contributions made in respect of it have no bearing on the matter.

4. As regards other state property, debts and archives, a commonly agreed principle to be found in several provisions of the Vienna Convention of 8 April 1983 on the Succession of States in Respect of State Property, Archives and Debts requires that they be divided between the successor States to the SFRY if, at the date of succession, they belonged to the SFRY, and the question of the origin and initial financing of the property, debts and archives, or of any loans or contributions made in respect of them, is irrelevant.

5. To determine whether the property, debts and archives belonged to the SFRY, reference should be had to the domestic law of the SFRY in operation at the date of succession -- notably to the 1974 Constitution.

There are, however, two particular problems arising from the federal structure of the Yugoslav State and from the concept of "social ownership" -- a concept which, while it does exist in other countries, was particularly highly developed in the SFRY.

6. On the first point, there is no doubt that the 1974 Constitution transferred to the constituent republics ownership of many items of property which in consequence cannot be held to have belonged to the SFRY, whatever their origin or initial financing.

7. As for "social ownership", it was held for the most part by "associated labour organizations" -- bodies with their own legal personality, operating in a single republic and coming within its exclusive jurisdiction. Their property, debts and archives are not to be divided for purposes of state succession: each successor State exercises its sovereign powers in respect of them.

If and to the extent that other organizations operated "social ownership" either at federal level or in two or more republics, their property, debts and archives should be divided between the successor States in question if they exercised public prerogatives on behalf of the SFRY or of individual

republics. On the other hand, organizations operating at federal level or in two or more republics but not exercising such prerogatives should be considered private-sector enterprises to which state succession does not apply.

8. The answer to the question referred is without prejudice to whatever compensation might be necessary to achieve an equitable overall outcome.

9. Should the application of these principles or the determination of the ownership of an item of property at the date of state succession give rise to problems, it would be for the States concerned to resort to arbitration or some other mode of peaceful settlement of their disputes, but it does not behove the Arbitration Commission in the exercise of its consultative function to detail what rules would apply to a particular contentious issue between States emerging from the dissolution of the SFRY.

10. The Arbitration Commission consequently takes the view that the assets and liabilities to be divided between the successor States to the SFRY for purposes of state succession are (i) those which the successor States are agreed in regarding as being such and (ii) the state property, debts and archives which at the date of state succession belonged to the SFRY in accordance with the law in operation there, excluding property belonging to individual republics or to "associated labour organizations" depending on them.

Paris, 13 August 1993

ARBITRATION COMMISSION

OPINION N° 15

On 20 April 1993 the Co-Chairmen of the Steering Committee of the Conference on Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question 5 was:

"(a) In view of the dissolution of the Socialist Federal Republic of Yugoslavia, is the National Bank of Yugoslavia entitled to take decisions affecting property, rights and interests that should be divided between the successor States to the Socialist Federal Republic of Yugoslavia in connection with state succession?

(b) Have the central banks of the States emerging from the dissolution of the Socialist Federal Republic of Yugoslavia succeeded to the rights and obligations of the National Bank of Yugoslavia deriving from international agreements concluded by the latter, in particular the 1988 financial agreement with foreign commercial banks?"

On 12 May 1993 the Co-Chairmen of the Steering Committee of the Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the FRY; this was addressed to the Co-Chairmen of the Steering Committee of the Conference on 26 May 1993. None of the States party to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia-Hercegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the SFRY. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

While they are linked, questions 5(a) and 5(b) are distinct enough to be answered separately.

I. Question 5(a)

1. Although municipal laws are merely facts in international law (Certain German Interests in Polish Upper Silesia, 1926 PCIJ, Ser. A, N° 7, 12), account must nevertheless be taken of the structure and responsibilities of the NBY as set out in the SFRY Constitution of 21 February 1974 and in the NBY Statute of November 1989.

As the bank of issue of the SFRY, the NBY participated in the exercise of the prerogatives of sovereignty. Moreover, as a composite of banking institutions - central, republican and provincial - it was responsible for carrying out common currency issue, credit and foreign exchange policy, and it had close institutional relations with Parliament.

The NBY, then, partook of the state power of the SFRY, whose dissolution led simultaneously to the disintegration of the collective structure of the NBY.

2. None of the organs of the NBY, therefore, can take legitimate decisions in respect of property, rights and interests that should be divided between the successor States of the SFRY.

No decision in such matters taken by the Governor of the NBY on his own authority would have any legal validity once the former collective organization has ceased to exist.

3. Only if, outside the preexisting institutional framework, collaboration between the central banks of the States emerging from the dissolution of the SFRY had continued could the NBY be considered to be a coordinating agency acting on their behalf for purposes of jurisdictio inter volentes to effect - rather than obstruct - the division of the property, rights and interests of the former SFRY.

4. As this is not the case, the Arbitration Commission takes the view that the NBY is not entitled to take decisions affecting property, rights and interests to be divided between the successor States in accordance with the principles of state succession.

II. Question 5(b)

5. Given the answer to question 5(a), decisions taken by the NBY as an organ of the SFRY committed that State. The rights and obligations deriving from those decisions consequently pass to the successor States and must be divided between them in accordance with the principles of international law rehearsed by the Commission in Opinion N° 9. This does not apply to ordinary commitments entered into by the NBY acting as a bank with its own legal personality.

6. This distinction is applicable to rights and obligations of the NBY deriving from international agreements it has entered into. The answer to the first part of question 5(b) therefore depends in each case upon the nature of the agreement and upon the NBY's commitments.

7. However, the Arbitration Commission would underline the fact that the rights and obligations of the NBY, as an organ of the SFRY, which are therefore subject to state succession (supra para. 5), do not pass automatically to the central banks of the States emerging from the dissolution of the SFRY: it is for each of the successor States to determine, by virtue of its sovereign constitutional powers, how these rights are to be exercised and these obligations discharged - rights and obligations which they may assume either direct or through their central banks.

8. As regards the financial agreement of 20 September 1988 between the NBY and Manufacturers Hanover Limited, acting for the international creditors, the Commission would point out that the NBY acted together with other Yugoslav banking institutions presenting themselves expressly as legal persons accepting on their own behalf the obligations deriving from the agreement (notably sections 1.01 and 10.01) and that the parties to the agreement made the discharge of their obligations subject to the law of a third State (section 14.12) and, in the event of a dispute, to the jurisdiction of various ordinary Yugoslav or foreign courts (section 14.08).

In the event of any dispute over the interpretation or application of the agreement, it is therefore for the parties to refer it to one of the courts that have jurisdiction under the agreement itself.

9. The Commission notes, however, that the successor States to the SFRY have succeeded it in so far as it had assumed the obligations of guarantor under the agreement of 20 September 1988.

Should the application of this principle give rise to problems, it would be for the States concerned to resort to arbitration or some other mode of peaceful settlement of their disputes.

10. The Arbitration Commission consequently takes the view:

(i) that problems arising from the rights and obligations of the NBY deriving from international agreements concluded by it are to be resolved by reference to the terms of the agreements and, in case of dispute, are to be referred to the appropriate courts; and

(ii) that this holds good in particular for rights and obligations deriving from the financial agreement of 1988 entered into by the NBY and other Yugoslav banking institutions with foreign commercial banks.

Paris, 13 August 1993