

### III – World order and the Balkans

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#### **“THE NEW INTERNATIONAL LEGAL ORDER” AND NEW STATES IN THE BALKANS**

**Abstract:** In this study the author attaches a great importance to the theoretical examination of the concept of the *New International Legal Order* that was embodied in the last decades of the 20<sup>th</sup> century. The starting point for that reflection is observations of dissolution of the SFR Yugoslavia which illustrates one of the fundamental legal precedents. Reminding that the basic principle for the post-modern State behaviour must be the one that includes minimal disturbance of the existing international legal relations, author stresses that “the Yugoslav case” was customized on the way to respond to the new reality where the principle of effectiveness played an essential role in valuation of the statehood and which could be one of the greatest catalysts for all further ‘development rules’ of international law.

#### **The expanding scope of international law**

The contemporary political transformation of the international community occurring in the last decade of the twentieth century necessarily affects the role and contents of international law, and gives the subject a new and more practical importance. Political situations formed on traditional institutions, and philosophical systems whose momentum has been largely spent, would never repeat again. After the historical periods of the “Cold War” and disintegration of the communist societies, we witness nowadays one of the phenomena in the modern international law history that could be qualified as the *New International Legal Order*. The current law system that arose from the new social structure has

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an important task to legitimate the new political *status quo* after the outstanding territorial changes have occurred. The traditional rules included in the universal legal order do not, however, lose their validity for the lack of support of the ideological. The existence of the international law system is becoming more dependent on the efficiency of the international community power whose functions of distribution and delegation of the State competences are applied constructively on the new situation and on the new realistic ground.

Since its beginning till the present days international law has appeared to be constantly in need of justification. The present development in international law goes to its very foundations. The theoretical examination of the *New International Legal Order* is not based on the *a priori* way, but it is in a conjugation with the general theory of the State and law. In conformity with the ontology that everything is changed but nothing lost (*omni mutantur, nihil interit*), international law has anticipated the existing norms that are developing new legal solutions connected with the State as a subject of international law. The history shows that the essential changes have taken place in the sphere of regulation of the process of “the birth and dying of States”. Having stated that the attitude of States towards international law is a very actual problem of global relations is an answer to the question what international law criteria of statehood shape, as a part of the *New International Legal Order*, what makes it appear highly significant. International relations of “new States” and “old States” are still in the phase of development, and it is very difficult to ascertain with precision what changes have a quantitative as well as a qualitative character. One of the reasons is emergence of the post-modern State based on behaviour that changes the traditional State sovereignty.

In positive international law based upon the *a priori* and *a posteriori* judgments on “the succession of the State sovereignty”, the ground for an ideal importance of the State and legal order in space is certainly establishment or extension of a State sovereignty with the timely conditioned exclusion of another State sovereignty (*expulsion*). This logical explanation follows the conclusion that sovereignty gets changed in legally formulated modalities, but it does not get transferred. International law as an advanced legal order is in conformity with the concept of a relative effect of the State sovereignty that regulates indirectly the division of competences and executes the supervision of their State performed realization. The fundamental reason for that divisibility is a wide range of international actors from States to international organizations, legal persons or individual entities who articulate an emerging consensus relating to the new international law principles and rules. In many instances, particularly in the United Nations (UN), pragmatism as well as political and economic factors plays an increasingly important role. The present international

law is governed by the idea of a higher law order, and it is primarily the result of acceptance of commonly agreed rules of conduct.<sup>2</sup>

Reflecting the political changes in Europe and the Soviet Union in early 1990s, we can see that the traditional international law criteria could not promote attainment of statehood through its operative norms. Focusing its greater attention to the new States that emerged with the break-up of the SFR Yugoslavia after 1991, the international community has faced many legal problems resulting from the new legal approach. Reopening of the questions of self-determination, secession, recognition, succession of States and boundaries resulted from the State dissolution. The Yugoslav case became a decision point of a series of pragmatical novelties and served as a catalyst for its further development in international law. A comprehensive analysis of the new attitude goes far beyond the scope of the present study and I could here only recall the next conclusions.

### **“Development rules” of recognition of the new Balkan states**

When the succession of SFR Yugoslavia occurred, five new States were established – Slovenia, Croatia, Bosnia and Herzegovina, Macedonia and FR Yugoslavia (Serbia and Montenegro). The central question that arose, was whether the legal effects following the new factual situation immediately affected other States, or whether they depended on an act of recognition.

In assessing the mechanism of State recognition in public international law, I have to stress that recognition played an important role in the process of acquisition of statehood. In the context of creation of statehood, recognition perhaps appeared as constitutive or declaratory, what depends on the fact whether it is an act of international law or an act of political character.<sup>3</sup>

The comparative analysis of latest State practice, particularly in Eastern and South-Eastern Europe has been complicated by the fact that recognition is often used as a political instrument to express approval or disapproval of a new State,

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<sup>2</sup> “A More Secure World: Our Shared Responsibility”, Report of the High-level Panel on “Threats, Challenges and Change”, *United Nations Document A/59/565*, 2 December 2004; “In Larger Freedom: Towards Development, Security and Human Rights”, Report of Secretary General, *United Nations Document A/59/2005*, 21 March 2005, pp. 35, etc.

<sup>3</sup> Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1948, pp. 26-38; James Crawford, “The Criteria for Statehood in International Law”, *British Year Book of International Law*, 1976-1977, pp. 93-182; *The Creation of States in International Law*, Oxford Clarendon Press, 1979, pp. 215, etc; Christian Hillgruber, “The Admission of New States to the International Community”, *European Journal of International Law*, 1998, vol. 9, pp. 491-509; Jochen A. Frowein, “Recognition”, *Encyclopedia of Public International Law*, Rudolf Bernhardt (ed.), Amsterdam, 2000, pp. 33-40.

government or legality of the territorial changes. On the other side, recognition keeps an average position that conforms to the general principles of international law. Evidently, the problem presupposes existence or disappearance of the State, what remains the matter of fact. The legal status of the State extends beyond the sphere of the internal legal order, it extends to the political and social spheres of international existence. Hence, recognition by other States has a purely declaratory character and means acknowledgment of a factual situation that is bound to fulfilling the basic conditions of statehood. Those conditions were very simple from the traditional point of view. The State had to have a defined territory, a permanent population and effective control over the territory and population.<sup>4</sup> The nature of conditions was not the same and somewhere and sometimes third States claimed one additional condition tie with capacity to enter inter-State relations. All these “criteria” are in present times subject to the State interpretation in the light of facts and according to the factual situation.<sup>5</sup>

The recent practice in the Yugoslav case could not lead to clear and unequivocal answers. The notion of recognition of the new Balkan States has political and legal aspects.<sup>6</sup> International law played the primary role in the legal evolution of the process and the principles of international law serve to define the conditions upon which an entity constitutes a State. Therefore, the question is, if recognition of new States in the territory of the former SFR Yugoslavia was a legal act and, as such, produced certain legal effects, what could these effects be other than fulfilment of a final condition of statehood?

The practice of recognition of the new Balkan States was a prerequisite act that conferred statehood and at the same time it was a presumption for establishment of complete and normal international relations with other States. In legal sense, it was not in conformity with the constitution, but it had an affirmative role for their political existence. After the recognition, it was clear that all rules and principles of general international law governing the relations between sovereign States in international community were applicable *ipso jure* to the new Balkan States.<sup>7</sup>

Today, recognition by means of an international decision is peculiar for the United Nations (UN) as the universal organization with an objective

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<sup>4</sup> “Montevideo Convention on Rights and Duties of States”, *League of Nations Treaty Series*, 1933, vol. 165, p. 19.

<sup>5</sup> Joe Verhoeven, “La reconnaissance internationale: déclin ou renouveau”, *Annuaire Française de Droit International*, 1993, pp. 7–40.

<sup>6</sup> Milan Šahović, “La reconnaissance mutuelle entre les Républiques de l’ex-Yougoslavie”, *Annuaire Français de Droit International*, 1996, pp. 228–33;

<sup>7</sup> Ronald Rich, Danilo Turk, “Symposium: Recent Developments in the Practice of State Recognition”, *European Journal of International Law*, 1992, vol. 4, pp. 74–91.

international personality. UN plays an important role in matters of recognition. It has a sole authority to determine with a binding effect for the international community as a whole, whether the conditions of statehood are fulfilled in each specific case. It can make a preliminary decision concerning the admission of a new member States (Article 4(1) of the UN Charter). In this collective way, State recognition substitutes the process of admission to the UN. More precisely, such an admission is a tantamount to collective recognition of new States.<sup>8</sup> However, regarding international organizations in general, a final decision of recognition of new States is vested in the existing sovereign States and it may be motivated by considerations that have nothing to do with the conditions of statehood. The recent practice of recognition demonstrates that every State makes a decision for itself or it does collectively through international institutions of the international community.

When the former Yugoslav Republics emerged as new States, the international community tested their ability to respect the positive international law standards. The European Community member states made a decision to mediate in the conflicts and did not recognize any entity that resulted from the forcible acts of aggression. On 27 August 1991 EC established the Conference on SFR Yugoslavia with the purpose of aiding the parties to the conflicts to achieve a peaceful solution. Its Member States took account of the effect of recognition of other States. The matter of recognition of the new Balkan States was discussed by the Yugoslav Arbitration Commission that was constituted as a consultative body of the Conference on the former Yugoslavia.<sup>9</sup> In its Opinion n° 1, dated 29 November 1991 the Commission confirmed that existence or disappearance of the State was a question of fact and that the effect of State recognition by other States was purely declaratory. In the Opinion n° 8, of 4 July 1991 the Commission underlined that such a recognition along with membership in international organizations, bore witness to these States conviction that the political entity so recognized was a reality and conferred on it certain rights and obligations under international law. Further position of the Commission's Opinion n° 10 of the same date purported attitude that recognition was a discretionary act that other States might perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law.

Extraordinary significance for "development rules" of international law has requirements for recognition made by the European Community in the *Guidelines on Recognition of New States in Eastern Europe and Soviet Union* on 16

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<sup>8</sup> "Advisory Opinion of the International Court of Justice on Conditions of Membership in the United Nations", *International Court of Justice Reports*, 1948, p. 57.

<sup>9</sup> "Conference of Yugoslavia, Arbitration Commission Opinions, no. 1-10", *International Legal Materials*, American Society of International Law (ASIL), Washington, 1993, vol. 92, pp. 162-208.

December 1991.<sup>10</sup> Member States of the European Community co-ordinate their actions of recognition of those new States in the Balkans that seek independence. The Guidelines applicable standards include the following requirements for recognition:

- respect of the UN Charter and the commitments subscribed to in the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe,<sup>11</sup> 1990 Charter of Paris for a New Europe,<sup>12</sup> especially with regard to the “rule of law, human rights and democracy”;
- guarantees for the rights of minorities in accordance with commitments subscribed to in the framework of CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- respect for all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- anticipation of commitment to settle by agreements, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

With the *Declaration of Yugoslavia* adopted on the same date, EC invited all former Yugoslav Republics to state by 23 December whether they wished to be recognized as independent States and whether they accepted the obligations contained in the *Guidelines*.<sup>13</sup> The application for recognition with additional commitments elaborated within the framework of The Hague Peace Conference was to be submitted to the Arbitration Commission for legal advice. After the Commission’s affirmative Opinions n° 4, 5, 6, and 7, all of 11 January 1992,<sup>14</sup> EC Member States recognized former Yugoslav Republics as independent States.<sup>15</sup>

<sup>10</sup> “Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”, *UN Security Council Document S/23293*, 17 December 1991, Annex II (1992), *International Legal Materials*, vol. 31, pp. 1486–87.

<sup>11</sup> *International Legal Materials*, vol. 14, p. 1292.

<sup>12</sup> *International Legal Materials*, vol. 30, p. 190.

<sup>13</sup> “Declaration on Yugoslavia”, *UN Security Council Document S/23293*, 17 December 1991, Annex I (1992); reprinted in *European Journal of International Law*, 1992, vol. 4, p. 73.

<sup>14</sup> “Conference of Yugoslavia, Arbitration Commission Opinions n° 4–10”, Annex III to the Symposium: ‘Recent Development in the Practice of State Recognition’, *European Journal of International Law*, 1993, vol. 4, pp. 74–91.

<sup>15</sup> “State Practice regarding State Succession and Issues of Recognition: The Pilot project of the Council of Europe”, Kluwer Law International, The Hague, 1999, pp. 60–74; Brigitte Stern, *Dissolution, Continuation and Succession in Eastern Europe, General Concluding Remarks*, Martinus Nijhoff, The Hague, 1998, pp. 197–208.

That was the crucial deviation from the customary practice regarding recognition of States.

Essentially, for this novelty the *New International Legal Order* built additional criteria for Statehood reserving the right to supervise new States with regard to fulfilment of particular international law obligations necessary for the full legal partnership in global relations. This practice is consistent with the predominantly voluntary character of the *New International Legal Order*, and accordingly, two traditionally divided institutions of international relations – recognition of States and establishment of statehood became more interconnected. From this premises we could deduce that the principle of effectively controlled territory by the government of the new State is becoming less important for the State being than recognition of the existing States or State members through some of the international organizations.

In spite of the fact that all conditional collective or individual recognitions lead to the constitutive conception, a declarative character of the State recognition that was primordial for the accession of the new Balkan States to the international community, cannot be put in question. With regard to the adopted EC principles, the *Guidelines* will surely become a mechanism in shaping the future international practice. At last, in comparison with the traditional criteria for existence of the State, the new approach only fixes the existing practice and instigates high evaluation of general international law.

### **New tactics in the law of state succession**

Explication of the legal nature of State succession is directly conditioned by explanations that concern the very State and its sovereignty. In the *New International Legal Order* a ground for an ideal substance of the State is surely establishment or extension of the State sovereignty with the timely conditioned exclusion of another State sovereignty. In legal and logical sense, the succession of States is also a substitution of States and the continuity of rights and liabilities. A logical explanation of the State succession leads to justification that sovereignty is changed in legally formulated modalities. The State succession means legal succession, what proves that territorial changes must constitute a base for a certain legal norm (*iusta causa*). Pursuant to various types of territorial transformation, international law contains rules for dissolution, cession, secession and unification of the State. The rules embrace the principles of justice and they can evolve. Convinced of the need to identify *de lege ferenda* rules after the disintegration process in Europe and Soviet Union, the international community developed new legal regime in this domain in turn to provide better guarantees for the legal certainty in

global relations.<sup>16</sup> It was oblivious that the case of the former Socialist Federal Republic of Yugoslavia (SFRY) was a model for the future international rehearsal.

With gradual expulsion of its sovereignty, produced mostly through violent practice, the former Yugoslavia was cracked by a progressive separation of its Republics. In the first phase of the dissolution process of the Predecessor State, the Republics of Croatia and Slovenia announced their declarations of independence on 25 May and 25 June 1991, respectively, but their independence was postponed by the Brioni declaration for three months. The independence was confirmed on 8 October 1991. Macedonia asserted its right to sovereignty on 25 January 1991. Proclamation of independence was suspended until referendum took place in September 1991, and was finally declared on 17 November 1991. The Bosnia and Herzegovina's Parliament adopted a resolution of independence in October of the same year that was contested by the Serbian people of that constituent Republic of the former Yugoslavia. After the referendum, Bosnia and Herzegovina declared its independence on 6 March 1992. The Federal Republic of Yugoslavia (FRY) adopted a new Constitutional Act with additional declaration on 26 April 1992, that emphasized the claim for political and international legal continuity with the former SFRY. The other Yugoslav Republics opposed to this claim because they were of the opinion that the former federation had ceased to exist. The western States, mainly the EC member states and the United States denied FRY the claim for continuity, too.

This situation remained uncertain and the international community had to confront with various legal problems for a long time. For the reason that succession and continuity are not obligatory exclusive conceptions, the legal effects of the Yugoslav succession case become the central issue for which the Arbitration Commission of the EC Conference on Yugoslavia had to be counselled. In its Opinion n° 1, the Arbitration Commission expressed the view that the situation in SFRY was the one involving the dissolution of States. The Commission admitted that the consequent emergence of the constituent Yugoslav Republics as independent States had not yet been complete. The process was regarded completed in the Commission's Opinion n° 8. For the Commission dissolution of SFRY meant that the State had no longer international legal personality. It found that the existence of the federal State, made up of a number of separate entities, was seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constituted themselves as sovereign States with the result that federal authority might no longer be effectively exercised. After admission of

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<sup>16</sup> "Institut de Droit International Résolution adoptée lors de la Session de Vancouver 2000-2001", *Annuaire de l' Institut de Droit International*, A. Pedone, Paris, 2001, vol. 69, pp. 712-41.



Slovenia, Croatia and Bosnia and Herzegovina to UN on 22 May 1992 (UN General Assembly resolutions—46/236; 46/237; 46/238), the Arbitration Commission reached the conclusion that the process of dissolution had been completed, and, that SFRY no longer existed.<sup>17</sup> UN and other international organizations took an immediate action to purport these legal opinions. In its resolutions 756 and 777 (1992) the UN Security Council denied FRY's claim for the former Yugoslav seat in UN, considering that the State formerly known as the SFRY had ceased to exist and that FRY could not automatically continue the membership of the former Yugoslavia in the United Nations. The resolution of the General Assembly A/47/1 of 22 September 1992 followed the recommendation of the Security Council and it was decided that FRY should apply for membership. At the same time FRY was excluded from participation in its work. This conclusion was the ground for anticipation of the next General Assembly resolution A/48/88 (1993) that brought it to the end- the confused status of FRY in that organization. Afterwards, the same standpoint was reiterated in the resolution 1022 (1995) that suspended the application by imposing the sanctions against FRY. Most other international organizations, especially financial organizations like IMF and the World Bank, insisted on FRY application for admission as a new member.<sup>18</sup> Some others suspended FRY's membership punishing its unlawful actions in the territory of the former SFRY.

The determination on inexistence of the predecessor State identity leads towards its succession, that is to say, it leads towards transition of its international rights and liabilities to the State successor, so the inexistence of the State identity is formulated as a *conditio sine qua non* for the succession of States. The succession of SFRY involves a change of the territorial sovereignty and replacement of the Predecessor State by five new States in responsibility for the international relations of the territory of the former Yugoslavia. Because of the fact that the emerging States were equal successors to the former State, a redefinition of the inherited legal relations between the successor States and

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<sup>17</sup> Yehuda Blum, "UN Membership of the 'New' Yugoslavia: Continuity or Break", *American Journal of International Law*, 1992, vol. 8, pp. 830–33; Milenko Kreča, "Succession and Continuity of Yugoslavia: A Commentary from the Aspects of International Law", *Jugoslovenska revija za međunarodno pravo*, Beograd, 1992, br. 39, pp. 178–94; The Former Yugoslav Republic of Macedonia was admitted to UN on 8 April 1993 (Security Council Resolution 817). UN has postponed FRY admission in that organization until 1 November 2000 (General Assembly Resolution A/55/12).

<sup>18</sup> "IMF Decision on 14 December 1992", *Press Release*, no. 92/92, December 15, 1992; "World Bank Decision on 25 February 1993", *Press Release*, no. 93/S43, February 26, 1993; Paul R. Williams, "State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations", *International and Comparative Law Quarterly*, 1994, vol. 42, p. 787.

other members of the international community was necessary. The Arbitration Commission stressed that and recommended to all successor States to settle all aspects of succession by an agreement, and in accordance with the principles and rules of general international law. For the most part they are included in the 1978 *Vienna Convention on Succession of States in Respect of Treaties* and, 1983 *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*.<sup>19</sup> Hence, the successor States of SFRY are obliged to regulate on an equitable manner all the consequences that have emerged from the State succession in correlation with other international law subjects. In main cases, they accepted rules that reflected reliance on the persuaded principles of the Vienna Conventions,<sup>20</sup> and extensive influence of international organizations in profiling the law on State succession, especially in the matter of allocation, division and distribution of the State property and debts. Finally, it resulted from the concept of “universal succession”, a different issue of international law, which may have relevance in the future practice.<sup>21</sup>

### **Self-determination vs. the principle of territorial integrity**

The question of SFRY's dissolution and establishment of new States is directly connected with the exercise of the right of nations to self-determination, taking account of the right to secession.

As a part of the *New International Legal Order* the States have to some degree a duty to promote creation of new States based on the principle of self-determination. This principle had been noted before in the UN Charter and emphasized in the General Assembly resolution 1514 (XV) 1960 (the Colonial

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<sup>19</sup> “Vienna Convention on Succession of States in Respect of Treaties (1978)”, *United Nations Document A/CONF. 80/31, International Legal Materials*, vol. 17, pp. 1488–1517; “Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (1983)”, *United Nations Document A/CONF. 117/14, International Legal Materials*, vol. 22, pp. 306, etc.

<sup>20</sup> Duško Dimitrijević, *The State Succession in Respect of Treaties of the SFR Yugoslavia, Foreign Legal Life*, Institute of Comparative Law, Belgrade, 2005, no. 1-2, pp. 1–40. With regard to succession of treaties of the former SFR Yugoslavia it appears that it does not provide any great difference of that customary international law codified in the Vienna Convention. Our case study shows that all successor States of the former SFRY have benefited from the “fast track” method of participating in international treaties through general declarations of succession in which they declared that they were bound as successors by the entire body of treaty law in force in respect of the State territory to which the succession relates.

<sup>21</sup> Carsten Stahn, “The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia”, *American Journal of International Law*, 2002, vol. 96, pp. 392, etc.

Declaration), 1966 International Conventions on Human Rights and the 1970 Declaration on Principles of International Law Concerning Friendly Relations (resolution 2625 (XXV)). It can be observed as a rule of international law in the glow of the number of UN declarations and resolutions and real State practice in the process of decolonisation. The fundamental issue today relates to the significance of self-determination beyond the decolonisation course of action. Self-determination does have a continuing function in circumstances related to human rights inside the territorial structure of autonomous States. The open question is what human rights do fall within self-determination? Only true is that the principle of self-determination cannot be used as a legal means for destruction of state sovereignty. The principle of territorial integrity preserves territorial sovereignty of independent States. Various international instruments exclude actions to disrupt the national unity and territorial integrity of the States. However, not any of them does prohibit creation of new States. The State creation continues to be the question of fact and would be justified in law by application of the principles that serve to define the conditions upon which an entity constitutes a State. It is well established in positive international law. Not any possibility is excluded that the territorial integrity can be destabilized by virtue of imperative standards of international law or the actual situation. In this respect, application of the principle of effectiveness, with or without consent of the Predecessor State plays of decisive role. The question whether the criteria of statehood comply with the given situation becomes a matter of evaluation by other States as well by international organizations.

One of the principal issues following the relevance of self-determination of the peoples of the former constitutive Republics of SFRY was that no consent was given by all actors in this process. At the beginning of the process of origination of the new States in the territory of the SFRY, FRY denied other former Yugoslav Republics the right to secession. On the other side, for Slovenia, Croatia, Bosnia and Herzegovina and Macedonia, self-determination was a basic title for independence. Insisting on the peremptory character of the commitment to respect the right to self-determination (*jus cogens*), they maintained the approach that secession was their constitutional right. FRY had a traditional law attitude that secession represented an illegal act and flagrant violation of the internal and international law order to which the Predecessor State had a full right to oppose by all lawful means.

The EC Arbitration Commission was called to resolve this open legal question. It adopted opinion on the merit of this issue. That is to say, the Commission, acting within the framework of rules and principles of international public law, 'redefined' the factual situation pertaining to the territorial status and status of borders of the republics of SFRY in a novel

manner.<sup>22</sup> In connection with the current situation and on the basis of the principle of protection of the territorial integrity of the new State, the Arbitration Commission adopted Opinion n° 2, and strictly limited the scope of right to self-determination in the context of unstable and unclear situation. It noted that international law as it currently stood, did not spell out all the implications of the right to self-determination. The Commission stressed that self-determination could not be carried out in such a way as to change borders existing immediately prior independence. In accordance with this, in its Opinion n° 3 the Arbitration Commission insisted on recognition of internal administrative borders as international borders. The principle of preservation of borders that had existed at the moment when the new States gained independence thus became a general ground for demarcation between the new Balkan States (*uti possidetis juris*).<sup>23</sup>

The arrangement for the above mentioned borders was derived from the fact that they represented “lines of demarcation that may be altered on the basis of free and mutual agreement”, and, *a contrario*, those borders thus became international frontiers “protected by international public law”. Merely, the effect of the principle *uti possidetis* is to “freeze” the legal title for possession of the territory at the moment when a new State has achieved independence. This interpretation may have been substantiated by the idea that the principle of respecting the territorial *status quo* may have also derived from the 1974 Constitution of SFRY (paragraph 2 and 4 of Article 5). The above mentioned Constitutional clauses prescribed irreversibility of borders of the Yugoslav Republics, unless the consent for change of borders was freely expressed. Thus, the formerly recognized principle of delimitation of the new States after the decolonisation in America and Africa, *uti possidetis juris qui*, has become a universal legal principle on the territorial delimitation that may be applicable to SFRY, too. Accepting the *de facto* situation, the Arbitration Commission stressed the security function of this principle under the circumstances that

<sup>22</sup> Marc Craven, “The European Communities’ Arbitration Commission on Yugoslavia”, *British Year Book of International Law*, 1995, vol. 66, p. 333; Alain Pellet, “La Commission d’Arbitrage de la Conférence Européenne pour la Paix en Yougoslavie”, *Annuaire Française de Droit International*, 1991-1993, pp. 329, 220, 286.

<sup>23</sup> “Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)”, Judgement of the International Court of Justice of 22 December 1986, *International Court of Justice Reports*, New York: United Nations, p. 565; Constantin Antonopoulos, “The Principle of Uti Possidetis Iuris in Contemporary International Law”, *Revue Hellénique de Droit International*, Institut Hellénique de Droit International Étranger, Athènes, 1996, pp. 29-88; Malcolm N. Shaw, Peoples, “Territorialism and Boundaries”, *European Journal of International Law*, 1997, vol. 3, pp. 478-507; “The Heritage of States: The Principle of Uti Possidetis Juris Today”, *British Year Book of International Law*, 1997, vol. 67, pp. 75, etc.

might lead to “fratricidal fights and endanger the stability and recently acquired independence of the new States”.

While the collapse of SFRY was going on, the Arbitration Commission explicitly declared itself in favour of the attempt of seceding a part of the population in the former Yugoslav Republics. It pointed out that all ethnic, religious and language groups in a State had the right to recognition of their identity under international law. The application of Slovenia, Croatia, Bosnia and Herzegovina and Macedonia for recognition as independent States should be granted, subject to the conditions, first, by full consultation of its people by a referendum, and second, by passing of amendments to the Croatian Constitution of the incorporation of more fully certain guarantees of human rights and the rights of minorities.

Provided for as the primary principle of the territorial integrity, by applying the method of argumentum *a contrario* the Arbitration Commission failed to reconsider all aspects of self-determination, this especially concerning the constituent Serbian population in Croatia and Bosnia and Herzegovina. The scope of minority rights remains in line with the territorial boundaries of the new Balkan States. Logically, they cannot interpret it a way that implies the right to secession. As an individual and collective human right, self-determination entails overall framework for consideration of the principles relating to democratic governance within the framework of independent States.<sup>24</sup>

With regard to the international borders of the former Yugoslavia that became external borders of the new States, the Arbitration Commission maintained that those borders should enjoy protection of international public law, in accordance with the principle embodied in the UN Charter. The protection of the above mentioned borders can be also derived from the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the UN Charter. Finally, international protection of the borders of the new States can be derived from the Helsinki Final Act that had inspired the Article 11 of the 1978 Vienna Convention on Succession of States in Respect to Treaties.

When analysing this part of the Commission’s opinion, one should concentrate on the concrete research of the rules of international public law that the Commission stated as the basis for the opinion on inviolability of international borders of SFRY after the succession. Namely, Article 11 of the Vienna Convention on State Succession in Respect to Treaties has approved the principle of international public law prescribing that the succession of States

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<sup>24</sup> Thomas Franck, “The Emerging Right to Democratic Governance”, *American Journal of International Law*, 1992, vol. 86, pp. 46, etc.

does not include the issues of borders that had been determined by treaties, nor the rights and duties pertaining to border regime that had been determined by treaties. This principle is derived from the legal practice and the theory of international public law and is essentially based on the principle of sovereign equality of States that also prescribes for States' obligation to refrain from threats and use of force in their relationship (Article 2 of the UN Charter). The 1975 Helsinki Final Act and the Declaration of CSCE also covered up the principle of inviolability of borders. Since the international community is based on prohibition of interventionism aimed against the territorial integrity of States, it prescribed that the internationally recognized borders might be altered exclusively in a peaceful manner, on the basis of mutual consent of the interested parties. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States repeated the same principle affecting to the "lines of demarcation". The 1990 Paris Charter for New Europe confirmed the rule on immutability of borders. Furthermore, it coincided with the collective consensus on recognition of new States that had been formed in the territory of SFRY. The EC Guidelines on Criteria for Recognition of States in Eastern Europe and Soviet Union and Declaration on Yugoslavia adopted on 16 December 1991, conditioning recognition of new States with their acceptance of the basic principles of international public law, amongst other obligations to respect the territorial integrity and inviolability of State borders.

In accordance with the valid provisions of international public law that was subject to a particular political test in case of Yugoslavia, one may assume that all former Yugoslav Republics of the SFRY acquired internationally recognized borders, once they had gained independence. *Via facti*, the internal administrative borders were transformed into the international frontiers, while the international borders had remained the same, in accordance with the provisions of international public law on immutability of international borders. However, the first case represents the particular legal presumption that may be generally applicable to the situations at the moment when the new States gained independence. Still, this presumption does not have an absolute effect *ratione temporis*, as, in itself, it functionally suspends the effect of legal title until the moment the title has been confirmed. The confirmation of the legal title, on the other hand, always depends on the concrete capability of the particular party to prove the validity of the facts it had based its claims on.<sup>25</sup>

On foundations of the above mentioned historic and legal facts that have been presented, the *New International Legal Order* encourages the particular legal

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<sup>25</sup> Gerald Fitzmaurice, "The General Principles of International Law", *Recueil de Cours*, Académie de Droit International, The Hague, 1957, vol. 92, p. 148.

discrepancy at the moment of the State succession that is linked with achievement of the right to self-determination. One should evaluate the affectivity at the moment when a State gained independence, and after that time, not merely in the light of social causes, but in the light of real events that should verify, *inter alias* the existence of a specific right. For this reasons, the *New International Legal Order* bends over factual situation and slowly but surely justifies effectiveness.