Appendix 2

The Opinions of the Badinter Arbitration Committee:

A Second Breath for the Self-Determination of Peoples

Appendix: Opinions of the Arbitration Committee

Opinion No. 1

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

> We find ourselves with a major legal question.
>
> Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.
>
> Other Republics on the contrary consider that there is no question of secession, but the question is one of a disintegration or breaking-up of the SDRY 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 way over the population and the territory;

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

e) that, in compliance with the accepted definition in international law, the expression `state succession' means the replacement of one state by another in the responsibility for the international relations of territory. This occurs whenever there is a change in the territory of the state. The phenomenon of state succession is governed by the principles of international law, from which the Vienna Conventions of 23 August 1978 and 8 April 1983 have drawn inspiration. In compliance with these principles, the outcome of succession should be equitable, the states concerned being free of terms of settlement 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 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;
- in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;
- in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav states;
- in Bosnia and Herzegovina, by a sovereignty resolution adopted by Parliament on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and 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 representatives 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.

Opinion No. 2

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

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

The Committee took note of the *aide-mémoires*, observations and other materials submitted by the Republics of Bosnia-Herzegovina, 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-Herzegovina'.

1. *The Committee considers 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 Committee 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 rights of minorities. This requirement applies to all the Republics *vis-à-vis* the minorities on their territory.

The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international convention 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 1986 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 she wishes.

In the Committee's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina 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 Committee is therefore of the opinion:

(i) that the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned 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-Herzegovina 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.

Opinion No. 3

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

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

The Committee took note of the *aide-mémoires*, observations and other materials submitted by the Republics of Bosnia-Herzegovina, 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-Herzegovina'.

1. In its Opinion No. 1 of 29 November, published on 7 December, the Committee 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-Herzegovina, *inter alia*, have sought international recognition as independent states, the Committee 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 Committee therefore takes the view that once the process in the SFRY leads to the creation 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 principles 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-Herzegovina and Serbia, and possibly 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 decolonisation 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 Fase and Hali (*Frontier Dispute*, (1986) Law 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 Republic 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.