Recognition of States: A Comment

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Legal issues arising from dissolution of states, emergence of new states and recognition of the latter require a thorough understanding of the relevant facts. While it is obvious that any legal discourse must proceed from firm factual foundations, it is necessary to emphasize the importance of the circumstantial dimensions of the issues, given that the views on the pertinent facts usually diverge, at least during the policy-making stage.

Assessment of facts is much easier from a historical distance. Nobody questions today the wisdom of recognizing the dissolution of the Spanish colonial empire in Latin America, or the independence of Greece from the Ottoman rule. These events belong to history and have a comfortable place in contemporary textbooks on international law. However, at their time they were among the most controversial political issues of the time and contributed considerably to the collapse of the hitherto prevailing international system which was based on the principles of the Holy Alliance. The principle of legitimacy – as understood at that time – had to give way to independence of new states. Therefore, it seems necessary to recognize that the 'facts' and 'policy matters' concerning dissolution of states, emergence of new states and recognition of the latter contain more than facts *per se*: they also contain an important contextual dimension and it is necessary to make an effort to understand it as completely as possible. It is necessary to comprehend the historical context within which they take place, as well as their effect on the functioning of the international system.

The preceding remarks are necessary as an introduction to any discussion on the issues concerning the dissolution of Yugoslavia and the Soviet Union (at the time of publication of this comment, the list of European countries recently dissolved will also include Czechoslovakia). Indeed, the dissolution of these states belongs to a broader process of disintegration of the Central and East European political, economic and security system and to the overall transformation currently under way in Europe.

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Back in November 1989, immediately after the fall of the Berlin wall, George Kennan defined the European agenda as one requiring elaboration of a new political, economic and security framework for all of Central and Eastern Europe. This, according to Kennan's analysis of 1989, required the solution of problems of great historical depth. Whoever undertakes to study them, concluded Kennan,

> ... is going to find himself confronting situations to which better answers should have been found, but were not, at the end of the last world war, and even some arising from the break up of the Austro-Hungarian Empire left unresolved in 1918 and 1919.[1]

Disregard for historical context of facts may lead to serious mistakes. Legal analysts and, above all, policy makers should be aware of that. The policy of non-recognition of the changed reality in Central and Eastern Europe has been influenced by that oversight. Moreover, insensitivity to the contextual dimension often led to incorrect assessment of actual facts, and to unsuccessful policy efforts – particularly in the case of the dissolution of former Yugoslavia.

The article by Roland Rich is remarkably accurate in its presentation of complex facts and in their historical context. The war characterizing the dissolution of Yugoslavia started with the armed attack of the Yugoslav army against Slovenia on 27 June 1991. The apparent failure of the attack was followed by the Brioni Declaration of 7 July, and the Federal Presidency of the Socialist Federal Republic of Yugoslavia decided, with the obvious agreement of the Yugoslav army, to withdraw the army from Slovenia. That retreat began in the middle of July 1991 and was completed by 25 October 1991.

The defeat of the Yugoslav army in Slovenia marked the beginning of the dissolution of Yugoslavia. The war in Croatia which started in the second half of July 1991 (prior to that there were only armed incidents in Croatia, mostly resulting from Serb guerilla attacks on Croat police forces) made the process of dissolution of Yugoslavia irreversible. Yugoslavia was vitally depending on the coexistence of Serbs and Croats.[2] The large armed conflict among them in the Summer of 1991 spawned two crucial consequences: it rendered the continuation of a common Serbo-Croat state of Yugoslavia impossible and made all other nations of ex-Yugoslavia, and particularly the Bosnian Muslims, the victims.

These facts would have been easily grasped by policy-makers in the Summer of 1991 had they appropriately understood their historical context. The ability to realistically face the situation and draw concrete conclusions, including those necessary for the timely recognition of the successor states of the former Yugoslavia, was lacking. Instead, the European community – until the end of September 1991 the only major international power involved in the Balkan embroilment – relied heavily on the idea of keeping the defunct Yugoslavia as a single state. Slovenia and Croatia

1 George Kennan, 'An Irreversibly Changed Europe, Now to be Redesigned', *International Herald Tribune*, 14 November 1989.

2 For analysis of the relevant historical facts, see A.J.P. Taylor, *The Habsburg Monarchy* (1948).

remained unrecognized and the Belgrade government continued to be considered as holding an illusionary authority over the whole territory of the former Yugoslavia. The conference on Yugoslavia (originally defined as 'Peace Conference') was convened without a clear understanding of its purpose – to many it seemed an instrument for the reconstitution of Yugoslavia and it relied on the illusion that a package solution was possible.

The policies on Yugoslavia were formulated in the Summer of 1991 under the threat of the dissolution of the Soviet Union. It is understandable (and very accurately described in the paper by Roland Rich) that the main Western states adopted an extremely cautious approach to the situation arising from the dissolution of the Soviet Union, given that it was one of the two superpowers. Therefore, it is natural that they did not wish to create any precedent in the case of the dissolution of Yugoslavia. The paradoxical aspect of this approach was that this type of caution was unnecessary, as the successor states of the former Soviet Union showed a remarkable level of political wisdom and common sense – and resolved most of the outstanding questions in 1991 by agreement.[3] Although that approach was, perhaps, influenced by the example of Yugoslavia (in particular by the ugly aspects thereof which probably had a deterrent effect), there is no reason to believe that the smooth transition from Soviet Empire into the Commonwealth of Independent States in 1991 was in any significant way influenced by the approach taken by the Western states.

In short, the policy pursued by the Western states with respect to the dissolution of Yugoslavia and the Soviet Union did not contribute to solving any of the historical problems in that part of the world. The process of change took its own course and the attempts to reverse or stop it were unsuccessful. The policy makers failed in many questions posed in the process, including those concerning the recognition of new states. For example, the EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991 contained a series of legal requirements including the declaration by the new states aspiring for recognition that they accept various international legal obligations. On the other hand, the guidelines, and the pertinent practice of Western states disregarded one of the classical criteria for recognition namely the criterion of effectiveness of the governments of the states which were aspiring for recognition.

Roland Rich accurately describes the inconsistencies characterizing the process of recognition. Although the EC and USA, together with other Western states reiterated, in various ways, their reliance on traditional international legal criteria for recognition, their policy of non-recognition of various states was far from being consistent application of legal criteria. Thus Slovenia which has fulfilled all traditional criteria since July 1991 remained unrecognized by the EC until mid January 1992, and by the USA until April 1992. Macedonia which also fulfilled these

3 The Alma-Ata Declaration of 21 December 1991, quoted by Roland Rich, *supra* note 38 of his article, represents probably the most important manifestation of that process. In that declaration all successor states of the former Soviet Union agreed that the USSR ceased to exist.

criteria, at least since the end of 1991, has remained unrecognized for a much longer period due to a dispute over its name; a dispute which carries a great deal of irrationality in conformity with the history of the Balkans.

On the other hand, Bosnia and Herzegovina – which was unable to fulfil the criterion of effectiveness – became recognized in April 1992 and was admitted to the UN on 22 May 1992. However, it would be wrong to conclude that recognition and admission of that state to the UN was necessarily a political mistake. The recognition of Bosnia and Herzegovina was not only fair and just but also – paradoxically, in accordance with state practice. In the case of Bosnia and Herzegovina it should have been clear that the emerging state would need more than formal recognition, admission to the UN and establishment of diplomatic relations. The Conference on Yugoslavia could have been – but was not – used for the purpose of creating appropriate guarantees for the independence of Bosnia and Herzegovina. This omission was probably due to (a) divergent opinions among the major powers regarding the approach to the Yugoslav crisis in general and (b) the lack of readiness to act by force, if necessary, to protect the independence of Bosnia and Herzegovina and thus to give credibility to the international support for Bosnia and Herzegovina's independence.

It is important to note that jurists did not make the mistakes which characterized most of the political dealings with the dissolution of Yugoslavia. The Arbitration Commission of the Conference on Yugoslavia (the 'Badinter Arbitration Commission') rightly concluded in its Opinion No. 1 of 29 November 1991 that Yugoslavia was in the process of dissolution, given the fact that its federal organs had lost both representativity and effectiveness.[4] The criterion of effectiveness was duly recognized in this context. On 4 July 1992 the Arbitration Commission concluded in its Opinion No. 8 '... that the process of dissolution of the SFRY referred to in the Opinion No. 1 of 29 November 1992 is now complete and that the SFRY no longer exists'.[5]

The Arbitration Commission was accurate and consistent also in its opinions on the recognition of successor states. It duly recognized that in the cases of Slovenia and Macedonia all criteria were fulfilled and that in the cases of Croatia and Bosnia and Herzegovina additional activities were necessary (respectively, provision for an appropriate status of minorities and a referendum). Finally, in its Opinion No. 8 the Commission also stated that '... – 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'.[6] Thus the Arbitration Commission provided a comprehensive legal interpretation of the status of successor states to former Yugoslavia.

4 Badinter Commission Opinion No. 1 is reprinted in 3 *EJIL* (1992) 182.

5 See below at 88.

6 See below at 88 (emphasis added).

The opinions of the Arbitration Commission were not legally binding and also did not deal with all implications of the situation of the dissolution of a state and emergence of successor states. The fact that the Arbitration Commission's opinion on recognition of Macedonia was not heeded by political fora of the EC, and that no serious action was taken to demonstrate that the Federal Republic of Yugoslavia (Serbia and Montenegro) was a new state, illustrated the difficulties involved in the political implementation of a legal opinion. Moreover, the fact that the Arbitration Commission was not invited to propose measures necessary to uphold independence of Bosnia and Herzegovina, a state with obvious shortcomings in the effectiveness of its government, is an illustration of the incomprehensiveness of the political approach which was taken. It might be argued that the Arbitration Commission should have proposed such measures independently even though this was not specifically requested. However, it remains doubtful whether such an activist approach would be wise in a situation characterized by the overwhelming prevalence of political considerations over application of legal criteria.

In short, the opinions of the Arbitration Commission of the Conference on Yugoslavia were legally consistent and correct, notwithstanding their inconsistent implementation and the silence of the Commission with regard to some questions which were of obvious relevance. The latter shortcoming was caused by political barriers and was not consequent from a decision of the Arbitration Commission itself.

On the other hand there are some questions which have not received a complete legal opinion and which were relevant to both the Yugoslav and Soviet cases of dissolution of states as discussed in Roland Rich's paper. The most important among them is the twin question of the territorial integrity of successor states and the protection of minorities on their respective territories.

The Arbitration Commission and the Conference on Yugoslavia have relied on the principle of *uti possidetis* with respect to the frontiers among the former republics. This was the first time that that principle was directly applied in Europe. The Arbitration Commission referred in its Opinion No. 3 to the 1986 International Court of Justice judgment in the dispute between Burkina Faso and Mali[7] to argue in favour of general applicability of the *uti possidetis* doctrine.[8] The EC and the international community have, in fact, relied on the same principle with respect to the successors of the former Soviet Union.

Roland Rich rightly highlights the difficulties involved in the realization of that approach, particularly in situations involving large minorities which are in some cases regional majorities. He concluded that it would be difficult to limit the application of that principle to a single geographic area (Europe) or to a type of nation with a particular method of internal organization (federalism). While this is generally correct it must also be recognized that both the Soviet Union and Yugoslavia were federations in which federal organization relied heavily on the ethnic component.

7 Frontier Dispute (Burkina Faso/Mali), [1986] ICJ Rep. 3.

8 Badinter Commission Opinion No. 3 is reprinted in 3 *EJIL* (1992) 184.

Moreover, the federal units – the Republics – were constitutionally defined as 'states' with both defined borders and a considerable amount of constitutional power, which included authority in the field of international relations.[9] These were not purely formal features but also had considerable political importance, both in terms of the duration of those two federations and in the process of their dissolution. Therefore the dissolution of the Soviet Union and Yugoslavia cannot be seen as a real precedent for the situations that might arise in states with different types of history and another type of political organization.

The question of the protection of minorities and, where possible and necessary, the adjustment of frontiers, remains open. All political fora, including the EC, CSCE and the UN, along with the Arbitration Commission agreed to the principle that peaceful change of frontiers, based on the agreement of states concerned, was permissible. It seems that such a possibility would be more likely to be realized if the pertinent international organization provided an appropriate institutional framework to facilitate the process of agreement. Moreover, it also seems that international institutional support would be necessary to encourage and supervise the evolution of appropriate minority protection regimes. Such institutional arrangements, some of which have already been conceived within the framework of the CSCE would represent a contemporary realization of the concept of peaceful change – a well known notion in international law, and one that may facilitate future political change and minimize its impact on the international community.

9 The Constitution of the Socialist Federal Republic of Yugoslavia of 1974 defined the Republics as 'states' (Article 3) and stipulated (in Article 5) that the Republic's territories and boundaries cannot be altered without their consent. In the case of the Soviet Union it is noteworthy that Article 80 of the 1977 Constitution of the USSR provided for the Federal Republics the right to establish diplomatic and consular relations with other states to conclude international treaties, and to participate in the work of international organizations.