

Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition

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I. Introduction

In accordance with the expressed will of the Montenegrin electorate at the referendum held in May 2006, Montenegro declared independence. The international community promptly recognized the new state, and on 28 June 2006 Montenegro became the 192nd member of the United Nations (UN).¹ The dissolution of the State Union of Serbia and Montenegro symbolized the end of state formations of South Slavic (Yugo-Slav) nations. The first such state formation began with the founding of the Kingdom of Serbs, Croats and Slovenes in 1918, which was later renamed the Kingdom of Yugoslavia in 1929, and was, in 1943, transformed into the second, socialist Yugoslavia—from 1963 called the Socialist Federative Republic of Yugoslavia (SFRY).² The SFRY was also one of the original members of the UN.³

In 1991, two of the SFRY's six republics, Slovenia and Croatia, declared independence. Later, Bosnia-Herzegovina and Macedonia also opted for independence, while Serbia and Montenegro together founded the Federal Republic of Yugoslavia (FRY), which, in 2003 became the State Union of Serbia and Montenegro and later disunited in 2006. I will argue that the dissolution of the SFRY took place in different political and legal circumstances than did the transformation of the FRY into the State Union and, ultimately, the latter's dissolution. Consequently, issues of self-determination, statehood and recognition raised by Montenegro's secession greatly differed from those raised upon the SFRY's dissolution.

My main objective will be to examine the right of self-determination and the problem of statehood and recognition in relation to Montenegro in three periods: (i) the dissolution of the SFRY and the creation of the FRY, (ii) the transformation of the FRY into the State Union of Serbia and Montenegro and (iii) the dissolution of the State Union of Serbia and Montenegro and Montenegrin independence. In this context, I will also examine how different legal conceptions of the right of self-determination influenced the problem of statehood and recognition in the processes of dissolution of the SFRY, and of the State Union of Serbia and Montenegro, respectively. I will also examine the impacts of the political involvement of the European Community (EC) and the European Union (EU) in the dissolutions of the SFRY and the State Union on the exercise of the right of self-determination and the problem of statehood and recognition.

This article will be structured in five parts: Following the introduction, I will clarify in a second part the concepts to which I then refer in the parts three and four: The right of self-determination, the problem of statehood and international personality and the problem of

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¹ G.A. Res 60/264 (28 June 2006).

² Terrett, Steve, *The Dissolution of Yugoslavia and the Badinter Commission* (Ashgate, Aldershot, Burlington, Singapore, Sydney, 2000), 20 ff.

³ Growth in United Nations Membership, 1945-2007, found on <http://www.un.org/members/growth.shtml>, last accessed 20/06/2007.

recognition. Using primary and secondary sources, I will specifically illuminate the postulates of particular importance for my text.

In the third part, I will address issues of internal self-determination in the SFRY, characteristics of statehood of member-republics, external self-determination and statehood and recognition issues during and after the process of dissolution of the SFRY. I will also invoke Montenegro's position in this process. For the examination of internal self-determination in the SFRY and characteristics of statehood of its member-republics, both the Constitution of the SFRY from 1974 and secondary sources will be used. For the examination of the issues of external self-determination, statehood and recognition of the former republics, initially the constitutional provision on self-determination will be examined and paralleled with the Opinions of the Badinter Commission, relevant Resolutions of the UN General Assembly and the Security Council, the EC Guidelines and the EC Declaration on Yugoslavia, as well as a number of secondary sources.

In the fourth part, I will specifically focus on Montenegro. Issues of self-determination (internal and external), statehood and recognition will be examined in the three above-mentioned periods. For this purpose, the constitutions of the FRY and the State Union of Serbia and Montenegro, relevant Resolutions of the UN General Assembly and Security Council and relevant internal legislation will be examined. Using secondary sources, I will also touch upon the political involvement of the EU in the process of Montenegro's secession. In this respect, I will specifically concentrate on the legal implications of this involvement and on the creation of internal legal provisions that severely impacted the right of self-determination and issues of statehood and recognition. The conclusion will follow in the fifth part.

II. Self-Determination, statehood, recognition: a theoretical framework

1. The right of self-determination

i. Development and codification

The right of self-determination is codified in the common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴ Furthermore, this right 'has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.'⁵

Self-determination as a political principle derives from postulates of the American Declaration of Independence (1776) and the French Revolution (1789). It is argued that these two events 'marked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance

⁴ Paragraph 1 of the Common Article of the ICCPR and of ICESCR reads: 'All peoples have right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Found on http://www.unhcr.ch/html/menu3/b/a_ccpr.htm, last accessed 20/06/2007.

⁵ McCorquodale, Robert, 'Self-Determination: A Human Rights Approach', in McCorquodale, R. (ed.), *Self-Determination in International Law* (Ashgate, Aldershot, Burlington, Singapore, Sydney, 2000), 478.

with the interests of the monarch. The core of the principle lies in the American and French insistence the government be responsible to the people.⁶

The principle of self-determination was invoked by two important figures at the end of the First World War: The American president Woodrow Wilson and the leader of the Russian Socialist Revolution, Vladimir Ilyich Ulyanov-Lenin. Each advocated self-determination on separate political and ideological foundations: 'While the Leninist conception was of course based on socialist political philosophy, Wilsonian self-determination originated from typically Western democratic theory. For the US president, self-determination was the logical corollary of popular sovereignty; it was synonymous with the principle that governments must be based on "the consent of the governed".⁷ On the other hand, Lenin perceived self-determination as 'the right of oppressed nations to political separation, that is secession, from alien oppressor bodies and nations and the formation of an independent national state.'⁸ Thus, importantly, Lenin wedded the right of self-determination to the right to secession.⁹

Both Wilsonian and Leninist conceptions of self-determination faced severe difficulties in implementation. From the Wilsonian aspect of self-determination, it is interesting to observe the aftermath of the First World War. Self-determination was applied selectively and arbitrarily and to peoples within the defeated states. The creation of nationally homogeneous states proved impossible, since this would have created a number of new problems.¹⁰ As has been rightly argued, Wilson formulated self-determination in 'general and universal' terms, thus raising peoples' hopes (which he could not fulfill), and naively believed that holders of the right of self-determination would be 'self-evident and therefore easy to ascertain.'¹¹ Importantly, self-determination did not find a place in the Covenant of the League of Nations, although Wilson included this principle in the draft of Article 10.¹² The Soviet reality proved Leninist self-determination to be *de facto* merely rhetorical, although it was *de jure* constitutionally well-rooted in the Soviet Constitution: its Article 72 acknowledged the right of self-determination as a right to secession of Soviet peoples. Yet Lenin departed from this concept already prior to the end of the First World War when arguing in favor of the Brest-Litovsk Treaty, which he saw as crucially important for advancing socialism, though it ceded Poland, Lithuania, and large parts of Latvia, Estonia, and Belarus to Germany, thus denying those peoples the right of self-determination. When

⁶ Cassese, Antonio, *Self-Determination of Peoples* (OUP, Oxford, 1995), 11. The same author (*ibid.*, 11 ff.) furthermore observes that the principle of self-determination was initially used for French annexation of territories, whereas the principle was applied selectively—only if popular vote were in favor of France. Significantly, the principle did not apply to colonial peoples.

⁷ Cassese, *supra* n. 6, 19.

⁸ Raič, David, *Statehood and the Law of Self-Determination* (Kluwer Law International, The Hague, London, New York, 2002), 185.

⁹ There must be a caveat that Lenin viewed secession as a last resort against nationalist oppression, which he saw as bourgeois. But as Raič observes, the right of self-determination in the Leninist notion did not have protection of the collective interests of nations as an objective, but 'Lenin proposed self-determination, defined as a right to secession, solely as a tool, a vehicle or a strategic concept for the realization of the integration of all nations, that is, a universal socialist society.' Raič, *supra* n. 8, 186.

¹⁰ See Raič, *supra* n. 8, 190 ff. Important for later references, at that time the Kingdom of Serbs, Croats and Slovenes was also established, renamed the Kingdom of Yugoslavia in 1929. The Kingdom was a manifestation of both the self-determination of South Slavs (Yugoslavs) and of the failure to create ethnically-homogenous states. Namely South Slavic nations that were previously under the Habsburg throne were united with the Kingdom of Serbia and thus came under the Serb throne. See *supra* n. 2.

¹¹ Raič, *supra* n. 8, 184.

¹² Raič, *supra* n. 8, 194.

clarifying this situation, Lenin held that the right of self-determination needed to yield to the interests of socialism.¹³ Lenin thus clearly made self-determination a mere underlaborer of socialist revolution. This concept was later confirmed by the actions of the Soviet Union, especially its occupation of the Baltic States.¹⁴

After the First World War, self-determination was merely a political principle and not an international legal norm.¹⁵ As a legal norm, it came into being with the international legal order established at the end of the Second World War and the creation of the UN. Self-determination is thus invoked in the Charter of the United Nations, Article 1(2). As argued above, it was also made the common Article 1 of the Covenants. In both documents the right was championed by the Soviet Union.¹⁶ There was an initial clash between UN member states drafting the Covenants on whether the right to self-determination should be limited to colonial situations or have universal scope. In the end, the latter view prevailed, however, with deep concern that this right could have severe impacts on the territorial integrity of states.¹⁷ In other words, as experienced in the Wilsonian concept of self-determination, a broad application of this principle (in the post-Second-World-War era defined as a right) could both bring high expectations of some peoples and create new problems, hostilities and injustices. Thus, application of this right was severely limited. Although *de jure* not limited as a right reserved to colonial peoples, it initially had the implication of a 'right to decolonialization'.¹⁸

ii. Internal and external self-determination and correlation with secession

It can be argued that '[t]he right of self-determination applies to all peoples in colonial situations. This position was upheld by the International Court of Justice [ICJ] in the *Namibia Case* and there is nearly uniform State practice consistent with its implication to colonial territory.'¹⁹ The application of this right beyond the colonial framework is, however, a much more complex and disputable question. Importantly, self-determination in colonial situations did not collide with the principle of territorial integrity since 'the only territorial relationship to be altered was that with the metropolitan power. Achieving independence [in contrast to secessionist claims] did not come at the expense of another sovereign state's territory or that of an adjacent colony.'²⁰ Thus, during the process of decolonialization, the right of self-determination manifested itself in the creation of new independent states, but in non-colonial contexts, the right of self-determination has been clearly divorced from the notion 'right to secession'.²¹ In this context the doctrine and state

¹³ Cassese, *supra* n. 6, 18.

¹⁴ Cassese, *supra* n. 6, 18 ff.

¹⁵ Cassese, *supra* n. 6, 27. This view is founded on the findings of the two Commissions appointed by the Council of the League of Nations in relation to the *Aaland Islands Case*. Cassese, *supra* n. 6, 27 ff.

¹⁶ Cassese, *supra* n. 6, 47.

¹⁷ Cassese, *supra* n. 6, 50 ff.

¹⁸ See, for example, Raič, *supra* n. 8, 226 ff.

¹⁹ McCorquodale, *supra* n. 5, 479.

²⁰ Fox, Gregory, 'Book Review: Self-determination in the Post-Cold War Era: A new Internal Focus?', [1995] 16 MJIL 733, 2.

²¹ As observed by the Supreme Court of Canada in the *Québec Case*: 'The right of colonial peoples to exercise their right to self determination by breaking away from the "imperial" power is now undisputed [...]'. *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217, para 132.

practice have established the difference between notions of internal and external self determination.²²

For understanding the right of self-determination in non-colonial situations, the position of the Supreme Court of Canada in the *Québec Case* is significant:

*The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.*²³

So defined, internal self-determination means fulfillment of Article 1 of the Covenants within the existing international borders, thus preserving the territorial integrity of states.

The question remains how people can consummate this right. It has been argued that the right of self-determination in its internal form is ‘the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government, i.e. a State’s “internal” relations are affected.’²⁴ A similar argument points out that ‘[i]nternal self-determination means the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime’.²⁵ It is further argued that ‘[t]he exercise of this right [internal self-determination] will usually depend on the constitutional order of the State concerned.’²⁶ A good example of a constitutional order that provides exercise of right of self-determination in its external form is that of federations.²⁷ Based on the argument that ‘[t]he classical case [of federalism] is that of a state composed of a number of ethnic, religious or linguistic groups, provided that these are concentrated in certain regions, so that the federal system makes it possible to confer upon them [...] self-rule’,²⁸ it is possible to argue that federalism is originally a manifestation of internal self-determination.²⁹

The question that remains is when the right of self-determination can be interpreted as a right to secession, i.e. what justifies ‘extreme cases’, as invoked by the Supreme Court of Canada?³⁰ It is generally perceived that such a right is undisputed if the constitution of a parent-state foresees a secession.³¹ Examples of such states include: Burma (1947), the Soviet Union (1977), Czechoslovakia (1968), Ethiopia (1984), Saint Christopher and Nevis

²² Raič, *supra* n. 8, 226 ff.

²³ *Reference Re Secession of Québec*, *supra* n. 21, para 126.

²⁴ Raič, *supra* n. 8, 226 ff.

²⁵ Cassese, *supra* n. 6, 101.

²⁶ McCorquodale, *supra* n. 5, 864.

²⁷ Below I will specifically address the issue of internal self-determination in relevant federations.

²⁸ Dinstein, Yoram, ‘The Degree of Self-Rule of Minorities in Unitarian and Federal States’, in Brölmann, C., Lefeber, R., Zieck, M. (eds.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993), 223 ff.

²⁹ Compare the observation on federalism in the *Québec Case*: ‘The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments [...]’. *Reference Re Secession of Québec*, *supra* n. 21, para 43.

³⁰ See *supra* n. 23.

³¹ Raič, *supra* n. 8, 313.

(1984), Moldova (1994), and the SFRY (1974).³² I shall add the recent example of the State Union of Serbia and Montenegro.³³

The right to secession may be further acknowledged if such an act, though in absence of specific constitutional provision, is approved by the central government (parent state). This approval may come prior to declaring independence or as a subsequent acknowledgement.³⁴ If none of these circumstances applies, the right of self-determination may not apply in its external form, either. Thus, there is no right to unilateral secession. However, it is important to stress that secession is not prohibited, either. It has been argued that '[n]either the Political Covenant nor any other international law requires the members of the international community to deny recognition to a successful secession.'³⁵

There is a question of what criteria should be applied in order to acknowledge a unilateral secession. One can argue that in acknowledging such exceptions, the doctrine carefully goes in the direction of human rights. Thus, if a parent state gravely violates human rights, this may legitimize its peoples' exercise of the right of self-determination in its external form. Judges Ryssdal and Wildhaber in concurring opinion in the *Case of Loizidou v. Turkey* at the European Court of Human Rights (ECtHR) held:

*[i]n recent years a consensus has seemed to emerge that peoples may also exercise a right of (external) self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way.*³⁶

Similarly, it was held in the *Québec Case* that secession may possibly be justified 'where a people is subject to alien subjugation, domination or exploitation outside a colonial context,'³⁷ and further 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.'³⁸

Thus, it has been summarized that the right to unilateral secession based on human rights concerns could be justified in the following examples: 'the people in question must have [sic] suffered grievous wrongs at the hand of the parent State from which it wishes to secede [...] consisting of either [...] a serious violation or denial of the right of internal self-determination of the people concerned [...] and/or [...] serious and widespread violations of the fundamental human rights of the members of that people [...] and [...] there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.'³⁹ Acknowledging the right to secession dependent on human rights violations and preservation of peace can be morally justified, but also makes such situations open to imposition of extra-legal (political) criteria when deciding when claims for secession are justified and when they are not.

³² Ibid.

³³ For my text the latter two will be important. However, as will be discussed below, the provision on the right to secession under the Constitution of the SFRY was rather problematic and questionable while in the case of the State Union the right to secession was, arguably, made a cornerstone of the state.

³⁴ Raič, *supra* n. 8, 314 ff.

³⁵ Franck, Thomas, 'Postmodern Tribalism and the Right to Secession', in Brölmann, C., Lefeber, R., Zieck, M. (eds.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993), 12.

³⁶ *Loizidou v. Turkey* [1997] 23 E.H.R.R. 513, Concurring Opinion of Judges Ryssdal and Wildhaber, 20 ff.

³⁷ *Reference Re Secession of Québec*, *supra* n. 21, para 133.

³⁸ *Reference Re Secession of Québec*, *supra* n. 21, para 134.

³⁹ Raič, *supra* n. 8, 332.

Along with debate on the scope of the right of self-determination, the definition of ‘all peoples’ to whom this right applies has also been questioned. An important issue with this dispute is whether minorities also fall under the category of ‘all peoples’. However, such a view has little grounding in international law. Namely, ‘peoples’ and ‘minorities’ are two separate concepts.⁴⁰ While the ICCPR elaborates minority rights in Article 27, self-determination of peoples is, as argued, elaborated in the common Article 1 of the Covenants. Thus, it has been argued that to claim that the right of self-determination applies to minorities is ‘to ignore the fact that the Political Covenant provides for two discrete rights.’⁴¹ The logical conclusion is thus that minorities do not fall into the category of ‘all peoples’ from common Article 1 and thus are not entitled to the right of self-determination. However, as has been importantly pointed out, ‘[m]any States accord a high level of self-management to ethnic groups in their constitutional law, though autonomy is not widely perceived as an obligation in general international law.’⁴²

2. Statehood

Article 1 of the Montevideo Convention on Rights and Duties of States (1933) reads as follows:

*The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states.*⁴³

These provisions of the Montevideo Convention, adopted by the Seventh International Conference of American States, now have a status of customary international law.⁴⁴ However, as has been noted, ‘the question remains whether these criteria are sufficient for Statehood, as well as being necessary.’⁴⁵ In this matter, there have been interesting developments in relation to the dissolution of the SFRY, which will be addressed below. As has been further argued, the Montevideo criteria for statehood have been supplemented by additional ones such as ‘independence achieved [...] in accordance with the principle of self-determination, and [...] not in the pursuance of racist policies.’⁴⁶

From the aspect of permanent population and defined territory, there is no prescribed lower limit of population or surface area. From the aspect of government, an entity needs to ‘have an organized and effective government before it can be considered a state [while] traditionally, there has been little concern with the *form* of the government, only its effectiveness.’⁴⁷ Further, effective government ‘depends on a notion of state autonomy built on isolation and separation.’⁴⁸ It has been argued that from the point of view of the capacity to enter into relations with other states, sovereignty is ‘the principal criterion of statehood

⁴⁰ See Thornberry, Patrick, ‘Self-Determination, Minorities, Human Rights’, [1989] 38 ICLQ 867 ff.

⁴¹ Higgins, Rosalyn, ‘Postmodern Tribalism and the Right to Secession (Comments)’, in Brölmann, C., Lefeber, R., Zieck, M. (eds.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993), 32.

⁴² Thornberry, *supra* n. 40, 362.

⁴³ Article 1, The Montevideo Convention on Rights and Duties of States, The Seventh International Conference of American States (26 December 1933), reprinted in the League of Nations Treaty Series (1936), vol. 165-167, 25.

⁴⁴ Harris, David, *Cases and Materials on International Law* (Sweet and Maxwell, London, 2004), 99.

⁴⁵ Dixon, Martin; McCorquodale, Robert, *Cases and Materials in International Law* (OUP, Oxford, 2003), 137.

⁴⁶ Dixon, McCorquodale, *supra* n. 45, 99.

⁴⁷ Charlesworth, Hilary; Chinkin, Christine, *The Boundaries of International Law* (Manchester University Press, Manchester, 2000), 132.

⁴⁸ *Ibid.*

[...] sovereignty means both full competence to act in the external arena, for example by entering into treaties or by acting to preserve state security, and exclusive jurisdiction over internal matters, for example exercise of legislative, executive and judicial competences.⁴⁹

A similar argument points out that '[t]here must be a central government operating as a political body within the law of the land and in effective control of the territory. [...] The government must be sovereign and independent, so that it is not subject to authority of another state within its territory. The result is that the state thus has full capacity to enter into relations with other states.'⁵⁰

For this article, it is important to note that even units of federations may have the capacity to enter into relations with other states and act in foreign affairs, depending upon the internal organization of a federation.⁵¹ However, in such competences federal units still remain more or less limited by the framework of the federation and its foreign policy. On the other hand, importantly, 'a fully sovereign entity can only voluntarily accept restraints on its activities.'⁵²

Thus, the following argument in relation to competences of federal units in foreign policy has been made: 'If and to the extent that, they [federal units] are allowed to do so [conduct their own foreign policy], such units are regarded by international law to have international personality [...] [s]uch units are thereby not states but international persons *sui generis*.'⁵³ The Republics of the former Soviet Union, which were constitutionally granted competences in foreign affairs, may serve as examples of such international persons *sui generis*.⁵⁴ As I shall discuss below, a similar observation can be applied for the SFRY, for the FRY, and for the State Union of Serbia and Montenegro *mutatis mutandis*.

3. Recognition

The controversial act of recognition in international law can be 'declaratory' or 'constitutive'. The former is understood as 'merely a political act recognizing a preexisting state of affairs', while the latter constitutes 'a necessary act before the recognized entity can enjoy international personality.'⁵⁵

The constitutive theory, that of bringing a state into legal existence, is disputable since there is no central authority to grant or deny recognition and, consequently, a state may be recognized by some states but not by others, which would mean that such a state at the same time does and does not have an international personality.⁵⁶ Furthermore, if an entity is not recognized, this does not mean that it does not have rights and duties under international law. It is thus argued that '[a] state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state.'⁵⁷ Consequently, it can be generally concluded that '[t]he declaratory theory is adopted by most modern writers.'⁵⁸ However, with the

⁴⁹ Ibid.

⁵⁰ Aust, Anthony, Handbook of International Law (CUP, Cambridge, 2005), 17.

⁵¹ Compare *supra* n. 28.

⁵² Ibid.

⁵³ Harris, *supra* n. 44, 106.

⁵⁴ Ibid.

⁵⁵ Dixon, McCorquodale, *supra* n. 45, 154.

⁵⁶ Brierly, James, reprinted in Harris, *supra* n. 44, 144.

⁵⁷ Ibid.

⁵⁸ Harris, *supra* n. 44, 145.

above-described human rights and peace-preserving approaches toward external self-determination, the question arises whether constitutive theory is not gaining momentum as, arguably, may have been the case with the dissolution of the SFRY. As I shall argue below, the EC may have *de facto* played the role of the central authority for granting of recognition.

For recognition there are no universally-prescribed acts, and state practice varies. Importantly, however, there may be certain actions that imply recognition, such as '[e]ntry into diplomatic relations [...] making of a bilateral treaty [...] support for a state's admission to the United Nations.'⁵⁹

III. Dissolution of SFR Yugoslavia: self-determination, statehood, and recognition issues

1. Internal self-determination, Yugoslav federalism and characteristics of statehood

The SFRY was a federation of six republics—Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro and Macedonia—and two autonomous regions within the republic of Serbia: Kosovo and Vojvodina.⁶⁰

Article 3 of the Constitution of the SFRY defined a republic as 'a state, deriving from sovereignty of a nation.'⁶¹ Article 5(1) of the Constitution of the SFRY defined the territory of each republic and made their borders intact without consent of a relevant republic. Notably, the same regulation also applied to the two autonomous regions.⁶² In practice, this meant that the federation (federal organs) alone was (were) not empowered to alter borders between republics (the internal borders) without their consent. Such a regulation was a consequence of the fact that republics were not merely administrative units but ethnically-based states, and borders between them followed borders between ethnicities. Therefore, the SFRY, similar to the Soviet Union, was a federation, 'in which federal organization relied heavily on the ethnic component.'⁶³

From Articles 3 and 5(1) it follows that republics within the SFRY had a defined territory and a permanent population—two of the four traditional (Montevideo) criteria of statehood. Furthermore, as I shall argue below, to a certain degree republics also met the remaining two Montevideo criteria, namely effective government and the capacity to enter into relations with other states. However, at this point I shall add the caveat that these two capacities of republics were curtailed and shared with federal organs from which follows that the organs of the republics were not sovereign in these two capacities.

Unlike the Constitution of the Soviet Union, the Constitution of the SFRY did not empower republics to apply for membership in international organizations, with membership open

⁵⁹ Harris, *supra* n. 44, 147. It also needs to be noted that polities that were not states have been members of the UN such as, notably, Ukraine and Belarus when they were still republics of the Soviet Union. Aust argues that membership in the UN is open to states, whereas 'this term is not defined in the Charter.' In relation to membership of Ukraine and Belarus, the following argument has been made: 'That has now been put right by independence.' See Aust, *supra* n. 50, 18.

⁶⁰ Article 2 of the Constitution of the SFRY (Uradni list, Ljubljana, 1974).

⁶¹ Article 3 of the Constitution of the SFRY, *supra* n. 60, my own translation.

⁶² 'The territory of a republic may not be altered without consent of the republic, as well as the territory of an autonomous region without consent of the autonomous region.' Article 3 of the Constitution of the SFRY, *supra* n. 60, my own translation.

⁶³ Türk, Danilo, 'Recognition of States: A Comment', [1993] 4 EJIL 66 ff. and 70 ff.

only to states.⁶⁴ However, with Article 271 they were empowered to act in international affairs in case international obligations accepted by the federation interfered with the interests or sovereign powers of a republic and were empowered to conduct their own foreign policy under the condition that it remained in the general framework of the federal one.⁶⁵

From paragraphs 1 and 2 of Article 271 it follows that foreign policy was not an exclusive domain of the federation. According to paragraph 1, republics could co-create foreign policy in issues which had impacts on their own sovereignty, as foreseen within the constitutional framework. Paragraph 2 gave them an option to enter into relations with foreign states and international organizations but did not permit independent foreign policy. Hence, it is obvious that we cannot talk about sovereignty of republics since restraints from the side of republics were not accepted voluntarily but imposed by the federal framework. Both the constitutionally-defined competences and the restraints imposed imply an international personality *sui generis* of the republics.⁶⁶

Similar to the curtailed empowerment to enter into relations with foreign states, the Constitution also allowed republics to exercise significant elements of effective government in their respective territories. Article 268, in its paragraphs 2 and 3, empowered each republic to adopt its own legislation in the framework of federal legislation or, alternatively, to fill a lacuna in federal legislation. Furthermore, Article 273 stipulated that for the execution of legislation, including federal, organs of republics or autonomous regions were empowered, except when certain legislation specifically empowered federal organs. Thus, analogically to the competences in foreign policy, it is possible to argue that republics and autonomous regions were also given characteristics of effective government, but this competence was curtailed and subject to federal supervision and sharing of competences.⁶⁷

One can thus conclude that the internal organization of the federation, as defined by the Constitution of 1974, comprehended two fundamental characteristics important for this text. First, Yugoslav federalism was a manifestation of internal self-determination.⁶⁸ Second, this kind of federalism awarded republics significant characteristics of statehood, if assessed from the aspect of traditional criteria of statehood.

⁶⁴ Compare *supra* n. 59.

⁶⁵ '[1] International treaties that either demand enacting of new or changing of existing legislation of respective republics or autonomous regions, or have as an effect specific duties for one or more republics or autonomous regions, shall be concluded only with consent of competitive organs of relevant republics or autonomous regions [...] [2] Republics and autonomous regions may cooperate with organs and organizations from foreign states as well as with international organizations, within the framework of the outlined foreign policy of the Socialist Federative Republic of Yugoslavia and international treaties.' Article 271 of the Constitution of the SFRY, *supra* n. 60, my own translation.

⁶⁶ Compare *supra* n. 53.

⁶⁷ In my opinion it is also important to stress that provisions that empowered republics and autonomous regions in foreign policy and in the exercise of effective government foresaw establishing relevant organs to exercise these competences. The existence of such organs enabled the republics the capacity to enter into relations with foreign states and the ability to establish effective government outside of the Yugoslav framework virtually immediately after they opted for independence. The problem of effective government exercised in different republics after independence will be addressed below.

⁶⁸ Compare *supra* at 127 ff.

i. Additional note: autonomous regions within Yugoslav federalism

Unlike for the republics, Article 3 of the Constitution did not give the autonomous regions state status but subordinated them to the republic of Serbia. Autonomy and self-governance, which derive from the above-referenced constitutional order, were established because of the significant share of non-Serb population in these two regions which were ethnic minorities of two neighboring states—Albania in the case of Kosovo and Hungary in the case of Vojvodina. The Constitution established an important distinction ‘between “nations” and “nationalities”, with the latter being defined as “members of nations whose native countries bordered on Yugoslavia”.’⁶⁹ A good example of this distinction is Article 4 of the Constitution which defines autonomous regions as units in which, *inter alia*, ‘nations and nationalities fulfill their sovereign rights.’⁷⁰ However, this article also implies that sovereign rights in autonomous regions did not only derive from a nation, as was the case with republics, but also from nationality (ethnic minority)—Albanian in Kosovo and Hungarian in Vojvodina.

Deriving from the above-quoted provisions of the Constitution of the SFRY in light of traditional statehood criteria, one can argue that, apart from being proclaimed a state by Article 3, my observations on republics in relation to the traditional statehood criteria also apply to the autonomous regions. Namely, all articles dealing with competences of federal units and their position vis-à-vis the federation mention republics as well as autonomous regions.⁷¹ Thus, although part of Serbia, we can say that Kosovo and Vojvodina enjoyed such a degree of autonomy within its framework that they were *de facto* made republics. Their autonomy was established within the federal constitutional order, not the Serb.⁷² Hence, it is possible to argue that internal self-determination applied also to nationalities, which means to Albanian and Hungarian ethnic minorities. However, it has been rightly pointed out that, ‘nationalities [...] did not have a right of self-determination or secession under the constitution.’⁷³ Importantly, as will be argued below, the Constitution of the SFRY wedded the right of self-determination to the right to secession, which was indeed formulated as a right of nations, not of nationalities.⁷⁴ As I have established above, the Constitution established federalism as a manifestation of internal self-determination of which not only the republics but also the autonomous regions Kosovo and Vojvodina were an integral part. Consequently, the right of self-determination in its internal form also effectively applied to nationalities, in other words, to Albanian and Hungarian ethnic minorities.⁷⁵

⁶⁹ Rich, Roland, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’, [1993] 4 E.J.I.L. 36, 39. As was also noted by Rich (*ibid.*), an important distinction was also the one between ‘nations’ and ‘republics’, whereas ‘nation’ meant one of the constitutive nations of the SFRY, but without a geographical determination, while ‘republic’ comprehended the geographical affiliation.

⁷⁰ Article 4 of the Constitution of the SFRY, *supra* n. 60, my own translation.

⁷¹ Compare *supra* n. 63, n. 64, n. 67.

⁷² This pattern was evident also from the functioning of the federation. In part IV of the Constitution, where the organization of the federation is outlined, articles foresee the composition of federal organs based on the equitable share of representatives of all republics as well as autonomous regions.

⁷³ Rich, *supra* n. 69, 39.

⁷⁴ Compare *infra* n. 76.

⁷⁵ Compare *supra* n. 42.

2. Toward external self-determination, statehood, and recognition of republics

In enumerating its general principles in preamble, the first was stated as

*Deriving from the right of each nation to self-determination, which includes the right to secession [...] the nations of Yugoslavia [...] created [...] the Socialist Federative Republic of Yugoslavia.*⁷⁶

This is interesting from two points of view. First, as implied above, only nations were proclaimed bearers of the right of self-determination, not nationalities.⁷⁷ Second, the right of self-determination was not only invoked, but extended to the right to secession.

Thus, there is a question of whether republics were given the right of self-determination in its external form: the right to secession. As argued earlier, the right of self-determination may be interpreted as a right to secession, provided that the constitution gives such an option.⁷⁸ Despite such a provision in the general principles of the Constitution of the SFRY, 'the application of this principle was limited by the fact that no mechanism existed in the Constitution to allow for secession.'⁷⁹ Also, Article 5(3) of the Constitution read as follows:

*Borders of the Socialist Federative Republic Yugoslavia may not be altered without consent of all republics and autonomous regions.*⁸⁰

This provision could be interpreted in a way that secession of one or more republics—and thus a change of federation borders—could only take place if all other republics and autonomous regions consented, but this would be in disaccord with general principle 1. However, this principle was expressed in the preamble which foremost attempted to ideologically express commitments of the SFRY in terms of socialism and fraternity rather than give rise for legal consequences.⁸¹

There is a question of why such an explicit wording was used in the preamble if the main text of the Constitution not only failed to establish a mechanism to allow for secession but, arguably, in Article 5(3) made right to external self-determination subject to consent of other nations.⁸² In my opinion the answer may be found in the ideological postulates of the Constitution. As pointed out, the right of self-determination interpreted as a right to

⁷⁶ General principle 1 of the Constitution of the SFRY, my own translation. The omitted lines refer to the events in the Second World War and point out the socialist commitment of the SFRY. Importantly, general principle 1 of the preamble to the Constitution of the SFRY is in several writings confused for Article 1, which is incorrect. Article 1 reads: 'The Socialist Federative Republic of Yugoslavia is a federal state, as a state union of its voluntarily-united nations in socialist republics and autonomous regions of Kosovo and Vojvodina [...].' This article further stipulates for socialist commitment. Significantly, it only invokes that nations are 'voluntarily-united', while self-determination is not invoked, let alone provisions for secession made. Article 1, Constitution of the SFRY, *supra* n. 60, my own translation.

⁷⁷ Nationalities are mentioned in the omitted lines, but solely as *obiter dictum* in reference to their merits in the Second World War and not as bearers of the right of self-determination. However, as argued above, main text of the Constitution effectively granted the right to internal self-determination also to nationalities (ethnic minorities) by their inclusion in the federal system, which was a reflection of internal self-determination. *Compare supra* at 129.

⁷⁸ *Compare supra* n. 31.

⁷⁹ Rich, *supra* n. 69, 38. In contrast to the Constitution of the SFRY, such a mechanism existed in the Constitution of the Soviet Union (Article 72).

⁸⁰ Article 5(3) of the Constitution of the SFRY, my own translation.

⁸¹ *See infra* n. 84.

⁸² *See supra* n. 75. It may be argued that based on Article 5(3) secession from the SFRY could be carried out upon the consent of all other republics and autonomous regions, which would count as an approval of the parent-state. However, Article 5(3) cannot be perceived primarily in relation to secession. Its important (if not primary) implication was that those republics, which were bordering foreign states, could not alter international borders (e.g. cede part of their territory in favor of a foreign state) without consent of all republics.

secession was part of the Leninist interpretation of self-determination.⁸³ Since the Constitution of the SFRY adopted socialism as a socio-economic order,⁸⁴ the formulation of the right of self-determination in general principle 1 in my opinion, must be viewed through this prism. In the absence of a legally relevant constitutional provision to allow for secession, general principle 1 was merely part of socialist rhetoric within the Constitution.⁸⁵

i. Self-determination, statehood, and recognition in light of EC involvement

As argued above, there is no right to secession under international law, although it is not prohibited, either. At the same time, acknowledgement of secessions has been bound to human rights issues and to preservation of peace.⁸⁶ In this issue, the involvement of the EC in the process of dissolution of the SFRY must also be understood. The declarations of independence in Slovenia and in Croatia provoked a military action of the Yugoslav National Army (YNA), initially in Slovenia, and later, on a much greater scale, in Croatia.⁸⁷ As I shall argue, through its involvement, the EC attempted to extinguish the conflict and secure human and minority rights in the newly emerging states at the same time.

On 16 December 1991, the foreign ministers of the EC states adopted a set of guidelines called *EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*. On the same day, they also adopted the *EC Declaration on Yugoslavia*.⁸⁸ In the Guidelines, the EC pointed out its willingness to recognize newly emerged states according to 'the normal standards of international practice and the political realities in each case.'⁸⁹ In this part, the Guidelines had the Montevideo criteria in mind as they made the first part of this statement.⁹⁰ Yet the Guidelines also invoked several other criteria that stretch beyond the Montevideo ones, falling into the category 'political realities in each case'. In essence, these criteria were associated with rule of law, democratic governance, human rights protection, and with protection of minorities, inviolability of borders and similar conditions that were obviously intended to prevent possible future conflicts.⁹¹ These criteria obviously reached beyond the traditional criteria of statehood and, consequently, it was argued that '[t]he Guidelines were not intended to be additional legal requirements of statehood. Instead they are political conditions, with recognition being used as a force to achieve political objectives.'⁹²

One can say that this is actually not a unique development, since 'recognition of states is a matter of policy but rarely has it been expressed in such a direct way [as was the case with

⁸³ Compare *supra* n. 9.

⁸⁴ Socialist commitment is pointed out in preamble, in mentioned Article 1, and, foremost, in chapter II of the Constitution (Articles 10 through 152) that define the socio-economic order of the federation.

⁸⁵ Significantly, the respective declarations on the independence of Slovenia and Croatia merely referred to general principle 1 of the Constitution of the SFRY in preambles, while main texts referred to the postulates of international law. References to the Montevideo criteria and commitments to democratic governance, human rights protection and adherence to international treaties are notable. Declaration on Independence of Slovenia (1991) and Declaration of Independence of Croatia (1991).

⁸⁶ Compare *supra* n. 36, n. 37.

⁸⁷ See, for example, Harris, *supra* n. 44, 150.

⁸⁸ Harris, *supra* n. 44, 147 ff.

⁸⁹ EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991), reprinted in Türk, *supra* n. 63, 73.

⁹⁰ Harris, *supra* n. 44, 148.

⁹¹ See EC Guidelines, *supra* n. 89.

⁹² Harris, *supra* n. 44, 149.

the EC Guidelines].⁹³ Further, 'the Guidelines make the process of recognition more difficult because they purport to retain the normal standards of international practice while adding a series of new requirements [...] the new requirements have tended to supplant the previous practice which was largely based on meeting the traditional criteria for statehood.'⁹⁴

However, it is not possible to claim that the previous state practice of following the Montevideo criteria has shifted to the doctrine adopted by the EC Guidelines. Importantly, the latter were geographically-limited, mentioning the example of the United Kingdom's recognition of Eritrea in 1993, which did not refer to the EC Guidelines.⁹⁵ Furthermore, the dissolutions of the Soviet Union and the SFRY were very specific occurrences, greatly impacted by the type of federalism as a reflection of internal self-determination, all of which have been discussed above. Thus, it is in my opinion possible to agree with the observation that '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.'⁹⁶ One should also perceive recognition in this context.

The EC Declaration comprehended an odd formulation, according to which republics of the SFRY were invited to apply for recognition.⁹⁷ Furthermore, republics wishing to be recognized as independent states had to commit themselves to having no territorial claims toward others and to other provisions that had an obvious aim: to contribute toward achieving peace.⁹⁸ In addition to Slovenia and Croatia, which had already declared independence, applications were also made by Bosnia-Herzegovina and Macedonia, but not by Serbia or Montenegro. I will address the example of the latter two in detail in the next part.

With three out of the four other republics that did apply for recognition, the process of recognition was inconsistent with the Montevideo criteria. Only Slovenia and Macedonia established effective government over their respective territories. Despite the inability to establish effective government over their entire territories, Croatia and Bosnia-Herzegovina were recognized as independent states, whereas Macedonia was not, because of Greece's objection to its name.⁹⁹

Though I have established that the EC's Guidelines are not generally applicable and that the EC Declaration may be seen as merely a matter of policy only expressing a political decision of the EC member-states, we can argue that the documents had constitutive implications. Notably, they were applied by a number of non-EC states.¹⁰⁰ Furthermore, the EC became the mediator in the conflict in the territory of the former SFRY. As shown by acts of other states, non-EC states followed the actions of the EC, granting explicit recognition once recognition had already been granted by EC member-states.¹⁰¹ Following this act, in 1992, most states broadly supported the admittance to the UN of the former

⁹³ Rich, *supra* n. 69, 43.

⁹⁴ *Ibid.*

⁹⁵ Harris, *supra* n. 44, 149.

⁹⁶ Türk, *supra* n. 63, 71.

⁹⁷ See EC Declaration on Yugoslavia (16 December 1991), reprinted in Türk, *supra* n. 63, 72.

⁹⁸ *Ibid.*

⁹⁹ The reason for non-recognition was thus not legal.

¹⁰⁰ Dixon, McCorquodale, *supra* n. 45, 159 ff.

¹⁰¹ It may be argued that the EC thus *de facto* played the role of the 'central authority for granting of recognition'. Compare *supra* n. 56.

SFRY republics recognized by the EC. Notably, Macedonia did not become member of the UN until 1993, after a compromise on its name was negotiated. Thus, the EC's (political) position obviously became universally applicable.¹⁰² Thus, though the Badinter Commission specifically noted that recognition is a declaratory act, in my opinion all of the above speak in favor of *de facto* constitutive implications of EC's recognition of republics of the former SFRY.¹⁰³

For the purposes of this text, it is important to affirm that Montenegro and Serbia were the only two republics that did not apply to be recognized as independent states. They instead claimed continuity with Yugoslavia's international personality, stating that the SFRY had transformed into the FRY.¹⁰⁴ The Badinter Commission's findings were, however, different.

ii. The Dissolution of the SFRY and the Badinter Commission

The Badinter Commission was established by the EC Peace Conference on Yugoslavia, under the official name of the *Arbitration Commission*.¹⁰⁵ In Opinion 1 from 29 November 1991, the Badinter Commission held that the SFRY was in a process of dissolution.¹⁰⁶ Consequently, in Opinion 8, from 4 July 1992, after Slovenia, Croatia, and Bosnia-Herzegovina were already recognized as independent states and had become members of the UN, the Commission noted that the process of dissolution had been completed.¹⁰⁷ This meant that the FRY could not continue the international personality of the SFRY, but, according to the EC Declaration and Opinion 1, Serbia and Montenegro could opt to found a new association. I will examine this issue in more detail in the next part.

¹⁰² Macedonia was admitted to the UN on 8 April 1993, under the name 'The Former Yugoslav Republic of Macedonia'. See G.A. Res 47/225.

¹⁰³ In its Opinion 11, which deals with the succession of the former SFRY, the Badinter Commission held that Slovenia and Croatia became states on 8 October 1991, meaning more than three months prior to formal EC recognition. This was the date when the EC-imposed three-month ban on Slovenia's and Croatia's independence activities (the Brioni Accord), which was part of EC-sponsored ceasefire deal in Slovenia, had expired. Thus, the Badinter Commission did not formally acknowledge the constitutive calling of Slovenia and Croatia into statehood by EC's recognition on 15 January 1992. However, as I have established in the main text implications were *de facto* constitutive. Opinion No. 11, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Terret, *supra* n. 2, 225 ff.

¹⁰⁴ Rich, *supra* n. 69, 53.

¹⁰⁵ The EC Peace Conference followed the outbreak of hostilities in the SFRY in 1991. The Arbitration Commission it established was composed of five members, whereas its chairman was a French lawyer Robert Badinter. Notably, findings of the Commission are not legally binding. See Harris, *supra* n. 44, 125.

¹⁰⁶ In the concluding part of Opinion 1 the Badinter Commission held: '[t]hat the Socialist Federative 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 1, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Pellet, Alain: 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples', [1992] 3 EJIL 178, 182 ff.

¹⁰⁷ In the concluding part of Opinion 8 the Badinter Commission held: '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.' Opinion 8, Arbitration Committee, EC Conference on Yugoslavia, reprinted in Pellet, *supra* n. 106, 87 ff. Importantly, as Harris notes, it flows from the Opinions that the Badinter Commission resorted to universal succession rather than partial. Universal succession follows dismemberment of a state, while partial succession results from separation of some units. See Harris, *supra* n. 44, 127 ff.

I shall further note that the Badinter Commission also adopted stances in Opinions 4 through 7 that Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia had met the requirements for recognition as set out in the EC Declaration and, importantly, the Commission resorted to *uti possidetis juris* in order to confine international borders between the former Yugoslav Republics—the first application of this principle in Europe.¹⁰⁸ In Opinion 3 the Commission observed the following:

Uti possidetis, though initially applied in decolonization issues in America and Africa, is today recognized as a general principle.

In order to argue in favor of the general applicability of *uti possidetis juris*, the Commission referred to *Burkina Faso / Mali Frontier Dispute Case* (1986) at the ICJ.¹⁰⁹ In my opinion, the application of this principle also had strong support within the Constitution of the SFRY. As argued, the SFRY's federalism was a manifestation of internal self-determination.¹¹⁰ *Uti possidetis juris* thus meant a translation of internal borders, established on a base of internal self-determination within the SFRY, to a situation resulting from external self-determination. Notably, by applying *uti possidetis juris*, statehood was recognized only to former republics of the SFRY and to no other units.¹¹¹

As the ICJ observed in the *Burkina Faso / Mali Border Dispute Case* and the Badinter Commission quoted in Opinion 3, the purpose of *uti possidetis juris* 'is to prevent the independence and stability of new States being endangered by fratricidal struggles.'¹¹² Exactly this was underway in Croatia and Bosnia-Herzegovina and also *mutatis mutandis* in Serbia (Kosovo). *Uti possidetis juris* confined borders and established ethnic minorities for which the right of self-determination does not apply.¹¹³ This is what the Badinter Commission established in Opinion 2, namely that the Serb population in Croatia and Bosnia-Herzegovina did not have the right of self-determination but were protected as an ethnic minority.¹¹⁴

¹⁰⁸ Türk, *supra* n. 63, 70.

¹⁰⁹ '[T]he principle (*uti possidetis*) 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'. *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, ICJ Reports, 1986, quoted in Opinion 3, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Türk, *supra* n. 63, 184 ff.

¹¹⁰ Compare *supra* at 128.

¹¹¹ An interesting deviation to this principle would be the hypothetical, but not unlikely, independence of Kosovo. However, Kosovo is a specific example, which has its own distinct genesis and thus reaches beyond the scope of this text. I shall also point out that Kosovo was an autonomous region within the SFRY and was thus constitutionally in a much different position than were, for example, Republika Srpska and Republika Srpska Krajina, which did not exist in the constitutional order of the SFRY. As I have argued, though self-determination in the SFRY was not recognized to the 'nationalities', among which were Albanians, Kosovo exercised a great degree of autonomy and self-government, not only vis-à-vis Serbia, but also vis-à-vis the SFRY.

¹¹² *Ibid.*

¹¹³ Compare *supra* n. 40, n. 41.

¹¹⁴ In the conclusion of Opinion 2, the Badinter Commission, inter alia, held: '[t]hat the Serbian population in Bosnia-Herzegovina 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 [...] that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law.' At an earlier point in Opinion 2 it was also held that 'international law as it currently stands does not spell out all the implications of the right of self-determination [in the case of Serbian minorities in Croatia and in Bosnia-Herzegovina]'. Opinion 2, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Türk, *supra* n. 63, 183 ff.

Thus, for my text, the most relevant opinions of the Badinter Commission were its findings that the SFRY was dismembered and that the FRY was treated as a new state and could not claim continuity with the international personality of the SFRY.

IV. Montenegro in light of self-determination, statehood, and recognition

1. The Dissolution of the SFRY and creation of the FRY

Although Serbia and Montenegro did not apply for recognition in accordance with the EC Declaration, this does not mean that they did not respond to the EC's offer. However, as pointed out, in this response they did not opt to create a new association. The two former republics of the SFRY referred to the statehood recognized to each of them respectively at the Congress of Berlin in 1878. Specifically, the response of the Montenegrin foreign minister to the EC's offer to apply for statehood was the following:

When Montenegro, upon unification became part of Yugoslavia, the sovereignty and international personality of Montenegro did not cease to exist, but became part of the sovereignty of the new state. In case Yugoslavia disunited and ceased to exist as an international entity, the independence and sovereignty of Montenegro continue their existence in their original form and substance.¹¹⁵

Thus, Montenegro together with Serbia claimed FRY's continuity of the international personality of the SFRY, while at the same time it claimed continuity of international personality of Principality of Montenegro, which would be continued if Yugoslavia no longer existed.

As mentioned, the claim for continuity of the FRY's international personality with that of the SFRY was rejected by the EC and the UN. I will first examine this issue in detail. For the purpose of understanding of Montenegro's path to independence via the State Union, I will also examine Montenegro's 1992 claim that its statehood would be automatically reestablished if Yugoslavia were disunited.

i. The FRY and the claim for continuity of the international personality of the SFRY

When establishing the SFRY's dismemberment, the Badinter Commission in its aforementioned Opinion 8 referred to Resolution 757 of the UN Security Council, which *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.¹¹⁶*

Later in the same year, in September 1992, the Security Council in Resolution 777, *inter alia*, recommended to the General Assembly that

¹¹⁵ See Rich, *supra* n. 69, 47.

¹¹⁶ S.C. Res 757, quoted in Opinion 8, Arbitration Commission EC Conference on Yugoslavia, reprinted in Pellet, *supra* n. 106, 87 ff.

*the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the Former Socialist Republic of Yugoslavia in the United Nations.*¹¹⁷

Furthermore, the same Resolution took the stance that the FRY (Serbia and Montenegro) needed to apply for membership and not participate in the work of the General Assembly. The General Assembly accepted this recommendation on the same day, 19 September 1992, in Resolution 47/1.¹¹⁸ As has been argued, '[t]hese resolutions settled the continuity issue by specifically denying the FRY's claims.'¹¹⁹ However, the Resolutions failed to expel the SFRY from the UN, thus an extinguished state continued to be member of the UN.

In Opinion 9, the Badinter Commission, *inter alia*, referred to the *Declaration on Former Yugoslavia*, adopted by the European Council in Lisbon on 27 June 1992:

*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 delegations of Yugoslavia at the CSCE [Commission on Security and Cooperation in Europe] and other international fora and organizations.*¹²⁰

Further, the Commission also took a stance that membership of the SFRY in international organizations needed to be terminated and that none of the successor states could continue it. Furthermore, it also held that property, assets, and debts must be shared equitably among the successor states.¹²¹

On 18 May 1992, the Chairman of the Conference for Peace in Yugoslavia addressed a straightforward question to the Chairman of the Arbitration Commission regarding the status of the FRY in terms of international law:

*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.*¹²²

The Badinter Commission took a stance in Opinion 10 which followed the findings in the previous ones, reaffirming that the FRY could not claim continuity with the international

¹¹⁷ S.C. Res 777.

¹¹⁸ Rich, *supra* n. 69, 54.

¹¹⁹ *Ibid.*

¹²⁰ The Declaration on Former Yugoslavia, the European Council, quoted in Opinion 9, Arbitration Commission, EC Conference on Yugoslavia, Opinion 9, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Pellet, *supra* n. 106, 88 ff.

¹²¹ In Opinion 9 the question to the Badinter Commission, set by the Chairman of the Conference for Peace in Yugoslavia, was: 'If this is the case, (if the dissolution of the SFRY is 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 Badinter Commission in the concluding part, *inter alia*, held that: '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'. Opinion 9, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Pellet, *supra* n. 106, 88 ff.

¹²² See Opinion 9, Arbitration Commission, EC Conference on Yugoslavia, reprinted in Pellet, *supra* n. 106, 88 ff.

personality of the SFRY. In the concluding findings of Opinion 10, the Badinter Commission held 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.*¹²³

In Opinion 10 the Commission made additional comments, which are interesting in light of the issues of statehood and recognition.

The Commission, *inter alia*, acknowledged 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’.¹²⁴ It further referred to Opinion 9 and UN Security Council Resolution 757, establishing that

*the FRY is actually a new state and could not be the sole successor to the SFRY [...] [t]his 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.*¹²⁵

Nevertheless, the FRY continued to claim continuity with the international personality and UN membership of the SFRY and did not address application for recognition according to the EC Declaration or apply for membership in the UN.¹²⁶ While non-membership in the UN is a normal consequence of the absence of such an application, non-recognition by the EC and most of the international community was a matter of policy. The EC did not grant recognition to the FRY, although it without a doubt fulfilled all of the traditional criteria for statehood as acknowledged by the Badinter Commission in the above-quoted Opinion 10. However, since the FRY did not apply for recognition in accordance with the EC Declaration, the EC was never in a position to explicitly deny recognition to it based on extra-legal criteria.¹²⁷ The United Kingdom recognized the FRY in 1996, and its failure to do so for so long has been labeled as ‘overtly political’.¹²⁸

Though not recognized by most of the international community and not a member of the UN, the FRY was doubtlessly made a bearer of rights and duties under international law.¹²⁹

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ After the end of the Milošević regime, the FRY applied for membership in the UN and was admitted as a member on 1 November 2000. See G.A. Res 55/12.

¹²⁷ In the realm of political situation in the FRY in the first half of 1990s and its involvement in wars in Bosnia-Herzegovina and Croatia, which was affirmed in S.C. Res 757, it is evident that the FRY would not meet criteria for recognition as set out by the EC Guidelines and the EC Declaration.

¹²⁸ Dixon, McCorquodale, *supra* n. 45, 160.

¹²⁹ One can argue that the FRY declared itself as a successor of the SFRY, according to the example of Russia’s succession of the Soviet Union. However, the Russian analogy was not accepted in the case of the FRY. Notably, the FRY declared that it would abide by the treaty obligations of the SFRY. Thus, it has been pointed out: ‘Other states were therefore faced with a dilemma: they wanted the FRY to respect the treaties, especially human rights conventions, to which the SFRY had been a party, but they could not accept the FRY as a party on the basis of continuation of statehood.’ Aust, *supra* n. 50, 400. In this concern it is also interesting the preliminary objection of the ICJ in the *Bosnia Genocide Case* on jurisdiction *rationae personae* in which it was held: ‘[the] intention expressed by Yugoslavia to remain bound by the treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes [...] that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing

Hence, it has been argued that '[t]he FRY, despite not having received, or indeed requested, recognition, was clearly considered to have fulfilled the factual requirements of Statehood, as is confirmed by its appearance before the ICJ in the *Bosnia Genocide Case* [1993].'¹³⁰

ii. Montenegro and the claim for continuity of the international personality recognized at the Congress of Berlin

The Principality of Montenegro became formally recognized as an independent principality at the Congress of Berlin in 1878. At the end of the First World War, when the Kingdom of Serbs, Croats and Slovenes was established, Montenegro became part of the Kingdom and discontinued to exist as a state. As Harris notes, '[a] state ceases to be an international person when it ceases to exist.'¹³¹ Merger of a state into another state, when the former becomes part of the latter is one of four reasons for extinction of states. Montenegro's merger into the Kingdom of Serbs, Croats and Slovenes has been invoked as an evident example of such extinction.¹³² Hence, Montenegro's claim that 'the sovereignty and international personality of Montenegro did not cease to exist, but became part of the sovereignty of the new state'¹³³ cannot find support in international law. As Montenegro ceased to exist as a state, its international personality ceased to exist as well. Not even constitutional law provides foundation for the above-quoted claim.¹³⁴

of the Application in the present case, namely, on 20 March 1993.' *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Preliminary Objections* [11 July 1996], para 17, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>, last accessed on 20/06/2007. The Court thus accepted the FRY's commitment to abide commitments of the SFRY, which the FRY expressed in relation to its claim for the continuation of SFRY's international personality. As argued in the main text, the latter claim was not generally accepted. Importantly, the Court also held: 'For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty.' *Bosnia Genocide Case*, para 26. By becoming party to an ICJ-proceeding, the FRY was thus acknowledged attributes of a state, regardless the question of recognition.

¹³⁰ According to Article 34(1) of the ICJ Statute, only states can be parties in cases before the Court. See also Terrett, *supra* n. 2, 282.

¹³¹ Harris, *supra* n. 44, 126.

¹³² *Ibid.*

¹³³ See *supra* n. 115.

¹³⁴ At this point I shall note that Montenegro's restoration of international personality is not analogous to that of the Baltic States. The occupation and annexation of the Baltic States by the Soviet Union, based on the Ribbentrop-Molotov Pact, was not recognized by a number of states, including the United States. See Ziemele, Ineta, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers, Leiden, Boston, 2005), 22 ff. The same author (*ibid.*, 24) argues that there was no unanimous stance of states of the EEC [European Economic Community] on that question virtually until restoration of independence. In contrast to that, Montenegro's merger to the Kingdom of Serbs, Croats and Slovenes was generally accepted as well as its later joining the SFRY. There was no objection to the SFRY's border, as was the case with the western border of the Soviet Union (the Baltic States). Significantly, even the Soviet Union was aware of its disputability. Thus, as Ziemele (*ibid.*) observes, in 1975 'the Soviet Union attempted to interpret the signature of the Helsinki Final Act of the [...] CSCE to imply recognition of its western border'. Namely, the Act included a 'principle of inviolability of frontiers'. As Ziemele (*ibid.*) furthermore argues, the United States and other Western States issued a statement in which they held that this principle could not be accepted 'when it went against other rules or principles of international law.' Thus it can be concluded that incorporation of the Baltic States in the Soviet Union was not generally accepted—in contrast to incorporation of Montenegro in various state-formations of Southern Slavs. As I shall refer to below, legal acts associated with Montenegro's secession also greatly differed from those to which the Baltic States resorted.

With the creation of the “second Yugoslavia”, Montenegro was given republic status. The constitution of the SFRY from 1974, as argued, gave republics a great measure of autonomy and features of statehood, so that they could be considered international persons *sui generis*.¹³⁵ However, no distinction was made between the republics that were formerly internationally-recognized as states (Serbia and Montenegro) and those that were not. This means that the right of self-determination, in its internal or external form, did not apply to Montenegrins any more than it did to other nations of the SFRY. Once Montenegro declared independence, nothing implied that the second part of its claim from December 1991 would be proven true: ‘In case Yugoslavia disunited and ceased to exist as an international entity, the independence and sovereignty of Montenegro continue their existence in their original form and substance.’¹³⁶ As I shall argue in the last subchapter, all legal actions associated with Montenegro’s secession disprove this assumption.

iii. Self-determination and characteristics of statehood within the FRY

Unlike the Constitution of the SFRY, the Constitution of the FRY did not invoke the right of self-determination in its basic principles, let alone the right to secession. In my opinion the reason for that is its abandoning of socialist ideology, which is evident from Articles 69 through 76, which enact a market economy.¹³⁷ Article 69 invokes ‘free labor and enterprise’, while Article 10 of the Constitution of the SFRY invoked ‘united labor’ within the framework of the ‘socialized property’. As argued above, the right of self-determination, extended even to the right to secession, was one of the (rhetorical) postulates of socialism.¹³⁸ The FRY abandoned these postulates, and thus not even the right of self-determination was invoked. As observed above, federalism as a manifestation of internal self-determination was thoroughly rooted in the Constitution of the SFRY.¹³⁹ Similar observations hold for the Constitution of the FRY.

The Constitution of the FRY did not foresee a mechanism for secession of one of its republics which were, according to Article 2, Serbia and Montenegro.¹⁴⁰ However, Article 6, similar to the SFRY’s Article 3, defined republics as states.¹⁴¹ Furthermore, Article 3, similar to Article 5 of the Constitution of the SFRY, confined borders of the republics in paragraph 3:

*The border between the republics may be altered only upon mutual agreement between the republics, in accordance with the constitution of the republics’ members.*¹⁴²

There exists a slight difference between the similar provisions of Article 3 of the Constitution of the FRY and Article 5 of the Constitution of the SFRY in that while both

¹³⁵ Compare *supra* n. 53.

¹³⁶ *Supra* n. 115.

¹³⁷ Compare *supra* n. 84.

¹³⁸ Compare *supra* at 127 ff.

¹³⁹ Compare *supra* ch. III (1).

¹⁴⁰ In addition to this wording in the first paragraph of Article 2, the second paragraph foresaw integration of new federal units if appropriate. In the realm of the political events in 1992, this provision was obviously meant to be a constitutional ground for the possible integration of the Republic of Srpska Krajina and the Republika Srpska into the FRY.

¹⁴¹ A republic member (of the federation) is a state in which power derives from citizens. Article 6, Constitution of the FRY, my own translation. Original text of the Constitution available at <http://www.ccmr-bg.org/zakoni/ustavsrbj.htm>, last accessed 20/06/2007.

¹⁴² Article 3(3), Constitution of the FRY, *supra* n. 141, my own translation.

declared international borders of the federation inviolable, Article 3 of the Constitution of the FRY did not foresee the consent of all republic-members in case of changing the federation's international borders.¹⁴³

My argument, however, is that the Constitution of the FRY adopted a federal model as had been established with the Constitution of the SFRY. As already argued, even within the FRY's Constitution, republics were defined as states. Furthermore, Articles 6 and 7 gave republics significant characteristics of statehood in terms of effective government on the territory and the capacity to enter into relations with foreign states. Article 6(2) regulated:

*The republic-member is sovereign in matters that are not defined with this Constitution as matters of the Federal Republic of Yugoslavia.*¹⁴⁴

Article 6(3) continued:

*The republic-member independently regulates the organization of its governance with its own constitution.*¹⁴⁵

In Article 7 the Constitution stipulated a considerable degree of sovereignty in international affairs, however, within the framework of the federal foreign policy.¹⁴⁶ Thus I shall conclude that the federalism of the FRY was *mutatis mutandis* reminiscent of the federalism of the SFRY and was a reflection of internal self-determination.

The constitution provided an unambiguous definition of territory as well as of population. However, competencies of republics in foreign policy were increased in comparison to the Constitution of the SFRY. While Article 271 of the latter only foresaw consent of the republic whose sovereignty would be infringed upon by an international treaty concluded by the federation, the former empowered federal units to conclude international treaties on their own, under the condition that this was not done at the expense of the federation of another republic. From the aspect of international law, member-republics of the FRY retained the status of international personality *sui generis*, established already within the constitutional order of the SFRY, while the degree of competences in foreign affairs was even increased. Furthermore, Article 271 of the Constitution of the SFRY only allowed contacts of competent organs of republics with their counterparts in foreign states, while Article 7 of the Constitution of the FRY allowed independent representatives of republics in foreign states.¹⁴⁷ Lastly, as shown, the Constitution of the SFRY did not foresee membership of its republics in international organizations, which Article 7 of the Constitution of the FRY did foresee. Article 6 also enabled a greater degree of effective government by a republic-member than was the case with Articles 268, 272, 273, and 274 of the Constitution of the SFRY, referred to above.¹⁴⁸

¹⁴³ Compare *supra* n. 81.

¹⁴⁴ Article 6(2), The Constitution of the FRY, *supra* n. 141, my own translation.

¹⁴⁵ Article 6(3), The Constitution of the FRY, *supra* n. 141, my own translation.

¹⁴⁶ '[1] The republic-member, within the framework of its competences, may conduct international relations, keep representatives in foreign states and become member of international organizations. [2] The republic member, within the framework of its competences, has the capacity to conclude international treaties, however, not at the expense of the Federal Republic of Yugoslavia or another republic-member.' Article 7, the Constitution of the FRY, *supra* n. 141, my own translation.

¹⁴⁷ Compare *supra* n. 67.

¹⁴⁸ Compare *supra* at 148 ff.

2. Creation of the State Union of Serbia and Montenegro

i. Montenegrin self-determination and characteristics of statehood

The FRY was transformed into the State Union of Serbia and Montenegro upon the adoption of a new constitution in February 2003. Thus constituted, the new state formation was an EU-sponsored compromise which ascribed both Serbia and Montenegro notable characteristics of statehood, while only the State Union had the international personality. The creation of such a transitional and, in many respects odd, state aimed to (at least temporarily) prevent Montenegro from declaring its independence.¹⁴⁹

Since on the international plane the FRY merely changed its name, continuity of international personality with the one of the FRY did not raise an issue. Significant constitutional changes, however, importantly interfered with the concepts of statehood, recognition and self-determination, and played an important role once Montenegro opted for independence, unambiguously in accordance with the Constitution of the State Union of Serbia and Montenegro from 2003. As I shall argue below, two major patterns are significant for the new constitution. First, it ascribed an even greater degree of statehood to the members of the state union. Second, it gave members of the union the right to secession and also provided them with a mechanism to do so.

Significantly, the Constitution of the State Union of Serbia and Montenegro entirely abolished the term 'republic', and its Article 2 defined the State Union as a union of two states, based on the principle of equality.¹⁵⁰ Thus federalism was also transformed into a union of two states. Article 5(3) confined borders by *mutatis mutandis* repeating Article 5 of the Constitution of the FRY:

*The border between the states may not be altered, except in the case that there exists such mutual concordance.*¹⁵¹

Article 14(2) gave the member states the capacity to become member of those international organizations which do not prescribe international personality as a prerequisite for membership,¹⁵² while Article 15(2) gave them the capacity to enter into relations and conclude treaties with foreign states, which was limited with the frameworks of the interest of the State Union as well as of the other member-state.¹⁵³ As a matter of fact, these two

¹⁴⁹ The International Crisis Group observed: 'The EU worked very hard to counter, or at least postpone, any prospect of Montenegrin independence, which it felt would have a negative spillover effect on Kosovo [...] Javier Solana, the EU's High Representative for Common Foreign and Security Policy, applied long and strong pressure on Montenegro's politicians to obtain their agreement to remain in an awkward construct with Serbia that permitted both republics *de facto* independence in nearly all spheres. In return they were promised they could engage in a more rapid EU accession process.' The International Crisis Group Briefing No. 169, Montenegro's Independence Drive, 7/12/2005, 1.

¹⁵⁰ 'Serbia and Montenegro is founded on the principle of equality between the two member-states, the state of Serbia and the state of Montenegro.' Article 2, the Constitution of the State Union of Serbia and Montenegro, my own translation. Original text of the Constitution available at http://www.ccmr-bg.org/zakoni/ustavna_povelja_scg.htm, last accessed 20/06/2007.

¹⁵¹ Article 5(3), The Constitution of the State Union of Serbia and Montenegro, *supra* n. 150, my own translation.

¹⁵² 'Member-states may become members of those international global and regional organizations, which do not prescribe international personality as a prerequisite for membership.' Article 14(2), the Constitution of the State Union of Serbia and Montenegro, *supra* n. 150, my own translation.

¹⁵³ 'Member-states may enter into international relations, conclude international treaties, and found representative missions in foreign states, if this does not infringe on competences of Serbia and Montenegro and interests of the other member-state.' Article 15(2), the Constitution of the State Union of Serbia and Montenegro, *supra* n. 150, my own translation.

Articles were a derivation of the above-mentioned Article 7 (both paragraphs) of the Constitution of the FRY.¹⁵⁴

In terms of the traditional criteria of statehood, we can say that with the Constitution of the State Union of Serbia and Montenegro, the member-states retained the defined borders and permanent population. Furthermore, the capacity to enter into relations with foreign states was neither increased nor diminished within the Constitution of the new State Union in comparison to that of the FRY. In my opinion, the most significant change in terms of the traditional criteria of statehood occurred within the criterion of effective government.

Articles 40-45 established only five common ministries: internal affairs, defense, international economic affairs, domestic economic affairs, and human and minority rights. Article 33 also established the Council of Ministers with the aim to coordinate the work of ministries in the exclusive domain of the member states. Thus the State Union had competences in foreign policy, security policy, and economy. Notably it did not have competences in internal affairs. Furthermore, Article 46 defined the Court of Serbia and Montenegro with the sole competence of deciding on matters regarding the State Union but was not superior to the Courts of member-states. The latter two thus exercised jurisdictional sovereignty over their respective territories. In terms of effective government, I shall conclude that the Constitution did not establish organs of the State Union with the aim to exercise control over the territory of its members. The effective government was exercised by each member-state. This is a significant change from the previous Constitution of the FRY. Hence, I shall argue that member-states of the State Union (for this article relevant Montenegro) established internal sovereignty virtually without any restraints. Those only remained in foreign policy—relevant for this text in Montenegro's ability to enter into relations with other states.

However, member-states also had significant competence to enter into relations with foreign states, though limited within the framework of State Union's foreign policy, which was a pattern retained from the FRY. Thus they were not able to conduct independent foreign policy and were precluded from membership in those international organizations that demand statehood as a condition of membership. In this concern I find the difference between the wording of Article 7(1) of the Constitution of the FRY and the wording of Article 14(2) of the Constitution of the State Union of Serbia and Montenegro to be especially important. While the former permitted republic-members membership in international organizations with an ambiguous limitation 'in accordance with the competences (of the republic-member)', the latter limited this empowerment to those international organizations that do not prescribe statehood as a condition of membership.¹⁵⁵ Since support for membership in such organizations may imply recognition, most notably in the UN, as pointed out above, this formulation can be understood as a 'safety-net' that one of the member-states (*de facto* Montenegro) would not use membership in international organizations as a shortcut to claiming international personality.¹⁵⁶ This provision excluded the possibility of Montenegro's membership in the UN, similar to the membership of Ukraine and Belarus in the times of the Soviet Union.¹⁵⁷ Together with other attributes of statehood, as described above, in this case there would be little reason to deny Montenegro international personality and not merely treat it as an international person *sui generis*. Even

¹⁵⁴ Compare *supra* n. 146.

¹⁵⁵ See *supra* n. 152.

¹⁵⁶ Compare *supra* n. 59.

¹⁵⁷ Compare *supra* n. 59.

with the declaratory doctrine of recognition, other states would need to acknowledge over time that Montenegro was a state.

ii. External self-determination in the State Union of Serbia and Montenegro

A transitional nature of the State Union is expressly pointed out in Article 60 of its Constitution, which reads as follows:

[1] After the end of the period of three years, member-states shall have the right to begin the process for a change of the status of the state or to secede from the State Union of Serbia and Montenegro. [2] The decision on the secession from the State Union of Serbia and Montenegro shall be taken at a referendum. [3] The referendum law shall be adopted by a member-state, bearing in mind internationally-recognized democratic standards. [4] In case of secession of the state of Montenegro from the State Union of Serbia and Montenegro, international documents referring to the Federal Republic of Yugoslavia, especially Resolution 1244 of the Security Council of the United Nations, shall utterly apply to the state of Serbia as the successor. [5] The member-state which resorts to the right to secession shall not inherit the right to personality under international law, while all disputes shall be separately regulated by the state-successor and the seceded state. [6] In case that both states, based on referendum, will opt for change of the status of the states or independence, in the process of succession the disputable questions shall be regulated analogically to the case of the former Socialist Federative Republic of Yugoslavia.¹⁵⁸

Article 60 thus not only provided for the right of self-determination to apply as a right to unilateral secession, it actually established a mechanism for dissolution of a state and in advance solved the problem of succession and continuity of the international personality of the State Union. While the right of self-determination—even extended to the right to secession—has been incorporated in constitutions before, as I have argued, Article 60 of the Constitution of the State Union of Serbia and Montenegro was unprecedented.¹⁵⁹ From paragraph 4 it is evident that an attempt of secession by Montenegro was foreseen. Thus, paragraph 5 was to solve the problem of continuity of international personality in advance, though it does not name the member-state that may secede. Importantly, Article 60 in paragraph 2 demanded a possible secession be carried out by referendum, while paragraph 3 resorted to an ambiguous demand that a possible referendum regulation should follow international democratic standards. Hence Article 60 did not specify the majority demanded at the referendum to exercise the right to secession and thus made the prescribed majority subject to further political negotiations and EU mediation.

3. Secession, statehood, and recognition

After the end of the three-year constitutional ban on referenda on independence, the referendum was held on 21 May 2006. A significant problem that had to be settled was the above-mentioned ambiguous wording of Article 60(3).¹⁶⁰ Once again, the EU became

¹⁵⁸ Article 60, the Constitution of the State Union of Serbia and Montenegro, *supra* n. 150, my own translation.

¹⁵⁹ Compare *supra* n. 32.

¹⁶⁰ See *supra* n. 158.

actively involved in the creation of the Montenegrin referendum law.¹⁶¹ The result was the *Law on Referendum on State-Legal Status of the Republic of Montenegro*. Article 6 of this law reads as follows:

*The decision in favor of independence shall be valid if the option 'yes' is supported by 55 % of the total number of valid votes, under the condition of the turnout of the majority of registered voters.*¹⁶²

The referendum question was formulated in Article 5:

*The referendum question shall read as follows: 'Do you agree that the Republic of Montenegro becomes an independent state with a full international legal personality?'*¹⁶³

The outcome of the referendum was 55.53 percent in favor of independence at a turnout of 86.49 percent. Montenegrins thus voted in favor of independence.¹⁶⁴ Based on these results, the Montenegrin Parliament adopted the Declaration on Independence on 3 June 2006. In the preamble to the Declaration, the first paragraph referred to Montenegro's international personality recognized at the Congress of Berlin: 'Originating from centuries-long state independence and recognition of the Kingdom of Montenegro at the Congress of Berlin in 1878.'¹⁶⁵ In the following paragraph, the preamble referred to the referendum of 21 May 2006, for which it was affirmed that it 'was carried out in accordance with the international standards and in cooperation with the European Union'.¹⁶⁶ Article 1 declared Montenegro 'an independent state with a full international legal personality.' In Article 2 the Declaration repeated the preamble mantra as: 'Deriving from restored state independence.'¹⁶⁷ In the same Article the Declaration further opted for Montenegro's

¹⁶¹ See *infra* n.164.

¹⁶² Article 6, *Law on Referendum on State-Legal Status of the Republic of Montenegro*, my own translation. Original text available at

http://www.rtcg.org/referendum/regulativa/zakon_o_referendumu.pdf#search=%22zakon%20o%20referendumu%20o%20dr%C5%BEavno-pravnom%20statusu%22, last accessed 20/06/2007. One can argue that this formula was a compromise between the unionists and secessionists under the EU's mediation, giving the secessionists a referendum on independence, while at the same time giving the unionists a reasonable hope that pro-independence forces would not win. Thus a boycott of the referendum from the unionists was averted, which enabled respect of the democratic standard. Significantly, the EU not only appointed observers to the referendum, but even appointed the Chairman of the Republic Referendum Commission, which was a citizen of Slovakia. See, for example, The International Crisis Group, Briefing No. 42, 30/05/2006, 2 ff.

¹⁶³ See *supra* n. 158; Art. 5.

¹⁶⁴ As the International Crisis Group observed, the EU-imposed fifty-five percent hurdle was a gamble. It secured legitimacy of the referendum by averting a possible boycott by unionists. However, the result shows that the vote was close to falling within the "grey-zone" between fifty and fifty-five percent. As the International Crisis Group commented, this would lead to a situation, where 'Montenegro's government would have been legally unable to declare independence. At the same time it would have viewed the referendum result as a mandate to further weaken the State Union. The unionists would have viewed the result as a victory and demanded immediate parliamentary elections and closer ties with Belgrade.' The International Crisis Group, Briefing No. 42, Montenegro's Referendum, 30/05/2006, 6. It must be added that Article 60 of the Constitution of the State Union of Serbia and Montenegro did not only foresee secession of one of the states, but a change of the status of the states. Thus, there was a constitutional foundation even for strengthening of the State Union's institutions and lesser autonomy of states. Tensions between the two camps, each interpreting the results in its own way, could have achieved results different from those anticipated by the EU, namely leading to turmoil rather than stability. As pointed out, Montenegro avoided such a situation by a tiny margin.

¹⁶⁵ Declaration on Independence, preamble (3 June 2006), my own translation. Original text available at <http://www.rtcg.org/index.php?akcija=vijesti&id=18297>, last accessed 20/06/2007.

¹⁶⁶ *Ibid.* Notably, with this wording the preamble acknowledged the political involvement of the EU in the process of Montenegro's secession.

¹⁶⁷ Article 2, Declaration on Independence, *supra* n. 165.

membership in international organizations. It contained a commitment to join those international organizations of which the State Union of Serbia and Montenegro was member and, according to Article 60 of the latter's Constitution, only Serbia continued membership. It also expressed a general commitment to join the EU and NATO. Article 3 invoked a commitment to respect principles of international law, bilateral cooperation with foreign states and commitment to regional cooperation. Article 4 expressed Montenegro's commitment to a *bona fide* settlement of all disputable questions with Serbia.

Based on the Declaration's broad text, the Montenegrin Parliament on the same day adopted the *Act on Declaring of Independence of the Republic of Montenegro*, which reads:

*1. The Republic of Montenegro is an independent state, with a full international legal personality, within its existing territorial boundaries. 2. The Republic of Montenegro, by restoring state independence, shall take over all empowerments that were with the adoption of the Constitution of the State Union of Serbia and Montenegro in the domain of institutions of the State Union. 3. The Republic of Montenegro shall accept and adopt all international contracts and treaties that were concluded and ratified by the State Union of Serbia and Montenegro and refer to Montenegro and are in accordance with its legal order. 4. Until the adoption of relevant regulations of the Republic of Serbia and Montenegro, transitionally those regulations of the State Union of Serbia and Montenegro shall apply that were on the day of entry into force of this Act valid as regulations of the State Union and are not in opposition with the legal order and interests of the Republic of Montenegro. 5. The Republic of Montenegro shall regulate the manner of taking over of those affairs that were so far in the domain of institutions of the State Union of Serbia and Montenegro and shall, with special instruments adopted by the Parliament and Government of the Republic of Montenegro, strengthen and provide the principles, according to which internal and foreign policies will be founded and carried out. 6. This Act shall enter into force on the day of its adoption and shall be published in the Official Gazette of the Republic of Montenegro.*¹⁶⁸

The above-quoted Act significantly addressed the issues of capability to enter into relations with foreign states (paragraphs 2 and 3) and of effective government (paragraphs 4 and 5). Interestingly, the Declaration and the Act specifically referred to 'restoring of state independence'. The Declaration also mentioned the recognition of the Principality of Montenegro at the Congress of Berlin in 1878. Notably, this can be perceived as having continuity with the position addressed to the Badinter Commission by the Montenegrin foreign minister in December 1991.¹⁶⁹

I have established that Montenegro's international personality was extinguished by its joining the Kingdom of Serbs, Croats and Slovenes.¹⁷⁰ Furthermore, from the procedure described in this chapter, it follows that Montenegrin independence was based on the right of self-determination in its external form (secession), for which a mechanism existed within the Constitution of the State Union of Serbia and Montenegro in its Article 60. Notably, this Article in advance settled the problem of continuation of international personality of the State Union, whereas restoring the international personality of either Serbia or

¹⁶⁸ *Act on Declaring of Independence of the Republic of Montenegro* (3 June, 2006), my own translation. Original text available at <http://www.rtcg.org/index.php?akcija=vijesti&id=18296>, last accessed 20/06/2007.

¹⁶⁹ *Supra* n. 115, n. 133.

¹⁷⁰ *See supra* n. 134.

Montenegro was not invoked. Significantly, even the preambles to the *Declaration on Independence* and the *Act on Declaring of Independence of the Republic of Montenegro* affirm the provisions of Article 60, while they also invoke restoring state independence.

In my opinion, the omission of the reference to the internationally-recognized international personality from the Congress of Berlin within the legally relevant Article 2 of the *Act on Declaring of Independence* is also significant. Instead a much more general reference to 'restored state independence' was made. Thus, recognition at the Congress of Berlin was invoked exclusively in legally non-binding texts of preambles. Lastly, not even the referendum question, as expressed in Article 5 of the *Law on Referendum on the State-Legal Status of the Republic of Montenegro*, included the wording 'restoring of state independence', let alone reference to the recognition at the Congress of Berlin. Thus, it is evident that legally-relevant wordings omit references that imply continuity with the international personality of the Principality of Montenegro, for which I have shown there exists no ground in international law, and instead clearly stipulate the creation of a new state.¹⁷¹ The statehood and recognition of the new Montenegrin state (Republic of Montenegro) thus derives from the external self-determination of Montenegrin people, expressed at the referendum, in accordance with the constitutional provisions of the State Union of Serbia and Montenegro. One can thus conclude that the entire procedure shows that the international personality of Montenegro recognized at the Congress of Berlin in 1878 was not restored in a legal meaning but is merely rhetorical and of political and symbolic significance.

In the days and weeks after the adoption of the *Act on Declaring of Independence*, foreign states, resorting to the declaratory theory of recognition, began processes of recognition of Montenegro's statehood. In accordance with its goals expressed in the *Declaration on Independence*, Montenegro applied for membership in the UN, to which it was admitted on 28 June 2006 with General Assembly Resolution 60/264.¹⁷²

¹⁷¹ Compare *supra* 18 ff. In contrast to that, legal instruments relevant to restoration of independence of the Baltic States refer to international legal personality prior to Soviet occupation in 1940 in legally-binding sections and in much more specific language. Thus, the Resolution on the State Status of Estonia, adopted by the Estonian Parliament in 1990, declared that Soviet occupation was illegal under international law, and thus the international personality of Estonia was never extinguished. Ziemele, *supra* n. 134, 28. Similarly, the Latvian Parliament adopted a Constitutional Law, proclaiming 'continuity and identity of the Latvian State of 18 November 1918.' Ziemele, *supra* n. 134, 34. Lastly, the Lithuanian Parliament adopted the Law on Reinstatement of the May 12, 1938 Lithuanian Constitution (*ibid.*). Thus, as Ziemele (*ibid.*, 41) concludes: 'All three Baltic States have clearly emphasized their constitutional continuity, both in the Constitutions in force as well as various legislative steps undertaken before the Constitutions were fully reintroduced or new were adopted. These steps were clearly intended to substantiate their international claims to State continuity.' Thus, one can conclude that the Baltic States pleaded for legal continuity of the international personality and restitution of the state (*restitutio ad integrum*) prior to annexation in 1940. See Loeber, Dietrich, 'Die baltischen Staaten vor völkerrechtlichen Problemen', in Sprudz, Adolf (ed.), *The Baltic Path to Independence* (William S. Hein & Co, Buffalo, NY, 1994), 373. As argued in the main text, this was not the case with Montenegro. Montenegro's references to restoration of statehood were merely rhetorical expressions, without any legal relevance.

¹⁷² G.A. Res 60/264 (28 June 2006).

V. Conclusion

In this text, I have established that federalism within the SFRY was a manifestation of internal self-determination. Republics were defined as states and significantly possessed features of statehood in light of the traditional criteria. This was especially the case with the criteria of permanent population and defined territory but to certain degree also with the criteria of effective government and capacity to enter into relations with foreign states. The latter two criteria were, however, severely curtailed and defined within the federal framework. In terms of international law, republics of the SFRY were international persons *sui generis*. The right of self-determination, extended to the right to secession, was invoked in general principle 1 of the Constitution. However, in absence of a constitutional mechanism to exercise secession, I have ascribed such wording to the ideological (socialist) rhetoric within the Constitution—a reference to the Leninist concept of self-determination. Slovenia and Croatia, the first two republics to have declared independence, referred to the right of self-determination within international law and not to general principle 1 of the Constitution.

Prior to the dissolution of the SFRY, the right of self-determination in its external form was only recognized to colonial situations. Faced with hostilities on the territory of the (former) SFRY, the EC got politically involved. As I have established, there is much evidence that EC's recognition policy toward states emerging from the SFRY had *de facto* constitutive implications, although the Badinter Commission referred to recognition as a declaratory act. The EC also extended the traditional criteria for statehood by adding political ones. I have also concluded that there is much evidence that the EC practice in this particular case was universalized but did not become generally applicable. It should be perceived in light of both the specific historical and constitutional circumstances and the diplomatic involvement in order to achieve peace and confine borders. For the latter purpose the Badinter Commission applied *uti possidetis juris* for the first time in Europe. The Badinter Commission, in fact, translated the internal self-determination within the SFRY to external and enabled its former republics to become independent states. Politics that did not have republic status in the SFRY were not recognized as having the right of self-determination.

Montenegro did not apply for statehood in accordance with the EC Declaration from December 1991. Together with Serbia it founded the FRY and claimed continuity of the international personality of the SFRY. The Badinter Commission rejected this claim, as did the UN Security Council. It was not until the end of the Milošević regime in 2000 that the FRY applied for membership in and became a member of the UN as a new state. Analysis of the FRY's Constitution showed that the federation continued federalism as a manifestation of internal self-determination, initiated already by the SFRY with the Constitution of 1974. Characteristics of statehood in terms of permanent population and defined territory were retained, while characteristics in terms of effective government and capacity to enter into relations with foreign states were even increased. Importantly, the Constitution did not provide a mechanism for secession. Furthermore, unlike the Constitution of the SFRY, it did not invoke the right of self-determination as a general principle, let alone extend it to the right to secession. I have ascribed that to the abandonment of socialist ideology within the Constitution and thus omission of socialist rhetoric which was otherwise significant for the Constitution of the SFRY.

I have argued that the State Union of Serbia and Montenegro was established under the patronage of the EU as a compromise between secessionists and unionists, whereas the EU

was motivated by maintenance of stability in the fragile region of the former SFRY. The State Union abandoned federalism and was conceptualized as a Union of two states, whereas the term ‘republic’ was entirely abandoned. The Constitution of the State Union only created a few federal organs that were in charge of foreign policy, while state-members exercised effective control over their respective territories. Article 60 of the Constitution, which established a mechanism for secession and thus granted member-states right of self-determination in its external form, was also an integral part of the EU-sponsored compromise on the creation of the State Union. This mechanism was frozen for a period of three years. The same article stipulated for a referendum as a condition for this right to be exercised. Since the referendum rules were not regulated, crafting of the Referendum Law was the product of a political compromise, once again sponsored by the EU.

Once independence was voted for by referendum, the Montenegrin Parliament accepted an *Act on Declaring of Independence*. Since Montenegro obviously fulfilled all of the traditional criteria of statehood once independence was declared, there was little reason to hesitate to acknowledge that Montenegro was an independent state. Furthermore, its secession had an explicit constitutional foundation. In accordance with the declaratory theory of recognition, Montenegro was promptly recognized as a state by the EC as well as by other states, which was confirmed by Montenegro’s admittance to the UN in June 2006. In terms of the right of self-determination in the SFRY in comparison to the State Union, I shall conclude that the right of self-determination in its internal form was rooted in the federalism of the SFRY—its republics exercised a great degree of self-government and had significant characteristics of statehood. Within the State Union internal self-determination was increased and allowed members to *de facto* function as two separate states, though only the State Union had international personality. While there was no constitutional mechanism to exercise external self-determination within the Constitution of the SFRY, such a mechanism was clearly defined by the Constitution of the State Union.

The EC became involved in the dissolution of the SFRY once this process was already underway. Motivated by establishing peace it applied extra-legal (political) criteria for statehood and used recognition as a mechanism for achieving political goals. In contrast, the EU became involved in the dissolution of the FRY via the State Union in the initial phase of dissolution. The EU’s motive was retaining peace and stability in the region, and it sponsored creation of the State Union and created constitutional mechanisms for secession. Furthermore, the EU sponsored the Referendum Act when Montenegrin independence was to be voted for. Political involvement of the EU had thus created different legal and political circumstances than was the case when the SFRY was dismembered. First, unlike the Constitution of the SFRY, the Constitution of the State Union comprehended a clear constitutional mechanism for secession. Second, with political involvement, the EU managed to impose its political goals already prior to Montenegro’s declaring independence. Thus, there was no need to make recognition dependent on political criteria in order to achieve political goals.