SECESSION AND SELF-DETERMINATION OF PEOPLE IN INTERNATIONAL LAW:
The case of former Yugoslavia

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АПСТРАКТ

Самоопределувањето е право на секој народ и нација во светот самостојно да одлучува за својата судбина. По принцип на самоопределување се подразбираат следниве права: право на отцепување и создавање независна национална држава, право на соединување со други народи, право на економско самоопределување, како и право на избор на општествено и политичко уредување. Повелбата на ООН правото на самоопределување го спомнува во членот 1 и 55, но без дефиниција за самиот поим. Поимот „народ" се` повеќе може да се примени на етно-културните групи во рамките на државата. Правото на самоопределување има внатрешни и надворешни аспекти. Надворешните аспекти се однесуваат на правото на народот да го одредат меѓународниот статус на територијата. Овој аспект го уживаат народите од несамоуправните територии, населението на суверени и независни држави, територијално сконцентрирана популација исклучени од јавниот и политичкиот живот и населението на конститутивна единица на етничка федерација во процес на распаѓање. Во сите останати случаи, признавањето на правото на народите на самоопределување нема влијание на територијалниот интегритет на суверената и независната држава. Интерните аспекти на правото на самоопределување го признава правото на сите граѓани слободно да го одредуваат својот политички статус и слободно постигнување на економскиот, општествениот и културниот развој. Сепаратизмот е залагање за состојбата на културните, етничките, племенските, верските или политичка автономиј на одредена група (расне, етничка), дури и барање за полно политичко отцепување и формирање на нова држава. Сепаратистичките барања зависи од различни економски, политички и социјални фактори. Процесот на дезинтеграција и распаѓањето на југословенската федерација започна на 25 јуни 1991 година. Трудот има за цел да ги даде меѓународно-правните норми на правото на самоопределување и во тој контекст да даде краток преглед на процесот на дезинтеграција на поранешната југословенска федерација.

Клучни зборови: сецесија, право на самоопределување, дезинтеграција, СФРЈ;

International law recognizes a right of cultural security for national, ethnic, cultural, religious and linguistic minorities. The decentralization of power to local communities increases the possibilities that minority groups may participate effectively in decision-making processes, concerning, for example, language and education policy.[143] For a number of ethno-cultural groups, the desire for political self-government forms part of the collective identity of the group.[144] Members of the group consider that „the political and the national unit should be congruent"[145], and that borders should be drawn, and institutions arranged, „to allow the group political freedom from domination by other groups"[146]. In other words, each „nation"should have its own State, if it so desires.[147]

Ethno-cultural groups demanding territorial self-government consider themselves, in the nomenclature of international law, „peoples"(or „nations") rather than „minorities"[148]. Reference is made to the right of peoples to self-determination.[149] The rights of persons belonging to minorities and the rights of peoples are related, but distinct.[150] The rights of minorities do not include the right to self-government, either in the form of separation or secession (sovereign self-determination)[151], or territorial autonomy within the State (less-than-sovereign self-determination)[152]. This paper examines the right of peoples to self-determination, secession and disillusion – case of former Yugoslavia.

Demands for separation, secession or territorial self-government by ethno-cultural groups rely on a „reinterpretation of the principle of the self-determination of nations".[153] Where politically feasible, and consistent with the allies' strategic interests, boundaries were drawn to coincide with ethno-cultural identity. Ethnically homogenous „Nation"States

[143] Asbjørn Eide, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/AC.5/ 2001/2, 2 April 2001, part. 46.

[144] Larry Diamond and Marc Plattnerv (eds.), Nationalism, ethnic conflict and democracy (Baltimore: Johns Hopkins University Press, 1994), p. 3, at pp. 11–12. Monty Marshall and Ted Robert Gurr, Peace and conflict 2003 (College Park, MD: University of Maryland, Center for International Development and Conflict Management, 2003);

[145] Ernest Gellner, Nations and nationalism (Oxford: Blackwell, 1983), p. 1.

[146] Jacob Levi, The multiculturalism of fear (Oxford: Oxford University Press, 2000), p. 137.

[147] Thomas Franck, The empowered self: law and society in the age of individualism (Oxford: Oxford University Press, 2001), p. 23.

[148] See David Copp, 'International law and morality in the theory of secession' (1998) 2 Journal of Ethics 219, 227.

[149] Gerry Simpson, 'The diffusion of sovereignty' (1996) 32 Stamford Journal of International Law 255, 274–5.

[150] Human Rights Committee, General Comment No. 23, 'Rights of minorities (Article 27)', adopted 8 April 1994, reprinted in 'Compilation of General Comments and General Recommendations adopted by human rights treaty bodies', UN Doc. HRI/GEN/1/Rev.7, 12 May 2004;

[151]Human Rights Committee, General Comment No. 23, 'Rights of minorities (Article 27)', part. 3.2: the enjoyment of the rights of persons belonging to minorities in Article 27 of the International Covenant on Civil and Political Rights 'does not prejudice the sovereignty and territorial integrity of a State party'.

[152] No right of autonomy can be read into Article 27 of the International Covenant on Civil and Political Rights, adopted by GA Res. 2200A (XXI), 16 December 1966, in force 23 March 1976;

[153] Donald Horowitz, 'The cracked foundations of the right to secede' (2003) 14 Journal of Democracy 5, 5.

were created following the collapse of the multi-national Hapsburg, Ottoman, Russian and German Empires: Romania as a State for Romanians, for example. The application of the national self-determination principle sought, on objective criteria, to identify „Nations"[154], and to recognize their sovereign and independent existence.

No legal right of national self-determination was recognized in the Covenant of the League of Nations, or in general international law. According to its Charter, one of the purposes of the United Nations is to „develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[155] The expression „equal rights and self-determination of peoples"is not defined. No right of peoples to self-determination is recognized in the Charter, although the principle underpins Chapters XI and XII of the Charter.

The contemporary position in international law on the right of peoples to self-determination is expressed in Article 1, common to the International Covenants: „All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. "[156] The term „people" is not defined in the International Covenants, although Article 1(3) confirms that the term includes the peoples of trust and non-self-governing territories.[157] The Human Rights Committee has confirmed that the term „peoples"includes the populations of sovereign and independent States. With regard to Article 1(1), the Human Rights Committee has requested States parties to describe the constitutional and political processes which in practice allow the exercise of the right of peoples to self-determination,[158] and complained that „many (States parties) completely ignore Article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws".[159] With the exception of indigenous peoples (below), the Human Rights Committee has not made a definitive determination that the term „peoples" may include groups within the State, although in its Concluding Observations on Yugoslavia, the Committee referred to „all the peoples" within the territory of the former Yugoslavia.[160] Additionally, the Committee on Economic, Social and Cultural Rights has referred to „the

[154] Nathaniel Berman, 'Sovereignty in abeyance: self-determination and international law' (1988) 7 Wisconsin International Law Journal 51, 91;

[155] Article 1(2) of the Charter of the United Nations, adopted 26 June 1945, in force 24 October 1945.

[156] Article 1(1), common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, adopted by GA Res. 2200A (XXI), 16 December 1966, in force 23 March 1976.

[157] Article 1(3),Ibid;

[158] Human Rights Committee, General Comment No. 12, 'Article 1 (right to self-determination)', adopted 13 March 1984, reprinted in 'Compilation of General Comments and General Recommendations', p. 134, part. 4.

[159] Ibid., part. 3.

[160] Human Rights Committee, Concluding Observations on Yugoslavia, UN Doc. CCPR/C/ 79/Add.16, 28 December 1992, part. 1.

culture of individuals, minorities, peoples and communities", and „the affected peoples of that State".[161] The consequences of recognizing a group within the State as a „people", with a right to self-determination, are not clear. It might, for example, require the reconfiguration of constitutional structures to accommodate the „multi-nation"character of the State.

The General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Peace Agreement) refers to the „Bosnians", Croats, and Serbs, as constituent peoples (along with others)".[162] Representatives of the Bosnian, Croat and Serb communities share political power. The 1991 Constitution of the Former Yugoslav Republic of Macedonia identified the Macedonians as the only constituent nation of the Macedonian State. This led to tensions with the ethnic-Albanian minority, who demanded designation as a „constituent people".[163] The „Framework Agreement"which resolved the crisis considers only that the „multiethnic character of Macedonia's society must be preserved and reflected in public life".[164]

Alternately, the recognition of a right of self-determination for peoples within the State might provide a legal basis for secession.[165] Finally, the recognition of a right of self-determination may require the introduction of territorial autonomy. Given that „national identity", as opposed to other forms of ethno-cultural identity, includes a collective desire for self-government, any constitutional arrangement should establish self-government regimes for each constituent „people" or „nation". Failure to do so might provide a legitimate basis for secession.[166]

International law distinguishes between acts of separation and acts of secession. Separation is a process whereby a new sovereign and independent political unit is created with the consent of the existing State.[167] Secession refers to the situation where a new State is established and recognized without the consent of the „parent "State.[168] The international legal status of a State remains unaffected by the separation or secession of part of its territory. State practice indicates that there are few legal limitations on the

[161] Committee on Economic, Social and Cultural Rights, General Comment No. 8, 'The relationship between economic sanctions and respect for economic, social and cultural rights', reprinted in 'Compilation of General Comments and General Recommendations', p. 51, part. 7.

[162] General Framework Agreement for Peace in Bosnia-Herzegovina, 35 ILM (1996) 89.

[163] Farimah Daftary, 'Conflict resolution in FYR Macedonia: power-sharing or "civic approach", (2001) 12 Helsinki Monitor 291, 300.

[164] Framework Agreement (Macedonia), 13 August 2001;

[165] Donald Horowitz, ...;

[166] Robert Howse and Karen Knop, 'Federalism, secession, and the limits of ethnic accommodation: a Canadian perspective' (1993) 1 New Europe Law Review 269, 312.

[167] Crawford, The creation of states in international law, p. 214.

[168] James Crawford, 'State practice and international law in relation to secession' (1998) 69 British Year Book of International Law 85, 85–6

ability of States to create new States through the grant of territory, although there must be evidence that the establishment of a new sovereign and independent State reflects the political will of the relevant population.

Few State constitutions recognize a right of separation for part of the State.[169] The permanence of State borders is one of the fundamental givens of political life.[170] A procedure for separation is established, requiring a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned, and the support of a majority of voters in a referendum on the question of secession.[171]

Democratic theory has failed to delimit, with any clarity, the circumstances in which a right of separation or secession should be recognized by democratic governments.[172] According to the „illegal taking"model, secession is permitted where the territory has been unjustly incorporated into the State. The „pact"model recognizes a unilateral right of secession for the constituent territories and/or peoples of ethnic federations. A right of secession exists for those territories and/or peoples which were party to the original agreement by which the State was constituted, when the terms of the constituting pact are breached. According to the „misconduct"model, where a State fails to recognize and protect the „universal equal rights of individuals", a right of secession exists for the members of a group who do not enjoy equal rights. Secession is a remedy of last resort, available to the „collection of individuals whose rights have been systematically violated by the state, and the territory to be carved out is the land inhabited by the affected group".[173] The „plebiscitary"model argues that a right of secession should be recognized where a majority of a territorially concentrated group expresses a desire to establish a sovereign and independent State, through referendums or elections. The „plebiscitary"model draws on the contractual model of democracy, and may in principle be applied to a single individual. Any group of citizens that withdraws its consent to the legitimate authority of the State enjoys, on that basis alone, a right of secession. The „national self-determination"model of secession argues that the right applies only to „nations": each „nation"should have its own State, if it so desires. Related to the national self-determination model is the „failure of recognition"model of secession. According to this model, a multi-nation State should be

[169] Vicki Jackson, 'Comparative constitutional federalism and transnational judicial discourse' (2004) 2 International Journal of Constitutional Law, p. 91;

[170] Michael Hechter, Containing nationalism (Oxford: Oxford University Press, 2000), p. 78. See also Ruth Lapidoth, Autonomy: flexible solutions to ethnic conflicts (Washington, DC: United States Institute of Peace Press, 1996), p. 202.

[171] Article 60 of the Constitutional Charter of Serbia and Montenegro;

[172] Diane Orentlicher, 'Separation anxiety: international responses to ethno-separatist claims' (1998) 23 Yale Journal of International Law 1, 46.

[173] Allen Buchanan, 'Democracy and secession', in Margaret Moore (ed.), National self-determination and secession (Oxford: Oxford University Press, 1998), p. 14, at p. 25.

(re)configured so that its multi-national character is both recognized and accommodated.[174] The State should introduce „meaningful constitutional arrangements that recognize the distinct national identity of the secessionist group".[175] Given that the group has expressed, as part of its identity, a collective desire for self-government,[176] the constitutional arrangement must establish a self-government regime for the people demanding the right to self-determination.[177]

The „failure of recognition"model considers that a failure to accord rights of self-government justifies, as a remedy of last resort, a right of secession. When politicians and political philosophers talk about a „right of secession", they are concerned to establish a moral right, from which legal consequences should flow. A moral right of secession may create an obligation on the State to grant independence, or for the international community to recognize the secessionist entity as sovereign and independent, irrespective of the attitude of the existing sovereign authorities. This is not the position under international law. For a new State to be established, it must possess the relevant criteria of statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) a capacity to enter into relations with other States.[178] These criteria are based on the principle of „effectiveness among territorial units".[179] The secessionist territory must demonstrate that it has effective and independent political control. This is a necessary, but not a sufficient criterion for the establishment of a new sovereign and independent State. Without the consent of the existing State, the international community will not recognize secessionist territories as sovereign and independent States. There are a large number of secessionist territories that have not been recognized as sovereign and independent States. [180] There is

[174] Alain Gagnon and James Tully (eds.), Multinational democracies (Cambridge: Cambridge University Press, 2001), p. 1, at p. 3.
[175] Patten, 'Democratic secession from a multinational state', 563.
[176] Ibid., 567.
[177] Ibid., 564–5.
[178] Article 1 of the Montevideo Convention on the Rights and Duties of States, adopted 26 December 1933: reprinted (1934) 28 (Supplement) American Journal of International Law 75.
[179]According to Brad Roth, they collapse into one: 'such population and territory as are found under the effective control of an independent government': Brad Roth, Governmental illegitimacy in international law (Oxford: Oxford University Press, 2000), p. 130.
[180] Examples of secessionist territories that have not been recognized include Tibet (China), Katanga (Congo), Biafra (Nigeria), Kashmir (India), East Punjab (India), the Karen and Shan States (Burma), Turkish Federated State of Cyprus (Cyprus), Tamil Elam (Sri Lanka), South Sudan (Sudan - Sudan – independent state as of June 2011), Somaliland (Somalia), Bougainville (Papua New Guinea), Kurdistan (Iraq/Turkey), Republika Srpska (Bosnia and Herzegovina), Chechnya (Russian Federation), Kosovo (Serbia), Abkhazia (Russian Federation), South Ossetia (Russian Federation - if one uses same approach, and considers Kosovo to be part of Serbia – which it at least technically is not – then it is necessary to view Abkhazia and S. Ossetia as part of Georgia, where from they were taken violently by Russian troops, still deployed there; Nagorno-Karabakh (Azerbaijan - de facto under Armenian administration/occupation) and Democratic Republic of Yemen (Yemen - both countries reunited, and they are currently one country, internationally recognized): Crawford, 'State practice and international law in relation to unilateral secession', Expert Opinion, ibid., part. 50.

no general right of secession in international law. The principle of sovereign equality of States includes the recognition that the territorial integrity of the State is „inviolable".[181] Any measure aimed at the disruption of the territorial integrity of a State „is incompatible with the purposes and principles of the Charter".[182] States must refrain from any act aimed at the „disruption of the national unity and territorial integrity of any other State".[183] This position applies in respect of support for secessionist movements, and the premature recognition of the secessionist unit.[184]

International law recognizes the possibility of establishing new sovereign and independent States through an act of separation, but not secession. The distinction between the two lies in the attitude of the „parent t"State. No right of secession is recognized for any „group", notwithstanding the possibility that ethno-cultural groups may be recognized as peoples. This position applies equally to „territories" in which the members of an ethno-cultural group constitute the majority, including the constituent units of an ethnic federation:[185] a federal State in which the constituent units approximate to the distribution of national, ethnic, cultural, religious or linguistic groupings, and which reflect the ethno-cultural identity of the majority group in the constituent entity. International law does not recognize any right of secession for the territories or peoples that were party to the original agreement (or subsequent agreements) by which the State was constituted.

In cases of dissolution, there is no State from which the separatist entity can seek consent for its separation. In the process of dissolution, the existing State ceases to exist. It

[181] GA Res. 2625 (XXV), adopted 24 October 1970, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations'.

[182] Ibid.

[183] Ibid.

[184] A state is a political community, within whatever territorial boundaries, that existing states collectively decide 'ought to be self-governing': Roth, Governmental illegitimacy in international law, p. 131. Cf. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM (1992) 1488, Opinion No. 8, part. 2: 'while recognition of a state by other states has only declarative value, such recognition, along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law.'

[185] A number of ethnic federations have proved to be politically unstable, including Nigeria, Pakistan, India, Malaysia, Canada and Belgium - Belgium – "politically unstable" is too strong judgment to be implemented to these countries, where ethnic tensions occur from time to time, but all of them are currently far from lack of stability or secession of certain parts – probably with the exception of Nigeria, where confrontation of Moslems and Christians are growing esp. in the North Similar degree of ethnic minorities 'claims for more rights up to secession occur periodically in many unitary states – Romania, Bulgaria, Italy (North-South), Spain, Slovakia, to list only European ones, as well as Great Britain and Germany, which are quasi federative. It is necessary to approach such claims carefully, and to look in more details whether these are produced by certain radical elites, like in the cases with Basques in Spain, Kurds in Turkey, and IRA fighters in N. Ireland, while majority of the population seems more or less satisfied with the status quo. The States of the former Soviet Empire comprised six unitary States and three ethnic federations. The six are now five, following the reunification of Germany. The three ethnic federations are now twenty-three, following the dissolution of the Union of the Soviet Socialist Republics (USSR), the Socialist Federal Republic of Yugoslavia and Czechoslovakia.

is replaced by new sovereign and independent entities.[186] There is no Continuer State. The act of dissolution may be voluntary or involuntary. In the case of ethnic federations, the dissolution of the „parent" State will see the emergence of territories which approximate to the distribution of ethno-cultural groupings as sovereign and independent „Nation" States. Where the constituent entities and peoples are able to provoke the dissolution of the State,[187] they enjoy a de facto right of secession.

The „Nation" States of Croatia, Slovenia, and the Former Yugoslav Republic of Macedonia, as well as the „multi-Nation" States of Bosnia and Herzegovina and Serbia and Montenegro,[188] emerged from the dissolution of the Socialist Federal Republic of Yugoslavia,[189] which was provoked by the secessionist efforts of Croatia and Slovenia, who declared their independence on 25 June 1991. All of the States were successor States.[190] The international community did not recognize Serbia and Montenegro as the successor to the Socialist Federal Republic of Yugoslavia.[191]

On 27 August 1991, the European Community established a Peace Conference on Yugoslavia, including an Arbitration Commission, comprising five Presidents from among the various Constitutional Courts of the EC States. The Arbitration Commission was known as the Badinter Commission after its president.[192] In its Opinion No. 1, adopted on 29 November 1991, the Arbitration Commission opined that, in accordance with the principles

[186] The dissolution of a State 'means that it no longer has legal personality': Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM (1992) 1488, Opinion No. 8, part. 2.

[187] This may occur, as in the Socialist Federal Republic of Yugoslavia, in the form of peripheral dissolution, where units beyond the centre seek to separate, or in the form of dissolution from the centre, where the core federal unit seeks to separate from the sovereign polity: Daniele Conversi, 'Central secession: towards a new analytical concept? The case of former Yugoslavia' (2000) 26 Journal of Ethnic and Migration Studies.

[188] In April 1992, Serbia and Montenegro (separate republics in the Socialist Federal Republic of Yugoslavia) joined together to form the Federal Republic of Yugoslavia. On 4 February 2003, the State changed its name to 'Serbia and Montenegro'and later Montenegro emerged as sovereign state.

[189] Marc Weller, 'The international response to the dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 American Journal of International Law 569, 569. Also Biserko, Sonja (ed.). *Yugoslavia: Collapse, War Crimes*. Belgrade: Centre for Anti-War Action, 1993.

[190] Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM (1992) 1488, Opinion No. 9, part. 1

[191]SC Res. 777 (1992), part. 1; and GA Res. 47/1, adopted 22 September 1992,'Recommendation of the Security Council of 19 September 1992', part. 1. See also GA Res. 55/12, adopted 1 November 2000, 'Admission of the Federal Republic of Yugoslavia to membership in the United Nations'.

[192] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples' (1992) 3 European Journal of International Law 178. Also Cohen, Lenard. J. *Broken Bonds. The Disintegration of Yugoslavia.* Boulder: Westview, 1993;

of public international law, „the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory".[193]

According to the Commission, in the case of a „federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the state implies that the federal organs represent the components of the Federation and wield effective power".[194]

The Arbitration Commission noted that, although the Socialist Federal Republic of Yugoslavia had „until now retained its international personality", a number of the constituent republics had expressed their desire for independence: Slovenia, Croatia and Macedonia in referendums, and Bosnia and Herzegovina in a parliamentary resolution.[195] Moreover, the „composition and workings of the essential organs of the Federation . . . no longer (met) the criteria of participation and representatives inherent in a federal state",[196] and the recourse to force in the different parts of the federation had demonstrated the federation's impotency.[197] Consequently, the Socialist Federal Republic of Yugoslavia was „in the process of dissolution", and it was „up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice".[198]

In Opinion No. 8, the Arbitration Commission dealt with the question as to whether the dissolution could be regarded as complete. The Commission noted a number of facts that had occurred in the intervening period since the adoption of Opinion No. 1: a referendum held in Bosnia and Herzegovina had supported independence; Serbia and Montenegro had constituted themselves as a new State; most of the new States formed from the former Yugoslav republics had recognized each other's independence, thus demonstrating that the authority of the federal State no longer held sway on the territory of the newly constituted States; the common federal bodies on which all the Yugoslav republics were represented no longer existed; the former national territory and population of the Socialist Federal Republic of Yugoslavia were entirely under the sovereign authority of the new States; Bosnia-Herzegovina, Croatia and Slovenia had been admitted to membership of the United Nations; United Nations bodies referred to the „former Socialist Federal Republic of Yugoslavia"; and the UN had not accepted the Federal Republic of

[193] Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM (1992) 1488, Opinion No. 1, part. 1(a). The following definition of a State is provided: 'a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty': ibid., part. 1(b).
[194] Ibid., part. 1(d).
[195] Opinion No. 1, para. 2(a).
[196] Ibid., para. 2(b).
[197] Ibid., para. 2(c). Also Opinion No. 8, part. 1.
[198] Opinion No.1, para. 3.

Yugoslavia (Serbia and Montenegro) as the continuer State of the Socialist Federal Republic of Yugoslavia.[199] The Arbitration Commission concluded „that the process of dissolution of the SFRY . . . is now complete and that the SFRY no longer exists".[200] Opinion No. 1 of the Arbitration Commission recognized a right of self-determination for the „peoples" of the constituent republics of the Socialist Federal Republic of Yugoslavia: it was „up to those republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice".[201] The peoples of the republics could emerge as new sovereign and independent States unilaterally or in association with other Republics. On 16 December 1991, the EC requested „any Republic of the Socialist Federal Republic of Yugoslavia' to state whether 'they wish(Ed) to be recognized as independent states".[202] The invitation was extended only to the federal units. It was not extended to sub-federal units (Kosovo), or regions dominated by a particular ethno-cultural group (those regions of Croatia and Bosnia and Herzegovina with majority Serbian populations). The internal administrative borders both defined the „people"to whom the right of self-determination was applied, and subsequently formed the international borders between the new sovereign and independent States. In its decision to limit the scope of application of the right of self-determination to the peoples of the republics, the Commission relied on the legal principle of *uti possidetis*: in the absence of agreement to the contrary, „the former boundaries become frontiers protected by international law . . . The principle applies all the more readily to the Republic since the . . . Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent."[203] The Arbitration Commission recommended the recognition of Croatia,[204] Slovenia[205] and Macedonia.[206] The Commission did not initially recommend the recognition of Bosnia and Herzegovina.[207] No referendum on the question of independence had been held in Bosnia and Herzegovina, although the Presidency and the Government, excluding the Serbian members, supported independence. The Commission determined that the „will of the peoples of Bosnia-

[199] Opinion No. 8, para. 3.

[200] Ibid., part. 4. Article 2(1)(e) of the Vienna Convention on Succession of States in respect of Treaties, adopted 22 August 1978, in force 6 November 1996, reprinted (1978) 72 American Journal of International Law 971.

[201] Opinion No. 1, part. 3.

[202] Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991), reprinted (1993) 4 European Journal of International Law 73. Denitch, Bogdan. *Ethnic Nationalism: The Tragic Death of Yugoslavia*. Minneapolis: University of Minnesota Press, 1994.

[203] Opinion No. 3, part. 2.

[204] Opinion No. 5. The recommendation was accompanied by certain conditions concerning minorities. The Commission based its recommendations on the EC's 'Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union', 31 ILM (1992) 1486. See also Musgrave, Self-determination and minorities, p. 112.

[205] Opinion No. 7.

[206] Opinion No. 6.

[207] Opinion No. 4.

Herzegovina to constitute (Bosnia and Herzegovina) as a sovereign and independent state cannot be said to have been fully established". The meaning of „peoples" in this context is not clear, given the Arbitration Commission's decision in Opinion No. 2 (below). The Arbitration Commission determined that the assessment „could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of (Bosnia and Herzegovina) without distinction, carried out under international supervision".[208]

In the Socialist Federal Republic of Yugoslavia, the right of self-determination was not applied to „individuals sharing common and distinctive ethnic, linguistic and cultural characteristics", but to „those inhabiting a region whose territorial limits had previously been defined by an autonomous government and administration".[209] Opinion No. 2 of the Arbitration Commission concerned the question as to whether „the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, (had) the right to self-determination". The Arbitration Commission responded in the negative, concluding that the „Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law".[210] Thus, the Serbian population in Bosnia and Herzegovina, which had favored the creation of a „Common Yugoslav (i.e. Serbian) State", or the establishment of a „Serbian Republic of Bosnia-Herzegovina",[211] did not enjoy the right to determine the international status of the territory where they formed the majority. The „people"to whom the right of external self-determination was applied was defined by reference to a political territory, and not national, ethnic, cultural, religious or linguistic identity. Opinion No. 2 refers additionally to the human right of peoples to self-determination, which recognizes that „every individual may choose to belong to whatever ethnic, religious or language community he or she wishes". In the view of the Arbitration Commission, „one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned".[212] The Commission concluded that the Republics must afford the members of minority groups „all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality". The

[208] Ibid., para. 4

[209] Weller, 'The international response to the dissolution of the Socialist Federal Republic of Yugoslavia', 606.

[210] Opinion No. 2, para. 4(i).

[211] Opinion No. 4, para. 3.

[212] Opinion No. 2, para. 3. See Karen Knop, Diversity and self-determination in international law (Cambridge: Cambridge University Press, 2002), p. 186.

determination is not consistent with the contemporary right of peoples to self-determination that has emerged in international law.

CONCLUSION

There is no objective distinction that can be made between groups recognized as minorities, national minorities, indigenous peoples and peoples. What distinguishes these groups is the nature of their political demands: simply put, minorities and national minorities demand cultural security; peoples demand recognition of their right to self-determination, or self-government. In the era of the United Nations, in contrast with the earlier inter-war period, the application of the principle of self-determination of peoples recognizes the right of the majority of the territory to confirm or deny the legitimacy of the authority of the governing power. The right of peoples to self-determination has been recognized for the peoples of trust and no self-governing territories, the peoples of sovereign and independent States, peoples excluded from public life, and the peoples of the units of a federal State in the process of dissolution. Increasingly, it is recognized that the term „peoples"may be applied to ethno-cultural groups within the State. The right of self-determination has both an external and an internal aspect. The external aspect concerns the right of the people to determine the international status of the territory. This aspect is enjoyed by the populations of trust and non-self-governing territories, the populations of sovereign and independent States, territorially concentrated populations excluded from public/political life, and the populations of the constituent units of an ethnic federation in the process of dissolution.

In all other cases, the recognition of the right of peoples to self-determination has no impact on the territorial integrity of sovereign and independent States. The internal aspect of the right of self-determination recognizes the right of all peoples to „freely determine their political status and freely pursue their economic, social and cultural development". The internal aspect is enjoyed by the populations of sovereign and independent States, and by indigenous peoples and peoples recognized as such by the State. The internal aspect of the right of peoples to self-determination is concerned with territorial self-government. As Judge Rosalyn Higgins notes, in her Separate Opinion in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, „Peoples" necessarily exercise their right to self-determination within their own territory". The definition of the term „peoples"in international law must include the requirement that the group demands political self-government in respect of a particular territory. Citizens who belong to groups recognized as indigenous peoples or peoples enjoy the rights of political participation both as citizens of the State and as members of their respective groups (indigenous peoples or peoples – and potentially both). The State must ensure the

effective participation of all citizens in nationwide (and as appropriate regional and local) decision-making processes, and introduce (or maintain) territorial self-government for groups recognized as peoples.

A desire for self-government is not a sufficient criterion for recognizing a group as a „people". Modern justifications for territorial self-government, that is, autonomy, concern the idea of cultural identity and integrity. Territorial self-government allows a national, ethnic, cultural, religious or linguistic group to „engage in their own competing nation-building, so as to protect and diffuse their societal culture through their traditional territory". The definitions of the term „people "must include both a collective expression of a desire to be self-governing, and a distinctive ethno-cultural identity. Beyond this, no criteria for defining the term „people" can be discerned: peoples have the right to self-determination, and those ethno-cultural groups having the right to territorial self-government are to be recognized as peoples. The important fact is to recognize the value and role of territorial self-government (for „peoples") as a tool for resolving cultural conflict.

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