

What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood

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It is paradoxical that in the conflict and confusion that has accompanied the disintegration of the former Socialist Federal Republic of Yugoslavia (SFRY), the one Republic to gain recognition as an independent State without being involved in widespread bloodshed has been the Former Yugoslav Republic of Macedonia (FYROM). Unlike Serbia or Montenegro, for example, the Republic of Macedonia has never before existed as an independent State in the modern era. In fact, its history, its borders, its people, its language, and its culture, all have been and continue to be the subjects of controversy.¹ That the Republic of Macedonia has managed to avoid armed conflict may be largely fortuitous, but its emergence as a State has not been without its difficulties. From the moment it first declared its independence, the Republic of Macedonia has been involved in a continuing dispute with Greece over the symbols of its national identity, and its use of the name "Macedonia". This dispute initially surfaced at the time the Republic was seeking international recognition of its statehood but has more recently resulted in the imposition of a Greek embargo on the movement of goods across the border between the two States.²

The superficial basis for Greek opposition to the emergence of the Republic as a State, is its use of the name "Macedonia" and the employment of a Hellenic emblem on the Macedonian flag (the star of Verginia) which is considered to be an appropriation of Greek heritage.³ The real dispute between the two Republics, however, relates to what those matters symbolise. As far as the Republic of Macedonia is concerned, it believes it has the ultimate right to determine its own symbols of national identity including, at least, the right to choose its own name. Use of the name "Macedonia" is the primary expression of Macedonian nationalism and, in a literal if not a legal sense, a manifestation

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1 See Glenny M, *The Fall of Yugoslavia* (1993), p 72. For the history of the region of Macedonia see Pribichevich S, *Macedonia: Its People and History* (1982); Singleton F, *A Short History of the Yugoslav Peoples* (1985).

2 Keesing's Contemporary Archives, *Record of World Events* (henceforth "Keesing's") (1994) Vol 40, p 39872.

3 Statement by Secretary for Foreign Affairs, Samaras A, 4 September 1991, cited in Ioannou K, *The Question of Recognition of Skopje* (1992), p 47.

of that people's self-determination.⁴ Greece, by contrast, is concerned that in using the name "Macedonia", the Republic is signifying its claim to the territory of the Macedonian region of antiquity, which included portions of both Greece and Bulgaria.⁵ This claim, which Greece considers a violation of its territorial sovereignty, has been evidenced both in Macedonian constitutional provisions⁶ and in the use of "hostile propaganda".⁷ Greece asserts in addition, that the notion of a "Macedonian people" or a "Macedonian nation" is a fiction created by Tito in 1946 which has no historical or cultural basis.⁸ As such, it considers there to be no real link between the inhabitants of the Republic of Macedonia and groups in Greece,⁹ and that they cannot really be considered a "people" for the purposes of self-determination.

Although the Greek embargo has had a considerable impact on the economic¹⁰ and political¹¹ stability of the Republic of Macedonia, and has been the subject of an action by the European Commission before the European Court of Justice,¹² the main question to be addressed here is the impact of the dispute

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- 4 As the Republic's Foreign Minister, Crvenkovski, is reported to have said, "the very moment we give up our name...the question will arise: if you're not Macedonians, then what are you?". Quoted in Thurow R, "Nouvelle Macedonia Pits Greeks, Slavs in Moniker Muddle", *Wall Street Journal*, 19 November 1992.
 - 5 Greece believed that the Republic had territorial ambitions over the Pirin district of Bulgaria and the province of Macedonia in Greece extending as far as the Aegean Sea (including both Mt Olympus and the port of Thessaloniki). Keesing's, n 2 above, (1992) Vol 38, No 1, p 38734.
 - 6 See text accompanying n 109 below.
 - 7 Keesing's, n 2 above, (1993) Vol 39, p 39328. Objection was made to a number of cards and calendars produced in Macedonia which portrayed those territorial ambitions. Macedonia had also complained that Greek aircraft had violated its airspace. Although the Greek concerns appear a little overplayed, it is clear that the opposition party within Macedonia (IMRO) was irredentist in outlook. Perry D, "Politics in the Republic of Macedonia: Issues and Parties" (1993) 2(23) *RFE/RL Research Report* 31 at 34-35.
 - 8 See Statement of Greek Government Spokesman, 17 April 1992, cited in, Ioannou, n 3 above, p 77. It is considered that Tito transformed indigenous Slavs into ethnic Macedonians by a process of "mutation" which involved the invention of a distinct Macedonian language and church affiliation and the creation of a Macedonian history, see eg Zahariadis N, "Is the Former Yugoslav Republic of Macedonia a Security Threat to Greece?" Winter (1994) *Mediterranean Quarterly* 84 at 85-86.
 - 9 Greece does not admit the existence of a Macedonian national minority in its Northern province. Rather, it considers the population there to include certain "Slavophone Greeks". See Thompson M, *A Paper House: The Ending of Yugoslavia* (1992), p 307. Greece's concern is that the Republic of Macedonia will stir up nationalist feelings among the "Greek Muslims" (Turks) as well as the "Slavophone Greeks"; Perry D, "Macedonia: From Independence to Recognition" (1994) 3(1) *RFE/RL Research Report* 118.
 - 10 The effect of the Greek embargo has reportedly encouraged many in FYROM to break the UN Sanctions against trading with Serbia, Poulton H, "The Republic of Macedonia after UN Recognition" (1993) 2(23) *RFE/RL Research Report* 22 at 28.
 - 11 See eg Mazowiecki T, *Situation of Human Rights in the Territory of the Former Yugoslavia*, UN Docs E/CN.4/1994/110, p 30; and E/CN.4/1995/57, p 24.
 - 12 The European Commission claimed the trade ban to be in violation of Article 113 of the Treaty of Rome. The preliminary ruling of the ECJ found there to be no case

on the Republic's acquisition of statehood. Although the Republic of Macedonia achieved its *de facto* independence without significant opposition, its subsequent recognition as a State was delayed by a period of up to fifteen months as a result of the Greek opposition. Indeed, when the Republic was eventually admitted to the United Nations (UN), it was forced to do so under a provisional name and without a flag.¹³ These events, particularly when placed alongside the practice with respect to other Republics such as Croatia and Bosnia-Herzegovina, raise a number of legal questions relating to the function of diplomatic recognition and the operative principles that govern the acquisition of statehood. Three specific issues will be considered in this article: first, whether the non-recognition of Macedonia pursuant to its dispute with Greece reflects a shift in practice as regards the terms by which statehood may be acquired; secondly, whether the principle of self-determination had a determining effect in the acquisition of statehood by the various Republics, and if so, whether the concerns put forward by Greece in the case of Macedonia were therefore influential; and thirdly, whether a new State can legitimately claim to have a "right to a name" by virtue of existing principles of public international law, and whether that is a matter in which other States have a legitimate interest.

I. Background¹⁴

The Former Yugoslav Republic of Macedonia is a small State (approximately 66,597 square kilometres in size) lying between, Bulgaria, Albania, Greece and Serbia. It has a population of 1,936,877 composed of 1,288,330 Macedonian Slavs (66.5 per cent population) and 442,914 Albanians (22.9 per cent population).¹⁵ The other main ethnic groups in the population are the Turks (4 per cent population), Serbs (2 per cent), Romas (2.3 per cent), and Vlachs (0.4 per cent).¹⁶ The territory of the Republic formed part of the Ottoman Empire for

for the imposition of interim measures, *Commission of the European Communities v Hellenic Republic*, C-120/94 R, 29 June 1994.

13 Keesing's, n 2 above, (1993) Vol 39, p 39328.

14 For details of the process of Yugoslav disintegration see generally, Weller M, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 *American Journal of International Law* 569; Zametica J, "The Yugoslav Conflict" (1992) *Adelphi Paper* 270; Thompson, n 9 above; Glenny, n 1 above; Glenny M, *The Rebirth of History*, 2nd ed (1993); Malcolm N, *Bosnia: A Short History* (1994); Magas B, *The Destruction of Yugoslavia* (1993); UN Department of Public Information, *The United Nations and the Situation in the Former Yugoslavia* (1995).

15 These figures are taken from the census held in June/July 1994. The Albanian minority boycotted the census and claim, in distinction, to constitute 40 per cent of the population, Keesing's, n 2 above, (1994) Vol 40, p 40112.

16 The Serb minority, like the Albanians, claim their numbers to be nearer 250,000 rather than the official figure of 39,000, Keesing's, n 2 above, (1994) Vol 40, p 40287.

500 years¹⁷ until the Treaty of Bucharest in 1913 when it was ceded to Serbia. As part of the Kingdom of Serbia, it later became part of the Kingdom of Serbs, Croats and Slovenes in 1918 which was later transformed into the Socialist Federal Republic of Yugoslavia after 1945. Although Macedonian nationalism may be traced back to the early nineteenth century,¹⁸ it was only in the creation of the SFRY that the Macedonians, as an ethnic group, were recognised. Within the SFRY the Macedonian "nation", together with the Serbian, Croatian, Slovenian, Muslim (Bosnian), and Montenegrin nations, were constitutionally recognised and formed the basis of the six Federal Republics.¹⁹ The first Constitution of the Macedonian People's Republic was promulgated on 31 December 1946.²⁰

Whilst the Yugoslav Federation was always a fragile creature,²¹ the moves towards independence in Macedonia (as in Bosnia-Herzegovina, Croatia and Slovenia) may be traced back most immediately to the multi-party elections held in 1990 which resulted in the rejection of the League of Communists of Yugoslavia in all Republics except Serbia and Montenegro.²² Over the following year, the new authorities in Slovenia,²³ Croatia²⁴ and Macedonia began to assert their autonomy from the Federation. In its initial declaration on sovereignty, issued on 25 January 1991, the Republic of Macedonia asserted

17 Prior to the Ottoman Empire, the territory had been occupied by the Romans, the Byzantines, the Bulgars and the Serbs. See Pribichevich, n 1 above, pp 65–155; Marko-Stöckl E, "Macedonia: Chronology Before 1920" in Blaustein A and Flanz G (eds), *Constitutions of the Countries of the World* (1993), pp v–x.

18 See Pribichevich, n 1 above, pp 106–36.

19 Alongside the six "nations" there existed two "Autonomous Provinces"—Kosovo (predominantly Albanian) and Vojvodina (Hungarian)—and a number of "nationalities" (Albanians, Hungarians, Turks, Italians, Vlachs, Romanies, and others). See generally, Rusinow D, "Nationalities Policy and the 'National Question'" in Ramet P (ed), *Yugoslavia in the 1980s* (1985), p 131.

20 Later Constitutions were enacted on 13 January 1953, 21 April 1963, 25 February 1974, and 17 November 1991. See Flanz G, "Macedonia: Chronology, 1920–1993" in Blaustein A and Flanz G (eds), *Constitutions of the Countries of the World—Macedonia* (1993), p xi.

21 The forces of nationalism were always deeply rooted within the Yugoslav Federation. Two significant elements may be identified:

- (i) the "nations" of Yugoslavia were considered sovereign in that they had entered the Federation through a process of "free association", retaining a right to self-determination and secession.
- (ii) there had been a lengthy process of constitutional reform dating back to the third constitution of 1963 which had decentralised power to the extent that the Federation began to resemble a Confederation of independent States.

See generally Ramet P, *Nationalism and Federalism in Yugoslavia 1963–1983* (1984), pp 20–84.

22 Keesing's, n 2 above, (1990) Vol 36, p 37923.

23 Slovenia initially made moves towards autonomy in 1989 when it included in its Constitution a provision declaring it to be "an independent, sovereign and autonomous State", Keesing's, n 2 above, (1989) Vol 35, pp 36899–900. On 23 December 1990 it held a referendum in which 94.6 per cent of votes were cast in favour of secession, Keesing's, n 2 above, (1990) Vol 36, p 37790.

24 Croatia held a referendum on independence on 19 May 1991 in which 92.2 per cent of voters favoured secession, Keesing's, n 2 above, (1991) Vol 37, p 38204.

inter alia the right of the Macedonian people to self-determination (including the right of secession), and stipulated that the Constitution of the Federal Republic should be applied within Macedonia so long as it was not contrary to the Constitution of the Socialist Republic of Macedonia".²⁵ It also resolved that the Macedonian Assembly should pass a new Constitution in order to determine "the social order and future symbols of the statehood of Macedonia".²⁶ At this stage, although the Republics sought greater autonomy, they were involved in negotiations about the constitutional future of the country²⁷ and had no clear determination for any to secede from the Federation.²⁸

The Republic of Macedonia ultimately declared its independence on 17 September 1991 following a referendum on independence held on 8 September 1991, the results of which found 95 per cent of voters (which constituted 75 per cent of the registered electorate) in favour of a "sovereign and independent Macedonia with a right to enter a union of sovereign States of Yugoslavia".²⁹ The Declaration came in the wake of many months of conflict³⁰ that had followed from the declarations of independence of Croatia and Slovenia,³¹ and had just been preceded by the opening of the European Community Peace Conference on Yugoslavia in the Hague.³²

Unlike the situation with respect to the other Republics, Macedonia attained *de facto* independence from the Federation both peaceably and relatively quickly. In January 1992, Macedonia withdrew its members from the Rump Yugoslav Parliament and agreement was reached for the full withdrawal of the

25 25 January 1991, Keesing's, n 2 above, (1991) Vol 37, p 37973.

26 Article 3. Other constitutional amendments were adopted in June 1991—one stipulated that only the Macedonian Assembly could declare a "state of emergency", another that Macedonia would henceforth regulate its own balance of payments, see Keesing's, n 2 above, (1991) Vol 37, p 38275. A new draft Constitution was approved on 23 August 1991, Keesing's, n 2 above, (1991) Vol 37, p 38375.

27 A first, albeit unsatisfactory, conference was held on 10 January 1991 after which the negotiations were taken over by the leaders of the various Republics. Whilst Croatia and Slovenia advocated a loose confederation of independent States, Serbia and Montenegro preferred the maintenance of a Federation. It was finally agreed on 11 April 1991 that separate referenda should be held in each Republic; Keesing's, n 2 above, (1991) Vol 37, pp 38973, 38203.

28 Slovenia's referendum on independence in 1990 had specifically provided that independence would only be sought if no agreement on a constitutional structure for Yugoslavia had been achieved within six months, n 23 above.

29 Keesing's, n 2 above, (1991) Vol 37, p 38420. The polls in Macedonia were boycotted by the Albanian minority (22 per cent of population).

30 Fighting broke out between the forces of the JNA and Slovenian militia after the JNA's intervention in Slovenia on 27 June 1991, Keesing's, n 2 above, (1991) Vol 38, p 38275. Inter-ethnic violence in Croatia, which had begun in March 1991, intensified in July 1991 and continued until January 1992, Keesing's, n 2 above, (1991) Vol 38, pp 38374–76.

31 Croatia and Slovenia initially declared their independence on 25 June 1991, Keesing's, n 2 above, (1991) Vol 38, p 38274. They subsequently agreed, in Brioni, to a three-month moratorium on their independence, Keesing's, n 2 above, (1991) Vol 37, p 38374.

32 Keesing's, n 2 above, (1991) Vol 37, p 38420.

armed forces of the central authorities (JNA) by 15 April 1992.³³ This was implemented without delay such that by 26 March 1992, all border crossings had been handed over by the JNA to the newly created Macedonian Army.³⁴ Diplomats of Macedonian origin were recalled from the Yugoslav foreign service, and in April the Republic adopted its own currency (the denar).³⁵

The ease by which the Republic achieved independence stands in stark contrast to the unduly protracted process by which the Republic gained international recognition. The recognition of Macedonia was initially closely related to that of Croatia and Serbia. In December 1991, the Council of the European Community at an extraordinary EPC Ministerial Meeting outlined certain conditions for the recognition of all the Republics in the Former Yugoslavia,³⁶ requiring all the Republics that wanted to gain international recognition to so indicate by 23 December 1991. The guidelines included a number of general considerations relating to the peace process, human rights and non-proliferation. They also included one specific condition, included on the insistence of Greece, which was directed to the Republic of Macedonia. That condition required the Republic to "adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State, including the use of a denomination which implies territorial claims".³⁷

The Republic of Macedonia duly requested recognition from the European Community (EC)³⁸ and made a number of constitutional amendments to take into account the EC's conditions.³⁹ On the 11 January 1992, the Badinter Commission,⁴⁰ which had been mandated, *inter alia*, with the task of considering the various requests for recognition, delivered its opinion on the claim of Macedonia to recognition. It concluded that Macedonia satisfied all the conditions for recognition laid down by the Council of Ministers. It noted, in particular, that Macedonia had formally renounced all territorial claims, and held that use of the name "Macedonia" could not therefore imply any territorial claim against another State.⁴¹

33 Ibid, (1992) Vol 38, p 38779.

34 Ibid, (1992) Vol 38, p 38833.

35 Ibid, (1992) Vol 38, p 38850.

36 Ibid, (1991) Vol 37, p 38685.

37 (1993) 4 *European Journal of International Law* at 72-73.

38 Keesing's, n 2 above, (1991) Vol 37, p 38685.

39 See Flanz, n 20 above, p xviii.

40 The EC agreed to establish the Arbitration Commission to deal with legal questions relating to the settlement of legal questions arising in the context of the Yugoslav Peace Conference (27 August 1991, Brussels). See Ragazzi M, "Introductory Note" (1992) 31 ILM 1488. In total, the Commission issued fifteen Opinions: Opinion No 1 (1992) 31 ILM 1494; Opinion No 2 (1992) 31 ILM 1497; Opinion No 3 (1992) 31 ILM 1499; Opinion No 4 (1992) 31 ILM 1501; Opinion No 5 (1992) 31 ILM 1503; Opinion No 6 (1992) 31 ILM 1507; Opinion No 7 (1992) 31 ILM 1512; Opinion No 8 (1992) 31 ILM 1521; Opinion No 9 (1992) 31 ILM 1523; Opinion No 10 (1992) 31 ILM 1525; Opinion No 11 (1993) 32 ILM 1586; Opinion No 12 (1993) 32 ILM 1589; Opinion No 13 (1993) 32 ILM 1591; Opinion No 14 (1993) 32 ILM 1593; Opinion No 15 (1993) 32 ILM 1595 (1993).

41 Opinion No 6, n 40 above, p 1512.

Over the next few months, although a handful of Eastern European States came to recognise Macedonia,⁴² the Member States of the EC were not persuaded. Despite the positive affirmation of the Macedonian case by the EC Arbitration Commission, the Council of Ministers of the EC announced that whilst it could recognise Croatia and Slovenia,⁴³ “there exist more important problems to resolve before the Community and its Member States can make a similar decision” with respect to Macedonia.⁴⁴ Although the “further problems” were not specifically identified, it appears that non-recognition was primarily due to Greece’s insistence⁴⁵ that the Republic renounce “the use of a denomination which implies territorial claims”.⁴⁶ This was made clear in May 1992 when the Council of Ministers indicated that it was “willing to recognise Macedonia as a Sovereign and independent State within its actual borders” but only “under a name which can be accepted by all parties concerned”.⁴⁷ At this stage a number of States suggested the name “New Macedonian Republic”; Greece itself preferred the “Democratic Republic of Skopje”.⁴⁸ By the time of the Lisbon summit in June 1992 the Council of the EC had given way to Greek pressure (perhaps fearing a loss of unanimity in matters of foreign policy) and declared that it would only recognise the Republic “under a name which did not include the term ‘Macedonia’”.⁴⁹ The Macedonian Assembly, by contrast, flatly rejected the idea that the Republic should change its name before recognition.⁵⁰

By the end of 1992 it became clear that there was increasing frustration within the EC over Greek intransigence, and that general recognition could not be held off much longer. The Republic had submitted an application for membership to the United Nations,⁵¹ and the International Monetary Fund had

42 Bulgaria recognised Macedonia on 16 January 1992. Greece retaliated by asking the EC to stop providing aid to Bulgaria, Keesing’s, n 2 above, (1992) Vol 38, p 38734. Bulgaria later declared that full diplomatic relations would only be established if Macedonia officially declared that there was no Macedonian minority in Bulgaria, and that it had no territorial claims on Bulgaria, Keesing’s, n 2 above, (1992) Vol 38, p 38779. Macedonia established diplomatic relations with Slovenia on 17 March, (Keesing’s, n 2 above, (1992) Vol 38, p 38833), and Croatia on 30 March (Keesing’s, n 2 above, (1992) Vol 38, p 38850).

43 Slovenia and Croatia were recognised by the EC on 15 January 1992 (Keesing’s, n 2 above, (1992) Vol 38, p 38703) and were eventually admitted to the UN on 22 May 1992, Keesing’s, n 2 above, (1992) Vol 38, p 38918.

44 Keesing’s, n 2 above, (1992) Vol 38, p 38704. See also, House of Commons Debates, Vol 204, 4W, 17 February 1992 (Lennox-Boyd).

45 It is clear that the Greek Government was under considerable internal pressure not to recognise Macedonia (eg demonstrations in Salonica), Keesing’s, n 2 above, (1992) Vol 38, p 38779.

46 Keesing’s, n 2 above, (1992) Vol 38, p 38704.

47 Keesing’s, n 2 above, (1992) Vol 38, p 38919.

48 *The Guardian*, 5 May 1992. It is clear that Greece changed its position on the acceptability of the word “Macedonia”; formerly it had merely required that a prefix be used to distinguish the Republic from the Greek province, Keesing’s, n 2 above, (1992) Vol 38, p 38873.

49 Keesing’s, n 2 above, (1992) Vol 38, p 38943.

50 The Government of Macedonia lost a vote of confidence for its part in the proceedings. Keesing’s, n 2 above, (1992) Vol 38, p 39013–14.

51 Keesing’s, n 2 above, (1992) Vol 39, p 39279.

already announced that the Republic was a successor to the liabilities and assets of the SFRY and that accession was open to it once formal conditions were satisfied.⁵² In February 1993, Greece accepted the idea of international arbitration over the issue of Macedonia's name.⁵³ Two months later, on 7 April 1993, the Security Council adopted Resolution 817 (1993), which had been drafted by France, Spain and the United Kingdom,⁵⁴ recommending that the Republic should be admitted to the Organization under the provisional name "Former Yugoslav Republic of Macedonia", until some agreement was reached as to its final name.⁵⁵ On the following day, Macedonia was admitted to the UN without a flag pending consideration by an arbitration committee of Greek objections to Macedonia's use of the star of Verginia as its national symbol.⁵⁶ Over the next year, FYROM was recognised by all Member States of the EC⁵⁷ (except Greece) and by a number of other States, including the United States.⁵⁸

Although the question of statehood was thereafter beyond doubt,⁵⁹ no further progress was made with respect to the ultimate name of the Republic,⁶⁰ and in October 1993 Greece withdrew from the UN-brokered negotiations.⁶¹ In order to emphasise its continuing objections to the Republic's name and

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- 52 Keesing's, n 2 above, (1992) Vol 38, p 39251. See generally, Williams P, "State Succession and the International Financial Institutions: Political Criteria v Protection of Outstanding Financial Obligations" (1994) 43 *International and Comparative Law Quarterly* 776.
- 53 Keesing's, n 2 above, (1993) Vol 39, p 39328.
- 54 As the United Kingdom played a central role in drafting the resolution, it considered that act to have been tantamount to the recognition of the Republic.
- 55 Keesing's, n 2 above, (1993) Vol 39, p 39328. On 29 March 1993 the Greek Government lost a vote of no confidence following its endorsement of the UN plan, Keesing's, n 2 above, (1993) Vol 39, p 39387.
- 56 Keesing's, n 2 above, (1993) Vol 39, p 39442.
- 57 In December, six States of the EC (Denmark, France, Germany, Italy, the Netherlands and the United Kingdom) established diplomatic relations with FYROM. Keesing's, n 2 above, (1993) Vol 39, p 39785. Some confusion remains over the precise dates on which each State recognised the Republic, although it is clear that Denmark did so on 13 April 1993 (Keesing's, n 2 above, (1993) Vol 39, p 39428), and Belgium on 21 October 1993, which it backdated to 8 April 1993 (Keesing's, n 2 above, (1993) Vol 39, p 39698).
- 58 The United States recognised FYROM on 9 February 1994, Keesing's, n 2 above, (1994) Vol 40, p 39872. Albania recognised FYROM on 9 April 1993, *Ibid.*, (1993) Vol 39, p 39428, China on 12 October 1993, *Ibid.*, (1993) Vol 39, p 39698, and Russia on 3 February 1994, *Ibid.*, (1994) Vol 40, p 39872.
- 59 Article 4 of the UN Charter provides that Membership of the United Nations is open to all "peace-loving States". The reference to "States" is generally considered to mean "States as defined by general rules of international law". See Dugard J, *Recognition and the United Nations* (1987), pp 54-55; Wright Q, "Some Thoughts about Recognition" (1950) 44 *American Journal of International Law* 548. For the contrasting positions of the United Kingdom and Australia on this point see nn 125-126 below.
- 60 Various proposals had been put forward including: "Slavomacedonia" (proposed by Milosevic); "Nova Macedonia" (proposed by Vance-Owen); "Republic of Macedonia (Skopje)" (which had been accepted by the Republic), Keesing's, n 2 above, (1992) Vol 38, p 39240; (1993) Vol 39, p 39519.
- 61 Keesing's, n 2 above, (1993) Vol 39, p 39698.

constitutional terms, Greece reinforced the earlier oil embargo which had been imposed against the Republic,⁶² by closing the Greek consulate in Skopje and halting the movement of merchandise from, and to, the Republic.⁶³ The only goods excluded from the embargo were humanitarian goods, such as food-stuffs and pharmaceuticals.⁶⁴

The Greek embargo on trade was criticised by the European Commission, which expressed its concern as to the compatibility of the measures with the terms of Article 113 of the Treaty of Rome. Greece, by way of justification, argued that it retained a right of unilateral action both in international law, and under Article 224 of the Treaty, and suggested that the embargo had been imposed in light of the threat of war between the two nations. Not convinced that the Greek actions were sufficiently justified, the European Commission requested the European Court of Justice to order Greece to suspend the embargo. The Court, however, refused to grant a provisional order against Greece on the basis that further detailed examination of the problem had to be undertaken.⁶⁵

II. Recognition of Statehood⁶⁶

The two most significant aspects of the Republic of Macedonia's emergence as an independent State are: even after the Arbitration Commission had declared that it had fulfilled the necessary conditions for statehood, the Republic did not attract general international recognition for another 15 months; and when recognition was granted, it was only under a provisional name. The precise conclusions to be drawn from non-recognition depend initially upon the particular theory of recognition adopted. According to traditional doctrine, the function of the diplomatic recognition of States is either constitutive or declaratory as regards the international personality of the recognised entity. According to the declaratory theory, recognition merely acts as a formal acknowledgment of the fact that an entity possesses the necessary attributes of statehood.⁶⁷ Those attributes are generally considered to be a permanent

62 The oil embargo was imposed in August 1992 and brought the Republic "to the verge of collapse", Keesing's, n 2 above, (1992) Vol 38, p 39150. This action was criticised by other States, Keesing's, n 2 above, (1992) Vol 38, p 39240.

63 Keesing's, n 2 above, (1994) Vol 40, p 39872.

64 Ibid.

65 Note 12 above.

66 See generally, Lauterpacht H, *Recognition in International Law* (1947); Dugard, above, n 59; Chen T, *The International Law of Recognition* (1951); Jennings A and Watts A (eds), *Oppenheim's International Law*, 9th ed (1992), Vol I, pp 126-203; Crawford J, *The Creation of States in International Law* (1979), pp 10-25; O'Connell D, *International Law* (1970) Vol I, pp 127-65; Brownlie I, *Principles of Public International Law*, 4th ed (1990), pp 87-106.

67 Brierly comments that the:

primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state, and to declare the recognizing state's readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.

population, defined territory, effective government and independence.⁶⁸ The constitutive theory, by contrast, “deduces the legal existence of new States from the will of those already established”.⁶⁹ Recognition here is a *sine qua non* for the acquisition of statehood such that if an entity fails to gain recognition it will not assume any rights or duties as a State under international law.⁷⁰

For practical purposes, the distinction between the constitutive and declaratory theories of recognition is often of only marginal importance and frequently serves to confusate rather than elucidate.⁷¹ For example, even if the declaratory approach is preferred, it is acknowledged that recognition will still have significant constitutive dimensions. Recognition is not only a condition for the establishment of formal bilateral relations on the international plane,⁷² it may also have the effect of providing crucial evidence of an entity’s status, especially in cases where it is doubtful.⁷³ Although in most cases States tend to

Brierly JL, *Law of Nations*, 6th ed (1963), p 139. For support for the “declaratory” view of recognition see, *Deutsche Continental Gas Gesellschaft v Polish State* (1929) *Annual Digest and Reports of Public International Law Cases* No 5; *Tinoco Arbitration* (1923) RIAA 369 (as regards recognition of governments).

68 Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19. Article 1 stipulates that:

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.

Although the Convention refers to “the capacity to enter into relations with other States” this has generally been treated as meaning “independence”, see eg Harris D, *Cases and Materials on International Law*, 4th ed (1991), p 105, Crawford, n 66 above, pp 47–48; cf also, *Austro-German Customs Union Case*, Advisory Opinion PCIJ Rep Ser A/B, No 41 (1931), (per Anzilotti J).

69 Lauterpacht, n 66 above, p 38.

70 Ibid, p 55.

71 Brownlie comments that the theories of recognition:

have tended to stand in front of the issues and to have assumed a “theological” role as a body of thought with its own validity which tends to distract the student, and to play the role of master rather than servant.

Brownlie, n 66 above, p 205.

72 Recognition may also have certain legal consequences on the domestic plane—the recognised entity and its property will, for example, acquire immunity from legal suit in certain jurisdictions. *Oppenheim’s*, n 66 above, p 159. It should be noted, however, that recognition *simpliciter* does not necessitate the establishment of diplomatic relations.

73 An act of recognition is more than merely one of cognition, or knowledge that an entity possesses the factual elements of Statehood. Recognition indicates, in addition, a willingness to bring about the legal consequences of that acknowledgment. See O’Connell, n 66 above, p 128. Compare Alexandrowicz C, “The Quasi Judicial Function in Recognition of States and Governments” (1952) 42 AJIL 631. Statehood may thus be said to be opposable as regards the recognising State. Compare Charpentier, *La reconnaissance internationale et l’évolution du droit des gens* (1956), pp 217–25.

recognise emergent entities as and when the traditional criteria are fulfilled,⁷⁴ difficulties may still arise in cases such as that of Macedonia where an entity fails to gain recognition despite apparently displaying the traditional factual criteria for statehood.⁷⁵

That the Republic of Macedonia was not recognised as a State in the period between January 1992 (when the Arbitration Commission declared it to have fulfilled the necessary recognition criteria) and April 1993 (when the Republic was finally admitted to the UN as a Member State) therefore raises questions as to the legitimacy of its claim to statehood, the timing of its ultimate acquisition, and its status in the intervening period.⁷⁶ According to the declaratory theory (which is broadly the better approach),⁷⁷ although non-recognition clearly has a considerable impact on the political and economic viability of the emergent entity,⁷⁸ it is not conclusive in itself as to the question of statehood.⁷⁹ Thus, in the case of Macedonia, it is theoretically possible to reconcile the fact of non-recognition with the Commission's findings as to the conditions for statehood.⁸⁰

74 Commenting on British practice, Warbrick notes:

Unless there were pressing reasons, usually of a legal kind, for not regarding an effective and independent territorial group as a State, the British government would regard it as a State and recognize it as a State.

Warbrick C, "Recognition of States" (1992) 41 *International and Comparative Law Quarterly* 473.

75 Problems also arise in cases of "premature" recognition. Under the declaratory approach, premature recognition of a seceding entity constitutes an unlawful intervention in the sovereignty of the parent State. This illegality is not recognised under the constitutive approach to recognition.

76 If the constitutive approach to recognition were adopted, the Republic would only qualify as a State once it had received general recognition from the international community. That approach is difficult to square with general State practice as regards Yugoslavia and would leave open the status of the territory after the dissolution of the SFRY and before the Republic's recognition.

77 See EC Arbitration Commission, Opinion No 8, n 40 above, p 1523. The principle problems with the constitutive theory of recognition are:

- (i) it may lead to "degrees of legal personality" according to how many States have recognised an entity;
- (ii) unrecognised entities will not be burdened by any duties under international law;
- (iii) it does not conceive of the possibility of illegal recognition.

See generally, Brierly, n 67 above, pp 138–40; Crawford, n 66 above, pp 18–20.

78 Shaw notes:

Recognition is constitutive in a political sense, for it marks the new entity out as a state within the international community and is evidence of acceptance of its new political status by the society of nations. This does not imply that the act of recognition is legally constitutive, because rights and duties do not arise as a result of the recognition.

Shaw M, *International Law*, 3rd ed (1991), p 244.

79 This follows from the fact that recognition merely has evidential value in the determination of statehood. See Brierly, n 67 above, p 140. That an entity which remains completely unrecognised may theoretically acquire statehood, however, is somewhat artificial, see Dugard, n 59 above, p 125.

80 In practice, however, it is clear that the Republic suffered considerably as a result of non-recognition. See eg comments of Mazowiecki, UN Doc E/CN.4/1994/110, p 26, para 160.

This follows, in part at least, from the discretionary nature of the act of recognition,⁸¹ and from the fact that no clear distinction is made between recognition for the purpose of acknowledging the existence of a new legal person, and recognition for the purpose of assuming diplomatic relations with that person.

Three possible explanations may be put forward for the apparent policy of non-recognition of Macedonia. First, the emergence of the Republic was associated with the violation of a rule of international law (and *a fortiori* a rule having the status of *jus cogens*) which served to vitiate its claim to statehood and prohibited recognition.⁸² Secondly, despite the conclusions of the Arbitration Commission, it was considered that the Republic did not fulfil the necessary requirements of statehood. Recognition in this circumstance would be premature and an unlawful interference in the sovereignty of the SFRY.⁸³ Thirdly, recognition was withheld merely as a matter of policy and not as an attempt to characterise the legal situation. This final explanation, while clearly possessing superficial appeal should be treated with some caution. Although it is inevitable that recognition decisions will have a political dimension, they still have a significant legal function and are invariably based upon legal principles, even if the operative principle is hitherto only of an inchoate nature.⁸⁴

A. Statehood and illegality

It is a fundamental principle of international law that acts which are contrary to international law cannot become the source of legal rights for the wrongdoer: *ex injuria ius non oritur*.⁸⁵ Moreover, in some circumstances States are under a duty to bring that illegal situation to an end.⁸⁶ Thus, if an entity were to be

81 The US Government has taken the position that:

International law does not require a state to recognize another entity as a state, it is a matter of judgement of each state whether an entity merits recognition as a state.

(1976) *Digest of United States Practice in International Law*, p 19. By contrast, both Lauterpacht and Chen identified an international legal obligation on the part of States to recognise entities as States when they fulfilled the necessary criteria. Lauterpacht, n 66 above, p 61; Chen, n 66 above, pp 50–54.

82 The cases of N Cyprus (1974–) and Manchukuo (1932–1945) support the view that States will not recognise entities created following the illegal use of force. See Lauterpacht, n 66 above, p 420.

83 Crawford, n 66 above, pp 255–66; Lauterpacht, above n 66, p 403; *Oppenheim's*, n 66 above, p 143.

84 *Oppenheim's*, n 66 above, pp 130, 132.

85 *Ibid*, p 183. This principle has been recognised by the ICJ, eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, ICJ Rep 1971, pp 46–47.

86 *Ibid*, p 54. This duty is ultimately an imperfect one—recognition of an illegal situation is not necessarily forbidden by international law as States may well choose to waive the interest they have in the observance of the rule in question in order to give recognition to the factual existence of the entity. Indeed over time, such a choice may become inevitable: *ex factus jus oritur*. That a State is ultimately recognised, however, does not serve to remedy the earlier illegality, but rather affirms in spite of it, the fact of effective government. Lauterpacht, n 66 above, p 412; Crawford, n 66 above, pp 121–23.

created in violation of the principle of the non-use of force,⁸⁷ or potentially the principle of self-determination,⁸⁸ it is arguable that States are under a general duty not to accord that entity diplomatic recognition.⁸⁹ Such situations are extraordinary, however, and may be said to be confined to situations which involve third States, rather than situations which are *prima facie* internal.⁹⁰ In the case of Macedonia two points may be made. First, unless the Republic is deemed to enjoy a right to self-determination, its claim to independence is primarily governed by the terms of national, not international law. International law, in such circumstances, is principally neutral on the matter. It follows that the internal legitimacy or otherwise of Macedonia's secession is not a matter that has any direct bearing on its claim to statehood. Secondly, even if Macedonia was deemed to be a unit of self-determination, there is no evidence that its claim to independence was in violation of that principle. Rather, it had been preceded by a referendum in which the vast majority had supported its move towards independence.⁹¹

87 For example, in the case of the Turkish Republic of Northern Cyprus, the Security Council declared the proclamation of independence as "invalid". SC Res 541 (19 November 1983). The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, GA Res 2625 (XXV), states in Principle 1 that no territorial acquisition resulting from the threat or use of force shall be recognised as legal.

88 A duty of non-recognition arose following the declaration of independence of Southern Rhodesia in 1965, when the Security Council adopted a resolution calling on all States "not to recognize this illegal racist minority regime". SC Res 216 (12 November 1965). The Security Council later repeated this demand and went on to declare the declaration of independence as having no legal validity, SC Res 217 (22 November 1965). See generally, Fawcett J, "Security Council Resolutions on Rhodesia" (1965–66) 41 *British Year Book of International Law* 102. In 1970, the Security Council called upon Member States to "take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia shall not be accorded any recognition", SC Res 277 (18 March 1970). The Security Council also declared the independence of Transkei to be "invalid" and called upon governments to "deny any form of recognition to the so-called independent Transkei", GA Res 31/6A (1976), endorsed in SC Res 402 (1976). These cases have been interpreted in two main ways: either as an affirmation that self-determination is an additional criterion for statehood, Crawford, n 66 above, pp 81, 102–06; or as evidence of self-determination as a peremptory norm serving to vitiate an otherwise established case of statehood, Dugard, n 59 above, p 147. For a moderate view emphasising the constitutive role of collective recognition, see Greig DW, "Oppenheim Revisited: An Australian Perspective" (1993) 14 *Aust YBIL* 227 at 231–32.

89 In analysing early State practice, O'Connell was sceptical about the existence of a "custom of non-recognition", O'Connell, n 66 above, p 147. Oppenheim notes, however, that a gradual change in attitude may be discerned, *Oppenheim's*, n 66 above, p 185.

90 The application of the principle of self-determination will have the effect of internationalising a situation that might otherwise have been internal. See Higgins R, *The Development of International Law Through the Political Organs of the United Nations* (1967), pp 90–106.

91 Text accompanying n 29 above.

B. The requirements of statehood

Even prior to its declaration of independence, it is clear that the Republic of Macedonia possessed some of the principal attributes of statehood. Under the Constitution of the SFRY the territory of each Republic had effectively been defined and guaranteed, and could not be altered save with the consent of all the parties concerned.⁹² Similarly, each Republic was inhabited by stable populations whose distinct identity was also constitutionally recognised.⁹³ The real question that had to be faced by the international community was whether the governments of the various Republics had established effective and independent control over their territory.

By March 1992 it was reasonably clear that the Government of the Republic of Macedonia had undisputed control over its territory. Its participation in the organs of the Federation had been terminated, and the peaceful withdrawal of JNA forces from Macedonian territory had been carried out peaceably and by mutual agreement. Equally, although there was a continuing tension between the Macedonian Government and the Albanian minority,⁹⁴ there was no outright conflict. Even if the Republic did not exercise effective control over the territory by the time of its declaration of independence in September 1991, as the Arbitration Commission had suggested,⁹⁵ there is much to suggest that it did so by March 1992 when the forces of the JNA had ultimately left the Republic.⁹⁶

It is clear, nevertheless, that the traditional requirements of statehood were not the only considerations taken into account for the purposes of according recognition to the Republics of the former SFRY. In December 1991 the Council of the EC at an Extraordinary EPC Ministerial Meeting in Brussels, laid down certain "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union" together with an associated "Declaration on Yugoslavia".⁹⁷ According to the guidelines, the EC and its Member States declared their readiness to recognise, "subject to the normal standards of international practice", those States which "have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations".⁹⁸ Specifically, the guidelines asked the various Republics to

92 Constitution of the SFRY, 1974, Articles 5(2) and (4).

93 Note 19 above.

94 Albanians demanded equal constitutional status and equal status for the Albanian language and religion, Poulton, n 10 above, pp 24–26.

95 The Arbitration Commission finally decided that the date of Macedonia's succession (and therefore statehood) was 17 November 1991. Opinion No 11, n 40 above, p 1589.

96 Cf Finland 1918, *Aaland Islands* case, (1920) Sp Supp No 3, *League of Nations Official Journal*, 3.

97 Keesing's, n 2 above, (1991) Vol 37, p 38685.

98 This did not mean, however, that individual Member States would relinquish their right to recognise States independently, see Warbrick C, "Recognition of States: Part 2" (1993) 42 *International and Comparative Law Quarterly* 433. It did, nevertheless, amount to a considerable revision of traditional practice as far as the United Kingdom was concerned. The traditional United Kingdom position was as follows:

commit themselves *inter alia*, to respect for the human rights commitments laid down in the UN Charter and the Helsinki Final Act, to guarantee the rights of minorities, to respect the inviolability of all frontiers, to accept commitments to disarmament and nuclear non-proliferation, and to commit themselves to settle by agreement, or arbitration, all questions concerning State succession and regional disputes.⁹⁹ In addition, in the Declaration on Yugoslavia, the EC requested the Yugoslav Republics to indicate their continued support for the Conference on Yugoslavia and to commit themselves to "the adoption of constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State, including the use of a denomination which implies territorial claims".¹⁰⁰

Whether or not the EC and its Member States conceived of these guidelines as new and essential conditions for the acquisition of statehood is not entirely clear, there being no explicit statement as to their function or status. As an initial point, it is apparent that some of the criteria relating specifically to the Yugoslav situation (such as continued support for the Conference on Yugoslavia), were little more than political conditions aimed at the achievement of localised and specific ends from which no general principle may be extrapolated.¹⁰¹ More serious consideration needs to be given to the broader aspects of the guidelines which applied both to the situation in the USSR and Yugoslavia, and in particular the conditions relating to human rights, minority guarantees, and non-proliferation. With respect to these conditions the Arbitration Commission was asked to offer an opinion on the extent to which States conformed to the principles, and in doing so, found deficiencies both in the case of Bosnia-Herzegovina (which had failed to hold a referendum),¹⁰² and in that of Croatia (which had not provided sufficient constitutional guarantees for minorities).¹⁰³ The composition and designation of the Commission as an arbitral tribunal, may on the face of it suggest that its determinations were intended to have some legal import. However, subsequent State practice is difficult to reconcile with the idea that the guidelines actually had a bearing on the legal issue of statehood. First,

a state...should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory and independence in their external relations. There are, however, exceptional cases when other factors, including relevant United Nations resolutions may have to be taken into account.

House of Commons, *Debates* (1984) Vol 55, col 226, 29 February 1984.

99 (1993) 4 *European Journal of International Law* 72-73.

100 *Ibid.*

101 Warbrick notes:

The advantages to the European Community are that it enables the Community to exercise some influence on the policies of these new States and that it may reduce some of the problems of State succession that will undoubtedly arise with respect to these States.

Warbrick, n 74 above, p 478.

102 Arbitration Commission, Opinion No 4, n 40 above, p 1503.

103 Arbitration Commission, Opinion No 5, n 40 above, p 1505. It was later found that these deficiencies had largely been remedied, *ibid*, pp 1505-07.

the EC Member States themselves appeared to consider the guidelines (or at least their interpretation by the Arbitration Commission) as directory, but not mandatory. Whilst recognition of Bosnia-Herzegovina was held off until a referendum had been held, Croatia was recognised by all Member States despite the deficiencies in its constitutional guarantees identified by the Arbitration Commission. Secondly, it is apparent that other countries, and most notably the United States and Canada, applied the human rights and non-proliferation conditions only in the context of establishing diplomatic relations, but not as a condition for statehood *per se*.¹⁰⁴ Thirdly, it is difficult to uphold any legal significance for the guidelines when the Federal Republic of Yugoslavia (FRY), which undoubtedly enjoys *de facto* statehood, has not formally undertaken to fulfil the necessary criteria or even to request recognition.¹⁰⁵ At best, therefore, the guidelines may be described as an act of policy on the part of the EC Member States aimed at securing the general conditions for a lasting and pacific territorial settlement in the region.¹⁰⁶ It follows that the guarantees given by the States claiming recognition are essentially unilateral acts falling short of an international agreement and, if they were to be subsequently breached, this would not give rise to the withdrawal of recognition.

As far as the Republic of Macedonia was concerned, the human rights conditions contained in the guidelines did not pose an insuperable problem. The Arbitration Commission, in finding that the Republic had fulfilled the necessary conditions, noted that the Republic had publicly accepted the provisions in the draft Convention on human rights and had adopted a number of special provisions on the rights of "nationalities" in its new Constitution.¹⁰⁷ Although there was certainly some continuing concern as to the position of the Albanian minority in Greece,¹⁰⁸ the main issue at stake for the EC Member States was the

104 Rich R, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union" (1993) 4 *European Journal of International Law* 36 at 56. Weller notes that this was also supposed to be the position of the EC Member States, n 14 above, p 588.

105 It is notable in that regard that the UN has formally requested the FRY to apply for membership of the United Nations, SC Res 777 (19 September 1992).

106 See Warbrick, n 101 above, p 441.

107 The main provisions are: Article 48 (protection of ethnic, cultural, linguistic and religious identity of "nationalities"); Article 19 (right of religious communities to establish schools and other social institutions); Article 7 (establishes the official nature of language and script of a particular nationality in municipalities where they form a substantial number of inhabitants); Article 9 (non-discrimination); Article 78 (establishment of Council for Inter-Ethnic Relations).

108 The Australian Minister for Foreign Affairs commented on 3 March 1992 that "Australia will not proceed to recognition until...the international community's concern about the protection of minorities...[was] fully satisfied": Senate, *Debates* (1992) Vol 151, p 537, cited in (1993) 14 *Aust YBIL* 415. Albanians objected to the clause in the preamble to the Constitution which states that the Republic is the "national state of the Macedonian people" and to the references to the Macedonian Orthodox Church (Article 19). They wanted instead a Constitution that did not distinguish on ethnic lines. Although some agreement on this question was reached in 1993, no amendment to the Constitution was made, see generally, Poulton, n 10 above, pp 24-26. A referendum on autonomy for Albanians in Macedonia was

Republic's apparent claim over Greek territory as evidenced in Article 49 of the new Macedonian Constitution, which provided that the Republic "cares for the status and rights of those persons belonging to the Macedonian people in neighbouring countries...assists their cultural development and promotes links with them".¹⁰⁹ As far as Greece was concerned, this provision alluded to the so-called "Macedonian minority" in Northern Greece and therefore posed a threat to its sovereignty and territorial integrity. In response to the specific EC requirement,¹¹⁰ the Republic specifically amended its Constitution,¹¹¹ made "unambiguous statements binding in international law" renouncing all territorial claims of any kind, and gave a formal undertaking to refrain from hostile propaganda against any other State.¹¹² As far as the Arbitration Commission was concerned, although the Republic did not strike out the terms of Article 49 itself, it had done enough to fulfil all the requisite conditions imposed by the guidelines. It noted in conclusion that "the use of the name 'Macedonia' cannot therefore imply any territorial claim against another State".¹¹³

Even if the dispute remained unresolved as far as the EC Member States were concerned,¹¹⁴ it is again difficult to consider the matter as being relevant to the question of statehood *stricto sensu*. Ultimately what was being sought of the Republic as a condition for recognition was a commitment to the observance of international law concerning respect for the territorial sovereignty of Greece. There is a certain amount of practice in which States have required, as a condition for recognition of governments, that a new government indicate its willingness to comply with its international obligations,¹¹⁵ but such practice

held in January 1992 in which 90 per cent of ethnic Albanians participated and more than 99 per cent voted in favour of autonomy: *ibid*, p 24.

109 Constitution of the Republic of Macedonia, in Blaustein A and Flanz G (eds), *Constitutions of the Countries of the World* (1993), p 17.

110 Text accompanying nn 99–100 above.

111 Amendment I:

1. The Republic of Macedonia has no territorial claims against neighbouring states.
2. The borders of the Republic of Macedonia could be changed only in accordance with the Constitution, and based on the principle of voluntariness and generally accepted international norms.
3. Item 1 of this Amendment is added to Article 3 and Item 2 replaces paragraph 3 of Article 3 of the Constitution of the Republic of Macedonia.

Amendment II:

1. The Republic shall not interfere in the sovereign rights of other states and their internal affairs.
2. This amendment is added to paragraph 1 of Article 49 of the Constitution of the Republic of Macedonia.

Flanz, n 20 above, p xviii.

112 EC Arbitration Commission, Opinion No 6, n 40 above, p 1511.

113 *Ibid*.

114 Notes 43–46 above. It is clear that a number of other States outside the EC took a similar line on the issue, eg: Australia, see Statement of Gareth Evans (Minister for Foreign Affairs) cited in (1993) 14 *Aust YBIL* 415.

115 For example, the United States, see Whiteman MM, *Digest of International Law* (1963), pp 72–73 and 78–81. Similarly, Article 4 of the UN Charter makes willingness to carry out the obligations of the Charter a condition for the admission

cannot really be seen as establishing a rule for the acquisition of statehood. While there is no reason why a commitment to the fulfilment of international obligations¹¹⁶ should not be imposed for the purposes of establishing diplomatic relations, it is not a condition for recognition properly speaking, as non-fulfilment *per se* will not justify the withdrawal of recognition.¹¹⁷ Just as the existence of a claim by one State over the territory of another will not serve to deprive the former of its statehood,¹¹⁸ so such a claim cannot be considered a condition for the acquisition of statehood.

The manner in which the EC Member States approached the question of recognition with respect to the Republics of the former Yugoslavia reflects a noticeable shift in practice. It goes without saying that the coordination of recognition policies by a group of States, even if it falls somewhat short of "collective recognition", is quite original.¹¹⁹ Similarly, for some States, such as the United Kingdom, employment of the common guidelines (even if they did not technically oblige the United Kingdom as regards its recognition policy) goes far beyond its traditional restricted concern for "common international doctrine".¹²⁰ The implications for recognition practice, however, are not entirely positive. It is apparent that the main emphasis in the recognition practice was not the appreciation of a factual situation in the traditional sense, but the promotion of wider political objectives through the modification of the constitutional orders of the emergent entities. Although it might be desirable for new States to conduct themselves in a manner consistent with the maintenance of peace and security (whether that be internal or external), it is quite another for such conditions to be the primary or sole considerations in recognition policy. Such a development tends to upset the inevitably delicate balance that exists between the legal function of recognition as a means of identifying those entities which have gained international personality and its political function as a precursor to the institution of diplomatic relations.

The continuing confusion over the function and significance of diplomatic recognition is nowhere more evident than in the contrasting positions of the United Kingdom and Australia over the question of Macedonia's membership in the United Nations. Article 4 of the UN Charter requires that for admission to

of a State to membership in the United Nations. That would appear to be a condition additional to Statehood, see, Higgins, n 90 above, pp 11–57.

116 This may be distinguished from the *capacity* to fulfil international obligations which has occasionally been required in State practice, see eg US Dept of State, (1976) *Digest of US Practice in International Law* pp 19–20.

117 It might be added that it is arguably illogical to expect an entity to make binding commitments under international law before it has actually gained international personality. See Brownlie, n 66 above, pp 78.

118 Cf Articles 2 and 3 of the Constitution of Ireland, 1937, which embody a claim over the territory of Northern Ireland. See Casey J, *Constitutional Law in Ireland*, 2nd ed (1992), pp 30–34.

119 Although there was a collective dimension to the recognition of the States in the former Yugoslavia, recognition remained an independent act for each of the States concerned.

120 See Statement by the Foreign Secretary (Lord Carrington), House of Lords, *Hansard*, Vol 408, cols 1121–22, 28 April 1980.

the United Nations the new member should be a “State”, understood to be as defined by general rules of international law.¹²¹ Whilst the admission of Macedonia did not necessarily represent an act of general recognition,¹²² it can legitimately be seen to be an act of implied recognition by those individual Member States which supported its membership,¹²³ and *prima facie* evidence of statehood.¹²⁴ This was certainly the understanding of the United Kingdom which declared that its act of sponsoring, and voting for, the admission of FYROM to membership of the United Nations was an act of recognition.¹²⁵ Australia, by contrast, took the view that its support for the admission of the FYROM to membership of the United Nations “did not in itself amount to recognition, which in Australian practice requires a separate and deliberate act and cannot be inferred from any other action taken by the Government”.¹²⁶ The obvious explanation for this divergence in practice is that Australia considered the primary consideration to be not so much the issue of statehood, which by all accounts had effectively been resolved, but rather the question whether or not to establish diplomatic relations. What is unfortunate from a legal perspective, is that Australia was unable to give credence to its apparent act of implied recognition, whilst reserving its position on the diplomatic front. A more consistent, albeit unsatisfactory, position might have been for it to refuse to support Macedonia’s admission to the United Nations whilst at the same time refusing to enter into diplomatic relations. As it is, Australia appears, like many of the EC Member States before it, to have discarded essential questions of legal principle in its approach to recognition in the case of Macedonia.

In light of practice with respect to the emergent States of the former Yugoslavia, and in particular Macedonia, one may wonder whether the diplomatic recognition of States may eventually suffer the same fate as that of recognition of governments. The tendency to downplay or eliminate recognition of new governments, which originally has its roots in the Estrada Doctrine employed by Mexico in the 1930s¹²⁷ and has more recently been adopted by a

121 Note 59 above.

122 *Oppenheim’s*, n 66 above, p 177. For the view that admission to the UN does constitute a form of general recognition see Dugard, n 59 above.

123 Compare *Cameroons* case (Preliminary Objections), ICJ Rep 1963, pp 119–20 Fitzmaurice Judge. It is clear that the non-recognition of an entity by certain States is entirely consistent with its membership of the UN. Thus Israel was a member of the UN alongside several Arab States which did not formally recognise Israel as a State.

124 Brownlie, n 66 above, p 97.

125 See Statement of Douglas Hogg, House of Commons, *Debates*, Vol 223, WA, col 241, 22 April 1993. For similar Canadian practice with respect to Israel and the Republic of Korea see Dai P, “Recognition of States and Governments under International Law with Special Reference to Canadian Postwar Practice and the Legal Status of Taiwan (Formosa)” (1965) 3 *Canadian Yearbook of International Law* 289 at 294.

126 Minister representing the Minister for Foreign Affairs, House of Representatives, *Debates*, Vol 191 (1993), pp 3374–75, cited in (1994) 15 *Aust YBIL* 416–17.

127 See (1931) 25 *American Journal of International Law*, Supp No 203.

large number of States including the United Kingdom¹²⁸ and Australia,¹²⁹ was prompted in part at least, by the perception that the conflation of recognition and political approval was debilitating and damaging.¹³⁰ In particular, it was considered that the necessities of legal discourse between States needed to be insulated from the broader political concerns that affected the approbation or otherwise of a government. Although for most States the policy of recognition of States (as opposed to governments) has remained intact, the growing tendency to exploit recognition for political purposes may eventually deprive it of its evidential value¹³¹ and undermine its utility as a tool in international relations.

III. Self-Determination and Secession

The dramatic events in Yugoslavia and the former Soviet Union have led to a wide-scale reconsideration of the applicability and force of self-determination in recent years.¹³² In particular, it has led some to the conclusion that secessionary self-determination (as one form of external self-determination) may be operative outside the context of decolonisation,¹³³ to which it was formerly confined.¹³⁴

128 Note 120 above. See Warbrick C, "The New British Policy on Recognition of Governments" (1981) 30 *International and Comparative Law Quarterly* 568.

129 See Charlesworth H, "The New Australian Recognition Policy in Comparative Perspective" (1991) 18 *Melbourne University Law Review* 1; Greig AM, "The Effects in Municipal Law of Australia's New Recognition Policy" (1991) 11 *Aust YBIL* 33.

130 As far as the United Kingdom was concerned, it was noted that the practice of recognition of governments:

has sometimes been misunderstood, and, despite explanations to the contrary, our "recognition" interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power, it has not sufficed to say that an announcement of "recognition" is simply a neutral formality.

Note 120 above. On the background to this change in policy generally see Peterson M, "Recognition of Governments Should not be Abolished" (1983) 77 *American Journal of International Law* 31.

131 One might recall the words of CJ Taft in the *Tinoco* arbitration (1923) RIAA 369: when recognition vel non of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its legitimacy or irregularity of origin, their non-recognition loses something of evidential weight.

132 For some recent articles on this question, see Franck T, "Fairness to 'Peoples' and their Right to Self-Determination" (1993) *Collected Courses of the Hague Academy of International Law* 125; Koskenniemi M, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 *International and Comparative Law Quarterly* 241; McCorquodale R, "Self-Determination: A Human Rights Approach" (1994) 43 *International and Comparative Law Quarterly* 857.

133 See Türk D, "Recognition of States: A Comment" (1993) 4 *European Journal of International Law* 66 at 71; Weller, n 14 above, p 606; Iglar R, "The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede" (1992) 15 *Boston College International and Comparative Law Review* 213. The dissolution of the

It is clear that during the crises in both States the various declarations of independence were frequently accompanied by claims to self-determination,¹³⁵ but such subjective characterisations cannot be accepted at face value particularly in so far as State practice is inconsistent. Even if Croatia and Slovenia could be said to have exercised their right to self-determination, such a conclusion is far less clear in the case of Macedonia and indeed, in that of Bosnia-Herzegovina.

Although the existence of a legal right to self-determination is now generally accepted,¹³⁶ considerable controversy remains as to its subjects, content, and method of implementation. By far the most controversial dimension of the right relates to its "external dimension",¹³⁷ and in particular, the "right to secede".¹³⁸

former USSR has also been treated as a case of self-determination, see Gray C, "Self-Determination and the Breakup of the Soviet Union" (1992) *European Law Review* 465.

134 Judge Dillard, eg, in analysing the *Namibia* case concluded that self-determination as a norm of international law was "applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations" *Western Sahara Case*, ICJ Rep 1975, p 12 at 121. Principle IV of GA Res 1541 (XV) defines a non-self-governing territory as "a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it". Crawford identifies the following as units to which the principle of self-determination applies:

- (a) trust and mandated territories, and non-self-governing territories under Chapter XI of the Charter;
- (b) States, excluding those parts of States which are themselves self-determination units;
- (c) (possibly) other territories forming distinct political-geographical areas, whose inhabitants do not share in government with the result that they become non-self-governing;
- (d) all other territories or situations to which self-determination is applied by the parties as an appropriate solution or criterion.

Crawford, n 66 above, p 101.

135 For Macedonia, see text accompanying n 25 above.

136 The "legal" basis of the right to self-determination is founded in a range of legal texts including: UN Charter, Article 1, para 1; International Covenant on Civil and Political Rights, Article 1; International Covenant on Economic, Social and Cultural Rights, Article 1; Pt VIII, Helsinki Final Act 1975; African Charter on Human and Peoples' Rights 1981, Article 20; GA Res 1514, 15 UN GAOR, Supp (No 16), p 66, UN Doc A/4684 (1960); GA Res 2625, 25 UN GAOR, Supp (No 28), p 121, UN Doc A/8028 (1970). The ICJ has also recognised the right to self-determination, see, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Namibia Case)* ICJ Rep 1971, p 16 at 31, and *Western Sahara Case*, ICJ Rep 1975, p 12 at 31. See generally, Cristescu A, *The Right of Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (1981).

137 On the distinction between "internal" and "external" self-determination see Cassese A, "Political Self-Determination—Old Concepts and New Developments" in Cassese A (ed), *UN Law/Fundamental Rights* (1979). Such a distinction is also made in the Helsinki Final Act, Principle VIII.

138 GA Res 1541 identifies three forms of "external" self-determination: independence, free association, or integration with an existing State. GA Res 1541 (XV) 15 UN GAOR, Supp (No 16), p 29 (1960). See generally, Buchheit L,

In normal circumstances, an attempt by a territorial unit to secede from an independent State will be exclusively a matter within the domestic jurisdiction of the parent State. International law, governing as it does the relations between States, has no role to play in such a situation. If, however, the principle of self-determination is applicable, the matter is effectively "internationalised" so as to be governed by the terms of international law.¹³⁹ In those circumstances a self-determination unit has a right to independence as a separate State,¹⁴⁰ and the parent State is under a duty not to impede the exercise of that right.¹⁴¹ Accordingly the use of force against a self-determination unit will be contrary to Article 2(4) of the UN Charter,¹⁴² and third States will not be violating the territorial integrity of the parent State if they recognise the secessionist unit as a State before it has fully established effective territorial control.¹⁴³ Having said that, even if self-determination is not applicable in a particular context, secession is not necessarily prohibited by international law.¹⁴⁴ On the contrary, international law is principally neutral on the subject, neither condoning, nor condemning acts of secession.¹⁴⁵ The role of international law is merely to

Secession: The Legitimacy of Self-Determination (1978). Some authors distinguish between "decolonization" and "secession", see eg, White R, "Self-Determination: Time for a Re-assessment?" (1981) 28 *Netherlands International Law Review* 147. Such a distinction assumes, however, that the applicability or otherwise of a right to external self-determination has already been conclusively determined.

139 Higgins, n 90 above, pp 90–106.

140 GA Res 2625 (XXV) refers, for example, to the "separate and distinct" status of non-self-governing territories under the UN Charter.

141 This duty is not only one of non-interference, but also one of assistance, Whelan A, "Wilsonian Self-Determination and the Versailles Settlement" (1994) 43 *International and Comparative Law Quarterly* 99 at 113.

142 GA Res 2625 (XXV) states that:

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

State practice is fairly consistent on this point, see Crawford, n 66 above, pp 111–12. Of a more controversial nature is the question of whether the self-determination unit is entitled to military assistance from third States in order to aid its secession, Wilson H, *International Law and the Use of Force by National Liberation Movements* (1988).

143 In such cases a lower level of effectiveness will be required as in the case of eg Guinea-Bissau see Shaw M, *Title to Territory in Africa* (1986), pp 151–58.

144 Article 2(4) of the UN Charter, eg, forbids the use of force in "international relations" or "against the territorial integrity and political independence of any State". It does not, in that sense, in any way prohibit the use of force aimed at the secession of an entity from a parent State. See Crawford, n 66 above, pp 266–68; Lauterpacht, n 66 above, p 8. The Security Council's references to the "illegality" of secessions in the context of Katanga (SC Res 169 (1961)), and S Rhodesia (SC Res 216 (12 November 1965)) were directed towards its municipal illegality (as in the case of Katanga) or the violation of some other norm of international law (S Rhodesia).

145 Thus the International Law Commission deliberately limited the principle of non-recognition of territorial acquisition by illegal force to acquisition "by another State", thereby excluding cases of forcible secession, *Yearbook of the International Law Commission 1949*, pp 111–13.

acknowledge the fact of secession once the constituent elements of statehood are present (and primarily according to the principle of effectiveness). In such cases, however, there is a presumption in favour of the territorial integrity of the parent State such that a high level of effectiveness will need to be demonstrated.¹⁴⁶ For example, in the cases of Katanga and Biafra, even though the secessionist units exercised significant control over the disputed territory, the majority of States refused to accord them recognition in order to preserve the territorial integrity of the respective parent State (the Congo and Nigeria).¹⁴⁷ Recognition will thus only be legitimate once it is clear that the parent State is unlikely to be able to re-assert control.¹⁴⁸

At first glance, there is some evidence to suggest that the principle of self-determination was applicable in the dissolution of the SFRY. First, throughout the early stages of the conflict, the Republics themselves, together with several other States such as Germany and Austria, characterised the situation as one in which self-determination was applicable.¹⁴⁹ Secondly, as a condition for the diplomatic recognition of statehood, the EC Member States required the various Republics to consult the will of the people as to their future status.¹⁵⁰ Thirdly, even while purporting to support the territorial integrity of Yugoslavia, the international community emphasised the inviolability of the internal borders between the Republics,¹⁵¹ thereby suggesting that the Republics possessed some independent status under international law. Finally, it is clear that the international community was willing to recognise Croatia and Bosnia-Herzegovina at times when neither had clear control over the entirety of their

146 Shaw, n 143 above, pp 214–16.

147 Biafra was recognised by only Tanzania, Gabon, the Ivory Coast and Zambia. Even then, recognition appears to have been accorded for “humanitarian” reasons, see Shaw, *ibid*, pp 209–10. Similarly, the General Assembly condemned the attempted secession of Mayotte as a violation of the sovereignty and territorial integrity of the Comores. GA Res 31/4 (21 October 1971); GA Res 45/11 (11 November 1990).

148 Lauterpacht, n 66 above, p 45.

149 Austria, UN Doc S/PV.3009 (1991), p 25. See *also*, Statement of Kohl, Keesing’s, n 2 above, (1991) Vol 37, No 7–8, p 38374.

150 The requirement of a referendum was enforced in the case of Bosnia-Herzegovina which was not recognised by the EC Member States until 6 April 1992.

151 See *eg*, Austria, n 149 above, at 25; Ecuador, *ibid*, at 27. This position was reflected in the Preamble to Resolution 713, 25 September 1991, which emphasised that no territorial gains or changes made within Yugoslavia by force would be acceptable. Weller concludes that:

unanimity was achieved regarding the principle of non-use of force and the intangibility of borders, even within a context that the majority of delegations still understood to be internal. This result in itself is significant, indicating the existence of an obligation concerning the nonuse of force in excess of Article 2(4), which relates to States only.

Weller, n 14 above, p 580. It is important to note, however, that the jurisdiction of the Security Council was based upon the fact that the conflict, albeit internal, represented a threat to international peace and security, *ibid*. One major consideration appears to have been the scale of the refugee flow, which by October 1991 was 300,000, see Report of Secretary General Pursuant to Paragraph 3 of SC Res 713 (1991), S/23169 (25 October 1991), paras 15–18 and Annex IV.

territory.¹⁵² As suggested above, premature recognition of this nature may be justified in the case of self-determination units where the territorial sovereignty of the parent State is limited by the unit's right to independence.

If the emergence of Croatia, Bosnia-Herzegovina and Slovenia are to be seen as cases of secessionary self-determination, it is seemingly necessary to distinguish the situation of the Republic of Macedonia. One possible explanation may be provided by the substance of the Greek complaint, namely, that the Macedonian nation lacked the necessary elements of historical or ethnic cohesiveness that would warrant it possessing a right to national self-determination.¹⁵³ If indeed this was the case, its subsequent act of secession would not emanate as of right, and therefore a delay in the recognition of the Republic would be entirely warranted. A closer analysis of the process by which the Republics attained statehood, however, suggests that the dominant consideration was not that of secession, but rather one of dismemberment, and that far from being determinative, self-determination was downplayed or marginalised as an operative principle.

A. Secession, devolution, and dismemberment

Traditionally, it is considered that States are formed either by an act of secession or one of devolution,¹⁵⁴ distinguished primarily by reference to the presence or absence of the consent of the parent State.¹⁵⁵ In a case of devolution,¹⁵⁶ unlike that of secession, consent of the parent State serves to confer territorial sovereignty upon the new entity and provides it with a *prima facie* right to

152 The EC Member States recognised Croatia on 15 January 1992, Keesing's, n 2 above, (1992) Vol 38, No 1 p 38703. At that time, the Serbian Republic of Krajina (formerly the two Autonomous Regions of Krajina and Slavonia, Baranja and Western Srem), which amounted to approximately one-third of Croatian territory, was effectively entirely independent. It was recognised by Serbia on 20 December 1991, Keesing's, n 2 above, (1991) Vol 37, p 38685. Similarly Bosnia-Herzegovina was recognised on 6 April 1992, despite the existence of the self-proclaimed Republic of the Serbian People of Bosnia-Herzegovina, Keesings's, (1992) Vol 38, pp 38704, 38833.

153 See nn 8-9 above.

154 These categories are not terms of art with clearly defined legal consequences and may not always be clearly differentiated. Nor are they intended to depict all cases in which questions of succession may arise outside the creation of a new State, eg the absorption of one State by another (accession of the GDR to the FRG in 1990).

155 Crawford, n 66 above, pp 215, 247. This distinction, as Crawford himself admits, is "formal and may even be arbitrary", *ibid*. This is particularly evident in so far as recognition by the parent State after the act of asserting independence may also be seen to be a form of consent.

156 A distinction could be made between "partial devolution" and "universal" devolution. The latter involves the voluntary unification of two States or the separation of a whole State (as opposed to merely parts of a State) to form a new international person, eg the merger of Egypt and Syria to form the United Arab Republic in 1958; or the merger of the People's Democratic Republic of Yemen and the Yemen Arab Republic to form the Republic of Yemen in 1990; or the separation of Czechoslovakia into the Czech and Slovak Republics on 1 January 1993.

govern its territory as a State.¹⁵⁷ In such a case the principle of effectiveness may be applied with less rigour. Thus, in 1960, the Congo was admitted to membership of the UN despite the fact that its government was struggling to prevent the Katangese secession and effectively controlled only the capital.¹⁵⁸

Although the Constitution of the former Yugoslavia did expressly refer to a right to secession,¹⁵⁹ it is doubtful that it served to provide internal legitimacy for the acts of the various Republics. Strictly speaking the constitutional right to self-determination and secession belonged to the respective "nations" rather than to the Republics themselves,¹⁶⁰ and that none of the constituent Republics (with the possible exception of Slovenia) was nationally homogenous. Moreover, there was never any agreement as to the precise implication of the right to secession,¹⁶¹ there being doubt in particular as to whether it could be exercised by means of a unilateral act.¹⁶² It is also clear that in the early stages

157 Crawford, n 66 above, pp 44, 218. He identifies a number of exceptions to this rule, however, particularly as regards grants of independence in violation of the principle of self-determination, *ibid*, pp 219–22.

158 See Shaw, n 143 above, pp 202–08.

159 The 1974 Yugoslav Constitution provided (Basic Principles 1, para 1):

The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities...have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people—the Socialist Federal Republic of Yugoslavia.

160 This also excludes a right of secession on behalf of "nationalities" (ie, the Albanians in Kosovo and the Hungarians in Vojvodina), see Rich, n 104 above, pp 38–39. Serbia adopted the position that the proper subjects of any political settlement are not the republics or provinces, but rather the South Slav nations. Accordingly, it considered the internal borders of Yugoslavia to be administrative rather than political, and therefore, claimed the right to represent Serbs irrespective of where they lived. Serbia officially committed itself to the annexation of parts of Croatia, Bosnia-Herzegovina and Macedonia in the event of the federation being replaced by a looser State structure. Magas, n 14 above, pp 275–76.

161 The right to secede was set alongside a duty to ensure the "unity of the political system" (Article 244). As Singleton comments:

The legal theory behind the federal structure is that the separate South Slav peoples voluntarily acceded to the [SFRY] and have the right of self-determination...[However] the possibility that any of them should exercise the right to secession is politically unthinkable.

Singleton, n 1 above, p 210. It is pertinent to note that Article 1 of the 1946 Yugoslav Constitution, which is the predecessor of the 1974 Constitution, described the Federal Republic as "a community of peoples equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative State". This apparently reflects the idea that self-determination has already been exercised in the creation of the Federation.

162 The Constitution did not stipulate the means by which the right could be exercised. See generally, Bagwell B, "Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics" (1991) 21 *Georgia Journal of International Comparative Law* 489.

of the crisis, the Federal authorities in Belgrade considered the proclamations of independence of the various Republics to be unlawful.¹⁶³

Although the emergence of the new Republics was apparently non-consensual in nature, it cannot necessarily be assumed that they therefore seceded from the SFRY. In its first opinion in December 1991, the EC Arbitration Commission considered specifically the legal nature of the crisis in Yugoslavia and in doing so, came to the conclusion that the SFRY was "in the process of dissolution".¹⁶⁴ Although it did not directly address the issue of secession, the Commission clearly endorsed the argument put forward by Macedonia, Croatia, Slovenia and Bosnia-Herzegovina, that there was "no question of secession" but rather one of the "disintegration or breaking-up of the SFRY as the result of the concurring will of a number of Republics".¹⁶⁵

Secession and dismemberment are usually distinguished by reference to the "continuity" of the former parent State.¹⁶⁶ In the case of secession, the parent State continues its international personality notwithstanding the alteration of its territorial boundaries.¹⁶⁷ By contrast, in a case of dismemberment the State as a whole is seen to disintegrate, with the result that it becomes extinct as an international person,¹⁶⁸ and all the new States that derive therefrom are successor States.¹⁶⁹ The importance of the distinction is clear as far as the

163 *The Guardian*, 26 June 1991, p 1. On 24 June 1991, the Yugoslav Prime Minister warned that the "Federal Government will use all means available to stop the republics' unilateral steps towards independence", Weller, n 14 above, p 570. The FRY did eventually recognise Slovenia, Keesing's, n 2 above, (1992) Vol 38, p 39036. It has not recognised the other Republics, however.

164 EC Arbitration Commission, Opinion No 1, n 40 above, p 1494. The Constitutional Resolution Regarding the Sovereignty and Independence of the Republic of Croatia specifically referred to the fact that "the SFRY no longer is acting as the constitutional-legal organized State", "Statements on Croatian Democracy and Independence", Croatian Democratic Union, 1991, cited in Rich, n 107 above, p 39. The Arbitration Commission later made clear that this did not entail the immediate expiry of the personality of the SFRY which was, at that time, "still a legal entity", Opinion No 8, n 40 above, p 1522.

165 *Ibid.*

166 Crawford, n 66 above, at 400; Schloh B, "Dismemberment" in *Encyclopedia of Public International Law* (1987), p 124. Brownlie comments that "the general categories of 'continuity' and 'state succession', and the assumption of a neat distinction between them, only make a difficult subject more confused by masking the variations of circumstance and the complexities of the legal problems which arise in practice", n 66 above, p 82. Many of these problems, however, relate to the specific problem of the re-establishment of States after illegal occupation.

167 For example, Great Britain retained its international personality despite the secession of India; the Republic of Turkey was deemed to be a continuation of the personality of the Ottoman Empire despite territorial changes, *Ottoman Debt Arbitration* (1925) 3 *Annual Digest and Reports of Public International Law Cases* No 57.

168 Examples of dismemberment may be: the Federation of Mali upon the secession of Senegal; the German Reich on the creation of FRG and GDR in 1945; the dissolution of the Austro-Hungarian Empire in 1918, see Marek K, *Identity and Continuity of States in Public International Law*, 2nd ed (1968), pp 199-36.

169 See generally, Vienna Convention on Succession of States in Respect of Treaties (1978) 72 *American Journal of International Law* 971; Vienna Convention on

parent State is concerned: the continuance of personality is a prerequisite for the maintenance of its existing rights and duties under treaty and of its continued membership in international organisations. The distinction is also frequently considered important for the succeeding States, whose rights and duties will differ according to the type of acquisition.¹⁷⁰ In general, whereas in the case of revolutionary secession, the emergent State will only automatically inherit treaty obligations that are said to inhere in the territory itself (the so called "dispositive treaties"),¹⁷¹ in the case of dismemberment it will inherit in addition, a proportion of the assets liabilities of the former parent State.¹⁷² Thus, in the latter case, the international debts and assets of the Republic of Yugoslavia would be dispersed among the various Republics.¹⁷³

Although having important consequences for both parent and successor States, the distinction between secession and dismemberment is not always easy to establish, and is frequently merely a matter of emphasis and degree. It is clear that revolutionary changes in government,¹⁷⁴ alterations of the domestic constitution, changes to the name of the State,¹⁷⁵ or loss of territory,¹⁷⁶ will not

Succession of States in Respect of State Property, Archives and Debts (1983) 22 ILM 306. Common Article 2(1)(a) defines State succession as "the replacement of one State by another in the responsibility for the international relations of territory".

170 Hence many authors distinguish between "partial" and "universal" succession: see O'Connell, n 66 above, p 366; *Oppenheim's*, n 66 above, p 209. This differentiation is not maintained, however, in the Vienna Conventions on State Succession. Under those Conventions succeeding States assume responsibility for treaty obligations and debts on substantially the same terms whether or not the parent State continues to exist.

171 Dispositive treaties that inhere in the territory of the State will be succeeded to even in cases of minimal continuity, see O'Connell, n 66 above, p 373. This represents a more realistic approach than the "clean slate" or "negative" thesis under which new States are conceived to acquire territory without any commitment of any sort, *ibid*, p 367. There is also evidence that newly emergent States will also succeed to treaties of a humanitarian nature, eg, Pakistan considered itself a party to the Convention for the Suppression of Traffic in Women and Children 1921 by virtue of the fact that India became a party prior to Pakistan's secession, see Schachter O, "The Development of International Law through the Legal Opinions of the UN Secretariat" (1948) 25 *British Year Book of International Law* 107. In a number of cases, breakaway States have also agreed to be liable for a portion of the national debt. This position is reflected in Articles 40 and 41 of the Vienna Convention of 1983, which eliminates the primary cause of distinguishing between cases of secession and dissolution. Commentators generally consider breakaway States to be under an inchoate duty to undertake a fair proportion of the national debt, subject to mutual agreement, see eg, O'Connell, n 66 above, at 384.

172 Proportionate parts of the national debt must be taken over by the different successors, O'Connell, n 66 above, p 384.

173 For a discussion of this point see Williams, n 52 above, at 794-95.

174 The USSR, for example, was treated as a continuation of Imperial Russia: see Marek, n 168 above, pp 34-38.

175 *The Sapphire v Napoleon III* (1871) 11 *Wallace* 164.

176 For example, The United Kingdom, Pakistan and Poland all remain the same legal person despite the loss of significant portions of territory. Territorial changes will, however, require the adjustment of international legal obligations that specifically

necessarily affect the continuing legal personality of a State, but that in cases of multiple changes the continuity might be affected.¹⁷⁷ In fact in cases of (potential) dismemberment, State practice has frequently been equivocal. Thus in the case of Austria-Hungary¹⁷⁸ there remained considerable controversy over the continuity of either Austria or Hungary as independent States. By contrast, despite the extensive loss of territory, Turkey was accepted to be the continuation of the Ottoman Empire¹⁷⁹ and Russia has been accepted as the continuation of the USSR.¹⁸⁰

Given the apparent difficulties of distinguishing between secession and dismemberment (or succession and continuity), particularly at a time when events were in the process of unfolding, it is somewhat surprising that the EC Arbitration Commission felt itself able to pronounce upon what it admitted was "a fluid and unstable situation".¹⁸¹ Nevertheless, undaunted, the Commission declared that the "existence or disappearance" of a State was a "question of fact" determined, in part, by the internal political organisation of the State. In the context of Federal States, therefore, the existence of the State "implies that the federal organs represent the components of the federation and wield effective power".¹⁸² Applying this reasoning to the SFRY, the Commission considered that since the organs of the Federation no longer met "the criteria of participation and representativeness inherent in a federal State", and since the Federation was unable to enforce respect for the cease-fire agreements, it was therefore "in the process of dissolution".¹⁸³

Leaving aside the Commission's somewhat ambiguous use of terminology, what was clearly of central concern to the Commission was the break-down of

relate to the territory, Mullerson R, "The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia" (1993) 42 *International and Comparative Law Quarterly* 473 at 478-79.

177 Marek rather rigidly applies the rule that continuity will be maintained "on condition that the validity of the new revolutionary order corresponds *more or less* to the pre-revolutionary territorial and personal delimitation of that State", n 168 above, p 63.

178 While Austria argued in favour of succession, the treaty of St Germain, for example, assumed the continuity of Austria, see generally, Marek, n 168 above, pp 199-236; O'Connell, n 66 above, p 4; Crawford, n 66 above, p 404.

179 See eg, *Ottoman Debt Arbitration*, n 167 above; *Roselins & Co v Dr Karsten and the Turkish Republic intervening* (1925/26) *Annual Digest and Reports of Public International Law Cases* No 26.

180 See Protocol of Alma Ata, 8 December 1991.

181 EC Arbitration Commission, Opinion No 1, n 40 above, pp 1496-97.

182 *Ibid.*

183 *Ibid.* The Commission later explained in a little more detail that:
the existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised.

Opinion No 8, n 40 above, p 1522.

the Federal Presidency.¹⁸⁴ The crisis began when the Serbian authorities unilaterally abolished the provincial assembly in Kosovo,¹⁸⁵ and in March 1991 replaced the representative of Kosovo to the Presidency by an appointee of the Serbian Assembly (Bajramovic). The refusal of Croatia and Slovenia to recognise Bajramovic as a legitimate representative, was followed by the Serbian rejection of the incoming Croatian president, Stipe Mesic.¹⁸⁶ The continuing disagreement ultimately led to the withdrawal of the representatives of Slovenia, Croatia and Macedonia from the Presidency¹⁸⁷ and from other Federal organs.¹⁸⁸ By September, it was also clear that the Federal organs had little direct control over the conflict. Much of the fighting involved irregular forces which refused to be bound by cease-fire agreements, and the Presidency had apparently lost its control over the JNA.¹⁸⁹ That the continued existence of the Federation was doubtful was ultimately confirmed by the President of the Collective State Presidency, who commented, on resigning, that “Yugoslavia no longer exists”.¹⁹⁰

In its later opinions delivered on 4 July 1992, the Commission was able to establish as fact that which it had earlier alluded to as a process, and decided that the dissolution of the SFRY was complete and that its personality was extinct.¹⁹¹ In doing so, it noted that a referendum held in Bosnia had produced a majority in favour of independence, that Serbia and Montenegro had established themselves as a new State (the FRY), and that Bosnia, Croatia and Slovenia had been recognised by each other and by several other States.¹⁹² The Commission

184 The Federal Presidency had eight members, one from each of the six Republics and the two autonomous provinces. Each of the representatives was to be elected by secret ballot in the appropriate provincial assembly. The President was elected by the Presidency according to a strict rota each year. In 1989 the post was held by Slovenia (Janez Drnovsek), in 1990 by Serbia (Borisav Jovic), and it was due to go to Croatia (Stipe Mesic) in 1991.

185 Magas comments: “Without a functioning assembly, Kosovo representatives in the Federal Assembly and on the Federal presidency became illegitimate, and with them also the work of these bodies”, Magas, n 14 above, pp 291–92.

186 Keesing’s, n 2 above, (1991) Vol 37, pp 38203–04. The constitutional deadlock continued until 30 June when Mesic was eventually proclaimed President, Keesing’s, n 2 above, (1991) Vol 37, p 38275.

187 The remaining Republics formed a “Rump Presidency” which assumed the powers of the full Presidency, but without constitutional authority, Keesing’s, n 2 above, (1991) Vol 37, p 38513.

188 Keesing’s, n 2 above, (1991) Vol 37, pp 38420, 38559; Magas, n 14 above, p 295.

189 On 12 September, the Defence Minister, Veljko Kadijevic rejected an order to withdraw JNA troops to barracks. Mesic, in response, called upon JNA soldiers to desert. Keesing’s, n 2 above, (1991) Vol 37, p 38421.

190 Keesing’s, n 2 above, (1991) Vol 37, p 38685.

191 EC Arbitration Commission, Opinion No 8, n 40 above, p 1523. The Commission noted, *inter alia*, that the new Republics had recognised one another and all but Macedonia had received broad international recognition; that Serbia and Montenegro had constituted a new State (the “Federal Republic of Yugoslavia”); that the common federal bodies no longer exist; that the UN Security Council is of the opinion that the SFRY no longer exists, *ibid*.

192 *Ibid*.

further decided that despite the claims of the FRY,¹⁹³ no single Republic was the sole successor to the rights and duties of the former Federal Republic. The Republic's assets and debts accordingly had to be divided equitably among the successor States.¹⁹⁴ On this matter, the weight of evidence supports the Commission's approach. Even if the Yugoslav seat and flag remain in the UN, both the UN Security Council (in Resolution 757) and the General Assembly have consistently refused to accept the FRY's claim to continue the membership of the former SFRY in the UN.¹⁹⁵ That is also a position adopted by the other Republics¹⁹⁶ which have, at the same time, accepted full and equal responsibility for the liabilities of the former SFRY.¹⁹⁷

A number of problems arise, however, in attempting to distinguish clearly between the notions of dismemberment and secession in the context of Yugoslavia. Even if it is accepted that the personality of the SFRY was eventually extinguished, that fact alone does not necessarily exclude the possibility that certain States had seceded prior to its demise. Indeed, according to the dates provided by the Commission, the process of disintegration started on 29 November 1991, and continued until 4 July 1992. At the same time, the Commission identified the relevant dates for succession (and *a fortiori* statehood) as: Croatia and Slovenia, 8 October 1991; Macedonia, 17 November 1991; Bosnia-Herzegovina, 6 March 1992; Federal Republic of Yugoslavia, 27 April 1992.¹⁹⁸ As such, whereas Bosnia-Herzegovina and FRY both emerge from the dismemberment of the Federation, Macedonia, Croatia and Slovenia apparently seceded from the Federation before the process of disintegration had begun. While according to traditional doctrine, this chronology of events should have resulted in different rules being applied to each of the two sets of States for

193 It was claimed that the SFRY was "transformed" into the FRY consisting of Serbia and Montenegro. FRY thus claimed to be the "continuity of the international personality of Yugoslavia" and "undertook to fulfil all the rights conferred to and the obligations assumed by the SFRY in international relations, including its membership in all organisations and participation in international treaties ratified or acceded to by Yugoslavia", UN Doc S/23877 (5 May 1992). Paradoxically, this mirrors an earlier debate concerning whether Yugoslavia was in fact the continuation of the Kingdom of Serbia, see O'Connell, n 66 above, p 366.

194 EC Arbitration Commission, Opinion No 8, n 40 above, p 1523.

195 SC Res 757 (30 May 1992). Later in Resolution 777, the Security Council, reaffirming that the SFRY "had ceased to exist" and that the FRY did not assume its membership of the United Nations, recommended that the General Assembly exclude its participation from the work of the United Nations; SC Res 777 (19 September 1992). In SC Res 47/1 (22 September 1992), the General Assembly endorsed the Security Council's recommendation and later excluded it from participating in the work of ECOSOC (29 April 1993). See Blum Y, "UN Membership of the 'New' Yugoslavia: Continuity or Break?" (1992) 86 *American Journal of International Law* 830.

196 Keessing's, n 2 above, (1992) Vol 38, p 39013.

197 The Republic of Macedonia ultimately accepted apportionment of the assets and liabilities of the SFRY on its succession to membership of the International Monetary Fund and the World Bank (International Bank for Reconstruction and Development), See generally, Williams, n 52 above, at 802-04.

198 EC Arbitration Commission, Opinion No 11, n 40 above, p 1589.

the purpose of succession, neither the Arbitration Commission nor the succeeding States themselves have attempted to pursue such a distinction. Two possible conclusions present themselves. First, that the initial secession of some Republics was eventually rationalised by the subsequent dismemberment of the Federation which served to alter the terms of their succession, or secondly, that despite the difference in process the rules of succession remain constant. The obvious problem with the first position is that the very notion of succession implies the assumption of certain rights and duties at the time of independence. It is illogical then to suggest that other obligations might "resurrect" themselves a year, or perhaps several years, later when the personality of the parent State is extinguished. The second position, by contrast, while certainly not being acceptable to the adherents of the "clean slate" principle and probably not yet reflecting customary international law,¹⁹⁹ may actually suggest the direction in which the law of succession is moving. Certainly in as far as the succession to treaties is concerned, the Vienna Convention on the Succession of States to Treaties,²⁰⁰ makes no distinction between secession and dismemberment.²⁰¹ Although more problems exist in succession to property, archives, and debts, it is notable again that the Vienna Convention on Succession to Property, Archives and Debts tends to universalise a principle of succession in equitable proportion.²⁰² Even if these principles are not yet widely accepted, the case of Yugoslavia clearly argues in favour of a reconsideration of the current distinction that is drawn between secession and dismemberment, not least because it is dependent upon establishing an arbitrary and reductive chronology of events.

A further problem that arises from the Arbitration Commission's analysis of events is its initial determination that the Federation was "in the process of dismemberment". Dismemberment is usually used as a descriptive term, like that of merger or absorption, to describe a set of circumstances in which a State ceases to exist.²⁰³ As such, it is usually determined, *ex post facto*, by reference to whether principles of "State succession" rather than "continuity" have been applied. That the dismemberment of the SFRY was identified as a "process" suggests that it was not merely descriptive, but that it also had some prescriptive value. This may be rationalised in the following manner. Applying traditional principles, if it becomes apparent during a process of secession that the personality of the parent State is irretrievably undermined, its claim to territorial sovereignty will be weakened, and the statehood of the nascent entities thereby established with greater ease. In the case of the SFRY, then, the suggestion that

199 *Oppenheim's*, n 66 above, p 222; *Yearbook of the International Law Commission* 1974, Vol II, Pt I, pp 265–66.

200 (1978) 17 ILM 1488.

201 A distinction is made, however, with respect to "newly independent States", defined in Article 2(1)(f) as those States "the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible", for whom the "clean slate" principle would apply (Article 16).

202 (1983) 22 ILM 306.

203 See eg, *Oppenheim's*, n 66 above, pp 206–08.

the federation was in the process of dismemberment could be taken as an indication that there was no longer any presumption in favour of its continuing sovereignty and that the impediments to establishing the sovereignty of any emergent entities were effectively removed.²⁰⁴ Such an analysis focuses not so much on the effectiveness of the nascent States, but rather upon the lack of effectiveness of the parent State. It may, therefore, go some way to explain the international community's somewhat precipitous acts of recognition with respect to Croatia and Bosnia-Herzegovina at a time when neither Republic had effective control over the entirety of its territory. What this analysis does not explain, however, is the eventual territorial settlement that was to emerge, and why, for example, the self-proclaimed Serbian autonomous Republics in Bosnia-Herzegovina and Krajina failed to attract recognition despite enjoying effective control over significant portions of territory in Bosnia-Herzegovina and Croatia. That being the case, it is instructive to examine the emphasis given to two relevant principles: self-determination and *uti possidetis*.

B. Self-determination and *uti possidetis*

The principles of self-determination and *uti possidetis* were specifically addressed by the Arbitration Commission in its second and third opinions delivered in December 1991.²⁰⁵ In its second opinion it was asked whether the Serbian population in Croatia and Bosnia-Herzegovina enjoyed a right to self-determination. In reply, the Arbitration Commission noted that although international law "does not spell out all the implications of the right to self-determination", it "must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*)".²⁰⁶ Accordingly, whereas the Serbian population was entitled to "all the rights accorded to minorities and ethnic groups under international law", it did not have a right to external self-determination in the form of complete independence or association with another State.²⁰⁷ In excluding the right to external self-determination in these circumstances, the Commission adopted an approach that was consistent with the long-standing Western approach which conceives of self-determination as operating only within the confines of established borders and in conformity with the principle of territorial integrity.²⁰⁸ Such a position did assume, however, that the boundaries of the new territorial entities had already been established, and in which the Serbian population existed as a minority.

The Arbitration Commission came to consider the status of the existing internal borders of the SFRY in its third opinion. There, it argued that application of "the principle of respect for the territorial *status quo* [together with...the principle of *uti possidetis*", meant that the former administrative

204 Some similarities might be found here with the situation of "revolution and anarchy" in Finland in 1917 as identified by the International Committee of Jurists in the *Aaland Island* case, n 96 above. In that regard see Koskenniemi, n 132 above.

205 Note 40 above, pp 1498, 1500.

206 *Ibid*, p 1498.

207 *Ibid*.

208 See Helsinki Final Act, Principle VIII.

boundaries of the SFRY became frontiers protected by international law.²⁰⁹ They were therefore not subject to alteration "except by agreement freely arrived at".²¹⁰ The application of *uti possidetis juris*²¹¹ to the situation in Yugoslavia was specifically justified by reference to the *Burkina Faso/Mali Frontier Dispute* case²¹² in which a Chamber of the International Court of Justice had considered it to be a principle of general application, and "logically connected with the phenomenon of the obtaining of independence, wherever it occurs".²¹³ It is undoubtedly the case that the notion of *uti possidetis* has been generally recognised in Latin America,²¹⁴ Africa²¹⁵ and even Europe,²¹⁶ but one may question whether its content has remained entirely stable.²¹⁷ For example, in its earliest application, it was used to pre-empt border disputes arising in regions that were not immediately under the effective control of the new government and in order to prevent the territory being construed as *terra nullius*.²¹⁸ Later in Africa, *uti possidetis* was employed as a means to temper the disintegrative effect of self-determination in the context of decolonisation, by rendering intangible the existing administrative borders.²¹⁹ Its application in Yugoslavia, outside the context of decolonisation, and in order to identify the presumptive units of future statehood where the Federation has disintegrated, may therefore be seen as a further extension of the principle. It is, nevertheless, an approach which has been consistently endorsed by the members of the international community which have on the one hand stressed the intangibility of

209 Note 40 above, p 1500.

210 Ibid.

211 The principle was initially developed in the nineteenth century during the decolonisation of Spanish America and then became an accepted principle in the decolonisation of Africa. As such, its roots are distinct from those of self-determination: see Franck, n 132 above, pp 128–29. It is to be noted, however, that many of the texts which refer to self-determination also refer to the maintenance of the territorial integrity of States eg, GA Res 1514 (XV), n 136 above, para 6; GA Res 2625 (XXV), n 136 above.

212 *Burkina Faso/Mali Frontier Dispute*, ICJ Rep 1986, p 554.

213 Ibid. See generally, Naldi G, "Case Concerning the Frontier dispute (Burkina Faso and Mali): *Uti Possidetis* in an African Perspective" (1987) 36 *International and Comparative Law Quarterly* 893.

214 See eg, *Colombia/Venezuela Boundary* arbitration (1922) in Hackworth G, (1940) 1 *Digest of International Law* 732.

215 OAU Charter.

216 Principle III, Helsinki Final Act 1975 (1975) 14 ILM 1292.

217 See eg, application in *Guatemala/Honduras Boundary* arbitration, ICJ Rep 1986, p 554 at 566, and in *Beagle Channel* arbitration (*Argentina/Chile*) 17 ILM 632 at paras 21–23.

218 *Colombia/Venezuela Boundary* arbitration, n 214 above, p 733.

219 As Shaw comments with respect to practice in Africa:

It can...be stated that self-determination is to be exercised within the colonial territory treating that territory as a unit, and that therefore the principle of territorial integrity operates prior to independence in these situations as a guarantor or the territorial basis of self-determination.

Shaw, n 143 above, p 141. Its application in post-colonial Africa, however, is less clear, see Pomerance M, *Self-Determination in Law and Practice* (1982), p 19.

the internal borders and, on the other hand, steadfastly refused to recognise the Republic of Krajina.

That statehood may be seen to have “devolved” upon the various Republics by virtue of the application of *uti possidetis* following a process of dismemberment, says little about the applicability of the principle of self-determination. Indeed in so far as Macedonia and Bosnia-Herzegovina may be said to have been somewhat unwilling partners in the dismemberment process, self-determination appears to have been virtually irrelevant. It was clear to begin with, that “national” self-determination, determined by the existence of ethnic ties or national orientation, had little part to play in the calculation of what territorial units were to be considered for statehood.²²⁰ The administrative boundaries of the Republics did not truly reflect the ethnic or national geography of the region but were rather the result of a political compromise within the SFRY aimed at securing a balance of interests between the various national groups.²²¹ Thus, the fact that Bosnia-Herzegovina consisted of a number of ethnically and territorially discrete groups had little impact on the determination of its boundaries. It follows that, despite the claims of Greece, the existence or otherwise of a Macedonian “nation” was not ultimately relevant to its claim to statehood. That being the case, the principle of self-determination, if it was relevant at all, applied only to the Republics themselves within their defined territorial boundaries, and was exercisable only by virtue of a choice between independence and association with another State.²²²

Generally speaking, the approach of the international community was characterised more by its intent to dismiss, rather than to apply, the principle of “external” self-determination in the context of Yugoslavia. First, it is notable that in public statements during the process of negotiation and recognition,

220 To a large extent this was also the case in the context of decolonisation in Africa, see Shaw, n 143 above. A not inconsiderable part of the problem relates to the identification of the relevant “national groups”. For the view that “nations” are created by “nationhood” and not the reverse, see Hobsbawm E, *Nations and Nationalism Since 1780: Programme, Myth, Reality*, 2nd ed (1992); Gellner E, *Nations and Nationalism* (1983).

221 Yugoslavia emerged as a Federal Republic after World War II based upon the following principles: it was a multinational State; the union of its peoples was freely-willed; the principle of absolute national equality; the Republics are “nearly-sovereign national States”; their borders cannot be changed without the consent of the parties concerned. The six South Slav nations (Croat, Macedonian, Serb, Slovene, Montenegrin, Muslim) had full equality as did national minorities after 1974 (thus Kosovo and Vojvodina became Federal members in their own right). This was essentially a “territorial-political” solution to the national question. The national minorities that lived within the eight Federal units enjoyed full cultural and political rights (use of their national language in State affairs; proportional representation at municipal and higher levels)—but no provision was made for the formation of new political territorial entities within individual Federal units. Magas, n 14 above, p 338.

222 In such circumstances, the assertion by Judge Dillard, that “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people” (*Western Sahara Case*, ICJ Rep 1975, p 12) appears to be somewhat hollow.

direct references to self-determination were conspicuous by their absence.²²³ The general tendency was to place the emphasis upon the "dissolution" of the Federation rather than the "secession" of the Republics as the principal basis for their nascent statehood. Indeed, it is significant that the question on self-determination addressed to the Arbitration Commission had been carefully redrafted to narrow its focus in order to avoid the necessity of dealing with the right of self-determination of the Serbian people as a whole, and to limit its application to the "minorities" within Croatia and Bosnia-Herzegovina.²²⁴ Secondly, in the context of Macedonia, one of the simplest but most expressive forms of self-determination, namely, the right to choose its own external forms of national representation, was apparently downgraded to a matter of negotiation between neighbouring States.

Ultimately, the principle of self-determination was given positive recognition in two subsidiary forms. First it was applied (albeit by inference in the form of a requirement of a referendum) as a condition for the recognition of the Republics once their presumptive statehood had already been established. It did not otherwise modify the traditional rules governing the acquisition of statehood. In that sense, self-determination provided internal legitimacy but did not have a determining role in the emergence of the new Republics. Secondly, self-determination was identified by the Arbitration Commission as a right of every individual to "choose to belong to whatever ethnic, religious or language community he or she wishes".²²⁵ Although "one possible consequence" of this might be that a minority group within a Republic has a right to "the nationality of their choice", it could not be interpreted as undermining the integrity of existing borders.²²⁶ This second sense of self-determination is both highly novel and deeply problematic. On the one hand it represents an attempt to reconcile the apparently competing rights of peoples, minorities and individuals, and to soften the harsh and destructive overtones of national self-determination. On the other hand, it serves to confuse an already complex notion and raises more questions than it resolves. Two immediate problems spring to mind. First, to what extent would an individual have the right to belong to a minority community, and enjoy any associated legal or social benefits, against the wishes of the community itself? Whilst it is certainly arguable that self-determination should not be exercised in a way that undermines other individual human rights, its reduction to an aggregation of individual entitlements or claims is inevitably destructive of the community interests which it purports to proclaim. Secondly, it is open to serious doubt whether many States would be willing to accept the general proposition that minorities residing within the territory of one State would have an unbridled right to claim the nationality of another. One might consider, for example, whether the United Kingdom would be willing to accept such a principle with respect to the current residents of Hong Kong, once the territory is returned to China.

223 See Zametica J, "The Yugoslav Conflict" (1992) *Adelphi Paper* 270 at 59-63.

224 *Ibid*, p 63.

225 EC Arbitration Commission, Opinion No 2, n 40 above, p 1498.

226 *Ibid*.

IV. The Right to a Name?

Whilst much of the discussion has focused upon matters relating to the acquisition of statehood, it should be noted that the dispute takes on a different dimension once the question of statehood is resolved. It is an accepted principle of international law, that flows from the sovereign equality of States, that each State “has the right freely to choose and develop its political, social, economic and cultural systems”.²²⁷ In that regard, it would surely be fundamental to the notion of sovereignty and self-determination that a State should have the right to establish its own constitutional system in conformity with obligations imposed by international law (for example, with respect to human rights treaties), and to choose its own national symbols including both its name and its flag. This would suggest that the action taken by Greece, with the acquiescence of other members of the international community, to force the Republic to alter its name, flag and constitution, all of which are potent symbols of the State’s national identity, represents an interference in the sovereignty of the Republic of Macedonia. It is clear, nevertheless, that not every interference in the sovereignty of another State will be prohibited by international law. The International Court of Justice (ICJ) specifically considered the question of intervention in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.²²⁸ There, it stated that “the principle of non-intervention...forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system”. As suggested above, the subject of the dispute between Greece and Macedonia clearly relates to an issue which, as a matter of sovereignty, should fall exclusively within the discretion of Macedonia itself. The ICJ continued, however, by stating that intervention is wrongful only “when it uses methods of coercion in regard to such choices, which must remain free ones”.²²⁹ Accordingly, the ICJ appears to distinguish between “intervention” in the sense of plain interference which is not prohibited by international law, and “unlawful intervention” which is defined by the use of coercive methods, that is, that it is forcible or dictatorial.²³⁰ As to what might amount to coercion, the ICJ did not limit itself to the use of armed force. It endorsed, as declaratory of customary international law,²³¹ the terms of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty²³² and the Declaration on Friendly Relations, both of which prohibit “the use of economic...measures to coerce another state

227 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (1970).

228 ICJ Rep 1986, p 14.

229 Ibid.

230 Compare *Oppenheim's*, n 66 above, para 134.

231 Ibid, para 203.

232 GA Res 2131 (XX) (21 December 1965).

in order to obtain from it the subordination of the exercise of its sovereign rights".²³³ It also decided that the provision of financial assistance to opposition groups within another State amounted to unlawful intervention.²³⁴ Although it is clear that certain economic measures may amount to unlawful intervention, the Court decided that on the facts of the case, the cessation of economic aid and the imposition of a trade embargo did not (although the latter did amount to a breach of treaty obligations).²³⁵ It cannot easily be concluded, leaving aside any specific treaty obligations, that the imposition of an economic embargo by Greece is either lawful or unlawful under existing international law. It is certainly clear that its objective is unlawful, but whether or not the measures taken to that end amount to intervention rests upon an appreciation of what amounts to coercive behaviour and to that end, how much discretion is given to States in the organisation and disposition of their own economic affairs.

V. Conclusions

Most of the issues raised in this article, and in particular those relating to recognition, succession, and self-determination, relate to questions of international law which are at once both complex and uncertain. The inconsistency of established practice and the diversity of plausible approaches mitigate against establishing, from a single set of circumstances, any hard and fast rules, particularly in so far as most of the important issues remain a matter of dispute. Nevertheless, it is clear that the dismemberment of Yugoslavia represents the most significant case since the era of decolonisation in which the international community has been forced to consider questions relating to the acquisition of statehood and its consequences. The examples of State practice that arise therefrom, are therefore of considerable importance and provide an operative indication of the direction in which the various aspects of international law are developing.

The case of Macedonia provides a useful focus for some of the broader issues that have arisen in the Yugoslav situation, not because it represents an accurate paradigm of the process of dismemberment as a whole, but because its differential treatment raises a number of important legal issues that require explanation. The first major issue raised by the case of Macedonia was that of diplomatic recognition. Traditionally, the function of diplomatic recognition has been understood as a mechanism for signalling the legal and factual existence of a new subject of international law. Whilst not being "constitutive" in international law, recognition will be particularly important in cases where the statehood of the new entity is in doubt. General practice in the context of Yugoslavia and particularly in relation to Macedonia, demonstrates a recent tendency in recognition policy to downplay, or ignore, the legally relevant facts that condition statehood in favour of the application of broader political conditions. Although the objectives pursued in the conditions attached to

233 Ibid, para 2.

234 Ibid, pp 14, 124.

235 Ibid, p 126.

recognition were entirely consonant with the maintenance of international peace and good order among States, their employment in the context tended to obscure some of the more fundamental legal issues relating to the effectiveness of the emergent entities. Such practice, if it is continued, may ultimately be self-defeating. The significance and utility of recognition depends primarily upon the ability to distinguish between legal considerations that govern the assumption of rights and duties by the nascent State, and political considerations that relate to its acceptability as an entity with which to enter into optional bilateral relations. The more politically-oriented recognition decisions become, the less legal weight may be attached to them and consequently the less their general significance. With respect to Macedonia, it would be entirely appropriate for States to defer to the concerns of Greece by, for example, refusing to enter into diplomatic relations with Macedonia, but to condition recognition upon a requirement that it alter its name, flag and constitution not only devalues the currency of recognition, but also offends the notion of sovereignty itself.

A second question that arises from the case of Macedonia, predicated by an inquiry into the applicability of self-determination, relates to the function and significance of the notion of dismemberment in international law. The idea of dismemberment does not represent an accepted term of art in international law, but is broadly descriptive of a situation in which the legal personality of a State is extinguished by virtue of the disassociation of its constituent territorial units. Whilst having certain similarities with the notion of "divided States" (such as Germany after 1945), dismemberment is generally posited as a counterpoint to cases of secession, like those which occurred in the period of decolonisation, in so far as in the latter cases the personality of the predecessor State is considered to remain intact and the emergent States only succeed to "dispositive treaties" that pertain exclusively to their territory. Two problems attach to this distinction. First, whether or not a situation is consistent with secession or dismemberment is frequently difficult to establish unless, as in the case of the USSR, there is a general agreement as to the continuity of one territorial entity. In absence of agreement, and where one State claims to be the continuation of the predecessor, the matter can only be determined in a relative manner, by reference to: the extent of the disruption (in territorial and political terms); the subjective characterisation of the situation by the parties concerned; and the positions adopted by the rest of the international community. Secondly, as the case of Yugoslavia demonstrates, in complex and uncertain situations an attempt to distinguish between those States which seceded and those which emerged from a process of dismemberment as dictated by current doctrine, is ultimately artificial and should not, as a matter of practicality as much as one of law, be determinative as regards the principles of succession that are to apply. The possibility that operative principles might be changing in this regard is signalled to some extent by the approach of the Arbitration Commission.²³⁶

236 For other views on the question of succession in Yugoslavia, see Schachter O, "State Succession: The Once and Future Law" (1993) 33 *Virginia Journal of International Law* 253; Williamson E and Osborn J, "A US Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and

What is most striking about the case of Yugoslavia, however, is that the dismemberment of the Federation was identified at a very early stage, and in fact before any of the emerging territorial units had themselves been formally recognised. Whilst the existence of all States is technically dependent upon their continued possession of the inherent attributes of statehood (population, territory, independence, effective control), a presumption is usually operated in favour of its continuity of personality. Such a presumption lends stability to international relations and ensures that the rights and interests of third States are not put at risk by every alteration in government or territory. That no such presumption appears to have operated with respect to the SFRY, was probably reflective of the unique nature of the crisis experienced in the Federal Government, and the particular characteristics of the Federal structure in Yugoslavia, in which the constituent Republics enjoyed considerable political autonomy. That being said, it is possible to view the notion of dismemberment having some prescriptive value in the acquisition of statehood by the emergent entities in the following ways. First, whereas in cases of secession the emergent entity has to establish its effectiveness in face of a presumption in favour of the territorial sovereignty of the parent State, that is not the case where the personality of the parent State is thrown into doubt by a more general process of dismemberment. Although this does not strictly mean that territorial sovereignty has been transferred to the emergent entity, as it would in a case of devolution, a lower level of effectiveness will be acceptable for diplomatic recognition. Such an understanding would go some way, at least, to explain the somewhat precipitous recognition of Bosnia-Herzegovina and Croatia.

Secondly, whereas in cases of secession the identity (if not the precise territorial boundaries) of the nascent State will be relatively clear, that is not necessarily the case in the context of dismemberment which, as a process, does not identify *per se* the presumptive units for future statehood. The problem was particularly acute in the case of Yugoslavia where there were sometimes two or more governmental authorities claiming possession of the same territory. There, the final territorial settlement was determined, not on the basis of national self-determination, as there was insufficient homogeneity within the Republics (with the possible exception of Slovenia), nor on the basis of effectiveness alone (as the Government of Bosnia-Herzegovina, for example, clearly did not enjoy full effective control). Rather, the operative principle appears to have been that of *uti possidetis juris* as identified by the Arbitration Commission. As such, during the process of dismemberment, the internal administrative borders of the SFRY (that is those between the various Republics) were deemed to be subject to the protection of international law and open to alteration only with the consent of all parties concerned. This application of *uti possidetis juris*, albeit one which is apparently in line with its status as a principle of "general application", is the first significant instance in which it has been specifically applied (as opposed to

Yugoslavia" (1993) 33 *Virginia Journal of International Law* 261; Mullerson R, "New Developments in the Former USSR and Yugoslavia" (1993) 33 *Virginia Journal of International Law* 299; Shaw M, "State Succession Revisited" (1994) *Finnish Yearbook of International Law*.

merely recognised) within Europe, and arguably represents a further extension in so far as it was applied with disregard for the existence of effective territorial units.

Despite the claims made by the various Republics, it appears from State practice that the principle of self-determination was given only a relatively minor role in the events in Yugoslavia. As seen above, the fact that dismemberment of the SFRY was the predominant process meant that for a number of the Republics, including Macedonia, the views of the population served only to legitimise what was effectively already a *fait accompli*—the only residual choice effectively being that of independence or subsequent association with another State. Ultimately the combination of dismemberment and *uti possidetis* provided a basis for the establishment of a new territorial settlement in Yugoslavia and dispensed with the need to address the question of self-determination in its populist or revolutionary form. This does not mean that secessionary self-determination is necessarily excluded (outside the context of decolonisation), but merely that the case of Yugoslavia does not provide evidence to that effect.

Having said that, the case of Yugoslavia does provide some evidence of a tendency to downplay or marginalise self-determination claims. Most apparent from the case of Macedonia is that its right to determine its own external forms of representation, a right which might presumptively form part of the notion of self-determination in its cultural sense, was left as a matter to be negotiated between itself and Greece. This is the first occasion in which it has ever been suggested that a State, or for that matter a people, should not be the exclusive determinants of their own cultural and political symbols. Even if it is accepted that Greece was within its rights in imposing an economic embargo on goods from Macedonia, the acquiescence of the rest of the international community in that action is somewhat surprising. A parallel might be drawn between the marginalisation of self-determination in the case of Macedonia and its reinvention by the EC Arbitration Commission. In delivering its opinions on the situation in Yugoslavia, the Arbitration Commission offered a new interpretation of self-determination in which it was assimilated first as a right of every individual to choose to belong to whatever ethnic, religious or language community he or she wishes, and secondly (albeit more tentatively) as a right of minorities to the nationality of their choice. This may be accepted as a brave attempt to reconcile the inevitable tensions that exist between the rights of peoples and the corresponding rights of minorities and individuals, but it does seem to offend the very integrity of the notion of group rights. Although it is conceivable that an individual has a right not to belong to (or at least enjoy the benefits and burdens of participation in) a particular ethnic, religious or language community, one may wonder whether the very notion of a minority may withstand the idea that individuals have a right to belong to that community without qualification. Reducing participation in communities to a subjective individual choice only serves to undermine the very justification for minority

rights. The same reasoning also applies, *mutatis mutandis*, to the notion of self-determination as a right of minorities to choose the nationality of their choice. In the latter case, however, the principle is even more problematic in so far as most States would find it clearly unacceptable that their exclusive discretion over questions of nationality should be subject to rights exercised by minorities resident in other States.

