

The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples

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On the 27th of August 1991,¹ the Community and its Member States, at the same time as convening a peace conference on Yugoslavia, created an Arbitration Committee. The Committee was chaired by Mr Robert Badinter, President of the French Constitutional Council, and was furthermore comprised of the Presidents of the German and Italian Constitutional Courts, the Belgian Court of Arbitration and the Spanish Constitutional Tribunal.

The mandate given to the Committee was somewhat vague. At the outset it was envisaged that the Committee would rule by means of binding decisions upon request from 'valid Yugoslavian authorities'. Although no consultative procedure was formally established, the Committee was in fact called upon to give one opinion at the request of Lord Carrington, President of the Peace Conference (Opinion No. 1); similar requests were subsequently made by the Serbian Republic, using the Conference as intermediary (Opinions Nos. 2 and 3) and the Council of Ministers of the EEC (Opinions Nos. 4 to 7).

The final four opinions were delivered on the 14th of January 1991. They were concerned with the question of whether the Republics of Croatia, Macedonia and Slovenia, who had formally requested recognition by the Community and its Member States, had satisfied the conditions laid down by the Council of Ministers of the European Community on the 16th of December 1991. The terms of this 'examination' were relatively indulgent and the Committee ruled that two Republics, Macedonia and Slovenia, fulfilled all the conditions. In the case of Croatia a reservation was made in relation to the rights of minorities. The request for recognition made by Bosnia-Herzegovina was, in the absence of a referendum, refused.

Those opinions concerning recognition were dealt with widely in the media. Less attention was paid to the other three. Yet the latter might be of great import in the long term, extending beyond the unfortunate turn of events in Yugoslavia. This is particularly true in relation to Opinions Nos. 2 and 3.

The primary Serbian question concerned the right of the Serbian populations in Croatia and Bosnia-Herzegovina to self-determination. The second dealt with the delimitation of internal borders, in other words the identification of frontiers between the Republics. Although the Committee gave two distinct opinions in response to the questions posed, it was made clear that

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1 Extraordinary Meeting of the Foreign Ministers (Brussels, 27 August 1991), Declaration on Yugoslavia.

The Opinions of the Badinter Arbitration Committee

these two questions, as well as the queries addressed in its first Opinion, delivered on the 29th of November 1991, were closely related to each other. In its November Opinion, although the Committee displayed little originality in observing that Yugoslavia was 'engaged in a process of dissolution', it made interesting considerations.

This group of three opinions invites a reflection on three essential points: the scope of the self-determination principle as it is applied in particular contexts, with a special focus on decolonialization; the relationship of this principle to another of equally fundamental import, that of the stability of frontiers; and finally, the general role which an international arbitration body might play in such problems.

The Future of Self-Determination

The United Nations Charter extends the right of self-determination to *all* peoples. However, it neither defines what is to be understood by the word 'peoples', nor does it lay down rules as to how this right is to be exercised; a right which so far has been successfully invoked by colonial peoples only.² The Badinter Committee was thus correct to assert that 'in its present state of development, international law does not make clear all the consequences which flow from this principle'. Nevertheless, through its Opinions it has contributed to a more precise definition of its attributes.

It is not insignificant that the Court, without an express statement to that effect, appeared to link the rights of minorities to the rights of peoples. This shows that the notion of 'people' is no longer homogeneous and should not be seen as encompassing the whole population of any State. Instead of this, one must recognize that within one State, various ethnic, religious or linguistic communities might exist. These communities similarly would have, according to Opinion No. 2, the right to see their identity recognized and to benefit from 'all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their national identity'.

The States are thus informed: these are 'imperative norms' binding all subjects of international law, and, which could one day be applied to protect, for example, the rights of Gagauz or Chechens without entailing the break-up of Moldavia or Russia. One dare not even consider Corsicans or even Basques...

More importantly, the Committee noted that Article 1 of the two 1966 International Covenants on human rights establishes that 'the principle of the right to self-determination serves to safeguard human rights'. This signifies that 'by virtue of this right, each human entity might indicate his or her belonging to the community (...) of his or her choice'. This might appear superfluous, but is in fact fundamental: it means that each and every man or woman who calls upon this right might choose the group to which they belong.

But Law is not always the 'best school of imagination', as suggested by Jean Giraudoux. In relation to its jurisdictional functions, the Committee did not fully develop the consequences which might flow out of its analysis. It did, however, open up an interesting direction of thought in suggesting that the States concerned might accord to Serbs in Bosnia-Herzegovina and Croatia, if they so desired, the nationality of their choice (in other words: Serbian nationality). One might

2 Cf., to this point the commentaries on Arts. 1(2) and 72, Cassese and Bedjaoui, in J.P. Cot and A. Pellet (eds), *La Charte des Nations Unies* (2nd ed., 1991).

thus suggest a distinction between 'nationality' and 'citizenship' similar to what is provided in the Treaty on European Union signed in Maastricht.

Even if solutions applicable in the European Union are not easily transposable to Central Europe or to the former Soviet Union, they remain a fertile inspirational source. The ultimate objective would be to allow those persons who so wish to, to declare themselves as Serbs while retaining certain civil and political rights in the territories of Bosnia-Herzegovina and Croatia – for example the right to vote in local elections – without thereby questioning the sovereignty of the State. Such arrangements would have the immense merit of guaranteeing the rights of peoples – and the individuals of whom they are composed –, while avoiding the fragmentation and weakening of States.

The Question of Frontiers

Another source of merit in this type of solution is to be found in the disassociation of the concept of nationality from that of 'territory'.

As they are given the right of self-determination, individuals may demand and obtain their recognition as being part of a group of persons of their choice. This would be done through precise mechanisms, bringing with them guarantees, which have to be negotiated and settled at international level. This would not, however, have any effect upon the territories of those States concerned. Frontiers would remain unchanged.

The Arbitration Committee laid great emphasis upon the fundamental importance which it attached to the principle of respect for frontiers existing at the moment of independence (*uti possidetis juris*). This point was not only made in its Opinion No. 3 but was also evoked in Opinion No. 2 when it recalled that, whatever the circumstances, 'the right to self-determination must not involve changes to existing frontiers'.

The territorial integrity of States, this great principle of peace, indispensable to international stability, which as noted by the Committee and the International Court of Justice,³ was invented in Latin America to deal with the problems of decolonialization, and then further applied in Africa has today acquired the character of a universal, and peremptory norm. The people of former colonial countries were wise to apply it; Europeans must not commit the folly of dispensing with it.

For all that the principle is not as rigid as some might feel it ought to be. Stability does not mean intangibility. Although States are prohibited from acquiring a territory by force, they might freely decide, as the Committee made clear, to a modification of their frontiers 'by agreement'. This was acknowledged by the Croatian Foreign Minister in an interview given to a French newspaper,⁴ where he stated that he did not exclude the possibility of 'slight modifications' in existing frontiers. However, such an agreement cannot be imposed by one of the parties as pre-requisite for a peace settlement: a rectification of this type could only result from negotiations between willing States.

3 In the case concerning the *Frontier Dispute between Burkina Faso and Mali*, Judgment of 22 December 1986, ICJ Reports (1986) 3.

4 *Le Monde*, 16 January 1991.

The Role of Arbitration in Europe

States might also agree to entrust the task of deciding on frontier changes to an arbitration tribunal, the proceedings of which would be inspired less by legal considerations – which could only result in a confirmation of existing frontiers –, than by equity or by general norms reflecting the States' common agreement.

This was not the role given to the Badinter Committee, whose mandate has been restricted to the application of the law in force. It did not, however, draw back, in the arguments which it developed, from opening doors and offering suggestions, nor from opening new horizons even though prospective considerations were absent from its opinions; as is suitable for a jurisdictional organ. Rejecting both a formal application of law, which would have frozen the situation by polarizing positions, and led to the application of adventurous visions, deprived of a grip on reality, the Committee chose a middle path; without 'showing-off', it adopted a line which might inspire the decisions which only politicians are able to take.

It would be foolish to think that in such difficult circumstances which at present exist in Yugoslavia, lawyers, solely by virtue of words, be they wise and legal words, might be able to re-establish peace, map frontiers or determine the aspirations of the people. All that they might do, and that is already a great deal, is to contribute to allay the tension and to suggest solutions, which they might also aid in putting into effect if and when they are finalized.

The Yugoslavian affair also demonstrates that one would be well-inspired to initiate structures designed to prevent conflicts from degenerating rather than call in the lawyers, like firemen, to dampen a raging fire. Yugoslavia will one day regain peace because there is no such thing as an infinite war. Then, the existence of an impartial body, charged with resolving the inevitable conflicts which remain or might arise between the Republics would be even more important than today.

Such a mechanism has an essential role to play if one wishes to prevent conflicts which might erupt anywhere in Europe – in particular among States which have replaced the former Soviet Union. The European States must demonstrate their resolve to overcome the contentious issues opposing them solely on the basis of law; to this end, creation of a European Court of settlement and arbitration is today absolutely necessary.

Through its balanced and impartial decisions, the Arbitration Committee of the Peace Conference on Yugoslavia has furnished proof that such an organ can provide a great service. This example must be recognized and used as a building block in the search for mechanisms to resolve ethno-territorial conflicts.

Appendix: Opinions of the Arbitration Committee

Opinion No. 1

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

We find ourselves with a major legal question.

Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.

Other Republics on the contrary consider that there is no question of secession, but the question is one of a disintegration or breaking-up of the SDRY as the result of the concurring will of a number of Republics. They consider that the six Republics are to be considered equal successors to the SFRY, without any of them or group of them being able to claim to be the continuation thereof.

I should like the Arbitration Committee to consider the matter in order to formulate any opinion or recommendation which it might deem useful.

The Arbitration Committee has been apprised of the memoranda and documents communicated respectively by the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia, and by the President of the collegiate Presidency of the SFRY.

1) The Committee considers:

a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state; that in this respect, the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory;

b) that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty;

c) that, for the purpose of applying these criteria, the form of internal political organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government's way over the population and the territory;

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

e) that, in compliance with the accepted definition in international law, the expression 'state succession' means the replacement of one state by another in the responsibility for the international relations of territory. This occurs whenever there is a change in the territory of the state. The phenomenon of state succession is governed by the principles of international law, from which the Vienna Conventions of 23 August 1978 and 8 April 1983 have drawn inspiration. In compliance with these principles, the outcome of succession should be equitable, the states concerned being free of terms of settlement and conditions by agreement. Moreover, the preemptory norms of general international law and, in particular, respect for the fundamental

The Opinions of the Badinter Arbitration Committee

rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.

2) The Arbitration Committee notes that:

- a) – although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence;
 - in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;
 - in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;
 - in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav states;
 - in Bosnia and Herzegovina, by a sovereignty resolution adopted by Parliament on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Herzegovina.
 - b) – The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal state;
 - c) – The recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people and wrought considerable destruction within a few months. The authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization.
- 3) – Consequently, the Arbitration Committee is of the opinion:
- that the Socialist Federal Republic of Yugoslavia is in the process of dissolution;
 - that it is incumbent upon the Republics to settle such problems of state succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities;
 - that it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice.

Opinion No. 2

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

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

The Committee took note of the *aide-mémoires*, observations and other materials submitted by the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia, by the Presidency of the Socialist Federal Republic of Yugoslavia (SFRY) and by the 'Assembly of the Serbian People of Bosnia-Herzegovina'.

1. The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.

2. Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.

As the Committee emphasized in its Opinion No. 1 of 29 November 1991, published on 7 December, the – now peremptory – norms of international law require states to ensure respect for the rights of minorities. This requirement applies to all the Republics *vis-à-vis* the minorities on their territory.

The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international convention as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the draft Convention of 4 November 1991, which has been accepted by these Republics.

3. Article 1 of the two 1986 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes.

In the Committee's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned.

4. The Arbitration Committee is therefore of the opinion:

- (i) that the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law and under the provisions of the draft Convention of the Conference on Yugoslavia of 4 November 1991, to which the Republics of Bosnia-Herzegovina and Croatia have undertaken to give effect; and
- (ii) that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality.

Opinion No. 3

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

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

The Committee took note of the *aide-mémoires*, observations and other materials submitted by the Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia, by

The Opinions of the Badinter Arbitration Committee

the Presidency of the Socialist Federal Republic of Yugoslavia (SFRY) and by the 'Assembly of the Serbian People of Bosnia-Herzegovina'.

1. In its Opinion No. 1 of 29 November, published on 7 December, the Committee found that 'the Socialist Federal Republic of Yugoslavia is in the process of breaking up'. Bearing in mind that the Republics of Croatia and Bosnia-Herzegovina, *inter alia*, have sought international recognition as independent states, the Committee is mindful of the fact that its answer to the question before it will necessarily be given in the context of a fluid and changing situation and must therefore be founded on the principles and rules of public international law.

2. The Committee therefore takes the view that once the process in the SFRY leads to the creation of one or more independent states, the issue of frontiers, in particular those of the Republics referred to in the question before it, must be resolved in accordance with the following principles:

First – All external frontiers must be respected in line with the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties.

Second – The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at.

Third – Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, (1986) Law Reports 554 at 565):

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles...

The principle applies all the more readily to the Republic since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent.

Fourth – According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia.