

Mutual Recognition of Croatia and Serbia (+Montenegro)

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I. Introduction

Much has been written on international recognition of the former republics of Yugoslavia,¹ but little on the possibility of their eventual mutual recognition. As the war shows, finding a solution, and the prospect of living in peace side by side, depends not so much on the opinion of the international community, but more on the political realities of the relationship between the former republics. Mutual recognition, as part of this political reality, is therefore an important prescription for peace.

This article examines an eventual mutual recognition of Croatia and Serbia (+Montenegro), because it is envisaged by both the international community and the republics themselves, and because steps have already been taken to promote this plan. First, a new UN peace-plan for Croatia contains guidelines as to its recognition by Belgrade.²

This means that – after the Vance-Plan submitted at the end of 1991 – another attempt is now being made to come to a general settlement concerning mutual recognition. Whilst the Vance-Plan succeeded in establishing so-called ‘United Nations Protected Areas’ in the Serbian parts of Croatia,³ it did not manage to find a final and encompassing solution to the problem of recognition. Second, both Belgrade and Zagreb envisage a mutual recognition, and contacts have been made recently to discuss this matter.⁴

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1 E.g., Pellet, ‘The Opinions of the Badinter Arbitration Committee, A Second Breath for the Self-Determination of Peoples’, 3 *EJIL* (1992) 178; Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’, 4 *EJIL* (1993) 36-65; Türk, ‘Recognition of States: A Comment’, 4 *EJIL* (1993) 66-71; Weller, ‘The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia’, 86 *AJIL* (1992) 569-607.

2 See *Frankfurter Allgemeine Zeitung (FAZ)*, 15 October 1994, 22 October 1994.

3 Report of the Secretary-General Pursuant to SC Res. 721 (1991), UN Doc. S/23280, Ann. III (1991); Weller, *supra* note 1, at 584.

4 E.g., Visit of the Secretary of Foreign Affairs of the ‘Republic of Yugoslavia’, Jovanovic, to Zagreb on 4 November 1994.

This article compares the international recognition of both republics with the envisaged mutual recognition, in particular outlining new aspects of the latter. It then discusses problems connected with this mutual recognition, e.g. the integrity of Croatian territory, the influence of Belgrade on Serbian entities (the so-called 'Republika Srpska Krajina'),⁵ the status of Serbs in Croatia and the wish of Belgrade to be recognized as a 'continuing State' of the former Yugoslavia. The article then concludes with some remarks on the development of recognition in public international law.

II. Background: Recognition of the Republics in Question by the UN, the EC and Third Countries and their Current Status under Public International Law

A. Croatia

In order to trace, in legal terms, Croatia's path to independence and, finally, international recognition, one has to go back to the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY), in which 'the right of secession' of 'the nations of Yugoslavia, proceeding from the right of every nation to self-determination' was implemented. Since there existed no mechanism in the Constitution to exercise the right of secession, Croatia declared its independence on 25 June 1991. Article I of the Constitutional Resolution Regarding the Sovereignty and Independence of the Republic of Croatia⁶ proclaims Croatia as a sovereign and independent State. The same resolution, which had been adopted by the Croatian Parliament, states that Croatia is to 'begin[s] the process of gaining international recognition'. This statement is interesting in so far as it *alone* cannot initiate the process of international recognition, as it is completely up to third countries to recognize statehood. It therefore has to be interpreted as a signal to third countries demonstrating Croatia's willingness for international recognition, and as a wish to be recognized internationally.

Despite Croatia's willingness, countries were loathe to set a precedent with the recognition of Croatia because of fear of the 'flow-on effect for the Soviet scene'.⁷ On 27 August 1991, the European Community decided to establish a peace conference on Yugoslavia and an Arbitration Committee comprising five Presidents from among the various Constitutional Courts of the EC countries. The Committee became known as the Badinter Committee named after its president Mr. Badinter –

5 It should be noted that, since its re-integration into the Croatian State by Croatian troops, the 'Republika Srpska Krajina' no longer exists. Moreover, the problem of Serbs living outside Serbia is not yet resolved, illustrated by the fact that Serbs still live in parts of Croatia (i.e. East-Slavonia) and in Bosnia-Herzegovina.

6 'Statements on Croatian Democracy and Independence', Croatian Democratic Union, 1991, Preamble.

7 Rich, *supra* note 1, at 40.

President of the French Constitutional Court. Its mandate was to give binding decisions as to the process of dissolution of the SFRY.

In the meantime, Croatia made another appeal to the Member States of the EC and the UN 'to establish diplomatic relations with the Republic of Croatia'.⁸ At the same time, it decided 'to recognize the independence and sovereignty of the other republics of the former SFRY on the basis of the principle of mutuality.' Recent undertakings between Belgrade and Zagreb aiming at a mutual recognition show that, up to now, this has been a mere intention without any practical consequences.

On 16 December 1991 the EC Foreign Ministers issued a 'Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union'⁹ and a 'Declaration on Yugoslavia'.¹⁰ They had acknowledged that they could no longer deny the political realities and that they had to react correspondingly.

It is interesting to note that, in the Guidelines, the recognition of the new States was not only made subject to the traditional criteria for the recognition of statehood (which are: permanent population, defined territory, a government in effective control of the territory and the capacity to enter into relations with other States),¹¹ but also made dependent upon 'the political realities in each case'. This made recognition a matter of political discretion whereas the traditional criteria only took account of the mere facts, exactly mirroring the current situation.

The development of recognition, from a simple declaration of an ascertainable fact into a tool for political actions, is also underlined by the statement that the Member States 'would take account of the effects of recognition on neighbouring States'. Consequently, recognition no longer remains only an issue between the two States in question, but entails a 'third dimension' in so far as neighbouring States are to be taken into account. Furthermore, it was stated that 'the Community and its Member States will not recognize entities which are the result of aggression.' This can be applied to the Serbian entities in Croatia and we will see in a moment the effects of this attitude.

Following the Guidelines, the Declaration on Yugoslavia made recognition of the Yugoslav Republics subject to various conditions, among them their application to be recognized. Having fulfilled the requirements, on 15 January 1992, Croatia was recognized by the EC and subsequently by many other countries. The whole recognition process ended with Croatia being admitted to the UN on 22 May 1992.

The current status of Croatia under public international law can be drawn from the Opinions (in particular Opinion Nos. 2, 3 and 5) spelled out by the Badinter Committee. These opinions were the basis for the Committee's decision to recognize Croatia. Applying the principle of *uti possidetis*, Opinion No. 3 held that

8 *Focus*, Special Issue, Belgrade, 14 January 1992; 92, 178.

9 *Ibid.*, at 149.

10 *Ibid.*, at 151;

11 I. Brownlie, *Principles of Public International Law* (1990) 72; Montevideo Convention on Rights and Duties, Art. I.

when the former republic Croatia was in the process of becoming a sovereign State, the former internal boundaries between Croatia and Serbia became frontiers between two sovereign States.

However, this principle could not be applied to the new Serbian entities in Croatia, although they, too, had declared their independence (the so-called 'Republika Srpska Krajina'). These boundaries were the result of the use of force and therefore were 'not capable of producing any legal effect.'¹² Although the Serbian population in Croatia did not constitute a sovereign State they were, however, still afforded the rights accorded to minorities under public international law, including the right to choose their own nationality.

B. Serbia and Montenegro

The determining issue in the question of recognition of Serbia and Montenegro has been the dispute as to whether the former Yugoslavia was in a process of secession or dissolution. Whereas Zagreb's view has been that this was a legitimate process of self-determination leading to the dissolution of the original State, Belgrade has assumed a process of secession, with Serbia and Montenegro being the 'continuing State' of the former Yugoslavia. The question behind the dispute is whether the SFRY's assets should be divided equitably between the successor States or whether the 'continuing State' is entitled to them.

Serbia expressed its view as early as in 1991 with a statement by Serbia's Foreign Minister that Serbia 'is not interested in secession'.¹³ It is very questionable, however, whether the interests of a State have any influence on determining the process which the SFRY went through. Of course, it was in the other republics' interest, too, to be recognized as sovereign States, but recognition was not due to this self-interest, but, instead, the requirements under public international law and the ones laid down by the EC (see above). Moreover, Serbia has not been interested in being recognized as a new State, because it fears that this would prejudice the decision as to whether it was a 'continuing State' of the former Yugoslavia with the other republics seceding from the 'core-land'. It therefore did not apply for recognition at all.

On 27 April 1992, the Assembly of the so-called 'Federal Republic of Yugoslavia (FRY)' promulgated the Constitution of the FRY, claiming that the SFRY 'is transformed' into the FRY, a State comprising two constituent republics, Serbia and Montenegro.¹⁴ They stated that they strictly respected the continuity of the international personality and that they undertook to fulfill

all the rights conferred to and the obligations assumed by the SFRY in international relations, including its membership in all international organisations and participation in international treaties ratified or acceded to by Yugoslavia.

¹² Opinion No. 3, 3 *EJIL* (1992) 178 (Appendix).

¹³ *Focus*, *supra* note 8, at 276.

¹⁴ UN Document S/23877 of 5 May 1992.

Here again, a unilateral statement to take over the rights and duties of the preceding State could not, in itself, determine whether Yugoslavia was in a process of secession or dissolution. An answer was given by the Badinter Committee (Opinion Nos. 1, 8 and 9) which stated that the SFRY was in a process of dissolution, with the six republics being equal successors to the SFRY. The Committee referred to the internationally recognized criterion that 'the essential organs of the Federation, ... no longer meet the criteria of participation and representatives inherent in a federal state.'¹⁵ As far as Montenegro is concerned, there was also no request for recognition, but, instead, the wish to form the 'FRY'.

In summary, the current status of Serbia and Montenegro can be described as follows: two former republics of Yugoslavia comprise one State that has not been granted international recognition.

Serbia, on the one hand, wants to be recognized exclusively as the 'continuing State' of the SFRY. The attitude of the international community, on the other hand, follows the Badinter Committee's statement that the SFRY was in the 'process of dissolution'. Opinion No. 8 of 4 July 1992, stated that 'the process of dissolution ... is now complete and that the SFRY no longer exists.'¹⁶ This means that the SFRY no longer has legal personality, something which has major repercussions in international law, e.g. concerning membership in international organisations like the UN. Also, the UN Security Council considered that 'the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist' and that the new Yugoslavia 'cannot continue automatically the (UN) membership' of the old Yugoslavia.¹⁷ We shall see later that the practice of the UN and especially the General Assembly does not convey this attitude of break in membership, but that there are various hints of continuity in membership.

III. Mutual Recognition

A. New Aspects

Having examined the international recognition of the republics in question, I will now turn to the question of which new aspects the envisaged mutual recognition entails.

First, recognition is now even more important for the establishment of peace in the area. This does not mean that international recognition is irrelevant, especially as it has now become a tool for political action (see above). Although international recognition does not directly concern the relations between the republics themselves, it 'would take account of the effects of recognition on neighbouring

15 Opinion No. 1, 3 *EJIL* (1992) 178 (Appendix).

16 4 *EJIL* (1993) 72-91.

17 UN SC Resolution 777 of 19 September 1992: S/24570.

States'.¹⁸ Mutual recognition, however, has direct effects on relations between the recognizing States: apart from being simply a 'congratulatory message on attainment of independence'¹⁹ or a formal determination of statehood, it leads to the establishment of diplomatic relations often connected with the conclusion of economic treaties. This means that the exchange of opinions and disputes can be carried out through direct contact persons, e.g. diplomats. These direct relations are likely to strengthen and stabilize the overall scenario.

Second, mutual recognition between Croatia and Serbia+Montenegro has effects on the situation at large, especially on the continuing war in Bosnia-Herzegovina. Since the conflicting parties are intertwined, and Serbs live in both Croatia and Bosnia-Herzegovina, a stabilisation process between Serbia and Croatia might reduce the conflicting parties' determination for war in Bosnia-Herzegovina.

Third, and most importantly, mutual recognition means that the peace process is no longer imposed by third parties through sanctions, embargos, etc., but is born out of their own initiative. This does not prevent third parties from helping the recognizing States on their way to recognition, but the decisive act itself depends completely on the parties' own will and decisiveness. As history shows, a self-initiated peace is a better guarantee for a lasting peace than an imposed one. Especially in a war like this, which has arisen out of ethnic conflicts between the different peoples of one State, and where there is not one single aggressor, the decisive initiative for peace must come from the involved parties themselves.

B. Relevant Changes since International Recognition

Having underlined the importance of mutual recognition as distinct from international recognition, one has to ask whether there have been any relevant changes *in materia*, i.e. concerning the conditions for recognition.

International recognition of Croatia took place in the first half of 1992. Since then, three years have passed. Consequently, one has to examine the effects of this lapse of time on the status of the republics, especially the status of the so-called 'Republika Srpska Krajina'. Three years ago, the Serbs in Croatia were recognized as a minority with all the rights accorded to minorities under public international law. We will see in a moment whether and in what respect the time factor has changed anything. Moreover, the reactions of the republics in question to the attitude of the international community and reactions of third States, may have contributed to a change *in materia*. The principles of estoppel and acquiescence, which constitute general principles under public international law,²⁰ show that certain reactions or conduct can have legal significance.

18 Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 16 December 1992, 4 *EJIL* (1993) 72-91.

19 Brownlie, *supra* note 11, at 91.

20 *Ibid.*, at 17, 18.

IV. Recognition of Croatia by Belgrade

The recognition of Croatia as a sovereign State is closely connected with the status of Serbs in Croatia: Croatia wants first to be recognized before talking about possible autonomy for the Serbs in Croatia, while Belgrade wants to recognize Croatia only when an agreement regarding Serbian autonomy has been reached.²¹

Because of its political nature, recognition has often been made subject to the fulfilment of certain conditions.²² This practice can be justified by the fact that recognition is a unilateral Act of State,²³ the validity of which depends on the declaration and conduct of only one State.

Before turning to the effects of recognition on Croatia as a whole, I will examine the status of Serbs in Croatia.

A. Status of Serbs in Croatia

More than three years ago, the Badinter Committee was of the opinion, that 'the Serbian population in ... Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law.'²⁴ Without explicitly denying the Serbian population's right to self-determination, the Committee put the stress on the Serbs' minority rights, thus trying to avoid a further break-up of the republics. Nevertheless, it derived these minority rights from the principle of the right to self-determination. This seems to be contradictory: either a minority has the right to self-determination which means that it does not constitute a minority any more, or it is denied this right in the interest of the integrity of States, and in order to hinder separatist activities. In this case, however, the rights accorded to minorities do not flow from the right to self-determination. Consequently, the Opinion of the Badinter Committee must be interpreted in such a way that the rights accorded to minorities imply certain rights of self-determination as, for example, to their language, religion and nationality.

The question arises whether the so-called 'Republika Srpska Krajina' still constitutes a minority after more than three years of control over the occupied territories and after permanent reference to statehood on their behalf.²⁵

21 *FAZ*, *supra* note 2, 5 November 1994, 23 November 1994;

22 M.N. Shaw, *International Law* (1991), at 257.

23 Brownlie, *supra* note 11, at 637.

24 Opinion No. 2, 3 *EJIL* (1992) 178 (Appendix).

25 The following examination is based on the situation before the 're-integration' of the 'Republika Srpska Krajina' into the Croatian State, since – at the time of writing – Serbs in Croatia still referred to their sovereignty.

Although the problem of the 'Republika Srpska Krajina' now seems to be solved for Croatia, this examination can still be of some interest with regard to the status of the Serbs still living in Croatia and the similar situation in Bosnia-Herzegovina. Moreover, an examination of the status of Serbs in Croatia before the re-integration in August 1995 can be necessary in order to assess the process of 're-integration' by force legally.

The Serbs cannot back up their claim to territorial sovereignty with the concept of effective occupation. Although relating to actual possession, effective occupation can only give a title if it is an occupation of *terra nullius*.²⁶ This is not the case with the Serbs in Yugoslavia. Originally belonging to the SFRY, the Serbian entities became part of Croatia following its independence (*uti possidetis*). So this land was at no time *terra nullius*.

The concept of acquisitive prescription, however, does not need the criterion of 'new' land. 'The essence of prescription is the removal of defects in a putative title arising from usurpation of another's sovereignty by the consent and acquiescence of the former sovereign.'²⁷

The Serbs in Croatia have tried to publicly display State authority for more than three years, and have permanently used the term 'Republika Srpska Krajina'. Even if one takes the view that three years of possession – under special circumstances like the Yugoslav war, where demarcation lines and possession of territory change rather quickly, and where stabilisation is a major prospective – are already enough for persisting possession, the title of acquisitive prescription still lacks the element of acquiescence. Huber in the *Palmas* case refers to the 'continuous and peaceful display of State authority.'²⁸ Zagreb has always challenged the Serbian entities' statehood and, on the visit of Belgrade's Foreign Minister Jovanovic to Zagreb on 4 November 1994, Zagreb referred to the possibility of regaining control over the occupied territories with all – even military – means.²⁹ Therefore, the conditions for acquisitive prescription are not fulfilled because of lack of acquiescence. Neither the time factor, nor the conduct of the Serbs themselves and third parties (here the Croats), have led to the sovereignty of the Serbian entities in Croatia. They still (only) have the rights accorded to minorities under public international law.

Compared with the system for the protection of human rights, the protection of minority rights is still very insufficient and only in its inception. Moreover, it seems to be very difficult to agree internationally on a system of protection for minority rights.³⁰ The UN Charter contains a number of references to a general standard of non-discrimination.³¹ Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966)³² gives an even more precise and detailed definition of racial discrimination. But minorities not only need non-discrimination but also special support and protection.³³ A further evolution in the system of minority rights can be seen in Article 27 of the UN Covenant on Civil and

26 Brownlie, *supra* note 11, at 139.

27 *Ibid.*, at 154.

28 *Island of Palmas* arbitration (1928), RIAA II 829.

29 *FAZ*, *supra* note 2, 23 November 1994; the same attitude was expressed by President Tudjman on 5 December 1994, at the CSCE Meeting in Budapest, *FAZ*, *supra* note 2, 6 January 1994.

30 *Süddeutsche Zeitung (SZ)*, 11 November 1994: 'Convention of the European Council on the Protection of National Minorities: no consensus on the definition of the term "minority"'.
31 Arts. 1(3), 13(1), 55, 56, 62(2) and 76.

32 I. Brownlie, *Basic Documents in International Law* (1983) at 302.

33 H.-J. Heintze, 'Minderheitenschutz im Völkerrecht', 2 *Humanitäres Völkerrecht* (1993) 107-109.

Political Rights (CCPR). According to that article, persons belonging to ethnic, linguistic or religious minorities

shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The negative formulation that individuals 'shall not be denied the right' indicates that direct, positive duties to guarantee rights absent from specific threats at the horizontal level cannot be inferred from Article 27 CCPR.³⁴ The obligation, however, goes beyond the mere prohibition of discrimination and contains elements of a right to *de facto* equality, i.e. positive protection against discrimination.³⁵

On 18 December 1992, the General Assembly finally agreed on a Declaration on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities.³⁶ Although the Declaration's nine articles guarantee minority rights as to minorities' own culture, language and religion and provide for cooperation in national and regional political decisions, the Declaration suffers from a lack of binding effect. Moreover, it does not contain a definition of a 'minority' – such a definition has not yet been agreed upon, as shown by the European Council Convention on the Protection of National Minorities. This means that the definition of what constitutes a national minority is up to the States. Consequently, the scope of protection can be defined by each State in a different way. The Serbs in Croatia have already been recognized as minorities by the EC and other third countries.³⁷ The question of whether the Croats are willing to do so depends on how many rights they want to grant to the Serbs.

With the CCPR entering into force in Croatia on 8 October 1991, Croatia gave a report under Article 40(1)(b) CCPR to the UN Committee on Human Rights at its 46th Meeting, from 19 October to 6 November 1992.³⁸ The report described measures that had been taken to prevent violations of human rights, e.g. the enactment of new laws concerning human rights and minority rights. The experts on the Committee acknowledged this, but still uttered their concerns about the abduction of Serbs, the lack of sanctions against members of armed forces who had violated human rights, and the conduct of Croatian troops on Bosnian territory. It is remarkable to note, however, that Croatia showed its willingness for an efficient protection of human rights and, especially, minority rights so promptly on the international level. Recent declarations on behalf of the Croats are in favour of

34 M. Nowak, *CCPR Commentary* (1993) Art. 27(46).

35 Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights', R. Bernhardt *et al.*, *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler* (1983), at 966.

36 Resolution 47/135 (18 December 1992); cf. Ermacora, 'Späte Einsichten – Der Entwurf der UN-Erklärung zum Minderheitenschutz', 5 *VN* (1992), at 149.

37 Opinion No. 2 of the Badinter Committee, 3 *EJIL* (1992) 178 (Appendix).

38 3 *VN* (1993), at 100.

efficient minority protection.³⁹ On the other hand, Croats still refer to the possibility of re-establishing 'law and order' in the Serbian-controlled areas.⁴⁰

To fulfill the minimum standards of international law, Croatia would have to guarantee the Serbs' rights as to their own language, culture, religion and nationality. Moreover, the rule of non-discrimination entails equal political rights in national and regional decision-making.

In contrast to this, the so-called 'Republika Srpska Krajina' still wants to be a sovereign and independent State. As we have seen, this point of view lacks any legal basis under public international law. It is therefore important to formally place the Serbian entities under the Croatian government, and to guarantee far-ranging autonomy rights as to culture, education, media and economy. Even their desire for nationality does not contradict the fact that the Serbs formally belong to Croatia. It is difficult to imagine, however, that Serbs will be allowed their own currency and police. That would amount to a 'Serbian State within the State of Croatia',⁴¹ which is against Croatia's legitimate interests. As the Declaration on Friendly Relations shows, the right to complete self-determination is only granted to oppressed peoples under totalitarian regimes. As long as the Serbs are granted the above-mentioned rights for minorities, they cannot refer to their sovereignty.

With the so-called 'Republika Srpska Krajina' being formally placed under the authority of the Croatian Government, the question of foreign relations basically remains with Zagreb. It is, then, up to the Serbs and Croats to find a solution that grants the Serbs in Croatia the establishment of external relations in the framework of their autonomy rights, e.g. the establishment of special relations with other minorities like the Bosnian Serbs or with other countries like Serbia. The question of foreign relations is part of the issue of legal personality in international law. 'International personality is participation, plus some form of community acceptance.'⁴² Whether or not the entities have legal personality has to be considered in the light of the circumstances of the case, e.g. the reaction of other international persons. Here again, the Serbian entities in Croatia derive their rights from the Croatian Government. The recognition of Serbs as a minority in Croatia shows that their legal personality in international law only exists to the extent that is conceded to the Serbs by Zagreb.

B. Integrity of Croatian Territory

Mutual recognition of sovereign States comprises the duty to respect the territorial integrity of the other State. This principle was spelled out by the ICJ as early as

39 *FAZ*, *supra* note 2, 22 October 1994; 28 October 1994; 23 November 1994; *SZ*, *supra* note 30, 22 November 1994.

40 *FAZ*, *supra* note 2, 23 November 1994; 6 December 1994; *SZ*, *supra* note 30, 1 December 1994.

41 *FAZ*, *supra* note 2, 22 October 94.

42 *Shaw*, *supra* note 22, at 137.

1928, in the *Palmas* case: 'Territorial sovereignty ... involves the exclusive right to display the activities of a state.'⁴³

The question arises, as to whether the influence of Belgrade on Serbian entities in Croatia contradicts the respect for Croatia's territorial integrity. Not only are there consultations between the Krajina-Serbs and Belgrade in all important questions,⁴⁴ Serbia has also established a military organisation and administration in the occupied areas. Apart from this political influence, there is great economic dependency on Serbia as arms, petrol and food are all supplied by Serbia. Whether this constitutes a breach of the duty to respect Croatia's territorial integrity depends on the nature and intensity of the acts. Whereas mere economic influence does not constitute such a breach, an administration organized and upheld by Belgrade is an 'exercice de sa puissance sur le territoire d'un autre Etat'.⁴⁵ If it is the case that the Krajina-Serbs are only being puppets in the hands of Belgrade, Croatia's integrity is violated and the Krajina-Serbs' plea for autonomy seems hypocritical.

The same result can be derived from the principle of non-intervention⁴⁶ or the duty of non-interference,⁴⁷ which is part of customary international law and founded upon the concept of respect for the territorial sovereignty of States. Whereas under classical doctrine only a 'dictatorial interference'⁴⁸ was forbidden, the 'Friendly Relations'-Declaration extended the scope of the principle in the sense that

[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

This means that the duty of non-interference has received a wider applicability than the principle of territorial integrity. It even encompasses the supply of arms to certain persons of another State, who intend to use them against that State.⁴⁹ Despite the armistice, agreed by Croats and Krajina-Serbs in March 1994, these arms may still be used against the Croats or against their interests, and therefore, the supply of arms to the Krajina-Serbs by Belgrade constitutes a breach of the duty of non-interference.

The question of massive violations of human rights committed by the Serbs in Croatia is also closely connected with the principle of non-interference and the respect for Croatia's territorial integrity. This problem has been repeatedly discussed by the UN Committee on Human Rights on the basis of human rights reports sent to the Committee by Serbia itself and reports from the Special

43 *Palmas* case from 4 April 1928, RIAA II, at 839; also: *Lotus* case, A 10 (1927), at 18: 'la limitation primordiale qu'impose le droit international a l'Etat est celle d'exclure ... tout exercice de sa puissance sur le territoire d'un autre Etat.'

44 SZ, *supra* note 30, 22 November 1994: 'Belgrade supports Serbs in Krajina'.

45 *Lotus* case, *supra* note 43.

46 Shaw, *supra* note 22, at 719.

47 H. Lauterpacht, *Recognition in International Law* (1947), at 229.

48 L. Oppenheim, *International Law* (8th ed.), Vol. I, at 305.

49 A. Verdross, B. Simma, *Universelles Völkerrecht. Theorie und Praxis* (3rd ed. 1984), at 307.

Rapporteur on Yugoslavia, Tadeusz Mazowiecki.⁵⁰ It should be noted, however, that the duty to respect human rights exists independently from the recognition problem. I will therefore return to specific problems connected with the mutual recognition of both States.

A solution to the conflict between the integrity of Croatian territory and the influence of Belgrade on Serbian entities might be found in the establishment of a confederation between the Krajina-Serbs and their mother land. Such a plan has been suggested by M. Curry, the Speaker of the US Foreign Secretary, concerning the Bosnian Serbs and Belgrade.⁵¹ A possible confederation between these parties might have a flow-on effect on the Serbian-Croatian scene. But is such a confederation compatible with a simultaneous recognition of the territorial integrity of Croatia (or Bosnia-Herzegovina, as it is suggested by the USA)?

The actual influence of Belgrade on Serbian entities conflicts – as we have seen – with Croatia's territorial integrity and constitutes a breach of the duty of non-interference where Croatia is recognized as a sovereign State by Belgrade. An eventual confederation between the Krajina-Serbs and Serbia would lead to an even more intense cooperation and the increased possibility of being influenced. In this case, the scope of recognition of Croatia as a sovereign State would have to be reduced. It would then only result in a recognition of the Croatian international frontiers without prejudice to the confederation. The relationship between Zagreb and Belgrade might thus become even more complicated and delicate. Moreover, this solution is to some extent contradictory: either Croatia could recognize the establishment of a Serbian confederation, but then the territorial sovereignty of Croatia over the Serbian entities would scarcely exist, or Serbia could recognize Croatia as a sovereign State without the possibility, under international law, of intervening, as regards Croatia's Serbian entities.

V. Recognition of Serbia and Montenegro by Zagreb

As we have seen above, Serbia and Montenegro have not been recognized internationally as the 'continuing State' of the former SFRY (Opinion No. 1 of the Badinter Committee). What is at stake here is not the question of Serbian statehood, but Serbia's demand to be recognized as the 'continuing State'. In contrast to territorial entitlement, the lapse of time has no influence on that situation. Either the essential organs of the SFRY continued to exist, leading to a continuity in statehood, or they did not. In the latter case, the passage of time cannot change this fact and the assessment of its legal consequences. However, the conduct of third States can give some insights regarding the international reception of this problem.

50 6VN (1992), at 209; 3VN (1993), at 99.

51 SZ, *supra* note 30, 30 November 1994.

After the promulgation of Opinion No. 1 by the Badinter Committee, the other republics of the former Yugoslavia vigorously asserted that all the former republics were successor States.⁵² Many other countries made reservations concerning Serbia's attitude to strictly respect 'the continuity of the international personality'.⁵³ But not everyone is of the same negative opinion and there are various factors which show inconsistency.⁵⁴

First, there was 'a glaring inconsistency in the position taken by the US delegation'⁵⁵ which implicitly admitted the right of 'the Belgrade authorities' to claim the seat of Yugoslavia in the UN. In its Resolution 777 of 19 September 1992, the Security Council stated that 'the State formerly known as the SFRY has ceased to exist' and that the new Yugoslavia 'cannot automatically continue the (UN) membership.'⁵⁶ Although Resolution 47/1 of the General Assembly of 19 September 1992,⁵⁷ endorsed the Council's recommendation, it failed to expel the SFRY from the UN. Therefore the allegedly non-existent Yugoslavia continues to take its seat (with nameplate) in the General Assembly and the flag continues to fly in front of the UN compound. Its membership in the UN has only been suspended, despite all declarations that the SFRY has been dissolved. The question is whether Belgrade's wish to be recognized as 'continuing State' can be reduced to the wish to be recognized in any event. With recognition being a unilateral act, recognition itself and the wish to be recognized can be provided with conditions. In this case, one has to ask whether the annex 'continuing State' is so important for Serbia, that, without it, it would not have expressed any wish for recognition at all. As we have seen, Belgrade has never applied for recognition so that such a reduction is not possible.

A second argument against this reduction is that statehood cannot be enforced on States against their will.⁵⁸ States have to accept recognition in order to be able to establish diplomatic relations. These arguments are in conflict with the need and interest of certain States and, in particular, of Croatia, to have contacts with Belgrade. With recognition on both sides, a foundation for the establishment of diplomatic (and economic) relations would be laid. On the other hand, Zagreb's concern not to implicitly renounce all assets of the SFRY in case of Serbia being recognized is understandable too. This conflict can only be resolved if the question of recognition is separated from the question of continuity. The concept of mutual recognition should be envisaged and considered without prejudice to the question of whether Serbia and Montenegro is the 'continuing State' of the SFRY or not.

52 'Peace Conference on Yugoslavia: Croatian Approach', Ministry of Foreign Affairs, Republic of Croatia, Zagreb, September 1991.

53 UN Doc. S/ 23877 of 5 May 1992.

54 Türk, *supra* note 1, at 70; Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Break?', 86 *AJIL* (1992), at 830-833.

55 Blum, *supra* note 54, at 830.

56 S/24570.

57 A/47/L.1.

58 A. Verdross, B. Simma, *supra* note 49, at 229; J. Crawford, *The Creation of States in International Law* (1979), at 151.

VI. Conclusion

As the Yugoslavian crisis shows, recognition under public international law has developed from a purely formal point of view based on facts, to one based on political discretion and is – as such – becoming a tool for political action. Whereas, under classical doctrine it was only asked if the four criteria (see above) had been fulfilled, political realities are now taken into account.

In the case of Croatia, the criterion of effective control over its territory has been interpreted in a wide sense, since Croatia does not have direct control over at least a third of its territory.

What effects does this development have on the mutual recognition between Zagreb and Belgrade? Recognition has become much more uncertain and unpredictable. This is a consequence of the above development which makes recognition subject to the political realities of each given case. The argument that this state of affairs leads to inconsistency⁵⁹ is overcome by the fact that the aim of recognition is to reach political agreement. Here, moral standards often play, if only implicitly, an important role, and an attempt to find a solution should not be content to consider only the mere facts of a war. The involved parties' major aim must be the establishment of direct relations in order to settle disputes peacefully. This conditions their mutual recognition. The extent to which they refer to moral standards in this process depends on their need and willingness to have direct talks with the other side. Both Croatia and Serbia need these direct relations as a first step. A second step will be the settlement of the disputes and the fulfilment of the conditions connected with the process of mutual recognition.

59 Rich, *supra* note 1, at 64;