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THE PROCESS OF THE ESTABLISHMENT OF THE INDEPENDENCE OF THE REPUBLIC OF CROATIA FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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As Croatia recently celebrated the twentieth anniversary of the proclamation of its independence as a state, a question arises as to whether the complex processes of the establishment of its statehood are understood. The responses to such a question are indeed incredible, as seen by many facts, beginning with the most rudimentary of newspaper polls among Croatian citizens.

The author of this work describes the legal process by which Croatia achieved sovereignty and independence, beginning with the constitutional proclamation of its independence and its severance of all constitutional ties with the Yugoslav Federation and its republics. He goes on to consider the processes related to its international recognition. The work provides an overview of historical events and, in its introduction, includes a short review of the concept of the state as the dominant subject of international law.

Key words: The establishment of the independence and sovereignty of the Republic of Croatia 1990-1995, the state as a subject of international law, the Yugoslav crisis

1. Introductory Notes – Concerning the State as the Dominant Subject in International Law

In contrast with domestic law, the role of the subject in international law represents one of its most complex and dynamic areas. New tendencies in the

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development of international law have radically expanded the number of its subjects. The variety of historical examples, ever increasing numbers of jurisdictions as well as the interests of and positions taken by scholars in international law led to the growth in the number of issues to be considered in connection with subjects in international law.

Although international law today recognizes a number of subjects (rebellions and liberation movements, man, international organs, areas having a special status, the Holy See, areas having some form of a dependency relationship), the state has always been the most important, absolute, and, until recently, the only subject of international law. As a result, until not too long ago, international law had also been known as interstate law.

A subject of international law is defined as “any person who under the provisions of such law is the bearer of rights and duties, who acts directly under the rules of such law and is directly subject to the international legal system.”¹

The state,² and the legal provisions which govern its relations in the international community, hold a central place in international law. The largest portion of the processes and mechanisms which govern international law include matters related to the state. But nevertheless, no generally accepted definition of the state currently exists, as reflected in numerous acts which attempted to define the law and duties of states within the system of international law. This has been similarly noted by the legal theoretician Hans Kelsen, who emphasized that international law has still failed to specify the unique criteria for the definition of a state.³

Still, it has been generally accepted that a state must meet three fundamental elements in order to satisfy the criteria of international law: a defined territory (land), population, and an independent, sovereign government.⁴ All of these elements must co-exist concurrently, and scholarly studies and practice have dealt with them in very diverse concrete situations. This definition of Georg Jellinek would be later confirmed in international jurisprudence and would be included in subsequent attempts to codify international provisions

¹ Juraj Andrassy, et al., *Međunarodno pravo I* (Zagreb: Pravni fakultet Sveučilišta u Zagrebu i Školska knjiga, 2010), p. 65. Concerning the meaning of subjectivity in international law, see also Vladimir Đ. Degan, *Međunarodno pravo* (Rijeka: Pravni fakultet Sveučilište u Rijeci, 2000), pp. 4-5, and future editions of the same work.

² We note here that the state has always been of special interest in theoretical-legal and constitutional analyses, which have dealt with the most varied questions of its origin and organization. For this study, such works are not of great consequence. As an example of such studies, one may consult the work of Eugen Pusić, *Država i državna uprava* (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 1999).

³ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens and Sons, Ltd., 1950), pp. 68 and 69.

⁴ Such elements first appeared in the 17th century, when sovereignty and the interaction of laws of equal states began to be mentioned, in contrast to the prior feudal hierarchical interstate relations.

related to the legal status of the state. These elements had been upheld in *Deutsche Continental Gas - Gesellschaft v. Polish State* heard by the Joint German-Polish Court,⁵ and are contained within the 1933 Convention of Montevideo on the Rights and Duties of the State (Article 1),⁶ the 1948 International Court's advisory opinion entitled "Conditions of Admission of a State to Membership in the United Nations,"⁷ and similar acts.

Earlier theories of international law differentiated between the derivative and origination means for the establishment of a state. Those states established under the origination doctrine have no legal or factual ties with the predecessor sovereign of its territory. This could occur where the state had been established in an area not under any sovereignty (*terra nullis*) or where legal continuity with the prior state had ended.

With respect to a state formed derivatively, the state subsumes within it legal and factual continuities with the predecessor state, so that the newly formed state becomes a successor of the prior state. Modern international law recognizes numerous examples and modalities of this means for the formation of a state. For the most part, it is mentioned in situations concerning the disintegration of a state, the secession of a portion of a state with the goal of achieving its independence, the independence of dependent territories, vassalages or colonies, the unification or fusion of a number of states with the intent to create a new one, etc. Such changes may occur through a legal act (e.g., the internal decisions of a predecessor state, an agreement between the metropolitan power and its colony, an international agreement or the decision of an international organization (in most cases today, the United Nations)).

We will now succinctly review the three generally accepted conditions which a state must satisfy to become a subject of international law.

Population.

Population is the initial, and according to many, the most important element. A definitive state territory must have a stable population which has a legal and factual connection with the state. This is satisfied through the institution of citizenship, which is determined independently by each state.⁸ International

⁵ 5 *Annual Digest of Public International Law* 11 (1929).

⁶ The text of same may be found at, among other places, <http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>.

⁷ 1948 I.C.J. 57.

⁸ Under the term "citizenship" one generally understands a specific legal relationship, characterized by its permanence, based on the relation between physical persons and sovereign states, which gives rise to certain rights and duties. International law allows states to thoroughly and independently control these relations, subject to only some minor exceptions. The most common criteria for the basis of citizenship are the principles of *ius soli* (citizenship based on the location

legal sources merely elaborate fundamental principles of citizenship, leaving it to states to administer citizenship in accordance with such principles. However, a population also includes aliens as well as stateless persons (*apatrides*). Their legal status is also a subject of interest of state normative acts in keeping with international legal standards. Contemporary international legal trends promote the interests of the population of a state with increasing numbers of provisions concerning the protection of human rights and ever diverse mechanisms for their realization and oversight.

The size of the population of a state is not determinative in delimiting a state's territory nor does it form a condition for recognition, as evidenced by the recent entry of a number of countries with very small numbers of inhabitants into the most important international organizations, whose members can only be states.

State Territory.

State territory is the second component of a state's subjectivity in international law. Positive international law contains numerous provisions concerning state territory and allows states to come to terms concerning their territorial questions independently and on a bilateral basis.

The territory of a state consists of the land portion of the state bounded by frontiers as well as the entire area above such land. In the case of maritime states, the territory of such a state includes the area of its internal seas and territorial seas, including the water column, the subsoil of its sea and corresponding aerial territory. So-called archipelagic states have the right to proclaim archipelagic waters, whose status only slightly varies from those of territorial waters. The international law of the sea has also created regimes which allow states to hold "sovereign rights" and "jurisdiction" in certain other areas of the sea outside of the range of the state's territory, i.e., outside of its border on the sea.

For international law, the size of a territory is of no importance. Examples of a number of countries show that a territory need not be physically joined together. It also does not demand the exact demarcation of borders as a precondition to recognition and its acceptance as a subject of international law.⁹

where the physical person had been born) and *ius sanguinis* (the citizenship of a parent). See, for example, Ivo Borković, *Upravno pravo* (Zagreb: Informator, 6th ed., 1997), p. 147 *et seq.* In connection with the formation of new institutions of the European Union, a special form of European citizenship or citizenship of the European Union has appeared. See Dario Đerda, "O državljanstvu u Europske unije," *Pravo i porezi – časopis za pravnu i ekonomsku teoriju i praksu* (2002, 11): 83-88.

⁹ As has already been noted, a large portion of international law concerns questions connected with state territory. Such matters are generally termed as "objects of international law" within which certain disciplines, such as the international law of the sea, have been established as separate subspecialties of international law.

Sovereignty (Supreme Power).

Sovereignty, or the supremacy of state power, is the third element that must be met for any territorial subject to be recognized as a subject of international law and deemed a state. Sovereignty is defined as the supreme power of a state over its territory, which excludes other states and is not subject to any superior power.¹⁰ In contemporary international relations, sovereignty is also understood as the right of a subject of international law to determine the conduct of its own foreign affairs, which includes the determination to enter into international agreements or to join alliances and international organizations. Although a state may be sovereign, it does not have unlimited power. Along with the need to respect generally accepted customary law, a state is also bound by the international treaties it enters into.

The most important requirement of international law in connection with sovereignty is without a doubt the effectiveness of a state's government, i.e., its ability to independently adopt and carry out legal acts. Effectiveness, however, does not require complete control over all of a state's territory. The temporary occupation or conquest of part of a territory does not act as an impediment to a claim that a certain government exercises effective control. Effectiveness can be deemed to exist where a state's government is prevented from controlling the entire area of a state due to internal revolts or instability.¹¹

A state's satisfaction of these cumulative preconditions causes it to become an absolute subject of international law, with all of its characteristics. To this one must add the legal capabilities of a state (as a bearer of international duties and obligations) and its ability act, which may concern either its ability to conduct its affairs or its ability to commit delicts. A state's ability to conduct its affairs differs somewhat from that in domestic law. For example, it includes *ius contrahendi* (the ability for the subject to enter into international agreements), *ius legitimationis* (the ability for the subject to exchange representatives with other subjects), and *ius in bello* (the duty of the subject to respect the international law of war). By the ability to commit delicts, one means the ability of the subject to cause harm to another subject, whether by acts (either with or without agreements) or omissions, as a result of which the subject commits an international delict and may be subject to international sanctions. International delicts remain uncodified, but customary law along with scholarly discussions and practices, more than adequately provide enough sources for the application of this concept.

¹⁰ According to the definition of Vladimir Đ. Degan, *Međunarodno pravo*, p. 228. It is similarly defined in the works of other authors. Concerning the development of the term sovereignty and its "internal" meaning, see Krbek's studies related to sovereignty in the Yugoslav Academy's *Rad* (1964/65), no. 334 and no. 339.

¹¹ Concerning sovereignty as a category of international law, see Juraj Andrassy, "Opće međunarodno pravo o suverenosti," *Jugoslavenska revija za međunarodno pravo* (1969, 3): 333-341.

The international recognition of a state has become a customary event in the absolute affirmation of a state in international life. According to the Institute for International Law of 1936, international recognition is “a free act in which one state, or more of them, pronounces on the existence of [another] state and shows its will that it considers [such other state] to be a member of the international community.”¹² International recognition is not a key to the establishment of a state. A state arises in a particular way, having the three elements discussed in this paper. International recognition only affirms its formation. Recognition is merely a declaratory act, not a constituent one.¹³ The theory and practice of international law differentiates between *de iure* and *de facto* recognition, depending on the permanency and conditionality of the act of recognition. An announcement of international recognition may be made publicly or privately. There are numerous examples in which recognition is provided subject to certain conditions or the satisfaction of some criteria.

The international recognition of a state must be contrasted with the recognition of a government. The latter is characterized by situations where a previously existing and recognized state has been the subject of an unconstitutional change in government, which thus poses the question of the international recognition of such an illegal government. This legal issue needs to be considered in the context of sensitive political implications which such a situation may cause. International law has established its practice concerning the recognition of such governments. Such an act is based on the prior diplomatic relations with the state in question, as well as the general legislative work of the new government.

International legal understanding of the state as a subject of international law remains a complicated and diverse. Contemporary trends in international law revolve around the perspective of the disappearance of certain historical forms of subjectivity (such as tributary principalities) as well as the appearance of a number of completely new subjects, including supranational organs such as the European Union. For purposes of this work, it is not possible to delve into other questions concerning the state and other subjects of international law, such as, for example, questions concerning the rights and obligations of states, or questions concerning the merger of states, the end of the existence of a state, etc.

¹² The definition is cited in Andrassy, et al., *Međunarodno pravo I*, p. 91.

¹³ Those favoring the position that international recognition is a constituent act argue that it is a fourth, cumulative element necessary for a state to become a subject under international law. Because the international community has no central body which could grant such recognition, states provide such recognition on an individual basis as members of the “international system.” The determination to grant recognition must be made within the constraints of legal principles. The supporters of this view include Dionisio Anzilotti, Hans Kelsen, Hersch Lauterpach, Oppenheim, and others. See further discussions concerning this matter in Vladimir Đ. Degan, *Hrvatska država u međunarodnoj zajednici* (Zagreb: Nakladni zavod Globus, 2002), pp. 55-59.

A large number of these issues made their appearance during the period that Croatian independence had been formulated. Thus, positions taken by *ad hoc* arbitration bodies which determined the legality of the acts related to Croatian independence relied on the understanding of international law concerning the state.

2. The Major Constitutional Decisions of the Croatian Parliament (*Sabor*) in 1991 – Toward the Establishment of Croatian Statehood

The major constitutional decisions of the Croatian Parliament (*Sabor*) in 1991 must be considered within the wider historical context of watershed events which took place during the end of the eighties and beginning of the nineties of the 20th century. This represented a time of radical changes to the entire system of international relations and the end of bipolarity and the Cold War, which led to the collapse of the Soviet state and its political and economic system, and, which, in turn, led to new reformist demands in many Central European states. The position of the United States also changed. It now became a unilateral actor in international relations, even though it began to speak about finding and defining a so-called New World Order.¹⁴ Trends toward strengthening European institutions accompanied these events, such as in the reformist moves of the European Economic Union (later known as the European Union) (EU), but also in organizations such as the OECD (of special significance is the Charter of Paris of 1990).¹⁵ This article can not delve more deeply into these questions, which have already been treated elsewhere.¹⁶

Croatia faced the events surrounding the fall of the Communist system in somewhat different circumstances in comparison with other Central European countries. Its formal, legal position, in keeping with the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY), included some relatively clear elements of statehood (defined, of course, by standard Socialist ideology), and even some characteristics of subjectivity under international law. But, the disintegration of the entire Yugoslav social, governmental and economic system, which had been weakened during its search for new reformist solutions, became dangerous when it became tied to Greater Serbian

¹⁴ Concerning this, see Radovan Vukadinović, *Postkomunistički izazovi europskoj sigurnosti – od Jadrana do Baltika* (Mostar: Zial, 1997).

¹⁵ The Charter of Paris for a New Europe. The text of the Charter can be found at <http://www.osce.org/mc/39516>.

¹⁶ Ennio di Nolfo, *Storia delle relazioni internazionali 1919. - 1999*. (Bologna: Edizione Laterza, 2005), pp. 1347-1411; Peter Calvocoressi, *World Politics Since 1945* (London: Longman, 1996); Constantine Pleshakov, *Berlino 1989 e caduta del muro - la guerra civile che ha portato alla fine dell comunismo* (Corbazzio: 2009); Padraic Kenney, *The Burdens of Freedom: Eastern Europe Since 1989* (London: Zed Books, 2006); Henry Kissinger, *Diplomacy* (New York Simon & Schuster, 1994), p. 762 *et. seq.*

policies. Originating in intellectual circles, Greater Serbianism became sublimated with the Communist Party's leading *nomenklatura*, gathered around the new main leader of Serbian Communists, Slobodan Milošević. In certain instances, the protagonists of Greater Serbianism expertly cloaked themselves under the banner of saving the Yugoslav community, relying on the forces of the Yugoslav Peoples Army (JNA). The Croatian leadership, which sought to make maximum use the constitutional position of the Socialist Republic (SR) of Croatia, did not at first have enough force and determination to successfully meet the challenges posed by the aggressive provocations of Milošević. Still, it began to implement the initial constitutional revisions required for a radical change in the existing system, one headed toward its democratization and liberalization. This became especially obvious in the legal reformist moves towards the introduction of a multiparty system, the announcement and organization of elections, and the call for constituent meetings of the Croatian Parliament.

From a constitutional perspective, the new democratic government significantly quickened the path toward the establishment of Croatian statehood. These steps would act as the basis for the adoption of key constitutional decisions by the Croatian Parliament in 1991. Following the formation of the new democratic government (after 30 May 1990), amendments to the Constitution of the SR of Croatia (25 July 1990) abandoned the Socialist attributes found in state symbols, as well as in the general characteristics of the organization of government. The strengthening executive power (a Government replaced the former Executive Council of the Parliament), separated powers among three branches of the government, in contrast with the prior emphasis on the principle of the government's unity.¹⁷

The pinnacle of the constitutional process of establishing the Croatian state is without doubt the adoption of the Constitution of the Republic of Croatia,¹⁸ the so-called "Christmas Constitution" (22 December 1990). The Constitution accepted the position of the Republic of Croatia within the Yugoslav State, setting forth in its transitional and final provisions possible scenarios in case of a breach of the fundamental interests of the Republic. But, it also clearly spelled out the desire of the Croatian Republic to be constituted as an independent and sovereign state. While Article 140 of the Constitution states that the "Republic of Croatia remains within the SFRY," two provisions of the Constitution clearly reflect the determination to establish the state's independence. First, the Constitution allowed the Parliament to undertake such a decision (which in fact the Parliament did through its acts in June and October 1991), and, second, it anticipated the possibility of coming to terms with the other Yugoslav republics concerning a new constitutional arrangement. Taking into account

¹⁷ For sources, see Anđelko Milardović, *Dokumenti o državnosti Republike Hrvatske* (Zagreb: Alineja, 1992).

¹⁸ Ustav Republike Hrvatske, *Narodne novine*, 56/90.

the complexities surrounding the Yugoslav crises, the Parliament, through Paragraph 2 of the same Article listed the possible dangers as being a threat to the territorial integrity of the Republic of Croatia, its placement in an unequal position within the Yugoslav state or a threat to its interests (by any body of the Federation or from other republics or provinces). In this Paragraph, which is subordinate to the first Paragraph of this Article, the Republican organs became specifically charged with adopting special acts to protect the interests of the Republic. These acts were further spelled out in the Constitutional Law for the Implementation of the Constitution of the Republic of Croatia, which temporarily suspended a number of sections of the Constitution (e.g., foreign affairs, defense).¹⁹

The major Croatian constitutional decisions, which represent the basis for the establishment of the Croatian state as a subject of international law, were adopted in 1991. Extremely difficult diplomatic conditions, which remained completely at odds with Croatian national interests, required the Parliament to take complex and unique steps in connection with independence. This in part made the establishment of Croatia's legal and factual sovereignty more complicated as well as more arduous.

The first extraordinary event on the road toward independence and the constitutional establishment of a free and sovereign Croatian Republic was the Determination (*Odluka*) of the President of the Republic of Croatia concerning the holding of a referendum, issued on 25 April 1991. The Determination set a 19 May 1991 referendum which presented two questions to voters:

1. Are you in favor that Republic of Croatia, as a sovereign and independent state, which guarantees the cultural autonomy and all civil rights of Serbs and members of other nationalities in Croatia, may enter into a federation of sovereign states with the other republics (in accordance with the proposal of the Republic of Croatia and the Republic of Slovenia to resolve the SFRY state crises)?
2. Are you in favor that the Republic of Croatia remain in Yugoslavia as a unified federal state (in accordance with the proposal of the Republic of Serbia and the Socialist Republic of Montenegro to resolve the SFRY state crisis)?

Reports concerning the referendum's results confirmed the undeniable expression of the desire of the great majority of the Croatian people concerning the independence and sovereignty of the Republic of Croatia.²⁰ With respect to the first question, 2,845,521 voted in favor, representing 93.24% of all voters.

¹⁹ Concerning the means by which the Christmas Constitution was adopted, see Duška Šarin, *Nastanak hrvatskoga Ustava* (Zagreb: Narodne novine, 1997).

²⁰ According to the referendum results collected from 7,691 polling stations, out of 3,592,827 registered voters, 3,051,881, or 83.56 %, voted in the referendum.

A somewhat lower number voted against the second referendum question. This represented not only a further affirmation of the voting public's approval of the path taken by the Croatian state's leadership to establish an independent and sovereign Croatian Republic, but also a clear demand by the citizens of the Republic for its full independence.

The end of May and early June 1991 marked the complete breakdown of all discussions among the leaders of the Yugoslav republics. Constant provocations by local Serbs and the Yugoslav Army on the ground threatened to escalate an extremely dangerous situation into open conflict. The political situation remained murky, while constant meetings among the Presidents of the Yugoslav republics led to no acceptable solution.²¹ During this period, President Tuđman and Slovenian President Kučan discussed questions concerning future bilateral relations after the proclamation of independence. All bodies of the Croatian government began to prepare for the adoption of the act concerning the independence and sovereignty of the Croatian state.

At its meeting on 25 June 1991, the Croatian Parliament adopted the most important Constitutional acts proclaiming the independence and sovereignty of the Croatian state. These decisions are expressed in two acts: the Constitutional Decision Concerning the Sovereignty and Independence of the Republic of Croatia (the Constitutional Decision), and the Declaration Concerning the Proclamation of the Sovereignty and Independence of the Republic of Croatia (the Constitutional Declaration). One should also mention the Constitutional Law Concerning Amendments and Additions to the Constitutional Law for the Implementation of the Constitution of the Republic of Croatia (the Constitutional Implementation Law).²²

Pursuant to the Constitutional Decision, the Parliament proclaimed the Republic of Croatia as an independent and sovereign state (Point I), and announced that the Republic would begin the processes to disassociate itself from the other republics of the SFRY and to seek international recognition (Point II). Pursuant to this act, the Parliament determined that international agreements which had been entered into and ratified by the SFRY would be adopted by the Republic of Croatia to the extent that they did not contradict the Constitution and the legal system of the Republic, in keeping with international law concerning the succession of states with respect to treaties (Point IV). The Parliament further determined that only those laws it adopts would be effective in the territory of the Republic, as would those laws of the SFRY which the

²¹ Even the newly announced Platform Concerning the Reorganization of the Yugoslav State, authored by Alija Izetbegović and Kiro Gligorov, did not propose a solution which would give any indication that the crisis would be overcome. This compromise proposal, supported by certain leftist circles in Croatia and Slovenia, remained unacceptable to the leadership of the Croatian state, which already had a plan outlined for the proclamation of independence, and had been even more unacceptable to Greater Serbian, Unitarian circles.

²² All of these acts appear in *Narodne novine*, 31/1991.

Parliament did not repeal until such time as the process of disassociation had been completed. The Republic assumed all rights and duties which under the Constitutions of the Republic of Croatia and the SFRY had been undertaken by organs of the SFRY, subject to the condition that such assumption would be governed by a Constitutional Law (Point V). The Constitutional Decision further declared the boundaries of the state would be based on the international legal principle of *uti possidetis iuris* (which would later be affirmed pursuant to the positions taken by the Badinter Commission).²³ The borders of Croatia would be set as the internationally recognized ones of the former SFRY as same related to the Republic, as well as the boundaries as had existed within the framework of the SFRY between the Republic of Croatia and each of the Republics of Slovenia, Bosnia and Herzegovina, Serbia and Montenegro (Point VI). By accepting the principles of the Charter of Paris, the Croatian Republic guaranteed all of its citizens all national and other rights and freedoms, a democratic system, the rule of law and all other privileges of its constitutional and the international legal systems.

The legal nature of the Constitutional Decision has been reviewed by Anto Milušić, who specifically looked at it from a constitutional viewpoint. Among other things, he notes that the “[c]onstitutional importance of the Constitutional Decision is a key element in the achievement of the independence of the Croatian state, in a legal process which began with the adoption of the [Christmas Constitution]. The determination of the Croatian Parliament pursuant to which ‘the Republic of Croatia proclaims itself as a sovereign and independent state’ is of a constituent legal nature and expresses the high point of that entire legal process. It only lacked the determination of the Republic of Croatia to disassociate itself from the Yugoslav federation, which would be adopted only after a three month moratorium mandated at the behest of the international community, in the context of which the Constitutional Decision was not implemented.”²⁴ As discussed below, theoreticians of international law look upon the Constitutional Decision in somewhat different light.

The Constitutional Declaration contained the elemental principles and arguments in favor of the proclamation of Croatia’s sovereignty and independence. Thus, the Declaration discusses constitutional continuity, emphasizing Croatian statehood within the framework of the Yugoslav federation. The Constitutional Declaration consolidates previously expressed bases of the constitutional principles of the legal system of the Croatian Republic, as well as the path of the overall future work of Croatian policies toward the remaining republics of the SFRY. The last Point of the Declaration (Point V) sets forth the criteria for future cooperation with the Yugoslav republics with the goal to

²³ The work of the Commission is further discussed below.

²⁴ A. Milušić, “Povijesne odluke Hrvatskog sabora od 25. lipnja i 8. listopada 1991.,” *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (2001), no. 1: 349. Concerning his position and views concerning these constitutional decisions, see also Vladimir Đ. Degan, *Hrvatska država*, pp. 240, 241.

create a possible federation of sovereign states on a confederal basis. Milušić describes the legal nature of the Constitutional Declaration as an act having only a declaratory nature, as it merely confirms previously adopted decisions set forth in the Constitutional Decision.

The Constitutional Implementation Law brought into force those Constitutional provisions which had not been implemented after their adoption, which for the most part concerned matters related to international relations and defense. The Parliament repeated its fundamental support for the protection of the rights of people and minorities in its Declaration Concerning the Rights of Serbs and Other Nationalities in the Republic of Croatia.²⁵

These decisions of the Croatian Parliament, adopted on the same day that Slovenia declared its independence, would have important effects on the further radicalization of relations in the evolving Yugoslav crisis. The JNA began its aggression against Slovenia only a day later, while the crisis in Croatia would also soon escalate into an open aggressive war by Serbia and Montenegro, with the assistance of the JNA, against the Croatian Republic. The international community, in an attempt to influence the resolution of the crisis, pressured the Croatian leadership to impose a three-month moratorium on the previously mentioned Constitutional decisions concerning Croatia's sovereignty and independence, during which time an agreement could be negotiated among the Yugoslav republics. This was set forth in the 7 July 1991 Brioni Declaration.²⁶ The Brioni Declaration confirmed the basic principles for future relations among the Yugoslav republics with the goal of resolving the crisis and established an Observational Mission of the European Community for Yugoslavia (Annex II). The Declaration further set forth the specific provisions concerning the preparations for negotiations (Annex I).²⁷

The conclusion of the Brioni moratorium, along with the above mentioned circumstances, influenced the further steps of the Croatian government toward the goal of achieving full independence and cutting off all constitutional

²⁵ *Narodne novine*, 31/1991.

²⁶ Common Declaration (Brioni Declaration of 7 July 1991), as cited in A. Milardović, *Dokumenti o državnosti*, pp. 114 – 117.

²⁷ The Brioni Declaration would in the end be only partially implemented. Its main aim, to commence negotiations among the Yugoslav republics to resolve the crisis, never got started, while events on the ground reflected the need for defense from the now open aggression against the Croatian Republic. Croatia became forced to wage a defensive war (known as the Homeland War) against Serbia, Montenegro and the Yugoslav Army. Given the passivity of the international community, which even imposed an arms embargo on the Republic, conditions in Croatia at the time became extremely uncertain and critical. In its military operations, the aggressor violated basic provisions of international humanitarian law. The Croatian leadership, led from August 1991 by a coalition Government of Democratic Unity, faced the extremely difficult tasks of organizing the defense of the state, which in such unique and critical times opened other very complex questions (humanitarian assistance, questions concerning displaced persons and refugees, etc.).

ties with the republics of the SFRY as well as with the Federation. This is contained in the Croatian Parliament's 8 October 1991 Decision Concerning the Termination of Constitutional Ties (Termination Decision), which severed the bonds forming the basis of the SFRY between the Republic of Croatia and the remaining republics and provinces of the SFRY.²⁸ This represented the last act in the constitutional process of establishing an independent and sovereign Croatian state. From and after 8 October 1991, the Republic of Croatia effectively becomes a subject of international law, and such date is viewed as the beginning of the international life of the Republic. The declaratory act of international recognition would later only reaffirm the effective establishment of the legal status created on 8 October 1991.

Relying on the right of self-determination of the Croatian people, the SFRY's 1974 Constitution and its legitimate decisions concerning the establishment of a sovereign and independent state, and confirming the expiration of the moratorium, the Croatian Parliament in the initial two Points of the Termination Decision broke all constitutional ties "on the basis of which [the Republic of Croatia] together with the other republics and provinces had created the present-day SFRY." Based on the Termination Decision, Croatia rejected the further legitimacy and legality of all organs of the Federation, and refused to recognize any legal action of any organ which acted in the name of the SFRY. The Republic of Croatia thus announced that it would continue the process of disassociation with the republics, provinces and Federation, setting forth in the Termination Decision a position which would be soon affirmed by the international community – that Yugoslavia no longer exists! The Termination Decision also contained provisions which clearly reflected the determination of the Republic to base its international relations (including with the other republics of the former SFRY) on the most widely accepted principles of international law.

Placing the legal nature of these constitutional processes within the context of the establishment of the state, Milušić claims that "[f]rom the constitutional viewpoint, the [Termination Decision] of the Croatian Parliament is of a declaratory legal nature in comparison with [those related to] the establishment of the sovereignty and independence of the Republic of Croatia, based on constituent legal act of the Constitutional Decision of 25 June 1991. Nevertheless, that portion in the Parliament's [Termination Decisions of] 8 October 1991, which asserts the basic legal fact of the severance of the constitutional ties of the Republic of Croatia and other republics and provinces of the former SFRY, is of a constituent legal nature. Two further provisions in this [Termination Decision] are of a constituent legal nature, which represent the legal outcome of the prior one. They are that the Republic of Croatia: (i) rejects the legitimacy and legality of all organs of the former Federation, and (ii) does not

²⁸ *Narodne novine*, 53/1991.

recognize the validity of any legal decision of any body acting in the name of the former SFRY.”²⁹

In contrast with Milušić, who views the Termination Decision from an explicitly constitutional position, Vladimir Đ. Degan approaches the issue from an analysis of the international legal nature of the Termination Decision. He especially notes that “[t]he Referendum of 19 May [1991] represented a legal manifestation of the Croatian people’s exercise of their right to self-determination, while the [Termination Decision] of 8 October [1991] represented an act by which the Republic of Croatia achieved status as an international legal subject.”³⁰ Vesna Barić-Punda similarly follows the same path, viewing the constitutional decisions of the Croatian parliament of 25 June 1991 as being merely “an expression of the desires of the Croatian people for an independent, sovereign and free state,”³¹ basing her conclusions on the positions taken by the later Badinter Commission and the Vienna Conventions on Succession of States of 1978 and 1983. Barić-Punda places the Parliament’s 8 October 1991 decisions within the context of state succession, which gives them a constituent legal importance, labeling 8 October 1991, in keeping with international agreements concerning state succession, “the date of succession.”³²

Although Milušić’s theses may be understood as part of a deeper constitutional analysis of the legal nature of the Parliament’s 25 June 1991 decisions, the constituent nature of such decisions does not seem apparent. Those decisions were quickly suspended (8 July 1991) while their implementation during the period between 25 June and 8 July 1991 were not completely effective, given the obstacles placed on the Croatian government’s ability to then act as a completely sovereign and independent state and especially given the shortness of time during which these decisions had been in force. As a result, it remains difficult to defend the position that Croatia had been constitutionally established as a free and sovereign state as early as 25 June 1991 (though this does not, of course, undermine the importance of those decisions (which, one should note, the Parliament had not unanimously accepted!)). Insisting on such a position would mean seeing sovereignty exclusively as a *nudum ius*, setting aside the factual components of the term sovereignty which remains elemental to its substance.³³

²⁹ Anto Milušić, “Povijesne odluke Hrvatskog sabora”: 357.

³⁰ Vladimir Đ. Degan, *Hrvatska država*, p. 243.

³¹ Vesna Barić-Punda, “Hrvatska od samostalnosti i nezavisnosti do međunarodnog priznanja,” *Zbornik radova Pravnog fakulteta u Splitu* (2001), 4 (64):341.

³² *Loc. cit.*

³³ See the further discussion in Budislav Vukas, ml., “Državnopravni aspekti konstituiranja hrvatske države (1989 – 1992),” - *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 23 (????), no. 2: 645 – 681; Sandra Fabijanić Gagro and Budislav Vukas, ml., “Pravna priroda i politička pozadina oružanih sukoba u Hrvatskoj i Bosni i Hercegovini,” in *Zbornik Pravnog fakulteta Sveučilišta u Zagrebu* (2008, 5): 1159-1199.

3. The International Recognition of the Republic of Croatia

From the start, the international affirmation of Croatia had been very complicated and characterized by many challenges. Croatia had been part of the intricate and uncertain international political processes tied to the collapse of Communism in Eastern Europe, which radically altered the foreign policy imperatives of the new democracies. But, the Croatian position faced road-block posed by the strong international standing of Yugoslavia, a reflection of the legacy of Josip Broz Tito. The continuation and reform of the Yugoslav state had been thought to be a guarantee of stability in Southeastern Europe, as shown by numerous diplomatic trends from 1989 through the end of 1991. The Serbian leadership surrounding Slobodan Milošević attempted to make use of this situation. Initial instability, whose sources we can not go into in this paper (nor can we discuss in this work the wider international political context surrounding the Yugoslav crisis), grew into a brutal military attack against the Republic of Croatia. This constellation of international political events and the large variety of actors in the international community would have a direct influence on the international legal decisions concerning the fate of the former Yugoslav states, as well as the international recognition of its republics.³⁴

3.1. The Opinions of the Arbitration or Badinter Commission

In light of its inability to restrain Greater Serbian provocations, which rose to open military conflict in the summer of 1991 with clear elements of aggression against the Republic of Croatia, the EU established various *ad hoc* bodies with the goal to mediate among the parties and, along with other tasks, to bring about a peaceful solution to the conflict. As a result, the Conference on Yugoslavia came to be established which would itself create technical teams as a result of its inability to come to decisions on key constitutional and international legal questions. The most well know of these is certainly the Arbitration Commission.

The Commission consisted of five experts in constitutional law from EU countries, and became more commonly known by the name of its chairman, the head of the French Constitutional Court, Robert Badinter. The Commission's positions became especially important from the viewpoint of international law since they would legally define newly established relations resulting from and guide the further varied paths concerning the Yugoslav crisis. Their importance also stems from the fact that they opposed Serbian arguments concerning the principle of the self-determination of peoples when Serbia

³⁴ See further discussions concerning this in Budislav Vidas, ml., "Državnopravni aspekti konstituiranja".

used that principle in an attempt to legally justify its policies toward the Croatian Republic.

The Commission initially expressed its general view by emphasizing in its Opinion No. 1 that “the existence or disappearance of the state is a question of fact . . . the effects of recognition by other states are purely declaratory.” The Opinion defined a state on the basis of widely accepted doctrines and practices of international law concerning the state as its main subject. Thus, the state is “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.”³⁵

The Commission found that Yugoslavia was then in the process of disintegration. It based its conclusion on international legal preconditions to the existence of a state. Thus, the Arbitration Commission confirmed that the basic organs of the Federation no longer carried out their functions as bodies of a federated state, a state that had lost control over its own territory.³⁶

A similar position would be repeated in the Commission’s Opinion No. 8 of 4 July 1992 concerning the dissolution of Yugoslavia where the Commission reaffirmed “that the process of dissolution of the SFRY referred to in Opinion 1 of 29 November 1991 is now complete and that the SFRY no longer exists.”³⁷ As a result, in later Opinions, mostly issued in connection with questions concerning state succession, the position would be taken that the process of the dissolution of Yugoslavia commenced as of 29 November 1991, with the issuance of Opinion No. 1, and ended on 4 July 1992 with the position expressed in Opinion No. 8. This stance would be affirmed in Resolution 777 of the United Nations’ Security Council adopted on 19 September 1992. The major arguments in favor of this conclusion included the previously mentioned facts that the Federal organs no longer functioned based on their constitutional duties and that the population on the territory of the SFRY had been placed under the effective jurisdictions of the government of the sovereign republics.

³⁵ The text of Opinion Nos. 1 through 3 can be found in Alain Pellet, “The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples,” 3 *Eur. J. Int’l L.* (1992): 178, 182-83. All quotes and citations in this text from Opinion Nos. 1 through 3 are from such article.

³⁶ This determination proved to be of great importance as delegates in the Federal bodies of the SFRY, especially those from Serbia and Montenegro, continued to present themselves as the legitimate representatives of the Yugoslav federation. Thus, the rump Presidency of the SFRY, composed of only the representatives of Serbia, Montenegro, and the Serbian Autonomous Provinces of Vojvodina and Kosovo, adopted a resolution on 4 November 1991 which stated that the Presidency continues to function as a governmental body.

³⁷ The text of the Arbitration Commission’s Opinions Nos. 4 through 10 can be found in Danilo Türk, “Recognition of States: A Comment,” 4 *Eur. J. Int’l L.* (1993): 66, 74-91. All quotes and citations in this text to Opinion Nos. 4 through 10 are from such article.

Opinion No. 1, along with later positions take by the Arbitration Commission, accepted as fundamental that the borders of the newly formed states had to be based on the principal of *uti possidetis iuris*. In reaching such a finding, the Arbitration Commission took into account the right of people to self-determination as such principle is used in the United Nations Charter.³⁸

Pursuant to these principles, the international frontiers of the newly-established states became the inter-republican, administrative-territorial borders of the former SFRY. Frontiers with third parties remained the same for the new states and the established border regimes could not be a subject of succession. The Arbitration Commission noted that international law does not make clear all the consequence which flow from the right of self-determination, nevertheless, as it stated in its Opinion No. 2, it is well-established 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."

Thus, by defining the frontiers of the newly formed states, the Commission confirmed the principle of the inviolability of borders, emphasizing that they cannot be changed absent the agreement of the parties involved. The Commission expressed its position concerning the application of the principle *uti possidetis juris* in its Opinion No. 3 as follows: "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 decolonization issues in America and Africa, is today recognized as a general principle . . ."³⁹

³⁸ Vladimir Đ. Degan, "Samoodređenje naroda i teritorijalna cjelovitost država u uvjetima raspada Jugoslavije," *Zakonitost* (1992, 3): 543.- 569.

³⁹ This principle had been adopted in connection with questions surrounding decolonization in Central and South America in the 19th Century and received its affirmation in the opinions of the International Court during the period of decolonization in Africa. It further had been called upon prior to the disintegration of the USSR and Czechoslovakia. The Arbitration Commission cited to this principle to resolve questions related to borders. A relatively rich amount of materials from international judicial decisions exists which confirms this principle. Vesna Crnić-Grotić thus concludes that "in reviewing available international judicial decisions as well as the decisions of political bodies of international organizations such as the UN, the [EU], the CSCE, [one can conclude] that . . . the principle of *uti possidetis iuris* is a general principle of international law which is applied in cases concerning decolonization and the disintegration of federal states." Vesna Crnić-Grotić, "Načelo *uti possidetis* u međunarodnom pravu," *Zbornik Pravnog fakulteta Sveučilište u Rijeci* (1995, 2): 295-308.

3.2 Conditions Imposed by the European Community for the International Recognition of the Independence of States on the Territory of Former Yugoslavia – 16 December 1991

Based on the above-mentioned Opinions of the Arbitration Commission, the overall circumstances surrounding the aggression of Serbia and the remnants of the JNA against Croatia and the desire of four of the republics of the former SFRY to receive international recognition, the EU decided to adopt certain criteria for the extension of such recognition. As Yugoslavia did not then represent the only instance of a large federation going through a similar process of disintegration, the EU adopted similar criteria for both the former Yugoslavia and the USSR. On 16 December 1991, an extraordinary summit meeting of European foreign ministers in Brussels adopted the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union as well as a Declaration on Yugoslavia.⁴⁰ These documents do not set forth the three elements of statehood, but only discuss the conditions under which international recognition would be granted. Looking at it from the viewpoint of international legal doctrine, we can classify this type of recognition as conditional as opposed to unconditional. While, the foreign ministers of the EU member states accepted the legitimacy of creating specific states from the view of international law and accepted the right of peoples to self-determination, they agreed that they would grant recognition to each such state separately, subject to the requirement that each one satisfy all of the following conditions:

1. that the state respect the provisions of the Charter of the United Nations and the obligations set forth in the Final Act of Helsinki and in the Charter of Paris, especially with respect to the rule of law, democracy and human rights;
2. that the state guarantee the rights of ethnic and national groups and minorities in accordance with the obligations accepted within the framework of the Conference for Security and Cooperation in Europe;
3. that the state respect the inviolability of all borders which can only be modified through peaceful means and through mutual agreements;
4. that the state accept all relevant obligations concerning disarmament and nuclear nonproliferation, as well as those related to security and regional stability; and
5. that the state agree to settle by agreement all disputes, including, where appropriate, by arbitration, including all questions concerning state succession and regional disputes.

⁴⁰ The texts of both Declarations are found in Türk, "Recognition of States," pp. 72-73.

The EU member states emphasized their opposition to granting recognition to any territorial unit which resulted from aggression and that they would take into account the effects of recognition on neighboring states. But, along with these material-legal conditions for recognizing new states, the EU member states also adopted a number of formal-legal conditions of a pseudo-legal character in which they could consider not only the satisfaction of the above-listed conditions but the opportuness of granting recognition.⁴¹

These were set forth in the Declaration on Yugoslavia adopted on the same day. Based on that Declaration, the EU and its member states determined that they would grant recognition on 15 January 1992 to those Yugoslav republics (i.e., the former federal units of the SFRY) which provided the following statements by 23 December 1991:

1. that they wish to be recognized as independent states;
2. that they accept the obligations implicit in the above-mentioned Guidelines on Recognition;
3. that they accept the provisions set forth in the Agreement concerning the Convention⁴² then being discussed by the Conference on Yugoslavia, especially those in Chapter II on human rights and rights of national and ethnic groups;
4. that they continue to support: (i) the efforts of the Secretary General and the Security Council of the United Nations, and (ii) the continued work of the Conference on Yugoslavia.

⁴¹ It is curious to note that on these bases all the states of the former Soviet Union received international recognition with little difficulty. Estonia, Lithuania and Latvia already received international recognition during September 1991, though their status had been unique as many countries had ignored their occupation by the Soviets in 1940 so that the granting of such recognition had not been necessary. The states which had then become part of the Community of Independent States became members of the United Nations on 2 March 1992.

⁴² The draft Agreement concerning the Convention, issued on 4 November 1991, had been a proposal to form a community of Yugoslav states, which, in keeping with the draft, would have been transformed into a special community of sovereign states, organized in accordance with the principles of the EU. This proved to be the last attempt to save Yugoslavia as an integral entity. Though the Convention never came into force, its provisions from Chapter II containing a catalogue of human rights and protections for minorities, would be accepted. Similar proposals had previously been made by the leadership of the Republics of Croatia and Slovenia. See further concerning same in Budislav Vukas, ml., "Prijedlozi i nacrti konfederalizacije Jugoslavije 1990/91 – posljednji pokušaj 'spašavanje' zajedničke države," *Zbornik Pravnog fakulteta u Rijeci* (2006, 2): 761-805; Budislav Vukas, ml., "Europska zajednica i Konferencija o Jugoslaviji u vremenu početaka internacionalizacije jugoslavenske krize - posljednji pokušaj 'spašavanje' zajedničke države," *Rijeka* (2004, 2): 103-109. The text of the Convention has been published along with earlier confederalization proposals related to Yugoslavia by V. Đ. Degan, one of the most important experts and an author of such proposals, in his *Hrvatska država*, p. 281 *et seq.*

Those republics which wished to obtain recognition had to submit their requests to the Chairman of the Conference on Yugoslavia and notify the Arbitration Commission. Further, this very complicated procedure required each republic to adopt constitutional and political guarantees ensuring that it had no territorial claims towards a neighboring republic or state of the EU and that it will conduct no hostile propaganda activities or use any denomination which implies any territorial pretensions.⁴³

Looking at the totality of the character and importance of the Opinions of the Arbitration Commission and the above-discussed acts related to the international recognition of states, we note the position taken by Budislav Vidas who argued that they do not consistently respect the criteria for statehood accepted in the doctrine and practice of international law.⁴⁴ As we have already seen with respect to Opinion No. 1, the Commission took the view that the establishment of new states under international law is a question of fact. With respect to the SFRY, it had determined that the government of the Federation no longer represented its interests and that, as a result, no organized political government existed. In that context, the Commission, in lieu of further analyzing and questioning this fact in its conclusion, insisted only on setting forth numerous material and indeed formalistic conditions for granting international recognition. Given that recognition is merely of a declaratory legal nature, the reasons supporting the Commission's determination to impose such complicated procedures to recognize the former Yugoslav republics remain unclear. The Opinions of the Arbitration Commission did not represent acts of recognition of new states but merely confirmed the criteria of statehood generally accepted in international law.

3.3. Acts Related to the International Recognition of Croatia 13 – 15 January 1992

Based on the above mentioned conditions, the Republics of Croatia, Slovenia and Macedonia as well as the Socialist Republic of Bosnia and Herzegovina

⁴³ This curious condition concerns the Republic of Macedonia and Greek demands to condition its international recognition on the change of its name. Greece claimed that it (the Hellene Republic) represented the sole constitutional heir of Hellenistic statehood and civilization and that the use of Macedonia related to ancient Macedonia. This dispute continues to this day, and despite attempts to come to a mutual understanding (e.g., through mediation and the like), it has been brought before the International Court of the United Nations where the issue remains pending. Although a majority of nations later recognized Macedonia under its constitutional name, it remains a member of the United Nations under the special name "Former Yugoslav Republic of Macedonia". See *Službena skraćena i puna hrvatska i engleska imena država* (Zagreb: Ministarstvo vanjskih poslova RH, September 1996), and later editions.

⁴⁴ Budislav Vukas, *State, Peoples and Minorities* (The Hague: Academy of International Law, 1999), pp. 301, 302.

submitted their requests for recognition and evidence related to their satisfaction of the above-noted requirements.⁴⁵

The Arbitration Commission announced its positions related to the requests of the Republics in a series of Opinions dated 11 January 1992 (Opinion Nos. 3, 4, 5, 6, and 7). Opinion No. 3 recapitulated the previously mentioned application of the principle of *uti possidetis iuris* to the disintegration of the Yugoslav Federation. Opinion No. 4 also contained a summary of the position of the Commission expressed in its prior Opinions, especially concerning the basic concepts and principles of international law on the question of statehood and the application of same to the Yugoslav situation. Thus, Opinion Nos. 3 and 4 can be deemed to be similar to declaratory legal acts, as they pronounce previously expressed positions concerning the doctrine and practice of international law related to states as subjects of same, the prior positions of the Commission concerning the application of international law to the Yugoslav context and, finally, the position of each of the republics (i.e., the Republics of Croatia, Slovenia and Macedonia and the Socialist Republic of Bosnia and Herzegovina, as well as the remains of Yugoslav governmental organs and the Republics of Serbia and Montenegro). These Opinions thus formed the basis

⁴⁵ Serbia and Montenegro did not submit any such requests as they in any event did not meet the conditions set forth in the Guidelines and the Declaration. Their military units had been active in the aggression against the Republic of Croatia and along with other violations of international law they did not satisfy the necessary criteria. But their position had also been determined based their view that they did not require international recognition as they claimed to be successors to the prior state. They attempted to prove this on 27 April 1992 through the adoption of a new Constitution through which a new state called the Federal Republic of Yugoslavia (FRY) came into being. Their position, however, was not accepted as shown by Security Council Resolution 777, General Assembly Resolution 47/1 and Opinion Nos. 8, 9 and 10 of the Arbitration Commission. Opinion No. 9 states that no state had the automatic right to succeed the SFRY while Opinion No. 10 found the FRY to be a new state which cannot be deemed to be a successor to the SFRY. Based on these findings, the FRY received international recognition from the EU only on 29 January 1996. Only the new Yugoslav leadership elected after the fall of Milošević in October 2000 changed its view thus allowing for progress on the question of the succession to the former state. On 25 May 2001 the parties entered into an Agreement on Succession Issues in Vienna. See more details on same in Degan, *Hrvatska država*, pp. 258-62. In March 2002, through the mediation of the EU, a new Agreement concerning future relations between the Republics of Serbia and Montenegro was reached, which now came to be called the State of Serbia and Montenegro. With this Agreement, the name Yugoslavia became part of history while all questions related to the continuity of Yugoslavia which had been advocated by Serbia and Montenegro fell by the wayside. Concerning that Agreement, see Perunčić-Fabris, "Nema više Jugoslavije, nova država Srbija i Crna Gora," *Vjesnik*, no. 68, 2002, p. 7 (col. 4-7). Based on the Constitutional Charter of Serbia and Montenegro, Montenegro used its right to leave the state alliance, and after a May 2006 plebiscite, proclaimed its independence on 3 June 2006. The continuity of the prior state, in keeping with the Charter, fell to Serbia. As of 17 February 2008, Kosovo also became an independent state, though it has not been recognized by certain states. Despite a 2010 advisory opinion of the International Court of the United Nations, Kosovo continues not to be a member of the United Nations as well as of other international institutions.

for the following series of Opinions, of which Opinion No. 5, entitled “Opinion on the Recognition of the Republic of Croatia by the European Community and its Member States,” is the most important.

The Arbitration Commission based Opinion No. 5 on the position taken by the Republic of Croatia (which it had set forth in accordance with its obligations under the 19 December 1991 Guidelines and the Declaration on Yugoslavia),⁴⁶ on the prior conclusions made by the Commission and on the basic fundamental constitutional decisions concerning the sovereignty of the Republic of Croatia.⁴⁷

As an additional condition for the recognition of the Republic of Croatia, the Commission directed that it had to supplement its Constitutional Law Concerning Human Rights and Freedoms and on the Rights of National and Ethnic Communities and Minorities in the Republic of Croatia, adopted by the Parliament on 4 December 1991, so as to satisfy the provisions of the Convention of the Conference of Yugoslavia, especially those found in Chapter II, Article 2(c), under the heading “Special Status” (this Convention relates to the draft concerning the proposed confederal alliance of sovereign states, analyzed further above, which included a very detailed system of protections for human rights and minorities).⁴⁸ The Republic of Croatia agreed to satisfy this condition, and it subsequently adopted a Constitutional Law to that effect.⁴⁹

On the basis of all of the above, the Commission concluded that “subject to this reservation, the Republic of Croatia meets the necessary conditions for its recognition by the Member States of the European Community in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Communities on 16 December 1991.”

⁴⁶ This document is entitled “Answers to the Declaration on Yugoslavia and to the Declaration to the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,” which had been sent by the President of the Republic of Croatia through the Minister of Foreign Affairs of the Republic of Croatia. See the text in Milardović, *Dokumenti o državnosti, op. cit.*, pp. 143.-147. The President of the Republic responded to additional questions of the Commission in a telegram sent on 10 January 1992.

⁴⁷ The Commission considered the following acts: Responses to the questions sent by the Commission to the interested republics on 24 December 1991; a document sent as a confirmation of recognition sent by the President of the Republic of Croatia on 19 December 1991; the Christmas Constitution; the Report Concerning the Results of the 19 May 1991 Referendum; the Constitutional Decision and Constitutional Declaration of 25 June 1991, and the Constitutional Law Concerning Human Rights and Freedoms and on the Rights of National and Ethnic Communities and Minorities in the Republic of Croatia of 4 December 1991.

⁴⁸ See footnote 42.

⁴⁹ Concerning the criticisms of the Arbitration Commission and other questions concerning the rights of minorities in Croatia during that time, see Budislav Vukas, “The legal status of minority in Croatia,” in: *Minorities in Europe, Croatia, Estonia, Slovenia* (The Hague: TMC Asser Institut, 1994), pp. 39-63.

The Republic of Croatia ended its long and very complicated process of achieving international recognition on 15 January 1992 when João de Deus Pinheiro, presiding over the Ministerial Council of the EU, released in the name of the Council, an announcement which, in its initial provisions, notes that it: “wishes to advise that, in keeping with the Declaration of 16 December 1991 on the recognition of states and its application to Yugoslavia and in light of the advise of the Arbitration Commission, the Union and her member states have determined, in keeping with such provisions and with corresponding national procedures, to recognize Slovenia and Croatia.”⁵⁰

The Republic of Croatia had been, despite the procedures set forth in the framework of the Conference on Yugoslavia, previously recognized by a number of states, including the Holy See.⁵¹ There followed the collective recognition by the member states of the EU on 15 January 1992 along with that of a number of other countries. This collective international recognition provided a clear indication that, in spite of conditions of extreme complexity, other countries around the globe would also extend recognition to the Republic (which indeed occurred soon afterward). This would represent the beginning of the period of the international affirmation of the Republic of Croatia as an independent and sovereign player in modern international relations. After the Republic of Croatia received recognition from the United States (7 April 1992), it became a permanent member in the United Nations on 22 May 1992, thus ending this period of its international affirmation.

4. Concluding Observations

Discussing the processes related to the establishment of the Republic of Croatia as an independent and sovereign state, it is not difficult to perceive their special complexity conditioned by internal Yugoslav and general international relations. Croatia had an especially challenging position with respect to obtaining its independence in contrast to many new democracies of Eastern Europe and the new states created as a result of the collapse of the USSR. One must conclude that in such circumstances the government of the Republic of Croatia adopted a policy that was exemplary and cautionary, as exhibited by the measured process of the constitutional proclamation of state independence. The Croatian President had the overwhelming support of the Parliament and the Government and had much experience in understanding the

⁵⁰ Izjava predsjedavajućega Ministarskog vijeća Europske zajednice o priznavanju jugoslavenskih republika, quoted in Milardović, *Dokumenti o državnosti*, p. 153

⁵¹ The first to recognize the Republic of Croatia on 26 June 1991 was the Republic of Slovenia, followed by the Republic of Lithuania (30 July 1991), Ukraine (11 December 1991), the Republic of Latvia (14 December 1991), Iceland (19 December 1991), the Federal Republic of Germany (19 December 1991), the Republic of Estonia (31 December 1991), the Holy See (13 January 1992) and the Republic of San Marino (14 January 1992).

workings of the Yugoslav state and political horse-trading. He very skillfully but in a timely manner made fundamental decisions concerning statehood. Displaying extreme tact toward players in the international community, Croatia knew when it had to take such decisions, when to stall them and when to finally and without conditions bring them to fruition.

The international affirmation of the Republic of Croatia as an independent subject of international law followed in its entirety the relations among the major powers concerning their policies toward the Yugoslav crisis. In considering the very complicated and long term process with respect to international recognition of the state's independence, which had been subject to numerous preconditions, it is clear that the leading players in the international community had been relatively slow, but in the end they nevertheless had to accept the new realities in the Central and Southeastern European region – and this primarily resulted from the determination of the new states themselves with their clear and uncompromising goals.

With respect to the new goals of the EU to expand to include the states which succeeded to the territory of the former SFRY (beginning with the admission of Slovenia into the EU in 2004), the act of international recognition of Croatian independence by the then twelve member states of the EU represented the beginning of a long period of interaction between European institutions and the Republic of Croatia. Often described as a “long” or “difficult” road toward membership in the EU, this actually led to the satisfaction of other basic foreign policy goals of the Croatian Republic.

At the end of this discussion, one must ask to what extent is the path that Croatia followed toward the establishment of its independence known within Croatia? Unfortunately, it is especially poorly appreciated, which is not helped by the fact that practically every new Government has engaged in unnecessary re-examinations and reinterpretations of these events. Although the new system of state holidays in the Republic of Croatia (enacted by the 2001 Law on Holidays, Memorial Days and Non-Working Days in the Republic of Croatia) is clearer and legally more precise than the 1991 law on the same topic, state holidays, especially due to their revisions, continue to cause confusion and uncertainty. Such trends may in fact be supported by some circles among the Croatian elite, but it remains to historians, legal scholars and pedagogues to carry out their primary mission to provide an exact explanation. This work seeks to play a small part in such attempts.

Der Prozess der Herstellung der Unabhängigkeit von der Republik Kroatien aus der Perspektive des internationalen Rechtes

Zusammenfassung

Als Kroatien unlängst den zwanzigsten Jahrestag der Erklärung seiner staatlichen Unabhängigkeit feierte, tauchte Frage auf, ob der komplexe Prozess der Herstellung seiner Staatlichkeit wohl verstanden ist. Die Antworten auf diese Frage sind wirklich unglaublich, wenn sie vonseiten vieler Tatsachen betrachtet werden, beginnend mit einer so fundamentalen Tatsache als Zeitungs-Umfragen unter kroatischen Bürgern.

Der Autor beschreibt auf welche Weise die Souveränität und die Unabhängigkeit Kroatiens hergestellt wurden. Seine Darstellung beginnt er mit dem konstitutionellen Prozess der Erklärung der staatlichen Unabhängigkeit und setzt fort mit der Abbrechung sämtlicher staatsrechtlichen Verbindungen Kroatiens mit der jugoslawischen Föderation und ihren Teilrepubliken sowie mit darauf folgenden Auseinandersetzungen um internationale Anerkennung Kroatiens. Im Artikel werden schlüsselartige konstitutionelle Entscheidungen des kroatischen Parlaments in den Jahren 1990 und 1991 besprochen, die die Grundlage des Inhaltes der Proklamation der Unabhängigkeit der Republik Kroatien bildeten (von der sog. Weihnachtsverfassung bis zu den parlamentarischen Entscheidungen vom 25. Juni 1991 und vom 8. Oktober 1991). Der Autor untersucht die Wichtigkeit dieser Entscheidungen vom rechtlichen Standpunkt aus, indem er die von den führenden Rechtswissenschaftlern vertretenden Standpunkte zu dieser Frage berücksichtigt. Zudem wird in diesem Artikel der Prozess der internationalen Anerkennung der Republik Kroatien besprochen, und vor allem werden die Politiken der Mitgliedstaaten der Europäischen Gemeinschaft sowie die Jugoslawien-Konferenz und die Arbitrage-Kommission (welche von der EG gegründet wurde mit dem Ziel, die Unabhängigkeitserklärungen der neu zu anerkennenden Staaten vom rechtlichen Standpunkt aus zu untersuchen, um fundamentale Bedingungen zu erfüllen) analysiert. Die ehemaligen jugoslawischen Teilrepubliken wurden nämlich verpflichtet, diese Bedingungen zu erfüllen, als Voraussetzung für ihre internationale Anerkennung.

Dieser Text beinhaltet einen kurzen Überblick historischer Geschehnisse sowie im einleitenden Teil eine Analyse des Begriffes „Staat“ und seiner Funktion des dominantesten Subjekten im internationalen Rechte.

