

**CURRENT LEGAL STATUS OF
THE FEDERAL REPUBLIC OF YUGOSLAVIA (FRY)
AND OF SERBIA AND MONTENEGRO**

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CURRENT LEGAL STATUS OF THE FEDERAL REPUBLIC OF YUGOSLAVIA (FRY), AND OF SERBIA AND MONTENEGRO¹

I. INTRODUCTION

The deteriorating relationship between Montenegro and Belgrade has raised the question of whether the Federal Republic of Yugoslavia, with its two constituent republics of Serbia and Montenegro, in fact continues to exist. The answer to this question has immediate relevance to the forthcoming federal elections scheduled for 24 September 2000, and in particular the issues of:

- whether the government of Montenegro can legitimately boycott those elections, in the sense of refusing to co-operate in their physical conduct and encouraging Montenegrins not to vote; and
- whether the federal government is entitled to take any, and if so what, action in response to the Montenegrin government so deciding.

This legal briefing paper seeks, in this context, to address the following questions:

- What precedents were set by the decisions of the European Community (EC) Arbitration Commission concerning the status of the former Socialist Federal Republic of Yugoslavia (SFRY) and its Republics that might be relevant to an assessment of the current legal status of the FRY?
- What actions have been taken by the FRY federal government, the Republic of Montenegro, the Republic of Serbia, or the international community that may affect the status of the FRY and the legitimacy of its government and federal institutions?
- What is the current status of the FRY, its government and federal institutions, and how does this affect Montenegro's obligation to participate in the 24 September 2000 federal elections?

¹ This analysis was prepared for ICG by a respected international and comparative constitutional lawyer, assisted by legal advisers within both Serbia and Montenegro, and reviewed and endorsed by Professor Herman Schwartz of the Washington College of Law, American University, Washington DC.

II. THE DISSOLUTION OF THE SFRY AND THE CREATION OF RELEVANT LEGAL PRECEDENT

To ascertain whether the current actions taken by Serbia and by Montenegro have affected the status of the FRY, and the legitimacy of its government and other federal institutions, it is necessary to establish the relevant legal precedents set by the international community during the early 1990s when the former SFRY dissolved, Bosnia, Croatia, Slovenia and Macedonia became independent states, and Serbia and Montenegro reconstituted themselves into a joint state that claimed to continue the international legal personality of the SFRY.

This section will therefore detail the factual circumstances relating to these events, noting when relevant where parallels exist with the current situation between Serbia and Montenegro. This section will then review the process created by the European Community to ascertain the status of the former SFRY and the successor states. The section will also examine in detail the relevant decisions of the EC Arbitration Commission so that they may be applied in the next section to the current dispute between Serbia and Montenegro.

A. Factual Circumstances Leading to the Dissolution of the SFRY

Following the death of Josip Broz Tito in the early 1980s, the political situation in the SFRY was characterised by two important trends. The first trend was for the gradual assertion of liberal democratic and anti-Communist doctrines by some of the constituent Republics of the SFRY, most notably Slovenia. The second trend was that the different Republics in the SFRY began to jockey either to attain a greater share of power in the governing of the SFRY or to prevent other groups from obtaining a greater share. As the assertion of liberal democratic and anti-Communist doctrines undermined the authority of many of the communist leaders and created political dislocation, and as the economic ruin of the communist era became more apparent, those leaders shifted to a policy of nationalism to retain and garner public support.

In January and February 1990, the tensions caused by these two trends led to the breakdown of the Communist Party Congress. Following the truncation of the Congress, Slovenia and Croatia held Republic elections, which were shortly followed by elections in the other Republics.² In all of the Republics except Macedonia, nationalist parties were voted into power.³ As a result of increasing economic and political tensions between Slovenia and Serbia, Slovenia began to hasten preparations for severing its ties with the SFRY and becoming an independent state. At this time, Serbia set up internal customs control and placed import duties on goods from Slovenia and Croatia. Serbia also organised a boycott of Slovene goods. The current efforts of Montenegro to assume important state competencies and Serbia's economic blockade of Montenegro parallel these earlier actions.

² Warren Zimmermann, "The Last Ambassador, A Memoir of the Collapse of Yugoslavia", 74 *Foreign Affairs Journal*, 2 at 6. March/April 1995.

³ Zimmermann, at 6.

The legal benchmark for the beginning of the break-up of the former SFRY was the Slovene Declaration of Sovereignty of July 1990, which was subsequently supported by a referendum on sovereignty in December 1990. Slovenia's Declaration was soon followed by a Declaration of Sovereignty from Croatia and Macedonia. Importantly, Montenegro has not to date adopted a Declaration of Sovereignty.

In the winter of 1991, Croat police forces clashed with the Yugoslav National Army (JNA) as a result of attempts by the JNA to disarm those forces. In the midst of negotiations between the republic and federal governments, the SFRY Constitutional Court annulled Slovenia's July 1990 Declaration of Sovereignty. Slovenia rejected this act as beyond the scope of authority of the Constitutional Court.

In response to the action of the Constitutional Court, the Slovenian Assembly adopted a resolution providing for the disassociation of Slovenia from the SFRY and proposed the gradual abolition of federal government control on Slovenian territory, leading to a separate banking system, currency, taxation regime, and the promotion of international recognition. On 21 February 1991, the Croatian Parliament enacted similar legislation, but specifically provided for the possibility of the creation of an "Association of States" with the other Republics of the SFRY. Almost immediately subsequent to this legislation, the governments of Croatia and Slovenia issued a joint statement invalidating Yugoslavian laws on their territory and demanding the formation of a confederation. Following these declarations, a series of meetings were held between the Presidents of the Republics in mid-March of 1991. At these meetings, Slovenia and Croatia proposed the establishment of a Community of Independent states (a symmetric federation with Slovenia and Croatia in confederal relationship with the Yugoslav Federation), with Serbia and Montenegro proposing a United Federal state in which the Republics continued to delegate some sovereign rights to the federal bodies, and with Bosnia and Macedonia favouring a compromise solution subject to a referendum. The Montenegrin "Platform Proposal for Relations with Serbia" for the reconstitution of the FRY, presented in August 1999 contains many similar elements to the proposals of Slovenia and Croatia.

The United States responded to the emerging crisis in the SFRY by freezing \$US 5 billion in economic aid on 6 May 1991, and conditioning its resumption on the resolution of ethnic conflicts and the promotion of economic and political reform. The European Community and United States also made clear their position that they desired for the SFRY to remain intact and that they would not recognise the independence sought by Slovenia and Croatia. Current American and European proclamations concerning the Montenegrin crisis are reminiscent of these earlier statements.

The Slovene government announced on 8 May 1991, that it would secede from the SFRY by 26 June 1991. A referendum in Croatia on 19 May 1991, indicated that over 90 per cent of the population, excluding the ethnic Serbs in the Krajina, were opposed to Croatia remaining in the SFRY as a federated state, but that they would support the idea of a confederal state. Throughout this time, Macedonia was quietly taking similar steps towards asserting its independence.

In May 1991, the SFRY presidency, which was composed of representatives of the Republics,⁴ was scheduled to rotate from the Serb representative to the Croat representative. Serbia blocked this rotation, setting off a constitutional crisis,⁵ which prompted many of the Republics to begin withdrawing their personnel from the federal ministries and institutions. The refusal of the federal government in 1998 to seat the newly appointed Montenegrin representatives to the Chamber of Republics caused a similar constitutional crisis and prompted Montenegro to declare that neither the FRY government nor federal institutions could exercise legitimate authority over the territory of Montenegro.

On 5 June 1991, the Slovenian Assembly passed the last of the necessary laws to facilitate the transfer of sovereign authority from the SFRY to Slovenia, and on 11 June 1991, the Slovene Constitutional Committee approved a new constitution transferring all sovereign powers to the Republic. Croatia, on 18 June 1991, began the process of adopting the necessary legislation for secession. The federal government again warned of the illegality of these measures and declared that it would take all necessary legal measures to prevent the break-up of the SFRY. As a result of this action, ethnic clashes between Croats and Serbs in Croatia intensified.

United States Secretary of State James Baker visited the SFRY on 21 June 1991 and supported the idea of a loose alliance of states, but warned that the United States would not recognise Slovenia or Croatia as international subjects, and expressed concern over the consequences of Yugoslav instability. The warnings of the United States were echoed by the European Community and the Conference on Security and Co-operation in Europe (CSCE), which expressed collective support for a unified, yet democratic SFRY in which human rights were respected.⁶ These statements are reflected in current State Department announcements concerning the need for a democratic transformation in the SFRY and an unwillingness to countenance an independent Montenegro.

Despite assurances provided to the United States that they would delay their pursuit of recognition, the Slovenian Assembly adopted a constitutional law on 25 June 1991, providing for an independent and autonomous Slovenia, and issued a proclamation of that independence. Croatia adopted a similar constitutional law and issued its own proclamation of independence.⁷

The federal government, now composed almost solely of Serbs and Montenegrins, condemned the proclamations as illegal and called upon the JNA to protect the borders of the SFRY. On 27 June 1991, JNA troops occupied the borders of Slovenia with Austria, Italy and Hungary, and then closed and bombed Slovenia's airport. The Yugoslav Army has recently taken similar action to occupy many of the official international border crossings into Montenegro and has closed most of the unofficial border crossings. The JNA also controls a portion of the Podgorica airport and has periodically seized the entire airport.

⁴ One representative from each Republic, and one each from the semi-autonomous Republics of Kosovo and Vojvodina.

⁵ Zimmermann, at 10-11.

⁶ U.S. Department of State, Press Release, "Yugoslavia: Croatian and Slovenian Unilateral Assertions of Independence," 26 June 1991.

⁷ Constitutional Decision on Sovereignty and Independence of the Republic of Croatia, 25 June 1991.

The European Community immediately began to seek a mediated solution to the crisis and brokered an agreement which stipulated that Slovenia and Croatia would suspend implementation of their declarations of independence for three months, but not the declarations themselves. The JNA would return to their barracks, and it was agreed a Croat would be elected to the rotating office of the President of the Yugoslavia Collective State Presidency.

The peace agreement broke down almost immediately, and the European Community and United States belatedly realised that Serbia intended to exploit the crisis in order to create a greater Serbia, which would include large parts of Croatia and Bosnia. Belgium and Denmark pushed for immediate recognition of Slovenia and Croatia, while the United States and Germany switched positions from insisting on the maintenance of territorial integrity to an opposition to the use of force to maintain such integrity.⁸

On 27 August 1991, the European Community attempted to restore peace to the region by establishing a Yugoslav Peace Conference for the purpose of providing a formal negotiating platform for the Republics and creating an Arbitration Commission for resolving disputes arising during those negotiations. The EC also proposed a plan for the future structure of the SFRY loosely based on its own structure,⁹ and sponsored UNSC Resolution 713 calling for a complete arms embargo on the SFRY.

By December 1991, Slovenia and Croatia had introduced their own currencies and adopted new constitutions.¹⁰ The Montenegrin adoption of the German Mark as a parallel currency and its assumption of taxation responsibilities reflects the strategy of Croatia and Slovenia, absent a formal declaration of independence.

The Croatian President resigned from the Yugoslavia Collective State Presidency on 5 December 1991, declaring that "Yugoslavia no longer exists." Other declarations followed: on 9 December Macedonia announced its intention to leave the Federal Presidency; on 13 December the Bosnian Assembly announced that in future no Bosnian representatives would attend Federal Presidency meetings; and on 20 December the Federal Prime Minister, a Croat, resigned from office. These actions have been mirrored by recent comments by the President of Montenegro that "it is evident that Yugoslavia no longer exists."¹¹

At this time, the European Community continued its efforts to compel the Republics to agree to some type of Yugoslav confederation. Germany and Austria rejected this venture and pushed in November to recognise the independence of Slovenia and Croatia. On 23 December, Germany recognised Slovenia and Croatia and promised diplomatic relations by 15 January 1992. Slovenia, Croatia, Bosnia, Macedonia, and Kosovo and the Serbian Krajina requested recognition

⁸ Yugoslavia Council of Presidents agreed on 20 August 1991, to maintain a minimum level of economic and political cooperation in order to continue the functioning of Yugoslavia institutions for an additional three months.

⁹ European Community Ministerial Press Conference, 3 September 1991.

¹⁰ By December 1991, Slovenia and Croatia had introduced their own currencies and adopted new Constitutions. *Id.* at 1512, and Conference on Yugoslavia Arbitration Commission Opinion No. 5, On Recognition of Croatia by the European Community and its Member States, 31 I.L.M. 1503, 1504 (1992).

¹¹ Associated Press, 10 July 2000.

from the European Community on 24 December 1991. On 23 December 1991 Montenegro declared that it would not seek recognition as it had already been recognised as a sovereign state at the Berlin Congress in 1878 and thus did not need to be recognised again. On 26 December 1991, it was announced by the Serbian Government that "a 'third Yugoslavia' had been formed with Serbia, Montenegro, and the Serbian Krajina in Croatia."

B. Creating a Legal and Political Process for Resolving Status Questions

In response to the deteriorating situation, on 27 August 1991, the European Community established the Peace Conference on Yugoslavia.¹² The European Community hoped that the Peace Conference would facilitate a peaceful and negotiated resolution of the crisis, and that it would forestall recognition of Slovenia and Croatia.

In order to assist the Peace Conference in reaching a negotiated settlement, the European Community created the EC Arbitration Commission with the intent to render arbitral decisions on matters in dispute between the parties to the Conference. The instrument establishing the Arbitration Commission provided that "relevant authorities" would be entitled to submit questions for arbitration to the Commission. The Arbitration Commission consisted of five members chosen from the French, German, Italian, Spanish and Belgium Constitutional Courts,¹³ with the Chairman being the President of the French Conseil Constitutionnel.¹⁴ The original instrument did not specify the law to govern the decisions of the Arbitration Commission, but it was implied that the Commission should rely upon public international law, including the peremptory norms of general international law.

On 29 November 1991, in response to a question submitted by the Chair of the Peace Conference, the Arbitration Commission found that SFRY was in the process of dissolution.

On 16 December 1991, the European Community Council of Ministers adopted a *Declaration on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union* and agreed to extend recognition by 15 January 1992 to those Republics that met the conditions of recognition. The *Declaration on Recognition* affirmed the principles of the Helsinki Final Act and the Charter of Paris, particularly the principle of self-determination. The *Declaration* then noted that the European Community would "recognise, subject to normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations

¹² Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992). Introductory Note by Maurizio Ragazzi. A joint declaration on 18 October 1991 by the United States, European Community, and Soviet Union supported the creation of the Arbitration Commission.

¹³ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992). Introductory Note by Maurizio Ragazzi.

¹⁴ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992). Introductory Note by Maurizio Ragazzi.

and have committed themselves in good faith to a peaceful process and to negotiations.¹⁵

The specific criteria that each applicant state was required to meet included:

- Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; and
- Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The European Community then issued a second, more specific, *Declaration on Yugoslavia*.¹⁶ This Declaration noted that the European Community and its member states had discussed the situation in the SFRY in light of their *Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union*, and that the European Community and its member states had agreed to recognise the independence of all the Republics which fulfilled the criteria set forth in the *Guidelines*, which accepted the provisions laid down in the European Community Draft Convention on Human Rights, especially those in Chapter 11 on the rights of national or ethnic groups, and which continued to support the efforts of the UN and the continuation of the Peace Conference.

As a result of the promulgation of the *Guidelines on Recognition* and the *Declaration on Yugoslavia*, the European Community received applications for recognition from Slovenia, Croatia, Bosnia, Macedonia, Kosovo and the Republic of Serbian Krajina. There was some speculation at this time that Serbia would submit an application for the recognition of a "new Yugoslavia" consisting of Serbia, Montenegro and the Serbian parts of Bosnia and Croatia. Such an application was, however, never submitted. Montenegro had also initially indicated it would seek recognition, but subsequently announced that it would not.

Serbia objected to the *Guidelines* and *Declaration* issued by the European Community and charged that these decisions violated international law and set a dangerous precedent for challenging a state's territorial integrity and the inviolability of borders. The rump federal government also asserted that the

¹⁵ Council of Ministers of the European Community: Declaration on Guidelines on the Recognition of New states in Eastern Europe and the Soviet Union, 16 December 1991.

¹⁶ European Community Declaration on Yugoslavia, 16 December 1991.

decisions encouraged secession and civil strife and contradicted promises of the European Community that recognition would only occur at the end of a negotiated process. The rump federal government also requested a retraction of the declarations and a return to the Peace Conference.¹⁷

On 11 January 1992, the Arbitration Commission determined that Slovenia and Macedonia met the requirements for recognition, that Croatia could meet the requirements if it provided sufficient guarantees for the protection of minority rights, and that Bosnia would meet the requirements once the will of its population to secede had been formally determined. The European Community then announced recognition of Slovenia and Croatia on 15 January 1992.

On 20 January 1992, the rump Yugoslavia Federal Assembly produced a draft law on the right to self-determination and proposals for a Constituent Assembly for a new Yugoslavia. These actions were rejected by all of the SFRY Republics except Montenegro. Serbia and Montenegro then agreed on 12 February 1992, to stay together and become the "continuity" of the SFRY. Montenegro held a referendum on 1 March 1992, in which 96 per cent of the 66 per cent participating voters (the Montenegrin Albanian and Muslim populations refused to participate) voted in favour of the following question: "Do you agree that Montenegro, as a *sovereign republic*, should continue to live within a common state – Yugoslavia, *totally equal in rights* with other republics that might wish the same?" [emphasis added]

As required by the European Community, Bosnia held a referendum on independence from 29 February to 2 March 1992, wherein 63 per cent of the population voted, with 99.4 per cent voting for independence. Bosnia then declared full independence on 3 March 1992. The Serbs, who had boycotted the referendum, then proclaimed the Serbian Republic of Bosnia-Herzegovina on 27 March 1992.¹⁸ On 6 April 1992 the European Community recognised Bosnia as an independent state. The European Community, however, denied recognition to Macedonia.¹⁹ The United States then recognised Slovenia, Croatia and Bosnia as independent states on 7 April 1992.

The Serbian and Montenegrin Republic Parliaments and the rump Yugoslavia Federal Assembly then issued, on 27 April 1992, a *Declaration on the Formation of the Federal Republic of Yugoslavia*, which modified the constitutional structure of the SFRY and transformed it into the FRY. The announcement expressed the will of the Serbian and Montenegrin citizens to remain in a common Yugoslav state and provided a number of the assurances sought by the European Community in its *Declaration on Recognition*, although the announcement made no reference to it and did not express a desire for recognition.²⁰ The FRY then

¹⁷ Declaration by the Assembly of Yugoslavia Regarding the Declaration on Yugoslavia adopted by the European Community Ministers of Foreign Affairs, 21 December 1991. Yugoslavia relied for the authority of its arguments upon the UN Charter, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, the Helsinki Final Act, and the Charter of Paris.

¹⁸ The Bosnian Serb nationalists had set up their autonomous regions in May 1991 and established a parliament in October 1991.

¹⁹ European Community Declaration on Yugoslavia, Luxembourg, 6 April 1992.

²⁰ The Declaration provided that the FRY would not use force to settle questions related to the dissolution of Yugoslavia; would accept all the basic principles in the UN Charter, Helsinki Final Act and Paris Charters,

announced that, "perpetuating Yugoslavia as a state (continuing the state, international legal and political personality of Yugoslavia)" it would honour the international obligations assumed by the SFRY, would honour the territorial integrity of the seceding states, would announce recognition of those states once outstanding issues were resolved in the Peace Conference, and would retain the membership of the SFRY in international organisations.²¹

To assert its claim to the continuity of the former SFRY, the FRY sent a circular diplomatic note to all states with which the SFRY had diplomatic relations informing them of its claim to the continuity of the SFRY. The diplomatic note referenced the new Constitution and proclaimed that the SFRY had been "transformed into the FRY consisting of the Republic of Serbia and the Republic of Montenegro."²² The note concluded by declaring the diplomatic missions and consular posts of the SFRY would continue to operate and represent the interests of the FRY, and the diplomatic missions and consular posts of foreign states and international organisations accredited to the SFRY would continue to be accorded the same status by the FRY.²³ The European Community and United States denied the FRY's claim to be the continuation of the SFRY,²⁴ and refused to recognise it as a state.²⁵

On 4 July 1992, the EC Arbitration Commission found that the federal institutions of the SFRY were incapable of functioning as originally designed in the Yugoslav Constitution, and thus the SFRY should be considered to have dissolved and ceased to exist. The Arbitration Commission also found that the FRY could not be considered the continuity of the SFRY.

C. Relevant Decisions of the EC Arbitration Commission

As noted in the preceding section, the EC Arbitration Commission issued a number of opinions concerning the status of the former SFRY and its Republics, as well as the FRY and its claims to continuity. This section will detail the arguments made before the Commission and the decisions of the Commission as they should be considered legal precedent for addressing the question of the current status of the FRY federal government, and the FRY.

specifically the principles of respect for human rights, including the rights of ethnic minorities, parliamentary democracy, and market economy; and would settle questions of state succession such as the division of assets through the Peace Conference. "Declaration on the Formation of the Federal Republic of Yugoslavia," 27 April 1992. (Done by the participants of the joint session of Yugoslavia assembly, the national assemblies of the Republic of Serbia and the Assembly of the Republic of Montenegro.)

²¹ Declaration on the Formation of the Federal Republic of Yugoslavia, April 27, 1992.

²² Diplomatic Note No. 8/I/92 from the Embassy of the S.F.R. of Yugoslavia (Federal Republic of Yugoslavia) to U.S. Department of State, 27 April 1992.

²³ Diplomatic Note No. 8/I/92 from the Embassy of the S.F.R. of Yugoslavia (Federal Republic of Yugoslavia) to U.S. Department of State, 27 April 1992.

²⁴ "We do not accept Serbia and Montenegro as the sole successor state to the former Yugoslavia. We call for the suspension of the delegation of Yugoslavia in the proceedings of the CSCE and other relevant international fora and organizations." George Bush, "Munich Economic Summit: Yugoslavia Communiqué, July 7, 1992," Public Papers of the President, 1992, Bk. 1, 1992-1993, Washington: U.S. Government Printing Office, 1993, 1086

²⁵ U.S. Department of State, Chronology: Developments related to the Crisis in Bosnia, March 10-August 28, 1992, in Dispatch Vol. 3 No. 35, at 676, 31 August 1992.

1. The Status of Yugoslavia (Opinion No.1)²⁶

On 20 November 1991, the President of the Conference on Yugoslavia asked the Arbitration Commission to determine whether the SFRY was in the process of dissolution or secession, and which entities might be considered the legal successors of the SFRY in the event that it was in the process of a dissolution. Specifically, the Chairman of the Peace Conference asked whether the claim by a number of Republics to be independent states had the effect of causing the SFRY to dissolve, or whether the SFRY continued to exist despite the acts of these Republics.

Memoranda on this issue were submitted by Slovenia, Croatia, Bosnia, Macedonia, Serbia, and Montenegro and by the President of the collegiate Presidency of the SFRY. Serbia, Montenegro and the President of Yugoslavia asserted that the Republics seeking independence were seceding from the SFRY, which would continue to exist. In the alternative, if the SFRY no longer existed, then Serbia should be considered the continuity of the SFRY. The other Republics asserted the SFRY was disintegrating as the result of the "concurring will of a number of Republics" and all six Republics would be equal successors to the SFRY.

On 29 November 1991, the Arbitration Commission found that SFRY was in the process of dissolution.

The Arbitration Commission considered the question of the existence or disappearance of a state to be a factual question, best answered based upon the principles of public international law defining statehood. The Commission thus considered the effects of the recognition of certain Republics by other states to be "purely declaratory." The Commission identified the criteria of statehood as those of territory, a population subject to an organised political authority, and characterised by sovereignty. According to the Commission, the form of internal political organisation and constitutional provisions constitute mere facts important for determining the government's control over the population and territory, but do not in and of themselves constitute relevant legal requirements.

The Commission further considered that:

In the case of a federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the federal organs represent the components of the Federation and wield effective power.²⁷

The Commission also considered that "the expression 'state succession' means the replacement of one state by another in the responsibility for the

²⁶ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 1 of 29 November 1991, 31 I.L.M. 1495, (1992).

²⁷ Opinion No. 1, at 1495-96.

international relation of territory," and that this "occurs whenever there is a change in the territory of the state."²⁸

The Commission then found that although the SFRY continued to retain an international legal personality by participating in international organisations, *the Republics had expressed their desire for independence*. As evidence of the Republics desire for independence, the Commission cited referendums and parliamentary declarations supporting calls for independence.

The Commission also found that:

The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional court or the Federal Army, *no longer meet the criteria of participation and representativeness inherent in a federal state.*²⁹ (emphasis added)

Finally, the Commission found that as the SFRY could not guarantee the enforcement of cease-fires negotiated with the European Community, it could not be considered to exercise effective power over those entities.

Based on these findings, the Commission concluded that the SFRY was "in the process of dissolution."³⁰

Concerning the question of whether a particular successor state could claim to continue the international legal personality of the SFRY, the Commission first took notice of the traditional definition of state succession, and determined that matters of state succession were to be resolved consistent with the principles of international law relied upon in the Vienna Conventions on State Succession. According to the Commission, these principles provided that the outcomes of succession should be equitable, with the states being free to settle terms and conditions by agreement. The Commission also proclaimed that a resolution of matters of state succession must abide by the peremptory norms of general international law, in particular, respect for the fundamental rights of the individual and the rights of people and minorities.³¹

The Commission concluded with the finding that "it is incumbent upon the Republics to settle such problems of state succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities."³² The Commission also found that it would also be appropriate

²⁸ Opinion No. 1, at 1496.

²⁹ Opinion No. 1, at 1496.

³⁰ Opinion No. 1, at 1496-97.

³¹ Opinion No. 1, at 1495-96.

³² Opinion No. 1, at 1497.

for the Republics to constitute a new association with democratic institutions of their choice.

2. The Status of Yugoslavia Revisited (Opinion No. 8)³³

On 18 May 1992, the Chairman of the Peace Conference requested the Arbitration Commission to determine whether the process of dissolution of the SFRY referenced in Opinion No. 1 could be regarded as complete. Memoranda on this question were submitted to the Commission by Slovenia, Croatia, Bosnia, Montenegro, Serbia and Macedonia.

To rebut the claim that the secession of Slovenia, Croatia, Bosnia and Macedonia affected the continuing existence of the SFRY, Serbia asserted that the question of a succession of states and the continuity of the international personality of the parent state were two co-existing questions of international law.³⁴ Serbia reasoned that as succession concerned the replacement by one state of the competence for the international relations of a given territory by another state, state succession related to the transfer of established rights and duties. The continuity of a state under international law, however, related to questions of international personality. In the case of the SFRY, the question was therefore what relationship Slovenia, Croatia, Bosnia and Macedonia have vis-à-vis the international personality of the SFRY. Serbia asserted that by virtue of their declarations of independence and sovereignty, they had clearly elected to constitute their own states and have their own international personality.³⁵

Serbia thus claimed that although the SFRY had become territorially diminished, it retained its international identity and continued to exercise its international rights and duties, which included membership in international organisations, the conduct of diplomatic relations, and the adherence to treaties. Serbia further claimed the will of the Serbian and Montenegrin people to retain the federal Yugoslavia as their own state supported the continued existence of the SFRY. Serbia concluded that the SFRY therefore continued to be possessed of its international personality both de jure and de facto, notwithstanding certain modifications brought about by the reduction of its territory.³⁶

³³ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 8 of July 4, 1992, 31 I.L.M. 1488, 1521 (1992). FRY challenged the competency and jurisdiction of the Commission to render decisions 8, 9 and 10. The Commission ruled that it had competency to determine its own jurisdiction, and that it determined it had jurisdiction.

³⁴ Fundamental Rules of International Law Governing the Continuity and Succession of States, Prepared by the Government of Serbia, 25 March 1992.

³⁵ Fundamental Rules of International Law Governing the Continuity and Succession of States, Prepared by the Government of Serbia, 25 March 1992. At the March 25-26 Meeting of the Working Groups of the Peace Conference 1992, Serbia argued that "continuity hinges on international personality" and that the other Republics have elected to constitute their own states and have their own international personalities, and thus the former Yugoslavia, although territorially diminished, retained its identity as a state endowed with international rights and duties.

³⁶ Fundamental Rules of International Law Governing the Continuity and Succession of States, Prepared by the Government of Serbia, 25 March 1992.

Despite these arguments, on 4 July 1992, the Arbitration Commission found that the federal institutions of the SFRY were incapable of functioning as originally designed in the Yugoslav Constitution, and thus the SFRY should be considered to have dissolved and ceased to exist.

In considering its decision, the Commission began with a review of its findings in Opinion No. 1, as stated above. In particular, the Commission made the following findings:

- A state's existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a state;
- *The SFRY was at that time still a legal international entity but the desire for independence had been expressed through referendums . . . and through a resolution on sovereignty . . .;*
- *The composition and functioning of essential bodies of the Federation no longer satisfied the intrinsic requirements of a federal state regarding participation and representativeness;*
- *Recourse to force in different parts of the Federation had demonstrated the Federation's impotence;*
- *The SFRY was in the process of dissolution but it was nevertheless up to the Republics which so wished to constitute, if appropriate, a new association with democratic institutions of their choice;* (emphasis added)
- The existence or disappearance of a state, is, in any case, a matter of fact.

The Commission then articulated what can be considered a standard to determine whether a state has ceased to exist:³⁷

The existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised.³⁸

In setting forth a second standard to confirm whether the entities of a federal state had successfully constituted themselves as sovereign states, the Commission stated:

While recognition of a state by other states has only declarative value, such recognition, along with membership

³⁷ Opinion No. 8, at 1522-23.

³⁸ Opinion No. 8, at 1522-23.

of international organisations, bears witness to these states' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law.³⁹

In applying these standards to determine the continuing existence of the SFRY, the Commission made the following findings. Since the issuance of Opinion No. 1, a large majority of Bosnia's population had voted for independence; Serbia and Montenegro had declared the formation of the new state of Federal Republic of Yugoslavia (in fact, Serbia and Montenegro had declared this state to be the continuation of the SFRY); most of the successor states of the SFRY had recognised the independence of each other, thus demonstrating the lack of authority of the federal state over these entities; the federal bodies of the SFRY no longer existed; the former national territory and population of the SFRY were under the sovereign authority of new states; Slovenia, Croatia, and Bosnia had been recognised as independent states by the European Community and many other states; the UN Security Council and European Union had issued statements or resolutions referring to "the former SFRY" or "the former Yugoslavia"; and UNSC Resolution 757 noted that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically [the membership] of the former Yugoslavia [in the United Nations] has not been generally accepted."⁴⁰

Based on these findings, the Commission concluded the process of dissolution referred to in Opinion No. 1 was now complete and the SFRY no longer existed.

3. Questions of State Succession, Particularly Membership in International Organisations (Opinion No. 9)⁴¹

Also on 18 May 1992, the Chairman of the Peace Conference requested the Arbitration Commission to determine, in the event the SFRY had ceased to exist, what basis and by what means should the issues of state succession be resolved between the successor states of the SFRY. The Commission received opinions from Slovenia, Croatia, Bosnia, the FRY and Macedonia.

Although this question is concerned solely with the resolution of matters of state succession, such as treaty continuity and assumption of debts and assets, it is relevant for the present legal brief as the Commission used this question to address the matter of whether the FRY could validly claim to be the continuation of the SFRY now that the SFRY had been declared dissolved.

³⁹ Opinion No. 8, at 1523.

⁴⁰ Opinion No. 8, at 1523.

⁴¹ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 9 of July 4, 1992, 31 I.L.M. 1524 (1992).

The FRY asserted it was legally entitled to the mantle of continuity, since the formation of the first Yugoslavia in 1918 was the result of Slovenia, Croatia and Bosnia breaking away from the Austro-Hungarian Empire, and Macedonia breaking from the Ottoman Empire and joining the independent states of Serbia and Montenegro to create Yugoslavia.⁴² With respect to the subsequent secession of these states from the SFRY, the FRY contended that although the separation of these Republics should properly be deemed a secession, these states have attempted to present it as a disassociation, and thus promote the argument that the SFRY has dissolved. The FRY rejected this argument on the basis "the recognition of secession was a means of creating a state as opposed to the right to self-determination which can never be exercised to the detriment of others and contrary to the standards of national and international law."⁴³

With respect to a basis in international law for these claims, Serbia noted that with regards to the authoritative sources of the rules of international law for state succession, an entity can either choose customary law, which is heterogeneous and inconsistent, or the Conventions on Succession of States adopted in 1978 and 1983. Serbia argued there were compelling reasons for choosing the Vienna Conventions as they were drafted based on the UN Charter principles which have the force of *jus cogens*. Although the Vienna Conventions were not yet in effect, the international community was required to acknowledge the relevant principles of the Conventions as rules of positive law and must apply them to the questions of succession in the case of the SFRY. As the rules of procedure set forth in the Vienna Conventions call for disputes to be submitted to the ICJ, should diplomatic means fail to bring about a settlement, the disputed questions should be submitted to the ICJ.⁴⁴

Slovenia and Croatia objected to the FRY's claim to continuity. Slovenia noted the proclamation of the FRY was appropriate as every nation was entitled to the right of self-determination, but it could not fairly claim to be the continuity of the SFRY, since it violated the Constitution of the former SFRY, and because it violated the principles of the Peace Conference.⁴⁵

According to Slovenia, the Federal Chamber, which purported to pass the resolution, was composed of 220 delegates and required 111 to pass resolutions and 147 to amend the Constitution. As only 70 delegates participated in the 27 April decision, their vote could not be taken to represent the will of the former SFRY,⁴⁶ and could not validly transfer the authority of the SFRY to the FRY.⁴⁷ With respect to the Peace Conference, the Arbitration Commission, as will be discussed in the analysis of Opinion No. 10, had declared the SFRY was in the process of dissolution, and

⁴² Some Data About the Federal Republic of Yugoslavia, 23 YUGOSLAV SURVEY No. 2, at 33 (1992).

⁴³ Memorandum of the Government of Yugoslavia on the Yugoslav Crisis, 23 YUGOSLAV SURVEY 1992 No. 1, at 83.

⁴⁴ Fundamental Rules of International Law Governing the Continuity and Succession of States, Prepared by the Government of Serbia, 25 March 1992).

⁴⁵ Constitutional Aspects of the Proclamation of the FRY, Slovene Ministry of Foreign Affairs, May 1992.

⁴⁶ Slovenia argued that, in fact, term of office of this body had expired four years earlier.

⁴⁷ Constitutional Aspects of the Proclamation of the FRY, Slovene Ministry of Foreign Affairs, May 1992.

questions of succession must be determined by the agreement of the parties in the Peace Conference. The FRY could not therefore unilaterally appropriate to itself the continuity of the SFRY. The Peace Conference must consequently separate out the question of the formation of the FRY and the question of the continuity of the SFRY. In rendering a final determination on the status of the FRY, Slovenia adopted a constitutive approach and noted the principle of "factuality" played an important role, and it would be important for states to refuse to treat the FRY as the continuity of the SFRY.⁴⁸

Slovenia concluded its argument by noting that the value of the creation of The FRY lay in the fact that it can be taken as an act bringing to an end the SFRY, and thus with the declaration, all Republics of the SFRY were considered independent.⁴⁹

In formulating its opinion, the Commission did not directly address these arguments, but rather took note of the *European Community Declaration on June 27, 1992*, discussed below, which declared that the European Community would not recognise the FRY as the continuity of the former SFRY until the moment that decision had been taken by the qualified international institutions, and that the European Community had decided to demand the suspension of the delegation of the SFRY at the CSCE and other international organisations.

The Commission reasoned that this announcement demonstrated the conviction of the European Community that The FRY had no right to consider itself the continuation of the SFRY.⁵⁰ Consistent with this reasoning, the Commission concluded that the membership of the SFRY in international organisations must be terminated and none of its successor states may claim for itself alone the membership rights of the SFRY.⁵¹

4. The Status of the FRY (Opinion No. 10)⁵²

On 18 May 1992, the Chairman of the Peace Conference also requested the Arbitration Commission to determine whether under international law the FRY represented a new state requiring recognition under the *Guidelines on Recognition* and the *Declaration on Yugoslavia*. The Commission received opinions from Slovenia, Croatia, Bosnia, Serbia, Montenegro and Macedonia.⁵³

The Commission chose to bisect this question into the two separate questions of whether the FRY could be considered the continuity of the SFRY (which it had previously addressed in Opinion No. 9), and whether

⁴⁸ Constitutional Aspects of the Proclamation of the FRY, Slovene Ministry of Foreign Affairs, May 1992.

⁴⁹ Constitutional Aspects of the Proclamation of the FRY, Slovene Ministry of Foreign Affairs, May 1992.

⁵⁰ Opinion No. 9, at 1524.

⁵¹ Opinion No. 9, at 1525.

⁵² Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 9 of 4 July 1992, 31 I.L.M. 1525 (1992).

⁵³ Opinion No. 10, at 1525.

the FRY as a new state required recognition by the European Community.⁵⁴

In answer to the first question, the Commission relied upon its finding in Opinion No. 9, and added that the Security Council had noted in its UNSC Resolution 757 that the claim by the FRY to automatically continue the membership of the former SFRY in the United Nations had not been generally accepted.⁵⁵

In answering the second question, the Commission noted that on 27 April 1992, Serbia and Montenegro had proclaimed a new entity called the Federal Republic of Yugoslavia and adopted a new Constitution. The Commission then found that this entity met the criteria to be a state as articulated in Opinion No. 1, which was that a "state is commonly defined as a community which consists of a territory and a population subject to an organised political authority; that such a state is characterised by sovereignty."⁵⁶ Importantly, the criteria do not require a formal declaration of statehood or independence, but rather as discussed in Opinion No. 1, such acts may serve as indicia of an entity's intent to become independent, or to become a state.

The Commission then relied upon its conclusion that the FRY was not the continuity of the SFRY to declare that although the FRY met the international legal criteria for statehood, it did not *ipso facto* enjoy the recognition enjoyed by the SFRY under completely different circumstances. The Commission thus reasoned that other states were free to choose, where appropriate, to recognise or deny recognition to the new FRY.

The Commission further noted that as recognition is not a prerequisite for the foundation of a state and is purely declaratory in its impact, the states considering recognising The FRY may do so at their discretion and based upon the criteria of their choosing. The decision to recognise would be subject only to the imperatives of general international law, in particular those prohibiting the use of force in dealing with other states or those guaranteeing the rights of ethnic, religious or linguistic minority.⁵⁷

Based on these findings, the Commission concluded that the FRY was a new state which could not be considered the sole successor to the SFRY, and that its recognition by the member states of the EC would be subject to its compliance with their conditions set forth in the *Guidelines on Recognition*.

5. The Date of Succession (Opinion No. 11)⁵⁸

On 20 April 1993, the Co-chairmen of the Peace Conference asked the Arbitration Commission to determine on what date state succession

⁵⁴ Opinion No. 10, at 1525.

⁵⁵ Opinion No. 10, at 1526.

⁵⁶ Opinion No. 1, at 1495.

⁵⁷ Opinion No. 10, at 1526.

⁵⁸ Conference on Yugoslavia Arbitration Commission, Opinion No. 11 of 16 July 1993.

occurred for the various states that had emerged from the dissolution of the SFRY. Submissions on this question were submitted by Slovenia, Croatia, Bosnia and Macedonia, with the FRY refusing to participate.

In developing its answer to this question, the Commission observed that the Vienna Conventions on State Succession provided that the date of succession of a state was the date upon which the successor state replaced the predecessor state in the responsibility for the international relations of the territory to which the succession of states related. Turning to the specific fact situation of the break-up of the SFRY, the Commission noted that the SFRY had ceased to exist with no state able to claim to be its continuation. Furthermore, the extinction of the SFRY, unlike that of the former Soviet Union and former Czechoslovakia, did not occur as a result of an agreement between the potential successor states on a particular date, but rather from a process of disintegration which started when the Commission issued Opinion No. 1 on 29 November 1991 (indicating that the SFRY was in the process of dissolution) and continued until 4 July 1992, when the Commission issued Opinion No. 8 (indicating that the SFRY had ceased to exist).⁵⁹ The Commission thus determined that the date of succession for each state was the respective date on which it became an independent state.

The Commission therefore concluded Slovenia and Croatia became independent on 8 October 1991, when their declarations of independence of 25 June 1991 came into effect, Macedonia became independent on 17 November 1991, when it adopted its new Constitution, and that Bosnia became independent on 6 March 1992, when the results of the 29 February to 1 March 1992 referendum were officially promulgated. Importantly, these dates all preceded recognition of the states by the members states of the European Community or the United States.

Turning to the question of when the FRY became a successor state, the Commission noted that complications arose as a result of the FRY's claim to be the continuation of the SFRY. The Commission selected 27 April 1992, as the date of succession for the FRY, as this was the date they adopted a new Constitution and reconstituted themselves as the Federal Republic of Yugoslavia, as well as the date most international organisations began referring to it as the "former Yugoslavia."⁶⁰

II. APPLYING THE PRECEDENT TO THE FRY

This section will assess the status of the FRY state and its federal government and institutions in light of the precedents established by the EC Arbitration Commission, by examining the following fact-based questions:

- Whether the FRY government and federal institutions meet the criteria of participation and representativeness inherent in a federal state. Specifically,

⁵⁹ Opinion No. 11.

⁶⁰ Opinion No. 11.

whether the composition and functioning of essential bodies of the Federation satisfy the intrinsic requirements of a federal state regarding participation and representativeness.

- Whether the FRY government and federal institutions can be considered to exercise effective political power over the FRY's constituent entities. In particular, whether it has been necessary for the FRY to resort to force in order to maintain its control over these entities.
- Whether the FRY has created an opportunity for its constituent entities to constitute a new association with democratic institutions of their choice.
- To what extent states and international organisations have expressed views as to the status or legitimacy of the FRY state, its government and federal institutions
- Whether the Republic of Montenegro constitutes a political community consisting of a territory and a population subject to an organised political authority, characterised by sovereignty.
- Whether Montenegro has expressed a desire for independence or the opinion that the FRY no longer exists.

A. Participation and Representativeness

The 1992 FRY Constitution provides in Article 1 that, "the Federal Republic of Yugoslavia shall be a sovereign federal state, founded on the equality of citizens and the equality of its member Republics," and in Article 11 that, "authority in the Federal Republic of Yugoslavia shall be organised on the principle of the separation of powers between the legislature, executive, and judiciary." Consistent with these proclamations, the government of the FRY was designed to operate on the basis of a parliamentary form of government which would ensure full and equal representation of each Republic's interests and full and equal participation in federal institutions.

The primary authority of the federal government was designed to rest in the Federal Assembly, as set forth in Articles 78 to 95 of the Constitution. The Federal Assembly was comprised of a Chamber of Peoples elected directly by the people of the two Republics, and a Chamber of Republics with its members appointed by the Republic Parliaments. The work of the Federal Assembly was to be complemented by an appointed government accountable to the Assembly. The Constitution also provided for the operation of a Supreme and Constitutional Court and a Presidency with limited authority. In the Chamber of Republics, each Republic is permitted to appoint one half of the 40 representatives in the Chamber. In the Chamber of Citizens, which is directly elected, Montenegro is guaranteed 30 out of approximately 185 seats.

The limited prerogatives of the FRY President are regulated by Article 96 of the Federal Constitution. Importantly, the 1992 Constitution provides in Articles 97 and 98 that the President is elected by the Assembly, not through general

elections. The Parliament may also dismiss the President if it determines that he violated the Constitution.⁶¹ Presidential prerogatives are also mentioned in Article 135 stipulating that the Yugoslav Army is under command of the President pursuant to decisions by the Supreme Defence Council, which consists of the President of the Republic and the presidents of member Republics with equal rights of vote, with the Federal President only presiding over Council meetings.

In practice, however, FRY President Slobodan Milosevic fully controls all federal institutions by exerting his personal authority rather than the authority of his office. He succeeded in gradually removing from office all those disloyal to him, especially Montenegro's representatives in federal institutions loyal to Montenegrin authorities. By asserting control over the Federal Constitutional Court, whose members are nominated by the President and elected by the Federal Parliament, Mr Milosevic, for instance, succeeded in preventing Montenegro to install its legally elected representatives in the upper house. This gave him full control over the Federal Parliament and enabled him to amend the Constitution. Representatives of Montenegro disloyal to Mr Milosevic were also removed from the Federal Government, the National (Central) Bank and all other relevant federal institutions in a procedure similar to the one that gave Mr Milosevic control over the Federal Constitutional Court.

Notably, in the opinion of Serbian and Montenegrin experts, Mr Milosevic has not circumvented formal institutions, but rather has gained full control over them and then misused them in order to exclude effective Montenegrin participation and representation. Mr Milosevic has thus managed to give the impression that proper executive and legislative avenues were used. Moreover, according to observers, Mr Milosevic seldom personally engaged in the misuse of institutions but rather relies upon his proxies, or those institutions loyal to him, e.g. the Federal Assembly and the Federal Constitutional Court to execute his orders.

1. Participation

Montenegrin officials have been effectively excluded from parliamentary representation, participation on the Supreme Defence Council, Ministry of Foreign Affairs, Central Bank, and representation in the Federal Constitutional Court and Federal Supreme Court. The actions of federal institutions in the run-up to the September 24, 2000 elections have also significantly limited the possibility that the citizens of Montenegro, as well as the citizens of Serbia, would be able to participate in elections which were in fact free and fair.

According to legal observers in the FRY, there is no doubt that the federal institutions have been abused by Mr Milosevic to prejudice the interests of Montenegro. An illusion of legality, however, was largely maintained by

⁶¹ Articles 97 and 98 were amended on 6 July 2000. Although the Constitutional amendments did not change the presidential prerogatives, the changes made in the election procedure for the President, now to be elected through general elections, considerably augmented the role of this office. (General elections for the President of the Republic represent a characteristic of presidential systems.) Furthermore, possible violation of the Constitution by the President cannot be judged any more by the Parliament, but rather by the Federal Constitutional Court upon an initiative from the Parliament; if the Court finds that a violation actually took place the Parliament decides on the dismissal of the President – Amendment VII.

the fact that Mr Milosevic effectively controlled these institutions, including the federal judiciary. Most of the representatives and officials loyal to the Montenegrin government have been removed from federal institutions. In cases when Montenegrin representatives loyal to Montenegrin authorities still remained in office, they were efficiently outvoted by their counterparts loyal to Mr Milosevic. Mr Milosevic has thus been able to use his constitutional prerogatives and his dominance over the Federal Parliament to nominate the candidate for the Prime Minister of the federal government, judges of the Federal Constitutional Court and the top officials of the National Bank, enabling him to gain full control over these federal institutions. Ultimately, Mr Milosevic was in a position to influence all decisions at the federal level maintaining at the same time the appearance of legality. As such, Mr Milosevic has thus successfully combined legal means with personal authority to block any meaningful Montenegrin participation in political decisions at the federal level.

Chamber of Republics

In May 1998, the citizens of Montenegro elected a new government. This government, as required by the Montenegrin Constitution, appointed twenty of its parliamentarians as representatives to the Federal Chamber of Republics to replace the twenty representatives appointed by the previous Montenegrin government. The new government, acting under a new law adopted by the parliament appointed all twenty representatives on the basis of a majority vote, rather than allocating the appointments on the basis of proportional representation as required by a previous law. The Montenegrin Constitution is silent as to the particular method by which the representatives are to be selected. Article 80 of the 1992 FRY Constitution simply provides, "the Chamber of Republics shall be made up of twenty federal deputies from each member Republic," and Article 81 provides "the election and termination of the mandates of federal deputies in the Chamber of Republics of the Federal Assembly shall be regulated by the laws of each member Republic." As such the method is government by parliamentary laws, which were appropriately amended by the new Montenegrin Parliament.

The majoritarian method had been employed by the Republic of Serbia since 1993. At that time the Serbian opposition appealed the matter to the Federal Constitutional Court, which declared that the Federal Constitution did not grant it jurisdiction to decide an issue that was completely within the purview of the Republic Constitutions and thus appropriately rested with the Constitutional Court of Serbia.

When the twenty Montenegrin representatives attempted to take their seats in the Federal Chamber of Republics, the Commission for Mandates and Immunity, the administrative body of the Federal Assembly, which formally verifies the mandates of federal representatives, simply ignored the election of the new Montenegrin representatives and declined to summon them to be seated. This act was taken despite the fact the Federal Constitution contains no provisions which grant the Federal

Parliament any authority over the mandates of the representatives to the Chamber of Republics.

Montenegro simultaneously ordered all twenty of its formerly elected representatives to the Chamber of Republics withdraw from the Federal Parliament, which most of them did. The six members of the pro-Milosevic Montenegrin party and one member of another party, however, refused to respond to the directive of the Montenegrin government and continued to act as "representatives" of Montenegro in the Federal Assembly, despite the fact their term had expired. It was these representatives who subsequently voted in favour of the July constitutional amendments as will be discussed below.

The six remaining pro-Milosevic representatives then appealed the matter to the Federal Constitutional Court claiming that the new law violated the FRY Constitution. As noted above, the Federal Constitutional Court had previously declared it had no jurisdiction over such matters when the matter was submitted by the Serbian opposition. In this instance, however, the Court declared that it did have jurisdiction and found the Montenegrin electoral law to be unconstitutional and implicitly approved the decision of the Federal Parliament not to confirm the mandates of the Montenegrin representatives for the Chamber of Republics. The core of the legal rationale for this decision was that the laws failed to assure the representation of the Republic. According to the Court, the electoral law only assured the representation of the ruling political parties by failing to provide a proportional representation of all parties from the Republic Parliament.

The Court then ordered that both Republics enact new laws and re-elect their representatives to the upper house in a proportional manner. Serbia responded by amending its laws to provide for proportional representation, and then sending all twenty representatives from the ruling coalition. The opposition apparently "withdrew" from Parliament at the time of the nomination because of an alleged attempt to assassinate their party chief.

Montenegro responded by rejecting the authority of the Court and by continuing to assert that the remaining seven representatives could not legitimately represent Montenegro's interests, and that the twenty newly elected representatives must be allowed to take their seats.

Fair representation in the Chamber of Republics is particularly essential to the political interests of Montenegro, as this is the only Federal body where Montenegro can ensure parity between the interests of Serbia and the interests of Montenegro. Under the 1992 FRY Constitution, the Chamber of Republics is the only federal body where Montenegro has absolute parity, and where it may exercise veto power if necessary given that the Federal President or Federal Government can not be elected nor can any law be passed without a majority vote of 21 of the 40 representatives in the Chamber. Without such an arrangement little

possibility exists for Montenegro to influence the composition of the federal government or the operation of federal institutions.

Montenegrin legal analysts argue, not without credibility, that the political manoeuvring which assured the necessary majority for constitutional amendments by pro-Milosevic forces represents an obvious violation of the Constitution and an evident misuse of the Federal Constitutional Court. In their view, it is a typical example of how Mr Milosevic and the ruling Serbian coalition manipulate federal institutions. This manipulation was deemed to be of special importance because it became the turning point in the abolition of equality between the member Republics in the FRY, a principle that is explicitly proclaimed by Article 1 of the 1992 Constitution. From that moment, the legal observers believe that Montenegro was practically deprived of any means to take part in political decisions on the federal level.

In light of this situation, the government of Montenegro announced that the 1992 FRY Constitution was in breach and that the operations of the key organs of the federal state – the Federal Parliament and Federal government (which could not be elected without the approval of both chambers) would cease to be legal and legitimate.⁶²

Supreme Defence Council

In light of the exclusion of the Montenegrin delegates from the Chamber of Republics, the government of Montenegro sought to maximise its legitimate participation in other federal organs and institutions to protect its interests. Montenegrin President Djukanovic thus attended the October 1998 session of the Supreme Defence Council, which has constitutional authority for controlling the operations of the Yugoslav Army. The Council consists of the FRY President and the Presidents of each of two Republics. Each member has equal standing and decisions are made by a two-thirds vote.

As a result of President Djukanovic's greater association with the European Union and with NATO, he was excluded from all further meetings of the Supreme Defence Council although he was constitutionally one of the three supreme commanders. President Milosevic then assumed the position of "Supreme Commander" of the Yugoslav Army, despite the fact there is no constitutional or legislative provision for this position beyond the provision that the Army of Yugoslavia shall be under the command of the President of the Republic, pursuant to decisions by the Supreme Defence Council. Recently, attempts by top-ranking military officials are being made to legitimise this illegal behaviour by referring to Mr Milosevic as the "Supreme Commander of the Yugoslav Army."

⁶² The U.S. Department of State has also acknowledged that "Milosevic has worked for several years to manipulate the composition of the federal parliament, particularly by excluding representatives of the democratic government of the Republic of Montenegro." U.S. Department of State, Office of the Spokesman, Press Statement by Richard Boucher, Spokesman, 13 July 2000.

President Milosevic has also purged the military of "disloyal" generals. The remaining generals have expressly indicated that they recognise only one supreme commander, and as a result, the President of Montenegro is unable to exercise any civilian control over the Yugoslav Army. Moreover, under the guidance of Mr Milosevic as "Supreme Commander," General Nebojsa Pavkovic, who heads the General Staff, has crafted a new defence doctrine for the Yugoslav army directed primarily against Milosevic's internal enemies.⁶³

Ministry of Foreign Affairs

According to the Government of Montenegro, the formulation and implementation of FRY foreign policy is carried out without the participation of Montenegrin officials, and as a result, the foreign policy of the FRY, which in its view rejects European integration and the basic principles of the Organisation for Security and Co-operation in Europe (OSCE) and United Nations, is in contradiction to the interests and objectives of Montenegro. Moreover, Montenegro asserts that Montenegro has been denied equal representation of its interests in the diplomatic missions of the FRY, and that its personnel have been excluded from service in the Foreign Ministry.

Central Bank

Montenegro also alleges that it has been denied participation in the decisions of the Central Bank, which has acted on matters of rates and money supply without any consultations or involvement of Montenegrin representatives. After Montenegro announced that it would accept the German Mark as valid currency along with the Yugoslav Dinar⁶⁴, the Central Bank ceased all financial transactions relating to Montenegro and halted the ability of Montenegrin entities to engage in direct payments to companies in Serbia. As a result, trade between companies from the two republics must be exercised through cash payments or through Republika Srpska in Bosnia. According to Montenegrin officials, the economic aim of this measure was to make prices in Montenegro enormously high and to undermine the implementation of the dual currency regime. It was also motivated by a desire to undermine the Montenegrin government in retaliation for introducing that regime.

Federal Constitutional Court and Federal Supreme Court

Montenegro alleges that the Federal Constitutional Court and Federal Supreme Court no longer jointly reflect the interests of both Serbia and Montenegro, but rather have become beholden to President Milosevic and are used by him as a means to restrict the legitimate interests of Montenegro - in particular its efforts to pursue genuine democracy. The Montenegrin government cites, for example, the use of the Courts to declare invalid the process for Presidential and Parliamentary elections in

⁶³ RFE/RL Newswire, 22 August 2000.

⁶⁴ The legal validity of this decision is discussed further below.

Montenegro (October 1997 and May 1998) in spite of Article 124 of the 1992 FRY Constitution, which provides that the Constitutional Court is only authorised to decide on issues related with federal elections, and Article 81 which provides that review of the organisation and conduct of elections in each republic are the exclusive responsibility of the Supreme and Constitutional courts of Montenegro and Serbia. As Milosevic has ensured that the Courts are filled with his supporters, he has been able to use them in a number of instances to strike against the Serbian democratic opposition as well.

Free and Fair Elections

In the event Montenegro were to participate in the 24 September 2000 elections, it would be participating in elections which are highly unlikely to be free, fair, or democratic, and thus would not ensure meaningful participation for either the Montenegrin or Serbian people in a democratic process. According to a Constitutional law expert, "the elections scheduled for September 24 will undoubtedly be irregular...even the way in which the elections had been called constituted a violation of the FRY Constitution." The expert further stated, "no one should have any doubts that these elections will be entirely undemocratic and unfair and fraught with all the machinations used in the past . . . these machinations included various voting roll irregularities, double voting, double voting registers and court changes of election results."⁶⁵ Moreover, the manner in which TV airtime has been allotted to opposition candidates will result in each party having approximately one minute to present their platform on state television.⁶⁶

As reported by Human Rights Watch, "Serbian authorities loyal to Yugoslav President Slobodan Milosevic are increasingly using violence against their opponents . . . In the past six weeks, police have beaten opposition activists and members of OTPOR. . . Police have also refused to investigate attacks on opposition activists by plainclothes thugs believed to be working for the Serbian government, [whereas] previously, police harassment of students and opposition activists was limited mostly to detention and interrogation."⁶⁷

The likelihood of effective international monitoring to ensure free and fair elections is very limited as the Yugoslav deputy prime minister, Nikola Sainovic, who has been indicted by the International Criminal Tribunal for the Former Yugoslavia for crimes against humanity, has declared that the FRY will reject any foreign observers from Western countries.⁶⁸

⁶⁵ V.I.P. Daily News Report, 28 July 2000.

⁶⁶ Broadcast on Radio B2-92, 2 August 2000.

⁶⁷ Human Rights Watch statement, 10 July 2000.

⁶⁸ Broadcast on Radio B2-92-Belgrade, 27 July 2000.

2. Representativeness

On 6 July 2000, Mr Milosevic and the FRY government adopted significant changes to the 1992 FRY Constitution that affected Montenegro's representation in the FRY government.

Substantive Changes to the 1992 FRY Constitution which Curtailed Representation of Montenegrin Interests

The first set of amendments change Article 97 of the Constitution to provide that the President would be directly elected rather than appointed by the Parliament.⁶⁹ By providing for the direct election of the President, the amendments exclude any meaningful input by the citizens of Montenegro as they represent less than 5 per cent of the population of the FRY, making it unnecessary, as a practical matter, for a candidate for the Presidency to concern himself with the interests of Montenegro. When the President was selected by the Parliament, it provided an opportunity for Montenegro to ensure its interests were given sufficient consideration.

In addition, Amendment VIII, which adds a new section to the 1992 Constitution, removes from the Prime Minister the authority to nominate and relieve ministers from their posts. Under the amended Constitution, the Federal Assembly appoints and dismisses the members of the government, the government is to be accountable to the Federal Assembly, and the President is responsible for proposing the replacement of members of the Federal Government. The effect of this amendment is to significantly weaken the position of the Prime Minister, the only federal position likely to be held by a Montenegrin, and to strengthen the position of the President.

The second set of amendments provides that Article 80, paragraph 3, Article 81, paragraph 2, and Article 86 be amended in order to provide for the direct popular election of the deputies in the Chamber of Republics in the Federal Parliament. Under the 1992 Constitution, the Montenegrin Parliament elected half of the 40 deputies in the upper house, while Serbia elected the other half. The amendments provide that the election of representatives to the Chamber of Republics will be governed by federal law, can not be recalled, and will decide and vote at their own discretion, whereas the 1992 Constitution provided that the election of Republic representatives was regulated by the laws of each member Republic, and that the federal deputies to the Chamber of Republics of the Federal Assembly shall represent the member Republic from which they were elected. By denying the Parliament of the Republic of Montenegro the opportunity to regulate and to appoint the Montenegrin representatives to the Chamber of Republics, Montenegro is denied the ability to ensure that the interests of the Republic are adequately reflected in the decisions of the Federal Parliament. Essentially, the amendments transform the Chamber of Republics into a second House of Citizens, and deny the

⁶⁹ The Amendments do provide that the President of a Republic and the President of the Federal Government, as a rule, may not be from the same constituent Republic.

member Republics the ability to ensure that the Republic representatives adequately represent the interests of the Republic at the federal level. As such, the Chamber of the Republics can no longer effectively represent the Republics of the federation as "sovereign states" (as they are defined in Article 6 of the Federal Constitution) and this substantially alters the federal character of the joint state.

The third set of amendments provide that Article 78, paragraph 7 will be amended to permit the Federal Assembly to elect and replace the President and members of the Federal Government and the Federal State Prosecutor. As noted above, under the 1992 Constitution the Yugoslav Prime Minister, in co-operation with the Montenegrin and Serbian governments, appointed the Cabinet of Ministers. By placing the authority to create and dissolve the government in the hands of the Federal Assembly, combined with the direct election of members to the Chamber of Republics, the amendments remove any meaningful influence the government of the Republic of Montenegro may have over the composition of the Federal government.

The fourth set of amendments, to Section V, paragraph 2 provide that the President of the FRY may only be removed from office if at least half of the Federal Parliamentarians move to place the matter before the Federal Constitutional Court, the Court then finds that he has violated the present Constitution, and two-thirds of each house of the Federal Parliament vote for his dismissal. Prior to amendment, the Constitution provided that the procedure for the dismissal of the President of the Republic shall be determined by federal law. The new amendment makes it impossible to remove the President for actions which may contravene the interests of the Republics, or for violations of international humanitarian law such as the commission of crimes against humanity.

The final set of amendments to Article 90, paragraph 2 remove the requirement of a two-thirds vote to modify or adopt federal statutes relating to the election of federal deputies for the Chamber of Citizens; election of the President of the Republic; the Federal Court; the Federal Public Prosecutor; organisation of the Federal Constitutional Court, the proceedings before this court and the legal effect of its decisions. By so doing, the amended Constitution now requires only a majority vote for these important decisions, thus significantly minimising the ability of the Republic of Montenegro to block changes which may negatively affect its interests.

Procedural Violations Associated with the Recent Amendments

Concerning the process by which these amendments were adopted, it has been claimed with some credibility by Montenegrin legal analysts that the amendments were treated as a state secret with no public debate, which is in direct violation of the rules of procedure of the Federal Assembly, as well as the dictates of democracy. Consequently, the Federal Parliament

met for an extraordinary session and adopted the amendments in a little under two hours without any reference to the Constitutional Committee of the Assembly, or any review by experienced experts on constitutional law in Belgrade. Whereas the rules of procedure of the Federal Assembly require seven days prior notice for all legislative matters, only 24 hours notice was provided in the case of the above constitutional amendments.

Compounding the apparent illegitimacy of the manner in which the amendments were adopted is the fact that neither the Montenegrin parliament nor government was consulted on the amendments, nor was the Montenegrin Assembly provided an opportunity to vote on the amendments before they were submitted to the Federal Assembly.⁷⁰ The exclusion of the Republic of Montenegro runs counter to the preambular language of the 1992 Constitution, which declared that the 1992 Constitution was adopted and promulgated upon "the proposal and consent of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro."

Concerning the right of Montenegro to approve the Constitutional amendments, Mr Milosevic constructed the amendments in such a way so as to ensure their adoption did not formally require the approval of Montenegro. The substance of the amendments, however, relates directly to matters which the 1992 FRY Constitution explicitly states require approval of the republics.⁷¹

For example, Article 1 of the FRY Constitution stipulates that the FRY is founded on equality of member republics. The new procedure established by the amendments substantially changes the election process for the Federal President from that of an election by the Federal Parliament, to a general election. This change violates the parity principle due to the large disproportion between the electoral bodies of the two member republics. These amendments also violate Article 77, which stipulates by enumeration, the jurisdiction of the federation. Enumeration of federal jurisdiction is in accordance with the jurisdictional assumption in favour of the member republics (Article 6). Although avoiding reference to Article 77, the new amendments de facto widened the jurisdiction of the federation by stipulating that the federation, not the member republics will now regulate the election of representatives for the Chamber of Republics. Amendments to Articles 1 and 77 require the consent of the member Republics' Parliaments. The Federal Assembly circumvented the consent of Republic Parliaments by leaving these articles nominally unaltered, while in fact it violated them seriously by other amendments enacted, derogating at the same time the basic principles and spirit of the Constitution.

⁷⁰ For a similar view, held by members of the Serbian NGO coalition, see statement by Serbian, NGO, media and opposition meeting sponsored by Slovakia's Ministry of Foreign Affairs-Bratislava, 8 July 2000.

⁷¹ The Constitution of 1992 stipulates in Articles 140 and 141 that only amendments to Articles 1, 2, 3, 6, 7, 77, 140 and 141 need to be approved by parliaments of member states. All other amendments require no more than a 2/3 majority in both houses of the Federal Parliament (Article 139).

According to Montenegrin legal experts, the Federal Assembly lacked authority to enact the amendments since the Montenegrin representatives in the Chamber of Republics were illegitimate because both their term had expired and they had been recalled by the Parliament of Montenegro, and thus could not validly participate in the work of the Federal Assembly.

In response to the amendment of the 1992 FRY Constitution, the Montenegrin Parliament adopted a resolution condemning the amendments as illegal and declared that it would no longer recognise the validity of acts of the FRY government or federal institutions on its territory.⁷²

B. Effective Political Power

1. Assumption of Federal Responsibilities by Montenegro

The FRY government and federal institutions are generally unable to exercise effective political power over the Republic of Montenegro. As a result of the Federal Assembly's unwillingness to seat the Montenegrin delegates to the Chamber of Republics, and Montenegro's exclusion from federal institutions such as the Supreme Defence Council and the Central Bank, which increasingly act in concert with Serbia to take make decisions and introduce measures to Montenegro's detriment, Montenegro has taken a series of actions to assume control over functions which Article 77 of the 1992 FRY Constitution set under the jurisdiction of the federal state, including the monetary and banking system, foreign trade, customs, and taxation. Importantly, the regulations adopted by Montenegro have been in line with West European standards and are the result of efforts of the Montenegrin government to distance its policies from those of the Milosevic regime and to prepare Montenegro for greater integration with the European Union.

Montenegro has thus succeeded in gradually taking over most of the functions from federal institutions and the federal state is now present in Montenegro only through the Federal Army and air traffic control. In instances where the government and federal institutions have been able to exercise political power, they have had to rely upon the threat or use of force.

It is generally agreed among legal experts both in Serbia and Montenegro that the actions taken by Montenegro to assume control over functions of the federal state have no independent legal foundation and are undoubtedly a violation of the FRY Constitution. In the view of Montenegrin analysts, however, when the legitimacy of these actions is judged, it must be taken into account that they were made in a situation where Montenegro had been deprived of all possibilities to take part in these functions at the federal level. That view seems compelling.

⁷² The U.S. Department of State has also expressed its view that the actions taken to amend the Constitution were illegitimate. U.S. Department of State, Press Conference of Secretary of State Madeleine K. Albright and Montenegrin President Milo Djukanovic, Rome, Italy, 1 August 2000.

Montenegro took these steps to protect its interests, which were jeopardised not only by Mr Milosevic's abuse of federal institutions, but also by violations of the Federal Constitution by the Republic of Serbia. Specifically, Serbia violated Article 77 of the Constitution when it imposed an embargo on the traffic of goods between Serbia and Montenegro. One of the constitutional obligations of the federal state (Article 77, paragraph 2) is to protect the Yugoslav single market, there were no reactions at the federal level to measures taken by Serbia.

Institution of Separate Monetary Policy

The first major step of the Republic of Montenegro to re-stabilise its economy and to minimise the influence of the Central Bank of Yugoslav was to institute the German Mark as a parallel currency. The adoption of the DM was in large part motivated by the need for Montenegro to protect itself against rampant inflation caused by the FRY government's adoption of policies in which Montenegro had no voice, and by the FRY's targeting of monetary sanctions against Montenegro. As a result of this action and the further retaliatory acts of the Yugoslav Central Bank, the DM accounts for approximately 95 per cent of the money supply in Montenegro, with the Yugoslav Dinar accounting for only 5 per cent.⁷³ On 8 August 2000 the Montenegrin Monetary Council took the additional step of adopting a working draft on the Act on Banks, which together with the Act on the Central Bank, revamped the basis of the credit, monetary and banking system of Montenegro, and enables banks to be founded by domestic and foreign entities under the same conditions as share-holding companies.⁷⁴ To complete its assumption of authority relating to the banking system, monetary policy and securities, on 11 August, the Montenegrin government also decided to temporarily transfer to Montenegrin institutions the jurisdiction and the powers of the federal authorities concerning the insurance of people and property.⁷⁵

Institution of Separate Customs Regime

The Montenegrin government has also assumed control over the regulation of customs and the collection of duties and taxes on its international borders with Kosovo, Albania, Croatia and Bosnia. The director of the Montenegrin customs office also recently announced that Montenegro would soon establish its own customs controls on the border crossings with the Republic of Serbia. This act is in partial response to the fact that Serbian authorities collect customs duties and tax on all imported goods arriving to Montenegro via Serbia, while Montenegro has allowed the free flow of imported goods for Serbia via Montenegro without collecting any duties. The director of the Montenegrin customs office also indicated this action was necessary as the federal Customs Directorate was refusing to co-operate with the Montenegrin customs officials concerning

⁷³ V.I.P. Weekly Economic Bulletin-Belgrade, 20 July 2000.

⁷⁴ *Vijesti* daily, quoted by MNNNews, 9 August 2000.

⁷⁵ Report on Montenegrin State TV Crna Gora-Podgorica, 11 August 2000.

the entrance of imported goods in Serbia.⁷⁶ The President of the Citizens Assembly of the Federal Parliament, has declared that the establishment of such a customs regime was "a direct attack on the federal state."⁷⁷

Creation of Distinct Visa Regime

Furthermore, Montenegro has abolished the FRY visa regime and makes its own determinations as to who may enter or leave Montenegro. Initially, Montenegro abolished the visa requirement for a period of six months in 1999 as a means of promoting tourism, but never re-imposed the regime as its perpetual suspension became a necessary means for combating the policies of political and economic isolation against Montenegro pursued by the federal government and institutions. As such, the visa regimes in Montenegro and Serbia have grown to be entirely incompatible and although Montenegro cannot issue FRY passports, it permits the entry of many foreigners without a visa normally needed in the FRY.

2. Use of Economic and Military Force by the FRY against Montenegro

The FRY government maintains intermittent effective control over entry to the country and the operation of the airport. This control has only been accomplished through the use of force. Moreover, the government of the FRY and the Republic of Serbia have initiated and maintained an economic blockade of the Republic of Montenegro, which is quite antithetical to the operation of a functioning federal state. The blockade of Montenegro's international borders was implemented during NATO's intervention and prevented the entry of consumer goods, food, and humanitarian aid. On intermittent occasions, the Yugoslav Army has used armed units to re-impose the economic blockade of Montenegro's international borders and has denied entry to businessmen, traders and journalists and has closed certain border crossings to commercial traffic.⁷⁸ The Montenegrin press has also reported that on previous occasions, the Yugoslav Army forces in Montenegro have assumed "full combat readiness" in the event they were called upon to use force against the government of Montenegro.⁷⁹

The FRY government asserts that these actions are in conformity with Article 77, paragraph 6 of the 1992 Federal Constitution which states that border crossing and control of goods, services and passengers across the border is in the jurisdiction of the federal state, and that the use of armed forces is justified by Article 133 of the Constitution which requires the army to defend the territory of the FRY.

The Montenegrin government, on the other hand, alleges that these acts, violate the core spirit of the 1992 FRY Constitution, and the principle that the Yugoslav army may not be used internally against the member

⁷⁶ Montena-fax news agency, 20 August 2000.

⁷⁷ Dan daily-quoted by MNNews, 23 August 2000.

⁷⁸ Associated Press, 25 July 2000.

⁷⁹ Montena fax independent news agency-Podgorica, 12 July 2000

Republics. The Montenegrin government has thus declared that the VJ can no longer be considered a legitimate authority in Montenegro.⁸⁰

In response to a recent attack by the Yugoslav Army upon a Montenegrin Police boat patrolling Lake Skadar, the Montenegrin Minister of the Economy declared that the army's increased control at the border crossings represented "the continuation of the Yugoslav Army's unconstitutional behaviour and its decision to openly side with the regime in Belgrade. Montenegro will conduct its own policies and no-one will tell it what to do, not even Milosevic's guard."⁸¹ The Yugoslav Army claimed that it did not recognise the boat as belonging to the Montenegrin police, but rather as one trying to smuggle goods from Albania. The federal government and Yugoslav Army have regularly explained such actions by attributing them to the normal activities of federal authorities in the area of national security, border controls or the protection of property belonging to the military (like in the airport incident). The Navy Commander has also alleged that the Montenegrin police provide physical protection for smugglers entering Montenegro, thereby necessitating their actions against Montenegro.

The blockades imposed by the Yugoslav army are complemented by a blockade of the internal border between Serbia and Montenegro put in place in February 2000 and enforced by the Serbian police.⁸² To provide a legal justification for the blockade, the Serbian Police have asserted that documents issued by the Serbian Trade Ministry are no longer valid, but have failed to identify a state agency with the authority to issue the appropriate documents.⁸³ Importantly, the Montenegrin authorities permit Serbian ships to dock at the port of Bar and for the goods to transit through Montenegro into Serbia.⁸⁴

The Montenegrin Government and the Montenegrin and Serbian press have also asserted that soon after NATO intervention in the FRY, the Yugoslav Army created a special military unit within the army ranks in Montenegro (the 7th Battalion of Military Police). The VJ leadership itself has acknowledged the creation and existence of the 7th battalion. The members of this unit were recruited from various parts of Montenegro strictly on a political and party basis, but almost exclusively from the pro-Milosevic Popular Socialist Party (SNP). The number of recruits is close to 1000 and is considered to largely surpass the needs of the military in normal conditions. The Montenegrin government believes these forces have been recruited and trained for the specific purpose of special tasks against the Montenegrin government. Substantiating this concern is the fact that the 7th Battalion was responsible for the temporary take-over of the Podgorica airport last year, and their frequent patrols throughout Montenegro.

⁸⁰ *Vijesti* daily quoted by MNNNews, 25 July 2000.

⁸¹ SRNA news agency-Bijeljina, 27 July 2000.

⁸² *Vijesti* daily, 27 July 2000.

⁸³ Beta news agency, 27 July 2000.

⁸⁴ Report on TV Crna Gora-Podgorica, 27 July 2000.

3. The Kosovo Experience

The events in Kosovo over the past two years also bear on the ability of the FRY government and institutions to exercise effective control over the FRY's constituent entities and the question of the use of force against FRY citizens.

The campaign of repression and violence against Kosovo Albanians by the FRY and Serbian authorities which prompted the NATO intervention evidences both the inability of the FRY institutions to exercise effective control over its constituent entities absent the use of military force, and foreshadows the type of actions which may occur within Montenegro should the situation continue to worsen. Moreover, the indictment by the United Nations War Crimes Tribunal of the President of the FRY and the President of Serbia, as well as the top commanding officers of the Yugoslav Army, for crimes against humanity committed against their own citizens severely undermines the legitimacy of the FRY and Serbian political institutions.

The adoption of UN Security Council Resolution 1244, which provides for the administration of Kosovo by the UN and the deployment of over 35,000 NATO and other military forces demonstrated the inability, in a legal as well as practical sense, of the FRY to exercise control over its constituencies. In fact, FRY military forces are barred from Kosovo and no federal institutions operate throughout the entire territory of Kosovo.

During the Kosovo conflict and the bombing of the FRY by NATO forces, Montenegro declared neutrality – an act that indicates a clear separation of Montenegro from the FRY institutions and the FRY state. During the conflict the international community broadly recognised Montenegro's claim of neutrality, but nonetheless engaged in air strikes against Yugoslav Army facilities in Montenegro.

C. Opportunities for a New Form of Association

Although the FRY has not expressed an interest in creating a new association among its constituent entities, other than amending its Constitution to minimise their level of representation and influence, Montenegro has attempted to initiate a dialogue concerning a new association. In August 1999, Montenegro drafted a "Platform" document, which advances the notion that the FRY should be restructured from a joint state into a loose Union or Commonwealth.

The core of the Commonwealth would be a Joint Assembly, Presidency, and Council of Ministers with five joint Ministries. The Commonwealth would be responsible for matters of defense and international security, foreign policy, the foundations of the economic system, the security of transportation and the promotion of scientific and technical development. All other matters would rest within the jurisdiction of the Republics. The means for electing the President and government of the Commonwealth would ensure that the Republic Assemblies

exercised effective control over the appointment of such officials and over their conduct while in office.

To date, both the Serbian and FRY governments have refused to discuss the platform proposal.

D. Views of Other States and International Organisations

While no state has expressed the view that Montenegro is an independent state, many have expressed a strong interest in preventing the FRY government or state institutions from acting to prejudice the legitimate interests of Montenegro. NATO Secretary-General Lord Robertson has, for instance, declared that:

NATO is watching not only in Kosovo, but in Montenegro as well. The Djukanovic government is committed to democratic practice, ethnic tolerance, and co-operation with Montenegro's neighbours and the international community. On the contrary, Milosevic's past adventures have only brought disaster and decline to Serbia. NATO has already shown its determination and strength of will, and that is something President Milosevic should always keep in mind.⁸⁵

The NATO Secretary General has also declared, "I again repeat my warning to President Milosevic not to make mistakes that he has made in the past and not to continue to undermine the elected government of Montenegro."⁸⁶

Similar sentiments were expressed by the European Commissioner for External Relations, Christopher Patten, who declared:

In Montenegro . . . we are determined to make a stand. We are using all the means at our disposal imaginatively and visibly, and have dramatically increased the scale of our assistance in recent weeks to help the democratically elected government cope with enormous pressure from Belgrade. Working closely with the US, the other major donor in Montenegro, we are, I hope, demonstrating that we have learned the lessons of recent years, by working to prevent a potential crisis.⁸⁷

The U.S. Department of State, while not supporting independence for Montenegro, does support a restructured relationship within the FRY.⁸⁸ The United States has also pledged to work with Serbian opposition movements to promote nascent efforts to replace the Milosevic regime through elections.⁸⁹

During the G8 meeting, the eight member states declared they were "very concerned by the motivation for and the possible consequences of the revision of the FRY Constitution;" called upon "the government in Belgrade to refrain from

⁸⁵ Statement of Lord Robertson, NATO Secretary General, 27 July 2000.

⁸⁶ *Los Angeles Times*, 28 July 2000.

⁸⁷ Chris Patten, European Commissioner for External Relations, Speech in London, 7 July 2000.

⁸⁸ Prepared statement in response to a "taken question" 6 July 2000. U.S. State. Dept., Office of the Spokesman, 7 July 2000.

⁸⁹ U.S. President Bill Clinton and Chancellor Gerhard Schröder, article-International Herald Tribune, 31 July 2000.

any action which could contribute to the further escalation of violence;" called upon "the opposition to contribute to the peaceful democratic development of the FRY;" indicated it "strongly oppose[d] the recent restrictions on the free press in the FRY;" and welcomed "the continued consolidation of democracy in Montenegro, reiterate our support for its democratically elected authorities, and urge them to continue to practice restraint."

The international community has also exempted the Republic of Montenegro from the economic and political sanctions imposed against the FRY, and has provided direct financial assistance. The European Union has provided over €55 million,⁹⁰ while the United States has allocated over \$60 million and is considering an additional \$16.5 million.⁹¹

Montenegrin officials have also held a wide variety of meetings with, among others, the United States Secretary of State, European Union Foreign Ministers, the EU Commissioner for External Affairs, Australian and Chinese diplomatic representatives, and the special representative of the Council of Europe Secretary-General. The republic has attained observer, guest, or other forms of special status or taken part in the meetings of organisations such as the Council of Europe, the OSCE, the Stability Pact for Southeast Europe, the Adriatic-Ionic Initiative, and the South East Europe Co-operation Initiative. Montenegro might also soon attain a special status in the World Bank and European Bank for Reconstruction and Development (EBRD), which would allow it to receive direct assistance.

While none of these acts confer sovereignty on the Republic of Montenegro, they do indicate that the international community views Montenegro as having a distinct legal personality separate from that of the FRY.

E. Montenegro's Sovereign Attributes

The Republic of Montenegro clearly constitutes a political community consisting of a territory and a population subject to an organised political authority. The only outstanding element relevant to a determination of independence would be whether Montenegro might be considered to possess sovereignty.

Montenegro cannot be said to possess complete sovereignty as it has not declared independence, been recognised by any states, nor established accredited diplomatic missions in other states. The ability of Montenegro to possess sovereignty is further limited by the continued presence of the Yugoslav Army on its territory. The internal political situation within Montenegro also leaves it uncertain as to whether a significant majority of the population would support a declaration of sovereignty or independence.

⁹⁰ The precise breakdown is €20 million for infrastructure and institution building, €20 million in budgetary assistance to help pay pensions and social welfare payments, €10 million in food security and €5 million in humanitarian assistance. Speech by Chris Patten, European Commissioner for External Relations, 7 July 2000.

⁹¹ Statement by U.S. Dept. of State spokesman Richard Boucher, 13 July 2000.

Montenegro has, however, declared that the FRY government and institutions do not possess sovereignty over the territory of Montenegro, and it has sought to begin to establish various indicia of sovereignty. For instance, as discussed above, Montenegro has assumed responsibility for a number of important matters normally within the purview of states, including foreign trade, investment guarantees, customs, border control, and exclusive regulation over corporate matters, taxation, and economic policy.

Montenegro has also established a number of unaccredited economic and political missions in the United States, Bosnia, Slovenia, and in New York (to the UN) and Brussels (to the EU). Each of these missions seeks to promote Montenegrin interests and exercise Montenegrin foreign policy.

Moreover, Montenegro has initiated the process for attaining independent representation in international organisations. For example, Montenegro, with the assistance of Slovenia, has informed the United Nations Security Council that the Republic of Serbia was in the process of attempting to provoke a civil war, and that certain Yugoslav institutions, notably the army and the police, "do not hesitate from attempts to provoke internal conflicts . . . which might lead to a civil war." The Government of Montenegro further accused the FRY institutions of trying to "economically exhaust" the Republic, in a bid to "destabilise it on the political level" and to "overthrow its democratically-elected authorities."⁹² As such, Montenegro has created an informal mission to the United Nations and has requested some form of accreditation to the United Nations.⁹³ During a UN Security Council meeting in June 2000, Montenegrin Foreign Minister Branko Lukovac openly stated that, from that moment on, the Montenegrin government would cease to acknowledge the right of FRY diplomacy to represent Montenegro in UN or elsewhere.

F. Montenegrin Government Views

The Montenegrin government has not formally declared independence from the FRY. It is not within the scope of this legal brief to explore the reasons for this caution, but – as described in an earlier ICG report⁹⁴ – they manifestly have to do with the division of opinion within Montenegro on the independence question, the desire of Milo Djukanovic to avoid precipitating violent internal conflict based on that division, and the international pressure upon him from his Western supporters to avoid precipitating violent conflict with Belgrade.

Nonetheless, Montenegrin officials have made a number of statements which indicate they do not recognise the authority of the FRY institutions on the territory of Montenegro and that the state of the FRY is in the process of collapse.

Montenegrin President Milo Djukanovic has for instance declared, "it is evident that Yugoslavia no longer exists. Instead of the two equal states, Montenegro and Serbia, we have a one-state model . . . Milosevic's dilemma was Yugoslavia or

⁹² Agence France Presse, 16 July 2000.

⁹³ Associated Press, 15 July 2000.

⁹⁴ See ICG, *Montenegro: In the Shadow of the Volcano*, Balkans Report No. 89, 21 March 2000.

The Hague . . . he chose destroying Yugoslavia."⁹⁵ In his view, the latest federal constitutional changes and Montenegro's decision to ignore them proves that Montenegro "has practically left the constitutional and legal system of Yugoslavia." President Djukanovic has also declared that although his government will not provoke the Yugoslav army, it intends to hold an independence referendum (although no date has been identified), and "will form a (Montenegrin) defence ministry and complete state sovereignty."⁹⁶

The Montenegrin Deputy Prime Minister has declared "the Yugoslav Army is trying to impose order in a unitary state called Serbia . . . It is obvious that the threat of war is the only method Belgrade is prepared to use in dealing with Montenegro."⁹⁷ The Montenegrin Justice Minister has argued that Montenegro will not "accept the [FRY] election laws . . . [and] we shall do nothing to implement them in the Montenegrin territory . . . [because] we have a completely undemocratic, illegitimate and illegal procedure in which the laws are adopted."⁹⁸

The Montenegrin Government has also decided to boycott the 24 September 2000 federal elections, although it has also indicated that it would not prohibit the FRY from conducting the elections on Montenegrin territory. The refusal to take part in the election was the result of the constitutional amendments and the fact that indicted war criminals would be participating in the elections.

In reply, the chairman of the Serbian Radical Party, who is also a government minister, has declared that the President of Montenegro should be arrested for his co-operation with NATO and the UN War Crimes Tribunal, and further declared that "we are bound by the federal constitution and we will fight to protect it with all the means at our disposal."⁹⁹ Similarly, the secretary of the Mrs Milosevic's Associated Yugoslav Left (JUL) party has declared that Montenegro is seeking to destabilise the federal state as instructed by foreign powers, and that "under the pretext of democratisation in Yugoslavia, the Montenegrin rulers are searching for new allies in their game of destroying the legal and legitimate president of Yugoslavia, Slobodan Milosevic, to enable foreigners to rule here instead of respecting the will of their own people."¹⁰⁰

III. CONCLUSIONS

A. Current Status of the FRY Government

In light of Montenegro's exclusion from the FRY political institutions, and their control by indicted war criminals, there is a sound legal basis to make the political determination that the current FRY political institutions are illegitimate. Moreover, the constitutional changes enacted by Mr Milosevic and rejected by the Montenegrin Parliament violate the principle of equal status among the Republics,

⁹⁵ Associated Press, 10 July 2000.

⁹⁶ Associated Press, 10 July 2000.

⁹⁷ Dragisa Burzan, Deputy Prime Minister of Montenegro Quoted by Vijesti daily, July 27, 2000.

⁹⁸ Radio Montenegro, July 27, 2000.

⁹⁹ BH Press news agency-Sarajevo, July 9, 2000.

¹⁰⁰ Zoran Babic, secretary, JUL main committee speaking in Herceg Novi Quoted by Tanjug state press agency (Belgrade), July 14, 2000.

which is the keystone principle for the federal structure. The modification of this principle fundamentally changes the nature of the regime, and in the absence of the consent of both Republics, the resulting institutions cannot be considered to be legitimate.

B. Current Status of the FRY

Applying the conditions and precedent of the EC Arbitration Commission, the FRY should be considered to be in the process of dissolution. If no effort is made to re-establish a legitimate FRY government through negotiations between Montenegro and Serbia, and the erosion of the federal institutions continues, the FRY will cease to exist. If this were to occur, Serbia would likely be considered the continuity of the FRY. In effect, it appears that Serbia has already taken on for its own use the legal personality of the dissolving Serbian and Montenegrin state.

C. Current Status of the Republic of Montenegro

As Montenegro has not formally declared independence, nor been recognised as independent by the international community, it is not a fully independent state. Neither, however, is Montenegro any longer a fully integrated part of the FRY. Montenegro is in the process of disassociation from that state and as such is not subject to the complete sovereign authority of the illegitimate FRY government or rump federal institutions. Moreover, Montenegro possesses some limited rights to its own territorial integrity and exercises elements of political independence and sovereignty.

D. Permissibility of the Federal Elections Boycott by Montenegro

Because of the unconstitutional actions and consequent illegitimate nature of the FRY government and federal institutions, the effective exclusion of Montenegrin interests from those institutions, the ongoing dissolution of the FRY, the refusal of Serbia to negotiate a reformulation of the joint state, and the evolving nature of Montenegro's sovereignty and political independence, Montenegro has no obligation to participate in the 24 September 2000 elections, and the Montenegrin government could legitimately deny the federal institutions the ability to conduct those elections on Montenegrin territory.

E. Permissibility of Use of Force by Serbia against Montenegro

The reasons just given for the legitimacy of the Montenegrin boycott mean also that neither the Federal government nor the Republic of Serbia may take any retaliatory action against Montenegro. Moreover, neither the 1992 FRY Constitution nor the recent amendments to that Constitution provide any authority for the Yugoslav Army to use force against the Republic of Montenegro in response to its election boycott.

It also follows from the analysis in this legal brief that neither the institutions of the FRY nor those of the Republic of Serbia are entitled to use force against the Republic of Montenegro in response to any other kind of non-violent provocation,

real or contrived, that may be claimed to occur, whether or not related to the forthcoming elections. Serbia's responsibility, like that of the Republic of Montenegro itself, is to address any constitutional or other dispute that may arise by peaceful means.

Washington/Brussels, 19 September 2000

JULY 2000 AMENDMENTS TO THE 1992 FRY CONSTITUTION

Article 78, paragraph 7 which read " The Federal Assembly: shall appoint and dismiss: the President of the Republic; the federal prime minister; justices of the Federal Constitutional Court: justices of the Federal Court; the governor of the National Bank of Yugoslavia, and other federal officials stipulated by federal statute;"

Amendment II, which replaces Article 78, paragraph 7 of the 1992 FRY Constitution reads, "The Federal Assembly: shall elect and replace: the President and members of the Federal Government, judges of the Federal Constitutional Court, judges of the Federal Court, the Federal State Prosecutor, Governor of the Yugoslav National Bank and other federal officials as designated by the federal law."

Article 80, paragraph 3 read, "The Federal Assembly shall be composed of the Chamber of Citizens and the Chamber of Republics . . . The Chamber or Republics shall be made up of 20 federal deputies form each member Republic."

Article 81, paragraph 2 read, "Federal deputies shall be elected for four-year terms. . . the election and *termination of the mandates of federal deputies in the Chamber of Republics of the Federal Assembly shall be regulated by the laws of each member Republic.*" (emphasis added)

Article 86 reads, " Federal deputies to the Chamber of Citizens of the Federal Assembly shall represent the citizens of the Federal Republic of Yugoslavia, while *federal deputies to the Camber of Republics of the Federal Assembly shall represent the member Republic form which they were elected.*" (emphasis added).

Amendment III, which replaces Article 80, paragraph 3, and Article 81, paragraph 2, and supplements Article 86 of the 1992 Constitution, reads, "The Chamber of Republics shall be comprised of 20 federal deputies each from each constituent Republic, *elected at direct elections. Election and end of the term of office* of a federal deputy to the Chamber of Citizens and the Chamber of Republics of the Federal Assembly shall *be regulated by the federal law. A federal deputy shall decide and vote at his own discretion and may not be recalled.*" (emphasis added).

Article 90, paragraph 2 read, "Federal statutes regulating: the flag, coat-of-arms or national anthem; *election of federal deputies for the Chamber of Citizens; election of the President of the Republic; the Federal Court; the Federal Public Prosecutor; organization of the Federal Constitutional Court, the proceedings before this court and the legal effect of its decisions shall be adopted in the Federal Assembly by a two-thirds majority of votes of all the federal deputies in each of the two cambers.* (emphasis added).

Amendment IV, which replaces Article 90, paragraph 2 of the 1992 FRY Constitution reads, "Federal laws on the flag, coat of arms and the national anthem shall be passed by the Federal Assembly by a two-thirds majority of all federal deputies voting in each of the two parliamentary Chambers."

APPENDIX A

Article 97 of the 1992 FRY Constitution reads:

The President of the *Republic shall be elected by the Federal Assembly for a four-year term of office*, by secret ballot.

The same individual may not be reelected President of the Republic for a second term.

As a rule, the President of the Republic and the federal prime minister may not be from the same member Republic.

The President of the Republic may not hold other public office or engage in professional activities.

The President of the Republic shall enjoy the same immunity as a federal deputy.

The Federal Assembly shall determine the immunity of the President of the Republic.

The President of the Republic *may only be dismissed if the Federal Assembly ascertains that he has violated the Constitution.* (emphasis added).

Amendment V, which replaces Article 97 of the 1992 FRY Constitution reads:

The President of Republic *shall be elected at direct elections* by a secret ballot.

The term of office of the President shall be four years.

The same person may be elected as President of Republic twice at the most.

The President of Republic and the President of the Federal Government, as a rule, may not be from the same constituent Republic.

The President of Republic shall enjoy the same immunities as the federal deputy.

Immunities enjoyed by the President of Republic shall be decided by the Federal Assembly. (emphasis added).

Article 98, paragraphs 1 and 2 of the 1992 FRY Constitution read, "The President of the Republic may resign from his office." And, "The mandate of the President of the Republic shall be terminated on the day he submits his resignation or is dismissed."

Amendment VI, which replaces Article 98, paragraphs 1 and 2 of the 1992 FRY Constitution, reads, "The term of the President of the Republic shall end before the expiry of the period for which he has been elected, if he is removed from office or if he resigns." And, "The term of the President of Republic shall end on the date of his resignation or removal from office."

APPENDIX A

Section V, paragraph 2 of the 1992 FRY Constitution read, "The procedure for the election and dismissal of the President of the Republic shall be determined by federal law."

Amendment VII, which replaces Section V, paragraph 2, reads:

The Federal Assembly may remove from office the President of Republic if the Federal Constitutional Court finds that he has violated the present Constitution.

Procedure for removal from office of the President of Republic may be initiated at least by half the federal deputies in both Chambers of the Federal Assembly.

Removal of the President of Republic from office may not be put to a vote before 15 days have expired from the date on which the Federal Constitutional Court has forwarded its decision to the Federal Assembly referred to in paragraph 1 above.

The President of Republic shall be deemed removed from office if both Chambers of the Federal Assembly have accepted the motion by a two-thirds majority of the federal deputies.

If the Federal Assembly declines the motion, it may not be voted on again before the expiry of six months.

Amendment VIII, which is not designated to replace any particular provisions of the 1992 FRY Constitution, reads:

The Federal Government shall be deemed elected if the majority of all federal deputies in both Chambers have voted for it by a secret ballot.

The Federal Government shall be accountable to the Federal Assembly.

The Federal Assembly may vote a no confidence motion to the Federal Government.

The President of the Federal Government may propose replacement of some Federal Government members.

No confidence motion may be voted on at least three days after the motion was moved.

The no-confidence motion shall be voted down if the majority of all federal deputies in each of the Chambers have gone along with it.

The Federal Government and each of its members may hand in their resignations to the Federal Assembly.

To bring into force, Amendment IX provided that "The Constitutional Law shall be adopted to implement Amendments II to VIII above." And Article 4 of *The Constitutional Law on the Implementation Of Amendments II To VIII to the Constitution of the Federal Republic of Yugoslavia* provide "The present Law shall enter into force on the date on which it is proclaimed by both Chambers of the Federal Assembly."

