

1998

## The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence

Michla Pomerance  
*Hebrew University of Jerusalem*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Organizations Law Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31 (1998).

Available at: <https://repository.law.umich.edu/mjil/vol20/iss1/2>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# THE BADINTER COMMISSION: THE USE AND MISUSE OF THE INTERNATIONAL COURT OF JUSTICE'S JURISPRUDENCE

Michla Pomerance\*

## INTRODUCTION

It has long been the dream of those anxious to increase the role of adjudication in international relations that the International Court of Justice ("ICJ," "International Court," or "the Court") would act in the international arena as a superior court—a forum whose pronouncements would nourish, sustain, and help unify the jurisprudence of other international tribunals, whether of an ad hoc or standing nature, and of national courts handling international law issues.<sup>1</sup> In the context of self-determination, the Arbitration Commission of the European Community's Conference for Peace in Yugoslavia ("the Badinter Commission," "the Commission," or "the Arbitration Commission") would appear, at first glance, to have taken significant steps toward bringing this dream to realization. From 1991–1993, the Badinter Commission rendered legal opinions relating to the break-up of the Yugoslav Republic (SFRY)<sup>2</sup>

---

\* Emilio von Hofmannsthal Professor of International Law, Department of International Relations, Hebrew University of Jerusalem, Israel. Research for this article was facilitated by a grant from the Israel Science Foundation. I also wish to thank my assistant, Maya Shapiro, for her help in assembling relevant materials.

1. This perspective on the Court's potential future role is well reflected, for example, in the U.S. Senate discussions in 1973. See *Hearings on S. Res. 74, 75, 76, 77, & 78 before the Senate Comm. on Foreign Relations*, 93rd. Cong., 1st Sess., *passim* (1973). See, especially, the discussion of S. Res. 76 and 78; and e.g., statement of Leo Gross, *id.* at 155.

2. The text of the first ten opinions (rendered between November 1991 and July 1992) and of some accompanying materials is reproduced in Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 and July 4, 1992, 31 I.L.M. 1488 [hereinafter Conference on Yugoslavia Arbitration Commission 1991–1992]. The later five opinions, of July/August 1993, appear in International Conference on the Former Yugoslavia Documentation on the Arbitration Commission under the UN/EC (Geneva) Conference: Advisory Opinions Nos. 11–15 of the Arbitration Commission, July 16, 1993, 32 I.L.M. 1586. For background and summary of the first set of opinions, see the introductory note by Maurizio Ragazzi, Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* at 1488. For analysis of the Commission's opinions, see the detailed critique by Matthew C.R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 1995 BRIT. Y.B. INT'L L. 333, and the more cursory and adulatory evaluation of Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178 (1995). On Pellet's possible authorship of some of the opinions, see Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 750 n.82 (1995) (book review).

and in so doing quoted liberally from the opinions and decisions of the ICJ and ostensibly relied on them in matters of both competence and substance. Upon closer examination, however, the Commission appears to have misused more than used the International Court's jurisprudence. Far from serving as the lodestar for the Commission, that jurisprudence instead provided a reservoir of formulas (themselves not free of ambiguity) which were unquestioningly repeated and, in some cases, questionably extended by the Commission in inappropriate contexts. The long-range results of the Commission's application of ICJ law could more plausibly harm than facilitate the goal of having self-determination questions adjudicated in judicial and quasi-judicial fora.

## I. CHALLENGES TO THE BADINTER COMMISSION'S COMPETENCE

Although labeled an "arbitration commission," the Badinter Commission lacked the characteristics of an arbitral forum, which is normally set up by the parties to a dispute by a *compromis* in which the agreed applicable law is usually specified.<sup>3</sup> None of the Commission's

---

For help in understanding the role of the Arbitration Commission within the confusing welter of permanent and *ad hoc* international institutions amongst which it operated, see, for the earlier period, Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992) and the introductory note by the legal advisor to the International Conference on the Former Yugoslavia, Paul C. Szasz, *Documents Regarding the Conflict in Yugoslavia*, Sept. 25, 1991–Nov. 16, 1992, 31 I.L.M. 1421. For the post-1992 period, see, for example, Paul C. Szasz, *Peacekeeping in Operation: A Conflict Study of Bosnia*, 28 CORNELL INT'L L.J. 685 (1995) and Paul C. Szasz, *The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia*, 90 AM. J. INT'L L. 301 (1996) (providing a useful appended "Glossary of Acronyms, Abbreviations and Other Specialized Terms Used in or in Connection with the Dayton/Paris Agreement on Bosnia"). There is a plethora of publications related to the political background, among which may be cited: DAVID OWEN, *BALKAN ODYSSEY* (1995); MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (rev. ed. 1994); SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* (1995); LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (rev. ed. 1997); Ivo H. Daalder, *Fear and Loathing in the Former Yugoslavia*, in *THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT* 35–67 (Michael E. Brown ed., 1996); MORTON H. HALPERIN ET AL., *SELF-DETERMINATION IN THE NEW WORLD ORDER* 32–38 (1992); Payam Akhavan, *Self-Determination and the Disintegration of Yugoslavia: What Lessons for the International Community?*, in *SELF-DETERMINATION: INTERNATIONAL PERSPECTIVES* 227–48 (Donald Clark & Robert Williamson eds., 1996).

3. The Commission was not created by the parties, but by the EC (of which neither Yugoslavia nor its constituent republics were members), within the framework of the EC's Conference on Yugoslavia. It was established pursuant to the EC Declaration of August 27, 1991, as supplemented by the EC ministerial joint statement of September 3, 1991, and with the stated purpose of helping to ensure the "peaceful accommodation of the conflicting aspirations of the Yugoslav peoples." However, those "peoples," as opposed to the Yugoslav republics, were not represented before the Conference or the Arbitration Commission. The August 27 Declaration spoke of undefined "relevant authorities" who would be entitled to

pronouncements were formal decisions: all of them—the ten opinions of 1991–92 and the additional five given in 1993—were advisory (or “consultative”) in nature. The Commission’s competence to give opinions requested was twice challenged by the Federal Republic of Yugoslavia (FRY) and twice upheld by the Commission—the first time

---

submit their differences to the Arbitration Commission. In the September 3 statement, it was provided that the Chairman of the EC peace conference would be the one who would transmit to the Arbitration Commission the issues submitted for arbitration and who would then report the results of the Commission’s deliberations to the peace conference. *See* Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1488–89; Weller, *supra* note 2, at 576–77. In fact, the Chairman, Lord Carrington, played an active role in fashioning the questions presented and did not act as a mere conduit, even with respect to issues which the parties—especially Serbia—wished to have addressed by the Commission. *See* Craven, *supra* note 2, at 341. The primary “arbitral” feature consisted in the provision for appointment by the Yugoslav presidency (acting unanimously) of two of the five arbitrators. (The other three were to be appointed by the EC and its member states). Since the Yugoslav presidency was unable to agree unanimously on suitable candidates, the two additional “arbitrators” were appointed by the three EC-appointed members. As originally composed, the Commission consisted of the Presidents of the French, Italian, and German Constitutional Courts (Robert Badinter, Aldo Corasaniti and Roman Herzog), who, in turn, selected the President of the Spanish Constitutional Court (Francisco Tomas y Valiente) and the President of the Belgian Cour d’Arbitrage (Conflicts Court) (Irene Petry). Badinter, a prime mover in the establishment of the tribunal, was selected by the Commission members to be their chairman. *See* Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1488–89; Craven, *supra* note 2, at 336–37.

The law which the Arbitration Commission was to apply was not specified in the EC Declaration of August 27, although the selection of Constitutional Court presidents might have pointed to the expectation that Yugoslav constitutional law would be a major component of the applicable law. Indeed, since the “arbitration” was not (initially, at least) between states, but rather between internal parts of a state (“relevant authorities,” in the terms of the Declaration), internal law was a logical point of departure. *See* Craven, *supra* note 2, at 339–40 & n.44. In fact, the Commission purported to base its opinions on international law, (including the controversial concept of *jus cogens*). It may be noted that, despite reference to the right of secession in the governing 1974 Yugoslav constitution (as in earlier post-war Yugoslav constitutions), the existence of such a constitutional right for the member republics is not readily sustainable. Closer inspection of the relevant clause and of Yugoslav constitutional doctrine reveals the extent of the ambiguity. *See generally* Ben Bagwell, *Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics*, 21 GA. J. INT’L & COMP. L. 489 (1991). The so-called secession clause in the governing 1974 Constitution refers to the right of secession as the *premise* for the establishment of the SFRY, but it nowhere posits a *future*, continuing right of secession, as can be seen from its text:

The nations of Yugoslavia, *proceeding from the right of every nation to self-determination, including the right to secession*, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, *have*, together with the nationalities with which they live, *united in a federal republic* of free and equal nations and nationalities and *founded a socialist federal community* of working people—the Socialist Federal Republic of Yugoslavia.

YUGO. CONST., Basic Principles, pt. I, para. 1 (1974) (emphasis added).

by means of a formal "interlocutory decision," and the second time by means of informal "reactions" by members of the Commission (given collectively).

1) In June 1992, Lord Carrington, Chairman of the Conference for Peace in Yugoslavia, requested the Commission's opinion on three questions bearing on the status of the FRY in international law.<sup>4</sup> He wished to know whether the dissolution of the SFRY was now complete;<sup>5</sup> whether the FRY was the sole successor to the SFRY or a new state whose recognition was subject to European Community Guidelines;<sup>6</sup> and how problems of state succession were to be settled among the emerging successor states. The Commission's competence to pronounce upon these questions was challenged jointly by the Presidents of Serbia and Montenegro on behalf of the FRY.<sup>7</sup> Inter alia, they argued that "all questions involved in the overall settlement of the Yugoslav crisis should be resolved in an agreement between FR Yugoslavia and all the former Yugoslav republics," and that "all legal disputes which cannot be settled by agreement . . . should be taken to the International Court of Justice, as the principal judicial organ of the United Nations."<sup>8</sup>

---

4. For text of the questions leading to Opinions 8–10, see Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1518–19.

5. In its first, and pivotal, opinion, of November 29, 1991, the Commission had concluded that the SFRY was in the process of dissolution. See *id.* at 1494–97. The EC had come to that conclusion previously and had proceeded, on the basis of that assessment, to plan future steps, including the threat of sanctions against Serbia. See Weller, *supra* note 2, at 582–83.

6. The text of the Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," adopted by the European Community on Dec. 16, 1991 is reprinted in 31 I.L.M. 1486 (1992).

7. Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1519.

8. Joint letter of June 8, 1992 by the Presidents of Serbia and Montenegro (English translation supplied by Bosnia-Herzegovina from the original Serbo-Croat), cited in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 17, para. 29 (Apr. 8) (Provisional Measures). The letter continued: "Accordingly, and in view of the fact that all the issues raised . . . are of a legal nature, FR Yugoslavia proposes that in the event that agreement is not reached among the participants in the Conference, these questions should be adjudicated by the International Court of Justice, in accordance with its Statute." *Id.* In the *Genocide* case, Bosnia later sought to rely on the joint letter as evidence that Serbia had implicitly consented to the jurisdiction of the ICJ with respect to all outstanding Serbian-Bosnian legal disputes. *Id.* at 18, para. 30. This interpretation was hardly tenable, since the Serbian suggestion was, at most, an offer to adjudicate, by mutual consent, specific disputes in the future. The Court, justifiably, deemed the letter to be an insufficient ground for endowing the Court with *prima facie* jurisdiction for the purpose of indicating provisional measures. See *id.* at 18, paras. 31–32. In the Preliminary Objections stage, the Bosnian gloss was more definitively rejected. Serbia, the Court said, had not accepted a binding and immediate commitment "to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes." Case Concerning Application of the Convention on the Prevention and Punishment of the

Serbia also contested the Commission's right to pronounce upon its own competence.<sup>9</sup> The Commission rendered an "interlocutory decision" rejecting the challenge to its competence, and proceeded to issue the three opinions requested (Nos. 8, 9, and 10), in a manner unfavorable to the FRY stance.<sup>10</sup>

2) The Arbitration Commission was reconstituted in January 1993 under new terms of reference, a partially new composition, and a more defined competence consisting of both contentious and advisory jurisdiction.<sup>11</sup> While the Commission was authorized to give decisions "with binding force for the parties concerned" on "any dispute submitted to it by the parties thereto upon authorization by the Co-Chairmen of the Steering Committee of the [International] Conference [on the Former Yugoslavia],"<sup>12</sup> the Commission was also specifically empowered (as it

---

Crime of Genocide (*Bosn. & Herz. v. Yugo.*), 1996 I.C.J. 225, para. 37 (July 11) (Preliminary Objections).

9. Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1519.

10. *Id.* at 1521-26. The Commission held that the SFRY no longer existed, its dissolution having been completed; that the FRY was not sole successor to the SFRY; that none of the successor states could claim exclusive membership rights of the former Yugoslavia in any international organization; that problems of state succession were to be negotiated and settled equitably among the successor states, taking into account the relevant provisions of conventional and customary international law; and that the FRY was a new state whose recognition was subject to the European Community Guidelines.

11. See International Conference on the Former Yugoslavia Documentation on the Arbitration Commission under the UN/EC (Geneva) Conference: Terms of Reference, Reconstitution of the Arbitration Commission, and Rules of Procedure, Jan. 27-Apr. 26, 1993, 32 I.L.M. 1572, 1572-78 [hereinafter 1993 Terms of Reference]. The reconstituted five-member "Arbitration Commission" was to comprise: (a) three members chosen by the European Community's Council of Ministers "from among incumbent Presidents of Constitutional Courts . . . in member States of the European Community or from among members of the highest courts in those States, it being understood that for the present these members are those from France [Robert Badinter], Germany [Roman Herzog] and Italy [Francisco Paolo Casavola]"; (b) one member chosen by the President of the ICJ either from among former ICJ judges or among those having the qualifications specified in Article 2 of the ICJ Statute; and (c) one judge of the European Court of Human Rights designated by that Court's president. *Id.* at 1573-74. The new composition reflected the increased importance attached to international law and human rights law, in light of the intervening events in the former Yugoslavia. The two judges selected under categories (b) and (c) were José María Ruda of Argentina, former President of the ICJ, and Elizabeth Palm of Sweden, Judge of the European Court of Human Rights. *Id.* at 1574. Judges *ad hoc* (who might be appointed in contentious proceedings only) were to be either sitting judges in the constitutional or highest courts of members of the CSCE (Conference on Security and Cooperation in Europe); or, alternatively, they were to possess the qualifications specified in categories (b) and (c) with respect to regular members of the Arbitration Commission. *Id.* at 1573.

12. The earlier EC Peace Conference on Yugoslavia (the "Carrington Conference") was replaced in late August 1992 by the joint U.N./EC-sponsored International Conference on the Former Yugoslavia. Its permanent steering committee had two co-chairmen: Cyrus Vance, special representative of the U.N. Secretary-General; and David Owen, acting (as successor to Carrington) on behalf of the EC. See OWEN, *supra*, note 2, chs. 1-2; Szasz, *The*

had not been in its earlier incarnation) to render its advice on "any legal question" which would be "submitted to it by the Co-Chairmen of the Steering Committee of the Conference."<sup>13</sup> The explicit dual-jurisdiction of the Commission paralleled that of the ICJ, and in the Arbitration Commission's new governing instrument, the paragraph on the advisory jurisdiction—including the "any legal question" formula—was clearly modeled on the stipulations of Article 96 of the U.N. Charter and Article 65 of the ICJ Statute.<sup>14</sup> In this round, too, the Arbitration Commission adopted and published formal rules of procedure on April 26, 1993.<sup>15</sup> These rules, however, differed greatly from those of the ICJ, particularly in the informality and secrecy of the contemplated proceedings, and in the expectation that the advisory procedure would not normally include oral hearings. Moreover, judges *ad hoc* were not to be permitted in the Commission's advisory proceedings.<sup>16</sup>

---

*Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia*, *supra* note 2, at 302, 316; James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 46 (Lori F. Damrosch ed., 1993).

13. 1993 Terms of Reference, *supra* note 11, at 1573.

14. Article 96(1) of the U.N. Charter empowers the General Assembly and the Security Council to request advisory opinions from the ICJ "on any legal question." Other U.N. organs and specialized agencies may, according to Article 96(2), request opinions "on legal questions arising within the scope of their activities," if authorized to do so by the General Assembly. Correspondingly, Article 65(1) of the ICJ Statute provides that the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." For an analysis of the formulation and purport of these provisions, see MICHLA POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 24-44, 296-316 (1973).

15. 1993 Terms of Reference, *supra* note 11, at 1575-78.

16. With respect to advisory procedure, the ICJ rules were essentially those developed by its predecessor, the PCIJ, which had gradually but consistently assimilated its advisory to its contentious procedure, thus lending to advisory opinions a far greater authoritativeness than had initially been expected. Secret advisory opinions had been ruled out from the beginning, and all subsequent efforts to resuscitate the idea had been rebuffed. See, for example, the draft provision in 1922 P.C.I.J. (ser. D) No. 2, at 414. Judge Anzilotti argued for allowing secret advice in the interests of world peace, but the views of Judges Moore and Finlay that secret advice would be incompatible with the Statute and "would be a death blow to the Court as a judicial body" prevailed. *Id.* at 160. In 1923, a proposal for secret consultations was renewed by Judge Altamira and forcefully opposed by Judge Moore. See 1926 P.C.I.J. (ser. D) No. 2 (Add.), at 293-96. On the crucial importance of non-adoption of the provision for secret advice, see JOHN BASSETT MOORE, 7 *THE COLLECTED PAPERS OF JOHN BASSETT MOORE* 10-11 (1944). With respect to judges *ad hoc*, these had only been allowed since 1927. For discussion of the history of the relevant provisions and their subsequent invocation in the *Namibia* case, see Michla Pomerance, *The Admission of Judges Ad Hoc in Advisory Proceedings: Some Reflections in the Light of the Namibia Case*, 67 AM. J. INT'L L. 446 (1973). In the *Western Sahara* case, 1975 I.C.J. 15-16, para. 9 (May 22), the ICJ, for the first (and to date only) time, permitted the appointment of a judge *ad hoc* in an advisory proceeding.

Several days before the adoption of these rules of procedure, six questions were submitted to the Commission by David Owen and Cyrus Vance, the Co-Chairmen of the Steering Committee of the Conference.<sup>17</sup> The competence of the Commission to give advisory opinions on the questions posed—all bearing on issues of state succession to the assets and obligations of the former Yugoslavia—was vigorously challenged by the FRY Government. In its “Statement” (which was not officially addressed to the Commission, presumably because the Commission’s competence to determine its own competence was also denied), the FRY declared that “in the sense of international law the Arbitration Commission was not established or composed for arbitration purposes”; that in its substantive work “it has been seriously in breach of both the law of procedure and the implementation of material law”; that the questions at issue “should be referred by agreement either to the Permanent Court of Arbitration . . . or to an ad hoc arbitration court”; and that, in sum, the FRY “shall consider null and void and non-binding any opinion of the Commission adopted in the procedure to which it has not agreed.”<sup>18</sup>

The Commission’s response was contained in unanimously adopted, but informal “Reactions” of the Commission members to the FRY statement, and was conveyed on May 26, 1993 to the Co-Chairmen of the Steering Committee.<sup>19</sup> In all but form, however, the “Reactions” amounted to a preliminary decision affirming competence to give the opinions requested.

FRY objections to the Badinter Commission’s decision to deal with the state-succession questions at issue were restated, even more firmly, in a letter of July 2, 1993, addressed to the Conference Co-Chairmen. Besides reasserting the claim that the Commission had violated international legal norms, both as to procedure and substance, the FRY protested:

---

It should also be noted that the Commission provided for the rendering of an opinion within three, and exceptionally, four months of the receipt of a request. In the original EC Declaration of Aug. 27, 1991, the Commission was required to render decisions within a two-month period. Exceeding this expectation, the Commission delivered its first ten opinions well before the end of the specified period; and in the crucial first opinion, which defined the international status of the SFRY, in just over a week. In all, the Commission’s rules, as well as its practice, tended to lend to that body a far less judicial character than that of either of the two world courts.

17. See International Conference on the Former Yugoslavia Documentation on the Arbitration Commission under the UN/EC (Geneva) Conference: Questions Submitted to the Arbitration Commission and Statements Relating to Their Submission, Apr. 20, 1993, 32 I.L.M. 1579, 1580–81 [hereinafter Questions and Statements 1993].

18. *Id.* at 1581–82.

19. *Id.* at 1582–84. Since the FRY had not presented an official challenge, the Commission presumably did not feel it appropriate to issue a formal “interlocutory decision.”



*In practice the opinions of the Commission, as an advisory body of the International Conference on the Former Yugoslavia, on the basis of which the Yugoslav participants at the Conference were to adopt relevant decisions by consensus taking also into account the Commission's opinion, were taken as judgments and served as a basis for making concrete decisions on relevant issues concerning the Yugoslav crisis.*<sup>20</sup>

"Resort to any court mechanism" was, in the FRY view, premature as long as there had not been any "substantiated and comprehensive discussion on the principles on the basis of which the property of the Federal Republic of Yugoslavia should be ceded to successor States."<sup>21</sup> Moreover, should judicial clarification nevertheless be necessary, it should be sought, as the FRY had often insisted, "within a court procedure in accordance with international law."<sup>22</sup> In the meantime, "pending discontinuation of the work of the so-called Badinter Commission," the FRY would temporarily suspend its further participation in the Working Group on Succession Issues, set up by the Conference.<sup>23</sup> Additionally, the FRY would consider the Commission's opinions and "the decisions and acts of other subjects based thereupon" to be "null and non-binding."<sup>24</sup>

## II. THE COMMISSION'S PRONOUNCEMENTS ON COMPETENCE

In its response to the first challenge to its competence, the Commission felt it necessary, first of all, to establish its right to determine its own jurisdiction, its *compétence de la compétence* which, as noted, Serbia had contested. But, in its attempt to do so, the Commission exhibited considerable confusion as to its own legal nature, and invoked ICJ precedents bearing on tribunals which were arbitral or judicial in nature, though the Commission decidedly was neither arbitral nor judicial. The Commission also implied that all the disputing parties had consented to its role—again an invalid proposition in this context. Using rather sophistic reasoning, the line of argument adopted by the Commission was basically the following.<sup>25</sup> 1) The original intention of the European Community ministers was to establish an arbitral procedure leading to

---

20. *Id.* at 1584 (emphasis added).

21. *Id.* at 1584–85.

22. *Id.* at 1585.

23. *Id.* at 1584.

24. *Id.* at 1585.

25. Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1519–21.

“decisions.” 2) The terminology used and the projected composition showed that arbitration was indeed intended. 3) The six republics agreed to the arrangements, thus consenting, presumably, to the establishment of a forum with arbitral powers. 4) Arbitral tribunals traditionally have the power to determine their own jurisdiction. 5) The right of standing tribunals to determine their own jurisdiction is even more incontestable than the corresponding right of arbitral tribunals set up for specific disputes.<sup>26</sup> 6) Hence, the Commission was empowered to decide on its own jurisdiction.

The legerdemain involved in this line of reasoning is obvious. In fact, regardless of the original intention (if such there were), the Commission was neither an arbitral body nor an established court; hence, the precedents cited were not pertinent. It was disingenuous to imply that all the disputants had given the kind of preliminary consent associated with a true arbitral procedure or with an existing judicial institution based on a constitutive instrument to which the disputing states were contractually committed. Indeed, the six republics were not members of the European Community which had set up the “Arbitration Commission”—a point also relevant to the issue of absence of consent to the rendering of advisory opinions. Nor was the principle of *forum prorogatum* applicable in this case to the FRY since, with respect to the questions under consideration, the FRY had never indicated even implicit consent to having its interests passed upon by the Commission. What needed to be examined and was, indeed, next addressed by the Commission was the Commission’s role as dispenser of advisory opinions delivered in the face of objections of one of the disputing parties. Here the Commission purported to base itself squarely on the advisory legacy of the ICJ, but here again the Commission’s reasoning was seriously flawed, and its use of precedents in non-analogous situations, misplaced.

The advisory competence of the Commission, it stated, had also been recognized. The proof? Serbia had, in November 1991, taken the initiative and submitted three questions to the Commission (two of which had been transmitted together with an additional one formulated by the Chairman of the Conference). Furthermore, “all the Republics took part in this procedure and none made the least mention of any incompetence on the Commission’s part, demonstrating an identical interpretation of its mandate, and thereby recognizing its competence in consultative issues as well.”<sup>27</sup>

---

26. For the last two propositions, the Commission cited the ICJ pronouncement in *Nottebohm Case (Liech. v. Guat.)*, 1953 I.C.J. 111, 119 (March 21) (Preliminary Objections). See Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1520.

27. *Id.*

How could the consent given in regard to these earlier consultations extend as well to later consultations to which objection *was* taken? In what instrument and by what actions could the FRY be said to have committed itself to accepting any and all consultations of the Commission bearing on the interests of the FRY? The Commission appeared not to notice the problem; but it proceeded, nevertheless, to use formulas and terminology employed by the ICJ in its advisory practice.

In particular, the Commission's statements echoed those enunciated by the International Court in the *Peace Treaties* case<sup>28</sup> and cited by the Court several times thereafter. Those statements established a judicial doctrine affirming an obligation to participate in the work of the U.N., barring compelling countervailing reasons.<sup>29</sup> The Commission's version of the doctrine was expressed in this manner:

The Arbitration Commission also notes that it was established in the framework of the Conference for Peace as a body of this Conference. Replying to the questions put by the Chairman of the Conference constitutes Commission participation in the work of the Conference, of which it is a body, and it would require conclusive reasons to bring it to refuse such a request. . . .

The Conference for Peace in Yugoslavia has a mission "to reestablish peace for all in Yugoslavia and to achieve lasting solutions which respect all legitimate concerns and legitimate aspirations." (Joint Statement of 7 September 1991 at the opening ceremony of the Conference).

Consequently, in attempting to enlighten the Conference on the legal aspects of problems which it encounters in carrying out this mission, the Arbitration Commission remains fully within the role entrusted to it by the European Community and its Member States on the one hand and the six republics on the other.<sup>30</sup>

In answer to the second FRY challenge to the Commission's competence, the terminology and concepts of the *Peace Treaties* case, with its sharp differentiation between the advisory and contentious jurisdiction of the Court, were repeated and, this time, explicitly cited. By the time of the second challenge, as noted earlier, the Commission had been

---

28. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71-72 (Mar. 30) [hereinafter *Peace Treaties*].

29. See *infra* notes 35, 42-44 and accompanying text.

30. Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1521.

reconstituted, and it had been endowed explicitly with an advisory jurisdiction.<sup>31</sup> However, the FRY had in no sense bound itself to accept that advisory jurisdiction, either in general or in respect to a particular issue. Indeed, as has been seen, the FRY had protested that the Commission's opinions were effectively determining the outcome of matters in dispute between the republics, and that thereby the legal right of the FRY not to have its rights adjudicated without its consent was being violated. Insisting, as had the ICJ in the *Peace Treaties* and some subsequent cases, that the consultation was a purely client-lawyer affair, the rendering of which the concerned state should not be permitted to prevent,<sup>32</sup> the Commission members stated in their informal "reactions":

[F]irstly, . . . the competence of the Arbitration Commission as an advisory body stems not from the consent of the parties concerned but from the mere fact of referral to it by the Co-Chairmen of the Conference; secondly, the reply given by the Commission to a question put before it in this context "is only of an advisory character: as such it has no binding force" (cf. ICJ, advisory opinion of 30 March 1950, *Interpretation of Peace Treaties*, ICJ Reports 1950, p. 71).

As a consequence, it is for the Co-Chairmen, and for them alone, to evaluate the desirability of a request for an opinion, and the States participating in the Conference are not qualified to prevent them from doing so. The opinion is given by the Arbitration Commission not to the States, but to the Co-Chairmen, in order to furnish them with information needed to take decisions. The reply to such a request constitutes the Commission's participation in the working of the Conference. In that regard it may be recognized that, as the FRY Government writes, such advisory opinions form part of the "subsidiary means for the determination of rules of law" referred to in Article 38, paragraph 1(d) of the Statute of the ICJ.<sup>33</sup>

The Commission added that the parties could always utilize the Commission's contentious jurisdiction "or any other adjudicatory or arbitral body of their choice," should they fail to conclude successfully the present negotiations, "for which the opinions of the Commission are not binding but may serve as points of reference."<sup>34</sup>

---

31. See *supra* notes 11–16 and accompanying text.

32. See *infra* Part III.

33. Questions and Statements 1993, *supra* note 17, at 1583.

34. *Id.*

In order to evaluate the validity of the Commission's purported adoption of the International Court's jurisprudence in the matter of consent to advisory jurisdiction, it is appropriate to examine the ICJ's approach to the problem and the validity of transporting that approach to the very different context in which the Badinter Commission was operating.

### III. THE ISSUE OF CONSENT IN THE ICJ'S ADVISORY JURISPRUDENCE

On several occasions, the ICJ was urged not to comply with a request for an advisory opinion on the grounds that the issuance of an opinion would amount to the exercise of compulsory jurisdiction on the basis of a majority vote in a political organ and the circumvention of the requirement of state consent. To overcome these objections and cooperate maximally with the requesting organ, the International Court was led to emphasize the "organizational" aspects of the requests and correspondingly to minimize their "quasi-contentious" aspects.<sup>35</sup> Its predecessor, the Permanent Court of International Justice ("PCIJ" or "Permanent Court"), had tended to do the opposite: to look beyond the formal source of the request to the true interests being litigated and to blur, almost to the vanishing point, the distinction between the advisory and contentious jurisdictions. In the matter of consent, the main PCIJ precedent was the much cited and much misunderstood refusal to give the League Council the advice it requested in connection with the Finno-Soviet dispute over the status of Eastern Carelia. The Permanent Court made it clear that it would not serve as the League's adviser automatically and in all instances. In this case, the major obstacle to compliance with the Council's request for an opinion was the fact that the Council lacked the competence to recommend any solution regarding a dispute in which Russia, a nonconsenting non-member of the League, was involved.<sup>36</sup> Subsequently, in the *Mosul* case, the Permanent

---

35. For a fuller discussion of the issue of consent in the jurisprudence of the ICJ and its predecessor, see POMERANCE, *supra* note 14, at 279-84, 287-96. For a recent analysis of the Court's "duty-to-participate doctrine," see Michla Pomerance, *The Advisory Role of the International Court of Justice and Its "Judicial" Character: Past and Future Prisms*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 297-323 (A.S. Muller et al. eds., 1997).

36. Advisory Opinion No. 5, Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5, [hereinafter Eastern Carelia]. The P.C.I.J. deemed it *unnecessary* to broach the *general* problem of the consent of disputant states to advisory proceedings. Among "other cogent reasons" for its refusal to reply in this case, the P.C.I.J. also cited the difficulty of elucidating disputed facts without Russia's testimony. On the basis of the P.C.I.J.'s reasoning, the "Eastern Carelia principle" could be said to relate to non-members of the League who, moreover, had never accepted the Council's competence for the purposes of a particular

Court appeared to depart somewhat from the earlier precedent, consenting to render an opinion despite the objections of Turkey, a non-member of the League.<sup>37</sup> However, there were essential differences between the two cases, and these, it would seem, were determinative for the Permanent Court. Turkey had earlier, by treaty, expressly granted the League Council a role in its dispute with Great Britain;<sup>38</sup> had participated all along in Council proceedings; and at one stage had even explicitly consented to accept the Council's decision in advance.<sup>39</sup> The Council's request for judicial advice came at a very late stage in the proceedings; and it involved not the question of *whether* the Council had competence to take a decision—this was generally conceded—but rather the question of what character the decision should have, and by what vote it should be taken.<sup>40</sup> In these circumstances, the League Council's right to have judicial clarification was thought to be unassailable and to outweigh the "quasi-contentious" aspects of the case.<sup>41</sup>

It was in the *Peace Treaties* case that the *Eastern Carelia* precedent of the PCIJ was, in practice, overturned, though this was not done overtly, as some states had urged, but by a somewhat inept attempt to distinguish the two cases. As in the *Eastern Carelia* case, the International Court was faced with non-consenting, non-member states of the World Organization who could be said to be "quasi-defendants" in relation to the request for an advisory opinion. Moreover, the requesting organ's competence to deal with the root issue involved (in this case,

---

dispute. However, subsequently, the *Eastern Carelia* precedent was widely misconstrued by writers (and even by the International Court of Justice, in the *Peace Treaties* case, *supra* note 28, at 71–72) to embrace the question of consent in general—at least where the request for an opinion touches on the merits of an existing dispute. See POMERANCE, *supra* note 14, at 282–83, 287–92. For the context of the League Council's request, see *id.* at 65–69. Equally misconceived was the attempt by some states (and the Court itself) to distinguish *Peace Treaties* from *Eastern Carelia* on the basis of the "preliminary" nature of the questions in the later case. See *id.* at 288 & n.36.

37. See Interpretation of Article 3(2) of the Treaty of Lausanne (Frontier between Turkey and Iraq) (Mosul Boundary), 1925 P.C.I.J. (ser. B) No. 12.

38. Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 11.

39. See 1924 LEAGUE OF NATIONS O.J. 1319–20, 1337, and especially, 1358–59.

40. See 1925 LEAGUE OF NATIONS O.J. 1317–27, 1336–37, 1377–82.

41. On the background to the Council's request, see POMERANCE, *supra* note 14, at 75–78. Turkey's attitude to the Court, it might also be noted, differed greatly from Russia's in the *Eastern Carelia* case. Turkey exhibited no general hostility to the Court and did not impugn its credentials as an impartial forum. While objecting that the questions before the Court were "of a distinctly political character" such as could not "form the subject of a legal interpretation," Turkey stopped short of challenging outright the Court's competence to give an opinion. Interpretation of Article 3(2) of the Treaty of Lausanne, *supra* note 37, at 8–9. It also cooperated with the Court by furnishing relevant documents and replying to questions posed. For its part, the Court did not find it necessary to address the question of Turkey's position in the case.

the observance of human rights in Bulgaria, Hungary and Romania) had earlier been challenged (resembling, in this respect, *Eastern Carelia* more than *Mosul*). But the International Court held these facts to be no bar to rendering an opinion. Adopting mainly the line of argument urged upon it by the United States and the United Kingdom, the International Court reasoned as follows: the Court's opinion is merely "advisory" and is given to the U.N. General Assembly for *its* enlightenment; hence, no state, member or non-member of the United Nations, can prevent the giving of such an opinion. Moreover, "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the organization, and, in principle, should not be refused."<sup>42</sup> Nevertheless, since the International Court is also the "principal *judicial* organ," it must examine whether its judicial character bars it from giving the opinion in this case.<sup>43</sup> For this purpose, it was necessary to distinguish the case from *Eastern Carelia*, as the International Court proceeded to do by emphasizing the *preliminary* nature of the question before it—the applicability of the dispute-settlement provisions of the peace treaties, rather than the merits of the disputes regarding human rights. Since the "sole object" of the request was "to enlighten the General Assembly as to the opportunities which the procedures contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it," the International Court could find "in the opposition to it made by Bulgaria, Hungary and Romania no reason why it should abstain from replying to the request."<sup>44</sup>

On the other hand, individual judges found in that opposition strong grounds for non-compliance. In contrast to the Court, they highlighted: the "non-advisory" character which advisory opinions had come to assume in practice; the substantive, nonpreliminary nature of the dispute at issue; and the quasi-contentious, non-organizational aspects of the opinion. Thus, on the force of advisory opinions, Judge Winiarski declared: "States see their rights, their political interests and sometimes their moral position affected by an opinion of the Court, and their disputes are in fact settled by the answer which is given to a question relating to them."<sup>45</sup> "In practice," Judge Zoričić stated, "an advisory opinion . . . in regard to a dispute between States is nothing else than an unenforceable judgment."<sup>46</sup> The fact that the dispute before the Interna-

---

42. Peace Treaties, *supra*, note 28, at 71.

43. *Id.* at 71–72.

44. *Id.* at 72.

45. *Id.* at 92 (dissenting opinion of Judge Winiarski).

46. *Id.* at 101 (dissenting opinion of Judge Zoričić). In a separate opinion, Judge Azevedo deemed particularly objectionable the attempt (by means of automatic institution of a second phase of advisory proceedings, in the event the three states remained recalcitrant)

tional Court was not the original dispute about human-rights observance but the subsequent dispute about the applicability of the dispute-settlement procedures did not in any way detract from its nature as a "dispute."<sup>47</sup> Though "preliminary" in relation to the main dispute, the new controversy nevertheless constituted a "pivotal point" in the case, even as the "preliminary" question in the *Eastern Carelia* case had formed an important new dispute, separate from the merits.<sup>48</sup> The formal addressee of the opinion may be the organ which requested it, but the real addressees were "the parties, the Organization, and . . . public opinion."<sup>49</sup>

Thereafter, the problem of non-consent to an advisory proceeding by a non-member of the World Organization would not again arise. The Court could and did contend that U.N. membership, and concomitant acceptance of Article 96 of the U.N. Charter (providing for Assembly and Council requests for advisory opinions) sufficed to meet any objections to the International Court's *competence* to render the opinion requested.<sup>50</sup> Nevertheless, as a matter of *propriety* and the International Court's admitted discretion to refuse to give an opinion in order to protect its *judicial character*, the Court continued to deal with the issue of the absence of consent. In the end, however, no matter how strong the claim of a non-consenting state to the status of "quasi-litigant" in an advisory proceeding, the "organizational" stamp of the requests would be underscored and deemed determinative. Thus, in the Namibia case, the Court said:

It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relat-

---

"to attribute material effects" to the Court's opinion. In his view, the opinion was thereby endowed with "an enforceability *sui generis* somewhat in the nature of an interdict or a writ." *Id.* at 86-87.

47. *Id.* at 93-94 (dissenting opinion of Judge Winiarski), 99-100 (dissenting opinion of Judge Zoričić).

48. *Id.* at 87-88 (separate opinion of Judge Azevedo).

49. *Id.* at 97 (dissenting opinion of Judge Winiarski). Similarly, Judge Zoričić wrote:

[A] request for an opinion cannot be regarded as giving rise solely to a relation between the Court and the international organ which asks for the opinion, but . . . in addition to that relation, other relations may be established first, between the Court and the parties, and, again, between the parties themselves.

*Id.* at 101.

50. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 23, para. 31 (Jan. 26) [hereinafter *Namibia*]. See also *infra* note 56 and accompanying text, with respect to the position of Spain in the Western Sahara case. The Court's views regarding the effect of accepting Article 96 of the Charter coincide with those expressed earlier by many writers. See, e.g., SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 357-58 (1958).



ing to the peaceful settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions.<sup>51</sup>

"The object of this request," the Court said, quoting from the *Reservations* case,<sup>52</sup> "is to guide the United Nations in respect of its own action." The existence of "radically divergent views between South Africa and the United Nations" served to convert the case neither into an interstate nor even into a U.N. v. South Africa dispute.<sup>53</sup> The Court's characterization of the case was criticized by Judge Gros, who deemed it "a purely formal view of the facts . . . which does not . . . correspond to realities,"<sup>54</sup> and also by Judges Petrén and Fitzmaurice.<sup>55</sup>

In the *Western Sahara* case the absence of Spanish consent was clear and conceded by the International Court, and Spanish participation in the case (unlike South African participation in Namibia) was not deemed tantamount to consent to the rendering of the opinion.<sup>56</sup> Nevertheless, the Court again concluded that the *Eastern Carelia* precedent would be no bar to complying with the request. Differentiating more clearly than in the past between competence and propriety, the Court held that there could be no question, based on *Eastern Carelia*, of the Court's incompetence to deal with the question. Correctly interpreting that earlier precedent (as the Court in the *Peace Treaties* case had not done), the Court said that a "decisive reason" for the Permanent Court's refusal to give an opinion in *Eastern Carelia* had been the "lack of competence of the League to deal with a dispute involving non-member States which refused its intervention."<sup>57</sup> As for the present case, however, the Court observed:

Spain is a Member of the United Nations and has accepted the provisions of the Charter and the Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the

---

51. Namibia, *supra* note 50, at 24, para. 32.

52. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 19 (May 28).

53. Namibia, *supra* note 50, at 24, paras. 32-34.

54. *Id.* at 326; *see generally id.* at 324-31.

55. *Id.* at 128-30, 313-16.

56. Western Sahara, *supra* note 16, at 23, para. 29. For the Court's reference to South Africa's participation in the proceedings in the *Namibia* case, *see* Namibia, *supra* note 50, at 23-24, para. 31; and *see id.* at 156 (separate opinion of Judge Dillard).

57. Western Sahara, *supra* note 16, at 24, para. 30.

decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers.<sup>58</sup>

Nevertheless, the Court held that "the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion."<sup>59</sup> "In certain circumstances" such lack of consent "may render the giving of an advisory opinion incompatible with the Court's judicial character."<sup>60</sup> That these circumstances did not arise in this case was due, yet again, to the "organizational" labeling of the case by the Court. The "legal controversy . . . arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations."<sup>61</sup> (On this reasoning, it is difficult to comprehend why a judge *ad hoc* was approved for Morocco. The Court must have had second thoughts on the "dispute" nature of the case; but, as Judge Gros noted, it was either "unable or unwilling to modify" its earlier contention.)<sup>62</sup>

To strengthen the "organizational" argument, the Court asserted that the request was "located in a broader frame of reference" than was the earlier dispute, since it included future elements and the territory's ties to Mauritania;<sup>63</sup> that the object of the request was to aid the General Assembly not in the pacific settlement of disputes but in the "proper exercise of its functions concerning the decolonization of the territory";<sup>64</sup> and that the Assembly possessed a "legitimate interest . . . in obtaining an opinion from the Court in respect of its own future action."<sup>65</sup> That interest could not be "affected or prejudiced" by the fact that an earlier Moroccan proposal for joint reference to the International Court on kindred issues had been rejected by Spain.<sup>66</sup> Nor was Spain correct in assuming that the Court would be adjudicating "existing territorial rights or sovereignty over territory."<sup>67</sup> Nor again was there any problem, as there had been in *Eastern Carelia*, of ascertaining the facts,

---

58. *Id.* The Court also noted that in the General Assembly, Spain objected to the formulation of the request and its restriction to the historical aspects of the question, not to the judicial consultation as such. *Id.*

59. *Id.* at 25, para. 32.

60. *Id.* at 25, para. 33.

61. *Id.* at 25, para. 34.

62. *Id.* at 71, 74.

63. *Id.* at 26, para. 38.

64. *Id.* at 26-27, para. 39.

65. *Id.* at 27, para. 41.

66. *Id.*; see generally *id.* at 25-27, paras. 35-42.

67. *Id.* at 28, para. 43.

since sufficient "information and evidence" had been presented to the International Court.<sup>68</sup>

#### IV. THE COMMISSION'S MISPLACED ANALOGIES AND REASONING

As was seen, the ICJ pronouncements on the issue of consent have themselves been sharply criticized from within the bench, on the grounds that unlike the PCIJ, the International Court took too formalistic a view of its advisory function and disregarded both the real interests that were being litigated by the circuitous advisory route and the authoritative nature of the technically non-binding advisory opinions.<sup>69</sup> Indeed, in its anxiety to participate as "principal judicial organ" in the work of the U.N., the Court, it would seem, was too ready to find "organizational" stakes even where they were negligible or minimal in comparison to those of the disputant states. In its defense, the Court could point to one or more of the following considerations: the U.N. membership of the non-consenting states (in the post-*Peace Treaties* cases); occasionally (as in the *Namibia* case), the participation of the contesting state in the proceedings as a form of *ad hoc* acceptance of the Court's competence; the status of the World Organization in relation to a wide spectrum of questions affecting international relations; and the Court's own status as the Organization's "principal judicial organ."

In the case of the Badinter Commission, the criticism leveled against the ICJ view is particularly apt, while the defense of the ICJ position is basically unavailable. Moreover, the Commission's defense of its competence was perhaps even less persuasive regarding the FRY's second challenge than with respect to the first. For by then, the authoritativeness, bordering on binding force, attributed to the Commission's decisions by the EC, its members, and other international organizations had become manifest;<sup>70</sup> the FRY's opposition to the Commission's in-

---

68. *Id.* at 29, para. 47. But compare the dissents on this point of Judge Petrén, *id.* at 113, and Judge de Castro, *id.* at 137-142. For the Court's dismissal of Rumanian objections in the *Mazilu* case, see Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177, 188-92, paras. 29-39 (Dec. 15); Pomerance, *supra* note 35, at 306-07.

69. See *supra* notes 45-49, 54-55, 62, 68 and accompanying text. See also discussion of the *Peace Treaties* case, in Leo Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS 339-42, 361-70, 415-17 (1967-1).

70. As summed up by Craven, rarely had "a quasi-judicial body . . . play[ed] such an active part in the process of dismemberment" of a state. Craven, *supra* note 2, at 410. The Commission's advice on recognition was basically followed by the EC and its members, except for the recognition of Croatia prior to fulfillment of the conditions outlined by the Commission and, contrariwise, the deferment of the recommended recognition of Macedonia because of Greek opposition. (Greece objected to the use of the name "Macedonia" and

v involvement in its disputes with the other former republics of the SFRY was indisputable; and, as Matthew Craven noted, any approval which the FRY might have extended to the Commission's work initially was not automatically transferable to the reconstituted Commission, now functioning under a new mandate and with a changed composition.<sup>71</sup> In any event, as he correctly observed, the position of the U.N. *vis-à-vis* its members was not comparable to that of the Conference for Peace in Yugoslavia *vis-à-vis* the FRY:

---

feared irredentist demands on Greek territory.) Non-recognition by the EC of the FRY as sole successor to the SFRY was expressly linked by the EC (in its joint statement of July 20, 1992) to the Commission's conclusions in Opinion No. 10. See introductory note by Ragazzi in Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1490. Apart from their impact on the decisions of the EC and its members, the Commission's opinions also influenced the decisions of other bodies. In particular, the momentous conclusion, in Opinion No. 1, that the SFRY was "in the process of dissolution" apparently led the U.N. and other international organizations to deny the FRY automatic membership as sole successor to the SFRY, thus departing from the precedent set with respect to Russia after the Soviet break-up. See Weller, *supra* note 2, at 593-94; Craven, *supra* note 2, at 335, 373, 379-80, 410. On the U.N. actions, see S.C. Res. 777, U.N. SCOR, 47th Sess. 3116th mtg., at 1, U.N. Doc. S/RES/777 (1992), and the Assembly resolution adopted pursuant to it, G.A. Res. 47/1, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/1 (1992). The latter resolution, while noting that the FRY cannot "continue automatically" the SFRY's membership, determined that the FRY can no longer participate in the work of the General Assembly. This differentiation between the membership of Yugoslavia (which was not explicitly terminated) and participation in the work of the General Assembly (which was denied to the FRY) was explicated in a memorandum by the U.N. Legal Counsel, *Letter Dated 27 September 1992 from Under Secretary General, the Legal Counsel, Addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations*, U.N. Doc. A/47/485 (1992), but was held by the ICJ to be "not free from legal difficulties." Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) 1993 I.C.J. 14, para. 18 (Provisional Measures, Order of Apr. 8). For a critique of the U.N. approach to the issue, see Yehuda Z. Blum, *U.N. Membership in the 'New' Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L J. 830 (1992), and Yehuda Z. Blum, *Correspondents' Agora: U.N. Membership of the Former Yugoslavia*, 87 AM. J. INT'L J. 248 (1993). For an attempt to make sense out of the conflicting U.N. precedents, see Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995).

The Commission's opinions have also been faulted by critics for possibly precipitating the premature recognition of Bosnia, thereby helping to engender the violence which the adjudicatory and conciliatory processes were ostensibly designed to forestall. See, especially, the following comment by Paul C. Szasz, written in 1995: "Unfortunately, to the extent that these opinions [Opinions Nos. 1-4] encouraged the Bosnian Government to seek early independence, that step provoked the disaster from which Bosnia-Herzegovina is still suffering. . . ." Szasz, *Peacekeeping*, *supra* note 2, at 693; see also Craven, *supra* note 2, at 380; Weller, *supra* note 2, at 606. Regarding the Commission's views on the *uti possidetis* principle, see *infra* Part V. Interestingly, Badinter himself apparently acknowledged later (June 29, 1994) that the recognition of Bosnia-Herzegovina brought about the disaster of war. See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 614 n.192 (1992). This was also the assessment of OWEN, *supra* note 2, at 46.

71. Craven, *supra* note 2, at 352.

[The Conference] has no constituent instrument, possesses only an ill-defined set of “organs”, and does not prescribe the rights and obligations of the participating States. It is one thing for States to accept, by treaty, limitations on their sovereignty through membership in an organization where the purposes and powers of the organization are clearly set out, and where the rights and obligations of the States *vis à vis* the organization are defined in advance. It is quite another for such limitations to be imputed to a State in virtue of its “participation” in an organization with an ill-defined and open-ended mandate.<sup>72</sup>

Nor was the analogy between the status of the ICJ as “principal judicial organ” and the functions of the Commission particularly convincing. Nor again was it a simple matter to accept that the “organizational” interest of the Conference in the questions of statehood and succession should be allowed to override the very concrete interest of the FRY in not having these questions adjudicated by means of a quasi-compulsory jurisdiction foisted on the FRY without its consent. This was all the more so since “the distinct identity of the Conference could scarcely be discerned.”<sup>73</sup>

The misuse by the Commission of International Court pronouncements was not, however, limited to matters of competence; it was also prevalent in the Commission’s substantive pronouncements, especially in the matter of the *uti possidetis juris* principle.

#### V. *UTI POSSIDETIS* IN THE ICJ AND IN THE BADINTER COMMISSION

The ICJ’s pronouncements on the issue of self-determination as such are sparse, often Delphic,<sup>74</sup> and the Commission does not appear to

---

72. *Id.* at 352–53.

73. *Id.* at 411.

74. These pronouncements have, however, been widely cited and recited unthinkingly, misused and misinterpreted. In particular, commentators have often ignored the specific contexts to which the Court’s statements related and to which the Court was careful to confine its comments. In general, the judicial pronouncements bore on matters of classic decolonization where, moreover, the international organization concerned possessed some specific authority (and the question of the extent of that authority was sometimes the issue to be determined). Additionally, some of the Court’s utterances were in the nature of *obiter dicta* and lacked any practical consequences. See especially the Court’s assertion in the *East Timor* case (which it refused to adjudicate on jurisdictional grounds) that self-determination is “one of the essential principles of contemporary international law” and that it has an “*erga omnes* character.” *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 102, para. 29 (June 30); see also *id.* at 213–16 (dissenting opinion of Judge Weeramantry) (regretting the fact that, under the circumstances, no practical consequences attached to the Court’s statement). For analysis of the Court’s approach to matters of decolonization (not self-determination in general), see

have used them in any discernible way. On the other hand, the Commission extensively cited the dictum of an International Court chamber in the 1986 *Frontier Dispute* case between Burkina Faso and Mali in the matter of *uti possidetis*;<sup>75</sup> and in so doing, the Commission extended the principle in ways that are neither legally warranted nor necessarily politically desirable.

In its second and third opinions, the Commission addressed two interrelated questions initiated by Serbia and transmitted by Carrington: 1) "Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?" 2) "Can the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law?"<sup>76</sup>

Responding to the first of these questions, the Commission determined (in Opinion No. 2) that "international law as it currently stands does not spell out all the implications of the right to self-determination." However, it continued, "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise."<sup>77</sup> This proposition was perhaps not as well established as the Commission thought,<sup>78</sup> but it

Shabtai Rosenne, *Decolonisation in the International Court of Justice*, 8 AFR. J. INT'L & COMP. L. 564 (1996). On the purport of the Court's pronouncements in the *Namibia* and *Western Sahara* cases, see MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 69-70, 114 (1982).

75. See Opinion No. 3 in Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1500 (citing Case Considering Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 565 (Dec. 22)).

76. Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1498-99.

77. *Id.* at 1498.

78. Examples of skepticism regarding the legal credentials of the principle, even in respect of Latin America, are legion. Thus, F.C. Fisher referred to the "indefinite and illusory concept of *uti possidetis*, the meaning of which is still as uncertain as when the effort was first made, over a century ago to elevate it to the dignity of a principle of American international law." F.C. Fisher, *The Arbitration of the Guatemalan-Honduran Boundary Dispute*, 27 AM. J. INT'L L. 415 (1993). Citing the ambiguity of the principle, C.H.M. Waldock concluded: "The doctrine of *uti possidetis* has proved to be so indefinite and ambiguous that it has become somewhat discredited even as a criterion for settling boundary disputes between Latin American states." C.H.M. Waldock, *Disputed Sovereignty in the Falkland Island Dependencies*, 1948 BRIT. Y.B. INT'L L. 325. The ambiguity, as Waldock explained, revolved primarily around "the question whether *uti possidetis* refers to possession *de iure*, that is, to the Administrative boundaries as theoretically defined in Spanish Royal Decrees or . . . to possession *de facto*, that is, to the boundaries actually respected by the former colonial administrations." *Id.* at 326; see also J.H.W. VERZIJL, 3 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 552 (1970) (concluding that *uti possidetis* is only a "principle" and "not a rule of international law proper"); YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW

was less questionable than the extension of the principle, in Opinion No. 3, to internal administrative boundaries as well. (It was also less controversial than some of the other statements in the preceding two opinions, including the assertions that respect for the rights of minorities was a peremptory norm of international law,<sup>79</sup> and that the right of self-determination alluded to in Article 1 of the two 1966 International Covenants on human rights was, in essence, an individual rather than a

---

342 (1965) (citing evidence to support a similar conclusion). The deviations in U.N. practice from strict application of the principle in the process of decolonization are also noteworthy. See examples cited in POMERANCE, *supra* note 74, at 18–22, 30–31, 84–88, 97–98. For recent discussions of the legal status and contours of the *uti possidetis* principle, see Ratner, *supra* note 70, at 590–624, and especially 594–95, 598–601; Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 1996 BRIT. Y.B. INT'L L. 75–154, and especially 99 (affirming the legal nature of the doctrine).

79. In Opinion No. 1, the Commission stated that “the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.” Conference on Yugoslavia Arbitration Commission 1991–1992, *supra* note 2, at 1496. In Opinion No. 2, the Commission reiterated the proposition, stating that “the—now peremptory—norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics *vis-à-vis* the minorities on their territory.” *Id.* at 1498. Yet the *jus cogens* concept in international law, as the International Law Commission deliberations preceding the adoption of the Vienna Convention on the Law of Treaties made clear, is controversial and not universally accepted. More important, the Vienna Convention, as is well known, used the expression *jus cogens* wholly in a negative sense and provided no substantive definition of the term. No principles which might qualify for the *jus cogens* designation were incorporated, even by way of illustration, mainly because of lack of agreement regarding suitable candidates for the status. The ILC report on the matter mentioned some of the matters suggested for incorporation by member states. These related primarily to the unlawful use of force, the slave trade, piracy, and genocide, and, among “other possible examples,” also self-determination. Minority rights were not among the principles cited. See *Summary Records of the 703rd Meeting*, 1963 Y.B. INT'L L. COMM'N 198–99; *Summary Records of the 880th Meeting*, 1966 Y.B. INT'L L. COMM'N 247–49; Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 963–64 (1967); JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 114–23 (1974). On the problematic aspects of the *jus cogens* concept, see also Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965). Among ICJ pronouncements, the kindred concept of “obligations *erga omnes*” appears in some *obiter dicta*—most prominently in the *Barcelona Traction* case, where the Court listed in this category obligations “derive[d], for example . . . from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” *Barcelona Traction, Light and Power (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5); see also *East Timor*, *supra* note 74. Even if one accepted the Arbitration Commission’s assertion regarding minority rights as *jus cogens*, further, possibly insuperable difficulties would be presented by the need to define the referents and scope of such rights and how they were to be reconciled with the rights of the individual. See RUTH LAPIDOTH, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS* 9–23 (1997) and the sources there cited; PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 1–21, 164–72 (1991); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 60–61 (1990).

group right, permitting "every individual" to "choose to belong to whatever ethnic, religious or language community he or she wishes."<sup>80</sup>)

According to the Commission's pronouncements in Opinion No. 3, international law mandated respect not only for all external frontiers but also for the former internal boundaries in Yugoslavia, which "may not be altered except by agreement freely arrived at."<sup>81</sup> Support for this proposition the Commission purported to find in the Court's jurisprudence:

This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, [1986] ICJ Reports 554 at 565): "Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles . . . ."<sup>82</sup>

---

80. Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1498. The case law of the U.N. Human Rights Committee reflects the opposing view, that Article 1 endows only "peoples as such," and not individuals, with an implementable right to self-determination. Petitions invoking Article 1 within the rubric of the Optional Protocol of the Covenant on Civil and Political Rights have, therefore, been dismissed by the Committee. See, for example, the treatment of cases relating to indigenous Canadian bands and to petitioners from South Tyrol, cited in Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 27 (1993/94); see also DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 254-56, 266-68 (1994).

For criticism of this part of the Arbitration Commission's opinion, its lack of clarity and questionable sustainability in international law, see Craven, *supra* note 2, at 393-95; Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 TRANS-NAT'L L. & CONTEMP. PROBS. 55, 65 (1993). It might be added that the Commission's ostensible theoretical "widening" of the definition of self-determination so as to embrace the individual "self" has the practical effect of restricting the right of some of the claimants to the collective right of complete self-determination and independence. It is, in a word, a way of limiting the rights of non-favored "selves."

81. Conference on Yugoslavia Arbitration Commission 1991-1992, *supra* note 2, at 1500. The Commission prefaced its opinion with the statement that it was "mindful of the fact that its answer to the question before it will necessarily be given in the context of a fluid and changing situation and must therefore be founded on the principles and rules of public international law." *Id.* at 1499.

82. *Id.* at 1500.



To bolster these conclusions, the Commission referred to Article 5, paragraphs 2 and 4 of the SFRY Constitution on non-alteration of the Republics' territories and boundaries without their governments' consent, and also to a series of international instruments declaring that forceful alteration of boundaries would be without legal effect.<sup>83</sup>

Whatever the legal merits of the other bases of the Commission's affirmation of the sanctity of the former internal administrative bounda-

---

83. *Id.* In applying the prohibition against the use of force, embodied in Article 2(4) of the U.N. Charter, to the context of the internal conflict in Yugoslavia, the Arbitration Commission was following the policy line of the EC (which, in turn, was influenced mightily by German pressure to "internationalize" the conflict), the United States, and the later stance of the U.N. Security Council. For pointed criticism of this policy, see Rosalyn Higgins, *Post-modern Tribalism and the Right to Secession: Comments*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 34 (Catherine Brölmann et al. eds., 1993):

This [principle that frontiers may not be altered by force] has . . . been a guiding precept in the various *avis* handed down by the *Commission Arbitrale* established within the Conference on Yugoslavia . . . [S]o far as normative guidance is concerned, this [is] a somewhat unsatisfactory principle . . . Does the principle . . . mean that the federal government may use no force at all to prevent . . . [secession, by unilateral declaration of independence of one of its provinces]? In other words, may a frontier be altered unilaterally by one side, so long as the other side is put in the position of using force to maintain the *status quo*? Or does the principle . . . mean that the old boundary between . . . [the seceding province] and what remains of the federal state must remain, and the federal state may not carve out new facts on the ground by seeking to gain by force any strip of, or enclave within, the newly seceding entity? Either way, the seceding state has the legal initiative . . . [T]he mere repetition of the formula that boundaries may not be changed by force does not begin to provide serious normative guidance to most of the issues that face us today in the context of secessionism.

See also, in like vein, Hannum's assessment: "The principle that borders should not be altered except by mutual agreement has been elevated to a hypocritical immutability that is contradicted by the very act of recognizing secessionist states." Hannum, *Self-Determination*, *supra* note 80, at 68. "The war crimes and crimes against humanity . . . cannot be cited in an *ex post facto* manner to justify the earlier secessions." *Id.* at 68 n.43. See also Steinberg, *supra* note 12, at 66–67; and the statement of David Owen, *infra* note 92 and accompanying text. On the EC policy, see Weller, *supra* note 2, at 575–77.

For U.S. statements opposing alteration of internal Yugoslav borders by force and branding Serbian actions as internal aggression, see HALPERIN ET AL., *supra* note 2, at 35–38; Hannum, *Self-Determination*, *supra* note 80, at 59–60; Steinberg, *supra* note 12, at 75 n.65; Weller, *supra* note 2, at 579–80. See especially James A. Baker, Violent Crisis in Yugoslavia, Address before the U.N. Security Council (Sept. 25, 1991), in U.S. DEPARTMENT OF STATE DISPATCH, Sept. 30, 1991, at 723–24. On divergent views in the U.N. on the matter of the use of force and internal borders—both in the early stages, when the conflict in Yugoslavia was still viewed as a secessionist struggle, and after the shift in attitude—see Weller, *supra* note 2, at 577–81. The crucial German role in shaping the EC approach and precipitating premature recognition of Croatia and Bosnia was widely, and generally critically, noted. See *id.* at 575, 586–88, 605; Daalder, *supra* note 2, at 50–51, 64; Steinberg, *supra* note 12, at 37–38, 66; OWEN, *supra* note 2, at 24, 27; WOODWARD, *supra* note 2, at 183–89; Stephen Kinzer, *Europe, Backing Germans, Accepts Yugoslav Breakup*, N.Y. TIMES, Jan. 16, 1992, at A10.

ries—and these have been seriously debated<sup>84</sup>—reliance on the International Court's jurisprudence, as several commentators have observed, was certainly questionable.<sup>85</sup> The principle of *uti possidetis juris* was not in contention between the parties in the *Frontier Dispute* case. On the contrary, in the Special Agreement by which the Chamber of the Court was seized with the dispute, the parties had stipulated that the controversy be settled in accordance with "respect for the principle of the intangibility of frontiers inherited from colonization."<sup>86</sup> Thus, the Chamber's statements regarding the status of the principle in general customary international law were all a matter of dictum only. Moreover, that dictum (which was cited by the Commission), when repeated later in the same judgment specifically spoke not, as before, of cases of "independence" but of "decolonization"<sup>87</sup>—a narrow term than "independence," in U.N. and ICJ discourse. Judge Luchaire emphasized the importance of the distinction and cautioned against confusing the two terms.<sup>88</sup> It is also noteworthy that the uncompleted sentence at the end of the passage cited by the Commission ended with the following words: "provoked by the challenging of frontiers following the withdrawal of the administering power"—a clear reference again to the decolonization context.<sup>89</sup>

In fact, employment of the ICJ dictum was inappropriate in a deeper sense. The issues before the Court in *Frontier Dispute* and those confronting the Commission in relation to Yugoslavia were fundamentally disparate. In the first case, the problem was a routine one, in which the principles of delimitation were agreed, and only their application was contested. The first three opinions of the Commission, on the other hand, raised in a fundamental way the basic conundrum of self-determination. The real issues, regardless of how they were semantically disguised, were: What was the unit of self-determination? How was the "self" of self-determination to be defined, by whom, and on

---

84. See *supra* note 3 (discussing the tenuous constitutional basis for establishing the proposition.)

85. See Ratner, *supra* note 70, at 598, 613–14; Craven, *supra* note 2, at 388; Hannum, *Self-Determination*, *supra* note 80, at 66.

86. Case Concerning Frontier Dispute, *supra* note 75, at 557.

87. See *id.* at 566, para. 23. Even in the paragraph cited by the Arbitration Commission, the *uti possidetis* concept is linked more frequently to "decolonization" than to independence in general. *Id.* at 565, para. 20. The chamber's dictum, when read completely and in context, appears designed primarily to emphasize that the rule was just as applicable to decolonization in Africa as it was to earlier South American decolonization.

88. In legal discourse, Judge Luchaire wrote, "the term 'decolonization' should be used only with great caution and must above all not be confused with accession to independence." *Id.* at 652.

89. See *id.* at 565, para. 20. This point is aptly highlighted by Hannum, *Self-Determination*, *supra* note 80, at 55.

what grounds? Whose territorial integrity was deserving of preservation, and why? If the secession of the republics from the SFRY was permissible because the Federation was disintegrating, on what *legal* grounds could further secession from those republics be legitimately opposed? Why was one unit's self-determination more sacrosanct than that of another? Why was the territorial integrity of the whole federation less holy than that of the sub-units? And what of the territorial integrity of the sub-sub-units, like Dražina and Petrinja within Croatia? (Or, for that matter, of Kosovo and Vojvodina within Serbia?)<sup>90</sup> By saying that *uti possidetis* applies to internal administrative divisions, the Commission was establishing them as the new "selves" entitled to self-determination and territorial integrity. But denying self-determination to sub-units was not really sustainable on *legal* grounds. Nor necessarily, for that matter, on practical grounds either. Politicians, as one commentator remarked, "do not draw internal lines with the possibility of secession in mind."<sup>91</sup> And if the rationale behind insistence on the universal application of *uti possidetis* was the belief that greater chaos and fragmentation would thereby be averted, that assumption would seem to have been disproven by the evolution of the conflict in Yugoslavia. As David Owen, one of the Co-Chairmen of the Steering Committee of the Conference on the Former Yugoslavia, later wrote:

My view has always been that to have stuck unyieldingly to the internal boundaries of the six republics within the former Yugoslavia, . . . before there was any question of recognition of these republics, as being the boundaries for independent states, was a folly far greater than that of premature recognition itself. The refusal to make these borders negotiable greatly hampered the EC's attempt at crisis management in July and August 1991 and subsequently put all peacemaking from September 1991 onwards within a straitjacket that greatly inhibited compromises between the parties in dispute . . . . There can be no universal solution, but a blanket ban on any boundary changes, particu-

---

90. Kosovo, in the south of Serbia, has long been an area of particular volatility within the former Yugoslavia, with constant potential for major eruption in violence. Inhabited by an overwhelming Albanian Muslim majority (about ninety percent of the population), it is claimed by the Serbians as their historic medieval heartland and home to their most cherished religious symbols. In northern Serbia, Vojvodina contained a sizable minority (of about 10%) of ethnic Hungarians. Both areas enjoyed enhanced autonomy under the 1974 Constitution, but in 1989–90 Serbia moved to restrict and abolish their autonomous status. See LAPIDOTH, *supra* note 79, at 227 nn.7–8; Steinberg, *supra* note 12, at 31–32; Misha Glenny, *Bosnia II?*, N.Y. TIMES, Dec. 9, 1997, at A39.

91. Ratner, *supra* note 70, at 606.

larly to internal boundaries, is as hard to sustain as a belief that boundaries can be in a permanent state of flux.<sup>92</sup>

Rigid application of the *uti possidetis* principle to the boundaries among the existing republics may simply have paved the way to greater and more intense conflict and conflagration. Long-range stability may have been the casualty of a misguided extension of a principle which was of questionable legal validity to begin with.

#### VI. THE LONGER VIEW: EXTENSION AS DIMINUTION, DIMINUTION AS EXTENSION

From time to time, the ICJ has been accused of paying excessive deference to its own jurisprudence, repeating and applying in too facile and unthinking a manner its earlier pronouncements and formulas instead of bolstering its position with other legal sources.<sup>93</sup> As has been seen, the malady has spread to other tribunals too, with implications which are less than salutary for the future of international law and international adjudication. The Badinter Commission offers a good illustration of the practice and its destructive potential. In matters of competence, the Commission, like the ICJ, strove to cooperate maximally with the political organs seeking legal advice, by overlooking and overcoming the objections of states whose interests were factually, if not formally, being adjudicated. But the inappropriate employment of the Court's "duty-to-cooperate-barring-compelling-countervailing-reasons" doctrine was not cost-free. The consent of states is not an expendable item in international adjudication, for consent normally determines, ultimately, the acceptability and effectiveness of the pro-

---

92. OWEN, *supra* note 2, at 33–34. See also *id.* at 34–35 (citing the views of Milovan Djilas that the internal borders "were made quickly during a march, without the fullest consideration," that they were "often arbitrary and driven by political expediency," and that "they were never intended to be international boundaries"). In similar vein, Alexander Karageorgevitch (Crown Prince of Yugoslavia), writing in August 1992, observed:

The country's internal boundaries, arbitrarily drawn by Tito in 1945, punished the Serbs by leaving a third of them outside Serbia. Such borders are incompatible with democratic principle because they were never negotiated, let alone ratified by freely elected assemblies. A solution that would satisfy the aspirations of virtually all ethnic groups in the former Yugoslavia, except the largest—the almost 10 million Serbs—is bound to fail.

Alexander Karageorgevitch, *Punish Serbia's Rulers, Not Its People*, N.Y. TIMES, Aug. 11, 1992, at A19.

93. See, for example, the complaint of Peter H.F. Bekker, in *International Decisions*, 91 AM. J. INT'L L. 522 (1997), that in the *Oil Platforms* (Jurisdiction) case, the ICJ used its own precedents as an exclusive basis for finding law, without proffering other legal sources.

nouncements of the tribunal.<sup>94</sup> By its sleight-of-hand and confused reasoning on competence, the Commission discredited itself as a quasi-judicial body without making its opinions more acceptable to the injured party.

With respect to matters of substance, the Commission's broadening of the *uti possidetis* principle to embrace internal administrative borders, its misreading of the International Court's dictum in support, and its several other surprising assertions with respect to the status and content of the principle of self-determination and of minorities' rights—all could not but sow doubts as to the rigor with which the Commission was able or willing to apply legal rules. If the Commission was more a political/legal than a purely legal forum, however, why turn to it for legal advice? Why not leave matters exclusively in the hands of avowedly political actors?<sup>95</sup>

For those seeking to enhance the role of international adjudication in self-determination questions, the pronouncements of the Badinter Commission were surely uninspiring. A less expansive view by the Commission of its own competence and of substantive international law might well have instilled greater confidence, thereby registering a net gain in the quest for increased rationality and legal principle in world affairs.

---

94. See, for example, the observation of Leo Gross regarding the practical consequences of abandoning the former League requirement of consulting the Court only on the basis of unanimity: "The United Nations now . . . [had] at its disposal an effective procedure for requesting advisory opinions but not a procedure for effective advisory opinions." Gross, *supra* note 69, at 369.

95. The Commission has been faulted, *inter alia*, for legitimating prematurely the disintegration of Yugoslavia and the recognition of its republics as sovereign states—especially, and most fatefully, of Bosnia, thus paving the way for the subsequent imbroglio and inferno. See generally *supra* note 70, and, in particular, the statement of Szasz, and Badinter's own later assessment of the effect of early recognition of Bosnia. The conclusion in Hannum, *Self-Determination*, *supra* note 80, at 69, that "the EC and its Arbitration Commission appear to have based their judgments on geopolitical concerns and imaginary principles of international law, not on the unique situation in Yugoslavia," seems justified. See also *id.* (commenting on the harmful long-term implications of that part of the Commission's reasoning, which suggests that federal states are more vulnerable, legally, to secessionist demands than are unitary states). The upshot could be (and in the case of Mali, may already have been) "a reluctance by central authorities to grant constitutional devolution, if such devolution carries within it the seeds of a right to secession." Weller, *supra* note 2, at 606 & n. 215. For many groups, the ultimate result might well be a net diminution of true "self-determination."