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COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

SOCIETIES IN CONFLICT: THE CONTRIBUTION OF LAW AND DEMOCRACY TO CONFLICT RESOLUTION

SOCIETES EN CONFLIT : LA CONTRIBUTION DU DROIT ET DE LA DEMOCRATIE AU REGLEMENT DES CONFLITS

TABLE OF CONTENTS / TABLE DES MATIERES

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This publication contains the reports presented at the UniDem Seminar organised in Bled from 26 to 27 November 1999 by the European Commission for Democracy through law in co-operation with the the Ministry of Foreign Affairs of Slovenia.

Cet ouvrage contient les rapports présentés lors du Séminaire UniDem organisé à Bled du 26 au 27 novembre 1999 par la Commission européenne pour la démocratie par le droit en coopération avec le Ministère des Affaires Etrangères de la Slovénie.

OPENING SPEECH, Mr Vojko Volk
Secretary General of the Ministry of Foreign Affairs, Slovenia

I am honoured to open the seminar “Societies in Conflict – The Contribution of Law and Democracy to Conflict Resolution” and to welcome you on behalf of the Ministry of Foreign Affairs of the Republic of Slovenia at this seminar.

In the year of the 50th Anniversary of the establishment of the Council of Europe, The Ministry of Foreign Affairs of the Republic of Slovenia is pleased to host this seminar as one of Slovenia's contributions to this important anniversary. I would also like to use this opportunity to warmly thank the other co-organiser of the Seminar, namely the European

Commission for Democracy through Law, i.e. the Venice Commission, for organizing the seminar jointly with us.

The theme of the seminar is most relevant - it reminds us that half a century after the establishment of the oldest European organization European continent is far from being stable and peaceful. The agenda of our seminar addresses numerous recent or present-day conflicts or crisis situations, which threaten not only stability of these individual states but could also have wider potentially destabilization effects. It is therefore to be hoped that disussions during the next two days will offer both some insight into the root-causes of those conflicts as well as offer some guidance on how best to alleviate the suffering of those who are affected by them. And we need to continuously seek ways to better protect those most affected in societies in conflict, namely civilians and among them women and children as the ones who suffer most.

The validity of human rights within societies in conflict is by no way diminished. On the contrary, non-derrogable human rights as well as international humanitarian law norms need to be fully observed by all, including in conflict situations. The period after the Cold War has marked a progressive trend towards recognizing that gross and massive violations of human rights are no longer *domaine reservé*, instead they are of concern to international community. Slovenia welcomes this progressive trend towards internationalization of human rights.

The Council of Europe can contribute importantly to this evolving concept of human rights protection. The Council of Europe has at its disposal unique and highly developed human rights and minority-rights protection system. We see the present seminar as a further contribution to the effective functioning of this system at the regional level and equally so as its contribution of the Council of Europe to raising the human rights standards at the global, universal level.

The Council of Europe continues to stand as a permanent reminder that democracy is not a virtue attainable once and for good. Even democracies of long standing are not fully fledged. Equally as important, the Council of Europe represents an inexhaustible source of knowledge and experience for new members, knowledge that is necessary in their period of transition.

Slovenia, as one of the younger members of the Council of Europe – during this year we celebrated the 6th anniversary of our membership, is fully aware of this. Throughout the period of our membership we continuously strived to become a fully committed member of the Organization, involving in this process not only representatives of government but also numerous Slovene experts active in different fields of the Organization's activities. Let me reiterate, that Slovenia fully supports all efforts by the Council of Europe to safeguard and further develop its fundamental principles, namely the rule of law, democracy, human rights and cultural diversity.

In conclusion, on behalf of the Foreign Ministry I would like to wish all of you, distinguished rapporteurs and participants, fruitful discussions during the seminar. We are confident that seminar will offer some useful recommendations also with regard to relevant future endeavors. In particular, part of your discussions will undoubtedly be pertinent already for the up-coming International Conference on the Contribution of Constitutional Arrangements to the Stability of South Eastern Europe, organized by the Slovene Foreign Ministry, Faculty of Law in Ljubljana and Venice Commission that will take place in Brdo, Slovenia in the beginning of next week.

OPENING SPEECH, Mr Serhiy Holovaty
Member of Parliament, President of Ukranian Legal Foundation,
Vice-President of the Venice Commission

I have the privilege to open this seminar on behalf of the co-organiser, the Venice Commission, which proposed to the Slovenian authorities to jointly hold such a seminar. It is however not the Venice Commission itself which first had the idea for such a seminar but no lesser person than the former Secretary General of the Council of Europe, Mr Tarschys. When Mr Tarschys addressed our Commission in Venice, he proposed that we should look from a legal point of view at the problems confronting those societies where transition has not progressed smoothly but has been combined with or led to violent conflict. Our Commission is actively involved in several of these conflict areas such as Kosovo, Bosnia and Albania and we therefore very much welcomed this proposal. Several of these conflict areas are not far from here and Slovenia has had close historical ties with them. It seems therefore an excellent idea to hold such a seminar in Slovenia and we were extremely pleased when the Slovenian government kindly offered to co-organise this seminar as part of the Slovenian contribution to the 50th anniversary of the Council of Europe.

Our wholehearted thanks go to the Slovenian Ministry for Foreign Affairs which has with what I would consider as typical Slovenian efficiency organised this seminar here in Slovenia and which offers us generous hospitality. In this context I would also like to pay tribute to our Slovenian colleague, Mr Jambrek, who has been instrumental in bringing us together here in Bled.

Since we meet here in Slovenia, it is only natural that the main focus of our debates will be on the situation in South Eastern Europe. This will also seem obvious to most people from Western Europe. The conflicts arising from the breakdown of former Yugoslavia have more than any others been at the centre of interest of the international community and have led to massive outside intervention, culminating in the NATO air-strikes against Serbia. Nevertheless, as somebody coming from the area of the former Soviet Union, I would like to draw your attention to the fact that the same type of conflicts arises in the CIS countries. At this very time we have an open military conflict in Chechnya. The Nagorno Karabakh conflict has already cost many lives, some of them this very year. The conflicts in Abkhasia, South Ossetia and Crimea have been more low-key but nevertheless extremely serious and at least the problem of Abkhasia is far from being solved. To sum up, the falling apart of the former Soviet Union has brought about at least as many conflicts as the situation in former Yugoslavia.

This clearly shows that the stability both regions seemed to enjoy during the Communist period was an illusion. Ethnic and other conflicts were hidden under the surface, they were temporarily suppressed but not solved. As soon as the mechanisms of oppression of the old system no longer worked, conflicts erupted of the existence of which few people had been aware. It is our task now to do better and to bring about durable solutions which are not simply based on force but on the acceptance of the people concerned.

This brings me to the purpose of this seminar. It is obvious that we will not be able to find solutions to all these conflicts in two days and anyway it is not up to us to impose any solutions anywhere. What we as lawyers however can do is to draw attention to the legal

dimension of these conflicts. While each conflict has its unique specific features, many elements are also common. Legal ingenuity can adapt the various types of solution to individual cases but the number of possible models is finite. Solutions found for one type of conflict may well be relevant for other conflicts. This is the reason why we will also be speaking about a conflict in a very different part of Europe, in Northern Ireland, where there is now hope for a lasting peace. What we will be doing is to try to have a comparative approach, enabling us to learn from experience, and to show which solutions we lawyers can offer to the politicians as tools for solving conflicts. We cannot do more than offer tools since the final decisions are up to the politicians.

But if we arrive at identifying a number of elements which will be helpful for the settlement of such conflicts or even for the prevention of future conflicts, we will have achieved quite something. The first condition will be the careful analysis of the existing conflicts and the consideration of the attempts to solve them. This will be the difficult task of our rapporteurs and I do not wish to take more of their time.

I would therefore like to conclude by expressing my conviction that the discussions at the seminar will not only be most interesting but will also make a valuable contribution to the future work of the Venice Commission and of other international bodies.

INDIVIDUAL AND COLLECTIVE SECURITY IN THE BALKANS, Mr Peter Jambrek
Former Judge at the European Court of Human Rights
and Former President of the Constitutional Court of Slovenia, Member of the Venice Commission

LIST OF CONTENTS FOR THE REPORT

The main problem: gross and massive human suffering

Labelling a specific immediate cause of structural violence:
civil war or interstate aggression?

Historic origins of ethnopolitical and state structures of the Balkans
and the present triple crisis of modernity, nationality and democracy

Dead ends and exits from the Balkan imbroglio

The contribution of the European Commission for Democracy through Law

International University for South Eastern Europe:
new centre of academic excellence in the region

A new type of international organisation:
Alliance of Balkan states and communities

The present introductory report to the UniDem seminar entitled "Societies in Conflict – The Contribution of Law and Democracy to Conflict Resolution" was aimed at addressing the general theme of "Democracy through law in societies in conflict". In the course of its writing, other emphases were included, while some aspects were either narrowed down or omitted. The notions of "democracy", "human rights" and "the rule of law" appeared rather general in view of the recent waves of violent conflict sweeping through several European regions, resulting in prolonged humanitarian crises and disasters. The security of individuals and institutional survival therefore seemed more relevant concerns in the context of societal conflict. Next, conflicts of the Balkan or Caucasian kind can hardly be resolved by "normal" legal means, short of international intervention by force or imposed order. Inter arma silent *(also)* leges, *not only* Musae. *Therefore, the usual legal tradition of settling disputes should give way to conflict prevention and conflict resolution approaches. The recent emphasis on regional analyses of structural violence, introduced by the Slovenian venue of the present debates, suggested the specific focus on the Balkans, the (in)famous territorial label with its well known ethnopolitical connotations. Last but not least, the content of the issues discussed should also point to some region-specific solutions to the main problem. What kind of democracy, what kind of law, and what kind of transnational instruments appear suited to the ethnopolitical landscape of the Balkans, at a specific turning point in its millenium-long, conflict-ridden history?*

The main problem: gross and massive human suffering

Communist regimes in the Balkans prior to the democratic revolutions after the year 1989 engaged in gross, massive and systematic violations of human rights for over forty years. They were however cautious to act as much as possible under the veil of secrecy and propaganda - labour camps operated in remote places, arrests and arbitrary killings took place during the night, party justice was covered by formal legality, etc. In addition, the Balkan states and their governments were stable and recognised as legitimate by all major actors of the international public order.

Things have changed radically since the fall of the Berlin Wall. Yugoslavia, the most complicated of all Balkan states, imploded loudly and visibly and was in consequence dismembered. The long-lasting and endemic structural violence of other Balkan states that remained within set borders also reached the state of humanitarian disasters, which became apparent to world audiences through media exposure. For various reasons, foreign governments and organisations were pushed to react – to prevent the spilling of the violence across state and regional borders, to bring back economic and political stability, to diminish human sufferening, to appease international and domestic public opinion, and to defend major powers' security concerns related to the Balkans as a European border region.

At this point, a short account on the notion of "structural violence" is needed. The term was borrowed from H.J. Geiger[1], and applied from health research on racial discrimination to broader issues of gross, structural and large-scale human rights violation. As such, structural violence does not only refer to violence as the use of physical force by individuals to cause injury, but also to pervasive personal and institutional actions and policies, which, by intent or omission, result in predictable harm to and violation of human rights and fundamental

[1] *H. Jack Geiger, "Inequity as Violence: Race, Health and Human Rights in the United States", Health and Human Rights (Harvard School of Public Health), Vol. 2, No. 3.*

freedoms of large populations. Structural violence is entrenched in social fabrics, political economy and government structure. It is manifest in a wide variety of social policies and legislative actions.[2] The attribute of "structural" points to the origins of the violence, and "large-scale" to the scope of the phenomenon of violence/violation. The presence of determinants of systematic violation as a rule results in massive, repetitive and persistent injuries to individual human rights.

The attribute of "gross"[3] denotes another dimension of violation: its seriousness in terms of the degree of human suffering inflicted. There are tragic instances where both dimensions occur. These are practices of torture, summary, arbitrary and unlawful killings or executions, genocide, slavery-like practices (forced labour, concentration camps), disappearances, arbitrary or prolonged detention, destruction of homes, property and villages ("ethnic cleansing", forced evictions of populations), mass rapings and systematic discrimination in the enjoyment of fundamental political rights. Such gross, structural and large-scale violations may be termed humanitarian catastrophies, disasters and emergencies. They are concomitant to domestic (civil war, rebellion, terrorism) and international armed conflict (international war), and to ethnopolitical, intergroup or intercommunal strife. Human rights crises are especially aggravated and prolonged where they occur within a totalitarian or authoritarian political culture.

Structural, large-scale and gross violations of human rights are not phenomena of the same kind. Human rights abuses and the related events, situations and claims might be termed "structural" or "systematic" when they are embedded in social fabrics, political economy and government practices, are implemented by social policies and legislative acton or are determined by major forms of group discrimination. The amount of structural violation, counted in terms of the number of respective claims, cases, or breaches, results in the "scale" or proportion of actual harm inflicted. Although structural violation tends to be large in scale, there is no conceptual identity between the two dimensions.

The category of "gross" violation is equally distinct. It denotes situations of major, absolute, uniquely disproportional, serious, aggravated, excessive or particularly offensive acts against protected human rights. Gross violations may also vary in scale, i.e. they may occur in rare cases or they may be persistent. They may be produced by structural factors or may represent a chance and isolated event.

There are tragic situations where social determinants generate gross violations on a large scale, giving rise to a human rights emergency. Even emergencies may be persistent, as experienced in cases of the three twentieth-century systems of total control and repression of individual freedom and human dignity, i.e. by national socialism, communism and apartheid, all three equally approaching the notion of the absolute evil. Another kind of modern human rights disasters are crimes against the peace and security of humankind.

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[2] *Ibid., p.8.*

[3] *For the notion of "gross" see also Aisling Reidy, Françoise Hampson and Kevin Boyle, "Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey", Netherlands Quarterly of Human Rights, Vol. 15, No. 2 (1997); Menno T. Kamminga, "Is the European Convention for Human Rights sufficiently equipped to cope with gross and systematic violations?", Netherlands Quarterly of Human Rights, Vol. 12, No. 2 (1994); "Summary" and "Conclusions" of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Netherlands Institute of Human Rights: SIM, Special No. 12 (1992).*

Large-scale violation as a rule coincides with domestic legislative and administrative practices. Institutional violation is not only produced by official policies, but also by the *Drittwirkung* of non-governmental or para-state organisations.[4] Some of the harm-inflicting practices represent chance-effects of spontaneous action distinct from the intentional, public, and planned official actions. In between both kinds of violation may be placed intentional and persistent, albeit covert official practices, such as torture, disappearances and systematic discrimination. Structural determinants produce repetitive, continuous, persistent violations. Their occurrence depends upon the dynamics of the producer and proceeds from the incipient event to the full outbreak of a human rights catastrophe. Structural and massive violations may be partial, limited to a distinct sector or region, or total and nation-wide.

Communism, for example, achieved its goal of total control by mass intimidation, institutional repression and indoctrination. In its more developed stage it demonstrated the evolution from mass killings to mass surveillance,[5] and in its fully fledged form of an unchallenged power of party bureaucrats it even engaged in the hypocrisy of a formal domestic recognition of international human rights. Most recently, in two European border regions - the Caucasus and the Balkans - virtually all kinds of determinants of human insecurity were co-operating: the lasting history of violent conflict, primordial community bonds on a low and primitive level of social organisation, disintegration of the communist system of total and authoritarian control, the ensuing institutional decay, increasing interethnic hostility, and military aggression directed by the still powerful remaining centres of Moscow's and Belgrade's imperial powers against various kinds of centrifugal forces.

Remedies for individual victims of human rights crises in the aforementioned cases may aptly be compared with the capacities of an emergency health clinic. To use the medical analogy, those acting within the domestic and international mechanisms for the protection of human rights function "for the most part like doctors in the emergency room, waiting for the next victims to be wheeled in and then doing the best we can to prevent these patients from dying".[6] Solving individual cases is increasingly seen as too little and too late to be an effective crisis response to human rights disasters on a large scale. In addition to the reactive, the proactive role of the human rights' protection mechanisms is therefore increasingly salient.[7] Like the health epidemic, the evolution of a humanitarian emergency may best be controlled in the beginning. Liberal reformers try to reduce injustice by responding to

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[4] *Cazim Sadikovic lists, on the data available, the following paramilitary "non-official" armed formations and groups from the territory of Serbia and Montenegro, which participated in the aggression and crimes against people of Bosnia and Herzegovina: "Arkanovci", "Seseljevci", "Beli orlovi", the "Royalists", the "Serbian Guard", "Vukovarci", "Marticevci", the Serbian and the Montenegro pro-chetnic "Volunteers". See: Cazim Sadikovic, Human Rights Without Protection, Sarajevo: Pravni centar – Fond otvoreno društvo BiH, 1999, p.123, fn. 4.*

[5] *"Human rights abuses in state-party systems in more recent years took the form of mass surveillance, instead of mass killings…", in Gabor Halmai, Laszlo Majtenyi, and Kim Lane Scheppele, "Who is an Agent and what can a Constitutional Court do with him?" East European Human Rights Review (Den Bosch, the Netherlands), Vol. 1, No. 1 (1995), p. 115.*

[6] *Morton Winston, "The Prevention of Institutionalized Inter-group Violence", Health and Human Rights (Harvard School of Public Health), Vol.2, No.3, p. 16.*

[7] *The reactive and the proactive role of the European Court of Human Rights in Strasbourg, including the preventative, hidden and unintended functions of dealing with individual human rights complaints, was discussed in: Peter Jambrek, "Individual Complaints v. Structural Violence", In our hands – The effectiveness of human rights protection 50 years after the Universal Declaration, Proceedings of the European regional colloquy organised by the Council of Europe, Strasbourg: Council of Europe Publishing, 1998, pp.75-82.*

individual claims, while the other strategy is to help individuals by reducing injustice through institutional and structural reform. But first we will take a view of the determinants of the present crisis in the Balkans.

Labelling a specific immediate cause of structural violence : civil war or interstate aggression?

The relative stability of the Balkan states until the collapse of their communist regimes depended upon the principle of exclusion of large segments of society from meaningful public involvement. Intellectuals were branded as elitist, managers as privilege-seeking, religious feelings were considered reactionary, loyalty to national identities was labelled separatist, irredentist or counter-revolutionary, while class interests were considered perfectly represented by the ruling proletarian party. Within the ensuing political vacuum the ruling elite had ample opportunities to manipulate fictitious consent, in most cases even without the need for a resort to force.

Whenever and wherever one or the other exclusionary principle was lifted, allowing for a more relaxed expression of popular interests and for grass-roots participation, the artificial tranquillity of authoritarian rule was shaken. Regression to the one-party hegemony was promptly justified by law and order concerns, "to prevent anarchy and chaos".

It might appear in retrospect and in many cases that the apologists of authoritarian regimes were justified, considering the scale of human suffering experienced during the nineties throughout the region. It is our aim to show that, on the contrary, chaos, violent conflict and human rights abuses were not inevitable consequences of the disintegration of the former communist regimes, and of the Soviet and the Yugoslavian empires in particular. The new Baltic democracies[8] and Slovenia represent examples of relatively harmless escapes – but in both cases the central military acted with restraint. In the regions where most pain was inflicted, most notably in Bosnia and Herzegovina and in Kosovo,[9] the immediate cause of the humanitarian crisis, we claim, was not "civil war" but military and paramilitary aggression.

This thesis was also tested, documented and defended by Sadiković: "The Serbian invasion of Bosnia and Herzegovina, first of all, was a real, classic aggression (or attack) since it had all the features provided in the official definition of aggression…(It) was carried out in several ways, the most striking one being direct engagement of regular units of the Yugoslav People's Army, those already stationed in Bosnia and Herzegovina as well as those which continued to arrive from Serbia throughout the war. However, a particular feature of the aggression against Bosnia and Herzegovina was a large presence of paramilitary formations – probably in a number never recorded in modern warfare history…"[10] Sadiković points to the efforts of the ex-Yugoslavian regime to create the impression that violent conflict in Bosnia and Herzegovina did not amount to an organised aggression, but to a civil war.

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[8] *See, e.g., Gianni Bonvicini et al. (eds.), Preventing Violent Conflict, Baden-Baden: Nomos Verlagsgesellschaft, 1998 (pp. 161-2 ff): "To what extent, in terms of conflict prevention, can the case of the Baltic States be called a success story? If we accept the widely-held understanding that differences, divergence of interests, values and controversy are not negative per se, but rather the very essence of politics, then when we say 'prevention of conflict' we actually mean the 'prevention of violent conflict', not prevention of all contrasts."*

[9] *There are comparable cases from the Caucasus region, e.g. Abkhazia and South Ossetia within Georgia, and Chechnya within the Russian Federation.*

[10] *Human Rights Without Protection, 1999.*

We have comparable reports from other places. Given the Baltic tradition of non-violent resolution of inter-ethnic conflicts, it is significant that since the Gorbachev era, no one has been killed in the region for ethnic or political reasons, except by Soviet repressive forces, as part of the Soviet Union's ill-fated crackdowns in the Baltics in January and July 1991.[11] The Russian forces' involvement in hostilities in the Transdniestrian area of Moldova only contributed to the problems.[12] And even the continued presence of two Russian brigades, less than 3000 men, in Chechnya, after Moscow had lost the war, became a major irritant.[13]

To the degree that the above central military aggression thesis is acceptable, the first and major precondition for conflict prevention (CP) and conflict resolution (CR) is the unconditional and unilateral withdrawal of the military and paramilitary forces controlled by the central authority from an area whose population either seeks more autonomy or strives for independence through self-determination. The only timely and efficient international intervention would in that case amount to enforcement of the adequate balance of military power between the disintegrating central state and its province. In other words, the NATO Alliance's military and political intervention in Yugoslavia was simply "too late". A well advised and well targeted preventive action against selected capabilities of the Yugoslav People's Army from June 1991 onwards would have accomplished more with smaller military deployment. It would also indirectly have prevented the ensuing humanitarian disasters, and reduced the costs of post-conflictual relief action.[14]

At this point, issue may be taken with a specific proposition of the general "conflict prevention" and "conflict resolution (CP, CR) doctrine, namely that international actors must balance between doing "too little, too late" and acting "too soon, too much". If a major power or international alliance acted "too late" because of its own domestic concerns or because of lack of strategic insight, than such factors must be clearly admitted. Waiting until a latent conflict has taken its fully fledged and violent form in order to assess the relative strength of the opponents may serve as a convenient rationalisation of what might more accurately be characterised as the constraining influence of domestic politics upon a timely CP and/or CR action.

We oppose in even stronger terms another specific "very early" conflict prevention strategy, that is, of preserving the conservative, old regime in power. Again, there are CP and CR theorists who seem to deplore the failure to keep alive the former communist Yugoslavia, by, for example, injecting more money and more democracy into its "socialism with a human face". We have shown earlier, elsewhere, that the Yugoslav *quid pro quo* of the eighties, based upon the marketisation of a socialised economy and a centralisation of the federal

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[11] *See The Baltic Independent, 16-22 August 1991, p.1, quoted in Preventing Violent Conflict, p.162, fn.71.*

[12] *Reported in Preventing Violent Conflict, p. 236.*

[13] *Ibid., p. 231, and fn. 6 on same page.*

[14] *Michael Mandelbaum described NATO's war against Yugoslavia as "a perfect failure". Its consequences were, in the author's view, just the opposite of what NATO intended: suffering Kosovar civilians, regional instability, and a fuming Russia and China. Michael Mandelbaum, "A Perfect Failure", Foreign Affairs, September/October 1999, pp.2-8.*

government, represented a contradiction in terms, as are such notions as a liberal bureaucracy or authoritarian liberalism.[15]

The next issues that must be tackled, after the inauguration of elementary democratic institutions in a former communist state, and after the voluntary or forced withdrawal of the central military from the territory of an ethnic or regional community, are therefore institution building and legal engineering consistent with the demands for a stable, plural and open society, based upon the rule of law and respect for human rights. But in order to do the job adequately, the elements on which social plurality is based should first be examined.

Historical origins of ethnopolitical and state structures of the Balkans and the present triple crisis of modernity, nationality and democracy

The CP and CR specialists and foreign policy advisers who apply their theories to a specific area in trouble usually have little prior knowledge of the relevant "deep structures", lack time to get aquainted with them from area studies, are constrained by ulterior motives of their political superiors, or simply consider social structural factors irrelevant. Local specialists may on the other hand have problems in focussing on pertinent aspects of the crisis and detaching themselves from the scene of the conflict. There are some exceptions to the two kinds, worth noting.

One classic example is the Marquis de Custine's *Russia in 1839*, first published in Paris in 1843,[16] and followed by George F. Kennan's learned commentary of the book, published in 1971.[17] Custine, the visitor to Russia, seemed to discover, with his knowledge of Russians gained from his numerous daily contacts with common people and the nobility, the *arrière-pensée* behind all Russian policy, that is "conquest as a concealment and expiation of internal failure". The thought of conquest he described as "the secret life of Russia". Kennan of course extended Custine's journeys "to and for our times", comparing, for example the Christian Orthodoxy of the Eastern Rite with the secular orthdoxy called Marxism-Leninism, pointing to the "Bolshevik fanaticism, intolerance, and self-righteousness" which "would evoke these archaic trends to life and would enthrone them again, as fundamental principles of Russian government".[18]

Another famous author was M. Edith Durham, fellow of the Royal Anthropological Institute, who travelled extensively throughout the Balkans before the First World War. Durham titled her comprehensive observations *Some Tribal Origins, Laws and Customs of the Balkans.*[19] There she described, *inter alia*, the historical origins and present day social and family structures, social psychology and local economy of the Serb, Montenegro, Bosnian and Albanian tribes she visited. Descriptions are given of their tribal codes and judiciary, of the ritual relationships of blood-brotherhood, cannibalism, the blood feud, blood offerings and

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[15] See Peter Jambrek and Dimitrij Rupel, "Declaration of Slovenian Self-Determination", in Samostojna Slovenia, Ljubljana: Nova revija, March 1990, pp.612-615.

[16] The Marquis de Custine's Journey for Our Time, Phillis Penn Kohler, ed., New York: Pellegrini and Cudahy, 1951, pp. 3-338.

[17] George F. Kennan, The Marquis de Custine and his Russia in 1839, Princeton: Princeton University Press, 1971.

[18] Kennan, The Marquis de Custine, 1971, p. 130.

[19] London: George Allen and Unwin Ltd., 1928.

head-hunting. The book makes fascinating reading, maybe in view of the fact that some of the most unpleasant practices were held as normal only two generations ago, giving rise to some questions about the formidable present-day challenges to modernity in Balkan places.

Some may enjoy the essays of Professor Jovan Cvijić, the well known Serbian geographer and ethnologist, whose collection was first published in Belgrade in 1921.[20] Cvijić, like Custine and Durham, studied people in their homes by travelling among them, and observed their politics for over thirty years. In the Dinaric area, he noted, for example, that the most illuminating among socio-psychological divisions are those that run from North to South. The main distinction among the Balkan peoples he attributed to their specific modes of food production, determined by the ecology and geography of local communities. Thus, the agricultural people inhabiting the river valleys and large plains north of the Danube river belong to the Pannonic types, and pastoral, nomadic people of the Dinara montains belong to the Dinaric types. These divisions cut across wider ethnic groupings such as Serb, Croat, Albanian, Turk and others, and also run across the three main religious affiliations of Catholicism, Orthodoxy and Islam.

Such studies may take us to even longer journeys into the past of the Balkans, in search of some enduring principles of social division. As a matter of fact, the only firm geopolitical dividing line across the Balkans appears to be the one that was drawn by the Roman Emperor Diocletianus, who by the end of the third century A.D. had divided the Balkan Peninsula into its northwestern province of Pannonia and the southeastern province of Moesiae. The borderline between both provinces was drawn from the Adriatic coast close to the present-day state border between Albania and Montenegro up to the Drina river, and followed the Drina up to the Danube river. Emperor Teodosius a century later formally divided the Roman Empire into its Western and Eastern part, following the set provincial borders. The enforced imperial border line was even older and reached back into the ancient times of Greek colonisation of the Eastern Adriatic cost.[21] It remained effective for over a millenium, until the fall of the last Byzantine Emperor Constantinius in 1453, after the conquest of Constantinople by the Turkish armies of Mohamed the Second. Almost five centuries thereafter the Balkans represented a vast and complicated battlefield where the two Empires of the Otoman and the Hapsburg dynasties met and fought.

The ancient Balkan divide became the state border again after the Berlin Congress in 1878 when Bosnia and Herzegovina fell under the Austro-Hungarian administration. That arrangement lasted until the Versailles Treaty between the Allies and Germany in 1919-1920 when a completely new state entity of Yugoslavia was created, ignoring the millenia-old divisions across the Balkan plural societies. The seven decades of exisentence of the new state, first led by the royal dictatorship of the Karadzordzević family and then by the communist dictatorship of Josip Broz-Tito represented a rather short episode in the two thousand-year long history of the Balkan states. In any case, the Dayton Agreements signed on 14 December, 1995 once again paid due respect to the old dividing line along the Drina river by recognising as an international border the previous administrative borders between the two Yugoslav republics of Bosnia and Herzegovina and Serbia.

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[20] Jovan Cvijic, Govori i Clanci (Speeches and Articles), 1921. Several essays from the Serbian printed book were published in The Slavonic Review.

[21] The Diocletianus-Teodosius divide started in the South close to the northernmost Greek colony of Epidamnus on the Adriatic cost and close to the present-day town of Shkoder.

The Balkans region is – similarly to the Caucasus – a very delicately structured agglomeration of territorial communities which are distinguished by religion, language, custom and morality, social psychology and history. The main concerns of the Balkan communities are, as everywhere else in the world, subsistence and security. A Balkan urban community is, in the primordial sense, organised much like a Chicago suburb: Gerald Suttles noted that people remain engrossed in their provincial and rather distinct moral worlds which provide for basic trustworthiness and security. They constantly fight dangers of ethnic invasion, transiency and destruction. Communities rest upon the principle of ordered segmentation, and their members

> are impelled by the basic task of finding an order within which they can secure themselves against common apprehensions… Within limits, the residents possess a way of gaining associates, avoiding enemies, and establishing each others' intentions. In view of the difficulties encountered, the provincialism of the … area has provided a decent world within which people can live.[22]

For the American suburb, as described by the Chicago School of Sociology and for Balkan communities alike, micro-politics has always been used as a means of defence against the outside world. It should be added that at least for the Balkan communities, macro-politics on the other hand as a rule represented an alien and repressive mechanism. The Balkan states as a rule ignored the principles of ethnic sharing of state power and of minority rights. It may safely be assumed that states were rather arbitrary mechanisms of power for the distribution of privileges among the ruling elites. An individual person's ethnic identity coincided only exceptionally with that of the rulers. What can be done in this respect to enforce the democratic principle?

We proceed from an informed assumption that Balkan states represent archetypal plural societies, "sharply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate subsocieties with their own political parties, interest groups, and media of communication." Therefore, in the typical socially plural Balkan state, "the flexibility necessary for majoritarian democracy is absent. Under these conditions, majority rule is not only undemocratic, but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and will lose their allegiance to the regime… What these societies need is a democratic regime that emphasises consensus instead of opposition, that includes rather than excludes".[23] The consociational model of democracy, we assume, therefore represents an answer to the need to accomodate the disruptive dividing lines inherent in the plural states of the Balkans, and in the transnational system of the Balkans itself.[24]

Considering the various determinants of the Balkan divisions, several partly overlapping and partly distinct dividing lines emerge. Each of the three main religions unites a number of

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[22] *Gerald D. Suttles, The Social Order of the Slum: Ethnicity and Territory in the Inner City, Chicago: The University of Chicago Press, 1968, pp.233-4.*

[23] *Arendt Lijphart, Democracies, New Haven: Yale University Press, 1984, pp. 22-23.*

[24] *Very few of the Balkan states already are or could be organised as "nation-states" where one "nation" or "ethnicity" comprises a sizable majority of the population. "Ethnic cleansing" is an obvious strategy to provide ethnic infra-structure for such a state. The strategy is not only abhorrent, it is also obviously impossible to implement on any scale, large or small. So is the irredentist strategy of assembling all members of a nation in one state, regardless of the ensuing ethnic composition of such a state. For the Serbian attempt to create the Greater Serbia see the excellent analysis of Cazim Sadikovic in Human Rights Without Protection, 1999.*

ethnic communities. Nationalities are split into several region-specific and state-specific units, e.g. the Kosovar Albanians, the coastal Catholic and the Muslim Albanians of their nation-state, the Croats from Herzegovina and the Serbs from Bosnia, from Montenegro and from Srpska Krajina in Croatia, the Turks from Turkey, from Bosnia and Herzegovina or from Bulgaria, etc.

Some members of ethnic groups are concentrated in distinct territories, where they tend to preserve their provincial culture, or are dispersed across the territory of one or several Balkan states. The former may be considered relatively insulated from cross-cultural influences, while the latter tend to assimilate themselves into the surrounding dominant culture.

Each of the Balkan states may further be considered to occupy a distinct position according to the scale of its ethnic congruency, "congruent states" being composed of territorial units with a social and cultural character that is similar in each of the units and in the state as a whole. In a perfectly congruent state system, the component units are therefore miniature reflections of the main aspects of the whole state system,[25] and vice versa.

Another salient dividing line within and across Balkan states is the notorious north-west / south-east dimension of economic development and performance. In this respect a ratio of 5:1 existed before 1990 between the richest and poorest extremes of the former Yugoslavia (Slovenia and Kosovo), which has no doubt widened in the course of time. Even among the two present Yugoslav federal units there exist, as measured by standards of developed economies, enormous differences: an average nett monthly income in Serbia is nowadays 80 DEM and in Montenegro 160 DEM.[26]

Dead ends and exits from the Balkan imbroglio

Even cases of violent conflict, which appear isolated, actually involve wider regional interests. Take Northern Ireland (involving the UK and the state of Ireland), the divided Cyprus case (involving Greece and Turkey), South-Eastern Turkey (a part of the inter-state Kurdish ethnic territory, involving several Middle Eastern states), or South Tyrol (involving Italy and Austria). There are regions, however, which present a patchwork of territorial communities with wide-ranging cultural distinctions, such as the Balkans and the Caucasus,[27] giving rise to various chains and sequences of interdependent conflicts. It was recognised only after a series of region-specific conflicts had arisen that a case-by-case approach to CP and CR does not pay.

The Balkans have been identified at least since the Balkan Wars and the start of the First World War as the "tinder-box" or "powder-keg" of Europe.[28] Therefore, the Balkan states'

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[25] The concept of congruency was adapted from Lijphart in his Democracies, and from Tarlton's definition of "symmetry" as an element of federalism; Charles D. Tarlton, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," Journal of Politics 27, No. 4, November 1965, p. 868.

[26] The same issues were discussed in another framework and more extensively by the present author in: "Human Rights in a Multiethnic State: The Case of Yugoslavia", in Human Rights and Security, 1991.

[27] "The Caucasus is a jigsaw puzzle of Soviet successor states containing about forty ethnic groups, each with a population of more than 10,000, and many smaller ones." Gevork Ter-Gabrielian, "Strategies in Ethnic Conflict and a Regional Cooperation Scheme for the Caucasus", in Preventing Violent Conflict, 1998, p. 291.

[28] Cf., O. Green, "The Balkans in a Divided Europe," in M. Milivojevic, J.B. Allcock and P. Maurer, eds., Yugoslavia's Security Dilemmas, Oxford: Berg, 1988, p. 1, pp. 256-260.

security and the security of the whole area must be seen within the context of European and global security issues. The overall strategic balance may be influenced even by comparatively localised and small-scale developments such as intra-state disturbances, a secessionist or irredentist movement, the collapse of the central authority of the state, the ensuing civil war, by mass rebellion or a combination of such events. The Balkans during the nineties represent such a blend, given that latent interethnic conflicts first evolved into crypto-secessionist movements, were soon countered by irredentist aggression, and became inter-state wars after the formal recognition of the new state following the dissolution of the former multiethnic entity – so that distinctions between intra-state and international wars became a matter of degree within rapid time-sequence.

CP and CR measures are therefore equally motivated by individual states' security, by regional and global security concerns – and by human rights concerns. In the eighties, inquiries into the relationship between security and human rights were of very recent vintage. With the advent of the *annus mirabilis* of 1989 and the upheaval in the communist world, the need for new thinking was accentuated.[29] And an even more recent commitment to an array of remedial actions was termed "human security".[30]

We therefore suggest that CP and CR measures be designed at the regional, state and local levels of conflict, and applied so that all three levels are taken as inter-dependent. It should on the other hand be considered that South-Eastern Europe, and the Balkans in particular, is not only "balkanised", representing (similarly to the Caucasus) a jigsaw of cross-border ethnic groups, which have declared their discontent in one way or another. It is also a profoundly divided region, whose major parts call for different treatment in terms of institution building and transnational security alliances – given the centrifugal forces that tear major segments (ethnic, territorial, state) of the region apart and in one or the other global direction: towards the Catholic north-west, the Orthodox east, or the Islamic centres of spiritual and financial power. Here I recall the everlasting and ever-present south-north divide from the Adriatic, along the Drina and to the Danube river,[31] the Dinaric and Pannonian ecological and socio-psychological identitities, and the history of Balkan state formation.

The international community (composed of superpowers, strong neighbouring states and international alliances) has throughout Balkan history been able to influence the processes of state formation and state dissolution. Such pressures were as a rule exerted as co-determinants of local and global wars and internal turmoil. The same observation also holds true for the

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[29] See Vojtech Mastny and Jan Zielonka (eds.), Human Rights and Security, Boulder: Westview Press, 1991, passim.

[30] A number of concerned governments declared "a partnership for human security" in Lysoen (Norway), on 20 May 1999. Their agenda for 2000 focuses on antipersonnel landmines, small arms, children in armed conflicts, safety of humanitarian personnel, conflict prevention, international criminal justice and transnational organised crime.

[31] Elsewhere I investigated the Balkan divide in the context of the overall eastern borderline of central Europe, which stretches from the Finnish Bay in the north along the eastern borders of Estonia, Latvia, Lithuania, Poland, the Czech and Slovak republics, Hungary, Croatia and Bosnia down to the eastern Adriatic at the northern Albanian border with Montenegro. This north-south divide between central and eastern parts of the continent was by-and-large established in the fourteenth century along the eastern borders of the Teutonic Order and of Poland in the north, and of the Austro-Hungarian Empire in the middle and in the south. See Peter Jambrek, "Mesto Slovenije v Evropi", in Slovenija v novi Evropi, Celje: Mohorjeva družba, 1996, pp.18-40. There the north-south European divide between central and eastern Europe was suggested as the most likely and "natural" Schengen border of the enlarged European Community for some time in the future.

recent wave of reconstruction of international and internal administrative borders of and among the Balkan states by, for example, the Dayton accords, the Kosovo intervention and autonomy or independence asserted by Montenegro.

The Stability Pact for South-Eastern Europe represents a major, concerted effort to combine all these pressures into an encompassing framework.[32] The June 1999 finalised agreement appears to reflect mainly NATO's and the European Union's security concerns, and thus provides for a monitoring umbrella mechanism, designed to set in motion the CP and CR processes and measures at the diposal of various international organisations - military, political, financial, etc. - to pacify the unruly region. The Pact itself will be analysed and discussed elsewhere.[33] I wish to conclude this paper by a brief discussion of three other topics, which may or may not be of relevance for a broader framework of the Stability Pact for South-Eastern Europe as well: (1) the contribution of the Venice Commission in consulting on new constitutional and other normative designs and in the area of institution building, including the judiciary and government administration; (2) the proposal to establish a regional network of academic institutions for graduate studies of law, government and business administration, economics and European integration – to provide for continued, long-term university training and education for the prospective elites of the Balkan states; and (3) the idea to create in the Balkans a new type of international organisation, along the lines already suggested by Gevork Ter-Gabrielian for the Caucasus.[34]

The contribution of the European Commision for Democracy through Law

The European Commission for Democracy through Law ("Venice Commission"), composed of independent experts from Council of Europe member states, no doubt represents an ideal international agency for legal and institutional consulting. It holds simultaneously high academic, political and judicial standing. It is independent of the Balkan states' governments. It does not dispose of military, financial and political means to exert pressure on leadership of an individual country, save to influence its actors by means of persuasion, advice, comparative study, identification of European legal standards, political impartiality and the personal credibility of its experts.

The Venice Commission has produced a number of general and country-specific reports, studies and expert opinions related to virtually all aspects of constitutional development of the

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[32] In this paper I stick to the established geo-political name of the "Balkans", instead of the somewhat euphemistic "South-Eastern Europe", which is – probably on purpose – stripped of its historic stereotyping, implying turmoil, security hazards, backwardness, irrational political divisions and the ensuing aggression; in short, a European region which hardly fits into the modern European legal-political culture. The Balkan people and power elites, aware of the plethora of such stereotypes, of course try to avoid the Balkan identity, while those in the border regions try to escape it altogether. I am, on the contrary, convinced that it is better to face the various Balkan identities, instead of pretending that they do not exist. Coping with one's self implies overcoming the undesired, and retaining the enduring traditions that may be integrated into the modern ways.

[33] The present paper's aim is to introduce the discussions of the UniDem seminar on "Societies in Conflict", organised by the Venice Commission of the Council of Europe and the Slovenian Foreign Ministry, Bled (Slovenia), 26-27 November 1999. The Stability Pact for South-Eastern Europe will be discussed in the follow-up International Conference on the "Contribution of Constitutional Arrangements for the Stability of South-Eastern Europe", Brdo (Slovenia), 29-30 November 1999

[34] Gevork Ter-Gabrielian is an Armenian scholar who joined the Ebenhausen conflict prevention team of the Stiftung Wissenschaft und Politik. The Ebenhausen team produced in collaboration with the Istituto Affari Internazionali (Rome) the already cited study Preventing Violent Conflict (pp.1-321), published in 1998.

Balkan states in their transition from communist to democratic public order. Its on-going activities for the Balkan states in 1999 include:

Albania – compatibility of the death penalty with the Constitution of Albania; Bosnia and Herzegovina – organic law on the Ombudsman of the Federation of Bosnia and Herzegovina and for Bosnia and Herzegovina, opinion on the scope of responsibilities of Bosnia and Herzegovina in the field of immigration and asylum with particular regard to possible involvement of the Entities, opinion on the conclusion and implementation of international agreements in Bosnia and Herzegovina, opinion on the restructuring of human rights mechanisms in Bosnia and Herzegovina; Bulgaria – opinion on the Bulgarian Law amending and supplementing the Law on the Judiciary, opinion on the draft Bulgarian Civil Service Act; Croatia – revision of the Constitutional Law for human rights and minorities, cooperation with the Constitutional Court related to international advisers; Moldova – Statute of Gagaouzia, opinion on the law on local administration, seminar on the role of the constitutional court in the protection of private property; Kosovo – constitutional aspects of the solution to the Kosovo conflict and work on an Ombudsperson for Kosovo.

In fact, most of the Venice Commission's activities are directly related to requests received from the member states, the statutory organs of the Council of Europe and the international institutions with which it co-operates. Moreover, most of the requests which the Commission receives call for urgent action and the Commission has been obliged to adapt its working methods to take into account the demands of those who request its assistance. Most of the time and energies of Commission's members and of its staff are consumed by the specific assignments, which as a rule are concluded by a written report, opinion or comparative study, a publication of proceedings from a conference or a seminar, etc.

What may be needed are better library, documentation and publication facilities for the available piles of papers in order to gain access to issue-specific materials.[35] National Documentation and Information Centres of the Council of Europe may be appropriate agencies to perform the task. A good academic library with cataloguing and storage facilities would nevertheless be the best solution to the problem. The collection of materials pertaining to one area, such as the Balkans, represents only one example of the possible analytical concerns.

International University for South-Eastern Europe: a new centre of academic excellence in the region

Education of elites seems in the long run the most promising and at present the comprehensive measure which is most lacking in order to allow the modernisation and integration of the region. The United States was aware of the major contribution of well designed and implemented international educational programmes for a long time before the fall of the Berlin Wall. The proof is the success of its Fullbright, Ford Foundation, IREX, Eisenhower and other academic foreign exchange programmes. Elite American universities are best-selling institutions for the spread of educational achievement globally. The European Union and the Council of Europe may learn from the US academic managers, backed by the synergetic co-operation of government and private funds. They may be prompted to do

[35] *The present author continues to struggle with the influx of Venice Commission papers filling up an ever-increasing number of files, whose contents are structured chronologically. It gets more and more difficult to locate a particular issue-specific paper.*

likewise for Europe as a whole, and especially for its troubled and/or border regions, such as the Baltic states, the Caucasus and the Balkans.

The best educational result may be achieved by and during an entire graduate programme. The student from a specific country should ideally complete his or her undergraduate studies, equivalent to a university diploma from the faculty of law, economics, humanities or government administration. After a couple of years of employment in his/her home country, or immediately after completing his/her studies, the prospective "European" or "international" student, selected on the basis of rigorous tests (such as the American Graduate Record Examination), should enrol in one of the graduate programmes of the International University for South-Eastern Europe. He/she should stay there in residence for at least two or three years, return home for the completion of his thesis, and after obtaining an M.A. or Ph.D. degree continue his/her home career. The results of such a programme should begin to be felt within a decade, and should thereafter exhibit progressively wider-ranging effects, reinforced continually through the alumni association network.

An excellent example of an ongoing initiative of the kind is the recent strategy proposed by the World Bank to address economics education and research needs in transition economies.[36] The report in question starts from the assumption that the development of the institutional capacity to create and evaluate economic policies remains a critical need – and constraint – in most transition economies if they are to complete the successful passage to fully functioning market economies. In the short term, the authors of the report assess that it is vital to train a large number of high-quality economics professionals, a task best done abroad by first creating a critical mass of economics education and research on a regional basis: "That means concentrating Western support for these endeavours rather than spreading resources too thinly." The core recommendation of the study suggests funding three regional centres – one in Central Asia, one in the Caucasus and one in the Balkans (former Yugoslavia and Albania).

All the analyses of the current poor quality of economics education and research in the region, core objectives and recommendations of the Pleskovic 1999 World Bank report are directly applicable, *mutatis mutandis*, to related fields of government and business administration, to law and to international and European studies.

Therefore, the strategy for responding to the educational and research needs of transition societies of South-Eastern Europe should be built upon the idea of a new, independent international university with one central and several "local" campuses. To implement the idea, concerted efforts by the Council of Europe institutions, the Stability Pact for South-Eastern Europe and possibly other American and international sponsors are needed.[37]

A new type of international organisation: Alliance of Balkan states and communities

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[36] See the 17 March 1999 draft report prepared by Boris Pleskovic (Acting Director), Anders Aslund, William Bader and Robert Campbell, "Proposed strategy to address critical economics education and research needs in transition economies", sponsored by Open Society Institute, Eurasia Foundation, Starr Foundation and the World Bank, pp.1-51.

[37] The idea was raised by the American President Bill Clinton during his official visit in Slovenia in 1999, and by Mr Bodo Hombach, the chief coordinator of the Stability Pact for South-Eastern Europe. It was also endorsed by the Slovenian Government.

The situation of most Balkan states, given the present conditions of the region as a whole – war-ridden, with ruined economies, socially uprooted, at their lowest level of quality of life in decades, with unstable governments and party systems – represents a formidable obstacle to the free flow of goods, capital and people, and thus to the overall economic development. It is almost impossible to cross the Balkan region without major difficulties – either from west to east or from south to north. In both directions a train, a bus or a truck would be stopped not only at state borders, but also at the borders of a federal unit, an "entity", a "canton", by a paramilitary ethnic group, etc.

Modern European states under the various globalisation processes are no longer in complete charge of their economic affairs: free trade has won the day and the state is no longer master of its economic borders, or of its own currency; neither is the state any longer master of its own law, as it has lost control over its airwaves, and the sense of national allegiance is diminishing.[38] The Balkan states on the contrary and precisely because they have not yet been embraced by global trends of modernity, present barriers to communication and exchange across the region and between the region and the outer world. This situation can change only slowly and gradually through economic reform and growth, with much outside help.

Meanwhile, some other aspects of regional public order should be considered, apart from state politics and economy. Foremost among them are security concerns of sub-national ethnic and regional communities and, of course, the individual security of each person. These may be satisfied neither by state actions nor by international intervention alone. Ter-Gabrielian proposed creating a new type of regional organisation for the Caucasus region such that by the very nature of the organisation independent state governments are given an equal status to that of the leadership of ethnic groups.

In the above scenario, all the actors in the region, be it the Caucasus or the Balkans, would be represented: territorially dispersed nationalities, dominant ethnic communities within a state ("nations"), ethnic minorities, autonomous sub-national entities, either congruent or incongruent in their ethnic composition, and of course independent states. The author of the idea suggested equal representation of all regional actors in the "general assembly", regardless of whether or not they possessed a recognised political configuration (cultural or political autonomy, status of a federative unit or independent statehood):

> Ethnic groups would have the opportunity to express their grievances against states within the borders of which they are included and to seek common systematic solutions to their problems. Ethnic groups would increase their bargaining power: they would be able to make coalitions both among themselves and with the states. At the same time, this arrangement would placate their strive to independent statehood, since they would be fully recognised decision-making sides in a respectful organisation, within the framework of which they propose and implement solutions to their problems.[39]

The proposed new type of regional alliance of the Balkan states and communities would not exclude or be a substitute for wider international groupings, such as the Stability Pact, or the

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[38] For a detailed account of the transformation and fading away of the nation-state see Bernard Chantebout, in The Transformation of the Nation-State in Europe at the dawn of the 21st Century, Strasbourg: Council of Europe Publishing, 1998 (Proceedings of the UniDem Seminar, Nancy, 6-8 November 1997), pp. 401-411.

[39] Preventing Violent Conflict, 1998, p.318.

role of the OSCE, Council of Europe, the UN, the OECD, NATO, IFIs or WEU. On the contrary, such an alliance of Balkan states and communities, composed of only those entities with direct interest in the area, would benefit from cooperation with organisations on the European and the global level, while it would at the same time retain its regional autonomy.

We also agree with the remark that such a solution would help to finalise certain trends in international law. It would provide for institutional recognition of the right of each ethnic group to self-determination, short of its statehood, but remain firm on the issue of its ethno-cultural survival and collective security. On the other hand, it would preserve states' concern for territorial integrity, in exchange for recognition of their ethnic groups with defined ethnic/territorial/administrative boundaries where these groups are not dispersed.

ENSURING HUMAN SECURITY IN CONFLICT SITUATIONS, Mr Roman Kirn State Undersecretary, Ministry of Foreign Affairs, Slovenia

Introduction

Conflict has been immanent to human beings since the very beginning of human society. The history of our civilisation has been a history of conflicts and history of conflict resolution. Far too long and far too often states have been the ones to be provided greater security, and not the people. A humane world of today, in which people can live in security and dignity, is still a dream for many, but should be enjoyed by all.

Today's seminar is about societies in conflict. We will discuss conflicts in contemporary societies, conflicts that are still fresh in our minds, conflicts whose images we can even follow on our TVs.

The global world has many common features, but for the purpose of our subject, let us focus on one in particular: there is increased security for the majority of states, while security for many people in the world has declined. The history of this century has been a very tragic one: we have witnessed two world wars (just two weeks ago we paid tribute to the victims of both world wars). The world has been much safer since these two world wars. International security has been substantially increased since the end of the Cold War, since the end of superpower confrontation. However, since the Second World War, and in particular in the last decade, we have seen many new civil conflicts, large-scale atrocities, even genocide, and non-traditional threats as a result of globalisation (i.e. organised crime, drug trade, terrorism). More security for states does not automatically bring more security for people. And people are at the focus of the Human Security Concept.

Relationship between human security and national security

Security between states remains a necessary condition for the security of people. While declining in frequency, the threat of inter-state war has not vanished, and the potential consequences of such a war should not be underestimated. However, national security is insufficient to guarantee people's security. Security threats come much less from external aggression, and more from internal tension. A growing number of armed conflicts are being fought within, rather than between states. It is necessary, therefore, to shift more of our attention from the security of territories and borders to that of people, inside and across

borders. The warring factors in intra-state conflicts are often irregular forces with a loose chain of command, frequently divided along ethnic or religious line. Small arms are often the weapon of choice and civilians account for eight out of ten casualties. These casualties are often considered "collateral damage". This expression (so often heard in Kosovo and in Chechnya) is as familiar as it is unacceptable and inhumane. Armed conflicts are not the only threat to the security of people. Greater exposure to violence is related also to the erosion of state control. This is most evident in the so-called "failed states", where governments are simply incapable of providing even basic security for people.

The security of a state is to be understood as a means of ensuring security for its people. In this context, state security and human security are mutually supportive. When states are extremely aggressive, internally repressive, or too weak to govern effectively, they threaten the security of people. Concern for the safety of people of course extends far beyond borders. For our understanding it is important to note that the security of people in one part of the world depends on the security of people elsewhere. The security of states, and the "maintenance of international peace and security", being the first aim of the United Nations Charter, is ultimately constructed on a foundation of people who are free from the fear of being killed, persecuted or abused. National security has no moral legitimacy if it is ensured at the expense of human security. At the same time, the international security is incomplete if it neglects human security. Human security is therefore the promotion of national and international security, by becoming a third, complementary pillar of a mutually reinforcing concept of security.

The concept of human security

Let me approach the issue of the definition of the concept of human security by quoting Mrs. Sadako Ogata, UN High Commissioner for Refugees: »Human security is a term which carries the risk of meaning all, and nothing«. So it is good, for practical reasons, to put it into a specific context whenever we discuss its content. However, before doing so, let us try to define the concept of human security. In its broadest possible sense, human security is security of people, it is safety for people from both violent and non-violent threats and risks. Expressed in a more philosophical way, human security is freedom from pervasive threats to people's fundamental rights, their safety, their lives. It is an alternative way of seeing the world, taking people as its point of reference, rather than focusing exclusively on the security of states and governments. Like other security concepts - national, economic, international - human security is about protection. As such, it can be easily transferred to foreign policy orientations, too.

The range of potential threats to human security should not be narrowly conceived. Human security is obviously most threatened and challenged in armed conflicts. However, a human security approach is not to be identified with mere humanitarian action. It is much more than just the human cost of violent conflicts. It is seeking the root causes of insecurity, and is aimed at providing people's future safety. The dimensions of the human security challenges are very broad: from gross violations of human rights, terrorism, ethnic cleansing, gender-based violence, organised crime, to environmental degradation, infectious diseases and natural disasters. We should not forget also the economic roots of Human insecurity, such as: economic crises, unemployment, social unrest, poverty. The degree of human insecurity is defined by the degree to which the safety of people is at risk - and that can be from nearly nothing to everything.

Protection and promotion of human security

The central objective of human security is to assist people in all kinds of insecure situations. These situations may be different, the degree of insecurity may differ, but the objective remains the same. When dealing with conflict situations we must not lose sight of the most essential point: what mechanisms do we have to ensure and maintain the security of threatened people? Namely, one of the main reasons of human insecurity is precisely the lack of effective political and security mechanisms to address conflicts, timely and properly. The tragedy in Kosovo is the latest evidence that we (the international community) still lack proper mechanisms.

First of all the political will of the countries in the international community is needed as to when and how to react to a specific conflict situation. Here, non-military intervention measures should have priority. To utilise measures of such kind, timely decisions are needed.

The protection of human security consists of a series of different measures, executed at different levels: governments, international organisations and humanitarian agencies, NGOs. A favourable environment is needed for doing so: political, legal and financial.

There are three fundamental strategies for enhancing human security:

- strengthening legal norms,

- building the capacity to enforce these legal norms,
- improving operational activities and measures in the field

To a large extent, human security approach is based on a normative framework, which is mainly provided by human rights, humanitarian and refugee law. Along with existing standards, new ones are needed in areas such as: restricting the uncontrolled spread of small arms, banning the use of children as soldiers, prohibiting exploitative child labour, providing greater protection for internally displaced persons, ensuring greater safety for humanitarian personnel, etc.

However, there is little point in defining new norms and rights if societies have no capacity to enforce existing norms or to protect already recognised ones. For this reason, improving democratic governance within states is a central strategy for advancing and promoting human security. However, we must be warned against the illusion that democracy, in itself, can defuse all types of tensions, such as ethnic or religious rivalries, or deep social disparities.

Finally, along with norm setting and capacity building we need to “translate” the human security concept into practice, into a concrete human security agenda that is implemented through the diverse, but co-ordinated operational activities of all actors: states, multilateral organisations, civil society groups. In this respect, there is a growing role of NGOs, which have proven to be effective partners in promoting the security of people.

The concept of human security is viable and credible only if tested and implemented in practice. The case of the Ottawa Convention on the total ban of anti-personnel land mines is very solid proof that the human security concept is working. With mentioning the Ottawa Convention, three points are worth of highlighting:

- there has been a strong, broad, durable and effective coalition of state and non-state actors in support of adopting the convention,
- a new legal norm has been adopted: anti-personal land mines are outlawed
- global and regional action has been promoted to implement the Convention: to demine, to destroy stocks, to assist mine victims.

Slovenia has joined these efforts by establishing the International Trust Fund for Demining and Mine Victims Assistance in Bosnia and Herzegovina, thus contributing to the implementation of the Ottawa Convention through a regional approach.

Very similar coalition has been established for the International Criminal Court.

However, the agenda for human security is far from being exhausted. Small arms, children in armed conflicts, exploitation of children, safety of humanitarian personnel are just some of these issues which are already at the focus of international activity.

This is a promising start to the challenge of human security for the next century.

LE ROLE DU DROIT INTERNATIONAL DANS LE REGLEMENT DES DIFFERENDS ENTRES ETATS, M. Constantin Economides
Ancien Directeur du Département juridique,
Ministère des Affaires étrangères, Grèce,
Membre de la Commission de Venise

1. Il existe aujourd'hui un ensemble de règles, un droit pourrait-on dire, pour le règlement des conflits entre Etats ou des différends internationaux, les deux termes étant, en réalité synonymes. Ces règles relèvent, bien entendu, du droit international public, qui régit donc les différends entre Etats.

Une norme fondamentale du droit international d'après-guerre est l'obligation du règlement pacifique des différends entre Etats. Cette norme est un des piliers du système international actuel tel qu'il a été instauré par la Charte des Nations Unies. Il est, en effet, évident que l'intérêt de la Communauté internationale réside dans le règlement rapide des différends pour éviter qu'ils ne se prolongent et ne se transforment éventuellement en crises menaçant la paix et la sécurité internationales. Cette norme fondamentale est complétée par une seconde norme tout aussi importante : l'interdiction de recourir à la force ou à la menace de la force dans les relations internationales (art. 2 par. 4 de la Charte des Nations Unies). L'objectif ici est le suivant : si les Etats, malgré l'obligation qui leur en est faite, ne réussissent pas à régler leurs différends par des moyens pacifiques, ils doivent savoir qu'en aucun cas ils n'ont le droit de recourir à la force ou à la menace de la force. La guerre et les actes de violence sont donc illicites selon la Charte des Nations Unies.

Cette seconde norme est, à son tour, complétée par l'institution de la sécurité collective des Nations Unies (chapitre VII de la Charte) qui est, en quelque sorte, le troisième pilier du système international actuel et dont le but est le suivant : si, malgré son interdiction expresse et catégorique, il y a recours à la force, il appartient au Conseil de sécurité de rétablir la légalité et la paix en utilisant contre l'Etat qui a agi illégalement toutes les mesures préventives et répressives nécessaires, y compris l'emploi de la force armée.

Ces trois institutions, très liées l'une à l'autre, puisqu'elles se complètent, constituent les trois axes du système international actuel.

2. Les règles et les principes du droit international concernant le règlement des différends sont essentiellement contenus dans la Charte des Nations Unies : à l'article 1 paragraphe 1, qui énonce les buts et principes de l'organisation, à l'article 2 paragraphe 3 qui est, en l'occurrence, la disposition fondamentale puisqu'elle contient l'obligation du règlement pacifique des différends internationaux et aux articles 33 à 38 du Chapitre VI.

Mais il convient de souligner que ce droit a été interprété, précisé, explicité, voire complété par quelques résolutions importantes à caractère normatif: celles de l'Assemblée générale, qui ont été adoptées par consensus, ce qui accroît leur valeur. Je pense notamment à la Déclaration de 1970 (résolution 2625, xxv) relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies (dorénavant nous l'appellerons Déclaration sur les relations amicales) et surtout à la Déclaration de Manille de 1982 sur le règlement pacifique des différends internationaux (résolution 37/10). Nous citerons également une autre Déclaration de 1988 se rapportant à la prévention et à l'élimination des différends et des situations qui peuvent menacer la paix et la sécurité internationales et au rôle de l'organisation des Nations Unies dans ce domaine (résolution 43/51).

3. La disposition fondamentale de l'article 2 paragraphe 3 de la Charte des Nations Unies dispose que «Les membres de l'organisation règlent leurs différends internationaux par des moyens pacifiques, de telle manière que la paix et la sécurité internationales ainsi que la justice ne soient pas mises en danger». Aujourd'hui, cependant, on admet que l'obligation de règlement des différends internationaux s'applique à tous les Etats et non pas seulement à ceux qui sont membres des Nations Unies. Elle concerne également tous les différends internationaux et non pas seulement ceux qui peuvent menacer la paix et la sécurité internationales.

Nous devons la première extension au fait que l'obligation de règlement des différends depuis longtemps déjà, le caractère d'une norme coutumière et, qu'en tant que telle, elle lie tous les Etats indistinctement. On peut même aller plus loin et dire qu'aujourd'hui cette obligation appartient à la catégorie des règles *de jus cogens* et qu'elle a, de ce fait, une valeur juridique supérieure aux autres règles du droit international.

La seconde extension a été surtout imposée par les actes normatifs, déjà cités, de l'Assemblée générale. La Déclaration de Manille, en particulier, s'applique à tous les différends internationaux, quel que soit leur gravité, à moins que le texte ne prévoie expressément des limitations à cet égard.

Cette double extension constitue, bien évidemment, un net progrès par rapport à la situation qui prévalait dans le passé, puisque tous les Etats ont aujourd'hui l'obligation, conformément à la Charte des Nations Unies, de régler par des moyens exclusivement pacifiques, tous les différends qui les opposent.

4. Il existe donc une obligation juridique pour le règlement des différends, mais cette obligation, qui est indéniable, ne se suffit pas en elle-même. En effet, il faut en plus, pour qu'elle devienne effective et s'applique dans la pratique, que les parties au litige se mettent

d'accord sur un ou éventuellement plusieurs moyens de règlement du différend. Les moyens, selon l'article 33 paragraphe 1 de la Charte, sont «la négociation, l'enquête, la médiation, la conciliation, l'arbitrage, le règlement judiciaire, le recours aux organismes ou accords régionaux ou tout autre moyen pacifique du choix des parties au différend». L'énumération est indicative et non limitative. Précisons que tous ces moyens sont considérés comme étant égaux et qu'il n'existe pas, par conséquent, de priorité d'un moyen sur les autres, à moins qu'une telle priorité ne soit convenue d'avance par les parties intéressées.

Ainsi, pour tout différend international – et à condition qu'il n'existe pas d'obligation juridique préétablie pour son règlement – les Etats ont le droit de choisir le moyen de leur préférence. Il s'agit là du principe dit du libre choix des moyens pour le règlement des différends internationaux. Cependant, si les Etats concernés ne réussissent pas à s'entendre sur un moyen de règlement donné, le différend ne sera jamais résolu.

Nous pensons que cette situation n'est en harmonie ni avec la lettre, ni, surtout, avec l'esprit des dispositions pertinentes de la Charte des Nations Unies. A notre avis, le prétendu principe du choix des moyens est un faux principe, ou, du moins, un principe secondaire strictement subordonné hiérarchiquement au principe fondamental du règlement pacifique des différends. Ainsi, en cas de litige, les Etats sont obligés, conformément à la Charte des Nations Unies et au principe de la bonne foi, de se mettre d'accord sur une procédure de règlement appropriée et efficace. Il y a là, selon nous, un véritable *pactum de contrahendo*, c'est-à-dire une obligation pour les Etats de tomber d'accord sur un moyen pouvant aboutir au règlement de leur différend. Le principe du libre choix des moyens ne saurait paralyser une norme supérieure, le principe du règlement pacifique des différends, qui, en plus, a le caractère d'une règle *de jus cogens*. Ainsi, s'il y a opposition entre ces deux principes, la norme supérieure doit l'emporter.

Cependant, cette opinion, qui est, selon nous, très forte sur le plan juridique, n'est pas dominante. Dans l'état actuel, le principe du libre choix des moyens l'emporte et ceci – disons le franchement – constitue un élément négatif, un obstacle souvent insurmontable, pour le règlement des différends internationaux.

5. Enfin, pour compléter notre développement, disons que dans le cas où les Etats acceptent de donner leur consentement pour le règlement de leurs différends – c'est l'exception plutôt que la règle – cette acceptation peut avoir lieu avant ou après la naissance du différend. Le consentement peut être conféré d'avance : a) par accord bilatéral ou multilatéral; b) par l'acceptation de la clause facultative de juridiction obligatoire de la Cour internationale de Justice, conformément à l'article 36 par. 2 de son statut; et c) par des clauses compromissoires spéciales contenues, en particulier, dans des conventions multilatérales pour le règlement des différends qui peuvent résulter de l'interprétation ou de l'application de leurs dispositions. Citons, par exemple, les articles 277 à 299 de la nouvelle Convention de 1982 sur le droit de la mer.

Le consentement est conféré après la naissance du différend par un compromis que concluent les Etats parties au litige. Le compromis est un accord international par lequel les Etats intéressés conviennent de soumettre leur différend à une procédure de règlement judiciaire ou arbitral.

6. Quelles sont aujourd'hui les obligations spécifiques qui, en cas de différend international, résultent, pour les Etats, du principe du règlement pacifique des différends

internationaux ? Elles résultent, bien entendu, de la Charte des Nations Unies, telle qu'elle a été interprétée et explicitée par les résolutions de l'Assemblée générale.

1) La première obligation pour les Etats est de rechercher rapidement, sur la base des principes de la bonne foi, de la coopération et de l'égalité entre Etats, un moyen approprié de règlement tenant compte des circonstances et de la nature du différend.

Cette première obligation résulte implicitement des dispositions de la Charte et, notamment, de l'article 33 par. 1, et, explicitement, de la Déclaration sur les relations amicales (par. 2) ainsi que de la Déclaration de Manille (I, par. 5). Toutes deux disposent, presque dans les mêmes termes, que «les Etats doivent rechercher de bonne foi dans un esprit de coopération une solution rapide et équitable de leurs différends internationaux par l'un des moyens suivants : négociation, enquête, médiation, conciliation, arbitrage, règlement judiciaire, recours à des accords ou organismes régionaux, ou par d'autres moyens pacifiques de leur choix, y compris les bons offices. En recherchant cette solution, les parties conviendront des moyens pacifiques qui seront appropriés aux circonstances et à la nature du différend».

Il faut rappeler ici que, selon la Charte des Nations Unies, «les différends d'ordre juridique devraient être soumis par les parties à la Cour internationale de Justice (Art. 36, par. 3)[40].

2) Les Etats doivent, selon une autre obligation, appliquer le droit international pour le règlement de leurs différends. Ce dernier et, en particulier, les obligations découlant de la Charte des Nations Unies et des principes de la justice constituent donc le droit applicable (article 1, par. 1 de la Charte des Nations Unies, Déclaration de Manille I, par. 3, Déclaration sur la prévention des différends, préambule, al. 9). Il va d'ailleurs de soi que les différends juridiques – et c'est le cas de la très grande majorité des différends internationaux – ne sauraient être réglés que sur la base du droit international. Le juge international et l'arbitre international, en particulier, appliquent donc exclusivement ce droit.

3) Dans le cas où les Etats parties à un différend ne peuvent pas tomber d'accord sur un moyen de règlement ou si le moyen choisi n'aboutit pas à la solution du différend, les Etats ont l'obligation de continuer leur effort pour trouver, aussi vite que possible «sans délai» – dit la Déclaration de Manille (I, par. 7) – le moyen approprié pour régler le litige. La Déclaration sur les relations amicales dispose expressément que les Etats ont, dans ce cas, «le devoir de continuer à rechercher un règlement à leur différend par d'autres moyens pacifiques dont elles seront convenues» (par. 3). Il en est de même de la Déclaration de Manille qui utilise les termes «les Etats doivent» (I par. 7). Il s'agit donc là d'une obligation qui est continue et qui s'applique jusqu'au règlement définitif du différend.

4) Pendant toute la durée du différend, depuis sa naissance jusqu'à sa solution définitive, tout Etat qui en est partie a les obligations spécifiques suivantes :

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[40] *Selon l'article 36 paragraphe 2 du Statut de la CIJ, qui est, en l'occurrence, la disposition la plus pertinente, les différends juridiques sont ceux qui ont pour objet : a) l'interprétation de tout traité; b) tout point de droit international; c) la réalité de tout fait qui, s'il était établi, constituerait la violation d'un engagement international; d) la nature ou l'étendue de la réparation due pour la rupture d'un engagement international.*

L'énumération est donc extrêmement large et couvre – notamment les points a et b précités – tous les différends juridiques.

a) Il est tenu de respecter la souveraineté, l'indépendance et l'intégrité territoriale de l'autre ou des autres Etats parties (Déclaration de Manille I par. 4).

b) Plus particulièrement, ces Etats, ainsi que tout Etat tiers, ont l'obligation de s'abstenir de tout acte qui pourrait mettre en danger le maintien de la paix et de la sécurité internationales (Déclaration sur les relations amicales par. 4, Déclaration de Manille I par. 8).

c) Le recours à la force ou à la menace de la force est évidemment strictement prohibé (art. 2 par. 4 de la Charte des Nations Unies). La Déclaration de Manille contient la disposition suivante : «Ni l'existence d'un différend, ni l'échec d'une procédure du règlement pacifique d'un différend n'autorise l'un quelconque des Etats parties à un différend à avoir recours à la force ou à la menace de la force (I par. 13). Et la Cour internationale de Justice, dans ses dix ordonnances du 2 juin 1999 rendues à l'occasion des demandes en indication de mesures conservatoires déposées par la Yougoslavie le 28 avril 1999, bien que s'étant abstenue, pour le moment, d'examiner le fond de l'affaire, n'en a pas moins souligné que «l'emploi de la force en Yougoslavie … soulève des problèmes très graves de droit international».

d) Les Etats parties doivent également s'abstenir de tout acte qui pourrait étendre ou aggraver le différend, le rendre plus difficile ou entraver son règlement (Déclaration de Manille I par. 8). On peut même dire que cette dernière obligation constitue un principe général du droit international qui se retrouve dans un très grand nombre de textes conventionnels similaires bilatéraux et multilatéraux depuis l'Acte général de Genève de 1928 sur le règlement des différends internationaux (art. 33 par. 3).

Il est intéressant de relever que la Cour internationale de Justice, dans ses récentes ordonnances déjà citées du 2 juin 1999, a rappelé avec force ce principe en ces termes : «Les parties à un différend doivent veiller à ne pas aggraver ni étendre le différend».

5) Enfin, si les Etats parties au différend, malgré leurs efforts, ne réussissent pas finalement à le régler et si ce différend est susceptible de menacer la paix et la sécurité internationales, ils en saisissent le Conseil de sécurité des Nations Unies. Cette obligation est prévue par l'article 37 par. 1 de la Charte des Nations Unies (voir aussi la Déclaration de Manille I par. 7). La Cour Internationale de Justice, désirant mettre le Conseil de sécurité devant ses responsabilités, a rappelé, en ces termes, cette obligation, dans les ordonnances précitées du 2 juin 1999 : «Considérant que, lorsqu'un différend suscite une menace contre la paix, une rupture de la paix ou un acte d'agression, le Conseil de sécurité est investi de responsabilités spéciales en vertu du Chapitre VII de la Charte».

A la fin de ce bref exposé, nous pensons pouvoir tirer les conclusions suivantes :

1. Il est incontestable que le système prévu par la Charte des Nations Unies pour le règlement des différends présente des lacunes et des faiblesses importantes. La plus sérieuse réside en l'absence, dans l'ordre juridique international, d'une protection juridictionnelle des Etats. Le règlement des différends entre Etats est encore facultatif et est, de ce fait, aléatoire. Pour qu'une procédure de règlement d'un différend puisse être mise en marche, il est nécessaire d'obtenir le consentement, non seulement de la victime, mais également de l'Etat qui a enfreint le droit. L'ensemble du système est strictement consensuel. Et arriver à ce consentement n'est pas, en règle générale, une affaire facile,

les Etats, et, en particulier les plus forts, n'étant pas habituellement disposés à limiter leur souveraineté. *A fortiori*, ceux dont la position juridique est faible accepteront difficilement le recours à une tierce partie pour le règlement de leur différend.

2. Il n'y a pas de doute que le principe dit du libre choix des moyens que soutiennent habituellement les Grandes Puissances, est, sur le plan juridique, l'ennemi principal de l'obligation du règlement pacifique des différends internationaux. Si nous voulons vraiment que des progrès soient réellement accomplis dans ce domaine, il faudrait œuvrer pour que l'obligation de règlement des différends internationaux devienne une véritable obligation de résultat – selon nous, cette interprétation résulte déjà des textes internationaux pertinents – qui contraindrait les Etats à conclure – et, si possible, dans un délai déterminé – des accords sur le choix des moyens à utiliser pour le règlement effectif de leurs différends juridiques.

3. Un autre effort à entreprendre serait, comme le souligne la Déclaration de Manille «d'encourager le Conseil de sécurité à faire plus ample usage des possibilités offertes par la Charte pour les différends ou les situations dont la prolongation semble devoir menacer le maintien de la paix et de la sécurité internationales» (II, par. 4 al. c). Il est vrai, cependant, que le Conseil de sécurité, qui est pourtant l'organe principal des Nations Unies pour le maintien de la paix et de la sécurité internationales, ne possède, dans le domaine des différends, que des attributions relativement faibles se limitant à la formulation de simples recommandations. Mais la pratique a montré que le Conseil de sécurité est encore plus faible que les dispositions de la Charte et qu'il n'a pas, jusqu'à présent, exercé toutes les attributions que cette dernière lui confère[41].

4. Enfin, je formulerai une dernière remarque qui concerne le sujet que nous examinons: dans tous les conflits entre Etats et notamment dans ceux qui sont à caractère ethnique et qui sont donc particulièrement difficiles et complexes, le règlement doit nécessairement découler de l'application du droit international, si l'on veut qu'il soit pacifique et civilisé. Si l'on tente de régler les conflits par d'autres moyens, on risque de glisser facilement vers l'arbitraire et l'illicite. Par conséquent, les parties au conflit doivent faire tout ce qui est en leur pouvoir pour régler leur différend par des négociations directes et franches, menées de bonne foi. En cas d'échec, elles devraient accepter de recourir à une tierce partie. Cette dernière pourra, selon les cas, les aider à régler le conflit (enquête, bons offices, médiation, concilliation), ou trancher le différend de façon contraignante et définitive (arbitrage, règlement judiciaire).

Il est évident que les parties au conflit devraient être fortement aidées dans cet effort, en particulier par les Organisations internationales régionales compétentes sur les questions de sécurité et par les Nations Unies.

MOLDOVA: TWO CONFLICTS WITH DIFFERENT HISTORIES, Mr Vladimir Solonari, Chairman of the Committee on Human Rights and National Minorities, Parliament of Moldova,

[41] *Il n'a pas exercé, en particulier, les compétences visées dans l'article 37, par. 2 de la Charte des Nations Unies (examen, dans les cas graves, du fond de l'affaire et recommandation aux parties «des termes de règlement qu'il juge appropriés») et dans l'article 38 (formulation de recommandations, si les parties le demandent, pour le règlement du différend).*

Member of the Venice Commission

The Republic of Moldova, a post-Soviet country of 4.3 million people and 33 600 thousand square kilometers, was fissured in the first days of its independence by the ethnic tensions which led to two long-lasting conflicts: that of Gagauzia and that of Transnistria. Both of them were born out of the turmoil which accompanied decentralisation and the breakdown of the Soviet Union. Afterwards, in the wake of consolidation of the new state the first problem was successfully solved by granting territorial autonomy to the Gagauzi minority. The second, Transnistria, is still unresolved.

To understand how and why those conflicts came to exist one should consider historical, demographic and linguistic characteristics of the country.

ORIGINS OF THE CONFLICTS

The territory of the Republic of Moldova was defined by Stalin's Politburo and the Soviet Government in July-August 1940 immediately after Romania had to relinquish the territory of Bessarabia and Northern Bukovina to the Soviet Union as a result of a secret understanding between Communist Moscow and Nazi Berlin, known as the Molotov-Ribbentrop pact of August 1939. The following components were included in the new Republic: the bulk territory of Bessarabia, that is the land lying between the Prut (a confluent of Danube) and Dniester rivers (30 200 square km), and the tiny strip of land on the left bank of the Dniester (3 500 square km) east of Bessarabia called Transnistria in Romanian and Pridnestrovie in Russian.

Historical differences between Bessarabia and Transnistria are considerable. Whereas Bessarabia was from 1359, when the Medieval Moldovan State was born, part of that principality, Transnistria as such never existed as a separate administrative entity. Until late 18th century it belonged partly to Rzech Pospolita, that is to the Polish-Lithuanian Kingdom, and partly to the Crimea Khan State which stayed under the sovereignty of Sublime Porte. In the late 18th century the left bank of the Dniester was annexed by the Russian empire and Bessarabia became part of it in 1812 after the Bucharest Peace treaty between Russia and Sublime Porte. This transfer of Bessarabia to Russia took place without the opinion of the Moldovan Government being either solicited or heeded.

At the time of Russia's annexation Bessarabia was already partitioned by Turks, who introduced their own administration in the cities of Bender (middle right bank of the Dniester) and Hotin (northern right bank of that river) and the surrounding territories and who allowed the Tartars to roam in the southern step part of Bessarabia which is now known as Bugeac. Nevertheless, more than half of Bessarabia until 1812 was ruled by Moldovan administration according to its own laws and regulations.

From 1812 to 1918 Bessarabia was first an autonomous region (oblast) inside the Russian empire (until 1837) and then an ordinary *gubernia* ruled in conformity with the imperial laws. The left bank of the Dniester was included, according to the old border between Poles and Tartars, into two Russian *gubernias*, Kamenets-Podolsk in the North and Herson in the South. In 1918 Bessarabia was taken over by Romania in contested circumstances and stayed inside the Greater Romania unitary state until 1940. The Soviet Union never recognised legitimacy of this act claiming its right to Bessarabia. During that period the left bank of the Dniester stayed as a Soviet territory. In 1924 the Moldovan Autonomous Soviet Socialist Republic

(MASSR) was formed within the Ukrainian Soviet Socialist Republic (SSR), which comprised a territory approximately three times larger than the present-day Transnistria. The pretext was that a considerable Moldovan minority of 25% was living on this territory, but a more plausible explanation is that by this act the Soviets tried to put pressure on Romania regarding the Bessarabian question. The MASSR was abolished in August 1940, when the new fully-fledged "Union" Moldovian Soviet Socialist Republic was formed.

The biggest difference between the Bessarabian and Transnistrian parts of Moldova lies therefore in the fact that whereas the former was for centuries part of the Moldovan State and for two decades included inside the Greater Romania unitary State, Transnistria since the late 18th century stayed as a Russian and later Soviet territory without the slightest autonomy. The MASSR was an example of Soviet pseudo-statehood bereft of any real significance in terms of self-rule.

The demographic history of Moldova is even more complex. It has been characterised by massive population influxes and outflows during the last two centuries which resulted in very considerable changes in its ethnic composition. After Turks and Tartars were evicted by Russians from Bessarabia, Moldovans remained numerically highly predominant (about 90%), but the province was scarcely populated (circa 300 000). The Russian Government invited settlers from France, Germany, Switzerland and the Balkans, mostly from present-day Bulgaria. Thus Bulgarians and Gagauzi (a small Turkish-speaking people of Orthodox Christian Faith) came to settle in Bessarabia. Russian and Ukrainian peasants came mostly on their own, fleeing the oppressions of their landlords and/or authorities.

A Russian census of 1897 found that Moldovans constituted 52.1% of the population. A Romanian census of 1937 showed that Romanians constituted 56.2% of the population, Ukrainians 11%, Russians 12.3%, Bulgarians 5.7%, Gagauzi 3.4%, Jews 7.2% and Germans 2.8%. The total number of inhabitants was 2 864 000. In 1940, Transnistria was comprised of 48.2% Moldovans, 30.25% Ukrainians and 9.29% Russians.

The number of inhabitants of the Moldovan SSR in 1940 was2 320 000, according to Soviet data, whereby Moldovans comprised 67.86%, Ukrainians 16.9% and Russians 8.91%. During the Second World War Germans were evicted (according to German Volksdeutsche Politik) and Jews suffered from Nazi extermination policies. The Romanian educated classes (teachers, professors, physicians, etc.) fled to Romania for fear of being executed by the Communists.

After the Second World War, major change arose from the massive influx of the Slavic population from Russia, Ukraine and to a much smaller degree, Belarus, coming to the "great construction sites of Communism" in Moldovan cities. About 70% of Russians living in Moldova neither lived there before 1940 nor are descendents of those who lived there before 1940. The same is true for about 50% of Ukrainians. The change among the urban population was much bigger, about 70-80%.

The last Soviet census of 1989 (the last one) counted 4 335 000people living in the Moldovan SSR, composed of 64.5% Moldovans, 13.8% Ukrainians, 13.0% Russians, 3.5% Gagauzi, 1.5% Jews, 2.0% Bulgarians and 1.7% others. Since then there has been no significant change.

Thus, it would not be an exaggeration to say that the population of Moldova, apart from being heterogeneous from an ethnical point of view, is also varied from the point of view of family origins. Among Slavs, families who have no other memories than those of the Soviet times, and of the Soviet political system, are predominant. It is especially difficult for these people to adapt to the new times.

However, when considering the ethnical composition of the Moldovan population one further complication should be taken into account, namely the superimposition of linguistic boundaries over ethnical ones due to the language policies pursued by the Soviets after the Second World War. These policies were characterised by an artificial extension of the use of Russian and a reduction in the use of Moldovan (Romanian), through thorough teaching of the former and only superficial (in Russian educational institutions) of the latter. In 1940, the Soviets reintroduced the Cyrillic (Russian) alphabet for the Romanian language which was in use until 1989 when new language legislation was adopted. There were two parallel systems of education in Moldova during the post-bellic period, with either Russian or Moldovan as the language of instruction. About 90% of Moldovans were educated in the Moldovan language educational institutions and virtually all non-Moldovans in Russian language ones. Fluency in Russian, which was also an official language, was a condition *sine qua non* for a career in any public sphere, whereas knowledge and use of Moldovan was neither encouraged nor requested. Henceforth a division appeared between two major linguistic communities: the Romanian-speaking community, whose members usually have a good command of both Romanian and Russian, and the Russian-speaking community, which is very dependent on the use of that language in all spheres of life due to a lack of knowledge of Moldovan.

The non-Moldovan, that is Russian-speaking, population predominated in some regions and cities of the country. In Transnistria, Moldovans comprised 39.9% of the population, Ukrainians 28.3% and Russians 25.4% (all data is provided in conformity with the latest census of 1989). The town of Bender, which is situated on the right bank of the Dniester river facing Tiraspol, the main Transnistrian city, had 29.9% Moldovans, 18.2% Ukrainians and 41.9% Russians. In the town of Balti, which is the main municipality in the North of Bessarabia, Moldovans comprised 41.7%, Ukrainians 25.5% and Russians 24%. In the capital, Chisinau, Moldovans had a slight majority. Finally, in the three southern districts of the country, Comrat, Cadir-Lunga and Taraclia, descendants of the 19th century settlers from the Balkans, namely Gagauzi and Bulgarians, predominated. In Comrat these two groups comprised 63.8% and 7.4% respectively, in Cadir-Lunga 64.2% and 22.7% and in Taraclia 27.5% and 40.2%, whereas Moldovans comprised 18.2%, 4.1%, and 17.5% respectively.

The democratisation process in the Republic of Moldova was launched by the Moldovan national movement, which was massively supported by the ethnic Moldovan population, who demanded that the Moldovan (Romanian) language be made the (only) official language of the country and that the Latin alphabet be brought back. The Latin alphabet has been in official use in Romania from the mid-19th century; it was used in Bessarabia in the inter-bellic period. These demands were accompanied by manifestations of ethnic intolerance and led to considerable interethnic tensions, the majority of the Russian-speaking population supporting the idea of making Russian the second official language alongside Moldovan and with some party apparatchicks starting to use appearing tensions for their own political ends.

Simplistic debates on “one or two” official languages were clearly leading only to further tension and facilitating the entrenchment of extremist factions on both sides. Transnistrians started to demand autonomy for their region, invoking linguistic, historical, economic and

other arguments. New Gagauzi political leaders followed suit, demanding ethnicity-based autonomy for themselves, but also referring to the issue of the official language as one of the main reasons for it. They were not supported by Bulgarians, however, who were living alongside them and who were suspicious of possible Gagauzi exclusivism.

The situation rapidly deteriorated with the first signs of the gradual disintegration of the Soviet Union, Moldovans supporting claims for greater autonomy and the eventual independence of the Republic, while Russian-speakers preferred direct Moscow control over it. The first democratically elected Parliament[42] (Supreme Soviet, February 1990) in Moldova was dominated by radical nationalists who commanded one third of the votes but who also had the support of moderate Moldovan deputies and who were constantly provoking interethnic tensions. On 23 June 1990 the Supreme Soviet adopted the Declaration on Sovereignty (N 149-XII) and immediately afterwards on the same day a Decision on the politico-legal appreciation of the Soviet-German pact on non-aggression and the secret protocol to it. The latter proved especially controversial since it effectively declared Bessarabia "a territory occupied by force" and the Republic as such created by an "illegitimate act". This raised the spectre of reunification with Romania and awakened memories of dictatorial nationalistic Romanian rule during the inter-bellic period, especially among non-Moldovans.

On 27 July the Parliament approved a common opinion of its Permanent Committees on Gagauzi autonomy (N 202-XII) which rejected claims for such autonomy invoking historical and legal arguments. By saying that the Gagauzi constitute an "ethnic group" having no national territory in the Republic of Moldova, the Parliament provoked a furious reaction among Gagauzi inhabitants, which in turn strengthened the positions of radical elements among them.

On 17 August 1990, the "First Congress of the people's deputies of all levels of the territories of compactly-living Gagauzi" declared "full freedom and independence of the Gagauzi people from the state authority and rule of the Republic of Moldova", proclaiming the "Gagauzi Republic". On 2 September the "Second Congress of the Deputies of all levels of Transnistria" did the same for Transnistria (and Bender). In October and November elections were held to the "supreme soviets" of the said "republics". The Moldovan Parliament declared those elections null and void.

In autumn 1990 the Moldovan Government organised the "volunteers' march to the South". Those "volunteers" were men, poorly armed and disorganised, brought together by the Government and local authorities and driven by the sentiments of "settling scores with Gagauzi". Fortunately, it led to no victims despite high levels of violence, partly because President Snegur called in the Soviet Army to stave off possible attacks against the civilian population.

But when in mid-November volunteers returned to Chisinau, the capital, they were driven together with Moldovan militia (police) to the left bank town of Dubosari, where in clashes with the local inhabitants three people (from Dubosari) were killed. This first bloodshed in interethnic violence led to soul-searching among Moldovan leaders and a partial comeback for moderates. A period of truce with the newly established separatist authorities followed, Moldovan leaders trying to persuade Moscow to somehow "disband" illegal separatist

[42] *There were no political parties besides the Communist Party at that moment, but free competition was allowed among contenders in every constituency.*

entities. It is probable that Chisinau overestimated the degree of Moscow control over the situation in the USSR in general and over Moldova separatist entities in particular. But it is also true that the Kremlin tried to use and to encourage separatists against Moldova's claims for independence.

The new wave of tensions was generated after the failed *coup d'etat* in Moscow in August 1991 during which Chisinau supported Mr Yeltsin and other democrats, while Tiraspol (the "capital" of Transnistria) and Comrat (the "capital" of Gagauzia) supported the putchists. Immediately after the coup Chisinau tried to use the favour of Mr Yeltsin's Moscow to arrest and imprison Tiraspol and Comrat leaders. These attempts nevertheless led nowhere because of the railway blockade in Transnistria and political and economic pressure brought to bear on Chisinau.

In the meantime, the Soviet Union ceased to exist and Moldova was recognised as an independent sovereign state. The international community disregarded the existence of separatist entities in its territory thus giving precedence to the *uti posedatis* principle. The former Soviet Army was either being withdrawn (as in the Baltics where in the meantime it acquired status of the Russian Army on foreign soil) or gave an oath of loyalty to the new states (as in all other former Soviet Republics). But in Transnistria, where the main part of the former Soviet 14th Army was located, officers and soldiers expressed their desire to take an oath of loyalty to the separatist authorities. So Moscow first reluctantly and lately willingly "took it over". At that time it was considered as a temporary arrangement before final withdrawal of the troops.

Nevertheless, from March 1992 the Russian Army started to engage in military actions, in particular by arming separatist forces. Military conflict reached its climax in June 1992 when Chisinau army and police were introduced into the town of Bender. At that moment the Russian Army intervened openly and Russian public opinion supported those actions. Under the pressure of events the Moldovan leadership succumbed, signing a ceasefire agreement with Transnistrian leaders on 8 July 1992. On 21 July 1992 Moldovan President Mircea Snegur and Russian President Boris Yeltsin signed an agreement "On the principles of Peaceful Settlement of the Armed Conflict in the Transnistrian Region of the Republic of Moldova". According to this agreement the ceasefire was to be completed, warring forces were to be disengaged and a zone of security was to be created between them. In this zone peace-keeping contingents were to be introduced from Russia, Moldova and Transnistria (later on a Ukrainian military contingent was added). A Control Commission was created to supervise the disengagement and implementation process. The 14th Army was to preserve "strict neutrality", any sanctions and blockades were to be terminated and refugees were to be allowed to return.

In July 1992, the Transnistrian problem acquired its present form, as a secessionist region with a foreign army on its soil and strong geopolitical implications.

With hindsight it is hard to see why the Law "On the Functioning of Languages in the Territory of the Moldovan SSR" N 3465-XII of September 1989 was so often invoked as the reason for dissatisfaction and fear among Russian-speakers, even as a motive for separatism. This law could hardly be criticised for its harshness to national minorities. It provides amongst others for the equal use of the Russian language alongside Moldovan (Article 3), for the right of the citizen to use either of these two languages in his dealings with public authorities (Article 6), for no limits on the use of language at public gatherings (Article 8) and

for state guarantees to receive education in Moldovan or in Russian (Article 18). Significantly, when passions subsided, it was precisely the deputies representing mostly minorities who insisted on raising the constitutional status of the Law and making it more difficult to change as a kind of guarantee against more radical language legislation demanded by nationalists (as a result, the Moldovan Constitution of 1994 provides in Article 7 of Chapter VII "Final and Interim Provisions" that during a period of seven years, that is until 2001, this Law can only be changed by at least 60% of all deputies elected and not by 50%, as is required for organic laws).

There are some provisions with a potentially divisive effect, especially those of Article 7 which provides that every person who "meets people on official business" must possess sufficient command of the state language. This fairly wide and vague provision, coupled with the fact that Decision N 3466 of the Parliament of 1 September 1989 "On the Procedure for Enactment of the Law on Languages Spoken in the Territory of the Republic of Moldova" foresaw only a four year period for transition, could have led to purges in virtually every sphere of life of the allolingual presence had it been vigorously applied. In fact, it was not (with the exception of a short period from 1990-1991when the public administration was being purged under the radical nationalistic Government of Mircea Druc). Anyway, they were certainly not enough to justify the kind of furious and radical reaction on the part of non-Moldovans which followed.

Perhaps more can be said about the Parliament's Declaration on the Molotov-Ribbentrop Pact and its decision concerning Gagauzi autonomy issue, which as we have already seen contained some short-sighted and provocative statements. But the real reason for the abrupt and steep deterioration in interethnic relations lay not so much in the texts adopted as in the general atmosphere of high expectations and popular agitation which accompanied the last days of the Soviet Union. Not democratisation as such, but rather the lack of democratic traditions and institutions and the rules of the game combined with decades of animosity and suspicion account for these deplorable developments.

At the end of 1992 there were clear signs of the political pendulum swinging back. Popular disenchantment with the political amateurism of radical nationalists created preconditions for the former nomenclatura to return. Accusing nationalists of incompetence, the disintegration of the Republic and unnecessary bloodshed, and invoking the scarecrow of unification with Romania, the old nomenclatura, united around the newly established Agrarian Democratic Party, was busy paving its way to power.

Parliamentary elections in February 1994 gave the Agrarian Democratic Party more than 43% of the popular vote and more than 54% of the seats. The new mood was conciliatory in the sphere of interethnic relations, skeptical about market reforms, but not totally hostile to them, and instinctively pro-Russian and anti-Romanian. Reforms as such were not rejected but not very much believed in either. Civil peace and stability were the key words. Solving the Gagauzi and Transnistrian problems were seen as the primary task with the first one being (rightly) considered as of a less intractable nature that the second one. Significantly, Gagauzi took part in 1994 Parliamentary elections, mostly giving their votes to the Agrarians, while Transnistrians abstained (or were prevented from voting by their leaders).

As the first step towards civil reconciliation, the new Parliament amended the 1989 Law on Languages by making its Article 7 applicable only to the public sphere and prolonging the transitionary period until 1997, as well as by changing the mode of taking language tests

(Decision N 151-XIII of June 17, 1993). The Constitution of 29 July 1994 contained some quite liberal provisions in the spheres of linguistic and other rights of persons belonging to national minorities. Article 10.2 provides that “the State recognises and guarantees to all its citizens the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity.” Article 13.2 states that “the State acknowledges and protects the right to preserve, develop and use the Russian language and other languages within the national territory of the country.” Article 35.2 foresees that “the State will enforce under the law the right of each person to choose his/her language in which teaching will be effected .” Finally, Article 118.2 provides for the use of interpreters in the courts by those persons who do not have enough command of the State language and Paragraph 3 of the same Article lays down that “in accordance with the law legal hearings may also be conducted in a language that is found to be acceptable by the majority of the persons participating in the hearing” (this is clearly a euphemism for Russian). As we have already seen, in Chapter VII “Final and Transitory Provisions”, Article 7 of the Constitution raised the status of the 1989 Law on Languages and made it more difficult to be changed during the period of seven years.

Though at the time of their adoption those provisions were criticised by more radical representatives of national minorities as falling far short of obtaining the status of second state language for Russian, in reality they proved to be quite efficient in placating the fears of the Russian-speakers and allowing interethnic issues to drop from the top of the list of priorities for the population to the far end of that list, according to all opinion polls over the next two to three years. It is worth noting that those liberal constitutional provisions cited above were developed in a number of laws adopted by the Moldovan Parliament, among them the Law on Education, N 547-XIII of 21 July 1995, especially Article 8, and the Law on Judicial System N 514-XIII, of 6 July 1995, especially Article 9. Though the special law on national minorities was never adopted, Moldova was one of the first countries to ratify the Framework Convention for the Protection of National Minorities. Simultaneously, the influence of the radical elements among Russian-speakers who exploited interethnic tensions for their advantage steeply declined.

GAGAUZI CONFLICT: HOW IT WAS SOLVED

The impetus for liberalising legislation on national minorities reached its climax at the end of 1994, when the Law On the Special Legal Status of Gagauzia (Gagauz-Yeri) N 344- XIII of 23 December 1994 was adopted. At that time it was already the fourth consecutive year that illegal Gagauzi and Transnistrian “republics” had been in existence in the territory of the Republic of Moldova, preventing Moldovan authorities from effectively exercising their control over the whole of the country. Those regions were hotbeds of instability, smuggling and violence. Since the use of force was discredited, far-reaching concessions to the “other side” were considered by Chisinau authorities as the only means to reach sustainable solutions to those two issues. The mentioned organic law on Gagauzi autonomy was drafted by the Special Committee set up by the Parliament in permanent consultations with Gagauzi leaders who had only recently been denounced as law-breakers. From the start their cooperation was considered essential for the peaceful settlement of the conflict and successful implementation of the would-be law. Debate and voting in the Parliament also took place with the active participation of Gagauzi representatives.

The 1994 Law on Gagauzi Autonomy is explicit in laying down its aims: “displaying the good will and aspiring to preserve century-long good relations between the peoples; in the aim of satisfying national needs and preserving the national identity of Gagauzi people, their

full and multilateral development, prosperity of national languages and culture, securing political and economic self-rule". It is enough to compare this statement with the 1990 Parliamentary Decision on the Gagauzi issue to comprehend the sea-change which took place between those two events.

The preamble also eloquently underlines the ethnic basis of the territorial autonomy being established: "taking into account that the initial bearer of the status of Gagauzia (Gagauz-Yeri, place where Gagauzi live) is a small number of Gagauzi people who compactly live in the territory of the Republic of Moldova", concomitantly giving priority to human rights and reiterating the equality of all citizens who live in the said territory, regardless of any ethnic or other differences. This explicitly ethnic basis of the territorial autonomous entity provoked the most heated debates in the Parliament and in society in general, and raised the most doubts. The relevant provision was nevertheless included in the Law upon consideration that it was a precondition *sine qua non* for the Gagauzi leaders' cooperation.

Article 1.1 defines the nature of Gagauzia as a "territorial autonomous entity with the special status which, being a form of self-determination of Gagauzi is a component part of the Republic of Moldova." Paragraph 4 of the same Article stipulates that "in case of a change of the status of the Republic of Moldova as an independent state the people of Gagauzia have the right to external self-determination" – a reference to a possible reunification with Romania and a kind of legal guarantee for Gagauzia against such a reunification. Shortly after this Law was enacted the Constitutional Court was seized by one deputy from a right-wing party who argued that the provision of Paragraph 4, Article 1 is unconstitutional because it contradicts Articles 1 and 2 of the Constitution of the Republic of Moldova providing for sovereignty, independence and the unitary and indivisible character of the State. Nevertheless, the Constitutional Court refuted this argument, stating that this provision was constitutional and that there was no need for a special Constitutional Law to be approved to enact such a provision. There was however a separate opinion by judge Gheorghe Susarenco agreeing with the arguments against constitutionality.

Paragraph 2 of the same Article provides that "Gagauzia resolves autonomously, in the framework of its competence, in the interests of the whole population, issues of political, economic and cultural development."

According to Article 5, localities are included in Gagauzia on the basis of the results of the local referendum carried out in each of those localities by the Government of the Republic of Moldova. In the localities where Gagauzi constitute more than 50% of the population, referenda are held automatically, while in those where they constitute less than 50%, referenda are held only in the case where one third of the registered voters support such an initiative by signing a special plea. Those localities which enter Gagauzia reserve the right to leave it on the basis of a local referendum, which cannot, however, take place earlier than one year after entering Gagauzia.

Article 2 stipulates that "Gagauzia is governed on the basis of the Constitution of the Republic of Moldova, this Law and other laws of the Republic of Moldova with exceptions provided for by this Law, the statute of Gagauzia and regulations of the Popular Assembly (*Halc Toplusu*) of Gagauzia which shall not contradict the Constitution and legislation of the Republic of Moldova." This wording gives an idea of the hierarchy of legal acts by which Gagauzi is governed, namely the Constitution, the Law on Gagauzia, other laws (and regulations issued in view of enactment of these laws) of the Republic of Moldova, statute

and other regulations of the Popular Assembly of Gagauzia. The formula "with the exceptions provided for by this Law" can only mean that the Law on Gagauzia has precedence over other laws and regulations of the Republic of Moldova. This position is reinforced by the provision of Article 111.2 of the Constitution and is repeated in Article 27.2 of the Law which reads as follows: "the organic laws establishing special status for the places mentioned in paragraph 1 above may be amended if three fifths of the Parliament members support such an amendment," in contrast to all other organic laws which can be amended by the majority of all members elected (Article 74). In reality, as we shall see, this is not always the case.

A very big issue which arises in relation to what was just said is what the mechanism of control of conformity of other Moldovan laws and regulations with the Law on Gagauzia is. Article 12.3, lit.i) enables the Popular Assembly of Gagauzia to seize the Constitutional Court in order to annul the "laws and regulations of the Republic of Moldova which violate the plenary powers of Gagauzia"; Paragraph 4 provides for cases in which the Constitutional Court of the Republic of Moldova "annuls laws and regulations of the Republic of Moldova or parts thereof, etc." Paragraph 5 of this Article lays down that a "contested law or regulation shall be suspended until the Constitutional Court makes the respective decision."

Meanwhile, there is nothing in the Constitution or the Code of Constitutional Jurisdiction N502-XIII of 16 June 1995 as amended or the Law on the Constitutional Court N 317-XIII of 13 December 1994 as amended which would allow the Court to decide on the basis of any other legal text than the Constitution itself and the said laws. Article 1 of the Code of Constitutional Jurisdiction stipulates that "constitutional jurisdiction is exercised on the basis of the Constitution, the Law on the Constitutional Court and this Code".

Until now, the jurisdiction of the Constitutional Court has had a pronounced tendency to treat the Law on Gagauzia as a "simple" organic law and consequently to control its constitutionality. So, by Decision of 5 May 1999 N 24 the Constitutional Court declared unconstitutional Paragraph 2 of Article 20 of the Law on Gagauzia whereby "the judges of the Courts of Law of Gagauzia are appointed by the President of the Republic of Moldova upon the proposal of the Popular Assembly of Gagauzia with the consent of the High Judicial Council." In this Decision the Court stated that the Constitution "established in the whole territory of the Republic of Moldova a unique principle for the appointment of judges, i.e. by the President of the Republic of Moldova upon the proposal of the High Judicial Council." In a Separate Opinion Judge Nicolae Chiseev stated that constitutional provisions cited by the Court "have a general character and do not refer to the stipulations of Article 20.2" of the Law on Gagauzia. The contested provision of Article 20.2 of the said law could not therefore be interpreted irrespectively of the principles of Article 111 of the Constitution whereby the special forms and conditions for autonomy with special status are established by organic laws which could be changed by a majority of two thirds of the deputies elected. Judge Nicolae Chiseev concluded that this provision of the Constitutional Court "has a political rather than a legal nature and consequently creates more problems than it solves".

The same tendency could be detected in the law application procedures. Thus, by Law N 268-XIV of 6 February 1999 the Parliament amended Electoral Code N 1381-XIII of 21 November 1997 whereby it prohibited changing the territorial-administrative subordination of a locality by local referendum. This amendment clearly contradicted the provision of Article 5.2 of the Law on Gagauzia. When a group of activists collected the signatures of one third of registered voters in two localities close to Gagauzia, in order to organise a local referendum on joining Gagauzia on the same day local elections were to be held, on 23 May 1999, the

Central Electoral Commission refused to allow such a referendum to take place citing the Electoral Code as amended. It was only after that incident that the Parliament returned to the issue and on 2 July 1999 by Law 480-XIV supplemented the relevant provision of the Electoral Code as amended by the reservation "with the exception of cases provided for in the Law on Special Legal Status of Gagauzia (Gagauz-Yeri)."

Concerning the compatibility of local laws and regulations of the Popular Assembly of Gagauzia with the Law on Gagauzia, the situation is even less satisfactory. As provided for in Article 12.6 "local laws and regulations of Gagauzia which contradict the Constitution of the Republic of Moldova and this Law shall be annulled", but nowhere is it specified who does this and under what procedure it is to be done. There is simply no way to control the constitutionality and legality of the "local laws and regulations of the Popular Assembly of Gagauzia" and there is no clarity regarding the legal nature of those acts.

On 6 June 1998 the Popular Assembly adopted the Statute of Gagauzia, thus making use of Article 12.1 of the Law on Gagauzia. Earlier, the Working Group of the Venice Commission composed of Mr Giorgi Malinverni from Switzerland and Mr Philippe De Bruycker from Belgium prepared an Opinion on the draft (CDL (98)41) drawing attention to the fact that "the draft statute covers the domains which in reality do not appertain to the competence of Gagauzia" and proposed to "systematically eliminate" those provisions. Nevertheless, this opinion was not taken into consideration by the Popular Assembly and there was nothing any other body in the country could do about it.

The Statute itself (Article 85) attributes to the Tribunal of Gagauzia the competence to examine and "interpret this Statute and issues concerning the legality of local laws and regulations of the Popular Assembly, Governor and Executive Committee of Gagauzia". Clearly, to live up to this provision, the Tribunal of Gagauzia must have this competence enshrined in the law of the country. As this is not the case, in reality this provision remains inapplicable.

One can argue that "exceptions" from the national legislation mentioned in Article 2 of the Law on Gagauzia, taken together, constitute "special forms of autonomy according to the special statutory provisions of organic law" (Article 111.1 of the Constitution). These "exceptions" are as follows: three official languages, i.e. Moldovan, Gagauzi and Russian (Article 3); Gagauzi official symbols which are used alongside State ones (Article 4); the particular way in which administrative borders of Gagauzia are established (Article 5); the special system of organising the governing institutions of Gagauzia which differ from those of other regions and which include the Popular Assembly of Gagauzia, a Governor (Bascan) elected by universal suffrage and an Executive Committee which is approved by the Popular Assembly on the proposal of the Bascan, as well as their powers and the division of competencies between them (Article 8.18); the fact that the chiefs of the administrative directorates of Gagauzia are included on the proposal of the Governor in the composition of the Boards of the Ministries of the Government of the State (Article 19); special procedures for the appointment of the Procurator of Gagauzia, the chiefs of the Justice, National Security and Internal Affairs Directorates (on the proposal of the Popular Assembly or that of the Governor by the Procurator General, National Security and Internal Affairs Ministries respectively) (Article 19.24); the fact that the capital of Gagauzia is chosen by means of local referendum (Article 26).

It is much more difficult though to establish what the competencies of autonomy with special status are. In fact, this is dealt with in various articles dedicated to the competencies of the Popular Assembly, the Governor and the Executive Committee. At first glance they have quite extensive powers. Thus, the Popular Assembly has the competence to adopt the Statute of Gagauzia, as well as local laws in the following domains: a) science, culture and education, b) utility services and housing, urban and rural development; c) health and sports; d) budgetary and fiscal activities; e) economy and environmental protection; and f) labour relations and social assistance. It is also competent to: a) solve issues related to the territorial organisation of Gagauzia, the establishment and modification of the categories of localities, borders of the districts (rayons), towns and villages, their place names; b) to participate in the promotion of external and internal policies of the Republic of Moldova in the fields affecting the interests of Gagauzia; c) to establish the mode of organisation and activity of local public administration of Gagauzia and of the associations of citizens with the exception of parties and other socio-political organisations; d) to call, organise and implement the election of deputies in the Popular Assembly and to approve the composition of the Central Electoral Commission; to call elections for the authorities of local public administration of Gagauzia; e) to implement local referendum on the issues of Gagauzia competence; f) to approve regulations concerning symbols of Gagauzia; g) to establish titles of honor and approve distinctions; h) to examine issues concerning submission to the Parliament of the Republic of Moldova of an initiative to decree a state of emergency in the territory of Gagauzia and establish a special form of administration, if necessary, in the interests of security and protection of inhabitants of Gagauzia; i) to seize the Constitutional Court (see above) (Article 12).

However, it is not clear from the text of the Law whether those competencies are of an exclusive, competing, or administrative nature like, for instance, those of any regular territorial administrative entity. In practice, there is a strong tendency on the part of State authorities to treat the competencies of Gagauzia as if they were of a purely administrative nature, and to consider national legislation as applicable *in toto* in the whole of the national territory, Gagauzia included, with the aforementioned exceptions. Where a conflict does arise from this kind of approach (as, for example, is the case with Article 18.1 of the Law on the Territorial-Administrative Organisation of the Republic of Moldova N 191-XIV of 12 November 1998 providing that it is the Parliament of the Republic of Moldova which changes the place names of localities as well as administrative boundaries of districts), then a piecemeal political solution is applied : the Parliament rubber-stamps changes which are made by the Popular Assembly in accordance with Article 12.3 (a).

Another even more eloquent example of such a kind of approach concerns the Law on Local Public Administration N 186-XIV of 6 November 1998, which was analysed in the Draft Opinion on the conformity of the Laws on the Local Public Administration and Territorial Administrative Organisation with legislation in force concerning the status of certain minorities prepared by Mr Kaarlo Tuori from Finland, Mr Giorgio Malinverni from Switzerland and Mr Franz Matscher from Austria, members of the Venice Commission, and approved by the said Commission at its meeting of 16 October 1999 in Venice. As indicated in the aforementioned Opinion, Article 2.2 of the Law on the Local Public Administration stipulates that the “organisation and functioning of the local administration in the autonomous territorial entities are determined by the Law on the statute of the relevant region and this Law.” According to Article 107 of the Law, a prefect is the representative of the central authorities in the regions, autonomous entities included. The Law on Gagauzia does not provide for any representative of central authorities. Thus, Articles 21, 22, 23 and 24 of the

Law on Gagauzia stipulate that the heads of the Procurator's Office and the Departments of Justice, National Security and Police in the autonomous region are appointed by the respective Moldovan ministers with the agreement of the Popular Assembly, while in accordance with Article 110 of the Law on Local Public Administration it is the prefect who proposes the candidates for these functions and ensures the good functioning of those services. Moreover, the Law on the Statute of Gagauzia disposes that the Bascan is the supreme executive authority of Gagauzia (Article 14.1); the Law on Local Public Administration however does not specify how the powers of the prefect articulated are exercised in relation to those of the Bascan. This is why, the members concluded, Articles 113, 114, and 115 of the Law on Local Public Administration could enter into conflict with Articles 14.6, 14.7, and 14.8 of the Law on Gagauzia. Furthermore, the members drew attention to other less important contradictions between the mentioned laws.

In the Opinion of the Venice Commission, the Law on Gagauzia is to be considered *lex specialis* (and not *lex superior* because Moldovan constitutional doctrine does not recognise the different legal force of organic laws) with regard to the Law on Local Public Administration. This, of course, means that in respective cases the Law on Gagauzia takes precedence over this and other laws (*lex generalis*). This fact, nevertheless, has not yet become an integral part of the Moldovan legal mentality.

As was indicated by Philippe De Bruycker, the issue of the character of the competencies of Gagauzia as well as of the legal nature of the acts of the Popular Assembly, local laws included, is of extreme importance "to measure the extent of the autonomy of the region", and this issue has not been clarified in the legislation in force.

The shortcomings of the 1994 Law on Gagauzia do not diminish its importance and the very solid positive results which were obtained by means of its adoption and application. It could even be affirmed that the practical application of the law is more satisfactory than the text as such. Thus, on 5 March 1995, local referenda were held in Gagauzi-populated localities to define the administrative boundaries of the new territorial-administrative formation. These referenda were considered by international observers as free and fair. As a result, 31 localities pronounced themselves in favour of entering the new autonomy with a total population of 163 500 people, ethnic Gagauzi comprising 74.8%, Bulgarians 4.7%, Moldovans 4.5%, Russians 4.3%, and Ukrainians 3.85%. It is not an integral mass of land, but rather consists of three "pieces" which together represent 1 831.5 square km. In June of the same year the first elections to the Popular Assembly and the Governership were held and the town of Comrat was chosen by referendum as the capital of Gagauzia. Both these elections and the referendum were considered by international observers as free and fair.

As a result of 1995 elections, new leadership came to power in Gagauzia, of leftist persuasion, but on the whole much more ready to cooperate with Chisinau than the team which roused Gagauzi to proclaim an illegal "republic" . Since then, this region has ceased to be a hotbed of tensions and the Gagauzi problem has disappeared from the political agenda of the Republic of Moldova. All outstanding differences between Chisinau and Comrat are solved by negotiations and mutual agreements, political compromises being applied to supplement the vagueness of legal texts. In August-September 1999 new elections were held for the Popular Assembly and Governership of Gagauzia. A new team was elected, this time of centrist reformist persuasion, but also willing to cooperate with Chisinau. The peaceful transfer of power in this poor and only recently rebellious region has been quite impressive.

All in all, the 1994 decision to grant territorial autonomy to the Gagauzi minority is considered an unquestionable success, despite all the shortcomings of the legal texts adopted. At that particular moment, there could have hardly been any other acceptable solution.

This being said, we do not mean that even now and especially in the future further efforts will not be needed to clarify the uncertainties contained in the current legal situation of Gagauzia and even possibly to amend the Law on Gagauzia as such. It is clear, though, that any such change must be effected with the consensus of the parties concerned and be negotiated and mutually accepted.

TRANSNISTRIA: A STORY OF STALEMATE

While the Gagauzia issue has been resolved more or less successfully and, hopefully, definitively, this was not to be the case with that of Transnistria. There are a number of reasons for this. Firstly, the sheer size of the region of Transnistria, which has a population, including the town of Bender, 4.5 times larger than that of Gagauzia, making a sizeable 16.3% of the whole population of the country. Secondly, its economic strength: during Soviet times Transnistria was heavily industrialised, so that in the early 1990s it produced approximately one third of the Moldovan GDP. Thirdly, its geographical location: the bulk of the territory of Transnistria is situated across the Dniester river from the rest of the country, making it a unique and easy-to-defend piece of land. Fourthly, with the majority of its population comprising Russian-speaking Slavs and highly russified Moldovans this region enjoyed much higher support from the imperialistic forces of Moscow than Gagauzia. Support from Russia is of a political, diplomatic, economic, financial and even military nature (especially at the time of the 1992 armed conflict). The Moldovan side lost the information war with Transnistria during 1992 and since then support for “Slav brothers” became a credo of a considerable part of Russian public opinion.

An example of this attitude is the 17 November 1995 Decision of the Russian State Duma in which it proposed to the President of the Russian Federation “to recognise Prednestrovie as a zone of strategic interests of the Russian Federation”, as well as “to examine the issues of the tri-partite meeting of the representatives of the legislative and executive powers of Russia, Moldavia, and Prednestrovie on recognising Pridnestrovian Moldavian Republic as an independent sovereign state”.

Sixthly, the bloodshed during the armed conflict of 1992 legitimised the separatist regime in Transnistria, which since then has systematically used references to “Moldovan aggression” to justify its own existence, as well as its own undemocratic authoritarian character. Finally, the nature of the regime itself makes extremely difficult any non-violent, peaceful political change in the Transnistrian territory, especially any change of the ruling elite. The “constitution” of 24 December 1995 of the “Transnistrian Moldavian Republic” is a mixture of very different elements, such as the powerful “supreme soviet” and “local soviets” which do not themselves form in any way the executive bodies, but can interfere with their functioning by means of budgets, legislation, votes of no-confidence, and even a suspensive veto over executive decisions deemed to be “illegal” (Articles 62, 115, 116, 117). “Higher-placed” “soviets” can abrogate decisions of the “lower-placed” ones, if they consider them to be illegal, and can even disband them (ibid). In turn, the “president of the republic” single-handedly forms the “government” and appoints “heads of the state administration” at the local level (Article 77). He, however, cannot dissolve the “supreme soviet” other than by means of a referendum (Article 78). The “courts” are in theory independent, but in practice subservient

to the political power, the heads of the most important "tribunals" being appointed by the "supreme soviet" on the proposal of the "president" and members of the said "tribunals" on the proposals of their presidents (Articles 62, 94-103). It goes without saying that this "constitution" was never examined by international experts and none of them participated in its elaboration and improvement.

There is strong evidence of the omnipresence and omnipotence of the "state security ministry" which often acts in breach of the "constitution", "laws" and decisions of the judicial "tribunals". Freedom of the press is non-existent. In this regard, reference could be made to the case of the "Novaya Gazeta" newspaper, which saw its whole stock of printed copies confiscated by security services three times in 1999 (January, February and April). In spite of two decisions by "courts" ("Tiraspol city court" in May and Transnistrian "arbitration court" in July) in favour of the newspaper, confiscation continued in June and August.

Cases of human rights violations include Mr Ilie Ilascu , member of the Moldovan Parliament, and his colleagues, who are known as the "Ilascu group". Having been imprisoned and condemned to death by the illegal "tribunal" of Transnistria in 1993 (a death sentence which was never implemented, but never annulled either), they have still not been released despite protests of international human rights organisations and bodies. The other case is the denial of the right of ethnic Moldovan pupils to study their mother-tongue on the basis of the Latin alphabet (the use of the Latin alphabet for the Moldovan language is prohibited in Transnistria).

It is obvious that the regime established in Transnistria is based not on law, but on the personal authority of a group of leaders which has remained basically the same since 1990 with Mr Igor Smirnov, the "president", as its head. There is strong evidence that these leaders are involved in various illegal activities on the black market and arms smuggling. The illegal trade of gasoline and tobacco products through Transnistrian territory became a very serious problem for the Moldovan Government, incurring enormous fiscal losses. As a result, the Moldovan authorities had to introduce so-called "fiscal posts" on the administrative borders with Transnistria in the spring of 1990. The biggest importer of consumer goods in Transnistria, Sheriff Co., which possesses the widest network of supermarkets, enjoys a number of privileges in taxes and tariffs. Mr Vladimir Smirnov, the son of Mr Igor Smirnov, is the head of Transnistrian customs service.

Budgetary and fiscal policies in Transnistria are extremely non-transparent and unpredictable, and economic reforms are never really implemented. The 1995 financial crisis in Russia inflicted a serious blow on the Transnistrian economy and standard of living. Nevertheless, there still exists a number of functioning enterprises, the biggest of them being Ribnita Metallurgical Factory, which has serious export potential, partially due to indirect subsides from Gazprom. According to some assessments, Ribnitsa Metallurgical Factory provides up to 40% of the revenues of the Transnistrian budget.

The "Personal authority-based regime" in Transnistria is very much dependent on several persons and the relations between them. The fact that the 1995 "constitution" limits the "president's" term of office to ten years (Article 75) could potentially lead to a serious political crisis when in 2001 the second term expires. In anticipation of this, in August 1999 a draft "constitutional law" prepared by the "presidency" was published in Transnistria providing for some changes in the "constitution" including removal of this provision (these changes do not make the "constitution" more functional).

Given the nature of the regime in Transnistria, there is very little incentive, if any, for the Transnistrian leaders to negotiate in good faith with Chisinau with a view to peaceful settlement of this conflict, especially because, as the example of Gaguzia demonstrates, the very first democratic elections in the latter region led to a change of the whole ruling group.

A very serious hindrance to the settlement of this conflict is the continuing presence of Russian troops in Transnistria. Presently their personnel is not numerous, about 2 600 thousand people, but it has huge quantities of armaments and munitions which were being stocked in Transnistria during the Soviet era, starting in the 1930s, and are estimated to be about 42 thousand tons.

The Moldovan authorities always considered those weapons as a threat to the stability of the country and the neighbouring region, and requested the immediate and unconditional withdrawal of them, as well as of the Russian troops. On the 21 October 1994 an Agreement was signed between the Governments of the Russian Federation and the Republic of Moldova on the "legal status, procedure and schedule of withdrawal" of those troops, which foresaw that the withdrawal would take place within three years from the entry into force of the said Agreement. Article 2 of the Agreement provides for the "synchronisation" of the withdrawal process with the "political settlement of the Transnistrian conflict".

The Moldovan Government implemented this Agreement by its Decision N 823 of 9 November 1994 , but the Russian Government decided to transmit the Agreement for ratification in the State Duma, thus breaking the gentlemen's agreement between Mr A. Sangheli and Mr V. Chernomyrdin, Prime-Ministers of the Republic of Moldova and the Russian Federation respectively, reached at the moment of signature of this document, that this Agreement would not go through parliamentary ratification and would rather be implemented after the relevant decisions of the national Governments. This followed the precedent created by the Russian Federation when it withdrew its troops from the Baltic states by a decision of the executive and without the approval of the State Duma. By sending this Agreement to the State Duma for ratification, the Russian Government effectively buried it, because it was clear from the start that the balance of political forces in the State Duma was such that it was extremely unlikely to decide in favour.

After four years of prevarication in the lower house of the Russian Parliament about ratifying the document, Mr Sredin, Vice-Minister of Foreign Affairs of the Russian Federation, requested the withdrawal from the State Duma of the said Moldovan-Russian Agreement claiming that "no progress had been made towards a final political settlement of the Transnistrian conflict". "Any further decision by the Russian Ministry to come back to this subject would depend on developments in relations with the Republic of Moldova and the Transnistrian region and political settlement in the region," concluded Mr Sredin. Thus, the Russian Federation broke its own obligation undertaken before the Council of Europe at the moment of its accession (25 January 1996), "to ratify, within six months from the time of accession, the Agreement of 21 October 1994 between Russian and Moldovan Governments, and to continue the withdrawal of the 14th Army and its equipment from the territory of Moldova within a time limit of three years from the date of signature of the Agreement". Since then, it is true that some (very limited) progress has been obtained on troop and personnel withdrawal, but basically the situation remains unchanged.

In connection with the provision of Article 2 of the 21 October 1994 Agreement on the synchronisation of political settlement of the Transnistrian conflict and withdrawal of Russian military formations one might recall the Decision of the OSCE's Budapest Summit (December 1994) to the effect that "the participating states welcomed the commitment by both parties to conduct the withdrawal of the Russian Fourteenth Army from the territory of Moldova and the search for a political settlement of the eastern part of Moldova (Trans-Dniester region) as two parallel processes which will not hamper each other".

Further international pressure led to the Russian Federation committing itself at the highest level to withdraw its troops from the Moldovan territory by the end of the year 2002. So, in the Istanbul OSCE Summit Declaration participating heads of States and Governments reiterated their "expectation of an early, orderly and complete withdrawal of Russian troops from Moldova". They welcomed "the commitment of the Russian Federation to complete withdrawal of the Russian forces from the territory of Moldova by the end of 2002". In the Final Act of the Conference of the State Parties to the Treaty on conventional armed forces in Europe signed at the said Summit, the Parties "have taken note of the statement by the Republic of Moldova, which is attached to the Final Act, concerning its renunciation of the right to receive a temporary deployment on its territory and have welcomed the commitment of the Russian Federation to withdraw and to destroy Russian conventional armaments and equipment limited by the Treaty by the end of 2001, in the context of its commitment referred to in paragraph 19 of the Istanbul Summit Declaration". It remains to be seen whether those commitments were entered into in good faith.

It goes without saying that the kind of political and military support Transnistrian leaders have from conservative elements among the Russian leadership, and especially in the Russian State Duma, makes them even more intransigent. Nonetheless, they never dared to say openly that they do not want any negotiated settlement and were forced, mostly by Russians, who were also eager to show their positive role in the region, to pretend that they were negotiating, while sticking grudgingly to their self-made "independence". On their side, the Moldovan leadership, after having failed to force Transnistrians to surrender, came to see direct negotiations with Tiraspol as the only hope for the final settlement of the conflict. In April 1993 the OSCE mission in Chisinau was set up in view of facilitating a negotiated settlement of the Transnistrian issue within the framework of territorial integrity and sovereignty of the Republic of Moldova. On 28 April 1994 a "Declaration of the leaders of Moldova and Transnistria" was signed in the presence of the OSCE Mission Chief Mr R.S. Samuel and the Plenipotential Representative of the President of the Russian Federation Ambassador Mr V. Vasev in the village of Parcani, adjacent to Tiraspol ("Parcani Declaration"). The Parties expressed their adherence to the universal principles and norms of dispute resolution exclusively by means of negotiations on the basis of mutual understanding and accord. The Parties committed themselves to take into consideration recommendations of the OSCE mission, suggestions of the Russian Federation and the experience of peaceful settlement of the conflicts in the other regions of the world. The Parties came to an agreement to immediately and unconditionally start negotiating on the whole range of issues of mutual interest, to remove all barriers which hinder normal economic and socio-cultural links, to secure their restoration and development and to establish mutually beneficial links in the economic, commercial, financial and other spheres of activity in the interests of the whole population. They also agreed on the need to define the *state-legal status of Transnistria* [my italics], on the need for a gradual programme for the establishment and fulfilment of state legal relations, about delegation and delimitation of competences of the Parties, about a transitional period for the gradual conclusion of reciprocal agreements in every concrete

sphere of activity, about the necessity of constructing a system of mutual guarantees, including international ones, and about complete and unconditional implementation of the understandings.

The Parcani Declaration commenced a prolonged process of difficult and protracted negotiations on the "state legal status" of Transnistria, as well as on a number of more practical issues. Transnistrians wanted to see in the aforementioned deliberately vague term an implication of the future recognised status of Transnistria as the "state" of Transnistria which shares its competencies with another state, Moldova, on a voluntary basis. Moldovans always claimed it meant the autonomy of Transnistria within the Moldovan State.

In conformity with this Declaration groups of experts were formed with the aim of defining the position of the Parties. The Moldovan group's proposals were debated in the Parliament and were made public ("*Pamint si Oameni*", 16 December 1995) as a draft Law "On the Special Status of the Localities on the Left Bank of the Dniester (Transnistria)". This text follows, more or less, the structure and logic of the Law on Gagauzia, with some important clarifications and innovations. It defines Transnistria "as a territorial formation in the form of Autonomous Republic, comprising localities on the Left Bank of the Dniester, to which a special status was granted in accordance with the Constitution of the Republic of Moldova and this Law, and which is a component part of the Republic of Moldova" (Article 2). Official languages in Transnistria were to be Moldovan, Ukrainian and Russian (Article 5). Transnistria was to have its own symbols, which were to be used alongside those of the State. In case of a change to the status of the Republic of Moldova as an independent state, the population of Transnistria had to have the right to territorial self-determination (Article 7). The territory of Transnistria was to be defined by means of local referenda conducted more or less on the lines of those carried out for Gagauzia, but the town of Bender is deliberately excluded from participation in such a referendum.

The powers of the bodies of public authorities in Transnistria were to be divided between the Legislative Assembly and the Government which was to be formed by the Legislative Assembly (Articles 12-19). The Head of the Transnistrian Government was to be *ex officio* Deputy Prime Minister of the Republic of Moldova and his aides were to be members of the Boards of respective ministries of the Republic of Moldova (Articles 18 and 21).

The Legislative Assembly adopts the statute of Transnistria, its laws and regulations. The statute, laws and regulations, as well as parts thereof, can be declared null and void if they are found to be in contradiction with the Constitution and this Law by the Constitutional Court of the Republic of Moldova at the request of the President and the Government of the Republic of Moldova (it implies a change of the Constitution in its part concerning the competencies of the Constitutional Court). In turn, the Legislative Assembly of Transnistria has the right to seize the Constitutional Court if it deems that Transnistrian competencies have been infringed (Article 16). This very important innovation clarifies both the status of the would be Law on Transnistria and the related issue of the control of the constitutionality and legality of the acts of Transnistria. But the status of the Statute of Transnistria remains unresolved.

The Legislative Assembly could be dissolved where a) it violates the Constitution of the Republic of Moldova and fails to take decisions in conformity with it; b) it adopts a decision aimed at violating the territorial integrity of the country or illegally changing the territorial-administrative arrangement of it; c) it is unable to form a Government of Transnistria during three month period. Dissolution of the Legislative Assembly under a) and b) is carried out by

the Parliament of the Republic of Moldova on the basis of the Opinion of the Constitutional Court and under c) by the Parliament on its own initiative.

Two separate chapters – four and five, deal with the powers of the Government of the Republic of Moldova and the Transnistrian Autonomous Republic respectively. The Republic of Moldova has exclusive competence in the following areas: a) control over respect for the Constitution of the Republic of Moldova; b) foreign policy; c) defence, national security, protection of state borders; d) custom services; e) nationality (citizenship); f) general legal regime of property and inheritance; g) organisation and functioning of courts, procurator's office, internal affairs bodies; h) legislation in the fields of civil law, administrative law, penal law, industrial relations and family law; i) organisation of financial, fiscal and monetary, and banking systems; j) state statistics, railway and air transportation, trunk pipelines, defence objects, general energy systems, communication and informatics system management (Article 24).

Nevertheless, in some of the aforementioned areas the Transnistrian Autonomous Republic had to have important competencies in its territory. Commanders of military formations located in Transnistria were to be appointed by the Ministry of Defence of Republic of Moldova with the agreement of the Transnistrian Government. The enrollment and location of military formations in Transnistria as well as the organisation and implementation of manoeuvres on its territory were to be determined by the competent body of the public administration of the Republic of Moldova with the agreement of the Transnistrian Government. Transnistrians were to be given the right to choose the place where they would serve their military term (Article 26). The head of the security service of Transnistria was to be appointed and dismissed by the Minister of national security of the Republic of Moldova on the proposal of the Government of Transnistria (Article 28). The head of the customs service of Transnistria was to be appointed by the Director General of the Department of Customs Service of the Republic of Moldova on the proposal of the Government of Transnistria (Article 29).

Although citizens of the Republic of Moldova, residents of Transnistria could have had stamps with the inscription "Resident of Transnistria" in their identification cards and passports (Article 30). Judges of Transnistrian courts were to be appointed by the President of the Republic of Moldova on the proposal of the High Judicial Council coordinated with the Legislative Assembly of Transnistria (Article 31). The Procurator of Transnistria was to be appointed by the Procurator General of the Republic of Moldova on the proposal of the Legislative Assembly, and all other procurators in Transnistria were to be appointed by the Procurator General on the proposal of the Transnistrian Procurator (Article 32). The head of the Internal Affairs Board of Transnistria was to be appointed by the Ministry of Interior of Republic of Moldova on the proposal of the Government of Transnistria. He would appoint and dismiss all heads of the district (rayon) and municipal heads of the internal affairs sections. Heads of municipal police were to be appointed and dismissed by the head of the Internal Affairs Board of Transnistria. The Commander of Carabinieri (internal troops) in Transnistria was to be appointed and dismissed by the Minister of Internal Affairs of the Republic of Moldova on the proposal of the head of the Internal Affairs Board of Transnistria (Article 34). The National Bank of Republic of Moldova was to establish its own branch in Tiraspol (Republican Bank) to implement its own monetary and fiscal policies. The Head of this bank was to be appointed and dismissed by the Legislative Assembly of Transnistria and was to be *ex officio* Vice President of the National Bank of the Republic of Moldova (Article 35).

To the competencies of the Transnistrian Autonomous Republic were attributed: a) the adoption of the Statute of Transnistria and republican laws, as well as their enforcement; b) calling elections of the Legislative Assembly; c) organisation and functioning of public administration bodies at republican and local levels; d) organisation and implementation of republican and local referenda on issues attributed to the competencies of Transnistria and local bodies of public authority; e) internal administrative territorial arrangement; f) determination of the structure and priority directions of the development of the economy of Transnistria, ensuring scientific and technical progress; g) republican fiscal and budgetary activity, local taxes; h) ensuring legal order and public security; i) establishment of fire and rescue services; j) establishment of municipal police (militia); k) industry, construction, agriculture and civic culture; l) organisation of entrepreneurial activity; m) issues in the spheres of health care, social security, education, science, culture, sports, environment protection; n) utility services management, and urban and rural development; o) ensuring employment of the local population (labour exchange); p) organisation of republican broadcasting services; r) organisation and functioning of telecommunications; s) functioning of republican roads and related services; t) organisation of republican statistics; u) other issues attributed to the competencies of Transnistria.

Transnistria also was to have the right to "take part in the implementation of foreign policies of the Republic of Moldova on the issues which relate to the interests thereof, as well as have the right to independently entertain contacts in economic, scientific and cultural domains". The Legislative Assembly was to acquire the right of legislative initiative in the Parliament of the Republic of Moldova. Other competencies could be attributed to Transnistria concerning the adoption of republican laws and regulations in accordance with organic laws of the Republic of Moldova (Article 38).

Transnistria was to have its own budget and to transfer a fixed part of all taxes and other payments to the state budget under the laws of the Republic of Moldova on the budgetary system and state budget for the respective year (Article 30).

Article 41.3 stipulated that "laws and regulations of the Republic of Moldova, as well as laws and regulations of the acting bodies of the public authority of Transnistria after entry into force of this Law are applied in part which does not contradict its provisions". It was not clear who would be empowered to decide in cases where the contradictory or non-contradictory nature of the said acts to the would be Law on Transnistria were to be questioned. Paragraph 1 for the same Article introduced further guarantees of the stability of the special autonomous status of Transnistria by stipulating that it could be changed by three fifths of the deputies of the Moldovan Parliament elected **with the accord of the Legislative Assembly of Transnistria**.

It is clear from what was said above that the draft Law on Transnistria, while following the structure and logic of the Law on Gagauzia, nevertheless attributed somewhat greater competencies to Transnistria (e.g., defence, monetary policy, legislative initiative) and was much more specific and clear concerning the division of competencies between Transnistria and the Republic of Moldova. One is tempted to explain the higher quality of the text of the draft Law on Transnistria by the participation of international experts in its elaboration. However, it still had some shortcomings in respect of the control of the conformity of Moldovan laws with the would-be law on Transnistria as well as "laws and regulations" of the illegal authorities of Transnistria with the would be Law on Transnistria. It also remained

vague as to the nature of Transnistrian competencies: were they of a complementary, competitive or exclusive nature?

All this being said, it is not to be denied that had this draft been accepted by the Transnistrian side as the basis for negotiations, it could have helped to settle this dispute by means of granting to the Transnistrian region the status of autonomous republic with wide enough powers by any standards. It is hard to see, besides some clarifications mentioned above, what further concessions the Moldovan side could make without prejudicing the internationally recognised nature and competencies of the nation-state.

It was not to be, however. The Transnistrians never agreed even to seriously consider the Moldovan proposals and in their turn put forward their own draft: "Treaty on the Common Competencies of the Transnistrian Moldavian Republic and the Republic of Moldova" (we refer to the variant of the Tiraspol group of experts of 3 November 1995). Article 1 of this draft stipulates that "the Transnistrian Moldavian Republic and the Republic of Moldova construct their relations on the basis of constitutional norms and contractual relations. Constitutions are adopted by the highest legislative bodies of the Parties." The Presidents of the two states were supposed to have "meetings for the resolution of issues of common interest " (Article 2), armed forces were supposed to interact on the "basis of [to be concluded] accords" (Article 3), analogous treaties were to be concluded in the spheres of combatting crime (Article 4), energy policy, transport, communications, informatics and official statistics (Article 5-8). Common policies were to be implemented in the spheres of health care, culture, sports, employment, wages and salaries, migration, social protection, education, science, family protection, maternity, paternity and childhood on the basis of special agreements (Article 11) . Simultaneously, the Transnistrian Moldavian Republic and Republic of Moldova were to (only) interact in the spheres of finance and banking and monetary policies for which they were to have concluded "respective agreements" (Article 12).

For the realisation of commonly approved decisions, executive bodies of the two states were to have concluded special agreements (Article 16). "External borders with the neighbouring states" would have been policed independently by the two parties (Article 13). Transnistiran Moldavian Republic was to acquire the right to participate on the issues of interest for it in the foreign policy and international relations of Republic of Moldova. To that effect special agreements were to have been concluded.

Probably the only concrete provisions concerned mutual recognition of "legal documents" and certificates (Articles 5, 9), thus cancelling the only advantage the Moldovan Party disposed of, as well as free movement of transport, goods and persons between the territories of the Parties (Article 6), which is important for the black market economy of Transnistria.

Finally, a "high court" was to be established comprising three members from every party to decide on possible disputes. Its decisions were to be universally binding.

It is crystal clear that this so-called draft "treaty" was not prepared in good faith and was intended to preserve a status quo, rather than to allow for any tangible progress.

In view of the evident stalemate in the negotiation process the emphasis was moved away from finding an overall settlement formula to a piecemeal approach, focusing on specific issues like customs and services, monetary policy, restoration of destroyed bridges across the

Dniester, etc. In reality, though, very little progress was achieved in any of those domains. Despite all the agreements signed between Chisinau and Tiraspol on customs services, Transnistria has become a very big hole in Moldovan borders, entailing huge losses in its budget. Finally, in spring 1999 special "fiscal posts" were introduced on the administrative border with Transnistria to close this hole, thus recognising the futility of any agreement with Transnistria on this issue.

Meanwhile, some changes in the "geometry" of the negotiation process took place. On 9 August 1995 during a meeting with Moldovan President Mr Mircea Snegur and the Transnistrian "president" Mr I. Smirnov an agreement was reached which, in addition to already regular phrases on non-violent means, etc., made a plea towards the Russian Federation, Ukraine and the OSCE to become "guarantors" of the said agreement. Shortly afterwards, on 19 January 1996 in Moscow during the CIS Summit the Presidents of the Republic of Moldova, the Russian Federation and Ukraine signed a "common statement" by which they committed themselves to "undertake all necessary measures, conducive in the framework of the existing negotiation process to the settlement of the conflict, to the acceleration of the elaboration and signature of the document defining the special legal status of Transnistria as a component part of a unitary and territorially integral Republic of Moldova". The Russian Federation and Ukraine expressed their readiness to become states-guarantors of the observance of the status of Transnistria as defined by the respective documents.

The reinvigoration of diplomatic efforts of Russia in this region of Europe has to be seen as part of Mr Yeltsin's re-election campaign during which he was eager to demonstrate his diplomatic abilities and Russia's role as a peacemaker, especially in the context of the ongoing Chechen crisis. Moldovan diplomacy for its part tried to use what was seen at that time as an open window of opportunity.

Soon it became clear, however, that this flurry of Russian activity was leading nowhere. Due to the intransigence of Transnistrian leaders, the idea of an all-comprising "negotiated settlement" was replaced by a much less ambitious "memorandum about the basis of normalisation of relations between the Republic of Moldova and Transnistria." But even this proved to be too much for Transnistrians, who refused to accept even the slightest hint of the territorial integrity of the Republic of Moldova. When the Memorandum was almost ready for signature, Mr Snegur, then President of the Republic of Moldova, himself facing a re-election campaign, refused to sign it. It led to angry exchanges between various contenders to the presidential office, as well as political parties. Mr P. Lucinschii, then Chairman of the Parliament, and later to be elected President hinted that he would sign the memorandum. But after coming into office in January 1997 he procrastinated some time, citing shortcomings in the draft memorandum as the reason for this. Finally the document was signed in Moscow on 8 May 1997 by Mr P. Lucinschii and Mr I. Smirnov in the presence of the Presidents of the Russian Federation and Ukraine and the OSCE Acting Chairman who signed it in their own capacities as guarantors and mediators.

Aside from the bold rhetoric about "peaceful means", etc. one can detect two or three meaningful statements, not altogether new. Under point 2, the parties agreed to continue to build "state legal relationships" between themselves. "The document defining those relations and the status of Transnistria, would be based on the principle of mutually agreed decisions, including delimitation and delegation of competencies and mutually secured guarantees". "Transnistria takes part in the implementation of foreign policy of the Republic of Moldova –

a subject of international law – on the issues of interests to it. Decisions on those issues are to be taken by consensus of the parties. Transnistria has a right to independently establish and entertain international contacts in the economic, scientific, technical and cultural spheres, while in other spheres, it may do so with the consensus of the parties" (Point 3). Point 11, the last one, referred to "the common state within the border of the Moldavian SSR of January 1990", in the framework of which the parties resolve to build their relations.

It is this last wording of "common state" which provoked furious reactions among politicians and bewilderment among legal experts. This formula is not used in international law, and each party tried to fill it with its own meaning. Moldovans insisted it was simply another way of saying "unitary state of Moldova", while Transnistrians saw it as confirmation of their old idea of a "new state" gradually evolving out of the "melting" of the two "equal states" of the Republic of Moldova and the Transnistrian Moldavian Republic. All in all, the Memorandum was a further setback for the Moldovan side. A small cushion for Mr Lucinschii was a Common Declaration of the Presidents of the Russian Federation and of Ukraine which was signed on the same day in Moscow. Saluting the signature of the Memorandum, the heads of those two states-mediators declared that "the provisions of the Memorandum cannot contradict the universal norms of international law and will not be interpreted and applied in contradiction with the international treaties in force, decisions of the OSCE and the Common Declaration of the Presidents of the Russian Federation and Ukraine of 19 January 1996, recognising sovereignty and territorial integrity of the Republic of Moldova".

So ended this saga with the Memorandum, without any tangible results and discernible prospects for future progress.

Somewhat more positive were the results of the meeting between Mr P. Lucinschii, Mr I. Smirnov, Mr V. Chernomyrdin, Russian Prime Minister, and Mr L . Kuchma , Ukrainian President, in Odessa on 20 March 1998 where an agreement was signed "On confidence-building measures in the development of contacts between the Republic of Moldova and Transnistria". According to this document, peacekeeping forces had to be reduced to 500 on each side, the number of stationary check-posts reduced, Ukrainian military observers sent to the "neutral zone", broken bridges across the Dniester river restored and the withdrawal of Russian munitions accelerated. Ukraine expressed its willingness to facilitate this process.

Some of those measures were indeed implemented, among them the reduction of peacekeepers and check-posts and the restoration of bridges. Those are almost the only tangible results of the protracted and difficult negotiation process. It should be kept in mind that despite all the protests by the Moldovan side, Transnistrians keep their troops in the "neutral zone", in breach of the 1992 Agreement on the Disengagement of Forces.

There was almost no progress in this field in 1999, mostly because of the inactivity of Moscow and indecision of Kiev, preoccupied by their political and economic troubles. For its own part the Moldovan leadership seemingly lost interest in further efforts, overwhelmed by the pressures of economic hardship, trade dependence on Russia, internal political instability and disenchantment due to the lack of interest of the rest of the world.

On 16 July 1999 a meeting took place in Kiev between Mr P. Lucinschii, Mr I. Smirnov, Mr L. Kuchma and Mr S. Stepashin, Prime Minister of Russia, who signed a "Common Statement". This document contained, *inter alia*, the following: "the parties agreed to build their relations on the following principles: common borders and common economic, legal,

defence, and social space". Leaders charged the respective structures "to prepare draft documents concerning the creation of mechanisms for the implementation of the above mentioned provisions." Though a reference to "common borders" could be interpreted as an evidence of positive change in the Transnistrian position, the draft "Declaration on Common State" presented by the Transnistrian side would refute such an over-optimistic supposition. It is simply a repetition of the old Transnistrian notion of the two "equal states" existing inside their "common borders" and in reality having very little in common.

It is worth noting that this same position is unconditionally supported by the Russian State Duma which in its Decision of 11 February 1999 "recommended" to the President of the Russian Federation "to initiate the conclusion of an accord on gradual settlement of the Transnistrian conflict which would provide for the building between the Republic of Moldova and Transnistria of the state legal relationships on the basis of mutual respect and **equality of status** (my bold) within the framework of the common state and borders of the Moldovan SSR of January 1990".

CONCLUSIONS

The Gagauzi and Transnistrian disputes in the Republic of Moldova present very different pictures. Born under similar circumstances in early 1990, under the pressure of events and popular passions, these conflicts then saw their destinies separate from one another. The Gagauzi issue was successfully resolved by granting autonomy to the territory defined on an ethnic basis, its principles being laid down in a not entirely perfect law. Though the inner logic of this autonomy still has to be worked out, it is a very rare example in Eastern Europe of ethnic conflict resolution by peaceful means and direct negotiations.

The same strategy did not succeed in the case of Transnistria. The reason for this is found not in the solution proposed and methods applied, but rather in the geopolitical context, as well as other demographic, cultural, economic, and political circumstances, the first, i.e. geopolitical, feature being perhaps the most important. Without repeating what has been already said we would like to underline that any genuine progress in the Transnistrian case is extremely unlikely to take place under the present circumstances, without an overall change in the policies of the Russian Federation and general regional environment. In particular, more diplomatic pressure should be put on Russia to persuade it to withdraw its troops from Transnistria and to increase its mediation efforts in view of the peaceful settlement of this dispute within the framework of international law and Russia's international obligations.

THE NORTHERN IRELAND AGREEMENT – NATIONAL LOYALTIES IN CONFLICT, Mr James Hamilton*

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Prosecutions in Ireland in 1999. The opinions in this paper are his personal views and do not necessarily represent the views of the Government of Ireland.

The problem of conflict between different constituent nationalities within a single political unit is common in central and eastern Europe. It is less common in Western Europe where national boundaries in the twentieth century have shown a remarkable stability. In a century which has seen the emergence of many new European states in central and Eastern Europe the only new state to emerge from any of the major political units in Western Europe was Ireland in 1922. Northern Ireland is the prime example in Western Europe today of a society which is divided in its national loyalties. Although this conference is principally concerned with conflict in Eastern Europe the theme of societies in conflict is one which has a resonance for those involved with the problems of divided societies everywhere.

At the time of writing it remains unclear whether the political parties in Northern Ireland can resolve the outstanding difficulties which have so far prevented them establishing the institutions agreed to be set up in the Northern Ireland Agreement[43] which was signed eighteen months ago, on Good Friday, 1998.[44] While the fundamental problem facing Northern Ireland, that of a society with a divided national allegiance, is by no means unique, some of the solutions proposed in the Northern Ireland Agreement present novel features which may be of interest to those involved with the problems of divided societies elsewhere.

In a short paper it is not possible to discuss in detail the whole area of the Northern Ireland Agreement. I propose to describe briefly the framework of the Agreement and the institutional arrangements to be established under it but I do not intend to discuss those arrangements in any detail, nor to discuss the current political problems involved in attempting to get the Agreement off the ground. I wish to concentrate instead on one of the basic ideas underlying the Agreement, that is to say, its approach to the problem of sovereignty over territory which is occupied by two groups of people, each proclaiming a different national identity, and the related question of the nationality and citizenship of its inhabitants. It is noteworthy that the problems which have delayed implementation of the Agreement do not relate to disagreement over this fundamental question but are concerned rather with problems over the sequencing and timing of the decommissioning of paramilitary weapons and whether this should precede the establishment of an executive, problems which in turn reflect the lack of trust between some of the parties. Even if the Agreement were to fail in the short term its approach to the questions of state sovereignty and citizenship seems likely to form a key component of any renewed endeavour to reach agreement.

NORTHERN IRELAND AS A POLITICAL UNIT

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[43] I have used the term "Northern Ireland Agreement" to refer to the complex of agreements entered into between Britain and Ireland and between the two Governments and the Northern Ireland political parties on Good Friday, 1998. It is also sometimes referred to as the "Good Friday Agreement", or the "Belfast Agreement".

[44] This paper was delivered on 26 November 1999, the day before the council of the Ulster Unionist Party voted to enter a Northern Ireland executive and work the institutions. The agreement between the two Governments formally entered into force on 2 December 1999.

Firstly, it is necessary for me to give some brief historical description of how Northern Ireland has come to exist as a political unit. This must, in a short paper such as this, necessarily mention only the essential elements and cannot deal with the many subtleties and complexities of the situation.

Northern Ireland has existed as a political unit only since 1921. It is comprised of six out of the nine counties of Ireland's northernmost province, Ulster. Between the completion of the English conquest of Ireland in the sixteenth century and the establishment of a separate Irish State in 1922, Ireland as a whole formed a single political unit, at first as a separate kingdom under the English crown, and after the Act of Union in 1801 as a constituent though nonetheless legally distinct part of the United Kingdom of Great Britain and Ireland.

Ulster was, at the beginning of the modern era, the least anglicised part of Ireland and the least effectively controlled by the English crown. Largely for this reason it was extensively planted in the late sixteenth and early seventeenth century by English and Scottish settlers. These plantations, and the later insurrections and wars of the seventeenth century, culminating in the decisive victory of King William III over his Catholic rival, King James II, at the Battle of the Boyne in 1690, led to a concentration of the land of Ireland, and of political and economic power, in the hands of the descendants of English and Scottish settlers. These, however, never constituted more than a fifth to a quarter of the population of Ireland and it was only in certain parts of the province of Ulster that they constituted a majority of the population. Since virtually all of the pre-plantation Irish population remained faithful to the Roman Catholic religion, and since the English and Scottish settlers were Protestant in religion, religion tended to become identified as a mark of national identity and allegiance. This identification continues to be made in Northern Ireland today[45].

When the demand for a devolved Irish parliament and, subsequently, Irish independence led to the creation of a separate Irish state in 1922, the overwhelming majority of the Protestants of Ulster opposed this development. They continued to support the union with Britain and to assert their British identity, and eventually succeeded in having Northern Ireland, which consisted of six of the nine Ulster counties[46], excluded from the arrangements arrived at for the rest of the island. Northern Ireland has remained a part of the United Kingdom since then and had its own devolved parliament and government from 1921 to 1972 when direct rule from London was imposed following extensive civil disturbances which had their genesis in protest against the disabilities and discrimination imposed on the nationalist minority and the unionist reaction to that protest.

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[45] *This is, of course, a broad generalisation. There have always been Roman Catholic loyalists and supporters of the Union of Ireland, and latterly Northern Ireland, with Great Britain, and there have always been Protestants who were separatist, nationalist or republican in politics. Indeed, it is remarkable how many prominent leaders of nationalist and republican Ireland were Protestant in religion or in their background. Nevertheless, the generalisation is a valid one.*

[46] *In 1922 the political and religious balance in Ulster as a whole between Protestant/unionist and Catholic/nationalist was very even. The three Ulster counties which were excluded from the new Northern Ireland state were, however, preponderantly Catholic/nationalist, so that in the six which were included in Northern Ireland, the Protestant/unionist ratio was in the order of 2 to 1. Even of these six, however, it may be noted that in two (Fermanagh and Tyrone) the population had a slight Catholic/nationalist majority, whereas two (Antrim and Down) which were also the most populous, had very strong Protestant/unionist majorities. Hence the nationalist charge that even the boundaries of the state itself were "gerrymandered" to take in the largest possible area without leaving the overall Protestant/unionist majority at risk.*

Northern Ireland today consists of a majority unionist community, mainly Protestant in religion, wishing to remain British, and a minority nationalist community, mainly Roman Catholic in religion, which regards its nationality as Irish. Each community is, in a real sense, both a majority and a minority. The unionist community, roughly 60 per cent of the population of Northern Ireland, represents less than 20 percent of the population of the island as a whole and has often been seen, not least by itself, as a community under siege. Nationalists, on the other hand, tend to see themselves not merely as a minority in Northern Ireland but as part of an Irish nationalist majority on the island as a whole, separated from the rest of Ireland by the partition of their country which they have never accepted.

THE NORTHERN IRELAND AGREEMENT

The Northern Ireland Agreement has a complex structure. There are in fact a number of agreements. The first, the Multi-Party Agreement, was agreed between the British and Irish Governments and representatives of six different political groupings in Northern Ireland. Separately, the two Governments concluded a formal international Agreement, designed to establish new constitutional arrangements for Northern Ireland and to provide for the relationship between the two Governments, which is to enter into force at the same time as the establishment of the various institutions agreed in the Multi-Party Agreement, and committing the two Governments to support and implement the provisions of that Agreement.[47] There is a further agreement between the two Governments (the Dublin Agreement) relating to North-South bodies with executive functions.

The Multi-Party Agreement contains a number of elements. Reflecting the two national identities in Northern Ireland, political institutions are to be established internally which guarantee the rights and interests of the two communities. These consist principally of an assembly elected by proportional representation and an executive chosen proportionally by the Assembly. Institutions are also to be established on a North-South basis (all-island cross-border institutions representing both parts of Ireland) as well as East-West (institutions representing all the governmental interests in Britain, Ireland and the other islands of the archipelago). Provisions dealing with human rights, equality of opportunity, cultural issues, the decommissioning of paramilitary weapons, security, policing, justice, and the release of prisoners are all vital components of the agreement.[48]

However, as I intend in this paper to focus on those aspects of the Agreement which relate to the issue of sovereignty over Northern Ireland and the nationality question I do not intend to deal further with these other matters[49].

THE CONSTITUTIONAL STATUS IN RELATION TO SOVEREIGNTY PRIOR TO THE NORTHERN IRELAND AGREEMENT

Prior to the signing of the Northern Ireland Agreement, the status of Northern Ireland represented a major source of disagreement, not only between the nationalist and unionist traditions in Northern Ireland, but between the two sovereign Governments.

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[47] *See footnote 2 above*

[48] *For a comprehensive analysis of all aspects of the agreement see the Fordham International Law Journal Vol 22 No. 4 April 1999.*

[49] *I have summarised the other principal elements of the Agreement in an Appendix to this paper.*

In order to understand the changes which will be brought about by the Northern Ireland Agreement it is necessary to consider the status of Northern Ireland both in British and in Irish law prior to the Agreement.

NORTHERN IRELAND'S STATUS - THE BRITISH VIEW

The British position was that Northern Ireland remained part of the United Kingdom after 1922. The root of title for this position were the two Acts of Union of the British and Irish parliaments passed in 1800 which had unified the kingdoms of Great Britain and Ireland from 1 January 1801. The Government of Ireland Act 1920, had established two devolved Home Rule parliaments for Northern Ireland and Southern Ireland. The parliament intended for the south never functioned. Instead the Irish nationalist members elected to the British House of Commons withdrew from the Westminster parliament in 1919, constituted themselves an Irish parliament which was known as Dáil Eireann, and declared the independence of Ireland. A Treaty was concluded on 6 December 1921 between the representatives of the British government and the Executive elected by Dáil Eireann. This Treaty provided for the establishment of the Irish Free State, the constitution of which came into force on 6 December 1922. The territory of the Irish Free State was to be the whole of Ireland, but the parliament established for Northern Ireland was to be free to opt out of this arrangement within one month and remain within the United Kingdom. This it did the following day, 7 December 1922.

In 1948, following on from the formal declaration by Ireland of the description of the State as a republic,[50] the British parliament passed the Ireland Act 1948, section 1 of which declared as follows:-

> (1) It is hereby recognised and declared that the part of Ireland heretofore known as Eire ceased, as from the eighteenth day of April, nineteen hundred and forty-nine, to be part of His Majesty's dominions.
>
> (2) It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland.
>
> (3) The part of Ireland referred to in subsection (1) of this section is hereafter in this Act referred to, and may in any Act, enactment or instrument passed or made after the passing of this Act be referred to, by the name attributed thereto by the law thereof, that is to say, as the Republic of Ireland.

The Parliament of Northern Ireland was prorogued in 1972 following the imposition of direct rule from London. Subsequently, the Northern Ireland Constitution Act 1973 was passed, Section 1 of which provided:

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[50] *In The Republic of Ireland Act, 1948.*

> It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section…

NORTHERN IRELAND'S STATUS - THE IRISH VIEW

After 1922, the general political attitude of nationalist Ireland, both among those who had supported and those who had opposed the Treaty settlement, was that while Northern Ireland might exist as a political fact, the partition settlement had involved the unjust sundering of an ancient nation. This settlement was regarded as having been imposed on Ireland in the 1922 Treaty settlement by duress and under threat from Britain of "immediate and terrible war".[51] A civil war was fought in Ireland in 1922-3 between supporters and opponents of the Treaty settlement. The side which had opposed the settlement and lost the civil war came to power following a general election in 1932 and immediately set about dismantling those arrangements insofar as lay within their power. A new Constitution of Ireland was adopted in 1937 by a plebiscite of the people. While the Constitution was republican in form and provided for an elected head of State, the formal description of "republic" was not used. In relation to the territory of the State, Articles 2 and 3 of the Constitution provided as follows:-

> "**Article 2.**
>
> The national territory consists of the whole island of Ireland, its islands and the territorial seas.
>
> **Article 3.**
>
> Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect."

These provisions have been authoritatively interpreted by the Irish Supreme Court to mean the following:-

> "1. The re-integration of the national territory is a constitutional imperative (cf. Hederman J in *Russell v Fanning* [1988] IR 505).
>
> 2. Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right.

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[51] *An expression used by the British Prime Minister, David Lloyd George, in the course of the Treaty negotiations.*

3. Article 3 of the Constitution prohibits, pending the re-integration of the national territory, the enactment of laws with any greater area or extent of application or extra-territorial effect than the laws of Saorstát Éireann and this prohibits the enactment of laws applicable in the counties of Northern Ireland.

4. The restriction imposed by Article 3 pending the re-integration of the national territory in no way derogates from the claim as a legal right to the entire national territory."

The provision in Article 3 of the Constitution contained in the words "and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory" is an express denial and disclaimer made to the community of nations of acquiescence to any claim that, pending the re-integration of the national territory, the frontier at present existing between the State and Northern Ireland is or can be accepted as conclusive of the matter or that there can be any prescriptive title thereby created and an assertion that there can be no estoppel created by the restriction in Article 3 on the application of the laws of the State in Northern Ireland. This is of course quite distinct from the extra-territorial effect of the laws of the State in respect of matters occurring outside the State for which persons are made answerable in the courts of the State."[52]

The provisions of Articles 2 and 3 came to be viewed by Unionist politicians as an irredentist claim to the territory of Northern Ireland[53].

THE ANGLO - IRISH AGREEMENT OF 1985

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[52] *McGimpsey –V- Attorney General [1990] 1 I.R. 110 (at p119)*

[53] *It seems to the present writer that insofar as such a view is based on legal rather than political considerations, despite McGimpsey, it is not well-founded. Undoubtedly, a "constitutional imperative" sounds rather more threatening than a mere aspiration. However, McGimpsey also made it clear that the enactment of laws applicable in Northern Ireland was prohibited "pending the re-integration of the national territory". The key question is: how can such a re-integration come about lawfully?*

The question cannot be answered without reference to Article 29 of the Constitution, sections 1 to 3 of which provide as follows:-

> *"1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.*
>
> *2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.*
>
> *3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."*

While this question has never been litigated, it is suggested that the joint effect of Articles 2, 3 and 29 would have been, so long as Britain maintained a claim to sovereignty over Northern Ireland, to preclude any unilateral declaration by the Parliament and Government of Ireland that the national territory was thereby reintegrated in the absence either of agreement or international arbitration or judicial determination to that effect.

In 1985, Britain and Ireland entered into an international agreement which made further provision for the governance of Northern Ireland. While the Anglo-Irish Agreement of 1985 did not represent a change in the formal legal claims put forward by the two Governments, it did represent a substantial change in practice. The British Government accepted a substantial degree of Irish influence over the affairs of Northern Ireland, including the right of the Irish Government to put forward views and proposals on matters relating to Northern Ireland concerning political, security and legal matters, including the administration of justice, and cross-border co-operation. The Agreement established an Intergovernmental Conference of the two governments. The two Governments also affirmed, in Article 1 of the 1985 Agreement, that any change in the status of Northern Ireland would only come about with the consent of a majority of the people in Northern Ireland, recognised that the then present wish of a majority in Northern Ireland was for no change in its status, and declared that "if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective parliaments legislation to give effect to that wish".

Article 2(b) of the 1985 Agreement, however, expressly provided that "There is no derogation from the sovereignty of either the Irish Government or the United Kingdom Government, and each retains responsibility for the decisions and administration of government within its own jurisdiction".

For its part, the Irish Government never allowed Articles 2 and 3 of the Constitution of Ireland to prevent it from recognising the separate existence of Northern Ireland at a certain "working" level, even in statutes passed by the Irish parliament[54]. The Irish High Court has held that there is no constitutional bar on the Irish parliament recognising the legal efficacy of British or devolved legislation enacted for Northern Ireland.[55] The Irish Supreme Court has described article 1 of the Anglo-Irish Agreement of 1985 as "a recognition of the *de facto* situation in Northern Ireland "which was, however, entered into "expressly without abandoning the claim to the re-integration of the national territory".[56]

THE NORTHERN IRELAND AGREEMENT - SOVEREIGNTY AND SELF-DETERMINATION

The Northern Ireland Agreement represents a fundamental departure by both Governments from the position each has adopted over the years. In place of an assertion by each side that Northern Ireland is of right part of its territory is substituted the principle of respect for the legitimacy of both the unionist and nationalist outlooks, recognition that it is for the people of Northern Ireland to choose whether to remain in the United Kingdom or to join a united Ireland, and recognition that whoever governs Northern Ireland must act impartially, respect the civil, political, social and cultural rights of all citizens and give just and equal treatment to the identity, ethos and aspirations of both communities.

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[54] *The term "'working' level of legality" is that of the authors of The Irish Constitution (Kelly, Hogan and Whyte) 3rd edition, 1994, p15, fn 26, citing a number of Irish statutes which make reference to and provision in relation to Northern Ireland.*

[55] *McGlinchey v Ireland (No.2) [1990] 2 I.R. 220, at pp 229 - 31 -*

[56] *McGimpsey (at p121)*

The agreement deals with the question of self-determination of Ireland in a subtle way. It rejects the right of any body outside Ireland to decide the fate of the island - an important point for nationalists and republicans - but, and this is a vital point for unionists, any act of self-determination to bring about a united Ireland must take place "on the basis of consent, freely and concurrently given, North and South" "accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland".

The agreement then goes on to acknowledge that

> while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people

It can thus be seen that British sovereignty in Northern Ireland is henceforth not to be grounded in any decision or act of the "sovereign" parliament or government at Westminster, nor in the will of the citizens of the United Kingdom as a whole, but in the will of the majority of the people in Northern Ireland.

As a corollary of this is the Agreement provides that if in the future a majority in Northern Ireland join with a majority in the rest of Ireland to seek to exercise their right of self-determination to bring about a united Ireland

> it will be a binding obligation on both Governments to introduce and support in their respective parliaments legislation to give effect to that wish.

While this provision reflects the earlier undertaking in the 1985 Anglo-Irish Agreement, the language is now much stronger. It is now described as "a binding obligation" whereas in the 1985 Agreement the two Governments merely "declare that" they will introduce and support legislation.[57] Secondly, the reference in the 1985 Agreement to there being no derogation from sovereignty is absent from the chapter of the Agreement entitled "Constitutional Issues" which contains this obligation.[58] It is clear that any failure to give effect to a future vote by the people of Northern Ireland in favour of a united Ireland would be inconsistent with the whole basis of the Agreement, with its reference to the legitimacy of the choice of a majority in Northern Ireland and the recognition of the right of the people of the island of Ireland, by agreement between its two parts and without external impediment, to exercise their right to self-determination.

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[57] *In McGimpsey the Irish Supreme Court said that here "the two Governments merely … state what their policy will be should events evolve in a particular way" (at p.120)*

[58] *There is an express provision in the chapter of the Agreement which deals with the British-Irish Intergovernmental Conference to the effect that "there will be no derogation from the sovereignty of either Government." The provision appears in paragraph 4 which deals with decisions of the Conference. No such provision, however, appears either in the chapter which deals with "Constitutional Issues" or in the chapter entitled "Strand Two" which deals with the North-South institutions.*

Pursuant to the Agreement, the British Government agreed that they would introduce the following provisions in their legislation:

> 1. (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
>
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between her Majesty's Government in the United Kingdom and the Government of Ireland.
>
> 2. The Government of Ireland Act 1920 is repealed.[59]

For its part, the Irish Government agreed to replace Articles 2 and 3 of the Constitution with the following:

> **Article 2**
>
> It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.
>
> **Article 3**
>
> 1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed

[59] *These provisions are now contained in sections 1 and 2 of the Northern Ireland Act 1998.*

> immediately before the coming into operation of this Constitution.[60]

It will be seen, therefore, that in place of a claim to territory, the new provision in the Irish Constitution focuses on people, by recognising the birthright of every person born in the island of Ireland to be part of the Irish nation. The new text goes on to assert the "firm will" of the Irish nation to unite all the people of the territory of the island, while recognising that unity can be brought about, firstly, only by peaceful means, and, secondly, only with the consent of the majority in both parts of the island.

THE NORTHERN IRELAND AGREEMENT AND CITIZENSHIP

The Agreement follows through on the recognition of the equal legitimacy of the two national identities of the people of Northern Ireland with a novel provision regarding citizenship. The Agreement recognises

> the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

It may be noted that both British and Irish law can accept the concept of dual citizenship. In common law systems, of course, such acceptance is facilitated by the greater emphasis placed on domicile or residence than on nationality in determining questions of jurisdiction and of legal status. It had long been the case that many Irish nationalists in Northern Ireland were accustomed to hold Irish passports. While this right did not in fact derive directly from the old Articles 2 and 3 of the Irish Constitution,[61] it was a right cherished by many nationalists from Northern Ireland as a tangible expression of their Irish national identity. Articles 2 and 3 were seen as a recognition of that identity. It was essential, therefore, both for the Government of Ireland and the nationalists and republicans represented at the talks concerning the Northern Ireland Agreement that any change in the provisions of Articles 2 and 3 would not weaken the right of nationalists to assert their Irishness and to be identified as citizens of Ireland.

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[60] *These provisions were approved by the people of Ireland in a subsequent referendum by a majority of over 94%. The amended versions of Articles 2 and 3 came into effect on 2 December 1999 at the same time as the international agreement between Britain and Ireland entered into force.*

[61] *The law regarding the right to Irish citizenship of persons born in Ireland was, prior to the Northern Ireland Agreement, a complex one beyond the scope of this paper to expound comprehensively. Briefly, any person descended from a person born anywhere in Ireland before 6 December 1922 can claim Irish citizenship as jus sanguinis. (It will be recalled that as a matter of law the Irish Free State established in 1922 briefly consisted of the whole island before Northern Ireland availed of an opt-out provision.) This right is subject to a two-generation limitation which does not, however, apply to persons born anywhere in the island of Ireland as a whole. In addition, persons born in Northern Ireland on or after 6 December 1922 and not otherwise Irish citizens (i.e. by virtue of the provisions referred to above) were entitled to Irish citizenship if they made a declaration to that effect.*

Under the Northern Ireland Agreement the right of all the people of Northern Ireland to be Irish citizens is recognised, and this right is reflected in the terms of the new Article 2 of the Irish Constitution. From a legal point of view this provision is interesting since the United Kingdom has recognised that birth in a part of its territory (Northern Ireland) can give rise to a right to citizenship of another state, Ireland. While it is relatively common for a state to recognise foreign citizenship by *jus sanguinis* of persons born in its territory by virtue of *jus sanguinis* the recognition of such a right as *jus soli* demonstrates yet again the unique approach to questions of sovereignty, citizenship and national identity adopted in the Northern Ireland Agreement. Of course, the reciprocal provisions of the Agreement mean that in any future United Ireland the Government of Ireland will likewise be bound to secure and recognise the right to British nationality of those of the Northern Ireland people who wish to assert it.

THE REFERENDUMS TO APPROVE THENORTHERN IRELAND AGREEMENT

A key aspect of the Northern Ireland Agreement, from the nationalist and republican perspective, was its method of popular approval by two referendums held on the same day in the two parts of Ireland. The result was that in the South over 94% of those voting approved the Agreement and in the North over 70% supported its terms.

Irish republicans, because of their fundamental objection to the partition of Ireland, had always queried the legitimacy of any democratic decision arrived at in either of the two jurisdictions alone. In their eyes, the last occasion on which the people of Ireland as a whole had voted together was in the United Kingdom general election of 1918, which in Ireland as a whole had led to majority support for the separatist Sinn Féin party and the withdrawal of the Sinn Féin members, who constituted the overwhelming majority of the elected Irish members, from Westminster in order to establish an Irish parliament and executive in Dublin. In republican eyes no act of a partitioned Irish parliament, or of the electorate of only a part of the Irish nation, could undo or derogate from that act of self-determination.

From the Irish nationalist or republican perspective, the fact that the new arrangements agreed in the Northern Ireland Agreement have been voted on and approved by the whole electorate of the whole island on the same day, albeit in separate referendums, has been regarded as a valid act of self-determination giving the Agreement the approval of the Irish people as a whole.

CONCLUSION

The Northern Ireland agreement proposes new solutions to the problem of different national identities in a divided society. The effect of the changes effected by the Northern Ireland agreement is that Northern Ireland's position within the United Kingdom is recognised and guaranteed for as long as it is based on the wishes of a majority of its inhabitants, and provided that the rights of the minority population are recognised. In the event of a majority in the future opting for a united Ireland, a mechanism is established to bring that about, and in relation to giving effect to such an option the British Government has entered into a binding commitment in international law. In return for Irish recognition of the present status of Northern Ireland, British sovereignty over the territory is qualified so that it rests, not on any act of the British parliament or the population of the United Kingdom as a whole but solely on the will of the inhabitants of Northern Ireland. A mechanism for secession from the United

Kingdom has been established, should that ever become the will of the inhabitants of Northern Ireland.

It is important to note that the guarantees for minority rights are reciprocal. The rights now guaranteed to those of Irish identity in a Northern Ireland for as long as it remains within the British state will, if in the future Northern Ireland opts to join a United Ireland, have to be afforded to those whose identity is British. In the words of the Agreement

> whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.

The traditional link between territory and citizenship is broken insofar as the people of the territory of Northern Ireland are free to opt for either or both of the two nationalities concerned. While the Agreement stops short of sharing sovereignty, there is agreement on how sovereignty might be transferred at a future date. Additionally, the arrangements to respect the national identity and rights of the present national minority, and the provision that they are to continue, *mutatis mutandis*, in the event that the present majority becomes the minority at a future date, are designed to ensure that both nationalities are permitted equal exercise of their national identities and rights, no matter which state is sovereign in the territory of Northern Ireland at the time, and hence to diminish the importance of the question of which state is sovereign.

APPENDIX

Summary of the principal elements of the Northern Ireland Agreement
other than issues relating to sovereignty and nationality.

1) **<u>The establishment of internal democratic institutions</u>**
These consist of (a) an elected Assembly with elaborate provisions to ensure that key decisions require the consent of both communities, and with power to legislate in devolved areas and (b) an Executive Committee consisting of a First Minister, a Deputy First Minister and up to ten other Ministers with executive responsibilities, chosen proportionately from the parties represented in The Assembly using the d'Hondt system and (c) Departmental Committees for each of the executive functions with power to initiate legislation, consider and advise on budgets, approve secondary legislation, and make enquiries and reports.

2) **<u>The establishment of a North/South Ministerial Council and executive "implementation" bodies</u>**
This is designed to bring together those with Ministerial responsibility in Northern Ireland with their counterparts in the Irish Government, to develop consultation, co-operation and action on an all-island and cross-border basis and to operate on the basis of consensus. It was also agreed to establish a

number of "implementation bodies" with executive powers to implement on an all-island and cross border basis policies agreed in the Council. The Council will be serviced by a standing joint Secretariat. The "implementation bodies" are the subject of a further international agreement between the British and Irish Governments,[62] which agreed to establish executive bodies in the following areas: waterways, food safety, trade and business, special EU programmes, language, fisheries and lighthouses.[63]

3) <u>The establishment of two British – Irish institutions</u>

These are (a) a British – Irish Council consisting of representatives of the two Governments and of the devolved institutions in Northern Ireland, Scotland, Wales and representatives of the Isle of Man and the Channel islands, to promote the harmonious and mutually beneficial development of the totality of relationships among their peoples and (b) a British – Irish Intergovernmental Conference to promote bilateral co-operation at all levels. The agreement provides that "in recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the conference concerned with non-devolved Northern Ireland matters, on which the Irish Government may put forward views and proposals". These meetings will also deal with all-island and cross-border co-operation on non-devolved issues, with co-operation in security matters, and the area of rights, justice, prisons and policing in Northern Ireland.

4) <u>Rights, Safeguards and Equality of Opportunity</u>

The two Governments' commitment to fundamental human rights norms is affirmed. The British Government undertook to complete incorporation of the European Convention on Human Rights and to confer on the Northern Ireland courts a power to overrule Assembly legislation for inconsistency with the Convention. New statutory rights to equality of opportunity were to be introduced. A Northern Ireland Human Rights Commission was to be, and has been, established. This is an independent institution with power to review the adequacy and effectiveness of laws and practices, make recommendations to Government, consider draft legislation and to bring court proceedings or assist individuals to do so. The Commission can also advise on the scope for defining rights supplementary to the European Convention to reflect the particular circumstances of Northern Ireland.

The British Government also undertook to establish a new statutory Equality Commission.

The Irish Government undertook to further examine the question of incorporation of the European Convention on Human Rights in its jurisdiction, to establish a Human Rights Commission "with a mandate and remit equivalent" to that of the Northern Ireland Commission, to ratify the Council

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[62] *The Dublin Agreement of 8 March 1999.*

[63] *These bodies, together with the institutions established under the Northern Ireland Agreement, all came into existence on 2 December 1999.*

of Europe Framework Convention on National Minorities, and to enhance its equality legislation.

5) Economic, Social and Cultural issues

These include provisions relating to rights relating to the use of minority languages including the Irish language.

6) Decommissioning of paramilitary weapons

The participants reaffirmed "their commitment to the total disarmament of all paramilitary organisations" and confirmed "their intention to continue to work constructively and in good faith" with the Independent International Commission on Decommissioning and "to use any influence they may have, to achieve the decommissioning of all paramilitary arms within two years following endorsement in referendums North and South of the Agreement and in the context of the implementation of the overall settlement". The Commission is charged with monitoring, reviewing and verifying progress on decommissioning.

7) Security

The Agreement envisages an early return to normal security arrangements. The Irish Government promised a review of its anti-terrorist legislation and this is taking place under the chairmanship of a former Supreme Court judge, Mr Justice Hederman.

8) Policing and Justice

The participants believed that the agreement provided "the opportunity for a new beginning" "with a police service capable of attracting and sustaining support from the Community as a whole". It was agreed to establish an independent Commission to make recommendations for future policing arrangements; the Commission, chaired by former British cabinet minister and Hong Kong Governor, and now a member of the Commission of the European Communities, Chris Patten, has presented its report. The report received a mixed reaction, broadly supportive in the nationalist community but many unionists object to the proposed removal of symbols they see as important, but which nationalists regarded as divisive, including the use of the title "Royal" or the use of the crown as a symbol.

It was also agreed to establish a review of criminal justice. This review, under the chairmanship of a British county court judge, has yet to report. Its remit includes arrangements for appointments to the judiciary, the organisation and supervision of the prosecution process, the independence of the judiciary and prosecutors, law reform, and the possible devolution of criminal justice functions to the Assembly.

9) Prisoners

An accelerated programme for the release of prisoners convicted of offences related to the Northern Ireland troubles was agreed, to be confined to prisoners affiliated to organisations maintaining a complete and unequivocal cease-fire. In general all such prisoners were to be released within two years.

The Agreement was approved by referendums held in both parts of Ireland, in Northern Ireland by a 71% majority and in the South by over 94% of those voting. The referendum in the South authorised the Government to consent to be bound by the Belfast Agreement and permitted certain changes in The Constitution of Ireland in relation to the definition of the national territory to be given effect on the coming into force of that Agreement.

BOSNIA AND HERZEGOVINA – MULTI-ETHNIC OR MULTINATIONAL?, Mr Joseph Marko

Professor, University of Graz,
Judge at the Constitutional Court of Bosnia and Herzegovina

1. Policy on minorities since independence

Whereas the other (former) Yugoslavian republics could and can be regarded without exception as nation states with a leading national element, different social, demographic and structural factors conditioning the protection of minorities prevailed and prevail in Bosnia and Herzegovina. The second, communist Yugoslavia, whose structure was determined from 1945 to 1991/92 by a federal constitution, could be termed a multinational state – albeit with communist overtones. Similarly, Bosnia-Herzegovina was rightly described as a "Yugoslavia in miniature" on account of its demographic structure; in addition to the three largest national groups – the Muslims, Serbs and Croats – members of other nationalities and leading national elements lived in the country and were entitled to equality under the Constitution. Be this at it may, the independence of the Republic of Bosnia and Herzegovina and its recognition in accordance with international law at the beginning of January 1992 after the break-up of Yugoslavia resulted in[64] a worst-case scenario of ethnic conflicts. The free-for-all was ended only by the Dayton/Paris peace agreement. Four years of implementation have revealed the fundamental dilemma inherent in this peace settlement: the issue of how far, after the atrocities of ethnic cleansing during the war, the ensuing ethnic and national structures and segregative institutional mechanisms[65] are accepted as a sign of political realism, or to what extent an attempt is made to restore the multi-ethnic structures of 1991 evidenced by the national census of the same year, for the sake of "justice" and under varying amounts of pressure from the international community.

2. Demographic situation

A purely quantitative comparison shows that, in 1991, Muslims, Serbs and Croats, the three leading national elements, together made up 92.1% of the population. It is possibly surprising that on the eve of the dismemberment of Yugoslavia, 5.5% declared that they were "Yugoslavs" and so formed the fourth largest ethnic group, while a further 0.3% availed themselves of their right under Article 170 of the Constitution of the Socialist Federal

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[64] *This is to be understood in a purely temporal sense and does not imply any cause and effect relationship. Cf in this connection, Marie-Janine Calic Der Krieg in Bosnien-Hercegovina. Ursachen –Konfliktstrukturen – internationale Lösungsversuche, Frankfurt/Main. 1995*

[65] *What is probably the most comprehensive analysis of the whole nexus of problems was supplied by Edin Sarcevic, Kritika etnickih ustava i postrepublickog ustavotvorsiva u Bosni i Herzegovini (Constitution and Policy. Criticism of the ethnic constitutions and the post-republican constituent in Bosnia and Herzegovina), Sarajevo, 1997.*

Republic of Yugoslavia not to state their nationality. The members of all other ethnic groups accounted for only 0.74%.

A comparison of these percentages therefore confirms that in 1991 Bosnia-Herzegovina was a multi-ethnic state chiefly comprising three “constituent” peoples and a number of small or very small minorities. Furthermore, in view of the large number of mixed marriages in Bosnia in particular, it is obvious that not only the constitutionally guaranteed possibility of not specifying nationality, but also a declared belief in “Yugoslavianism” served as statistical categories which offered a means of avoiding an unequivocal profession of nationality, and so of preserving a multiple, multicultural identity.

Table 1: Nationality according to the censuses of 1981 and 1991

Nationality	**1981**	%	**1991**	%
Muslim	1,630.033	39,5	1,902.956	43.5
Serbian	1,320.738	37,2	1,366.104	31,2
Croatian	758.140	18,4	760.852	17,4
"Yugoslavian"	326.316	7,9	242.682	5,5
Other	946		24.218	0,5
Unknown	26.576		35.670	0,8
Not stated	17.950	0,4	14.585	0,3
Montenegrin	14.114	0,4	10.048	0,2
Rom	7.251	0,2	8.864	0,2
Ukrainian	4.502	0,1	3.929	0,1
Albanian	4.396	0,1	4.922	0,1
Nationality	**1981**	%	**1991**	%
Regional	3.649	0,1	224	0,0
Slovenian	2.755	0,1	2.100	0,04
Macedonian	1.892	0,04	1.595	0,03
Hungarian	945	0,02	893	0,02
Czech	690	0,01	590	0,01
Italian	616		732	0,01

Polish	609		525	0.01
German	460	0,01	470	0,01
Slovak	350	0,00	297	0,00
Jewish	343		426	0,01
Romanian	302		162	0,00
Russian	295		297	
Turkish	277		257	
Ruthenian	111		133	
TOTAL	**4,124.256**		**4,377.033**	

If we scrutinise the geographical distribution of peoples and nationalities, we find an all-important difference to that in the multi-ethnic states of western Europe. Unlike linguistic groups in Switzerland, Belgium or Spain, who are settled in separate areas, the members of the three peoples were essentially scattered right across the territory of Bosnia-Herzegovina, although they were concentrated in particular regions. For example, the Croats made up from 90 to as much as 99% of the population in West Herzegovina and also formed an absolute majority in two communes of Posavina. The Serbs comprised the absolute majority of the population above all in the communes of West Bosnia, whereas in the communes of East Bosnia, along the Drina, they were in the majority only in Bijeljina. Muslim majorities were to be found mainly in communes in central Bosnia and in the north-west in and around Bihac. This means that none of the three peoples were settled in a separate, territorially unified area.

Today, the territorial distribution of the population has altered dramatically as a result of the fighting between 1992 and 1995 and the concomitant ethnic cleansing, as is clearly shown by a comparison of the statistically hypothetical population figures from the 1991 census and UNHCR[66] estimates for 1997 for the entities now known after the Dayton Agreement as the Republika Srpska and the Federation of Bosnia and Herzegovina:

Table 2: Comparison of the population structures of the Republika Srpska and the Federation of Bosnia and Herzegovina

	Republika Srpska		**Federation of BiH**	
	1991	**1997**	**1991**	**1997**
Bosniacs	28,77	2,19	52,09	72,61
Serbs	54,32	96,79	17,62	2,32
Croats	9,39	1,02	22,13	22,27

[66] *Source: International Monitoring Group (IMG) on the basis of the 1991 census and UNHCR estimates for 1997.*

Other	7,53	0,00	8,16	2,38

These figures illustrate the extent of ethnic cleansing in the territory of the Republika Srpska: while in 1991, the Bosniacs constituted almost one third of the population of the then non-existent territory of the Republic, in 1997 they were down to approximately 2%; the Croat population had fallen from about 9% to 1%, and the "others" who, after all, had accounted for 7.5%, had completely disappeared. But even the Serbs, who would have made up an absolute majority of 54% of the population, were not by any means concentrated in one part of the country, so that in 1991 what is now the territory of the Republika Srpska would have been an area with a mixed population.

In the territory of the Federation of Bosnia and Herzegovina, the displacement of Bosniacs and Serbs is striking, while the percentage of Croats – about 22%- has remained exactly the same. In 1991, the Bosniacs would have just formed an absolute majority; in 1997 they accounted for almost two thirds of the population, whereas the Serb percentage had fallen dramatically from 17% to 2%. The exodus of the Serbs from Sarajevo after the signing of the Dayton Agreement was, of all things, primarily a consequence of a policy sometimes executed by force on the orders of Karadzic and the SDS leaders.

As far as population distribution is concerned, the Republika Srpska and the Federation of Bosnia and Herzegovina are now ethnically homogenised "nation states" of the respective "constituent" peoples: the Serbs in the Republic and the Bosniacs and Croats in the Federation. This transformation of what used to be the multi-ethnic Republic of Bosnia-Herzegovina when it was part of the former Yugoslavia, where peoples and ethnic groups were dispersed across the breadth and length of the state's territory, into an ethnically homogeneous area with (multi)national state institutions was a long and violent process spanning the period between the disintegration of Yugoslavia and the conclusion of the Dayton Agreement in December 1995, a process that was reflected in the international community's plans prior to the signing of the Washington Agreements in 1994, which established the Federation of Bosnia and Herzegovina and, before the Dayton Agreement, in the proposals for territorial reorganisation and the restructuring of state institutions[67].

3. Notion of "minorities" and nationality

In the words of the preamble to the Constitution of Bosnia and Herzegovina, which constitutes Annex 4 to the Dayton Agreement, "Bosniacs, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina" determine the Constitution. Article II.4 of the Constitution, which obviously echoes Article 14 of the European Convention on Human Rights, uses the term "association with a national minority", while Annex 7 to the Dayton Agreement speaks of "ethnic and/or minority populations" and "ethnic or minority groups". In contrast to the other republics of the former Yugoslavia which adhere to the eastern European model of the nation state, where the distinction between majority and minority nations rests on language, Bosnia and Herzegovina displays at least two unusual features.

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[67] *Cf in detail Joseph Marko, The ethno-national effects of territorial delimitation in Bosnia and Herzegovina in Autonomies locales, intégrité territoriale et protection des minorités, edited by the Institut suisse de droit comparé/European Commission for Democracy through Law of the Council of Europe, Zurich 1996, pp. 121-143.*

First, the multi-ethnic demographic structure and multinational legal and constitutional foundations of the Republic mean that in Bosnia and Herzegovina as a whole there was no and is no sharp division between a majority, or leading national element, on one side and minorities on the other. Secondly, the social construct of ethnic differentiation in Bosnia, especially between Bosniacs, Serbs and Croats, the three largest national groups who have shaped the cultural and political history of Bosnia and Herzegovina, is not linked solely to language, but also to religion, as was already made abundantly clear by the Bosnian Constitution of 1910 after annexation by Austria-Hungary.

This first Bosnian Constitution and the appended election regulations for the State Parliament of Bosnia and Herzegovina[68] took as their example the Moravian settlement of 1905 and introduced a system of proportional political representation of the "three main denominations", to quote Section 5 of the electoral Act. Accordingly, of the 72 seats in the State Parliament, 31 went to Serbian Orthodox members, 24 to Muslims and 16 to Catholics. In addition, one seat in the Second Senate was set aside for a Jew, so that the Jewish population was likewise represented by two deputies in the State Parliament, since the Sephardic Chief Rabbi of Sarajevo had a seat in the Senate, as did the Reis-el-ulema, the Muftis of Sarajevo and Mostar, the four Serbian Orthodox bishops, the Roman Catholic Archbishop, the two diosecan bishops and the two provincials of the Order of St Francis. Moreover, according to Article 39 of the Constitution, the nine-member State Council was to be elected in such a way that "every denomination in the State Parliament shall elect the number of members of the State Council to which they are entitled on the basis of their proportion of the State's population .....". This first "Austrian" Constitution recognised not only proportional representation, but also the system of rotation. The Presidency of the State Parliament, comprising a President and two Vice-Presidents, once again consisted of a representative of each of the three main denominations. Whenever a new member was appointed, a rota was observed among these three denominations (Article 23 of the Constitution). So the Dayton system is not an American invention.

It can therefore be seen that religion and not language[69] was the distinguishing feature of ethnic identity and therefore the basis of the Constitution's recognition of collective rights in the form of proportional representation and participation in the political decision-making process. Although the Jews were given a kind of minimum safeguard through one out of a total of 72 seats, the Serbs, Muslims and Croats were granted a more prominent status by being called the "three main denominations". This made Bosnia and Herzegovina a multinational entity from the outset.

With this first Constitution of 1910, a fundamental distinction deriving from their legal position could therefore already be drawn between three categories of ethnic groups:

- the "three main denominations" who enjoyed not only autonomy as "a recognised religious association", but also collective rights through proportional representation and participation in the State Parliament and State Council;

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[68] *Cf Edmund Bernatzik Die österreichischen Verfassungsgesetze, 2. A., Vienna, 1991, pp. 1037-1051.*

[69] *Up until now, even the Serbs in Bosnia and Herzegovina have spoken the iyekavian variant of modern Serbo-Croation and the Cyrillic script was used alongside the Latin alphabet. Provision for this was made in Article 4 of the Constitution of the Republic of 1974. The drawing of linguistic distinctions on a large scale did not start until the establishment of the Republika Srpska and the Washington Agreement of 1994.*

- the Jews who were allowed autonomy plus guaranteed minimum representation through one seat in the State Parliament;

- the other ethnic groups ranging from the Ruthenians to the Roma, whose identity was based on language, who were given no collective rights. Their members were, however, protected by liberal fundamental rights. In addition, Article 11 of the Constitution contained a guarantee of protection which was formulated in terms of an individual right, but which definitely referred to groups, in that in wording reminiscent of Article XIX of the 1867 constitutional laws " protection of national individuality and language shall be secured to all members ...".

Despite the fact that Bosnian Muslims were recognised in the Constitution and allowed political representation, even before the end of the Austro-Hungarian Dual Monarchy and the formation of the Kingdom of Serbs, Croats and Slovenes in 1918 (which was accompanied by a swelling Serbian and Croatian nationalist movement), the issue of their nationality had arisen and, with it, the question of whether they were "only" a religious community or a separate national group. The emergence of a "denominational nationality" conducive to a special ethnic national awareness extending beyond religious bonds and loyalties was promoted before 1918 by the problem of religious and educational autonomy and the administration of the assets of pious Muslims. These questions precipitated a politicisation that was reflected in the setting up of networks and the subsequent appearance of cultural and social organisations, newspapers, Muslim banks and, after 1906, political organisations.

Nevertheless, in 1918 the constitutional independence of Bosnia and Herzegovina was abolished when the Kingdom of Serbs, Croats and Slovenes came into existence as a centralised state. Furthermore, the Vidovdan Constitution of 1921, which drew on Yugoslavianism as the integrating ideology, assumed that there was one nation consisting of three "tribes" – the Serbs, Croats and Slovenes – and one language. On the basis of this conception of a national state, Articles 7 to 10 of the St Germain Peace Treaty with the Serb-Croat-Slovene state[70] consequently made it easier for Serbian-Croat-Slovene nationals who belonged to an ethnic, religious or linguistic minority to use their mother tongue in court, laid down safeguards protecting the use of their mother tongue in the educational system and forbad discrimination against them. Article 10 in particular provided that the Muslims as a "religious minority" should enjoy cultural autonomy, officially authorised the application of the sharia and placed mosques, cemeteries and other Islamic religious institutions under government protection. But, as far as "self-definition" was concerned, the Yugoslavian Muslim Organisation, the leading political force in the inter-war years, rejected all "political nationalisation".

Without being able to go into the details of the further historical development of this dual religious and national awareness and the variations and contradictions in it which accompanied the emergence of a Muslim nation tugged this way and that by external pressure from the Yugoslavian Communist Party and the "self-definition" of Muslim intellectuals before the early sixties[71], it must be noted that Bosnia-Herzegovina was more or less regarded

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[70] Treaty of Peace between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, St Germain-en-Laye, 10 September 1919, in Yugoslavia through Documents, ed. Snezana TRIFUNOVSKA et al. Dordrecht, 1994, published by Nijhoff, especially p. 166.

[71] Cf Wolfgang HŐPKEN Die jugoslawische Kommunisten und die bosnischen Muslime in Die Muslime in der Sowjetunion und in Jugoslawien, ed. Andreas KAPPELER et al. Cologne, 1989, pp. 181-210.

as the hinterland of the republics of Serbia and Croatia[72] - even though under the first Federal Constitution of 1946 it had been established as a separate republic[73] within the framework of the federal state of the second, communist Yugoslavia - and the Muslims were therefore more or less obliged to declare themselves as Serbs or Croats in national censuses. Although the first time that someone could declare themselves to be a Muslim in the ethnic sense was in the census of 1961 and the Muslims were first described as a people[74] with equal rights in the Bosnian Constitution of 1963, it was not until the fall of the then Minister of the Interior and head of the secret service, A. Rankovic, and the ensuing political reorganisation which culminated temporarily in the 1974 Constitution of the confederation, that the political context was created in which the "battle for the capital M"[75] , that is to say acceptance as a nation, awakened a response throughout Yugoslavia. The Bosnian Muslim interest in being elevated to the status of a nation clearly coincided with the intentions of the federal party leaders close to Tito to use Bosnia and the Muslims as a kind of stabilising buffer in the intensifying ethnic and national debate taking place within the wider context of discussions about federalisation. The first time that acknowledgement of a Muslim nation was of any benefit in Yugoslavia as a whole was in the 1971 census, when Muslims could declare themselves to be "Muslims in the sense of a nation". The result was not just a jump in the number of Muslims to 1.7 million citizens, but a dramatic change in the composition of the institutions of the Communist Party and state organs, in which Muslims had hitherto been completely under-represented.

The 1974 Constitution of the Republic of Bosnia[76] again specified that Croats, Serbs and Muslims were "the" peoples of Bosnia and Herzegovina who, together with the members of other (Yugoslavian) peoples and nationalities, were equally entitled to substantialise their national interests. Similarly, the 1974 Federal Constitution made provision for collective equality without, however, naming individual peoples/nations. Nothing changed in that respect until the disintegration of Yugoslavia. Even the Constitution which still applied to the independent state of the "Republic of Bosnia and Herzegovina" until, after numerous amendments, it was ultimately republished in 1993[77], again in Article 1 described Muslims, Serbs and Croats as the peoples of Bosnia and Herzegovina, even though in view of the war in Bosnia and Herzegovina, various agreements[78] and peace plans[79] were already referring to them as "constituent peoples". Unlike the version published in 1974, the version republished

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[72] *Hőpken, op. cit. p. 199.*

[73] *At the second AVNOJ (Antifasisticko Vjece Narodnog Oslobodejenja Jugoslavije – Antifascist Council of National Liberation of Yugoslavia) conference in 1943, the leaders of the Yugoslavian Communist Party refused to give the Muslims the status of a leading national element but, at the same time, contrary to other plans, promised to grant Bosnia-Herzegovina the status of a republic with the same rights as Serbia, Croatia, Slovenia, Macedonia and Montenegro. Its population would comprise sections of the Serbian and Croatian nation and Bosnian Muslims*

[74] *In Serbo-Croatian the term "narod" is used for both nation and people.*

[75] *Spelled with a small m, this would be understood to mean Muslims as a religious community.*

[76] *Not only in the preamble, but also in Articles 1 to 3.*

[77] *Cf Sluzbeni list Republike Bosne i Herzegovine, br 5/1993, stav 119.*

[78] *Cf Sporazum o prijatelstvu i suradnji izmedju Republike Bosne Hercegovine i Republike Hrvatske. Zagreb 1. Srpnja 1992, Article 1.*

[79] *Cf Draft Agreement Relating to Bosnia and Herzegovina (Vance/Owen Plan), ICFY/6, 4 January 1993, Article II(4). "The constitution shall recognise three 'constituent peoples', as well as a group of 'others'.*

in 1993 spoke only of members of other peoples, but no longer made any mention of "nationalities".

The 1994 Washington Agreements not only ended the war between Croats and Muslims, but, by establishing the Federation of Bosnia and Herzegovina alongside the Republika Srpska which had existed de facto since 1992, it provided a constitutional superstructure. The term "constituent peoples" was used for the first time in a document with legal force in the Constitution of this Federation[80], inasmuch as in Article 1, Bosniacs and Croats along with Others are described as the constituent peoples of the Republic of Bosnia and Herzegovina. Furthermore, Article 6 states that a "Bosniac language" shall be an official language of the Federation as well as Croatian[81]. This terminology was then adopted in the Dayton Agreement of 1995. Thus the Bosnian, Croatian, English and Serbian texts of the General Framework Agreement are equally authentic and according to the preamble to the Constitution contained in Annex 4, Bosniacs, Croats and Serbs are the constituent peoples.

The wheel has therefore come a full circle: both religion and language are criteria for the recognition of ethnic distinctness. The evolution of a special ethnic and national awareness on the part of the Muslims, which goes further than their regarding themsevles as "merely" a religious community, has led after many twists and turns and in the face of political resistance to acceptance of the Muslims as an ethnically perceived nation. This development is contributing to the creation of a separate language, so that the linguistic distinctions separating Bosnian from Serbian and Croatian which became apparent as early as 1990 with the disintegration of communist Yugoslavia, have now ended for the time being with the legal recognition in Bosnia of a separate Bosnian language.

The relationship between the terms Bosnian, Bosniac and Muslim[82] is, however, by no means clear and unambiguous, although it appears that with the Washingon and Dayton Agreements the word "Muslim" has simply been replaced by "Bosniac". Two Muslim parties already took part in the first free elections in 1990. A "Muslimanska bosnjacke organizacija" (MBO Muslim Bosniac Organisation) founded by Adil Zulfikarpasic and subsequently renamed Liberal Bosnian Organisation[83] put up candidates as well as the Stranka demoktratske akcije (SDA – Party of Democratic Action) led by the subsequent President Alija Izetbegovic. The MBO described itself in its manifesto as a political organisation of the Muslims and other "Bosniacs" and interpreted the term "Muslim" as a purely religious epithet. The SDA in contrast stressed the national connotation of the same term.

This debate about "muslimantsvo" or "bosnjastvo" therefore once again turned on the question of the relationship betweeen religious and national identity on the one hand, and on the issue of the exclusive nature of national identification on the other. The term "Bosniac" was coined under Turkish rule to distiguish between "indigenous Muslims" and Turkish Muslims (in Bosnia). Under Austrian rule, an attempt was made to apply this term to the resident Serbs and Croats as well and thus give it a transnational meaning. But even this

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[80] Cf the (authentic) English text in International Legal Materials, Vol. XXXIII, No. 3, 1994, p. 740 et seq.

[81] It is said that in the 1991 census, 90% of Muslims stated that their language was Bosniac, after it had become possible to specify oneself what language one spoke. Cf. Aydin Babuna Zur Entwicklung der nationalen Identität der bosnischen Muslime in Osteuropa 1996, p. 336.

[82] Cf. Wolfgang Libal, Bosnier – Bosniaken – Muslime: Versuch einer Entwirrung in Europäische Rundschau 1998, pp. 79 – 85.

[83] Cf with regard to relevant references to sources Babuna op. cit. Pp. 334 et seq.

transnational meaning is not entirely unambiguous. On the one hand, it might refer simply to civil identity along the lines of the French model of citizenship or that of "Jugosloventstvo" and enable a Bosnian or Bosniac to consider themself a Serbian, Croatian or Muslim irrespective of any religious or national affiliation. This would be tantamount to claiming a supranational identity which, however, as an integrating ideology would not be supranational at all, but would function according to the same principle of exclusivity as any other national ideology, as the failed experiment with Jugosloventstvo has shown. On the other hand, the term "Bosniac" might well be a means of arriving at a multicultural identity which is not exclusive, but which rests on multiple identities; an identity which does not force everyone qua Croat, Serb or Muslim to be categorical about their national identity but which, in the multi-ethnic context of Bosnia, offers them an opportunity to identify with something quite special. Many conversations with the descendants of mixed marriages have convinced me that this is not theoretical speculation, but of everyday practical importance, since the only alternative is to profess oneself to be a Serb, Croat or Muslim or simply to be excluded from all of these communities.[84]

Yet at present, four years after the signature of the Dayton Agreement, this identification variant seems to be the least likely to develop and spread, but conceivably it could well find favour among the Croats of central Bosnia and Posavina (the area on the right bank of the Save in north Bosnia) who have always differed from the Croats in Herzegovina. The former were far more accustomed to live alongside Serbs and Muslims, while the Croats in Herzegovina, especially those in the western part, are aggressively nationalistic, far more intolerant and fairly openly pursue a policy of joining up with Croatia. The same is true of the political elites of the Republika Srpska who quite frankly reject a joint state of Bosnia. Dual identities and loyalties are inconceivable for either the Croats or the Serbs of Herzegovina. But even among the Muslims of Bosnia, the SDA's national variant ultimately prevailed in 1993 in and over a "Svebosnjacki sabor". In the media, both names, Muslims or Bosnjaci, or a combination of them "Muslimani Bosnjaci" are still used when indicating the national identity of the Muslims in order to emphasise the Muslim section of the Bosnian population[85]. By making the terms "Muslim" and "Bosniac" synonymous in the Washington and Dayton Agreements, inasmuch as they are called a separate constituent people together with the Serbs and Croats, the nationalisation of this term has been provided with a constitutional basis and is therefore gathering momentum in practice as a standard legal notion.

Although the whole constitutional system of Dayton[86] contains a conceptual differentiation of "constituent" peoples, (just) peoples, ethnic groups and ethnic or national minorities, the actual classification of individual ethnic groups in these legal categories is not at all clear cut. Because of the ethnic cleansing in the war between 1992 and 1995 and the failure to date to implement the Dayton Agreement with respect to "minority returns"[87], the Republika Srpska

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[84] This phenomenon of creating an identity because of being excluded from all communities in the vicinity is by no means a Bosnian speciality. For a description of the phenomenon of "identity through not belonging" using the example of the historical area of Trieste, which culturally speaking, was neither wholly Slavic nor completely Italian, but somehere in-between, as brought to light in the novels of Fulvio Tomizza and Franco Vegliani, see only Claudio Magris/Angelo Ara, Trieste, Munich 1993, p. 255

[85] Cf with relevant references to sources Babuna op.cit. p. 337.

[86] This comprises Annex 4 as the Constitution of the whole State, the Constitutions of the two entities the Republika Srpska and the Federation of Bosnia and Herzegovina and the Constitutions of the cantons of the Federation.

[87] This term is used by the international community to refer not only to the Roma, Romanians or Ruthenians but in particular to the three constituent peoples, namely Serbs, Croats and Bosniacs, who wish to return to the

and the Federation of Bosnia and Herzegovina have turned into the nation states of the Serbs, Muslim-Bosniacs and Croats respectively. This raises the question not only whether Roma, Romanians or Ruthenians should be regarded as minorities vis-à-vis the constituent peoples, but also whether the members of the constituent peoples themselves ought to be treated as minorities in the entities.[88] This topic will be dealt with in detail in the next chapter.

First, however, it is necessary to look briefly at the system of nationality. The constitutional bases are to be found in Article I.7 of Annex 4 to the Dayton Agreement. Under this article, there exists a citizenship of Bosnia and Herzegovina and a citizenship of each entity and all citizens of the entities are declared to be thereby citizens of the state as a whole. All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of the Dayton Agreement are by virtue of the Constitution likewise citizens of Bosnia and Herzegovina. In addition to this, citizens of Bosnia may hold the citizenship of another state, provided there is a bilateral agreement governing this matter. Persons with dual citizenship may, however, vote in Bosnia only if it is their country of residence. Furthermore, Annex 1 to the Dayton Constitution lists other international agreements which also contain provisions on citizenship[89].

As the parties in the parliament of Bosnia and Herzegovina were unable to agree on a law of citizenship, the High Representative Carlos Westendorp issued an Act on the subject which came into force provisionally after its publication on 1 January 1998[90]. The regulations cover three areas: acquisition, termination and proof of citizenship; the conditions governing dual citizenship and, lastly, detailed provisions for transferring citizenship of the Republic to that of the whole state of Bosnia and Herzegovina. The Act adhered to the conceptual norms customary in central Europe: jus sanguinis takes priority and jus soli plays a corrective role. Nevertheless, the provisions of Article 38 (3) and (4) tend to sanction ethnic cleansing by means of citizenship law. Thus, all citizens of the Socialist Federal Republic of Yugoslavia who were settled in one of the entities between 6 April 1992 and the entry into force of the Act and who have been continuously resident there for two years since the Act came into force, may acquire citizenship on request. This applies above all to the Krajina Serbs who settled in the Republika Srpska after their flight and expulsion from Croatia in the summer of 1995 in the wake of the “Oluja” military operation.

4. Bases of the Constitution

As mentioned above, the constitutional system of Bosnia and Herzegovina has a hierarchy comprising several levels. The top level consists not of the Constitution of the state of Bosnia and Herzegovina to be found in Annex 4 to the Dayton Agreement, but the European Convention on Human Rights which, according to Article II. 2 of the Dayton Constitution not only applies directly, but also has “priority over all other law”. Next comes the Constitution and the additional human rights agreements listed in Annex 1 to the Dayton Constitution,

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entities in which they do not belong to the majority section of the population. Cf the reports of the Office of the High Representative to the Secretary-General of the UN or to the Peace Implementation Councils (PICs).

[88] This very question forms the subject of an actual case pending before the Constitutional Court of Bosnia and Herzegovina.

[89] Cf in detail Hellmuth Hecker Die Staatsangehörigkeit in Bosnien und Herzegovina seit dem Friedensabkommen von Dayton/Ohio in WGO-MfOR 1996, pp. 105-110.

[90] See Sluzbeni glasnik Bosne i Hercegovine, br. 4/97. Cf in detail Edin Sarcevic Zum neuen bosnisch-herzegowinischen Staatsgehörigkeitsgesetz in WGO-MfOR 1998, pp. 331-348.

which apply in Bosnia. The Convention on the Elimination of All Forms of Racial Discrimination, the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities are of relevance to the law on minorities. The level under this[91] is formed by the Constitutions of the two entities, to wit the Constitution of the Republika Srpska, which was already adopted by a "Narodna skupstina" in 1992[92] and the Constitution of the Federation of Bosnia and Herzegovina which was drawn up under the Washington Agreements of April 1994 with a view to setting up this federation[93]. This Constitution likewise has an Annex enumerating "Human Rights Instruments to be incorporated into the Federation Constitution". In contrast to the Dayton Constitution, the 1990 Document on the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE and the 1990 Council of Europe Parliamentary Assembly Recommendation on the Rights of Minorities, paras 10-13, and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities are also listed as being of relevance to the law on minorities.

The Constitutions of the cantons of the Federation are the bottom level[94]. This level does not exist at all in the Republika Srpska because of its unitary structure.

While in the earlier communist constitutional system, only two groups, that is to say nations (narodi) and nationalities (narodnosti), benefited from collective equality with regard to representation and participation in the organs of the state[95], the legal status of various ethnic groups and their members is much more sophisticated in the constitutional system introduced by the Dayton Agreement. In principle, it is possible to distinguish between three main questions. Into what different categories do ethnic groups fall and what effects do these categories have on their legal status? What are the legal consequences of embodying the ethnic and citizenship principle in the Constitution? The answers to these two queries have a bearing on the question of the assertion of individual and collective rights.

4.1 The principle of equality and the ban on discrimination

The statutory provision central to the protection of the individual by the law is the ban on discrimination laid down in Article II.4 of the Dayton Constitution, which stipulates that there shall be no discrimination on grounds such as " ... language, religion, ... national origin, ... association with a national minority". This clause of the Dayton Constitution is obviously modelled on Article 14 of the European Convention on Human Rights and, like it, not only prohibits the state itself from engaging in any form of discrimination, but makes it incumbent on the state to secure the enjoyment of rights and freedoms without discrimination.

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[91] *Because of the "supremacy clause" of Article III.3.b of the Dayton Constitution.*

[92] *Cf the original version in Sluzbeni glasnik Srpskog naroda u Bosni i Hercegovini, br. I/1992, 16 Marta 1992 and the re-issued version in Sluzbeni glasnik Republike Srpska, br. 21/1992, 31 decembra 1992.*

[93] *These Washington Agreements contained not only the Constitution, but also the agreement on a confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia and agreements granting the Federation access to the Adria through the territory of the Republic of Croatia and the Republic of Croatia the right of transit through the Federation. The Constitution of the Federation was ultimately published in Sluzbene novine Federacije BiH, br. 1/1994, on 21 July 1994.*

[94] *Under Article V.4 of the Federation Constitution, they are subordinate to the latter.*

[95] *According to Amandman LXI to the 1974 Constitution of the Republic, the narodnosti even had proportional representation in the organs of state. See Slubuzbeni list Socijalisticke Republike Bosne i Hercegovine.*

This positive duty of protection is enjoined on the entities in Article III.2.c. "The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions , ... with respect for the internationally recognised human rights and fundamental freedoms referred to in Article II above ...". Furthermore, since this is of political significance for the restoration of a multi-ethnic Bosnia after all the ethnic expulsions during the war, the right to property, freedom of movement and residence is expressly referred to in connection with the return of refugees and displaced persons, and specific measures are outlined in respect of the duties of protection. For example, Article II.5 of the Dayton Constitution lays down that "All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991...". Accordingly, the Parties[96] must, under Article II.1 of Annex 7 "create in their territories, the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without any preference for any particular group." To this end, according to Article I.3 of Annex 7, the following confidence building measures among others had to be taken immediately:

"(a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect;
(b) the prevention and prompt suppression of any written or verbal incitement, though media or otherwise, of ethnic or religious hostility or hatred;
...
(d) the protection of ethnic and/or minority populations wherever they are found ...;
(e) the prosecution, dismissal or transfer, as appropriate, of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."

The reference to Annex 7 in Article II.5 of the Dayton Constitution means, however, that these positive duties of protection are not simply obligations of the Parties under international law, but that they likwise extend to fundamental rights which have been infringed but which can be restored.

In addition to this, the constitutions of both entities include in their catalogues of fundamental rights bans on discrimination on grounds of religion, language or national origin (Article II.A.2.d of the Constitution of the Federation and Article 10 of the Constitution of the Republika Srpska).

Lastly, Article 34 of the Constitution of the Republika Srpska guarantees the freedom to declare or not declare one's nationality, as provided for in Article 3 (1) of the Council of Europe's Framework Convention for the Protection of National Minorities and Article 31 of the Constitution makes it possible to ban political parties which stir up national, ethnic or religious hatred and intolerance.

4.2 Special rights

[96] *When the Dayton Agreement was signed these were the Republic of Bosnia and Herzegovina, the Federation and the Republika Srpska.*

Neither the European Convention on Human Rights nor the catalogue of basic rights in the Dayton Constitution contain special individual rights designed to protect or advance the members of national minorities, although of course it must not be forgotten that a number of general basic rights such as freedom of opinion, freedom of religion, respect for privacy and family life or electoral law (can) have the indirect effect of protecting minorities[97]. As the basic rights of the Convention are to be applied directly in Bosnia, the case law of the European Court of Human Rights is of immediate relevance in this connection, as the decisions of the Human Rights Chamber[98] and the Constitutional Court show[99].

On the other hand, in accordance with Article 5 of the Constitution of the Republika Srpska, protection of the rights of "ethnic groups and other minorities" must indeed be regarded as a fundamental principle of the constitutional system of the Republic, but one which is not translated into individual rights in either the organisation of the state or the section on basic rights, despite the fact that the Republic explicitly rests on the principle of the nation state. Thus Article 1 states that the Republic is the "State of the Serbian people and all its citizens" and Article 7 lays down that Serbian in its ekavian and iyekavian variants is the official language. The only exception, in the form of an individual right which counterbalances the establishment of Serbian as the official language, is contained in Article 112 of the Constitution of the Republika Srpska which permits any person to use "his/her language" in dealings with public authorities and to acquaint themselves with the facts of the matter in their own language. Nevertheless, as this is a general human right similar to those set forth in Article 6 of the Convention, but in this instance one which is not confined to the courts, this is not a provision which specifically protects minorities.

The wording of Article II.A.2. (1) (r) of the Constitution of the Federation, which grants everyone an individual right to minority protection, is highly dubious. The only meaningful construction that can be placed on this provision is possibly that, on the one hand, everyone has the right to profess membership of an ethnic group or national minority[100], and that on the other, the state has a constitutional duty to protect minorities. This interpretation is especially cogent, given that the Federation of Bosnia and Herzegovina is constituted according to the principle of a nation state, since Article 1 states that Bosniacs and Croats are "constituent peoples" and Article 6 asserts that Bosnian and Croatian are the official languages of the Federation.

Special rights may be found in the following spheres in the constitutional system of the Federation. They take the form of individual rights the exercise of which depends on the actual existence of groups and of collective rights in the shape of group rights.

4.2.1. Right to an official language and a language of instruction in schools

Although, as stated above, the Constitutions of the two entities provide that the official languages shall be Serbian on the one hand and Bosnian and Croation on the other with the

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[97] *Cf Christian Hillgruber and Mathias Jestaedt, The European Convention on Human rights and the Protection of National Minorities, Cologne 1994.*

[98] *Cf, for example, Islamic Community in Bosnia and Herzegovina against the Republika Srpska, Case No. CH/96/29, judgment delivered on 11 June 1999.*

[99] *U predmet 5/98.*

[100] *The relevant provisions of the Framework Convention of the Council of Europe did not exist when the Constitution of the Federation was adopted.*

Cyrillic or Latin alphabet as the official script, both Constitutions contain exceptions permitting the official use of minority languages. For example, Article 6 (2) of the Federation Constitution specifies that "other languages" may be used as means of communication and instruction. Moreover, additional official languages may be designated as official by a majority vote of each house of the Federation parliament, but in the House of Peoples a majority of the Bosniac and Croat delegates must vote in favour. The corresponding Article of the Constitution of the Republika Srpska (Article 7) even lays down the use of languages of other linguistic groups as official languages subject, however, to the constitutional requirement of a specific enactment and only in the area in which that group is settled. Lastly, Article 38 of the Constitution of the Republika Srpksa secures to everyone the "right to education on equal conditions".

These constitutional provisions of the entities give rise to two sets of issues which must be analysed separately, although they are interrelated in practice. They likewise form the subject matter of proceedings pending before the Constitutional Court to determine the compatibility of the Constitutions with higher ranking instruments. On the one hand, the question is to what extent these provisions conflict with the articles of the European Charter for Regional and Minority Languages (some of which are more far-reaching), as the Charter takes precedence over the Constitutions of the entities and therefore forms a yardstick for the Constitutional Court. The other point is to which of the other languages or linguistic groups these provisions or those of the Charter apply or are supposed to apply. This comes down to the basic problem that the Dayton Constitution itself contains no stipulations regarding the use of languages, while the entities' Constitutions declare only the language of the respective "constituent" peoples to be the official language, in keeping with the concept of the nation state. Does this therefore mean that Serbian in the Federation, and Bosnian and Croation in the Republika Srpska are minority languages and that each of the three constituent peoples forms a national minority in one entity or another, although in the preamble to the Dayton Constitution all three peoples are termed "constituent peoples"? If, however, it is assumed on the basis of this rule in the preamble to the Dayton Constitution that the three constituent peoples have (collective) equality and if the conclusion is drawn from this that they and hence their languages must legally be placed on an absolutely equal footing throughout the territory of Bosnia and Herzegovina, ie also within the entities, as the applicant in the proceedings pending before the Constitutional Court maintains, then the provisions on official languages in the entities' Constitutions would be unconstitutional. Even the provisions of the European Charter for Regional and Minority Languages which, unlike those of the Framework Convention, are relatively far-reaching and which in Article 8 provide for bilingual state education and in Articles 9 and 10 for the use of two languages in courts and by administrative authorities and public services (although they by no means make this obligatory), would be no substitute for this complete legal equality.

If, however, it were to be held that the constitutional requirement regarding (collective) equal treatment did not derive from the term "constituent peoples", it would then be up to the entities' Constitutions to differentiate in the use of language(s) in accordance with the stipulations of the Charter. Article 3 of the latter makes it possible to apply its provisions not only to regional or minority languages, but to an "official language which is less widely used on the whole or part of its territory". Accordingly, the above-mentioned high standard set by Articles 8 to 10 would have to be applied to the languages of the constituent peoples who are in the minority in the entity in question, while the lower standard could be reserved for the languages of the other minorities, ie schooling provided in the minority languages as required, the use of the minority's mother tongue in dealings with authorities and courts and the

employment of interpreters. Nevertheless, because of the the obligations stemming from the Charter, the clauses of Article 6 (2) and (3) of the Federation Constitution would then have to be interpreted as being constitutional imperatives instead of being only optional provisions.

4.2.2. Political representation and participation

The different constitutional levels display significant disparities as regards the political representation and participation of ethnic groups.

In the Dayton Constitution, the notion "constituent peoples" acquires more than just a symbolic function, since special opportunities are open to them for representation and participation in the decision-making process of the organs of the state. For example, under Article V, the Presidency consists of three members: one Bosniac, one Croat and one Serb, each of whom must be directly elected in the respective entity as constituency. The same pattern of representation applies under Aricle IV.1 to the composition of the second chamber of parliament, the House of Peoples. Five Croats and five Bosniacs are to be chosen as Delegates of the Federation by the Bosnian and Croat Delegates to the House of Peoples of the Federation, while the five Serbian Delegates of the Republika Srpska are to be chosen by the National Assembly of the Republic. A quorum of nine Delegates is necessary for decisions in the House of Peoples and at least three Delegates of each of the constituent peoples must be present. In contrast to this, no provision is made for ethnic representation in the first chamber of parliament, the House of Representatives, but the Delegates of the three constituent peoples can impose a joint veto on the parliament's decisions. Under Article IV.3, the majority of the Bosniac, Croat or Serb Delegates may declare that a proposed decision is destructive of a vital interest of the constituent people in question. If a Joint Commission comprising one Delegate from each of the three peoples is then unable to find a compromise, the matter must be referred to the Constitutional Court, which must review it for procedural regularity. Article V.4.b. lays down that, as far as the composition of the government is concerned, no more than two thirds of all ministers may be appointed from the territory of the Federation and that Deputy Ministers may not be of the same constituent people as their Ministers. The arrangement in the Law on the Council of Ministers according to which instead of the Chair provided for in the Constitution, two Co-Chairs and two Deputy Ministers were to be appointed in an ingenious system of ethnic proportional representation, has recently been declared unconstitutional by the Constitutional Court[101]. Article IX.3 of the Dayton Constitution which states that "Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina" should therefore probably be understood to refer to the judicial and administrative machinery.

Ethnic representation and participation in the common institutions of the state Bosnia and Herzegovina are therefore confined to the three constituent peoples. Representation and participation of other ethnic groups or minorities in the House of Peoples or Presidency are explicitly ruled out. These provisions naturally give rise to serious misgivings about how far individual rights, especially the right to participate in elections and the ban on discrimination on grounds of ethnic origin or nationality, are being violated. Nevertheless, as these provisions, like the basic rights, have constitutional status, they are as such not subject to review by the Constitutional Court from that angle. The Constitutional Court could note how far these provisions violate specific basic rights set forth in the European Convention on

[101] *U predmet 1/99 of 14 August 1999.*

Human Rights and Article 14 thereof (the Convention takes precedence over the Dayton Constitution in the hierarchy of the legal order), but this undoing of the Dayton Agreement through a decision by the Constitutional Court on the compatibility of these clauses with higher ranking instruments, and hence on their validity, would probably have such serious political implications, that parties to proceedings have so far refrained from doing so, even in one case which is pending where this would have been possible.

The two entities' Constitutions in some respects take different paths. Notwithstanding Article 1 relating to legal policy, which states that the Republic is a "State of the Serbian people and its citizens", the Constitution of the Republika Srpska contains no provisions establishing any kind of ethnic representation or participation in the supreme organs of the state or in judicial or administrative machinery. In ordinary Acts and in practice, the end result of this "ethnically indifferent" Constitution based on the citizenship principle is, however, that only Serbs are to be found in the supreme organs, courts and police force.

For example, Amendment LIII, which supplements Article 89, provides for a Senate as an advisory body to the supreme organs of the Republic. It is to consist of 55 members appointed by the President. While this Article is ethnically neutral, the implementing Act stipulates that these members must be of Serbian nationality[102]. Although about 25% of the Deputies in the National Assembly of the Republic are not Serbs, the ethnic composition of the government is completely homogeneous. All 21 ministers, including the Prime Minister are Serbs.[103] The same national homogeneity is to be found in the judiciary and the police force.

Table 3: Ethnic origin of judges, public prosecutors and the police in the Republika Srpska[104]

	Serbs	Bosniacs	Croats
Judges and Public prosecutors	97,6%	1,6%	0,8%
Police	93,7%	..5,3%	.. 1,0%

In absolute figures, it turns out that of a total of 375 judges and public prosecutors, all nine persons of Bosnian and Croatian origin are to be found in Brcko, where multi-ethnic staffing was achieved through the international regime of the Supervisor.

The Federation Constitution institutionalises the ethnic representation and participation of both constituent peoples, the Bosniacs and Croats but, unlike the Dayton Constitution, it introduces the category of "Others" in Article 1. These "Others" are also included in the system of proportional representation in the legislature and judiciary. Although it has not yet been ascertained who belongs to this category, it may be presumed that, on the one hand, these may be members of the third constituent people, ie Serbs, and on the other, members of different ethnic groups.

The Federation Constitution contains the following provisions on proportional representation.

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[102] *Cf Article 2 of the Zakon o senatu Republike Srpske, Sluzbeni glasnik RS br 8/97.*

[103] *Source: Ministry for Civilian Affairs and Communications of Bosnia and Herzegovina.*

[104] *These figures are based on data supplied by the International Police Task Force (IPTF) as at 17 January 1999.*

Article II.B.1 lays down that the three ombudsmen must consist of one Bosniac, one Croat and one Other. Article IV.A.6 states that the second chamber of parliament must comprise 30 Bosniac and 30 Croat Delegates and a proportional number of Other Delegates, yet under Article IV.A.18, the Bosniac and Croat, but not the Other Delegates, may exercise a joint veto when a decision of parliament concerns the vital interest of any of the constituent peoples. Participation in the election of the President and Vice President of the Federation is unconditionally reserved for Bosniac and Croat Delegates. For example, only they can nominate candidates and the majority of the Bosniac and Croat Delegates, as well as the absolute majority, is necessary for their election As far as the composition of the government is concerned, Article IV.B. 4 and 5 state that no Deputy Minister may belong to the same constituent people as his Minister and that no fewer than one third of ministerial positions must be occupied by Croats. Article IV.B.6 lays down that government decisions require consensus when the vital interests of the constituent peoples are concerned. With regard to the judiciary, Article IV.C.6 provides that in principle there shall be an equal number of Bosniac and Croat judges in each Court of the Federation, while the Others must be appropriately represented. Article IV.C.18 explicitly states that the Human Rights Court, which has not yet been appointed, shall consist of one Bosniac, one Croat and one Other judge.

On looking at the ethnic composition of the bench, public prosecutors' offices and the police force in the Federation, it is however very plain that Serbs and "Others" are extremely under-represented when compared not only with the estimated population figures for 1997, but also with the census of 1991.[105]

Table 4: Ethnic origin of judges, public prosecutors and police in the Federation of Bosnia and Herzegovina

	Bosniacs	Croats	Serbs	Other
Judges and Public prosecutors	71,72%	23,26%	5,00%	no figures
Police	68,81%	29,89%	1,22%	0,08%

Even if this form of ethnic representation and participation of the constituent peoples has been institutionalised in the Constitution, the obvious aim being to divide power after the war between the Bosniacs and Croats and to set up a democratic political system with proportional representation, from the point of view of constitutional theory the question still arises how far this system infringes individual political rights not secured by the European Convention on Human Rights, the Dayton Constitution and the International Convention on the Elimination of All Forms of Racial Discrimination. For example Article 3 of the First Protocol to the European Convention on Human Rights specifies that "free elections" are to be held "at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." According to the established precedents of the European Court of Human Rights, a general equal right to elect at least one chamber of parliament must be guaranteed as an individual basic right. Nevertheless Article 5 (c) of the Convention on the Elimination of Racial Discrimination does not restrict franchise to legislative elections, but goes a step further by securing not only "the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage" but

[105] *These figures are based on data supplied by the IPTF as at 17 January 1999.*

also the right "to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service". This raises the question whether the system of ethnic proportional representation (especially that of the constituent peoples) provided for in the Federation Constitution does not violate individual rights and the ban on discrimination on grounds of national origin embodied in the Convention.

According to the decision of the European Court of Human Rights in the case of Mathieu-Mohin and Clairfayt against Belgium, Article 3 of the First Protocol, in contrast to the American Voting Rights Act 1964, does not guarantee the right to elect a member of one's own ethnic group. The majority of the judges held that the French-speaking electorate of the Flemish district Halle-Vilvoorde were "in no way deprived of the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors by the mere fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the house of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council." The practical consequence is therefore that the French-speaking electors of this district are represented on the Flemish Council only if they elect a Dutch-speaking candidate.

It could therefore be argued that the right to vote is not infringed if a Croat has to vote for a Serbian or Bosniac candidate. Nevertheless, as mentioned above, the right to participate in elections comprises not only the right to vote but also the right to stand for election and here there is a crucial difference in the legal position of Belgium and that of the Federation of Bosnia and Herzegovina. Belgian electoral law does not exclude anyone from eligibility for political office solely on language grounds. Any citizen may stand for election but, after the elections, he or she must take the parliamentary oath in Dutch or French and subsequently becomes a member of the Dutch or French language group in Parliament and hence of the Community Council. It is therefore a subjective decision on the part of every candidate in which language he or she takes the oath, whereas the Constitution of the Federation of Bosnia and Herzegovina ethnically defines certain seats, parliamentary parties, government positions and the power to exercise a veto from the outset and thereby excludes anyone not belonging to that specific ethnic group from public office.

It is probably not possible to argue that a system of proportional representation and participation for ethnic groups per se automatically infringes the general and, above all, equal right to participate in elections. It is quite plain from the *travaux préparatoires* to the Washington Agreements, that these elements of a consociational democracy (A.Lijphart) were institutionalised in the Constitution in order to end the war between the Croats and Bosnians and establish a balance of power between them by a division of that power. This can be regarded as a legitimate aim in order to secure the political stability and democracy of state structures. In the context of the principle of proportionality developed by the courts, especially the European Court of Human Rights, it is therefore of much greater importance who is served by these preferences in the form of exceptions to the general, equal right to participate in elections, how far such interference with this right goes and to what extent this may be regarded as reasonable.

The proportional representation of the Bosniacs, Croats and Others and the possibility of Delegates or Ministers of both constituent peoples to impose a joint veto, certainly constitute "preferences based on national or ethnic origin" within the meaning of Article 1 (1) of the

Convention on the Elimination of Racial Discrimination, since a distinction is to be made from the outset between Bosniacs, Croats and Others. Article 1 (4) of the Convention provides for the possibility of positive discrimination. “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination ...”.

It cannot however be asserted in connection with these special measures, which are supposed to serve the protection of minorities and their members, that particularly the Bosniacs and Croats as constituent peoples who comprise the majority of the population, need such special protective measures in order to be able to enjoy an equal right to participate in elections at the level of the Federation. For this reason, the special rights for Others contained in the Federation Constitution are probably covered by the provision on exceptions, but this certainly does not apply in respect of the members of both constituent peoples, even when these rights serve what is essentially a legitimate purpose.

It is therefore necessary to examine how far this interference in equal franchise goes in specific areas and whether this may be regarded as reasonable. At all events, the institutional arrangements in favour of Bosniacs and Croats, which completely exclude members of other ethnic groups from actual participation in the legislature, government and judiciary, may be deemed unconstitutional. Accordingly, the provisions on the President and Vice Presidents, which in effect reserve these positions for Bosniacs and Croats, clearly infringe Article 5 of the Convention on the Elimination of Racial Discrimination. As far as the composition of the legislature is concerned, the introduction of a two-chamber system, where the lower chamber is not elected according to ethnic criteria, would not violate the right to vote and the right to stand for election. The element giving rise to doubts is, however, the combination of ethnic representation in the House of Peoples and the possibility of a joint veto, which may be wielded only by the Delegates of the two constituent peoples, who in reality form a parliamentary majority. Such a combination of representation and a power of veto held by the constituent peoples alone undermines the equality of the right to participate in elections to such an extent that “the free expression of the opinion of the people in the choice of the legislature” (Article 3 (1) of the First Protocol to the European Convention on Human Rights) is seriously weakened. It cannot therefore be justified by the basically legitimate purpose of equalising power.

With regard to the ethnic make-up of the organs of the cantons of the Federation, the Federation Constitution itself departs from arrangements based on constituent peoples and others in that Article V.8 and 11 state that the Cantonal Executive and Judiciary should reflect the ethnic composition of the cantonal population as a whole. The individual cantonal constitutions consequently repeat this principle and contain appropriate provisions on the executive, judiciary and above all the police, at both cantonal and municipal level.

4.2.3 Self-administration of minorities and functional co-operation

The form of territorial autonomy is determined solely by the Federation Constitution. Under Article V.2.2 thereof, every canton may delegate functions concerning education, culture, tourism, local business, charitable organisations, radio and television to municipalities whose majority population is other than that of the Canton as a whole. Some cantonal constitutions

make this a must rather than a may.[106] On the other hand, under Article V.3 of the Federation Constitution, cantons where Bosniacs or Croats comprise the majority of the population, may establish Councils of Cantons in order to co-ordinate policies on matters of common interest and advise their representatives in the House of Peoples. To that end, commissions and working groups may be set up, but no military or political arrangements may be reached.

5. The foundations of the protection of minorities

Briefly speaking, the constitutional bases may be divided as follows into the foundations of, or obstacles to the protection of minorities.

In accordance with the pattern set by the Washington Agreements and the Constitution for the Establishment of the Federation of Bosnia-Herzegovina contained therein, Annex 4 to the Dayton Agreement, which may be regarded as the Constitution for the whole state of Bosnia and Herzegovina, is characterised by a multi-ethnic concept with three constituent peoples. Unlike the Constitution of the Republika Srpska whose institutional structures, save for the programmatic Article 1, rest on ethnic indifference along the lines of the French model of citizenship, the Dayton and Federation Constitutions recognise ethnicity, which is reflected in collective rights through the representation and participation of the constituent peoples in the system of government, with all the problems of potential infringments of individual rights listed above. Minorities are therefore primarily all the other ethnic groups named in the first chapter. The territorial dissociation of the three constituent people at the level of the entities prompts the question (which must be settled by the Constitutional Court in a case which is pending) of how far the Serbs in the Federation and the Croats and Bosniacs in the Republika Srpksa can be transformed from a constituent people into a minority by elements of the entities' Constitutions which consolidate their character as nation states.

As the subdivision of the Federation into cantons also follows the ethnic principle, since apart from in the two "mixed" cantons, it is assumed that in the other eight cantons the majority of the population are either Bosnian or Croatian and provision is accordingly made for the minority in question (who in some communes may form the majority) to practise self-administration in the fields of education, training, culture and the media, a general system of institutional, ethnic segregation arranged according to the territorial principle has thus been introduced. Nevertheless, since the Dayton Agreement places just as much importance on the return of refugees and displaced persons, as is shown in particular by the provisions of Annex 7 (thus, in the final analysis, the ethnic cleansing carried out during and after the war is to be reversed) the whole structure of the state of Bosnia and Herzegovina faces a crucial alternative. Should the premises of Realpolitik be accepted, ie the idea of a nation state and the practice of the organs of both entities, which de facto successfully prevent minority returns[107]? This would signify that the ethno-national homogenisation triggered by ethnic

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[106] *Cf for example Article 14 of the canton Tuzla-Podrinje.*

[107] *In international usage, this term is understood to mean the return of Serbs in the Federation and the return of Croats and Bosniacs in the Republika Srpska. By 31 January 1999, a total of 97,966 refugees and internally displaced persons had gone back to the Republika Srpska. Of these, only 751 were Croats and 9,212 Bosniacs, that is to say approximately 10%. In the Federation, by the same date, 474,261 persons had returned, of whom about 4% were Serbs. These figures alone clearly indicate that when refugees return, the authorities in both entities discriminate on ethnic grounds. Numerous reports of the Office of the High Representative, the ombudpersons of the Federation and non-governmental organisations speak of many cases of undisguised violence and threats of violence against persons who wish to return. Some of this violence is even instigated by local authorities. In other instances, the police merely stand and watch without intervening. Such behaviour is a*

cleansing would now be upheld by political practice and ultimately legitimised by law. Or should the restoration of the multi-ethnic population structure of 1991 be pushed through by courts' decisions, especially those of the Human Rights Chamber and the Constitutional Court?

The chief mechanisms for the protection of minorities are general and specific bans on discrimination and the principle of equality, which figure in every list of basic rights at all constitutional levels. But, of course, some general basic rights, like freedom of religion, are also of importance for the protection of particular minorities. With respect to special rights which act as guarantees of protection not only for individual members of ethnic groups but for these groups themselves, the Bosnian constitutional system is characterised by the incorporation of a number of international agreements which are to be applied directly as municipal constitutional law. Essentially the most extensive guarantees are offered by the European Charter for Regional or Minority Languages. They could in effect counteract the consequences of ethno-national homogenisation on the basis of territorial segregation, if they were interpreted and applied in that way by the courts. Against this background, note should be taken of the introduction of the institution of territorial self-administration for minorities which, however, exists only in the Federation of Bosnia and Herzegovina.

THE CRISIS IN KOSOVO, Matthew Russell
Special Representative for Kosovo of the Venice Commission

The Beginning

There are those who insist that the problems which exist today in the Kosovo region have their origin as far back as 1389 when the Serbs were defeated by the Ottoman army at the battle of Kosovo Polje. But an event which occurred in more recent times can certainly be said to have led to the release of political forces in Yugoslavia which have yet to run their course: the death in May, 1980 of its President, Marshal Tito. For the previous quarter century he had held in check the fissionistic tendencies of his country. During that period a series of constitutions of, first, the Federal Peoples Republic of Yugoslavia (in 1946 and 1953) and then the Socialist Federal Republic of Yugoslavia (in 1963 and 1974) had recognised the autonomous province of Kosovo. Now, following his death, there began a slow process of unravelling of the links which bound the various territories within the federation. During the eighties unrest, countered by repression, developed in Kosovo as Albanians' aspirations for greater autonomy, and public protests against economic hardship (unemployment reached 50% in 1987) became vocal and, on occasion, violent. In June 1991

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flagrant dereliction of their duty of protection. One of the less obvious administrative measures to prevent refugees returning is, for example, the formula of reciprocity, which is even embodied in the law of the Republic Srpska. For example Section 45 of the Act on Refugees and Displaced Persons (Zakon o izbeglicama is raseljenim licima, Sluzbeni glasnik RS, br 26/97) provides for the protection of national minorities as a part of legal policy but, at the same time, Sections 38 and 40 lay down the completely unconstitutional principle of reciprocity for the return of refugees from the Federation and the restitution of property, or to put it plainly, that no more Croatian and Bosniac refugees are permitted to return than the number of Serbs accepted by the Federation. This reciprocity formula was even suggested in February 1999 by President Izetbegovic for an exchange of populations between Sarajevo, Banja Luka and West Mostar. An extremely instructive study of the motives behind and arguments used to prevent the return of refugees has recently been published by the International Crisis Group. Cf. ICG, Preventing Minority Returns in Bosnia and Hercegovina. The Anatomy of Hate and Fear, 10 August 1999, at http://www.intl.-crisis-group.org/projects/bosnia/reports/bh50rep.htm.

Slovenia and Croatia declared their independence from the Yugoslav federation. Three months later the Kosovo Assembly (despite having being closed by Serbia in 1990) held a referendum which produced a 87.01% turnout and a vote of 99.87% in favour of sovereignty. This result was ignored by the Federal Assembly, which the following April adopted the new constitution of the Federal Republic of Yugoslavia (FRY) consisting of the Republic of Serbia, including Kosovo, and the Republic of Macedonia.

During the period 1988-1992 the Republic of Serbia, and later the Federal Republic of Yugoslavia, gradually tightened their grip on Kosovo. Under the 1974 federal constitution Kosovo, although part of the Republic of Serbia, was an Autonomous Province with its own constitution, Assembly, Executive Council and Constitutional Court. Now new constitutions for Serbia and the FRY (in 1990 and 1992, respectively) significantly reduced the independent powers of the autonomous province, and numerous laws discriminating against the Albanian inhabitants in many areas of life were enacted. Although the Serb proportion of the population was by now less than 10% (compared with some 27% in the 1950s), official rhetoric proclaimed Kosovo to be the heartland of Serbia and agitation by Albanians for a restoration of autonomy was rigorously repressed.

The International Reaction

As armed conflict spread in Yugoslavia, and evidence of officially sanctioned atrocities mounted, the international community began to grow concerned. The brutality of the actions and the large number of victims (a quarter of a million non-Serbs were killed, and almost two and a half million displaced by means of ethnic cleansing, in Bosnia alone), and the fact that all this was taking place in the heart of Europe, made it impossible to continue the policy of ignoring the problem and hoping it would resolve itself. Kosovo now provoked a concern that had not previously manifested itself elsewhere.

In translating concern into action the international community had to overcome what was for more traditionally minded diplomats a not inconsiderable difficulty: the long-established principle of the sovereignty of the State, a principle to which there was only one exception which secured more or less general acceptance, namely, that a State was not free to engage in genocide against its own citizens. The residual strength of the old principle was undoubtedly a decisive inhibiting factor explaining why the international community stood by throughout most of the nineties despite the evidence of gross violations of human rights in Kosovo. A contributing element may be found in the fact that central to the Kosovo problem was a claim for self-determination by a minority ethnic group within a State. Such a situation was not unique to Serbia, and the possibility of establishing a precedent which could haunt them in the future must have made a number of members of the Security Council deeply uneasy.

Whatever the explanation, the fact is that it was not until March 1998 that the first Security Council Resolution was adopted which condemned the actions in Kosovo of the Belgrade government - indeed the only other Security Council Resolution during the nineties which referred to what was happening in Kosovo was one five years earlier which had done no more than call upon the FRY to reconsider its refusal to extend an OSCE monitoring mission in the territory.

A combination of increasing repression and ethnic cleansing by the Serbs, pressure to do something brought on governments by their publics appalled by what was appearing on television and in the newspapers, fear of a humanitarian disaster during the winter, and the

escalation of hostilities by the Kosovo Liberation Army (KLA), all eventually galvanised the international community into acting. An arms embargo was adopted by the Security Council, though its attempts to impose economic sanctions on the FRY / Serbia were blocked by Russia. The Council of Europe condemned Serb repression, a series of missions to Belgrade were undertaken by a number of European leaders such as the Spanish Prime Minister Felipe Gonzales and Foreign Ministers Primakov and Kinkel and Vetrine, and the members of the Contact Group on the Former Yugoslavia other than Russia (France, Germany, Italy, the United Kingdom and the USA) froze the international assets of the FRY.

Two diplomatic initiatives in particular seemed to be on the brink of achieving success, those carried out by Christopher Hill, US Ambassador to Macedonia, and by Richard Holbrooke, who had been a principal negotiator at the Dayton Conference and was now appointed U.S. Special Envoy to Belgrade.

The Hill and Holbrooke initiatives

The first substantial international effort to achieve a peaceful settlement to the Kosovo crisis was made by the Contact Group, with Ambassador Hill as its chief negotiator. Following shuttle diplomacy throughout the summer of 1998 it produced the draft of an agreement in October. This was silent about the issue of the status of Kosovo (on which the Serb and Albanian sides were locked in disagreement) and, instead, concentrated on the manner in which administrative power might be exercised.

It proposed that there would be an Assembly with responsibility for "enacting all decisions of Kosovo, including those relating to political, economic, social and cultural areas" with power to adopt " the organic documents of Kosovo". The powers were, however, qualified by the requirement of a majority vote by the Members of any national community which asserted that the proposed decision affected the vital interests of that community. There would be a Government presided over by a Chairman who would be directly elected. However, the basic unit of government was stated to be the commune. Each commune would have a council, with "exclusive responsibility for carrying out typical functions of local and regional government". These communes would be based on national communities, and would have the right to unite to form self-administering regions. Each commune would have its own police representative of the community.

The draft met with a mixed response. On the one hand the Serbs noted its silence in relation to the issue of the sovereignty and the territorial integrity of the FRY (notwithstanding provision for Kosovar representation in the Federal Assembly and the Serbian Assembly) and, on the other hand, the Kosovars, remembering the establishment of Srpska in Bosnia and Herzegovina, were unhappy about the prospect of communes uniting to form ethnic Serb entities, and also the veto over legislation by national communities.

The Hill mission replaced this draft in November with a second, considerably more detailed draft. This version provided Kosovo with a President, a Constitutional Court and a Supreme Court, but it also strengthened the postion of the communes, each of which would now have an Assembly as well as a Council. This draft in turn was replaced by a third in December (which was rejected by both sides) and, in January 1999, a fourth, which was subsumed into the Rambouillet negotiations.

Meanwhile, more or less concurrently, Special Envoy Holbrooke's initiative was proceeding. In October 1998 it seemed that his talks with the Serbs were being productive. On 13 October - the same day that Nato issued a 96 hour ultimatum - the Serbian Government announced that a political framework had been worked out and that agreement had been reached on eleven principles of a political solution, along with a time-table framework for its realisation. The agreed principles included –

- any solution for Kosovo must respect the territorial integrity and sovereignty and internationally recognised boundaries of the FRY;

- the solution has to be based on the full respect of equality of all citizens and national communities in Kosovo;

- citizens in Kosovo shall govern themselves democratically through assemblies, executive and judicial organs of Kosovo. Within nine months there will be free and fair elections for Kosovo authorities, including those on the communal level. The Government of the FRY hereby invites the OSCE to supervise these elections to ensure their openness and fairness.

The timetable included 2 November as the date of completion of an agreement containing core elements for a political settlement in Kosovo using as a basis the first Hill proposal.

As regards military matters, certain undertakings were given for withdrawals by the FRY/Serbia of security forces and equipment from Kosovo or to barracks.

At the same time by separate agreements the FRY accepted NATO air surveillance missions to verify compliance with UN Security Council requirements, and also agreed to the deployment by the OSCE of 2,000 unarmed verifiers on the ground in Kosovo.

While the Holbrooke agreement (in which the Kosovar Albanians had not been involved) averted immediate international military intervention, it did not provide any settlement of the political issues.

In the event, the 2 November deadline passed without a political settlement. The Hill initiative did not achieve a solution. Humanitarian problems on a vast scale remained: it was now winter and although 100,000 Kosovar Albanians returned to their homes another 200,000 remained displaced. The discovery of evidence of what appeared to be Serb atrocities inflamed international public opinion. Fighting between Serb security forces and the KLA increased and in late December a major Yugoslav military offensive was launched. It was in this gloomy atmosphere that an international conference to achieve a negotiated interim settlement was proposed. Its immediate genesis was a joint statement issued by US Secretary of State Albright and Russian Foreign Minister Ivanov on 26 January calling for "meaningful intensive negotiations". A sharp push towards the negotiating table was given by NATO which announced that its Secretary-General had been empowered to authorise air strikes against targets on FRY territory (an initiative which gave rise to much debate amongst international lawyers).

This was the background when the parties met at the Chateau Rambouillet outside Paris.

The Rambouillet Conference

The Rambouillet Conference is so recent and has been written about so extensively that it is unnecessary to go into it in great detail. The conference opened on 6 February with a date for completion fixed for 19 February. The Yugoslav side described itself as the delegation of the Republic of Serbia (led by Vice President Markovic), thus indicating that the matter was an internal affair of Serbia's. Much negotiation was needed in regard to the composition of the other side but eventually it comprised one third LDK representatives (including Ibrahim Rugova, a moderate who was elected in 1992 as president of the self-styled Republic of Kosovo, one third LBD (United Democratic Movement) and one third KLA who provided the leader of the delegation, Hashim Thaci. If the organisers had hoped for a quick repeat of the Dayton Conference they were disappointed. Protracted negotiations involving frequent changes of position by participants failed to secure consensus. Eventually as the deadline for the close of the conference approached the text of an Interim Agreement for Peace and Self-Government in Kosovo was produced on 18 February (replacing one that had been tabled by a contact group at the outset of the conference), and was in turn replaced by another text. However the conference ended on 23 February without any signatures.

A follow up conference opened in Paris on 15 March, its stated aim being to discuss implementation rather than principles. The Kosovo delegation expressed its immediate willingness to sign but was requested by the negotiators to delay signature pending further discussions with the Serb delegation. That delegation now produced its own proposals which effectively sought to re-open political issues which the negotiators believed had been resolved in principle at Rambouillet. The conference ended with the 23 February document being signed by Kosovo. The Serbs - who had appeared willing at Rambouillet - refused to sign, prompting a statement of critism from the (French and United Kingdom) co-chairmen of the conference.

The details of the Rambouillet Accords, as the text is formally described, have to a considerable extent been overtaken by events and it is not necessary to particularise them. The main features of the constitution of Kosovo which was set out in the text of the Accords were:

(1) Kosovo would govern itself through legislative, executive, judicial and other organs, with full respect for human rights, democracy and the equality of citizens and national communities.

(2) The commune would be the basic unit of local self-government.

(3) There would be an Assembly of 120 members, 80 of whom would be directly elected and 40 elected by members of "qualifying national communities" (10 members for communities comprising 0.5-5% of the population, 30 members for communities comprising more than 5%).

(4) The "vital interests" qualification on proposed legislation applied.

(5) There would be a President elected for 3 years by the Assembly.

(6) The Government would include at least one person from each national community that met the 5% threshold.

(7) A candidate for the post of Prime Minister would put forward a list of proposed ministers who would be voted on by the Assembly.

(8) The Government would resign following a vote of no confidence.

(9) There would be a Constitutional Court, a Supreme Court, District Court and Communal Court.

(10) The court would have jurisdiction over issues arising under the Kosovo consitution and federal law. Questions of federal law could be appealed to the federal courts.

(11) A citizen could opt to have civil disputes referred to other courts in the FRY; those courts would apply the law of Kosovo.

(12) The Constitutional Court should have 9 judges with at least one from each national community reaching the 5% threshold.

(13) Internationally recognised human rights and fundamental freedoms to be respected by all authorities in Kosovo.

(14) National communities and their members should have additional specified rights in respect of their nationality, cultural, religious and linguistic identity in accordance with international standards.

(15) Each commune should have an Assembly and an Executive Council.

(16) Each national community with a 3% threshold should be represented on the Council in proportion to its numbers, with a minimum of one member.

(17) Citizens of Kosovo could take part in electing 10 deputies to the House of Citizens of the Federal Assembly and 20 deputies to the Serbian National Assembly.

(18) The Kosovo Assembly could nominate one member of the Federal Government and one in the Government of the Serb Republic and at least one judge in the Federal Constitutional Court, one in the Federal Court and three in the Supreme Court of Serbia.

(19) Amendment of the constitution would require a two-thirds majority of the Assembly, which majority would have to include a majority of the members representing each national community which met the 5% threshold.

This text represented the last effort of the international community to solve the Kosovo crisis by diplomatic means.

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NATO's Intervention

Occasional threats of force against the Serbs had been made since the early nineties. President George Bush had reportedly written to Slobodan Milosevic in late 1992, stating that "In the event of conflict in Kosovo caused by Serbian action, the United States will be prepared to employ military force against the Serbs in Kosovo and Serbia proper", and the Clinton Administration repeated the threat the following year. However, time passed and it was not until hostilities began between Serb forces and the KLA early in 1998 that the North Atlantic Council announced that "NATO and the international community have a legitimate interest in Kosovo, *inter alia* because of their impact on the stability of the whole region, which is of concern to the Alliance". As the year went on and the situation in Kosovo worsened, NATO conducted air and land exercises in Albania and Macedonia, with their consent. In September the North Atlantic Council announced an increased level of military preparedness. Finally, on 13 October, as the Holbrooke mission continued in Belgrade, NATO announced activation orders for both limited air strikes and a phased air campaign in Yugoslavia to enforce compliance with the requirements of the Security Council, the actions to commence after approximately 96 hours - a breathing space that was clearly intended to give time for the Holbrooke initiative to succeed.

This ultimatum was unprecedented, because although the UN Security Council had adopted two mandatory Chapter VII Resolutions it had given no mandate for their military enforcement (in contrast to ultimata issued by NATO in relation to Bosnia and Herzegovina where there was such a mandate). Therefore the only basis for justifying military action was the humanitarian emergency which existed in the region. The United Kingdom said that international law permitted action because of the "exceptional circumstances in Kosovo". It contended that

> a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming catastrophe.

One is perhaps justified in surmising here that the emphasis on the humanitarian basis for the armed intervention reflected the general reluctance of the international community to take up a position on the self-determination aspect of the Kosovo problem.

In the event diplomatic initiatives did not achieve their aim of a peaceful settlement, and finally on 24 March 1999 NATO commenced operations against Yugoslavia which lasted until early June when the Serbs forces withdrew from Kosovo.

The United Nations Intervention

On 10 June 1999 the Security Council of the UN adopted Resolution No. 1244 by 14 votes to 0, with China abstaining. The Resolution provides the legal foundation for the presence and actions in Kosovo of the UN, through its United Nations Interim Administration Mission in Kosovo (UNMIK).

Before referring to the contents of the Resolution a brief word as to its legal basis is appropriate. The Resolution, after a number of recitals, states that the Security Council is

> "DETERMINING that the situation in the region continues to constitute a threat to international peace and security"

and is

> "ACTING …. under Chapter VII of the Charter of the United Nations".

It will be recalled that Chapter VII authorises the Security Council to determine, *inter alia*, the existence of "any threat to the peace" and to make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 to "maintain or restore international peace and security" : *Article 39*.

Although the relevant determination by the Security Council, which is required by Article 39 as a pre-condition to intervention, is of the existence of a threat to "the peace", and not to international peace, the Council clearly considered that the reference later in the Article to maintaining or restoring international peace, once the determination has been made, necessarily implies that the threat should be to international peace – hence the insertion of the word "international" in the text of the determination quoted above.

The region referred to in the determination is identified in an earlier recital in the Resolution as "the Federal Republic of Yugoslavia and the other States of the region." However, no transfrontier element is mentioned in the Resolution, and all its references are to the situation existing within Kosovo itself.

Resolution No. 1244

For present purposes the main elements of the lengthy Security Council Resolution which are relevant may be considered to be the following:

(i) It reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and Annex 2".

Annex 2 to the Resolution was the paper presented in Belgrade on 2 June 1999 *[S/1999/649]* which, the Resolution stated, had been agreed by the Federal Republic of Yugoslavia. It had set out a number of principles on which "agreement should be reached" to move towards a resolution of the Kosovo crisis.

They included:

- withdrawal from Kosovo of all security forces;
- deployment under UN auspices of international civil and security presences under Chapter VII;
- the international security presence with substantial NATO participation to be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees;
- establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo could enjoy substantial autonomy within the FRY, to be decided by the Security Council, the interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions …;

- a political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet Accords and the principles of sovereignty and territorial integrity of the FRY and the other countries of the region …"

(i) The Resolution decided on the deployment in Kosovo, under UN auspices, of international civil and security presences, with appropriate equipment and personnel.

(ii) It requested the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and requested the Secretary-General to instruct his Special Representative to co-ordinate closely with the international security presence to ensure that both presences operate towards the same goal and in a mutually supportive manner.

(iii) It authorised Member States and relevant international organisations to establish the international security presence, with substantial NATO participation, deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

(iv) It authorised "the Secretary-General, with the assistance of relevant international organisations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the FRY, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo."

(v) It decided that the main responsibilities of the interim civil presence would include
- "promoting the establishment, pending a final settlement, of substantial autonomy and self government in Kosovo, taking full account of Annex 2 and of the Rambouillet Accords";
- "performing basic civilian administrative functions where, and as long as, required".

(i) It decided that the international civil and security presences be established for an initial period of 12 months, to continue thereafter until the Security Council decided otherwise.

The text of this Resolution, with its effort to balance recognition of the sovereignty and territorial integrity of the FRY with the concept of substantial autonomy and meaningful self-administration for self-government in Kosovo, reflects the efforts that were required to secure agreement among the members of the Security Council. It was a substantial diplomatic achievement which must be saluted. However, it has provided those who have to implement it with a task of great difficulty.

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UNMIK

Following the termination of hostilities in June 1999 UNMIK proceeded to establish itself in Kosovo, with its headquarters in Pristina. It set out the legal basis of its operation in *Regulation No. 1999/1* issued by the Special Representative of the Secretary-General, Dr. Bernard Kouchner (who had succeeded Ambassador Sergio de Mello). Its terms echoed the *de facto* situation which had prevailed since the arrival of the UN presence in providing that

- "all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the SRSG" *[:section 1.1];*
- "the SRSG may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in Section 3, and any regulations issued by UNMIK" *[:section 1.2];*
- "in exercising their functions, all persons undertaking public duties or holding office in Kosovo shall observe internationally recognised human rights standards and shall not discriminate against any person on any grounds …." *[:section 2];*
- the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNMIK under UN Security Council Resolution 1244 (1999), or the present or any other regulation issued by UNMIK" *[:section 3];*
- UNMIK shall administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo" *[:section 6]*.

This Regulation, which was issued on 25 July but provided that it should be deemed to have entered into force as of 10 June, 1999 (the date of adoption by the Security Council of Resolution No. 1244), may be regarded as the basic constitutional text for Kosovo.

In July the Secretary-General set out UNMIK's agenda. Its work, he informed the Security Council, would be conducted in five integrated phases:

The first would be the establishment and consolidation of its authority, and the creation of UNMIK - managed administrative structures and local consultative bodies at the political and the functional levels. Emergency assistance to returning refugees would be provided, basic public services would be restored, and capacity-building activities, including police and judicial training, carried out. UNMIK's aim would be the establishment and maintenance of a viable, self-sustaining economy. In a statement which presaged UNMIK's later financial stringency Secretary-General Annan said that "customs revenue will represent one of the most important sources of finance to meet public expenditures in the short term. As soon as UNMIK can deploy civilian customs agents at Kosovo's international borders, it will commence collection of customs revenues for use to meet Kosovo public spending needs."

The second phase would begin when conditions of basic stability had been achieved. UNMIK would encourage the revival of broadly representative political activity and political expression, including through assistance in the formation of political party structures. It would encourage the strengthening and deepening of civil society through *inter alia* the revival of print and broadcast media. These efforts would be directed toward the promotion of reconciliation and harmonious relations between all ethnic communities. There would be

intensive efforts to build, and where possible restore, basic economic structures, such as payments systems, public finances and hard budget constraints so as to promote economic and social development.

It was expected that during the latter stages of this phase, the provisional transfer of executive authority for the management and administrative funding of specific sectors, such as health and education, could begin at local and possibly regional levels. Preparations would also begin for the conduct of elections.

In the third phase the emphasis would be on the finalisation of preparations for and the conduct of elections to what might be termed the Kosovo Transitional Authority. UNMIK would have to ensure the necessary preconditions for free and unfettered political expression, free assembly and campaigning by parties and candidates, including equitable access to the media. Administrative and economic revival would continue and deepen. Local revenue-generation should increasingly replace international assistance. It was envisaged that efforts to facilitate the political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords, would be intensified.

It was envisaged, the Secretary-General said, that efforts to facilitate the political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords, would be intensified during this phase.

In the fourth phase UNMIK would oversee and, as necessary, assist elected Kosovo representatives in their efforts to establish provisional institutions for democratic and autonomous self-government. As these were established, UNMIK would transfer its remaining administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions.

The fifth phase would depend upon a final settlement and its terms. As envisaged in Resolution No. 1244, in a final stage UNMIK would oversee the transfer of authority for Kosovo's provisional institutions to institutions established under a political settlement.

Subsequent developments in Kosovo

The Judiciary : recommendations

One of the first problems facing UNMIK when it arrived in Kosovo in June 1999 was the establishment of an operating judiciary. Apart from the normal needs of an organised society for courts and the judicial determination of criminal charges and civil disputes, the problem in Kosovo was one of particular urgency because the NATO forces (KFOR) arrested a number of people for serious crimes and, in the absence of any functioning prison system, did not wish to have to hold them in military custody for any prolonged period, both for operational and for legal reasons. The difficulty, however, was that effectively there was no longer any judicial system: the judges, who were almost entirely Serb (some 700 out of a total of 736 judges and prosecutors, according to figures supplied by the Serb Ministry of Justice in Kosovo), were not to be found, either because they had already left Kosovo or because they did not wish to present themselves for duty until the security situation clarified.

Faced with this situation two steps were taken in June: the UN invited the Council of Europe to send a group of experts to Pristina immediately to advise on the setting up of an interim judiciary, and UNMIK made a number of temporary appointments.

The Council of Europe experts' report was produced speedily, and in time for the Secretary-General to incorporate some of the recommendations in his own report to the Security Council on 12 July. The experts' main recommendations were

-firstly, that an independent Judicial Commission should be established whose function would be to seek, by way of widespread public advertising, applicants for judicial and prosecutorial office and to nominate suitable persons for appointment by the SRSG (who would be free to accept or reject a nominee but could not appoint someone who was not so nominated). This body would consist of eight members: three international members who would be experienced judges or distinguished lawyers (one of whom would be chairman and have a casting vote), and three Albanian and two Serb members. While the selection of judges and prosecutors should be on the basis of merit, 20% of those appointed should be Serbs. (This proportion does not mirror the Serb proportion of the population, which is believed to be less than 10%, but is intended as a confidence-building measure.)

-secondly, that a commission of technical experts should be established simultaneously to examine the structure of the existing courts with a view to its rationalisation and a possible reduction in the number of judicial and prosecutorial posts by way of appropriate mergers, etc., since it struck us that the existing total of 756 posts was excessive for a population of between 1.8 and 2.0 million inhabitants, even if, as we were informed, some of the judges performed tasks which in other countries would be dealt with administratively.

-a Supreme Court should be established in Kosovo to replace the existing jurisdiction of the Supreme Court in Belgrade in the Kosovo judicial system (which otherwise comprises 22 Municipal Courts at first instance and 5 District Courts exercising appellate functions and first instance jurisdiction in more important cases). When the future status of Kosovo becomes clearer the question of a Constitutional Court should be examined.

-that pending the selection of a sufficient number of judges and prosecutors to provide a viable court system, the existing personnel should continue in office. While they would, of course, be eligible to apply for new appointments, many Serb judges and prosecutors would lose their positions for reasons other than personal misconduct and would suffer hardship. For that reason an appropriate scheme of compensation should be devised.

The Judiciary : results

In the event it has not yet proved possible to achieve all of the results hoped for. Progress has been slow. Serb participation in the judiciary and as members of the Advisory Judicial Commission which, following the Council of Europe recommendation referred to above, was established on 7 September by the SRSG has been meagre; many have left Kosovo, or have declined to serve, citing violence and intimidation against them. On the Albanian side a number of the judges and prosecutors who were appointed by UNMIK have refused to

recognise the applicable law (despite the unambiguous provisions of *Regulation No. 1999 / 1)* and are insisting on applying earlier laws which were repealed a number of years ago.

For those reasons, and also because of shortages of support staff and logistic requirements in various parts of the territory, the court system in Kosovo is still in an unsatisfactory - indeed, one might almost say, embryonic - state, as is the prison system. Another problem is the fact that for almost ten years Albanians in Kosovo have faced serious difficulties in obtaining legal qualifications which were adequate and officially recognised. (For example, the diplomas of the parallel Albanian university which was established in Kosovo when the University of Kosovo was 'Serbanised' were not accepted by the Serb authorities, thus depriving its graduates of the opportunity of practice as lawyers and appointment as judges and prosecutors.) This has reduced the number of suitable, qualified Albanian lawyers available for judicial appointment.

The Transitional Council

In July UNMIK established a Transitional Council as an advisory and consultative body. Although it has a multi-ethnic membership, with representatives of all the communities and major political groupings in Kosovo, it has suffered from boycotts by members due to disputes over its composition. So far it has been only a partial success.

Local Administration

UNMIK has been endeavouring to re-establish local administration outside Pristina. Although it has appointed a civil administrator for each region, with some support staff, there are many difficulties; the absence of elected representations, the departure of (Serb) technical and administrative staff, neglect and destruction of facilities, and inadequate security. In connection with the last it has to be recorded that ethnic crimes have continued to be committed, this time by Albanians, although on a diminishing scale. Despite the presence of NATO troops, a number of Serb Orthodox churches and monasteries, some of them cultural monuments of European importance, which survived the vicissitudes of the centuries, have been destroyed or damaged in the last months of the twentieth century.

In addition the vacuum at local level which existed for several weeks in June and July has in many places been filled, to a greater or lesser degree, by a rival administration set up by the 'Provisional Government' who have appointed their supporters as prefects or mayors to run each of Kosovo's 28 municipalities. In some instances they have been collecting ' taxes' to finance their administration.

It is UNMIK's hope that as it gradually places its own administration on a firm footing the rival bodies will melt away. However UNMIK is hampered by delay in obtaining adequate funding for its needs - the payment of salaries and the creation of the necessary infrastructure - as well as the absence of experienced local personnel.

While UNMIK has divided Kosovo for administrative reasons into five regions (whose boundaries correspond to the military zones of the different NATO forces), this arrangement is intended to be only temporary, and the regions will be replaced by the municipalities after the local elections.

The 'Provisional Government'

At the Rambouillet peace talks in February 1999, three main Kosovar Albanian political groupings had been given recognition : the UCK / KLA, led by Hashim
Thaci ; the LDK (Democratic League of Kosovo), led by Ibrahim Rugova; and the LBD (United Democratic Movement), a coalition of seven parties, led by Rexhep Qosja. These three leaders agreed at Rambouillet to form a provisional government which would represent the Kosovar Albanians until elections could be held, and in April it was duly formed, with Thaci as its prime minister. However Rugova and the LDK have refused to accept ministerial posts (though some individual members of the LDK have), stating that the government is not sufficiently representative. While many parties are represented, the UCK have secured the important ministries of Public Order, Finance and Local Government. At present the political scene is volatile, with frequent charges of allegiance and formation of new parties.

In law, of course, UNMIK (or, more precisely, Dr. Kouchner, the SRSG) is the only government in Kosovo, but it tolerates the existence of the provisional government, *faute de mieux*. The two groupings have a wary and less than friendly relationship with each other but avoid outright confrontation.

Elections

UNMIK wishes to hold elections throughout Kosovo as soon as this is feasible practicable. It intends to hold elections to the municipalities first, and it hopes that this may be possible early in the summer of 2000. Elections to a Kosovo assembly would follow later in the year. However, before any elections can be held it will be necessary to draw up an electoral register, and here there are considerable difficulties. Very extensive destruction and loss of public records occurred during the hostilities and many of the Albanian inhabitants had their identity papers confiscated as they fled Kosovo. As a result the creation of an electoral register presents the OSCE (who have been asked to undertake this work) with a difficult and time-consuming task: it may be possible in many cases to establish people's identity for official purposes only by way of personal interviews. It may be, therefore, that UNMIK's timetable for elections will prove too ambitious.

In addition to the work being carried out by the OSCE on the preparation of the electoral register, UNMIK is engaged in the task of establishing a central register of the population for the purposes of social welfare, pensions, etc., together with an identity card system, and faces similar logistical problems.

Important issues of principle still remain to be decided. Which electoral system or systems will be adopted for the two elections as being most likely to produce both stable administration and reasonable representation for minority groups – eg. majoritarian or proportional, party lists, vote thresholds, etc.? This is an extremely importat matter because by reason of the deeply polarised nature of Kosovar society and the volatile nature of such political structures as exist, it is essential to have an electoral system which will contribute to stability and will also have the confidence of the electorate. In the opinion of the writer the SRSG should appoint as speedily as possible an advisory group (which should include international experts) to examine the range of electoral options. The Council of Europe, which has considerable experience in this field, would be happy to assist.

Again, who will be entitled to vote at either or both of the elections? What, if any, description of citizenship or nationality will appear on the identity cards or the central register? Will the FRY or Serbia be willing to renew or reissue passports held by Albanian inhabitants of Kosovo - if, that is, such requests are made? Would States allow persons to enter their territory on production of a Kosovo identity card without a passport? If not, must Kosovars await the political settlement to travel or will UNMIK issue passports? While the issue of an identity card is not an act of sovereignty, the grant of a passport is.

A constitution for Kosovo?

The Rambouillet Agreement had provided for a constitution for Kosovo and included the text for such a document. That constitution was to enter into force upon signature of the Agreement. Elections would follow. By contrast, UNMIK, while preparing for elections as soon as is feasible, has not yet clarified its position in regard to a constitution, and clearly does not envisage one before the elections and possibly for some time afterwards. Although ordinarily the respective powers and functions of an executive and a legislative or representative body are set out in a constitution, this does not have to be the case in Kosovo where those (like all other) matters may be provided for in regulations issued by the SRSG. It is to be hoped that such regulations will be published well in advance of the elections so as to allow candidates to formulate the programmes which they will place before the electorate and so that the voter will know the extent of the powers which the person he or she is electing will be exercising.

While the contents of a Kosovar constitution would involve sensitive political decisions, its mere existence would not pre-empt any political settlement on the future status of Kosovo because, as already noted, Kosovo had its own 1974 constitution despite being part of the Republic of Serbia.

The elected bodies

So far, UNMIK has not given a very precise indication as to what powers and functions will be exercised by the bodies to be elected, local and central, or what their relationship will be with the UN-appointed local civil administrators and with UNMIK itself. In the case of the local bodies, whereas clearly local functions such as street cleaning, sewers, and bridge repairs are likely to be included in their remit, other matters such as education and health might be considered to be functions of the central authority, in whole or in part.

In the case of the body to be elected in the second election, the Kosovo Transitional Council, the extent of the powers to be vested in it, and its relations with UNMIK during the period of interim administration, will surely depend upon how the concept of substantial and meaningful autonomy is reconciled with Security Council Regulation No. 1244's affirmation of the sovereignty and territorial integrity of the FRY, unless and until a new political settlement resolves that issue.

It may be recalled here that a study of the question produced by the Venice Commission [*avis 076/1998 fry*] identified areas of executive and legislative responsibility which might be exercised by the relevant organs in Kosovo. In recommending a large measure of self government for Kosovo it balanced this by a reduction in the territory's participation in federal affairs: it would no longer be represented in the Chamber of the Republics. Kosovo

should be responsible for all subject matters which are, according to the constitution of the FRY within the responsibility of the Republics.

The report considered that the relevant organs in Kosovo should have, on the territory of Kosovo, exclusive responsibility for

(i) organisation of the political institutions and form of government (Constitution, Parliament, government and judicial system);

(ii) organisation and number of local and regional authorities, their powers and borders and their civil service;

(iii) local and regional elections;

(iv) housing;

(v) public works with the exception of projects of national importance;

(vi) communications, roads and transport within the territory of Kosovo;

(vii) water, forests, nature reserves;

(viii) protection of the environment and nature;

(ix) regional and spatial planning;

(x) hunting and fishing;

(xi) agricultural policy and law, including agricultural property law;

(xii) culture, museums, historical monuments (though national monuments belonging to the Serbian Orthodox Church should be under the joint protection of FRY and Kosovo);

(xiii) teaching and education at all levels (subject to certain measures of protection for the Serbian language and education specified in the study);

(xiv) relations with religious communities;

(xv) sport;

(xvi) tourism;

(xvii) public health, hospitals;

(xviii) police, maintenance of public order;

(xix) civil protection, fire fighting and natural catastrophes;

(xx) administration of justice in criminal, civil and administrative matters, subject to review of the application of federal law by the federal courts of last instance;

(xxi) family law and law of succession;

(xxii) mining and exploitation of natural resources;

(xxiii) energy policy;

(xxiv) privatisation of public enterprises;

(xxv) taxes and budget of Kosovo;

(xxvi) social security;

(xxvii) symbols, flag and emblems of Kosovo;

(xxviii) official languages in Kosovo;

(xxix) civil service of Kosovo;

(xxx) media, including radio and television.

These suggested allocations would, of course, be subject to the provisions of whatever Agreement embodied the terms of a political settlement.

It must be noted that that study was completed in September 1998, and because that was then and this is now it may be appropriate that some matters which the report had assigned to the federal organs and institutions should now be exercised in Kosovo, such as responsibility for the criminal and criminal procedure codes, procedure before the administrative courts, and other areas of law. The proposal at (xx) above will also require reconsideration in the light of the present situation.

THE FEDERAL REPUBLIC OF YUGOSLAVIA, Mr Vladimir Goati
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The Federal Republic of Yugoslavia (FRY) was formed on 27 April 1992 by Serbia and Montenegro, two former republics of the Socialist Federal Republic of Yugoslavia (SFRY). There is a wide disproportion between the two republics in terms of population size (9 791 475 and 618 287 respectively) and a similar asymmetry in economic resources. FRY is remarkably heterogeneous in ethnic (and cultural) terms: Serbs, as the most numerous nation, make up 62.6% of the country's population, Montenegrins 5%, while Albanians as a national minority comprise 16.5%. Serbia and Montenegro taken separately are also ethnically heterogeneous: Serbs comprise 65.1% of Serbia's population, while Montenegrins account for 62% of Montenegro's population.

Serbia and Montenegro "entered" FRY each with its particular and mutually incompatible political institutions established back in 1990, while SFRY still existed. The Constitution of Serbia (adopted on 28 September 1990) provided the president of the republic with enormous powers, so that a "semi-presidential system" may be said to be in effect in this republic. In Montenegro, however, through constitutional amendments adopted in 1990, a parliamentary system was introduced, confirmed subsequently by the Constitution of Montenegro of 12 October 1992. The Constitution of FRY (1992) defines a parliamentary system, like the Montenegrin one. Some important provisions of the Constitution of Serbia (concerning for example the guarantee of personal liberties or rights and liberties of citizens during the state of war) are in direct conflict with the provisions of the Constitution of FRY. Between the Federal Constitution and the Constitution of Montenegro only a few minor differences exist because the Constitution of the latter republic was adopted after the federal one. Even though Article 115 of the Constitution of FRY requires that the constitutions of the republics be brought into line with it, to this very day the Constitution of Serbia has not been made to conform with the Federal Constitution. Moreover, in FRY several dozen federal laws are in effect which were adopted in SFRY and conflict with the current Federal Constitution. Through modifications and additions to the Constitutional Law the deadlines for harmonising these laws with the Constitution of FRY were prolonged several times; the deadlines expired in 1995, but these laws have not been brought into harmony with the Constitution, nor have they been abolished. Since in FRY two incompatible Constitutions are simultaneously in effect - the Federal Constitution and the Constitution of Serbia - as well as a set of laws from the SFRY period which conform with neither of these constitutions, the legal system of FRY cannot be described as a logically ordered and non-contradictory body of mutually dependent norms. Rather, we may speak of the coexistence of various norms whose enforcement depends on meta-legal factors, often on the current distribution of influential individuals at strategic positions in the federation and the republic. *The confusion in the "legal terrain" is, on one hand, an indicator of the conflicting interests within FRY and on the other, a generator of new conflicts.*

As things stand at the end of 1999, conflicts in FRY have been taking place at, broadly speaking, three levels: republican (the conflict between Serbia and Montenegro); ethnic (conflict within Serbia, primarily - but not exclusively - with the Albanian minority in Kosovo-Metohija); and finally, political (the conflict within Serbia between the ruling political regime and the parties of the democratic opposition which on 21 September started permanent protests demanding the resignation of the current regime headed by Slobodan Milosevic). We shall consider in more detail each of these three kinds of conflicts.

(1) Confrontations between Serbia and Montenegro

In the dramatic events that preceded the breakdown of SFRY (1991), the Montenegrin leadership energetically backed the Serbian one. The leaderships of these two republics refused to accept the view that SFRY had broken down, claiming instead that four Yugoslav republics (of six altogether) - Slovenia, Croatia, Macedonia and Bosnia-Herzegovina – had, by proclaiming their independence, committed acts of "one-sided secession". Starting from such a premise, on 27 April 1992 the political leaderships of Serbia and Montenegro formed the Federal Republic of Yugoslavia (FRY), insisting that this state had the exclusive right to continuity with SFRY. In order to procure proofs to support such claims it was decided that the Constitution of FRY should be adopted by the Parliament of SFRY (under the 1974 Constitution). But in that process, the Constitution of SFRY (1974) was violated gravely at several points. First, not all the federal units took part in the procedure of adopting the

Constitution, as was required by the Constitution then in effect (Articles 400, 401, 402). Second, the Federal Chamber of the Assembly of SFRY which was deciding on FRY's Constitution did not have a quorum, because the MPs ("delegates") of the four "seceded" republics did not attend the session. Thus the decision to proclaim the Constitution was made by just 73 members of the Federal Chamber, which, according to Article 291 of the Constitution of SFRY, had 220 members. Third, the term of office of the MPs who were deciding on the adoption of the Constitution had expired in 1990 (they had been elected in 1986). Finally, and most paradoxically, at the moment when the Federal Chamber of the Assembly of SFRY proclaimed the Constitution of FRY, SFRY no longer existed. The legal "acrobatics" described above missed the point, however, since most countries refused to recognise FRY's claim to the status of exclusive successor of the "second Yugoslavia".

On the very day on which the Constitution of FRY was proclaimed, the Federal Chamber of the Assembly of SFRY (incomplete once again) adopted the electoral law and decided, with no consultation whatsoever with the opposition parties of Serbia and Montenegro, that the first elections for the Federal Assembly of FRY would be held as soon as 31 May 1992. In addition to this extremely short period of time, which did not suit the opposition in Serbia and Montenegro, the ruling parties of the two republics, the Socialist Party of Serbia (SPS) and the Democratic Party of Socialists of Montenegro (DPSM), ignored the demands of the opposition for equal access to the media during the election campaign and for state subsidies to political parties. For these reasons opposition parties called voters to boycott the May elections. A large number of voters responded to their call so that voter turnout in these elections was only 56% in Serbia, and 56.7% in Montenegro, which is 15 and 18.3% less, respectively, than in the first free elections (1990). *The atmosphere of deep political distrust and strain in which the May elections to the Federal Parliament - the "founding elections" of FRY - were held announced serious difficulties which the country would face later on.*

True, no difficulties could be perceived in FRY's functioning during the first couple of years. This was the result of a firm consensus between the ruling parties of Serbia and Montenegro, which used to solve all problems in the federation through "political deals". But the situation changed at the beginning of 1997 when the Montenegrin DPSM split into two fractions. One, supported by the majority, was (broadly speaking) social-democratic; the other (also broadly speaking) was neo-communist. The latter left the DPSM and formed a new party, called the Socialist People's Party of Montenegro (SPPM). In the heat of the conflict within the DPSM, Momir Bulatovic was eliminated (in July 1997) from the position of party president and Milo Djukanovic, expressing a resolutely pro-democratic orientation and critical stance toward the regime of Slobodan Milosevic in Serbia, was elected new party leader. In October 1997 Milo Djukanovic succeeded in defeating Momir Bulatovic in the elections for the president of Montenegro, although Bulatovic enjoyed strong media and material support from Serbia. Djukanovic's victory was complemented by the triumph in the republic’s parliamentary elections (31 May 1998) of the pro-democratic and pro-European coalition "For a Better Life" (DPSM - People's Party - Social Democratic Party) over the SPPM.

The regime in Serbia could not, however, reconcile itself to the democratic turn in Montenegro. In its political conflict with Montenegro the Serbian regime has exerted a whole range of pressures, violating the Federal Constitution and many laws. Let us name just a few: preventing the MPs legally elected by the Montenegrin Parliament in 1998 from taking their posts in the Chamber of the Republics of the Federal Assembly; imposing Momir Bulatovic as Prime Minister of the Federal Government, although the Parliament of Montenegro was against it, and blocking the traffic of goods between the two republics (particularly of

agricultural products from Serbia to Montenegro). The latter measure recalls the "economic blockade" enforced by Serbia against Slovenia within SFRY in late 1989. The illegal obstruction of the members of the Montenegrin Parliament elected in 1998 from taking part in the working of the Chamber of the Republics of Federal Parliament and calling into this Chamber Montenegrin MPs elected in 1996 instead(!) was aimed at achieving a majority in this chamber of the Federal Parliament by the Serbian ruling coalition, thereby sidestepping the parity principle on which the composition of the Chamber of the Republics is based, with 20 members coming from each of the republics. In addition, the ruling coalition from Serbia wields a compelling majority in the other chamber of the Federal Parliament - the Chamber of Citizens - because Serbia elects 108 and Montenegro only 30 members to this Chamber. In this way, regardless of the principle of equality of the republics proclaimed in the Article 1 of the Constitution of FRY (1992), Montenegro has been completely marginalised both in the Federal Assembly and in the Federal Government, as well as in all other federal institutions. Having lost the possibility of influencing the formation of federal organs through constitutional means, Montenegro refused to enforce the decisions of the Federal Government.

At the beginning of 1999 Montenegro tried unsuccessfully to avert the confrontation of FRY with NATO. The Assembly, the President and the Government of that republic insisted on several occasions on the need to accept the Rambouillet agreement on peaceful management of the crisis in Kosovo-Metohija with the participation of the international community, but the Parliament of Serbia rejected the agreement. With the same goal in mid-March 1999 the Montenegrin Parliament adopted a resolution demanding the return of Montenegrin army reservists drafted in the Yugoslav Army (YA) to Montenegro and calling upon the appropriate organs of the republic to make sure that in the case of conflict with NATO the Army of Yugoslavia not be allowed to use the territory of Montenegro. When NATO attacks on FRY began, the Government of Montenegro issued a decree (on 26 March) rejecting the decision of the Federal Government declaring the state of war. On 1 May the Montenegrin Government demanded that Montenegro be exempted from the international petrol embargo, promising that the petrol it imported would not be used by the Army of Yugoslavia. *On the basis of all this we may conclude that FRY can be called a federal state only in a figurative sense.*

The conflicts described above between the two federal units, where one of them does not hesitate to breach the Federal Constitution and laws in order to further its own interests, are a result of completely divergent political orientations of the party coalitions in power in Serbia and in Montenegro. In Serbia, the ruling coalition formed on 24 March 1998 consists of: the SPS headed by Slobodan Milosevic, the extremely left-wing Yugoslav Left (YUL) presided by Slobodan Milosevic's wife Mirjana Markovic and the ultranationalist Serbian Radical Party (SRP) of Vojislav Seselj. The parties of the "red-and-black" coalition in Serbia (SPS - YUL - SRP) - having won 76% of seats in the Parliament of that republic (192 of 250) in the 1997 elections - oppose democratic reforms, property reforms, and reintegration of FRY into the world. In contrast, in Montenegro, the ruling coalition - which won 53.4% of the seats (42 of 78) in the 1998 elections - consists of parties with a pro-democratic and pro-market orientation: DPSM, PPM, and SDPM. Differences are particularly striking between the most important parties, which represent the backbone of the ruling coalitions in Serbia and Montenegro: the SPS and the DPSM.

First, the SPS states that it is committed to privatisation, but the relevant republican law (1997) prescribed voluntary rather than mandatory privatisation in Serbia, which actually

means postponing privatisation *ad calendas graecas*. In Montenegro, on the other hand, mandatory privatisation has been in full swing. Second, the SPS in principle supports democratisation of the country and its connections with the world; in practice, however, the political leadership of Serbia has not been willing to implement the OSCE's recommendations (of 1996) concerning the democratisation of the country, although their implementation is an essential precondition for its reintegration into the world. By contrast, the DPSM has launched radical democratic reforms, including the holding of parliamentary elections in May 1998 that were judged as "free and fair" by both domestic and foreign monitors. Third, for several years the SPS had been paying lip service to negotiations as the way to resolve the crisis in Kosovo-Metohija; nevertheless, on 23 April 1998 it organised a referendum whereby foreign mediation was excluded. In addition, it formed a coalition government with the ultranationalist SRP which in its Program (1996) advocates the abolition of the already limited autonomy enjoyed by the province according to the Constitution of Serbia (1990). In this area as well, the DPSM has pursued a completely different policy from the SPS, as evidenced both by the party's efforts to bring the problem of Kosovo-Metohija to a resolution exclusively through negotiation, including the possibility of foreign mediation, and by a more tolerant policy of the DPSM towards national minorities within Montenegro itself. Finally, the SPS energetically opposes the arrest of indicted war criminals and their extradition to the International Tribunal in the Hague, although Serbia assumed such an obligation by signing the Dayton Accords. The fulfilment of this obligation became even less likely when, in April 1999, the International Tribunal indicted, among others, the President of FRY Slobodan Milosevic and the President of Serbia Milan Milutinovic, for crimes committed in Kosovo-Metohija. Unlike the SPS, the DPSM has explicitly committed itself to implementing the Dayton Accords, which is illustrated by public statements of its leaders that indicted war criminals would be arrested in the territory of Montenegro. *We are facing here an extraordinary paradox indeed - to our knowledge, unprecedented in the history of federalism - that the chief of the federal state and the chief of one federal unit can be arrested in the other federal unit.*

(2) Ethnic Division

The crisis of interethnic relations, particularly relations with Albanians (17.2% of Serbia's population) in Kosovo-Metohija, has a long history which we will not deal with in this text. The "Kosovo problem" was politically reopened at the beginning of 1989, when Serbia adopted amendments to the Constitution of the Republic considerably curtailing the rights of the autonomous provinces (Kosovo-Metohija and Vojvodina) that had been guaranteed by the Constitution of SFRY (1974) then in force. Expressing their discontent, Albanians in Kosovo-Metohija organised mass demonstrations after which the state of emergency was introduced in the province. In January 1990 Albanian revolt broke out again, demanding the abolition of the state of emergency, free elections and the release of political prisoners. The revolt was suppressed by the intervention of the Yugoslav People's Army (YPA), which was followed by decisions of the Parliament of Serbia dissolving the Provincial Assembly, the Executive Council of the Province and the Presidency of the Province. Furthmore, decisions of the responsible bodies of Serbia abolished previous school curricula and introduced new ones; Albanian teachers who refused to work on the basis of these new curricula were dismissed, and many Albanian-language schools were closed down. However, the measures of the ruling regime in Serbia were not limited to the educational system but affected other spheres as well. As stated in the report of the Belgrade Centre for Human Rights: "... In the early 1990s the Serbian authorities suspended almost all Albanian directors of state-owned enterprises, while over 100 000 Albanians were fired... Thus in Kosovo a completely divided society had

emerged: Serbs and Montenegrins controlled the state apparatus and state-owned enterprises, while agriculture and the black market were left to Albanians. In the meantime, Albanians established a certain para-state system of government which was completely at variance with the Serbian Constitution and laws" (*Human Rights in Yugoslavia 1998*, 1999: 255).

Protesting against the repressive policy of the regime, Albanians followed the lead of their parties in the "Albanian alternative" grouping and boycotted the elections for the Parliament of Serbia held in 1990, as well as all subsequent elections, and refused to participate in the population census carried out in SFRY in March 1991. Between 26 and 30 September 1991 the "Albanian alternative" even organised an illegal referendum "for the sovereign and independent state of Kosovo". According to the organisers, 89.3% of the citizens went to the polls in this referendum and 87% voted in favour of the referendum question (Lutovac, 1995: 115). Refusing to participate in the "official" political life of Serbia and FRY, the parties of the Albanian national minority in Kosovo-Metohija even formed their own political institutions: a parliament, a government, administrative organs, etc. Parallel institutions - largely tolerated by FRY and Serbian authorities until the end of 1996 - were also established in the areas of education, culture and health care. The scope of these institutions is convincingly demonstrated by the figures: for instance, in the 1994/95 school year about 380 000 students were included in the parallel educational system in Kosovo-Metohija at all levels, along with about 20 000 teachers, professors and technical personnel. The annual budget of the educational system was about $20-25 million.

Absorbed by the crisis in Bosnia-Herzegovina, the regime in Serbia did not obstruct the functioning of parallel institutions. Instead it directed its efforts to stopping the emigration of Serbs from the "Southern province" and on blocking the "expansion" of Albanians into the territory of Serbia outside Kosovo. To this effect the Law on Special Conditions for Real Estate Transactions was adopted (in 1989). Article 2 of the Law authorises the Ministry of Finance of the Republic to approve the transfer of ownership or other real rights between two persons, or between persons and legal personalities in the territory of the Republic of Serbia (excluding Vojvodina). According to this Law the Ministry of Finance, or more precisely its Council for Economic and Legal Affairs, grants approval of a transaction "...in cases where it is judged that the transaction will not cause modifications in the national structure of the population or lead to emigration of members of a particular nation or nationality, and where the transaction will not provoke alarm or insecurity or inequality among citizens of another nation or nationality" (Article 3). Significantly, where a contract is made without the appropriate approval the Law makes the buyer alone liable to prosecution, but not the seller, because buyers are predominantly Albanians (*Human Rights in Yugoslavia 1998*, 1999: 53-54). Understandably, the legislator did not mention Albanians explicitly in the text of the Law; instead, selective enforcement of the general provisions of the Law was ensured by giving powers to the state organs to grant or deny approvals for real estate transactions arbitrarily. *By this law the principle of equality is blatantly violated, because citizens' rights are made dependent on their ethnic membership.*

The peaceful coexistence of two ethnically defined communities in Kosovo-Metohija collapsed at the beginning of 1997 when the military rebellion of the Albanian population broke out. The conflicts between the "Kosovo Liberation Army", on one side, and the police and the army, on the other, escalated rapidly. A good illustration is provided by the fact that in the course of fighting in the area of Drenica in March 1998 several hundred people were killed. After that the international community demanded that FRY start a dialogue with Albanian representatives in the presence of international mediators. Rejecting this idea, the

ruling regime in Serbia decided to support its negative stance with an alibi in the form of "the will of the people". For this purpose a referendum was held on 23 April 1998 with the question: "Do you accept the participation of foreign representatives in solving the problems in Kosovo-Metohija?" According to the official report 74% of Serbia's citizens went to the polls in this referendum, 94.7% of them voting against foreign participation. We shall not go here into the many irregularities of this referendum (Goati, 1999: 167-172), but what is certain is that its results served the ruling regime well in its rejection of offers for the participation of foreign representatives in solving the Kosovo crisis. The whole issue soon came to an end though, since the UN Security Council in its Resolution No. 1199 demanded that FRY put a stop to fighting in Kosovo-Metohija, facilitate the return of refugees to their homes, enable unhindered delivery of international humanitarian aid and begin negotiations with the Albanian minority. On 3 October 1998 the United States, via Richard Holbrooke, sent a "last warning" to FRY either to begin implementing the Resolution immediately or to face a military intervention by NATO. This intervention was avoided, because FRY consented through an agreement struck between Slobodan Milosevic and Richard Holbrooke on 13 October 1998 to meet all the demands of the Resolution 1199. In addition, FRY accepted that 2000 OSCE "verifiers" and (unarmed) NATO planes would take over the monitoring of the implementation of the agreement. Let us note that through the Milosevic-Holbrooke agreement the foreign factor directly "meddled" in the Kosovo-Metohija crisis, which represented a violation of the republic's Law on Referendum and People's Initiative (1994) stipulating that the decisions citizens make in a referendum are mandatory (Article 25).

In practice, however, the Milosevic-Holbrooke agreement was not enforced and military conflicts in Kosovo-Metohija resumed in late 1998. The last attempt to reach a peaceful solution of the crisis was made in Rambouillet in March 1999 when the international community offered FRY and the representatives of the Albanian minority the opportunity to sign an agreement on a peaceful resolution of the crisis. Since FRY refused to sign, on 24 March NATO began bombing FRY. The bombing stopped on 9 June 1999 when FRY accepted all NATO demands concerning Kosovo-Metohija, primarily the demand to withdraw all its military and police forces from the province. Subsequently a UN protectorate has in fact been introduced in Kosovo-Metohija.

We have given a brief outline of the evolution of the "Kosovo crisis" and the problem of the Albanian minority, although other ethnic groups in Serbia have also been facing considerable difficulties, as the ruling regime has systematically favoured the majority nation at the expense of minority ethnic groups such as Hungarians (3.5% of the republic's population) and Muslims (2.5%). The unenviable position of minority ethnic groups in FRY in general is convincingly demonstrated in a study of the Helsinki Committee for Human Rights (1995) that includes a list of measures and acts of state organs (mostly in the territory of Serbia) that harmed national minorities (International Convention on the Elimination of all Forms of Racial Discrimination - *A Review of Legislation and Practice in FR Yugoslavia,* 1995). Anti-minority policy sometimes assumed the form of legal discrimination. A remarkable example is the Law on Cultural Values adopted by the Serbian Parliament on 16 December 1994. This law lists five elements defining a cultural value of which the continuance is subsidised by the state; one of them is "significance for national history" (in the sense of ethnic history). Members of Parliament from the Democratic Community of Vojvodina Hungarians tried unsuccessfully to explain in the Serbian Parliament that by such a definition of cultural value, members of minorities are discriminated against because they are obliged, as taxpayers, to

finance cultural values of the majority nation, while members of the minority nation are relieved of a reciprocal obligation towards cultural values of minority groups.

(3) Conflict with the Opposition

In contrast with most post-communist countries of South-Eastern Europe, the establishment of democratic institutions in Serbia and Montenegro in 1990 did not occur as a result of pressure "from below" but of decisions of the ruling communist parties of the two republics. These parties, after changing their programme commitments and names, have managed to win all the elections for republic and federal parliaments held so far. For this reason the first peaceful change of government has never been completed in Serbia and Montenegro, as it has been in all other countries of the region. Nonetheless, after the republic elections in Serbia in 1997 and in Montenegro in 1998 former opposition parties in both republics came to power within various coalition arrangements, so that in both republics we may speak of the beginning of a gradual peaceful change of government.

The survival in power of ex-communist parties in Serbia and Montenegro (SPS and DPSM respectively) is not only a result of the broad support enjoyed by these parties in the electorate, but also of the extremely unequal conditions under which electoral contests have been held. The SPS and (until 1998 elections) the DPSM have held strong advantages over opposition parties in economic, institutional and media terms. Economically, they have been in a better position because they "inherited" vast property (buildings, cars, enterprises) from the previously ruling communist parties. Institutionally, the SPS and the DPSM have been able to change electoral laws and laws on electoral boundaries according to their current interests and without consultation with opposition parties. Finally, in the media domain, the SPS and the DPSM have enjoyed greater "favour" from the official media than opposition parties (see Goati, 1999). For these reasons none of the elections in Serbia (and in Montenegro until 1998) could be considered free and fair. The superior position of the ruling parties over the opposition has, however, been apparent not just in elections but also, particularly in Serbia, in political life generally speaking. For example, the Constitution of Serbia was adopted in 1990 in the one-party parliament elected under the "ancien regime" with no consultation with opposition parties. This is why the most important parties of the democratic opposition, the Serbian Renewal Movement (SRM) and the Democratic Party (DP) have been challenging the legitimacy of the political regime in Serbia since 1990. We can also note that, unlike these two parties, the parties of the Albanian minority have denied that Serbia and FRY have any legitimacy as "political communities" (on the difference between "political community" and regime see Easton, 1979: 143).

Seeking to maintain its dominant political position, the SPS did not refrain from violating the law, even laws which it had decisively influenced itself. A good illustration is what happened at the constitutive session of the Serbian Parliament on 28 January 1993, when the SPS, assisted by the SRP, without prior notice enacted a new law on electing members of the Chamber of the Republics of the Federal Assembly. The previous law was based on the principle that each party represented in the Parliament of Serbia had the right to be proportionally represented among the 20 members of the Chamber of the Republics of the Federal Assembly elected by the Serbian Parliament. Under the new law enacted on 28 January 1993 the principle of proportional representation was abolished. Subsequently, on the same day and at the same session, the Parliament elected to the Chamber of the Republics only members from the SPS and the SRP. In this way, the legal obligation that a law must be published in the "Official Gazette of Serbia" before becoming effective was breached. Even

more serious is that by this decision of the Parliament of Serbia, a fundamental legal principle that laws must not be enforced retroactively was violated; in this case the changes in the law concerned a matter already settled by the elections held some time before (in December 1992).

The opposition in Serbia did not resign itself to its marginal political position but tried to force the ruling party to make concessions. To this effect opposition parties have left sessions of parliament, boycotted elections and organised mass demonstrations. The longest demonstrations, lasting from mid-November 1996 to the early February 1997, were provoked by the regime's attempt to prevent the opposition from taking power in municipalities and cities where it won a majority in the 1996 local elections (the "big electoral fraud"). While in this case the regime was forced to yield and let the opposition take power in cities and municipalities where it had won, threats of election boycotts have been less successful. Such a threat did not succeed, for example, in the elections for the Parliament of Serbia in 1997 largely because the SRM did not join the boycott by 12 opposition parties but instead participated in the elections held under unfavorable conditions. Yet these elections were boycotted by a number of parties, including the DP and the Democratic Party of Serbia (DPS), which in the preceding elections in the republic (1993), had won one-sixth of the votes (16.7%) between them. If we add that in the 1997 elections Albanians, making up one-sixth of Serbia's population, did not vote (like in all preceding elections), then it is not exaggerated to conclude that a non-representative, rump parliament emerged from the 1997 elections. In this parliament there has been no chance to hear the voices of important opposition parties on dramatic problems faced by Serbia from 1997 to 1999. Here we have in mind in particular some democratic opposition parties that have advocated a compromise resolution of the Kosovo crisis, through which FRY's military conflict with NATO would have been avoided. Since they are not represented in the Parliament of Serbia, the parties of the democratic opposition have been engaging in mass protests begun on 21 September 1999 in 18 Serbian cities, with the goal of forcing Slobodan Milosevic to resign and calling pre-term elections that would for the first time be held under fair conditions.

Whereas undemocratic elections comprise a constant feature of the political development of Serbia from 1990 to 1999, elections were held in Montenegro on 31 May 1998 and basically met the criteria of democracy. Monitoring missions of the OSCE and the European Bureau for Democratic Institutions and Human Rights judged that

> ... Parliamentary elections... were well organised and are a significant improvement compared with previous elections held in Montenegro. These elections are a step forward in the direction of fulfilling the conditions which are the OSCE's basic commitments. The Monitoring Mission has the pleasure to state that most recommendations directed by the Monitoring Mission in 1997 as well as by the technical assistance team since February 1998 were put into practice (Parliamentary Elections of 1998, *Official Gazette of the Republic of Montenegro*, 1998: 109).

Concluding remarks

The threefold conflict described above of FRY "with itself" is closely tied to the conflict between FRY and the international community which has followed FRY like a shadow ever since its proclamation on 27 April 1992. Approximately one month later (on 30 May) the UN Security Council voted to introduce economic sanctions against FRY because it had not withdrawn the YPA and paramilitary forces from the territory of Bosnia-Herzegovina.

Economic sanctions of the UN were lifted in late 1995, but this did not bring with it the return of FRY into the UN and other major international organisations, because some prerequisites for that had not been fulfilled: namely, democratisation of the country and respect of human rights. After military rebellion in Kosovo-Metohija FRY found itself, as we have already described, again on the agenda of the UN Security Council, and then in a military conflict with NATO as well. With the end of the conflict in the beginning of June 1999 the question of the future of FRY comes to the forefront.

Dissatisfied by the inferior position of their republic within the federation in the preceding period, the Government of Montenegro adopted (on 5 August 1999) a document entitled *Basic Elements of New Relations of Montenegro and Serbia*, suggesting the transformation of FRY into a confederate union. The Government of Montenegro sent this proposal to the Government of Serbia, but the latter failed to respond by the beginning of October, with the explanation that the matter is within the competence of the Federal Assembly, where the ruling coalition of Serbia has the "control package of shares" and whose decisions Montenegro refuses to recognise. The President of Montenegro, Milo Djukanovic, on 6 October 1999 announced that there is a "precise deadline" for waiting for Serbia's response, and when it expires a referendum on independence would be held (*Vijesti*, 6 October 1999). Two days later the SPS expressed willingness to start "interparty dialogue" with the DPSM on the proposal. Yet the fate of the Montenegrin proposal, and the future of FRY as well, depend to a great extent on the situation in Serbia. If in this republic radical democratic change occurs, it is possible to expect the settling of the relations between the two republics on new principles. If, on the other hand, the existing regime in Serbia remains in power, it will almost certainly resist the transformation of FRY into a confederation. In that case Montenegro will probably proclaim independence and FRY will at once "become history" and the number of independent states on the territory of SFRY will become equal to the number of republics that composed it.

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THE CONTRIBUTION OF LAW AND DEMOCRACY TO CONFLICT RESOLUTION IN THE REPUBLIC OF ALBANIA

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The debates of the Parliamentary Assembly of the Council of Europe offer a great deal of food for thought regarding the process of the peaceful change of regime in Albania and the establishment of a free and democratic government in that country. The debates concern both Albania's application for membership of the Council of Europe and the management of the internal conflicts which affected constitutional developments in Albania even after the country became a member of the Council of Europe on 13 July 1995.

When reading the documents relating to this process we must bear in mind that one of its main features is the essentially internal nature of the difficulties which international organisations and bodies have had to deal with: the crises and conflicts which endangered Albanian democratisation had their sources in internal economic and political instability. Until the recent developments in Kosovo the international community appreciated Albania's restraint in the context of Balkan conflicts and had seldom had occasion to express concern over Albanian activity in the field of international relations. The restraint of its foreign policy in the face of rising tensions appeared to be a factor of stability in the region.

Relations with Greece deteriorated, however, when the Greek authorities tried to stop the flow of refugees looking for a better economic situation in the Greek territory. Large numbers of Albanian illegal immigrants were sent back to their country, and at the same time the disagreement between the two governments as to the size and the treatment of the Greek minority in Albania resurfaced. Tensions further escalated over a border incident in which two Albanian soldiers were killed and the Albanian authorities retaliated, arresting five ethnic Greeks accused of conducting espionage for Greece. Co-operation was re-established when the arrested people were released and the Greek goverment lifted the veto blocking European assistance to Albania. These developments were favoured, in particular, through the intermediary of the authorities of the European Community, of which Greece is a member and on which Albania depends for economic support. We shall return to the problem of the Greek minority in Albania when we deal with the internal dimension of the Albanian process of democratisation, which is the main point of interest of this paper.

Concern was also frequently expressed about the consequences of the availability of large numbers of weapons in Albania. These weapons were taken from the depots during the turmoils of the past years and were assumed to be frequently smuggled to Kosovo via Macedonia and other bordering countries. This illicit cross-border trade was seen as a major contribution to the possibility of inter-state conflicts in the Balkans but an evident sponsorship of this traffic or a guilt in the field of the Albanian goverment were never proved. However, many international sources of information shared the opinion that these developments had to be connected with the operations of the Kosovo Liberation Army, which had a relatively free hand in the north-eastern part of the country due to the evident security vacuum.

With the explosion of the crisis in Kosovo, Albania experienced an influx of half a million refugees and became the basis of operations for the international intervention. Although international commentators predicted a destabilisation of the country, it in fact accepted the situation with remarkable calm. The problem of the arms trade was only partially superseded, although the presence in the area of NATO armed forces strengthened the monitoring of the borders, insofar as those armies appear to be better fitted to this task than the international peacekeeping forces entrusted with the restoration of law and order following the 1997 uprising in the frame of the Italian-led Operation Alba. In any case the large number of weapons in civilian hands has continued to be a major factor of internal distress which has to be dealt with by the Albanian government.

The process of democratisation in Albania started when the Communist Party authorised the formation of other political parties in December 1990. But it was only after the elections which were held between March and April 1991 that a transitional "constitution" was adopted: it is known as the Law on Major Constitutional Provisions. It was a very rough document requiring - to be effective - the approval of a large number of detailed legislative provisions aimed at its implementation. According to a generally shared opinion the new Parliament should have taken care of the task of approving all the necessary statutes in view of the completion of the first phase of Albania's transition to a democracy. But the Assembly was largely controlled by the former communist party and did not have the benefit of a thorough political debate about the future Albanian regime. Mr Ruffy, one of the Swiss members of the Parliamentary Assembly of the Council of Europe, correctly reminded his colleagues of the analysis of the elections made by the delegation of the Council of Europe Parliamentary Assembly which monitored them: "these elections, while not totally fair, particularly during the election campaign, can be regarded as free and democratic, especially if compared to the 1987 elections in which, out of 1.8 million voters, the single party obtained 100% of the votes (only one vote against)". At that stage Albania was granted special guest status with the Parliamentary Assembly of the Council of Europe in November 1991.

Instead of thinking about the implementation of the Law on Major Constitutional Provisions the political forces focused their debate on the preparation of a new draft Constitution, which should have reflected the on-going transition. A first draft had been ready before the elections of Spring 1991 and a second draft was prepared after these elections, but neither of them received the necessary support. In the meantime new elections were called: the party in power was losing the support of the electorate, the incumbent 250-seat Assembly was thought to need a renewal, the introduction of some elements of proportionality was required, and even the number of seats in the Assembly was discussed because it was perceived to be too large. After the elections, which were held on 22 and 29 March 1992 and were won by the Democratic Party, a new commission was appointed to work on the third draft of the Constitution.

It is worth recalling that the draft of the new electoral law was revised by the Council of Europe and by the CSCE Office for Democratic Institutions and Human Rights. Although in January 1992 these institutions found the text acceptable, a new amendment adopted by the Assembly to eliminate any reference to the political organisation of national minorities recognised by law changed the meaning of the document. The representatives of the Greek minority in Albania complained and looked for help from the international community. The Council of Europe heard their call and tried to obtain a change of the law, but - notwithstanding the intervention of the Secretary General of the Council and of the President of the Parliamentary Assembly - the Albanian authorities' response was not completely satisfactory. It was not until the arrival in Tirana of a special envoy of the President of the Parliamentary Assembly that the legislative provision was to some extent bypassed through the formation of a new political party, the Union for Human Rights, not explicitly connected with the Greek minority but largely entrusted with the task of taking care of its rights and interests.

In fact, after the elections of 1992, Council of Europe observers arrived at the conclusion that their results "opened the way for closer relations between Albania and the Council of Europe, with a view to subsequent membership - subject to review of the position of the ethnic Greek minority (notably in the south)" (Opinion No. 189 (1995) of the Parliamentary Assembly of

the Council of Europe). Concerns were raised with regard both to the precise nature of the protection of this community and also to the identification of the ethnic Greek Albanian citizens: the minority criticised the position taken by the Albanian government to restrict education in the mother tongue to the ethnic Greek inhabitants residing in the districts surrounding the towns of Argyrocastro and Ayii Saranta, excluding the residents of the towns themselves, who were therefore deprived of the necessary protection. Moreover assurances were sought that the Orthodox Christian community in Albania was not deprived in practice of an opportunity to flourish (Doc. 7304 of the Parliamentary Assembly - appendix I). As a matter of fact, the Greek minority and the Orthodox Christian community issue were only two of the major problems which had to be settled. Therefore, in January 1993, a joint European Commission/Council of Europe programme of co-operation in the fields of human rights and the rule of law was established and the Venice Commission was highly active in assisting Albanian efforts to complete a new draft of the Constitution.

Whereas Albania's new Civil Code entered into force in November 1994 after its adoption on the basis of a draft prepared with the help of international financial institutions, on 6 November 1994 the new draft of the Constitution was rejected by a referendum called by the Parliament in agreement with a proposal of the President of the Republic. The opposition, that is the Socialist Party, complained that - according to the constitutional rules - the draft could not be submitted to the vote of the people without having gained prior parliamentary approval, but the Constitutional Court upheld the referendum's lawfulness. In an opinion written for the Parliamentary Assembly by the Swiss member Mr Columberg we read that "the reason for rejection of the draft was apparently not the text itself (the public had not even discussed it in depth); it was rather a rejection of the whole situation in the country at the time" (Doc. 7338). The conflict between the political parties was actually growing day by day, while criminal trials were carried on which concerned not only representatives of the old nomenclatura but also such a prominent personality of the transition as Mr Fatos Nano, who had been Prime Minister from February to June 1991 and was accused of abuse of authority and forgery of official documents relating to aid from the Italian State. Arrested on 30 July 1993 although his parliamentary immunity had not been lifted and without parliamentary authorisation, he was held in custody despite the fact that the offences of which he was accused were not punishable - according to the opinion of his lawyer - by imprisonment. The trial did not begin until 5 March 1994, and Mr Nano was sentenced to twelve years' imprisonment. The Court of Appeal and the Court of Cassation upheld the decision. On the basis of a reasoned opinion of the Inter-Parliamentary Council, doubt was expressed by the Parliamentary Assembly of the Council of Europe as to the guilt of Mr Nano and the fairness of the procedure adopted. The solution of a presidential pardon was suggested ("provided Mr Nano is not subsequently barred from participating in the political life of the country": the opinion of Mr Columberg reminded his colleagues of the advice given by the Inter-Parliamentary Council) because it was considered "an obligation for the Albanian authorities to solve Mr Nano's case".

These developments underline the importance of the concern about the judicial system that is frequently underlined in the papers of the Council of Europe. Judicial independence was at stake and effective solutions had to be found in view of ensuring, on the one hand, the transition from the old judiciary dependent on the government and the single party to a new judiciary independent of the other constitutional powers, and, on the other hand, the establishment of a full guarantee of neutrality and impartiality of the judges with regard to the people concerned by their activity. Some major problems were addressed by the international institutions, and particularly by the Council of Europe and the Venice Commission: the

professional training of magistrates, the role of the High Council of Justice in dismissing judges, the reform of the Prosecutor's Office. The question of a close examination of the qualifications of some judges, which were suspected of not being in conformity with the requirements of the Main Constitutional Provisions, was frequently raised: some appointments were contested. But also the lack of sufficient legal training was underlined. The government tried with some foreign help (joint European Commission/Council of Europe programme of co-operation) to solve the problem with special courses lasting no more than six months, which were attended by more than 400 persons. These people were permitted to take examinations at the Faculty of Law and to earn the diplomas necessary for appointment to various state positions, including that of judge and prosecutor. The solution looked useful and effective but its consequences are and will be felt today and in the future insofar as the poorness of such legal training is becoming apparent. Moreover, there have been complaints about the lack of impartiality in the selection process: some of the persons selected were from families that had been persecuted by the communist regime, but most of them were graduates of university faculties and were identified as loyal followers of the political party in power. The Democratic Party was evidently trying to establish a judiciary prone to accepting its political guidelines: this hypothesis is confirmed by the frequent dismissal at the time of judges and prosecutors who were not connected with the Party itself. That is the reason why the question of the role of the High Council of Justice was raised by the international observers.

Notwithstanding these difficulties and flaws, between 1994 and 1995 there was growing support inside of the Council of Europe for the acceptance of the Albania’s application to become a member of the Council of Europe. The opinion of Mr Columberg underlined the considerable progress made by the country towards the implementation of the principles of freedom and democracy as well as "the (laudable) work of the Council of Europe task force for Albania and its legal experts" (Doc. 7338 Parliamentary Assembly). The fact that "Albania has been functioning as a multi-party parliamentary democracy since the elections of 31 March and 7 and 14 April" was considered to be of particular relevance (Opinion No. 189 (1995) of the Parliamentary Assembly). Human rights were to be implemented under the Law on Fundamental Freedoms and Human Rights (31 March 1993) and in view of the recent adoption of the new Criminal Code and the new Code of Criminal Procedure. In principle, compliance with the principle of separation of powers was secured by the existence of the High Council of Justice and by the recent creation of the Constitutional Court. Even if heavy industry had not yet been privatised, the privatisation of land had made great progress and small enterprises were in the process of being privatised.

As the Republic of Albania became a member State of the Council of Europe on 13 July 1995, it was bound - like every other member State - to be monitored in the framework of the monitoring process provided for by Order No. 508 (1995) of that institution. In reality, the monitoring process has not only been a procedure aimed at scrutinising the behaviour of the country concerned, but has also been the occasion for ensuring Albania received the political and technical co-operation necessary to guarantee a fair and coherent implementation of the obligations and commitments of a member State. In the case of Albania these obligations and commitments were particularly heavy because the acceptance of its application was based on the assesment that there existed an adequate "capital of trust", which Albania was supposed to have built up "in its relations with the Council of Europe - and, indeed, with other European and international bodies and with our member states" (according to the opinion of a Belgian member of the Parliamentary Assembly Mr Kelchtermans - Doc. 7304). It was the follow-up to a positive evaluation of the dynamics of progress, which were deemed sufficient to justify a

political judgment to the effect that the level of Albania's achievement could be interpreted in the terms required by the Statute of the Council of Europe. But in the meantime the country's extremely difficult starting position was taken into account, keeping in mind the former totalitarian system, the situation of economic ruin and the absence of a democratic or legal tradition.

Albania was required to sign - at the time of accession - the European Convention on Human Rights and its Additional Protocols, to comply with the principles of Recommendation 1201 (1993) on the protection of minorities, and to ratify within the period of one year all the aforementioned instruments and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Protocol No. 6 had to be ratified within three years. But other important commitments were entered into by Albania concerning the implementation of human rights and fundamental freedoms, the judicial system, "decommunisation" laws, the case of Fatos Nano, the prison system, police custody and property issues (also with regard to the rights of religious communities).

In January 1997 the first phase of the monitoring process started. Inevitably, the bodies of the Council of Europe were confronted with electoral problems, because in 1996 parliamentary elections and local elections were called in Albania. The parliamentary elections became a major issue of conflict because of the opposition’s decision to boycott the second round in the context of violence marring voting procedures and of the numerous irregularities observed on the first polling day. Whereas both previous parliamentary elections were observed by a delegation from the Parliamentary Assembly, no observers were sent for the elections in May 1996, as Albania was already a member of the Council of Europe. According to a report of the OSCE Parliamentary Assembly, however, the validity of the outcome could not be questioned even if the credibility of the democratic process in Albania appeared undermined by irregularities, technical difficulties and problems with the interpretation of the electoral law.

Notwithstanding the boycotting of the Albanian Parliament by the opposition, the Parliamentary Assembly of the Council of Europe was successful in organising a round table between Albanian political parties with a view to changing the electoral legislation to avoid future occasions of conflict. Concern was also expressed, on the one hand, at the frequent improper conduct of the police, and, on the other hand, about the exclusion from the elections of persons who have held certain posts in the Communist Party or State structures, or were listed in the files of the secret service as informers or collaborators. The amendments that were agreed to and were adopted by the Albanian authorities concerned in particular the law on public meetings and the forthcoming local elections. It was decided to allow the visit of a delegation of observers during the local elections in October: the conduct of the electoral operations on both polling days was satisfactory. In Resolution No. 1114 (1997) of the Parliamentary Assembly it was suggested that the government had to provide sufficient guarantees for the normal functioning of the opposition parties: the rapporteurs’ opinions explicitly mentioned the use of the state-owned media, which had not been entirely unbiased during the electoral time. On the other hand, the opposition was invited to take part in the work of the Parliament, partly with a view to promoting co-operation in the preparation of the necessary legislative reforms.

Progress in the implementation of the Albanian commitments was welcomed, particularly with regard to the ratification of the European Convention on Human Rights (and some of its protocols) and of the European Convention for the Prevention of Torture. A moratorium was

instituted on the execution of the death penalty. But the observers stated that a number of obligations and commitments remained unfulfilled, so that more progress was necessary (beyond the simple ratification of international instruments that had not already been ratified). The importance of implementing the proposals of the Venice Commission through the reform of the Albanian judiciary in the framework of the Council of Europe Demo-Droit Programme was stressed: the major problems related to the appointment, dismissal and immunity of judges and prosecutors; the composition, role and procedure of the High Council of Justice; the prosecutor's office and the Albanian police academy (which required the co-operation with the Council of Europe). A fair tax treatment of the press and improvement of media access in general to official information were suggested.

Political conflicts, economic difficulties, the dissatisfaction of the unemployed, the increasing incidence of illegal activities (particularly weapons or drugs trafficking and smuggling cigarettes) and, eventually, the crisis of the pyramid schemes led to a deterioration in the Albanian social situation. The government was gradually losing the confidence of the people, who had largely supported the majority in power at the parliamentary and local elections of 1996.

Actually, in the absence of any serious economic initiatives of the public authorities, a major source of earnings had to be connected with the appearance of a number of companies engaged in borrowing money at very high rates of interest - but also engaged, allegedly, in money laundering. The system had apparently worked for a few years. When the managers of the foundations working the pyramid schemes announced that they were no longer in a position to pay the interest and delayed day by day the return of the capital, turmoil and agitation exploded throughout the country, and especially in the cities of central Albania where large numbers of the creditors lived. The government tried to deal with the situation, started investigations into the functioning of the companies concerned, and announced that it would distribute those of their assets that had been frozen in the banks. But it was not in any position to comply satisfactorily with its engagements. While the attempts of the opposition to organise non-violent protests were repeatedly rebuffed by the public authorities, violence also erupted in the south of the country.

In the context of the spreading riots the government appeared to be unable to control the development of the protest movement politically and declared a state of emergency on 2 March 1997. Afterwards it was obliged to resign, even though the President, Sali Berisha, had been reappointed despite the emergency situation. The majority agreed to arrange a coalition government with a premier choosen by the largest opposition party. Fatos Nano, along with other political (and ordinary) prisoners, was freed in mid-March.

A political solution to the crisis was favoured through the intervention and visits of the Council of Europe, European Union and OSCE representatives, who were effective in convincing the political parties to find an agreement. But violence continued all over the country, the curfew was still in effect and government attempts to remove the censorship instituted at the beginning of March failed. Most of the south of the country remained outside government control and many districts were substantially ruled by regional "salvation committees". Representatives of these committees met in Vlora with representatives of the opposition political parties and signed a political declaration supporting the government and accusing the President of dividing the country: they meant that Albania had ceased to function as a constitutional state. At the beginning of April the Socialist Party eventually decided to send to the Parliament the deputies who had previously boycotted the Parliament’s work: it

thus complied with the principles of the national reconciliation platform signed at the formation of the new government.

From our point of view, the decisions taken in the meantime by the international institutions are particularly relevant. All of them were prepared by OSCE missions chaired by Mr Vranitzky and including representatives of the European Union, Western European Union and Council of Europe. It was correctly underlined (Doc. 7806 of the Parliamentary Assembly of the Council of Europe) that they exemplified an unprecedentedly rapid focusing of concerted efforts by Europe's international institutions. Besides the various political results mentioned, they led to the establishment of an OSCE Office in Tirana and to the creation of a co-ordinating framework for the initiatives of the other organisations. The United Nations Security Council authorised Member States to take part in a multi-national force and to act under Chapter VII of the United Nations Charter. The purpose was the protection of the humanitarian aid which the relevant international institutions had decided to send to Albania in view of its economic and social difficulties. Eight countries contributed to a 6000-strong force, led by Italy. The great issue was the restoration of order and authority of the State without impairing the credibility of the national reconciliation government which had, in any case, to rely on the help of international mediators in negotiating with the "salvation committees". The calling of new elections was required, but it had to be delayed given low levels of security in a country sharply divided between north and south: even the local committees were not in a position to tackle organised crime, which took advantage of the political turmoils to increase its activity and establish a common and widespread form of low-level banditry.

With a view to preparing the Albanian authorities to deal with this phenomenon, an EU Advisory Mission was also established with the following structure: a police advisory element, a section for emergency aid, a section for co-ordination with other EU actions and programmes and a section for elections and democratisation. The agreements between the international institutions envisaged a role for the Council of Europe in making its experience available to the police advisory element, to the establishment of a legislative base for the elections and media reform, to the needs of the election infrastructure and election monitoring. Moreover, it was to give renewed impetus for the reform of the judiciary and the adoption of the new Constitution. All these commitments required the creation of a special office of the Council of Europe in Tirana.

In the following months the efforts aimed at ending the political crisis were substantiated by the co-operation of international experts in drafting a new electoral law, which aimed at introducing more elements of proportionality into the electoral system, and organising the international monitoring of the vote. The law which was eventually adopted lowered the threshold for representation, allocated a fair proportion of the seats to the smaller parties (without massively distorting the returns) and established a media committee to monitor radio and television coverage of the campaigns. In the meantime legislative reforms were envisaged to abrogate several provisions of the Albanian lustration law with the purpose of allowing the election or the appointment to political office of people who had collaborated with the communist regime.

The elections were held in July and they were judged "adequate, acceptable and satisfactory" by the international observators, who fulfilled their mandate with the asistance of the military multinational protection force. A convincing result was achieved in the elections and sent a clear political message: the previous governing party had to join the ranks of the opposition

and the government had to be taken over by a new majority, and in particular by the political forces which had been in the opposition in the past (Doc. 7902 of the Parliamentary Assembly).

After the elections not only was a new government appointed but also a new President was elected: Berisha had resigned, something he had promised to do if his party lost. But the public order was not improving and police efforts had little effect, largely because of the omnipresence of firearms throughout the country. The judiciary was not functioning very well; the judges who had been appointed after the six-month courses of 1993 were unfit for the heavy task of co-operating in re-establishing the public order and the rule of law. With the aim of improving the efficiency of the courts and the independence of the judicial power the High Council of Justice was reformed, with the helpful contribution of Venice Commission experts, and a new magistrates school was established with the co-operation of the Council of Europe. New legislative provisions were adopted to deal with the follow-up to the pyramid firms' crisis under pressure from the International Monetary Fund, whose intervention was needed to support the economic recovery of the country.

The relations between the majority and the opposition were always very difficult and affected the functioning of all the constitutional bodies. The Constitutional Court disappointed international observers and the government, ruling that the appointment of public administrators over the pyramid schemes was unconstitutional. A solution to another conflict between the Parliament and the Constitutional Court concerning the membership of this body was found with the support of the Venice Commission, which is still actively following the reform of the law concerning the organisation and the functioning of the Constitutional Court itself.

But the difficulties in the relations between the political parties particularly affected the procedure for the adoption of the Constitution because the opposition refused to participate in drafting the Constitution and strongly criticised not only the work of the special body entrusted with the task but also the contributions of foreign legal experts. Eventually a draft was finalised with the support of the Venice Commission (some observers said that it was "approved" by the Commission) and was sent to the Parliament. Adopted by the Assembly on 21 October 1998, it was ratified in a nationwide referendum on 22 November. In this way the country was able to overcome the turmoils caused by the reaction of the opposition to the arrest of people who had held important public positions under Berisha's government and to the killing of a collaborator of Berisha himself. The government was able to control the situation through the intervention of the police. But difficulties were always present because of the smuggling of the weapons stolen from the military depots during the riots of winter 1997, while in some parts of the country the Kosovo Liberation Army had been establishing bases. The way was open to an involvement of Albania in the Kosovo crisis.

If we look at the developments I have just described, we cannot help underlining the participation of the European institutions in the transition of Albania from the communist regime to democracy. But one aspect in particular deserves our attention: the OSCE, European Union and Council of Europe with the Venice Commission focused their activity on the internal affairs of Albania, and only recently became concerned with the international dimension of Albanian public life in connection with the events in Kosovo. As I underlined in the previous pages, before 1998 Albania's self-restraint in international affairs was highly appreciated as a major contribution to the stability of the Balkan region, which could have been - in the past - and could be - in the present - easily undermined by Albanian political

initiatives aimed specifically at emphasising the ethnic links of the Albanian minorities in Yugoslavia, Macedonia and Greece with Albania. On the other hand, the international connections of drug smuggling with Albania could not and cannot be forgotten, even if the opinion of the European institutions was and remains that the problem of illegal trafficking can largely be solved by improving the social situation in Albania and restructuring the Albanian public administration and police.

As a matter of fact, there was a widespread opinion that - after the fall of the communist regime - there was no effective State authority in Albania. The public structures, which had been underpinned in the past by the Communist Party and by its totalitarian and illiberal practices, found themselves deprived of their previous support and were unable to gain the lasting confidence of the population. The people, in the meantime, considered the advent of a democratic regime as a necessary solution to the difficulties of the social and economic situation which the new government had inherited from the past. They looked to the future with a great deal of hope without taking into account the fact that the condition of the country was the condition of an underdeveloped country which cannot delude its inhabitants with unfounded illusions. Day by day the inability of the State to deal with the economic and social distress increased the dissatisfaction of the people.

The political weakness of the State matched the crisis of the public administration, whose structures and personnel were completely unfitted to the establishment of a reformed government in compliance with the principles of freedom, democracy and rule of law. We have to keep in mind that during the communist regime the Albanian institutions entrusted with the task of legal studies and research had been dissolved and nobody took care of training legal experts: according to the prevailing opinion the administration of law did not require any special expertise, while lawyers were judged to be untrustworthy because they were supposed to be substantially prone to the interests of the capitalist institutions and ready to support ideas and theories contrary to the Marxist-Leninist doctrines.

Therefore the European international institutions had to provide technical legal support to different branches of the Albanian State: Parliament, the judiciary, police and public administration. Their activity was not restricted to the usual monitoring of the process of democratisation, but concerned the drafting of the Constitution and constitutional laws, the preparation of ordinary laws aimed at the implementation of the Constitution, and the training of magistrates and police officers. These interventions, which could have been seen as direct interference in the life of a sovereign State, were instead the necessary steps towards the strengthening of the Albanian democratic institutions and, therefore, of Albanian sovereignty itself. The adoption of the new Constitution, the enactment of important laws, the establishment of a school for the judiciary and of courses for police officers are interesting results of the policies adopted by the European institutions in Albania.

Political differences and a lack of legal experience were at the origins of some dangerous constitutional conflicts, which were settled with the active co-operation of European legal experts: the monitoring of the elections and the assessment of their results, the question of the rotation of the judges of the Constitutional Court, the problems of the criminal proceedings affecting Fatos Nano and Berisha are relevant examples of a direct involvement of international advisors in the search for a solution to internal conflicts in Albania. Analogous conclusions could be drawn with regard to the adoption of important reforms of the private and commercial laws, which were sponsored by the International Monetary Fund and by the World Bank, as well as in connection with the investigations concerning the fall of the

financial pyramids and the measures adopted to find a way out of the ensuing social and economic turmoils.

But the international institutions were also very active in dealing with the political aspects of the Albanian transition. They very frequently assisted in starting negotiations between the political parties, favoured the establishment of active co-operation between them, created the conditions for the conclusion of political agreements; the adoption of the Constitution is again the most oustanding result of these efforts, but other achievements deserve to be mentioned, such as the creation of a government of national co-operation in the context of the pyramids crisis, the reform of the electoral legislation, the improvement of the relations with the Greek minority and - therefore - with Greece.

It is worth recalling that Albania was able to overcome the riots and turmoils of summer 1998 and to deal with the Kosovo emergency. Even if a fraction of the opposition is still boycotting the activity of the Parliament and the country resents the initiative of the Kosovo Liberation Army, we can say that Albania recently showed that national solidity which could help it to find an autonomous role in the framework of the international relations. Albania's compliance with the principles of democracy and freedom has been improving, notwithstanding any doubts about future decisions concerning the implementation of the Framework Convention for the Protection of National Minorities and uncertainties regarding the abolition of the death penalty. But in any case the country is still in need of further international help, which should be given looking, on one hand, towards the finalisation of the transition to a regime comparable with the Western model of government, and, on the other hand, towards a complete restoration of Albanian sovereignty, which has frequently been endangered by the inability of the country to deal independently with its own problems. It is the Albanian State which has to be reinstated wherever we have been or are confronted with the ruins of its communist past. The country must now recover and attain a level of development capable of stopping the flow of the Albanians escaping from their country to look abroad for work and a decent standard of living.

THE UNITED NATIONS EFFORTS FOR A SETTLEMENT OF THE CYPRUS PROBLEM, Mr Gustave Feissel
United Nations Assistant Secretary-General (Ret.),
Former Chief Mission of the United Nations Operation in Cyprus

I. The origins of the Cyprus problem

1. The Cyprus problem originated in the struggle in the 1950s by the Greek Cypriot community against the United Kingdom, the then colonial ruler of Cyprus, to achieve *enosis* or union with Greece.

2. At that time, Cyprus had a population of some 550,000; 80% Greek Cypriot and 18% Turkish Cypriot. The two communities lived interspersed throughout the island in homogeneous villages, mixed villages and in ethnic quarters in larger towns. They lived in close proximity to each other and coexisted peacefully. This changed dramatically with the outbreak of violence during the second half of the 1950s.

3. Even though Greek Cypriots and Turkish Cypriots have long lived on the same island in relative harmony, they never forged a common national identity. They have thought of themselves as Greeks or Turks, not Cypriots. Their allegiance lay with their community and their respective mother country.

4. As the overwhelming majority in Cyprus, Greek Cypriots believed it was their right to decide the future of the island. They viewed Cyprus as a Greek island, part of the Hellenic world. A referendum among Greek Cypriots in 1950 revealed that 96% favored union with Greece. Although this objective first manifested itself after Greek independence in 1821 and was vocalized from time to time during British rule, it was not actively pursued until the 1950s.

5. Turkish Cypriots, fearing domination by Greek Cypriots and Greece, strongly opposed *enosis*. They argued that Cyprus was not composed of a majority and minority but of two distinct and equal people. Many came to advocate partition or double *enosis*, i.e., dividing Cyprus into Turkish Cypriot and Greek Cypriot areas that would be merged with their respective mother countries.

6. Violence between the two communities grew as the Turkish Cypriots, who opposed the Greek Cypriot objective, became targets of the underground organization EOKA. The Turkish Cypriot community reacted by establishing the TMT.

7. In 1958, after Archbishop Makarios, the Greek Cypriot leader, indicated a willingness to accept independence, the UK arranged for talks with Greece and Turkey to work out a final settlement. The 1959 Zurich-London agreement was reached without the participation of the Cypriot communities. The leaders of the two communities were invited to London to sign the three agreements that had emerged, namely the basic structure of the Republic of Cyprus (the Constitution), the Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom, and the Treaty of Alliance between Cyprus, Greece and Turkey. Dr. Kutchuk, the Turkish Cypriot leader, signed readily. But Archbishop Makarios signed with great reluctance.

II. The Republic of Cyprus

8. Cyprus thus became an independent state in 1960 with a Constitution designed and guaranteed by outside powers. Many articles of the Constitution could never be amended. It was drawn up explicitly in terms of two communities that gave the preservation of ethnic balance priority over majority rule. It provided for a permanent coalition government between the two communities.

9. The executive power called for a Greek Cypriot president and a Turkish Cypriot vice-president with similar powers, including absolute veto powers on decisions by the council of ministers concerning foreign affairs, defense and internal security. The council of ministers was composed of seven Greek Cypriot ministers and three Turkish Cypriot ministers.

10. Although Greek Cypriots received a substantial majority in the unicameral legislature (35/15), separate majorities were required for legislation pertaining to elections,

taxation and the separate municipalities. As in the council of ministers, the president and vice-president had absolute veto powers pertaining to foreign affairs, defense and internal security.

11. The supreme Constitutional court reflected the same checks and balance: one judge from each community and a neutral (foreign) presiding judge.

12. The Constitution further recognized the bicommunal nature of Cyprus by setting a 70:30 ratio for its civil service and a 60:40 ratio for its army. The public service commission was to be composed of seven Greek Cypriots and three Turkish Cypriots, but some decisions required the affirmative vote of at least two Turkish Cypriots.

13. The Constitution divided the five largest towns into Greek Cypriot and Turkish Cypriot municipalities with their own councils, and established two separately-elected communal chambers responsible for the functions not entrusted to the legislature, including education, religion, personal status, sports, culture, consumer cooperatives and credit establishments. For these purposes, each municipal chamber could impose taxes, set up courts and conduct relations with Greece or Turkey for assistance in funds and personnel.

14. Under the Treaty of Guarantee, Cyprus agreed to ensure respect for its Constitution, not to participate in any political or economic union with any other country, and to prohibit any action that promoted *enosis* or partition. For their part, Greece, Turkey and the United Kingdom recognized and guaranteed the independence, territorial integrity and security of the Republic of Cyprus, as well as the state of affairs established by the Constitution. In case of a breach of treaty provisions, guarantors could take action in concert or, if this was not possible, separately with the sole purpose of restoring the state of affairs established by the Treaty of Guarantee.

15. The Treaty of Alliance provided, *inter alia*, for Greece and Turkey to permanently station 950 and 650 troops respectiviely on the island to defend Cyprus and to train its army.

III. The breakdown

16. From the very outset, the spirit of compromise and accommodation, which such a Constitutional arrangement requires, was clearly missing. Greek Cypriots felt that the Constitution, which they considered had been imposed on them, conferred disproportionate powers to the Turkish Cypriots and was unworkable. They favored a unitary government in which they, the majority, would be in charge, with minority safeguards for the Turkish Cypriots. On the other hand, Turkish Cypriots viewed the 1960 Constitution as the bare minimum they could accept and therefore it had to be enacted to the letter. Neither side was committed to the unity of the state – Greek Cypriots wanted *enosis* while Turkish Cypriots favored partition.

17. The government was soon deadlocked. Greek Cypriots objected in particular to the veto powers of the vice-president and to rigid applications of the 70:30 ratio for the civil service. Turkish Cypriots responded by blocking passage of important legislation, notably taxation. Deadlock soon resulted on the establishment of the army – Turkish

Cypriots insisted on communal units at the company level and below, while Greek Cypriots insisted on mixed units throughout. As a result the army called for in the Constitution was never established. There was also an impasse concerning the separate municipalities.

18. In November 1963, Makarios proposed substantial revisions of the Constitution that would fundamentally alter the balance in favor of the Greek Cypriots (e.g., abolish the presidential and vice-presidential veto, no separate majorities in the legislature, unify the municipalities, civil service ratio based on 80:20 population ratio). This was rejected by Turkey and the Turkish Cypriots.

19. Inter-communal violence broke out in December 1963. The Turkish air force staged warning flights over Cyprus. Makarios agreed to UK intervention. This produced a ceasefire and the establishment of a "green line" separating the two communities in Nicosia. The violence subsided, but the state of affairs of the 1960 Constitution was not restored. As a result of the violence, around the country more than half of the Turkish Cypriots gathered in armed enclaves with their own administration.

20. Efforts by the guarantor powers and the two communities to resolve the differences failed. Greek Cypriots continued to insist on a unitary government, whereas Turkish Cypriots stated that the violence that had broken out proved the two communities could not live together and had to be physically separated. They demanded a federal state with two ethnic components. Since the Constitutional collapse of 1963, the government of Cyprus has been operated exclusively by Greek Cypriots; a situation that the Turkish Cypriots maintained was contrary to the 1960 Constitution and therefore could not represent the Turkish Cypriot side.

IV. The United Nations involvement

21. When violence persisted in some areas in early 1964, the United States proposed NATO intervention. Makarios rejected this. In March 1964, Makarios brought the matter before the United Nations Security Council. The resulting resolution established a UN peacekeeping force (UNFICYP) "to prevent a recurrence of fighting, to contribute to the maintenance and restoration of law and order and a return to normal conditions." It also called on the Secretary-General, "in agreement with the government of Cyprus and the governments of Greece, Turkey and the United Kingdom, to designate a mediator who will use his best endeavors with representatives of the communities and the aforementioned four governments for the purpose of promoting a peaceful solution and an agreed settlement of the problem confronting Cyprus."

22. The Security Council accepted the Makarios government as the government of Cyprus. Makarios viewed this as endorsement of his actions. On the other hand, Turkish Cypriots considered this to be a grave injustice. Rauf Denktash, the Turkish Cypriot leader, has consistently stated that the Security Council's recognition of the Greek Cypriot administration as the government of the Republic of Cyprus was the key obstacle to a solution to the Cyprus problem. Throughout the past thirty-five years, it has remained a contentious issue, i.e., for the Greek Cypriots to retain recognition and for the Turkish Cypriots to receive equal recognition.

23. In March 1965, the United Nations mediator, Galo Plaza, proposed a unitary Constitutional system with provisions for minority rights and safeguards. He considered the Turkish Cypriot position in favor of a federation as unrealistic and impractical and called on Greek Cypriots to voluntarily renounce *enosis*. The Galo Plaza report was immediately rejected by Turkey and the Turkish Cypriots as being grossly partisan. They refused to have anything further to do with him. Greece and the Greek Cypriots favored the report but objected to the proposal to renounce *enosis*. Gala Plaza resigned later in 1965. He was not replaced.

24. 1967 was marked by a major crisis resulting from renewed fighting in Cyprus that brought Greece and Turkey close to war. The United States defused the situation, getting Greece to remove forces illegally on the island. This event and Makarios' deteriorating relations with the military junta in Greece no doubt influenced his decision in 1968 to publicly renounce *enosis.*

25. United Nations involvement had gradually resumed in 1966 in the form of the Secretary-General's mission of good offices. However, the Special Representative of the Secretary-General would not directly participate in inter-communal talks until 1972. United Nations-sponsored talks between 1968 and 1974 were marked by encouraging moments, punctuated by frequent deadlocks. By 1969, the situation looked promising. Turkish Cypriots indicated their readiness to accept a unitary form of government as well as most of Makarios' Constitutional amendments, provided they would be given local autonomy. Despite repeated efforts over the next few years, Makarios would not agree to the demand for local autonomy.

26. On 15 July 1974, a coup led by the pro-*enosis* Greek junta overthrew Makarios. This was followed by Turkey's intervention on 20 July and a subsequent UN-brokered cease-fire. After failed talks in Geneva (where Turkey demanded, on a take it or leave it basis, a federation with the Turkish Cypriot area comprising 34% of the federation) the Turkish attack resumed and led to the occupation of nearly 37% of Cyprus. Some 160,000 Greek Cypriots were displaced from the north and about 45,000 Turkish Cypriots left the south (i.e., about 1/3 of the respective populations of Cyprus). Cyprus was thus transformed into two mono-ethnic zones with an impassable buffer zone dividing the island in two.

27. In 1975, the Secretary-General was entrusted with a new mission of good offices. The mandate made it clear that his mission of good offices was with the two communities with a view to reaching freely a mutually acceptable settlement and that their participation in this process would be on an equal footing. The Council urged the speedy withdrawal of all foreign forces, the return of all displaced persons to their homes and the need to ensure the independence, sovereignty and territorial integrity of Cyprus.

28. In 1977 and 1979, the Greek Cypriot and Turkish Cypriot leaders agreed that Cyprus become a federation and concurred on guidelines for negotiating an overall settlement (e.g., bicommunal federation, territorial adjustment, the freedoms of movement, of settlement and the right to property, powers and functions of the central government). By 1981, the two sides agreed that the federation would be bicommunal as concerns Constitutional aspects and bizonal as concerns territorial aspects. However, efforts to

translate these agreements into concrete action failed, given the very different views of the two sides on the type of federation that would be acceptable and on the negotiating procedure that should be followed.

29. The situation was further exacerbated by the Turkish Cypriot unilateral declaration of independence in 1983 which has been only recognized by Turkey. Turkish Cypriots, for their part, were often irritated by Greek Cypriot efforts to obtain international support through debates and resolutions at the United Nations and other international fora, particularly in view of Turkish Cypriot inability to participate in these deliberations on an equal footing.

30. A continuous bone of contention for Turkish Cypriots has been their economic isolation. Since the outbreak of violence in 1958, Turkish Cypriots were increasingly placed in a disadvantaged economic position as a result of blockades imposed on Turkish Cypriots enclaves. Since 1974, the Greek Cypriot policy that people and goods could only enter and depart Cyprus via sea and airports under government control resulted in the Turkish Cypriot area being largely cut off from international commerce. This was reinforced by the 1994 European Court of Justice decision, *inter alia*, that agricultural exports (the largest export of the Turkish Cypriot side) from Cyprus required government of Cyprus certificates of origin and health.

31. An additional development that has affected the Cyprus question in recent years is Cyprus' application for membership in the European Union. Greek Cypriots consider Cyprus' EU membership of critical importance. They are convinced that becoming an integral part of Europe not only will offer economic advantages for the island, but will also provide vital security insurance.

32. In March 1995, the Council of Ministers of the European Union decided that negotiations on Cyprus' accession to the EU would begin six months after the conclusion of its Inter-Governmental Conference and called on the European Commission to organize contacts with the Turkish Cypriot community in order to explain the benefits of EU accession and to allay that community's concerns. The accession negotiations with Cyprus were launched on 31 March 1998 and are on-going. It has been the considered view of the international community that EU membership for Cyprus would be in the interest of both communities.

33. Turkey and the Turkish Cypriots have strongly objected, maintaining that the European Union membership application violated the 1960 Constitution and the Treaty of Guarantee that forbids Cyprus from entering into a political or economic union with any other country. They maintained that the Greek Cypriots had no right to unilaterally apply for and negotiate membership in the EU. They insisted that Cyprus could not join the EU before Turkey. Following the EU developments, Turkey and the Turkish Cypriots announced an agreement that anticipates further integration between them. They have also rejected the validity of intercommunal negotiations that have been the basis of the process since its inception. They demanded that the international community adopt a new approach for dealing with the Cyprus problem based on the acknowledgement of the existence of two separate states in Cyprus, with confederation as the objective.

V. The United Nations efforts to shape a settlement

34. Over the years, the Security Council has set out the guidelines for a settlement, namely (a) the *status quo* was not acceptable; (b) a settlement had to be based on a state of Cyprus with a single sovereignty and international personality and a single citizenship with its independence and territorial integrity safeguarded; (c) it had to comprise two politically equal communities in a bicommunal and bizonal federation, as defined by Security Council resolutions; and (d) union in whole or in part with any other country or any form of partition or secession was excluded.

35. The detailed elements of a settlement to the Cyprus problem took detailed shape between 1990 and 1992 in the form of a draft overall agreement on Cyprus known as the Set of Ideas. This comprehensive document emerged in the course of lengthy informal discussions with the leaders of the two communities and senior officials of Turkey. During this process, the text was repeatedly refined to take account of the legitimate interests and reasonable concerns of each side. It was endorsed by the Security Council as the basis for reaching an agreement. By the summer of 1991, it was expected that the Secretary-General would be able to convene a high-level meeting in September 1991 with the leaders of the two communities and the Prime-Ministers of Greece and Turkey to conclude and sign an overall framework agreement. This did not materialize. Intensive efforts continued until the end of 1992, but to no avail.

36. The United Nations then redirected its efforts toward confidence-building measures that would have ended Turkish Cypriot economic isolation, enabled Greek Cypriot property owners to return to Varosha, and would have provided a major impetus to an overall settlement (1993-1994). A series of informal dinners held in October 1994 with the two leaders and hosted by the Chief of Mission endeavored to identify concrete ways of making progress on an overall settlement and on the confidence-building measures. While these talks created unprecedented opportunities for making progress, there was no forward movement. High-level meetings with the two leaders in July and August 1997 failed to make any progress. Recent efforts resulted in bringing the two leaders to New York in December 1999 for separate proximity meetings. These meetings will continue in Geneva under the same arrangement at the end of January 2000.

VI. Efforts to reconcile the differences

37. The Secretary-General's efforts have focused on finding ways to reconcile the differences between the two sides in a manner responsive to the main preoccupations of the two communities, to respect both group and individual rights, and to allow a measure of self-determination for the whole and its two parts.

38. The main issues impeding a settlement are sovereignty and political equality, the federal executive, the three freedoms, security and guarantee, territorial adjustments, and displaced persons. The following paragraphs explain the positions of the two sides and the efforts of the Secretary-General to reconcile their differences.

Basic principles

39. As noted, the issues of sovereignty and political equality have been at the heart of the Cyprus problem since its inception. The Greek Cypriot side asserts that in 1960, sovereignty was given to the Republic of Cyprus and not to the two communities. Therefore, the federal republic would be established through a transformation of the existing Republic into a federation and the sovereignty vested in the Republic of Cyprus would be transferred to the federal republic. The Turkish Cypriots insist that as co-founders of the 1960 Republic of Cyprus, sovereignty was vested in the two communities. Therefore, the federation could only be established through the voluntary devolution of some sovereign powers of each community to the federal government. Each federated state would remain sovereign in so far as its sovereignty was not limited by the sovereignty of the federal state.

40. The United Nations objective has been to devise proposals that respected the relevant resolutions of the Security Council (see paragraph 34 above) while taking into account in a reasonable manner the disparate positions of the two communities. A set of basic principles gradually evolved that underlie a solution. These basic principles were endorsed by the Security Council:

a. Cyprus is the common home of the Greek Cypriot community and of the Turkish Cypriot community; their relationship is not one of majority and minority but one of two communities in the federal republic of Cyprus.

b. A Cyprus settlement must be based on a state of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities.

c. An overall agreement should ensure the political equality of the two communities, defined as follows: “While political equality does not mean equal numerical participation in all branches and administration of the federal government, it will be reflected in the fact that the approval and amendment of the federal Constitution will require the approval of both communities; the effective participation of both communities in all organs and decisions of the federal government; in safeguards to ensure that the federal government will not be empowered to adopt any measures against the interests of one community; and in the equality and identical powers and functions of the two federated states.

d. The federal republic will have one sovereignty which is indivisible and which emanates equally from the Greek Cypriot and Turkish Cypriot communities. One community cannot claim sovereignty over the other community.

e. Each federated state will be administered by one community. Each federated state will decide on its own governmental arrangement in a manner consistent with the federal Constitution. The federal government cannot encroach upon the powers and functions of the two federated states. Security, law and order and the administration of justice in its territory will be the responsibility of each federated state in a manner consistent with the federal Constitution.

Structure and functions of the federal government

41. The Greek Cypriot side has traditionally favored a federation with a strong central government. In contrast, the Turkish Cypriot side favored a weak central government with many federal functions to be implemented by the federated states. The Turkish Cypriot side placed special emphasis on the effective equal participation of both communities in the federal government, hence their emphasis on decisions by consensus, while the Greek Cypriot side stressed the importance of the effective functioning of the central government, with emphasis on majority votes and deadlock resolution mechanisms.

42. The most serious difference concerns the executive branch. Greek Cypriots favored a presidential system in which the president and vice-president (coming from different communities) are elected on a federation-wide basis by weighted voting. Turkish Cypriots favored a rotating president and vice-president elected solely by the community of the candidates. Turkish Cypriots favored a council of ministers composed of an equal number of members, taking decisions by consensus, while Greek Cypriots favored a 7:3 ratio with decisions taken by majority vote. Greek Cypriots opposed the president/vice-president veto of legislative decisions, while Turkish Cypriots favored the expansion of the 1960 veto powers (i.e., foreign affairs, defense and security) to all decisions by the legislature and the council of ministers.

43. The United Nations suggested an executive branch that underlined the unity of the country while ensuring that both communities have the opportunity to occupy the presidency. The proposal envisaged a president and vice-president (who could not come from the same community) elected on a federation-wide basis under a formula whereby 75% of the votes would come from the community of the candidates and 25% from the other community. This voting arrangement would ensure that the support of a significant segment of both communities was necessary to win an election. Furthermore, the president/vice-president would alternate in a two Greek Cypriot to one Turkish Cypriot ratio. A 7:3 ratio for the council of ministers with decisions taken by majority vote was proposed. However, decisions concerning foreign affairs, defense, security, budget, taxation, immigration and citizenship would require the concurrence of both the president and vice-president. These were also the suggested areas in which the president/vice-president could veto legislation.

44. The positions of the two sides on the structure and functions of the federal government evolved to the point where both were in general agreement with the United Nations proposals (a) on the powers and functions to be vested in the federal government (foreign affairs, central bank, customs and coordination of international trade, rules and procedures for international airports and ports, federal budget and taxation, immigration and citizenship, federal defense, federal postal and communications services, patents and trademarks, and federal officials and civil service); (b) that residual powers would be vested in the federated states; (c) on the structure, functioning and deadlock resolving mechanism of the legislature, namely a lower house with a 70:30 ratio and an upper house with a 50:50 ratio; (d) that all laws had to be adopted by majority in each house, with the adoption of some laws requiring separate majorities in the lower house; (e) that a conference committee would be established to harmonize differences in decisions of the two houses; and (f) that the federal judiciary consisting of a supreme court, which would be both the federal Constitutional court and the highest court of the federation, would be composed of an equal number of judges from each community and have a rotating president. The

courts of the federated states would deal with all functions not attributed to the federal supreme court by the Constitution.

Freedom of movement, of settlement and ownership of property

45. Turkish Cypriots agreed to freedom of movement, but insisted, in order to preserve the agreed bizonal nature of the federation, that the freedom of settlement and ownership of property should be regulated by the federated states and could only be implemented after the resettlement process resulting from the territorial adjustment was completed and a moratorium period for confidence-building had elapsed. Greek Cypriots stressed that the unity of the federal state required the uniform application throughout Cyprus of individual rights and freedoms, including the freedom of movement, settlement and ownership of property. They did not object to these being regulated by the federated states provided they did not violate international law and human rights instruments.

46. The United Nations submitted that all universally recognized fundamental rights and freedoms be included in the federal Constitution; that the freedom of movement be implemented without restrictions as soon as the federal republic was established; and that the freedoms of settlement and ownership of property be implemented after the resettlement process arising from the territorial adjustments had been completed and that these be regulated by the federated states in a manner consistent with the federal Constitution. The two sides remain far apart on this matter.

Security and guarantee

47. The key difference between the two communities on the issue of security and guarantee has been the interpretation of the 1960 Treaty of Guarantee. The Greek Cypriot side considers that neither Turkey nor the other guarantor powers has the unilateral right of military intervention, as this is contrary to the United Nations Charter. Turkish Cypriots have insisted that the Treaty of Guarantee could not be diluted, including Turkey's right of unilateral intervention.

48. The United Nations proposed that the 1960 Treaties of Guarantee and of Alliance remain in force, but be supplemented to provide, in a manner consistent with the principles of the OCSE, for the establishment of a supervision and verification body (composed of the three guarantor powers and the two communities, with the support of UN personnel). This body would investigate any development which the federal president or vice-president or any guarantor power considered to be a threat to the security of either community and would make recommendations for rectifying any situation it established to be in contravention of the arrangements covered in the Treaties of Guarantee and of Alliance. The parties would be obligated to implement the recommendations of the supervisory and verification body. The UN proposal, *inter alia*, provided for the withdrawal from Cyprus, under international supervision, of all non-Cypriot forces not envisaged in the Treaty of Alliance and provided for the reduction of Greek Cypriot and Turkish Cypriot units to an equal agreed level prior to the establishment of the federal republic. As a result, the great majority of foreign troops and equipment would be removed from the island by the time the federal republic was established. During the 1991-1992 negotiations, all concerned were in broad agreement with these provisions.

49. Since then, the situation on the ground has deteriorated. Despite repeated calls by the Security Council, the level of Turkish troops in Cyprus and the level of Cyprus government defense spending have not been reduced.

Displaced persons

50. Since 1974, Greek Cypriots have demanded that persons displaced as a result of the 1974 events be allowed to return to their homes. The Turkish Cypriot position has been that the problem of displaced persons be resolved through compensation.

51. The United Nations proposed the establishment of a property claims commission composed of two persons from each community. Persons from both communities who resided or owned property in the federated state administered by the other community could submit claims within a given period of time and select one of the two options: (a) prompt compensation at current value of the property; or (b) return to their residence. However, the latter option would only be implemented after the resettlement process resulting from the territorial adjustment had been essentially completed and within the limits of an annual quota. Furthermore, persons could only return to their property after the current resident has been satisfactorily relocated. If the current occupant was also a displaced person, he could elect to remain. The two sides remain far apart on this matter.

Territorial Adjustments

52. The Greek Cypriot side has called for territorial adjustments that would enable a large proportion of displaced persons to return to their homes under Greek Cypriot administration. Turkish Cypriots, while recognizing the need for territorial adjustments, have argued that this could not result in uprooting a large number of Turkish Cypriots. In 1984, Turkish Cypriots agreed that in the federation the territory under its control be reduced from 37% to 29+%. However, they maintained that a map could only be drawn up after the Constitutional aspects of the federation had been mutually agreed upon.

53. The Secretary-General considered that all elements of a settlement had to be defined simultaneously. The map presented to the leaders of the two communities in 1992 took into account the five criteria mentioned by the Turkish Cypriot leader (i.e., maintain the current coastline controlled by the Turkish Cypriots, the Turkish Cypriot federated state should border on the British Sovereign Area, traditional Turkish Cypriot villages should remain on the Turkish Cypriot side, the territorial adjustment should take into account the water distribution on the island, and Ercan airport should remain under Turkish Cypriot administration). The map also took into account the need to enable a significant number of Greek Cypriot displaced persons to return to their homes. The proposed map provided for a Turkish Cypriot area comprising 28.2% of the federal republic. It was estimated the proposed territorial adjustments would enable about half of the Greek Cypriot displaced persons to return to their homes under Greek Cypriot administration.

54. The United Nations also set out a procedure to avoid hardship by Turkish Cypriots affected by the territorial adjustments. It proposed that, in the area currently under Turkish Cypriot control that would come under Greek Cypriot administration, Turkish Cypriots who resided there prior to the events of 1974 could elect to remain there or receive a comparable residence in the area under Turkish Cypriot administration. Other Turkish Cypriot displaced persons living in the area that would come under Greek Cypriot administration would have the option to receive a comparable residence in that area, return to their pre-1974 residence, or receive a comparable residence in the area under Turkish Cypriot administration. All others would be relocated before the former resident could return. Displaced persons could not return to their homes until the persons living there had been relocated.

VII. Assessment

55. The United Nations has been seized with the Cyprus problem for some thirty-five years. It is the oldest peacekeeping and peacemaking mission still active today. In peacekeeping, UNFICYP has successfully prevented violence between the two sides, because the parties concerned (the two communities, Turkey and Greece) have respected UNFICYP's mandate as it evolved after the 1974 events and, on the whole, have abided by the rules prescribed by UNFICYP. As such, UNFICYP can be considered a prototype peacekeeping operation.

56. In contrast, peacemaking efforts have been thwarted, even though, as acknowledged by the international community, the United Nations has succeeded in devising a comprehensive proposal that offers a settlement which respects international norms and responds to the key interests and concerns of the two communities. Even the leaders of the two communities have recognized that through the UN proposals all the elements of an agreement are on the table. It is widely believed that if an agreement is ever reached, it will closely resemble these proposals.

57. What has stood in the way of a settlement? Two major factors must be mentioned: the insensitivity of the two communities to each other and the unhelpful roles played by the mother countries.

58. The attitude of the two communities is not conducive for compromise. Each community holds the other totally at fault for the problem. They are unable to empathize with each other, or to imagine the other's fears and needs. There is a lack of trust and a deep-seated insecurity about the future. Turkish Cypriots believe Greek Cypriots want to restore the pre-1974 situation, while Greek Cypriots fear that Turkey wants to take over the entire island. In short, there is an absence of mutual sympathy and shared needs.

59. Given this mind-set, it is counter-productive to ask the two communities to submit proposals. Their proposals are defensive rather than constructive and are consistently rejected by the other side. The greatest progress has come from proposals prepared by the UN on the basis of informal discussions with the parties and Turkey and Greece. Furthermore, the best, if not only, possibility for reaching an agreement is through a comprehensive proposal. The comprehensive approach provides a more effective basis for give-and-take than does an easily deadlocked issue-by-issue approach.

60. Agreements were all but reached on a number of occasions. Decisions of such importance require courage. Over the years this has been lacking by one side or the other. In the recent past, the reluctance of the Turkish Cypriot side to take reasonable risks has stood in the way of testing the willingness of both sides to reach a settlement.

61. The second impediment has been the roles of Turkey and Greece. Their involvement in Cyprus has been motivated by two, often incompatible, objectives: first, to safeguard the interests of their respective communities in Cyprus, and second, to promote their own national objectives, in particular in the context of their troublesome relations with each other. Given the great insecurity of the Greek Cypriot and Turkish Cypriot communities, the absence of a common sense of national identity, and their reliance on their mother countries for psychological and physical support, the role of Turkey and Greece cannot be overestimated. What has been lacking is a policy by the mother countries that offers their respective communities a constructive security option and encourages them to achieve a settlement. The absence of such a policy by Turkey and Greece vis-à-vis the UN effort has been critical in preventing a settlement.

62. A third factor, while undertaken in support of the United Nations objective, has made the UN effort more difficult. Attempts by key member states to try to move the process forward through parallel efforts undermine UN efforts by holding out prospects to the two communities for an alternative to UN-brokered negotiations, thereby encouraging the parties to play a waiting game. Efforts by member states have also failed to achieve progress.

63. Once the Security Council has established a peacemaking mandate, the United Nations should receive the undivided support of key member states which should resist the temptation to get involved on their own. True, the political clout of the United Nations is limited. It lacks sticks and carrots of its own. Therefore, it does require the active and solid backing of key member states which should send a clear message to all concerned of unqualified support of UN efforts. Such a united stance, making it clear that the UN is the only game in town, would greatly enhance the possibility for progress.

64. Properly supported, the United Nations is ideally suited for conflict resolution and mediation provided the parties concerned want to solve the problem and are willing to negotiate and compromise. Perhaps the most unique attribute of the United Nations is that it has no vested or national interests. Its sole desire is to assist the parties in reaching a fair agreement. As such, it is well placed to gain the confidence of the protagonists.

65. The United Nations succeeded in defining a settlement of the Cyprus problem and brought it within reach of agreement. Whether this effort will be taken to fruition will depend primarily on the extent to which the two communities and Turkey and Greece can adopt the necessary constructive and objective position on the Cyprus problem. This is clearly in the interest not only of the parties concerned, but also of Europe and the North Atlantic community.

EXPERIMENTING INTERNATIONALLY MANAGED CONFLICT RESOLUTION IN A DIVIDED SOCIETY, Mr Gianni La Ferrara

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1. A difficult experiment

Jean Jacques-Rosseau famously wrote that – for the protection of the common good – if a few individuals were to refuse to embrace the principles of free democratic government, they would simply have to be *forced* to be free. The paradox of such a "tyranny of tolerance" illustrates the fundamental dilemmas faced by the international community in the conflict-resolution effort in Bosnia and Herzegovina, of which the High Representative is the main instrument.

On 14 December 1995, the signing of the Dayton/Paris peace agreement put an end to the conflict in Bosnia and Herzegovina. The peace came after 4 years of intense fighting among the Serb, Croat and Bosniac/Muslim ethnic factions, to which a long series of initiatives by different international negotiators had failed to bring a solution. The US-sponsored Dayton plan comprised a General Framework Agreement for Peace (GFAP) and eleven Annexes, each dealing with specific aspects of the country's new institutional set-up. It created a federal structure composed of a new central government with extremely limited responsibilities and the two ethnically polarised "Entities" of the Republika Srpska (Serb-dominated) and the Federation of Bosnia and Herzegovina (itself divided into Bosniac- and Croat-majority cantons). Apart from opting for decentralisation to ethnically homogeneous units, the new arrangement included among its fundamental features a system of ethnic quotas and vetoes in all key institutions, securing permanent power-sharing among the three main ethnic groups. In addition, a temporary, institutionalised international presence was introduced in all key sectors of authority. The two latter variables are obviously interconnected: due to the difficulties met by the post-war institutions in producing the consensus needed to operate a highly consociational system, the need for an external life-support mechanism emerged as the only way to sustain the system until a more constructive environment had developed.

Although this approach has given positive results up to present – the conflict among the former warring parties has been contained, and a certain normalisation of political life achieved – it is clearly not without problems or risks. In particular, it is open to question whether internationally imposed changes have more chances of being durably incorporated into a new political culture or of being ultimately regarded – at the opposite extreme – as an obstacle to political development. Keeping the sum positive requires a very delicate balance. At a time in which similar experiences are being replicated in other areas – the international administration of Kosovo being the main case in point – a cursory analysis of the Bosnian experience might perhaps be of some use in this respect.

2. Mandate and powers

The mandate of the High Representative is to oversee the implementation of the civilian aspects of the GFAP. In particular, the opening provisions of Annex 10 to the peace agreement establish the authority of the High Representative in the following terms:

1. The Parties agree that the implementation of the civilian aspects of the peace settlement will entail a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable in Annex 3 to the General Framework Agreement. A considerable number of international organisations and agencies will be called upon to assist.

2. In view of the complexities facing them, the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilise and, as appropriate, coordinate the activities of the organisations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below.

In its mission, the High Representative is assisted by his Office (OHR), which over the years has acquired the size and features of a small international organisation. At the moment, the OHR employs about 260 international staff, mostly diplomats seconded by governments, and about 370 local support staff, the overwhelming majority in each category being based in Sarajevo. The functional subdivisions at headquarters include political affairs, assistance to refugees and the return process, economic and material reconstruction, legal affairs and human rights. There is also a cell for coordination with the NATO-led Stabilisation Force (SFOR) – which supervises the implementation of the GFAP's military aspects – and a UN liaison office. In addition to the Sarajevo headquarters there are three regional offices within Bosnia and Herzegovina – in Banja Luka, in Mostar and in Brcko – a few Special Envoys representing the High Representative in minor centres and a small secretariat in Brussels mostly dealing with planning and relations with the donor community. This is the machinery for the task, which in terms of Annex 10 to the GFAP is generally carried out through three main instruments:

1. Monitoring of the implementation of the peace settlement and reporting periodically on progress to the PIC and the UN Secretary General;

2. Coordinating the activities of the international organisations and agencies, and providing them with guidance as appropriate;

3. Maintaining close contact with the Parties and adopting measures necessary to promote full compliance with the Peace Agreement.

2.1. Co-ordination of other international actors

Apart from seeking support on the international scene through the fulfilment of the High Representative's monitoring and reporting obligations, the Parties accorded the High Representative a wide authority in the co-ordination of other international organisations and agencies active in Bosnia and Herzegovina, as provided for in Article II.1.(c) of Annex 10 to the GFAP, in terms of which he shall:

(c) Co-ordinate the activities of the civilian organisations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace

> settlement. The High Representative shall respect their autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement. The civilian organisations and agencies are requested to assist the High Representative in the execution of his or her responsibilities by providing all information relevant to their operations in Bosnia-Herzegovina.

In practice, this power is made particularly significant by the unprecedented level of international involvement in the peace process. Annex 3 to the GFAP, for instance, provides the Organisation for Security and Cooperation in Europe (OSCE) with a mandate to set rules and administer elections for all levels of government, which, though initially limited to the first post-Dayton vote, has been subsequently extended. The OSCE mission in Bosnia has developed an extremely large and sophisticated institutional machinery, the scope of which extends to all election-related developments in the fields of political organisation, the media, and more generally the development of civil society and the protection of human rights within the country. Concerning the latter, the OSCE and the Council of Europe have both been directly involved in the creation and running of the office of the Ombudsperson and the Human Rights Chamber – the two organs forming the Human Rights Commission established under Annex 6 to the GFAP. Staffed with a majority of international members, the institution works as the highest instance for the adjudication of violations of the European Convention of Human Rights and other international human rights instruments in force in Bosnia and Herzegovina. Similarly, Annex 7 to the GFAP establishes a Council of Europe-appointed Commission for Real Property Claims, which, working in close coordination with the UN High Commissioner for Refugees, is responsible for processing applications by displaced persons and refugees for restitution of housing. Finally, Annex 8 to the GFAP creates the UNESCO-chaired Commission to Preserve National Monuments, with a five-year mandate to identify and provide guidelines for the protection of the cultural heritage of the three former warring parties.

The OHR has, moreover, a key role in assisting the economic implementation agencies – the World Bank, the European Commission, the European Bank for Reconstruction and Development and the International Monetary Fund – some of which also are directly involved in GFAP implementation. The President of the EBRD, for instance, appoints two of the five members of the Commission on Public Corporations, established under Annex 9 to further negotiations between the two Entities on the operation of joint infrastructures, while the Governor of the Central Bank is, for an initial period of six years, a foreigner appointed by the IMF. Finally, OHR coordination extends also to the security apparatus, to the extent to which all police forces in Bosnia and Herzegovina are subject to the supervisory authority of the Commissioner of the UN International Police Task Force (IPTF) under Annex 11 to the GFAP. Although the High Representative is expected not to interfere with the military aspects of GFAP implementation, frequent consultation with the SFOR Commander provides him with additional leverage in addressing questions related to military expenditure and civil-military relations involving the armed forces of Bosnia's two Entities.

2.2. Monitoring and reporting

The OHR, through its functional departments and regional offices, works in strict contact with political office holders and other key officials at all levels of government in Bosnia and Herzegovina. This allows the High Representative to monitor closely all significant developments within the wide range of matters relevant to the implementation of the peace

agreement, and to keep the main external supporters of the process fully informed. According to Article II.1.(e) and (f) of Annex 10 to the GFAP, the High Representative is in fact requested to

(e) Participate in meetings of donor organisations, particularly on issues of rehabilitation and reconstruction.

(f) Report periodically on progress in implementation of the peace agreement concerning the tasks set forth in this Agreement to the United Nations, European Union, United States, Russian Federation, and other interested governments, parties, and organisations.

The more formal legal relationship, in this respect, is the one linking the High Representative to the UN Secretary General, to whom he periodically reports. This results from the endorsement of the appointment for the position by Resolution of the UN Security Council No. 1031, of 15 December 1995. Three High Representatives (Carl Bildt, Carlos Westendorp and Wolfgang Petritsch) have up to now served since the entry into force of the Dayton Agreement, benefiting from UN endorsement as a source of authority in the coordination of the many international organisations and agencies involved in GFAP implementation. In terms of the Resolution, the High Representative is expected in fact to *"monitor the implementation of the Peace Agreement and mobilise and, as appropriate, give guidance to, and coordinate the activities of, the civilian organisations and agencies involved"* (paragraph 26).

The most relevant link affecting the High Representative, however, is the one established since the London Peace Implementation Conference of December 1995, and submitting the High Representative to the political guidance of the *Peace Implementation Council* (PIC). The PIC is a standing diplomatic conference bringing the signatories of the GFAP together with a Steering Board composed of the US, Russia, France, Germany, UK, Japan, Canada, Italy, the European Union Presidency, the European Commission and Turkey on behalf of the Organisation of Islamic Countries. This is the forum in which much of the policy relevant to the internal development of Bosnia and Herzegovina is made. In a gradual way, the concluding declarations of PIC meetings have in fact developed into fairly detailed wish-lists, aiming to guide the actions of domestic actors in the framing of institutional and economic policies. The fact that all major donor countries take part in the PIC – and that the economy of Bosnia and Herzegovina and its Entities is completely dependent on external support – has in practice conferred on such recommendations the quasi-obligatory character of a governmental agenda.

2.3. The power to interpret and to impose

The political leverage resulting from the above represents, quite obviously, an important tool for inducing national political actors to comply with their commitments under the peace agreement. As a matter of fact, however, the capacity of the international community to set detailed policies and a certain degree of presence within a limited number of institutions has often proved sufficient to have those policies actually adopted by domestic political actors. Following the Sintra Peace Implementation Council of May 1997, therefore, the High Representative lobbied for the PIC to accept endorsing a stronger interpretation of his powers, essentially resulting in the power to *impose* legislative and other measures on the domestic political actors when needed to secure compliance with key aspects of the peace agreement.

Such an interpretation is based on a wide reading of Art. II.1.(d) of Annex 10 to the GFAP, in terms of which the High Representative shall

> Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.

This broad formula is indeed sufficient to justify a more active role of the High Representative as a breaker of political deadlocks. Although admittedly generous, its interpretation is in fact subject to the atypical provision in Article V of Annex 10, in terms of which the High Representative is empowered, in the last instance, to make decisions on the meaning and extent of his own mandate (*Kompetenzkompetenz)*:

> The High Representative is the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement.

Such an approach was actually endorsed by the PIC at its December 1997 meeting in Bonn. In giving their full support to the High Representative's proposal for a more robust interpretation of the mandate, Council members codified this interpretation in paragraph XI.2 of the conference's declaration in the following terms:

> The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues:
>
> a) timing, location and chairmanship of meetings of the common institutions;
>
> b) interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;
>
> c) other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

After the Bonn PIC, High Representative Carlos Westendorp exercised the powers thus recognised on a number of occasions. A few pieces of legislation – including the State Citizenship Law, the Laws on national symbols (flag, coat of arms), a framework Law on Privatisation and a meaningful package of legislation related to the property of refugees and displaced persons – were imposed as an interim measure in cases in which obstructionism by a part of the governmental majority had prevented them from entering into force. Similarly, around a dozen officials from all levels of government were removed by the High Representative in cases of openly obstructionist behavior aiming at preventing the implementation of key commitments undertaken under the peace agreement. The most talked-about case in this respect was the removal by the High Representative – in March 1999 – of the elected radical President of Republika Srpska, Nikola Poplasen, after the latter had

managed to block the governmental process in the Entity by delaying his consent to the designation of a new Prime Minister.

It is indubitable that the use of such powerful instruments has considerably advanced the state of the implementation of the GFAP in Bosnia and Herzegovina. Nevertheless, practice has shown that the imposing power has to be used, if not sparingly, at least not in isolation. Although useful in the immediate, in fact, the breaking of deadlocks by the High Representative's *fiat* has proved a dangerous encouragement to Bosnia's "dependency syndrome". As long as political power holders can obtain a solution from an external actor, in fact, incentives to produce a domestic agreement will be few – with obvious consequences in terms of long-term consolidation of the results. The need to re-balance the general orientation has been clearly addressed by the new High Representative Wolfgang Petritsch, since the very inception of his term of office. At the New York meeting of 22 September 1999, support was in fact gained from the Foreign Ministers of the PIC countries for his concept of "ownership", emphasising that it is the leadership and authorities of BiH – and not the International Community – who are primarily responsible for the implementation of the Peace Agreement. Although the developments in recent months have demonstrated that the new High Representative will not refrain from using the imposing power when necessary, it is clear that increased attention to self-sustaining processes and mechanisms will become an essential feature of the next phase of the peace process.

3. Specific activities

The main areas of activities under the High Representative's mandate, to be examined here in further detail, include: (1) political and constitutional development; (2) economic reconstruction and infrastructure rehabilitation; and (3) encouragement of the return of displaced persons and refugees.

3.1. Political and constitutional development

In 1996, the OHR took a leading role in running a number of joint bodies which brought together the representatives of the Entities - the Federation, the Republika Srpska and the Government of Bosnia and Herzegovina - to discuss practical questions of mutual concern in advance of the establishment of the common institutions, which were set up after the elections. The highest such body, the Joint Interim Commission, included the Prime Ministers of Bosnia & Herzegovina, the Federation and Republika Srpska, and was directly chaired by the High Representative. The Joint Civilian Commission, on the other hand, brought together ministerial representatives of the Entities and the international agencies based in Sarajevo – with similar structures at the regional level. In the meantime, the High Representative took part in the preparations for the first post-Dayton elections through his representation in the OSCE-established Provisional Election Commission, established under Annex 3 to the GFAP with the purpose of enacting Rules and Regulations, as well as setting up the necessary administrative machinery for the registration of voters and for conducting the actual voting procedure.

As elections were first held in September 1996, the focus of OHR efforts was re-directed towards assisting with the setting up of the structures needed to facilitate the work of the common institutions. The Constitution of Bosnia and Herzegovina, which forms Annex 4 of the Peace Agreement, provides for six such institutions, namely the Presidency, the Council of Ministers, the Parliamentary Assembly, the Constitutional Court, the Central Bank and the

Standing Committee on Military Matters. The Presidency, comprising directly elected representatives of the three constituent peoples of Bosnia and Herzegovina, met at the OHR for its first session on 30 September 1996. After two months of intensive negotiations, it reached agreement on the structure and composition of the Council of Ministers, which was later approved by the House of Representatives of the Parliamentary Assembly. The appointed Council consisted of two Co-Chairs, a Vice-Chair, a Minister for Foreign Affairs, a Minister for Foreign Trade and a Minister for Civil Affairs and Communications. Decision-making mechanisms were agreed upon and enshrined in internal rules of procedure, which were elaborated under OHR auspices in the course of 1997. Later in May, the Constitutional Court of Bosnia and Herzegovina held its first session at the OHR headquarters. All judges met for the first time and the three international judges – appointed by the President of the European Court on Human Rights - made a solemn declaration thereby officially constituting the court. The Standing Committee on Military Matters, an independent auxiliary body of the Presidency including representatives of the Entities' defence apparatus, was established in early June 1997.

Following the establishment of the Common Institutions, the role of the Office of the High Representative focused on providing them with legal instruments sufficient to implement a minimum of policy. The inception of this new phase was marked by the Quick Start Package, a set of draft laws submitted by the High Representative for consideration by the national authorities and covering the most fundamental areas entrusted by the Constitution to central regulation. Formally presented to the Council of Ministers of Bosnia and Herzegovina in mid-January 1997, the package focused on essential economic laws, other proposals on foreign investment, telecommunications, railways and civil aviation as well as citizenship, passports, immunities and a law on vacancy and absence in the Presidency. Over a period of several months, the entire package was examined and negotiated by the OHR in working groups established within the Council of Ministers, until a part of it (the Law on the Central Bank, Law on Foreign Debt, Law on Foreign Trade, Law on Customs Policy, Law on Customs Tariffs, Law on Immunity and Law on the Budget and Budget Execution) was finally adopted on 20 June by the Parliament of Bosnia and Hezegovina. It was the first substantial act to be accomplished by the common institutions. Since then, the OHR has continued lobbying for the adoption of the state-level legislation necessary to fulfil the responsibilities entrusted to the joint institutions of Bosnia and Herzegovina by the Dayton constitution. Progress has been made, although some political deadlocks could only be bypassed through the use of the High Representative's power to impose measures. The latest such move was made between the end of July and the beginning of August 1999, when Carlos Westendorp first, and Wolfgang Petritsch later, put an end to the delaying tactics of the parties by enacting a series of decisions reforming the public broadcasting sector at the level of both Bosnia and Herzegovina and its two Entities. This initiative followed the establishment by the High Representative's decision, in the summer of 1998, of the Independent Media Commission as a central regulator of the broadcasting sector across the entire territory of the state.

3.2. Economic reconstruction

In 1996, the OHR initiated meetings with the economic implementation agencies to discuss priorities, plans and practicalities. These meetings initially focused on the need for an early start to rehabilitation and reconstruction efforts. Weekly meetings of the OHR-led Economic Task Force are held to co-ordinate the political and operational aspects of economic reconstruction, as well as to discuss economic policy and other measures being jointly recommended to the State, Federation and Republika Srpska authorities. The role of the

Economic Task Force was endorsed by the Peace Implementation Conference in London in December 1996.

As a general rule, politics should not be allowed to interfere with or slow down the pace of reconstruction efforts, but inevitably local authorities have focused on issues other than the purely technical, thus causing delay in implementation. Of crucial importance to revival of the infrastructure is the restoration of public utilities such as water, electric power, gas, telecommunications and road and rail links. Sectoral Task Forces, established by the World Bank and European Union and coordinated by the OHR, meet regularly to exchange information, discuss sectoral policy issues and coordinate programming and implementation. Participants in these Task Forces include the main donors and international agencies active in a given sector as well as representatives of the recipients. Sectoral task forces exist in thirteen economic and infrastructural areas, ranging from macroeconomic policy planning to waste management and including general concerns such as employment and industry as well as specific ones in the energy and telecommunications sectors.

After the signing of the Peace Accords, joint efforts of the World Bank and other major international financial institutions, working together with the Government, resulted in the drafting of a $5.1 billion Priority Reconstruction Programme for the years 1996-1999. This Programme formed the framework within which external funding has been channeled. It has been endorsed by the donor community at four donors' conferences resulting in pledges of $4.25 billion in 1995-1998 from over 47 countries and 11 institutions. A large part of this assistance is used for infrastructure reconstruction. Humanitarian aid is decreasing and the attention of donors has shifted towards economic recovery and reforms. Activities which support the implementation of the Peace Agreement, such as media and police training and restructuring, are an important part of the reform program. Macro-economic assistance committed to date is an essential part of the priority programme, helping the Government pay recurrent costs associated with donor-financed investments, such as salaries and social costs for the poor, demobilised soldiers and refugees. The privatisation process will start in 1999. A recent important step taken by the OHR was the creation of the Privatisation Monitoring Commission.

Tangible results in the economic sphere will depend primarily on cooperation among the parties and their willingness to create a healthy economic environment. This will help the economies adjust from war to peace and significantly reduce the dependence of the population on humanitarian aid. Economic reconstruction is one of the most potent instruments available to influence the reintegration of the country, of which the return of refugees and displaced persons is a central part. As such, it has great political significance, which is why it is important to ensure that a proportion of projects has, as one of their main objectives, the economic reintegration of the two entities. Without the support of the many donors working in a coordinated manner, sustainable economic revival will be impossible. The role of the parties themselves cannot be over-emphasised in this regard. They must provide the driving force behind Bosnia and Herzegovina's transition to a market economy, allowing the country to wean itself off its dependence on foreign aid. For a healthy economy to flourish, concerted efforts to attract investors to Bosnia and Herzegovina must be vigorously pursued.

3.3. Return of refugees and displaced persons

Another key element of the Peace Agreement is the right of refugees and displaced persons to return to their homes of origin. Enabling return is important for rebuilding the country

socially, politically and economically, and is intimately linked to the implementation of other aspects of the Peace Agreement. There remain over 375 000 refugees abroad who still lack durable solutions; about half of these refugees are living in Croatia and the Federal Republic of Yugoslavia. More than 860 000 Bosnians remain internally displaced, most of whom would be in the minority if they chose to return to their homes of origin now.

In 1998, more than 140 000 refugees and displaced persons returned to Bosnia and Herzegovina, of which some 100 000 were refugees from abroad (mainly from Germany). Only about 35 000 of them were minority returns, a figure only slightly higher than that achieved in 1997. The rest simply added to the mass of internally displaced persons in need of durable solutions. The social costs and potentially destabilising effects of perpetuated displacement on such a scale make the implementation of the right to return a matter of priority. At present, the return of refugees and displaced persons – some even living within eyesight of their homes of origin – is being prevented by two main factors. The lack of political will on the part of the authorities to create conditions for safe, orderly and voluntary return is the most serious obstacle. Ethnic divisions are still the prevailing reality and few have returned to areas in which their ethnic group is now in the minority. Besides concerns about the security environment, people are also prevented from returning by inadequate material conditions, including the lack of available housing, employment and social services, as well as a low level of infrastructure and communications.

In accordance with the conclusions of the London Peace Implementation Conference of 5 December 1996, and after consultations with the UNHCR and other main actors including the European Commission and the World Bank, the Reconstruction and Return Task Force (RRTF) was established in February 1997, under the chairmanship of the OHR, to create an integrated approach to the return of refugees and displaced persons. The Bonn Peace Implementation Conference of 9-10 December 1997 mandated a Deputy High Representative to head the RRTF. During 1998 the RRTF has developed into a fully functioning network with a central secretariat in OHR to coordinate and support the work of all members. The OHR and the UNHCR are the lead agencies within the RRTF: the OHR operates on a political level, acting on behalf of the High Representative to promote and negotiate the key civilian aspects of Dayton Implementation. The OHR also operates as the coordination mechanism between the member agencies. The UNHCR continues, within its lead role under Annex 7 of the GFAP, to promote, facilitate and monitor the return of refugees and displaced persons, as well as address legal and administrative barriers to return.

Since its inception, the RRTF has sought to develop links between economic reconstruction and the return of refugees to maximise the impact of limited resources in supporting sustainable returns. The RRTF has also submitted a number of reports with practical and policy recommendations to the donor and host country community: among the conclusions have been the need to focus resources in areas where there is both economic potential and expected refugee return, and the need to identify loan mechanisms to overcome the major financing gap in the housing and relevant infrastructure sectors. Host governments are also urged to provide repatriation incentives to provide start-up support to both the returnee and the receiving community and not to repatriate refugees who originate from areas where they are no longer in the majority ("minority" returns) and who are still unable to return directly to their homes of origin.

4. Conclusion

Four years after the signing of the Dayton peace accords, Bosnia and Herzegovina is a different country. Due to the efforts of the international community – of which the High Representative is the most significant expression – the security environment has been largely stabilised and political tensions have, if not vanished, considerably relaxed. There is, however, a risk that, precisely because of the size and intensity of the international peace effort, the capability of domestic actors actually to reach agreements and make policy in a modern and coherent manner might scarcely develop. As the urgency of immediate post-war recovery is left behind, it is of key importance that the international community in Bosnia and Herzegovina develops a suitable exit strategy designed bearing in mind the need of leaving behind fully self-sufficient governance structures. As an organisation essentially created to put itself out of its job, the Office of the High Representative is ultimately called to account for the absolute peculiarity of its mandate, and for the bold challenge there implied.

LESSONS AND CHALLENGES, Mrs Gro Hillestad Thune
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Introduction

Societies in conflict is a subject of great concern. The European continent today is far from peaceful. The ongoing conflicts are not only a threat to the security of those people who are directly affected, they also carry the risk of further destabilisation. One particularly worrying feature is that serious political conflicts to an increasing extent seem to include direct attacks on innocent civilians including physical abuse, killing, rape and destruction of homes. Ordinary people have become familiar with the realities behind the expression ethnic cleansing, and are paying a high price as a result of their leaders failure to provide security and peace. Their personal security is being sacrificed for what is claimed to be overriding political, strategic and military interests.

New technical development with the possibility of immediate and extensive media coverage of conflicts as they develop, bring the devastating consequences, including bloodshed and atrocities, directly into homes all over the world. States can no longer shield human rights violations from the international public eye. This leads to a feeling of common responsibility and subsequent demands on states and international organisations to react and bring an end to the suffering of innocent people. The difficulties this entails are equally being publicly disclosed. The recent conflicts in the Balkans and in Caucasus have indeed left what is often referred to as the international community in a situation characterised by on the one hand strong demands for action and on the other hand a feeling of serious failure as regards effective means to ensure peace and basic security in areas affected by deep-rooted and violent conflicts.

Many questions – few answers

Principles enhancing democracy, human rights, the rule of law, respect for minorities as basic preconditions for peace and stability have been developed and incorporated in the

international as well as the national legal order of most states including those responsible for serious aggression.
The establishment of these fundamental principles, however, do not appear sufficient neither to avoid or to solve such conflicts. It is, thus, of utmost importance to raise the questions which have been in focus at this conference.

- How can conflicts be prevented or settled before they get out of hand?

- What lessons are there to be learned from previous efforts to settle conflicts and provide for long-term stability? Are there any common denominators?

- How can lasting solutions implying long term stability be achieved?

- Why is the international community with its many high level organisations supported by super powers not more successful in their efforts to enhance the basic principles of democracy, human rights and ethnic diversity? Are the measures applied the most appropriate?

- Why do the same mistakes appear to be made again and again? Would it not be possible to more actively rely on the experience gained in previous attempts to settle conflicts including achievements as well as failures?

- What is the consequence of the international community departing from the principle of state sovereignty as an absolute principle? When international involvement to some extent is being accepted, on what basis and through which means should it be performed?

There are no easy answers to these questions, but equally essential to discuss them. Under international humanitarian law as well as human rights law the international community has undertaken responsibility to provide assistance to resolve conflicts and restore peace and security in situations of disaster such as in the Balkans. The violent nature and level of suffering as well as the complexity of these conflicts is over-whelming. UN, OECD, Council of Europe, EU and other international organisations are being challenged and urged to find solutions. They make efforts to respond in various ways, but so far without great success. There seem to have been more shortcomings than accomplishments, more failures than successes, more deception than applause.

The international community represented by a great number of different organisations has embarked on a road implying a common undertaking of concern and responsibility for the fate of victims also of conflicts within national borders. So far the efforts to act have not shown too encouraging results. International involvement including direct military intervention as well as assistance in efforts to settle conflicts through negotiations, peace-agreements and subsequent presence in order to secure implementation of such agreements have failed in many respects. The achievements do not appear to comply neither with political promises nor public expectations resulting from these promises. Serious analysis and scrutiny is called for, but also modesty and realism. There seems to be unrealistic expectations as to what can actually be achieved through international assistance, which can easily result in a feeling of betrayal.

It is, however, equally important to keep in mind also the small victories. There have been achievements where credit can be addressed to international efforts. Situations of conflict and

tension which have been settled must certainly be kept in mind in order to prevent a too pessimistic attitude as regards the prospects for the future.

The Bled conference has been presented with a number of excellent reports where conflicts in various European states have been described and analysed. The circumstances are different, but there are a number of common features like ethnic conflicts, military and political aggression. The thoroughness by which the various experts have given their perspective on the historical background as well as more recent political development, make them particularly useful and relevant in a discussion of those questions mentioned above.

Due to limited time the participants of the Bled conference were not able to give the issues the attention they deserve. In this context a proposition was made to request that the organisers consider a further meeting on the basis of the same documents. This would make it possible to concentrate more on possible practical steps to take and in particularly alternative ways of approaching various conflict situations. This being said, already this meeting brought forward a number of considerations, ideas and concrete proposals.

It is not an easy task to make a final report trying to sum up a conference of this kind presented with reports containing a substantial amount of factual information about the historical development of a number of extremely complex and lengthy conflicts. The presentations were followed by interesting interventions and remarks by various speakers also disclosing substantial emotional commitment. The following is an attempt to focus on some of the main points emerging from the discussion without any intention to repeat what is being said in the various reports. The present report is aimed at presenting some of the major points of view, including those of criticism, according to the recollection and interpretation of the rapporteur not based on any explicit consensus among the participants. Opinions must necessarily differ in discussions on a subject as challenging as the theme of this conference. One important factor in this respect is the difference between those experts who through personal experience have a first hand knowledge of the practical realities in states encumbered by difficult and also violent conflicts and those scholars and academic experts who have acquired their knowledge and understanding in a less burdensome way. It must therefore be considered particularly valuable that this conference provided for a discussion where problems and possible solutions were presented from quite different perspectives. This being said, there seemed to be a general agreement about the urgent need to search for new and more effective methods, mechanisms and approaches in order to protect innocent civilians victimised by serious political and military conflicts.

Law as an instrument against conflicts

A discussion of the possible contribution of law and legal instruments to conflict prevention and conflict solution should as far as possible be realistic having regard to the extremely difficult and many facetted situations one is addressing. Perhaps the most important task is to try to identify the limits of what can be obtained through law and legal instruments. As it was stated by one of the participants: fundamental principals and legal instruments are of little use as long as there is lack of political will.

It is equally evident that legal instruments are of limited use when a conflict is at its peak. The possible contribution of law and democracy should rather be discussed in relation to preventive actions and later stages of negotiation and implementation of peace settlements.

It was generally agreed between the participants that stronger efforts are necessary to strengthen the implementation of basic principles of international humanitarian law, democracy, the rule of law, human rights and minority rights.

In his report, Mr Economides expressed the view that the UN and in particular the Security Council should be expected to embark on a more adequate and effective application of the legal instruments at its disposal under the UN Charter. This could be done without further development of the existing legal instruments, which in his view would also be desirable.

Legal expertise is relevant on various stages of a conflict:

- as preventive measure
- assistance in finding solutions
- implementation of peace accords
- secure permanent stabilisation

In this respect it is necessary to question the appropriateness of applicable law, in particular international public law and international human right and the relation between this law and domestic law. One must consider whether the content is satisfactory and more important the various impediments related to the lack of compliance and effective implementation both on national and international level. Several examples were given of how shortcomings in this respect, strongly have contributed to the development and further escalation of serious and long-lasting conflicts.

A particularly difficult problem concerns the relationship between law and politics which inevitably places important limitations as to what can be obtained through the available legal instruments. Serious conflicts on state level normally have important political, military and strategic aspects. A discussion among lawyers as to possible ways of approaching a situation of tension and conflict, would seem without purpose if it does not include a genuine attempt also to identify the political and practical realities. One has to take into account the various obstacles as to compliance with applicable law as well as basic human rights principles. Of interest in this respect is what is being done more than what is being said.

The reports presented at this conference on the development in Kosovo, Bosnia-Herzegovina and The Federal Republic of Yugoslavia over the last years, brought forward a clear impression of how a situation of conflict gradually develops when state authorities neglect their obligation to establish fair justice providing every member of the population with his or her basic rights, regardless of race, ethnic affiliation etc. Lack of legal protection, respect for the rule of law and equality between individuals with different ethnic background will inevitably reduse confidence in the national authorities and result in intolerance, suspicion and distrust among people. This again will inevitably affect the stability in a negative way with the risk of an open conflict breaking out. Such a development will necessarily affect the stability in a negative manner.

In a discussion on human rights particular attention must be given to questions relating to effective redress. A huge gap between the letter of the law and the practical realities can be observed also in states enjoying political and social stability. It is rather astonishing to what extent politicians and state authorities give the impression of being satisfied by the mere fact that individual rights are established even in situations when there is no prospect what so ever of these rights being effectively implemented.

When there is an ongoing serious conflict the situation is normally characterised by flagrant human right violations on a large scale without any foreseeable repercussions on the perpetrators. Neither humanitarian law nor human rights law can be expected to provide the necessary protection. One is left with the possibility of criminal justice at a later stage when the situation has calmed down and possibly also as an item in the peace settlement. Also on this point shortcomings are evident. The situation in Kosovo at present illustrates the hopeless situation when the national legal system does not function as a direct consequence of a conflict. The judges who were almost entirely Serbs are no longer available, some have left Kosovo the others do not wish to present themselves for duty in the present situation. For several reasons it appears to be extremely difficult to substitute them with Albanian lawyers. One major reason being that for almost ten years Albanians in Kosovo have faced serious difficulties in obtaining legal qualifications which were adequate and officially recognised.
This has substantially reduced the number of qualified Albanian lawyers available for appointments as judges, defence layers and prosecutors. It also upsets the efforts to establish an adequate prison system. UNMIK has made attempts to find intermediary solutions by setting up an interim judiciary by engaging international legal experts as advisors and also by a number of temporary appointments. This, however, does not appear sufficient to meet the imminent need for an independent and functional judiciary. In longer terms adequate legal training for young Albanians seems indispensable in order to have a functional judiciary and also a satisfactory prison system where basic human rights are being respected.

Several of the speakers referred to the discrepancy between established principles and the willingness to actively secure compliance on the international political arena. Experts and NGOs should be encouraged to pursue their efforts to disclose this type of hypocrisy by challenging the political establishment on national as well as international level. Law can only be an effective weapon in the struggle for peace and security if it is matched with a certain amount of realism in particular when it comes to the question of implementation. All peace agreements, including those established with international assistance, should be accompanied by effective control mechanisms.

The conference was reminded of the fact that law can be used as an instrument of power. This is exemplified in the report on the Federal Republic of Yugoslavia referring to the Law on Special Conditions for Real Estate Transactions adopted by the regime in Serbia in 1989. This legislation violated the principle of equality since citizens rights were made dependant on their ethnic status. As conflicts often are related to tension and antagonism between different ethnic groups, a measure to prevent escalation of the conflict would be to provide the minorities with adequate protective legislation as well as political influence. Oppression of minorities will inevitably cause anger paving the way for extremism and terrorism.

The contribution of law is particularly important during peace negotiations and in the drafting final agreements. Such a process will often necessitate substantial pressure on the parties. If this pressure is too strong, one runs the risk of a breakdown. This was in fact what happened following the Cyprus Constitution of 1960 which was adopted following a compromise but did not appear to be workable in practical terms. If one or both parties to an agreement are left with a feeling of the solution having been imposed on them, the imminent risk is that it will not provide for a long term solution. There must in other words be reasonable proportionality between established conditions and the expectations and sentiment of the parties involved if a successful result is to be achieved. This was also underlined during the presentation of the report on Northern Ireland. When the aim is to overcome distrust and even hatred between

people, there is no other way than to involve them directly in activities that can help establish trust and confidence between individuals from all sides of the conflict.

More effective implementation of basic principles

It is not difficult to identify a number of different obstacles to respect for basic human right principles commonly known in most states. In relation to the Balkan situation, it was in particular referred to problems relating to a complicated and incoherent legal system as well as lack of legal training.

Several reports described an urgent need for the development of new and more effective mechanisms for implementation of human rights. The Court in Strasbourg has through its years of existence proved the importance of independent implementation by an institution able to operate independently from state powers. At present it is already overburdened without any prospect of being able to cope with the substantial backlog and increasing influx of cases. As Mr Jambrek have stated in his report, the redress which the Strasbourg Court is providing is insufficient in several respects, too little and too late. Recent developments give rise to doubt as to the willingness of the member states to provide the substantial financial resources that are necessary. In this respect he challenged Council of Europe and also members of the Venice Commission to assist in effort to find new ways of implementing human rights. This would be a valuable contribution to conflict prevention.

It should in this respect be underlined that it is the national states which have the main responsibility to implement the international human right conventions. International implementation can only be considered as a supplement to the national systems. Article 13 in the European Convention on Human Rights requires that people are provided with an effective remedy on national level available for those individuals who claim that one of their rights under the Convention has been violated. This requirement is not always complied with, even in states with long democratic traditions.

The establishment of effective domestic remedies is even more important in relation to the present efforts to stabilise the situation in the Balkans. It must be expected to take a long time to establish a functional legal system operating in a non-discriminatory manner and enjoying the confidence of all sections of the population. Additional mechanisms for implementing human rights and humanitarian law would provide an important supplement.

Other mechanisms established within Council of Europe, such as monitoring procedures and the establishment of an Ombudsman for Human Rights does not provide sufficiently effective protection. The same can be said for the various mechanisms within the UN system.

The attempts to establish criminal justice on international level, like the International Tribunal for Former Yugoslavia in the Hague, is important but not sufficient to provide for the necessary redress and therefor not sufficient to compensate for lack of criminal justice on domestic level.

Security of states does not automatically imply security of people

According to the UN Charter, the “maintenance of international peace and security” is established as one of the main aims. State security is essential also for the security of people. State security, however, is not necessarily sufficient to guarantee the security of people. In his

opening speech to the conference, State Undersecretary Mr Roman Kirn, underlined this, by claiming that the protection of people always should be the first concern. Unfortunately, this is far from being the reality as there are enough examples of situations where the security of people has been swept aside by reference to the importance of securing state interests.

History shows, as the various reports confirm, strong efforts to justify aggression and confrontation by referring to national interests. At the same time it is unquestionable that a society in conflict fails to provide security for people and also fails to comply with basic human right principles. For this reason it is essential to stress the need to make a clear distinction between state security and the security of people.

Mr Kirn suggested three strategies to enhance human security. Firstly to strengthen legal norms, secondly to build sufficient capacity to enforce them and thirdly to improve operational activities and measures in the field.

A number of interventions touched on the problems relating to the doctrine of no intervention. The sovereignty of national states can no longer be considered valid or justified as an absolute principle also when a situation is totally out of control and implies a serious threat to peoples security. The post-war establishment of numerous human right conventions adhered to by most states all over the world, has created a common international responsibility to secure compliance with these basic principles. This responsibility cannot be full-filled as long as the suprimacy of state powers is accepted to be unconditional and unlimited. Further development of principles within the framework of international public law on this point was requested during the discussion.

Prevention rather than cure

The main concern of every community is subsistence and security. Democracy in the broad sense including legal stability, respect for human rights and minorities are essential preconditions for peace and security. The best way to prevent conflict is through the functioning of a democratic regime based on the rule of law and respect for basic human rights. Confidence within the population is equally important. This again requires the functioning of democratic institutions, free elections, respect for ethnic and religious minorities The most useful contribution of law and legal experts would therefore be to assist in establishing a situation satisfying these principles also by disclosing deficiencies and shortcomings. This cannot be done by legal experts in isolation. Success will require close co-operation with NGOs and representatives from various groups and sections of the society. Legal competence cannot be applied isolated from the practical realities. This is elementary in every democratic state and even more important in actions with the aim to prevent or settle conflicts.

It was a common understanding among the participants that conflicts are particularly difficult to settle when they have developed too far. The evolution of humanitarian emergency may, in other words, best be controlled at an early stage. Law and legal institution are not of much help once the situation is out of control. Legal experts should thus be particularly concerned with the need to find ways of addressing the situation when a conflict is building up. In other words, how can the international community, be helpful at a stage when it is still possible to avoid the escalation of the conflict? In the case of Bosnia-Herzegovina and Kosovo, the warnings were there through requests for assistance from members of the democratic

opposition to President Milosevic. The response from the western states was at this stage seen as timid and weak, without sufficient attempt to identify the aggressors.

In a situation when a conflict is emerging, efforts should be made to provide practical assistance to organisations and groups on national level striving for a peaceful solution through democratic means. In this context there are reasons to question why it seems difficult to obtain the necessary political support at a stage when it is evident that an emergency situation is to be expected. Preventive measures is not considered "sexy" enough to acquire media attention, and without pressure through the public opinion, politicians and government seem hesitant to act.

Participants in the discussion seemed to agree that it would be desirable with stronger efforts from organisations and state authorities at a time when there are still prospects of achieving a peaceful solution. There can be no doubt from the experience in Bosnia-Herzegovina and Kosovo that these conflicts which included ethnic cleansing at large scale through the most deplorable acts, require a long and extremely difficult healing-process. Peace and democracy would be much better served by strong preventive efforts.

Professor Goati has in his report on the situation in the Federal Republic of Yugoslavia shown how international acceptance of a regime can serve as factor contributing to the negative development of a conflict, without this being the purpose. This appears to be an additional reason to take effective, not only symbolic steps aimed at avoiding a conflict to break out.

Respect for people necessary precondition for any solution

It was stressed by several of the speakers that international support not only tends to come too late, but not always to a sufficient degree is based on local expertise and experience. Organisations with their great number of employees tend to enter the scene of a conflict with already established ideas as to possible approaches and solutions. This creates an impression domestically of an international invition by people who act as "besser-wissen"ers not showing sufficient respect for the existing and perhaps also available resources on domestic level. International assistance can only provide success if it is performed with sensitivity and in local partnerships.

The reports on the various conflicts confirmed that it is indispensable to re-establish confidence. A peace process, would have to, in order to bring positive results actively involve local people.

Democracy requires respect for the will of people and their basic wish live in peace.

A wounding process can not be ordered - it has to be inspired and supported. People have to learn to respect each other regardless of previous antagonism. Experience from attempts to settle conflicts show that this is not always sufficiently taken into account when the peace accord is being worked out. The report on the most important elements in the agreement on Northern Ireland, on the other hand, seems to illustrate how the practical support of the population can be included as an essential aspect of the agreement.

The report on Moldova recalls two different conflicts with opposite outcome. It is particularly interesting to note how the Gagauzi issue was successfully solved by granting autonomy to the territory defined on an ethnic basis regulated in a law created for this purpose. The various

elements of this success-story should be carefully studied and used as inspiration in similar conflict situations where there is a willingness to search for practical solutions. Unfortunately a similar strategy did not succeed in the case of Transnistria illustrating the complexity of the matter and the importance of addressing each situation in close co-operation with the population on all sides of the conflict.

International action will fail unless it is locally based and supported

An important subject during the two days of discussion related to the performance of the international organisations in their efforts to assist in conflict prevention and conflict solution. There was no denial as to the necessity of international support in particularly difficult conflict situations, but there were strong opinions as to the quality and quantity of international involvement.

Objections were particularly related to the Balkan situation which will be addressed later. However also in other respects was the opinion expressed that the international organisations most likely would be more successful if they were more cautious in their approach and give priority to co-operation with domestic and regional institutions and organisations. Operations are too often seen as organised as a "top down" operation without sufficient knowledge and respect for the underlying historical, cultural and ethnic factors. It seems that an interesting subject on later occasions could be to discuss possible methods and mechanisms which would assist the international organisations like the UN to improve their performance as regards their mutual co-operation as well as their ability to develop relationships with relevant partners on domestic and regional level. In this context it is of relevance to mention the hope expressed by representatives of domestic NGOs who were present, that more foreign money is made available for local initiatives.

The opinion was expressed that when the world community reacts, the reaction tends to come too late without sufficient groundwork in advance. The task is of course extremely difficult, but if there is international involvement, it should be as effective as possible. It must equally be accepted that the main responsibility to settle a conflict lies with the parties who are involved. It is for example extremely difficult for international negotiators to assist in resolving the Cyprus conflict without a substantial change of climate in the relationship between Greece and Turkey since the conflict is closely related to the tension between these two states.

Any conflict of the kind in focus at this conference carries a risk for further regional instability and is therefor also a concern for the neighbouring states. It was stressed during the discussion that the ongoing conflicts in Balkan is being considered a serious obstacle as to the general development of the whole region. This gives the impression of a common responsibility for finding solutions providing for permanent stability in the whole area. It would seem constructive to challenge the resources in the region and invite to partnership and co-operation also with institutions and organisations in neighbouring states not directly involved in the conflict in order to find constructive and workable ways of action. An interesting example is that the peace agreement for Northern Ireland provides for the establishment of a Human Right Commission for Ireland which might otherwise not have been expected at this point in time.

The initiatives and involvement of the Slovenian Government and the various organisations present at this conference is an excellent illustration of concern and willingness to contribute when next door neighbours are in serious trouble.

The Balkan situation

What kind of democracy, what kind of law and what kind of transnational instruments appear suited to the ethnopolitical landscape of the Balkans, at this specific turning point of its conflict-ridden history?

These were difficult questions addressed to the conference where in fact a substantial amount of time was allocated to the problems in the various Balkan states and in particular the impact of the international involvement in the region and temporarily presence in Kosovo and Bosnia- Herzegovina. Various points of criticism were raised in this respect. The objections against the performance of the western states as well as international organisations were many and strong and also accompanied by substantial scepticism as to the ability to create the necessary foundation for permanent stability in the region.

The international community, represented by the major powers acting through the UN and other international organisations, have undertaken an extremely difficult task when embarking on the policy of trying to stop serious and systematic human right abuses in the Balkan area. A large number of international and national organisations have been and still are present in Bosnia- Herzegovina and Kosovo. This provides for a certain stability.

There are however, a number of disturbing elements as to the present situation in the Federal Republic of Yugoslavia. Professor Goati explained in his intervention that there are in fact three parallel conflicts. Firstly between Serbia and Montenegro, secondly an ethnic conflict between Serbs and Albanians and thirdly a conflict between the ruling regime and the opposition. Experience shows that the attitude of the international community to such a situation is not unimportant as to the further development and prospects of a peaceful solution.

The performance of the organisations in the various Balkan states seems to be considered problematic and unsatisfactory in many respects. It was alleged that people working for them all come with their individual schemes and programs designed and organised abroad without sufficient knowledge, sensitivity and respect for local conditions and local resources. The enormous amount of money which is being paid to foreign experts could have been much

more useful if the organisations were making more efforts to link up with local partners and in this way tried to approach the problems more in line with local traditions. "Conflicts in Balkan has to be solved in the Balkan way," was one of the statements made in the discussion. For obvious reasons "The Balkan way" is not easy to discover neither in London nor in Amsterdam or Washington. Perhaps not easily understood by all the human rights observers who are present.

It was alleged by several of the participants that the international involvement appears as uncoordinated ad-hoc activities without any underlying long-term strategy. People have the feeling that solutions are being imposed on them rather than developed through a constructive dialogue involving local experts. In this way people on domestic level feel they are not being respected. The conflicts in Kosovo and Bosnia-Herzegovina can only be resolved through long term reconciliation and bridge-building between people belonging to different ethnic groups. In this process the people themselves have to be subjects not objects in schemes designed by strangers. Perhaps it is not yet sufficiently taken on board in the western states that effective assistance should be designed on domestic and regional level. The following remark:" Bring us musicians and artists instead of human rights observers" is food for thought in this respect. It is not obvious that the international leadership is sufficiently responding to the fact that lasting peace require that people meet and learn to trust each other.

It seems that so far the efforts made have not been successful in a way which could have been hoped for. This implies a warning that it will take a long time before the wounds are healed and democracy fully installed. It requires great patience from all parties. For time being international presence in Kosovo and Bosnia-Herzegovina indispensable and will have to remain there for a long time. The question discussed in this respect was whether this presence is performed and organised in a way which gradually will make it possible to control the situation through national institutions and available resources on national level. The participation of legal and other experts from other parts of Europe can only temporarily do the job. Inevitably the organisations will at one point in time be withdrawn and people left to themselves without international supervision and control as well as support.

Various points of criticisms were raised. All of them not necessarily supported by all the participants, but the discussion gave the impression that many are unimpressed by the performance of the West and equally worried about the future. In the following is recalled some of the points mentioned in this respect. It should be recalled, in this context that the problems in this region are extremely complex and any effort to take action is deemed to be criticised.

- Difficult to understand the difference in treatment by the western states of the present conflict in Chechenia as compared to Kosovo. Those involved feel they should be able to expect more direct support following the strong commitment in Kosovo.

- Lack of support to the democratic opposition to President Milosevic during the period when the conflicts in Bosnia-Herzegovina and Kosovo were emerging. Manipulative policies by the state powers could have been taken much more seriously by the Western states. Reactions came too late. The conflict had accelerated for too long with extensive hatred, distrust, ethnic and religious intolerance as an unavoidable consequence. In this context criticism was raised against the NATO bombing, which by people who were directly affected was considered difficult to accept at that

particular stage of the conflict. There are now wounds which are extremely difficult to heal.

- A too strong international presence creates a risk of paralysing the domestic resources. Mr Fremby, representing the Office of the High Representative in Bosnia-Herzegovina came with a clear warning when he expressed his worry that the capability of domestic actors may scarcely develop as long as the main responsibilities are being taken care of by international experts.

A similar remark was made by Mr Russell in relation to his report on Kosovo.

In this way assistance given with the best intention, but perhaps not with sufficient "*sagesse*", can turn out to be counter-productive and upset or prevent possible efforts to find domestically workable solutions. Such solutions are indispensable if lasting peace and stability is to be achieved. The lesson to be learned from this is the importance of an international approach aimed at "empowerment" rather than "patronising".

- The international organisations would achieve more if they were more concerned with the concrete results of their activities and less concerned with personal or institutional prestige.

- Better co-operation between various organisations and institutions on international, regional and national level is indispensable in a process of confidence building which again is an absolute precondition for permanent stability. The international community must observe their obligation as a role model in this respect. How can people who hate each other be expected to co-operate if the various organisations are not prepared to do so?

- More concern and resources allocated to the acquisition of knowledge and experience from those effort that already have been made by international organisations like the UN, OSCD etc to solve conflicts. It should not be necessary to apply a system of ”trying and failing” every time, but rather aim at the establishment of an international "bank" of knowhow acquired through practical experience in attempts to avoid or settle difficult conflicts.

Certain proposals presented by participants during the discussion.

A number of general, as well as more concrete, proposals were offered during presentation of the reports as well as during the subsequent discussion. It was agreed that these proposals should be recalled in the final report in order to facilitate further discussions. The wish was expressed that they are not being forgotten, but rather pursued in the most appropriate way by the Venice Commission or Council of Europe.

These proposals and ideas are quite different, reflecting the composition of the meeting. The various discussions was the result of an interesting and challenging combination of scholars, international experts and representatives of local organisations as well as Slovenian political and public life.

- Acceptance of the need for institutional engineering in the Balkans within the framework of a regional approach.

- The future cohabitation which can be foreseen between international organisations and local institutions has to include active efforts of constructive co-operation, sharing of responsibilities and a gradual shuffling of tasks over to the various local institutions.

- More foreign money should be made available in support of local projects.

- International financial support should be allocated to formation of attitudes among ordinary people and in particular in local schools with teachers as key players.

- International support and attention should be given to the situation of individuals of Roma origin living under extremely difficult conditions in the Balkans as well as in other countries in the area.

- The proposal to create an Alliance of Balkan States and Communities. The conference was presented with a concrete proposal to create a new type of regional organisation for all of Balkan based on the idea that the various ethnic groups are represented through their elected leaders on equal terms as state governments. The idea has been presented by Mr Ter-Gabrielian for the Caucasus region with the purpose of reconciliation and stabilisation. Such an institution, if it were to function according to the intention, would result in more recognition and influence to the various minority groups which again possibly would inhibit their strive for independence.

- The proposal to create an International University for all the Balkan States in Lubljana with particular high academic standards is being brought forward also by the Slovenian Government. Further internal support would be required. The proposal is based on the idea that access to education on a high international level inside the region could prevent young people from leaving and also provide the region with qualified lawyers and other academics who can assist in further development of democracy and peace in all of Balkan.

- The last proposal to be mentioned is a request concerning the participation on seminars like the present. The participants found it quite satisfactory that issues were discussed not only among legal experts with academic background, but that they were able to draw also on the competence and knowhow of participants with different type of practical experience. It was underlined that when difficult and important subjects are being discussed, it is useful to create a meeting place between international and local legal experts and people with experience from more practical and problem-oriented work. This would facilitate a dialogue where problems can be addressed from different perspectives, with a better hope to find ideas and possible solutions that would work in practise, not only in theory.